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Author
Chang, Michael

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Doctrinal Instability in Contextual Race-Conscious Review:
The Continuing Legacy of the Korematsu Court's Ultra-Deference Standard

Michael Chang, Ph.D., J.D.

Abstract

The judicial tools of standards of review are designed to recognize historical inequities by applying heightened burdens of proof for discrimination and the abridgment of constitutional rights. In this Article, I argue that, in the past twenty-seven years since *Adarand Constructors v. Peña*, the Supreme Court's contextual application of strict scrutiny for race and national origin discrimination has evolved to a point of instability, rendering its outcomes indeterminate. This instability is a result of our national conflict over when and how to use race to remedy race-based discrimination.

The Court has selectively applied different standards of deference depending on the reasons that the government uses race. In applying these standards, the Court treats governmental use of race, whether benign or invidious, as two sides of the same problem, when in fact they are distinct legal questions. In other words, the Court treats the use of race as suspect regardless of its remedial application. This universalist approach has been defended as the best method to address and capture the complexity of different contexts. However, the universalist approach at its core, represents two diametrically opposed viewpoints on the role of race in American society.

This inconsistency extends back before *Adarand* to the 1942 *Korematsu v. U.S.* decision. Since *Korematsu*, the Court has overwhelmingly given substantial deference—what I refer to as ultra-deference—to government rationales of national security and safety over the interest of civil liberties and civil rights protections for minorities and marginalized groups. Since the September 11, 2001 terrorist attacks, this practice of ultra-deference has become firmly established in regulatory and jurisprudential practices. Most recently, the principles of *Korematsu* reappeared in the 2018 *Trump v. Hawaii* decision. Justice Robert's opinion reflects that, even when presented with clear and convincing evidence of religious and national origin discrimination

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that should trigger a higher standard of strict scrutiny, ultra-deferential justices are willing to imply a presumption of a rational basis for government justifications.

This ultra-deference occurs despite insufficient facts to satisfy the standard threshold for the discharge of the government's burden of proof when its policy discriminates on the basis of race and national origin. Ultra-deference is manifested in the mechanics of when, whether, and how to apply the strict scrutiny standard of review to suspect classifications of race and national origin. Ultra-deference to national security and safety rationales has been most often used in cases involving politically sensitive issues such as immigration. It has been presumed in cases where the Court deemed the national security interest of paramount importance to outweigh evidence of even invidious motivation, let alone disparate impact.

While others may argue that a contextual application of strict scrutiny is an appropriate individualized response to the diversity of factual scenarios triggering the suspect classification of race, such deference is in direct contrast to the universalist application of strict scrutiny to race-conscious policies regardless of benign, remedial, or invidious purposes. This inconsistency raises the importance of a thorough legal analysis of the role that implicit bias plays when there is clear evidence of disparate impact on the basis of race or national origin.

About the Author

Michael Chang is a Lecturer at the UC Berkeley Department of Ethnic Studies, and a government civil rights attorney. The views expressed in this piece are exclusive to those of the author and do not reflect the views of the author's employers.

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Introduction

The notorious seventy-eight-year-old Supreme Court case, *Korematsu v. United States*,[1] made headlines when Chief Justice Roberts referenced it in his 2018 *Trump v. Hawaii*[2] opinion.[3] He stated, "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear— 'has no place in law under the Constitution.'"[4]

Korematsu was held up as a particularly troubling legal outcome that, with today's hindsight, is clearly discriminatory and in violation of the Fifth Amendment.[5] However, the underlying legal rationale of ultra-deference to national security interests in *Korematsu* was never overturned and, in fact, played an important role in *Trump v. Hawaii*—so much so that Justice Roberts specifically emphasized the difference between *Korematsu* and the 2018 *Trump* rationale, lest it be similarly tainted.[6]

Strict scrutiny, a tool designed to address the history of law and policy's role in race-based discrimination, developed only after a strong social and cultural awareness of race discrimination as power asymmetry became popular.[7] American anthropologist Franz Boas introduced the concept of "cultural relativism" at the turn of the twentieth century, countering the prevailing notions of scientific racism.[8] In attacking the problem of ethnocentrism, he cogently argued that race is not biological—at a time when it was widely believed to be—and that cultures should not be referentially compared to other cultures or to an idealized standard.[9] With his influential students, Ruth Benedict and Zora Neale Hurston, Boas laid the foundations for sociocultural arguments against the racist rationales underlying social evolutionism and eugenics that justified differential outcomes and, thus, discrimination.[10] The contemporary

1. 323 U.S. 214 (1944).
2. 138 S. Ct. 2392, 2423 (2018).
3. *Id.* at 2423 (citing *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)).
4. *Id.*
5. *See id.*
6. *See id.* ("But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission.)
7. The field of critical race theory (CRT) in particular has asserted that the popularly known and decried adverse harm of legal segregation should be remedied with the tool of strict scrutiny. *See, e.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color-Blind*,*"* 44 Stan. Law. Rev. 1, 63–4 (1991). CRT emerged in the late 20th Century as post de jure segregation and post-colonial speakers addressed how law and policy, once part of the problem, can and should be part of the solution through strict scrutiny review. *See* Richard Delgado and Jean Stefancic, Introduction to Critical Race Theory 2–9. In Cheryl Harris' seminal work, she reminds that strict scrutiny review of the disparate impact of segregation—de jure and otherwise—demands reparations through affirmative action. *See* Cheryl Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707, 1777–81 (1992).
8. *See* Michael F. Brown, *Cultural Relativism 2.0*, 49 Current Anthropology 363, 364 (1994). *See generally* Franz Boas, Race, Language, Culture, (1940).
9. Brown, *supra* note 8, at 364–63.
10. For a comprehensive discussion of the broad influence of the scholarship and advocacy of Boas, Benedict, and Hurston, see generally Charles King, Gods of the Upper Air: How a Circle of Renegade Anthropologists Reinvented Race, Sex, and Gender

historical backdrop of the era of Boas and his influential students was segregation, colonialism and post-colonialism, World War II, national socialism, and the Cold War. The legal segregation and genocides of the mid-century were viewed by Boasian cultural relativists as the political consequences of power asymmetries deeply embedded in stereotypes.[11]

In the vein of a cultural relativist analysis, this Article seeks to parse out assumptions about the operation of race, discrimination, and remedies that underlie the contextual application of strict scrutiny. This Article thus considers the Court's modern ultra-deference to government assertions of national security rationales, as evidenced by the post- 9/11 era, as a radical turn from its original intent—to apply a robust review of government use of race.

Cultural relativism countered social Darwinism by arguing that the association of race and national origin with material culture and perceived sociopolitical complexity—two traditional markers of a culture's advancement—was ethnocentric and thus false.[12] This was a first version of the developing American concept of diversity and inclusion reflected in the sentiments behind Associate Justice Harlan F. Stone's famed Footnote 4 in *United States v. Carolene Products*.[13] The judiciary assumed that the appropriate role of race in government policy was that "discrete and insular" minorities, given their isolation and outsider positionality, needed federal protection from the majority for the proper functioning of equal protection.[14] The *Carolene Products* Court asserted that it may be the federal judiciary's responsibility to apply higher judicial review, or "exacting judicial scrutiny" with a "narrower scope" of presumptive constitutionality of government conduct, to allegations of discrimination against minorities.[15] As such, the Court broadly framed the application of an incipient strict scrutiny for allegations of Fourteenth Amendment and Bill of Rights violations.[16]

This fledgling blueprint for strict scrutiny was a response to the Jim Crow era of explicit legal segregation, involving both de jure and de facto race discrimination. As such, during the Jim Crow era, from 1879 into the 1960s, the federal judiciary increasingly viewed itself as a corrective hand to discriminatory local laws.

Today, in the post-civil rights era the federal judiciary's view on its role regarding race has become much more complex. In particular, it has

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in the Twentieth Century (2019).

11. While the term stereotype was not available to early Boasian cultural relativists, they recognized that seeking universal theories of modernity or advancement and pegging hierarchy to culture drove racism. *See id.* at 247–249.

12. *See generally* Ruth Benedict, Race: Science and Politics (1959) (arguing, amidst the turmoil of the mid-century, that anthropology had become too bound to institutional ambitions and thus perpetuated racism through its universal theories of cultural and national advancement).

13. 304 U.S. 144, 153 n.4 (1938).

14. *Id.*

15. *Id.*

16. *See id.*

increasingly taken the position that the use of race in the law, whether it be de jure or de facto, remedial or invidious, may in fact reproduce race-based differences and stereotypes that are in and of themselves discriminatory.[17] The assumptions can be described as two-fold. On one hand, due process is formally and readily available to minorities through sweeping anti-discrimination federal laws passed in the 1960s.[18] On the other hand, while generational consequences persisting from the Jim Crow era, intentional race discrimination is rare and isolated to individual actors.[19] These two viewpoints are reflected in the legal presumptions today for judicial review of race-conscious remedies behind burdens of proof and for the structuring of the means and ends tests that we conduct for a strict scrutiny analysis.

Strict scrutiny is both a means and an ends test applied to race-conscious classifications in government policies, applied to policies regardless of whether they are invidious or benignly remedial in objective—a color-blind approach.[20] The two-part test begins with an inquiry into whether the objective or goal of the policy represents a compelling government interest justifying the use of race.[21] If the government is able to prove that its purported policy interest is compelling, it must survive a second important hurdle: the question of whether its policy is narrowly tailored.[22] This means the government must be able to show that there are no race-neutral means by which it could have reached its purported policy objective.[23] This shift towards requiring plaintiffs to satisfy a burden of showing intentionality in discrimination reflects a change in the underlying sociocultural consensus on what constitutes discrimination and what the appropriate remedy should be if there is evidence of discrimination.

This is the historical and political context out of which the concept of strict scrutiny emerged, shaped by competing sociocultural impulses on the appropriate role of race in American society. This Article argues that there are competing and inconsistent approaches to the contextual application of strict scrutiny today, particularly in the contexts of education and national security. Contextual strict scrutiny reflects sharply divergent views toward

17. *See, e.g.*, *Parents Involved in Cmty Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

18. *See, e.g.*, Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat. 241 (1964) (prohibiting discrimination on the basis of race, color, sex, religion or national origin); The Voting Rights Act of 1965, Pub. L. 89–110, 79 Stat. 437 (1965) (prohibiting race and color based discrimination in voting); Immigration and Nationality Act of 1965 (1965), Pub. L. 89–236, 79 Stat. 911 (1965) (removing long-standing race and national origin based immigration exclusion).

19. *See* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 522–23 (1980).

20. *Adarand Constructors, Inc. v. Pefia*, 515 U.S. 200, 227 (1995).

21. *Id.*

22. *Id.*

23. Angelo Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21, 25–26 (2004).

the relative weights that the Court applies in gauging the interests of society as a whole in a national security context compared to gauging the interests of an individual in a context like education.

Specifically, the Court applies ultra-deference to national security interests, yet limited deference to post-secondary admissions policies. For example, the Court in *Fisher v. University of Texas at Austin (Fisher I)*,[24] reaffirmed its position that strict scrutiny should be applied to all affirmative action policies.[25] In *Fisher I*, Justice Kennedy further interpreted Justice Powell's language in *Regents of the University of California v. Bakke*,[26] stating:

> It is therefore irrelevant that a system of racial preferences in admissions may seem benign. Any racial classification must meet strict scrutiny, for when government decisions 'touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.'[27]

In post-secondary education admissions, the Court has repeatedly held that the use of race in admissions policies triggers strict scrutiny review, regardless of the motivation and purpose behind the policy.[28] However, in other contexts, specifically national security and immigration, the Court has deferred to congressional authority and the "broad discretion" of the Executive in border control, as stated in *Trump*,[29] and reflecting the highly deferential posture of *Korematsu*.[30] This dichotomy fails to create symmetry and instead represents indeterminacy as it results in the inconsistent application of deference on issues regarding the role of race in public policy. Thus, while little or no deference is provided to educational policymakers and strict scrutiny is applied in all affirmative action contexts, there is significant deference to government rationales in the context of national security since *Korematsu*. This contrast perpetuates an inconsistent and indeterminate application of the Fourteenth Amendment's Equal Protection Clause in the remedying of past race-based discrimination.

Two questions drive this Article. First, what are the current conflicting sociocultural viewpoints on discrimination that drive the indeterminacy of the application of strict scrutiny? Second, how should the Court determine the appropriate balance between the safety and security interests of society versus the civil liberties and rights interests of racial minority groups that are impacted by such policies?

The recent history of the Supreme Court's inconsistent approach to race classification in governmental conduct reveals a bifurcated *Korematsu* holding

24. 133 S. Ct. 2411 (2013).

25. *See id.* at 2417.

26. 438 U.S. 265 (1978).

27. *Fisher*, 133 S. Ct. at 2417 (citing *id.* at 299).

28. *See, e.g.*, *Bakke*, 438 U.S. at 271; Grutter v. Bollinger, 539 U. S. 306, 326–27 (2003); Fisher v. U. Tex. Austin (*Fisher II*), 136 S. Ct. 2198, 2214 (2016).

29. Trump v. Hawaii, 138 S. Ct. 2392, at 2408 (2018)

30. Korematsu v. United States, 323 U.S. 214, 223–24 (1944).

that persists today. *Korematsu* represents a conflict between the interests of the whole versus the marginalized, a conflict the Fourteenth Amendment's Equal Protection Clause was engineered to mediate.[31] In other words, the purpose of the clause was specifically to remedy—and manage—discrimination against minorities, as it required the extension of full citizenship rights to recently freed African Americans. As such, it was an admission that federal jurisdiction over race was necessary to remedy discrimination by enforcing compliance across jurisdictions with the goal of removing indeterminacy.

In *Korematsu*, this mediation of interests was framed as a balancing of interests between national security—society as a whole—versus those of Japanese Americans—a disempowered minority.[32] This balancing act is the proverbial to be or not to be conflict of American jurisprudence's long-running, internal narrative on how to remedy race-based discrimination.

The Court's bifurcation of strict scrutiny is reflected in the way the Court applies this standard in the education context versus the national security context. Comparing the Court's application of strict scrutiny review in the educational and national security contexts illustrates two polar opposite approaches to evaluating race-conscious laws. The polarities describe academic policymaking deference on the basis of traditional First Amendment rights with affirmative action, where the Court has declined to conduct a more traditional standing review of plaintiffs regardless of the relevant policy's invidious or remedial purpose, even as it applies strict scrutiny. Conversely, with national security concerns, the Court has effectively established a rule of deference to Congress and the Executive, declining to apply strict scrutiny. It is apparent that the current strict scrutiny jurisprudence is applied differently based on context and is, thus, inconsistent in application. This varying approach is problematic because it results in indeterminate outcomes in equal protection law and places a disparate burden on minority groups.

In Part I, this Article argues that the Court's contextual application of strict scrutiny is a doctrinal manifestation of what critical race theorist Neil Gotanda described as our "color-blind constitutionalism."[33] This universalist interpretation of race avoids the question of whether the alleged harm caused by governmental conduct involves (1) a benign and remedial intent, or (2) differential treatment, purposeful or otherwise, based on race.[34] Moreover,

31. *See generally* Beverly E. Bashor, *The Liberty/Safety Paradigm: The United States' Struggle to Discourage Violations of Civil Liberties in Times of War*. 41 W. St. U.L. Rev. 167 (2014) (describing a historic form of contextual application of the balance of interests between a stated governmental rationale of safety that is directly counterposed to the interest in liberty, which, more often than not, involves policy that differently effects persons on the basis of national origin, race, and immigrant status).

32. *Korematsu*, 323 U.S. at 223–24.

33. *See* Gotanda, *supra* note 7, at 3–4.

34. *See generally* Ancheta, *supra* note 23 (outlining a useful taxonomy of different forms of contextual strict scrutiny). Ancheta writes that the form of contextual application of strict scrutiny as described in *Adarand Constructors* applies strict scrutiny in a manner that was intended to create "symmetry." *Id.* at 36.

this approach circumvents the important legal doctrine of standing, which is embedded in the traditional constitutional law rationale of equity.[35] This equity-based model poses the question of whether a plaintiff has experienced harm such that the person has a right to a corrective remedy if such harm is adequately proven. This model recognizes the importance of history, and thus would be copacetic with the remedying of lingering effects from past race-based discrimination.

In Part II, the Article specifically examines the problem of indeterminacy in the Court's balancing of state and individual interests in *Korematsu*—and its progeny, *Trump v. Hawaii*, in which the Court declined to apply strict scrutiny. In Part III, the Article argues that the cognitive role of implicit bias in systemic and individual forms of discrimination has complicated the application of contextual strict scrutiny. Part III reflects on the Court's troubling conflation of invidious and benign uses of race in its universalist application of strict scrutiny to modern understandings of the operation of motivation specifically implicit bias. In other words, the operation of implicit bias in decision-makers, particularly government actors, is relevant to the application of strict scrutiny review—if discrimination can operate on an implicit level, then it is not intentional. If bias is largely implicit in the modern era, as some suggest, then the principle that discrimination must be intentional to hold parties liable may not be neutral as it would allow injustices to reproduce indefinitely. Finally, Part IV reviews the *Trump* decision, which does not apply strict scrutiny, and argues that compared to cases involving post-secondary education, the ultra-deference in the *Trump* case signals the confusion of today's contextual strict scrutiny.

I. A Brief History of Judicial Review Of Governmental Use Of Race

In his important work on the taxonomy of the Court's different approaches to race, A Critique of "Our Constitution is Color-Blind," Neil Gotanda described the Court's now dominant "color-blind" approach to race-conscious policies.[36] The color-blind doctrine reflects a two-fold perspective on the use of race.[37] First, the doctrine presumes that all uses of race, whether it be invidious or remedial, should be treated as suspect.[38] Second,

35. *See* Mass. v. Mellon, 262 U.S. 447, 488 (1923)

36. *See generally* Gotanda, *supra* note 7.

37. *Id.* at 47. Much has been written about the "doctrinal confusion" caused by the contemporary shift towards applying strict scrutiny regardless of whether invidious or benign purpose is in evidence, or of failing to apply strict scrutiny at all where evidence of race-based factors is found. *See, e.g.*, Maxwell L. Stearns, Obergefell, Fisher, *and the Inversion of Tiers*, 19 U. Pa. J. Const. L. 1043, 1043 (2017). Stearns argues that doctrinal clarity can be provided through application of a broader spectrum of "tiers" of review in determining when equal protection or due process analysis should be applied and compares legal treatment of sexual minorities to racial minorities. *See id.* at 1048–49.

38. *See generally* Gotanda, *supra* note 7, at 47–48. Justice Powell's language on diversity in *Bakke* pivoted legal remedy for the adverse harm of racial exclusion from its

it presumes that the appropriate burden of proof to establish race discrimination is one of intentionality.[39] These two presumptions are based on a perspective developed in the post-civil rights era, which views incidents of intentional discrimination as unusual in both a judicial and social context. Color-blindness also views disparate impact evidence of systemic discrimination as presumptively unintentional and as insufficient bases for liability and remedy.[40] Gotanda critiques this approach as an antiquated fixation on the explicit, intentional forms of discrimination employed by segregationist and Jim Crow actors of the civil rights revolution era,[41] who publicly advocated for "segregation now, segregation tomorrow, segregation forever."[42] This bifurcated viewpoint—which equates normatively good and bad race classification while requiring a heightened burden of proof for discrimination—has gained a foothold in the post-civil rights era as the Court has sought to bring consistency and symmetry to the review of race-conscious policies by applying a color-blind approach to strict scrutiny application.[43]

Subpart A below describes the current universalist approach to judicial review of race by government. The universalist approach treats invidious (intentionally discriminatory) and benign (remedial) applications of race as the same, subjecting both to the highest level of judicial review, strict scrutiny.

A. *The Universalist Approach to Government Use of Race*

The motivation to create consistency and symmetry by applying a universalist approach to race-conscious policies points to the Court's ambivalence over its role in adjudicating allegations of race discrimination in the post-civil rights era. This goal to assert a universalist approach to race-conscious policies reflects a contradictory assertion. On one hand, the approach suggests that the government should no longer be in the business of using race in policy because doing so will reproduce racial classifications and thus exacerbate racial conflict. On the other hand, the approach disfavors the use of race-based policies to remedy the present effects of past discrimination, a position that arguably could perpetuate racial hierarchy and racial conflict by assuming it will not reproduce on its own. As we will see below, the role of judicial ultra-deference to the other branches of government creates a bifurcated and inconsistent application of strict scrutiny review, as the universalist approach of color-blind constitutionalism introduces more, not less,

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equal protection moorings and arguably set affirmative action on track toward its current color-blind approach. Gotanda notes that, "Equating all imaginable forms of governmental consideration of race-maintenance of a Jim Crow school system, racial preference in medical school admissions or government contracting-requires an extraordinary effort of abstraction, social reductionism, and historical contraction. Gotanda, *supra* note 7, at 64.

39. *Id.* at 48–50.

40. *Id.* at 45–48.

41. *Id.*

42. George Wallace, Gov. Ala., Inaugural Address (Jan. 14, 1963).

43. Ancheta, *supra* note 23, at 36 (discussing instability in the application of strict scrutiny through contexts where categorical deference to government conduct is provided by the Supreme Court).

indeterminacy into legal outcomes. The Court's universalist approach in education contexts—treating benign and invidious uses of race as the same and thereby applying strict scrutiny to both but not in national security contexts—raises a troubling question about the practice of contextual strict scrutiny. It suggests that the contextual application of strict scrutiny is a manifestation of this bifurcated and contradictory viewpoint on discrimination based on race, rather than a solution to it.

In *Richmond v. J.A. Croson Co.*[44] and *Adarand Constructors, Inc. v. Peña*,[45] the Court rejected distinctions between invidious and benign racial classifications in the application of strict scrutiny, asserting that strict scrutiny must be applied to all racial classifications in race-conscious policies, regardless of the intent behind their use.[46] In the decades since these holdings, two important historical developments have furthered this approach to race-conscious policies: (1) aggressive challenges to affirmative action in post-secondary school admissions, and (2) the post-9/11 national security response to terrorism. In the wake of these developments, the Court has assiduously applied strict scrutiny review in the context of education access. However, when national security is the asserted rationale for governmental conduct, the *Croson* and *Adarand* dictum are not always applied in the same rigid manner. This is a reflection of the continuing relevance of the Court's holding in *Korematsu.*[47]

In 1942, after the Japanese military's bombing of Pearl Harbor, President Franklin Delano Roosevelt issued Executive Order (EO) 9066, which gave Presidential authority to the military to remove persons of Japanese descent regardless of citizenship status from designated military zone and the surrounding communities, including California and much of the West Coast.[48] More than 122,000 persons were evacuated, two-thirds of whom were U.S. citizens, and moved by military transport to "internment camps" across six states in remote, rural, and mountainous outposts.[49] These outposts were hastily built out of facilities, such as horse stables, that were not designed for human habitation.[50] Despite the order, Fred Korematsu refused to leave his home and job, going so far as to getting plastic surgery to change his

44. 488 U.S. 469 (1989).

45. 515 U.S. 200 (1995).

46. *Id.* at 227; *Croson*, 488 U.S. at 721–22.

47. Korematsu v. United States, 323 U.S. 214 (1944).

48. *See* Exec. Order No. 9,066, 7 Fed. Reg. 1,407 (Feb. 19, 1942).

49. *See Executive Order 9066: Resulting in Japanese-American Incarceration (1942)*, Nat'l Archives, https://www.archives.gov/milestone-documents/executive-order-9066 [https://perma.cc/H6U7-M8DM] (Jan. 24, 2022). For more information about Japanese internment, consult the extensive works of Roger Daniels. *See, e.g.*, Roger Daniels, *The Incarceration of the Japanese Americans: A Sixty-Year Perspective*, 35 Hist. Tchr. 297 (2002); Roger Daniels, Prisoners Without Trial: Japanese Americans in World War II (rev. ed. 2004).

50. *See* Ronald Takaki, Strangers from a Different Shore: A History of Asian Americans 394 (1998).

appearance.[51] After his arrest, he challenged the EO as a violation of the Fifth Amendment.[52] However, both the district and appeals courts held that Korematsu had violated military orders.[53] On appeal, the Supreme Court affirmed in a divided opinion that Korematsu's detention—and by extension the internment of Japanese Americans—was a military necessity while acknowledging that the EO was explicitly based on race.[54]

The legal question examined by the Court in *Korematsu* was whether the executive and legislative branches exceeded their war powers by targeting and restricting Americans of Japanese descent.[55] This case represented the classic societal dilemma in which the rights of an outsider minority group are pitted against the broader national interests—a concern that was evoked in *Carolene Products* a couple years prior, that deference to majoritarian interests has historically resulted in restrictions of due process for minority groups. Such an outcome is generally considered to be a defect of majoritarian interest-driven politics, as due process that is not applied consistently is not due process at all.

Justice Black began his *Korematsu* opinion by both recognizing that race-based curtailment of civil rights was at the core of the case's legal issue and by establishing a necessity rationale for such restrictions:

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[56]

In this early version of contextual strict scrutiny, the Court established an ultra-deference to the war powers of Congress and the Executive, holding that the government's interest in preventing "espionage and sabotage" outweighed the resulting racial discrimination against persons of Japanese descent, especially in wartime.[57] In particular, Justice Black determined that the means by which the government aimed to preserve national security—through the creation of the exclusion zones and internment camps—was

51. *Fred Korematsu's Story*, Fred Korematsu Inst., https://korematsuinstitute.org/freds-story [https://perma.cc/NJ94-9G9D].

52. *See* Lorraine K. Bannai, *Taking the Stand: The Lessons of the Three Men Who Took the Japanese American Internment to Court*, 4 Seattle J. for Soc. Just. 10–12 (2005).

53. *See* Korematsu v. United States, 319 U.S. 432, 432 (1943); Korematsu v. United States, 140 F.2d 289, 290 (9th Cir. 1943).

54. Korematsu v. United States, 323 U.S. 214, 223–24 (1944).

55. *Id.* at 217.

56. *Id.* at 216.

57. *Id.* at 217. Justice Murphy's dissent foretold the post-9/11 national security response. His dissent raised the specter of a super precedent for exigency-based national security rationale that outweighs individual's fundamental civil liberties and civil rights even without individualized evidence of wrongdoing. *See id.* at 240–42 (1944) (Murphy, J, dissenting).

constitutionally valid.[58] This validity was based on the finding that "some" Japanese Americans were "disloyal," since some refused to sign loyalty oaths refuting allegiance to Japan and asserting such to the United States.[59] This, Justice Black stated, was evidence that the blanket and non-particularized race-based determination was narrowly tailored.[60]

Justice Murphy voiced in his dissent that the scope of war powers must comport with reasonableness and the check and balance of judicial review:

> In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation. At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.[61]

Korematsu's holding was the first test of strict scrutiny but from the start the Court failed the *Carolene Products* Court's recognition that the judiciary must protect "discrete and insular minorities" from discrimination.[62]

B. *Implications of Universalist Approach*

Recently, the rationale of ultra-deference used in *Korematsu* was again asserted in the 2018 *Trump v. Hawaii* ruling in which the Court declined to apply strict scrutiny on the basis that the executive branch has broad discretion in immigration matters.[63] However, the *Trump* Court's position indicated, as in *Korematsu*, some distance from the *Carolene Products* Court's finding that an exacting judicial inquiry into the constitutionality of a law is necessary where plaintiffs bring allegations of government-sanctioned discrimination against minorities.

58. *Id.* at 216.

59. *Id.* at 223; *see also* Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. Haw. L. Rev. 649, 652 (1997).

60. *Korematsu*, 232 U.S. at 218–19. Justice Black, in countering the assertion that the blanket application of the executive order was racially discriminatory, framed the issue as a wartime exigency where the "loyal" versus the "disloyal" could not be discerned. *Id.* This construction was predicated on a stereotype-driven assumption that Japanese Americans were presumptively disloyal, or guilty rather than innocent. Today, this dual-loyalty fear is recognized in race scholarship as a projection of the presumption that Asians are perpetual foreigners, unable to fully assimilate and thus relinquish loyalty to their sending country.

61. *Id.* at 234 (Murphy, J., dissenting).

62. United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938).

63. Trump v. Hawaii, 138 S. Ct. 2392, 2408 (2018).

Here plaintiffs asserted that President Trump's travel ban created an official policy of religion-based discrimination in violation of the First Amendment.[64] During his 2016 presidential campaign, President Trump specifically referred to a "Muslim ban," using extreme political rhetoric that was widely criticized as race-baiting for votes.[65] Following the election, President Trump issued his first executive order, Executive Order 13769 "Protecting the Nation from Foreign Terrorist Entry into the United States," on January 27, 2017.[66] The EO restricted entry of immigrants from seven countries—Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen—all of which are characterized by their large Muslim populations.[67] Critics argued that the immigrants from many of the restricted nations were not known to pose a national security threat to the United States.[68] In particular, criticism of the EO focused on the fact that a number of the restricted countries were not involved at the time in military conflict or posed significant terrorist threats to the United States, even though a majority were Muslim nations.[69] Eventually, after multiple legal challenges, a third version of the EO, Presidential Proclamation 9645, amended the list of countries to add North Korea, Chad, and Venezuela while removing Sudan.[70] Of the final eight countries, six are predominantly Muslim.[71] The countries added were non-Muslim countries and could be demonstrated to pose a national security threat due to geopolitical conflicts with the U.S. while Sudan did not pose such and is a majority Muslim country.[72]

The National Immigration Law Center began tracking Trump's tweets when he declared his candidacy on June 16, 2015.[73] It determined that Trump

64. *Id.* at 2403. In *Trump v. Hawaii*, the assertion was that the First Amendment, part of the Bill of Rights was violated, *id.*, which the *Carolene Products* Court asserted should also require the exacting judicial review of strict scrutiny. *Carolene Prod. Co.*, 304 U.S. at 153 n.4.

65. Brian Klaas, *A Short History of President Trump's Anti-Muslim Bigotry*, Wash. Post (Mar. 15, 2019), https://www.washingtonpost.com/opinions/2019/03/15/short-history-president-trumps-anti-muslim-bigotry [https://perma.cc/S2GG-FED6] detailing the record of tweets, since deleted, which describe campaign period, post-election, and inauguration language on the issue of the "Muslim Ban" or "Travel Ban").

66. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

67. *Id.*

68. Chantale Moore, *Cover Up or Strip Down: An Analysis of France, the 'Burkini Ban', and Secularism*, 8 J. *Global Rts. and Orgs.* 78, 99–103 (2018).

69. *See id.* For an examination of the importance of due process as a legal doctrine in the context of national security, see generally Amy L. Moore, *Even When You Win, You Lose: Executive Order 13769 & the Depressing State of Procedural Due Process in the Context of Immigration*, *26 Wm. & Mary Bill Rts. J.* 65 (2017).

70. Exec. Order 9,645, 82 Fed. Reg. 45161 (Sep. 24, 2017).

71. *Id.*

72. Kathyrn Casteel and Andrea Jones-Rooy, *Trump's Latest Travel Order Still Looks a Lot Like a Muslim Ban*, FiveThirtyEight (Sep. 28, 2017).

https://fivethirtyeight.com/features/trumps-latest-travel-order-still-looks-a-lot-like-a-muslim-ban [https://perma.cc/45HK-2ELC].

73. *All Tweets from @realDonaldTrump That Include the Word "Muslim" or "Muslims" Since Donald Trump Declared His Candidacy for President on June 16, 2015*, Nat'l Immigr. L. Ctr., https://www.nilc.org/issues/litigation/trump-tweets-with-muslim-muslims [https://

used the word "muslim" in tweets with associated inflammatory language, twenty times between September 21, 2015 and March 24, 2016.[74] He used the word "refugee" in inflammatory contexts in seventeen Tweets between November 15, 2015 and February 12, 2017.[75] Chief Justice Roberts' opinion in *Trump* argued that the tweets were merely campaign rhetoric and thus failed to evince invidious intent in violation of the First Amendment's Establishment Clause underlying the later Presidential Proclamation issuing a temporary travel ban. [76]

In *Trump v. Hawaii*, an important question was whether the travel ban violated the Establishment Clause of the First Amendment, which served to prohibit discrimination based on religion.[77] Because the allegation, as tweeted by the President during his election campaign, cited anti-Muslim language prohibiting immigrants from various nations, it was easy for the Court to consider this as a form of race and national origin discrimination.[78] Either way, the evidence of the explicit campaign Tweet language of invidious motivation behind the travel ban indicated it was rooted in the suspect classifications of race and/or religion, both of which trigger strict scrutiny.[79]

Immediately after the implementation of President Trump's first Executive Order, thousands demonstrated across the United States, with many demonstrations taking place at the nation's airports.[80] The ensuing public criticism of the Court's holding in *Trump* reflects a lack of social consensus. Social consensus is not a unanimous agreement on an issue, but rather a convergence of different interests that are common to that issue, resulting in a legal, policy-based, or sociocultural outcome.[81] The strong public criticism

perma.cc/9CEE-VZFW].

74. *Id.*

75. *All Tweets from @realDonaldTrump That Include the Word "Refugee" or "Refugees" Since Donald Trump Declared His Candidacy for President on June 16, 2015*, Nat'l Immigr. L. Ctr., https://www.nilc.org/issues/litigation/trump-tweets-with-refugee-refugees [https://perma.cc/5LUA-YK8Z].

76. Trump v. Hawaii, 138 S. Ct. 2392, 2417–18(2018).

77. *Id.* at 2403.

78. For a discussion of the scope of judicial deference to the executive branch, see generally *First Amendment—Establishment Clause—Judicial Review of Pretext—*Trump v. Hawaii, 132 Harv. L. Rev. 327 (2018).

79. While national security interests are grounded in plenary power and serve to protect important interests, it must be carefully considered within the context of due process which is also in our national interest. *See* Moore, *supra* note 69.

80. Chas Danner, *Protests Against Trump's Travel Ban Break Out Across America*, N.Y.T. Mag. (Feb. 10, 2022), https://nymag.com/intelligencer/2017/01/protests-against-trumps-travel-ban-break-out-across-america.html [https://perma.cc/Y4NR-RHCN].

81. *See* Bell, *supra* note 19 (discussing the concept of interest convergence and the role it plays in political compromise and outcomes). In particular see Kimberlé Crenshaw, *Race, Reform, and Retrenchment Transformation and Legitimation in Antidiscrimination*. 101 Harv. L. Rev. 1331, 1370-1387 (1988). Crenshaw examines how consensus can function as ideological coercion in hegemonic relations. *Id.* She reflects on the role that consensus plays in racial domination but also the role that the concomitant relationship of subordination in hegemony plays in the agency of those subordinated. *Id.* In other words, contestation is inherent to domination and change occurs through an expansion of the

of the *Trump* holding reflects the instability, grounded in the Court's indeterminacy towards how to review allegations of race discrimination, underlying ultra-deference.

Justice Sotomayor's strong dissenting language in *Trump v. Hawaii* illustrates the bifurcation of views on the appropriate trigger for the application of strict scrutiny in the national security context. She described the progression in Donald Trump's presidential campaign from suspect campaign language, such as the tweets criticized as anti-Muslim and explicit pledges to ban all Muslims from entering the United States to the eventual Presidential Proclamation.[82] Justice Sotomayor argued that the final Proclamation, while supported by revisions after federal court injunctions, was still tainted by invidious intent:

> During his Presidential campaign, then-candidate Donald Trump pledged that, if elected, he would ban Muslims from entering the United States. Specifically, on December 7, 2015, he issued a formal statement "calling for a total and complete shutdown of Muslims entering the United States."[83]

In her dissent, Justice Sotomayor cited to precedent, stating that to determine if plaintiffs have proved an Establishment Clause violation, "the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion."[84] She added that to answer this question in the past, the Court has "generally considered" not only the text of the policy and its operation but also any available evidence of the historical background of the challenged policy, including the events that lead to the enactment of the policy and statements made by the policymaker—here, the President.[85]

Justice Sotomayor's dissenting language refers to precedent in the Court's determination of whether the stated government rationale should trigger strict scrutiny, by conducting a broad, totality-of-the-circumstances style review of the available facts. This employs a robust ends scrutiny test of the actual versus perceived bases for the government's asserted interest, intended to avoid the problem of pretextual facially neutral policies.[86] The review for pretext emerged out of Jim Crow-era laws that were facially neutral but in practice were designed to be invidious based on race.[87]

While the color-blind approach to the application of strict scrutiny, as presented in *Croson* and *Adarand*, is premised on a neutral or first principle intended to provide symmetry to the review of race-conscious government policies, its application has a universalist effect. In other words, it is a

parameters of existing consensus. *Id.*

82. *Trump*, 138 S. Ct. at 2435–39 (Sotomayor, J., dissenting).

83. *Id.* at 2435.

84. *Id.* at 2434 (Sotomayor, J., dissenting) (*citing* Town of Greece v. Galloway, 572 U.S. 562, 608–09 (2014) (Thomas, J., concurring)).

85. *Id.* at 2434–35.

86. Roy G. Spece & David Yokum, Jr., *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 310–311 (2015).

87. Margaret Hu, *Algorithmic Jim Crow*. 86 FORDHAM L. REV. 633, 645–663 (2017).

one-size-fits-all approach that has resulted in the current indeterminacy and conflict across different contexts, as evidenced by Justice Sotomayor's dissenting opinion in *Trump v. Hawaii*.[88] Strict scrutiny applies when the policy at issue uses the suspect classification of race and infringes upon a fundamental constitutional right, such as freedom of religion.[89] It is evident in *Trump v. Hawaii* that the universalist application of strict scrutiny for race-conscious measures in the context of school admissions is in stark contrast to its application in the context of national security.[90] The Court in *Trump* declined to apply strict scrutiny despite the President's prior language targeting Muslim groups that presaged the initial two executive orders and finally the Proclamation.[91]

II. Ultra-deference to Executive and Legislative branches in issues of National Security following Korematsu

The contemporary context behind the contextual and bifurcated application of strict scrutiny review originated in *Korematsu*, in which the Supreme Court firmly established contextual strict scrutiny while also providing broad deference to executive authority on issues of national security despite substantial and direct evidence of discrimination on the basis of national origin.[92] The *Korematsu* holding established that the Court, in balancing the national security interests of the government against that of the civil liberties rights of minority individuals, would provide ultra-deference to executive and

88. *See generally* Bell, *supra* note 19. Bell considers Herbert Weschler's question of whether *Brown v. Board of Education* was grounded in rule of law based "neutral principles." *Id.* at 519–21. Weschler questioned the soundness of applying the Fourteenth Amendment's Equal Protection Clause in *Brown*. *Id.* at 521. Bell disagreed with *Weschler*'s first principles conclusion on the basis that equitable outcomes do not always result from the application of such. *Id.* at 522–28. This doctrinal conflict succinctly characterizes the indeterminacy behind the Court's application of strict scrutiny.

89. *See* Khiara Bridges, *The Supreme Court 2021 Term: Forward: Race in the Roberts Court*, 136 Harv. L. Rev. 23, 30-33, 110-118 (2022). Bridges describes the contradictory approach of the Supreme Court's interpretation of adequate suspect classification triggers for strict scrutiny when reviewing for governmental conduct based on race in college admissions in contrast to the application when national security is the asserted governmental interest. *Id.* She describes the high level of deference provided to the executive branch for President Trump's later revised travel ban despite evidence that the progeny executive order in question was revised specifically to make legally sound what was explicitly a "Muslim" travel ban in its first iteration. *Id.* Bridges points to Justice Sotomayor's dissent in its critique of the failure of the majority to be necessarily specific in its deference to the executive given the explicit prior history of anti-Muslim animus expressed by the political campaign language used to promise the original "anti-Muslim" travel ban executive order from which the last, reviewed by the Supreme Court was revised from. *Id.*

90. *See First Amendment—Establishment Clause—Judicial Review of Pretext—*Trump v. Hawaii, *supra* note 78, at 330–332.

91. *See First Amendment—Establishment Clause—Judicial Review of Pretext—*Trump v. Hawaii, *supra note* 78, at 332 n.85. Author refers to works discussing the traditional triggers for strict scrutiny of forbidden governmental motivation is involved.

92. Korematsu v. United States, 323 U.S. 214, 223–24 (1944).

congressional authority.[93] This context will hereafter be referred to as National Security Strict Scrutiny.

The ultra-deferential approach taken in *Korematsu* was instrumental to the judicial support of post-9/11 War on Terror cases, the rationale for which extends into the recent 2018 *Trump v. Hawaii* travel ban case. In *Korematsu*, Justice Black reasoned that the government's interest in national security in the aftermath of the Pearl Harbor attack by the Japanese government provided broad executive authority under war powers to issue Executive Order 9066, requiring all persons of Japanese descent in West Coast states to report to internment centers.[94] Ironically, the *Korematsu* holding was an important basis for both an emerging modern strict scrutiny standard where there is prima facie government policy based on race, national origin, and an ultra-deference to congressional and executive authority when national security and war powers are raised as a justification for the abridgment of Constitutional rights under such policies.

A. *Means and Ends Scrutiny as a Function of Ultra-Deference*

The Court's accommodation of contextual differences, particularly between national security and education contexts, through an adjustment of strict scrutiny's two-part inquiry, results in a bifurcated and contradictory approach to a race remedy. This outcome is not surprising given that the two-part inquiry now disregards the purpose of the use of race classifications. In particular, the color-blind doctrine has been applied in a manner that disregards whether the purpose of a policy's race classifications is invidious or remedial. Rather, the broader intent behind strict scrutiny is to ferret out discrimination regardless of whether it is de jure or de facto, or whether it is intentional or disparate in its impact. Privileging intentional—rather than disparate—impact as the only appropriate form of discrimination to be remedied, as the colorblind approach to strict scrutiny application does, inappropriately shifts the burden of proof from the governmental actor onto the plaintiffs.

The two-part mechanics behind the application of "ends scrutiny" and "means scrutiny" is mediated by the burden of proof.[95] The burden-shifting mechanism is contextually variable and highly dependent on the factor of deference, particularly where national security necessity is raised. Thus, the relative weight provided to the asserted government interest, versus that of the civil rights and civil liberties interests of individuals, can short-circuit a considered balancing of interests. The purpose behind ends scrutiny is to limit government conduct to its actual interests. In other words, the application of strict scrutiny review should begin with the government's burden

93. *Id.*

94. *Id.* at 217–18; *see also* Exec. Order No. 9,066, 7 Fed. Reg. 1,407 (Feb. 19, 1942).

95. *See* Spece & Yokum, Jr., *supra* note 86, at 310–311 (providing a constructive analysis of the functioning behind strict scrutiny by disaggregating its components and examining means scrutiny, ends scrutiny and necessity scrutiny and the role of burden shifting).

to provide a clear explanation of its interests behind the use of a suspect classification. Requiring an explicit statement of actual interests encourages government accountability by "identifying its actual goals" and protects important individual interests by "maximiz[ing] the probability that individual interests are sacrificed only when the government embrace[s] a coherent goal that channels its actions towards achieving important ends."[96]

Author Roy G. Spece Jr. notes that disaggregating ends and means scrutiny to first establish whether there is an actual, appropriate ends is necessary in order to properly conduct a compelling interest determination.[97] However, the determination of whether an interest is compelling has been historically marked by a duality. This duality is, on the one hand, the question of whether the compelling nature of an interest is only dependent on the context of the government's goal itself, and the degree to which it is advanced by the government conduct. On the other hand, it is the question of whether the validity of the proposed compelling interest is dependent not on a fixed context or variable, but on a case by case weighing of the competing interests of the government versus that of the individual rights that the policy abridges.[98] The disparate application of the former approach to determining the extent to which an interest is compelling, versus that of a case-by-case weighing of interests in the second form, is the source of the bifurcation of contemporary strict scrutiny application. Means scrutiny is a separate analysis from whether the government's policy has an actual ends that is appropriately compelling.

III. Implicit Bias's Challenge To Strict Scrutiny

In the past few years, the role of implicit bias in decision-making has entered the national conversation on race, particularly regarding policing.[99] However, implicit bias research has been an integral part of academic scholarship for decades. It refers to the stereotypes and notions about associations between race and behavior, between culture and biology, that sit in the unconscious and automatic functions in our minds.[100] In other words, some biases are programmed into our cognitive operations in a manner that individuals

96. *Id.* at 298.

97. *See id.* at 296.

98. *See id.* at 299–300 (providing an important analysis for our contextual analysis framework by analyzing whether the compelling-ness of the asserted government interests is fully dependent on the nature or weight of the goal itself (i.e. the type of goal, and thus its context) or if compelling-ness is a true balancing test of the interests of the government versus the individual right that has been abridged or restricted.)

99. At a speech to Georgetown University students, then FBI Director James Comey stated in 2015 that the recent spate of incidents of police excessive force against African Americans indicated that serious review of police practices was necessary. Michael S. Schmidt, *F.B.I. Director Speaks Out on Race and Police Bias* N.Y. Times (Feb. 12, 2015), https://www.nytimes.com/2015/02/13/us/politics/fbi-director-comey-speaks-frankly-about-police-view-of-blacks.html [https://perma.cc/BG9A-3EY4]. He raised unconscious bias as a necessary problem to be addressed. *Id.*

100. Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism about Equal Protection*, 66 Ala. L. Rev. 627, 627–30 (2014).

are not explicitly aware, even though they affect our decision-making. There is now an extensive list of implicit bias studies from the fields of neurology and cognitive behavioral science that are supported by functional magnetic resonance technology, which aim to innovate pedagogical practices to untrain our biased brains.[101] This Part emphasizes that the operation of implicit bias in decision-makers, particularly government actors, is relevant to the application of strict scrutiny review—if discrimination operates on an implicit level, then it is not intentional. If contemporary forms of bias are not intentional, yet there is still concomitant pervasive evidence of statistically significant race-based disparities that, as a result, impacts equitable access such as academic achievement, employment, and leadership attainment, then the Court must craft doctrines that recognize evidence of disparity in conjunction with implicit bias as bases for sufficiency for fourteenth amendment and other protected classification allegations. To not do so would be to permit injustices to continue to reproduce for generations based on a neutral principle that in practice fails to square with the principle of equity raised so many years ago in *Carolene Products* as the core rationale behind strict scrutiny.[102]

This friction between the view that discrimination can be proved only if it is intentional, versus the view that discrimination is provable if there is evidence that the government conduct is disparately impactful, is the evolved result of the original concern regarding the difference between de jure versus de facto discrimination. That is, prior to the civil rights revolution of the 1960s, a primary legal concern in civil rights was that Jim Crow-era discriminatory laws were passed under the cover of facially neutral policies, specifically intended to appear race-neutral but in fact had a disparate race-based impact. This was the rationale in *Yick Wo v. Hopkins*, where the Court found a violation of the Fourteenth Amendment's Equal Protection Clause, when the challenged San Francisco ordinance requiring permits for laundries in wood buildings was shown to have an eighty-eight percent disparate impact against Chinese applicants.[103] The Court did not require specific evidence of intentionality, rather it indicated recognition of the racialization of labor competition between Chinese American laundry workers and an incipient White labor movement just four years after the 1882 Chinese Exclusion Act.[104] *Yick Wo* established the standard for disparate impact evidence for Fourteenth Amendment claims where it has often been the case that the law in question may be neutral on its face but de facto discriminatory.

In an early and seminal piece on implicit bias, Charles R. Lawrence III wrote that the Supreme Court thinks of "facially neutral actions as either intentionally and unconstitutionally or unintentionally and constitutionally

101. *See, e.g.*, Project Implicit, https://implicit.harvard.edu/implicit/takeatest.html [https://perma.cc/4GF2-2HX7] (last visited Nov. 25, 2022) (conducting Implicit Association Tests for over twenty years); *see also* Jerry Kang and Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465, 473 (2010).

102. United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938).

103. Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886).

104. *See id.*; Chinese Exclusion Act of 1882, Pub. L. 47–12622 Stat. 58 (1882).

discriminatory."[105] Lawrence asked whether evidence of racially disproportionate impact standing alone should trigger strict scrutiny, or whether a deferential standard should be applied to legislative and administrative decisions, absent the proof of intent of racial consequence by policymakers.[106]

IV. Korematsu's Strict Scrutiny Standard of Race and National Origin and the Counterbalance of National Security Are Born of the Same Moment

While the strict scrutiny standard has origins prior to *Korematsu*, the crystallization of the necessary balance between the interests of the government versus the rights of minorities emerged in that case. The need for the protection of minorities against majority interests, as raised by *Carolene Products*, was prominently displayed in the facts of *Korematsu.* Although the Court found that the national interests of national security outweighed that of the civil liberties and rights of Japanese Americans, it simultaneously established that when evidence of invidious animus and harm based on national origin existed, that a "most rigid" scrutiny was necessary to properly protect minority rights against the overwhelming proclivity to protect majoritarian interests and the status quo.

Conclusion

With its decision in *Trump v. Hawaii* to not apply strict scrutiny review to the travel ban on the basis of the deference to executive authority used in *Korematsu*, the Court continues to promote the bifurcation behind the *Adarand* symmetry rationale and promotes indeterminacy in outcomes. This indeterminacy is the result of an avoidance of the systemic problems represented by evidence of disparate race-based impact that abound in our era of readily available data. In *Adarand*, the Court, perhaps seeking to assert consistency over race-conscious government policies, equated and conflated invidious and benign uses of race, by stating that strict scrutiny should apply in both contexts. In truth, however, benign versus invidious motivation in race-conscious policy represent opposite applications of race-consciousness. One is motivated by a desire to remedy discrimination while the other is meant to limit civil rights and civil liberties based on race, color, and national origin. They are not the same. To continue down this road will only lead to further injustices and the erosion of the principles of the rule of law as rule of law can only be stable when the type of due process that *Carolene Products* intended is enshrined in our approach to resolving Equal Protection claims.

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105. Charles R. Lawrence III., *The Id, the Ego, and Equal Protection Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 322 (1987).

106. *Id.* at 321–22.