AMERICAN EXCLUSION DOCTRINE: A RESPONSE TO LIBERAL DEFENSES OF STARE DECISIS

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ABSTRACT

Stare decisis has long been considered a conservative doctrine. Yet, in recent years, liberals have taken up a defense of the legal principle in efforts to preserve key liberal precedents. Despite the existing critiques of stare decisis as oppressive, political, and inconsistent, advocates along the entire political spectrum continue to claim its value as a neutral tool that ensures equality, consistency, and impartiality in jurisprudence. This Note pushes back on liberal defenses of stare decisis by highlighting well-established critiques through a case study of Supreme Court decisions on citizenship. The analysis, based on Critical Race Theory, provides an original approach to critiques of stare decisis and contextualizes the potential harm from continued advocacy to protect "progressive" decisions for the sake of setting liberal precedent.

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INTRODUCTION

> *Whiteness conferred on its owners aspects of citizenship that were all the more valued because they were denied to others. Indeed, the very fact of citizenship itself was linked to white racial identity.*
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> *—Cheryl I. Harris, Whiteness As Property.*[1]

> *Citizenship is not just a matter of formal legal status; it is a matter of belonging, including recognition by other members of the community.*
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> *—Evelyn Nakano Glenn, Unequal Freedom.*[2]

Citizenship is at the foundation of American society. It goes beyond "a mere juridical-political category," and "entails a sense of and a claim to belonging."[3] In this context, Citizenship "refers to full membership in the community in which one lives."[4] It fully encompasses the political, civil, and social dimensions of the term.[5] It is no wonder, then, that it has been the subject of significant debate. How do we define this broad idea of Citizenship that extends beyond the legal status of individuals within the context of the United States? Who gets to participate? What are the boundaries of American Citizenship? These questions have been discussed at length by scholars, journalists, activists, and jurists since the very beginnings of the United States, often without clear answers.

What, then, *can* be said about American Citizenship? The two quotations at the beginning of this Introduction reflect an important truth: American Citizenship is a project based on power and affects all aspects of American life. Despite its purported universality, it is evident in both the history of citizenship and the development of civil rights in the United

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1. Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1710, 1742 (1993).
2. EVELYN NAKANO GLENN, UNEQUAL FREEDOM: HOW RACE AND GENDER SHAPED AMERICAN CITIZENSHIP AND LABOR 52 (2002).
3. Eduardo Bonilla-Silva & Sarah Mayorga, *On (Not) Belonging: Why Citizenship Does Not Remedy Racial Inequality*, *in* STATE OF WHITE SUPREMACY: RACISM, GOVERNANCE, AND THE UNITED STATES 77, 89 (Moon-Kie Jung, João H. Costa Vargas & Eduardo Bonilla-Silva, eds. 2011). This Note uses the capitalized term "Citizenship" to signify this broader meaning, while the lower-case "citizenship" is used to refer to the narrower, legal meaning as in the context of immigration.
4. GLENN, *supra* note 2, at 19.
5. *See, e.g.*, *id.*

States that this project has failed to accomplish its supposed vision of inclusivity.[6] From legal analyses focused on gender, race, sexuality, and immigration, it is evident that the American project of Citizenship has been, and continues to be, an exclusionary one.[7]

Efforts have been made to expand this project by granting the constitutional protections that citizenship entails to previously unprotected groups. These efforts have resulted in progress—Equal Protection jurisprudence, the Civil Rights Act, reproductive rights legislation, legislative and judicial recognition of LGBTQ+ rights, among many other achievements, are evidence of this. The Supreme Court—a key institution responsible for constitutional rights, yet one with limited power—has stood central to these advocacy efforts.[8] This Note acknowledges the importance of these varied efforts while focusing its discussion on one dimension of Citizenship in particular: racial identity and the Court's construction of race in its citizenship decisions.

A long-standing dynamic of the Court relevant to this discussion of Citizenship and constitutional rights and which takes into account the Court's political nature[9] is the doctrine of stare decisis, or precedent. Conservatives have traditionally advocated for strict adherence to the doctrine to perpetuate a narrow conception of constitutional rights

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6. *See, e.g.*, *id.* at 24.
7. *See id.* at 26 ("Race and gender have continuously been organizing principles of American citizenship."). *See generally* Harris, *supra* note 1; Moon-Kie Jung, *Constituting the U.S. Empire-State and White Supremacy*, *in* STATE OF WHITE SUPREMACY: RACISM, GOVERNANCE, AND THE UNITED STATES, *supra* note 3, at 1; Leti Volpp, *Feminist, Sexual, and Queer Citizenship*, *in* THE OXFORD HANDBOOK OF CITIZENSHIP 153 (Ayelet Shachar, Rainer Bauböck, Irene Bloemraad & Maarten Vink, eds. 2017).
8. "The Supreme Court . . . has relatively fewer degrees of freedom, constrained as it is, at least nominally, by stare decisis and the Constitution itself." Moon-Kie Jung, *supra* note 7, at 11.
9. Though the Supreme Court is meant to be nonpartisan, it is not disputed that conservative justices typically vote one way and liberals another. *See also* Parisis G. Filippatos, *Doctrine of Stare Decisis and the Protection of Civil Rights and Liberties in the Rehnquist Court*, 11 B.C. THIRD WORLD L.J. 335, 336 (1991) (characterizing the Rehnquist Court as part of a conservative judicial project); David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, ATLANTIC (June 29, 2012), https://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/; Samuel Moyn, *The Court Is Not Your Friend*, DISSENT MAG. (Winter 2020), https://www.dissentmagazine.org/article/the-court-is-not-your-friend. For a discussion of legal reasoning as political, see Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733, 735, 735 n. 6 (describing the "Skeptical Accounts" approach to legal reasoning as that which believes "judges do, or should, decide cases based on their vision of what is politically correct.").

protections, whereas liberals have tended to argue against precedent to continue expanding said protections.[10] This simplified context requires accepting a basic truth about the American legal and political system: its deeply unequal beginnings. If the foundations of the law are unequal and exclusionary, it follows that reliance on precedent will have unequal and exclusionary results.

This understanding is grounded in Critical Race Theory (CRT),[11] which "proceeds from the premise that racial privilege and related oppression are deeply rooted in both our history and our law."[12] CRT looks critically at purportedly neutral legal principles, like stare decisis.[13] Building off of this work, this Note seeks to address a fairly new development in the traditional approach to precedent. As more "progressive" precedents have been created, liberals have moved towards a stronger view of stare decisis while conservatives have moved away from it.[14] This shift highlights a deeper problem with reliance on precedent:

10. See, e.g., Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENT. 67 (1993); Mark Joseph Stern, *Everyone Is Mad at Elena Kagan*, SLATE (Apr. 22, 2020, 2:46 PM), *https://slate.com/news-and-politics/2020/04/elena-kagan-supreme-court-conservatives-precedent.html*. This Note uses the terms conservative and liberal or progressive to refer to legal, rather than political, perspectives. Liberal/progressive legal views, for the purposes of this Note, refer to beliefs that the law should be used to advocate for social change, and that the law should protect marginalized and vulnerable communities. One example of this is movement lawyering, which connects legal advocacy to socially and politically progressive movements. *See, e.g.*, Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645 (2017).

11. *See, generally* Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893 (1995); CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2001); Angela P. Harris, *Critical Race Theory*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 2976 (2001).

12. Rose M. Brewer & Nancy A. Heitzeg, *The Racialization of Crime and Punishment: Criminal Justice, Color-Blind Racism, and the Political Economy of the Prison Industrial Complex*, 51 AM. BEHAV. SCIENTIST 625, 626 (2008).

13. *See, e.g.*, Sally Ackerman, *The White Supremacist Status Quo: How the American Legal System Perpetuates Racism as Seen Through the Lens of Property Law*, 21 HAMLINE J. PUB. L. & POL'Y 137, 140–42 & 153 n. 77 (1999) (discussing in Part I.A. "how the white supremacist status quo is perpetuated through existing laws of stare decisis").

14. Robert Barnes, *Supreme Court's Conservatives Overturn Precedent as Liberals Ask "Which Cases the Court Will Overrule Next,"* WASH. POST (May 13, 2019), https://www.washingtonpost.com/politics/courts_law/supreme-courts-conservatives-overturn-precedent-as-liberals-ask-which-cases-the-court-will-overrule-next/2019/05/13/b4d3c4f8–7595–11e9-bd25-c989555e7766_story.html?utm_term=.c59e797e4c98; Leah Litman, *Supreme Court Liberals Raise Alarm Bells About* Roe v. Wade, N.Y. TIMES (May 13, 2019), https://www.nytimes.com/2019/05/13/opinion/roe-supreme-court.html; Joanna Zdanys & Daniel I. Weiner, *When It Comes to the Laws of*

Rather than serving as a neutral tool, it is used to obscure the ideological work that Justices engage in. Critiques of stare decisis, far from new to liberals,[15] are now being ignored in the hopes that the doctrine will provide some protection against conservative attacks on progressive case law.[16]

Many CRT scholars have already discussed at length the dangers[17] of relying on systems steeped in inequality and oppression as the means of liberation and, therefore, would likely look critically on this new liberal defense of precedent.[18] Rather than repeating this work, this Note attempts

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Democracy, the Supreme Court's Conservative Majority Often Abandons Its Own Core Principles. Will Brett Kavanaugh Do the Same?, BRENNAN CTR FOR JUST. (Aug. 31, 2018), https://www.brennancenter.org/our-work/analysis-opinion/when-it-comes-laws-democracy-supreme-courts-conservative-majority-often. *See also* Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 401 (1988) ("[I]f there is any principle that is fundamental to the true conservative, if there is any doctrine that is inviolable to the true conservative, if there is any rule that is cardinal to the true conservative, it is stare decisis. . . . But if you vote for Ronald Reagan . . . [his Attorney General] will appoint judges who are essentially sworn to a program of reversing certain Supreme Court decisions." (internal citations omitted)); Filippatos, *supra* note 9, at 336–37, 374 (noting how Republican appointments to the Court emphasized reliance on stare decisis and criticizing the Rehnquist Court's pattern of reasoning as "first pay[ing] homage to the principle of *stare decisis* and then proceed[ing] to 'distinguish' or to 'qualify' the precedent in question instead of explicitly overruling it," in order to argue for greater reliance on stare decisis to prevent conservatives from undoing or diminishing progressive precedents); Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TULANE L. REV. 1533, 1538 (2008) (criticizing the Roberts Court's approach to stare decisis as "purport[ing] to respect a precedent while in fact cynically interpreting it into oblivion," indicating support for greater adherence to stare decisis to protect progressive precedents); James G. Wilson, *Taking Stare Decisis Seriously*, 10 J. JURIS 327 (2011) (recommending against judicial activism for a liberal Court so as to not undermine non-judicial progressive efforts).

15. See Christopher P. Banks, *Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change*, 32 AKRON L. REV. 233, 245 (1999) ("Through its reversals of precedent, the Rehnquist Court has been politically successful in narrowing the scope of civil rights of those who come into contact with the criminal justice system."); Charles Wallace Collins, *"Stare Decisis" and the Fourteenth Amendment*, 12 COLUM. L. REV. 603 (1912); Kent Greenawalt, *Constitutional & Statutory Interpretation*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (Jules L. Coleman, Kenneth Einar Himma & Scott J. Shapiro eds., 2004); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999); Nathan Muchnick, *The Insular Citizens: America's Lost Electorate v. Stare Decisis*, 38 CARDOZO L. REV. 797, 828 (2016).

16. Stern, *supra* note 10.

17. *See, e.g.*, DELGADO & STEFANCIC, *supra* note 11, at 29 (arguing that proponents of progressive precedents will, "believing the problem has been solved, go on to a different campaign . . . while its adversaries, the conservatives . . . step up their resistance").

18. CRT scholars generally are critical of liberalism "as a framework for addressing America's racial problems." *Id.* at 26.

to connect it to the current moment with a historical case study of Supreme Court citizenship jurisprudence. As past CRT scholarship demonstrates, the use of legal narratives helps illustrate realities that traditional legal analysis often obscures.[19] Unlike past CRT scholarship, though, this piece modifies the personal narrative method by using a semi-chronological approach to Supreme Court cases. This approach creates a judicial narrative of how stare decisis perpetuates the exclusionary nature of American Citizenship. Modifying the personal-narrative CRT approach with traditional legal analysis of precedent contextualizes the dangers of stare decisis such that liberals relying on precedent to protect advances in constitutional rights work can better understand the limitations of using stare decisis for progressive goals.

There has already been considerable scholarship devoted to analyzing the problems within the history of citizenship jurisprudence and how these problems persist in modern issues related to Citizenship.[20] Little has been done, however, to delineate exactly how this history has continued to affect American Citizenship and how it connects to both the existing critiques of stare decisis and the current political shift of the doctrine. With CRT scholarship as a starting point, this Note looks to fill this gap.

Part I begins with a brief outline of stare decisis critiques and the modern political shift. Part II presents case studies of key Supreme Court citizenship decisions to provide new evidence for these critiques and to demonstrate how stare decisis has resulted in an exclusionary concept of citizenship in the United States. Part III completes the analysis by situating these cases within CRT and considers an important question that remains unanswered: If not stare decisis, what tools are available to ensure protections are preserved and exclusionary systems undone? This Note echoes CRT scholars in concluding that any efforts to further and preserve existing progress should not look to the courts as a solution, but rather, look outside the judiciary for lasting and substantial change.

I. A CRITICAL RACE APPROACH TO STARE DECISIS

The function of the American legal system as a project of exclusion and white supremacy has been broadly discussed in legal scholarship,

19. *See* RICHARD DELGADO & JEAN STEFANCIC, *Legal Storytelling and Narrative Analysis*, *in* CRITICAL RACE THEORY: AN INTRODUCTION, *supra* note 11, at 43 (2002) [hereinafter "DELGADO & STEFANCIC, Chapter III"].

20. *See, e.g.*, Moon-Kie Jung, *supra* note 7, at 1–20 (reviewing the Supreme Court cases on citizenship to criticize the idea of citizenship as a measure of equality within American society).

particularly in the context of CRT. Through this work, numerous legal principles, along with the legal system as a whole, have been analyzed and criticized for perpetuating racial[21] and gender-based[22] oppression, among other forms of marginalization.[23] A CRT approach to stare decisis, then, is entirely appropriate as precedent often arises in CRT critiques.

At the base of CRT work is the idea that the racial underpinnings of the law continue to perpetuate racial and other inequalities today. Cheryl Harris investigates this concept, arguing that in the early years of the United States, "[t]he law assumed the crucial task of racial classification," which "allowed the law to fulfill an essential function" of allocating rights according to race and enabling systematic racial discrimination such that this work "continued a century after the abolition of slavery."[24] Harris continues this analysis by connecting the "judicial definition of racial identity based on white supremacy" to the reproduction of "race subordination at the institutional level."[25] The law, Harris argues, can "mask[] the ideological content of racial definition,"[26] which is reflected in the use of "neutral" legal principles that have decidedly non-neutral effects—including stare decisis.[27]

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21. *See, e.g.*, Brewer & Heitzeg, *supra* note 12(explaining that CRT work "acknowledges the myriad ways in which the legal constructions of race have produced and reproduced systemic economic, political, and social advantages for Whites"); Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1647 (2019) (criticizing criminal law as an institution "through which the government regulates and authorizes violence, which critics argue is often deployed in service of maintaining racial subordination").
22. *See, e.g.*, Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, DUKE L.J. 365 (1991); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD L. REV. 1241 (1991).
23. For critical race perspectives in the immigration context, see Ian Haney Lopez, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 10 LA RAZA L.J. 57 (1998) and Mary Romero, *Crossing the Immigration and Race Border: A Critical Race Theory Approach to Immigration Studies*, 11 CONTEMP. JUST. REV. 23 (2008). For critical race perspectives in queer analyses, see E. Patrick Johnson, *"Quare" Studies, or (Almost) Everything I Know About Queer Studies I Learned From My Grandmother*, 21 TEXT & PERFORMANCE Q. 1 (2001) and Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation,"* 48 HASTINGS L.J. 1293 (1997).
24. Cheryl Harris, *supra* note 1, at 1737.
25. *Id.* at 1741.
26. *Id*.
27. It follows that, by definition, stare decisis cannot have progressive results since it is meant to uphold the status quo, which is founded on white supremacy. *See id.* at 1746 ("After the dismantling of legalized race segregation, whiteness took on the character of property in the modern sense in that relative white privilege was legitimated as the status quo.").

Elsewhere, Harris also specifically addresses "how the Constitution may limit . . . efforts to secure equal citizenship," looking at how the Court "constructs race" in equal protection cases as neutral "in order to assert its irrelevance."[28] She describes the law as a "conservative, backward looking enterprise, governed by interpretive rules which tie it to the past," while also existing as a "site in which dynamic social debate takes place and in which views and ideology are worked, reworked and given power."[29] Harris criticizes the "standard liberal account" of the law as an apolitical institution along with "the cruder forms of the left critique which sees the law as merely an ideological reflection of some class interests," finding both approaches insufficient to grasp the "crucial role of the law" in equal protection work.[30] The law should not be praised for its mythical impartial nature nor ignored or dismissed for its political one. Rather, the importance of the law in the United States in "assigning, negotiating and defining race" should form a central focus in legal critiques and analysis.[31]

CRT scholars often draw on the unequal foundations of the American legal system to analyze how existing inequalities are upheld by the law. In the context of criminal justice, Brewer and Heitzeg distinguish between "*de jure* racism codified explicitly into the law and legal systems" and "*de facto* racism where people of color . . . are subject to unequal protection of the laws" due to the emergence of new "indirect mechanisms for perpetuating systemic racism" in the legal system.[32] They connect the development of *de facto* racism to the "legal legacy of the racialized transformations of plantations into prisons, of Slave Codes into Black Codes, of lynching into state-sponsored executions."[33] Again, the racist foundations of the law serve as harmful precedent that have lingered long after the original racist systems have been dismantled or, as Brewer and Heitzeg claim, transformed.

Derrick Bell, a prominent CRT scholar, specifically discusses the limitations and harms of precedent as a legal principle, calling it a "formal rule[] that serve[s] a covert purpose," that "will never vindicate the legal rights of [B]lack Americans."[34] He further criticizes the insubstantiality of precedent as a means to protect the rights of marginalized communities, noting that progressive "[l]egal precedents we thought permanent have been

28. Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1756, 1761–62 (2001).
29. *Id.*
30. *Id.* at 1761.
31. *Id.* at 1762.
32. Brewer & Heitzeg, *supra* note 12, at 626.
33. *Id.*
34. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 376 (1992).

overturned, distinguished, or simply ignored."[35] Bell argues for a modification of legal realism that he calls "racial realism"—the recognition that "Black people will never gain full equality in this country." He contends that reliance on legal advocacy efforts will only result in "short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance."[36] Bell criticizes legal formalism in the judicial system for the use of "abstract concepts" to "mask policy choices and value judgments,"[37] and so warns against relying on racial equality through the law as a solution for inequality and oppression.[38]

This Note thus grounds its analysis in CRT scholarship,[39] giving new evidence to the dangers of relying on a liberal Supreme Court and progressive precedent to safeguard constitutional protections, and further cautioning against reliance on the judicial system overall in efforts to effect substantial change.

An important tool in CRT scholarship is the use of legal narratives, which rely on "perspective, viewpoint, and the power of stories to come to a deeper understanding of how Americans see race."[40] The purpose of narratives in this work is to "provide a language to bridge the gaps in imagination and conception," given that "members of this country's dominant racial group cannot easily grasp what it is like to be nonwhite."[41] This Note embraces this tradition and modifies it by providing a *judicial* narrative, rather than a personal one, of American Citizenship. The judicial narrative in Part II thus seeks to achieve the same goal that CRT storytelling pursues by highlighting the actual effect of "neutral" principles—in this case, stare decisis—on nonwhite communities. It also reflects CRT efforts around revisionist history, by "reexamin[ing] America's historical record"[42] concerning Citizenship to present a new analysis of the effect of precedent throughout history up until the present day.

The following discussion, therefore, demonstrates how stare decisis continues to exist as a tool leveraged to produce arbitrary and political results centering whiteness in American identity, rather than to legitimize

35. *Id.* at 374.
36. *Id.* at 373.
37. *Id.* at 369.
38. *Id.* at 377–78 ("The ideal is that law, through racial equality, can lift [Black Americans] out of [oppression]. I suggest we abandon this ideal and move on to a fresh, realistic approach.").
39. *See generally id.*; Derrick Bell, *The Supreme Court 1984 Term Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).
40. DELGADO & STEFANCIC, CHAPTER III, *supra* note 19, at 44.
41. *Id.* at 45, 51.
42. DELGADO & STEFANCIC, *supra* note 11, at 24.

courts and ensure fairness in the judicial system. Precedent allows courts to maintain a racist status quo, whether that means relying on prior legal rules that were based on racist reasoning, or ignoring good precedents[43] that threaten existing power structures. In the context of Citizenship, precedent contributes to the Supreme Court's exclusionary scheme, limiting participation in American society to white Americans.

II. CITIZENSHIP AND STARE DECISIS

The question of who gets to participate in American Citizenship has been widely discussed throughout the history of the United States. It determines which classes of people receive certain fundamental rights, protections, and privileges. It directly relates to systems of power and oppression.[44] In the early years of American society, Citizenship expanded only as the idea of whiteness grew beyond Christian settlers of British ancestry.[45] At its inception, the project of Citizenship was one of exclusion[46] seeking to promote white supremacy.[47] Despite gradual steps to expand the concept of Citizenship, the concept remains exclusionary at its core.[48] In essence, participation in American Citizenship is a question of who belongs and who does not.

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43. This Note often uses the terms good precedent and bad precedent. This is to simplify the language in the analysis—in this context, good precedent refers to precedent that stands for an expansionary or progressive view (of citizenship, but also more broadly), while bad precedent refers to precedent that supports an exclusionary view, generally rooted in, for instance, racist, nativist, and xenophobic reasoning. This simplification allows the case study to provide a general analysis of citizenship jurisprudence to demonstrate how stare decisis, despite the existence of good precedents, can continue to function in exclusionary and oppressive ways.

44. *See generally* IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (rev. ed. 2006).

45. *See* AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 58–61 (2010). *See also* Harris, *supra* note 1, at 1742 ("Whiteness was . . . central to national identity and to the republican project. The amalgamation of various European strains into an American identity was facilitated by an oppositional definition of Black as 'other.'").

46. *See, e.g.*, *Id.* at 1744 ("Indeed, the very fact of citizenship itself was linked to white racial identity.").

47. *See, e.g.*, GLENN, *supra* note 2, at 18 ("Citizenship has been a principal institutional formation within which race and gender relations, meanings, and identities have been constituted in the United States. Since the earliest days of the nation, the idea of whiteness has been closely tied to notions of independence and self-control necessary for republican government.").

48. As a legal concept, American citizenship is by nature exclusionary. *See id.* at 52 ("Formal law and legal rulings create a structure that legitimates the granting or denial of recognition."). At its inception, the legal aspect of American citizenship arose from such a structure, such that the social and political concepts of citizenship were designed to be similarly exclusionary from the start. For an argument that noncitizens should not

Despite the centrality of citizenship to questions of legal protections, expansion of civil rights, and political participation, the Supreme Court did not initially take steps to clearly define the concept. With regard to the Fourteenth Amendment in particular, the Court left this work "to the operation of the doctrine of *stare decisis*."[49] Through the "gradual process of judicial inclusion and exclusion" the Court "intended" an accumulation of a "long line of judicial precedents . . . which would in themselves define the terms of the Amendment."[50]

As the following case study will demonstrate, this reliance on stare decisis resulted in a historical project of exclusion that defined Citizenship for a narrow class of people and upheld white supremacist systems that continue to oppress marginalized communities today. In advancing this project, the Supreme Court relied on principles that, like stare decisis, were characterized as neutral but, also like stare decisis, were transparent efforts to advance white supremacy.[51] Despite the existence of so-called good cases which expanded citizenship to include previously unprotected persons,[52] the bad cases that rely on explicitly racist and nativist lines of reasoning have generally not been overruled.[53]

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look to citizenship as the goal because the concept within the United States is limited and exclusionary, see Moon-Kie Jung, *supra* note 7, at 18 ("U.S. citizenship has never meant equality, not just informally but formally[.]"). While questions about reconceptualizing citizenship are outside the scope of this Note, the discussion in Part III, *infra*, addresses what a starting point for such questions could look like.

49. Collins, *supra* note 15, at 604.

50. *Id.*

51. Discovery and conquest, membership theory, and national security were all utilized in the Court's reasoning throughout the citizenship cases to (poorly) disguise racist and xenophobic values. Marshall's vision of the American empire from the early indigenous cases provided the groundwork for the colonialist analysis in the *Insular Cases*. The idea of Citizenship as pertaining only to white Americans underlies the Court's use of membership theory throughout the citizenship cases. Both of these approaches, in turn, paved the way for national security arguments in the Chinese and Japanese exclusion cases. This historical pattern of legal reasoning perpetuated by stare decisis helped the Court legitimize its racist holdings, such that it continues to shape citizenship jurisprudence today.

52. *See, e.g.*, Harris, *supra* note 1, at 1744 ("Moreover, the trajectory of expanding democratic rights for white was accompanied by the contraction of the rights of Blacks in an ever deepening cycle of oppression.").

53. The following sections expound on this idea in more detail. A case like *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), for example, discussed in Part II.A, *infra*, is a landmark case in property law for establishing the foundations of property rights in the United States, and remains "good law," despite its explicitly racist and nativist reasoning and bad outcome with respect to the rights of Indigenous tribes over their lands. The Insular Cases, also discussed in further detail in Part II.A, *infra*, have not been overruled despite being based on racist and nativist reasoning that traces back to *M'Intosh*.

This results in three important consequences. First, harmful reasoning from bad precedents has been deeply entrenched in constitutional jurisprudence and continues to affect legal reasoning today, despite the racist values contained within them being largely repudiated. Second, overruling a case often falls short as a countermeasure to stare decisis perpetuating bad precedents, both due to its rare occurrence and its inability to resolve underlying sociopolitical conditions. Third, even good precedents have limited positive effect due to judicial discretion and the practice of distinguishing cases from each other rather than outright overruling. These consequences support the criticism of stare decisis as a regressive rather than neutral legal tool that upholds exclusion independently of why and how stare decisis is utilized. The following discussion provides new evidence for the argument that stare decisis should not be relied upon to preserve and expand constitutional protections for marginalized groups.

A. The Danger of Bad Precedents

Perhaps the most significant of the citizenship cases in terms of its impact in perpetuating exclusion and oppression is *Johnson v. M'Intosh*, which effectively limited the sovereign rights of Indigenous tribes over their lands.[54] As one of the earliest cases dealing with this issue, *M'Intosh* established a line of reasoning that the Supreme Court would continue to rely on for over a century. Specifically, Chief Justice Marshall set out a doctrine of discovery that served as the foundation for the United States's authority over Indigenous tribes. His reasoning was rooted in principles of conquest later seen in the *Insular Cases*[55] as well as in membership theory[56]

54. *M'Intosh*, 21 U.S. 543 (limiting the sovereign rights of indigenous tribes over their lands such that they could only sell to the United States).

55. The *Insular Cases* refer to a series of Supreme Court decisions that characterized Puerto Rico as an unincorporated territory, such that the rights of its inhabitants under the Constitution were substantially limited. This Part reviews some of these cases to demonstrate the long-lasting dangers of bad precedent. *See also* Doug Mack, *The Strange Case of Puerto Rico*, SLATE (Oct. 9, 2017, 5:45 AM), https://slate.com/news-and-politics/2017/10/the-insular-cases-the-racist-supreme-court-decisions-that-cemented-puerto-ricos-second-class-status.html.

56. The references in this Note to membership theory come from Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 37 (2002). Cleveland ties membership theory to social contract theory, explaining that this approach to constitutional rights considers "whether the individual [being acted upon by the government] is one intended to be protected by the Constitution." *Id.* at 20. The implications are that "[o]nly members and beneficiaries of the social contract are able to make claims against the government and are entitled to the contract's protections, and the government may act outside of the contract's constraints against individuals

which became a common feature of the majority of the Court's citizenship cases years after the *M'Intosh* decision.

In his opinion, Marshall acknowledges that Indigenous tribes were "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion," while also claiming that "discovery gave [the United States] an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[57] Drawing from membership theory to justify this discovery doctrine, Marshall roots his reasoning in the "character and habits" of Indigenous tribes, characterizing them as "fierce savages, whose occupation was war," and as impossible to govern "because they were as brave and as high spirited as they were fierce."[58]

This use of othering as justification for exclusion from Citizenship was followed in *Dred Scott v. Sandford*,[59] the Chinese Exclusion Cases,[60] and the *Insular Cases*. In *Dred Scott*, Chief Justice Taney justified the exclusion of freed slaves from citizenship in part by relying on aspects of membership theory found in *M'Intosh*. Taney parallels Marshall's othering language by characterizing Black people as subordinate and inferior in order to continue the Court's exclusionary project of Citizenship. *Dred Scott* also holds significance[61] in this discussion beyond being an example of how *M'Intosh*'s racist reasoning was consistently upheld in subsequent Supreme Court cases. Until the 1960s, the decision in *Dred Scott* "more commonly stood in for the harms of judicial overreach,"[62] and was cited in the *Insular Cases* as "authority for the constitutional relationship between Congress and acquired territories."[63] Thus, despite the implementation of the Fourteenth

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who are nonmembers." *Id.* In the context of the citizenship cases, this approach is utilized to exclude non-white individuals and non-citizens from "membership" in American society. The arguments made in the citizenship cases justified this membership approach in racist, xenophobic, and nativist reasoning. *See also id.* at 21 ("In the late nineteenth century, social contract approaches resolved the question of membership in favor of a white, male, Protestant vision of the national identity.").

57. *M'Intosh*, 21 U.S. at 574, 587.
58. *Id.* at 573, 590.
59. 60 U.S. 393 (1857).
60. Most notably, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (both finding that Congress had inherent power to regulate immigration, including the power to exclude a certain class of people from the United States).
61. *Dred Scott* is also notable as a firm member of American "anticanon," an idea developed by Jamal Greene that refers to a decision "embod[ying] a set of propositions that all legitimate constitutional decisions must be prepared to refute." Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).
62. *Id.* at 441.
63. *Id.* at 437; *see also* Moon-Kie Jung, *supra* note 7, at 15.

Amendment overturning the decision, it remained relevant precedent long after the harmful ideas it espoused were disavowed.

About three decades later in *Chae Chan Ping v. United States*,[64] known as the "original Chinese Exclusion Case,"[65] the Court established the expansive power of the national government in the immigration context and allowed for the exclusion of a particular class of immigrants from the United States.[66] Justice Field's reasoning in this decision was "overtly nativist,"[67] and reflected aspects of membership theory from Marshall's *M'Intosh* opinion. This *M'Intosh*-like line of reasoning led to Field's "embrac[ing] the . . . argument that 'vast hordes' of friendly [immigrants] encroaching upon U.S. shores triggered the core national security powers of the state."[68] Thus, where Marshall relied on membership theory rooted in racist attitudes towards Indigenous people to justify his discovery doctrine, Field did so concerning Chinese immigrants to justify a vague concern over national security. Similarly to Marshall's treatment of the doctrine of discovery in *M'Intosh*, the concept of national security is frequently abstracted from the context of the issue at hand in an—often quite thinly veiled—attempt to disguise underlying racism. This came amid growing sentiments, particularly along the West Coast, that "Chinese were 'barbarians' like Indians, and only slightly more advanced than [B]lacks."[69] Field explicitly referenced this "apprehension," almost as a justification for his racist views.[70]

The endurance of legal reasoning so blatantly rooted in racism and nativism for over half a century demonstrates just how powerful bad precedent can be. Even if *M'Intosh*'s reasoning is not directly cited, it persists by mere usage over time due in large part to the power of precedent in American jurisprudence. These harmful effects are seen to this day despite the fairly widespread repudiation of such transparently racist

64. *Chae Chan Ping*, 130 U.S. 581.
65. Cleveland, *supra* note 56, at 124.
66. *Chae Chan Ping*, 130 U.S. 581.
67. Cleveland, *supra* note 56, at 129.
68. *Id.* at 130.
69. *Id.* at 113.
70. *Chae Chan Ping*, 130 U.S. at 594 ("[A] limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific coast, and *possibly to the preservation of our civilization*." (emphasis added)); *see also id.* at 595 ("The differences of race added greatly to the difficulties of the situation. . . . It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living.").

reasoning, where "national security" is considered a valid justification to expand governmental powers at the expense of civil rights protections.[71]

Nearly eighty years after *M'Intosh*, Marshall's opinion continued to affect Supreme Court jurisprudence on citizenship in *Downes v. Bidwell*, one of the early *Insular Cases*.[72] Here, Justice Brown cited directly to *M'Intosh* to support the exclusion of Puerto Rico from membership to the United States.[73] The references to conquest[74] and the "American empire"[75] furthered Brown's nativist[76] analysis, which was "expressly designed to prevent dilution of the American birthright by *uncivilized* peoples."[77] Relatedly, Justice White relied on membership theory in his concurrence to emphasize the "power [of the United States] to protect the birthright of its own citizens" from "those absolutely unfit to receive it[.]"[78]

Using similar "othering" language as Marshall did with regards to the Indigenous tribes in *M'Intosh* and Taney regarding freed Black individuals in *Dred Scott*, Brown emphasized that the inhabitants of Puerto Rico were of

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71. In fact, in *Chae Chan Ping*, Field used language that wouldn't seem out of place in present-day discussions around the "Muslim Ban." *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018). *See also* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 U.C.L.A. L. REV. 1 (1998) (arguing for a reexamination of the plenary power doctrine given that the foundational cases, which include *Chae Chan Ping*, upheld racial discrimination against immigrants and were decided by the same Court that decided *Plessy*).

72. Downes v. Bidwell, 182 U.S. 244 (1901). The early *Insular Cases* also indicate support for the conclusion examined in Sub-part B, *infra*. These were "decided by the same Supreme Court that allowed "separate but equal" segregation in *Plessy v. Ferguson* in 1896," and while *Plessy* was overruled, the *Insular Cases*, "which are built on the same racist worldview, still stand today." Mack, *supra* note 55.

73. *Downes v. Bidwell* introduced the "'Incorporation Doctrine,' which recognized Puerto Rico and the other former Spanish territories as 'unincorporated territories'" and which "extends only the 'fundamental' rights" in the Constitution to residents of these territories. *See* Muchnick, *supra* note 15, at 805.

74. *Downes*, 182 U.S. at 281 ("So too, in *Johnson v. M'Intosh* . . . 'The title by conquest is acquired and maintained by force. The conqueror prescribes its limits . . . .'").

75. *Id.* at 286 ("A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire.").

76. *Id.* at 279–80 ("[I]t is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions and modes of life, shall become at once citizens of the United States."); *see also id.* at 287 ("If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible . . . ."). For paternalistic language that factored into *Downes*'s nativist analysis, see *id.* at 284 (claiming that it would be a "great[] injustice," an "intolerable burden," and "oppressive and ruinous" to apply the Uniformity Clause to Puerto Rico).

77. Cleveland, *supra* note 56, at 221 (emphasis added).

78. *Downes*, 182 U.S. at 306 (White, J., concurring).

different "race, habits, laws, and customs" than white Americans, which required a different approach than that used "in the annexation of contiguous territory inhabited only by . . . scattered bodies of native Indians."[79] This distinction is what facilitated the development of the "Incorporation Doctrine," which continues to allow for the separate treatment of Puerto Ricans concerning their participation in American Citizenship and access to constitutional rights.[80] The combination of Brown's majority opinion and White's concurrence thus served to establish the necessary power of the United States to "be able to govern the territorial inhabitants . . . since it was impossible that they should be given the benefits of American citizenship."[81]

Marshall's reasoning resurfaced again in a later *Insular Case*, about twenty years after *Downes v. Bidwell*. In *Balzac v. Porto Rico*,[82] Chief Justice Taft quoted *Dorr v. United States* to invoke Marshall's discovery doctrine, rooted in similarly racist conceptions of membership, conquest, and imperialism.[83] The opinion in *Balzac* demonstrates the long-lasting dangers of bad precedent such as *M'Intosh*, even in the face of legislative acts that move towards expansionary concepts of Citizenship. *Balzac* limited rights for Puerto Rican residents who had newly been granted citizenship under the Jones Act, holding that the right to trial by jury was not a fundamental Constitutional right such that it would extend to citizens residing in Puerto Rico.

The *Insular Cases* further act as their own bad precedent, continuing the trend of viewing territories like Puerto Rico and their inhabitants as a sub-class within the American Citizenship project.[84] In *Harris v. Rosario*, the Court permitted the federal government to fund social welfare programs at lower rates in U.S. territories, so long as there was a "rational basis" for

79. *Downes*, 182 U.S. at 282.
80. *See* Puerto Rico v. Valle, 136 S. Ct. 1863 (2016) (holding that Puerto Rico is not a sovereign independent of the United States for double jeopardy purposes).
81. Cleveland, *supra* note 56, at 227.
82. Balzac v. Porto Rico, 258 U.S. 298 (1922).
83. "'We conclude that the power to govern territory, *implied in the right to acquire it*, and given to Congress in the Constitution . . . does not require that body to enact for ceded territory . . . a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated.'" *Id.* at 305 (quoting *Dorr v. United States*, 195 U.S. 138, 149 (1904)) (emphasis added).
84. *See* Mack, *supra* note 55(discussing recent cases in which the Court upheld the reasoning of the Insular Cases); Muchnick, *supra* note 15, at 799 (arguing that the status of Puerto Rican residents' rights "exposes a troubling disparity in the rights of citizenship," and this "disparity is a function of the status of the unincorporated territories, decided by the *Insular Cases*").

such disparity.[85] The Court declined to apply heightened scrutiny to the equal protection claim, concluding that this standard of review was "simply unavailable to protect Puerto Rico or the citizens who reside there from discriminatory legislation."[86] More recently in 2016, the Court ruled in *Puerto Rico v. Sanchez-Valle* that Puerto Rico was not a separate sovereign, thus upholding the logic of the *Insular Cases* and reasoning that permits the disparate treatment of Puerto Rico and its inhabitants concerning civil rights.[87]

Finally, in *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, the Court passed on an opportunity to expressly reject the *Insular Cases*, still following their reasoning in upholding the constitutionality of an undemocratic, federally-appointed body that retains virtually complete authority over Puerto Rico's budget. Though Justice Breyer, who wrote the opinion, noted that the *Insular Cases* were a "dark cloud" over the case,[88] he ultimately followed the reasoning from the Court's long line of precedents permitting the United States' colonial and exploitative control over the island. This has had substantial negative effects given that "the *Insular Cases* have not been left for dead by lower courts."[89]

Though the focus of this analysis is indeed *M'Intosh*'s status as bad precedent, the opinion itself reflects an important critique of stare decisis in legal reasoning: "Apparently neutral" principles promote the "interests of the dominant class . . . at the expense of those who are oppressed."[90] Though the principles Marshall utilizes—notably, discovery, conquest, and membership theory—are markedly not neutral, they are justified merely by their prior use; "if the principle has been asserted in the first instance, and afterwards sustained . . . it becomes the law of the land, and cannot be

85. Harris v. Rosario, 446 U.S. 651, 651-52 (1980) (relying on the Territory Clause in Art. IV, § 3, cl. 2 of the Constitution to uphold Congress's power to treat Puerto Rico differently, so long as a rational basis exists for doing so).

86. *Id.* at 654 (Marshall, J., dissenting).

87. Puerto Rico v. Valle, 136 S. Ct. 1863 (2016); *See also* Mack, *supra* note 55("[T]he Obama administration, like its predecessors, fought to uphold the Insular Cases" in *Valle*).

88. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 139 S. Ct. 2735 (2019). Kyla Eastling, Danny Li & Neil Weare, *The Supreme Court Just Passed Up a Chance to Overrule Appallingly Racist Precedents*, SLATE (June 1, 2020, 5:42 PM), https://slate.com/news-and-politics/2020/06/puerto-rico-insular-cases-supreme-court.html.

89. *Id. See, e.g.*, Igartúa v. United States, 626 F.3d 592 (1st Cir. 2010) (holding that Puerto Rican residents did not have the right to vote for members of the House of Representatives, and specifically referencing stare decisis as precluding the court from disregarding a prior holding that U.S. citizens residing in Puerto Rico did not have the right to vote for members of the House).

90. Greenawalt, *supra* note 15, at 299–300.

questioned."[91] This abstraction of principles from the historical context of Indigenous genocide and violent conquest allowed Marshall to justify an opinion that excluded Indigenous people from full participation in American Citizenship—and allowed subsequent Justices to do the same in continuance of the white-centered project of Citizenship.

B. Limits of Overruling

The ability of the Supreme Court to overrule erroneous cases is a necessary and important balance to the strength of stare decisis as a legal principle.[92] Despite this, overruling is not only rare, but it is often not enough to undo the harms of bad cases. Prominent examples of this are the cases of *Plessy v. Ferguson*[93] and *Brown v. Board of Education*.[94] While not explicitly citizenship cases, they are both significant in their effect on the broader concept of American Citizenship, and in what they reveal about the limits of overruling.[95]

The harm of the Court's "separate but equal" decision upholding the constitutionality of racial segregation in *Plessy* is well recognized.[96] This well-understood harm, in theory, supports *Brown*'s status as a strong, good precedent that successfully overruled *Plessy*'s harmful, "longstanding precedent."[97] Speaking from social and moral considerations, Chief Justice Warren in *Brown* held that "separate but equal"[98] violated the Fourteenth Amendment's Equal Protection Clause. Yet, implementing the changes mandated by *Brown* was far from smooth. Both before the *Brown* decision and for some time after it, "there was no consensus even among elites that *Plessy* was wrongly decided."[99] This made it incredibly contentious and

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91. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 590.
92. *See, e.g.*, Lee, *supra* note 15, at 653–54 ("Blind adherence to precedent in all cases, however, threatens to undermine the principal policy [of] assuring accurate judicial decisions that faithfully apply correct principles of law.").
93. Plessy v. Ferguson, 163 U.S. 537 (1896).
94. Brown v. Board of Education, 347 U.S. 483 (1954).
95. As a separate note on stare decisis's oppressive effect in legal decisions, *Plessy* is one of the clearest examples of reliance on precedent resulting in a harmful outcome. In *Plessy*, "judicial precedent was firmly on the side of the majority," which allowed the Court to justify the "separate but equal" doctrine through deference to this precedent. Greene, *supra* note 61, at 415. In fact, for the Court in *Plessy* to have "str[uck] down a law based on hidden illicit motives would [have] squarely confront[ed] a powerful tradition of refusing to look beyond the face of statutory text." *Id.* at 416.
96. Like *Dred Scott*, *Plessy* is significant in large part because of its place in the "anticanon." *Id.* at 380.
97. *Id.* at 381.
98. *Plessy*, 163 U.S. at 552 (Harlan, J. dissenting).
99. Greene, *supra* note 61, at 442.

difficult for *Brown* to have a radical, progressive effect on constitutional protections.[100] In fact, under some of the factors considered when deciding whether to overrule, *Brown* could have been found "unworkable" enough to overturn, whereas *Plessy*, at the time, was not.[101]

A more recent example of the limitations of overruling as a counter to bad precedents is *Korematsu v. United States*[102] and *Trump v. Hawaii*.[103] While *Trump v. Hawaii* overruled *Korematsu*, it took nearly eighty years to do so, and throughout that period, *Korematsu* continued to have significant and harmful effects.[104] *Korematsu*'s reliance on bad precedent[105] and its bad reasoning[106] retain relevance as certain ideas established in the decision, such as the concept that the "power to exclude includes the power to do it by

100. Harris, *supra* note 1, at 1751, 1756 (criticizing the Court in *Brown* for "declin[ing] to guarantee that white privilege would be dismantled," and therefore "fail[ing] to address the full measure of the harm," and citing to *Milliken v. Bradley*, 418 U.S. 717 (1974) as "the logical consequence of *Brown*'s ambivalence on the question of the state's responsibility to give content to the mandate of equality"). For further critique of *Brown* as resulting in actual progress, see Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

101. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court set forth four factors to consider when determining whether to uphold or depart from a prior ruling: first, whether the prior holding has been proven to be "unworkable;" second, whether there exist reliance interests that would result in injust hardship or inequities if the prior rule was overturned; third, whether the law has developed in such a way that the prior holding can be considered effectively abandoned; and fourth, whether circumstances have changed so much that the prior rule no longer has any justification or appropriate application. *Id.* at 854–60.

102. Korematsu v. United States, 323 U.S. 214 (1944) (upholding the exclusion of Japanese-Americans from certain areas and the subsequent forced relocation of Japanese-Americans to internment camps).

103. Trump v. Hawaii, 138 S. Ct. 2392 (2018) (upholding the "Muslim Travel Ban" Executive Order which prevented citizens of mostly Muslim-majority countries from entering into the United States) .

104. While there was a similarly long period between *Plessy* and *Brown*, the length is more significant in the case of *Korematsu* and *Trump v. Hawaii* because *Korematsu*, more so than *Plessy*, has more positive citations than negative. *See infra* note 107.

105. *Korematsu* built upon language from the Indigenous citizenship cases that persisted in the Chinese Exclusion Cases and that was used in the Insular Cases. The opinion also emphasized the "times of war" and the broad "power of Congress and the Executive to exclude those of Japanese ancestry" established in *Hirabayashi*. *Korematsu*, 323 U.S. at 217–19.

106. Even Justice Murphy's dissent in *Korematsu*, which recognizes that the "exclusion . . . falls into the ugly abyss of racism," gives "great respect and consideration to the judgments of military authorities." *Korematsu*, 323 U.S. at 233–34 (Murphy, J., dissenting). Murphy does recognize that "obvious racial discrimination" should not be "entitled to the great weight ordinarily given the judgments based upon strictly military considerations," but this does little to address the dangerous effects that "national security" concerns and deference to military judgments has on the rights of marginalized classes of people, including citizens and non-citizens. *Id.*

force if necessary,"[107] continue to serve as a dangerous precedent in a time where, despite "almost uniform[] recogni[tion]"[108] that *Korematsu* is bad law, national security concerns continue to be permissible justification for exclusion and oppression.[109] Thus, the difficulty for the Court to overturn its past decisions helps stare decisis to function over the long term as an exclusionary mechanism.

Korematsu also reflects the dangers of bad precedents, with the decision being the culmination of more than a century's worth of precedent expanding Congressional power concerning immigration (and, by association, citizenship) justified by racist and nativist values that had been set out as early as the 1820s in *M'Intosh*. *Korematsu* relied heavily on *Hirabayashi v. United States*, which raised nativist, xenophobic, and "national security" concerns to justify the exclusion of Japanese Americans from full participation in American citizenship and the rights and privileges that come with it.[110]

Importantly, *Korematsu* has been "cited positively far more [often] than negatively," despite broad consensus that it is "bad precedent."[111] The positive references may be explained by the recent trend of citing *Korematsu* "in support of the proposition that governmental racial classifications receive strict scrutiny from reviewing courts."[112] However, it is also significant that the Warren Court, after the *Korematsu* decision, "refused to invoke [it] for its obvious negative lessons" in race cases, "instead treat[ing] it unself-consciously as a precedent to be cited for its positive contributions to the Court's race jurisprudence."[113]

Thus, the length of time that passed before *Korematsu* was overruled permitted the decision to ingrain itself deeper into legal reasoning, which weakened the effect of it being overruled in the end. Notably, despite *Trump v. Hawaii*'s explicit abrogation of *Korematsu*, the majority's decision in that case "redeploys the same dangerous logic underlying *Korematsu* and merely replaces one 'gravely wrong' decision with another."[114] This brings

107. *Id.* at 223.
108. Greene, *supra* note 61, at 402.
109. *See* Trump v. Hawaii, 138 S. Ct. 2392; see *also* Greene, *supra* note 61, at 425 ("The Court has long espoused deference to military judgments about the conduct of war.").
110. Hirabayashi v. United States, 320 U.S. 81 (1943); *see also* Greene, *supra* note 61, at 425 ("[T]he use of Japanese ancestry as a proxy for dangerousness had already been accepted as constitutionally valid by the Court, and unanimously so, in *Hirabayashi v. United States*.").
111. *Id.* at 398–99, 402.
112. *Id.* at 398.
113. *Id.* at 457.
114. *Trump*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting).

up the question of what overruling bad precedents accomplishes if they may be replaced with a new, equally harmful opinion.

Overruling has clear limits in countering the negative effects of stare decisis.[115] This is not to say that those currently advocating for greater adherence to stare decisis to preserve good precedent should find comfort in these limits. Rather, these examples mean to highlight problems inherent in the principle of stare decisis that result in its overwhelmingly oppressive effect, regardless of who is advocating for its use.

C. Limited Effect of Good Precedents

One argument against the above critique of stare decisis is the fact that good precedents do, in fact, exist—both in terms of good holdings and in terms of legal reasoning in opinions that still reach bad conclusions—and should be preserved. This, however, simplifies the reality of how good precedents function. Some of the citizenship cases related to Indigenous tribes and some of the Chinese Exclusion cases demonstrate the limited effect that good precedents have, especially when stacked against a long history of bad precedents. This particular consequence has also become readily apparent in several of the most recent Supreme Court cases dealing with LGBTQ and reproductive rights.[116]

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115. *See* Harris, *supra* note 1, at 1757 ("What remained consistent [after *Brown*] was the perpetuation of institutional privilege under a standard of legal equality.").

116. This Note's case study focuses on historical lines of citizenship cases centered around race, and so an in-depth discussion of the Court's rulings on LGBTQ rights and abortion rights are outside its scope. It is worth noting though that even recent progressive rulings in these areas are quite limited in bringing about substantive change. Chief Justice Roberts, in *June Medical Services v. Russo*,—S. Ct.——, 2020 WL 3492640, *21 (June 29, 2020) (Roberts, C.J., concurring), explicitly states that he still believes *Whole Women's Health v. Hellerstedt*, 126 S. Ct. 2292 (2016) (striking down a Texas "TRAP," or "targeted regulation of abortion providers," law requiring abortion providers to have admitting privileges in nearby hospitals) was wrongly decided, but sides with the majority because of stare decisis. Rather than this acting as support for stare decisis, it reveals how thin these wins actually are. States can continue to enact abortion-limiting legislation, and the Supreme Court may distinguish *Whole Women's Health* to uphold those laws, or a future Court may agree with Chief Justice Roberts and overrule it. *See also* Jamille Fields Allsbrook & Nora Ellman, June Medical Services v. Russo: *The Potential Impact on Abortion, Civil, and Human Rights*, CTR FOR AM. PROGRESS (Feb. 6, 2020), https://www.americanprogress.org/issues/women/reports/2020/02/06/480156/june-medical-services-v-gee/ ("*June Medical* illustrates that reliance on courts and precedent alone is not enough; state and federal legislation is also necessary to prevent attacks on abortion care and proactively improve access to abortion."); Laurie Sobel & Alina Salganicoff, *Abortion Back at the Supreme Court:* June Medical Services LLC v. Russo, KAISER FAM. FOUND. (June 29, 2020), https://www.kff.org/womens-health-policy/issue-brief/abortion-back-at-the-supreme-court-june-medical-services-llc-v-

First, bad holdings often jump through hoops to distinguish good precedent in order to reach exclusionary conclusions. Second, and similarly, overruling Supreme Court cases outright is so rare that cases with good holdings also tend to jump through hoops in distinguishing bad precedent, which effectively leaves the bad precedents in place while weakening the long-term effect of the good precedents. The result is a deeply entrenched history of exclusionary reasoning that supports present-day efforts to perpetuate narrow conceptions of citizenship and undermines attempts at broadening access to citizenship.

As an example of this first point, in *Chae Chan Ping*, Field ignored prior rulings in *Yick Wo*[117] and *Chy Lung*[118] that supported constitutional protections for newly arrived non-citizens against arbitrary treatment, [119] while his arguments about assimilation found support from the prior Indigenous citizenship cases. This allowed Field to uphold the "power of exclusion of foreigners [as] an incident of sovereignty belonging to the government of the United States,"[120] an idea that continues to permeate current immigration policies and legislation.[121] Similarly, in *Downes v. Bidwell*, the Court "distinguished" and "differentiated" precedents from *Dred Scott*, and from *Yick Wo*[122] and *Wong Wing*,[123] to expand Congressional power and "establish[] an unprecedented and complex form

russo/ ("The Court will likely not apply the Whole Woman's Health balancing test to future challenges to abortion restrictions, but will rather inquire whether the law poses a 'substantial obstacle.' As a result, the Court may uphold some laws with little or no benefit."). For a critique of *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down laws prohibiting private homosexual activity, see Berta E. Hernández-Truyol, *Querying* Lawrence, 65 OHIO STATE L.J. 1151, 1262 (2004) ("By looking at privacy and/or equality separately, the Court does not center on . . . the significance of subordination. The Court's opinion thus fails to utilize the opportunity provided by *Lawrence* to focus on the real problem presented to it in the case—one of second-class citizenship.").

117. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that facially neutral laws applied in a racially discriminatory manner violated the Fourteenth Amendment).
118. *Chy Lung v. Freeman*, 92 U.S. 275 (1875). *See also* Cleveland, *supra* note 56, at 131 (suggesting that *Chy Lung* provided that the "Constitution protected even newly arrived [immigrants] from arbitrary treatment").
119. *Id.* at 131.
120. Chae Chan Ping v. United States, 130 U.S. 581, 609.
121. *See* Trump v. Hawaii, 138 S. Ct. 2392.
122. Another example of the Court distinguishing *Yick Wo* to reach an exclusionary holding is in *Plessy v. Ferguson*, where the Court made a distinction between "unjust" discriminatory legislation that would lead to unequal results and permissible discrimination that would qualify as separate but equal. *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896).
123. *Downes v. Bidwell*, 182 U.S. 244, 283.

of colonial governance" over the territories.[124] By outrightly ignoring good precedents in some cases and distinguishing them on shallow grounds in others, the Court has repeatedly relied on stare decisis to continue the long-lasting effects of the exclusionary project of Citizenship.

As for the second point, *Wong Wing v. United States*[125] provides a helpful example. In this case, Justice Shiras affirmed *Yick Wo* in recognizing that the Fourteenth Amendment, along with the Fifth and Sixth Amendments, applied "to all persons within the territorial jurisdiction of the United States," resulting in a shift towards expansionary ideas of Citizenship.[126] However, rather than repudiating or overruling the nativist and xenophobic reasoning in *Chae Chan Ping*, the Court deferred to "Congress's decisions regarding [immigrants'] membership in the American polity [despite] holding that the Constitution otherwise applied to [non-resident immigrants] in the United States."[127] This upheld the expansive powers of the national government *Chae Chan Ping* set out and further entrenched its precedential effect.

United States v. Wong Kim Ark[128] demonstrates this point further. Here, the Court again moved towards expansion of Citizenship by considering Chinese individuals born within the United States to be American citizens. However, Justice Gray reached such a holding without overruling any prior cases supporting exclusionary visions of Citizenship. In particular, Gray engaged in creative legal reasoning that permitted a narrow interpretation of his own opinion in *Elk v. Wilkins*[129]—one of the early cases on Indigenous citizenship that explicitly excluded Indigenous people born into tribes from American citizenship. *Elk v. Wilkins* itself relied on bad precedent from *Cherokee Nation*,[130] *Worcester*,[131] and even *Dred Scott* in excluding Indigenous children from birthright citizenship.[132]

124. Muchnick, *supra* note 15, at 800, 805. *See also Downes*, 182 U.S. at 283 ("Large powers must necessarily be entrusted to Congress in dealing with these problems . . . .").
125. Wong Wing v. United States, 163 U.S. 228 (1896).
126. Cleveland, *supra* note 56, at 153.
127. *Id.* at 154.
128. United States v. Wong Kim Ark, 169 U.S. 649 (1898).
129. Elk v. Wilkins, 112 U.S. 94 (1884).
130. Cherokee Nation v. Georgia, 30 U.S. 1, 27 (1831) (holding that Indigenous nations were not "foreign states" under the Constitution, and so could not sue in federal courts).
131. Worcester v. Georgia, 31 U.S. 515 (1832) (barring states from intervening in Indigenous affairs and setting out the relationship between the federal government and Indigenous tribes as falling under the War, Treaty, and Commerce Clauses).
132. Justice Gray cited *Dred Scott* to support the claim that the "main object" of the Fourteenth Amendment was to "settle the question . . . as to the citizenship of free[d

Thus, by cabining the decision in *Elk* to just Indigenous citizenship rather than overruling it outright, the effort to expand Citizenship for Chinese Americans was greatly limited. The dangerous and harmful reasoning from *Elk* continued to have legal standing, which in turn extended the lifespan of other bad precedents from *Cherokee Nation*, *Worcester*, and *Dred Scott*. These examples reveal how stare decisis historically tends toward oppressive rather than progressive values, even when there appears to be incremental progress.

III. BEYOND THE COURT, BEYOND THE LAW

The preceding analysis of citizenship cases in the Supreme Court demonstrates the dangers of relying on stare decisis as a liberal organizing tool to preserve case law that has expanded civil rights protections to marginalized groups of people. First, progressive wins in the Supreme Court have rarely overruled prior, exclusionary precedents. Second, such victories have generally taken long periods to be achieved, allowing harmful and exclusionary lines of reasoning to become so embedded in legal thought, they continue to be upheld as "neutral" principles. Third, continuing to place importance on a principle that has repeatedly revealed itself to function in exclusionary and oppressive ways will only further ingrain stare decisis as a cornerstone of legal reasoning, making it a powerful tool for any who seek to limit constitutional protections rather than expand them.

The question remains, then, of what those who wish to preserve and expand existing constitutional protections for marginalized groups should do. There are several approaches for legal advocacy[133] that can be utilized outside of promoting adherence to stare decisis. This Note specifically cautions against over-reliance on legal structures, like stare decisis, in

slaves]," and was thus not intended to include indigenous tribes in its scope. *Elk*, 112 U.S. at 101. He cited *Cherokee Nation* and *Worcester* as support for claims about the sovereign and separate nature of indigenous tribes, which ultimately allowed him to hold that indigenous people born into tribes were not "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the [F]ourteenth [A]mendment." *Id.* at 100, 102.

133. *See, e.g.*, Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); *See also* DELGADO & STEFANCIC, *supra* note 11, at 27 ("[O]ne critical race scholar proposed that society 'look to the bottom' in judging new laws. If they would not relieve the distress of the poorest group—or, worse, if they compound it—we should reject them.").

engaging in such advocacy.[134] Judicial principles cannot solve inequality if the legal system itself is built on inequality.[135] A system founded on white supremacist ideals cannot contain the solutions to white supremacy. For lawyers who truly believe in an expansionary vision of American Citizenship, perhaps the better question is how to reimagine the role of progressive lawyers with this context in mind.

This is where the substantive CRT scholarship meets the present moment in which liberals have taken up the fundamentally conservative principle of stare decisis. It has already been established that precedent is conservative, oppressive, and a tool for the propagation of white supremacy and that stare decisis cannot and will not bring about transformative and expansionary progress.[136] Thus, when liberals take up stare decisis as a "shield" against conservative attempts to undo progressive precedents, they fall into the "color-blindness"[137] trap—that is to say, they are ignoring the racist underpinnings of the American legal system and, instead, are embracing a color-blind constitutional jurisprudence.

Stare decisis serves as an example of how the American judicial system is employed to achieve oppressive and exclusionary results. By ignoring the systemic problems[138] and championing precedent as a neutral tool through which progressive change can be safeguarded, liberals are perpetuating the very harms they seek to prevent. This approach cannot result in any form of

134. Again, this follows the work of CRT scholars who "critique civil rights legal reforms by noting that they failed to fundamentally challenge racial inequality." Brewer & Heitzeg, *supra* note 12, at 626. *See, e.g.*, Derrick Bell, *An American Fairy Tale: The Income-Related Neutralization of Race Law Precedent*, 18 SUFFOLK U. L. REV. 331 (1984); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006). *See also* Brewer & Heitzeg, *supra* note 12, at 626 (noting that civil justice "has been used to explicitly reify via the law the essentialist White supremacist paradigm").

135. *See* AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House, in* SISTER OUTSIDER: ESSAYS AND SPEECHES 110–14 (2007).

136. Bell, *Foreword: The Civil Rights Chronicles*, *supra* note 39, at 12; Bell, *Racial Realism*, *supra* note 34, at 374, 376.

137. *See e.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STANFORD L. REV. 1 (1991); Keith E. Sealing, *The Myth of a Color-Blind Constitution*, 54 WASH. U. J. URB. & CONTEMP. L. 157 (1998); *see also* Brewer & Heitzeg, *supra* note 12, at 626 ("At present, civil justice has been at the center of legal claims of color-blindness, forwarding the notion that if race is no longer the basis for legalized discrimination, then it is no longer relevant to the law at all."); Kimberlé Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1313 (2011) (discussing the threat "post-racialism" poses to racial justice); DELGADO & STEFANCIC, *supra* note 11, at 7 ("Color-blind, or 'formal,' conceptions of equality, expressed in rules that insist only on treatment that is the same across the board, can thus remedy only the most blatant forms of discrimination.").

138. *See, e.g.*, Moyn, *supra* note 9.

expansionary progress.[139] Any solutions must therefore involve "efforts to expose the deep structures of racism" present in the American legal system.[140]

CONCLUSION

The project of exclusion in the law began at the founding of the United States and has been perpetuated by a history of jurisprudence bolstered by allegedly neutral legal principles that disguise the law's unequal beginnings. The Supreme Court citizenship cases analyzed in this Note demonstrate how these principles, like stare decisis, promote limited participation in American society for those outside of the dominant class, even as slow and incremental progress is made.[141] Through this process, those left out of the complete project of Citizenship are essentially told: "You are American, but . . . "

How can Citizenship be expanded, then, when the current system has legally allowed membership to be restrained if a person does not belong to the dominant class? Critical Race Theory encourages us to think deeply about the meaning and implications of this question. The racial underpinnings of constitutional law, the continued effect of exclusionary precedent on current efforts, and the need to consider alternatives to progress through litigation all must be considered in exploring this question. CRT also encourages lawyers to look beyond principles like stare decisis to

139. The Supreme Court's recent decision in *Dep't Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020) again reveals the limits of the Court's power to create substantial and expansionary change. As Justice Sotomayor's concurrence notes, the Court "foreclosed any challenge to the rescission of [the DACA program] under the Equal Protection Clause." *Id.* at 1917 (Sotomayor, J., concurring in part, dissenting in part). This severely limits the impact of the opinion in protecting immigrants classified as "Dreamers." It additionally permits the Trump Administration to follow the roadmap laid out in the opinion to try again and survive any subsequent challenge under the arbitrary and capricious standard. Thus, it is only, at best, a temporary respite for Dreamers, and does little, if anything at all, to substantively guarantee the rights of immigrants in this country.

140. What those specific solutions may be is a question beyond the work of this Note, which only proposes moving away from focusing advocacy within the judiciary as a starting point. Brewer & Heitzeg, *supra* note 12, at 626. *See also* DELGADO & STEFANCIC, *supra* note 11, at 27 ("Only aggressive, color-conscious efforts to change the way things are will do much to ameliorate misery.").

141. *See* DELGADO & STEFANCIC, *supra* note 11, at 29 ("[B]reakthrough is quietly cut back by narrow interpretation, administrative obstruction, or delay. In the end, the minority group is left little better than it was before, if not worse."); GLENN, *supra* note 2, at 24 ("These times of expanding egalitarianism typically were followed by periods of regression during which hard-won gains were rolled back and new exclusions put in place.").

safeguard existing progress and continue expanding constitutional protections. It is a difficult undertaking that asks lawyers to participate in nuanced legal analysis by considering history and human impacts, by requiring a creative reimagining of the role of the law, and by pushing against established ideas of what the law ought to be. If any progress is meant to be more than a fleeting moment in history, though, this undertaking is necessary.