The Racism of Immigration Crime Prosecution

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ABSTRACT: Eric Fish's Article, Race, History, and Immigration Crimes*, explores the racist motivation behind the original 1929 enactment of the two most common federal immigration crimes, entry without permission and reentry after deportation. This Response engages with Fish's archival work unearthing this unsettling history and examines how his research has informed a series of legal challenges seeking to strike down the modern federal border crossing law as violating the Equal Protection Clause of the Constitution. Focusing on the district court decision in* United States v. Carrillo-Lopez *that struck down the reentry law, and the subsequent Ninth Circuit reversal, this Response explores three central and recurring questions in the immigration law field: (1) the legacy of plenary power; (2) the significance of the blurry boundary between immigration law and other areas of law, such as the criminal law; and (3) the thorny problem of when taint from a discriminatory predecessor law continues to infect a modern law. The resolution these three key debates is central not only to the constitutionality of the illegal entry and reentry laws, but also to other areas of law that shape the lives of immigrants in the United States.*

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INTRODUCTION

Eric Fish's Article, *Race, History, and Immigration Crimes*, is a tour de force.[1] In it, he unearths the racist history of the Undesirable Aliens Act, a law passed in 1929 that criminalized crossing the border without permission.[2] He also calls on lawyers, judges, politicians, and the public to recognize racist origins of the modern criminal law barring entry and reentry of immigrants.[3]

Through careful archival research, and building on related strands of work by path-breaking historians,[4] Fish traces the 1929 border law to "a group of white men who believed in racial eugenics" and sought to stop migration from Latin America.[5] One of these men was South Carolina Senator, Coleman Livingston Blease, a known racist who first proposed the law.[6] Blease did not hide his racist views about Mexicans, saying during a 1928 Senate committee hearing: "I want them kept out. They know when they get over here they have got to behave or we will kill them."[7] Labor Secretary James Davis, in his role administering the immigration laws,[8] worked by Blease's side on the drafting of a proposal to criminalize unlawful reentry after deportation.[9] Fish characterizes Davis as "more of a genteel racist;"[10] Davis believed in racial eugenics and wrote two books setting forth his views on immigration, warning of "rat-people [who] began coming here, to house under the roof that others built."[11] The Blease-Davis proposal to criminalize reentry was eventually merged with a related proposal by a third man, Congressman Albert Johnson, to make unlawful entry a misdemeanor.[12] Chair of the powerful House Committee on Immigration and Naturalization,[13] Johnson was also a

1. Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051 (2022).

2. *See* Act of Mar. 4, 1929, Pub. L. No. 70-1018, 45 Stat. 1551 (1929).

3. Fish, *supra* note 1, at 1057, 1106.

4. Among others, Fish cites to the work of KELLY LYTLE HERNÁNDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965 (2017); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004); and BENJAMIN GONZALEZ O'BRIEN, HANDCUFFS AND CHAIN LINK: CRIMINALIZING THE UNDOCUMENTED IN AMERICA (2018).

5. Fish, *supra* note 1, at 1054.

6. *Id.* at 1080–81 (describing Blease as a proponent of lynching Black men and criminalizing interracial marriage). For additional discussion of "Blease's law," see Kelly Lytle Hernández, *How Crossing the US-Mexico Border Became a Crime*, CONVERSATION (Apr. 30, 2017, 10:00 PM), https://theconversation.com/how-crossing-the-us-mexico-border-became-a-crime-74604 [https://perma.cc/VX4Z-LZAQ].

7. Fish, *supra* note 1, at 1081 (citing *Restriction of Western Hemisphere Immigration: Hearings on S. 1296, S. 1437, S. 3019 Before the S. Comm. on Immigr.*, 70th Cong. 25 (1928)).

8. *Id.* at 1082.

9. *Id.* at 1056, 1083.

10. *Id.* at 1082.

11. *Id.* (citing JAMES J. DAVIS, THE IRON PUDDLER: MY LIFE IN THE ROLLING MILLS AND WHAT CAME OF IT 61 (1922)).

12. *Id.* at 1056, 1067.

13. *Id.* at 1055, 1062–63.

card-carrying eugenicist,[14] and one of the namesakes of the Johnson-Reed Act of 1924 that set numerical per-country migration limits based on each country's representation in the 1890 census.[15]

The racism that undergirds the Undesirable Aliens Act was on full display in the racial slurs that filled the legislative record leading up to its passage. Legislators referred to Mexicans as "mongrels," "peons," and "degenerates" who they said presented a racial problem and threatened the purity of the white race.[16] They warned of "[h]ordes of undesirable immigrants from Mexico" who were coming to the United States, and "not the better or higher-type Mexicans, but generally of the less desirable type, and in many cases the criminal and diseased element."[17] As Fish explains, the debate around the Act "revealed its purpose: to target Latin American immigrants for punishment and deportation because of their race."[18] The resulting law achieved the restrictionists' goal by allowing federal prosecutors to use the criminal law as a tool to effectively bar permanent settlement by Mexicans and others from Latin America.[19] Importantly, the new law also satisfied agri-business interests by not penalizing employers for hiring migrant labor to prepare the harvest.[20]

Fish's history of the now nearly century-old Undesirable Aliens Act has enduring relevance today. The law has been reenacted and amended many times, but remains on the books in substantially the same form, found in section 1325 and section 1326 of the federal penal code.[21] Just as in the original law, section 1325 criminalizes the simple act of entering the United States without permission, and section 1326 criminalizes reentering after a prior deportation.[22] While section 1325 is a misdemeanor, section 1326 is a felony, now punishable by up to twenty years in federal prison.[23]

Over time, prosecution of illegal entry and reentry has grown.[24] In the year after the Undesirable Aliens Act was passed, 7,001 people were convicted under the new provision.[25] In the 1950s, prosecutions of entry crimes—which

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14. According to Fish, Congressman Johnson was an active member of the American Eugenics Society and "president of the Eugenics Research Institute from 1923 to 1924." *Id.* at 1062.

15. *Id.* at 1061.

16. *Id.* at 1058, 1068–69.

17. *Id.* at 1087 (citing 70 CONG. REC. 3,525, 3,555 (1929) (statement of Congressman Charles Edwards)).

18. *Id.* at 1086.

19. *Id.* at 1089–90.

20. *Id.* at 1065–66.

21. 8 U.S.C. §§ 1325–26 (2018).

22. Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1297–98 (2010).

23. 8 U.S.C. § 1326(b)(1)–(4).

24. Eagly, *supra* note 22, at 1298.

25. Fish, *supra* note 1, at 1089–90; *see also* Eagly, *supra* note 22, at 1353 fig.4.

the Attorney General referred to with the derogatory term "wet-back"[26] cases—again surged.[27] The Department of Justice requested that its budget be nearly doubled in order to bring criminal charges against "Mexican laborers coming across the Rio Grande and at other points along the southern border to seek employment."[28] During Barack Obama's presidency, prosecutions for illegal entry and reentry grew to forty-three percent of the federal criminal docket.[29] Under the Donald Trump administration, border prosecutions again skyrocketed, this time to a record high of fifty-nine percent of all cases brought in federal courts.[30]

Heavy reliance on the law criminalizing entry and reentry by the federal government—combined with its use almost exclusively against immigrants from Latin America—adds urgency to Fish's call to action. As the United States Sentencing Commission reports, ninety-nine percent of people prosecuted in district court today for illegal reentry are Latino.[31] Additionally, as research by sociologist Matthew Light documents, illegal reentry cases "are punished uniquely in U.S. federal courts," as they are almost always (ninety-seven percent of cases) punished with incarceration.[32]

Since Professor Fish posted an early draft of his Article online in April 2021,[33] a lot has happened. Federal public defenders throughout the country representing persons charged with unlawful entry and reentry have been busy doing precisely what Fish recommends—recounting the law's racist history and challenging the law's constitutionality.[34] On August 18, 2021, Chief Judge

26. Eagly, *supra* note 22, at 1352 (citing DIR. OF THE ADMIN. OFF. OF THE U.S. COURTS, ANNUAL REPORT 112 (1953)).

27. *Id.* at 1352–53 fig.4.

28. *Id.* at 1352 n.408 (citing *Hearing Before the Subcomm. of the S. Comm. on Appropriations*, 82d Cong. 160–61 (1952) (statement of J.M. McInerney, Assistant Att'y Gen.)).

29. Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967, 1969 (2020) (citing JUDICIAL BUSINESS OF THE U.S. COURTS, ADMIN. OFF. OF THE U.S. COURTS tbls.D-4 & M-2 (Sept. 30, 2016)).

30. *Id.* at 1969; *see also* Press Release, U.S. Dep't of Just. Off. of Pub. Affs., Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019 (Oct. 17, 2019), https://www.justice.gov/opa/pr/department-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year [https://perma.cc/CK6N-82U6].

31. U.S. SENT'G COMM'N, QUICK FACTS-ILLEGAL REENTRY OFFENSES 1 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY20.pdf [https://perma.cc/2F7T-4XCT].

32. Brief of Amici Curiae Advocates for Basic Legal Equality et al. in Support of Defendant-Appellee for Affirmance at App. A, United States v. Carrillo-Lopez, 68 F.4th 1133 (9th Cir. 2023) (No. 21-10233) [hereinafter Light Declaration].

33. *See Immigration Article of the Day: Race, History, and Immigration Crimes by Eric Fish*, L. Professor Blogs Network: IMMIGR.PROF BLOG (Apr. 29, 2021), https://lawprofessors.typepad.com/immigration/2021/04/immigration-article-of-the-day-race-history-and-immigration-crimes-by-eric-fish.html [https://perma.cc/T42G-PDDT] (featuring Fish's Article posted on SSRN as the Immigration Article of the Day).

34. Professor Eric Fish, as well as other academics, including Professors Kelly Lytle Hernández, S. Deborah Kang, and Benjamin Gonzalez O'Brien, have served as expert witnesses in constitutional challenges to the illegal entry and reentry statute before the trial courts.

Miranda Du of the District Court of Nevada made headlines when she issued a forty-three page landmark ruling striking down a section 1326 indictment brought against Gustavo Carrillo-Lopez on equal protection grounds.[35] In particular, Judge Du concluded that although the reentry statute is racially neutral on its face, it "has a disparate impact on Latinx persons," "was enacted with a discriminatory purpose," and the government failed to show that the law "would have been enacted absent racial animus."[36] In reaching her finding on racial animus, Judge Du considered both animus that tainted the original enactment of the law in 1929, as well as other evidence of animus at the time the modern reentry law was enacted in 1952 as part of the Immigration and Nationality Act ("INA") (also known as the McCarran-Walter Act).[37]

On appeal, a three-judge panel of the Ninth Circuit disagreed. In particular, the panel concluded that the district court erred because Mr. Carrillo-Lopez provided insufficient proof that Congress was motivated by discrimination in enacting the reentry statute.[38] Importantly, as discussed further in this Response, the Ninth Circuit's analysis focused on the intent of Congress when the INA was adopted in 1952 and rejected Judge Du's finding that discriminatory intent motivating the 1929 Act taints the modern section 1326 law.[39] Other similar challenges are percolating their way through the

35. For samples of press coverage, see Elie Mystal, *The Groundbreaking Decision That Just Struck a Blow to Our Racist Immigration Laws*, NATION (Aug. 20, 2021), https://www.thenation.com/article/society/immigration-crime-law [https://perma.cc/Y38E-95J2]; and Hassan Kanu, *Courts Are Beginning to Admit That Some Immigration Laws Are Racist*, REUTERS (Aug. 23, 2021, 6:20 PM), https://www.reuters.com/legal/litigation/courts-are-beginning-admit-that-some-immigration-laws-are-racist-2021-08-23 [https://perma.cc/7TTH-SY2S].

36. United States v. Carrillo-Lopez, 555 F. Supp. 3d 996, 1000–01, 1019–20 (D. Nev. 2021), *rev'd and remanded*, 68 F.4th 1133 (9th Cir. 2023) (citing Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252 (1977)). For a primer on how a law can be found to violate the Equal Protection Clause, and the specific arguments made by Mr. Carrillo-Lopez, see Nicole Newman, United States v. Carrillo-Lopez *Is Transforming Immigration Law: Will It Survive Appellate Review?*, 36 GEO. IMMIGR. L.J. 869, 869–71 (2022). *See also* Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO STATE L.J. 13, 51 (2019) (summarizing the *Arlington Heights* standard applied by Judge Du in Mr. Carrillo-Lopez's case).

36. *Carrillo-Lopez*, 555 F. Supp. 3d at 1000–01.

37. *Id.* at 1005, 1007–1011; *see also* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 276, 66 Stat. 229 (codified as amended at 8 U.S.C. § 1326 (1952)).

38. United States v. Carrillo-Lopez, 68 F.4th 1133, 1138, 1147 (9th Cir. 2023). The Fifth and Third Circuits have also found that the reentry law does not violate the Equal Protection Clause. United States v. Barcenas-Rumualdo, 53 F.4th 859 (5th Cir. 2022); United States v. Arana Wence, No. 22-2618, 2023 WL 5739844 (3d Cir. Sept. 6, 2023).

39. *Carrillo-Lopez*, 68 F.4th at 1150–52.

courts,[40] but Judge Du was the first—and thus far the only—court to declare the law unconstitutional.[41]

This Response uses the historical record presented by Professor Fish—together with the legal arguments developed by the parties and amici in the *Carrillo-Lopez* litigation—as a framework for discussing three central and recurring questions in the immigration law field. First and most fundamentally, Fish and *Carrillo-Lopez* provoke consideration of the enduring legacy of the plenary power doctrine that has long been used to legitimize and mask discrimination based on race in immigration. Second, Fish's history, especially as seen through the lens of *Carrillo-Lopez*, calls for examination of the boundary between the core of immigration law, which is generally shielded from constitutional review, and other related areas of law that touch on the lives of noncitizens—such as the criminal law—that enjoy the full bundle of constitutional protections. Third and finally, Fish and the litigation challenging the illegal entry and reentry law invite interrogation of what scholar Kerrel Murray calls "the 'discriminatory predecessor' problem."[42] That is, under what circumstances can a new enactment or revision of a law originally passed with racist intent purge the law of constitutional infirmity? The three Parts of this Response that follow engage each of these key debates, the resolution of which is central to not only the constitutionality of the illegal entry and reentry laws, but also to other areas of law that shape the lives of immigrants in the United States.

I. QUESTIONING THE PLENARY POWER DOCTRINE

A threshold topic in all immigration law textbooks is the enduring legacy of the plenary power doctrine.[43] In the foundational 1889 case of *Chae Chan Ping*, commonly known as *The Chinese Exclusion Case*, the U.S. Supreme Court held that Chinese nationals returning to the United States from overseas

40. *See, e.g.*, United States v. Suquilanda, No. 21-cr-263, 2021 WL 4895956 (S.D.N.Y. Oct. 20, 2021), *appeal docketed*, No. 22-1197 (2d Cir. June 1, 2022); and United States v. Amador-Bonilla, No. cr-21-187, 2021 WL 5349103 (W.D. Okla. Nov. 16, 2021); No. 21-cr-330 (W.D. Okla. Dec. 14, 2021); *appeals consolidated*, Nos. 22-6036 & 22-6037 (10th Cir. Mar. 16, 2022).

41. Judge James E. Graves Jr. of the Fifth Circuit also registered his vote that the illegal reentry law violates equal protection, dissenting in United States v. Barcenas-Rumualdo, 53 F.4th 859, 869 (5th Cir. 2022) (Graves Jr., J., dissenting in part).

42. W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1193 (2022).

43. As Peter Schuck has aptly noted, "[p]robably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system." Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984). For examples of coverage of the plenary power doctrine in law school textbooks, see T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 30–68 (9th ed. 2021); LENNI B. BENSON, LINDSAY A. CURCIO, VERONICA M. JEFFERS & STEPHEN W. YALE-LOEHR, IMMIGRATION AND NATIONALITY LAW: PROBLEMS AND STRATEGIES 33–53 (2013); BILL ONG HING, JENNIFER M. CHACÓN & KEVIN R. JOHNSON, IMMIGRATION LAW AND SOCIAL JUSTICE 53–67 (2d ed. 2021); KIT JOHNSON, IMMIGRATION LAW: AN OPEN CASEBOOK 34–44 (Version 2.0 2023); STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY 293–323 (7th ed. 2019).

could be excluded based on their race.[44] Despite the fact that immigration powers are not enumerated in the Constitution, the Court reasoned that these powers derived from "the sovereignty and nationhood of the United States."[45] As Kevin Johnson explains, "*The Chinese Exclusion Case* established the foundation for the immigration exceptionalism that continues to insulate the U.S. immigration laws and policies from constitutional review."[46] Four years later, in *Fong Yue Ting*, the Court extended the plenary power doctrine to sanction the deportation of Chinese nationals residing in the United States, so long as they were unable to prove their lawful resident status with the testimony of "one credible white witness."[47] As Justice Horace Gray wrote for the Court: "[t]he right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance."[48]

Immigration scholars have written volumes critiquing the plenary power doctrine and predicting its demise. Recently, David Rubenstein and Pratheepan Gulasekaram offered a useful three-part cataloging of different "line[s] of attack" that academics have put forward to discredit the doctrine, particularly as it applies in the arena of constitutional rights litigation.[49] First, they have sought to "dislodge" the plenary power doctrine by showing that the doctrine is "misplaced as applied to constitutional rights."[50] For example, in his classic work on the topic, Stephen Legomsky argued that the Supreme Court had erred in extending the plenary power doctrine's federalism cases to the area of individual constitutional rights.[51] A second attack seeks to

44. Chae Chan Ping v. United States ("The Chinese Exclusion Case"), 130 U.S. 581, 609–11 (1889).

45. Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 853–54 (1987) (citing *The Chinese Exclusion Case*, 130 U.S. at 603–04).

46. Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 IND. L.J. 1455, 1472 (2022).

47. Fong Yue Ting v. United States, 149 U.S. 698, 727 (1893). *See generally* Eisha Jain, *Policing the Polity*, 131 YALE L.J. 1794, 1796 (2022) (pointing out that "[t]he policing practices at issue in *Fong Yue Ting* reflected a racial presumption that those of apparent Chinese descent were indelibly foreign; race rendered them deportable and also obligated them to show their papers on demand").

48. *Fong Yue Ting*, 149 U.S. at 707. *But see* Ma v. Ashcroft, 257 F.3d 1095, 1109 n.24 (9th Cir. 2001) (explaining that the Supreme Court in Yamataya v. Fisher, 189 U.S. 86, 101 (1903), overruled part of *Fong Yue Ting*'s holding when it found deportation proceedings for those present on United States soil must comply with due process).

49. David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 615–16 (2017).

50. *Id.* at 615.

51. STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 177–222 (1987); *see also* Stephen H. Legomsky, *Immigration Exceptionalism: Commentary on Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 307, 308 (2000) (arguing that the plenary power doctrine "reflects a clumsy conflation of federalism issues with individual rights issues").

"dismantle" plenary power by showing how the rationales that support the doctrine—including "foreign affairs" and the "right[s] of sovereign nations"—are especially flawed when applied to "constitutional rights challenges."[52] For instance, Gabriel Chin has shown that the Chinese Exclusion laws undergirding the plenary power cases "were not primarily motivated by a desire to influence foreign policy or international affairs, or even to protect American labor, but instead to foster white supremacy by defending white civilization against an undesirable race."[53] A third line of attack identified by Rubenstein and Gulasekaram is to question the continued significance of plenary power in modern times.[54] Illustrating this view, Adam Cox and Cristina Rodríguez have argued that when the plenary power cases are put "in their proper historical context, it becomes clear that the Court decided each of them in an era when the same policies would have been accepted as a matter of ordinary constitutional law, or at least when the domestic law was in a state of development."[55]

These varied critiques of plenary power were on full display in the *Carrillo-Lopez* litigation. For instance, Asian Americans Advancing Justice and other nonprofit groups argued in an amicus brief supporting Mr. Carrillo-Lopez that the plenary power doctrine should be discarded or limited in its scope because it is "[r]ooted in racism against Asian immigrants."[56] Indeed, *The Chinese Exclusion Case* and *Fong Yue Ting* were decided by the same Fuller Court as the long-since discredited case of *Plessy v. Ferguson* that justified the racist doctrine of "separate but equal."[57] As amici pointed out, "[i]f Congress were to enact a law today excluding all Asian immigrants for the express purpose of preserving racial purity, it would be difficult to imagine that this Court would uphold such a law."[58] Accordingly, the "doctrine belongs

52. Rubenstein & Gulasekaram, *supra* note 49, at 615–16.

53. Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 22 (1998); *see also* Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1129 (1994) ("The Supreme Court's analysis was tainted by the racist backlash against Chinese laborers that motivated Congress to pass these provisions.").

54. Rubenstein & Gulasekaram, *supra* note 49, at 617.

55. ADAM B. COX & CHRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 235 (2020).

56. Brief of Amici Curiae Asian Americans Advancing Justice et al. in Support of Appellee and Affirmance at 5, United States v. Carrillo-Lopez, 68 F.4th 1133 (9th Cir. 2021) (No. 21-10233) [hereinafter AAAJ Amicus Brief].

57. Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by*, Brown v. Bd. of Educ., 347 U.S. 483 (1954).

58. AAAJ Amicus Brief, *supra* note 56, at 8; *see also* Henkin, *supra* note 45, at 862 (describing the doctrine undergirding *The Chinese Exclusion Case* as "a constitutional fossil"); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 306–07 (1984) ("When the inevitable breaking point is reached, the Supreme Court will candidly admit that neither precedent nor policy warrants retaining this remarkable departure from the fundamental principle of constitutional law.").

on the ash heap of history," along with other racist doctrine that has since been discarded, such as *Plessy v. Ferguson* and *Korematsu v. United States*.[59]

While Judge Du and other district judges around the country have squarely rejected the government's argument that the plenary power doctrine insulates section 1326 from an equal protection challenge,[60] a handful of district courts have expressly relied on plenary power to uphold the statute.[61] Counsel for Mr. Carrillo-Lopez defended the district court's ruling before the Ninth Circuit by arguing that the federal "government's plenary power over immigration does not give it license to enact racially discriminatory statutes in violation of equal protection," and therefore the heightened scrutiny for equal protection challenges set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corporation* must apply to any analysis of the constitutionality of section 1326.[62]

Two recent Ninth Circuit cases lend support for Mr. Carrillo-Lopez's argument that plenary power must give way, at least when race-based equal protection claims challenge immigration laws and policies.[63] In *Regents of the University of California v. Department of Homeland Security*, the Ninth Circuit

59. AAAJ Amicus Brief, *supra* note 56, at 9; *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (calling *Korematsu* "gravely wrong the day it was decided" and adding that it "has been overruled in the court of history").

60. *See, e.g.*, United States v. Carrillo-Lopez, 555 F. Supp. 3d 996, 1002 (D. Nev. 2021) ("The federal government's plenary power over immigration does not give it license to enact racially discriminatory statutes in violation of equal protection."); United States v. Machic-Xiap, 552 F. Supp. 3d 1055, 1070 (D. Or. 2021) ("Because the Fifth Amendment's focus is persons rather than citizens, all persons present in the United States, including noncitizens, are entitled to the Fifth Amendment's protections."); United States v. Wence, No. 3:20-cr-27, 2021 WL 2463567, *4 (D.V.I. June 16, 2021) ("[I]t strains credulity—and is without basis in law—to conceive that courts would be unable to review a criminal law that, on its face, targets a particular racial group merely because the offense relates to immigration . . .").

61. *See, e.g.*, United States v. Novondo-Ceballos, 554 F. Supp. 3d 1114, 1119 (D.N.M. 2021) ("The Court determines that analyzing § 1326 under *Arlington Heights* is incorrect, however, because Defendant is directly challenging a federal immigration law, which courts have routinely analyzed under the rational basis standard of review."); United States v. Porras, No. 21cr00158, 2022 WL 1444311, *3 (N.D. Ill. May 6, 2022) (concluding "that application of the rational basis standard to section 1326 comports with guidance from the Supreme Court and Seventh Circuit that Congress enjoys special deference in the area of immigration policy"); United States v. Salas-Silva, No. 320cr00054RCJCLB, 2022 WL 2119098, *2 (D. Nev. June 13, 2022) (applying rational basis review and noting that "the Supreme Court has repeatedly held that courts have limited judicial review over immigration matters because 'the power over aliens is of a political character'") (citations omitted).

62. Appellee Gustavo Carrillo-Lopez's Answering Brief at 23–24, United States v. Carrillo-Lopez, 68 F.4th 1133 (9th Cir. 2023) (No. 21-10233) [hereinafter Answering Brief] (quoting *Carrillo-Lopez*, 555 F. Supp. 3d at 1002; *id.* at 2, 20 (citing Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252 (1977)).

63. As Victor Romero points out, even within immigration law, at times the Court has opened cracks in the doctrine, such as by finding that noncitizens in deportation proceedings are protected by due process. Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After* Adarand Constructors, Inc. v. Peña, 76 OR. L. REV. 425, 432 (1997) (citing Yamataya v. Fisher ("The Japanese Immigrant Case"), 189 U.S. 86 (1903)).

refused to apply plenary power in evaluating whether President Trump's rescission of the Deferred Action for Childhood Arrivals (DACA) program violated equal protection.[64] On review, the Supreme Court reversed on other grounds, but did not disturb the application of the heightened standard of constitutional review.[65] In a separate case also addressing an immigration rule—*Ramos v. Wolf*—the Ninth Circuit rejected an equal protection challenge to the government's termination of Temporary Protected Status for four countries, but in so doing acknowledged that such a challenge is governed by strict scrutiny rather a deferential standard.[66]

In *Carrillo-Lopez*, as in other similar challenges, the government has consistently defended section 1326 by leaning in on plenary power, arguing that the reentry statute should receive mere rational-basis review given the plenary power doctrine's deference to the political branches in the immigration context.[67] A pair of recent Supreme Court cases—both of which were cited by the government in *Carrillo-Lopez*—lend support. First, in *Trump v. Hawaii*, the Supreme Court upheld President Trump's travel ban that restricted entry of certain foreign nationals in the face of a constitutional Establishment Clause challenge.[68] As Lucas Guttentag explains, the Court declined to apply a more stringent test "because of the ban's national security patina, its immigration origins, and the judicial doctrines of deference to federal immigration policies."[69] Second, in *Department of Homeland Security v. Thuraissigiam*, the Court held that a Sri Lankan subjected to expedited removal after entering the United States to seek asylum could not challenge his removal in a habeas petition on due process grounds.[70] Guttentag calls *Thuraissigiam*'s application of the plenary power doctrine to justify summary expulsion without judicial review one of the most "deeply consequential immigration ruling[s] in decades."[71] According to the government, *Trump v. Hawaii*, *Thuraissigiam*, and other plenary power decisions "foreclose a searching judicial inquiry into legislative or executive motivations even when

64. Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 518–20 (9th Cir. 2018), *rev'd in part, vacated in part*, 140 S. Ct. 1891 (2020).

65. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915–16 (2020) (setting forth the *Arlington Heights* standard, but finding that the plaintiffs failed to make a sufficient showing of animus).

66. Ramos v. Wolf, 975 F.3d 872, 896 (9th Cir. 2020), *reh'g en banc granted, vacated*, Ramos v. Wolf, 59 F.4th 1010 (9th Cir. 2023).

67. Opening Brief for the United States at 20–21, *Carrillo-Lopez*, 68 F.4th 1133 (No. 21-10233) [hereinafter Opening Brief] (citing Trump v. Hawaii, 138 S. Ct. 2392, 2419–20 (2018)).

68. *Trump*, 138 S. Ct. at 2423.

69. Lucas Guttentag, *The President and Immigration Law: The Danger and Promise of Presidential Power*, JUST SEC. (Oct. 19, 2020), https://www.justsecurity.org/72863/the-president-and-immigration-law-the-danger-and-promise-of-presidential-power/ [https://perma.cc/5VKP-653J].

70. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020).

71. Guttentag, *supra* note 69. For additional analysis of the *Thuraissigiam* decision and how the Supreme Court has continued to extend the plenary power doctrine, see Catherine Y. Kim, *Rights Retrenchment in Immigration Law*, U.C. DAVIS L. REV. 1283, 1307–13 (2022).

the political branches have drawn express distinctions that would trigger close scrutiny outside of the immigration context."[72]

On review, the Ninth Circuit acknowledged the Supreme Court's long tradition of relying on plenary power to immunize immigration control from judicial review,[73] including as recently as in *Trump v. Hawaii*.[74] At the same time, the panel recognized that the Court applied higher scrutiny to an immigration case in *Regents of the University of California*.[75] Ultimately, the Ninth Circuit declined to opine whether plenary power can insulate section 1326 from review, finding instead that Mr. Carrillo-Lopez's equal protection challenge failed even under the heightened standard of *Arlington Heights*.[76]

The ongoing debate over the proper standard of review in determining the constitutional rights of noncitizens crosses over into another heated controversy in the immigration field addressed in Part II of this Response: where to demarcate the hazy line between immigration law and other areas of the law that receive full constitutional protection.

II. IMMIGRATION LAW OR ALIENAGE LAW?

A second core question in the immigration law field is how to distinguish between immigration law and other areas of law—such as housing law, public benefits law, and criminal law—that also touch on the rights of noncitizens.[77] The line between immigration law and what is sometimes referred to by immigration scholars as "alienage law" is, as Hiroshi Motomura writes, "elusive," but "[a]s traditionally understood, 'immigration law' concerns the admission and expulsion of [noncitizens], and 'alienage law' embraces other matters relating to their legal status."[78] The distinction matters because, while courts often insulate the immigration laws from review, they routinely apply "mainstream constitutional law" when evaluating constitutional claims challenging alienage laws.[79]

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72. Opening Brief, *supra* note 67, at 22–24 (citing Fiallo v. Bell, 430 U.S. 787, 792–93, n.5 (1977)); *id.* at 30–31 (citing *Thuraissigiam*, 140 S. Ct. at 1981–83).

73. United States v. Carrillo-Lopez, 68 F.4th 1133, 1142 (9th Cir. 2023) (citing Fiallo v. Bell, 430 U.S. 787, 792 (1977) and Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953)).

74. *Id.* (citing *Trump*, 138 S. Ct. at 2418–19).

75. *Id.* (citing *Regents of the Univ. of Cal.*, 140 S. Ct. at 1915).

76. *Id.* ("We decline to address this issue, because . . . Carrillo-Lopez's equal protection challenge fails even under the usual test for assessing such claims set forth in *Arlington Heights*.").

77. *See, e.g.*, Legomsky, *supra* note 58, at 256 (distinguishing immigration law from the "more general law of [noncitizens'] rights and obligations").

78. Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 202 (1994).

79. *Id.* at 204; *see also* Taylor, *supra* note 53, at 1091 ("From its inception, however, the plenary power doctrine has existed alongside cases that provide constitutional protection to aliens when their claims do not relate to immigration matters."); Carrie L. Rosenbaum, *(Un)equal Immigration Protection*, 50 SW. L. REV. 231, 244 (2021) ("Immigration law presents two categories of equal protection claims—those contesting alienage laws or those challenging immigration laws.").

The tradition of including laws that touch on the rights of immigrants within the constitutional fold harkens back to the 1886 Supreme Court case of *Yick Wo v. Hopkins*.[80] In *Yick Wo*, the Court relied on equal protection doctrine to invalidate a municipal statute that gave the San Francisco Board of Supervisors discretion over permits to operate wooden laundries in the city.[81] Although the law was "fair on its face," it was "applied and administered by public authority with an evil eye and an unequal hand" to shut down only those laundries operated by Chinese business owners.[82] The Court concluded that law's racially biased enforcement violated the Equal Protection Clause, which applies "to all persons within the territorial jurisdiction" of the United States.[83]

Or consider the case of *Wong Wing v. United States*,[84] another Chinese Exclusion era case that remains a stronghold in immigration law textbooks today.[85] In *Wong Wing*, the Court invalidated the government's attempt to sentence Chinese immigrants who allegedly violated the Chinese Exclusion laws to hard labor without first providing a judicial trial subject to the protections of the Fifth and Sixth Amendments.[86] "[T]o declare unlawful residence within the country to be an infamous crime punishable by deprivation of liberty and property," wrote the *Wong Wing* Court, "would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial."[87] Today *Wong Wing* is widely recognized as standing for the principle that criminal law falls within the full protective canopy of rights applicable in the criminal process.[88]

Although *Yick Wo* and *Wong Wing* endure, their application is often litigated because the line between immigration and alienage law can be

80. *See* Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1575 (2008) ("*Yick Wo* is usually cited for the proposition that the Equal Protection Clause applies to aliens and that laws that are neutral on their face may violate the Equal Protection Clause."); Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1097–98 (1994) (observing that *Yick Wo* established that "resident aliens enjoy the protections of the fourteenth amendment"); Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1644–46 (2007) (asserting that the origins of the plenary power doctrine "lie in the right of the sovereign to protect itself from the invasion of outsiders and the right to expel outsiders once they have gained access to the United States").

81. Yick Wo v. Hopkins, 118 U.S. 356, 357–59, 374 (1886).

82. *Id.* at 373–74.

83. *Id.* at 369–74.

84. Wong Wing v. United States, 163 U.S. 228 (1896).

85. *See, e.g.*, ALEINIKOFF ET AL., *supra* note 43, at 22–25; HING ET AL., *supra* note 43, at 570–74.

86. *Wong Wing*, 163 U.S. at 238.

87. *Id.* at 237.

88. *See, e.g.*, Bosniak, *supra* note 80, at 1096–97 ("In effect, *Wong Wing* stands for the following proposition: The mere fact that the object of government power is an alien does not mean that the government is exercising its immigration power.").

blurry,[89] especially given that other areas of law can serve as what Motomura calls "surrogates" for immigration law.[90] In *Carrillo-Lopez*, the government seized on the immigration function of criminal law to argue that the criminal illegal reentry law is a form of immigration regulation entitled to constitutional deference.[91] Mr. Carrillo-Lopez countered that the challenged reentry law "is a purely criminal law with carceral punishment as its core function."[92]

At the district court, Judge Du sided with Mr. Carrillo-Lopez, finding that section 1326 is "a criminal law—which goes to the 'nature' of the Fifth Amendment's protective concern . . . rather than an immigration policy addressing national security concerns of those not within the United States."[93] As Judge Du warned, to hold otherwise would allow the criminal immigration laws to fly "free from constitutional equal protection constraints" and give the government "license to enact racially discriminatory statutes in violation of equal protection."[94]

On appeal, the Ninth Circuit panel referenced section 1326 as an "immigration law,"[95] but declined squarely resolve whether section 1326 falls on the side of immigration law or criminal law.[96] Instead, disagreeing Judge Du below, the panel concluded that the racism fueling the 1929 Act "lacks probative value" in evaluating the constitutionality of the reentry law enacted in 1952.[97] The relationship between the Undesirable Aliens Act of 1929 and the INA of 1952 thus raises a thorny problem often relevant to attempts to invalidate modern laws built on racist predecessors. Namely, as discussed in the next Part, courts must consider whether and under what circumstances

89. *See, e.g.*, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 826 (2008) (explaining that "immigration and alienage law bleed together" and should therefore be viewed "as part of a continuum"); Taylor, *supra* note 53, at 1135 (clarifying that "the boundary between the plenary power doctrine and aliens' rights tradition is not easily marked").

90. Motomura, *supra* note 78, at 202; *see also* Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 351–53 (2008) (critiquing the distinction between alienage laws and immigration laws and discussing related "doctrinal confusion").

91. Opening Brief, *supra* note 67, at 2–3. Under this low standard, the government argued it need only show "a rational relationship between the disparity of treatment [of Latin Americans] and some legitimate governmental purpose." *Id.* at 21 (citing United States v. Ayala-Bello, 995 F.3d 710, 715 (9th Cir. 2021)).

92. Answering Brief, *supra* note 62, at 32, 49–51.

93. United States v. Carrillo-Lopez, 555 F. Supp. 3d 996, 1002 (D. Nev. 2021).

94. *Id.*

95. United States v. Carrillo-Lopez, 68 F.4th 1133, 1142, 1150 (9th Cir. 2023).

96. *Id.* at 1142. The Fifth Circuit similarly declined to the resolve the immigration-alienage question, but did note that "[t]here is ample support for both positions. On one hand, [section] 1326 is part of Congress's immigration scheme. . . . On the other, [section] 1326 relates to those already excluded, so it does not unequivocally fall under Congress's exercise of power over admission and exclusion." United States v. Barcenas-Rumualdo, 53 F.4th 859, 864–65 (5th Cir. 2022).

97. *Carrillo-Lopez*, 68 F.4th at 1150–51.

an impermissibly tainted law that has been revised or reenacted in subsequent years continues to infect the new law.

III. RACIST TAINT IN IMMIGRATION LAW

In *Ramos v. Louisiana*, the Supreme Court recently had the opportunity to consider a Louisiana state law allowing for non-unanimous jury verdicts that was originally adopted for the explicitly racist purpose of nullifying the vote of Black jury members.[98] Because the law allowed for conviction by a ten to two verdict, the state's non-unanimous jury provision functioned to make it more likely that Black defendants would be convicted, as a minority dissenting voice of one or two Black jurors could not result in acquittal.[99] As a result of the non-unanimous jury rule, Mr. Evangelisto Ramos was convicted of murder in the state of Louisiana despite the fact that two jurors voted for acquittal.[100] He was "sentenced to life in prison without the possibility of parole."[101] The Supreme Court reversed Ramos' conviction on the ground that the Sixth Amendment's guarantee of a trial "by an impartial jury" requires a unanimous verdict.[102]

Although Mr. Ramos did not bring an equal protection challenge to the non-unanimous jury provision, the Court explained that it could not turn a blind eye to the rule's "racist history" and cautioned that such an "uncomfortable past" could not go "unexamined."[103] As Justice Brett Kavanaugh emphasized in his concurrence, it is "imperative to purge racial prejudice from the administration of justice."[104] If ignored, Justice Kavanaugh explained, "the resulting perception of unfairness and racial bias [could] undermine confidence in and respect for the criminal justice system."[105] Justice Sonia Sotomayor also wrote separately to stress that a law's "legacy of

98. Ramos v. Louisiana, 140 S. Ct. 1390, 1394–95 (2020).

99. For more on the background facts of Mr. Ramos' conviction, see *Sixth Amendment—Right to Jury Trial—Nonunanimous Juries—*Ramos v. Louisiana, 134 HARV. L. REV. 520, 520 (2020). *See also* Daniel S. Harawa, *The False Promise of* Peña-Rodriguez, 109 CALIF. L. REV. 2121, 2142 (2021) ("[F]or racial minorities to truly have a voice during deliberations, they must make up a critical mass, given that 'field studies show that without a minority of at least three jurors, group pressure is simply too overwhelming: one or two dissenting jurors eventually and inevitably accede to the majority view.'") (citing Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1698 (1985)).

100. *Ramos*, 140 S. Ct. at 1394.

101. *Id.*

102. *Id.* at 1395–97 (explaining that there is "no question" that the constitution's "unanimity requirement applies to state and federal criminal trials equally").

103. *Id.* at 1401 n.44.

104. *Id.* at 1418 (Kavanaugh, J., concurring in part) (quoting Peña-Rodriguez v. Colorado, 580 U.S. 206, 221 (2017)).

105. *Id.*

racism" is "worthy of this Court's attention."[106] Particularly so, she observed, when a legislature has never acknowledged the "law's tawdry past."[107]

Later that same term, Justice Samuel Alito cited to Justice Sotomayor's concurrence in *Espinoza v. Montana Department of Revenue*, a case in which the Court struck down a Montana state law prohibiting public funds for religious affiliated schools as violative of the Free Exercise Clause.[108] In his concurrence, Justice Alito discussed how the Montana law had been motivated "by virulent prejudice against immigrants, particularly Catholic immigrants."[109] Although the law had been reenacted, Justice Alito noted that "[u]nder *Ramos*, it emphatically does not matter whether Montana readopted the no-aid provision for benign reasons. The provision's 'uncomfortable past' must still be '[e]xamined.' And here, it is not so clear that the animus was scrubbed."[110]

The question of how courts should engage with a law's racist past is particularly pressing in the immigration field given the U.S. immigration law's historic role in preserving a migration system premised on race-based exclusion.[111] Not surprisingly, this issue was on full display in the *Carrillo-Lopez* litigation. Mr. Carrillo-Lopez's evidence of racial animus at the time of the adoption of the 1929 Act was so strong that the government lawyers prosecuting him conceded before the district court that the 1929 law was passed with impermissible racist intent.[112] Despite this concession, on appeal the government sought to protect the 1929 law from constitutional challenge by maintaining that any past racism was wiped away when the reentry law was made part of the new and comprehensive INA of 1952, and later amended by subsequent Congresses.[113]

Fish's Article takes issue with the government's view that adoption of the INA purged the reentry law of racist taint. Starting from where the Supreme Court left off in *Ramos*, Fish offers a helpful typology for understanding

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

107. *Id.*

108. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2268 (2020) (Alito, J., concurring).

109. *Id.*

110. *Id.* at 2273 (citing *Ramos*, 140 S. Ct. at 1401 n.44).

111. *See, e.g.*, DESMOND KING, MAKING AMERICANS: IMMIGRATION, RACE AND THE ORIGINS OF THE DIVERSE DEMOCRACY (2000); ERIKA LEE, AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES (2019); REECE JONES, WHITE BORDERS: THE HISTORY OF RACE AND IMMIGRATION IN THE UNITED STATES FROM CHINESE EXCLUSION TO THE BORDER WALL (2021).

112. United States v. Carrillo-Lopez, 555 F. Supp. 3d 996, 1007 n.17 (D. Nev. 2021) (explaining that government's counsel agreed that Mr. Carrillo-Lopez "offered enough evidence to demonstrate that the 1929 enactment stems from racial animus under *Arlington Heights*"). On appeal, the government stated that the concession of racist intent before the district court in Nevada was an aberration and "improvidently made." Opening Brief, *supra* note 67, at 12 n.3. In other similar litigation, the government has maintained "that the historical record does not support the conclusion that Congress as a whole was motivated in part by discriminatory intent in enacting the 1929 Act." *Id.*

113. Opening Brief, *supra* note 67, at 44–46.

different ways that a legislature can reenact laws originally passed with discriminatory intent. According to Fish, a "silent reenactment" occurs when there is no "substantive consideration" of the law prior to reenactment.[114] In contrast, "a benign reenactment" occurs when the "legislature debates the ultimate merits of the law and decides to keep it, but . . . does not appear to have racist motivations for doing so."[115] Finally, a "conscious reenactment" is one in which the "legislature reenacts the law for race-neutral reasons while also acknowledging the law's racist history."[116]

Applying this typology, Fish characterizes the 1952 reentry law as a silent reenactment. He explains that the INA "was a recodification project" designed to "reorganize[e] an existing set of laws," not an effort to "debate the merits of these crimes."[117] As Fish notes, in 1952, Congress made just one significant change to the reentry law: adding a new "found in" element that worked to make cases easier to prosecute.[118] At no point did the Congress weigh and consider the discriminatory intent of the earlier law, or evaluate its ongoing discriminatory impact. Such a silent reenactment, Fish argues, cannot cleanse the law of its original racist intent.[119]

In a recent article, Professor Kerrel Murray sets forth another useful framework for identifying when impermissible "discriminatory taint" endures in modern laws.[120] In particular, Murray posits that in cases where an older law built on racial animus still endures with the same "operative core," the new law can carry forward impermissible "discriminatory taint" absent "*genuine* purging, rather than its laundering."[121] Applying his analysis to the litigation challenging section 1326, Murray concludes that the modern illegal reentry law remains infected by a "problematic policy lineage."[122] Murray notes that although the law has been "reenacted and amended" multiple times, the "operative core" of the reentry law "has persisted unchanged" since 1929, with only minor changes "around the edges."[123] Furthermore, there was no "intervening event" that interrupted the "continuity chain."[124]

Under Murray's approach, after an initial finding of discriminatory taint, the question becomes whether the taint can be legitimately purged.[125]

114. Fish, *supra* note 1, at 1103.

115. *Id.*

116. *Id.*

117. *Id.* at 1100.

118. *Id.* at 1099 (explaining that the law now criminalized when someone "enters, attempts to enter, or is at any time found in, the United States").

119. *Id.* at 1104.

120. Murray, *supra* note 42, at 1194, 1227.

121. *Id.* at 1194–95, 1197 (emphasis in original).

122. *Id.* at 1252.

123. *Id.* at 1209, n.125, 1251–52.

124. *Id.* at 1252.

125. Brandon Garrett has argued that after a court finds "unconstitutionally illegitimate discrimination," judges should "remain skeptical of certain do-overs," including when they are

According to Murray, section 1326 may be a candidate for purging, but first legislators would need to evince "better engagement" with the law's problematic lineage. For example, Murray posits that that Congress could "acknowledge[e] the reprehensible mentalities animating the original act, investigat[e] the historical and ongoing impact of the criminal provisions, articulat[e] why the criminal provisions remain necessary notwithstanding ongoing impact, and tak[e] feasible steps to minimize that impact."[126] Congress has not pursued these paths.

The district court in *Carrillo-Lopez* adopted similar logic. In Judge Du's view, the original racist goal of the reentry law continued to "infect"[127] the current law because, among other factors, the "functional operation" of the law remained the same.[128] Additionally, Congress did nothing in passing the INA to refute "the express nativist intent behind the Act of 1929."[129] And the 1952 law was adopted during a period of widespread xenophobia and awareness by members of Congress that the law was being used almost exclusively against Mexican migrants.[130] Moreover, Congress approved the law over President Harry S. Truman's veto that raised concerns that it "'would perpetuate injustices of long standing against many other nations of the world' and 'intensify the repressive and inhumane aspects of our immigration procedures.'"[131]

Research by historian Deborah Kang prepared in her capacity as an expert witness supporting a similar challenge to the reentry law in the Western District of Texas is also relevant here. Through review of the relevant historical background, Kang identifies widespread and explicit anti-Mexican animus in the years leading up to passage of the reentry provision of the INA in 1952.[132] Reviewing the legislative record to the 1952 Act, she also finds evidence of racism that pervaded the debates, such as a statement by a

"justified by neutral reasons." Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 104 VA. L. REV. 1471, 1519, 1526 (2018).

126. Murray, *supra* note 42, at 1253.

127. United States v. Carrillo-Lopez, 555 F. Supp. 3d 996, 1010, 1027 (D. Nev. 2021).

128. *Id.* at 1109–10, 1026–27.

129. *Id.* at 1012. Indeed, as Fish points out, the 1950 Senate Judiciary report that served as the foundation for the 1952 reenactment "drew unflattering comparisons between Mexicans and putatively racially undesirable southern and eastern Europeans." Fish, *supra* note 1, at 1099 (citing THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. REP. NO. 81-1515 (1950)).

130. *Carrillo-Lopez*, 555 F. Supp. 3d at 1015–16.

131. *Id.* at 1012 (quoting Memorandum from Harry S. Truman to the House of Representatives, Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality (June 25, 1952), https://www.trumanlibrary.gov/library/public-papers/182/veto-bill-revise-laws-relating-immigration-naturalization-and-nationality [https://perma.cc/V99M-6FLT] (raising the concern that the law would perpetuate the 1924 national origin quotas that "discriminate[d], deliberately and intentionally, against many of the peoples of the world"). Fish also points to Truman's veto in his Article. Fish, *supra* note 1, at 1100 n.407.

132. *See, e.g.*, Affidavit of S. Deborah Kang, Associate Professor of History, at 2–36, United States v. Cadena-Salinas, No. 5:19-cr-850-XR (W.D. Tex. Mar. 10, 2023), ECF No. 77-1 (affidavit filed as Ex. M, Feb. 15, 2023).

legislator that changing the quota system would "destroy the white race."[133] As Kang explains, "the recodification of the criminal entry and re-entry provisions of the immigration laws in the 1952 Act reiterated the anti-Mexican animus that pervaded the new measure."[134] Furthermore, Kang shows that subsequent technical amendments to the reentry law in 1988, 1990, 1994, and 1996 were motivated by a combination of anti-Haitian and anti-Hispanic racism.[135] At no point in any of these various revisions did Congress examine the law's "uncomfortable past."[136]

On appeal, the Ninth Circuit rejected Judge Du's conclusion that the 1952 law was a "reenactment of the 1929 law," finding instead that it was a "broad reformulation" that incorporated provisions from "three acts and made substantial revisions and additions."[137] As a "new enactment," the Ninth Circuit reasoned, the law could not be infected by earlier discriminatory taint and Congress carried forward no duty to expressly disavow the racism of the 1929 lawmakers.[138] Turning to the legislative record of the 1952 law, the Ninth Circuit found no floor debate on the reentry statute and little mention of the criminal immigration laws in the 925-page report prepared by the Senate Committee on the Judiciary that provided the background investigation to revise the immigration law system.[139] The panel also discounted President Truman's veto, which it said was grounded in opposition to the national origin quota system and did not mention the reentry law.[140] Several other district courts considering constitutional challenges to the reentry law have similarly concluded that, while the 1929 law was clearly infected with impermissible discriminatory motivation, the passage of time and subsequent adoption of the INA in 1952 neutralized the earlier racism such that, without further evidence of discriminatory intent, the modern reentry law survives constitutional review.[141]

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133. *Id.* at 37 (citing 98 CONG. REC. 4318, 4320 (April 23, 1952)).

134. *Id.* at 34.

135. Affidavit of S. Deborah Kang, Associate Professor of History, at 16–62, United States v. Cadena-Salinas, No. 5:19-cr-850-XR (W.D. Tex. Mar. 10, 2023), ECF No. 45 (affidavit filed as Ex. I, Sept. 21, 2021).

136. Ramos v. Louisiana, 140 S. Ct. 1390, 1401 n.44 (2020); *see also* Brief of Amicus Curiae Dr. S. Deborah Kang, Associate Professor of History, in Support of Defendant-Appellee for Affirmance, at 28–29, United States v. Carrillo-Lopez, 68 F.4th 1133 (9th Cir. 2023) (explaining that, despite several amendments to section 1326, "there is no evidence in the Congressional Record that Congress acknowledged or otherwise sought to expunge the racial animus that informed the initial enactment and subsequent reenactments").

137. *Carrillo-Lopez*, 68 F.4th at 1151.

138. *Id.* at 1150–51 (citing Abbott v. Perez, 138 S. Ct. 2305, 2325–26 (2018)).

139. *Id.* at 1143–46 (citing S. REP. NO. 81-1515, *supra* note 129).

140. *Id.* at 1146–47.

141. *See, e.g.*, United States v. Hernandez-Lopez, 583 F. Supp. 3d 815, 820 (S.D. Tex. 2022) (explaining that although the "dark history" of the 1929 Act "is relevant to understanding the historical backdrop behind the unlawful reentry provisions . . . it is not dispositive for understanding the motivation for the unlawful reentry provision . . . because that provision was reenacted in 1952, and the penalty provision at issue was enacted in 1988"); United States v.

Murray's approach inspires further reflection on the Ninth Circuit's ruling. Was 1952 genuine purging or mere laundering?[142] As equal protection challenges continue to percolate through the courts, the issue of the problematic history of the illegal reentry law will continue to arise.

CONCLUSION

Eric Fish has uncovered a detailed and deeply troubling history of what have long been the two most-prosecuted crimes in the federal criminal system.[143] This Response has built on Fish's contributions to analyze the *Carrillo-Lopez* litigation challenging the federal reentry law on equal protection grounds due to its racist origin. Although the law has thus far survived review, as Daniel Harawa has pointed out, airing the racist history of the Undesirable Aliens Act and subsequent iterations of the reentry law has "forced courts to grapple with the history and explain why it does or does not render the current law unconstitutional."[144] As a result, the litigation will surely have rippling effects.[145] Informed by Fish's history, defense lawyers may now be more likely to apply a race-conscious approach to defending their clients charged with illegal reentry at other stages in their cases, including in pretrial motions, during voir dire, and at trial.[146] Such strategies could call out the fundamental unfairness of a law that is used in practice today to prosecute almost exclusively immigrants from Mexico and Latin America, and highlight how the law was originally designed to function as a tool for race-based exclusion on the border. Once made aware of the law's history and current disparate impact, federal judges may proceed with more caution when presiding over jury trials or sentencing defendants under these laws. Appreciating how such cases can perpetuate systemic racism, prosecutors may reevaluate the wisdom of bringing these cases in the first instance.[147] And, jurors who learn about the law's unsettling history may refuse to convict.[148]

Muñoz-De La O, 586 F. Supp. 3d 1032, 1051 (E.D. Wash. 2022) ("[T]he Court rejects the notion that similarities between two laws enacted decades apart forever taints the later legislation, particularly where the members of Congress have completely changed in the ensuing years.").

142. Murray, *supra* note 42, at 1197, 1244.

143. *See generally* Fish, *supra* note 1; Eagly, *supra* note 22, at 1352–53.

144. Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court's Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 723 (2022).

145. Fish, *supra* note 1, at 1105–06.

146. Walter I. Gonçalves, Jr., *Narrative, Culture, and Individuation: A Criminal Defense Lawyer's Race-Conscious Approach to Reduce Implicit Bias for Latinxs*, 18 SEATTLE J. FOR SOC. JUST. 333, 335–37 (2020).

147. *See generally* Light Declaration, *supra* note 32, at 18 (finding that section 1326 convictions "disparately target Latinos" and "result in disproportionately carceral sentences").

148. Fish, *supra* note 1, at 1105–06.