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Author

Arulanantham, Ahilan

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BY

AHILAN ARULANANTHAM

PROFESSOR FROM PRACTICE

FACULTY CO-DIRECTOR, CENTER FOR IMMIGRATION LAW & POLICY

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Ahilan T. Arulanantham[*]

ABSTRACT

The Supreme Court has long read the Constitution to prohibit state action motivated by racial animus. Courts have applied that prohibition to various forms of governmental decisionmaking, from the individual decisions of judicial officers to constitutional amendments enacted by states. Yet they have not applied it to their own prior precedent. No court, including the Supreme Court, has ever held that courts must disregard prior court decisions that were themselves motivated by racial animus on the ground that such decisions violate the Constitution's anti-discrimination constraint.

I first noticed that strange omission while litigating immigration cases against the federal government, several of which involved race discrimination claims. Time and time again I found government attorneys relying on cases from the Chinese Exclusion Era to support their positions, despite the fact that those cases are full of racist reasoning and rhetoric. Courts often accepted those arguments, occasionally even citing the Chinese Exclusion Era cases themselves.

In this Article, I identify racist precedent as a key feature of our legal system that furthers racial injustice. I argue that the Constitution's prohibition on invidious race discrimination should apply to court decisions by stripping such decisions of precedential force. Courts should apply that principle by creating a new exception in stare decisis doctrine: cases should be denied precedential force if they were motivated by racial animus. I ground this argument in anti-discrimination caselaw and show how it could operate alongside extant stare decisis doctrine. I then respond to various objections. Finally, I illustrate how the approach would work in detail by

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[*] Professor from Practice, UCLA School of Law. Many thanks to Tendayi Achiume, Devon Carbado, Beth Colgan, Adam Cox, Meera Deo, Astghik Hairapetian, Cheryl Harris, Talia Inlender, Kevin Johnson, Jerry Kang, Emmanuel Mauleon, Priya Morley, Hiroshi Motomura, Sunita Patel, Jaya Ramji Nogales, Stephen Rich, Joanna Schwartz, Vishnu Sridharan, Sujith Xavier, Noah Zatz, and other participants in the Critical Race Studies workshop at the UCLA School of Law. Special thanks to Grace McLeod for her extraordinary research assistance, and to Shiva Sethi for excellent editorial support.

applying it to two Chinese Exclusion Era cases that remain foundational to contemporary constitutional immigration law.

Applying the Constitution's prohibition on invidious race discrimination to prior precedent would dramatically alter the legal landscape in areas like immigration law, where the governing doctrine rests on cases infected by racism. It would give lawyers a reason, and judges an obligation, to examine the potentially racist origins of many rules that would otherwise be left undisturbed. If embraced fully, this doctrinal shift could disrupt a foundational source of structural racism in our legal system—the continued force of racist precedents.

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INTRODUCTION

Seven years ago, the Trump Administration decided to terminate the lawful immigration status of approximately 400,000 people from six countries by ending their designations for Temporary Protected Status (TPS). Most of the people targeted by the Administration's decisions had lived here lawfully for more than 15 years. They had stable jobs and deep ties to this country, as well as several hundred thousand American children, many of whom were teenagers.

In response to the Trump Administration's decision, a bipartisan group of Senators drafted a legislative compromise that would have given the TPS holders lawful permanent residence in exchange for various restrictive immigration measures. The Senators went to the White House to present their proposal to the President. In a now-infamous meeting, Trump rejected it, asking "Why are we having all these people from shithole countries coming here? Why can't we have more people from countries such as Norway?"[1]

I was already working intensively on litigation to challenge the administration's TPS decisions when I heard news of the President's statements. I was of course appalled. But the clouds had a silver lining. While the President had repeatedly expressed racist views against immigrants before, he had now specifically denigrated the people I represented. Surely his statement would make it far easier to challenge the

[1] The six countries in question were El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan. The termination decisions happened between November 2017 and June 2018. For a detailed account of the relevant history, *see Ramos v. Nielsen*, 336 F.Supp.3d 1075, 1082-85 (N.D. Cal. 2018), rev'd… rev'd en banc… appeal dismissed… [note that a complicated procedural history follows this order—reversed by three judge panel; then that decision vacated upon order granting rehearing en banc; then the government's appeal voluntarily dismissed under Rule 42]. For more information on the history and purpose of the TPS statute, *see generally* Amicus Brief of Immigration Law Scholars, *Ramos v. Nielsen*, No. 18-16981 (9th Cir.). For more on the racist nature of Trump's statement and his long history of similar statements, see Amicus Brief of Anti-Defamation League, et al., *Ramos v. Nielsen*, No. 18-16981 (9th Cir.). Although there is no publicly-available information on precisely what transpired in the infamous "shithole countries" meeting, the restrictive measures the Senators proposed in exchange for their proposal to grant lawful residence to TPS holders (as well as people who benefited from the Deferred Action for Childhood Arrivals (DACA) program) appear to have included drastic limits to family-based immigration, an end to the visa lottery, and huge increases in funding for border enforcement, among other provisions. *See* Tal Kopan and Daniella Diaz, *Graham, Durbin introduce bipartisan immigration bill despite setbacks*, (available at https://edition.cnn.com/2018/01/17/politics/dreamers-bill-immigration-graham-durbin-congress/index.html).

decisions themselves as motivated by racism, and therefore unconstitutional. How could the government possibly answer this evidence?

Several months later, I found the answer. In briefing responding to our lawsuit challenging the TPS termination decisions, the government argued that normal anti-discrimination law did not apply to our case because it arose in the immigration context. In that realm, the government's lawyers contended, courts must apply an extremely deferential form of rational basis review when assessing discrimination claims. Under that approach courts must ignore all evidence of discriminatory motive other than that which appears within the four corners of the official governmental decisions under challenge. To support this view, the government cited a line of cases originating in the virulently racist Chinese Exclusion Era.[2]

Again, I was appalled, but hardly surprised. I have spent much of the last twenty years representing non-citizens challenging various federal immigration enforcement laws and policies, including on race discrimination grounds. Time and again over my years of practice I have found government attorneys relying on cases from the Chinese Exclusion Era to support their positions, despite the racist reasoning and rhetoric throughout those cases. Ironically, government attorneys would often cite these cases even when defending against claims—as in the TPS case—that the government had engaged in race discrimination. Courts often accepted those arguments, occasionally even citing the Chinese Exclusion cases themselves.[3]

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[2] *See* Brief for Appellants, *Ramos v. Nielsen*, No. 18-6981 (9th Cir.), at 49-50. I use the term "Chinese Exclusion Era" to refer to a period from roughly 1882 to 1893, during which Congress passed and the Supreme Court upheld provisions banning Chinese immigration. Those statutes both responded to and produced widespread anti-Chinese violence throughout the western United States. *See generally* Beth Lew-Williams, The Chinese Must Go: Violence, Exclusion, and the Making of the Alien in America (2021). I discuss both the cases and the social context in which they arose infra, Section ___.

[3] For example, nearly twenty years ago, in the first case I litigated in the Ninth Circuit—on behalf of a refugee jailed by immigration authorities for more than four years while awaiting a final decision on his asylum case—the government defended his lengthy imprisonment through extensive direct citation to cases from the Chinese Exclusion era. Brief of Respondents-Appellees, *Nadarajah v. Gonzales*, 05-56759 (9th Cir. 2006), at 13-14. The government also relied on this line of authority in a detention case I litigated at the Supreme Court. *See* Brief for Petitioners, *Jennings v. Rodriguez*, No. 15-1204 at 19 ("[T]he power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.' *Fiallo* [*v. Bell*, 430 U.S. 787, 792 (1977).]"); *see also* Reply Brief for the Petitioners, *Jennings v. Rodriguez*, No. 15-1204 at 10 (citing *Fiallo* again for the same proposition). And it has done so in cases under the Biden Administration. *See* Response Brief for Appellee United States, *Rodrigues Barios v. United States*, No. 21-50145, at 18-19 (9th Cir. 2022) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 706 (1893), which upheld the Chinese Exclusion provision's

Of course, like other immigrants' rights litigators, I have long had arguments for distinguishing these precedents on both factual and doctrinal grounds—some stronger than others. But it seems strange that I had to distinguish them at all. Over time, I developed a strong sense that there must be something fundamentally wrong with the fact that our law still accords precedential weight to these blatantly racist cases. If a judicial decision is obviously motivated by racism, shouldn't that be reason enough to disregard it? As this Article explains, the answer is "yes."

The Supreme Court has long read the Constitution to prohibit state action motivated by racial animus. It read the Fourteenth Amendment to contain that prohibition in 1872,[4] applied it to facially-neutral rules motivated by discriminatory purpose in 1886,[5] and clearly stated that the prohibition applied to the federal government by 1896.[6] Under the modern version of that rule, a court considering a challenge to a facially neutral governmental action alleged to be motivated by racial animus can look at a large body of evidence to determine whether the allegation has merit. If invidious race discrimination did play a role, the court must strike the action down unless the government can show it would have made the same decision even without the race-based intent.[7]

While courts have applied the Constitution's prohibition on state action motivated by racial animus to various forms of governmental decisionmaking—including court orders and other judicial acts—they have not applied that prohibition to *their own* prior precedent. The omission is somewhat anomalous. Nothing in the Constitution's text or the cases applying it suggests that judicial decisions are exempt from this basic constitutional prohibition. Indeed, to some it might seem obvious that a court decision motivated by racism should lack any precedential value, as individual justices across the ideological spectrum have suggested from time to time.

Yet the Supreme Court has never actually said that. It has never held that courts must disregard prior court decisions that were themselves motivated by racial animus, or even stated that the prohibition against such discrimination should inform how courts apply *stare decisis* doctrine.

This Article argues that the Constitution requires such a principle and explores how it would work. I argue that the prohibition against

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"one white witness" rule, to argue for deferential review of claim that Congress acted with racial animus). For examples of court decisions citing the Chinese Exclusion cases, *see infra* ___.

[4] *Slaughterhouse Cases*, 83 U.S. 36, 37, 81 (1872), *see infra* ___.

[5] *Yick Wo v. Hopkins*, 118 U.S. 356, 366-368 (1886), *see infra* ___.

[6] *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896), *see infra* ___.

[7] *See generally* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

invidious race discrimination should apply to judicial decisions by stripping cases motivated by racial animus of precedential force. When one party relies on a precedent infected by racism, the other should be able to challenge reliance on that precedent as inconsistent with the Constitution's anti-discrimination prohibition. If the court agrees, it should disregard the precedent.

The principle I advocate offers the possibility of disrupting structural racism embedded in various areas of law. In a common law system built on stare decisis, rules enacted with invidious racist intent may naturally persist for decades or more, even where the lawyers and judges following them today harbor no present racist intent. Such rules will continue to profoundly influence our jurisprudence until we adjust stare decisis doctrine to require courts to take account of a rule's racist origins. In other words, absent an exception for racist precedents, stare decisis doctrine *itself* functions as a structure that perpetuates racism.

Adopting a new exception to stare decisis for cases motivated by racial animus would give lawyers and judges a reason to examine the origins of many racist precedents that would otherwise be left undisturbed. It would also encourage others within the legal system to confront its long immersion in the racism that has plagued our nation's history since its founding. If embraced fully, this proposal could give advocates and judges a new tool to help eradicate racism in our precedent and more aggressively challenge its ongoing effects.

This Article concludes by illustrating how the principle I advocate would work in the immigration context. As my analysis reveals, old cases plainly motivated by racism continue to have significant influence in immigration doctrine. Reversing racist precedent in that area would profoundly alter the way courts analyze several highly controversial modern immigration policies.

Immigration law is hardly unique insofar as it remains infected with rules first adopted in cases motivated by racial animus. Various other areas of law are also built on such precedent. While I do not provide examples from other areas of law, the argument advanced here would permit lawyers and judges to utilize the research of scholars who have documented the racism embedded in various areas of legal doctrine. In addition to constitutional immigration law, scholars have documented racism embedded in the cases upholding the so-called Japanese-American "internment," the law governing the status of people living in U.S. territories, federal Indian law, and cases involving slavery, among others. Moreover, the doctrinal principle I describe likely also could be applied to cases manifesting other kinds of discrimination—including most obviously gender discrimination—that is prohibited by the Constitution but

nonetheless embedded in caselaw. Scholars have already advocated overruling cases in many of these areas.[8] This paper provides a doctrinal foundation grounded in generally applicable constitutional law and stare decisis doctrine for overruling cases in all of these areas.[9]

In Part I, I explain my proposal by reference to anti-discrimination law and extant stare decisis doctrine. Courts are already familiar with the concept of invidious discrimination, as they apply it on a routine basis when evaluating discrimination claims under current statutory and constitutional doctrine. While there are many thorny questions—both in extant doctrine and scholarship—concerning the extent to which anti-discrimination law should be understood to prohibit laws that have a discriminatory impact (and other forms of arguably-discriminatory conduct), the theory I describe is agnostic as to such questions. It focuses solely on invidious race discrimination by state actors, as that particular form of race discrimination is unquestionably prohibited by the Constitution.[10] Part I ends by discussing

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[8] For examples of scholars describing certain cases as racist and, in some cases, advocating that they be overruled in part for that reason, *see, e.g.*, as to constitutional immigration cases: Hiroshi Motomura, *Americans in Waiting*, 21-31 (2006); Devon W. Carbado and Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. Rev. 1543, 1602-05 (2011); Kevin Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 Indiana L.J. 1455 (2022); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1, 55-66 (1998); as to the cases involving the mass incarceration of Japanese Americans during World War II: Jerry Kang, *Denying Prejudice—Internment, Redress, Denial*, 51 UCLA L. Rev. 933, 954 (2004); as to the Insular cases: Adriel I. Cepeda Derieux and Rafael Cox Alomar, *Saying What Everyone Knows To Be True: Why Stare decisis Is Not An Obstacle To Overruling The* Insular Cases, 53 Colum. Hum. Rts. L. Rev. 721, 747-56 (2022); as to cases involving Native Americans: Maggie Blackhawk, *Federal Indian Law As Paradigm Within Public Law*, 132 Harv. L. Rev. 1787, 1829, 1842-45, 1861 & n.467 (2019); as to cases involving slavery: Justin Simard, *Citing Slavery*, 72 Stan. L. Rev. 79, 119-122 (2020). [add stuff on 2nd Amdt here].

[9] Although I am not aware of anyone having advanced the central claim I advocate here—that the constitutional prohibition on discriminatory state action requires courts to adopt an exception to stare decisis for cases motivated by racial animus, my proposal shares some common ground with Daniel Rice's suggestion that modern stare decisis doctrine be altered to permit courts to repudiate "repugnant precedents." *See* Daniel B. Rice, *Repugnant Precedents and the Court of History*, Mich. L. Rev. (forthcoming 2023) at 8, 36-38, 42, available at https://papers.ssrn.com/abstract=3920497. However, our proposals differ in important respects. The rule I advocate is compelled by the Constitution, and its rationale rests on extant anti-discrimination law. For that reason, my proposal is limited to cases motivated by discriminatory animus. In contrast, Rice does not argue that racist court decisions should be rejected because they contravene the Constitution's anti-discrimination requirements. Rather, he argues for a discretionary, free-standing exception to stare decisis that extends well beyond cases motivated by invidious discriminatory intent.

[10] I use the phrases "invidious race discrimination" and "action motivated by racial animus" interchangeably to refer to a particular form of race discrimination that is

several concurring opinions in recent Supreme Court cases that have already endorsed—albeit implicitly—the core rationale for the argument I advance here. Those opinions have presumed that cases infected by racism lack precedential weight, although they have not explained why.

In Part II, I consider various objections. I first consider a set of objections that challenge whether the constraints created by anti-discrimination law are properly analogized to court cases. I refute those objections through analysis of longstanding doctrine prohibiting invidious race discrimination. That doctrine is best read to require the new exception to stare decisis that I propose. Courts have long applied the anti-discrimination prohibition to facially neutral statutes and other enactments—finding them unconstitutional if motivated by discriminatory animus despite their facial neutrality. Courts have also already applied anti-discrimination doctrine to court orders and judicial acts such as jury selection, as well as to a great variety of other forms of state action analogous to court decisions. And they have applied the prohibition against the federal government, even though, by its terms, the Fourteenth Amendment's Equal Protection Clause applies only against the states. Given those features of current doctrine, it should be clear that there is no doctrinal barrier to treating decisions motivated by racism as lacking in legal authority, just as we treat statutes or other enactments motivated by racial animus. If the Constitution requires courts to reject statutes and other enactments, thereby stripping them of legal force, it requires the same for cases infected by racism.

I close Part II by discussing what I view as the two most serious conceptual difficulties with my proposal. First, how would courts disentangle the widespread racism of earlier eras from the particular decisions handed down during those times? Whatever one thinks of more recent decisions, there is likely to be widespread agreement that *many* cases decided prior to, say, the 1950's, were decided by judges whom we would

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unquestionably prohibited by the Constitution under extant constitutional law. As I use them, those terms do not refer to laws or policies that could be understood to constitute race discrimination by virtue of their having a discriminatory impact—a possibility that present doctrine generally does not recognize. I have deliberately set aside questions concerning whether the Constitution should be read to prohibit such conduct, as well as other forms of what some would consider race discrimination, including explicit racial classifications arguably *not* motivated by racial animus because adopted for arguably-benign reasons, such as affirmative action policies, because of alleged "statistical" justifications (sometimes described as "Bayesian" discrimination), or for other reasons. *See generally* Khiara Bridges, *Foreword, Race in the Roberts Court*, 136 Harv. L. Rev. 23, 26-32 (2022). Consideration of such questions is beyond the scope of this project, but to the extent that other forms of racial discrimination are prohibited by the Constitution, there may be an argument for denying precedential force to decisions resting on them as well, much as I advocate here as to invidious discrimination.

now describe as holding racist views. Should all the cases they authored now lack precedential weight? Second, assuming we can identify some earlier cases that should lack precedential weight because they were motivated by racism, how should we treat what I call "second generation" cases—later cases that rely on that earlier precedent but contain no explicit manifestation of racial animus?

I answer these questions by exploring how my principle might apply to *Hirabayashi* and *Korematsu*. Those cases upheld the forcible relocation and then mass incarceration of Japanese Americans during World War II. As my discussion of those cases reveals, applying the principle I advocate would not always be straightforward—undoing structural racism buried deep in our legal system rarely is. Nonetheless, existing anti-discrimination law already suggests several approaches to resolving the concededly thorny problems my proposal raises.

Part III illustrates how my proposal would work in more detail by using immigration law as an exemplar, focusing on issues I have litigated. I describe how applying the anti-discrimination prohibition to racist precedents would require courts to reject two important cases decided during the Chinese Exclusion era—*Chae Chan Ping v. United States*, and *Fong Yue Ting v. United States*. Immigration law scholars have long criticized these cases as motivated by racism. I describe them in some detail to establish which particular propositions in them rest on racist reasoning. I then apply my proposed anti-discrimination exception to stare decisis, showing how it would not only serve as a strong foundation from which to reject several holdings in these cases, but also require courts to look anew on much of the extensive constitutional immigration law that courts have built upon them through "second-generation" (and later) cases.

Part III ends by demonstrating how eradicating racism from constitutional immigration law would fundamentally alter the legal landscape involving several contemporary immigration issues. I consider two examples. First, controversial modern disputes over the discriminatory treatment of Haitians, Afghans, and others seeking refuge in this country—as compared to Ukrainians—look radically different without the long shadow cast by *Chae Chan Ping*. Second, ongoing constitutional challenges to the prolonged incarceration of immigrants with pending removal cases appear radically different once the racist propositions from *Fong Yue Ting* have been excised from our doctrine.

I close with some thoughts on how this proposed exception to stare decisis could be used to advance the project of reversing racist precedent as a crucial step on the road to eradicating racism from our legal system.

I. USING ANTI-DISCRIMINATION DOCTRINE TO REVERSE RACIST PRECEDENT

There is no serious dispute among courts or legal scholars that the Constitution prohibits state action motivated by racial animus. Nor do courts or scholars dispute that the prohibition applies to a large variety of government actors. Courts have long read the Constitution to prohibit invidious race discrimination, although its source and scope remain in some dispute.[11]

My central claim is that the Constitution's anti-discrimination prohibition requires courts to apply a new exception to stare decisis: they must disregard prior precedent motivated by racial animus. This principle rests on the premise that if a court decision is motivated by racial animus, then the decision itself violated the Constitution at the time it issued—just as if it had been a legislative enactment. It follows that the legal rules established in decisions motivated by racial animus should lack precedential force unless the court that made the original decision would have adopted the same rule even without its racist motivation.[12]

In this Section, I ground my claim in an analogy between court decisions and other kinds of state action that are routinely challenged on anti-discrimination grounds. I then describe how my proposal would fit within contemporary stare decisis doctrine.

A. The Source of the Prohibition: Anti-Discrimination Doctrine

My proposed stare decisis principle takes its inspiration primarily from a straightforward application of existing anti-discrimination law principles. Courts have recognized for more than a hundred years that the Constitution prohibits state action motivated by racial animus. When faced

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[11] *See* Strauder v. State of W. Virginia, 100 U.S. 303, 307-308 (1870). I discuss this doctrine in more detail infra in Section ___. Regarding on-going disputes concerning the source and scope of the prohibition, Justice Thomas has argued that the prohibition against "separate but equal" treatment may be grounded in the Fourteenth Amendment's Citizenship Clause, rather than the Equal Protection Clause. *See* United States v. Vaello Madero, 142 S. Ct. 1539, 1547 (2022) (Thomas, J., concurring). In addition, in the last thirty years or so the Court has expanded the scope of the anti-discrimination prohibition by holding that it applies with full force to state action intended to *benefit* racial groups historically subject to discrimination. *See, e.g.*, Students for Fair Admissions Inc. v. President & Fellows of Harvard College, Students for Fair Admissions, Inc. v. University of North Carolina, ___ U.S. ___ (2023); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995)).

[12] I discuss below the circumstances under which this counterfactual exception—i.e., that a rule can survive if the court would have made the same decision even without racist motivation—may apply. *See infra* Part ___.

with legal challenges alleging impermissible discrimination of various kinds, courts routinely examine state action to determine whether the relevant decisionmakers were motivated by invidious discriminatory intent. In such cases, they look to a wide range of evidence to ascertain the intent of the relevant decisionmakers. They could do the same with respect to their own precedent.

Describing three features of the principle I advocate will help clarify the proposal. *First*, the constitutional violation on which I am focused arises from the decision of the court, not the underlying state action that was the subject of the litigation on which the court ruled. While courts may sometimes express racial animus as part of their decision upholding state action that is also motivated by racism, they may also sometimes express racial animus in the course of upholding other actions by government officials, or even in cases not involving government action at all. In all such cases, it is the *decision motivated by racial animus* that violates the constitutional prohibition on discrimination, regardless of whether the underlying conduct at issue in the litigation was also unconstitutional or not.

Second, a court evaluating today whether a prior court's decision was motivated by racial animus should use the same types of evidence that courts use when assessing discrimination claims in other contexts. The contemporary court should begin by analyzing the text of the opinion in the case under attack, just as a court examining legislation for evidence of discriminatory intent would begin with the legislation itself. However, a court evaluating today whether a prior court decision was motivated by racial animus need not be limited to the four corners of the decision being challenged. Rather, it can assess all the same types of evidence courts use when assessing discrimination claims in other contexts. Under current doctrine, that includes the rule's disparate impact—including whether it is "unexplainable on grounds other than race;" the historical background of the type of decision at issue and the particular decision in dispute; procedural or substantive departures from normal decisionmaking processes; and the relevant legislative history—including statements by members of the relevant decisionmaking body.[13]

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[13] This list of relevant sources for assessing discrimination claims comes from *Arlington Heights v. Metropolitan Housing Development Corp.*, 426 U.S. 252, 266-268 (1976). That case sets forth the modern framework for analyzing claims based on discriminatory intent. *Arlington Heights* is applied ubiquitously in the lower courts. For a smattering of cases from several circuits, *see, e.g.*, Mhany Mgmt., Inc. v. County of Nassau, 819 F. 3d 581, 606 (2d Cir. 2016) (county's re-zoning policy unconstitutional because motivated by racial animus of its supporters (in the general public)); N.C. State Conf. of NAACP v. McCrory, 831 F. 3d 204, 220-221 (4th Cir. 2016) (striking down facially-neutral election law as motivated by racial animus); Lewis v. Ascension Parish Sch. Bd., 662 F. 3d 343, 359-365 (5th Cir. 2011)

While the Supreme Court provided this (non-exhaustive) description of potentially relevant sources of evidence in a case analyzing the decision of a zoning board, each of the categories of information identified can be considered when assessing whether prior court decisions may have been driven by racial animus. Most obviously, a court today can assess the relevant historical background of earlier decisions—including whether the same judges utilized racist reasoning or rhetoric in prior cases, and any historical evidence concerning whether the judges who decided the earlier case may have held racist views that informed their decision. Some such information can be readily discerned simply from reading prior opinions of the same court, transcripts of oral arguments, and the briefing provided to the judges. Other sources would no doubt be harder to obtain (and to assess for relevance), but they need not be off the table. Just as a court may look at a wide range of evidence when analyzing a prior legislative enactment to assess its potentially-disparate impact on people of certain groups, so too should a court considering whether a prior decision was infected by racial animus assess many other sources of evidence, including whether the earlier court could foresee that the rule it adopted would have a disparate impact on people of different races; departures from normal decisionmaking processes—including whether the rule the court adopted was itself supported by pre-existing doctrine or instead made up largely from whole cloth; and statements by the judges themselves outside the opinion(s) issued in the case under challenge.

Third, once a court today finds that a precedent on which it had been asked to rely was motivated by racial animus, it does *not* follow that the court must reject all of the rules the original case endorsed, or indeed any of them. Under modern anti-discrimination doctrine, proof that a state actor's decision was motivated by racial animus does not *automatically* require that it be annulled. Instead, a court making such a finding must then take a further analytical step: it must consider whether the state actors would have made the same decision even absent racial animus. In other words, even where racial animus has been identified as having played *some* role in a given decision, a court evaluating the legality of that decision must determine whether that animus was a *motivating* factor in the decision. This type of counterfactual analysis will no doubt be fraught with uncertainty in

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(reversing grant of summary judgment on whether school district's student assignment plan was motivated by invidious discrimination); Spurlock v. Fox, 716 F. 3d 383, 397-402 (6th Cir. 2013) (applying *Arlington Heights*, and affirming bench trial finding no racial animus motivating alleged resegregation of public schools); Mensie v. City of Little Rock, 917 F.3d 685, 689-691 (8th Cir. 2019) (similar, as to city's zoning decision rejecting application to open beauty salon); Arce v. Douglas, 793 F. 3d 968, 981 (9th Cir. 2015) (reversing grant of summary judgment as to whether Arizona statute banning Mexican American studies program was motivated in part by racial animus against Latinos).

some cases, but, again, the same is true of legislative enactments and many other forms of state action to which the anti-discrimination prohibition is routinely applied.[14]

Even where a court finds that a prior decision was motivated by racial animus, it still does not necessarily follow that the court today must reject the rule adopted by the prior decision. When a legislative act is struck down by a court because the legislature was motivated by racial animus, the court's decision does not preclude a future legislature from adopting the same rule. It merely requires that the law be reenacted for permissible reasons, and perhaps also that the new legislature consciously recognize the original rule's racist origin.[15] So too, a court today could choose to adopt anew the same rule that a prior decision infected with racial animus had adopted. But it must do so, at a minimum, for new reasons unrelated to the original rationale motivated by animus, and without according any weight to the prior precedent.

Thus, under the principle I advocate, where a court denies precedential force to a prior case because the prior decision was motivated by racism, that finding simply leaves the modern court free to decide the case before it without the weight of the prior case's authority. The court could still adopt the rule (or rules) adopted by the original court, so long as it is not motivated by animus.[16]

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[14] *See Arlington Heights*, 429 U.S. at 270 n.21 ("Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose").

[15] This principle is clearly illustrated in *Hunter v. Underwood*, 471, U.S. 222, 233 (1985), where the Court struck down a provision of Alabama's constitution that disenfranchised felons. In rejecting Alabama's argument that there were valid non-discriminatory reasons for upholding the provision today, the Court stated: "[w]ithout deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*."

[16] To preview an example discussed at length in Part IV, courts looking at the question whether the federal government should be entitled to heightened deference in constitutional challenges to border policies might conclude today, for reasons not motivated by racism, that the government should receive such deference. If accepted, the proposal I advocate would mean only that courts would not be *bound* to adopt that approach based on prior cases motivated by racial animus.

Finally, while the challenges I propose here are analogous to the challenges to legislative enactments or other state action motivated by race discrimination in many ways, they are *not* analogous in at least one very important way: they seek no redress for the parties to the original case. A suit challenging a statute alleging invidious race discrimination will argue that the statute itself harms the complaining party before the court. Such suits typically seek to have the offending provision struck down. In contrast, an argument for reversing racist precedent will always be raised by litigants in a *later* case, not in the case that gave rise to the precedent itself. And because the litigants will challenge the other sides' reliance on the allegedly racist precedent (whether at the trial level or on appeal), the "remedy" they will seek is simply that the court deciding the later case not rely on the precedent established by the earlier one.[17] The discriminatory harm alleged arises from the ongoing effects on new litigants of legal rules established in prior cases, and, more generally, on the distortion in our legal system created by the resulting structural racism.

In this respect, the project I advocate here is fundamentally different from projects that seek to provide redress to the parties (or their descendants) for the on-going effects of cases they lost due to racist court decisions. It is also fundamentally different from projects that seek to eradicate entirely any mention—including even citation—of cases arising from certain contexts inextricably intertwined with racism. To be clear, I recognize the importance of—and have great admiration for—attempts to achieve justice akin to reparations, apologies, or other admissions of wrongdoing arising from the mass incarceration of Japanese Americans in World War II, and favor similar projects for the descendants of enslaved people, Native Americans subject to ethnic cleansing and genocide, and comparable atrocities.[18] In addition, as Justin Simard has persuasively argued, I think it important for lawyers and judges to be conscious of the decision to cite cases that arose in the context of the enslavement of Black people—as well as the ethnic cleansing of Native Americans and other massive projects of racial oppression in which law played a significant part. I agree that such awareness is important even where such cases are being

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[17] As noted previously, the remedy is to *ignore* the prior case rather than to *reverse* it, because there may be race-neutral reasons for adopting the rule adopted in the prior case. A court considering the old, racially-motivated rule, remains free to re-adopt it for race-neutral reasons, just as a legislature may choose to re-enact a statute originally motivated by race discrimination, so long as it recognizes its racist origins and adopts it anew based only on permissible reasons.

[18] For a detailed account of the coram nobis litigation that led to the reversal of Fred Korematsu's conviction, and also a critique of the Ninth Circuit's resolution of that case insofar as it implausibly absolved the Supreme Court despite its own significant role in perpetuating that grave injustice, *see* Kang, Denying Prejudice, *infra*.

cited for propositions that are uncontroversial, and for which there is ample support in cases *not* arising from such contexts.[19]

However, my focus here is on the ongoing precedential force of cases that were motivated by racial animus at the time they were decided. The eradication of legal rules arising from such cases is a distinct, crucial project that lawyers and judges must undertake to eliminate one important form of structural racism that remains present our legal system.

B. Grounding in Stare Decisis Principles

Courts should give effect to the principle I advocate—that the Constitution requires courts to deny precedential force to cases motivated by racial animus—by adopting a new exception to stare decisis for cases infected by invidious race discrimination. If a prior decision adopted a legal rule because of racial animus, the ruling itself violated the Constitution, and therefore the case should lack precedential force when cited for that rule.

Current stare decisis doctrine would not require significant adjustment to accommodate my proposal.[20] Stare decisis generally requires judges to follow the decisions of their predecessors, subject to various exceptions.[21] Two uncontroversial propositions of contemporary stare

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[19] *See* Justin Simard, *Citing Slavery*, 72 Stan. L. Rev. 79, 119-122 (2020). Simard offers several thought-provoking proposals for addressing the citation of cases arising from slavery, including that legal research databases add a flag for cases arising from slavery on the ground that they have been abrogated by the Thirteenth Amendment, and that litigants and judges make note of that context whenever citing such cases. *See* Simard, *Citing Slavery*, *supra*, 72 Stan. L. Rev. at 119-122.

[20] Of course, even if the principle I advocate did not comfortably fit within current stare decisis doctrine, that would hardly constitute a strong argument against my position. If the Constitution's commands conflict with stare decisis principles, it is the latter that must give way in our constitutional system. *See generally* Batson v. Kentucky, 476 U.S. 79, 107 (1986) (Marshall, J., dissenting). In any event, stare decisis doctrine was hardly a model of clarity even before it became the subject of intense politicized controversy as part of the abortion debate. If that doctrine were unable to accommodate the rule I advocate here, that would likely suggest a problem with the former rather than the latter. *See generally* William Baude, *Precedent and Discretion*, 2020 Sup. Ct. Rev. 313, 334 (noting that contemporary stare decisis doctrine leaves substantial room for "arbitrary discretion").

[21] What exactly the doctrine requires in theory and how it should work in practice are subjects of great controversy. For example, stare decisis applies differently depending on where a judge sits in the judicial hierarchy. Whether lower court judges could apply the principle I advocate to reject higher-court precedents motivated by racial animus is a complex question I do not address. *See generally* Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan. L. Rev. 817, 818 (1994) ("Stare decisis permits a federal court to overrule its prior decisions under special circumstances, but longstanding doctrine dictates that a court is always bound to follow a precedent established by a court 'superior' to it").

decisis doctrine strongly counsel in favor of my proposal. First, extant doctrine recognizes greater authority to reject cases resting on particularly poor reasoning. Although virtually every aspect of the Court's decision in *Dobbs v. Jackson Women's Health Organization*,[22] has been heavily criticized, commentators do not appear to have objected to its assertion that "the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered."[23] That may be because, to support that proposition, the Court cited its prior decision in *Lawrence v. Texas*,[24] in which it overruled a blatantly homophobic opinion in part because its rationale "did not withstand careful analysis."[25]

Of course, this exception could easily come to swallow the rule: as the Court itself has noted on occasion, every party asking a court to disregard prior precedent will surely argue it is poorly reasoned. But whether or not that concern has merit in other contexts, one could imagine a narrow version of this proposition that distinguishes between cases that are merely the product of poor reasoning, and those that lack legal authority because their reasoning is motivated by racial animus. The latter are the product of *prohibited*—not just poor—reasoning, and therefore deserve to be consigned to the dustbin of history.[26]

Second, the Court has acknowledged greater justification for overruling cases where "intervening development of the law, through [] the growth of judicial doctrine … have removed or weakened the conceptual underpinnings from the prior decision."[27] Again, one can recognize the complexity inherent in applying such a principle without denying its utility

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The Supreme Court ostensibly requires lower courts to always follow its decisions. *See* Hutto v. Davis, 454 U.S. 370, 375 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."). But lower courts often do not adopt the best reading of Supreme Court cases, choosing instead to distinguish them in ways that the Supreme Court acquiesces in, and at times even encourages. *See* Richard Re, *Narrowing Supreme Court Precedent from Below*, 104 Georgetown Law Journal, 921, 924 (2016).

[22] 142 S. Ct. 2228, 2264 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973) and Casey v. Planned Parenthood, 505 U.S. 883 (1992)).

[23] *Id.* at 2265 (citing Janus v. Am. Fed. Of State, Cnty. and Mun. Emps. Council, 138 S. Ct. 2448, 2479 (2018)).

[24] 538 U.S. 558, 577 (2003).

[25] *Id.* (overruling Bowers v. Hardwick, 478 U.S. 186 (1986)).

[26] I also acknowledge the possibility that a judge could be motivated by racial animus but nonetheless issue a very well-reasoned decision, albeit one that was very result-oriented. It would likely be very difficult for litigants attacking such decisions to show that discriminatory animus was a motivating factor in them, given the presumably-strong race-neutral reasons supporting them. *See* Arlington Heights, 429 U.S. at 270 n.21.

[27] Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989).

in the racism context. Where judicial decisions rest on reasoning infected by racism, the prohibition on invidious race discrimination as developed in the cases implementing that prohibition has "weakened the conceptual underpinnings" of those decisions.

Although the Supreme Court has never explicitly endorsed the exception to stare decisis I advance here, some recent opinions have suggested support for the idea. In *Ramos v. Louisiana*,[28] the Court held the Sixth Amendment right to jury trial requires a unanimous verdict to convict a defendant of a serious offense, and struck down a Louisiana state constitutional rule permitting non-unanimous verdicts in criminal cases. *Ramos* overruled two cases that had permitted non-unanimous verdicts: *Apodaca v. Oregon*[29] and *Johnson v. Louisiana*.[30]

Ramos provides support for the argument advanced here in several respects. The Court's opinion overruling *Apodaca* and *Johnson* begins with a discussion of the racist origins of the non-unanimity rule they upheld. "Louisiana first endorsed nonunanimous verdicts for serious crimes at a constitutional convention in 1898," with the purpose of "'establish[ing] the supremacy of the white race.'"[31] *Ramos* then notes that the authors of the original provision designed their non-unanimity rule to be facially-neutral with respect to race in order to avoid potential challenge. They knew that the courts would strike down any law explicitly barring participation by Black people, so they "sought to undermine African-American participation on juries in another way."[32] "With a careful eye on racial demographics, the convention delegates sculpted a 'facially race-neutral' rule permitting 10-to-2 verdicts in order 'to ensure that African-American juror service would be meaningless.'"[33] These provisions were later reenacted under less explicitly-racist circumstances, but the Court found those reenactments an insufficient basis to justify ignoring the underlying racism in the original provisions.[34]

Ramos relied on that history in explaining why stare decisis could not justify following *Apodaca* and *Johnson*, saying "[l]ost in the accounting [that those cases undertake] are the racially discriminatory *reasons* that Louisiana and Oregon adopted their peculiar rules in the first place."[35] Thus, *Ramos* criticized prior precedents for failing to take note of the racist origins of the laws they upheld, and that criticism served as part of the

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[28] 140 S. Ct. 1390 (2020).
[29] 406 U.S. 404 (1972).
[30] 406 U.S. 356 (1972).
[31] *Ramos*, *supra* note 107, at 1394.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 1401 n. 44.
[35] *Id.* at 1401 (emphasis in original).

Court's rationale for declining to follow them. While *Ramos* did not advocate overruling *Apodaca* and *Johnson* because those cases were motivated by racial animus—it focused instead on the racism underlying the provisions those cases upheld, not any racism in the cases themselves—it supports application of the same principle to prior precedent. If decisions can be disregarded for failing to account for the racist motivation underlying the laws they uphold, perhaps they can also be disregarded if they are themselves motivated by racism, or if they ignored the racist reasoning in cases on which they relied.

Two concurring opinions in *Ramos* also underscore that at least some Justices have begun to think about how a history of racism may be relevant in stare decisis analysis. Justice Sotomayor's concurrence argues that "[a]lthough Ramos does not bring an equal protection challenge, the history is worthy of this Court's attention" because "the States' legislatures never truly grappled with the laws' sordid history in reenacting them."[36] To be clear, Justice Sotomayor did not argue that the Court's decisions upholding the non-unanimity rules were themselves racist. But in explaining why the legislatures' reenactments were insufficient to cure the racism underlying the original law, Justice Sotomayor stated "policies that are 'traceable' to a State's *de jure* racial segregation and that still 'have discriminatory effects' offend the Equal Protection Clause."[37] The proposal advanced here would essentially apply a version of that rule to precedent.

Justice Kavanaugh's *Ramos* concurrence also relies in part on the racist origins of the rule permitting nonunanimous verdicts. He argues that "the Jim Crow origins [of the rule] and [its] racially discriminatory effects (and the perception thereof)," weigh in favor of overruling prior precedent upholding it.[38] Although he does not explain exactly why, his concurrence is best read to endorse the view that decisions which fail to account for a law's racist origins are for that reason "not just wrong, but grievously or egregiously wrong."[39] It is not a long leap from this view to my proposal: that the Court should not adhere to precedent that is *itself* motivated by invidious race discrimination.

Perhaps the most direct recent support for the view that racist precedents should not be afforded the benefit of stare decisis comes from Justice Gorsuch's concurrence in *United States v. Vaello Madero*.[40] That

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[36] *Id.* at 1410 (Sotomayor, J., concurring).

[37] *Id.* (citing United States v. Fordice, 505 U.S. 717, 729 (1992)).

[38] *Id.* at 1418 (Kavanaugh, J., concurring).

[39] *Id.* at 1414. *See also id.* at 1419 ("Why stick by an erroneous precedent that…tolerates and reinforces a practice that is thoroughly racist in its originis and has continually racially discriminatory effects?").

[40] 142 S. Ct. 1539 (2022).

case involved an anti-discrimination challenge to the federal law barring Puerto Ricans from accessing Supplemental Security Income, notwithstanding their status as U.S. citizens.[41] In a short opinion, the Court applied a "deferential rational basis test" to reject the discrimination challenge. Its holding rested on two per curiam cases that in turn relied on a set of cases from the turn of the Twentieth Century—often referred to collectively as "The Insular Cases"—holding that Puerto Ricans and other residents of American colonies are not entitled to full constitutional protection even though they are U.S. citizens.[42]

Justice Gorsuch concurred, but only because no party had called for the Court to overrule the Insular Cases.[43] As he explained, those cases are deeply infected by racism. Indeed, a central part of the original rationale for declining to apply the Constitution of its own force to Puerto Rico was that its inhabitants were not "of the same race" as other U.S. citizens, but instead part of "alien races" in the newly-acquired American colonial possessions.[44] While Justice Gorsuch described the racism infecting the Insular Cases in some detail, he did not explain exactly *how* it contributed to his conclusion that they should be overruled—a view he also defended by describing their inconsistency with the Constitution's original meaning.[45] Nonetheless, his concurrence suggests support for the proposition that cases lack precedential force where infected by racism.[46]

As these cases show, several Justices on the Supreme Court have already begun to grapple with the question whether a case's racist reasoning—like the racist origins of a law or any other type of governmental enactment—could undermine its ongoing precedential force in light of the Constitution's prohibition against invidious race discrimination.[47]

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[41] *Id.* at 1542.

[42] *See* Harris v. Rosario, 446 U.S. 651, 652 (1980) (per curiam), citing Califano v. Torres, 435 U.S. 1, 3 n.4 (1978) (per curiam), citing, *inter alia*, Balzac v. Porto Rico, 258 U. S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Downes v. Bidwell, 182 U. S. 244 (1901).

[43] United States v. Madero, 142 S. Ct. 1539, 1557 (2022) (Gorsuch, J., concurring).

[44] *Downes*, *supra* note 121, at 287 (Brown, J., concurring); *Downes*, *supra* note 121, at 306 (White, J. concurring) (people of "uncivilized race" could be "unfit" for constitutional protections).

[45] *Madero*, *supra* note 122, at 1554-56.

[46] For an argument that the insular cases should be overruled in part because their reasoning is poor insofar as it is motivated by racism, *see* Adriel I. Cepeda Derieux and Rafael Cox Alomar, *Saying What Everyone Knows To Be True: Why Stare Decisis Is Not An Obstacle To Overruling The* Insular Cases, 53 Colum. Hum. Rts. L. Rev. 721, 747-56 (2022).

[47] In the gender discrimination context, the Court has also at times suggested that cases infected by sexism were themselves exemplars of discrimination and, therefore, lacking in

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As I have shown, my proposal that courts disregard precedents motivated by racial animus finds strong support in existing anti-discrimination law and fits comfortably within modern stare decisis doctrine. In particular, the fact that courts have applied the Constitution's anti-discrimination principles to other types of judicial acts for more than one hundred years strongly suggests that the prohibition on invidious race discrimination should apply to court cases as precedent.

Nonetheless, my proposal faces many potential objections. I turn to those next.

II. PROBLEMS WITH REVERSING RACIST PRECEDENT

The principle I advocate gives rise to a host of objections and questions, both doctrinal and practical. I address several of them here, divided into two general categories: first, challenges to the analogy between court cases and other types of state action subject to challenge under extant anti-discrimination doctrine; and second, conceptual problems concerning how to operationalize the principle, including whether it would require upsetting too much existing caselaw, or too little.

A. Defending the Analogy to Anti-Discrimination Doctrine

Objectors have questioned the strength of the analogy between state action motivated by racial animus and court decisions motivated by such animus on several grounds. A strong version of three related objections along these lines goes something like this: *First*, court decisions themselves almost never draw explicit racial classifications, or indeed any classifications at all. Instead they set forth legal rules that do not themselves

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precedential value. *See, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1691 (2017) (stating that "[u]nder the once entrenched principle of male dominance in marriage, the husband controlled both wife and child. '[D]ominance [of] the husband,' this Court observed in 1915, 'is an ancient principle of our jurisprudence.' Mackenzie v. Hare, 239 U.S. 299, 311 (1915)," and noting in a footnote that this position is no longer the law). *But see* Kerry v. Din, 576 U.S. 86, 96 (2015) (relying on statute and regulations that stripped women of citizenship upon marriage to noncitizens to disprove a historical basis for right to family unity through marriage, even while acknowledging that those provisions "were premised on the derivative citizenship of women, a legacy of the law of coverture") (Scalia, J.), (plurality opinion).

involve racial classification of any kind—whether explicit or implicit.[48] For that reason alone, the analogy to state action does not work. *Second*, beyond that obvious difference lies another: because they do not legislate, judges occupy a unique role in our legal system. That the prohibition on invidious race discrimination applies to other actors tells us little if anything about whether and how to apply it to judicial decisionmaking. *Third*, even if one otherwise accepts the analogy to discriminatory state action as to *state* courts, the principle I advocate here would apply to the *federal* courts, even though the federal Constitution's Equal Protection Clause applies only to states.

While all these objections warrant attention, I find none of them persuasive, as the extensive body of anti-discrimination doctrine provides answers to all of them.

1. *Facially-Neutral Decisions*

While it is true that the vast majority of court decisions announce facially race-neutral legal rules, that fact does not immunize them from scrutiny under the Constitution's anti-discrimination prohibition. Since soon after the passage of the Fourteenth Amendment, courts have applied the prohibition on invidious race discrimination not only to state laws that explicitly classified people based on race, but also to state action that was *motivated* by racial animus, even though it did not involve any explicit racial classification. Thus, even though the vast majority of legal rules whose validity I seek to call into question do not draw explicit racial classifications, they may still run afoul of the Constitution's anti-discrimination prohibition. For example, the rule that courts owe extreme deference to the political branches when they enact federal immigration policy at the border does not itself rest on an explicit racial classification. Neither does the rule that U.S. citizens residing in territories enjoy fewer constitutional rights than those who reside in states. Yet the Constitution's anti-discrimination principles should still prohibit courts from adopting such rules if motivated by racial animus, even if they did not draw explicit racial classifications. Therefore, the facial neutrality of most rules adopted in court decisions would not prevent those decisions from being analyzed for evidence of invidious discriminatory motives.

The Supreme Court first interpreted the Constitution to prohibit state legislation drawing discriminatory racial classifications shortly after the

[48] For example, a case upholding the requirement that a witness produce a white witness in certain kinds of cases on the ground that courts must defer to legislative judgments about evidentiary rules need not itself draw a racial classification, even though the law it upholds does draw such a classification.

passage of the Thirteenth, Fourteenth, and Fifteenth Amendments. Even as it narrowly circumscribed the reach of the Fourteenth Amendment's Privileges or Immunities Clause in the *Slaughterhouse Cases*, the Court described "the main purpose" of the Reconstruction Amendments as ensuring the "protection" of the "African race" "from the oppressions of the white men who had formerly held them in slavery." The *Slaughterhouse Cases* specifically held both that the Privileges or Immunities Clause "protects" all citizens "from the hostile legislation of the states," and that the Equal Protection Clause prohibits state laws that "discriminated with gross injustice and hardship" against "formerly enslaved people as a class."[49]

Soon afterward, the Court made clear that the prohibition it first described in the *Slaughterhouse Cases* applies to facially neutral measures that in practice targeted people based on racial animus. *Yick Wo v. Hopkins* involved a facially-neutral municipal ordinance that regulated laundromats—most of which were owned by Chinese people—in San Francisco.[50] The Board of Supervisors' ordinance required that any laundromat in a building constructed of wood receive consent before operating, ostensibly due to the risk of fires. However, the Board did not provide such consent to laundromats owned by Chinese people, even as those run by others remained free to operate (even if made of wood).[51] Notably, San Francisco's ordinance did not require the Board to assess whether the wood-operated structures were properly protected from the risk of fire (despite that being the ostensible justification for the law). Instead, it simply gave the Board standardless discretion to grant or withhold licenses.[52]

Yick Wo found the ordinance unconstitutional. It began by making clear that the Equal Protection Clause applied to non-citizens, including people who were not Black, holding that its protections "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."[53] It then found that the law, though neutral on its face, had been applied in a manner that constituted unlawful discrimination, because the uncontested evidence regarding how it had been enforced showed it was "directed so exclusively against" Chinese people. "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public

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[49] *Slaughterhouse Cases*, 83 U.S. 36, 37, 81 (1872).

[50] Yick Wo v. Hopkins, 118 U.S. 356, 366-368 (1886).

[51] *Id.*

[52] *Id.* at 368.

[53] *Id.* at 369.

authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."[54] The Court found it had been applied unequally based on an uncontested statistical disparity: the Board of Supervisors had denied laundromat operations permission to all two hundred Chinese petitioners who had sought licenses, while granting them to all eighty "not Chinese subjects" who had applied.[55] The City offered no non-discriminatory account for that gaping statistical hole. "The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified."[56]

Thirty years after *Yick Wo*, the Supreme Court applied the prohibition on invidious race discrimination to strike down a facially neutral state constitutional amendment in *Guinn v. United States*.[57] That case involved two Oklahoma state election officials who had been convicted of denying voting rights to Black citizens in violation of the Fifteenth Amendment. The officials had acted pursuant to an amendment to the Oklahoma Constitution that enacted a literacy test for voting, but then exempted from that test people eligible to vote under the rules that existed prior to the Fifteenth Amendment's passage. The amendment seemed quite obviously designed to circumvent the Fifteenth Amendment's rule permitting Black citizens to vote, but the officials nonetheless asserted that the state constitutional amendment permitted them to deny suffrage to Black citizens who failed the literacy test.[58]

Like the provision at issue in *Yick Wo*, the constitutional amendment in *Guinn* was facially neutral—"it contain[ed] no express words of an exclusion."[59] Nonetheless, the Court concluded that the decisionmakers must have been motivated by a desire to circumvent the Fifteenth Amendment's protections, as it could find no other conceivable purpose for adopting a rule that utilized two different voting rules—one for people who had voted before the Fifteenth Amendment went into effect, and the other for those who had not. As the Court delightfully explained: "[c]ertainly it cannot be said that there was any peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would

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[54] *Id.* at 373-374.
[55] *Id.* at 374.
[56] *Id.*
[57] 238 U.S. 347 (1915).
[58] *Id.* at 355.
[59] *Id.* at 364.

not exist at another and different period unless the Fifteenth Amendment was in view."[60] On that basis, it struck down the law despite it being neutral on its face.

Today, the rule that the Constitution forbids state action motivated by racial animus is most closely associated with *Arlington Heights*. A brief review of that key modern precedent further illustrates the strength of the analogy discussed in this Section. *Arlington Heights* involved a challenge to a zoning decision that prohibited the building of a multi-dwelling housing unit that would likely have resulted in greater integration in the Arlington Heights area (in the suburbs outside of Chicago). The court of appeals had found the zoning decision unconstitutional because it furthered racially segregated housing, despite affirming the district court's finding that the decision had not been motivated by discriminatory animus.[61] The Supreme Court reversed, explaining that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact… Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[62] As the Court explained, the Equal Protection Clause forbids state action where "individual discriminatory purpose was a motivating factor" in the state's decision.[63]

Ultimately, my proposal is simply that we apply that rule to courts.

2. *Court Orders and Other Judicial Acts*

Court decisions are of course made by judges acting in their judicial capacity, rather than state legislatures, zoning boards, or other non-judicial actors. Does that affect whether the anti-discrimination prohibition applies to court decisions?

No, it does not. Courts have consistently applied the prohibition on discriminatory state action to judicial acts, including jury selection and even court orders in some forms, as well as the decisions of other institutions that resemble courts. Although the Constitution's anti-discrimination prohibition was first applied to challenge discriminatory *legislation*, courts quickly extended it to various other forms of state action, from constitutional amendments ratified by voters at one end of the spectrum to the discriminatory acts of individual prosecutors on the other. That the prohibition on racist decisions applies so broadly strongly suggests that it should also apply to judicial decisions that adopted rules for impermissible reasons.

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[60] *Id.* at 365.
[61] *Id.* at 269.
[62] *Arlington Heights*, *supra* note ___, at 264-265.
[63] *Id.* at 266.

The cases reviewed above already illustrate the breadth of state actors to which the prohibition applies. While municipal ordinances as in *Yick Wo* and state constitutional amendments as in *Guinn* are very different from court decisions in many ways, they are also very different from each other, yet the prohibition on state action motivated by racial animus applies equally in these very different contexts.

Thus, it should not surprise us that the prohibition on invidious discrimination has long been applied to judicial acts. Just a few years after the *Slaughterhouse Cases* first construed the Equal Protection Clause, *Strauder v. West Virginia* applied the prohibition on racist decisionmaking to reverse a conviction because the jury pool had excluded Black men under a West Virginia law that explicitly barred non-white men from serving on juries. *Strauder* ruled that law unconstitutional. As the Court explained, "[t]he words of the [Fourteenth] amendment … contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored."[64] While *Strauder* concerned a statute governing jury service, it enforced the legal rule it established by reversing a conviction entered by the court below. In other words, it applied the Equal Protection Clause to regulate judicial conduct.

The Court soon applied the rule from *Strauder* to other judicial acts. Perhaps the most powerful example comes from *Ex Parte Virginia*. In that case, decided in the same term as *Strauder*, the Supreme Court applied its rule to uphold the pre-trial detention of a judge by denying his habeas corpus petition. Federal officials had charged a judge with intentionally excluding Black men from jury service in violation of the Civil Rights Act of 1875, which contained criminal penalties for such discrimination.[65] No state legislation explicitly required the judge to discriminate; rather the Virginia jury selection scheme authorized local judges to construct a pool of men "well qualified to serve as jurors," of "sound judgment," and "free from legal exception."[66] The indictment challenged the judge's discretionary decision to exclude jurors based on their race. The Supreme Court upheld the judge's detention, finding that, if proven, his alleged discriminatory conduct was prohibited by the Civil Rights Act of 1875, and that the Act was duly authorized by the Fourteenth Amendment. As the Court explained, under the Equal Protection Clause "immunity from any such discrimination is one of the equal rights of all persons, and … any withholding it by a State is a denial of the equal protection of the laws,

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[64] *Strauder v. State of W. Virginia*, 100 U.S. 303, 307-308 (1870).

[65] Ex Parte Virginia, 100 U.S. 339, 344 (1879).

[66] To qualify, one had to be a male citizen between age 21 and 60, entitled to vote and hold office in Virginia, and resident of the county. *Id*. at 349 (Field, J., dissenting).

within the meaning of the [Fourteenth] Amendment."[67] By applying the Constitution's prohibition on race discrimination to a judge's official acts, *Ex Parte Virginia* left no doubt that judicial action can constitute unlawful state action motivated by racial animus. "A State acts by its legislative, its executive, or its judicial authorities."[68]

In the years following *Ex Parte Virginia*, the Court reaffirmed the notion that judicial action can itself constitute state action in various contexts. One notable case not involving race discrimination involved the Australian union organizer Harry Bridges, in *Bridges v. California*. After Bridges and other organizers published articles critical of the conduct of the Los Angeles Superior Court in some pending trials, "the petitioners were adjudged guilty and fined for contempt of court by the Superior Court of Los Angeles County."[69] In reversing that decision the Supreme Court took a capacious view of state action, noting that "the state courts asserted and exercised a power to punish petitioners for publishing their views concerning cases not in all respects finally determined," in violation of the First Amendment (as incorporated through the Fourteenth).[70]

The Supreme Court built on *Ex Parte Virginia* and *Bridges* in its unanimous ruling in *Shelley v. Kraemer*,[71] perhaps the most famous case treating court decisions as themselves a form of state action that must comport with anti-discrimination constraints. *Shelley* involved two consolidated cases, both involving Black people who had purchased property from white people in violation of racially-restrictive covenants that prohibited such sales. Third parties—white people holding property subject to the same restrictive covenants—sued to enjoin the sales.[72]

The Court first recognized that restricting property ownership based on race would be unconstitutional if done through legislative action: "restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance."[73] It then held that the same had to be true where the discrimination was accomplished through court orders: "That the action of

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[67] *Id.* at 345.

[68] *Id.* at 347.

[69] 314 U.S. 252, 258 (1941).

[70] *Id.* at 259. It also applied the concept to due process violations, holding that a state's highest court could violate an individual's due process rights if it interpreted state law to deny adequate notice and opportunity to be heard. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930).

[71] 334 U.S. 1 (1948).

[72] In one of the cases the white third party also sought to effectuate the Black owners' eviction. *Id*. at ___.

[73] *Id.* at 11.

state courts and judicial officers in their official capacities *is to be regarded as action of the State* within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."[74] In support, *Shelley* cited *Ex Parte Virginia*, *Bridges*, and other cases treating court orders as state action.

It concluded that court orders are subject to the Constitution's anti-discrimination constraints, stating:

> The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials…. it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.[75]

Shelley, like *Strauder*, *Ex Parte Young* and *Bridges* before it, treated courts as state actors, such that their conduct had to comply with the Fourteenth Amendment, just as statutes, municipal ordinances, and constitutional amendments did. In each of these cases the Court denied legal effect to actions taken by judges—and in *Ex Parte Young* upheld the imprisonment of the judge!—for violating the Fourteenth Amendment's requirement.[76]

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[74] *Id.* at 14 (emphasis added).

[75] *Id.* at 18.

[76] While some scholars (and arguably the Court itself) have treated *Shelley* as sui generis insofar as it appeared to effectively prohibit private contracts on the ground that they would have been unenforceable if entered into by a state actor, its conception of court orders as unconstitutional when they were themselves the cause of discrimination has not been widely cast into doubt. As Laurence Tribe put it, *Shelley*'s approach, "consistently applied, would require individuals to conform their private agreements to constitutional standards whenever individuals might later seek the security of judicial enforcement, as is often the case." Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 Cal. L. Rev. 451, 453 (2007) (quoting Laurence H. Tribe, *American Constitutional Law* 1697 (2d ed. 1988)). It is not obvious to me that this characterization is accurate, as one might instead read *Shelley* to have held that individuals who seek to violate discriminatory private agreements cannot be forced to comply with them through judicial decree. Moreover, the evidence supporting the view that *Shelley* has been limited by the Supreme Court appears to derive primarily from the First Amendment context. Rosen, 95 Cal. L. Rev. at 459-61. Commenting further upon disputes over the continued vitality of this aspect of *Shelley* is beyond the scope of this project.

That the prohibition on invidious discrimination ought to apply to courts finds further support from Supreme Court cases consistently applying it to an expansive set of governmental actors. For example, for more than fifty years, the Court has applied the constitutional prohibition on invidious race discrimination to another distinct class of government actors who bear an obvious resemblance to judges for present purposes: individual prosecutors.

The Court held in *Swain v. Alabama* that a prosecutor's decision to exercise a peremptory strike to excuse a juror based on their race would violate the Equal Protection Clause, even if the prosecutor advanced a facially neutral reason for the strike. *Swain* held that criminal defendants asserting such a challenge would have to show a "systematic" pattern of racially-discriminatory strikes to make out a claim—and an extensive pattern at that, as it upheld a conviction obtained from an all-white jury in a county where no black person had served on a jury in at least a decade, and perhaps *ever*.[77] Twenty years later the Court reversed course on this proof question in *Batson v. Kentucky*,[78] holding that defendants could make a showing of discrimination based on individual strikes, without having to show a pattern. *Batson* also reaffirmed that aspect of *Swain* most relevant for our purpose here: that the Fourteenth Amendment's core anti-discrimination prohibition applied to individual prosecutors' use of strikes. "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."[79] That rule followed logically not only from *Swain*, but also from the rules established one hundred years earlier in *Strauder* and *Ex Parte Virginia*. The Supreme Court has continued to apply *Batson* on a regular basis.[80] In all these cases, that the prosecutor asserted facially neutral reasons for their actions and was clothed in the garb of official authority did not suffice to foreclose application of the Constitution's prohibition on state action motivated by racial animus. If the statement of facially neutral reasons under color of the state's enforcement authority does not suffice to immunize a prosecutor from anti-discrimination scrutiny, it is hard to see why courts should be shielded from it.

Finally, to the extent any concern about applying anti-discrimination doctrine to courts arises from the fact that appellate courts (including the Supreme Court) often operate with multiple decisionmakers rather than

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[77] Swain v. Alabama, 380 U.S. 202, 205, 223 (1965).

[78] 476 U.S. 79 (1986).

[79] *Id.* at 86.

[80] *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2157 (2019); Foster v. Chatman, 578 U.S. 488 (2016).

single actors (as in *Strauder*, *Ex Parte Young*, *Bridges*, *Shelley*, and *Batson*), extant doctrine already recognizes that reviewing courts must sometimes attribute racial animus to multi-member decision making bodies. Courts have applied the prohibition on state action motivated by racial animus to administrative bodies as in *Yick Wo* and *Arlington Heights*, whose quasi-common law decision-making activity arguably bears a strong resemblance to judicial decision-making; legislative bodies as in *Strauder*; voters approving state constitutional amendments as in *Guinn*; and various other large decision-making bodies. And lower courts have applied the prohibition to various other decision-making bodies, including to the Department of Homeland Security's immigration-related decisions, which we discuss in Part III.[81]

3. *Federal Actors*

The last objection grounded in the doctrine that I wish to address concerns how my proposal would apply to federal—as opposed to state—actors. The Equal Protection Clause is located in the Fourteenth Amendment, not the Fifth. It provides "nor shall any *State* … deny to any person within its jurisdiction the equal protection of the laws." (emphasis added).[82] So why does it bind federal actors?

Scholars have postulated various theories to explain this puzzle,[83] but the bottom line is that the Supreme Court has repeatedly held that the prohibition on race discrimination also applies against the federal government through the Due Process Clause of the Fifth Amendment, and that its scope is "precisely the same" as that which governs the states.[84] Given the Supreme Court's clear instructions on this point, there should be no dispute that the Constitution prohibits the federal courts, as part of the federal government, from engaging in invidious race discrimination. If that is so, then the Constitution should also require that decisions originally rendered in violation of that prohibition be denied any precedential force.

The idea that equal protection principles bind the federal government is not new. The Court stated that the Constitution's anti-discrimination prohibition applied to the federal government as early as

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[81] *Ramos v. Wolf*, 975 F. 3d 872 (9th Cir.) (finding *Arlington Heights* applies to analyze claim that Secretary of Homeland Security was motivated by race discrimination in decisions terminating Temporary Protected Status), *vacated upon reh'g en banc*, 59 F.4th 1010 (9th Cir. 2023).

[82] U.S. Const. Amdt. XIV, Section 2.

[83] *See generally* Hon. Jay Bybee, *The Congruent Constitution (Part Two): Reverse Incorporation*, 48 B.Y.U.L. Rev. 303, 338-54 (2022).

[84] *Weinberger v. Wisenfeld*, 420 U.S. 636, 638 n.2 (1975); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (quoting *Weinberger*).

1896, in *Gibson v. Mississippi*.[85] Twenty years later, the Court applied what appeared to be an anti-discrimination prohibition under the Due Process Clause of the Fourteenth Amendment, albeit one also tied to a right to dispose of property without government interference, in *Buchanan v. Warley*.[86] *Buchanan* applied the anti-discrimination prohibition to strike down a municipal ordinance from Louisville, Kentucky, that prohibited white people from selling residential property to black people.

The Supreme Court most clearly held that the prohibition against invidious discrimination applies against the federal government when—in a truly ironic twist—it upheld the curfew and exclusion provisions of the so-called "Japanese-American internment" in *Hirabayashi v. United States*[87] and *Korematsu v. United States*,[88] respectively. I discuss both cases at length below, as they raise important questions for how my proposal might work in practice. For present purposes it suffices to say that *Hirabayashi* held the federal government is prohibited from acting out of racial animus, and that *Korematsu* went further, holding that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and therefore "subject … to the most rigid scrutiny."[89] Both cases clearly established that the federal government cannot engage in action motivated by racial animus—even as they failed in how they applied the principle they announced. Nonetheless, that aspect of both cases remains good law.

The Court reaffirmed the rule that the Fifth Amendment prohibits invidious race discrimination in *Bolling v. Sharpe*,[90] which held that the Fifth Amendment prohibited segregated public schools in the District of Columbia.[91] *Bolling* also affirmed *Korematsu*'s invocation of strict scrutiny, citing it (and *Hirabayashi*) to support the claim that "[c]lassifications based solely upon race must be scrutinized with particular care," adding that such classifications are "constitutionally suspect" because they "are contrary to our traditions."[92]

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[85] 162 U.S. 565, 591 (1896) ("the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race"). It arguably endorsed that proposition even earlier, in *Yick Wo*, insofar as that case describes the prohibition on invidious discrimination as having "universal application." *See supra* text at n. ___.

[86] 245 U.S. 60, 70 (1917).

[87] 320 U.S. 81 (1943).

[88] 323 U.S. 214 (1944).

[89] *Id.* at 216.

[90] 347 U.S. 497 (1954).

[91] The Court issued *Bolling* on the same day it issued *Brown v. Board of Education*, 347 U.S. 483 (1954).

[92] *Id.* at 499. The first case it cited to establish that "tradition" was decided in 1896.

Twenty years later, in *Weinberger v. Wisenfeld* the Court stated that the content of the anti-discrimination protection in the Fifth Amendment is "precisely the same" as that contained in the Fourteenth Amendment.[93] And twenty years after *Weinberger*, the Court reaffirmed that rule again in *Adarand Constructors*, this time in the context of a challenge to an affirmative action program to aid minority government contractors.[94]

* * *

As this review of anti-discrimination caselaw from various contexts reveals, courts have consistently approached invidious race discrimination claims by asking some version of a single question: was the relevant government actor motivated by racial animus? They have looked at a range of evidence in assessing that question. If the evidence reveals that racial animus motivated the governmental action, then the Court has found that action unconstitutional unless the government can show that the same decision would have been reached if free of racial animus. Courts have applied that same basic rule regardless of whether the challenged action explicitly drew a racial classification or instead was facially-neutral, irrespective of the nature of the government actors involved—whether legislators, voters enacting state constitutional amendments, prosecutors, or judges—and to federal as well as state action. Given the breadth of these applications, extant doctrine strongly supports the application of the prohibition to federal court decisions as well.

B. Conceptual Problems

Even if one accepts the basic doctrinal argument advanced thus far—that the prohibition on invidious race discrimination constitutes a free-standing basis on which to deny precedential effect to court cases infected by racial animus—there remain thorny questions about how to operationalize it. This should not surprise us; rooting out the effects of systemic racism deeply embedded in our nation's legal system is rarely straightforward. Here I consider two conceptual difficulties. The first arises

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[93] *Weinberger v. Wisenfeld*, 420 U.S. 636, 638 n.2 (1975).

[94] While the view that the constraint on the federal government should be the *same* as that applied to the states (and therefore subject to the same level of scrutiny) has recently been challenged by Justice Thomas, *see infra* n. ___—despite his having voted to apply it against the federal government in *Adarand*—there appears to be no dispute on the current Court that the Fifth Amendment prohibits federal government officials from engaging in invidious race discrimination. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) ("I agree with the majority's conclusion that strict scrutiny applies to *all* government classifications based on race") (emphasis in original).

from how we might apply the principle I advocate to old cases decided during eras where explicit racism was widespread, and the second concerns how we might apply it to more recent cases that rely on that earlier, racist authority.

1. Cases from Eras of Widespread Explicit Racism

How should we treat the many cases decided during eras of widespread and explicit racism among judges? Whether or not one believes that racism remains operative in present-day judicial decisionmaking, one need not be a historian to know that views that today are seen as racist were widespread and generally accepted by large swaths of the public, including members of the judiciary, at least until the 1950's. Indeed, prior to the untimely death of Justice Vinson (and appointment of Earl Warren as Chief Justice), the Supreme Court was famously poised to reaffirm *Plessy v. Ferguson* and uphold racial segregation in public schools in *Brown v. Board of Education*.[95] If every case decided by judges who held racist views is no longer good law under our proposal, it may seem at first glance that scarcely any case issued prior to 1950—in any area of law—could survive.

While some might view this as a welcome implication of the argument I have advanced, I do not. Nor do I believe it follows. The Constitution prohibits invidious race discrimination in all forms of state action, but courts invalidate governmental action only where that racism was a "motivating factor" in the decision.[96] If a judge who happens to harbor racist views issues a decision, but there is no evidence that racism played a role *in that decision*, the fact that the author held racist views would not suffice to justify disregarding the case as precedent. This is not to say that a judge's racist views expressed outside the four corners of a decision would never be relevant. On the contrary, as described above, modern anti-discrimination doctrine makes a broad swath of information relevant when assessing a decision for signs of discriminatory intent,

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[95] While there were no doubt many reasons for why the Justices were initially inclined to uphold *Plessy*, evidence suggests at least some of them were based on continued support for segregation as an institution on racist grounds. For example, Justice Reed apparently argued that "'Negroes have not thoroughly assimilated,' and that segregation was 'for the benefit of both' blacks and whites." *See* Cass R. Sunstein, *Did Brown Matter?*, New Yorker (Apr. 25, 2004). The federal courts' official website recounts one version of this history. See History - Brown v. Board of Education Re-enactment, available at https://www.uscourts.gov/educational-resources/educational-activities/history-brown-v-board-education-re-enactment (stating that, prior to Justice Vinson's replacement by Chief Justice Warren, "most [of the justices] wanted to reverse Plessy and declare segregation in public schools to be unconstitutional").

[96] *See supra* ___, citing *Arlington Heights*, 429 U.S. at 266.

including statements by members of the relevant decision-making body, irregularities in the procedure that produced the decision, and other factors. Thus, a decision that is, for example, poorly reasoned, inconsistent with prior precedent, and has a disparate impact on a group against whom a judge harbored racist animus (as evidenced by their other writings) could for those reasons be found by a later court to have been motivated by racism, thus stripping the prior decision of precedential force—even if there were no "smoking gun" evidence of racism in the text of the decision itself.

Moreover, to say a case has been "reversed" or "overruled" is not necessarily to say that every aspect of it has been rejected in its entirety. Most cases can be cited for multiple propositions.[97] Even where a case clearly manifests racist intent, perhaps through explicitly racist language, some propositions advanced in the case may have no connection to that racist motivation, and therefore remain good law. Put another way, a case that clearly manifests racist intent may still provide authority for a proposition it advances—so long as the court would have adopted that proposition had it been free of racist intent.

My view on this issue follows from the generally-accepted anti-discrimination doctrine described in Parts I and II.A. Recall that, under modern anti-discrimination caselaw, a court identifying a legislative enactment motivated by racial animus does not automatically strike it down, but instead asks whether "the same decision would have resulted even had the impermissible purpose not been considered."[98] To take an extreme example, a case that begins its legal analysis with the standard of review—stating, for example, that questions of law are reviewed de novo—should remain good authority for that proposition even if its description of the facts and resolution of other legal questions makes clear that the decision was motivated by racism. In that situation, I believe the case should still be good law for its description of the standard of review, as that aspect of the court's holding does not rest on the racist reasoning that follows.

I recognize that others may have a different view on this issue. One could see decisions infected by racism as comparable to decisions contaminated by fundamental procedural defects that go to the heart of the integrity of the decision-making process itself—as in a case where a judge has accepted a bribe. In that situation, one might expect courts that later learned of the defect to treat the decision as though it were completely wiped off the books in all respects.

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[97] As Jamal Greene has explained as to the cases he describes as the "anticanon," "these cases stand for a variety of often mutually inconsistent propositions." Greene, *The Anticanon*, 125 Harv. L. Rev. 380, 435 (2011).

[98] *See supra*, citing Arlington Heights, 429 U.S. at 270 n. 21.

However, that is not my view. Precisely because racism was so widespread in our country's legal culture for so long, we should expect that many legal rules we find acceptable—and even excellent—may have their origin in cases written by judges who were racists. Many of the original Framers enslaved people, and undoubtedly held deeply racist views. Yet the same document that protected the horrific institution of slavery also gave us the writ of habeas corpus, the First Amendment, and many other crucial safeguards for liberty.

So too there may be good legal rules that arise from decisions motivated by racism. To treat all cases written by racist judges as comprehensively flawed is to ignore the extent to which racism pervaded the thinking—and therefore decision-making—of so many actors in our legal culture, including many actors who produced good legal rules.[99]

We can test these ideas against a powerful, vexing example I alluded to earlier: the cases about the mass incarceration of Americans of Japanese descent during World War II. The first case unambiguously applying the Constitution's anti-discrimination prohibition against the federal government is *Hirabayashi*. It contains soaring language clearly describing the evils of race discrimination:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. [citing, *inter alia*, *Yick Wo*].[100]

But *Hirabayashi* went on to hold that that prohibition did not bar Congress, "in time of war and of threatened invasion" from "plac[ing] citizens of one ancestry in a different category from others."[101] It upheld that distinction based on an evaluation of "facts and circumstances with

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[99] Notwithstanding my general view that all cases written by racist judges should not for that reason be rejected, I could understand why some scholars might view certain bodies of doctrine in a more categorical way, perhaps where racism pervades nearly every significant aspect of a decision because the case itself is about slavery or Native American genocide. Although he does not ultimately advocate this view for cases involving slavery, Justin Simard suggests the basic rationale for it when he states that "White supremacy was a basic underlying presumption of every slave case." Simard, *Citing Slavery*, 72 Stan. L. Rev. at 112. *See also id*. at 120 n.250 ("Slavery, however, is unique."). Nonetheless, he ultimately does not argue that all cases involving slavery are no longer good law for any proposition they endorsed, but rather only that they should be presumptively invalid. *See id*. at 119-22.

[100] *Id.* at 100.

[101] *Id.*

respect to the American citizens of Japanese ancestry residing on the Pacific Coast."[102]

The Court extended *Hirabayashi* in *Korematsu v. United States*, which upheld the "exclusion" from their homes of individuals subject to the curfew order upheld in *Hirabayashi*.[103] In practice, "exclusion" meant incarceration in large prison camps, although the Court avoided addressing the validity of the mass incarceration itself.[104]

Like *Hirabayashi*, *Korematsu* unambiguously condemned state action motivated by racial animus as unconstitutional, even in the context of military decisions by the federal government. "Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[105] "Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice."[106] And, as mentioned previously, it went beyond *Hirabayashi* in not just condemning racism, but also establishing the modern strict scrutiny rule for racial classifications: "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and therefore "subject … to the most rigid scrutiny."[107] For decades afterward, the Supreme Court continued to cite *Korematsu* for the proposition that all racial classifications warrant strict scrutiny.[108]

Despite explicitly condemning racism, both *Hirabayashi* and *Korematsu* plainly contain evidence that racial animus motivated their decisions. Among other examples, *Hirabayashi* treated the fact that American children of Japanese descent had gone to schools to learn Japanese and traveled to Japan as reasons to treat them as national security threats.[109] It also provided no coherent explanation for why the same concerns did not apply to Americans of German and Italian descent, or even non-citizens from those nations, even as it acknowledged that applying a curfew to "all citizens within the military area" would be unreasonable.[110] *Korematsu* arguably went further, as it directly identified Americans of Japanese descent with the Japanese state solely by virtue of their race, stating "Korematsu was not excluded from the Military Area because of

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[102] *Id.* at 101.

[103] *Korematsu*, *supra* note 50, at 218.

[104] *Id.* at 221-222.

[105] *Id.* at 216.

[106] *Id.* at 223.

[107] *Id.* at 216.

[108] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 214 (1995); Regents of Univ. of Cal. v. Bakke, 438 U.S. 264, 291 (1978); Loving v. Virginia, 388 U.S. 1, 11 (1967).

[109] Hirabayashi v. United States, 320 U.S. 81, 97 (1943).

[110] *Id.* at 95.

hostility to him or his race. He was excluded because we are at war with the Japanese Empire."[111] Similarly, it treated "evidence of disloyalty on the part of some [Japanese Americans]" as a valid justification for action against all others of the same race.[112] Beyond this evidence from the text of the opinions themselves, scholars have documented in great detail how the facts on which the Court relied in *Hirabayashi* and *Korematsu* were also filled with expressions of racism, and themselves rested on sources—in particular the report of General DeWitt—that manifested obvious racial animus against people of Japanese descent.[113]

Given this complex and troubling history, how would the principle I advocate apply to *Hirabayashi* and *Korematsu*? Most obviously, could a court embrace my proposal, but use it to *reject* application of strict scrutiny to federal racial classifications on the ground that the decision adopting that rule was itself motivated by racial animus?

In my view, such a decision would be misguided. As I described above, even where a case clearly manifests racist intent—even through racist reasoning as in *Korematsu*—some propositions advanced in the case may have no connection to that racist motivation, and therefore remain good law. Just as a case that clearly manifests racist intent may still provide authority for its description of the standard of review, so too may *Korematsu* continue to provide support for the proposition that federal racial classifications should be subject to strict scrutiny. Indeed, the promising rhetoric in *Korematsu* provides reason to believe the Court would have adopted that same rule had it been free of racist intent; in contrast, I see no comparable evidence that if the *Korematsu* court had *not* harbored anti-Japanese sentiment, it would have been *less* likely to adopt the strict scrutiny test.[114]

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[111] Korematsu v. United States, 323 U.S. 214, 222 (1944).

[112] *Id.* at 224.

[113] As Jerry Kang has put it, "[t]o the Court, drawing general inferences of potential disloyalty based solely on ethnicity was not an act of racial prejudice—it was rational common sense." Jerry Kang, *Denying Prejudice—Internment, Redress, Denial*, 51 UCLA L. Rev. 933, 954 (2004). Kang argues that one need not believe the Supreme Court Justices were "evil racists," or people who harbored naked animus, in order to accept that "racial schemas deeply influenced their rationalization of the cases, in ways that substantially harmed Japanese Americans." *Id*. at 958. Jamal Greene takes a less charitable view, describing *Korematsu* as having "approved racial profiling," "based on little more than naked racism and associated hokum." Greene, *The Anticanon*, 125 Harv. L. Rev. 380, 423 (2011).

[114] The Court strongly suggested agreement with this aspect of my argument in its recent decision in *Students for Fair Admissions*. After noting that the first case to establish strict scrutiny for racial classifications was in fact *Korematsu*, the Court stated that its failure in that context demonstrates "that '[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.'" (citing *Adarand*

Although the Supreme Court has now overruled *Korematsu* in *Trump v. Hawaii*,[115] it remains useful to think about how different that decision might have looked had the Court adopted my approach. *Hawaii* did not overrule *Korematsu* on the ground that the decision had been motivated by racial animus. *Hawaii* employed lofty rhetoric—and something akin to an apology—in stating that "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.'"[116] Nonetheless, the only rationale it provided for overruling *Korematsu* was that "[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority." This suggests legal error (and perhaps racism on the part of the Executive Branch), but not judicial decision-making infected by racial animus. And, of course, the Court has never overruled *Hirabayashi*.[117]

In contrast, overruling cases like *Korematsu* and *Hirabayashi* on the grounds proposed here—that their racist reasoning renders them inconsistent with the Constitution's prohibition on invidious race discrimination—would allow courts to call into question the cases that relied on them in subsequent decades. Ironically, *Trump* relied on one of those cases even as it overruled *Korematsu*.[118]

2. "Second Generation" Cases

As the thorny questions arising from *Korematsu* suggest, accepting that courts should reverse racist precedent does not tell us how to deal with

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Constructors, Inc. v. *Peña*, 515 U. S. 200, 236 (1995)) (internal quotation marks omitted).

Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 2023 U.S. LEXIS 2791, *35

[115] 138 S. Ct. 2392, 2423 (2018).

[116] *Id.* at 2423 (citing *Korematsu*, *supra* note 63, at 248 (Jackson, J., dissenting)).

[117] Because *Trump* stated that *Korematsu* "has nothing to do with this case" shortly before overruling it, the legal effect of the overrule remains uncertain. *Compare* Jamal Greene, *Is* Korematsu *Good Law*?, 128 Yale L.J. Forum 629 (2019) (suggesting the effect of the overrule remains unclear) *with* Aziz Z. Huq, *Article II and Antidiscrimination Norms*, 118 MICH. L. REV. 47, 76 (2019) (suggesting *Korematsu* has been unambiguously overruled). *Hirabayashi* continues to be cited in Supreme Court opinions. Justice Thomas cited it just last term for the proposition that the Fifth Amendment contains an anti-discrimination prohibition (albeit one allegedly weaker than that contained in the Fourteenth Amendment) in his concurrence in *United States v. Vaello Madero*, 142 S. Ct. 1539, 1544 (2022) (Thomas, J., concurring). Perhaps more surprisingly, he also cited it in support of a general assertion of broad deference to Executive Branch factual determinations—presumably including the racist determinations credited in *Hirabayashi* itself—in his dissent in *Hamdi v. Rumsfeld*, 542 U.S. 507, 584 (2004) (Thomas, J., dissenting).

[118] *See infra* ___.

the many cases that rest in some way on cases infected by racist reasoning. It's one thing to reject cases—often decided more than a hundred years ago—that clearly manifest racist intent, but something else entirely *also* to reject the cases *citing* those cases, the cases citing *those* cases, and so on. In a common law system of constitutional adjudication such as ours, many cases will ultimately rest—somewhere back in the chain of precedent—on cases decided at a time when explicitly racist views were the norm. Yet the rules originating in decisions driven by animus may often have been affirmed and applied repeatedly in subsequent cases that contain no explicit sign of racism in their reasoning.

This is a tricky issue, but there are multiple conceptually coherent ways to solve what I call the "second-generation cases" problem. Existing anti-discrimination law already gives us tools we can use to distinguish between, on the one hand, cases that are too infected by the racism in prior precedent to remain good law, and, on the other, cases whose core reasoning does not rest enough on such prior cases as to strip them of precedential force. While it will not always be easy to discern on which side of the line any given case falls, the difficulty of the task is not sufficient to justify abandoning this important project.

To help analyze this thorny problem, imagine a hypothetical rule where the first case establishing it was plainly motivated by racism, but a subsequent, second-generation case reaffirmed the original rule without employing any racist reasoning of its own. Instead, the second-generation case merely cites the first case as governing authority before repeating and reaffirming the original description of the rule. If the first case is no longer good law under our approach, what about the second?

In the following section, I consider three potential responses to this question. First, one might believe that so long as the later case does not itself contain evidence of racial animus, then it provides adequate support for the rule, notwithstanding its citation to the prior case.

Second, one might believe that the later case should survive so long as it provides race-neutral reasons for the rule endorsed in the prior case, such that we can say with sufficient certainty that the later case would have adopted the rule even as a matter of first impression.

Third, one might believe that the later case must not just advance race-neutral reasons, but also *acknowledge* that the prior case was motivated by racial animus and explicitly choose to re-adopt the rule from the prior case notwithstanding its racist origins.

As I explain below, the first of these views is contrary to normal rules of statutory interpretation and insufficient under anti-discrimination principles. However, both the second and third are arguably consistent with anti-discrimination law from other contexts, and one need not choose

between them to see how my proposal would require the reconsideration of large bodies of precedent.

a. Racism-Free Reaffirmation Is Enough

First, one might believe that second-generation cases remain good law when cited for the original rule so long as they are themselves free of racist reasoning. On this view, a second-generation case constitutes sufficient non-discriminatory precedent to support the original rule because it does not itself manifest any racist intent—it adopted the original rule out of respect for stare decisis, not due to racist motivation.

This may have been the view Justice Scalia expressed during a brief discussion of this issue at the oral argument in *Zadvydas v. Davis*.[119] After the government attorney pointed to *Fong Yue Ting*—a case from the Chinese Exclusion Era—to support a claim of absolute Congressional power "to expel aliens" that buttressed his reliance on a case from the 1950's, Justice Breyer responded that "*Fong Yue Ting*, if I'm right, was a case where the Court was considering a law that said you had to have a credible, white witness for a Chinese person to remain in the United States… so I'm not sure about the strength of that precedent." But Justice Scalia disagreed, stating "I think the case is in point, because…[w]hat you're appealing to is the Government's power to keep out of the United States people who have no right to be in the United States period."[120]

The *en banc* Fifth Circuit appeared to share Justice Scalia's view in a recent case where it considered the somewhat analogous issue of how to analyze race discrimination challenges to statutes that re-enact provisions originally enacted with discriminatory intent. As the Fifth Circuit concluded when upholding the constitutionality of a felony disenfranchisement provision (over vigorous dissents), "the most recent enactment is the one that must be evaluated under the Equal Protection Clause."[121]

There are several very serious problems with this position. First, it does not accord with how courts assess analogous questions in the context of statutes. A problem similar to the one at issue here frequently arises

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[119] *Zadvydas v. Davis*, 533 U.S. 678 (2001).

[120] I discuss *Fong Yue Ting* and the cases that have relied on it in Part III, *infra*.

[121] *Harness v. Watson*, 47 F. 4th 296, 307 (2022) (*en banc*); cert. denied, ___ U.S. ___. *See also* ___ U.S. ___ (Jackson, J.) (dissenting from denial of certiorari). *See also* United States v. Barcenas-Rumualdo, --- F.3d --- (5th Cir. Nov. 18, 2022) (citing *Harness* for proposition that "[n]ewly binding circuit precedent requires us to 'look to the most recent enactment of the challenged provision,' in determining its constitutionality"). For a sustained treatment of how courts have analyzed the reenactment of statutes originally passed with discriminatory intent, *see* W. Kerrel Murray, *Discriminatory Taint*, 135 Harv. L. Rev. 1190 (2022).

when courts have to interpret statutory provisions that were originally enacted by one legislative body and then later reenacted by another—often as part of a recodification of a large set of laws. Unsurprisingly, the default rule is not that reenactments wipe the slate clean when trying to assess the purpose underlying the provision at issue. On the contrary, absent evidence that the reenacting legislature intended to change the law's purpose, courts assume that the original enactment's intent remains operative. As Justice Scalia put it in his treatise on statutory interpretation, because a reenactment with only minor changes in wording "does not result from legislative reconsideration of the substance of codified statutes," "new language does not amend prior enactments unless it does so clearly."[122]

For similar reasons, it would be odd to treat a second-generation case that adopts the rule of a prior case out of respect for precedent as somehow erasing the motivation behind the original decision. If the second case did not engage in a "reconsideration of the substance" of the rule—i.e., disregard the precedential effect of the prior case and weigh the reasons for and against the rule anew—then we should treat it as motivated by the same concerns that supported the rule when it was first adopted. As Eric Fish put it when describing the rationale for this view in the context of legislative reenactments, to ask why the reenacting legislature chose to maintain the original law "would be like asking why King James wrote the Book of Genesis."[123]

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[122]Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 257 (2012). That view is in accord with a venerable treatise of statutory interpretation, as well cases going back more than a century. As Sutherland's treatise put it: "[p]rovisions of the original act which are reenacted in the amendatory act, either in the same or equivalent words, are a continuation of the original law." 1A Sutherland Statutory Construction § 22:36 (7th ed., 2021). Courts have long applied more or less the same rule. *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 (1912) (statutory revision that "placed portions of what was originally a single section in two separated sections" did not alter scope and purpose of original statute because "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed"); *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 505 (1936) ("[E]ven in the face of a repealing clause, circumstances may justify the conclusion that a later act repeating provisions of an earlier one is a continuation, rather than an abrogation and reenactment, of the earlier act"); *Finley*, 490 U.S. at 554 (per Scalia, J.) (finding revision to Federal Tort Claims Act did not broaden scope of statute to extend jurisdiction to non-federal defendants because "[w]e have found no suggestion, much less a clear expression [under Anderson], that the minor rewording at issue here imported a substantive change").

[123] *See* Eric S. Fish, *Race, History, and Immigration Crimes*, 107 Iowa L. Rev. 1051, 1104 (2022). For those not familiar with the metaphor, the point is that King James did not write Genesis at all, he only translated it (or, to be more precise, ordered others to do so). King James VI of England ordered a translation of the whole Bible into English, and that translation became what is now widely known as the "King James Version" of the Bible.

Accordingly, (and in opposition to the view expressed by Justice Scalia during the *Zadvydas* argument, though consistent with the view expressed in his book), the Supreme Court has struck down legislative re-enactments as discriminatory where they carried on too much of the original discriminatory enactment without having taken steps to purge it of discriminatory taint. For example, in *Lane v. Wilson*,[124] the Court struck down a facially neutral voter registration requirement that, when read against the backdrop of a prior enactment that discriminated against Black voters, had the effect of perpetuating pre-existing voter disenfranchisement. The Supreme Court found the provision unconstitutional because the new law "partakes too much of the infirmity of" its explicitly discriminatory predecessor, even though it cited no evidence of discriminatory intent on the part of the reenacting legislature.[125] For similar reasons, a case that cites a prior, racially-motivated case as authority for a rule without providing any independent justification for that rule "partakes too much of the infirmity of" the original case to be considered free of racist motivation.

While I disagree with the "racism-free reaffirmation is enough" point of view for the reasons just described, it bears mention that even adopting this limited approach to the problem of racist precedent would have some consciousness-racism benefits. Requiring lawyers and judges to consider whether the cases they cite are themselves motivated by racism, even without tracing the lineage of their progeny in second-generation cases, would force legal actors to grapple with the racism embedded in our legal system, albeit only by encouraging them to "solve" the problem by citing cases lower down the decision tree. It thus would serve some consciousness-raising function, though it would accomplish little else.

b. New Reasons Suffice

A second, middle position, would treat the second-generation case as good law only if it offers sufficient separate, non-racist reasons to endorse the original rule, apart from its reliance on the original, racist case. This position again borrows from the Court's treatment of an analogous problem in modern anti-discrimination law. As described above, under current doctrine a court does not automatically annul governmental action even where the court has found evidence of racist intent. The government

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The Book of Genesis is the first book of the Bible. It was written by unknown authors about two thousand years earlier. When we think of authorial intention in this context, we think at least in part (and most likely in large part) of the original authors, and not in the first instance of those who translated it for King James.

[124] 307 U.S. 268 (1939).

[125] *Id.* at 275.

can still prevail if it can show that "the same decision would have resulted even had the impermissible purpose not been considered."[126] And, even if it cannot make that showing, the legislature can still pass the legislation anew, so long as it relies on permissible reasons.

This principle is clearly illustrated in *Hunter v. Underwood*, which unanimously struck down a provision of the Alabama Constitution that disenfranchised people convicted of "any crime … involving moral turpitude." That provision was enacted at a constitutional convention in 1901. The convention president stated in his opening address that the provision's purpose was "to establish white supremacy in this State." In response to Alabama's argument that there were good reasons to enact the provision today, the Supreme Court stated:

> Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*.[127]

The "new reasons suffice" approach applies this principle from *Hunter*) to racist precedent, asking whether a second-generation case affirming a prior, racist case provided sufficient race-neutral reasons to support its holding at the time it issued its ruling. If it did, then the rule remains good law notwithstanding the fact that it relies in some part on a prior case motivated by racism. If, instead, the second-generation case's endorsement of the rule at issue rested primarily on the original case, then the later case is also no longer good law.

One might object that answering the counter-factual question this approach requires—how would the second-generation case have come out if it had not relied on the prior case?—would be impossible to answer, or at least extremely difficult, in many instances. However, the counter-factual query required here is not harder than similar counter-factual questions that courts must answer in other contexts. For example, the law often asks courts to assess whether their own prior cases were merely applying precedent or instead making new law. In retroactivity analysis under *Teague v. Lane*,[128] courts routinely asked whether a case announced a "new rule" of criminal procedure or instead merely applied a prior one—because cases announcing

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[126] Village of Arlington Heights v. Met. Hous. Dev. Corp., 429 U.S. 252, 270 n. 21 (1977).

[127] Hunter v. Underwood, 471 U.S. 222, 233 (1985).

[128] 489 U.S. 288 (1989).

new rules do not apply retroactively, whereas cases merely extending old ones do.[129] Similarly, when the Supreme Court issues a new decision overturning lower court precedent, lower courts routinely must assess whether other cases about related (but not identical) issues rest enough on grounds distinct from the overturned precedent to remain good law.[130]

A second objection to the "new reasons suffice" approach is that it permits courts to continue relying upon rules that originated in racism without ever confronting, or even acknowledging, their racist origins. How can we expect to rid our law of structural racism if our doctrine does not even require courts to identify and acknowledge those areas where it has left its mark? There are hints of support for this objection in the Court's treatment of the analogous problem in the context of legislative reenactments in *Ramos v. Louisiana*.[131] In explaining why the reenactment of the rule permitting non-unanimous juries did not purge the taint of racism that motivated the original law, the Court suggested that the later-acting (or second-generation) legislature had acted unconstitutionally in leaving the rule's "uncomfortable past unexamined."[132] This passage is brief, and somewhat cryptic, but its formulation recurs elsewhere. In her concurring opinion in *Ramos*, Justice Sotomayor found the later enactments insufficient to cure the constitutional violation because they did not "actually confront [the provision's] tawdry past."[133] And Justice Alito used a similar formulation in arguing that a provision originally enacted to discriminate against Catholics had not been purged of its discriminatory taint when later reenacted without any "examin[ation]" of its "uncomfortable past."[134]

Thus, treating new reasons as sufficient to retain rules originally enacted based on racist intent would leave large swaths of our law's racist origins unexamined, even though it would also be a substantial improvement on current practice.

c. The Court Must Both Acknowledge Past Racism And Provide Non-Racist Reasons

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[129] *Compare* Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (declining to apply jury unanimity requirement for state court convictions retroactively because it was a "new rule") *with* Penry v. Lynaugh, 492 U.S. 302 (1989) (finding constitutional requirement that jury be permitted to consider any mitigating evidence at penalty phase of capital case was not a "new rule").

[130] *See, e.g.*, Miller v. Gammie, 335 F. 3d 889 (9th Cir. 2003) (*en banc*) (prior circuit precedent not binding where "clearly irreconcilable" with intervening higher authority).

[131] 140 S. Ct 1390 (2020).

[132] *Id.* at 1401 n. 44.

[133] *Id.* at 1410 (Sotomayor, J., concurring).

[134] Espinoza v. Montana Dept. of Revenue, 140 S. Ct. 2246, 2273 (2020).

A third approach holds that a court, like a legislature, must consciously confront the racism of a prior case when considering whether to adopt that case's rule for non-racist reasons This view, which stands at the opposite end of the spectrum from the first, holds that the second-generation case is never binding precedent in support of the original proposition except where it actually confronts the racist origin of the rule by explicitly acknowledging it, before then adopting it for non-racist reasons. On this theory, so long as the second-generation case relies on the precedential weight of the original case without acknowledging its racist origins, the subsequent case necessarily also lacks precedential weight because its reliance remains infected with the same error (insofar as the first case is no longer good law). While a court could of course re-adopt the original rule for non-racist reasons, it would have to do so based on a new assessment of the rule's merits *and* on an acknowledgment and repudiation of its racist origins. Only such acknowledgment would ensure that the original, infected precedent does not add even a thumb on the scale in favor of the original rule.

This approach also has some support in anti-discrimination doctrine, as it would enact the Supreme Court's rule—announced in the desegregation context, though honored more in word rather than deed—that the Constitution imposes an "affirmative duty to take whatever steps might be necessary to … [create a] system in which racial discrimination would be eliminated *root and branch*."[135] And, as discussed previously , it finds some support in the recent decision of the Court in *Ramos* and concurring opinions in both *Ramos* and *Espinoza*.[136]

As an approach to eradicating racism within our jurisprudence, this view has much to recommend it. However, we must also acknowledge that the Supreme Court has almost never been willing to admit that animus played a role in its own cases.[137] As a result, this approach would leave courts free to adopt many new rules, which over time could lead to a radical reshaping of the legal landscape in many areas of law.

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[135] Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15 (1971) (citing Green v. County Sch. Bd., 391 U.S. 430 (1968)) (emphasis added).

[136] *See supra* at ___ (citing *Ramos*, ___; *Espinoza*, ___)

[137] As noted above, it failed to do so even in *Korematsu*. *Lawrence v. Texas* offers a truly rare exception, insofar as it criticized a prior decision for having "demean[ed]" individuals who sought sexual intimacy with partners of the same sex. *Lawrence v. Texas*, 539 U.S. 558, 567, 575 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986).

While I think the first view described above clearly wrong, I can see strong arguments both for and against the second and the third. However, either of them would allow us to begin the urgent task of eradicating racist precedent from our law. I illustrate how that approach would work in practice Part III.

III. THE PROPOSAL APPLIED: CHINESE EXCLUSION CASES

The discussion thus far has been largely abstract. This section attempts to concretize it by applying my proposed approach in the immigration law context. Immigration jurisprudence provides fertile ground for generating examples of how my proposal might work, as much of the caselaw on which contemporary constitutional immigration law has been built originates in a set of seminal cases upholding the Chinese Exclusion laws in the 1880s and 1890s. I focus on two of the most important for purposes of modern immigration law: *Chae Chan Ping v. United States*[138] and *Fong Yue Ting v. United States*.[139] The reasoning of those cases rests in significant part on racism. The discrimination is not subtle; the opinions are filled with bigoted descriptions of Chinese people and the illusory threat they pose to the (white, European) nation. Given the widespread anti-Chinese sentiment of the time, this is hardly surprising.[140]

Perhaps more surprising is that these cases continue to be treated as good law. The Supreme Court and lower federal courts have continued to

[138] 130 U.S. 581, 606 (1889).

[139] 149 U.S. 698 (1893).

[140] For discussion of that sentiment, including a detailed account of one particularly striking instance of anti-Chinese ethnic cleansing from the West Coast, *see* Kevin Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 Indiana L.J. 1455, 1461, 1464-68 (2022)

rely on them,[141] as has the federal government in litigation.[142] Indeed, several of the doctrines developed during that era remain foundational to some of the most hotly-contested disputes surrounding the rights of immigrants to this day, including the constitutional law governing the limits on the federal government's power to admit or exclude people based on race, and the constitutional law governing the rights of immigrants incarcerated by Immigration and Customs Enforcement (ICE) in what is often known as immigration or ICE "detention".

As we shall see, the federal courts' continued reliance on racist cases from the Chinese Exclusion era and doctrines derived from them contravenes the Constitution's prohibition on state action motivated by racial animus. Assessing the implications of rejecting those cases is not straightforward, but doing so would fundamentally change the landscape of constitutional law in this context.

A. Racism in the Chinese Exclusion Cases

Scholars have written extensively on both the racist motivations underlying the Chinese Exclusion laws and the racist reasoning employed

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[141] Supreme Court opinions—whether majorities, concurrences, or dissents—have cited *Fong Yue Ting* at least seven times in the last 20 years, and dozens of times before then. *See, e.g.*, DHS v. Thuraissigiam, 140 S. Ct. 1959, 1980 (2020) (citing *Fong Yue Ting* for proposition that Congress has plenary power to set admission requirements); Sessions v. Dimaya, 138 S. Ct. 1204, 1244 n.3, 1247 (2018) (Thomas, J., dissenting) (citing *Fong Yue Ting* for proposition that deportation was not historically viewed as punishment). They have cited *Chae Chan Ping* less—only twice since 2000. *See* Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (citing "The Chinese Exclusion Case," i.e. *Chae Chan Ping*, for proposition that there are some constitutional limits on congressional authority in immigration context); *id*. at 703 (Scalia, J., dissenting) (citing it for proposition that "an inadmissible alien at the border has no right to be in the United States"). Nevertheless it remains good law, and was cited nearly 20 times in circuit court cases during the same period, including ubiquitously in lower court litigation involving the Muslim Ban. *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 961 F.3d 635, 649 (4th Cir. 2020).

[142] For example, in a remarkable passage of the government's brief in a recent Ninth Circuit appeal involving an anti-discrimination challenge to a criminal immigration statute, the government cited *Fong Yue Ting* to support its argument that deferential rational basis review rather than *Arlington Heights* should govern. *See* Response Brief for Appellee United States, *Rodrigues Barios v. United States*, No. 21-50145, at 18-19 (9th Cir.) ("…Rodrigues-Barios argues that his challenge to the statute was based on race … and therefore the court was required to engage in an *Arlington Heights* analysis…[H]owever, courts apply rational basis because … the power to exclude or expel is 'an inherent and inalienable right of every sovereign and independent nation.' *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893). It is this consideration—not the specific nature the allegations brought by any individual defendant—that dictates the appropriate standard of review"). The government won, albeit on other grounds. *See United States v. Carrillo-Lopez*, ____ F.3d ___ (9th Cir. 2023).

by the Supreme Court in upholding them. As Hiroshi Motomura has explained, "[t]he U.S. Supreme Court rejected constitutional challenges to Chinese exclusion laws with reasoning premised largely on Anglo-Saxon racial superiority."[143] Because other scholars have explored the racist motivations underlying those cases in great detail, and because it cannot be seriously disputed that several of them rest on bigotry, I focus only on two of them—*Chae Chan Ping v. United States*[144] and *Fong Yue Ting v. United States*[145]—arguably the most important cases of the Chinese Exclusion era for modern immigration law. Both cases plainly rest on racist reasoning, and to provide enough context to allow us to consider what it would mean to reject them because they were motivated by racist intent.

1. Chae Chan Ping

Chae Chan Ping concerned the validity of one of several laws banning Chinese immigration enacted at the end of the nineteenth century. In 1882 and 1884, Congress banned most Chinese immigration, but it permitted Chinese people already living in the United States to visit China and return to the United States if they first obtained a certificate recognizing their residence in the U.S. However, in 1888 Congress amended the statute to retroactively invalidate those certificates.

Although there is literally no mention of Mr. Chae Chan Ping in the Supreme Court's opinion, he had lived in the United States for more than a decade when he left—certificate in hand—to visit his family in China. He was on his way back by ship when Congress passed the law that barred his return. 20,000 other Chinese immigrants who had traveled abroad with their certificates were similarly stranded.[146]

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[143]Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 Cornell L Rev 457, 461-62 (2020). *See generally* Lucy Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (1995); Hiroshi Motomura, *Americans in Waiting*, 115-19 (2006). For an exploration of the racism in *Chae Chan Ping* and *Fong Yue Ting* that argues they should be overruled even without the adoption of a racism exception to stare decisis, *see* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA Law Rev 1, 54-73 (1998). For further analysis of the historical underpinnings of Chinese Excusion and, ultimately, *Chae Chan Ping* itself, *see* Kevin Johnson, Systemic Racism in the U.S. Immigration Laws, 97 Ind. L.J. 1455, 1478 (2022). Dean Johnson argues that reversing *Chae Chan Ping* is a prerequisite to any "meaningful effort … to end systemic racial injustice in the U.S. immigration laws."

[144] 130 U.S. 581, 606 (1889).

[145] 149 U.S. 598 (1893).

[146] For an account of *Chae Chan Ping*'s life and related aspects of the case's history, *see* Motomura, Americans in Waiting, at 15.

Upon Mr. Ping's arrival, authorities denied him entry and effectively imprisoned him on the ship. He challenged their refusal to admit him by habeas corpus. His case ultimately reached the Supreme Court, where he advanced two primary sets of arguments—that the 1888 exclusion statute violated a pre-existing treaty with China, and that it violated his constitutional rights to due process, and against bills of attainder and ex post facto legislation because he had relied on the government's promise that the certificate would permit him to return.

The Court ruled against him. In reaching that result, *Chae Chan Ping*'s reasoning rested heavily on the government's asserted interest in upholding Chinese Exclusion policy—even in contravention of the treaty and Mr. Ping's manifest reliance on the law in place at the time he traveled abroad. What was that government interest? The Court saw it as the need to protect national security. There was no evidence that Mr. Ping or other Chinese immigrants harbored ill will towards the United States, but the Court nonetheless analogized the government's interest in stopping Chinese immigration to its interest in repelling a hostile invasion. I quote the crucial passage at some length here, to illustrate exactly how the Court's key holding is infected by racism:

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us… If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary.[147]

[147] *Chae Chan Ping*, *supra* note 132, at 606.

Even a casual reader will note this passage fairly drips with bigotry. "[V]ast hordes" of Chinese people "crowding in upon us," present "the same" threat as an invasion, even though "there are no actual hostilities." The Court's racism apparently left it unable to see that the Constitution does not define "us" to exclude Chinese people or recognize any inherent danger in people who allegedly "will not assimilate."[148]

However, under the principle advanced thus far, it does not suffice merely to catalogue the racism; we must also identify whether the Court's racist reasoning was crucial to any holding for which *Chae Chan Ping* remains relevant. Only propositions supported by racist reasoning should be stripped of precedential force.

Several foundational principles of immigration law originating in *Chae Chan Ping* rest on the decision's racist reasoning. As the government argued in the litigation about the Temporary Protected Status program which I described at the outset of this article, it remains hornbook constitutional immigration law that the government is entitled to extreme deference in the face of challenges to at least some of its immigration policies, including those governing the admission of non-citizens. That deference originates in *Chae Chan Ping*'s assertion that the government's authority to enact exclusion policies derives from its constitutional power to "give security against foreign aggression," which the Court found applicable in the immigration context because of its xenophobic fear of Chinese immigrants.

Were *Chae Chan Ping*'s deference rule treated as a legislative enactment announced today, with the court's reasoning supplying the operative legislative history, it obviously would not survive review under the modern doctrine prohibiting invidious race discrimination. While there are no doubt hard cases where modern courts might struggle to determine whether older decisions were infected by racial animus, *Chae Chan Ping* would not be among them. To the extent *Chae Chan Ping* stands for the proposition that the federal government has unconstrained (or virtually unconstrained) power to set the rules governing admission free of constitutional constraints, and, relatedly, that its determination as to the necessity of those rules "is conclusive upon the judiciary," those propositions rest on reasoning motivated by racism.

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[148]This was not the only racism manifest in the opinion. *Chae Chan Ping* also advanced another rationale for Congress's action: that Chinese people are more inclined to lie under oath than others, which it treated as justification for ignoring their documents establishing a right to reside here. *Fong Yue Ting* would rely on that racist reasoning just a few years later in upholding the infamous "one white witness" rule. *Fong Yue Ting*, 149 U.S. at 729-30 (citing *Chae Chan Ping*, 130 U.S. at 606).

2. Fong Yue Ting

If *Chae Chan Ping* is the most important Chinese Exclusion case related to the government's exclusion authority, *Fong Yue Ting* has long been understood to establish comparable power with respect to deportation. *Fong Yue Ting* established that deportation is not punishment, but rather a mere civil sanction.—an issue that had been hotly contested almost a century earlier, shortly after the nation's founding (as Justice Field's dissent in *Fong Yue Ting* discusses).

Fong Yue Ting also concerned a provision of the Chinese Exclusion laws. However, this law authorized not just exclusion, but also deportation. The particular provision the Court considered authorized the arrest and deportation of any Chinese immigrant in the United States unless they had registered with the government. To register, Chinese immigrants needed proof that they had been in the country prior to the 1892 immigration ban. While those who failed to register were subject to arrest, their deportation was not automatic. Chinese immigrants who failed to register could escape deportation if they could produce "at least one credible white witness" who would testify that they had resided here prior to the ban.[149]

As it reached the Supreme Court, *Fong Yue Ting* involved the consolidated cases of three Chinese immigrants (Fong Yue Ting, Wong Quan, and Lee Joe), all of whom claimed to have lived here prior to the law's enactment, but none of whom had produced a white witness. As a result, they all had been ordered deported. The third petitioner, Lee Joe, had a hearing where he produced a witness—whom the government did not controvert—stating that Lee Joe had resided in the country before the ban. But the lower courts deemed that testimony insufficient because it was "by a Chinese witness only."[150]

The Supreme Court upheld all three deportation orders, finding lawful the provision requiring Chinese people to present "one white witness" in order to prove they had resided here prior to the passage of the deportation law.[151] While laws privileging the testimony of certain types of witnesses were not unheard-of during this time period,[152] it is hard to imagine a clearer manifestation of racism in law than one that presumes testimony to be worthless based on the race of the witness. *Fong Yue Ting*

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[149] *Fong Yue Ting*, *supra* note 133, at 727.

[150] *Id.* at 732.

[151] *Id.* at 729.

[152] In particular, laws privileging the testimony of ministers were not unusual. *See* Motomura, Americans in Waiting, 24-34. For a detailed account of the political and social context surrounding both *Chae Chan Ping* and *Fong Yue Ting*, *see* Salyer, Laws Harsh as Tigers, *supra*___.

leaned into that racist reasoning, reaching its conclusion in part by relying on *Chae Chan Ping*'s determination that Congress was entitled to credit the perception that Chinese people were more likely to lie under oath than white people. As the Court stated:

> The reason for requiring a Chinese alien, claiming the privilege of remaining in the United States, to prove the fact of his residence here, at the time of the passage of the act, "by at least one credible white witness," may have been the experience of Congress, as mentioned by Mr. Justice Field in Chae Chan Ping's case, that the enforcement of former acts, under which the testimony of Chinese persons was admitted to prove similar facts, "was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath."[153]

Like the passage on which it relies from *Chae Chan Ping* itself, this part of the Court's opinion reeks of racism. The Court cites no evidence when crediting the claim that "many" Chinese witnesses had a "suspicious nature" and "loose" conceptions of the oath's obligations. It simply believed Chinese people were more likely to lie.

The Court also defended the provision's race-specific witness requirement by comparing it to longstanding laws requiring naturalization applicants to present citizens as witnesses.

> [The white witness] requirement, not allowing such a fact to be proved solely by the testimony of aliens in a like situation, or of the same race, is quite analogous to the provision, which has existed for seventy-seven years in the naturalization laws, by which aliens applying for naturalization must prove their residence within the limits and under the jurisdiction of the United States, for five years next preceding, 'by the oath or affirmation of citizens of the United States.'[154]

This argument is not quite as far-fetched as it might initially appear, insofar as the naturalization laws in effect at this time permitted only white and Black people to naturalize.[155] Nonetheless, the argument clearly rests on racist reasoning by conflating Chinese *racial* identity with *alienage* status,

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[153] *Id.* at 729-30 (referencing *Chae Chan Ping*, *supra* note 132).
[154] *Id.* at 730.
[155] *See* Naturalization Act of 1870, Pub. L. No. 42-254, 16 Stat. 254.

as the Fourteenth Amendment had already established that all "*persons born"* in the United States were citizens, regardless of their race.[156]

For these and other reasons, no one today could seriously dispute that *Fong Yue Ting* is motivated by racism. But determining the implication of that conclusion is trickier in this case than for *Chae Chan Ping*. *Fong Yue Ting* establishes several different rules that remain relevant in modern immigration law, and, as I explained in Part I, *supra*, acknowledging that the decision was motivated by racism does not tell us which, if any, propositions should no longer be good law.

It seems clear today that even though *Fong Yue Ting* upheld the one white witness rule and has not been overruled, no one would point to it as authority to support a law discrediting witness testimony based on race. Recognizing even a narrow version of the rule I advocate here would allow us to explain *why* it could not support such a proposal.

But *Fong Yue Ting* also stands for at least two other propositions—both of which remain relevant to modern immigration law. *First*, courts have relied on *Fong Yue Ting* to support a general deference to federal immigration policies not only with respect to rules governing who may gain admission to the United States as established by *Chae Chan Ping* but also with respect to who can be deported. After describing *Chae Chan Ping* at length and quoting its passages justifying deference to admissions policies, *Fong Yue Ting* asserts:

> The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, *rests upon the same grounds*, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country. … This is clearly affirmed in dispatches referred to by the court in *Chae Chan Ping*'s case.[157]

It is the allegedly "unqualified" nature of this governmental authority—arising from the power to expel hostile invaders—to which *Chae Chan Ping* pointed in support of its holding that courts had to afford the government substantial deference when reviewing exclusion policies.

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[156] U.S. CONST., AMDT. XIV. The Court would validate that rule as to Americans of Chinese descent just a few years later, in United States v. Wong Kim Ark, 169 U.S. 649 (1898).

[157] *Id.* at 707 (emphasis added).

Although this statement does not contain any explicitly racist language, its close to connection to *Chae Chan Ping*'s reasoning strongly suggests that it is motivated by racism for the same reasons.[158]

Second, *Fong Yue Ting* remains relevant for the proposition that deportation is not punishment.[159] That is an extraordinarily important legal rule. Were it otherwise, deportation cases would have to proceed in criminal courts, with at least most if not all of the attendant procedural protections we generally associate with criminal cases. Yet *Fong Yue Ting*'s reasoning on that point is extremely weak. It cites various international law sources establishing that the government has the power to expel, none of which explain why exercising that power would not constitute punishment. It also utterly fails to grapple with the very serious disagreement on the question that arose eighty years earlier, in the controversy over the Alien and Sedition Acts.[160] These omissions are particularly striking because they are addressed at some length in Justice Field's dissent. He clearly distinguished between "the object" of deportation "being constitutional," which he believed it was, and "the lawfulness of the procedure provided for its accomplishment," which he thought clearly inadequate absent the protections afforded in criminal trials.[161] And he specifically referenced the dispute surrounding the "sedition act."

Of course, bad arguments are not necessarily racist—though the absence of other plausible reasons can buttress the inference of discriminatory motive. The portion of the Court's opinion holding that deportation is not punishment is not inflected with racist statements or obviously racist reasoning the way that other portions are. And although this part of the Court's discussion does cite *Chae Chan Ping*, it does so to point out that the Court had already credited one of the (inapposite) international law sources noted above.[162]

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[158] The argument is also conceptually weak and supported by dubious authority, both of which provide some further support for the view that it was driven by racial animus. Even if one accepts that there are security justifications for giving the government wide latitude to exclude people arriving here, it hardly follows that the *same* rationale applies to people who have lived here for years. *Fong Yue Ting* also cited no caselaw to support the claim, and the secondary authorities on which it relied did not support the proposition, as explained *infra*.

[159] *Id.* at 709; *see, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (citing *Fong Yue Ting*).

[160] As Justice Gorsuch has explained, the portion of the acts that applied to non-citizens from countries against which we were *not* at war "was widely condemned as unconstitutional by Madison and many others. It also went unenforced, may have cost the Federalist Party its existence, and lapsed a mere two years after its enactment." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229-1230 (2018) (Gorsuch, J., concurring).

[161] *Id.* at 754 (Field, J., dissenting).

[162] *Id.* at 707.

Perhaps the strongest argument for seeing *Fong Yue Ting*'s holding that deportation is not punishment as motivated by racism comes from its failure to grapple with the dissent's insistence that international law had long distinguished between non-citizens from "hostile" nations and those from "friendly" ones. On this point Justice Field quoted James Madison's condemnation of the Alien and Sedition Acts:

> With respect to alien enemies, no doubt has been intimated as to the Federal authority over them; the Constitution having expressly delegated to Congress the power to declare war against any nation, and, of course, to treat it and all its members as enemies. With respect to aliens who are not enemies, but members of nations in peace and amity with the United States, the power assumed by the act of Congress is denied to be constitutional; and it is accordingly against this act that the protest of the general assembly is expressly and exclusively directed.

In other words, Madison believed the federal government's power over non-citizens from countries against which the U.S. was *not* at war was no greater than its power over citizens, as the Constitution had not granted Congress any such power.[163] The Court never explicitly answers this point, but the simplest—and perhaps only—way to explain its failure to distinguish between friendly and hostile non-citizens may be to credit its adoption of *Chae Chan Ping*'s racist characterization of Chinese immigrants as inherently hostile simply by virtue of their race. But this inference too is not obvious, as the author of the Court's opinion in *Chae Chan Ping* was Justice Field, the author of the dissent in *Fong Yue Ting*.[164]

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[163] *Id.* at 748. Justice Field quoted with approval Madison's view that even allegedly dangerous non-citizens from friendly countries (i.e., countries against which the U.S. was not at war) could not be deported as national security threats, though they could be punished for crimes, as could any citizen. "'It is said, further, that, by the law and practice of nations, aliens may be removed, at discretion, for offences against the law of nations; that Congress is authorized to define and punish such offences; and that to be dangerous to the peace of society is, in aliens, one of those offences. The distinction between alien enemies and alien friends is a clear and conclusive answer to this argument. Alien enemies are under the law of nations, and liable to be punished for offences against it. Alien friends, except in the single case of public ministers, are under the municipal law, and must be tried and punished according to that law only.'" *Id*. at 749-50.

[164] For an attempt to reconcile the guiding ideology behind all the Court's Chinese Exclusion cases—including those that ruled for Chinese immigrants and Chinese-American citizens as well as those that ruled against them, *see* Aziz Rana, *The Two Faces of American Freedom*, ___ (2010).

Ultimately, there are compelling arguments both for and against the view that the Court was motivated by racism in adopting the rule establishing deportation as a civil penalty rather than a criminal punishment.

* * *

As this discussion reveals, the task of determining which holdings from these Chinese Exclusion cases rest on their racist motivations is not simple. For each case and contested proposition within it, we must define precisely what proposition we seek to examine, look closely at what the court offered in support of it, and then investigate for the kinds of evidence that modern anti-discrimination doctrine requires courts to consider.

As the next section shows, while that work can be arduous, it remains vitally important. The conclusion that *Chae Chan Ping* and *Fong Yue Ting* lack precedential force for at least some important propositions for which they continue to be cited would help resolve some of the most controversial disputes in modern immigration law. I examine two of them next.

B. The Stare Decisis Exception for Racist Cases Applied: Can the Government Discriminate on the Basis of Race in Admissions?

Remarkably, it remains unclear whether the Constitution permits the federal government to engage in race discrimination when deciding whom to allow into the country—whether programmatically through the policies governing issuance of visas and green cards, or through the arguably-more nimble systems of asylum adjudication, parole, and more informal forms of entry.[165]

1. Racism in Immigration Admissions Today

The question is not merely academic. On the contrary, it has been central to disputes surrounding highly controversial immigration policies over the last several decades. For example, the federal government has long treated mostly white Cubans fleeing political persecution very differently from mostly-black Haitians doing the same. That stark disparity rose to prominent public view in the summer of 2021, when the Biden Administration summarily expelled approximately 15,000 Haitian asylum

[165] Congress has banned race discrimination in the issuance of immigrant visas. 8 U.S.C. 1152(a)(1). However, the Supreme Court interpreted that provision narrowly to apply only to immigrants (as opposed to non-immigrants), and only to visa issuance—rather than the right to enter. *Trump v. Hawaii*, 138 S. Ct. 2392, 2414-15 (2018).

seekers without permitting any of them to seek asylum only a few months after it had deemed Haiti unsafe to accept the return of its nationals by designating it for Temporary Protected Status.[166] In contrast, thousands of Cuban asylum seekers coming to the United States during roughly the same period were permitted to access the asylum system.[167] Whether or not this disparity could be challenged as motivated by invidious race discrimination remains an open question, as the Supreme Court explicitly declined to resolve it in *Jean v. Nelson*.[168] Indeed, in Florida, where many Haitians fleeing by boat first land on U.S. soil, the answer is "no." The Eleventh Circuit has held that the Constitution does *not* prohibit invidious race discrimination in the admissions context.[169] That ambiguity is entirely the result of the continuing legacy of *Chae Chan Ping*.

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[166] See Nick Miroff, Biden Administration grants protected status to thousands of Haitian migrants, Washington Post (May 22, 2001) (available at https://www.washingtonpost.com/national/biden-haitians-temporary-protected-status/2021/05/22/ae7fe5a4-bb44-11eb-bb84-6b92dedcd8ed_story.html) and Adam Isacson, A tragic milestone, 20,000th migrant deported to Haiti since Biden inauguration, Washington Office on Latin America (Feb. 17, 2022) (stating that 17,900 of the Haitians expelled under the Biden Administration were sent between September 19, 2021 and February 17, 2022) (available at https://www.wola.org/analysis/a-tragic-milestone-20000th-migrant-deported-to-haiti-since-biden-inauguration/). *See generally* Plaintiffs' Complaint, *Haitian Bridge Alliance v. Biden*, No. 21-2217 (D.D.C.).

[167] *See* PBS News Hour, *Court ruling extends Title 42, continuing unequal treatment for asylum-seekers* (May 23, 2022) (describing how Cubans, Venezuelans, and Colombians were largely permitted to seek asylum, whereas Hondurans, Guatemalans, Salvadorans, and Mexicans were not).

[168] 472 U.S. 846 (1985).

[169] The Eleventh Circuit sometimes characterizes the race discrimination claim it rejected in *Jean* as one involving a distinction based on nationality, without explicitly referencing race, even though Jean clearly stated that plaintiffs made a race discrimination claim. *Compare Cuban American Bar Ass'n v. Christopher*, 43 F.3d 1412 (11th Cir. 1995) (cert. denied) ("We agree with our *en banc* court's statement in *Jean v. Nelson*…that 'there is little question that the Executive has the power to draw distinctions among aliens based on nationality.'") *with Jean v. Nelson*, 727 F.2d 957, 963 (11th Cir. 1984) (*en banc*) (characterizing plaintiffs' claim as asserting "they cannot be denied parole, pending a determination of their admissibility, because of their race and/or national origin."). Although the plaintiffs in *Jean* had unambiguously pled a race discrimination claim, the distinction between race and nationality discrimination can be slippery, particularly in the immigration context. For more on how immigration law plays a role in constructing racial categories, thereby contributing to the difficulty of distinguishing between race, national origin, and nationality discrimination, *see generally* Jaya Ramji-Nogales, *This Border Called My Skin*, in Race and National Security (Matiangai Sirleaf, ed., Oxford Univ. Press, forthcoming 2023); Jennifer Chacón, *Immigration and Race*, *in* The Oxford Handbook of Race and Law in the United States (Devon Carbado, Emily Houh & Khiara M. Bridges eds., 2022) (online publication); Ian Haney López, White by Law: The Legal Construction of Race (2006). I do not address questions concerning the distinction between race and national origin directly,

Nor is that the only very recent example of apparently blatant race discrimination in the immigration laws. In August 2021, the Biden Administration withdrew American military forces from Afghanistan, and simultaneously evacuated tens of thousands of Afghan citizens allied with the U.S. government. However, it left behind thousands of other American allies and others at risk of harm from the victorious Taliban government. Shortly afterward, the Administration announced the creation of a parole program through which people from Afghanistan could apply for humanitarian protection in the United States. To apply, each individual seeking protection had to pay a substantial fee and send a completed paper application establishing that they would face harm from the Taliban government. While a small number of people obtained parole this way in the first few weeks of the program, processing effectively ceased in November 2021. In total, although the government took in approximately $20 million in fees under the program, it processed only about 8,000 of the more than 60,000 applications it received, and granted *123* of them.[170]

A few months after the U.S. pulled out of Afghanistan, Russia invaded Ukraine. In response, thousands (and eventually millions) of Ukrainians fled the country. Many of them flew to Mexico in order to attempt to enter the United States. The contrast in treatment between, on one hand, the (Black) Haitians and Middle Eastern, mostly-Muslim Afghans, and, on the other, the white, mostly-Christian Ukrainians was truly extraordinary. Within weeks of the start of the Russian invasion, the Department of Homeland Security issued a memo essentially exempting Ukrainians from the expulsion policy that had been employed against the Haitians.[171] Shortly thereafter, the government adopted an innovative new program for Ukrainians seeking parole into the United States. That program permits private sponsorship by any interested individuals—including friends, relatives, churches, NGO's, or virtually anyone else—who volunteered to sponsor Ukrainian individuals or families. Applications for sponsorship under the program are submitted online and without a fee;

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as the issue here is not whether the Constitution prohibits all distinctions based on nationality in the immigration laws, but rather whether the Constitution prohibits nationality distinctions *motivated by racial animus*. The latter would be clearly true but for *Chae Chan Ping* and its progeny.

[170] Najib Aminy & Dhruv Mehrotra, *The US Has Approved Only 123 Afghan Humanitarian Parole Applications in the Last Year*, REVEAL (Aug. 19, 2022), https://revealnews.org/article/the-us-has-approved-only-123-afghan-humanitarian-parole-applications-in-the-last-year/ .

[171] Camilo Montoya-Galvez, *Ukrainians Can Be Considered for Asylum at U.S. Border, Despite Pandemic Restrictions*, CBS NEWS (Mar. 17, 2022, 4:58 PM), https://www.cbsnews.com/news/ukraine-asylum-us-mexico-border/.

permit whole families to obtain parole through a single application; and require no showing of specific harm from the Russian military (as opposed to the generalized threat of violence from the conflict).[172] Within the first three months of its operation, the U.S. government had paroled more than 70,000 Ukrainians into the United States through this program. That number would eventually exceed 100,000.[173]

The process and criteria established for obtaining parole from Ukraine were far more generous than those for Afghanistan. Moreover, even after both were up and running, the Government did not apply the Ukraine program's innovations to the Afghan parole program. Afghans seeking parole were never permitted to utilize private sponsorships; avoid paper applications (at a cost of $575 per applicant); file for their whole family (and thereby avoid the risk of family separation); or obtain parole based on a generalized risk of harm rather than individualized risk from the Taliban. Instead, in September 2022, the Administration simply shut the program down entirely.

Although there were some lawsuits challenging various aspects of the mistreatment suffered by both Haitians in Del Rio and Afghans seeking protection in the U.S., no lawsuit alleged side-by-side disparate treatment with Cubans or Ukrainians on the basis of race.[174] Partly because of *Chae Chan Ping*, it remains unclear whether the Constitution imposes any anti-discrimination constraints on the federal government when determining whom to admit into the United States, and what processes to require of applicants when making that determination.

2. Chae Chan Ping*'s Extreme Deference Rule and the Muslim Ban*

Trump v. Hawaii, the Supreme Court's most recent decision analyzing a claim of discrimination in admissions, demonstrates how the government's ability to engage in invidious race discrimination at the border remains unsettled in light of *Chae Chan Ping*. *Hawaii* upheld the former President's so-called Muslim Ban—a policy given that moniker because during his campaign for office, former President Trump repeatedly called for "a total and complete shutdown on Muslims coming into the United States."[175] After he won office, the Trump Administration banned

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[172] *See* UNITING FOR UKRAINE, https://www.dhs.gov/ukraine (last visited Jan. 26, 2023).

[173] Camilo Montoya-Galvez, *U.S. Admits 100,000 Ukrainians in 5 Months, Fulfilling Biden Pledge*, CBS NEWS (July 29, 2022, 6:26 PM), https://www.cbsnews.com/news/us-admits-100000-ukrainians-in-5-months-fulfilling-biden-pledge/.

[174] *See* Complaint, *Haitian Bridge Alliance*, *supra*; *see also* Complaint, *Roe v. Mayorkas*, No. 22-10808 (D. Mass.).

[175] *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018).

most migration—both short- and long-term—from the Muslim-majority countries whose people were coming to the United States in the largest numbers.[176] This prompted an extraordinary mobilization of protesters, as well as multiple rounds of litigation that eventually reached the Supreme Court.[177]

The primary constitutional challenge to the Muslim Ban focused on the discriminatory intent underlying it, which plaintiffs argued rendered it unconstitutional. While that claim was framed as religious discrimination under the First Amendment, as a doctrinal matter the intentional discrimination analysis is not materially different from that involving race discrimination.[178] That framing also mirrored the extent to which identification as Muslim has become akin to a racial category in the United States since September 11, 2001. As Jaya Ramji-Nogales puts its, "[i]n contemporary American society, however, non-Christian religions have become intertwined with racial traits that denote 'foreignness.'"[179]

In the Supreme Court, the government scarcely attempted to defend the ban under normal principles of anti-discrimination law. Its primary argument was that the ban was not justiciable at all. Even the government's argument under what it called "domestic" anti-discrimination doctrine leaned heavily on the need for deference in the face of "the Executive's reasons underlying its foreign-affairs and national-security judgments," for which it cited an immigration case.[180]

The Court ruled for the government. Largely in keeping with the government's brief, it did not analyze the ban under normal anti-discrimination doctrine. Instead, it held that it could not look beyond the face of the Presidential Proclamation enacting the Muslim Ban to discern discriminatory intent because it was bound to accord extreme deference to

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[176] *See* No Muslim Ban Ever, June 2019 [report on file with author]

[177] *See* Protests erupt at airports nationwide over immigration action (CBS News, Jan. 29, 2017).

[178] *See* Emp't Div. v. Smith, 494 U.S. 872, 886 n.3 (1990) ("Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion.") (citations omitted).

[179] *See* Ramji-Nogales, *This Border Called My Skin*, at 3. Scholars have also argued that Muslims should be treated as akin to a racial group for purposes of anti-discrimination law, at least in some contexts. *See* Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 Calif. L. Rev. 1259, 1278 (2004) (describing "gross overbreadth" of the "racial dimension" of the ostensibly religious classification of Muslims); *see also* Khaled A. Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116 Colum. L. Rev. Online 108, 111 (2016).

[180] *See* Brief for the Petitioners, *Trump v Hawaii*: Nos. 16-1436 and 16-1540, at 71-72 (citing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (available at 16-1436-ts.pdf (scotusblog.com)).

the government's proffered justification for the program, on the grounds that "the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments *largely immune from judicial control*.'"[181]

Every case *Hawaii* relied upon for this crucial proposition—that the Court was required to afford extreme deference to the government's stated justification for the Muslim Ban—ultimately rests on the racist Chinese Exclusion cases described above. The Court's primary citation for the deference proposition was *Fiallo v. Bell*.[182] That case repeated the "largely immune from judicial control," language in the course of applying deferential review to uphold a provision of the immigration laws that discriminated on the basis of gender and so-called "legitimacy"—whether a child is born out of wedlock. In support of deferential review, *Fiallo* directly cited *Chae Chan Ping* and *Fong Yue Ting*.[183]

The second case the Court cited for the proposition was *Harisiades v. Shaughnessy*,[184] and it too relies on *Fong Yue Ting*. In the course of upholding a statute that retroactively made membership in the Communist Party a ground for deportation, *Harisiades* repeated the same deference assertion: that immigration policies are "largely immune" from judicial review.[185] Although *Harisiades* did not specifically cite *Fong Yue Ting* when it made that statement, it cited cases that themselves cite *Fong Yue Ting* for that claim, as well as other cases motivated by race discrimination.

Harisiades went on to rely heavily on another aspect of *Fong Yue Ting*, regarding whether deportation is punishment. This holding rested on the notion that because non-citizens' entitlement to remain in the United States "is a matter of permission and tolerance," rather than "right,"[186] the government retains largely unchecked "power to terminate its hospitality" by deporting them—i.e., because deportation involves merely rescinding a prior act of grace, rather than a punishment.[187]

Finally with respect to *Harisiades*, it is clear that it cannot serve as an independent basis for preserving the rule from *Fong Yue Ting* because *Harisiades*' Due Process analysis relies on still more racist precedent. It defended the deportation orders it upheld as consistent with the Due Process

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[181] *Trump*, *supra* note 162, at 2418 (emphasis added).

[182] 430 U.S. 787, 792 (1977).

[183] *Id.* at 792.

[184] 342 U.S. 580, 588-89 (1952).

[185] *Id.* at 589. *Harisiades* offers weaker support for the deference rule than *Fiallo*, insofar as it acknowledged that "these restraints upon the judiciary…do not control today's decision." *Id*. at 589.

[186] *Id.* at 586-87.

[187] *Id.*; *see also id.* at n. 11 (citing *Fong Yue Ting*); *id.* at n. 14 (citing *Fong Yue Ting* for the proposition that deportation is a "power inherent in every sovereign state").

Clause on the ground that even some citizens had to submit to "expulsion from their homes and places of business" in the name of national security, citing *Korematsu* and *Hirabayashi*.[188]

The next case *Hawaii* cited in favor of extreme deference was *Mathews v. Diaz*.[189] That case upheld a statute providing certain medical insurance benefits to lawful permanent residents who have lived here for five years, but not for other non-citizens. It too granted deference on the ground that federal immigration policies are "largely immune from judicial inquiry,"[190] but the first citation for this proposition was *Harisiades*, and the third *Fong Yue Ting*.

The other case *Mathews* cited was *Kleindienst v. Mandel*,[191] which is also the last case *Hawaii* cited directly to support its view that it should apply extreme deference.[192] *Kleindienst* too rests heavily on the same precedent infected by racism. In the key passage in which it explained why the citizen plaintiffs' First Amendment claim did not warrant standard First Amendment scrutiny in the admissions context, the Court relied principally on the same two racist cases of the Chinese Exclusion era: *Chae Chan Ping* and *Fong Yue Ting*.[193]

To summarize, the *Hawaii* court's constitutional holding—that the Trump Administration's Muslim Ban was entitled to deferential review in the face of a discrimination challenge—rests in substantial part on precedent built on *Chae Chan Ping* and *Fong Yue Ting*. Because both of those cases were themselves motivated by racial animus when announcing

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[188] *Id*. Recall that *Trump v. Hawaii* overruled *Korematsu*—even as it simultaneously relied on *Harisiades*. Had it overruled *Korematsu* on the ground that the decision was motivated by racial animus, that would have raised questions about the validity of *Harisiades* as well. However, the Court overruled *Korematsu* on far narrower grounds. *See supra* ___. *Fiallo* cited two other cases (besides *Harisiades*) in the same string cite. One of them—*Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)—also repeats the same "largely immune from judicial control" language, and again cites *Chae Chan Ping* and *Fong Yue Ting* in support. The other--*Lem Moon Sing*—is another Chinese Exclusion-era case that relies extensively on *Fong Yue Ting*, and also cites *Chae Chan Ping*.

[189] 426 U.S. 67 (1976).

[190] *Id.* at 81 n. 17.

[191] 408 U.S. 753 (1972). *Trump* actually cited *Kleindienst* not to justify extreme deference, but instead for a related but somewhat different proposition—that where citizens assert constitutional claims arising from the government's decision to exclude noncitizens with whom the citizens seek to associate, the Court should apply a "circumscribed judicial inquiry" focused on whether "the Executive gave a facially legitimate and bona fide reason for its action." *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018) (quoting *Kleindienst*). In the end, *Trump* applied what it called "rational basis review," which the Court appeared to see as slightly more searching than the standard of review in *Kleindienst*. *Trump*, at 2120.

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[193] *Kleindeinst, supra* not 179, at 765.

the propositions for which they are cited, *Hawaii* should not have treated those propositions as binding.

The following diagram illustrates in summary form the relationship I have described:

Chae Chan Ping ("The Chinese Exclusion Case"), 130 U.S. 581, 606 (1889):

"To…give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from ***vast hordes*** of its people ***crowding in upon us***."

Kleindienst v. Mandel, 408 U.S. 753, 765-766 (1972):

"In accord with ancient principles of the international law of nation-states, the Court in [*Chae Chan Ping*]…held…that the power to exclude aliens is 'inherent in sovereignty…a power to be exercised exclusively by the political branches of government'…Since that time, the Court's general reaffirmations of this principles have been legion."

Trump v. Hawaii, 138 S. Ct. 2392, 2402 (2018):

"Although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen. That review is limited to whether the Executive gives a 'facially legitimate and bona fide' reason for its action." (citing *Kleindienst*).

3. *Analyzing Discriminatory Admissions Without* Chae Chan Ping

Rejecting *Chae Chan Ping* and *Fong Yue Ting* because they are racist precedents would radically change how courts analyze discrimination claims in the admissions context. At bottom, such a change would requires courts to apply the Constitution's anti-discrimination principles in the immigration context just as they do everywhere else. When we analyze the question whether the government can engage in invidious race discrimination in the immigrant admissions process without relying on racist doctrine, it becomes clear not only that the federal government has no authority to act based on invidious motives when deciding whom to admit at the border, but also that it is entitled to no special deference when courts consider how to assess such claims.

Because the Court's longstanding rule requiring extreme deference to the federal government's admissions policies is built on two clearly racist cases, courts today should be free to reconsider that rule without the weight of those precedents or their progeny.

While a full exposition of how courts might resolve the question anew is beyond the scope of this project, it is likely that a court would conclude that policies discriminating on the basis of race in the admissions context warrant strict scrutiny. After all, the Supreme Court has said that strict scrutiny applies to all forms of explicit racial classifications—even ostensibly benign ones.[194] As described in Part II, the Court has endorsed the broad evidentiary inquiry required by *Arlington Heights* in a wide variety of contexts, without any other limitation—there is no other context in which courts have refrained from applying *Arlington Heights* to a claim alleging state action motivated by racial animus. It would be odd to treat the Constitution's explicit prohibition on racial discrimination as less robust when applied to policies regulating the admission of non-citizens—a power mentioned nowhere in the Constitution.

Nor are the traditional reasons provided for such deference compelling when considered anew. The original rationale for such deference in *Chae Chan Ping*, that immigrants from China pose a threat analogous to hostile invaders because they will not assimilate,—is transparently racist. Nor does the somewhat different later formulation of the same idea—that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form

[194] *See supra n.* ___ (citing *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

of government"[195] withstand serious analysis. That reformulation comes from *Mathews v. Diaz*, but that case actually illustrates why this claim is obviously false. Congress's decision to make certain federal medical insurance benefits available to lawful permanent residents who had lived here for five years but not to those who had lived here for shorter periods simply is not "vitally and intricately interwoven" with "the conduct of foreign relations, the war power, and the maintenance of a republican form of government." It is no more related to those considerations than a host of other governmental decisions as to which courts provide no comparable deference. While there are undoubtedly some immigration policies that do have significant implications for U.S. foreign policy and, in at least some contexts, the war power, there are many others that do not. The exercise of the federal government's authority governing the admission of immigrants does not *always* implicate foreign policy and national security considerations.

Some might wonder whether rejecting the extreme deference rule from *Chae Chan Ping* means that the government may never treat people of different nationalities differently in the immigration context. Relatedly, perhaps some might contend that any argument for judicial deference to legislative and executive policy judgments regarding admissions policies is necessarily racist because it presumes that immigrants pose a threat. This line of inquiry leads quickly to questions about whether the act of excluding people on the basis of national borders is itself racist—either because of this nation's history as a settler-colonial state, or in general, because people have an inherent right to free movement that is practically unavailable to people from the so-called "Global South" in ways that are not true of those from Europe and certain other countries.[196]

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[195] *Mathews*, *supra* note 177, at 81 n. 17.

[196] *See generally* Natsu Taylor Saito, *Settler Colonialism, Race, and the Law* (2020). Saito appears to suggest at times that any project built on the use of current doctrine may have limited utility as a tool of anti-racism, insofar as the doctrine is designed to serve the purpose of perpetuating the American settler colonial state. *See, e.g.*, *id*. at 23-24. For a defense of the view that restrictions on movement enforced against people from formerly colonized nations is racist, *see* Tendayi Achiume, *Migration as Decolonization*, 71 Stan. L. Rev. 1509 (2019). For an account that situates deportation laws within the broader project of laws that served to construct the racial composition of the United States through various forms of ethnic cleansing, *see* K-Sue Park, *Self-Deportation Nation*, 132 Harv. L. Rev. 1878 (2019). For a defense of the right to free movement irrespective of the history of racism and settler colonialism, *see* Joseph Carens, *The Ethics of Immigration* (2013). For those who fundamentally disagree, and instead see migration as an engine of exploitation, while borders serve to constitute national community in ways that do not necessarily rest on divisions based on race, *see, e.g.*, Angela Nagle, *The Left Case Against Open Borders*, Vol. II, No. 4 American Affairs (Winter 2018) (available at

In my view, one can remain agnostic on these questions while still recognizing profound shifts in constitutional immigration law that would accompany the demise of *Chae Chan Ping* and the deference rule to which it has given rise. Reversing it would mean simply that the Constitution's anti-discrimination principles should apply in the immigration context just as they do anywhere else. It follows from this that the government may not act out of racial animus in the immigration admissions context, and, relatedly, when the government draws distinctions on the basis of *race* in that context, it must justify them by reference to strict scrutiny (so as to ensure that animus played no role in its decisions). This accords with the basic rule in international law, which permits border exclusion policies while also prohibiting border policies intended to discriminate on the basis of race.[197]

It would also follow from reversing *Chae Chan Ping* that when a litigant alleges that the government's policies have been motivated by racism, the government must respond with evidence sufficient to satisfy the inquiry under *Arlington Heights*. Under governing anti-discrimination doctrine, if the legislature was motivated by race-neutral reasons for any given admissions policy, that policy should survive challenge notwithstanding that it may have a disparate impact. However, if motivated by racial animus, it should be struck down.[198]

C. The Stare Decisis Exception for Racist Cases Applied: When Can the Government Imprison Immigrants?

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https://americanaffairsjournal.org/2018/11/the-left-case-against-open-borders/); Michael Walzer, *Spheres of Justice*, at 31-63 (1983).

[197] *See Recommended Principles and Guidelines on Human Rights at International Borders*, United Nations Office of the High Commissioner for Human Rights, available at https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf ("States are entitled to exercise jurisdiction at their international borders, but … the human rights of all persons at international borders must be respected in the pursuit of border control, law enforcement and other State objectives"). For scholars arguing that the rules of international law nonetheless encode racially discriminatory categories, see Tendayi Achiume, *Racial Borders*, 110 Geo. L.J. 445, 459 (2022) (citing, inter alia, EVE LESTER, MAKING MIGRATION LAW: THE FOREIGNER, SOVEREIGNTY, AND THE CASE OF AUSTRALIA (2018)). Moreover, even where the rule requiring respect for human rights at borders operates, how it applies in practice can be messy—like so many rules in the race discrimination context. *See* (Some) refugees welcome: When is differentiating between refugees unlawful discrimination? - Cathryn Costello, Michelle Foster, 2022 (sagepub.com).

[198] *Washington v. Davis*, 426 U.S. 229 (1976); *M.L.B. v. S.L.J.*, 519 U.S. 102, 125 (1996) (reaffirming and explaining *Davis*).

Denying precedential effect to the propositions motivated by race discrimination in *Fong Yue Ting* could also lead to dramatic changes in the legal landscape related to the so-called "immigration detention" system. It is hard to imagine how that system could exist in a world where constitutional rules freed from the shadow of racial animus governed it.

1. The Immigration Prison System Today

On any given day, the Department of Homeland Security's Immigration and Customs Enforcement bureau currently incarcerates approximately 30,000 people.[199] Although the population's composition has varied over time, in general the people jailed in this system fall into one of three categories: people stopped at a port of entry or arrested in the border region without documents, who have then sought asylum or other humanitarian relief; people found in state or local law enforcement custody, usually after being convicted and sentenced for a crime; and people arrested in the interior of the country for having violated the terms of their visas, been ordered removed in absentia, or otherwise run afoul of the immigration laws.[200] Once transferred to ICE's longer-term detention facilities, such individuals are held in prison-like conditions—in locked cells or secure dorms, generally without contact visits from loved ones, and with extremely limited access to legal representation. Most of these facilities are run by private prison companies.[201]

The ostensible legal justification for this system arises from two primary rationales familiar to anyone who studies pretrial detention: danger and flight risk. Specifically, courts have upheld incarceration under the

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[199] Over the last five years, the average daily population of ICE inmates has been as low as 15,000 (at the height of the pandemic) and as high as 50,000 (during the Trump Administration). John Burnett, *Immigrant Detention For Profit Faces Resistance After Big Expansion Under Trump*, NPR (Apr. 20, 2021, 5:00 AM), https://www.npr.org/2021/04/20/987808302/immigrant-detention-for-profit-faces-growing-resistance-after-big-expansion-under. As of ___[month prior to publication date], ICE reported an average daily population of ___.

[200] I provide these imprecise descriptions to paint a broad picture of the jailed immigrant population. Obviously there is overlap between these categories as I have defined them. There are also people in immigration detention who do not fit in any of these categories.

[201] *See* Eunice Cho, Tara Tidwell Cullen, Clara Long, *Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration* (2020) (documenting conditions in immigration prisons) (available at https://www.aclu.org/sites/default/files/field_document/justice-free_zones_immigrant_detention_report_aclu_hrw_nijc_0.pdf); *Jennings v. Rodriguez*, 138 S. Ct. 830, 861 (2018) (Breyer, J. dissenting) (describing government's own investigative reports documenting that "in some cases the conditions of their confinement are inappropriately poor").

immigration laws to protect public safety, and to ensure the immigrant appears for their removal proceedings and, if they lose their case, for physical removal.[202]

Neither justification would pass muster in this context under the standard constitutional law governing civil confinement. The Due Process Clause generally permits incarceration to prevent danger only prior to criminal trial or, if after (or in lieu of) trial, only where an individual is both mentally ill and dangerous to themselves or others.[203] To incarcerate someone after their sentence in this context, the Court has required that their mental illness render them unable to control their behavior.[204] Indeed, if any state enacted a free-standing program to incarcerate people *after* they had served their sentences for run-of-the-mill offenses, one would expect the courts to quickly strike it down. And at a broader level, there is no evidence that the immigration enforcement regime enhances public safety. On the contrary, detailed studies analyzing it have repeatedly concluded that it has no effect on crime rates.[205]

The flight risk justification is similarly weak. For the most part, immigration enforcement officials and judges conducting bond hearings do not apply a "least restrictive means" test, i.e., they do not order confinement pending completion of deportation cases only upon a showing that there are no other conditions that would ensure the immigrant's appearance for court

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[202] *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001).

[203] *Addington v. Texas*, 441 U.S. 418 (1979); *Kansas v. Hendricks*, 521 U.S. 346 (1997).

[204] *See* Kansas v. Crane, 534 U.S. 407 (2002).

[205] *See* Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J. L. Econ. 937 (2014) (studying comprehensive crime data during the roll-out of the "Secure Communities" immigration enforcement program, finding it did not reduce crime rate); Annie Laurie Hines & Giovanni Peri, *Immigrants' Deportations, Local Crime and Police Effectiveness*, Inst. Lab. Econ. (June 2019) (same); David K. Hausman, *Sanctuary Policies Reduce Deportations Without Increasing Crime*, 117 Proc. Nat'l Acad. Sci. 27262 (2020) (examining a sample of 296 counties, 140 of which had sanctuary policies between 2010-2015 finding 'no evidence of significant effects of sanctuary [when a county refuses retainer requests] and crime'). These studies offer precisely the kind of evidence one would expect to garner attention from courts conducting strict scrutiny. The first two exploited a "natural experiment" arising from the Obama Administration's adoption of the Secure Communities program, which dramatically expanded detention and deportation rates by automating the flow of information from state and local law enforcement to federal immigration authorities. Because the program was rolled out in different counties over time, social scientists were able to study whether increasing immigration enforcement would decrease crime. The third study took advantage of essentially the opposite phenomenon: as opposition to Secure Communities grew, state and local jurisdictions adopted "sanctuary" policies that limited state and local cooperation with immigration enforcement. This too produced something akin to a natural experiment, which again permitted detailed examination of the question whether decreasing immigration enforcement increases crime.

hearings or removal. That standard is generally required in the pre-trial federal criminal system,[206] but not in the immigration system.[207] And available empirical evidence—including from pilot programs run by the government—suggests that pre-trial confinement is only rarely required to ensure appearance.[208]

Nonetheless, the immigration detention system persists. While a deprivation of liberty as fundamental as incarceration without criminal trial would normally be permissible only where the government has satisfied what we commonly think of as strict scrutiny—by showing that the deprivation is narrowly tailored to serve a compelling interest—courts have upheld various aspects of ICE's immigrant prison system without conducting that analysis.[209] Courts have refrained from applying strict scrutiny in this area of law only because of the rules first established in *Fong Yue Ting*.

2. Fong Yue Ting's *Rules and Immigration Detention*

To understand this, let us consider a detention-related issue that has been the subject of intense litigation: the government's practice of incarcerating immigrants pending resolution of their deportation cases

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[206] *See* 18 U.S.C. § 3142; United States v. Salerno, 481 U.S. 739 (1987).

[207] Some courts have imposed heightened standards in some classes of cases—including those involving prolonged imprisonment under the immigration laws—but there remains no uniform national practice, and litigation over the issue continues. *Compare* Singh v. Holder, 638 F.3d 1196, 1203-05 (9th Cir. 2011) (requiring that government show danger and flight risk by clear and convincing evidence in bond hearings for people facing prolonged incarceration) *with* Rodriguez-Diaz v. Garland, 53 F.4th 1189, 1196 (9th Cir. 2022) (stating, in dicta, that *Singh* is no longer good law).

[208] *See, e.g.*, Ingrid v. Eagly & Steven Shafer, *Measuring In Absentia Removal in Immigration Court*, 168 U. Penn. L. Rev. 817, 849 (2020) (finding that 95% of immigrants who are not detained attend their immigration hearings). Data reported by the government contractor that runs its alternatives-to-detention program shows comparable results. *See* Hernandez v. Sessions, 872 F.3d 976, 991 (9th Cir. 2017) ("As the American Bar Association explains in its amicus brief, the Intensive Supervision Appearance Program — which relies on various alternative release conditions — resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings"). With respect to asylum seekers apprehended in the border region in particular, the Obama Administration ran a pilot project known as the Family Case Management Program from January 2016 to June 2017, which it described as an alternative to detention program "for families with vulnerabilities not compatible with detention." Families in the program were matched to community-based organizations that provided both social services and basic legal guidance. 99% of participants attended their immigration court hearings. *See* Audrey Singer, Congressional Research Service, *Immigration: Alternatives to Detention (ATD) Programs*, R45804 (2019).

[209] *Compare Foucha*, 504 U.S. at 80 (applying strict scrutiny) *with* Demore v. Kim, 538 U.S. 510, 528 (2001) (holding that Congress need not choose the "least restrictive means").

without providing them bond hearings before immigration judges. Bond hearings are ubiquitous in other areas of civil detention, but the Supreme Court nonetheless upheld the practice against a facial challenge in *Demore v. Kim*.[210]

Hyung Joon Kim, the plaintiff in that case, came to the United States at the age of six, from South Korea. He became a lawful permanent resident two years later.[211] Ten years after that, he was convicted of two crimes—burglary, when he was 18, and petty theft with priors in the following year. He served a prison sentence, and the day after his release was arrested and imprisoned again, this time by immigration authorities, on the theory that because his offenses permitted the government to strip him of permanent residence and deport him to South Korea, the immigration laws required that he be jailed without trial while his deportation case remained pending. Although that process required that Mr. Kim be afforded a removal hearing before an immigration judge, the government contended that Mr. Kim had no right to ask that judge for release on bond while his immigration case remained pending. Mr. Kim eventually filed a habeas petition, which he won at the trial level. After the federal judge ordered that he be considered for bond, immigration authorities voluntarily released him on bail of $5,000, which he paid. The Ninth Circuit affirmed, but the Supreme Court reversed.

Demore avoided applying rigorous review of Mr. Kim's Fifth Amendment Due Process challenge by relying on cases that ultimately rest on *Fong Yue Ting* and its progeny. Although it did not explain in any one place precisely why it chose not to apply heightened scrutiny, it did state:

> [w]hen the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal. The evidence Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of action. *Cf., e.g., Los Angeles v. Alameda Books, Inc.*, 535 U. S. 425, 436-437 (2002); [*Reno v.*] *Flores*, *supra*, at 35 ("It may well be that other policies would be even better, but 'we are [not] a legislature charged with formulating public policy'" (quoting *Schall v. Martin*, 467 U. S. 253, 281 (1984))).[212]

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[210] 538 U.S. 510 (2003).

[211] I draw these facts from the Ninth Circuit decision in his case, as the Supreme Court's opinion includes scarcely any discussion of Mr. Kim's personal history. *Kim v. Ziglar*, 276 F.3d 523, 526 (9th Cir.), *rev'd*, *Demore v. Kim*, 538 U.S. 510 (2003).

[212] *Demore*, *supra* note 198, at 528. *Demore* did engage in some rudimentary analysis of data concerning the efficacy of alternatives to detention, but it rejected that data without applying anything akin to strict scrutiny, and focused instead on whether it was reasonable for Congress to have concluded that detention was needed. 538 U.S. at 519-20.

While this passage does not cite a case specifically in support of its ruling that a lower level of scrutiny applies—the nearest citations come only after the next sentence, preceded by a "Cf." signal, and appear to illustrate *how* courts should apply such scrutiny rather than *when*—the immigration case cited there, *Reno v. Flores*, [213] was also cited earlier in *Demore* for the proposition that "reasonable presumptions and generic rules" are permissible because of "Congress' traditional power to legislate with respect to aliens."[214]

Flores involved the government's highly controversial policy of keeping immigrant children who arrived in the United States without their parents in custody when the parents did not come forward to obtain custody (often because the parents were undocumented). It upheld the government's policy of refusing to release the minors to their nearest relatives other than parents or legal guardians. While much of the opinion's substantive due process analysis focuses on child custody doctrine, at the end of the discussion it invokes a familiar set of cases— *Mathews v. Diaz*, *Fiallo v. Bell*, and others that ultimately rest on the Chinese Exclusion cases, as we have discussed earlier—for the proposition that "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."[215]

Apart from *Flores*, *Demore* also relies heavily on one case we have not previously discussed—*Carlson v. Landon*[216]—to support its conclusion that Congress may vest substantial discretion in the Attorney General to decide whether to confine non-citizens in custody. *Carlson* receives very detailed treatment in *Demore*—indeed, it is probably the case on which the Court most heavily relied for its conclusion that non-citizens could be incarcerated without the opportunity even to ask an immigration judge for release on bond.[217]

Unsurprisingly, *Carlson* too ultimately rests on the Chinese Exclusion-era cases. *Carlson* was the first case to establish the government's power to incarcerate people pre-trial solely on the basis of dangerousness in any context. Decided at the height of the Cold War, *Carlson* upheld the detention pending deportation proceedings of people charged with being removable for membership in the Communist Party.

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[213] 507 U.S. 292 (1993).
[214] *Demore*, *supra* note 198, at 526.
[215] 507 U.S. at 305.
[216] 342 U.S. 524 (1952).
[217] *Demore*, *supra* note 198, at 523-25.

Carlson derived this power to detain on the basis of dangerousness from the power to deport without trial, and the first case it cited—as by now you would surely guess—was *Fong Yue Ting*.

> The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, 'with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.'[218]

Although *Carlson* was careful to qualify this statement, acknowledging that "[t]his power is, of course, subject to judicial intervention under the 'paramount law of the Constitution,'"[219] it went on to find imprisonment without trial constitutional in this situation because "[o]therwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings," *Carlson* never explains why the criminal law could not adequately control for any such risk of danger.[220] Ultimately it concluded "[t]here is no denial of the due process of the Fifth Amendment under circumstances where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government."[221] Thus, it too appears to rest on an unexplained assumption that certain immigrants pose a kind of special danger—beyond the power of the criminal law to address. As we have seen, this idea has its origins in the racism of the Chinese Exclusion cases—including *Fong Yue Ting*, on which *Carlson* relied.[222]

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[218] *Carlson*, *supra* note 204, at 537, n. 27 (quoting *Fong Yue Ting*).

[219] *Id.*

[220] *Id.* at 538.

[221] *Id.* at 542.

[222] *Carlson* cites various other cases decided shortly before or after *Fong Yue Ting*, but without quotation or, in most cases, even pin cites, making it hard to assess to what extent its holding can be understood to independently rest on them. In any event, the cases it cites that support the general deportation power and deference propositions relevant here (as opposed to the exclusion power at issue in *Chae Chan Ping*) all ultimately rest on *Fong Yue Ting* as well. *See* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (upholding exclusion); Yamataya v. Fisher, 189 U.S. 86, 97, 100 (1903) (citing *Fong Yue Ting* in upholding deportation after a hearing); Zakonaite v. Wolf, 226 U.S. 272, 275 (1912) (citing *Fong Yue* Ting in upholding deportation); Wong Wing v. United States, 163 U.S. 228, 231, 236 (1896) (citing *Fong Yue Ting* while striking down the portion of the Chinese Exclusion Act allowing violators of the Act to be sentenced to imprisonment at hard labor without a trial by jury); Turner v. Williams, 194 U.S. 279, 290-291 (1904) (citing *Fong Yue Ting* and *Chae Chan Ping* in upholding exclusion); Bugajewitz v. Adams, 228 U.S. 585, 591 (2013) (citing *Fong Yue Ting* in upholding deportation); Mahler v. Eby, 264 U.S. 32, 39 (1924)

As this close reading of the authority on which *Demore* relies shows, the doctrine undergirding the government's authority to run the vast immigration prison system—like the doctrine surrounding the government's power to make admissions decisions subject only to very deferential judicial review—ultimately rests on cases infected with the racist motivations of the Chinese Exclusion era.

(citing *Fong Yue Ting* in upholding exclusion); Ng Fung Ho v. White, 259 U.S. 276, 281, 284 (1922) (citing *Fong Yue Ting* in affirming deportations for noncitizens and reversing deportations pending verification of their citizenship); Eichenlaub v. Shaughnessy, 338 U.S. 521, 529 n. 15 (1950) (citing *Fong Yue Ting* in upholding deportation).

A diagram again helps illustrate the point:

Fong Yue Ting, 149 U.S. 698, 706 (1893):

"To…give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from ***vast hordes*** of its people ***crowding in upon us***."

Carlson v. Landon, 342 U.S. 524, 534 (1952):

Individuals who "fail to obtain and maintain citizenship by naturalization…remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders." (citing *Fong Yue Ting*).

Demore v. Kim, 538 U.S. 510, 528 (2003):

"When the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." Why? Because "detention is necessarily a part of this deportation procedure" (quoting *Carlson*).

3. Analyzing Prolonged Immigration Detention Without Fong Yue Ting

If *Fong Yue Ting* and its progeny were stripped of their precedential force, such that courts had to apply conventional due process doctrine when analyzing the constitutionality of immigration detention laws, the government would have to justify those laws by reference to the normal principles of constitutional law governing substantial deprivations of liberty. Under modern constitutional law, that would require showing that it is narrowly tailored to serve compelling interests. It is not at all clear that the government could do so. Indeed, it is particularly hard to see how the government could justify so-called "mandatory detention," which is confinement without the opportunity to ask a judge for release on bond, if courts were required to consider its validity without relying on doctrine built upon the racist precedent of the Chinese Exclusion era.

In the twenty years since *Demore*, the Supreme Court has repeatedly considered but ultimately refrained from deciding as-applied constitutional challenges to the government's practice of jailing immigrants for long periods of time without affording them the opportunity to seek release on bond, as well as various other aspects of the immigration prison system.[223] Whether or not *Fong Yue Ting* and the cases relying on it should form part of the legal landscape in resolving those dispute remains very much a live question.[224] Adopting the proposal I advocate here—and rejecting racist precedent in this context—would allow courts to resolve it in a manner consistent with the Constitution's anti-discrimination constraints.

CONCLUSION

The Constitution requires courts to reverse racist precedent. In practice, this means applying the Constitution's prohibition on decisions motivated by racial animus to prior court decisions, thereby establishing a new exception to stare decisis. Under that exception, courts should not afford precedential force to cases motivated by racism. Where those cases were cited by later cases, courts should not afford precedential force to the second-generation cases, at least where the later case does not rest on independent grounds.

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[223] *See* Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Nielsen v. Preap, 139 S. Ct. 954 (2019); Johnson v. Arteaga-Martinez, 142 S. Ct. 1827 (2022); Garland v. Aleman Gonzalez, 142 S. Ct. 2057 (2022).

[224] In a recent concurrence on a related question—concerning whether individuals held for long periods should be entitled to a second bond hearing—a Ninth Circuit judge relied prominently on *Fong Yue Ting* in arguing that non-citizens should have few if any due process rights in this context. *See Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1216 (9th Cir. 2022) (Bumatay, J., concurring).

Adopting this exception would allow stare decisis doctrine to cease functioning as a tool that furthers structural racism. And it would give lawyers and judges a tool they could use to cabin the ongoing influence of racist cases.

I have illustrated how my proposal would work by applying it to important cases in constitutional immigration law. That analysis illustrates how courts should consider anew the constitutional law governing race discrimination in immigrant admission and exclusion policy, and the constitutional law authorizing incarceration under the immigration laws. The radical changes in how courts would analyze the issues I address offer a window into how reversing racist precedent could bring about sweeping changes to the law, not only in the immigration context, but also in other areas. Large bodies of existing scholarship document the racism undergirding various areas of law. In all of them, lawyers and judges should be asking whether the rules they are applying have been infected by racist precedent.

This article has brought together various strands of relevant doctrine to shed light on a path we can take to dismantle one crucial aspect of structural racism embedded in our legal system. The labor of eradicating the on-going effects of cases motivated by race discrimination from our legal doctrine would no doubt be painstaking for lawyers and courts. But in this respect it would be no different from the task of confronting structural racism elsewhere. Reversing racist precedent is a difficult but vitally important step on the road to eradicating racism in our legal system and building a vision for an anti-racist future.