



## ESSAY

**White Nationalism as Immigration Policy**

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**Introduction**

Two years into the Trump presidency, white nationalism may be driving the Administration's immigration policy. We view white nationalism as "the belief that national identity should be built around white ethnicity, and that white people should therefore maintain both a demographic majority and dominance of the nation's culture and public life."<sup>1</sup> We do not use the term lightly, nor view all restrictions on immigration as inherently racist. Nonetheless, our review of the Trump Administration's rhetoric and policies affecting nonwhite immigrants suggests this motivation.<sup>2</sup>

This Essay argues that legal challenges to Trump's restrictive immigration policies should call out white nationalism as the underlying harm, both through raising equal protection claims and in presenting the overall theory of the case. Despite longstanding barriers to equality claims in immigration law, asserting these claims can frame public and political understanding of the issues at stake, support social movements challenging racialized immigration enforcement, and offer an alternative vision for immigration law that rejects both racial

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1. We borrow this definition from Eric Kaufmann, a University of London politics professor who studies nationalism and cultural identity in the U.S. and Europe. See Amanda Taub, "White Nationalism," *Explained*, N.Y. TIMES (Nov. 21, 2016), <https://perma.cc/7TVK-TTKF> (citing definition). Some consider white nationalism to be a "re-branding" of white supremacy intended to emphasize the belief in America as a nation for white people, rather than inherent racial superiority. See, e.g., *Fresh Air: How a Rising Star of White Nationalism Broke Free from the Movement*, NPR (Sept. 24, 2018, 2:31 PM ET), <https://perma.cc/HRK3-W8K9>.
2. We use the term "immigrant" to refer broadly to all noncitizens, including those who are undocumented, those on nonimmigrant (temporary) visas, and those with immigrant visas (green cards).

criteria and the exceptional judicial deference long accorded to the political branches in immigration decisions.

## I. The White Nationalism Behind Immigration Policy

### A. Rhetoric

The President's statements and policies suggest that he views U.S. national identity in racial terms and seeks to preserve the nation's predominantly white identity. As a general matter, the President has parroted ideas of white cultural threat popular among white nationalists. For instance, on multiple occasions, Trump excoriated the removal of Confederate monuments as a threat to "our culture"<sup>3</sup>—identifying "our culture" with memorials erected to send a message of white supremacy in the name of a war fought to protect slavery.<sup>4</sup> He gestured at the notion of a "white genocide"—a rallying cry of white nationalists worldwide—by tweeting support for South African far-right claims that white farmers were suffering from mass killings and land seizures in that country.<sup>5</sup> Most notably, following the largest U.S. gathering of white supremacists in a generation, the President insisted that some who marched in Charlottesville were "very fine people."<sup>6</sup>

With respect to immigration, Trump has repeatedly disparaged various groups of nonwhite immigrants. He began his presidential campaign by denouncing Mexican migrants as "rapists."<sup>7</sup> He allegedly commented that Haitian immigrants "all have AIDS" and that Nigerian immigrants would never "go back to their huts" after seeing the U.S.<sup>8</sup> He repeatedly conflated Middle Eastern and Muslim immigrants with terrorists<sup>9</sup> and falsely claimed that most

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3. Max Greenwood, *Trump on Removing Confederate Statues: "They're Trying to Take Away Our Culture,"* THE HILL (Aug. 22, 2017, 11:28 PM EDT), <https://perma.cc/H7ML-Z4JQ>.
  4. Miles Parks, *Confederate Statues Were Built To Further a "White Supremacist Future,"* NPR (Aug. 20, 2017, 8:31 AM ET), <https://perma.cc/9U23-AYLG>.
  5. Vann R. Newkirk II, *Trump's White-Nationalist Pipeline,* ATLANTIC (Aug. 23, 2018), <https://perma.cc/A4RX-UGKD>.
  6. Rosie Gray, *Trump Defends White-Nationalist Protesters: "Some Very Fine People on Both Sides,"* ATLANTIC, (Aug. 15, 2017), <https://perma.cc/DV4M-TQ8S>.
  7. Amber Phillips, *"They're Rapists." President Trump's Campaign Launch Speech Two Years Later, Annotated,* WASH. POST (June 16, 2017), <https://perma.cc/ZZZ9-KWEJ>.
  8. Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy To Advance Immigration Agenda,* N.Y. TIMES (Dec. 23, 2017), <https://perma.cc/F7LT-A8MC>.
  9. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2435-36 (2018) (Sotomayor, J., dissenting) (compiling statements "from which a reasonable observer would readily conclude that the [travel ban] was motivated by hostility and animus toward the Muslim faith"). More recently, the President claimed that "unknown Middle Easterners" and "people . . . from the Middle East and other places that are not appropriate for our country" were heading to the U.S. border. *Fact Check: President Trump's False Claims on Migrant Caravan, Tax Cuts,* NPR (updated Oct. 23, 2018, 5:22 PM ET) (quoting Donald J. Trump (@realDonaldTrump), TWITTER

people convicted of terrorism in the U.S. came from abroad.<sup>10</sup> In addition, Trump has trafficked in age-old racist tropes, portraying immigrants as criminals, invaders,<sup>11</sup> threats to women,<sup>12</sup> and even subhuman. On one occasion, Trump described unauthorized immigrants as “animals;”<sup>13</sup> on another, he conjured images of vermin in describing immigrants as threatening to “pour into and infest our Country.”<sup>14</sup> Perhaps most infamously, he reportedly railed against immigration from “shithole countries”—an apparent reference to Haiti, El Salvador, and African nations—and asked why the U.S. couldn’t get more people from countries like Norway.<sup>15</sup>

The President’s comments on immigration to Europe even more strongly suggest that he views immigration as a cultural threat to the U.S.—not just an economic or security challenge. He called immigration to Europe a “shame” and stated that it had “changed the fabric of Europe” and that Europeans “are losing [their] culture.”<sup>16</sup> He railed against the German government, which had (at one point) welcomed Syrian refugees, calling it a “[b]ig mistake made all over Europe in allowing millions of people in who have so strongly and violently

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(Oct. 22, 2018, 5:37 AM), <https://perma.cc/7H6U-RE6G>, <https://perma.cc/MEC8-2MN3>.

10. For more on those claims and the Justice Department’s belated attempt to correct them, see, for example, Benjamin Wittes, *Case Closed: The Justice Department Won’t Stand Behind Its Report on Immigrants and Terrorism*, LAWFARE (Jan. 7, 2019, 7:30 AM), <https://perma.cc/BAG4-7EPB>.
11. See President Donald Trump, Remarks on the Illegal Immigration Crisis and Border Security (Nov. 1, 2018, 4:19 PM EDT) (transcript available at <https://perma.cc/F4DX-RZ84>) (describing the migrant caravans as “like an invasion”).
12. In addition to depicting Mexican immigrants as rapists, the President required the Department of Homeland Security to report information on “gender-based violence against women, including honor killings, in the United States by foreign nationals.” Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977, 8981 (Jan. 27, 2017), *revoked by* Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13,209 (Mar. 6, 2017). The Muslim Travel Ban’s reference to “honor killings” played to the popular association of honor killings with Muslims. See, e.g., Sarah Mahmood, *Honor Killings and the Travel Ban*, TAKE CARE (Oct. 4, 2017), <https://perma.cc/M4FK-859C>.
13. Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants “Animals” in Rant*, N.Y. TIMES (May 16, 2018), <https://perma.cc/V53X-J6ZT>. Five days later, the White House released a statement referring ten times to MS-13 gang members as animals. *What You Need To Know About the Violent Animals of MS-13*, WHITE HOUSE (May 21, 2018), <https://perma.cc/WRZ3-95EK>.
14. David A. Graham, *Trump Says Democrats Want Immigrants To “Infest” the U.S.*, ATLANTIC (June 19, 2018) (quoting Donald J. Trump (@realDonaldTrump), TWITTER (June 19, 2018, 6:52 AM), <https://perma.cc/K6B4-65AZ>), <https://perma.cc/A586-H6NC>.
15. Josh Dawsey, *Trump Derides Protections for Immigrants from “Shithole” Countries*, WASH. POST (Jan. 12, 2018), <https://perma.cc/4JLR-QUHQ>.
16. Philip Bump, *Trump’s Comments on European Immigration Mirror White Nationalist Rhetoric*, WASH. POST (July 13, 2018) (quoting Tom Newton Dunn, *Donald Trump Told Theresa May How To Do Brexit “But She Wrecked It”—and Says the US Trade Deal Is Off*, SUN (updated July 13, 2018, 4:51 PM)), <https://perma.cc/ZX2Y-KCJG>, <https://perma.cc/Z96L-LNR7>.

changed their culture!”<sup>17</sup> Lest some might read these statements as pertaining to Europe alone, Trump drew a direct connection to the U.S.: “We don’t want what is happening with immigration in Europe to happen with us!”<sup>18</sup>

Putting together the President’s claims of cultural threat from immigration with his vilification of nonwhite immigrants, these statements suggest support for white nationalist ideas. Even if certain remarks might be challenged as insufficiently proven or susceptible of non-racist meanings, the record as a whole cannot be read in race-neutral terms.<sup>19</sup> Nor should the fact that non-racial motivations for restricting immigration *can* exist sanitize the reasons Trump has actually expressed for curtailing immigration.

## B. Policies

The Trump Administration’s immigration policies reflect its white nationalist rhetoric. The Administration has issued a dizzying array of policy changes that explicitly target or disproportionately affect noncitizens of color at the same time that President Trump’s statements reflect racist intent. These policy changes represent the most wide-ranging Executive Branch attempt to restrict immigration policies in generations.

Shortly after President Trump’s inauguration in 2017, the Administration instituted the first iteration of the Muslim Travel Ban, barring certain noncitizens from Muslim-majority countries from admission to this country.<sup>20</sup> In 2017 and 2018, the Administration ended Temporary Protected Status (TPS) for noncitizens from El Salvador, Haiti, Nicaragua, and Sudan, granted and renewed by prior administrations (for decades in some cases) to protect people unable to return to their home countries because of armed conflict, natural disasters, or other conditions.<sup>21</sup>

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17. Graham, *supra* note 14 (quoting Donald J. Trump (@realDonaldTrump), TWITTER (June 18, 2018, 6:02 AM), <https://perma.cc/LF5R-MTH2>).

18. *Id.*

19. Moreover, the examples noted here do not exhaust the President’s racial comments. For other examples, see Christal Hayes, *Here Are 10 Times President Trump’s Comments Have Been Called Racist*, USA TODAY (updated Aug. 14, 2018, 11:39 PM ET), <https://perma.cc/7Y9Z-4J44>; and David Leonhardt & Ian Prasad Philbrick, *Donald Trump’s Racism: The Definitive List*, N.Y. TIMES (Jan. 15, 2018), <https://perma.cc/MKW8-L9UF>.

20. Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977 (Jan. 27, 2017), *revoked by* Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

21. See Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2654 (Jan. 18, 2018); Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2648 (Jan. 18, 2018); Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59,636 (Dec. 15, 2017); Termination of the Designation of Sudan for Temporary Protected Status, 82 Fed. Reg. 47,228 (Oct. 11, 2017). For a full list of TPS designations, see *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://perma.cc/NW5F-RLVJ> (archived Feb. 11, 2019).

Numerous Trump Administration policies are designed to limit grants of status to Mexican and Central American immigrants. In 2017 President Trump rescinded the Deferred Action for Childhood Arrivals (DACA) program, under which individuals who had entered the country without papers as children could obtain work permits.<sup>22</sup> Ninety-four percent of DACA recipients are Latino.<sup>23</sup> The Department of Justice has also targeted Mexican and Central American refugees by heightening the standard that asylum-seekers fleeing domestic violence must meet<sup>24</sup> and implementing (later rescinded) draconian family separation policies.<sup>25</sup> The Administration is now defending a recent presidential proclamation that attempted to restrict the rights of individuals within the U.S. to apply for asylum, contrary to the plain language of the immigration statutes and this country's longstanding practice.<sup>26</sup>

The Trump Administration has also dramatically escalated enforcement and detention,<sup>27</sup> attempted to move deportation cases so quickly in immigration court as to preclude noncitizens from preparing a defense or

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22. See Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA) from Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs. et al. (Sept. 5, 2017), <https://perma.cc/MT6A-6R92>.
  23. Gustavo López & Jens Manuel Krogstad, *Key Facts About Unauthorized Immigrants Enrolled in DACA*, PEW RES. CTR. (Sept. 25, 2017), <https://perma.cc/6H8C-35MP>.
  24. See A-B-, 27 I&N Dec. 316, 317, 319 (A.G. 2018), *abrogated by* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018).
  25. See Memorandum on Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(A) from the Attorney Gen. to Fed. Prosecutors Along the Sw. Border (Apr. 6, 2018), <https://perma.cc/H5JB-LFG9>; see also OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-18-84, SPECIAL REVIEW—INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 2-3 (2018) (explaining the link between the Zero Tolerance Policy and family separation).
  26. See Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations: Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,934-35 (Nov. 9, 2018) (to be codified at 8 C.F.R. pts. 208, 1208); Donald J. Trump, *Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States*, WHITE HOUSE (Nov. 9, 2018), <https://perma.cc/9XBL-FEF4>; see also *East Bay Sanctuary Covenant v. Trump*, No. 18-cv-06810-JST, 2018 WL 6053140, at \*1 (N.D. Cal. Nov. 19, 2018) (temporarily enjoining Trump Administration from implementing policy barring asylum for noncitizens who enter the U.S. outside a port of entry).
  27. See RANDY CAPPS ET AL., MIGRATION POLICY INST., *REVVING UP THE DEPORTATION MACHINERY: ENFORCEMENT AND PUSHBACK UNDER TRUMP* 24, 37 (2018) (reporting that immigration arrests from President Trump's inauguration through September 2017 rose by 42%, and removals by 37%, compared to the previous year, while noting that these numbers were lower than in 2010 and 2011). While the Obama Administration increased removals for some years, it ultimately scaled back substantially on those numbers. Muzaffar Chishti et al., *The Obama Record on Deportations: Deportee in Chief or Not?*, MIGRATION POL'Y INST. (Jan. 26, 2017), <https://perma.cc/RJE6-EQMD>. Moreover, removals under the Obama Administration (even at their height) were not accompanied by the other policy changes that we now see under the Trump Administration, nor by the Trump Administration's inflammatory rhetoric.

finding attorneys,<sup>28</sup> slowed down and tightened visa issuances,<sup>29</sup> and planned to restrict severely the ability of certain indigent immigrants to obtain green cards, regardless of the strength of family ties.<sup>30</sup> The Administration has also markedly increased efforts to denaturalize U.S. citizens.<sup>31</sup> While these changes do not, on their face, target a specific group of noncitizens, the demographics of immigration to this country mean that their impact falls predominantly on noncitizens of color.<sup>32</sup>

It is true that neither nationality distinctions in immigration law nor efforts to control immigration are new. But the President's racist statements and the breadth of the changes to immigration policy distinguish this Administration from prior efforts to restrict immigration.

Moreover, while it is fairly easy to link certain immigration policies, like the Muslim Travel Ban or the termination of TPS for Haitians, to the

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28. See Exec. Office for Immigration Review, U.S. Dep't of Justice, Backgrounder on EOIR Strategic Caseload Reduction Plan (2017), <https://perma.cc/J2B9-E6SW>; see also SARAH PIERCE & ANDREW SELEE, MIGRATION POLICY INST., IMMIGRATION UNDER TRUMP: A REVIEW OF POLICY SHIFTS IN THE YEAR SINCE THE ELECTION 4 (2017) (citing *Immigration Court Backlog Tool*, TRAC REPORTS, <https://perma.cc/Q5N4-7RWM> (archived Feb. 11, 2019)); Memorandum on Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases To Serve the National Interest from the Attorney Gen. to the Exec. Office for Immigration Review (Dec. 5, 2017), <https://perma.cc/T7KX-NPCD>. While the Administration's plan to hire additional immigration judges accords with bipartisan support for increasing the resources of the country's immigration courts, its case completion requirements (if followed) would mean that cases may be processed more rapidly in certain circumstances.
29. See, e.g., Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13,209, 13,215 (Mar. 6, 2017); Unified Agenda of Federal Regulatory and Deregulatory Actions: Removing H-4 Dependent Spouses from the Class of Aliens Eligible for Employment Authorization, 83 Fed. Reg. 27,138, 27,142 (proposed June 11, 2018) (to be codified at 6 C.F.R. Chs. I, II) (proposing a rule to eliminate work authorization for H-4 dependents of H-1B visa holders); EMILY GELBAUM, NAT'L P'SHIP FOR NEW AMS., BUILDING A SECOND WALL: USCIS BACKLOGS PREVENTING IMMIGRANTS FROM BECOMING CITIZENS 7 (2017); PIERCE & SELEE, *supra* note 28, at 5 (describing mandated in-person interviews for applicants for employment-based permanent residency); Ted Hesson, *Trump Administration Introduces Green Card Hurdle*, POLITICO (Aug. 25, 2017, 7:52 PM EDT), <https://perma.cc/J47H-6ZWE>.
30. See Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212-14, 245, 248) (proposing that those seeking adjustment of status or applying for admission to the U.S. must establish that they are not likely at any time to become a public charge or receive public benefits, and thus making it harder for indigent immigrants who have used public benefits to get green cards).
31. See Seth Freed Wessler, *Is Denaturalization the Next Front in the Trump Administration's War on Immigration?*, N.Y. TIMES MAG. (Dec. 19, 2018), <https://perma.cc/FQ2U-62PV>.
32. According to the Pew Research Center, "[i]n 2016, 11.6 million immigrants living in the U.S. were from [Mexico], accounting for 26% of all U.S. immigrants. The next largest origin groups were those from China (6%), India (6%), the Philippines (4%) and El Salvador (3%)." Gustavo López et al., *Key Findings About U.S. Immigrants*, PEW RES. CTR. (Nov. 30, 2018), <https://perma.cc/8BH2-3TYW>. The top countries of origin for recent immigrants are India, Mexico, China, and Cuba. *Id.*

President's hostile comments about those groups, the President's statements cast doubt on the intent behind a wider swath of immigration policies. To the extent that the President's statements reflect a view of U.S. national identity as centered in white identity, they render immigration policies suspect even if the President has not disparaged the particular nonwhite nationalities affected.

## II. Immigration, White Supremacy, and Plenary Power

White supremacy has a long and sordid history in the federal immigration laws. The immigration statutes openly discriminated on the basis of race starting in the late 1800s with the Chinese Exclusion laws.<sup>33</sup> By 1917, federal law prohibited the entry of all people from the Asiatic Barred Zone.<sup>34</sup> The immigration statute imposed racially-based national-origin restrictions until 1965.<sup>35</sup> And from 1790 to 1952, the very definition of U.S. citizenship for persons not born within the U.S. depended on racial criteria: Federal law prohibited black people from naturalizing until 1870 and barred most other nonwhites from doing so until the 1940s.<sup>36</sup>

Constitutional challenges to these racist laws largely failed. The Supreme Court upheld the Chinese Exclusion laws in the late 1880s, stating that, if "the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary."<sup>37</sup> Under the plenary power doctrine announced in the Chinese Exclusion cases, federal courts were to grant broad deference to the political branches to regulate immigration. The plenary power doctrine has subsequently operated, for the most part, to insulate federal

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33. Act of May 6, 1882 (Chinese Exclusion Act), Ch. 126, 22 Stat. 58. The Chinese Exclusion laws were amended multiple times after 1882. *See generally* Gabriel J. Chin, Chae Chan Ping and Fong Yue Ting: *The Origins of Plenary Power*, in IMMIGRATION STORIES 7 (David A. Martin & Peter H. Schuck eds., 2005) (recounting the history and evolution of Chinese Exclusion laws).

34. *See* Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 876 (restricting people from the Asiatic Barred Zone from entering the U.S.).

35. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911, 911. For an overview of racist immigration laws from the Chinese Exclusion Act onward, see Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1119-47 (1998).

36. *See* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103-04 (limiting naturalization to free white persons); IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 30-33 (2006) (describing the incremental extension of naturalization opportunities to racial groups and the end of racial bars in 1952).

37. Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 606 (1889). The immigrant in *The Chinese Exclusion Case* did not raise discrimination claims under the Fifth Amendment. *See* 130 U.S. 581.

immigration statutes from developments in constitutional law for over a century.<sup>38</sup>

Challenges to facially neutral immigration statutes with a disparate impact on racial minorities must overcome not only the plenary power doctrine's restrictive review, but also the inhospitable legal landscape for such claims under the Supreme Court's equal protection jurisprudence. Even as to citizens, equal protection challenges based on race to facially neutral statutes require a showing of discriminatory intent, which in practice is extremely difficult to demonstrate.<sup>39</sup>

While the Supreme Court has not recently considered an immigration statute that explicitly discriminates on the basis of race, its decision in *Trump v. Hawaii* suggests that plenary power would likely dominate its analysis. In June 2018, the Court upheld the Trump Administration's Muslim Travel Ban excluding citizens of several predominantly Muslim countries, despite the President's repeated expressions of animus towards Muslims.<sup>40</sup> Applying a highly deferential standard of review to the plaintiffs' Establishment Clause claim, the Court asked only whether the travel ban was "plausibly related" to the government's declared objectives.<sup>41</sup> That standard would appear to discount even compelling evidence of animus when the government can offer any alternative, facially legitimate explanation for a policy.<sup>42</sup> *Trump v. Hawaii* concerned the entry of foreign nationals and a purported national security rationale—circumstances that do not apply in all immigration cases. Nonetheless, the Court's full-throated invocation of deference—and its citation to classic cases upholding discriminatory immigration policies—does not bode well for equal protection claims.<sup>43</sup>

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38. See generally, e.g., Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57 (2015) (noting continued vitality of the plenary power doctrine but predicting demise based on recent Supreme Court decisions that erode the edges of the doctrine); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995) (same). One recent exception to plenary power's application is *Sessions v. Morales-Santana*, which the Supreme Court essentially treated as a non-immigration case. See 137 S. Ct. 1678, 1689-93 (2017) (addressing the equal protection aspect of the differential application of the immigration statute).

39. See Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1783 (2012) (summarizing the development of equal protection standards); Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 2-3, 16-20 (2013) (same).

40. 138 S. Ct. 2392, 2415, 2423 (2018).

41. *Id.* at 2420.

42. See Cristina M. Rodríguez, *Trump v. Hawaii and the Future of Presidential Power over Immigration*, AM. CONST. SOC'Y SUP. CT. REV., <https://perma.cc/4W42-MVGP> (archived Feb. 11, 2019) (arguing that the Court's standard of review departed radically from ordinary review of facially neutral laws where there is evidence of discriminatory intent).

43. See *Hawaii*, 138 S. Ct. at 2418-20 (citing, among other cases exhibiting judicial deference to immigration policies, *Fiallo v. Bell*, 430 U.S. 787 (1977); and *Kleindienst v. Mandel*, 408 U.S. 753 (1972)).

### III. Why Frame Challenges to Highlight Discrimination on the Basis of Race?

#### A. Equal Protection Successes in the Lower Courts

Litigants challenging Trump Administration immigration policies that are accompanied by statements of racial animus are turning to equal protection claims, despite the plenary power doctrine and the hostile legal standard for those claims. And in some cases they are winning, at least in the lower federal courts. Two examples are illustrative.

After the Trump Administration rescinded the DACA program, several litigants filed suit, raising claims under the Administrative Procedure Act (APA), Equal Protection Clause, and Due Process Clause.<sup>44</sup> While the APA claims—alleging that the Trump Administration’s decision to rescind rested on a flawed premise that DACA is unlawful—formed the core of district court and court of appeals decisions, those decisions also referenced and credited the equal protection claims.<sup>45</sup> Plaintiffs alleged that the Administration’s decision to rescind DACA violated the Equal Protection Clause because the decision was motivated by animus against Latinos, who comprise 93% of approved DACA recipients.<sup>46</sup> Courts have referenced this claim in their decisions (and upheld it against the government’s motions to dismiss it).<sup>47</sup>

Immigrants have also challenged the Trump Administration’s TPS terminations on equal protection grounds. Since President Trump took office, his administration has terminated the TPS designations of El Salvador, Haiti, Nicaragua, and Sudan, among other countries. A class of noncitizens challenged these terminations on equal protection, APA, and due process grounds. The plaintiffs alleged that the decisions were motivated by racial and national origin animus, as demonstrated by President Trump’s numerous racially discriminatory and anti-immigrant statements.<sup>48</sup> They also alleged that the White House applied direct pressure on the Department of Homeland Security (DHS) to end TPS designations, based on racist animus.<sup>49</sup> In a decision issued

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44. *See, e.g.*, *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 492 (9th Cir. 2018); *see also* *NAACP v. Trump*, 315 F. Supp. 3d 457, 460, 462 (D.D.C. 2018) (finding DACA rescission unlawful under the APA); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 409, 417 (E.D.N.Y. 2018) (granting a preliminary injunction against DACA rescission on APA grounds).

45. *See, e.g.*, *Regents*, 908 F.3d at 518-20.

46. *E.g.*, Principal and Response Brief for the *Garcia and County of Santa Clara* Plaintiffs at 46-53, *Regents*, 908 F.3d 476 (Nos. 18-15068 et al.), 2018 WL 1414353.

47. *See, e.g.*, *Regents*, 908 F.3d at 518-20.

48. Class Action Complaint at 18-21, *Ramos v. Nielsen*, 336 F. Supp. 3d 1075 (N.D. Cal. 2018) (No. 3:18-cv-1554), 2018 WL 4823816.

49. Corrected Plaintiffs’ Notice of Motion and Motion for a Preliminary Injunction; Memorandum of Points and Authorities in Support Thereof at 15-16, *Ramos*, 336 F. Supp. 3d 1075 (No. 3:18-cv-1554-EMC), 2018 WL 4847238.

after *Trump v. Hawaii*, the district court granted a preliminary injunction,<sup>50</sup> holding that the challengers had demonstrated a likelihood of success on their APA claim and that there were “serious questions on the merits on the Equal Protection Claim” sufficient to support the preliminary injunction.<sup>51</sup>

The TPS and DACA litigation illustrate that, even with another claim as the principal basis of a court’s decision, the equal protection claim (and the racial statements recounted in the brief to make out that claim) inform how courts frame the case as a whole.

## B. The Broader Value of Equal Protection Claims

Given the plenary power doctrine and the Supreme Court’s *Trump v. Hawaii* decision, it is unlikely that, if the Court ends up considering the TPS or DACA equal protection claims, those claims will prevail. But there are still important reasons for litigants to raise equal protection challenges and to highlight the illegitimacy of white nationalism as a basis for immigration policy.

First, as Hiroshi Motomura observed nearly thirty years ago, even when courts apply plenary power to avoid review of constitutional claims, those claims may result in statutory victories in the same cases.<sup>52</sup> “Phantom” constitutional norms like equal protection—which exist in mainstream constitutional law but which courts have not typically applied directly to immigration policies—affect courts’ decision-making as to the other claims in a lawsuit. In some cases, courts apply “phantom norms” through interpreting statutes to avoid raising serious constitutional questions.<sup>53</sup> But as Motomura observes, constitutional norms like equal protection affect consideration of a case even without explicit application of the avoidance doctrine.<sup>54</sup> And there is reason to believe that operation of this theory is even more pronounced when it comes to agency action, as compared to legislative mandate.<sup>55</sup>

Even if the current Supreme Court is unfavorable to both constitutional and statutory challenges to the Administration’s immigration policies, there is

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50. *Ramos*, 336 F. Supp. 3d at 1108.

51. *Id.* at 1097, 1105.

52. See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990). Since this landmark article, the doctrine of constitutional avoidance has come under strong critique from many scholars. See generally, e.g., Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331 (2015) (collecting sources). We take no position on the appropriate application of the doctrine, and acknowledge the limitations of a doctrine that does not ultimately require judges to grapple head on with the equal protection question.

53. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 682, 699 (2001) (interpreting a detention statute in light of constitutional concerns to limit detention to a period reasonably necessary to remove an “alien” from the U.S.).

54. See Motomura, *supra* note 52, at 564-93.

55. See *id.* at 580-83.

a second reason to pursue and publicize equal protection claims. Equal protection litigation can frame public dialogue, advance the claims of social movements, and promote extrajudicial political change by highlighting the core equality principle at stake.<sup>56</sup> The equal protection argument promotes the public message that, while people can reasonably disagree over the proper scale and form of immigration, white nationalism can never be a legitimate basis for immigration policy.

Litigation can frame public understanding about the nature of a grievance and the definition of a cause.<sup>57</sup> Whereas other legal challenges to immigration measures are often inscrutable to the public—like APA claims that DHS insufficiently explained a rule change or failed to follow notice-and-comment procedures—the equal protection claim articulates an intuitive harm and allows the public to grasp the stakes of a dispute. Especially at a time when litigation often dominates news coverage of immigration, highlighting the equal protection claim can focus public attention on core values—*who we are as a nation*—rather than on legalistic defects in policy enactment.

The equal protection narrative also supports communities that are suffering from racialized immigration enforcement by countering the exclusionary message of President Trump’s policies. Unlike more technical arguments, equal protection claims speak to the indignity, dehumanization, and lack of belonging experienced by affected immigrants. Naming the grievance as white nationalism helps align legal advocates with the broader movements they support.<sup>58</sup> That narrative may also propel advocates to de-emphasize other narratives that divide immigrant communities—like the prevalent cultural frame that “Dreamers” are responsible, “good” immigrants, in contrast to undeserving others.<sup>59</sup>

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56. Law and social movement scholars have long debated how effectively litigation produces social change. In the defensive posture of the immigrant rights’ movement today, there is no serious argument against filing legal challenges to attempt to block or delay devastating new immigration restrictions. So the question is not *whether* immigrant rights’ supporters should litigate, but *how* they can do so in a way that optimizes the chance of succeeding inside or outside of court.

57. See, e.g., MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 65-68 (1994) (showing how judicial decisions gave pay equity activists a compelling normative frame for understanding injustice and demanding reform); Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 MARQ. L. REV. 263, 280-81, 288-89 (2010) (citing social movement scholarship on the importance of framing for social movements and arguing that court decisions on abortion and same-sex marriage shifted the terms of debate).

58. See Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1476-77 (2017) (describing how local immigrant advocates sought to integrate movement narratives around white supremacy into litigation against restrictive Arizona law SB 1070).

59. For analysis of the utility and perils of mainstream cultural narratives in the immigrants’ rights movement, see Jennifer J. Lee, *Outsiders Looking in: Advancing the Immigrant Worker Movement Through Strategic Mainstreaming*, 2014 UTAH L. REV. 1063, 1066-67.

Centralizing the equality narrative may also help immigrant rights' advocates pursue political reform because of the "capacity of legal frames, narratives, and performances to construct identities and meanings" that influence political agendas.<sup>60</sup> In fact, even a high-profile loss on the equal protection claim can help mobilize political reform—if advocates drive home the message that political leaders must resist white nationalist immigration policy because the courts have failed to do so.<sup>61</sup>

When plaintiffs centralize the equal protection claim, justices who dissent from decisions rejecting that claim are more likely to do so in terms that can galvanize a popular response. Lani Guinier has argued that dissents can promote democracy when they (1) engage with a significant issue of democratic legitimacy; (2) are written in an accessible public style; and (3) inspire nonjudicial actors, including legislators and ordinary people, to act collectively "to revisit the majority's conclusions."<sup>62</sup> A dissenting opinion that amasses the evidence of discriminatory intent and declares white nationalism a fundamentally impermissible basis for immigration policy has potential to mobilize democratic engagement and political reform.

Third, asserting equal protection claims allows litigants to promote a constitutional framework in immigration law that a future Supreme Court may recognize. In that framework, contrary to the plenary power doctrine and *Trump v. Hawaii*, courts would not give special deference to the political branches when reviewing immigration policies; immigration policies motivated by discriminatory animus would be deemed unconstitutional; and courts would strike down policies where significant evidence of such animus existed, regardless of whether other reasons for the same policies could be hypothesized. That framework would bring immigration law within the larger fold of constitutional law, including the development of the idea of animus as an illegitimate basis for state action under the Court's equal protection doctrine.<sup>63</sup> Challenges to immigration policies that name the harm—white nationalism—and articulate a different vision of the law grounded in

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60. LEILA KAWAR, *CONTESTING IMMIGRATION POLICY IN COURT: LEGAL ACTIVISM AND ITS RADIATING EFFECTS IN THE UNITED STATES AND FRANCE* 153, 159 (2015) (arguing that immigration litigation shaped political agendas in the 1980s by catalyzing a civil rights immigration reform coalition).

61. On the value of litigation loss for social movements, see, for example, Ben Depoorter, *Essay, The Upside of Losing*, 113 COLUM. L. REV. 817, 821 (2013), for the argument that adverse outcomes in litigation can benefit social movements; and Douglas Nejaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 969-1011 (2011), for the argument that advocates can use litigation losses to shape organizational identity, mobilize constituents, and appeal to other state actors and the public.

62. Lani Guinier, *The Supreme Court 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 49 (2008).

63. See, e.g., Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 900-24 (2012) (describing development of concept of unconstitutional animus in Supreme Court equal protection cases, even under rational basis review).

contemporary notions of equality may not succeed today, but they make clear what is at stake in a way that may instigate future constitutional law reform.

### **Conclusion**

Some may object that emphasizing race may alienate members of the public who would respond more sympathetically to universal or humanitarian narratives, or distract courts from narrower legal arguments with a greater likelihood of success. We recognize that a uniform approach may not be appropriate in every case, and that the communities affected by various measures and their lawyers have to assess potential costs against the benefits we have outlined. But in making that assessment, lawyers in particular should consider that clients, social movement actors, and even the general public may be well ahead of lawyers in recognizing the racism behind the Trump Administration's policies.<sup>64</sup> Moreover, the failure to raise equality claims presents its own risk: normalizing white nationalism in our political and legal life. If legal actors cannot call out racism even when it manifests in the express comments and policies of the President, there is little hope of countering it in its more subtle and pervasive forms.

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64. See, e.g., QUINNIAC UNIV. POLL, HARSH WORDS FOR U.S. FAMILY SEPARATION POLICY, QUINNIAC UNIVERSITY NATIONAL POLL FINDS; VOTERS HAVE DIM VIEW OF TRUMP, DEMS ON IMMIGRATION 1 (2018), <https://perma.cc/EZ4S-LA62> (reporting poll results finding that 49% of voters believe President Trump is racist and 44% believe "racist beliefs" motivate his immigration policies, while 47% believe he is not racist and 50% believe that "a sincere interest in controlling our borders" is the main motive); Emily Swanson & Russell Contreras, *AP-NORC Poll: Most Americans Say Trump Is Racist*, ASSOCIATED PRESS-NORC CTR. FOR PUB. AFF. RES. (Feb. 28, 2018), <https://perma.cc/UY2R-DMGK> (reporting AP-NORC Center for Public Affairs Research poll results finding that 57% of adults, "including more than 8 in 10 blacks, three-quarters of Hispanics and nearly half of whites," believe that Trump is racist).