

From Railroads to Real Estate:
The Legacy of Exclusion Revived in New Alien Land
Laws

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I. INTRODUCTION

In the shadow of towering skyscrapers and sprawling estates lies a battleground not of arms but of laws, where the specter of national security looms large over the right to own a piece of the American dream. Zhiming Xu, a political asylee who fled to the United States from persecution by the Chinese government, finds himself barred at the threshold of homeownership, not by financial constraints, but by a law that echoes an exclusionary past.¹ This is not just a story of one; it's the narrative of many who find themselves entangled in legislative efforts like Florida's Senate Bill 264 (“**SB 264**”), which restrict foreign nationals from designated “countries of concern” from purchasing real estate.² At stake is more than property, it's the American dream itself, bound not just by the dream of property ownership but by the constraints of government overreach and xenophobia.³

The election of Donald Trump in 2024, spurred by populist movements and renewed rhetoric on immigration and national security, has reignited debates that many believed were consigned to history.⁴ Accompanied by shifting geopolitical tensions with China, where concerns over espionage and communism have become flashpoints, numerous states are resurrecting legislation eerily reminiscent of early twentieth-century alien land laws.⁵

These legislative attempts, framed as measures to protect national security, prompt critical inquiries into the balance between security and discrimination.⁶ The echoes of the past—alien land laws that prohibited Asian immigrants from owning land, the Chinese Exclusion Act, and the incarceration of Japanese Americans during World War II under

¹ See First Amended Complaint at 19-20, *Shen v. Simpson*, 687 F. Supp. 3d 1219 (N.D. Fla. 2023) (No. 4:23-cv-208-AW-MAF).

² See S.B. 264, 2023 Leg., Reg. Sess. (Fla. 2023); FLA. STAT. § 692.201–205 (2023).

³ Patrick Toomey & Clay Zhu, *Florida Really Just Banned Chinese Immigrants from Owning Property. We're Suing*, TIME (June 21, 2023 6:00 AM), <https://time.com/6288638/florida-ban-chinese-immigrants-owning-property-suing/> [<https://perma.cc/S6NQ-7WER>] (“This bill tells us that we are not good Americans, we are not Americans deserving of protection under the law, we are not Americans that the legislators we elect care to serve[.]”).

⁴ Francis Fukuyama, *What Trump unleashed means for America*, FIN. TIMES, (Nov. 7, 2024), <https://www.ft.com/content/f4dbc0df-ab0d-431e-9886-44acd4236922/> [<https://perma.cc/K75J-KVKQ>].

⁵ See Mark Jia, *American Law in the New Global Conflict*, 99 N.Y.U. L. REV. 636, 667-70 (2024).

⁶ See Sean L. Litteral, *National Security at Home: Chinese Investment in U.S. Real Estate*, 31 STAN. L. & POL'Y REV. 237, 253-54 (2020) (“The excuse of national security should not lead to over-sweeping legislation.”).

Korematsu—resound in these present actions, and reveal a recurring pattern of using national security to justify targeting vulnerable groups.⁷ Scholars have previously examined the xenophobic underpinnings and constitutional vulnerabilities of such laws.⁸ This paper aims to build upon those foundations and contributes new perspectives by linking the reemergence of property ownership restrictions to a shifting geopolitical landscape and incorporating Professor Eric K. Yamamoto’s Strategic Blueprint for National Security Accountability (the “**Strategic Blueprint**”), as conceptualized in *White (House) Lies*, to propose a structured judicial and societal response to the New Alien Land Laws.⁹

Such legislation has historically benefitted white Americans, reinforcing systemic inequalities at the cost of minority rights and freedoms.¹⁰ Yet, what is truly at stake is the fundamental fairness and equity of American society, challenging us to confront whether history will look back on these laws as protective measures or as relics of prejudice.¹¹ This paper argues that these legislative actions are not mere reflections of national security concerns but rather manifestations of historical anti-Asian sentiment, repackaged in contemporary legal measures. However, this paper does not focus on the complexities of the United States–China relations, but instead aims to analyze the New Alien Land Laws through the lens of past historical injustices.

By employing Strategic Blueprint, this analysis aims to promote a structured method for ensuring that national security measures do not overshadow constitutional rights.¹² The Strategic Blueprint originates from a deep understanding of the historical and ongoing challenges faced by the judiciary in maintaining a balance between national security and civil liberties.¹³ Its purpose is to foster rigorous judicial scrutiny that does not merely accept at face value the executive branch’s claims of national

⁷ See discussion *infra* Sections II.A, II.B, II.C.

⁸ See e.g., Keith Aoki, *No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998).

⁹ See Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 LAW & CONTEMP. PROBS. 285, 287-89 (2005) [hereinafter *White (House) Lies*]; see also *infra* Section IV.A.

¹⁰ See Tina Al-Khersan & Azadeh Shahshahani, *From the Chinese Exclusion Act to the Muslim Ban: An Immigration System Built on Systemic Racism*, 17 HARV. L. & POL’Y REV. 131, 147 (2022) (comparing Trump’s views on immigrants as a “cultural threat to white Americans” to Theodore Roosevelt’s views on the Chinese as “ruinous to the white race[.]”).

¹¹ See *infra* Part II for a discussion of historical laws discriminating against Asians and Asian Americans.

¹² See *infra* Section IV.A.

¹³ See *White (House) Lies*, *supra* note 9, at 287.

security needs.¹⁴ By combining critical legal advocacy, media involvement, and grassroots efforts, the blueprint aims to educate and influence both public perception and judicial review.¹⁵

Through this lens, the analysis will explore the roots and ramifications of historical legislative attempts to exclude Asians, scrutinize the contemporary legislative measures' direct and indirect effects, and provide a comprehensive critique encompassing legal and social justice dimensions. This paper also critically examines the limitations of current legislative efforts, placing them within the broader history of injustice and questioning their impact on national security without perpetuating exclusionary practices.

To do so, Part II traces the historical antecedents of contemporary legislative efforts to restrict property ownership by foreign nationals. The exploration will begin by examining the Chinese Exclusion Act, which prohibited the immigration of Chinese nationals. It will then revisit the Alien Land Laws of the early 20th century, which systematically excluded Asian immigrants from the American promise of land and liberty. Finally, it analyzes the infamous *Korematsu v. United States* decision, which sanctioned the incarceration of Japanese Americans during World War II under the pretense of national security.¹⁶ By examining historical episodes of discrimination framed as national security, this paper seeks to reveal the cyclical influence of past prejudices on present policies.

Part III analyzes the specifics of SB 264 and similar legislation in other states, offering a critical analysis of their provisions, justifications, and the broader socio-political context in which they were enacted. It begins by scrutinizing the legal and ethical foundations of these laws, questioning the purported balance between security and liberty, then it provides an overview of the legal challenges mounted against these laws in *Shen v. Simpson*.¹⁷

Building on the groundwork laid by the previous sections, Part IV will then employ Professor Yamamoto's Strategic Blueprint for National Security Accountability to critically evaluate how the judiciary can effectively balance civil liberties against the expansive claims of national security. Employing this blueprint in the context of SB 264 and its historical predecessors, this section advocates for a judiciary that ensures legislation like SB 264 is critically reviewed with attention to both immediate legal impacts and broader societal implications.¹⁸ This analysis will dissect the

¹⁴ See *id.* at 287-88.

¹⁵ *Id.*

¹⁶ See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment of Japanese Americans during World War II on the basis of national security).

¹⁷ See *Shen*, 687 F. Supp. 3d 1219 (2023) (No. 4:23-cv-208-AW-MAF).

¹⁸ See *infra* Section IV.B for detailed analysis of Professor Yamamoto's Strategic

role of critical legal advocacy in challenging not only the text, but the underlying societal narratives and power structures reinforced by such laws. It will argue for the judiciary's proactive stance in demanding rigorous justification for any security measure that infringes upon individual rights. In doing so, reminding the judiciary of its role as a backstop to unwarranted government overreach and ensuring that national security does not serve as a *carte blanche* for undermining fundamental freedoms.

II. ROOTS OF RESTRICTION

Analyzing contemporary legislative efforts like Florida's SB 264 necessitates understanding the history of discrimination against Asians in America.¹⁹ This history shows a recurring theme of targeting specific groups under the guise of national security, further entrenching racial disparities and fostering societal divisions.²⁰ The examination of the Alien Land Laws, the Chinese Exclusion Act, and the incarceration of Japanese Americans during World War II, reveals a pattern of exclusion and marginalization stemming from xenophobia, economic competition, and racial prejudice.²¹ These historical injustices demonstrate that modern legislative actions, though appearing to protect national interests, actually resonate with past discriminatory practices.²² Understanding this historical context is pivotal for grasping the foundations of such legislative efforts as well as the power dynamics and social values at play.

This section will provide a detailed exploration of three episodes of injustices. First, it begins by exploring the enactment of the Chinese Exclusion Act, a significant period of legislative discrimination that set a precedent for excluding immigrants based on race and nationality, and its wider implications for Asian communities in America. Next, it examines the Alien Land Laws that specifically targeted Asian immigrants, effectively denying them the American promise of land and liberty and highlighting the economic and social ramifications for these communities. Finally, it will analyze the *Korematsu* decision during World War II, illustrating the use of national security to justify the incarceration of Japanese Americans and its lasting impact on Asian American perceptions and treatment. Through this

Blueprint.

¹⁹ See Eric K. Yamamoto et. al., "*Loaded Weapon*" Revisited: *The Trump Era Import of Justice Jackson's Warning in Korematsu*, 24 *ASIAN AM. L.J.* 5, 22-23 (2017) [hereinafter *Loaded Weapon Revisited*].

²⁰ See *id.*

²¹ See California Alien Land Law of 1913, 1913 Cal. Stat. 113 (repealed 1952); Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882); *Korematsu v. United States*, 323 U.S. 214 (1944); See also Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 *CASE W. RES. L. REV.* 1183, 1209-11 (2018).

²² See Chang, *supra* note 21, at 1210.

narrative, this section aims to provide a comprehensive examination of the historical patterns of discrimination against Asians in America, as well as providing context and critical insight on current legislative measures.

A. *The Chinese Exclusion Acts*

The story of Asian immigration to the United States is intertwined with a complex legacy of opportunity, hardship, and systemic discrimination.²³ Beginning in the mid-19th century, a significant number of Asians, starting with the Chinese, ventured to America, attracted by the Gold Rush and the burgeoning opportunities in the West.²⁴ These early immigrants played pivotal roles in shaping the burgeoning American frontier, contributing much needed labor to critical projects like the Transcontinental Railroad.²⁵ Yet, their increasing presence soon sparked strong opposition from white laborers and local communities who perceived them as competitors for jobs and resources.²⁶

The Chinese Exclusion Act of 1882 is central to the history of legislative discrimination against Asians in the United States.²⁷ As anti-Chinese sentiment in the West grew, worsened by economic downturns and labor competition, the government responded by prohibiting the immigration of all Chinese laborers.²⁸

However, seven years before the Chinese Exclusion Act of 1882 imposed a broad restriction on Chinese laborers, the Page Act of 1875 targeted Chinese women by effectively preventing their immigration to the United States.²⁹ Under the Page Act, port officials were authorized to

²³ See Xiao-Huang Yin, *Writing a Place in American Life: The Sensibilities of American-born Chinese as Reflected in Life Stories from the Exclusion Era*, in CHINESE AMERICAN TRANSNATIONALISM: THE FLOW OF PEOPLE, RESOURCES, AND IDEAS BETWEEN CHINA AND AMERICA DURING THE EXCLUSION ERA 211, 225-26 (Sucheng Chan ed., 2006).

²⁴ See Madeline Hsu, *Trading with Gold Mountain: Jinshanzhuang and Networks of Kinship and Native Place*, in CHINESE AMERICAN TRANSNATIONALISM: THE FLOW OF PEOPLE, RESOURCES, AND IDEAS BETWEEN CHINA AND AMERICA DURING THE EXCLUSION ERA 22, 23 (Sucheng Chan ed., 2006).

²⁵ BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA* 26 (2018).

²⁶ See ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943* 25-27 (2003) (detailing how Chinese immigrants quickly began to be perceived as threats during the gold rush period).

²⁷ See generally Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882) (barring Chinese laborers from entering the United States for 10 years).

²⁸ Adam Minoru Yasui Estacio, *The "Newest 'Yellow Peril'": How American Legal History Shaped the Rise in Asian American Hate Crimes in the COVID-19 Pandemic*, 100 DENV. L. REV. 305, 310 (2022) ("As Chinese immigrants' jobs developed into agricultural, factory, and railroad jobs, anti-Chinese sentiment grew among white laborers who feared that they could not compete with the Chinese workers' low wages[.]").

²⁹ See generally Page Act of 1875, Pub. L. No. 43-141, 18 Stat. 477 (1875).

invasively interrogate Chinese women to prove they were not immigrating for “lewd and immoral purposes,” a policy rooted in the prejudiced belief that Chinese women were likely to engage in prostitution.³⁰ The stringent scrutiny and narrow criteria for proving legitimacy made it exceedingly difficult for Chinese women to immigrate and resulted in a drastic reduction of Chinese women immigrants, which further skewed the gender ratio in the Chinese American community and impacted the ability of these communities to grow and thrive within the United States.³¹ This scrutiny did not just impact the women attempting to immigrate; it affected the perception of Chinese women and Asian women more broadly in the United States.³² In doing so, intertwining racism and misogyny to create overly sexualized stereotypes and further contributing to their discrimination.³³

The Chinese Exclusion Act of 1882 and the preceding Page Act of 1875 was the first time the United States government explicitly restricted immigration based on nationality and race, and set a precedent for future immigration policies marked by exclusion and bias.³⁴ The enactment of these acts excluding Chinese immigrants did not occur in a vacuum.³⁵ It was the culmination of escalating violence and local ordinances aimed at curbing the Chinese presence in communities across the Pacific Coast.³⁶ Events like the Rock Springs Massacre and the driving out of Chinese from towns like Eureka, California and Seattle, Washington are examples of the intense racial prejudice Chinese immigrants faced at the time.³⁷ Economic

³⁰ See REECE JONES, *WHITE BORDERS: THE HISTORY OF RACE AND IMMIGRATION IN THE UNITED STATES FROM CHINESE EXCLUSION TO THE BORDER WALL* 38-39 (2021); LEW-WILLIAMS, *supra* note 25, at 44-45.

³¹ LEW-WILLIAMS, *supra* note 25, at 45 (“The Chinese sex ratio in America had always been imbalanced, but now accusations of immorality tipped the scales further. The 1880 U.S. census counted only 4,779 Chinese, women, or a mere 4.5, percent of the Chinese population.”); Yin, *supra* note 23, at 211–212 (describing how the Page Law of 1875 virtually barred Chinese immigrants from bringing their families to the United States and led to the Chinese American community evolving into a predominantly bachelor society).

³² JONES, *supra* note 30, at 46 (“The Chinese women were described as vectors of disease, as agents of moral decline, and of literally diluting the white race through pregnancy and mixed-race children.”).

³³ *See id.*

³⁴ *See id.* at 43-45.

³⁵ LEW-WILLIAMS, *supra* note 25, at 197 (explaining how in 1890, Congress commissioned a special commission to assess the effectiveness of the 1888 Exclusion Act across major Pacific coast cities.)

³⁶ *Id.* (“Without a continued policy of exclusion, [the special commission] proclaimed, ‘the whole Pacific Coast would be overrun’ by the Chinese and ‘serious labor troubles would surely arise.’”); *see* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (overturning a San Francisco ordinance that discriminatorily targeted Chinese laundry operators).

³⁷ Denny Chin & Kathy Hirata Chin, “*Kung Flu*”: *A History of Hostility and*

fears often spurred these laws, scapegoating Chinese laborers for lower wages and job scarcity despite their integral role in the nation's development.³⁸

The Chinese Exclusion Act and the Page Act began the era of discriminatory and restrictive immigration policies that had enduring impacts on Chinese communities in the United States.³⁹ These laws not only halted new immigration from China but also severely limited the civil liberties of Chinese immigrants already residing in the U.S., casting them into a state of legal and social limbo.⁴⁰ Families were torn apart, as the laws made it nearly impossible for Chinese men working in the U.S. to bring over their wives and children.⁴¹ Furthermore, the legislation contributed to the creation of bachelor societies, with predominantly male Chinese communities becoming a common sight across American Chinatowns.⁴²

Violence against Asian Americans, 90 FORDHAM L. REV. 1889, 1901-04 (2022); On September 2, 1885, approximately 150 white coal miners in Rock Springs, Wyoming, attacked their Chinese coworkers, killing twenty-eight and wounding fifteen, prompted by wage disputes and competition for jobs. The attackers also destroyed Chinatown, burning seventy-nine homes and driving hundreds of Chinese into the hills. Despite the severity of the incident, the local grand jury refused to indict any rioters, and those arrested were quickly released and celebrated by the local community. *Id.* at 1908-09; On February 6, 1885, in Eureka, California, a white man was fatally shot during a crossfire between two Chinese men, sparking a violent mob that demanded the expulsion of all Chinese residents from the city. Within forty-eight hours, an estimated 300 to 800 Chinese were forcibly removed and shipped to San Francisco, after makeshift gallows were erected and threats made by prominent community members. *Id.* at 1910-12; On February 7, 1886, a white mob of 1,500, including members from surrounding cities, forcibly expelled over 300 Chinese residents from Seattle's Chinatown, driving them to the steamship *Queen of the Pacific* for transport to San Francisco. Despite initial resistance from the ship's captain, the mob collected enough money to pay for the transportation of nearly 200 Chinese by the following day. Although federal troops eventually restored order, only a few dozen Chinese merchants and domestic servants remained in Seattle. *Id.* at 1910-12; *see generally* LEW-WILLIAMS, *supra* note 25, at 3 (explaining how violence pushed Chinese immigrants to the margins of national memory, despite their arrival in the U.S. West in the 1850s to join the California Gold Rush, while other newcomers integrated more fully into American history and society).

³⁸ Chin & Chin, *supra* note 37, at 1936-38.

³⁹ *See* LEW-WILLIAMS, *supra* note 25, at 239-40; JONES, *supra* note 30, at 38.

⁴⁰ *See* LEW-WILLIAMS, *supra* note 25, at 239 ("After consigning Chinese migrants to permanent alienage without a path to citizenship, the federal government then moved to restrict their entry and curtail their rights.").

⁴¹ Yin, *supra* note 23, at 211-12 (explaining how it was virtually impossible for a Chinese immigrant to bring a wife over to America).

⁴² *Id.* at 211 ("In 1900 the sex ratio of Chinese men to women was 12:1 in California, 36:1 in Boston, 50:1 in New York, and 19:1 in the continental United States as a whole").

Although Congress initially enacted the Chinese Exclusion Act for a ten-year term, its lifespan extended well beyond its original term.⁴³ The introduction of the Scott Act further entrenched these restrictive measures.⁴⁴ The Scott Act of 1888, amending the Chinese Exclusion Act, specifically targeted Chinese laborers by denying them re-entry to the United States if they left.⁴⁵ *Chae Chan Ping v. United States*, also known as the Chinese Exclusion Case, exemplifies the judiciary's role in reinforcing these exclusionary policies.⁴⁶ Customs officials barred Chae Chan Ping from re-entering the United States after his visit to China, despite Ping legally residing in the country for over a decade.⁴⁷ Without dissent, the court upheld the ban and reasoned that in light of the "Oriental invasion" from the unassimilable Chinese immigrants posing "a menace to our civilization," the U.S. Constitution permitted targeted exclusion of Chinese laborers.⁴⁸ Writing for a unanimous court, Justice Stephen J. Field stated:

It seemed impossible for [the Chinese] to assimilate with our people, or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken

⁴³ Shehong Chen, *Republicanism, Confucianism, Christianity, and Capitalism in American Chinese Ideology*, in *CHINESE AMERICAN TRANSNATIONALISM: THE FLOW OF PEOPLE, RESOURCES, AND IDEAS BETWEEN CHINA AND AMERICA DURING THE EXCLUSION ERA 174*, 175 (Sucheng Chan ed., 2006).

⁴⁴ Chinese Exclusion Act of 1888 (Scott Act), ch. 1065, 25 Stat. 504 (1888).

⁴⁵ *Id.*

⁴⁶ *See generally* *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

⁴⁷ *Id.* at 581-82.

⁴⁸ *Id.* at 595.

[T]he presence of Chinese laborers had a baneful effect upon the material interests of the state, and upon public morals; that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization; that the discontent from this cause was not confined to any political party, or to any class or nationality, but was well nigh universal; that they retained the habits and customs of their own country, and in fact constituted a Chinese settlement within the state, without any interest in our country or its institutions[.]

Id. at 595-96; *see* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 857 (1987).

to restrict their immigration.⁴⁹

This ruling not only affirmed the legality of discriminating against a specific nationality but also signaled the judiciary's complicity in perpetuating racial prejudice and xenophobia.⁵⁰

In 1892, Congress passed the Geary Act, renewing the Chinese Exclusion Act for another decade.⁵¹ In addition to this extension, the Geary Act also imposed stricter requirements on Chinese individuals, such as the requirement for Chinese individuals to carry identification certificates or face deportation.⁵² The Geary Act also required "at least one credible white witness" to testify to a Chinese person's immigration status and expanded its scope to include territories such as Hawai'i and the Philippines, where the United States exerted influence or control.⁵³ In 1893, the Supreme Court in *Fong Yue Ting v. United States* upheld Congress's authority to deport foreign nationals who failed to secure a certificate of residence with at least one white witness's endorsement.⁵⁴

The Court justified its decision by raising Congress's broad constitutional powers over immigration and foreign affairs, essentially placing legislative discretion above the protections normally afforded by the Constitution to individuals residing in the United States.⁵⁵ Justice Horace Gray, writing for the majority, highlighted the danger of an increasing Chinese population by referring to them as "a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests[.]"⁵⁶ Three dissenting opinions emerged from the case, all arguing that the Geary Act's deportation procedures were unconstitutional and criticizing the racist implications of the law.⁵⁷ By endorsing race and nationality-based

⁴⁹ *Chae Chan Ping*, 130 U.S. at 595; A few years later, Justice Field would join the majority in *Plessy v. Ferguson*, which upheld the constitutionality of racial segregation under the "separate but equal" doctrine. *See Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁵⁰ *See* Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 40-46 (2010) (analyzing how *Chae Chan Ping* framed immigration as a form of foreign aggression).

⁵¹ Geary Act, 1892, ch. 60, 27 Stat. 25 (1892) (repealed 1943).

⁵² *Id.*

⁵³ *Id.*; LEE, *supra* note 26, at 49-50.

⁵⁴ *See Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

⁵⁵ *Id.* at 707.

⁵⁶ *Id.* at 717.

⁵⁷ *Fong Yue Ting*, 149 U.S. at 737-38 (Brewer, J., dissenting) ("Banishment may be resorted to as punishment for crime; but among the powers reserved to the people, and not delegated to the government, is that of determining whether whole classes in our midst

immigration restrictions, the Supreme Court in *Chae Chan Ping* and *Fong Yue Ting* legitimized systemic racism and xenophobia within legal frameworks and sanctioned the use of legislative power to discriminate.⁵⁸

In 1904, Congress indefinitely extended the Chinese Exclusion Act.⁵⁹ These extensions, again, reflected the persistent anti-Chinese sentiment and the government's commitment to these exclusionary policies.⁶⁰ The Chinese Exclusion Act remained in effect for sixty one years, until 1943.⁶¹ Amidst World War II and influenced by the geopolitical shift and the alliance with China, the United States passed the Magnuson Act, which repealed the Chinese Exclusion Act and permitted Chinese immigration for the first time in decades.⁶² However, it introduced a restrictive quota, allowing only 105 Chinese immigrants each year.⁶³ This change, although it ended over six decades of discriminatory legislation, still reflected the U.S.'s reluctance to fully open its doors to Chinese immigrants.⁶⁴ The change from total exclusion to minimal acceptance highlights the slow progress and persistent challenges in achieving equitable immigration policies in the U.S.⁶⁵ The judiciary's role and complicity in upholding discriminatory policies should not be overlooked and should serve as a cautionary tale reminding us of the need for courts to actively counter unjust policies that threaten our civil liberties.⁶⁶

B. *Alien Land Laws*

Over time, the initial focus on Chinese immigrants broadened to encompass other Asian nationalities.⁶⁷ As Japanese and later Filipino workers arrived in the United States, they too faced similar patterns of

shall, for no crime but that of their race and birthplace, be driven from our territory."); *Id.* at 745-61 (Field, J., dissenting); *Id.* at 761-63 (Fuller, C.J., dissenting).

⁵⁸ See Leo Yu, *From Criminalizing China to Criminalizing the Chinese*, 55 COLUM. HUM. RTS. L. 45, 59-62 (2024).

⁵⁹ Chen, *supra* note 43, at 175; LEW-WILLIAMS, *supra* note 25, at 212.

⁶⁰ See LEW-WILLIAMS, *supra* note 25, at 211-12.

⁶¹ *Id.* at 232.

⁶² *Id.* at 231-32; Magnuson Act, Pub. L. No. 78-199, 57 Stat. 600 (1943).

⁶³ Magnuson Act, Pub. L. No. 78-199, 57 Stat. 600 (1943).

⁶⁴ Yin, *supra* note 23, at 222 ("As late as 1948, five years after the exclusion acts were repealed, 65 percent of white Americans still opposed marriages with Chinese").

⁶⁵ LEW-WILLIAMS, *supra* note 25, at 232 ("While European immigrants were subject to quotas based on their nation of origin, Asian immigrants were subject to quotas defined by racial ancestry. Whether a person hailed from China or Canada, a Chinese was always a Chinese under the law.").

⁶⁶ See *White (House) Lies*, *supra* note 9, at 287.

⁶⁷ LEW-WILLIAMS, *supra* note 25, at 231 (listing Asian nationalities barred from immigrating to America).

exclusion and discrimination.⁶⁸ The legislative discrimination that began with the Chinese soon extended to other Asian communities, notably the Japanese, who, by the turn of the 20th century, sought to escape political turmoil and economic stagnation in their homeland.⁶⁹ The arrival of Japanese immigrants in significant numbers, particularly on the West Coast, rekindled economic and racial anxieties like those that had led to the exclusion of Chinese laborers.⁷⁰

This fear culminated in the Gentleman's Agreement of 1907 between the United States and Japan, whereby Japan agreed to restrict the emigration of its citizens to the U.S., in exchange for the latter's assurance of fair treatment for those already residing in America.⁷¹ However, the agreement did little to quell the growing animosity toward Japanese immigrants, who were increasingly seen as a threat to white American labor and culture.⁷²

The 1913 California Alien Land Law prohibited "aliens ineligible for citizenship" from owning agricultural land or having long-term leases, targeting Japanese immigrants who had begun to establish successful farming ventures in California.⁷³ This legislation set a precedent that spread to other states.⁷⁴ Arizona, Louisiana, New Mexico, Oregon, Idaho, Montana, and Kansas passed similar laws between 1921 and 1925, with Wyoming and Utah adding their own during World War II.⁷⁵ This law, and others like it, not only sought to economically marginalize Asian immigrants but also solidified a racial hierarchy that favored white Americans.⁷⁶

Local ordinances and state laws also complemented federal immigration policies, creating a suffocating system of discrimination that affected Asians across the United States.⁷⁷ Cities along the West Coast

⁶⁸ *Id.*

⁶⁹ See Aoki, *supra* note 8, at 44-45.

⁷⁰ *Id.* at 49.

⁷¹ Devon W. Carbado, *Yellow by Law*, 97 CAL. L. REV. 633, 642-43 (2009).

⁷² See *id.* at 672-73.

⁷³ California Alien Land Law of 1913, 1913 Cal. Stat. 113 (repealed 1952).

⁷⁴ Gabriel J. Chin & Anna Ratner, *The End of California's Anti-Asian Alien Land Law: A Case Study in Reparations and Transitional Justice*, 29 ASIAN AM. L.J. 17, 18 (2022) ("California's Alien Land Law was a model for the nation, adopted in as many as 15 states, from Delaware to Oregon.").

⁷⁵ Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7, 7-8 (1947).

⁷⁶ See Gabriel J. Chin, *A Nation of White Immigrants: State and Federal Racial Preferences for White Noncitizens*, 100 B.U. L. REV. 1271, 1273 (2020).

⁷⁷ See ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850 111-12 (1988) (detailing California law giving discretion to school

enacted measures to segregate Asian populations, limit their economic opportunities, and curtail their rights.⁷⁸ Initially sparked by economic competition and xenophobia towards Chinese immigrants in the mid-1800s, this animosity expanded to Japanese immigrants as they began to fill the labor void left by Chinese workers.⁷⁹ These actions reflected broader societal prejudices that Asians were unassimilable foreigners, threats to the racial purity and economic stability of the white populace.⁸⁰

The Immigration Act of 1924, or the National Origins Act, marked a decisive moment in the institutionalization of racial discrimination in U.S. immigration policy.⁸¹ By establishing quotas based on national origins that favored European immigrants, the act excluded all potential immigrants from Asia, deemed *incompatible* with American society.⁸²

Amidst the widespread enactment of alien land laws across the United States, two landmark cases, *Terrace v. Thompson* and *Oyama v. California*, emerged as pivotal in challenging the constitutionality and moral standing of these laws.⁸³ In 1923, in *Terrace v. Thompson*, the Supreme Court upheld the Washington state's version of the Alien Land Law.⁸⁴ There, the Court's decision was grounded in the argument that the regulation of land ownership on the basis of nationality was within the states' rights, ostensibly to protect the public interest and maintain agricultural prosperity.⁸⁵ However, the underlying motive was less about agricultural prosperity and legitimizing the exclusionary practices, but rather to further entrench the racial hierarchies that these laws sought to perpetuate.⁸⁶

In 1948, the Supreme Court's decision in *Oyama v. California* presented a different narrative and represented a turning point in the legal battles against the Alien Land Laws.⁸⁷ In this case, the Supreme Court examined the constitutionality of California's Alien Land Law as it applied

boards to discriminate against children of Asian descent).

⁷⁸ See Chin, *supra* note 72, at 1301 (providing examples of local ordinances prohibiting the employment of Chinamen).

⁷⁹ See Aoki, *supra* note 8, at 40.

⁸⁰ See Yu, *supra* note 58, at 58-59.

⁸¹ See Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924).

⁸² *Id.*

⁸³ See generally *Terrace v. Thompson*, 263 U.S. 197 (1923); *Oyama v. California*, 332 U.S. 633 (1948).

⁸⁴ See *Thompson*, 263 U.S. at 224.

⁸⁵ *Id.* at 223-24.

⁸⁶ See Chin & Ratner, *supra* note 74, at 23.

⁸⁷ See generally *Oyama v. California*, 332 U.S. 633 (1948).

to Fred Oyama, a U.S.-born citizen of Japanese descent.⁸⁸ Fred's father had purchased land in California in Fred's name, attempting to circumvent the Alien Land Law.⁸⁹ The state attempted to escheat, or revert, the land to the state, claiming that the purchase was an attempt to evade the law's restrictions.⁹⁰ Applying the Fourteenth Amendment's Equal Protection Clause, the Court found that denying Oyama the right to own land based on his ancestry effectively discriminated against him as a U.S. citizen, violating his equal protection rights under the law.⁹¹ The justices held that the State's actions were not justifiable under any legal or constitutional grounds because they were based solely on racial discrimination.⁹² This decision marked a significant departure from earlier rulings that upheld restrictive land ownership laws.⁹³

The Court's decision in *Oyama v. California* did not outright overturn the Alien Land Laws but signaled a shift in judicial perspective by recognizing the citizenship rights of American-born children of Japanese immigrants.⁹⁴ This ruling was a beacon of hope, indicating that the legal system could be leveraged to dismantle racially discriminatory laws and practices.⁹⁵

The situation for Filipino immigrants, who began arriving in larger numbers following the U.S. annexation of the Philippines in 1898, further reflected the complexities of American colonialism and its impact on immigration policy.⁹⁶ Initially, the U.S. granted Filipinos, as nationals of an American colony, free entry, which led to their significant presence in sectors like agriculture and domestic service.⁹⁷ However, their increasing numbers soon provoked backlash, leading to the Tydings-McDuffie Act of 1934, which reclassified Filipinos as aliens and severely restricted their immigration.⁹⁸ This act, while granting the Philippines eventual

⁸⁸ *Id.* at 635.

⁸⁹ *Id.* at 635-38.

⁹⁰ *Id.* at 643-46.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See *Thompson*, 263 U.S. 197 (upholding the Washington Alien Land Law prohibiting aliens from acquiring or leasing land).

⁹⁴ RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 411-12 (Little, Brown & Co. rev. ed. 1998).

⁹⁵ See Aoki, *supra* note 8, at 64-65.

⁹⁶ See TAKAKI, *supra* note 94, at 331-33.

⁹⁷ *Id.*

⁹⁸ Deenesh Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities*, 41 *LAW & SOC'Y. REV.* 587, 606 (2007); Philippine Independence Act of 1934 (Tydings-McDuffie Act), Pub. L. 73-127, 48 Stat.

independence, effectively curtailed Filipino presence in the U.S., again reiterating America's commitment to enacting exclusionary policies targeting Asians.⁹⁹

The cumulative impact of these exclusionary policies on Asian communities in the United States was profound.¹⁰⁰ Economically marginalized and socially ostracized, Asian immigrants and their descendants faced significant barriers to integration and success.¹⁰¹ Local ordinances and state laws, in addition to federal policies, created a labyrinth of legal restrictions that affected every aspect of life, from property ownership to education and employment.¹⁰² This period's exclusionary laws reflected and perpetuated societal attitudes shaped by "yellow peril," casting Asians as threats to national purity through media and pseudoscientific racial theories.¹⁰³

In cities across the West Coast, where the majority of Asians resided, this discrimination also manifested in daily life through segregated schools, racially targeted ordinances, and violent mob actions.¹⁰⁴ Such societal pressures not only reinforced the legal barriers established by exclusionary laws but also contributed to the marginalization and ghettoization of Asian communities, pushing them into insular enclaves where they could find some measure of safety and solidarity.¹⁰⁵

The legal precedent established by *Oyama v. California* laid the groundwork for further challenges to discriminatory laws and practices, leading to the gradual repeal of Alien Land Laws across the United States.¹⁰⁶ The repeal of these laws across various states did not occur overnight but was a gradual process influenced by changing societal norms, economic considerations, and the growing acknowledgment of the contributions of

456 (1934) (reclassifying Filipinos as aliens and limiting immigration from the Philippines to 50 persons a year).

⁹⁹ See TAKAKI, *supra* note 94, at 333 ("Originally allowed to enter the United States as 'cheap labor,' Filipino farm laborers had completed their 'brief but strenuous period of service to American capital'").

¹⁰⁰ See LEE, *supra* note 26, at 114-15.

¹⁰¹ See *id.*

¹⁰² See *id.* at 52.

¹⁰³ See *id.* at 36-37; Yu, *supra* note 58, at 21 ("The Yellow Peril—the fear of the Chinese and Japanese invasion—came from ignorance and race-based bias against Asian culture, which was perceived as inferior, predatory, and barbaric.").

¹⁰⁴ DANIELS, *supra* note 77, at 36-38 (1988). See generally Chin & Chin, *supra* note 37 (detailing violent mob actions targeted against Asian Americans).

¹⁰⁵ TAKAKI, *supra* note 94, at 246-47.

¹⁰⁶ *Id.* at 411-12.

Asian Americans to the fabric of American society.¹⁰⁷ By the 1950s and 1960s, as civil rights movements gained strength and the injustices of racial discrimination became more widely recognized and condemned, states began to repeal their Alien Land Laws.¹⁰⁸ California, the state where these laws had been most aggressively applied, repealed its Alien Land Law in 1955, marking a significant victory for civil rights activists and for all those who had been affected by these discriminatory laws.¹⁰⁹

C. *National Security Through the Echoes of Korematsu v. United States*

While the explicit legislative discrimination of the early 20th century gradually waned with the repeal of the Chinese Exclusion Act in 1943 and the gradual repeal of Alien Land Laws across the United States, the legacy of these policies persisted.¹¹⁰ The enduring legacy of exclusionary policies, in the wake of the Japanese attack on Pearl Harbor, set the stage for the issuance of Executive Order 9066 during World War II.¹¹¹ This order marked a profound shift in the nation's approach to civil liberties under the guise of national security.¹¹²

In 1942, President Franklin D. Roosevelt signed Executive Order 9066, granting the Secretary of War the power to designate military zones from which any persons could be excluded.¹¹³ Despite the order being ostensibly race-neutral, this directive led to the curfew, removal, and mass incarceration of over 120,000 individuals of Japanese ancestry, the majority of whom were American citizens, ostensibly under the pretext of national security to protect the nation against espionage and sabotage.¹¹⁴ While Executive Order 9066 specifically targeted individuals of Japanese ancestry, German and Italian nationals—despite their countries also being Axis

¹⁰⁷ *See id.*

¹⁰⁸ *See* Nicole Grant, *White Supremacy and the Alien Land Laws of Washington State*, SEATTLE CIVIL RIGHTS AND LABOR HISTORY PROJECT (2008), https://depts.washington.edu/civilr/alien_land_laws.htm/ [<https://perma.cc/V6H2-SMLK>].

¹⁰⁹ Chin & Ratner, *supra* note 74, at 31.

¹¹⁰ *See* LEE, *supra* note 26, at 245 (“While the president cited the need to ‘correct a historic mistake,’ the repeal of the exclusion laws was mostly a symbolic gesture of friendship to China[,] a wartime ally against Japan[.]”).

¹¹¹ *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

¹¹² *See* Erwin Chemerinsky, *Korematsu v. United States: A Tragedy Hopefully Never to Be Repeated*, 39 PEPP. L. REV. 163, 172 (2011).

¹¹³ Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

¹¹⁴ *See* Dean Masaru Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 4 UCLA ASIAN PAC. AM. L.J. 72, 75 (1996).

powers—faced far less severe restrictions and were not subjected to the same mass incarceration.¹¹⁵

One of the individuals most directly affected by the racial targeting under Executive Order 9066 was Fred Korematsu, who would later challenge the government's actions in court.¹¹⁶ Fred was born in Oakland, California, on January 30, 1919, to Japanese immigrant parents, making him a Nisei, or second-generation Japanese American.¹¹⁷ Growing up in the United States, Korematsu experienced the racial prejudice and discrimination that was pervasive against Asian Americans during this era.¹¹⁸ Despite these challenges, he attempted to live an ordinary American life, attending school and working various jobs.¹¹⁹ However, the outbreak of World War II and the subsequent executive actions taken by the U.S. government drastically altered the course of his life.¹²⁰

Following the attack on Pearl Harbor on December 7, 1941, anti-Japanese sentiment in the United States reached a fever pitch, resulting in the issuance of Executive Order 9066.¹²¹ Korematsu, witnessing the forced removal and incarceration of Japanese Americans, faced a critical decision.¹²² Despite the pressure to comply with the government's orders to report to the internment camps, Korematsu chose to resist.¹²³ He

¹¹⁵ Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Façade of National Security*, 128 YALE L.J. F. 688, 693 (2018-2019) (citing to Justice Murphy's dissent in *Korematsu* noting that Germans and Italians were not subject to the same treatment as Japanese).

¹¹⁶ *Fred Korematsu's Story*, FRED T. KOREMATSU INST., <https://korematsuinstitute.org/freds-story/> (last visited Apr. 20, 2024).

¹¹⁷ *Id.*

¹¹⁸ LORRAINE K. BANNAI, *ENDURING CONVICTION: FRED KOREMATSU AND HIS QUEST FOR JUSTICE* 16 (2021) (“Restaurants would refuse to serve me, and places would refuse to give you a haircut. I had to go to Chinatown, and that was the only place that would give you a haircut. And when I'd go there, there'd be twenty people waiting, all Asians, to get a haircut.”).

¹¹⁹ *Id.* at 16-18.

¹²⁰ *Id.* at 37 (“On May 3, 1942, DeWitt issued Civilian Exclusion Order No. 34, requiring the Korematsus and other persons of Japanese ancestry residing in their area of southern Alameda County, California, to register with the army, and proclaiming that they would be banned from the area as of noon[.]”).

¹²¹ *Executive Order 9066: Resulting in Japanese-American Incarceration (1942)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/executive-order-9066> [<https://perma.cc/F6QE-NCX5>] (last visited Apr. 20, 2024).

¹²² BANNAI, *supra* note 118, at 16; Fred wanted to stay behind to stay with Ida Boitano, his Italian-American girlfriend, and live as “normal people.” *Id.* at 42-43.

¹²³ *Id.* at 35 (“Fred chose liberty over confinement. That liberty was the freedom to be with the person he loved, to be near her where he pleased, and to enjoy the rights of citizenship guaranteed to any other American.”).

attempted to evade the authorities by undergoing plastic surgery on his eyelids to appear less Japanese, changing his name, and claiming to be of Spanish and Hawaiian heritage.¹²⁴ Korematsu's attempt to evade internment and resist the executive order did not go unnoticed for long.¹²⁵ Despite his efforts to conceal his identity, the FBI arrested Fred Korematsu on May 30, 1942, in San Leandro, California, for failing to report to a relocation center.¹²⁶ Korematsu sought to overturn his conviction by arguing that the internment policy violated his civil liberties, and the Supreme Court heard the case in 1944.¹²⁷

In a 6-3 decision led by Justice Hugo Black, a former Ku Klux Klan member, the Supreme Court ruled against Fred Korematsu, purportedly prioritizing the nation's need to guard against espionage over Korematsu's individual rights.¹²⁸ Writing for the majority, Justice Black held that wartime conditions justified the incarceration of Japanese Americans as a reasonable exercise of military necessity, effectively ignoring official military reports finding that racial lineage did not dilute loyalty.¹²⁹

The Court chose to overlook the evident racial prejudice fueling the military orders, dismissing concerns over racial bias, and focusing instead on the perceived "urgent need" for precautionary measures against a potential Japanese invasion, suggesting the entire racial group posed an "imminent danger to public safety."¹³⁰ This decision, thus, labeled all persons of Japanese ancestry as potential threats, sanctioning racial discrimination in the name of national security.¹³¹ The Court's deference to executive and military judgment marked a moment of judicial passivity, with the Court accepting the government's claims of the order as a matter

¹²⁴ *Id.* at 35-36.

¹²⁵ *Id.* at 42.

¹²⁶ Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 949 (2004).

¹²⁷ *Id.* at 949-51.

¹²⁸ *Korematsu*, 323 U.S. at 223-24; Yamamoto & Oyama, *supra* note 115, at 693 (citing Kat Eschner, *This Supreme Court Justice Was a KKK Member*, SMITHSONIAN (Feb. 27, 2017), <https://www.smithsonianmag.com/smart-news/supreme-court-justice-was-kkk-member-180962254/> [<https://perma.cc/QFD6-BM37>]).

¹²⁹ *Korematsu*, 323 U.S. at 216-17; K.D. Ringle, *Ringle Report on Japanese Internment*, U.S. Navy (Jan. 29, 1942), <https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/r/ringle-report-on-japanese-internment.html> [<https://perma.cc/62TT-N4BY>] (finding that "the entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people[.]").

¹³⁰ *Korematsu*, 323 U.S. at 218.

¹³¹ *See id.* at 220 ("But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.").

of pressing public necessity, without any substantial evidence.¹³² The dissenting opinions, notably from Justices Roberts, Murphy, and Jackson, criticized the majority for this sanctioning.¹³³ Justice Murphy explicitly condemned the action as “legalization of racism.”¹³⁴

This backdrop sets a stark precedent for examining the Trump administration’s 2017 executive orders, also known as the “travel ban” or “Muslim ban.”¹³⁵ These orders, reminiscent of past discriminatory policies, ignited debates on the judiciary’s role in safeguarding civil liberties against executive claims of national security.¹³⁶ In response to the orders, Judge Derrick Watson of the United States District Court for the District of Hawai‘i subsequently entered a temporary restraining order blocking the restrictions.¹³⁷ The United States Court of Appeals for the Ninth Circuit upheld the injunction, and the Supreme Court granted certiorari.¹³⁸

In *Trump v. Hawaii*, the Supreme Court revisited these issues and raised critical questions about judicial deference to the executive.¹³⁹ While the Supreme Court’s majority in *Trump v. Hawaii*, led by Chief Justice Roberts, formally repudiated *Korematsu*—declaring it “gravely wrong”—the decision paradoxically mirrored *Korematsu*’s legacy of judicial deference.¹⁴⁰ The Court upheld the travel ban and reinforced the government’s prerogative in matters of national security, despite evident

¹³² See e.g., Hashimoto, *supra* note 114, at 81.

¹³³ *Korematsu*, 323 U.S. at 226 (Roberts, J., dissenting) (“[I]t is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States.”); *Id.* at 233 (Murphy, J., dissenting) (“Such exclusion goes over ‘the very brink of constitutional power’ and falls into the ugly abyss of racism.”); *Id.* at 243 (Jackson, K., dissenting) (“No claim is made that [Korematsu] is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed.”).

¹³⁴ *Id.* at 242 (Murphy, J., dissenting) (“I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life.”).

¹³⁵ See Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L. J. F. 641, 654 (2019).

¹³⁶ *Id.* at 652.

¹³⁷ *State v. Trump*, 265 F.Supp.3d 1140 (D. Haw.), *aff’d in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *rev’d and remanded*, 585 U.S. 667 (2018).

¹³⁸ *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017), *rev’d and remanded*, 585 U.S. 667 (2018).

¹³⁹ See *Trump v. Hawaii*, 585 U.S. 667 (2018).

¹⁴⁰ *Id.* at 710; see *id.* at 753-54 (Sotomayor, J., dissenting) (comparing the majority’s reasoning to the Court’s justification in *Korematsu*).

parallels to the racial and religious discrimination characterizing the internment orders scrutinized in *Korematsu*.¹⁴¹

In Justice Sotomayor’s dissent, she argued that the travel ban was motivated by anti-Muslim animus rather than actual national security concerns.¹⁴² She criticized the majority for leaving in place a policy that, though now cloaked in the guise of national security, began as, and remains a “Muslim ban.”¹⁴³ In doing so, the majority is repeating the same mistakes of the past.¹⁴⁴ Like *Korematsu*, the decision in *Trump v. Hawaii* relies on a superficial claim of national security to justify discriminatory practices against a disfavored group, in this case, Muslims.¹⁴⁵

The Court’s decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a “total and complete shutdown of Muslims entering the United States” because the policy now masquerades behind a facade of national-security concerns. . . . Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus.¹⁴⁶

The juxtaposition of these cases reveals an enduring struggle within American jurisprudence: the tension between national security imperatives and the protection of fundamental civil liberties.¹⁴⁷ It highlights the necessity for a judiciary that critically examines executive claims of security threats, especially when such claims may infringe on the rights and liberties of vulnerable minority groups.¹⁴⁸ The lessons from *Korematsu* and its eventual challenge through *coram nobis* petitions, along with the contentious debates surrounding *Trump v. Hawaii*, serve as pivotal reminders of the judiciary’s critical role in maintaining the delicate balance between ensuring national security and safeguarding the constitutional rights that underpin American democracy.¹⁴⁹

In summary, the judiciary’s role in navigating the balance between national security and civil liberties has repeatedly intersected with

¹⁴¹ *See id.* at 711.

¹⁴² *Id.* at 728-29 (Sotomayor, J., dissenting).

¹⁴³ *Id.* at 733-35.

¹⁴⁴ *Id.* at 751-52.

¹⁴⁵ *Trump*, 585 U.S. at 752-54.

¹⁴⁶ *Id.* at 728.

¹⁴⁷ *See Loaded Weapon Revisited*, *supra* note 19, at 19-20.

¹⁴⁸ *Id.* at 21.

¹⁴⁹ *See id.* at 27-29.

America's history of racial and ethnic discrimination.¹⁵⁰ This history has established a precedent in our judiciary where the executive branch has often wielded the weapon of national security to justify extensive civil liberties violations, and either by design or by consequence, disproportionately affecting minority groups.¹⁵¹

In addressing these historical wrongdoings, the ongoing debate surrounding the legitimacy and implications of such legal measures continues to evolve.¹⁵² Laws framed as necessary for national security frequently mask deeper societal biases that significantly impact vulnerable populations.¹⁵³ The following section will analyze how modern legislation such as Senate Bill 264, not only mirrors but also continues the legacy of these past laws.

III. FROM PAST TO PRESENT: ANALYZING MODERN LEGISLATION

Building on this understanding of historical and contemporary legal frameworks, it becomes vital to examine how these principles are applied in modern contexts. In the era of globalization, the phenomenon of foreign ownership of real estate has become increasingly prevalent, driven by economic, social, and political factors.¹⁵⁴ Countries around the world have experienced a significant influx of Chinese cross-border investments, resulting in heightened scrutiny and legislative responses aimed at balancing economic benefits with national security concerns.¹⁵⁵ This trend has been particularly notable in the United States, where foreign

¹⁵⁰ See Katyal, *supra* note 135, at 644-45.

¹⁵¹ See *Loaded Weapon Revisited*, *supra* note 19, at 10.

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ See Matthew S. Erie, *Property as National Security*, 2024 WIS. L. REV. 255, 264 (2024).

¹⁵⁵ See *China's Foreign Investments Significantly Outpace the United States. What Does That Mean?*, U.S. GOV'T ACCOUNTABILITY OFF. (Oct. 16, 2024), <https://www.gao.gov/blog/chinas-foreign-investments-significantly-outpace-united-states.-what-does-mean/> [<https://perma.cc/8BAT-F834>] ("China is the world's largest investor in other countries—providing funding to build infrastructure like roads and railways, energy supplies, telecommunications, and more"). In the United States, the Committee on Foreign Investment in the United States now monitors real-estate transactions near sensitive sites due to security risks from Chinese-owned properties near U.S. military bases. Alexander Ward & Richard Vanderford, *U.S. to Expand National-Security Reviews of Real-Estate Deals Near Military Bases*, WALL ST. J. (Nov. 1, 2024, 2:55 PM), <https://www.wsj.com/politics/national-security/u-s-to-expand-national-security-reviews-of-real-estate-deals-near-military-bases-623a09e8/>; Concerns have grown after incidents in recent years where Chinese nationals, sometimes posing as tourists, accessed military bases and other sensitive locations in the U.S. as many as 100 times, along with purchases of farmland near Grand Forks Air Force Base in 2021 and land near Camp Grayling in 2023, all of which have sparked fears of a growing espionage threat from Beijing. *Id.*

investments have been seen as a vital part of the real estate market, and subsequently contributing to America's overall economic growth.¹⁵⁶ However, this openness to foreign investment has not been without its challenges and concerns, particularly in the context of national security.¹⁵⁷

State legislatures across the United States, in response to these concerns, have initiated a series of legislative actions aimed at restricting foreign ownership of real estate.¹⁵⁸ Under the pretext of national security, such legislation effectively serves as modern iterations of historical alien land laws.¹⁵⁹ Particularly, the passage of Senate Bill 264 in Florida, which limits the ability of foreign nationals from certain "countries of concern" to own or invest in key sectors of the state's economy and infrastructure, reflects a recent and significant instance of this legislative trend.¹⁶⁰ This section analyzes the resurgence of protective measures against foreign real estate ownership within the context of national security and economic policy, exploring their echoes of historical alien land laws and the ways in which history may be repeating itself.

A. *New Alien Land Laws*

On May 8, 2023, Florida Governor Ron DeSantis signed SB 264 and its companion bill, House Bill 1355, into law, marking a pivotal moment in the United States' ongoing reassessment of foreign ownership of real estate, especially concerning national security and countries perceived as adversarial.¹⁶¹ This legislation, while focused on Florida, has ramifications

¹⁵⁶ See Mary Szto, *Representing Chinese Real Estate Investors in the United States*, 23 MINN. J. INT'L L. 173, 174 (2014) ("Chinese purchasers spent 12% of the \$68.2 billion that foreigners paid for residential properties for the twelve-month period ending March 31, 2013."); Scholastica (Gay) Cororaton, *Foreign Investor Acquisitions of U.S. Commercial Real Estate Increased 49% in 2021*, NAT'L ASS'N OF REALTORS (Feb. 15, 2022), [https://www.nar.realtor/blogs/economists-outlook/foreign-investor-acquisitions-of-u-s-commercial-real-estate-increased-49-in-2021/\[https://perma.cc/D6F5-4UC4\]](https://www.nar.realtor/blogs/economists-outlook/foreign-investor-acquisitions-of-u-s-commercial-real-estate-increased-49-in-2021/[https://perma.cc/D6F5-4UC4]).

¹⁵⁷ See Jia, *supra* note 5, at 686-88 (detailing the increase in executive orders targeting Chinese investments due to national security concerns).

¹⁵⁸ Erie, *supra* note 154, at app. (listing over 150 state bills across the United States prohibiting Chinese parties from owning or leasing property in that state); see Kimberly Kindy, *State Lawmakers Move to Ban Chinese Land Ownership*, WASH. POST (Aug. 21, 2023, 6:00 AM), <https://www.washingtonpost.com/politics/2023/08/21/state-laws-chinese-land-ownership-military-bases/> ("The Chinese government could set up spy operations on land purchased near military bases, the bills' backers say, and the nation's food supply could be threatened if hostile foreign entities acquire too much agricultural land."); but see Fangyao Wang et al., *Mapping and Contextualizing Foreign Ownership and Leasing of U.S. Farmland*, J. AM. SOC'Y FARM MANAGERS & RURAL APPRAISERS 162, 162 (2024) (finding that "adversary' countries like China hold only 1% of all the foreign-owned agricultural land.").

¹⁵⁹ See Fla. S.B. 264.

¹⁶⁰ See *id.*

¹⁶¹ *Governor Ron DeSantis Cracks Down on Communist China*, Governor Ron

that extend beyond state borders, wielding the ability to influence national policy debates and overall reflecting the broader geopolitical tensions, notably with China.¹⁶² The purported purpose of SB 264 is to safeguard national security by restricting foreign ownership of real estate in areas deemed critical to state and national interests.¹⁶³ The law targets “foreign principals” from countries identified as posing significant concerns—namely China, Cuba, Iran, North Korea, Russia, Syria, and Venezuela.¹⁶⁴ The act defines “foreign principals” as the following:

- (a) The government or any official of the government of a foreign country of concern;
- (b) A political party or member of a political party or any subdivision of a political party in a foreign country of concern;
- (c) A partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country of concern, or a subsidiary of such entity;
- (d) Any person who is domiciled in a foreign country of concern and is not a citizen or lawful permanent resident of the United States.¹⁶⁵

It specifically prohibits these entities and individuals from directly or indirectly owning, purchasing, or selling real property within Florida, particularly focusing on agricultural lands and properties within a 10-mile radius of military installations and critical infrastructure.¹⁶⁶ It also imposes severe penalties for violations, including civil forfeiture of the property and criminal penalties up to a felony.¹⁶⁷

Desantis (May 8, 2023) [hereinafter DeSantis Press Release], <https://www.flgov.com/2023/05/08/governor-ron-desantis-cracks-down-on-communist-china/>.

¹⁶² Erie, *supra* note 154, at 263-64.

¹⁶³ See Fla. S.B. 264.

¹⁶⁴ FLA. STAT. § 692.201 (2023).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* § 692.203. (“A foreign principal may not directly or indirectly own, or have a controlling interest in, or acquire by purchase, grant, devise, or descent any interest, except a de minimus indirect interest, in real property on or within 10 miles of any military installation or critical infrastructure facility in this state.”).

¹⁶⁷ *Id.* § 692.204. (“If the court finds that the real property, or any portion thereof, is owned or held in violation of this section, the court must enter a final judgment of forfeiture vesting title to the real property in this state . . . A violation of this section constitutes a felony of the third degree . . .”).

Most notably, in addition to the “countries of concern”, there are additional China-specific restrictions in SB 264 prohibiting any entity or individual associated with the People’s Republic of China, including its government, the Chinese Communist Party, and citizens not holding U.S. citizenship or lawful permanent residency from acquiring or owning *any* real property in Florida.¹⁶⁸

SB 264 includes narrow exemptions that allow a natural person to buy one residential property of up to two acres, not within five miles of a military base in Florida, if they hold a non-tourist U.S. visa or have been granted asylum.¹⁶⁹ SB 264 also allows for *de minimis indirect interests* in publicly traded companies and the acquisition of residential properties under certain conditions.¹⁷⁰ However, these exemptions themselves are limiting, as Florida is home to more than 20 military bases, conveniently located close to major urban centers such as Miami, Orlando, and Tallahassee.¹⁷¹ SB 264’s narrow exceptions and geographic constraints essentially resurrect the spirit of historical exclusion laws by establishing modern equivalents of “Chinese exclusion zones.”¹⁷² These restrictions apply to over 76% of Florida’s land and affect areas where nearly 99% of the population resides, making ownership nearly impossible for Chinese nonimmigrant visa holders and asylees.¹⁷³

In this way, SB 264 echoes the discriminatory impact of historic laws like the Chinese Exclusion Act of 1882 and the California Alien Land

¹⁶⁸ *Id.* (“A person or entity described in paragraph (1)(a) that directly or indirectly owns or acquires any interest in real property in this state before July 1, 2023, may continue to own or hold such real property, but may not purchase or otherwise acquire by grant, devise, or descent any additional real property in this state.”).

¹⁶⁹ *Id.* § 692.203.

¹⁷⁰ FLA. STAT. § 692.202 (2023).

¹⁷¹ Megan Butler, *11th Circuit takes up challenge to Florida restriction on property purchases by Chinese immigrants*, COURTHOUSE NEWS SERV. (Apr. 18, 2024), <https://www.courthousenews.com/11th-circuit-takes-up-challenge-to-florida-restriction-on-property-purchases-by-chinese-immigrants/> (“There are more than 20 military bases in Florida, many of them within five miles of city centers like Orlando, Tampa, Jacksonville, Pensacola, Panama City, and Key West, and there are many other sites across the state that may qualify as “military installations.”).

¹⁷² *See* First Amended Complaint at 24, *Shen*, 687 F. Supp. 3d 1219 (2023) (No. 4:23-cv-208-AW-MAF) (“The law will have the net effect of creating “Chinese exclusion zones” that will cover immense portions of Florida, including many of the state’s most densely populated and developed areas.”).

¹⁷³ Complaint at 5, *Nat’l Fair Hous. All., Inc. v. Sec’y of Com.*, No. 1:24-cv-21749 (S.D. Fla. May 6, 2024) (noting that such “military installations or critical infrastructure cover over 76% of Florida’s land, where 98.85% of the population lives” and “65% of all Florida cities are entirely within ten miles of a critical infrastructure facility or military installation.”).

Law of 1913.¹⁷⁴ It disproportionately targets those of Chinese descent, limiting their property ownership rights in a manner that echoes past discriminatory legislation.¹⁷⁵ As a result, the law is likely to reinforce exclusionary practices rather than actually safeguard economic interests or national security.¹⁷⁶ This is indicative, considering that Florida was also the last state to repeal its alien land laws, which reflects the State's prolonged history of such discriminatory policies.¹⁷⁷

While proponents argue that SB 264 aims to protect land ownership for state citizens, the law's stringent restrictions on foreign nationals suggest an underlying intent to exclude rather than merely safeguard property rights.¹⁷⁸ Upon signing SB 264 into law, Governor Ron DeSantis' administration released a statement, proclaiming it as "the strongest legislation in the nation to date to counteract the influence of the United States' greatest economic, strategic, and security threat."¹⁷⁹

With the legislation signed today to limit Chinese purchases of agriculture land and land near military bases and critical infrastructure, to protect digital data from Chinese spies, and to root out Chinese influence in Florida's education system, Florida has once again taken the lead in protecting American interests from foreign threats and has provided a blueprint for other states to do the same.¹⁸⁰

¹⁷⁴ See *supra* Sections II.A, II.B.

¹⁷⁵ See Amy Qin & Patricia Mazzei, *When Buying a Home Is Treated as a National Security Threat*, N.Y. TIMES (May 6, 2024), <https://www.nytimes.com/2024/05/06/us/florida-land-law-chinese-homes.html>; ("[R]esidents of Chinese descent said they faced discrimination as they tried to buy a home. Some said they lived in fear over whether they may have inadvertently violated the law."). Asian Americans also report facing profiling and discrimination under SB264, as real estate agents question the eligibility of individuals perceived to be Chinese, regardless of citizenship. see *id.*; Nicole Griffin, *Real estate agents struggle with confusion over ban on Chinese nationals owning property in Florida*, SPECTRUM NEWS 13 (June 11, 2024, 11:08 AM), <https://mynews13.com/fl/orlando/news/2024/06/05/real-estate-agents-struggle-amid-sb-264-confusion/> [<https://perma.cc/ZT6J-DZRT>].

¹⁷⁶ See Jia, *supra* note 5, at 668-69 (noting SB 264's parallels with historic alien land laws).

¹⁷⁷ *Id.* at 669 ("SB 246 is especially ironic because Florida was the *last* state to remove constitutional language referencing alien land restrictions in 2018").

¹⁷⁸ See DeSantis Press Release, *supra* note 161.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* As part of his campaign to curb the perceived influence of the Chinese Communist Party and Chinese nationals in Florida's education system, Governor DeSantis also signed Senate Bill 846 into law, which prohibits state universities and colleges from accepting grants or entering into partnerships with colleges or universities based in foreign countries of concern, including China. *Id.*; S.B. 846, 2023 Leg., Reg. Sess. (Fla. 2023); FLA. STAT. § 288.860 (2023); but see Bina Wang, *International Students and Professor Sue*

The administration further described the law's purpose as to "counteract the malign influence of the Chinese Communist Party in the state of Florida," and emphasized "their commitment to crack down on Communist China."¹⁸¹ Notably, the DeSantis administration's boast that the law provides "a blueprint for other states to do the same," likens its influence to that of the California Alien Land Law of 1913, propping itself up as a model for exclusion.¹⁸² This reiteration of exclusionary policies serves as political grandstanding, with lawmakers exploiting xenophobic tendencies for political advantage, ultimately undermining the values of inclusivity and economic opportunity that have been cornerstones of societal progress.¹⁸³

Like the influence of the Alien Land laws on other states in the early 20th century, the passage of SB 264 has set a precedent for other U.S. states, sparking a wave of similar legislative efforts nationwide, spawning copycat legislation, which this paper will collectively refer to as the "New Alien Land Laws."¹⁸⁴ States such as Alabama, and Idaho have considered or enacted legislation with comparable objectives, reflecting a nationwide reconsideration of foreign property ownership, even extending to traditionally liberal states like Hawai'i.¹⁸⁵

However, this approach has not been universally accepted.¹⁸⁶ In Texas, significant public pushback has emerged against this discriminatory legislation. Similar to Florida's SB 264, Texas' Senate Bill 147 aimed to prohibit citizens of certain countries, including China, from purchasing land in Texas.¹⁸⁷ This "copycat law" faced immediate criticism and was the

Florida Over Unconstitutional and Discriminatory Law Blocking Them From Academic Labs, ACLU FLA. (Mar. 25, 2024), <https://www.aclufla.org/en/press-releases/international-students-and-professor-sue-florida-over-unconstitutional-and/> [<https://perma.cc/69US-3N9J>] ("[T]here is no evidence of national security harm resulting from international students from China studying in Florida.").

¹⁸¹ DeSantis Press Release, *supra* note 161.

¹⁸² See DeSantis Press Release, *supra* note 161; Wang, *supra* note 175 (stating that laws like SB 246 and SB 846 "single out average people from seven countries and blanketly treat them as spies or agents of their governments.").

¹⁸³ Erie, *supra* note 154, at 295 (explaining the "race to the bottom" concept where "[s]tate governments may try to outdo one another by enacting increasingly 'tougher' laws on China . . .").

¹⁸⁴ *Id.*

¹⁸⁵ *Id. at app.*; H.B. 505, 32nd Leg., Reg. Sess. (Haw. 2023).

¹⁸⁶ See Sakshi Venkatraman, *Bill That Set Out to Restrict Chinese Property Ownership Dies in Texas House*, NBC NEWS (May 25, 2023, 9:48 AM), <https://www.nbcnews.com/news/asian-america/bill-set-restrict-chinese-property-ownership-dies-texas-house-rcna86257> [<https://perma.cc/D6J8-32CF>].

¹⁸⁷ *Id.*

source of public protest, prompting the legislature to “water down” and amend the bill to allow dual citizens and lawful permanent residents to buy property.¹⁸⁸ The bill eventually died in the House as a result of the strong public opposition and concerns of discriminatory legislation against Asian Americans, which could spark calls for a reconsideration of such legislation across the country.¹⁸⁹

Nonetheless, this trend of “copycat laws” indicates a shift towards stricter scrutiny of foreign ownership under the pretext of national security, not only affecting the balance between attracting foreign investment and safeguarding national interests but also impacting civil rights.¹⁹⁰ As more states emulate Florida, this collective movement could significantly reshape the U.S. foreign real estate investment scene, demonstrating the ripple effect of such xenophobic policies under the pretext of national security, reminiscent of historical Alien Land Laws.¹⁹¹

B. *Shen v. Simpson*

The enactment of SB 264 has sparked significant legal challenges and constitutional debates, reigniting debates about the judiciary’s role in safeguarding the constitutional protections afforded to individuals and entities in light of governmental claims of national security.¹⁹² Central to these challenges is *Shen v. Simpson*, which represents a direct challenge to the law’s provisions and its implications for constitutional rights.¹⁹³

On May 22, 2023 the American Civil Liberties Union filed a lawsuit on behalf of four Chinese citizens, Yifan Shen, Zhiming Xu, Xinxi Wang and Yongxin Liu, and a real estate brokerage firm, against SB 264, challenging the constitutionality of the law.¹⁹⁴ The plaintiffs argue that SB 264 discriminates against Chinese nationals by violating the Equal Protection and Due Process Clauses of the Fourteenth Amendment,

¹⁸⁸ Robert Downen, *Texas Senate passes bill limiting farmland sales to China, other countries*, TEX. TRIB. (Apr. 25, 2023), <https://www.texastribune.org/2023/04/25/texas-legislature-china-land-sales-kolkhorst/> [<https://perma.cc/32QZ-KCCB>].

¹⁸⁹ See Venkatraman, *supra* note 186.

¹⁹⁰ See Erie, *supra* note 154, at 295 (“Despite its prevalence, the practice of copying and pasting legislation has been criticized by scholars for resulting in suboptimal outcomes.”).

¹⁹¹ See *id.*

¹⁹² See *Asian American Community and Allies Rally Against Florida’s Anti-Chinese Land Law After Court Hearings*, STOP AAPI HATE (Apr. 19, 2024), <https://stopaapihate.org/2024/04/19/asian-american-community-and-allies-rally-against-floridas-anti-chinese-land-law-after-court-hearings/> [perma.cc/HHW3-VYG5].

¹⁹³ See First Amended Complaint, *Shen*, 687 F. Supp. 3d 1219 (2023) (No. 4:23-cv-208-AW-MAF).

¹⁹⁴ *Id.* at 1-6.

infringing upon the Supremacy Clause, and breaching the Fair Housing Act with its nationality-based restrictions on property ownership in Florida.¹⁹⁵

Florida defends SB 264, claiming it lawfully regulates real estate transactions to protect national security without discriminating based on race or nationality because the statute does not contain the words “national origin.”¹⁹⁶ In June 2023, the United States Department of Justice filed a Statement of Interest supporting the plaintiffs’ motion to prevent the enforcement of SB 264’s property ownership restrictions.¹⁹⁷ The Department of Justice argued that the restrictions discriminate based on national origin, violating the Fair Housing Act and the Equal Protection Clause of the Fourteenth Amendment.¹⁹⁸

However, Judge Winsor of the U.S. District Court of the Northern District of Florida denied the plaintiffs’ motion for a preliminary injunction, propelling the case to the United States Court of Appeals for the Eleventh Circuit.¹⁹⁹ In February 2024, the Eleventh Circuit Court granted an injunction pending appeal to two plaintiffs, Yifan Shen and Zhiming Xu, recognizing their imminent risk of irreparable harm they faced because of their pending real estate transactions at the time SB 264 became effective.²⁰⁰ Although this decision acknowledges the plaintiffs’ likely success in arguing that SB 264 is preempted by federal law, specifically the Foreign Investment Risk Review Modernization Act of 2018, it denied injunctive relief for the other plaintiffs.²⁰¹

Judge Nancy Abudu’s concurrence addressed the broader constitutional implications of SB 264, particularly concerning the Equal Protection Clause.²⁰² She pointed out that the law’s targeting of individuals of Chinese descent, supported by anti-Chinese rhetoric from Florida officials, suggested a substantial likelihood of success on the plaintiffs’ claim that SB 264 violates the Fourteenth Amendment’s protections against

¹⁹⁵ *Id.* at 30-32, 35-42.

¹⁹⁶ Memorandum in Opposition to Motion for Preliminary Injunction at 30, *Shen*, 687 F. Supp. 3d 1219 (2023) (No. 4:23-cv-208-AW-MAF).

¹⁹⁷ Statement of Interest of the United States in Support of the Plaintiffs’ Motion for Preliminary Injunction at 2, *Shen*, 687 F. Supp. 3d 1219 (2023) (No. 4:23-cv-208-AW-MAF).

¹⁹⁸ *Id.*

¹⁹⁹ Order Denying Preliminary Injunction Motion at 51, *Shen*, 687 F. Supp. 3d 1219 (2023) (No. 4:23-cv-208-AW-MAF); Order Granting Motion for Preliminary Injunction Pending Appeal in Part at 2, *Shen v. Simpson*, No. 23-12737 (11th Cir. Feb. 1, 2024).

²⁰⁰ Order Granting Motion for Preliminary Injunction Pending Appeal in Part at 3, *Shen* No. 23-12737 (11th Cir. Feb. 1, 2024).

²⁰¹ *Id.* at 2-3.

²⁰² *Id.* at 5-6 (Abudu, J., concurring).

discrimination.²⁰³ Her reasoning questions the relevance of the century-old *Terrace* cases, which upheld states' rights to restrict land ownership by aliens, suggesting that these precedents may no longer align with modern constitutional principles.²⁰⁴

Judge Abudu reasoned that the evolving jurisprudence around equal protection, especially as it pertains to state-based restrictions on alien land ownership, should subject SB 264 to strict scrutiny.²⁰⁵ Under such scrutiny, the plaintiffs' equal protection claim demonstrates a significant likelihood of success, given the discriminatory nature and impact of SB 264, thereby justifying the call for a preliminary injunction on these grounds as well.²⁰⁶

This case thus raises a fundamental question: can SB 264's nationality-based restrictions, framed as national security measures, withstand strict scrutiny without violating equal protection or due process?²⁰⁷ The ongoing legal battle in *Shen v. Simpson* reflects the broader debate over balancing security with civil liberties, with significant implications for both state powers and individual rights.²⁰⁸

The outcome of *Shen v. Simpson* will also have far-reaching implications for the future of state-level legislation on foreign property ownership.²⁰⁹ A ruling against SB 264 could compel the executive and legislative branches to adopt a more balanced approach to addressing security concerns without broadly discriminating based on nationality.²¹⁰ Conversely, a ruling in favor of SB 264 may embolden other states to enact similar laws, potentially leading to a patchwork of state-level regulations that affect foreign investment in the U.S. real estate market.²¹¹

While the judiciary wrestles with these national security justifications and their implications for civil liberties, there remains a palpable need for a more structured approach to reconcile these often-conflicting interests.²¹² National security and civil rights are not mutually exclusive concepts, and both can be protected with the right strategies in

²⁰³ *Id.* at 8-9.

²⁰⁴ *Id.* at 6-8.

²⁰⁵ *Id.* at 9.

²⁰⁶ Order Granting Motion for Preliminary Injunction Pending Appeal in Part at 9, *Shen*, No. 23-12737 (11th Cir. Feb. 1, 2024).

²⁰⁷ *See Erie*, *supra* note 154, at 273.

²⁰⁸ *See Jia*, *supra* note 5, at 671.

²⁰⁹ *See Erie*, *supra* note 154, at 267-68.

²¹⁰ *See id.* at 318.

²¹¹ *Id.* at 290-91.

²¹² *See White (House) Lies*, *supra* note 9, at 287.

place.²¹³ This context sets the stage for Professor Eric Yamamoto’s Strategic Blueprint for National Security Accountability.²¹⁴ Rooted in a deep understanding of historical precedents and judicial responses to executive overreach, Professor Yamamoto’s framework offers essential tools for rethinking and reformulating legislative and judicial strategies.²¹⁵ The forthcoming section will explore this blueprint in depth, providing a thorough analysis of how integrating such a framework offers a tool for defending constitutional mandates against the overreach of national security justifications and ensuring that the pursuit of security does not erode the bedrock of civil liberties.

IV. JUDICIAL SCRUTINY IN EVALUATING NATIONAL SECURITY CLAIMS

If the task of holding the executive accountable to constitutional standards ultimately falls on the courts, how does the American public hold the judiciary accountable — how do we assure that the courts actually scrutinize, rather than blindly accept, the executive’s proffered justification for ostensible national security restrictions of our most basic freedoms?²¹⁶

Judicial scrutiny plays a crucial role in mediating the balance between national security measures and civil liberties.²¹⁷ This section examines the patterns that occurred when the judiciary was faced with unsupported governmental claims of national security. It emphasizes the judiciary’s crucial responsibility to scrutinize the legitimacy of executive actions that claim urgency for national security, ensuring that such actions do not infringe upon civil liberties.²¹⁸ An active judiciary is essential, given the extensive powers often claimed by the executive branch.²¹⁹ Judges must challenge the basis and the scope of these powers.²²⁰ Against this backdrop,

²¹³ See *Loaded Weapon Revisited*, *supra* note 19, at 41-42.

²¹⁴ See *infra* Section IV.B for greater discussion of the Strategic Blueprint.

²¹⁵ See *White (House) Lies*, *supra* note 9, at 287-88.

²¹⁶ *Id.* at 287.

²¹⁷ See *id.* (discussing the blueprint for “building the political coalitions and cultural momentum needed to impel close judicial scrutiny of executive national security claims.”).

²¹⁸ See *id.* (“The price for failing to build those coalitions and that momentum is, I suggest, a weak judiciary, unfettered presidential power, and civil liberties disasters in waiting.”).

²¹⁹ See *Loaded Weapon Revisited*, *supra* note 19, at 36.

²²⁰ See *id.*

what can the public do to combat such abuses of power and ensure that national security measures do not override fundamental civil liberties?²²¹

A. *The Role of the Judiciary Against Threats to Civil Liberties*

Throughout American history, vulnerable groups have consistently suffered from significant breaches of trust, including the unjust incarceration of Japanese Americans during World War II, the inhumane use of torture and rendition techniques during the War on Terror, the sweeping powers granted by the PATRIOT Act, and the targeted scrutiny of Arab and Muslim Americans post-9/11.²²² These chapters of American history highlight the recurrent impact of unchecked executive actions on marginalized communities as well as the necessity for rigorous judicial scrutiny to safeguard fundamental rights.²²³

The *Korematsu* decision, infamously utilized as a “loaded weapon” in the hands of executive authority, serves as a stark reminder of the judiciary’s potential complicity in sanctioning constitutional transgressions under the pretext of national security.²²⁴ In his poignant dissent, Justice Robert H. Jackson criticized the majority’s decision to uphold the incarceration of Japanese Americans, arguing that it laid the groundwork for future legal endorsements of racial prejudice and arbitrary detention under national security claims.²²⁵ He famously warned that the decision was a “loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”²²⁶ This foresight warned of the perils of judicial deference to expansive executive powers, especially when such powers are asserted without sufficient factual basis.²²⁷

²²¹ See *id.*

²²² See *Korematsu*, 323 U.S. 214; Erwin Chemerinsky, *Civil Liberties and the War Terror: Seven Years After 9/11 History Repeating: Due Process, Torture and Privacy During the War on Terror*, 62 SMUL. REV. 3, 11-12 (2009) [hereinafter *Civil Liberties and the War Terror*] (detailing “torture memos” opining that the President was not obligated to international agreements regarding torture); *Id.* at 13-14 (explaining the government’s deprivation of individual privacy in the name of national security); Al-Kharsan & Shahshahani, *supra* note 10, at 141-42 (“Muslims during President Barack Obama’s tenure were subjected to preventive detention, exclusion based 90 on their political views, and potentially unconstitutional racial profiling.”).

²²³ See *Loaded Weapon Revisited*, *supra* note 19, at 37.

²²⁴ *Korematsu*, 323 U.S. 214 at 246 (Jackson, K., dissenting) (“The principle [of racial discrimination] then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”); see *Loaded Weapon Revisited*, *supra* note 19, at 32-34.

²²⁵ *Korematsu*, 323 U.S. at 246 (Jackson, K., dissenting).

²²⁶ *Id.* (“The principle [of racial discrimination] then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”).

²²⁷ See *White (House) Lies*, *supra* note 9, at 325.

During the War on Terror, this “loaded weapon” was evident in the judiciary’s often uncritical acceptance of executive justifications for measures like the Patriot Act, which expanded surveillance capabilities significantly, and the authorization of torture and indefinite detention of suspects at Guantanamo Bay without trial.²²⁸ More recently, during the Trump administration, this deferential stance enabled controversial policies such as the travel ban on several predominantly Muslim countries, which lower courts initially struck down but the Supreme Court ultimately upheld.²²⁹ These instances not only reflect Justice Jackson’s concerns about the potential misuse of national security to justify broad encroachments on civil liberties but also highlights the critical ongoing need for a vigilant judiciary that questions the factual basis of security measures to prevent abuses of power.²³⁰ This historical oversight, wherein the judiciary deferred to the executive’s national security claims without rigorous scrutiny, is alarmingly relevant today.²³¹

The judiciary must actively counteract such overreaches, serving as a safeguard against the repetition of these injustices.²³² Courts play an indispensable role in scrutinizing the balance between national security measures and the preservation of civil liberties.²³³ This scrutiny involves a careful evaluation of how laws impact fundamental rights and whether these impacts are justified by genuine security needs.²³⁴ Judicial oversight is crucial in situations where the line between necessary protection and excessive infringement is blurred.²³⁵ Judicial oversight cannot be sidestepped by deferring to the executive branch’s claimed institutional competence; the judiciary serves as the bulwark, ensuring that executive actions are continually measured against the fundamental principles enshrined in the Constitution.²³⁶ Judges must assert their autonomy in these cases, challenging any tendencies towards overreach by interpreting the

²²⁸ See *Civil Liberties and the War Terror*, *supra* note 222, at 11-14.

²²⁹ See *Trump v. Hawaii*, 585 U.S. 667 (2018); Yamamoto & Oyama, *supra* note 115, at 690 (“Justice Scalia stated that ‘Korematsu was wrong But you are kidding yourself if you think the same thing will not happen again’”).

²³⁰ See Yamamoto & Oyama, *supra* note 115, at 716 (labeling the majority’s opinion in *Trump* as a “reloaded weapon”).

²³¹ See *supra* Part III (examining the New Alien Land laws in the context of historical alien land laws discriminating against Asians and Asian Americans).

²³² See *White (House) Lies*, *supra* note 9, at 287.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ See Katyal, *supra* note 135, at 645 (“[I]n both [*Korematsu* and *Trump*], the majorities tempered these implicit promises of (albeit marginal) judicial oversight by hiding behind the shield of the executive branch’s institutional competence.”).

²³⁶ See *id.*

laws in the light of constitutional values.²³⁷ This means courts should not automatically defer to the national security claims presented by the executive but should require substantial evidence that supports the necessity and proportionality of the measures in question.²³⁸

In doing so, they protect the public from the potential abuse of power that can occur under the cover of national security.²³⁹ The courts are tasked with a pivotal role in scrutinizing the balance between necessary security measures and the safeguarding of civil liberties, a role that must evolve from historical precedents where judicial deference often led to overreaches.²⁴⁰ This evolution requires judges to engage critically with national security claims, contrasting with past instances where courts have permitted extensive breaches under the umbrella of security needs without stringent examination.²⁴¹

Judges must assert their independence by demanding rigorous evidence that substantiates any national security claim that impinges on individual rights.²⁴² This approach stands in contrast to historical judicial tendencies toward passive acceptance of executive assertions.²⁴³ By insisting on thorough justification, the judiciary not only protects civil liberties but also fortifies the constitutional checks on executive power.²⁴⁴ Furthermore, the judiciary's mandate includes upholding due process and ensuring that discussions about national security measures are grounded in constitutional principles.²⁴⁵ This protective role is crucial for overturning unjust laws and preventing the enactment of laws that compromise fundamental rights, thereby signaling a shift from previous judicial practices where oversight may have been lacking.²⁴⁶

Drawing from this, the application of the Strategic Blueprint today necessitates a concerted effort from a wide array of public advocates.²⁴⁷

²³⁷ See *Loaded Weapon Revisited*, *supra* note 19, at 33

²³⁸ *Id.* at 39.

²³⁹ See Craig Green, *Ending the Korematsu Era: An Early View from the War on Terror Cases*, 105 NW. U. L. REV. 983, 1033-35 (2011) (detailing examples of executive abuse).

²⁴⁰ See *id.* at 1034.

²⁴¹ See Thomas I. Vanaskie, *The Independence and Responsibility of the Federal Judiciary*, 46 VILL. L. REV. 745, 751 (2001) (reiterating the judiciary's role "as a check upon executive and legislative authority.").

²⁴² See Yamamoto & Oyama, *supra* note 115, at 705.

²⁴³ *White (House) Lies*, *supra* note 9, at 290.

²⁴⁴ *Id.*

²⁴⁵ See *id.* at 293-94.

²⁴⁶ See *id.* at 294.

²⁴⁷ *Id.* at 290.

These advocates are tasked with pressuring the judiciary to adopt a stance of heightened scrutiny rather than blind deference towards executive justifications for curbing liberties.²⁴⁸ Such strategy relies on leveraging critical legal advocacy, coupled with media engagement and grassroots mobilization, with the goal of securing judicial acknowledgment of the non-neutral and often subjective interpretation of law in cases with significant national security implications.²⁴⁹

In this context, Professor Yamamoto's Strategic Blueprint for National Security Accountability, as conceptualized in *White (House) Lies*, serves as a critical framework for combating modern legislative actions such as New Alien Land Laws.²⁵⁰ This blueprint, deeply rooted in the lessons learned from historical judicial responses to executive overreach under the guise of national security, presents a structured approach to ensuring that our country's constitutional mandates are upheld.²⁵¹ In operationalizing this Strategic Blueprint, the challenge extends beyond confronting specifically the New Alien Land Laws; it encompasses a broader endeavor to recalibrate the balance between national security needs and the protection of civil rights.²⁵² This broad endeavor calls for the judiciary, legal community, and public to unite in a collective effort to ensure that the specter of national security does not become a *carte blanche* for the erosion of constitutional rights.²⁵³

B. *Critical Legal Advocacy in the Face of Government Overreach*

At the core of this blueprint is the principle of critical legal advocacy.²⁵⁴ This advocacy challenges not just the text of the law but also the societal narratives and power structures it reinforces, entailing an analytical exploration into the legal, social, and political underpinnings of current legislative actions to identify the real issues at stake.²⁵⁵ By questioning who benefits from and who is harmed by such legislation, and by exposing the power dynamics and social values at play, legal advocates can present a compelling argument for heightened judicial scrutiny.²⁵⁶

The power dynamics revealed through this advocacy show a stark manipulation of national security concerns, often used to fortify nationalist

²⁴⁸ *Id.* at 293-94.

²⁴⁹ *White (House) Lies*, *supra* note 9, at 287.

²⁵⁰ *See id.* at 287.

²⁵¹ *See id.* at 332-333.

²⁵² *See Loaded Weapon Revisited*, *supra* note 19, 32-34.

²⁵³ *White (House) Lies*, *supra* note 9, at 290.

²⁵⁴ *Id.* at 287.

²⁵⁵ *Id.* at 291-92.

²⁵⁶ *Id.*

sentiments while sidelining fundamental civil liberties.²⁵⁷ SB 264 and its copycats claims to protect against foreign influence, yet predominantly affects Asian American communities and other immigrant groups, mirroring discriminatory patterns seen in the Chinese Exclusion Act and Alien Land Laws.²⁵⁸ The primary beneficiaries of such legislation are typically not the American people, as often claimed, but rather specific political groups and leaders who exploit fear and discrimination to consolidate power.²⁵⁹

Such legislation often serves to perpetuate racial prejudices and foster environments conducive to xenophobia.²⁶⁰ Governor Ron DeSantis, for instance, uses SB 264 to galvanize electoral support by tapping into and amplifying these nationalist sentiments.²⁶¹ These actions not only undermine the rights of those directly affected but also erodes the foundational principles of fairness and justice in democratic societies.²⁶² This type of political grandstanding further perpetuates and amplifies historical patterns of discrimination under the guise of national security.²⁶³ The echoes of the past are unmistakable, with cases like *Korematsu* and *Trump v. Hawaii* serving as stark reminders of the legal system's capacity to marginalize and exclude based on exaggerated national security fears.²⁶⁴

Critical legal advocates must bring these issues to the forefront, questioning not only the legality but the morality of measures like the New Alien Land Laws.²⁶⁵ In pushing for this heightened scrutiny, advocates emphasize the importance of recognizing the echoes of historical injustices in contemporary legislation.²⁶⁶ This advocacy is crucial in educating the public and reshaping public opinion, with the goal of cultivating a more informed electorate that can hold its leaders accountable for the laws they

²⁵⁷ *Id.* at 326-27.

²⁵⁸ See Fla. S.B. 264; Butler, *supra* note 171.

²⁵⁹ See Erie, *supra* note 154, at 295.

²⁶⁰ See *id.*

²⁶¹ DeSantis Press Release, *supra* note 161 (emphasizing “commitment to crack down on Communist China.”).

²⁶² See Jia, *supra* note 5, at 710 (“Crises tend to enable backsliding in democratic institutions, which become in turn more susceptible to autocratic exploitation. Thus a broader concern: Efforts to compete with China may unwittingly lead us to emulate it.”).

²⁶³ See Erie, *supra* note 154, at 295.

²⁶⁴ Susan Kiyomi Serrano & Dale Minami, *Korematsu v. United States: A “Constant Caution” in a Time of Crisis*, 10 *ASIAN L.J.* 37, 49-50 (2003).

²⁶⁵ See *id.* at 38 (“Many [students], however, never discuss the political or moral issues raised by the mass imprisonment of Japanese Americans. Nor do they examine the devastating human cost of this decision—the suffering, broken families, lost property, and shattered dreams.”).

²⁶⁶ *White (House) Lies*, *supra* note 9, at 308-09.

enact.²⁶⁷ Advocates argue for a judiciary that is not only informed by the law but also by a profound understanding of the broader societal impacts of its decisions.²⁶⁸ By doing so, critical legal advocacy not only seeks to influence individual cases but also to shift the judicial perspective more broadly.²⁶⁹ It promotes a culture where the judiciary rigorously questions the balance between national security and civil liberties, urging a reversal of the trend toward unchecked executive power in matters of national security.²⁷⁰

C. *Disarming the Loaded Weapon Through Judicial Accountability*

Critical legal advocacy extends beyond the courtroom to influence public opinion and legislative processes.²⁷¹ The Strategic Blueprint aims to establish a culture of judicial accountability in which courts actively scrutinize executive actions that compromise fundamental freedoms.²⁷² A culture of accountability requires acknowledging and correcting historical injustices.²⁷³ Recognizing these historical faults and taking steps to prevent their repetition is crucial for creating trust in governmental institutions and reinforcing a commitment to maintaining civil liberties as fundamental rights.²⁷⁴ Recognition, in this context, demands an honest confrontation with both the contemporary and historical narratives surrounding Asian Americans, thereby acknowledging the ways in which laws like New Alien Land Laws resonate with and potentially revive these discriminatory practices.²⁷⁵

This requires a judiciary that is responsive to public pressure and educated critique, capable of distinguishing genuine national security needs from executive overreach.²⁷⁶ Historically, our judiciary has been prone to granting the executive unchecked discretion in national security matters,

²⁶⁷ *Id.* at 294.

²⁶⁸ *Id.* at 292.

²⁶⁹ *Id.*

²⁷⁰ *See id.*; *Loaded Weapon Revisited*, *supra* note 19, at 32-33.

²⁷¹ *White (House) Lies*, *supra* note 9, at 308-09.

²⁷² *Id.* at 287.

²⁷³ *Id.*

²⁷⁴ *See* Eric K. Yamamoto et al., *Apology & Reparation: The Jeju Tragedy Retrials and the Japanese American Coram Nobis Cases as Catalysts for Reparative Justice*, 45 U. HAW. L. REV. 5, 59-60 (2022) (“recognition, prompts two collaborative stakeholders’ inquiries. It asks each participant to come to the social healing table and to “see into the woundedness of self and others.”).

²⁷⁵ *See* Frank H. Wu, *Necessary but Not Sufficient: Two Case Studies of Government Apologies Failing to Bring Closure*, 16 HASTINGS RACE & POVERTY L.J. 193, 204-05 (2019).

²⁷⁶ *White (House) Lies*, *supra* note 9, at 290-91.

often at the expense of civil liberties.²⁷⁷ This approach, therefore, advocates for a reversal of this trend, urging the judiciary to adopt a stance of heightened scrutiny and to demand substantive justification for executive claims that threaten the constitutional balance.²⁷⁸

Through public forums and scholarly critique, advocates can bring to attention the broader implications of national security legislation on societal values and institutions.²⁷⁹ This approach not only challenges the judiciary to reconsider its deference to executive claims but also educates the public on the critical balance between security and liberty.²⁸⁰ In doing so, this blueprint emphasizes the indispensable role of media engagement and grassroots activism in shaping public discourse.²⁸¹

Grassroots efforts are crucial in exerting pressure on judicial and legislative bodies.²⁸² Through organized campaigns, public demonstrations, and forums, these movements do more than protest against unfair laws; they cultivate a culture that staunchly supports the preservation of civil liberties.²⁸³ When combined with targeted interactions with policymakers, these efforts encourage the creation and enforcement of more equitable laws that prevent national security from being misused as a pretext to infringe upon fundamental rights.²⁸⁴ The proposed New Alien Land Laws has prompted many Chinese Americans, who usually do not engage politically, to take action through protests, public testimony, and alliances with civil rights groups.²⁸⁵

²⁷⁷ See Al-Khersan & Shahshahani, *supra* note 10, at 140-41.

²⁷⁸ See *White (House) Lies*, *supra* note 9, at 307.

²⁷⁹ See Serrano & Minami, *supra* note 264, at 49.

²⁸⁰ *Id.* at 47-50.

²⁸¹ See, e.g., Venkatraman, *supra* note 186 (detailing successful protests of proposed New Alien Land Law bill in Texas).

²⁸² See *id.*; *White (House) Lies*, *supra* note 9, at 309.

²⁸³ *White (House) Lies*, *supra* note 9, at 308-09; see *Defying the Storm: Chinese Americans Rally for Justice and Equality in Miami, FL*, PR NEWSWIRE (Dec 18, 2023, 4:51 PM), <https://www.prnewswire.com/news-releases/defying-the-storm-chinese-americans-rally-for-justice-and-equality-in-miami-fl-302018269.html/> (detailing gathering where “elected officials, and individuals from diverse ethnic backgrounds united against injustice, protesting Senate Bill 264.”).

²⁸⁴ *Id.* at 289.

²⁸⁵ Claire Wang, *Ron DeSantis-backed law barring Chinese from owning land in Florida galvanizes Asian Americans*, NBC NEWS (Aug 19, 2024, 7:00 AM), <https://www.nbcnews.com/news/asian-america/desantis-backed-law-chinese-owning-land-florida-galvanized-asian-ameri-rcna166640/> (“This bill alone helped activate a lot of people in the Chinese American community who historically are not engaged with the government, especially the state government[.]”) (internal quote omitted); Bochen Han, *Texas’ threat of real estate ban prompts surge of Chinese-American activism*, SOUTH CHINA MORNING POST (Oct 18, 2024, 1:00 AM), <https://www.scmp.com/news/china/article/3282807/texas-threat-real-estate-ban->

Historical instances of executive dissembling, as highlighted in the context of national security abuses, are well documented and illustrate the power of a well-informed public in demanding transparency and accountability.²⁸⁶ The “noble lie,” wherein the executive branch misleads the public “for their own good,” finds a counter in vigorous journalism and public advocacy that challenge the veracity of national security claims.²⁸⁷ However, achieving meaningful change may require time and depend on shifts in political and judicial power, but critical legal advocacy remains essential to hold decision-makers accountable and prevent the abuse of marginalized and vulnerable minority groups, whether targeted based on race, economics, politics, or geopolitics.²⁸⁸

In the digital age, this mobilization takes on new forms, with social media platforms amplifying the reach of critical commentary and grassroots campaigns.²⁸⁹ These platforms offer an avenue for widespread public education on the use of national security as a weapon to erode civil liberties, ultimately creating a culture of critical inquiry and resistance against unfounded executive claims.²⁹⁰ However, the proliferation of misinformation through digital platforms complicates such efforts.²⁹¹ Influential platforms like X (formerly Twitter) and figures such as Elon Musk wield significant power in shaping public narratives, thereby requiring strategic media engagement to counteract false or harmful narratives that support xenophobic policies.²⁹²

Applying the blueprint to the New Alien Land Laws represents a synthesis of historical insight and modern advocacy. Florida’s SB 264, which ostensibly aims to protect national security by preventing foreign influence in critical sectors, can be considered as a contemporary “loaded weapon.”²⁹³

prompts-surge-chinese-american-activism/.

²⁸⁶ See LEE, *supra* note 26, at 247.

²⁸⁷ *White (House) Lies*, *supra* note 9, at 290.

²⁸⁸ See *id.*

²⁸⁹ Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U.L. REV. 1535, 1545 (2018) (“Images and videos advocating for social changes are now created and broadcasted using social media platforms that reach billions of people across the world for free.”).

²⁹⁰ See *id.*

²⁹¹ See Davey Alba et al., *Elon Musk Is Now X’s Biggest Promoter of Anti-Immigrant Conspiracies*, BLOOMBERG NEWS, (Oct. 24, 2024), <https://www.bloomberg.com/graphics/2024-musk-x-election-influence-immigration/> [<https://perma.cc/7KYL-NZ72>].

²⁹² See *id.*

²⁹³ See *Loaded Weapon Revisited*, *supra* note 19, at 37; See also S.B. 264, 2023 Leg., Reg. Sess. (Fla. 2023).

This assertion draws a direct comparison to historical precedents where laws justified by national security became tools, or weapons, for broader political or discriminatory agendas.²⁹⁴ This law parallels historical misuses of national security, such as the incarceration of Japanese Americans during World War II or the inhumane use of torture during the War on Terror, where the American government used national security as a basis to justify extensive violations of individual rights.²⁹⁵ The judiciary's role is to ensure that SB 264 does not become a modern-day "loaded weapon" by meticulously examining the law's intent, application, and consequences.²⁹⁶ Courts must challenge the premises of SB 264, investigating whether its measures are the least intrusive means necessary to achieve a legitimate security goal and whether they address the alleged threats proportionately without unjustly targeting specific groups.²⁹⁷ Considering these circumstances, critical judicial review is essential to prevent the law from being weaponized against marginalized groups under the broad banner of national security.²⁹⁸

Operationalizing the blueprint calls for the institution of a culture of accountability wherein both the executive and the judiciary are held to high standards of transparency and adherence to constitutional principles.²⁹⁹ Doing so will not only ensure that national security measures uphold fundamental rights and maintain the delicate balance necessary in a democratic society, but also correct the course for the future role of courts as essential bulwarks against threats to civil liberties.³⁰⁰

V. CONCLUSION

The journey from the Chinese Exclusion Act and Alien Land Laws to today's SB 264 in Florida mirrors America's enduring tension between its celebrated ideals and its practices of exclusion, particularly under the guise of national security.³⁰¹ This historical continuum reveals a significant

²⁹⁴ See Jia, *supra* note 5, at 643-644 ("In time, economic insecurities and cultural xenophobia gave way to racial violence and calls to limit Chinese immigration.").

²⁹⁵ *Id.* at 645; see *Loaded Weapon Revisited*, *supra* note 19, at 21.

²⁹⁶ *Loaded Weapon Revisited*, *supra* note 19, at 9; see also S.B. 264, 2023 Leg., Reg. Sess. (Fla. 2023).

²⁹⁷ *White (House) Lies*, *supra* note 9, at 289-90; see also S.B. 264, 2023 Leg., Reg. Sess. (Fla. 2023).

²⁹⁸ *White (House) Lies*, *supra* note 9, at 287; see also S.B. 264, 2023 Leg., Reg. Sess. (Fla. 2023).

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ See *supra* Parts II, III.

shortfall in acknowledging and addressing the impacts of such policies, threatening the essence of American values like liberty and equality.³⁰²

The United States now stands at a crucial juncture, faced with the resurgence of exclusionary laws that challenge its foundational principles. This moment calls for a clear decision: to either perpetuate a history of exclusion or to steer towards a future that truly embodies inclusion and fairness. The persistence of discriminatory policies, fueled by a historical failure to fully confront and remedy their consequences, demands a decisive shift towards justice, equity, and the unconditional protection of rights for all. In light of the Trump presidency and ongoing criticism of the Supreme Court's conservative tilt, the urgency to address and counteract exclusionary laws like SB 264 has never been greater. Without proactive judicial and societal interventions, there is a significant risk of more widespread abuse driven by racial animus disguised as national security.

The discourse surrounding SB 264 provides an opportunity to amend these long-standing errors by reinforcing the need for a judiciary that scrutinizes and challenges governmental claims of national security rigorously.³⁰³ It urges an evolution from past judicial deference to a more proactive role in protecting civil liberties against unchecked executive powers. By advocating for a judiciary that demands rigorous evidence and evaluates the constitutional validity of national security claims, we can safeguard against the misuse of power and uphold the fundamental liberties that define our democratic society. This proactive stance is vital to prevent future injustices and ensure that security measures are balanced with the preservation of individual rights.

The battle against discriminatory policies, informed by an understanding of historical patterns, calls for a revitalized commitment to the principles of justice and equality. By choosing to move away from exclusion and towards inclusivity, America can shape a legacy that truly reflects its highest ideals. The time for action is now; it is an opportunity to redefine America's legacy and affirm its dedication to a more just and inclusive society.

³⁰² See *supra* Sections II.A, II.B.

³⁰³ See *supra* Section III.A.