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Whitewashing Precedent: From the *Chinese Exclusion Case* to *Korematsu* to the Muslim Travel Ban Cases

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WHITEWASHING PRECEDENT: FROM
THE *CHINESE EXCLUSION CASE* TO
KOREMATSU TO THE MUSLIM
TRAVEL BAN CASES

Robert S. Chang[†]

ABSTRACT

The travel ban cases test the extent of the President's authority to promulgate orders regarding the issuance of visas and the entry of refugees. Specifically at issue is whether the President's actions are even reviewable by the courts, as well as whether the President exceeded his statutory authority or acted in violation of the Establishment Clause. Though his government attorneys do not cite to or directly rely upon the *Chinese Exclusion Case* or *Korematsu v. United States*, these cases directly underlie their arguments, providing perhaps the strongest precedential authority for his actions. It is quite possible that the government attorneys believe that they cannot openly invoke these precedents. This article argues that courts should not succumb to this attempt by the government attorneys to let these cases operate *sub rosa*, and instead should use this opportunity to repudiate two principles embedded in the two cases: that Congress and the Executive exercise plenary power over matters involving

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This article is an extended version of remarks delivered on Nov. 17, 2017, at the *National Security, National Origin, and the Constitution: 75 Years after Executive Order 9066 Symposium*, sponsored by the Case Western Reserve University Law Review. Those remarks were entitled, "How's It Going to End?" with the title taken from the film *THE TRUMAN SHOW* (Paramount Pictures 1998). In that film, a button was worn by viewers of a reality TV show, posing that question. At times, the 2016 presidential campaign and the presidency itself has resembled a reality TV show, whose ending is not yet apparent.

The author is co-counsel on amicus briefs that have been filed in federal district courts, the Fourth and Ninth Circuits, and the U.S. Supreme Court that have supported the legal challenges to the various iterations of the Muslim travel ban. This Article is informed by his work in those cases. The author is grateful for the work of his co-counsel in those cases, especially pro bono counsel at Akin Gump Strauss Hauer & Feld.

immigration and the border that is not subject to judicial review; and that the judiciary must defer to the Executive without meaningful judicial review when national security is invoked. So far, federal courts have faithfully executed their role in our democratic system of checks and balances. They have fulfilled their constitutional obligations by reviewing the actions of the Executive and not merely acting as a rubber stamp to action taken in the name of national security. Time will tell whether this will hold with the Supreme Court.

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INTRODUCTION: A PROFOUND SENSE OF DÉJÀ VU

On January 27, 2017, Hameed Khalid Darweesh, his wife, and his three children were seated in a plane headed to New York City.¹ They were traveling with “golden tickets” authorizing them to enter the United States.² They had qualified to come to the United States because Hameed, an Iraqi citizen, had worked in Iraq for the United States as an interpreter, electrical engineer, and a contractor.³ This

1. Michael D. Shear et al., *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. TIMES (Jan. 28, 2017), <https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html> [https://perma.cc/5A43-WL84].

2. *Id.*

3. Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief at ¶ 4, *Darweesh v. Trump*, No. 1:17-cv-00480, 2017 WL

had included working as an interpreter for several months for the U.S. Army 101st Airborne in Baghdad and Mosul from 2003 to 2004, several months for the 91st Engineering Unit at Baghdad Airport in 2004, approximately a year as a Project Engineer for the U.S. Government Projects Contracting Office Oil sector from 2005 to 2006, and approximately five years working for Vessar contractors of the U.S. government from 2006 to 2011.⁴ He was granted what is known as a Special Immigrant Visa (“SIV”), made available to Iraqi nationals who worked for at least one year as employees or on behalf of the U.S. government and “who ha[ve] experienced or [are] experiencing an ongoing serious threat as a consequence of [that] employment.”⁵ After being targeted and receiving threats because of his work for the U.S., and having fled with his family a couple times and relocating to different places in Iraq, he applied for an SIV on or around October 1, 2014.⁶ Following a lengthy review process, he and his family were finally given SIVs over two years later on January 20, 2017, and were on a plane a week later.⁷

But while they were hurtling through the skies, President Donald J. Trump issued Executive Order No. 13,769 (“EO 1”), and with a stroke of his pen invalidated those immigration visas for persons from seven Muslim-majority nations, including those from Iraq.⁸ Upon

388504 (E.D.N.Y. Jan. 28, 2017), 2017 WL 393446 [hereinafter Darweesh Habeas Petition].

4. *Id.* ¶ 19.
5. *Special Immigrant Visas for Iraqis – Who Were Employed by/on Behalf of the U.S. Government*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visas-iraqis-employed-us-gov.html> [<https://perma.cc/M6S2-7WA2>] (last visited Feb. 22, 2018).
6. Darweesh Habeas Petition, *supra* note 3, ¶¶ 20–22.
7. *Id.* ¶¶ 22–30.
8. See Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017). The countries singled out in Executive Order 13,769, though not by name, were countries that had previously been excluded from a visa-waiver program that allowed persons from included countries to travel to the United States without obtaining visas. The countries excluded from the visa-waiver program based on the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015 were Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. See *Visa Waiver Program*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html> [<https://perma.cc/9MXU-YMRH>] (last visited Feb. 23, 2018). The majority of persons in each of these countries is Muslim. Emily Stephenson & Eric Knecht, *Trump Bars Door to Refugees, Visitors from Seven Mainly Muslim Nations*, REUTERS (Jan. 27, 2017), <https://www.reuters.com/article/us-usa-trump-refugees/trump-bars-door-to-refugees-visitors-from-seven-mainly-muslim-nations-idUSKBN15B2HL> [<https://perma.cc/G7BL-TCLB>].

landing at Kennedy International Airport, Hameed Darweesh was taken into custody.⁹ For reasons that remain unclear, his wife and children, though traveling with him from Iraq, and also with immigrant visas, were not detained.¹⁰

That evening, a lawsuit was filed with Hameed as the lead plaintiff seeking habeas relief and an injunction against the executive order.¹¹

The facts in *Darweesh v. Trump*¹² bear an eerie similarity to the facts in the *Chinese Exclusion Case*,¹³ decided nearly 130 years earlier. On September 7, 1888, Chae Chan Ping embarked on the steamship *Belgic* from Hong Kong on his way back to San Francisco.¹⁴ He had lived and worked in the San Francisco area since 1875 when he arrived from China.¹⁵ After working nearly twelve years in the United States, Mr. Ping left on June 2, 1887, to visit China.¹⁶ Before leaving

9. Nicholas Kulish, *Iraqi Immigrant, Caught in a Trump Policy Tangle, Is Allowed to Stay*, N.Y. TIMES (Jan. 28, 2017), <https://www.nytimes.com/2017/01/28/us/iraqi-immigrant-donald-trump-airport-detention.html> [https://perma.cc/JP5R-2BHC].

10. *See id.*

11. *See Darweesh Habeas Petition, supra* note 3.

12. No. 1:17-cv-00480, 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017).

13. *Ping v. United States*, 130 U.S. 581 (1889). This case came to be known as the *Chinese Exclusion Case* and is referred to as such in a number of cases, including in recent decisions. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936). Many courts and scholars refer to the case as *Chae Chan Ping v. United States*, though even that locution is problematic. As can be gleaned from the case, his surname was Ping. The case should be called *Ping v. United States*. 130 U.S. at 581. This also applies to the other cases from this era. Another example of a troubling naming convention is the way Westlaw, and West's Supreme Court Reporter, refer to *Korematsu v. United States* as *Toyosaburo Korematsu v. United States*. In addition to inserting "Toyosaburo" as part of the case name, West editors inserted "Toyosaburo" in the synopsis of the opinion, even though the official reporter, U.S. Reports, did not. *Compare* 323 U.S. 214 (1944) *with* 65 S. Ct. 193 (1944). One possible explanation for inserting "Toyosaburo" in the synopsis when the Supreme Court justices just referred to him as "Korematsu" was to make a person whose first name was Fred sound more foreign. West carries forward this alteration and inserts "Toyosaburo" as part of the case name in later cases that cite *Korematsu*. *See, e.g., Harisiades v. Shaughnessy*, 72 S. Ct. 512, 519–20 nn.16–17 (1952); *Shaughnessy v. United States ex rel. Mezei*, 73 S. Ct. 625, 634 n.5 (1953).

14. *Chinese Exclusion Case*, 130 U.S. at 582.

15. *Id.*

16. *Id.*

for China, he obtained a “certificate of return” that would permit re-entry to the United States.¹⁷ Starting in 1884, this certificate of return provided the only legal means by which a Chinese laborer in the United States would be permitted to leave and return.¹⁸ On October 8, 1888, the *Belgic* arrived in San Francisco and Mr. Ping presented his certificate to the proper custom-house officers but was denied permission to land.¹⁹ Though his certificate was valid when issued, and valid when he left Hong Kong, while the steamship *Belgic* was making its way across the Pacific Ocean, President Grover Cleveland signed the Scott Act of 1888 on October 1, which canceled all previously issued “certificates of return.”²⁰

Held aboard the *Belgic*, he sued for habeas relief, challenging the Scott Act.²¹ Described more fully below, he was unsuccessful and he was forced to return to China; what happened to him thereafter is not known.²² But his legal challenge produced what has come to be known as the plenary power doctrine, a deformity in our constitutional jurisprudence that has produced, and continues to produce, much mischief.²³

The facts in *Darweesh* also raise issues similar to those in *Korematsu v. United States*,²⁴ which was decided nearly seventy-five years ago. During World War II, Fred Korematsu was convicted of

17. *Id.*

18. See Act of July 5, 1884, ch. 220, § 4, 23 Stat. 115. The Court, in *Heong v. United States*, made clear that this Act could not be applied retroactively to Chinese laborers who had left prior to its enactment and its requirement of a certificate of reentry, but otherwise left the Act intact and not in violation of existing treaties between the United States and China. 112 U.S. 536, 560 (1884).

19. *Chinese Exclusion Case*, 130 U.S. at 582.

20. Scott Act of 1888, ch. 1064, 25 Stat. 504, *repealed by* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

21. *Chinese Exclusion Case*, 130 U.S. at 582.

22. Kit Johnson, *Chae Chan Ping at 125: An Introduction*, 68 OKLA. L. REV. 3, 4 (2015) (“As for what happened to Chae Chan Ping after his final deportation and return to China, nothing is known.”).

23. See, e.g., Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550, 613 (1990); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 862–63 (1987) (acknowledging that the power to control immigration is plenary, but criticizing the *Chinese Exclusion Case* as an “embarrassment”); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255.

24. 323 U.S. 214 (1944).

violating Civilian Exclusion Order No. 34, the authority for which came from President Franklin D. Roosevelt's Executive Order 9066.²⁵ The Exclusion Order required "all persons of Japanese ancestry, both alien and non-alien, be excluded from" a certain area and required "[a] responsible member of each family, and each individual living alone, in the above described area" to report to a Civil Control Station.²⁶ Justice Hugo Black, delivering the opinion of the Court in *Korematsu*, noted that:

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.²⁷

Though denial of entry to the United States for non-U.S. nationals is certainly different from the forced removal and incarceration of persons of Japanese ancestry, a key shared question is whether the wholesale lumping together of people based on nationality for discriminatory treatment can be justified in the name of national security. This requires a determination of what the role of the judiciary will be in assessing whether sufficient pressing public necessity exists to warrant such discriminatory treatment. In addition, at stake today is the seriousness with which the judiciary will examine whether religious animosity motivates the executive orders.

Though Hameed Darweesh was released and allowed to join his family,²⁸ and eventually that lawsuit was settled,²⁹ other legal challenges to later iterations of Executive Order 13,769 currently remain before the courts and will be resolved by the U.S. Supreme Court, as it made clear when it stayed the injunctions issued by the federal

25. *Id.* at 215–17.

26. Exec. Order No. 9,066, 3 C.F.R. 1092 (1943).

27. 323 U.S. at 216. Though credited as "announcing the equal protection principles of suspect classifications and strict scrutiny", Peter J. Rubin, *Taking Its Proper Place in the Constitutional Canon: Bolling v. Sharpe, Korematsu, and the Equal Protection Component of Fifth Amendment Due Process*, 92 VA. L. REV. 1879, 1892 (2006), *Korematsu* is typically placed in the rubbish heap of discredited precedent. See Craig Green, *Ending the Korematsu Era: An Early View from the War on Terror Cases*, 105 NW. U. L. REV. 983, 985 (2011) ("Every American lawyer knows *Korematsu v. United States* as a discredited precedent.").

28. Kulish, *supra* note 9.

29. See Settlement Agreement, *Darweesh v. Trump*, No. 1:17-cv-00480, 2017 WL 388504 (E.D.N.Y. Aug. 31, 2017), ECF No. 218.

district courts in Hawaii and Maryland.³⁰ After staying the injunctions,³¹ and following a per curiam opinion by the Ninth Circuit affirming the injunction, the Court has accepted review of *Hawaii v. Trump* with regard to what might be referred to as EO3.³² Argument took place on April 25, 2018, and the Court is expected to issue its decision by the end of June when the Court recesses for the summer.

When the Court finally addresses the merits, a key question is whether history will repeat itself with an affirmation, *sub rosa*, of the *Chinese Exclusion Case* and *Korematsu v. United States*. Though the government attorneys defending the Muslim travel ban do not cite to or directly rely upon the *Chinese Exclusion Case* or *Korematsu*, these cases underlie their arguments, and perhaps provide the strongest precedential authority for President Trump's executive actions.³³ More directly, a number of the cases the government relies upon cite directly to the *Chinese Exclusion Case* and *Korematsu*; however, as

30. Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (2017). Executive Order 13,769, portions of which were deemed illegal by various courts, was supplanted on March 6, 2017, by Executive Order 13,780, bearing the same name as the first. *See* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (2017). After courts again blocked much of its implementation, and shortly before oral argument before the Supreme Court, a third version of the Muslim travel ban, Presidential Proclamation 9,645, was issued. *See* Proclamation No. 9,645, 82 Fed. Reg. 45,161 (Sept. 24, 2017). The legality of this third iteration remains before the courts. *See* *Trump v. Hawaii*, 138 S. Ct. 542 (Mem) (2017) (granting stay and noting that “[i]f the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment” and also stating, “[i]n light of its decision to consider the case on an expedited basis, we expect that the Court of Appeals will render its decision with appropriate dispatch”). The Ninth Circuit rendered its decision on December 22, 2017, affirming the district court's finding that the latest iteration of the travel ban, Proclamation 9,645, exceeded the scope of the President's delegated authority; limiting the scope of the district court's injunction to “foreign nationals who have a bona fide relationship with a person or entity in the United States,” and staying its decision “pending Supreme Court review.” *Hawaii v. Trump*, 878 F.3d 662, 673, 702 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 923 (Mem) (2018). A petition for a writ of certiorari was filed on January 5, 2018. Petition for a Writ of Certiorari, *Trump v. Hawaii*, 878 F.3d 662 (9th Cir. 2017) (No. 17-965). The Fourth Circuit affirmed the preliminary injunction granted by the district court and stayed its decision pending “the Supreme Court's decision.” *Int'l Refugee Assistance Project v. Trump*, 888 F.3d 233, 274 (2018). In the meantime, Judge Robart issued an injunction that partially lifts the ban on refugees in *Doe v. Trump*. No. C17-0178JLR, C17-1707JLR, 2017 WL 6551491, at *26 (W.D. Wash. Dec. 23, 2017).

31. *See* 138 S. Ct. at 542 (granting government's application for a stay of the district court's Oct. 20, 2017, preliminary injunction order).

32. 878 F.3d 662, *cert. granted*, 138 S. Ct. 923 (2017).

33. *See infra* Part III.

explained below, the government attorneys' citations obscure the connection.³⁴

A proper appreciation of the ways the *Chinese Exclusion Case* and *Korematsu* lie at the heart of the defense of the Muslim travel ban is necessary to understand fully what is at stake doctrinally. Once these cases are addressed openly, it increases the possibility that the legal challenges will result in a course correction that 1) fixes the constitutional deformity known as the plenary power doctrine and 2) ensures that courts will fulfill their constitutional role as a check to executive power and not simply give the political branches a blank check whenever they invoke national security.

Stated differently, the hope is that the decision rendered by the Supreme Court does not reinstate the flawed jurisprudence behind the *Chinese Exclusion Case* and *Korematsu*.

Part I of this Article discusses the cases upholding Asian exclusion in detail and explains how these cases might be described as embodying immigration exceptionalism—a jurisprudence that exists outside of what we would expect in terms of constitutional jurisprudence. Part II discusses the World War II cases that embody national security exceptionalism. Part III details how the Department of Justice, in defending President Trump's executive orders, relies extensively on precedent that is based on the *Chinese Exclusion Case* and *Korematsu*. This citation practice might be labeled a form of whitewashing. The Article concludes by arguing that the Court should not, *sub rosa*, reaffirm *Korematsu* and the *Chinese Exclusion Case*.

I. IMMIGRATION EXCEPTIONALISM

According to the celebrated grand narrative about the United States Constitution and its system of democratic governance, one of the most important functions of the federal judiciary is to act as a check on the improper or unlawful exercise of power by the political branches—Congress and the Executive.³⁵ The declaration of the role

34. *Id.*

35. See, e.g., Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1461 (2017) (“*Marbury v. Madison* got it right. Chief Justice John Marshall explained that the Constitution exists to impose limits on government powers, and these limits are meaningless unless subject to judicial enforcement.”); Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 671 (1980) (“The genius of the American Constitution is the creation of a national government that is at once powerful and effective, and yet restrained by internal checks and balances from tyrannical abuses of its power.”).

Because the authority of President Trump to promulgate EO1, EO2, and EO3 derives from a grant of Congress, this Article does not explore the

of judicial review of the actions of the Legislature and the Executive, within constitutional jurisprudence, is usually attributed to Chief Justice John Marshall, who, in *Marbury v. Madison*,³⁶ stated that “[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”³⁷ Out of this eventually emerged a notion of judicial supremacy.³⁸ In the context of school desegregation by judicial command, the Court in *Cooper v. Aaron*³⁹ declared that *Marbury v. Madison* set forth the “basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as

difficulties and nuances that arise if the authority had been one directly provided the Executive in the Constitution or based on the Executive’s law-interpreting function. See generally Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765 (2016); Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580 (2006); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

36. 5 U.S. 137 (1803).
37. *Id.* at 176. This sentence, as careful readers will note, is directed to the legislature. Nevertheless, even though Chief Justice Marshall includes language in *Marbury* that appears to give the Executive *carte blanche* with regard to certain matters, this power is circumscribed as Marshall makes clear in other parts of the opinion. Further, because, with regard to the various travel orders, President Trump asserts that they have been properly issued pursuant to explicit legislative grant. See e.g., Adam Liptakjan, *President Trump’s Immigration Order, Annotated*, N.Y. TIMES (Jan. 28, 2017), <https://www.nytimes.com/2017/01/28/us/politics/annotating-trump-immigration-refugee-order.html> [https://perma.cc/8LR8-GLL7]; Josh Blackman, *The Travel Ban, Article II, and the Nondelegation Doctrine*, LAWFARE (Feb. 22, 2018, 9:00 AM); <https://www.lawfareblog.com/travel-ban-article-ii-and-nondelegation-doctrine> [https://www.lawfareblog.com/travel-ban-article-ii-and-nondelegation-doctrine]. The distinction between judicial authority over the exercise of legislative versus executive power is not directly at issue for purposes of this Article.
38. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). The notion of judicial supremacy is not without its critics. See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (assuming that in well-functioning democratic institutions, there should be weak need for judicial review of legislation). Its defenders include Erwin Chemerinsky and Frederick Schauer. See generally Chemerinsky, *supra* note 35; Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CAL. L. REV. 1045, 1067 (urging a notion of judicial supremacy based on what he describes as the “modest Constitution”).
39. 358 U.S. 1 (1958).

a permanent and indispensable feature of our constitutional system.”⁴⁰ This celebrated narrative is what is taught in constitutional law.⁴¹

Standing against this popular notion about the role of the federal judiciary is the treatment of matters relating to immigration and national security.⁴²

A. *The Rise of Immigration Exceptionalism*

Immigration scholars describe immigration law as operating outside of the mainstream of constitutional law, embodying something that might be described as immigration exceptionalism.⁴³ By this, scholars are referring to the operation of the plenary power doctrine, under which much of what happens to persons who are not U.S. citizens with regard to their entry or exclusion into the United States⁴⁴—and in some instances, deportation from the United States⁴⁵—operates

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40. *Id.* at 18 (“It is emphatically the province and duty of the judicial department to say what the law is.” (quoting *Marbury*, 5 U.S. 137, 177 (1803))).
41. For a critique of the way constitutional law is taught that advances the celebrated grand narrative of judicial review and ignores defects such as the plenary power doctrine, see Janel Thamkul, Comment, *The Plenary Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 CAL. L. REV. 553 (2008).
42. Plenary power reserved to the political branches with limited involvement of the judiciary arose in the context of the assertion of certain powers inherent in sovereignty over “Indians, and over immigrants in entry and exclusion proceedings, and to justify the exercise of U.S. power abroad.” Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 10 (2002); see also Natsu Taylor Saito, *Asserting Plenary Power Over the “Other”: Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL’Y REV. 427, 447–458 (2002).
43. See, e.g., Legomsky, *supra* note 23, at 255; Peter H. Schuck, *Introduction: Immigration Law and Policy in the 1990s*, 7 YALE L. & POL’Y REV. 1, 19 (1989); T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 10 (1990); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1362 (1999); Saito, *supra* note 42, at 433. A recent article purports to be “the first comprehensive study of ‘immigration exceptionalism’” and provides an interesting reformulation of immigration exceptionalism that attempts to tie together what they describe as rights exceptionalism, federalism exceptionalism, and separation of powers exceptionalism. David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 585–88 (2017).
44. See generally *Chinese Exclusion Case*, 130 U.S. 581 (1888).
45. *Ting v. United States*, 149 U.S. 698, 713–14 (1893) (extending, as a matter of simple logic, that the power to exclude aliens must necessarily include

outside the purview of judicial review. These scholars find the origins of immigration exceptionalism in the *Chinese Exclusion Case*.⁴⁶ Specifically at issue in that case was whether the political branches could enact a law that abrogated rights established under an earlier federal law and in violation of existing treaties between the United States and China.⁴⁷ One commentator argues that this case and those following it had the effect of locating federal power to exclude, not within the commerce power as previous cases held, but within the war powers.⁴⁸

As discussed earlier, Mr. Ping had a certificate of reentry that was issued by an official empowered under the 1882 Immigration Act,⁴⁹ as amended in 1884.⁵⁰ While in transit from Hong Kong to San Francisco, Congress enacted and President Grover Cleveland signed into law the Scott Act, which nullified all previously issued reentry certificates.⁵¹ Just five years earlier, in *Heong v. United States*,⁵² the Court had faced a similar legal issue, the outcome of which likely gave Mr. Ping and the Chinese immigrant community hope.⁵³

Chew Heong was a laborer from China who had immigrated to the United States and was present in the United States on November 17, 1880, the date a new treaty was entered into between the United States and China. Then, as reported by Justice Harlan in the opinion, “departed from the United States for Honolulu, in the Hawaiian Kingdom, on the 18th of June, 1881, and remained there until

the power to expel aliens even after they have been admitted to and lived and worked in the United States). The Court in *Ting* also upheld the requirement that Chinese immigrants living in the United States had to establish proof of their residence in the United States at the time of the passage of the Act of May 5, 1892, “by at least one credible white witness.” *Id.* at 729.

46. See generally sources cited *supra* note 43.
47. *Chinese Exclusion Case*, 130 U.S. at 589.
48. 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, 2 (2010).
49. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882).
50. *Chinese Exclusion Case*, 130 U.S. at 582.
51. Scott Act of 1888, ch. 1064, § 2, 25 Stat. 504, 504 (1888), *repealed by* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600 (1943).
52. 112 U.S. 536 (1884).
53. Litigation on behalf of individual Chinese plaintiffs was funded by Chinese community organizations. Lawyers for Chae Chan Ping have been described as “a ‘Dream Team’ of elite lawyers of the day.” Gabriel J. Chin, *Chae Chan Ping & Fong Yue Ting: The Origins of Plenary Power*, in IMMIGRATION STORIES 9 (David A. Martin & Peter Schuck eds., 2005).

September 15, 1884, when he took passage on an American vessel bound for the port of San Francisco.”⁵⁴ Upon arriving at the port of San Francisco, he was not permitted to disembark the vessel because he lacked a certificate of reentry, required under the 1882 Immigration Act as amended in 1884.⁵⁵ Such a certificate of reentry did not exist when he left the United States and could only be obtained after the passage of the 1882 and 1884 Acts because it was only provided upon a person’s departure from the United States. As is obvious from the dates, it was impossible for Mr. Heong to have obtained such a certificate before his departure, and there was no provision made for anyone who had departed before the 1882 Act to obtain one.

Specifically, the Court had to determine “whether section 4 of the act approved May 6, 1882, as amended by that of July 5, 1884, prescribing the certificate which shall be produced by a Chinese laborer as the ‘only evidence permissible to establish his right of re-entry’ into the United States, is applicable to Chinese laborers who, residing in this country on November 17, 1880, departed by sea prior to May 6, 1882, and remained out of the United States till after July 5, 1884.”⁵⁶ First, the Court emphasized the role that treaties between sovereign nations play in international law and that courts should not find that legislation interferes with rights secured by treaties absent clear Congressional intention.⁵⁷ The rights secured by treaty to Mr. Heong are found in the 1880 treaty that was assented to by the Senate on May 5, 1881, and ratified by the President on May 9, 1881.⁵⁸ The treaty stated that “Chinese laborers who are now in the United States[] shall be allowed to go and come of their own free will and accord.”⁵⁹

Relying upon rules regarding the interplay of statutes and treaties, the Court followed what it described as the well-settled rule that “repeals by implication are not favored, and are never admitted where the former can stand with the new act.”⁶⁰ With that rule as its guidepost, the Court interpreted the later enacted Act of 1882, as amended by the Act of 1884, as not abrogating the rights created by the earlier treaty. Because the statutes did not explicitly specify that those in Mr. Heong’s position lost their rights, the Court found that the

54. *Heong*, 112 U.S. at 538.

55. *Id.* at 538–39.

56. *Id.* at 539.

57. *Id.* at 539–40.

58. Treaty Between the United States and China, Concerning Immigration, China–U.S., Nov. 17, 1880, 22 Stat. 826, 827.

59. *Heong*, 112 U.S. at 541–42 (quoting *id.* art. II, 22 Stat. 826, 827).

60. *Id.* at 549.

statutes could not have been intended to abrogate previously conferred treaty rights by imposing requirements, such as having certificate of reentry, that were impossible for Mr. Heong to satisfy.⁶¹ To this, the Court added that “courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature.”⁶² The Court further noted that

It would be a per-version of the language used to hold that such regulations apply to Chinese laborers who had left the country with the privilege, secured by treaty, of returning, but who, by reason of their absence when those legislative enactments took effect, could not obtain the required certificates.⁶³

With that, Mr. Heong was granted habeas relief and permitted to “enter and remain in the United States.”⁶⁴

There was a strong dissent issued by Justice Stephen Field in which the kernel of what came to be the plenary power doctrine was expressed. He denied that the majority’s construction of the statutes was necessary so “as not to lead to injustice, oppression or absurd consequences.”⁶⁵ Instead, Justice Field put forward a notion, previously suggested by Justice Curtis, that considered matters vested in Congress to be outside of the purview of the judiciary, such that it was “wholly immaterial to inquire whether, by the act assailed, it has departed from the treaty or not, or whether such departure was accidental or designed, and if the latter, whether the reasons therefor [sic] were good or bad.”⁶⁶ Questions raised about matters placed in the Constitution under legislative power simply did not present judicial questions.⁶⁷ This statement is completely at odds with Chief Justice Marshall’s pronouncement in *Marbury* and, if taken seriously, would likely take the notion of separation of powers too far.

61. *Id.* at 554–55.

62. *Id.* at 559.

63. *Id.* at 559–60.

64. *Id.* at 560.

65. *Id.* at 561 (Field, J., dissenting).

66. *Id.* at 564.

67. *Id.* at 563.

Justice Field went on to describe the legislation in question as the product of

[t]houghtful persons who were exempt from race prejudices [who] saw . . . the certainty, at no distant day, that from the unnumbered millions on the opposite shores of the Pacific, vast hordes would pour in upon us, overrunning our coast and controlling its institutions. A restriction upon their further immigration was felt to be necessary to prevent the degradation of white labor, and to preserve to ourselves the inestimable benefits of our Christian civilization.⁶⁸

Several years later, Justice Field was able to return to this notion of invasion to anchor the Court's examination of the next restrictive legislation directed toward the Chinese, the Scott Act that voided all previously issued certificates of reentry and forbid the issuance of new ones.⁶⁹

In a unanimous opinion written by Justice Field, the Court in the *Chinese Exclusion Case* described the problem created by Chinese immigrant laborers who came into competition "with *our* artisans and mechanics, as well as *our* laborers in the field."⁷⁰ Though the Court was generous in describing the Chinese immigrant laborers as industrious and frugal, these qualities that might otherwise commend a group or individuals gets flipped and becomes the basis for unfair competition:

Not being accompanied by families, except in rare instances, their expenses were small; and they were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace. The differences of race added greatly to the difficulties of the situation [T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living.⁷¹

68. *Id.* at 569.

69. *See supra* note 51 and accompanying text.

70. 130 U.S. 581, 594 (1888) (emphasis added).

71. *Id.* at 595.

The Court then went on to validate the fear of those who “petitioned earnestly for protective legislation” because “the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions in 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”⁷² These earnest people felt that Chinese “immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization.”⁷³

With this factual background, the Court emphasized that the Act of 1882 was entitled, “An act to execute certain treaty stipulations relating to [the] Chinese.”⁷⁴ As such, the legislation did not create any independent rights beyond any that might be contained in the treaty. The Court acknowledged that the Scott Act contravened “express stipulations of the treaty of 1868 and of the supplemental treaty of 1880.”⁷⁵ But unlike a property right that might be created by treaty, the treaty provision that allows a Chinese laborer to go and come of their own free will and accord is understood by the Court to be a privilege that is held subject to the grantor’s prerogative. With no vested right in sight, the issue of retroactive application, which bothered the majority in *Heong*, is finessed by the Court in the *Chinese Exclusion Case*.

The Court emphasized that “[t]hose laborers are not citizens of the United States; they are aliens.”⁷⁶ In saying this, the Court glossed over the fact that the naturalization statutes then in effect only permitted “aliens being free white persons, and to aliens of African nativity and to persons of African descent”⁷⁷ to naturalize. The 1882 Act explicitly foreclosed that pathway to citizenship for immigrants from China, mandating “[t]hat hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.”⁷⁸ Even if Mr. Ping had desired to become a U.S. citizen, that pathway was doubly foreclosed to him by the Naturalization Act of 1870 and the Chinese Exclusion Act of 1882. Any connections he may have made to individuals and to the

72. *Id.*

73. *Id.*

74. *Id.* at 597 (quoting Act of May 6, 1882, ch. 126, 22 Stat. 58).

75. *Id.* at 600.

76. *Id.* at 603.

77. Act of Feb. 18, 1875, ch. 80, 18 Stat. 316, 318, *amending* Act of July 14, 1870, ch. 254, 16 Stat. 254.

78. Act of May 6, 1882, ch. 126, § 14, 22 Stat. 58, *repealed by* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

local community in his twelve years of residence in the United States and any expectation he may have had with regard to his return are disregarded by the Scott Act.⁷⁹ In the eyes of the law and of the Court, he is forever an “alien.”

Once the Chinese were placed in the juridical category of “alien,” then Mr. Ping’s challenge became an easy one to resolve. The Court set up a first principle that located the power to exclude aliens as incident to and inherent in sovereignty. It then connected this power to a sovereign nation’s war powers and prerogatives to protect itself:

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other.⁸⁰

Control over its borders and the body of the immigrant becomes a matter of national security, in wartime or not.⁸¹ And whether in wartime or not, the determination by the political branches of what is in

79. Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504.

80. *Chinese Exclusion Case*, 130 U.S. at 606.

81. It is this language that leads Matthew Lindsay to argue that the *Chinese Exclusion Case* marks a shift in the locus of the federal government’s power to regulate immigration. He notes that just “five years . . . [before the *Chinese Exclusion Case*] in the *Head Money Cases*, the Court had reaffirmed that a federal statute ‘designed to mitigate the evils inherent in the business of bringing foreigners to this country’ lay squarely within Congress’s commerce power.” Lindsay, *supra* note 48, at 45–46 (citing *Head Money Cases*, 112 U.S. 580, 595 (1884)). However, the constitutional structural argument is probably a little more muddled and muddled. For example, the 1891 Immigration Act that made a big step toward federalizing the administrative immigration structure made immigration officials part of the Treasury Department, whose authority stems from the Commerce Clause and not from war powers. Immigration Act of March 3, 1891, ch. 551, 26 Stat. 1084.

the nation's best interests is "conclusive upon the judiciary."⁸² And with that, the Court abdicated the role it was intended to play in our constitutional democracy in which the judiciary was to act as a check on the improper or unlawful exercise of power by the other branches. In this arena—control over our borders and immigration—the power of the political branches became unbounded, operating largely outside of judicial oversight. Hence, the plenary power doctrine and immigration exceptionalism were born.

The Scott Act of 1888 invalidated Mr. Ping's reentry certificate as well as the certificates of up to 20,000 other Chinese laborers who had obtained such certificates. As many as 600 may have been in transit, like Mr. Ping, when the Scott Act went into effect.⁸³

Part of what the Court ceded in the *Chinese Exclusion Case*, the legislature expressly claimed in the Immigration Act of 1891.⁸⁴ It continued the push to federalize the bureaucratic immigration system and included a specific jurisdiction stripping provision. Within the Treasury Department, it created a new office of the superintendent of immigration and provided for inspection officers and their assistants whose decisions "touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury."⁸⁵ This section seemed to conflict with or exist in tension with section 13 of the statute, which stated: "That the circuit and district courts of the United States are hereby invested with full and concurrent jurisdiction of all causes, civil and criminal, arising under any of the provisions of this act."⁸⁶ The Court was quickly given an opportunity to determine what the role of the federal judiciary was to be.

Nishimura Ekiu arrived at the port of San Francisco on May 7, 1891.⁸⁷ Like Mr. Ping before her, she arrived on the steamship *Belgic*, though she departed from Yokohama, Japan.⁸⁸ Acting under authority of the Immigration Act of 1891, an immigration inspection officer determined that Ms. Ekiu was "a person without means of support, without relatives or friends in the United States," and "a person unable to care for herself, and liable to become a public charge, and

82. *Chinese Exclusion Case*, 130 U.S. at 606.

83. Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504.

84. Immigration Act of March 3, 1891, ch. 551, 26 Stat. 1084.

85. *Id.* § 8, 26 Stat. at 1085.

86. *Id.* § 13, 26 Stat. at 1086.

87. *Ekiu v. United States*, 142 U.S. 651, 652 (1892).

88. *Id.*

therefore inhibited from landing.”⁸⁹ The Court acknowledged that an “alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful.”⁹⁰ Then, the Court proceeded to insulate the decisions of the immigration officials from judicial review by characterizing the decisions made by immigration officials under section 8 of the 1891 Immigration Act as discretionary acts entrusted by Congress to executive officers to investigate and ascertain facts such that the executive officer “is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted.”⁹¹ Thus, with regard to “foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law . . . the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”⁹²

Then, with regard to the possibility that section 13 of the 1891 Act granted concurrent jurisdiction to federal courts, the Court concluded without discussion that section 13 was limited only to “civil actions in the nature of debt for penalties under sections 3 and 4, or indictments for misdemeanors under section 6, 8, and 10” and that it was “impossible to construe . . . [section 13] as giving the courts jurisdiction to determine matters which the act has expressly committed to the final determination of executive officers.”⁹³

The Court in *Ekiu* used language that appeared to limit the category of those affected to certain classes of foreigners, but several years later, adhered to the same jurisdiction stripping provisions of the 1891 Act and held that what counts as due process for the class of persons described in *Ekiu* is also all that is required for a person claiming to be a native-born U.S. citizen.⁹⁴

Ju Toy arrived at the port of San Francisco on the Doric, a steamship from China, and was determined by a port official to not be a native-born U.S. citizen as he claimed; this determination was up-

89. *Id.* at 656.

90. *Id.* at 660.

91. *Id.*

92. *Id.*

93. *Id.* at 664. The referenced penalties and misdemeanors were for those who assisted or improperly permitted ineligible aliens to land.

94. *United States v. Toy*, 198 U.S. 253, 263–64 (1905).

held by the Secretary of Commerce and Labor.⁹⁵ The district court held otherwise and found that Mr. Toy was a U.S. citizen who had been illegally restrained.⁹⁶ Justice Oliver Wendell Holmes, writing for the Court, held that the decision of the Secretary of Commerce and Labor was conclusive and that it was irrelevant that a federal district court found that Mr. Toy was a U.S. citizen.⁹⁷ What mattered, then, was not whether or not Mr. Toy was a U.S. citizen or even that he had been able to persuade a district court of the same; instead, what mattered was the process set forth by statute and who the statute designated as the decision-maker. With regard to the exclusion of persons seeking entry into the United States, plenary authority resided in executive officers as designated by statute, authority that the federal judiciary was not able to second-guess.

By the time *United States v. Toy*⁹⁸ was decided, this legal principle was well-settled, with pages of citations supporting it.⁹⁹ But the fact that Mr. Toy might be a U.S. citizen was more than Justice Brewer could accept without a strongly worded dissent. Justice Brewer emphasized that the procedural rules and evidentiary presumptions operated explicitly against Chinese persons such that he asked rhetorically, “If this be not a star-chamber proceeding of the most stringent sort, what more is necessary to make it one?”¹⁰⁰ He characterized the decision as “appalling” and reminded his brethren that the deportation of a U.S. citizen under these circumstances was nothing short of the punishment of banishment.¹⁰¹ Perhaps most powerfully, he ends his dissent by stating:

I cannot believe that Congress intended to provide that a citizen, simply because he belongs to an obnoxious race, can be deprived of all the liberty and protection which the Constitution guarantees, and if it did so intend, I do not believe that it has the power to do so.¹⁰²

But to the majority of the Court, Mr. Toy was whatever the immigration official, as confirmed by the Secretary of Commerce and Labor, decided Mr. Toy was. In the eyes of the immigration official,

95. *Id.* at 258–59.

96. *Id.* at 259.

97. *Id.* at 263–64.

98. 198 U.S. 253 (1905).

99. *See id.* at 261–63 (listing cases standing for this proposition).

100. *Id.* at 268 (Brewer, J., dissenting).

101. *Id.* at 269.

102. *Id.* at 279–80.

Mr. Toy was a Chinese person. He was unable to persuade the official that he had been born in the United States and thus a natural-born citizen based on *United States v. Wong Kim Ark*.¹⁰³ Congress vested power in an executive officer. Any process conceived or contrived by the duly invested official was all the due process that was required.¹⁰⁴

It did not matter that a federal district court had found Mr. Toy to be a U.S. citizen.¹⁰⁵ It did not matter that Mr. Toy was a natural-born citizen. It simply did not matter.

These cases, when viewed from today's perspective, reflect direct racist views, especially the views expressed by Justice Field for a unanimous Court in the *Chinese Exclusion Case*. That is the underpinning of the plenary power doctrine and the notion that there is no place for judicial review when the political branches make decisions about categories or classes of people to exclude. It is a national security decision that lies outside of judicial inquiry. *Ekiu* and *Toy* carry forward what becomes, in today's parlance, the doctrine of consular non-reviewability. The executive officers whose discretionary decisions are largely insulated from judicial scrutiny, first located domestically acting under authority based on the statutes challenged in *Ekiu* and *Toy*, become, years later, consular officers stationed overseas.¹⁰⁶ For some, these cases provide a strong foundation; for others, these cases are but the base of a house of cards.

*B. Some of the Non-Doctrinal Consequences of Immigration
Exceptionalism*

With the courts standing down, the political branches ran rampant. With the success of Chinese exclusion, the pull factors of the U.S. economy's general thirst for cheap labor produced a demographic shift in terms of the countries of origin of migrants.¹⁰⁷ As the number of

103. 169 U.S. 649 (1898); see *Toy*, 198 U.S. at 257 (announcing that “citizens of the United States . . . are entitled to all the rights of citizenship” and thus Chinese exclusion laws do not apply to them (citing *id.*)).

104. *Id.* at 263.

105. *Id.* at 257.

106. The Immigration Act of 1924 granted authority to issue visas to “consular” officers, Immigration Act of 1924, 8 U.S.C. § 202(a), who were directed that “[n]o immigration visa shall be issued . . . [if] the immigrant is inadmissible to the United States under the immigration laws.” *Id.* § 202(f). The D.C. Circuit found the denial of a writ of mandamus by the lower court was not in error, finding that “[w]e are not able to find any provision of the immigration laws which provides for an official review of the action of the consular officers in such case by a cabinet officer or other authority.” *United States ex. rel. Ulrich v. Kellogg*, 30 F.2d 984, 986 (D.C. Cir. 1929).

107. See *supra* note 13 and accompanying text.

Japanese immigrants began to rise, exclusionists shifted their focus from the Chinese to the Japanese. The Japanese and Korean Exclusion League formed in 1905 and agitated for the exclusion of immigrants from Japan and Korea as well as discriminatory treatment of those already present.¹⁰⁸ These efforts resulted in President Theodore Roosevelt negotiating the so-called Gentlemen's Agreement of 1907 whereby the government of Japan agreed to stop issuing visas to Japanese migrants seeking to come to the United States in exchange for Roosevelt's promise to intercede to prevent Japanese schoolchildren in San Francisco being placed in schools designated for Mongolians.¹⁰⁹ Just a month after the Gentlemen's Agreement, he also issued Executive Order 589 by which he forbid the entry of Japanese and Korean migrants who had previously migrated to Hawaii, Mexico, or Canada and who now sought to migrate to the United States.¹¹⁰ His authority to forbid entry of Japanese migrants was given to him in the 1907 Immigration Act¹¹¹ which states:

[W]henver the President shall be satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the Canal Zone are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, the President may refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such other country or from such insular possessions or from the Canal Zone.¹¹²

Though written in neutral terms, the impetus for this provision was the perception fostered by exclusionists that Japan would circum-

108. Keith Aoki, *The Yellow Pacific: Transnational Identities, Diasporic Racialization, and Myth(s) of the "Asian Century"*, 44 U.C. DAVIS L. REV. 897, 918 (2011) (discussing the League's effort to expand the reach of the Chinese Exclusion Act to cover Japanese and Koreans).

109. Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 154–57 (2014). The political resolution between the two governments also satisfied the Japanese government's desire to not have its citizens be subject to explicit exclusionary laws. Duncan B. Hollis & Joshua J. Newcomer, "Political" Commitments and the Constitution, 49 VA. J. INT'L L. 507, 516 (2009).

110. Exec. Order No. 589 (Feb. 20, 1907).

111. Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898.

112. *Id.* at § 1, 34 Stat. at 898.

vent the Gentlemen's Agreement that was entered into just five days before the passage of this immigration act.

Following this successful exclusion effort, the Japanese and Korean Exclusion League rebranded itself as the Asiatic Exclusion League and went after the next significant group of Asian immigrants—those from what we would now designate as South Asia.¹¹³ These efforts helped lead to the enactment of the Immigration Act of 1917.¹¹⁴ Unlike previous exclusion efforts that designated groups by country of origin, the 1917 Act designated portions of Asia and certain Pacific Islands by setting forth longitude and latitude. Lest one think that this applied to nationals of those territories regardless of race, the Act applied specifically to “*natives* of islands not possessed by the United States adjacent to the Continent of Asia” and

[N]atives of any country, province, or dependency situate on the Continent of Asia west of the one hundred and tenth meridian of longitude east from Greenwich and east of the fiftieth meridian of longitude east from Greenwich and south of the fiftieth parallel of latitude north, except that portion of said territory situate between the fiftieth and the sixty-fourth meridians of longitude east from Greenwich and the twenty-fourth and thirty-eighth parallels of latitude north.¹¹⁵

Thus, if a “native” from one of the proscribed countries or territories were to migrate and become the subject of, say, Britain, such person would still be forbidden entry to the United States, even though there was no restriction for entry of British subjects.¹¹⁶

113. Vinay Harpalani, *Desicrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. AM. L. 77, 124–26 (2013). Harpalani's Article also provides information regarding the historical treatment of South Asians.

114. Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347, 1372–73 (2005) (discussing SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY (2004)).

115. Immigration Act of 1917, ch. 28, § 3, 39 Stat. 874, 876 (emphasis added).

116. Justice Field, sitting as a Circuit Judge, held that the petitioner, though born in Hong Kong and therefore a subject of Britain, was “Chinese by race, language, and color, and has all the peculiarities of the subjects of China” and was a laborer and therefore excludable by the Chinese Exclusion Act of 1882. *In re Ah Lung*, 18 F. 28, 29, 32 (C.C.D. Cal. 1883). A different circuit court came out the other way. *United States v. Douglas*, 17 F. 634, 635, 638 (C.C.D. Mass. 1883) (granting habeas to a person who was “Chinese by race and language, as well as in appearance and dress” but who “has been from his birth, a subject of the queen of Great Britain”). Perhaps cognizant of this circuit split, Congress thereafter defined “Chinese” in subsequent amendments and iterations of the initial

Though it appears that the primary impetus was to stop immigration from the area that is now India and Pakistan, a look at the map shows that many of the countries covered were majority Muslim in population.¹¹⁷ The Immigration Act of 1917 might be characterized as including the first Muslim ban enacted by the United States.

This was quickly followed by the Immigration Act of 1924, which completed Asian exclusion and, through its implementation of a national origins quota system, had a profound impact on the nation's demographic profile.¹¹⁸ Though nothing at the time prevented the federal government from specifying Asians or "Orientals" by name,¹¹⁹ the legislation effected Asian exclusion through a facially neutral term: "[n]o alien ineligible to citizenship shall be admitted to the United States"¹²⁰

This phrase, "alien ineligible to citizenship," had already previously been embraced by states who sought to discriminate against Asian immigrants. In 1913, California passed its first of a series of Alien Land Laws, which forbid aliens ineligible for citizenship from owning or leasing land unless specifically authorized by treaty.¹²¹ The purpose of these laws, as described by historians, "was to discourage further immigration of Japanese aliens to California and to call to the attention of Congress and the rest of the country the desire of California that the 'Japanese menace' be crushed."¹²² The Territory of

1882 Chinese Exclusion Act. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1872 n.252 (1993) (comparing Act of July 5, 1884, ch. 220, § 15, 23 Stat. 115, 118 ("all subjects of China and Chinese, whether subjects of China or any other foreign power"), with Act of Sept. 13, 1888, ch. 1015, § 3, 25 Stat. 476, 476 ("all persons of the Chinese race"))).

117. Compare Jeff Nilsson, *America's Last Massive Immigration Ban: 100 Years Ago*, SATURDAY EVENING POST (Feb. 2, 2017), <http://www.saturdayeveningpost.com/2017/02/02/history/post-perspective/americas-last-massive-immigration-ban-100-years-ago.html> [https://perma.cc/GX2A-4KRL] with Stephenson & Knecht, *supra* note 8.

118. Immigration Act of 1924, ch. 190, §§ 5, 11, 43 Stat. 153, 155, 159. In 1921, in response to the perceived threat posed by immigrants from southern and eastern Europe, Congress enacted the Emergency Quota Act of 1921, ch. 8, 42 Stat. 5.

119. As the Court famously stated in *Hirabayashi v. United States* in rejecting Hirabayashi's Fifth Amendment claim, "[t]he Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process." 320 U.S. 81, 100 (1943).

120. Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. 153, 162.

121. Cal. Alien Land Law, 1914 Cal. Stat. 176, §§ 1–2.

122. Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CAL. L. REV. 61, 61–62 (1947); see also Keith Aoki, *No*

Washington, before statehood, enacted an alien land law that denied land ownership rights to those aliens ineligible for citizenship.¹²³ A version of this proscription was carried forward into the inaugural Washington state constitution, which provided: “The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited, except [under various specified circumstances].”¹²⁴ Not content with this constitutional proscription against land ownership, Washington state legislators enacted a new Alien Land Bill in 1921 that intended to prevent long-term leaseholds of agricultural land¹²⁵ by “aliens ineligible to citizenship.”

The constitutionality of Washington’s 1921 Alien Land Law was tested in *Terrace v. Thompson*;¹²⁶ California’s was tested in *Porterfield v. Webb*;¹²⁷ both decided in 1923. *Terrace* found that because the category “aliens ineligible to citizenship” was one created by Congress, that “in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act.”¹²⁸ Thus, there was no violation of due process or equal protection.¹²⁹ *Porterfield* summarily upheld California’s law based on the controlling precedent of *Terrace v. Thompson*.¹³⁰

Contemporaneously, the Supreme Court made clear that a Japanese immigrant was not “white” within the meaning of the country’s naturalization laws.¹³¹ It found similarly, the following year, that a “high-caste Hindu, of full Indian blood, born at Amritsar, Punjab, India” was not a white person and was ineligible for naturalization.¹³² Referring to the 1917 Immigration Act, which forbid the entry of “natives” from a geographic area that included India, the

Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment, 40 B.C. L. REV. 37, 55–56 (1998).

123. 1886 Wash. Sess. Laws 309; Mark L. Lazarus III, *An Historical Analysis of Alien Land Law: Washington Territory & State 1853–1889*, 12 U. PUGET SOUND L. REV. 197, 220–21 (1989).

124. WASH. CONST. art. 2 § 33, *repealed by* WASH. CONST. amend. 42.

125. 1923 Cal. Stat. 1020; *see* Lazarus, *supra* note 123, at 235–36.

126. 263 U.S. 197 (1923).

127. 263 U.S. 225 (1923).

128. *Terrace*, 263 U.S. at 220.

129. *Id.* at 220–22.

130. *Porterfield*, 263 U.S. at 233.

131. *Ozawa v. United States*, 260 U.S. 178, 197–98 (1922).

132. *United States v. Thind*, 261 U.S. 204, 204 (1923).

Court stated that “it is not likely that Congress would be willing to accept as citizens a class of persons whom it rejects as immigrants.”¹³³ In addition, it disclaimed the possibility that Congress or the Court considered such exclusion to be based on notions of racial superiority or inferiority. Instead, “[w]hat we suggest is merely racial difference, and it is of such character and extent that the great body of *our* people instinctively recognize it and reject the thought of assimilation.”¹³⁴

In addition to being barred from citizenship and many forms of land ownership, including long-term leaseholds of agricultural land, Asians immigrants were barred from a number of professions.¹³⁵ A number of other states also forbid Asian children, regardless of citizenship, from attending public schools.¹³⁶ There were also anti-miscegenation laws that operated to further isolate Asian immigrant communities and their U.S.-born children.¹³⁷

One of the ironies of the discrimination directed against Japanese immigrants is that it became the basis for the judgment, deemed rational, by the Court in *Hirabayashi v. United States*,¹³⁸ for government officials to feel afraid of persons of Japanese ancestry, Japanese immigrants ineligible for naturalization and their U.S.-born citizen children.¹³⁹ The Court acknowledged:

There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in

133. *Id.* at 215.

134. *Id.* (emphasis added).

135. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1293 (1993) (listing professions which barred Asian Americans such as law, medicine, pharmacy, public school education, cosmetology, and veterinary medicine).

136. *E.g.*, CAL. EDUC. CODE §§ 8003–04 (1945), repealed by 1947 Cal. Stat. 1792, ch. 737 (requiring segregation of Chinese, Japanese, or Mongolian children); *Gong Lum v. Rice*, 275 U.S. 78, 82–87 (1927) (ruling, in an as-applied challenge, that when no public schools for “Mongolian” children existed, Chinese children may attend “colored public schools” but not “white public schools”); *Wong Him v. Callahan*, 119 F. 381, 382–83 (C.C.N.D. Cal. 1902) (holding that segregated schools did not deprive Chinese students of equal protection under the laws of California).

137. See Hrishi Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910–1950*, 9 ASIAN L.J. 1, 14–16 (2002).

138. 320 U.S. 81 (1943).

139. *Id.* at 96–98.

substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population.¹⁴⁰

This sentence is supported by a footnote that provides the following as examples:

Federal legislation has denied to the Japanese citizenship by naturalization, and the Immigration Act of 1924 excluded them from admission into the United States. State legislation has denied to alien Japanese the privilege of owning land. It has also sought to prohibit intermarriage of persons of Japanese race with Caucasians. Persons of Japanese descent have often been unable to secure professional or skilled employment except in association with others of that descent, and sufficient employment opportunities of this character have not been available.¹⁴¹

Then, the Court stated that these laws and societal discrimination “have been sources of irritation and may well have tended to increase their isolation, and in many instances their attachments to Japan and its institutions.”¹⁴² The conclusion that persons of Japanese ancestry, citizen and non-citizen, experienced irritation, isolation, and attachment to Japan serves to rationalize the fear felt by Congress, the Executive, and certain members of the military.¹⁴³ Then, while claiming fidelity to antidiscrimination principles,¹⁴⁴ the Court upheld the curfew for individuals of Japanese ancestry stating:

The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.¹⁴⁵

140. *Id.* at 96.

141. *Id.* at 96 n.4 (citations omitted).

142. *Id.* at 98.

143. *Id.* at 98–99.

144. *Id.* at 100 (“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”).

145. *Id.* at 101.

Hirabayashi exemplifies the confluence of the non-doctrinal consequences of immigration exceptionalism which then validates what might be termed national security exceptionalism, extended to justify the wholesale removal of persons of Japanese ancestry, citizen and non-citizen, from their homes and communities.

II. NATIONAL SECURITY EXCEPTIONALISM

As a term, “national security exceptionalism” emerges only recently in the academic legal literature and might be used to describe “judicial responses to national security emergencies.”¹⁴⁶ To talk about national security exceptionalism presumes that judicial responses in this area are somehow different from what you would expect a judicial response would be when the political branches exercise power that affects or infringes the rights of an individual or group.¹⁴⁷ Typically, this description is connected to normative conclusions about whether and to what extent these different judicial responses are appropriate.¹⁴⁸

Perhaps the most well-known cases that test the outer limits of what the political branches can do in the face of a national security emergency are the four cases during World War II testing aspects of the incarceration of Japanese Americans.¹⁴⁹ In *Hirabayashi*, the first

146. Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 226 (2009). It is quite possible that national security exceptionalism is simply a new name for an old phenomenon, in the same way that immigration exceptionalism is a relatively new name for the plenary power doctrine in immigration. Attention to national security law has gained a renewed urgency following 9/11. *Id.* at 272 (describing national security law as “fast becoming a subdiscipline within the legal academy with a paraphernalia of case books, specialists, central questions, and well-defined camps”).

147. Huq describes the threshold descriptive claim as “that what courts do in national security crises is somehow different from what they do elsewhere.” *Id.* at 226. Huq argues that a close examination of post-9/11 cases disproves this descriptive claim. *Id.* Huq, though, does not address whether this descriptive claim holds with regard to earlier emergencies and, to a certain extent, seems to accept the descriptive claim with regard to the wartime incarceration of Japanese Americans. *Id.* at 231–32. This Article argues that the descriptive claim holds with certain pre-9/11 emergencies.

148. *Id.* at 227–29 (discussing various normative claims by critics).

149. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Endo*, 323 U.S. 283 (1944). The last of these cases, *Endo*, is the least well-known. See Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1934 (2003) (asking “[w]hy don’t we remember *Endo*?”). One of the reasons offered is early commentaries and critiques of the Court’s wartime incarceration cases considered *Endo* to be a case turning on a statutory, rather than constitutional, interpretation. *Id.* at 1938–39 n.24

case decided by the Supreme Court, the Court determined that curfew for persons of Japanese ancestry did not violate the Constitution.¹⁵⁰ The second, *Yasui v. United States*,¹⁵¹ found the same.¹⁵² The third, *Korematsu*, found that exclusion of persons of Japanese ancestry also did not violate the constitution.¹⁵³ Although Mr. Korematsu asked the Court to address the constitutionality of the requirement to report to and be detained in assembly and relocation centers, the Court refused to reach those questions, narrowing the issue only to whether the conviction for violating the exclusion order should be upheld, which required only a determination of whether the exclusion order was constitutional.¹⁵⁴ Finally, while the Court in *Ex Parte Endo*¹⁵⁵ found that the continued detention of a citizen whose loyalty was conceded by the wartime authorities detaining her was impermissible, it did so only on statutory grounds and explicitly avoided the underlying constitutional issues.¹⁵⁶

To speak about the existence of a state of emergency presumes that there is some precipitating event or series of events that gives rise to this state of emergency that, in turn, precipitates action by the political branches. This is then followed by the end of the state of emergency, which presumably leads to the government standing down or backing off. For example, if the government incarcerated persons from a racialized ethnic group during war, presumably the end of war would lead the government to free those who remained incarcerated.¹⁵⁷ Thus, the incarceration of persons of Japanese ancestry, citizen and non-citizen, during World War II ended after the national security emergency ended, which preceded the end of the war when Japan

(discussing Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 512–13 (1945); Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175, 215 (1945); Jacobus tenBroek, *Wartime Power of the Military over Citizen Civilians Within the Country*, 41 CAL. L. REV. 167, 200 (1953)).

150. *Hirabayashi*, 320 U.S. at 102.

151. 320 U.S. 115 (1943).

152. *Id.* at 117.

153. *Korematsu*, 323 U.S. at 221–22.

154. *Id.*

155. 323 U.S. 283 (1944).

156. *Id.* at 297.

157. See, e.g., Public Proclamation No. 21, 10 Fed. Reg. 53 (Dec. 17, 1944) (rescinding Civilian Exclusion Orders Nos. 1 through 108 and Civilian Restrictive Order No. 1). This rescission, though, was not effective until January 2, 1945, and was even later, January 20, 1945, for many.

surrendered. There remains, of course, a factual question about when the state of emergency on the mainland United States in fact ended, aside from questions about the appropriateness of the government's decision to incarcerate over 110,000 persons without any evidence of individual disloyalty.

For example, when Chief Justice Stone delayed issuing the *Korematsu* and *Endo* opinions, Justice Douglas wrote a memo to the Chief Justice:

The Court is unanimous in the view that [Endo] is unlawfully detained. An opinion in the case was distributed on November 8, 1944. A majority of the Court has agreed to it. But the matter is at a standstill because officers of the government have indicated that some change in detention plans are under consideration. Their motives are beyond criticism and their request is doubtless based on important administrative considerations. Mitsuye Endo, however, has not asked that action of this Court be stayed. She is a citizen, insisting on her right to be released—a right which we all agree she has. I feel strongly that we should act promptly and not lend our aid in compounding the wrong through our inaction any longer than necessary to reach a decision.¹⁵⁸

The Court, which recognized that national security rationales could not justify the continued incarceration of Ms. Endo, or for that matter nearly all of the those who remained incarcerated in the camps, could have, as Justice Douglas argued, issued its opinion and remanded to the district court to act in compliance with its opinion, i.e., order the release of Ms. Endo. Instead, it chose to wait and issued its decision on December 18, 1944, the day after the War Relocation Authority announced that it would be closing the camps.¹⁵⁹

When the crisis had passed, even the remedy given to Ms. Endo, based only on statutory grounds, left intact the constitutionalization of disparate treatment in *Hirabayashi*, *Yasui*, and *Korematsu*.

One of the most profound and disturbing aspects of Justice Black's opinion of the Court in *Korematsu* is the claimed fidelity to antidiscrimination principles while simultaneously disclaiming that discrimination was occurring. Justice Black is able to say, with no sense of irony the following two statements in the same opinion. First he stated:

158. Gudridge, *supra* note 149, at 1935, n.11 (quoting Memorandum from William O. Douglas to Harlan Stone (Nov. 28, 1944) (on file with the Library of Congress)).

159. *Id.* at 1935 n.11.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.¹⁶⁰

Just a few pages later, Justice Black wrote:

Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.¹⁶¹

In some ways, it is this aspect of *Korematsu* that best supports the government in defending the Muslim travel ban. It can claim fidelity to antidiscrimination, that discrimination on the basis of religion is abhorrent, yet simultaneously deny that any such discrimination is occurring. Yet, when the Fourth Circuit examined EO2, in an opinion now formally vacated, it declared that EO2 “in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination.”¹⁶²

One wonders how certain Supreme Court justices, if the EO2 appeal had not been dismissed as moot, would have addressed this factual finding. Perhaps they would have echoed Justice Black in *Korematsu* and said:

John and Jane Doe were not excluded from the United States because of hostility to them or their religion. They were excluded because we are at war with terror, because the President, properly and fully advised, feared acts of terrorism and felt constrained to take proper security measures, because he felt that the national security urgency of the situation demanded that all persons from the designated countries be

160. *Korematsu*, 323 U.S. at 216.

161. *Id.* at 223.

162. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017), *vacated as moot*, 138 S. Ct. 353 (mem.) (2017).

excluded from the United States temporarily, and finally, because Congress, reposing its confidence in this time of the war on terror in our Commander in Chief—as inevitably it must—determined that the Executive should have the power to do just this.

Or, recall the various aspects of the Chinese Exclusion Acts, which found a constitutional justification based on the threat posed by the invasion of foreign hordes that would disrupt the peace and security of this nation.¹⁶³ When did that threat end? Even if the premise that the Chinese posed a threat to national security were true, the judicial response in the *Chinese Exclusion Case*—instituting a structural constitutional approach through the creation of the plenary power doctrine in immigration—resulted in a constitutional deformity that has persisted, making available the starting point for the Justice Department’s defense to the legal challenges to President Trump’s various travel bans—that the matter is simply not reviewable by courts.¹⁶⁴

Constitutionalizing discriminatory treatment, once given legal life, becomes normalized. Borrowing Justice Robert H. Jackson’s words in his dissent in *Korematsu*, immigration and national security exceptionalism each “lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.”¹⁶⁵

III. WHITEWASHING PRECEDENT

Can you imagine a litigant, today, citing directly to the *Chinese Exclusion Case* and *Korematsu* in support of his or her case? But what if those cases supply the strongest precedent to support his or her argument? Instead of direct citation, a litigant may rely upon those precedents indirectly by citing to cases that rely upon the forbidden precedents. For lack of a better term, in this Article, this practice is referred to as “whitewashing precedent.”

163. See *supra* Section I.A.

164. Brief for the Petitioners at 22, *Trump v. Int’l Refugee Assistance Project*, *Trump v. Hawaii*, 137 S. Ct. 2080 (2017) (Nos. 16-1436 and No. 16-1540). *Trump v. Int’l Refugee Assistance Project* is also referred to as *Trump v. IRAP*.

165. *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

A. Immigration Exceptionalism and National Security Exceptionalism Lie at the Heart of the Government's Legal Arguments in Support of the Muslim Travel Ban

During oral argument on May 15, 2017, on the government's appeal on EO2 before the Ninth Circuit, Judge Paez referenced the Korematsu Center amicus brief and asked Solicitor General Jeffrey Wall, "Would the *Korematsu* executive order pass muster under your test today?" Wall responded, "This case is not *Korematsu*, and if it were I wouldn't be standing here and the United States would not be defending it" ¹⁶⁶ When Wall denied that this case is *Korematsu*, one wonders, in what sense is this case different than *Korematsu*?

In similar fashion, during the preliminary injunction hearing with regard to EO3, Judge Theodore Chuang asked, "How is this different from *Korematsu*?" ¹⁶⁷ He also expressed concern that it might someday be revealed that Trump's executive action wasn't consistent with the DHS report. ¹⁶⁸ Judge Chuang asked DOJ attorney Hashim Mooppan directly, "Are you representing to me now as an officer of the court that there's nothing in there that is inconsistent with this proclamation?" ¹⁶⁹ Notably, Mooppan failed to provide a direct answer, saying, "I think what's in the proclamation supports [the policy] under the relevant legal standard." ¹⁷⁰ When asked further, "Mooppan said he'd read the report but didn't think the court needed to know precisely what was in the document, which addresses deficiencies in vetting of visitors to the U.S. and information sharing with foreign governments." ¹⁷¹ In the face of responses like this, how can the judge, or anyone for that matter, know whether there is a legitimate non-discriminatory reason justifying the broad sweep of the travel ban?

166. Oral Argument at 23:55, *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (No. 17-15589), <https://www.c-span.org/video/?427827-1/ninth-circuit-hears-oral-argument-travel-ban&live&start=1403> [<https://perma.cc/2Q97-3BA4>].

167. Josh Gerstein, *Federal Judge Hears Challenge to Third Version of Trump's Travel Ban*, POLITICO (Oct. 16, 2017), <https://www.politico.com/story/2017/10/16/trump-travel-ban-judge-maryland-243840> [<https://perma.cc/R2EP-4UVS>].

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

B. (Citation Omitted): Obscuring the Racist Precedent Underlying the Principle of Judicial Nonreviewability

Rather than cite directly to the *Chinese Exclusion Case* and to *Korematsu*, the Department of Justice attorneys rely on more recent cases without acknowledging the direct precedential history that goes back to those disfavored cases. Compare the following two sentences that appear in recent briefing submitted by Department of Justice attorneys in the Muslim travel ban litigation:

Example A	Example B
<p>“The Supreme Court has long recognized that ‘the power to . . . exclude aliens’ is a ‘fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’ <i>Fiallo v. Bell</i>, 430 U.S. 787, 792 (1977) (citation omitted).”¹⁷²</p>	<p>“This Court accordingly ‘ha[s] long recognized the power to . . . exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’ <i>Fiallo v. Bell</i>, 430 U.S. 787, 792 (1977) (quoting <i>Shaughnessy v. United States ex rel. Mezei</i>, 345 U.S. 206, 210 (1953)).”¹⁷³</p>

The sentences are nearly identical. Example A’s use of the quoted language with a “citation omitted” parenthetical would lead most readers to think that the *Fiallo* Court wrote the words that appear in quotes and that it cited to and relied on other precedent in making the proposition. Example A does not indicate that the language that appears in quotation marks is from another case.

Example B, though, indicates that the *Fiallo* Court is quoting another case and allows a reader to trace the precedential basis for the proposition. Here is the full quote from *Mezei*:

Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control. *The Chinese Exclusion Case (Chae Chan Ping v. United States)*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Knauff v. Shaughnessy*, 338

172. Defendants’ Opposition to Plaintiff Joseph Doe’s Motion for Preliminary Injunction at 10, *Doe v. Trump*, 2017 WL 6551491 (W.D.Wash. Dec. 23, 2017) (No. 2:17-cv-00178 JLR).

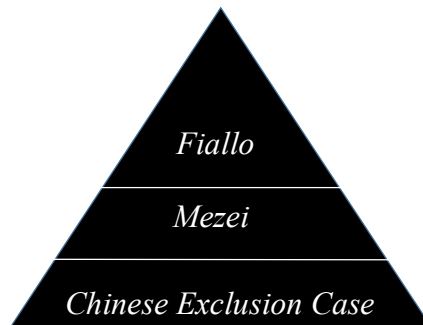
173. Brief for the Petitioners, *supra* note 164, at 23.

U.S. 537 (1950); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).¹⁷⁴

Example A's incorrect, and misleading, use of a "citation omitted" parenthetical obscures the source of the proposition. Example B's correct use permits a reader to make the direct connection to the *Chinese Exclusion Case*.

Though both briefs were submitted by the Department of Justice, the lawyers named on the two briefs are mostly different, and only Chad A. Readler, the Acting Assistant Attorney General, appears on both briefs.¹⁷⁵ The language that appears in quotes is indeed taken directly from *Mezei*, so Example B provides the correct attribution. A little surprising perhaps is that Example B, submitted on August 10, 2017, preceded Example A, submitted on November 22, 2017, by a few months.

The key takeaway, though, is that the proposition relied upon by the government is not as presented in Example A, which stops at *Fiallo*, but instead is a proposition that provides a direct path from *Fiallo* to *Mezei* to the *Chinese Exclusion Case*.



Given the provenance of the proposition, to cite just to *Fiallo* is to engage in a form of whitewashing of the problematic precedent that includes clear evidence of racial animus against Chinese persons; to cite to *Fiallo* and *Mezei* also engages in some whitewashing, though this is less deceptive because the obscuring of the problematic precedent is not as overt. The challenge for attorneys in both briefs is whether they should rely on a case that justified the exclusion of Chinese persons in a case where it is alleged that the travel ban is

174. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953).

175. I only note Mr. Readler as signing onto both briefs and I am not ascribing any intentionality on his part with regard to the incorrect and potentially misleading citation in Example A.

intended to ban travel and refugees from certain majority Muslim nations.

Given the correct citation practice followed by the attorneys in Example B, one might expect them to maintain this throughout the brief. Yet just one page later, the Example B authors follow the incorrect citation practice used in Example A. Here is the language from the brief:

The Court has since made clear that “[t]he conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate the hospitality of aliens, [and] the grounds on which such determination shall be based” are “wholly outside the power of this Court to control.” *Fiallo*, 430 U.S. at 796 (citation omitted).¹⁷⁶

As discussed previously with regard to Example A above, the use of the quoted language with the citation to *Fiallo* with the “citation omitted” parenthetical would lead a reader to believe that the quoted language is that of the *Fiallo* Court. Instead, here is the complete language from *Fiallo*:

Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary,” and “[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.” *Mathews v. Diaz*, 426 U.S. at 81–82. See *Harisiades v. Shaughnessy*, *supra*, at 588–89. As Mr. Justice Frankfurter observed in his concurrence in *Harisiades v. Shaughnessy*:

The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of Congress and wholly outside the power of this Court to control. 342 U.S.[] at 596-97.¹⁷⁷

176. Brief of the Petitioners, *supra* note 164, at 23–24.

177. *Fiallo v. Bell*, 430 U.S. 787, 796 (1977).

What you see then is that the primary citation to *Mathews* is more restrained and the primary citation to *Harisiades*'s majority opinion uses language more restrained than that used by Justice Frankfurter in his concurrence. Yet, you would never know this from the way the Department of Justice attorneys obscure the fact that the overbroad language of matters “wholly outside of the power of this Court” comes from a concurrence not joined by any other justice. Nor would you know that this concurrence was written by the same justice who famously wrote, “[t]he war power is the war power,” in *Ludecke v. Watkins*.¹⁷⁸ He advanced a very broad notion of the war power that extended even after the formal end of World War II. This phrase brings trepidation to some in our never-ceasing “war on terror.”¹⁷⁹

Another example that comes from Example B authors in the Opening Brief filed by the Petitioners in the consolidated cases of *Trump v. IRAP* and *Trump v. Hawaii* is a quotation attributed to Justice Jackson, one of the dissenters in *Korematsu*. The brief states:

As Justice Jackson explained for the Court in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), “any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.” *Id.* at 588-589. “Such matters are so exclusively entrusted to the political branches as to be largely immune from judicial inquiry or interference.” *Id.* at 589.¹⁸⁰

What is interesting and slippery about quoting Justice Jackson is that his writing style was such that he wrote his opinions with nearly all citations in footnotes, and so it would have been appropriate to include in the brief a “footnote omitted” parenthetical. Readers are not alerted to the existence of a footnote with citations, which becomes apparent only to those readers who go back to the original source. The two textual sentences from Justice Jackson’s opinion quoted in the brief are supported by footnote 16:

United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-322; *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111; U.S. Const. Art. IV, § 4; *Luther v. Borden*, 7 How. 1, 42, 12 L. Ed. 581; *Pacific States Telephone & Telegraph Co. v. State of Oregon*, 223 U.S.

178. 335 U.S. 160, 171 (1948).

179. See generally Stephen I. Vladeck, *Ludecke’s Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT’L SECURITY L. & POL’Y 53 (2006).

180. Brief of the Petitioners, *supra* note 164, at 23.

118; *Marshall v. Dye*, 231 U.S. 250. In respect to the war power over even citizens, see *Hirabayashi v. United States*, 320 U.S. 81, 92; *Korematsu v. United States*, 323 U.S. 214, 217—218. . . .¹⁸¹

Despite protestations otherwise, *Korematsu* is relevant to the legal challenge of the Muslim travel ban. An amicus brief submitted by the children of the three men who defied curfew and exclusion during World War II seeks to remind the Court and the public of the connection between the two.¹⁸² The amicus brief draws a comparison between the earlier decisions by the Court that “enabled the government to cover its racially discriminatory policies in the cloak of national security” to the current controversy, in which national security is invoked and “the Court is once again asked to abdicate its critical role in safeguarding fundamental freedoms.”¹⁸³

In addition to non-justiciability based on plenary power and extreme deference on matters involving national security, the government asserts the express authority of the President to “suspend the entry of aliens or any class of aliens” whenever he “finds” that their entry “would be detrimental to the interests of the United States.”¹⁸⁴ Though both the petitioners and respondents appear to locate the origins of the authority of the President to suspend entry to the Act of May 22, 1918,¹⁸⁵ they are either unaware of or ignore what may be the first express grant of authority by Congress to the President to limit entry. Previously, Congress had granted authority to officials to administer federal immigration law, including making individualized determinations regarding the admissibility of aliens.¹⁸⁶ But section 1 of the Immigration Act of 1907 granted broad authority to the President.

181. *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 n.16 (1952) (emphasis added).

182. Brief of Karen Korematsu, Jay Hirabayashi, Holly Yasui, the Fred T. Korematsu Center for Law and Equality, Civil Rights Organizations, and National Bar Associations of Color as Amici Curiae in Support of Respondents, *Trump v. Hawaii*, 138 S. Ct. 923 (March 30, 2018) (No. 17-965), reprinted *infra*.

183. *Id.* at 8.

184. Brief of the Petitioners at 31, *Trump v. Hawaii*, 138 S. Ct. 923 (2018) (No. 17-965) (quoting 8 U.S.C. § 1182(f)).

185. Brief of the Respondents at 38, *Trump v. Hawaii*, 138 S. Ct. 923 (2018) (No. 17-965) (discussing Act of May 22, 1918); Brief of Petitioners, *supra* note 184, at 32 (same).

186. *See, e.g.*, Act of March 3, 1891, ch. 551, §§ 1, 7, 8; 26 Stat. 1085.

This provision in the immigration act is of note because it is a precursor for section 1182(f) of the Immigration and Nationality Act that ostensibly provides President Trump the right to issue his various executive orders restricting entry of “all aliens or any class of aliens as immigrants or nonimmigrants.”¹⁸⁷ Compare the similar triggering mechanisms required for the exercise of the authority granted by Congress to the President under the respective Acts:

1907 Immigration Act, § 1	Immigration & Nationality Act § 1182(f)
“[W]henever the President shall be satisfied that passports issued by any foreign government for its citizens . . . are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein” ¹⁸⁸	“Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States” ¹⁸⁹

In 1907, President Theodore Roosevelt, acting pursuant to powers granted by the Act of February 20, 1907, entitled “An act to regulate the immigration of aliens into the United States,” issued Executive Order 589:

And Whereas, upon sufficient evidence produced before me . . . I am satisfied that passports issued by the Government of Japan to citizens of that country or Korea and who are laborers, skilled or unskilled, to go to Mexico, to Canada and to Hawaii, are being used for the purpose of enabling the holders thereof to come to the continental territory of the United States to the detriment of labor conditions therein;

I hereby order that such citizens of Japan or Korea, to-wit: Japanese or Korean laborers, skilled and unskilled, who have received passports to go to Mexico, Canada or Hawaii, and come therefrom, be refused permission to enter the continental territory of the United States.¹⁹⁰

187. Immigration and Nationality Act, 8 U.S.C. §1182 (2012).

188. Immigration Act of 1907, ch. 1134, 34 Stat. 898, 898.

189. 8 U.S.C. §1182.

190. Exec. Order No. 589 (Feb. 20, 1907).

There was no legal challenge to test Roosevelt's Executive Order 589. Had there been one, it is likely that Roosevelt's executive order would have been upheld, with the plenary power doctrine extending to actions undertaken by the executive, the other political branch to which the courts must defer in matters involving immigration.¹⁹¹ That it may have been motivated by animus would either be rejected as a factual matter¹⁹² or would be deemed doctrinally irrelevant, because, after all, the federal government at that time was not constrained by equal protection.¹⁹³

Unlike in 1907, there is, of course, the challenge to Trump's EO3 pending before the Court.¹⁹⁴ An important and as yet unresolved question is whether things have changed since 1907. The Fourth and Ninth Circuits, in their respective opinions, have found that things are different.¹⁹⁵ Each court rejected the government's argument that the legality of the travel ban was unreviewable or non-justiciable.¹⁹⁶ The Ninth Circuit held that EO3 violated the Immigration and Nationality Act's prohibition on nationality-based discrimination and that the President did not have the constitutional authority to issue EO3.¹⁹⁷ The Fourth Circuit held that the plaintiffs were likely to succeed on their Establishment claim, finding that "an objective observer could conclude that the President's repeated statements convey the primary purpose of the Proclamation – to exclude Muslims from the United States."¹⁹⁸

It remains to be seen what the Court will do.

191. *Cf. Ping v. United States*, 130 U.S. 581 (1889).

192. *Id.* (justifying disparate treatment based on cultural differences).

193. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that the Fifth Amendment due process guarantee includes an equal protection component that applies to the federal government).

194. *Trump v. Hawaii*, 138 S. Ct. 923 (2018) (No. 17-965).

195. *Trump v. Hawaii*, 878 F.3d 662 (9th Cir. 2017); *IRAP v. Trump*, 883 F.3d 233 (4th Cir. 2018) (en banc).

196. *Trump v. Hawaii*, 878 F.3d at 682 ("notion that the Proclamation is unreviewable 'runs contrary to the fundamental structure of our constitutional democracy'") (quoting *Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017)); *IRAP v. Trump*, 883 F.3d at 257 (finding Establishment claim justiciable).

197. *Hawaii*, 878 F.3d at 673.

198. *IRAP*, 883 F.3d at 268.

CONCLUSION

In 1948, President Harry S. Truman issued Executive Order 10,009, which repealed in part Executive Order 589.¹⁹⁹ On the thirty-fourth Anniversary of the issuance of Executive Order 9,066, President Gerald R. Ford issued Presidential Proclamation 4,417. Entitled “An America Promise,” and issued during America’s bicentennial, the Executive Order recognized that along with commemorating great events in American history, it was also important to engage in “[a]n honest reckoning” and to “include a recognition of our national mistakes.”²⁰⁰ President Ford proclaimed “that all authority conferred by Executive Order No. 9,066 terminated upon the issuance of Proclamation No. 2,714, which formally proclaimed the cessation of the hostilities of World War II on December 31, 1946.”²⁰¹ Though one might criticize a proclamation in 1976 that declares the effect of a proclamation made in 1946, the sentiment remains a good one.

If the Supreme Court fails to check the authority of the Executive and in essence reinstates the *Chinese Exclusion Case* and *Korematsu*, we might have to wait decades for a president to issue an apology and a revocation of the Trump’s Presidential Proclamation 9,645. A remedy, in that sense, does lie with the political branches. But it is time to bring immigration law and national security law more within the mainstream of constitutional jurisprudence.

199. Exec. Order No. 10,009, 13 Fed. Reg. 6,104 (Oct. 19, 1948).

200. Proclamation 4417 Confirming the Termination of the Executive Order Authorizing Japanese-American Internment During World War II, 12 WEEKLY COMP. PRES. DOC. 245 (Feb. 23, 1976).

201. *Id.* at 246.