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## DEHUMANIZATION, IMMIGRANTS, AND EQUAL PROTECTION

REGINALD OH\*

*The process of dehumanization is an essential ingredient in the  
perpetration of inhumanities.*<sup>1</sup>

*Albert Bandura*

*We have people coming into the country, or trying to come in. We're  
stopping a lot of them. You wouldn't believe how bad these people  
are. These aren't people, these are animals . . . ."*<sup>2</sup>

*President Donald Trump*

### INTRODUCTION

This article examines the concept of dehumanization and discusses its relevance to the immigrant experience with invidious discrimination, and to equal protection doctrine. It contends that immigrants, including undocumented immigrants, require special judicial protection under equal protection due to their history of, and susceptibility to, dehumanization.

The equal protection suspect class doctrine has categorized racial and ethnic minorities, women, nonmarital children, and immigrants as politically vulnerable suspect classes. Accordingly, laws

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1. Albert Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3 PERSONALITY AND SOC. PSYCHOL. REV. 193, 200 (1999) [hereinafter *Moral Disengagement*].

2. Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants 'Animals' in Rant*, N.Y. TIMES (May 6, 2018), <https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html>.

discriminating against these suspect classes are subject to rigorous judicial review. Courts will apply either strict or intermediate scrutiny and require the government to have a strong justification for the discrimination. A law discriminating against a class that is not considered suspect will be subject to deferential rational basis review and the government will only need to show the discrimination serves some legitimate government interest for the law to be upheld.

The United States Supreme Court has, in a line of cases, relied on a set of suspect class factors to decide which classes or social groups are suspect. These factors include whether a class: (1) has suffered a history of discrimination; (2) is politically powerless; (3) is defined by an immutable trait; (4) is defined by a highly visible trait; and (5) is defined by an irrelevant trait.

However, legal commenters have criticized the suspect class analysis for lacking coherence. The Court has not fully fleshed out the meaning of the various factors. Neither has it explained whether all or just some of the factors need to be met for a class to be suspect, nor has it explained whether some factors are more important than others. It is not entirely clear what exactly the factors aim to prove or establish.

This article contends the concept of dehumanization can help bring clarity to the suspect class doctrine. Dehumanization is the process by which a class of people is treated as less than human or as subhuman. Dehumanization denies that the dehumanized group possesses traits unique to humans, such as the ability to think critically or feel emotions.<sup>3</sup> Dehumanizing treatment is a key step in governmental infliction of abuse, atrocities, and harm against the dehumanized group, making it a central process in the subordination of a marginalized group.

This article argues the suspect class factors laid out by the Supreme Court are, at least implicitly, intended to determine if a social group is susceptible to dehumanization, consequently making them susceptible to invidious discrimination. Incorporating the concept of dehumanization into suspect class analysis will help explain why immigrants, especially undocumented immigrants, should be considered suspect and, therefore, afforded special judicial protection.

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3. See Stephen M. Utych, *How Dehumanization Influences Attitudes Towards Immigrants*, 1 POL. RES. Q. 19 (2017).

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This article is divided into three parts. Part I explores the concept of dehumanization and its central role in the subordination of marginalized groups. Part II discusses the equal protection doctrine of suspect classes by analyzing key decisions by the Court and its reasoning for whether or not to consider a particular group as a suspect class. Part II also argues that the decision in *Brown v. Board of Education* regards racial segregation in public schools as a form of racial dehumanization and provides the doctrinal basis to consider dehumanization a central factor in determining suspect class status. Part III contends that the experience immigrants have with pervasive dehumanization, in both the past and the present, strongly justifies their designation as a suspect class. Moreover, it argues if dehumanization is indeed a central concern of the suspect class doctrine, then undocumented immigrants should be afforded suspect status.

## I. DEHUMANIZATION

Dehumanization is the process by which people are understood to be less than human.<sup>4</sup> Typically, a group is dehumanized through language or imagery depicting them as animalistic or subhuman. Dehumanization encompasses two layers. One layer involves stripping a person, or class of persons, of human qualities, such as emotions and cognitive abilities.<sup>5</sup> The second layer involves “attributing demonic or bestial qualities to them.”<sup>6</sup> The two layers combine to turn a dehumanized person into something less than human, something even akin to a subhuman, animalistic creature.<sup>7</sup>

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4. DAVID LIVINGSTONE SMITH, *LESS THAN HUMAN: WHY WE Demean, ENSLAVE, AND EXTERMINATE OTHERS* 26 (2011). There is a growing body of social psychology literature studying dehumanization and its effects. *See generally* Vera Katelyn Wilde et al., *Dehumanization as a Distinct Form of Prejudice*, 21 *TPM* 301, 302 (2014); Nick Haslam, *Dehumanization: An Integrative Review*, 10 *PERSONALITY AND SOC. PSYCHOL. REV.* 252 (2006); Phillip Atiba Goff & Jennifer L. Eberhardt, *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 *J. OF PERSONALITY AND SOC. PSYCHOL.* 292, 293 (2008).

5. *See* Nour Kteily et al., *The Ascent of Man: Theoretical and Empirical Evidence for Blatant Dehumanization*, *J. OF PERSONALITY AND SOC. PSYCHOL.* 3–4 (2015).

6. Albert Bandura, *Selective Moral Disengagement in the Exercise of Moral Agency*, 31 *J. OF MORAL EDUC.* 101, 109 (2002).

7. Kteily et al., *supra* note 5, at 3.

For social psychologist Albert Bandura, “The process of dehumanization is an essential ingredient in the perpetration of inhumanities.”<sup>8</sup> Dehumanization plays a paramount role in the marginalization of certain groups, as “conceiving of people as subhuman often makes them objects of violence and victims of degradation.”<sup>9</sup>

How does dehumanization lead people to inflict harm or support punitive policies against a class of people? One factor is the attitudes of the person or group engaging in dehumanization. When a group views a specific class of people as subhuman, these outgroups are placed “outside of normal moral consideration,” which then “facilitate[s] violence against the dehumanized group.”<sup>10</sup> According to Herbert Kelman, “[t]o the extent victims are dehumanized, principles of morality no longer apply to them and moral restraints are more readily overcome.”<sup>11</sup> The ability to restrain oneself from engaging in cruel conduct against another person is severely diminished once the victim is stripped of human qualities.<sup>12</sup>

Dehumanizing a group also elicits negative emotions, such as anger, disgust, and fear against the dehumanized group.<sup>13</sup> Those negative emotions can lead to reduced empathy for the dehumanized group and support the desire for harsh, punitive treatment.

#### A. *The Dehumanization of Jews and African Americans*

Historically, dehumanization was integral to the atrocities inflicted upon marginalized classes in society. For example, dehumanization played a crucial part in the genocidal campaign against Jews during World War II, and to the enslavement of persons of African descent in the United States.

In Nazi Germany, those who were Jewish were dehumanized as an insidious, subhuman race of people who possessed the qualities of

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8. *Moral Disengagement*, *supra* note 1, at 200.

9. SMITH, *supra* note 4, at 37.

10. Kteily et al., *supra* note 5, at 902.

11. H.C. Kelman, *Violence Without Moral Restraint: Reflections on the Dehumanization of Victims and Victimiziers*, 29 J. OF SOC. ISSUES 24, 48 (1973).

12. *Moral Disengagement*, *supra* note 1, at 200.

13. See Utych, *supra* note 3, at 2.

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disease and vermin.<sup>14</sup> Adolf Hitler believed Jewish people were an “illness spreading parasite, representing the danger of disease.”<sup>15</sup> He considered them as a “germ, germ carrier, or agent of disease, a decomposing agent, fungus, or maggot.”<sup>16</sup> He referred to Jews as “bloodsuckers, leeches, and poisonous parasites.”<sup>17</sup> Joseph Goebbels, in a Nazi propaganda film he produced entitled *The Eternal Jew*, connected “Jews and filth, decay, and disease in every sector of cultural life. The film’s narrator gravely states the ‘race of parasites’ has no feeling for the ‘purity and cleanliness’ of the German idea of art.”<sup>18</sup> A campaign of genocide seemed entirely rational, logical, and necessary to the Nazis once Jews were dehumanized as vermin and disease.

Similarly, dehumanization was at the heart of African and African American experiences with slavery and segregation in the United States.<sup>19</sup> American slaveholders justified the enslavement of Africans by contending that they were animalistic subhumans.<sup>20</sup> If Africans were not really human, then enslaving them did not constitute a violation of *human* rights. Thus, slavery apologists believed that Africans could be “tamed, trained and used like domestic animals . . . .”<sup>21</sup>

Even after the abolishment of slavery, African Americans continued to be dehumanized. Immediately after slavery was abolished, former slave states enacted the Black Codes,<sup>22</sup> replicating through state law a system of discriminatory treatment depriving African Americans of basic liberties. After the Fourteenth Amendment abolished the Black Codes, former slave states implemented Jim Crow

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14. SMITH, *supra* note 4, at 146.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 139.

19. *See id.* at 114–23 (describing dehumanization of Africans).

20. *Id.* at 117 (“Many colonists treated slaves as less than human and also explicitly stated that Africans were soulless animals.”).

21. *Id.* at 119.

22. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW: A COMMEMORATIVE EDITION* 23 (2002).

segregation to dehumanize African Americans.<sup>23</sup> Like slavery, Jim Crow laws were a legal manifestation of the entrenched belief that African Americans were inferior subhumans who could not share spaces with whites.<sup>24</sup>

The tragic story of Ota Benga, a member of the African pygmy group from central Africa, illustrates the horrors of dehumanization. In the early 20<sup>th</sup> century, a white American arranged for Ota Benga to move from Africa to the United States to become an attraction at the Bronx Zoo in New York.<sup>25</sup> Ota Benga was put in a cage as if he was an animal. In fact, they made him share his cage with an orangutan.<sup>26</sup> *The New York Times* reported on Ota Benga, stating, “[f]ew expressed audible objection to the sight of a human being in a cage with monkeys as companions.”<sup>27</sup>

The treatment of Ota Benga incited an uproar among the local African American community. Under mounting social pressure, the Bronx Zoo ultimately released Ota Benga from his cage. However, he remained at the zoo and continued to be treated as an attraction. Thousands of visitors came to see “the star attraction in the park, the wild man from Africa. They chased him about the grounds all day, howling, jeering, and yelling” before Ota Benga ultimately committed suicide.<sup>28</sup>

### *B. The Dehumanization of Immigrants in the United States*

Throughout American history, dehumanization went hand in hand with invidious discrimination towards immigrants of all races, though especially immigrants of color. Americans in the 19<sup>th</sup> and 20<sup>th</sup> centuries described Asian immigrants as a “yellow peril,” a faceless horde of homogeneous and “unassimilable” aliens who posed an existential

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23. See JERROLD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW* 65 (2002) (“From the end of Reconstruction until the Supreme Court’s *Plessy v. Ferguson* decision in 1896, Jim Crow spread like a pestilence.”).

24. See *id.* at 64 (“But Jim Crow was a Southern phenomenon, the infrastructure white Southerners built to preserve, insofar as humanly possible, the old master/slave system.”).

25. SMITH, *supra* note 4, at 121.

26. *Id.* at 122.

27. *Id.*

28. *Id.* at 123.

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threat to American society.<sup>29</sup> Chinese immigrant men in the late 19<sup>th</sup> century were dehumanized as drug addicts whose very presence fostered prostitution, gambling, and other immoral activities.<sup>30</sup> Japanese immigrants took on the label of a dehumanized yellow peril in the early 20<sup>th</sup> century.<sup>31</sup>

The relentless dehumanization of Asian immigrants inevitably led to violence. Over 150 anti-Chinese riots occurred in the American west during the 1870s and 1880s.<sup>32</sup> In 1884, a judge in Texas dismissed a murder charge against a white man accused of killing a Chinese immigrant, ruling that he could not find a “law against killing a Chinaman because the law in Texas came down only to killing human beings.”<sup>33</sup>

Some white European immigrants also suffered from dehumanization upon their arrival to the United States, particularly Irish and Italian immigrants. During the mid-19<sup>th</sup> century, Irish immigrants were “depicted as subhuman. They were the carrier of disease. They were drawn as lazy, clannish, unclean drunken brawlers who wallowed in crime and bred like rats.”<sup>34</sup> In an 1881 British political cartoon, an Irish American immigrant was depicted as a grotesque animal-like creature dubbed the “Wild Beast” and “Dynamite Skunk.”<sup>35</sup> In the

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29. See Yvonne Walter, *Asian Americans and American Immigration and Naturalization Policy*, 49 AM. STUD. J. (2007), <http://www.asjournal.org/49-2007/asian-americans-and-american-immigration-and-naturalization-policy/>.

30. Gwen Sharp, *Old “Yellow Peril” Anti-Chinese Propaganda*, SOC’Y PAGES (June 20, 2014), <https://thesocietypages.org/socimages/2014/06/20/old-yellow-peril-anti-chinese-posters/>.

31. See Devon Carbado, *Yellow by Law*, 97 CAL. L. REV. 633, 640 (2009).

32. Braden Goyette, *How Racism Created America’s Chinatowns*, HUFFPOST (Nov. 11, 2014), [https://www.huffpost.com/entry/american-chinatowns-history\\_n\\_6090692](https://www.huffpost.com/entry/american-chinatowns-history_n_6090692).

33. Chinese Railroad Workers in North America Project, *Timeline*, STANFORD UNIV. <https://web.stanford.edu/group/chineserailroad/cgi-bin/website/timeline/> (last visited Nov. 17, 2019).

34. Douglas Kierdorf, *Getting to Know the Know-Nothings*, BOS. GLOBE (Jan. 10, 2019), <https://www.bostonglobe.com/ideas/2016/01/10/getting-know-know-nothings/yAojakXKkiauKCAzsf4WAL/story.html?outputType=amp>.

35. Kevin Kenny, *Irish Immigrant Stereotypes and American Racism*, AM. SOC. HISTORY PROJECT CTR. FOR MEDIA AND LEARNING: PICTURING U.S. HISTORY,



cartoon, the “Wild Beast” is locked up in a cage, has “diabolical ears and feet,” and an “extraordinary tail.”<sup>36</sup> American political cartoonists depicted Irish immigrants as “Celtic ape-men with sloping foreheads and monstrous appearances.”<sup>37</sup> Those cartoons reflected the view that Irish immigrants were closer to apes than to humans.<sup>38</sup>

Americans, fueled by the belief that “Irish immigrant depravity” made them “inherently violent, savage by nature,”<sup>39</sup> discriminated against the Irish in employment, physically attacked them, and supported harsh, punitive, anti-immigrant policies.<sup>40</sup> In Massachusetts, when the anti-immigrant “Know-Nothing Party” gained control of the state legislature, they immediately deported three hundred Irish immigrants believing they were a drain on public resources.<sup>41</sup> Additionally, the state prohibited naturalized citizens from voting unless they had been in the United States for twenty-one years—further impacting the Irish immigrant.<sup>42</sup>

In August of 1855, in Louisville, Kentucky, the infamous “Bloody Monday” took place on an election day when armed members of the “Know-Nothing Party” engaged Irish and German immigrants in street fights and ransacked and set fire to their homes.<sup>43</sup> More than twenty Irish and German immigrants were killed, and thousands were forced to leave the city.

Italian immigrants were similarly dehumanized in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. A New Orleans newspaper described them as “a pest without mitigation. Our own rattlesnakes are as good citizens as they.”<sup>44</sup> The editorial went on to conclude lynching was the only way

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<https://picturinghistory.gc.cuny.edu/irish-immigrant-stereotypes-and-american-racism/> (last visited Nov. 17, 2019).

36. *Id.*

37. Christopher Klein, *When America Despised the Irish: The 19<sup>th</sup> Century’s Refugee Crisis*, HISTORY, <https://www.history.com/news/when-america-despised-the-irish-the-19th-centurys-refugee-crisis> (last visited Nov. 18, 2019).

38. Kenny, *supra* note 35.

39. *Id.*

40. Klein, *supra* note 37.

41. Kierdorf, *supra* note 34.

42. Klein, *supra* note 37.

43. *Id.*

44. Christopher Woolf, *A Brief History of America’s Hostility to a Previous Generation of Mediterranean Migrants-Italians*, PRI (Nov. 26, 2015),

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to stop Italian immigrants from committing crimes.<sup>45</sup> Moreover, an author of a 1907 book commenting on Italian immigrants stated that “immigrants from eastern and southern Europe are storming the Nordic parts of the United States and mongrelizing the good old American stock.”<sup>46</sup> On March 14, 1891, in one of the worst lynchings in U.S. history, eleven Italian immigrant men were killed by those seeking vengeance for a police officer who had been murdered—allegedly by an Italian immigrant.<sup>47</sup>

These are just a few historical examples of the inhumanity immigrants from all over the world encountered following their immigration to the United States. Unfortunately, the ugly legacy of dehumanizing immigrants has not been relegated to the past. It is still alive today.

### *C. The Dehumanization of Immigrants in the Present*

The dehumanization of immigrants is pervasive in American political culture, as it has gone hand-in-hand with support for, and enactment of, punitive anti-immigration policies. President Donald Trump has been a catalyst for the increase in volume and intensity of the dehumanizing rhetoric about immigrants. Trump’s dehumanizing of immigrants was central to his winning the 2016 presidential election. Throughout his presidential campaign in 2015 and 2016, Trump referred to Latino immigrants as criminals, rapists, animals, and disease carriers.<sup>48</sup> In a 2015 campaign speech, he called Latino immigrants entering the United States a “tremendous infectious disease,” and claimed that they were “pouring across the border.”<sup>49</sup> He also talked

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<https://www.pri.org/stories/2015-11-26/brief-history-america-s-hostility-previous-generation-mediterranean-migrants>.

45. *Id.*

46. *Id.*

47. *Id.*

48. Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016),

<https://time.com/4473972/donald-trump-mexico-meeting-insult/>.

49. Rupert Neate & Jo Tuckerman, *Donald Trump: Mexican Migrants Bring ‘Tremendous Infectious Disease’ to US*, GUARDIAN (July 6, 2015), <https://www.theguardian.com/us-news/2015/jul/06/donald-trump-mexican-immigrants-tremendous-infectious-disease>.

about how undocumented immigrants “roam” the United States as if they are predatory animals: “Nearly 180,000 illegal immigrants with criminal records. . .are *roaming* free to threaten peaceful citizens.”<sup>50</sup>

President Trump has only continued to dehumanize immigrants since taking office. He continues to refer to immigrants as infestation and disease, claiming that Democrats want “illegal immigrants, no matter how bad they may be, to pour into and infest our country.”<sup>51</sup> Trump has referred to Latino immigrants, and, specifically, to Latino gang members as predatory animals. In one speech, he described Latino immigrants in this manner, stating “You’ve seen the stories about some of these animals. They don’t want to use guns because it’s too fast and it’s not painful enough. So, they’ll take a young, beautiful girl, 16, 15 and others, and they slice them and dice them with a knife because they want them to go through excruciating pain before they die.”<sup>52</sup>

Trump’s administration has followed suit in sharing his dehumanizing rhetoric. Former White House Press Secretary Sarah Sanders agreed with Trump’s characterization of Latino gang members, stating, “It took an animal to stab a man 100 times and decapitate him and rip his heart out,” when referring to a murder allegedly committed by a Latino immigrant MS-13 gang member.<sup>53</sup> She added, “Frankly I think the term animal doesn’t go far enough” and that Trump needs to do everything to stop “these types of horrible, horrible disgusting people.”<sup>54</sup>

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50. Miriam Valverde, *Trump: Nearly ‘180,000 Illegal Immigrants’ Have Criminal Records but Haven’t Been Deported*, POLITIFACT (July 22, 2016, 2:36 AM), <https://www.politifact.com/truth-o-meter/statements/2016/jul/22/donald-trump/trump-nearly-180000-illegal-immigrants-have-crimin/>.

51. *Trump: Immigrants Are Threatening to ‘Infest’ U.S.*, DAILY BEAST (June 19, 2018), <https://www.thedailybeast.com/trump-immigrants-are-threatening-to-infest-us>.

52. Maya Oppenheim, *Donald Trump Brands Illegal Immigrant Gang Members ‘Animals’ Who ‘Slice and Dice’ Young Beautiful Girls*, INDEPENDENT (July 26, 2017, 3:45 PM), <https://www.independent.co.uk/news/world/americas/donald-trump-illegal-immigrants-animals-slice-dice-young-beautiful-girls-us-president-a7861596.html>.

53. Gaby Morrongiello, *Not ‘Strong Enough’: Sarah Sanders Defends Trump Comments About Violent Illegal Immigrants*, WASH. EXAM’R (May 17, 2018, 2:10 PM), <https://www.washingtonexaminer.com/news/white-house/not-strong-enough-sanders-defends-trump-comments-about-violent-illegal-immigrants>.

54. *Id.*

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These characterizations of Latino immigrants dehumanize them and perpetuate Trump's narrative that they are less than human.

*D. Empirical Studies of Dehumanization*

President Trump does not dehumanize immigrants simply for the sake of dehumanizing them. He dehumanizes them to catalyze public support for harsh, punitive, anti-immigrant policies, doing so whether the policies concern mass deportations, detention of asylum-seekers, separation of migrant children from their parents, termination of Temporary Protective Status for Haitian immigrants, or termination of the Deferred Action for Childhood Arrivals program.

Social science studies confirm the connection between dehumanization and subsequent implementation of punitive policies and infliction of physical harm against a dehumanized group.<sup>55</sup> In a classic study by Stanford psychologist Albert Bandura, college students were assigned to selectively administer electric shocks to a group of individuals under their supervision.<sup>56</sup> The groups were described in three distinct ways to the students: humanized, dehumanized, or neutral.<sup>57</sup> The experiment found that the students aggressively administered electric shocks to the dehumanized.<sup>58</sup> According to Bandura, "Dehumanized performers were treated more than twice as punitively as those invested with human qualities and considerably more severely than the neutral group."<sup>59</sup> Moreover, "[u]nder dysfunctional feedback, the subjects suddenly escalated punitiveness toward dehumanized performers to near maximum intensities."<sup>60</sup> In other words, when it became clear to the students that administering shocks to the dehumanized subjects did not improve performance, the students became even *more* punitive.<sup>61</sup> Students who supervised dehumanized subjects engaged in arbitrary and irrational infliction of

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55. See, e.g., Albert Bandura, *Disinhibition of Aggression Through Diffusion of Responsibility and Dehumanization of Victims*, 9 J. OF RES. PERSONALITY 253 (1975) [hereinafter *Disinhibition*].

56. *Id.* at 256.

57. *Id.* at 258.

58. SMITH, *supra* note 4, at 130.

59. *Disinhibition*, *supra* note 55, at 266.

60. *Id.*

61. See *id.*

harm,<sup>62</sup> demonstrating that dehumanization is a “potent predictor of aggressive intergroup attitudes and behavior toward marginalized groups in the United States.”<sup>63</sup>

Another study from 2017 found dehumanizing Mexican immigrants went hand-in-hand with support for anti-immigration policies, even “controlling for levels of political conservatism and prejudice.”<sup>64</sup> In this way, dehumanization predicted support for anti-immigrant policies more so than political conservatism or prejudice toward Mexican immigrants. People who dehumanized immigrants were more likely to think of them “in threatening terms, withhold sympathy from them, and support measures designed to send and keep them out such as surveillance, detention, expulsion, and building a wall between the United States and Mexico.”<sup>65</sup> Importantly, the study also showed that dehumanization leads to support for punitive government policies.<sup>66</sup> The study found people who had dehumanizing beliefs about Mexican immigrants were likely to sign petitions favoring punitive policies against them.<sup>67</sup>

A third study from 2015 further examined this relationship between the dehumanization of undocumented immigrants and support for punitive anti-immigrant policies.<sup>68</sup> Individuals were randomly assigned to two groups. One group read text describing undocumented immigrants in a negative, but non-dehumanizing manner:

I understand that immigration has become a *controversial* issue these days. However, the *movement* of immigrants across our border must be controlled. Our nation is negatively impacted by illegal immigration; this *situation* is getting worse, not better. Some have suggested amnesty as a *solution*; I believe this is a solution that just

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62. See *id.* at 267 (“subjects escalated their punitiveness with dehumanized performers”).

63. Nour Kteilly & Emile Bruneau, *Backlash: The Politics and Real-World Consequences of Minority Group Dehumanization*, 43 PERSONALITY AND SOC. PSYCHOL. BULL. 87, 93 (2017).

64. *Id.* at 90.

65. *Id.*

66. *Id.* at 90 (“blatant dehumanization of Mexican immigrants was uniquely associated with more support for the anti-immigration statements and policies . . .”).

67. *Id.* at 91.

68. Utych, *supra* note 3, at 5.

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exacerbates the problem. Offering amnesty will not *end* the problem of illegal immigration-it will only make our country *let in* more immigrants. We have to *address* this problem at its *location*. Only increased border security and deportation will serve to control the *danger* of illegal immigration.<sup>69</sup>

The other group read text discussing the same issue but using dehumanizing language:

I understand that immigration has become a *toxic* issue these days. However, the *transmission* of immigrants across our border must be *contained*. The *body* of our nation is *plagued* by illegal immigration; this *disease* is getting worse, not better. Some have suggested amnesty as a *cure*; I believe this is a *remedy that kills the patient*. Offering amnesty will not *eradicate* the problem of illegal immigration-it will only make our country *absorb* more immigrants. We have to attack this problem at its *nucleus*. Only increased border security and deportation will serve to *quarantine* the *poison* of illegal immigration.<sup>70</sup>

Afterwards, the participants were asked about immigration policies.<sup>71</sup> Those who read the dehumanizing text were significantly less likely to support an increase in legal immigration, significantly more likely to support border security measures, and significantly less likely to support granting undocumented immigrants a path to citizenship.<sup>72</sup>

In addition, the study showed that reading dehumanizing text about immigrants elicited negative emotions in the participants.<sup>73</sup> Those who read the dehumanizing text were angrier and more disgusted by immigrants than those who read the non-dehumanizing text.<sup>74</sup> Not surprisingly, those who expressed anger and disgust favored more restrictive immigration policies, such as restricting the number of immigrants permitted to enter the country, increased border security,

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69. *Id.* at 17.

70. *Id.*

71. *Id.* at 4.

72. *Id.*

73. *Id.* at 7.

74. *Id.* at 6 (“dehumanization leads to higher reported feelings of both anger and disgust”).

and denying any path to legal status.<sup>75</sup> Feelings of anger against immigrants led to support for punitive policies (detention and deportation), while feelings of disgust led to support for policies of avoidance and protection (border wall).<sup>76</sup> The study concluded that dehumanizing immigrants (with language likening them to disease and contagion) influenced “attitudes towards immigrants directly by causing more negative attitudes towards immigrants, and indirectly by increasing self-reported levels of disgust towards immigrants.”<sup>77</sup>

## II. THE DOCTRINE OF SUSPECT CLASSES

The concept of dehumanization has implications for law. Under the equal protection doctrine of suspect classes, a law is subject to heightened scrutiny only if it operates to the disadvantage of a suspect class.<sup>78</sup> Racial and ethnic minorities, women, illegitimate children, and immigrants have been deemed suspect, vulnerable groups that deserve special constitutional protection.<sup>79</sup> Laws that discriminate against suspect classes are subject to heightened judicial review such as strict or intermediate scrutiny. Under strict scrutiny, the government must have a very strong justification for the discrimination.<sup>80</sup> If it does not, the law will be deemed unconstitutional and struck down.<sup>81</sup> Strict scrutiny review establishes a very high standard to meet for a law to be upheld; therefore, when reviewed using this standard, a law is likely to be struck down.<sup>82</sup> If a group is not considered a protected class, heightened constitutional protection under strict scrutiny is not afforded

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75. *See id.* at 5 (“dehumanization increases feelings of disgust, which in turn decreases the likelihood of an individual having pro-immigrant attitudes”).

76. *See id.* at 8 (“disgust may trigger protectionist policies, such as increased barriers to entry or removal from the country of immigrants, while anger may lead to more confrontational policy preferences, such as incarceration or even violence”).

77. *Id.* at 5.

78. *See Plyler v. Doe*, 457 U.S. 202, 216 (1982) (“[W]e have treated as presumptively invidious those classifications that disadvantage a ‘suspect class’ . . .”).

79. *See* Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 132 (1990).

80. *See Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (under strict scrutiny, only laws narrowly tailored to serve compelling interest will be found constitutional).

81. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 11 (1967).

82. *See id.*

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to them.<sup>83</sup> Laws discriminating against that group will generally be reviewed, and are likely to be upheld, under the rational basis test.<sup>84</sup>

The suspect class theory of equal protection originates from the theory of judicial review explicated in *United States v. Carolene Products* Footnote Four.<sup>85</sup> Based on the *Carolene Products* theory, courts would strictly scrutinize legislatively enacted “suspect classifications” that burdened the rights of a vulnerable group or a “suspect class.”<sup>86</sup> A social group will be considered “suspect” if it suffers from the traditional indicia of “suspectness:”<sup>87</sup> whether a class is saddled with disabilities, whether it has been subject to a history of unequal treatment, whether the group has been relegated to “position[s] of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>88</sup> If a group fails to meet the traditional indicia of “suspectness,” the group will be considered a non-suspect class, and laws discriminating against them will be subject to deferential rational basis review.<sup>89</sup>

The suspect class doctrine has been subject to voluminous analysis and criticism.<sup>90</sup> Commentators argue the Court has failed to apply its

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83. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

84. *See San Antonio v. Rodriguez*, 411 U.S. 1, 40 (1973) (a law subject to rational basis upheld as long as it’s “shown to bear some rational relationship to legitimate state purposes”).

85. *United States v. Carolene Products Co.*, 304 U.S. at 152–53 n.4 (1938); *see generally* Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1290–1309 (1982) (analyzing Footnote Four’s theory of judicial review).

86. *See Plyler*, 457 U.S. at 216–17 (“With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.”).

87. *See Murgia*, 427 U.S. at 313.

88. *Rodriguez*, 411 U.S. at 28.

89. *See Murgia*, 427 U.S. at 313–14.

90. *See, e.g.*, Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135 (2011); Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court’s Suspect Classification Jurisprudence*, 50 WASHBURN L.J. 33 (2010); Darren Lenard Hutchinson, “Not Without Political Power”: *Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975 (2014) [hereinafter *Political Power*]; Darren Lenard Hutchinson, “Unexplainable on Grounds Other than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615; Kenji



suspect class analysis in a consistent and coherent manner.<sup>91</sup> They also contend the Court has failed to adequately explain the meaning, nature, and importance of the various suspect class factors it has developed to determine if a social group deserves special judicial protection.<sup>92</sup>

For example, the Court has yet to adequately explain the immutability factor. Commentators argue immutability should not be dispositive in determining if a class should be deemed suspect, and, arguably, it is truly not even relevant at all.<sup>93</sup> Specifically, there is considerable debate over whether sexual orientation is an immutable trait,<sup>94</sup> meaning whether it is a “permanent state, unalterably imprinted in the fixed order of creation.”<sup>95</sup> However, because there is no question that members of the LGBT community have experienced—and continue to experience—invidious discrimination, their need for special judicial protection should not depend on whether or not sexual orientation is immutable.

The concept of dehumanization could provide some coherence to the Court’s suspect class analysis. The Court’s suspect class factors make more sense when understood as the Court’s attempt to establish criteria to identify social groups that are susceptible to dehumanization. A group susceptible to dehumanization is a group that is vulnerable to invidious discrimination by the political majority, thus requiring heightened judicial protection. The Court has never explicitly analyzed its suspect class factors through the lens of dehumanization but an

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Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485 (1998).

91. See *Political Power*, *supra* note 90, at 978 (suspect class doctrine is “inconsistently applied”).

92. See *id.*

93. See Strauss, *supra* note 90, at 165 (“Immutability suffers from the same flaws as the other factors—it is imprecisely and inconsistently defined by the courts.”).

94. See *id.* at 161–62.

95. William Brennan, *Female Objects of Semantic Dehumanization and Violence*, STUD. PRO LIFE FEMINISM 15 (1995) (available at <https://www.thefreelibrary.com/Female+objects+of+semantic+dehumanization+and+violence.-a095580037>).

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analysis of the Court's suspect class cases suggests that, at least implicitly, concern about dehumanization has been present.<sup>96</sup>

*A. Racial Minorities, Brown v. Board of Education,  
and Dehumanization*

Any examination of the equal protection suspect class doctrine must begin with an examination of *Brown v. Board of Education*.<sup>97</sup> Although the Court in *Brown* did not use suspect class language in determining that racial segregation in the schools denies African Americans equal protection, *Brown* is the paradigmatic case involving a vulnerable class in need of special judicial protection.

In *Brown v. Board of Education*, the Court examined the constitutionality of state-imposed racial segregation in public schools.<sup>98</sup> It declared that such segregation violated the Fourteenth Amendment's Equal Protection Clause, overruling *Plessy v. Ferguson* and abolishing the doctrine of "separate, but equal."<sup>99</sup> In *Plessy*, the Court had upheld state racial segregation laws as long as they provided for separate but equal facilities.<sup>100</sup> Under *Plessy*'s separate but equal doctrine, racially segregated schools were constitutional as long as white and black schools were equal in terms of tangible factors, such as the quality of physical facilities.<sup>101</sup> However, in *Brown*, the Court rejected the application of the *Plessy* doctrine, reasoning that schools with equal tangible factors may not truly be equal for purposes of equal protection.<sup>102</sup> The Court further explained:

[t]here are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other

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96. See *Brown v. Board of Education*, 347 U.S. 483, 494 (1954) (expressing concern that racial segregation generates feelings of inferiority in black schoolchildren).

97. *Id.*

98. *Id.* at 493.

99. *Id.* at 495.

100. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

101. See *Sweatt v. Painter*, 339 U.S. 629, 635–36 (1950) (holding black law school unconstitutional because it was separate but unequal to white law school).

102. *Brown*, 347 U.S. at 495.

'tangible' factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of these cases. We must look instead to the effects of segregation on public education.<sup>103</sup>

The Court concluded that, "[t]o separate children from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."<sup>104</sup> Thus, the Court held the racial segregation of public schools violated the Equal Protection Clause of the Fourteenth Amendment.<sup>105</sup>

The Court's holding and reasoning in *Brown* supports the claim that dehumanization is, and should be, considered a central concern for equal protection analysis. *Brown* can be viewed as a case about dehumanization achieved through discrimination and segregation. Segregation instilled a sense of inferiority in black schoolchildren because its underlying premise was the innate inferiority of blacks. Whites believed African Americans were "mentally inferior, physically and culturally unevolved, and apelike in appearance."<sup>106</sup> They believed that, as a matter of biology, blacks "occupied the lowest position of the evolutionary scale."<sup>107</sup> Segregation's key function was to institutionalize the dehumanization of African American students, which explains why "separate" in the context of Jim Crow was inherently unequal.

*Brown* implicitly provides the reasoning to support the designation of marginalized racial groups as a suspect class. All the suspect class factors are present with respect to African Americans. First, African Americans are defined by race, an immutable or fixed trait. Second, that trait is highly visible and gives a racial group, such as African Americans, distinctive, identifiable features. Third, that trait is irrelevant to defining a person's abilities. Fourth, African Americans have suffered from a history of discrimination. Fifth, African Americans experience political powerlessness that makes them

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103. *Id.* at 492.

104. *Id.* at 494.

105. *Id.* at 495.

106. S. Plous & Tyrone Williams, *Racial Stereotypes from the Days of American Slavery: A Continuing Legacy*, 25 J. APP. SOC. PSYCHOL. 795, 795 (1995).

107. *Id.*

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deserving of special judicial protection from the majoritarian political process.

What ties all the suspect class factors is dehumanization. The suspect traits were the basis upon which African Americans experienced systematic dehumanization which led to their enslavement and then segregation under Jim Crow. Their highly visible and fixed trait, race, was the basis for their dehumanization and consequent subjugation. Their supposed inferiority to whites and their supposed subhuman nature flowed from their race. In this way, the suspect class factors can be understood as a proxy for susceptibility to dehumanization.

### *B. Women as a Suspect Class*

The United States Supreme Court concluded women are a suspect class because their experience bore similarities to the experience of African Americans. In *Frontiero v. Richardson*, the Court held that gender is a suspect classification and treated women as a suspect class deserving of special judicial protection.<sup>108</sup> Underlying the Court's analysis is a concern about the dehumanization of women. The Court noted, "our Nation has had a long and unfortunate history of sex discrimination."<sup>109</sup> That discrimination was based on paternalistic beliefs that "put women, not on a pedestal, but in a *cage*."<sup>110</sup> Those beliefs also led men to invidiously discriminate against women in a manner akin to the experience of African Americans. Like slaves, women historically could not "hold office, serve on juries, or bring suit in their own names."<sup>111</sup> Women who married lost their individual legal rights upon entering into the marriage. Married women could not own or convey property or even serve as legal guardians for their children.<sup>112</sup>

The Court could have strengthened its argument for women as a suspect class by elaborating on why women experienced pervasive discrimination in greater depth. Our patriarchal society structured gender relations on dehumanizing beliefs about women. They could

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108. 411 U.S. 677, 688 (1973).

109. *Id.* at 684.

110. *Id.* (emphasis added).

111. *Id.* at 685.

112. *Id.*

not vote because women were believed to lack the mental capacity to vote in a rational, informed manner. Unlike men, women were considered intrinsically irrational, driven by emotions rather than reason.<sup>113</sup> According to an anti-suffragist, “[t]he female vote . . . is always more impulsive and less subject to reason, and almost devoid of the sense of responsibility.”<sup>114</sup> The view of the unstable female mind put women on the same level as “paupers, felons, and so-called idiots,” classes who also were denied the right to vote.<sup>115</sup>

According to anti-suffragists, if women were allowed to vote, they would eventually take on masculine roles, which would lead to the creation of a “race of masculine women and effeminate men and the mating of these would result in the procreation of a race of degenerates.”<sup>116</sup> In other words, women would go against their true, inferior nature by trying to emulate men and would then become “degenerate,” “masculine” women who would inevitably give birth to “degenerates.”<sup>117</sup>

When women are viewed as inferior, it is inferior in a dehumanized sense. Women’s inferiority is a “totalistic notion encompassing almost every aspect of the woman’s being—physical, mental, and emotional.”<sup>118</sup> Moreover, women’s inferiority is something intrinsic and immutable.

In *Frontiero v. Richardson*, the Court ultimately concluded that gender classifications must be treated as suspect because they have “the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.”<sup>119</sup> Understanding the role that dehumanization plays in this invidious relegation helps to bolster the Court’s reasoning.

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113. Cynthia Crossen, *Even Women Didn’t Want to Give Women the Vote*, WALL STREET J. (Mar. 5, 2003, 12:01 AM), <https://www.wsj.com/articles/SB1046817919602413840>.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Brennan, *supra* note 95, at 4.

119. *Frontiero*, 411 U.S. at 687.

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*C. The Intellectually Disabled as an Implicit Suspect Class*

The Court has not, technically, held that the intellectually disabled are a suspect class. However, in *Cleburne v. Cleburne*, the Court arguably did so covertly.<sup>120</sup> To invalidate a zoning restriction that discriminated against the intellectually disabled, the Court applied “rational basis with bite” review.<sup>121</sup> The Court’s reasoning suggests that, in striking down the zoning permit requirement, it was concerned with the dehumanization of the intellectually disabled.<sup>122</sup> Relying on precedent, the Court discussed at length the rationale for treating certain traits like race, national origin, alienage, gender, and illegitimacy as suspect.<sup>123</sup> In explaining the “suspect” nature of racial, alienage, and gender classifications, the Court found those traits are “so seldom relevant to the achievement of any legitimate state interest that laws grounded in such consideration are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others.”<sup>124</sup> In reasoning as such, the Court spoke the language of dehumanization.

Additionally, the Court explained that the recognized suspect class traits are suspect because they “frequently bear no relation to ability to perform or contribute to society.”<sup>125</sup> The Court stated that a suspect trait like sex does not reflect a person’s abilities, while a trait like intelligence does serve as a reasonable and legitimate proxy for a person’s abilities.<sup>126</sup> Here, the Court is suggesting that intellectual disability differs from sex and race because that trait is often relevant to one’s ability to perform or contribute to society, and therefore there is less reason to be suspicious of laws that discriminate on the basis of intellectual disability.

The remaining analysis of suspect classes discussed the Court’s conclusion that the intellectually disabled are not “politically

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120. 473 U.S. 432 (1985).

121. *Cleburne*, 473 U.S. at 447–50.

122. *See id.* at 448 (“mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for” treating intellectually disabled).

123. *Id.* at 442–47.

124. *Id.* at 441.

125. *Id.* (quoting *Frontiero*, 411 U.S. at 686).

126. *Id.* at 440–41.

powerless,” thereby failing to meet another one of the suspect class factors.<sup>127</sup> The class has been able to successfully lobby legislatures to enact legislation that protects their rights.<sup>128</sup> Because the group protected its interests through the legislative process, the Court reasoned that their political strength diminished the need for judicial intervention on their behalf.<sup>129</sup> However, the Court did acknowledge a history of invidious discrimination, but it reasoned that such history alone does not justify labeling them as a suspect class.<sup>130</sup> While the Court concluded that the intellectually disabled do not merit suspect class status, in examining the discriminatory government action being challenged in the case, the Court ultimately held that the denial of a zoning permit for a home for the intellectually disabled failed even the deferential rational basis test and, thus, violated equal protection.<sup>131</sup>

The Court’s special attention to the intellectually disabled stems from its implicit understanding that such persons are susceptible to, and have historically suffered from, dehumanization. The Court implicitly acknowledged that the city denied the zoning permit, in part, because they viewed the intellectually disabled in a dehumanizing manner. One of the reasons asserted by the city for denying the permit was that elderly residents in the neighborhood were fearful of the intellectually disabled.<sup>132</sup> In rejecting that as a basis for denying the permit, the Court recognized that those fears are a result of “private biases,”<sup>133</sup> biases reflective of dehumanization. Moreover, the city’s concern that students of the junior high school would harass the intellectually disabled<sup>134</sup> stems from viewing them in a dehumanizing manner, as people who are physically and intellectually subhuman in nature.<sup>135</sup>

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127. *Id.* at 443–446.

128. *Id.*

129. *See id.* at 445 (negating “any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of lawmakers”).

130. *Id.* at 446.

131. *Id.* at 450.

132. *Id.* at 448.

133. *Id.*

134. *Id.* at 449.

135. *Id.*

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As a dehumanized group, the intellectually disabled “are derogated, tend to be avoided, and are often targets of discrimination.”<sup>136</sup> Members of this class are so “severely dehumanized that they are not even processed as human beings.”<sup>137</sup> People may feel disgust about the intellectually disabled, and treat them accordingly.<sup>138</sup> The Court implicitly recognized these considerations in concluding that the denial of the zoning permit violated equal protection. Even under the rational basis test, dehumanization of a class cannot be the basis for differential treatment. Dehumanization cannot underlie any interests proffered by the state for discriminating against the class. Thus, even under deferential scrutiny, the Court ultimately concluded that the city’s decision rested “on an irrational prejudice against the mentally retarded . . . .”<sup>139</sup>

*D. Nonmarital Children as a Suspect Class*

The concern with dehumanization can also help to explain why the Court treats children born out of wedlock (nonmarital children) as a suspect class. While the Court in *Mathews v. Lucas* ultimately upheld a law discriminating against non-marital children under the Social Security Act, the case is now understood to stand for the proposition that laws discriminating against nonmarital children are subject to intermediate scrutiny.<sup>140</sup>

Nonmarital children have, historically, experienced dehumanization by virtue of their “illegitimate” status and are a “traditionally disfavored class in our society.”<sup>141</sup> Even the legal term used to describe nonmarital children, illegitimate, is dehumanizing. Being viewed as illegitimate is to treat the person as if he or she is less than human and, thus, not entitled to the rights and privileges associated with being a legitimate child or person.

The Court reasoned that nonmarital children are not defined by a highly visible trait like race or gender, which could explain why

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136. Laura Ruth Murry Parker, *Less Than Human: Dehumanization Underlies Prejudice Toward People with Developmental Disabilities*, PURDUE UNIV. 6 (2015).

137. *Id.*

138. *Id.* at 5.

139. 473 U.S. at 450.

140. 427 U.S. 495 (1976).

141. *Id.* at 520.



“discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes.”<sup>142</sup> However, the Court also acknowledged that nonmarital children have experienced societal discrimination as a result of their status, and, thus, merit status as a suspect class.

### *E Nonsuspect Classes*

Dehumanization helps explain the cases in which the Court held a group should not be deemed a suspect class. In *San Antonio v. Rodriguez*, the Court concluded that the poor are not a suspect class.<sup>143</sup> In *Rodriguez*, the Court dealt with an equal protection challenge to the State of Texas’ public school funding scheme.<sup>144</sup> The issue was whether the poor constituted a suspect class deserving of special judicial protection: “[w]e must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class . . . thereby requiring strict judicial scrutiny.”<sup>145</sup> The Court noted that the class alleging discrimination could be defined in three different ways. The school funding scheme “might be regarded as discriminating against: (1) ‘poor’ persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally ‘indigent;’ (2) those who are relatively poorer than others; or (3) all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts.”<sup>146</sup>

The Court concluded that “[t]he Texas system does not operate to the peculiar disadvantage of any suspect class,”<sup>147</sup> rejecting the notion that any one of the three possible classes could qualify as suspect. While the Court focused on the amorphous, difficult-to-define nature of the possible classes bringing the lawsuit to reject the poor as a suspect class, implicit within that analysis is the underlying belief that, wrongly or rightly, the poor are not particularly susceptible to dehumanization.

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142. *Id.* at 506.

143. 411 U.S. 1 (1976).

144. *Rodriguez*, 411 U.S. at 4.

145. *Id.* at 17.

146. *Id.* at 19–20.

147. *Id.* at 28.

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Poverty is not an immutable trait nor is it easily identifiable. As such, it would not be easy to make the poor a target of dehumanization. Thus, the amorphous nature of the class actually provides some level of protection from dehumanization, which undermines the class's need for special judicial protection.

Similarly, the Court's belief that the aged do not experience systematic dehumanization may have been the basis for its decision in *Massachusetts Board of Retirement v. Murgia*.<sup>148</sup> In *Murgia*, a class of police officers forced to retire upon turning fifty years old challenged the constitutionality of a state mandatory retirement law.<sup>149</sup> The threshold question for the Court was whether the discriminatory law should be subject to heightened judicial scrutiny.<sup>150</sup> The Court opined, "[e]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly . . . operates to the peculiar disadvantage of a suspect class."<sup>151</sup>

The Court refused to designate "a class of uniformed state police officers over 50" as a suspect class,<sup>152</sup> reasoning that as a class, those of an advanced age have not experienced a history of purposeful unequal treatment like "those who have been discriminated on the basis of race or national origin."<sup>153</sup> Likewise, the Court found that those of an advanced age have not been "subjected to unique disabilities based on the basis of stereotyped characteristics not truly indicative of their abilities."<sup>154</sup> Ultimately, the Court reasoned that old age does not define a "'discrete and insular group' in need of 'extraordinary protection from the majoritarian political process.'"<sup>155</sup> Rather, old age simply "marks a stage that each of us will reach if we live out our normal life span."<sup>156</sup>

As such, the Court subjected the mandatory retirement statute to review under the rational basis test and concluded that because "physical ability generally declines with age," it is rational for the State

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148. 427 U.S. 307 (1976).

149. 427 U.S. at 309.

150. *Id.* at 312.

151. *Id.* at 312.

152. *Id.* at 313.

153. *Id.*

154. 427 U.S. at 313.

155. *Id.*

156. *Id.* at 313–14.

to “remove from police service those whose fitness for uniformed work presumptively has diminished with age.”<sup>157</sup> For the Court, the discrimination experienced by the aged is rationally based on reduced capabilities as one ages, not because they are being thought of as less than human. Thus, they do not require special protection by the courts.

### III. IMMIGRANTS, DEHUMANIZATION, AND EQUAL PROTECTION

There is a clear historical pattern of dehumanization of immigrants of all races throughout American history. As a dehumanized group, immigrants, including undocumented immigrants, deserve special protection against discriminatory laws as a protected suspect class.

#### A. *Immigrants as a Suspect Class*

The Court has long held that immigrants, specifically permanent legal residents, are a suspect class.<sup>158</sup> In *Graham v. Richardson*, the Court held that immigrants are a suspect class and state laws discriminating against them should be subject to strict scrutiny.<sup>159</sup> Although the Court did not explicitly use the term “suspect class” and did not offer much analysis, the Court concluded “[a]liens as a class are a prime example of a ‘discrete and insular’ minority” for whom heightened judicial scrutiny is appropriate.<sup>160</sup>

Immigrants are a “prime example” of a suspect class because of their political powerlessness. By virtue of their inability to vote, immigrants are unable to advance and protect their interests through the political process. However, it is not readily clear that immigrants unequivocally deserve status as a suspect class, as the other identified indicia of “suspectness” do not neatly apply to immigrants.<sup>161</sup> For instance, immigration status is not necessarily an immutable characteristic. Immigrant status can change by applying for and being granted U.S. citizenship, or by leaving the country. Therefore, immigrants have greater control over their current immigration status.

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157. *Id.* at 314.

158. *Graham v. Richardson*, 403 U.S. 365 (1971).

159. *Id.* at 371–72.

160. *Id.* at 372.

161. See Simon, *supra* note 79, at 135 (“alienage, unlike race, does not socially stigmatize in such a way that a person cannot readily strip herself of the bondage”).

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Additionally, immigrant status is not a highly visible physical trait, such as race or gender.

Perhaps for these reasons, the suspect class status of immigrants has several caveats. First, under *Graham*, only permanent resident aliens are afforded suspect class status.<sup>162</sup> Nonimmigrant aliens and undocumented immigrants are not considered suspect classes and laws discriminating against them are subject to the rational basis test. Second, permanent resident aliens are afforded suspect class status only with respect to state laws that discriminate against them but are not afforded suspect class status with respect to discriminatory federal laws.<sup>163</sup> Third, even in challenging state laws, there are exceptions to strict scrutiny analysis.<sup>164</sup> Laws discriminating against immigrants with respect to government functions are subject only to rational basis scrutiny.<sup>165</sup>

Commentators critique this varying treatment of immigrants under equal protection.<sup>166</sup> Some contend that all laws discriminating against immigrants, whether federal or state, should be subject to strict scrutiny.<sup>167</sup> The fragmented treatment of immigrants under the suspect class doctrine would be better informed by considering dehumanization.

The concern with dehumanization suggests that immigrants should be considered a suspect class whether the law discriminating against them is a state or federal law. The federal government's "plenary power" over immigration should not provide a license to dehumanize immigrants. Moreover, concerns with dehumanization suggest that, of all the various kinds of immigrants or aliens, laws that discriminate against undocumented immigrants deserve the highest level of scrutiny because undocumented immigrants are highly susceptible to dehumanization.

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162. See Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 815 (2013).

163. *Mathews v. Diaz*, 426 U.S. 69, 83 (1976).

164. *Sugarman v. Dougall*, 413 U.S. 634, 646–49 (1973).

165. *Id.*

166. See Jenny-Brooke Condon, *Equal Protection Exceptionalism*, 69 RUTGERS U.L. REV. 563 (2017).

167. Victor Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After Adarand Constructors, Inc. v. Peña*, 76 OR. L. REV. 425, 429 (1997).

*B. The Case for Undocumented Immigrants as a Suspect Class*

In *Plyler v. Doe*, the Supreme Court addressed the status of undocumented immigrants in analyzing a Texas statute barring undocumented immigrant children from attending public schools.<sup>168</sup> The Court struck down the law, implicitly treating undocumented immigrant children as a protected class.<sup>169</sup>

However, the Court distinguished undocumented immigrant children from undocumented immigrant adults.<sup>170</sup> The Court reasoned undocumented immigrant adults cannot be given suspect class status because their “presence in this country in violation of federal law is not a ‘constitutional irrelevancy.’”<sup>171</sup> States may discriminate against undocumented immigrants whose “very presence within the U.S. is the product of their own unlawful conduct.”<sup>172</sup> Undocumented children, on the other hand, have little control over their status and many of them did not have any choice in entering the U.S. without authorization.<sup>173</sup> Thus, barring undocumented immigrant children from public school imposes an unconstitutional “discriminatory burden on the basis of a legal characteristic over which children can have little control.”<sup>174</sup>

While the Court in *Plyler* humanizes undocumented immigrant children, it dehumanizes undocumented immigrant adults. The Court declared that undocumented immigrant adults “should be prepared to bear the consequences” for entering into the United States “by stealth and in violation” of U.S. laws.<sup>175</sup> Effectively, the Court stated that undocumented adults deserve discriminatory treatment because of their undocumented status.

If the Court views the suspect class doctrine as specially concerned with the dehumanization of social groups, then undocumented immigrants would have a very strong case for being given protected

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168. 457 U.S. 202 (1982).

169. *Id.* at 223–24 (“In determining the rationality of Section 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.”).

170. *Id.* at 220.

171. *Id.* at 223.

172. *Id.* at 219.

173. *Id.* at 220.

174. *Plyler*, 457 U.S. at 220.

175. *Id.*

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status.<sup>176</sup> Status as undocumented is the basis for which they are dehumanized and why they consequently suffer from invidious discrimination. Dehumanization of undocumented immigrants is not merely exacerbated by their status as “illegals,” but, their status itself is inherently dehumanizing.<sup>177</sup>

Being thought of as an “illegal” is thoroughly dehumanizing. When thought of as an “illegal,” it is as if the undocumented immigrant’s very essence is one marked by illegality. Such thinking treats undocumented immigrants as if they are not truly human, but subhuman. People who see undocumented immigrants through the lens of “illegality” believe that undocumented immigrants should be treated inhumanely, as if they deserve it for being “illegal.”

Being perceived as “illegal” is even more insidious than being deemed a criminal. Criminals are perceived as deserving of due process. A person who is “illegal,” however, must be eradicated altogether because their very existence is a threat to law and order. For this reason, “illegals” are worse than those who commit crimes: “illegals” are themselves the crime.

Being “illegal” is coextensive with being subhuman. Assigning subhuman characteristics to undocumented immigrants is far too easy. Undocumented immigrants are depicted as diseases or disease carriers. They are called “wetbacks,” a derogatory term deriving from the fact that many undocumented immigrants had to wade or swim in the Rio Grande River to cross into the United States.<sup>178</sup> The use of the term is akin to viewing undocumented immigrants as fish. Clearly associated with fishing, the term “catch and release” describes the policy of detaining undocumented immigrants and then immediately releasing them from custody.<sup>179</sup>

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176. Kteily et al., *supra* note 5, at 25 (“Groups occupying positions of particularly low status in society... might be most subject to blatant dehumanization”).

177. *See id.* (“blatant dehumanization is not only exacerbated by low status but is in fact dependent on it.”).

178. Stacy Sullivan, *We Shouldn’t Take the Bait on ‘Catch and Release,’* ACLU (July 20, 2018, 2:45 PM), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/we-shouldnt-take-bait-catch-and-release>.

179. *See id.*

Undocumented immigrants need extraordinary protection from the political process. They are “politically powerless”<sup>180</sup> because they cannot vote and, as a class, they are highly vulnerable to dehumanization.<sup>181</sup> Unfortunately, the Court’s reasoning in *Plyler* supports the dehumanization of undocumented immigrant adults.<sup>182</sup> The Court implied that, by choosing to come to the United States illegally, undocumented immigrants deserve the discriminatory treatment inflicted by the government.<sup>183</sup> However, that logic is arguably the result of a dehumanized perception of undocumented immigrants.

In a political climate where a class of people, such as undocumented immigrants, are dehumanized, negative action against them does not deserve judicial deference. When the government explicitly engages in dehumanization, whether at the state or federal level, any action taken against immigrants should be deemed suspect and subject to rigorous judicial scrutiny. The federal government’s plenary power should not be the basis for permitting dehumanizing and discriminating treatment of immigrants.

Dehumanization is the hallmark of irrationality and arbitrariness. As shown in the 2015 study discussed above, when the government dehumanizes a group, such conduct is driven by disgust, anger, and other emotions triggered by dehumanization.<sup>184</sup> Policy-making based on heightened emotions triggered by dehumanization deserves deep judicial skepticism.<sup>185</sup>

## CONCLUSION

This article argues that we need to incorporate the concept of dehumanization into the equal protection suspect class analysis. Failing to consider the central role of dehumanization in the subordination of

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180. See Condon, *supra* note 166, at 598 (“Immigrants’ inability to vote renders them particularly vulnerable to . . . discrimination and marginalization . . .”).

181. See generally Utych, *supra* note 3.

182. See *Plyler*, 457 U.S. at 220 (arguing undocumented immigrant adults “who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation.”).

183. *Id.*

184. See Utych, *supra* note 3, at 3.

185. See *id.*

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vulnerable groups when determining a suspect class is fundamentally flawed. Understanding that the equal protection doctrine is concerned with preventing invidious discrimination against groups susceptible to dehumanization provides a strong justification for protecting immigrants, including undocumented immigrants, as a suspect class. Immigrants have a long history of being subject to dehumanization. Moreover, undocumented immigrants are highly susceptible to dehumanization because they are labeled as “illegals.” For these reasons, immigrants of any immigration status merit suspect class protections. The concept of dehumanization also helps clarify issues, such as how race-conscious affirmative action programs should be treated under equal protection.

Dehumanization is a process that overlaps with, but is not identical to, discrimination. Discrimination is the unequal treatment of similarly situated groups. However, not only can laws discriminate against a class without dehumanizing that class, but discriminatory laws do not necessarily treat a class of people as subhuman. Because affirmative action programs that discriminate in the college admissions process do not dehumanize whites, the argument for strict scrutiny is diminished. Only discrimination *coupled* with dehumanization fundamentally implicates the core values and concerns of equal protection.

Since *Brown*, the equal protection doctrine has been implicitly concerned with the harms of dehumanization to vulnerable groups. That concern now should be made explicit by incorporating the concept of dehumanization into equal protection suspect class analysis.