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Dark Matter in the Law

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DARK MATTER IN THE LAW

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DARK MATTER IN THE LAW

D. CAROLINA NÚÑEZ*

Abstract: Not all law is written down. Sometimes, informal norms and expectations about what the law is or ought to be constrain behavior. Lawyers and legal commentators instinctively understand this concept and have written about it, but none have discussed the interaction or relationship between these unwritten norms—which I refer to as law's "dark matter"—and traditional formal law, like case law and statutes—which I refer to as law's "ordinary matter." I venture into this overlooked relationship to reveal a fascinating and important dynamic that shapes the development of law. In this Article, I explore law's dark matter by observing its effect on law's ordinary matter. I focus on the interaction between dark matter and court precedent, and I show how dark matter can play a significant, and even primary, role in shaping behavior despite the existence of contrary precedent in the field. I illustrate this curious phenomenon primarily with reference to *The Chinese Exclusion Case*, an 1889 Supreme Court decision that remains formally "on the books" but seems inimical to modern conceptions of constitutional law. I also briefly examine *Korematsu v. United States*, *Buck v. Bell*, and their interaction with subsequently developed dark matter. From my examination of these cases and their subsequent treatment by legal actors, I argue that, counterintuitively, dark matter can weaken ordinary matter—formal law—while at the same time insulating that ordinary matter from review and possible rescission. I identify three factors that can lead to the development of dark matter with this effect. I also posit that dark matter has more influence on legislative bodies and courts than on the executive branch, and I examine the implications of this discrepancy in dark matter's power.

INTRODUCTION

During the 2016 presidential campaign, Republican front-runner Donald Trump brought what had once been squarely within the realm of far-fetched law school exam hypotheticals into a very real national spotlight. In urging the

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United States to bar the entry of Muslims,[1] then-candidate Trump sparked discussions among scholars and other commentators about the constitutionality of such a bar.[2] As President, Trump ultimately signed an executive order that did not explicitly mention religion and therefore narrowly skirted the constitutional question that had sparked debate.[3] But the memory of the original Trump proposal lingers and raises difficult questions about the Constitution and immigration law.

After all, under ordinary constitutional analysis, excluding individuals from a government-provided right or benefit based on religion almost certainly violates the Constitution.[4] But immigration law is anything but ordinary. Though the United States has never passed a law or implemented a policy explicitly prohibiting the entry of members of a religion, it does have a history of prohibiting or limiting entry based on race and national origin. In fact, President Trump's original proposal sounded eerily similar to an 1888 law barring, with few exceptions, the entry of Chinese immigrants into the United States.[5] In a subsequent extension of the Chinese Exclusion Act, as it became known, Congress went so far as to prohibit legal permanent residents of Chinese descent from returning to the United States.[6] In doing so, Congress made obvious

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[1] Reid J. Epstein & Peter Nicholas, *Donald Trump Calls for Ban on Muslim Entry into U.S.*, WALL ST. J. (Dec. 7, 2015), https://www.wsj.com/articles/donald-trump-calls-for-ban-on-muslim-entry-into-u-s-1449526104 [https://perma.cc/G69T-AA33]; Patrick Healy & Michael Barbaro, *Donald Trump Calls for Barring Muslims from Entering U.S.*, N.Y. TIMES (Dec. 7, 2015), http://www.nytimes.com/politics/first-draft/2015/12/07/donald-trump-calls-for-banning-muslims-from-entering-u-s/ [https://perma.cc/PN7X-97L5]; Jenna Johnson & David Weigel, *Donald Trump Calls for 'Total' Ban on Muslims Entering United States*, WASH. POST (Dec. 8, 2015), https://www.washingtonpost.com/politics/2015/12/07/e56266f6-9d2b-11e5-8728-1af6af208198_story.html [https://perma.cc/SH37-8MQR].

[2] *Compare* Peter J. Spiro, Opinion, *Trump's Anti-Muslim Plan Is Awful. And Constitutional.*, N.Y. TIMES (Dec. 8, 2015), https://www.nytimes.com/2015/12/10/opinion/trumps-anti-muslim-plan-is-awful-and-constitutional.html [https://perma.cc/WB7B-NFSG], *and* Eric Posner, *Is an Immigration Ban on Muslims Unconstitutional?*, ERICPOSNER.COM (Dec. 8, 2015), http://ericposner.com/is-an-immigration-ban-on-muslims-unconstitutional/ [https://perma.cc/8MUX-A477], *with* Ivan Eland, *Trump's Ban on Muslims Is Unconstitutional and Obscures Real Solution*, HUFFPOST (Dec. 14, 2015), https://www.huffpost.com/entry/trumps-ban-on-muslims-is_b_8804284 [https://perma.cc/D6AR-N8H7].

[3] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2417, 2420–21 (2018); Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

[4] *See* U.S. CONST. amend. I (barring Congress from passing any "law respecting an establishment of religion, or prohibiting the free exercise thereof").

[5] Act of May 6, 1882, ch. 126, § 1, 22 Stat. 58, 59 (repealed 1943) (declaring that the "coming of Chinese laborers to the United States . . . is hereby, suspended").

[6] Scott Act, ch. 1064, 25 Stat. 504 (Oct. 1, 1888) (repealed 1943). The effects of this legislation were significant. In 1882, before the effective date of the Act of May 6, 1882, ch. 126, commonly known as the Chinese Exclusion Act, over 39,000 Chinese immigrants entered the U.S. In 1887, after the effective date, only ten entered. ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943, at 43–44 (2003); Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, *in* IMMIGRATION STORIES 7, 8 (David A. Martin & Peter H. Schuck eds., 2005).

that race was its motivating factor and left long-time U.S. residents of Chinese nationality stranded abroad with no way to return home.

The parallels between the original Trump proposal and the Chinese Exclusion Act are significant, and the implications of those parallels are perplexing. After all, the Supreme Court unanimously upheld the Chinese Exclusion Act and its subsequent extensions in *Chae Chan Ping v. United States* (*The Chinese Exclusion Case*) in 1889.[7] And that case has never been overturned. Rather, the very foundations of immigration law rest on the Court's century-old pronouncements in that case.[8] By its own terms, *The Chinese Exclusion Case* established nearly unbridled federal power—"plenary power"—over immigration law.[9] The plenary power doctrine articulated in this case and its progeny appears to allow Congress to act outside the constitutional norms that ordinarily restrain its lawmaking power. But how far outside of those norms may Congress act? Could Congress re-enact a ban on the entry of Chinese nationals or—more relevant to recent history—prohibit the entry of Muslims or Central Americans into the country today? Is the Court's holding in *The Chinese Exclusion Case* an immortal blank check for Congress, or, for that matter, the President?

Since the era of Chinese exclusion, the Court has never had an opportunity to again address a categorical bar on entry so blatantly based on criteria now heavily scrutinized under the law. Never again has Congress categorically barred individuals from entry based on race or national origin. And Congress has never barred individuals from entry based on religion. But the Court *has* reaffirmed the broad plenary power established in *The Chinese Exclusion Case* to uphold other legislation that would be held unconstitutional if applied to citizens in the United States. Indeed, "[the] Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."[10] Plenary power has insulated Congress's immigration-related laws from substantive and procedural due process,[11] equal protection,[12] First Amendment,[13] and Fourth Amendment

[7] 130 U.S. 581, 609 (1889) (declaring "[t]he power of exclusion of foreigners . . . an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution").

[8] *See, e.g.*, Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 346–48 (2008) (surveying the impact that the Supreme Court's 1889 case *Chae Chin Ping v. United States* (*The Chinese Exclusion Case*) had on immigration law); David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 30 (2015) (noting that *The Chinese Exclusion Case* "is traditionally taken as the fountainhead of the plenary power doctrine").

[9] Martin, *supra* note 8, at 30.

[10] Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)); *see* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (holding that the Attorney General may refuse to allow foreigners to enter the United States).

[11] *See, e.g.*, Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 U. CONN. L. REV. 879, 895–99 (2015) (contending that the plenary power doctrine hindered the expan-

norms.[14] Although the scope of plenary power has certainly eroded over time, it continues to exist today (to the dismay of numerous immigration law scholars and commentators[15]).

And so *The Chinese Exclusion Case* lives on. It is the existing foundation of over a century of immigration plenary power decisions and an institutional expression of xenophobia that seems inimical to basic constitutional ideals today. It is both the baby that grew into full-grown (if often criticized) plenary power and the bathwater that incubated it. Scholars and commentators are left with the uneasy task of distinguishing between the two. It is no wonder, then, that scholars disagree on the contours of plenary power today. Should Congress ever choose to bar the entry of Muslims, *The Chinese Exclusion Case* would be the most factually similar precedent for Supreme Court review. Does that fact mean President Trump's original proposal to bar the entry of Muslims was constitutional? Some immigration and constitutional law scholars have concluded that, albeit reprehensible, President Trump's original proposal might indeed be constitutional.[16] Others have cited to the erosion of the plenary power doctrine in more recent Supreme Court opinions to conclude that the Court

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sion of due process protections in the immigration context); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1628 (1992) (noting that the plenary power doctrine has limited the effectiveness of due process challenges to immigration laws and regulations); Ozan O. Varol, Note, *Substantive Due Process, Plenary-Power Doctrine, and Minimum Contacts: Arguments for Overcoming the Obstacle of Asserting Personal Jurisdiction Over Terrorists Under the Anti-terrorism Act*, 92 IOWA L. REV. 297, 321 (2006) (asserting that the plenary power doctrine leaves foreigners with lesser constitutional protections than United States citizens).

[12] *See, e.g.*, *Fiallo*, 430 U.S. at 791, 799–800 (rejecting an equal protection challenge to a law providing preferential immigration status to illegitimate children and their mothers, while excluding illegitimate children and their fathers); Hampton v. Mow Sun Wong, 426 U.S. 88, 101, 103–04 (1976) (noting that the plenary power doctrine allows the government in certain instances to treat non-citizens differently than citizens, though cautioning that the government cannot do so arbitrarily); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 3 (1998) (contending that immigration law is one of the last remaining areas where racial classifications still trigger little judicial scrutiny); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 714 (1996) (noting that non-citizens enjoy greater constitutional protections *outside* the immigration law context).

[13] *See, e.g.*, Galvan v. Press, 347 U.S. 522, 532–33 (1954) (Black, J., dissenting) (arguing that the statute banning naturalization for Communist party members violates the First Amendment); Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952).

[14] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 744–61 (1893) (Field, J., dissenting) (arguing that the deportation procedure constitutes an unreasonable seizure of person under the Fourth Amendment).

[15] *See, e.g.*, Chin, *supra* note 12, at 15 (analogizing the doctrine's staying power to "baseball's antitrust exemption" because both benefit from "almost a century of precedent" (quoting Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 291)); Robert Pauw, *Plenary Power: An Outmoded Doctrine That Should Not Limit IIRIRA Reform*, 51 EMORY L.J. 1095, 1114 (2002) (arguing that "the governmental interest in controlling immigration should not necessarily always trump the fundamental family rights at stake").

[16] Spiro, *supra* note 2.

might potentially invalidate any attempt to bar entry based on religion.[17] Because President Trump's final executive order did not explicitly mention religion, the Supreme Court's 2018 opinion in *Trump v. Hawaii*, which addressed Hawaii's claim that the travel ban was unconstitutional, offered little guidance on the core question.[18]

The traditional analysis of the plenary power doctrine examines and deconstructs plenary power cases to find evidence of plenary power's contours. This, of course, is useful analysis. If it is indeed a court's job to say what the law is, then examining what a court has said is a pretty good measure of the law. But that analysis has its shortcomings. What if the particular question at issue has not been asked in a long time and the only relevant precedent on the question, though still technically good law, seems wrong somehow? Such is the case in the realm of plenary power. There is too little data to fully illuminate the extent and limits of plenary power, particularly as it relates to categorical exclusion based on race or religion. The only precedent we have is *The Chinese Exclusion Case*.

There is, however, another piece of the puzzle that is worth exploring. Plenary power's limits cannot be defined by studying precedent in a vacuum; rather, its contours are also a function of law's "dark matter"—the substance that occupies the void between precedents and statutes. In the century since *The Chinese Exclusion Case*, much has happened, both within the legal world and outside it, that is relevant to an evaluation of plenary power's limits. Though it does not fit neatly within a formal conception of law, dark matter nonetheless constrains behavior. In the plenary power realm, something has constrained Congress from repeating a categorical bar on entry based on race or, thus far, from enacting a similar bar based on religion. That same "something" is what is likely to cause the Supreme Court, should such legislation come before it, to invalidate it. But what is law's dark matter, how do we know it is there, and how strong is its pull?

In physics, the term "dark matter" refers to a substance that, unlike "ordinary matter," is not directly observable.[19] Ordinary matter is quite visible; it is

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[17] Ari Melber, *Constitutional Scholars: Trump's Anti-Muslim Immigration Proposal Is Probably Illegal*, MSNBC (Dec. 7, 2015), http://www.msnbc.com/msnbc/trump-anti-muslim-proposal-probably-illegal [https://perma.cc/5P8F-KS2C].

[18] Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018) (noting that President Trump's executive order was "facially neutral toward religion"); *see also* Richard A. Dean, Trump v. Hawaii *Is* Korematsu *All Over Again*, 29 GEO. MASON U. C.R.L.J. 175, 184–85 (2019) (claiming that the Court did not consider the purpose behind the regulations and whether it violated the establishment clause); Vicki Lens, *The Travel Ban Cases: A Tale of Two Governments*, 29 B.U. PUB. INT. L.J. 67, 96 (2019) (suggesting that the majority avoided a thorough First Amendment analysis by not considering President Trump's anti-Muslim statements).

[19] *Dark Matter*, CERN, https://home.cern/about/physics/dark-matter [https://perma.cc/85ZS-HJK8] (describing "normal matter," which I refer to as ordinary matter).

the substance that makes galaxies, stars, planets, forests, rocks, and pages of law reviews. In short, ordinary matter comprises everything humans encounter in their lifetime.[20] But ordinary matter is only a small part of the picture. Dark matter, though invisible, outnumbers ordinary matter by a factor of five.[21] And it exerts significant gravitational force and helps form the scaffolding of the universe.[22] As a result, it is not enough to merely observe the bright objects in the universe—stars, galaxies, and planets—however easy they are to find.[23] After all, they are only a small percentage of the universe's substance.[24] An accurate understanding of the universe depends on an accounting of dark matter. Of course, finding something that is invisible to the human eye and to our instruments is complicated. To find dark matter, physicists look for its effects—its gravitational pull on galaxies and its distortion of light, for example.[25]

An analogous phenomenon exerts influence on the scope and contours of plenary power and, more generally, the law. While the "ordinary matter" of the law—statutes, court opinions, regulations, contracts—is certainly an important part of the structure of the law, it is not the entire picture. The dark matter of law, though harder to observe than the bright stars of formal law, fills in the voids. Dark matter helps explain the unsettling nature of cases like *The Chinese Exclusion Case*—cases that are formally on the books and even play a foundational role in a body of law, but give voice to notions long ago rejected outside of that particular historical incident.[26]

Dark matter is not merely context—it is legal substance. Dark matter is not a lens through which to examine precedent or statutes—it is a legitimate focus of the lens being applied. Dark matter is not simply information that a court may consider in deciding what the law should be—it is part of the very

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[20] *Dark Energy, Dark Matter*, NASA SCI., https://science.nasa.gov/astrophysics/focus-areas/what-is-dark-energy [https://perma.cc/6SD6-TUMZ].

[21] *Id.* (estimating that normal matter comprises roughly 5% of the universe and dark matter comprises roughly 27% of it).

[22] Author Summer Brennan has said:

> That's all regular matter, just five percent. A quarter is "dark matter," which is invisible and detectable only by gravitational pull, and a whopping 70 percent of the universe is made up of "dark energy," described as a cosmic antigravity, as yet totally unknowable. It's basically all mystery out there—all of it, with just this one sliver of knowable, livable, finite light and life.

Ethan Siegel, *The Biggest Problem with the Expanding Universe Might Be Trouble for Dark Energy (Synopsis)*, SCIENCEBLOGS (Apr. 12, 2016), http://scienceblogs.com/startswithabang/2016/04/12/the-biggest-problem-with-the-expanding-universe-might-be-trouble-for-dark-energy-synopsis/ [https://perma.cc/3K9T-HZPZ]; *see also Dark Matter*, *supra* note 19.

[23] *See Dark Energy, Dark Matter*, *supra* note 20.

[24] *Id.*

[25] *See id.*; *see also Dark Matter*, *supra* note 19.

[26] *See generally* Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (rejecting a challenge to the Scott Act of 1888 that suspended all immigration from China).

substance that courts attempt to describe in pronouncing the law. A description of plenary power that fails to account for legal dark matter also fails to accurately describe the shape and extent of plenary power.

Legal scholars have recognized the existence of what I refer to as dark matter in the law. In fact, some have even used this very term. Professor Laurence Tribe has written extensively about "invisible" principles that are considered binding constitutional law despite being detached from the text of the Constitution.[27] He even refers to the physical concept of dark matter to illustrate his argument.[28] Professor Tribe's work offers a comprehensive approach to understanding how formal law later adopted these extra-textual norms (which I call "ordinary matter").[29] But the scholarly literature fails to address the interaction between dark matter and the ordinary matter of law, particularly when they conflict.

My Article adds an important new claim that is entirely absent from existing literature: as dark matter accumulates to set a new standard that is in tension with ordinary matter, the ordinary matter becomes insulated from review. I examine the interaction between ordinary matter and conflicting dark matter to illuminate this counterintuitive phenomenon. Dark matter contains legal norms that constrain behavior in a way that may offset or weaken ordinary matter while, at the very same time, insulating that ordinary matter from review and potential modification or rescission. In that sense, long-forgotten ordinary matter lurks behind conflicting dark matter, ready to be invoked by a non-conformist legal actor.

Here, my main focus is on Supreme Court precedent and conflicting dark matter. I use immigration law's plenary power doctrine, particularly as it was applied in *The Chinese Exclusion Case*, as the primary vehicle to explore the phenomenon of law's dark matter. But dark matter is not limited to the field of immigration law, and so I offer examples outside of immigration law to illustrate dark matter's presence and potential effect in other fields. Indeed, *The Chinese Exclusion Case* is not unique. The 1944 Supreme Court case *Korematsu v. United States*,[30] widely rejected as a stain on American history, imme-

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[27] *See generally* LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2008) (contending that much of constitutional law is shaped not by the Constitution's text itself, but by dark, invisible matter).

[28] *Id.* at 22.

[29] *Id.*; *see* CLYDE WAYNE CREWS JR., MAPPING WASHINGTON'S LAWLESSNESS 2016: A PRELIMINARY INVENTORY OF "REGULATORY DARK MATTER" 3 (2015), https://cei.org/sites/default/files/Wayne%20Crews%20-%20Mapping%20Washington%27s%20Lawlessness.pdf [https://perma.cc/3KY8-LU8S] (discussing the impact of regulatory dark matter such as internal agency memoranda and guidance documents); Michael Steven Green, *Law's Dark Matter*, 54 WM. & MARY L. REV. 845, 846 (2013) (surveying the continuing impact of dark matter in choice of law decisions).

[30] 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

diately comes to mind.[31] Until Chief Justice Roberts's recent description of *Korematsu* as "gravely wrong the day it was decided" and "overruled in the court of history,"[32] the case had silently lurked behind an almost universal dark matter consensus. Few would disagree that the forced relocation of thousands of Americans to internment camps based solely on ethnic origin[33] is undoubtedly wrong.[34] Whether Chief Justice Roberts's dicta is enough to finally bury *Korematsu* is still, however, an open question.[35] The 1927 case *Buck v. Bell*, in which the Supreme Court upheld the forced sterilization of a woman, with Justice Holmes infamously claiming that "three generations of imbeciles are enough," also remains on the books and serves as a contrasting example.[36] *The Chinese Exclusion Case* and *Korematsu*, I argue, are far more likely to be invoked or revived until their formal rescission. *Buck* may formally survive but is unlikely to influence future caselaw.[37]

In this Article, I help explain the unseen force at play in these examples. This Article adds to the existing literature in three ways. First, I explore how dark matter constrains behavior and creates an expectation that behavior inconsistent with that norm will result in legal sanction.[38] Dark matter can dissuade a legislative body from enacting a law apparently authorized by ordinary

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[31] *Id.*; *see* Dean, *supra* note 18, at 189 (stating that the Supreme Court in 1944 in *Korematsu v. United States* "closed its eyes to racial discrimination"). Perhaps it is not a coincidence that when defending President Trump's proposal to ban the entry of Muslims into the United States, one supporter raised *Korematsu* as authorization for Congress to pass such legislation. Margaret Hartmann, *Trump Supporter Cites Japanese Internment Camps as 'Precedent' for Muslim Registry*, N.Y. MAG. (Nov. 17, 2016), http://nymag.com/daily/intelligencer/2016/11/trump-supporter-muslim-registry-internment-camps.html [https://web.archive.org/web/20210219012326/https://nymag.com/intelligencer/2016/11/trump-supporter-muslim-registry-internment-camps.html].

[32] *Trump v. Hawaii*, 138 S. Ct. at 2423.

[33] *Korematsu*, 323 U.S. at 219 ("We uphold the exclusion order . . . . In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as it is privileges, and in time of war the burden is always heavier." (citations omitted)).

[34] *See infra* notes 313–318 and accompanying text.

[35] *Compare* Dean, *supra* note 18, at 175–76 (noting that despite Chief Justice Roberts's assurances that comparisons between *Korematsu* and its 2018 case *Trump v. Hawaii* were flawed, "the language and reasoning of the two decisions are eerily similar"), *and* Neal Kumar Katyal, Trump v. Hawaii*: How the Supreme Court Simultaneously Overturned and Revived* Korematsu, 128 YALE L.J.F. 641, 642–43 (2019), https://www.yalelawjournal.org/forum/trump-v-hawaii [https://perma.cc/9F37-2P9K], *and* Kaelyne Yumul Wietelman, *Disarming Jackson's (Re)Loaded Weapon: How* Trump v. Hawaii *Reincarnated* Korematsu *and How They Can Be Overruled*, 23 UCLA ASIAN PAC. AM. L.J. 43, 44–46 (2019), *with* Jeffrey F. Addicott, *The Trump Travel Ban: Rhetoric vs Reality*, 44 U. DAYTON L. REV. 491, 521–22 (2019) (discussing "Justice Sotomayor's dissenting opinion where she drew an unwarranted parallel between the World War II era case of *Korematsu v. United States* and the majority's decision in *Trump v. Hawaii*").

[36] 274 U.S. 200, 207 (1927).

[37] *See infra* notes 359–386 and accompanying text.

[38] *See infra* notes 278–349 and accompanying text.

matter but that members of the legislative body instinctively and collectively expect to be challenged and struck down. In that sense, dark matter does significant work. In the realm of plenary power, dark matter imposes limits on the legislative power to regulate immigration that might appear unlimited if our lens focuses only on ordinary matter. Dark matter forms a protective barrier around *The Chinese Exclusion Case* that prevents the development of the plenary power doctrine from collapsing back toward the specific holding of that case.

Second, I examine the factors that allow dark matter to both weaken ordinary matter and insulate it from review. I identify three important factors that lead to this counterintuitive result.[39] First, significant time has elapsed since the making of a law without that specific law being acknowledged as legitimate. This might be a decision in a case that lingers "on the books" without being expressly reaffirmed or revisited or a statute that has long remained unenforced. Second, the ordinary matter at issue—whether a case or statute—nonetheless plays an important functional role in subsequent development of law in the area. It may be, for example, that an opinion in a case establishes a general principle of law that forms the basis of an entire subsequent generation of cases, even if those subsequent cases do not repeat the specific holding of its predecessor. Third, the case or statute is consistent with the legal and social culture existing at the time it is issued. In other words, a holding was not obviously wrong the day it was decided, and, in the case of a legislative act, a statute was not obviously invalid the day it was passed. When all three of these factors are present, dark matter pulls against a precedent's specific holding or a statute's specific rule and negates some of its precedential value. At the same time, it insulates the precedent or statute from review as legal actors avoid acting to the full extent authorized by the precedent or statute.

Third, I describe how different legal actors—legislative actors, judicial actors, and executive actors—may respond to the tension between dark matter and ordinary matter.[40] I argue that the executive branch may be least constrained by dark matter and therefore in a position to revive long-forgotten ordinary matter. This raises important questions. What obligation do legislators and judges have to address formal law that lurks in the background but is unlikely to be invoked? Should there be a mechanism that allows judges to invalidate old precedent without a live case?

To detail my arguments, I begin in Part I by discussing the ordinary matter in immigration law's plenary power doctrine—the seminal Supreme Court decisions in this area.[41] I examine this more observable part of immigration

[39] *See infra* notes 262–267 and accompanying text.
[40] *See infra* notes 389–399 and accompanying text.
[41] *See infra* Part I.

law's plenary power to trace the origins of and developments in plenary power. In Part II, I discuss existing academic commentary on immigration law's plenary power, much of which is a critique of its extra-constitutional nature, and highlight the current confusion that surrounds plenary power in today's commentary.[42] This sets the stage for Part III, in which I propose that the confusion surrounding the scope of plenary power stems from the accumulation of dark matter that pulls against the holdings of *The Chinese Exclusion Case* and its progeny.[43] Because dark matter is difficult to observe, I examine dark matter's effect on legal actors, including Congress, the President, and the Supreme Court. I also describe the conditions that led to the accumulation of dark matter in the realm of plenary power to distill three indicators that, when all present, mean that dark matter is likely significantly constraining behavior and insulating ordinary matter from review. To illustrate how these indicators play out in other areas, I explore *Korematsu* and *Buck* as additional examples of dark matter pulling against ordinary matter in Part IV.[44] I offer a brief discussion of how different legal actors may respond to dark matter in Part V,[45] followed by a conclusion and questions for the future.[46]

I. *The Chinese Exclusion Case* and Its Progeny: Ordinary Matter in an Extraordinary Immigration Law Universe

Before embarking on an exploration of law's dark matter, I focus first on the ordinary matter of immigration law's plenary power—Supreme Court precedent. This ordinary matter reveals an extraordinary constellation in the immigration law universe. Congress's historical regulation of naturalization, entry, or deportation of noncitizens appears to mock deeply rooted constitutional ideals. For example, Congress has imposed more burdensome naturalization requirements on children born out of wedlock to U.S. citizen fathers than those imposed on similarly-situated children of U.S. citizen mothers.[47] Congress has provided for the exclusion of returning legal permanent residents without notice and opportunity for a hearing,[48] as well as barred the entry of immigrants based on political opinion.[49] The Supreme Court has upheld these discriminatory actions

[42] *See infra* Part II.

[43] *See infra* Part III.

[44] *See infra* Part IV.

[45] *See infra* Part V.

[46] *See infra* Conclusion.

[47] *Compare* 8 U.S.C. § 1401(g), *and id.* § 1409(a) (naturalization requirements for children born out of wedlock to U.S. citizen fathers), *with id.* § 1409(c) (naturalization requirements for children born out of wedlock to U.S. citizen mothers).

[48] *See* Scott Act, ch. 1064, 25 Stat. 504 (1888) (repealed 1943).

[49] *See* 8 U.S.C. § 1182(a)(3)(D).

under the broadly deferential doctrine of "plenary power."[50] In this Part, I discuss these decisions—the ordinary matter of immigration law's plenary power doctrine—both to (1) illustrate the image of plenary power that emerges from a traditional analysis of precedent and (2) highlight the vacuous spaces in between those precedents. This Part contextualizes my discussion in Part II of dark matter, the substance that fills those spaces. Part I.A examines the origins of plenary power in the immigration context,[51] and Part I.B highlights questions over the constitutionality of plenary power in the wake of *The Chinese Exclusion Case*.[52]

A. The Origins of Immigration Law's Plenary Power Doctrine

The disconcerting origins of Congress's plenary power over immigration derive from an era of intense racial bias against Chinese immigrants.[53] In *The Chinese Exclusion Case*, a Chinese national, Chae Chan Ping, who had been living in the United States for over a decade departed on a temporary visit to China.[54] At the time Chae Chan Ping left, Chinese immigrants were barred from entering the United States under the Chinese Exclusion Act.[55] Congress, however, provided that Chinese legal permanent residents who planned to travel abroad could return to the United States with a certificate authorizing reentry.[56] When Chae Chan Ping left the United States, he carried the required reentry certificate.[57] Upon his return to the United States, however, Chae Chan Ping was not allowed to disembark.[58] Rather, he discovered that Congress had invalidated all return certificates. Because Congress had acted while Chae Chan Ping had been in a steamship crossing the Pacific Ocean on his return trip home to the United States, there was nothing Chae Chan Ping could have done—short of jumping ship and swimming back to China—to avoid exclusion and detention upon his arrival.[59]

The Supreme Court unanimously upheld the invalidation of the reentry certificate as fully within Congress's power to "exclude aliens from its territory."[60] The power to exclude aliens, however, appears nowhere in the Constitu-

[50] Nguyen v. INS, 533 U.S. 53, 58–59 (2001) (naturalization requirement differences); Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952) (deportation based on Communist party affiliation); Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (legal permanent resident exclusion).

[51] *See infra* Part I.A.

[52] *See infra* Part I.B.

[53] *See, e.g.*, Cox, *supra* note 8, at 348 (tracing the development of the plenary power doctrine to "racially discriminatory" laws); Martin, *supra* note 8, at 30 (noting that *The Chinese Exclusion Case* and its challenged law "stemmed from xenophobic and racist agitation").

[54] *Chae Chan Ping*, 130 U.S. at 581.

[55] *Id.* at 597–98.

[56] *Id.*

[57] *Id.* at 582.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 603.

tion. Rather, the Court held that such power was inherent in the country's very existence as "an incident of sovereignty."[61] "If [the government of the United States] could not exclude aliens it would be to that extent subject to the control of another power,"[62] an untenable result in the Court's eyes.

A modern reader of the Court's opinion might characterize the holding in *The Chinese Exclusion Case* as an artifact of a time when pernicious racism against Chinese immigrants went unpunished—and even was sanctioned—by the law.[63] Though that is certainly part of the story,[64] it is not the whole story. The Court had already recognized, just three years before *The Chinese Exclusion Case*, that the Constitution protected Chinese immigrants from racial discrimination in at least some circumstances. In *Yick Wo v. Hopkins*, the Court struck down a San Francisco ordinance that required individuals who operated laundries in wood buildings to obtain a permit.[65] Although the safety ordinance purportedly addressed the risk of fire in wood buildings, the Supreme Court held that the ordinance impermissibly discriminated against San Francisco's Chinese residents, who owned the vast majority of laundries in the city and were disproportionately imprisoned for violations of the ordinance.[66] The Court held that the discrimination, which could not be explained as anything other than "hostility to the race and nationality to which the petitioners belong," violated the Fourteenth Amendment.[67]

In *Yick Wo*, the Court unambiguously identified and condemned racial bias where it believed the law prohibited that bias.[68] The Court's decision in *The Chinese Exclusion Case* in the wake of *Yick Wo* suggests that something more than culturally accepted racial biases motivated the Court. Rather, a legal distinction motivated the Court. One obvious legal distinction between the two cases is the applicability of the Fourteenth Amendment. Principles of equal

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[61] *Id.* at 609.

[62] *Id.* at 604.

[63] *See, e.g.*, Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 260–64 (2000) (tracing the racist origins of *The Chinese Exclusion Case* and noting that during this period, racially discriminatory laws against both citizens and non-citizens were common).

[64] *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 551 (1990) ("We must bear in mind that this was an earlier era of constitutional law, when equal protection was well on its way to 'separate but equal,' and judicial recognition of the substantive and procedural rights of individuals was still far beyond the constitutional horizon.").

[65] 118 U.S. 356 (1886).

[66] *Id.* at 358, 362, 373–74.

[67] *Id.* at 374.

[68] *See id.* ("The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the Fourteenth Amendment of the Constitution.").

protection derived from the Fourteenth Amendment would not apply to the federal government's actions until 1954.[69]

But a more fundamental distinction between *Yick Wo* and *The Chinese Exclusion Case* highlights the underlying rationale for the plenary power doctrine of immigration law. One case centered on Congress's right to exclude noncitizens from the country,[70] while the other dealt with the ordinary governance of individuals already present in the United States.[71] Indeed, *The Chinese Exclusion Case* considered core immigration law—the rules that regulate entry into the United States.[72] *Yick Wo*, in contrast, involved a local ordinance that purportedly sought to promote safety in San Francisco.[73] *Yick Wo* and subsequent cases established that the Constitution generally applies fully to cases not directly involving immigration matters, especially if the government actor is a state or locality.[74] But for the Court in *The Chinese Exclusion Case*, the federal government's ability to regulate its borders justified wide latitude for Congress. In sweeping language, the Court hinted that this power was subject to little constitutional restraint or Court review:[75]

> 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 . . . . 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

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[69] *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.").

[70] *See* Chae Chan Ping v. United States, 130 U.S. 581, 597–98 (1889) (considering a law banning immigration from China).

[71] *See Yick Wo*, 118 U.S. at 374 (upholding a San Francisco permit requirement for laundry services, even though, as applied, the requirement disproportionately impacted Chinese laundromats—not one Chinese owned laundromat received a permit, yet *all but one* non-Chinese owned laundromat did receive a permit).

[72] *Chae Chan Ping*, 130 U.S. at 597–98.

[73] *Yick Wo*, 118 U.S. at 374.

[74] LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 4, 123–29 (2006) ("Citizenship, we tend to think, is *hard on the outside and soft on the inside*, with hard edges and soft interior together constituting a complete citizenship package. Yet the complementarity aspired to in this construct of citizenship can stand only so long as the hard outer edge actually separates inside from outside.").

[75] Sarah Cleveland has helpfully distilled plenary power—a concept that plays out in immigration law, federal Indian law, and foreign relations—into three essential characteristics. Plenary power is (1) inherent to sovereignty rather than enumerated in the Constitution; (2) subject to few or no constitutional constraints; and (3) subject to limited, if any, judicial review. 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, 7–8 (2002).

> not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects . . . . [I]ts determination is conclusive upon the judiciary.[76]

The Supreme Court would subsequently pull Congress's deportation laws under the plenary power doctrine's cloak. In *Fong Yue Ting v. United States*, the Court held that, like the exclusion of noncitizens, the deportation of noncitizens was inherent to U.S. sovereignty.[77] *Fong Yue Ting* involved a challenge to certain provisions included in an extension of the Chinese Exclusion Act.[78] Congress required Chinese immigrants already present in the United States to secure a certificate proving that their residency in the United States pre-dated the new extension of the Chinese Exclusion Act.[79] An immigrant without the required certificate would be deported unless a white person could attest to the immigrant's residency.[80] A divided Court rejected the claimants' procedural due process challenge to the white-witness rule.[81] Reasoning that the power to deport was a necessary corollary of the power to exclude, the majority upheld the white-witness rule, going so far as to say that Congress could have summarily deported the claimants in the same way that it could have summarily excluded them from entering the United States.[82]

Over the next decade, the Supreme Court would continue to embed the plenary power doctrine into constitutional immigration law as it upheld Congress's anti-Asian immigration laws. A snapshot of the plenary power doctrine just after the turn of the century depicts a virtual blank check for Congress's substantive immigration laws. Not only could Congress permissibly exclude immigrants based on race and/or national origin, but it could also deport them on that basis.[83] The Court recognized in two early cases that, in theory, Congress had to meet some basic procedural due process requirements in cases dealing with immigrants present in the United States.[84] The Court, however, would not invalidate the application of an immigration law on that basis until 1953.[85]

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[76] *Chae Chan Ping*, 130 U.S. at 606.

[77] Fong Yue Ting v. United States, 149 U.S. 698, 732 (1893).

[78] *Id.* at 699 n.1.

[79] *Id.*

[80] *Id.*

[81] *Id.* at 732.

[82] *Id.*; *see also* Ekiu v. United States, 142 U.S. 651 (1892).

[83] *Fong Yue Ting*, 149 U.S. at 698.

[84] Yamataya v. Fisher, 189 U.S. 86, 100 (1903); *Ekiu*, 142 U.S. at 660.

[85] Kwong Hai Chew v. Colding, 344 U.S. 590, 601–02 (1953) (holding that a non-citizen's "status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him" and that the Court's limited holding "does not leave an unprotected spot in the Nation's armor").

B. Plenary Power and the Constitution After Chinese Exclusion

Plenary power has played a role in a wide spectrum of cases, from core immigration law decisions (admission and removal decisions) to decisions that do not directly concern immigration but nonetheless have a distinct effect on noncitizens (alienage law),[86] and scholars have catalogued and explored the strength of the plenary power doctrine in multiple contexts.[87] Scholars have noted the waning strength of the plenary power doctrine where procedural pro-

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[86] Alienage law concerns the application of the law to noncitizens who are within the United States. While the plenary power doctrine does not, in theory, apply to alienage law decisions, the line between immigration law and alienage law is sometimes blurry. For example, does Congress's limitation of means-tested public assistance to citizens and residents who have lived in the United States for over five years amount to immigration law? It certainly does not directly regulate entry and removal from the United States, but such legislation might be a method of disincentivizing immigration. In 1976, in *Mathews v. Diaz*, the Supreme Court subjected this distinction based on citizenship and long-term authorized residence to rational basis review despite its earlier review of similar state legislation under a strict scrutiny standard. 426 U.S. 67 (1976). One explanation for the difference is that plenary power might have some effect even outside of core immigration law decisions. For a critique of the distinction between alienage and immigration law, see Cox, *supra* note 8, at 343 ("[L]egal rules cannot be classified as concerning *either* selection *or* regulation because every rule concerns both. Every rule that imposes duties on noncitizens imposes . . . selection pressure . . . .").

[87] *See generally* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002) (examining the plenary power's durability and arguing for less rigid notions of state power and citizenship); BOSNIAK, *supra* note 74 (surveying the immigration policies of several countries, most notably the United States); Chin, *supra* note 63 (discussing the powerful force that the plenary power doctrine exerts on immigration law); Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57 (2015) [hereinafter Johnson, *Immigration in the Supreme Court*] (contending that, although the Court has extended procedural due process protections for non-citizens, the plenary power doctrine still insulates most of Congress's substantive immigration decisions from judicial review); Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to* Is There a Plenary Power Doctrine?, 14 GEO. IMMIGR. L.J. 289 (2000) (arguing that the Supreme Court continues to tolerate racial classifications in the field of immigration law); Motomura, *supra* note 64, at 545–613 (noting that the plenary power doctrine has led courts to skirt difficult decisions by invalidating laws based on sub-constitutional challenges, but arguing that courts should address these constitutional questions); Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930 (1987) (considering the use of the plenary power doctrine to support the government's ideological exclusions of foreign speakers who espouse disagreeable viewpoints); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002). A survey of this scholarship and relevant case law suggests that the plenary power doctrine has been most consistently and successfully invoked to shield core federal immigration law from substantive constitutional claims. When it comes to procedural constitutional claims in core immigration law cases, the Court has been more willing to recognize limits to the plenary power doctrine. And when *states* attempt to legislate in an area that overlaps with core immigration law, the Court is swift to invalidate state legislation as federally preempted. In the realm of alienage law, the Court has not hesitated to follow the 1886 *Yick Wo v. Hopkins* Court's lead in requiring states to comply with constitutional limitations—both substantive and procedural—on state power. The extent to which the *federal* government must comply with constitutional limitations in alienage law is less clear. The Court has subjected federal legislation that distinguishes based on immigration status to less rigorous scrutiny than it imposes on states, even where that federal legislation does not directly govern core immigration functions.

tections are at issue and in cases that are only tangentially related to immigration.[88] My interest here, however, is specific to substantive constitutional issues in core immigration law cases—those that involve a noncitizen's ability to enter and remain in the United States. This, after all, is the realm of *The Chinese Exclusion Case* and recent proposals to ban the entry of Muslims into the United States. It is also where the Supreme Court's language has historically most boldly affirmed the plenary power doctrine. But, as I will explain in Part II below, it is also where significant dark matter has accumulated to alter the legal landscape.[89]

Although Asians have been the only group to be categorically denied entry based on race, Congress has enacted immigration laws that have barred entry based on other criteria that otherwise would be constitutionally suspect.[90] In addressing challenges to such provisions, the Court has consistently upheld them, sometimes avoiding the plenary power issue and deciding the case on other grounds,[91] and sometimes addressing plenary power directly. Though plenary power has played a role in cases that have featured a variety of substantive constitutional challenges, many of the most significant plenary power cases arose from challenges to limits based on political opinion and gender.[92] I discuss cases concerning political opinion in Subsection 1.[93] In subsection 2, I explore opinions related to gender.[94]

1. Plenary Power and Political Opinion

Perhaps second only to the era of Chinese exclusion, midcentury McCarthyism propelled the plenary power doctrine into Supreme Court jurisprudence more than any other historical political phenomenon.[95] Fearful of communist

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[88] *See*, *e.g.*, Michael Kagan*, Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 24 (2015), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1164&context=mlr_fi [https://perma.cc/F2MC-LQ5Q] (noting the limitations that procedural due process imposes on the plenary power doctrine).

[89] *See infra* Part II.

[90] *See* Motomura, *supra* note 64, at 550–60 (tracing the evolution of the plenary power in the immigration context).

[91] *See id.* at 548 (considering two competing approaches that litigants sometimes use to challenge immigration laws). Petitioners often bring constitutional challenges, but some commentators believe that judges treat "subconstitutional" challenges—arguments that the government violated statutes or administrative regulations—more favorably than constitutional ones. *Id.*

[92] *See infra* notes 95–141 and accompanying text.

[93] *See infra* notes 95–122 and accompanying text.

[94] *See infra* notes 123–141 and accompanying text.

[95] *See, e.g.*, Matthew J. Lindsay, *Disaggregating "Immigration Law*,*"* 68 FLA. L. REV. 179, 215 (2016) (noting that the Supreme Court first recognized the plenary power doctrine in the 1880's but the doctrine played a more prominent role in immigration and national security law during the 1950s; Victor Romero, *On Elián and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 343, 350 (2000) (noting that the plenary power doctrine resurfaced with greater strength in the 1950s).

infiltration into American minds and, ultimately, the American political system, the federal government actively excluded and deported individuals based on potential connections to communism.[96] This sometimes came in the form of exploiting existing statutes designed to exclude individuals who were national security threats,[97] and sometimes it involved Congress enacting new grounds for exclusion.[98] The Supreme Court repeatedly declined to interfere in resulting exclusions and deportations.

One of the government's tools of communist exclusion was an existing provision of the 1918 War Time Passport Act (Passport Act) that allowed the Attorney General to exclude noncitizens whose "entry would be prejudicial to the interest of the United States."[99] Under this conveniently vague provision, the government excluded several individuals who ultimately appealed their cases to the Supreme Court.[100] One of them, Ignatz Mezei, had been a resident of the United States for twenty-five years when he left to visit his dying mother in Romania.[101] Mezei never made it to his mother's bedside, as he was denied entry to Romania. He instead spent nineteen months in Hungary struggling to secure an exit permit so he could return home to the United States.[102] Upon finally reaching U.S. shores, the Attorney General excluded him under the Passport Act provision and detained him on Ellis Island.[103] Besides giving the Attorney General broad discretion to exclude an individual, the Passport Act also allowed the Attorney General to proceed without giving the excluded individual notice of the grounds of exclusion or a hearing.[104] Unable to return to his home and wife in Buffalo, New York, and ignorant of the reasons why the United States excluded him, Mezei began seeking admission to several countries.[105] Perhaps based on his exclusion in the United States, no country would

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[96] *See* Lindsay, *supra* note 95, at 251 n.390 (noting the "extraordinary breadth of the class of persons that Congress made deportable—any noncitizen who knowingly joined the Communist Party, without regard to the timing or duration of membership"); Romero, *supra* note 95, at 361.

[97] *See, e.g.*, Act of May 22, 1918, ch. 81, 40 Stat. 559, *amended by* Act of June 21, 1941, ch. 210, 55 Stat. 252 (repealed 1952); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953), *superseded by statute*, 8 U.S.C. § 1252(e)(2), *as recognized in* DHS v. Thuraissigiam, 140 S. Ct. 1959 (2020).

[98] *See, e.g.*, Alien Registration Act, ch. 439, 54 Stat. 670 (1940) (codified as amended at 8 U.S.C. § 137) (repealed 1952); Harisiades v. Shaughnessy, 342 U.S. 580, 581 (1952) (considering a law authorizing the deportation of Communist Party members).

[99] *Mezei*, 345 U.S. at 210 (quoting Proclamation No. 2523, 6 Fed. Reg. 5821 (Nov. 14, 1941)).

[100] *Id.*

[101] *Id.* at 208.

[102] *Id.*

[103] *Id.* at 208–09.

[104] *Id.* at 210–11.

[105] *Id.* at 209.

accept him.[106] The Supreme Court upheld Mezei's exclusion in 1953 without a hearing, in effect permanently marooning Mezei on Ellis Island.[107]

Though the issue before the Supreme Court in *Shaughnessy v. United States ex rel. Mezei* was a procedural one—whether the lack of hearing violated the Constitution—the Court spoke in sweeping language and hinted at the ultimate substantive issue, exclusion based on political opinion.[108] It opined that "Whatever [the Court's] individual estimate of that policy and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate."[109] The Court noted that Mezei had "remained behind the Iron Curtain for [nineteen] months" and explained that "the times being what they are," Congress should be at peace despite the ultimate result: indefinite detention on Ellis Island.[110]

While the Attorney General leveraged the Passport Act to exclude individuals like Mezei, Congress passed provisions designed to deport communists already residing in the United States. One of those provisions authorized deportation for any individual who had been a past member of the Communist party.[111] In a 1952 Supreme Court case, *Harisiades v. Shaughnessy*, three noncitizen U.S. residents argued that the Fifth Amendment limited Congress's power to deport long-term residents for past membership in the Communist party.[112] One of the individuals had arrived in the United States when he was only thirteen years old and had been a legal resident of the United States for over forty years.[113] Citing to cases from the era of Chinese exclusion, the Court affirmed Congress's "power to terminate its hospitality" toward noncitizens at any time and for virtually any reason.[114] The Due Process Clause, the Court held, made no difference in the case: "Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[115] The Court thus upheld the noncitizens' deportation orders.

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[106] *Id.*

[107] *Id.* at 216. Ultimately, political pressure secured Mezei's release. In some ways, this suggests that plenary power gets worked out through political dynamics, but this is not the case for individuals who have never been in the United States and who therefore have little political leverage in the United States.

[108] *Id.*

[109] *Id.*

[110] *Id.* at 214, 216.

[111] *See, e.g.*, Alien Registration Act, ch. 439, 54 Stat. 670 (1940) (codified as amended at 8 U.S.C. § 137) (repealed 1952).

[112] Harisiades v. Shaughnessy, 342 U.S. 580, 584 (1952).

[113] *Id.* at 581–82.

[114] *Id.* at 587 ("War, of course, is the most usual occasion for extensive resort to the power . . . . But it does not require war to bring the power of deportation into existence or to authorize its exercise.").

[115] *Id.* at 589. For a discussion of the term "political branches," and how the power to regulate immigration power is shared by the executive and legislative branches, see Adam B. Cox & Cristina

Twenty years later in 1972, the Court considered the case of *Kleindienst v. Mandel*.[116] There, several U.S. citizens challenged the exclusion of Ernest E. Mandel, a Belgian national who advocated Marxist ideology in his speeches and numerous writings.[117] Under the McCarran-Walter Act, noncitizens who "write or publish . . . the economic, international, and governmental doctrines of world communism" were barred from entry.[118] The U.S. citizen claimants argued that excluding Mandel impermissibly limited their First Amendment rights to meet with Mandel.[119] While the Court recognized that the First Amendment indeed protected individuals' access to ideas and information, it explained that the plenary power doctrine protects any "facially legitimate and bona fide reason" for excluding a noncitizen.[120] The government offered a speech-neutral reason for excluding Mandel—a prior violation of a visa.[121] This, the Court held, was sufficiently legitimate to override the U.S. citizen claimants' First Amendment right to access ideas.[122]

2. Plenary Power and Gender

Soon after *Mandel*, in 1977, the Court upheld a provision in the Immigration and Nationality Act (INA) that discriminated based on sex and illegitimacy.[123] In *Fiallo v. Bell*, the Court examined the INA's definition of "child."[124] Although the biological offspring of any woman was considered a "child" under the INA, a baby born out of wedlock to a man was not.[125] As a result, a U.S. citizen father could not seek immigration benefits for his child born out of wedlock even where a U.S. citizen mother could.[126] Likewise, a U.S. citizen child born out of wedlock could facilitate immigration benefits for her mother, but not her father.[127] The Court quoted its *Harisiades* opinion to explain that Congress's immigration decision was "solely for the responsibility of the Con-

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M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 471–72 (2009) ("In *Fong Yue Ting v. United States*, in which a divided Court held that the power to deport was a corollary to the power to exclude, the Court similarly treated as an open question whether the Executive can act to exclude or expel aliens without authorization from Congress." (citing 149 U.S. 698 (1893)).

[116] 408 U.S. 753 (1972).

[117] *Id.* at 756, 759.

[118] *Id.* at 755 (quoting Immigration and Nationality (McCarren-Walter) Act, ch. 477, § 212(a)(28)(G), 66 Stat. 182, 185 (1952) (amended 1990)).

[119] *Id.* at 754.

[120] *Id.* at 770.

[121] *Id.*

[122] *Id.*

[123] Fiallo v. Bell, 430 U.S. 787 (1977).

[124] *Id.* at 788–89.

[125] *Id.* at 789.

[126] *Id.*

[127] *Id.*

gress and wholly outside the power of this Court to control."[128] Today's INA recognizes the relationship between a child born out of wedlock to his father for immigration purposes "if the father has or had a bona fide parent-child relationship" with the child.[129]

Congress's rules governing citizenship (as opposed to immigration) of children born abroad to U.S. citizen parents have historically raised a similar issue. The INA imposes more burdensome requirements for granting birthright citizenship to nonmarital children born abroad to U.S. citizen fathers than for nonmarital children of U.S. citizen mothers.[130] The Court first considered a challenge to the distinction in *Miller v. Albright* in 1998.[131] The Court ultimately decided the case on the issue of standing, but the Justices did discuss the plenary power doctrine in the split opinion.[132] The Justices disagreed on whether the plenary power doctrine applied, whether plenary power would fully shield the provision from constitutional analysis, or whether it would merely dilute the standard that would apply to constitutional analysis.[133]

In 2001, the Court had an opportunity to again confront the gender-based distinction in citizenship rules for nonmarital children born abroad to U.S. citizens in *Nguyen v. INS*.[134] In a five-four decision, Justice Kennedy explained that because the statute satisfied traditional equal protection analysis there was no need to address the plenary power issue.[135] Important government objectives, according to the majority, justified the citizenship rules, which were substantially related to those objectives.[136] Justice O'Connor wrote the dissent.[137] She, along with Justices Souter, Ginsburg, and Breyer, argued that despite its claims to the contrary, the majority had actually employed a more lenient standard than the Court would normally apply in traditional analysis of gender-based classifications.[138] Justice O'Connor and her fellow dissenters recognized plenary power's mark in the opinion even if the majority did not.

[128] *Id.* at 796 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952)).

[129] 8 U.S.C. § 1101(b)(1)(D).

[130] Miller v. Albright, 523 U.S. 420, 429–30 (1998).

[131] *Id.*

[132] *Id.*

[133] *See id.* at 455 (Scalia, J., concurring) (emphasizing that "[j]udicial power over immigration and naturalization is extremely limited" and that the Supreme Court "ha[s] long recognized the power to expel or exclude aliens as a fundamental sovereign attribute" (quoting *Fiallo*, 430 U.S. at 792)).

[134] *See generally* 533 U.S. 53 (2001) (upholding a law that installed more restrictive citizenship requirements for children born outside the United States to unmarried U.S. citizen fathers than to children born outside the United States to unmarried U.S. citizen mothers).

[135] *Id.* at 72–73 ("In light of our holding that there is no equal protection violation . . . . we need not assess the implications of statements in our earlier cases regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power.").

[136] *Id.* at 70.

[137] *Id.* at 74–97 (O'Connor, J., dissenting).

[138] *Id.* at 97 ("No one should mistake the majority's analysis for a careful application of this Court's equal protection jurisprudence concerning sex-based classifications. Today's decision instead

The Supreme Court only recently invalidated one of the discriminatory provisions related to birthright citizenship for children born outside of the United States in *Sessions v. Morales-Santana*.[139] There, the Court abandoned its prior precedents and applied a rather unexceptional equal protection analysis to invalidate a provision that gave preferential treatment to unwed U.S. citizen mothers as compared to their male counterparts.[140] At the same time, as discussed in more detail in Part II below, the Court was careful to leave plenary power intact by distinguishing *citizenship* rules from *immigration* rules and explaining that similar discriminatory *immigration* rules had historically been upheld in deference to Congress's expansive power—plenary power—in the field.[141]

II. THE PLENARY POWER TODAY: CONFUSION AND SILENCE

Given this background, what are the contours of plenary power today? Does the doctrine authorize Congress to ban entry into the United States based on race? Does plenary power remain "segregation's last stronghold?"[142] And what about religion? The answer is not clear to legal commentators and lower court judges, and recent Supreme Court precedent is conspicuously silent on the plenary power doctrine. In this Part, I discuss the confusion that surrounds plenary power today to set the stage for my argument in Part III that dark matter has accumulated in this field to pull against the broad congressional authority to enact substantive immigration law with little constitutional restraint.[143] Part II.A provides an overview of current uncertainty regarding the plenary power doctrine.[144] Part II.B considers the Supreme Court's silence concerning the scope of plenary power today.[145]

represents a deviation from a line of cases in which we have vigilantly applied heightened scrutiny to such classifications to determine whether a constitutional violation has occurred.").

[139] 137 S. Ct. 1678 (2017).

[140] *See id.* at 1690 ("Prescribing one rule for mothers, another for fathers, § 1409 is of the same genre as the classifications we declared unconstitutional in [prior cases]. As in those cases, heightened scrutiny is in order. Successful defense of legislation that differentiates on the basis of gender, we have reiterated, requires an 'exceedingly persuasive justification.'" (quoting United States v. Virginia, 518 U.S. 515, 531 (1996))).

[141] *See id.* at 1693. Specifically, the Court distinguished *Fiallo v. Bell*, 430 U.S. 787 (1977), in which the Court had upheld the preferential treatment of U.S. citizen mothers in petitioning for a child's entry into the United States. *See id.* ("Applying minimal scrutiny (rational-basis review), the [*Fiallo*] Court upheld the provision, relying on Congress' 'exceptionally broad power' to admit or exclude aliens . . . . This case, however, involves no entry preference for aliens.").

[142] Chin, *supra* note 12.

[143] *See infra* Part II.

[144] *See infra* Part II.A.

[145] *See infra* Part II.B.

A. Modern Confusion Surrounding Plenary Power

A brief look at the recent academic debate surrounding President Trump's original travel ban proposal, as well as an interesting exchange among judges of the U.S. Court of Appeals for the D.C. Circuit in an unrelated case, hints at the enormous chasm in the current understanding of the plenary power doctrine. In subsection 1, I examine the scholarly debate concerning the proposed travel ban,[146] and I discuss similar confusion about the scope of plenary power in lower courts in subsection 2.[147]

1. Academic Discussion Surrounding the Proposed Travel Ban

Admittedly, a basic reading of the ordinary matter of plenary power suggests that a ban based on religion or race would be constitutional as a close analog of the legislation at issue in *The Chinese Exclusion Case*. Several scholars, including Professors Eric Posner, Peter Spiro, and Eugene Volokh took this approach when considering the validity of Trump's campaign proposal to ban the entry of Muslim immigrants.[148] In a *New York Times* opinion piece, Professor Peter Spiro explained: "Unlike other bygone constitutional curiosities that offend our contemporary sensibilities, the Chinese Exclusion case has never been overturned. More recent decisions have upheld discrimination against immigrants based on gender and illegitimacy that would never have survived equal protection scrutiny in the domestic context."[149] Professor Eric Posner suggested that the only reasonable conclusion is that an immigration ban on Muslims would be constitutional and called into question the motives of scholars concluding otherwise:

> [A]ny honest answer to a journalist's question about whether Trump's plan to ban Muslim immigration is unconstitutional should start with the plenary powers doctrine, and observe that it would be an uphill battle to persuade the Supreme Court to abandon a century of precedent. Unfortunately, that is not what scholars—who certainly know better—are telling journalists. They are likely being abetted by journalists and headline writers who don't like the idea that

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[146] *See infra* Part II.A.1.

[147] *See infra* Part II.A.2.

[148] Posner, *supra* note 2 ("The Court has repeatedly turned away challenges to immigration statutes and executive actions on grounds that they discriminate on the basis of race, national origin, and political belief . . . . While the Court has not ruled on religious discrimination, it has also never given the slightest indication that religion would be exempt from the general rule."); Spiro, *supra* note 2; Eugene Volokh, Opinion, *Banning Muslims from Entering the U.S. Is a Very Bad Idea—But It May Be Constitutionally Permissible*, WASH. POST (Dec. 8, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/08/banning-muslims-from-entering-the-u-s-is-a-very-bad-idea-but-it-may-be-constitutionally-permissible/ [https://perma.cc/BX6U-AXYN].

[149] Spiro, *supra* note 2.

> Trump's ban would be lawful. Not everything that is stupid or offensive is unconstitutional.[150]

In contrast, other scholars were quick to condemn Trump's initial proposal as unconstitutional. Professor Laurence Tribe, for example, concluded that such a proposal would violate the First Amendment's religion clauses and the Fifth Amendment's equal protection principle.[151] Professor Michael Dorf and others agreed, though some recognized the question may be a difficult one.[152]

That legal scholars could so readily disagree in their conclusions about President Trump's proposal is fascinating in light of *The Chinese Exclusion Case*'s very existence. It is not that commentators disagree about the meaning of the case—I have not read any scholarly discussion on the substantive issue of whether *The Chinese Exclusion Case* would permit the enactment of the initial Trump proposal. Rather, the differing conclusions seem to stem from an implicit disagreement about whether and how much *The Chinese Exclusion Case* matters. Although some commentators have pointed at *The Chinese Exclusion Case* to conclude, quite comfortably, that President Trump's proposal would be constitutional, many scholars who have concluded otherwise have failed to mention *The Chinese Exclusion Case* at all.[153] Instead, those commentators simply assumed that traditional equal protection and First Amendment analysis would apply.[154]

2. Lower Court Confusion Surrounding Plenary Power

While President Trump formulated his final travel order and scholars discussed a possible "Muslim ban," the apparent confusion over the current force of *The Chinese Exclusion Case* and its progeny also played out in other contexts. In 2017, in *Garza v. Hargan*, D.C. Circuit judges disagreed about whether the plenary power doctrine applied in a dispute over whether a minor detained in an immigration detention center could obtain an abortion.[155] The D.C. Circuit, sitting en banc, reinstated an order from the district court requiring the

[150] Posner, *supra* note 2.

[151] *See* Ari Melber, *Law Experts Weigh Donald Trump's Plan to Ban Muslims from U.S.*, NBC NEWS (Dec. 8, 2015), https://www.nbcnews.com/politics/2016-election/law-experts-weigh-donald-trumps-plan-ban-muslims-n476041 [https://perma.cc/78KV-MBLZ] (quoting Harvard Law School Professor Laurence Tribe).

[152] *See id.* (quoting Cornell Law Professor Michael Dorf).

[153] *See* Spiro, *supra* note 2 ("[The Supreme Court's] posture of extreme deference is known as the 'plenary power' doctrine . . . . [and] dates back to the 1889 decision in the Chinese Exclusion case, in which the court upheld the exclusion of Chinese laborers based on their nationality.").

[154] *See* Melber, *supra* note 151 (quoting Professor Tribe as stating his belief that "[President] Trump's unprecedented proposal would violate our Constitution").

[155] Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017) (en banc) (per curiam) (mem.), *judgment vacated*, 138 S. Ct. 1790 (2018).

government to allow the requested abortion.[156] Judge Henderson, dissenting, accused the court of ignoring controlling plenary power decisions, including the 1972 Supreme Court case *Kleindienst v. Mandel*: "[f]ar from faithfully applying the Supreme Court's abortion cases, this result contradicts them, *along with a host of immigration and due-process cases the Court declines to even acknowledge*."[157] Judge Henderson maintained that those cases demonstrate that even fundamental constitutional rights cannot override the plenary authority of the President and the legislature in the immigration context.[158] She continued: "[B]ut the freedom to terminate one's pregnancy is more fundamental than them all? This is not the law."[159] The plenary power applies, she concluded, with equal force regardless of the "constitutional entitlement" at issue.[160]

That one D.C. Circuit judge would cite the plenary power doctrine and find it controlling while the litigants, including the federal government, and the rest of the judges remained silent on it is remarkable. That this same phenomenon also played out in the realm of the Trump travel ban proposal suggests a disconnect between the ordinary matter on which the plenary power doctrine is based—cases like *The Chinese Exclusion Case* and *Mandel*—and legal actors' understanding of what the law is.

B. The Supreme Court and the Sound of Silence

It is not surprising that legal commentators and federal district and appellate court judges are talking past each other about plenary power. The Supreme Court has offered little guidance on the contours of plenary power in the last decade, especially when it comes to the question of constitutional limits on substantive immigration law. The Court's hesitancy to reaffirm the plenary power doctrine is not an altogether new phenomenon. Immigration law scholars have observed the waning influence of the plenary power doctrine in Supreme Court decisions and called for the elimination of the doctrine for several decades.[161] The Court's continued silence, however, has not reassured those scholars. Instead, it has left many questions open.[162] Subsection 1, below, discusses optimism among legal scholars that the Court would abolish the plenary

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[156] *Id.*

[157] *Id.* at 752 (Henderson, J., dissenting) (emphasis added).

[158] *Id.* at 750.

[159] *Id.*

[160] *Id.*

[161] *See* Christopher N. Lasch et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1720 n.72 (2018) (noting that "immigration law scholars have been predicting the imminent demise of the plenary power doctrine for at least three decades" (quoting Kagan, *supra* note 88, at 27)).

[162] For a discussion of the many roles "silence" plays in the development of U.S. constitutional law, see Laurence H. Tribe, *Soundings and Silences*, 115 MICH. L. REV. ONLINE 26 (2016), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1003&context=mlr_online [https://perma.cc/K7QQ-YZVZ].

power doctrine.[163] Subsection 2 examines the Supreme Court's silence on the matter.[164]

1. Historical Scholarly Enthusiasm for the End of Plenary Power

Scholars were particularly hopeful that the Supreme Court would eliminate the plenary power doctrine in the last decades of the twentieth century. In 1990, Professor Hiroshi Motomura identified a repeated pattern of courts, including the Supreme Court, resolving immigration law cases on statutory interpretation rather than constitutional grounds to achieve the same result as the constitutional application would have required.[165] The Court avoided the constitutional question simply by interpreting statutes in a way that would comply with ordinary constitutional norms.[166] In this way, Professor Motomura argued, phantom constitutional norms were percolating into immigration law in ways that the plenary power doctrine had historically precluded.[167] He believed this signaled a softening of immigration law exceptionalism.[168]

Almost a decade later, Professor Gabriel "Jack" Chin posited that plenary power may not exist at all.[169] He noted that though *The Chinese Exclusion Case* and its progeny are incongruous with modern constitutional norms, their holdings do not require that immigration law be excepted from ordinary constitutional norms.[170] Rather, Professor Chin argued, these cases are not exceptional at all—they are consistent with the cultural and domestic constitutional norms of the era in which they were decided, and they instead could be read as calling for non-exceptionalism in immigration law.[171]

Other scholars expressed similar criticism of plenary power and predicted its demise, but the plenary power doctrine proved to have more staying power

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[163] *See infra* Part II.B.1.

[164] *See infra* Part II.B.2.

[165] Motomura, *supra* note 11, at 1656 ("While it is a widely accepted idea that procedural rules often reflect substantive values, the anomalous structure that the plenary power doctrine imposes on constitutional immigration law means that procedural decisions are often the only vehicle for taking substantive rights seriously.").

[166] *Id.*

[167] *Id.*

[168] *Id.* at 1628 (contending that "[j]udges with constitutional misgivings about an immigration decision by the government have ameliorated the harshness of the plenary power doctrine").

[169] Chin, *supra* note 12, at 58 (tracing the plenary power doctrine's roots to "[t]he [Supreme] Court['s] . . . understanding of international law rather than any specific provision of the Constitution").

[170] *Id.* (arguing that "[g]iven the fluidity of the precedents, when faced with applications of the plenary power doctrine that are inconsistent with due process and equal protection, the court clearly has choices"). *But see* Stephen H. Legomsky, *Immigration Exceptionalism: Commentary on* Is There a Plenary Power Doctrine?, 14 GEO. IMMIGR. L.J. 307, 307 (2000) (considering Professor Chin's argument "persuasive" but "somewhat overstated").

[171] *See* Chin, *supra* note 12, at 56 (contending that courts' varying treatment of immigration cases throughout history traces prevailing attitudes on immigration at the time of decision).

than those scholars had hoped.[172] Since the 1990s, when scholars began predicting the end of plenary power, the Supreme Court has declined to terminate or expressly limit the doctrine.[173] But the Court has also been reluctant to expressly reaffirm the doctrine in the immigration context.[174] Recognizing the overly optimistic predictions of earlier scholarship, immigration law scholars have more recently predicted a more gradual decline for the plenary power doctrine. Professor Kevin Johnson and others have documented the Supreme Court's increasingly tenuous relationship with the plenary power through detailed analysis of its constitutional immigration jurisprudence over the last three decades.[175] Their work shows, as Professor Johnson has noted, that "without eliminating the doctrine, the Court has silently moved away from anything that might be characterized as immigration exceptionalism."[176]

I do not intend to revisit here all of these cases discussed at length by scholars elsewhere, many of them dealing with constitutional challenges to the procedures, rather than the substance, of immigration laws. Rather, I pause to examine a much narrower slice of recent Supreme Court jurisprudence—the Court's treatment of recent constitutional challenges to substantive immigration law.[177]

2. The Supreme Court's Deliberate Silence

Several types of judicial silence, some of them potentially more meaningful than others, mark the last two decades of Supreme Court jurisprudence in this area.[178] Subsection a below discusses instances in which the Court has not

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[172] *See, e.g.*, Legomsky, *supra* note 15, at 122 (noting that lower courts are becoming increasingly uncomfortable with the plenary power doctrine and suggesting that its power may be declining); Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1, 32 ("For more than a century, immigration law has been haunted by the so-called plenary power doctrine . . . ."); Spiro, *supra* note 87, at 339.

[173] *See* Romero, *supra* note 95, at 362 (recognizing the "proven resilience of the plenary power doctrine" despite hopes for its decline).

[174] *See* Johnson, *Immigration in the Supreme Court*, *supra* note 87, at 111–16 (arguing that the Court has continued to bring immigration law into the constitutional mainstream by bypassing the plenary power doctrine).

[175] *See, e.g.*, *id.* (chronicling the development of immigration law at the Supreme Court); Lindsay, *supra* note 95, at 202–39 (tracking the history of immigration law and its intersection with the Constitution).

[176] Johnson, *Immigration in the Supreme Court*, *supra* note 87, at 64.

[177] *See infra* notes 182–201 and accompanying text.

[178] *See* Tribe, *supra* note 162, at 32 ("[C]onstitutional silences, like silences of other kinds, aren't just occasional gaps or omissions in an otherwise-seamless design. They're everywhere and come in as many flavors and varieties as sounds. Ambiguity and multiplicity of meanings are in a sense manifestations of silence. There are as many reasons to be silent as there are to speak, and as many ways to hear meaning in the sounds of silence.").

had the chance to rule on the plenary power doctrine.[179] Subsection b highlights the Court's avoidance of the plenary power doctrine.[180] Next, subsection c explores the Court's unspoken reliance on plenary power. Finally, subsection d reviews the Court's deliberate efforts to reserve plenary power.[181]

a. Lack of Opportunity

The first kind of silence is not necessarily within the control of the Court: the Court cannot speak to the contours of plenary power if no cases implicate the issue. Indeed, the Supreme Court has had very few opportunities to decide the constitutionality of substantive immigration law in the last ten years. In fact, just a few immigration law cases during that time period can fairly be described as implicating the Constitution's applicability to substantive immigration law.[182] The dearth of cases in this area renders the few decisions that do exist extremely important as ordinary matter. And that is why the Court's more deliberate silence in those cases, as described below, is a particularly interesting demonstration of the pull of dark matter.

b. Avoidance: Trump v. Hawaii

In 2018, the Supreme Court heard oral arguments in *Trump v. Hawaii*, the culmination of challenges to President Trump's final travel ban.[183] Some scholars had hoped the Court would shed some light on the contours of the plenary power doctrine, but the case instead reinforced uncertainty.[184]

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[179] *See infra* Part II.B.2.a.

[180] *See infra* Part II.B.2.b.

[181] *See infra* Part II.B.2.c.

[182] *See generally* Trump v. Hawaii, 138 S. Ct. 2392 (2018) (upholding a ban restricting travel to and from certain countries deemed a national security risk); Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (invalidating gender-based distinction in a law governing citizenship requirements); Kerry v. Din, 576 U.S. 86 (2015) (denying a U.S. citizen's due process challenge to the executive branch's denial of her non-citizen spouse's visa applications).

[183] *Trump v. Hawaii*, 138 S. Ct. at 2392; Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

[184] Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 125 (2017) (predicting that "[t]he Supreme Court may provide more clarity on [the plenary power doctrine]" when it decides *Trump v. Hawaii*); Ali Shan Ali Bhai, Note, *A Border Deferred: Structural Safeguards Against Judicial Deference in Immigration National Security Cases*, 69 DUKE L.J. 1149, 1168 (2020) (arguing that *Trump v. Hawaii* left uncertainty about the plenary power doctrine); Dalen Porter, Comment, Trump v. Hawaii*: Bringing the Political Branches' Power Back into Equilibrium Over Immigration*, 97 DENV. L. REV. F. 128, 146 (2019), https://www.denverlawreview.org/dlr-online-article/trump-v-hawaii-bringing-the-political-branches-power-back-into-equilibrium-over-immigration [https://perma.cc/UL22-QLLQ] ("The consequential effect that the *Trump* [*v. Hawaii*] decision has on separation of powers justifies the need for an amendment of [8 U.S.C.] § 1182(f). The plenary power doctrine has been understood as the judiciary leaving immigration policy issues to the other political branches. However, it is still unclear how power over immigration is distributed between the executive and legislative branches.").

President Trump's order banned the arrival of travelers from seven countries that raised security concerns.[185] The order issued, however, did not expressly mention religion despite President Trump's inflammatory references to Islam in his repeated calls for a travel ban.[186] Hawaii challenged the order, arguing that the travel ban was motivated by religious preferences, as evidenced by President Trump's rhetoric leading up to his order, and therefore invalid under the Constitution's Establishment Clause.[187] Five of the seven countries from which the order banned travelers were, indeed, majority Muslim countries.[188]

Chief Justice Roberts, writing on behalf of the five-Justice majority, rejected Hawaii's argument. President Trump's prior rhetoric, he wrote, "does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks."[189] The finding that religious hostility did not motivate the order essentially took the core issue that most interested scholars—the full contours of plenary power in a direct constitutional challenge—off the table.[190]

Some scholars argued that the Court's willingness to ignore President Trump's prior rhetoric nonetheless evidenced the continuing role of the plenary power doctrine.[191] But the core question remains: what is the legacy of *The Chinese Exclusion Case*? Does Congress—and perhaps the executive—have virtually unlimited power to regulate immigration?

c. Unspoken Plenary Power: Kerry v. Din

In other cases that implicated the application of the Constitution to substantive immigration law, the Court's deliberate silence on the plenary power doctrine has taken different forms. In the first, the Court hesitated to expressly rely

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[185] *Trump v. Hawaii*, 138 S. Ct. at 2417, 2419–20; Exec. Order No. 13,769, § 3.

[186] *See* Healy & Barbaro, *supra* note 1. *See generally* Exec. Order No. 13,769 (providing no mention of religion).

[187] *Trump v. Hawaii*, 138 S. Ct. at 2403.

[188] *Id.* at 2421.

[189] *Id.*

[190] The majority opinion did suggest that *some* judicial review of government action that falls under the plenary power doctrine might be available, though under less strict standards of review than would otherwise apply outside of the plenary power doctrine. *See id.* at 2419–20 ("The upshot of our cases in this context is clear: 'Any rule of constitutional law that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution,' and our inquiry into matters of entry and national security is highly constrained. We need not define the precise contours of that inquiry in this case . . . . For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review." (quoting Mathews v. Diaz, 426 U.S. 67, 81–82 (1976) (internal citation omitted)).

[191] *See, e.g.*, Katyal, *supra* note 35, at 642 ("Despite overturning *Korematsu*, the Court's decision in *Trump v. Hawaii* perpetuates the very-near-blind deference to the executive branch that led the *Korematsu* Court astray." (footnote omitted)).

on the plenary power doctrine while clearly operating under its weight. In *Kerry v. Din*, a 2015 case, the Court ultimately issued the same decision that the plenary power doctrine would have required without reaffirming the plenary power doctrine.[192] Din, a U.S. citizen, had petitioned for permanent residency for her husband, an Afghan citizen.[193] Her husband was denied admission based on undisclosed security-related grounds.[194] In a divided opinion, the Court rejected Din's due process claim, which resulted in Din and her husband not being able to live together in the United States.[195] Though this 2015 case was eerily similar to the Court's 1950 decision in *Shaughnessy v. United States ex rel. Mezei* that upheld the indefinite confinement of a noncitizen on Ellis Island based on secret security-related allegations, only the concurring opinion of Justices Kennedy and Alito even mentioned the plenary power doctrine or its seminal cases.[196]

d. Reserved Plenary Power: Sessions v. Morales-Santana

In another form of deliberate silence, the Court decided a case under ordinary constitutional analysis as if plenary power did not apply, while expressly reserving the possibility that the plenary power doctrine might apply in a different context. In 2017 in *Sessions v. Morales-Santana*, the Court upended a decades-old history of distinct citizenship rules for the foreign-born children of unwed U.S. citizen mothers and fathers.[197] Justice Ginsburg, writing for the Court, applied a traditional equal protection analysis to hold that the foreign-born children of unwed U.S. citizen fathers could not be subject to a more burdensome citizenship standard than the similarly situated children of U.S. citizen mothers.[198]

In reaching its holding, the Court summarily dismissed the government's appeal to its 1977 opinion in *Fiallo v. Bell* (in which the Court upheld a statute that categorically excluded the alien children of U.S. citizen fathers from immigration eligibility).[199] *Fiallo*, Justice Ginsburg wrote, relied on Congress's "'exceptionally broad power' to admit or exclude aliens."[200] But *Morales-Santana*, she asserted, was about someone who claimed to be a citizen, rather than an alien who hoped to immigrate as a noncitizen permanent resident.[201]

[192] Kerry v. Din, 576 U.S. 86, 101 (2015) (holding that because the petitioner "was not deprived of 'life, liberty, or property' . . . there is no process due to her under the Constitution").

[193] *Id.* at 88.

[194] *Id.* at 89–90.

[195] *Id.* at 101.

[196] *Id.* at 103 (Kennedy, J., concurring).

[197] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1700–01 (2017) (holding that "[t]he gender-based distinction . . . violates the equal protection principle").

[198] *Id.*

[199] *Id.* at 1693–94; *see* Fiallo v. Bell, 430 U.S. 787 (1977).

[200] *Morales-Santana*, 137 S. Ct. at 1693 (quoting *Fiallo*, 430 U.S. at 794).

[201] *Id.* at 1693–94.

Justice Ginsburg's opinion was, on the one hand, a victory for critics of plenary power in that it seemed to remove birthright citizenship from plenary power's grip. But on the other hand, the opinion left room for an expansive power that allows Congress to discriminate based on gender when it comes to immigrant admission decisions.

III. PLENARY POWER'S DARK MATTER

The confusion surrounding the plenary power doctrine gives rise to several important questions. First, is *The Chinese Exclusion Case* good law? Second, if not, why has the Supreme Court declined to overturn it? I believe that if Congress were to enact a *Chinese Exclusion*-style, race-based categorical ban to entry into the United States, the Court would not uphold it. It is unlikely, however, that a case directly on point will arise given the amount of dark matter at play in this area. In this Part, I argue that dark matter does significant work in the realm of plenary power.[202] Below, I begin by explaining what I mean by "dark matter" in Section A.[203] In Section B, I highlight the way dark matter has affected Congress, the President, and the Supreme Court.[204] In Section C, I then discuss the conditions that have led to the accumulation of dark matter in the realm of plenary power.[205]

A. What Is Dark Matter?

My Article, up to this point, might seem to dodge a crucial question: What is dark matter in law and how does it form? For the purposes of this Article, a simple definition suffices: dark matter is a widely shared but informal (not institutionalized through formal lawmaking processes) understanding of the law that affects actors' behavior. I am admittedly avoiding offering any theory about how dark matter forms or the sources for its content. This is, in part, because other scholars have already offered explanations for changing informal norms. Professor Laurence Tribe, for example, has described various types of constitutional interpretation modes and the way that each might result in extratextual "dark matter" constitutional norms.[206] Professor Michael Steven Green has examined instances of rules from overturned case law lingering past the

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[202] *See infra* Parts III.A–C.

[203] *See infra* Part III.A.

[204] *See infra* Part III.B.

[205] *See infra* Part III.C.

[206] TRIBE, *supra* note 27, at xiii, xv (quoting Law Professor Geoffrey R. Stone's "Editor's Note": "[A]s Laurence Tribe demonstrates in this book, much of what we mean by the Constitution cannot be found in the visible text. Indeed, the text of the Constitution is silent on many of the most fundamental questions of constitutional law . . . . In an original and brilliant leap, Tribe identifies six 'modes of construction of the invisible Constitution,' which he alliteratively names the *geometric*, the *geodesic*, the *global*, the *geological*, the *gravitational*, and the *gyroscopic*.").

death of those cases.[207] These scholars have identified sources for the content of dark matter norms as well as ways that dark matter might come into existence.[208]

Another reason I avoid offering a theory of how dark matter forms or the origin of its content is that it is immaterial to my argument. My purpose here is not to comment on dark matter and its formation, but rather to focus on dark matter's interaction with the ordinary matter of law and dark matter's concomitant effect on legal actors. I hope to observe dark matter's effects to identify its power and limitations. That is, regardless of what, exactly, dark matter is, I write to argue that dark matter does significant work in shaping the behavior of relevant actors. Moreover, I illustrate how dark matter may affect behavior differently across the three branches of government. My argument does not depend on the origin or content of the dark matter at issue. Just as physicists can observe dark matter's results without knowing what makes up dark matter, I observe dark matter's effect on the law without necessarily knowing how it arises.

I will thus leave theories of the specific process for the development of dark matter, as well as the actual content of dark matter, to other scholars. That being said, several observations about dark matter are worth noting here. First, dark matter does not always conflict with ordinary matter of the law. I examine the conflict between dark matter and ordinary matter here merely because that is the context in which dark matter is most easily observed. But dark matter could reinforce ordinary matter or create norms where no ordinary matter exists.

Second, dark matter is amoral. While I would characterize the dark matter that is limiting immigration law's plenary power doctrine as "good," that is not a defining feature of dark matter. Dark matter could also be "bad." It could also be neither. And opinions could obviously vary.

Third, dark matter is not limited to legal fields where court-made doctrine dominates. Dark matter may exist in areas of law governed by statutes, regulations, and contracts. I discuss dark matter in the specific context of constitutional case law because it limits the scope of my paper while still remaining broadly accessible.

Finally, dark matter is not necessarily mysterious, unknowable, and unmeasurable. The dark matter analogy breaks down on this point. Though the dark matter of the universe is poorly understood, dark matter in the law may be susceptible to observation and measurement. Social science, for example, may certainly offer tools to measure public understanding of the law or what the law ought to be. I do not use the term "dark matter" to suggest otherwise. Rather, I use the dark matter analogy to distinguish informal norms from formal law and to further the discussion of how formal and informal norms interact.

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[207] *See generally* Green, *supra* note 29.

[208] *See infra* notes 262–267 and accompanying text.

B. Evidence of Dark Matter Surrounding The Chinese Exclusion Case

In Parts I and II, I considered the ordinary matter of the plenary power doctrine—Supreme Court precedent—to highlight the vast empty spaces that characterize the plenary power doctrine and the resulting confusion and disagreement about the contours of the doctrine today.[209] Here, I turn my attention away from court decisions and toward the behavior of legal actors. I examine the way the three branches of the federal government have treated *The Chinese Exclusion Case* outside of more direct, formal lawmaking activities.[210] Subsection 1 focuses on Congress.[211] Subsection 2 highlights the judiciary.[212] Finally, subsection 3 addresses the President.[213]

1. Congress

Although the Supreme Court is responsible for creating the plenary power doctrine, Congress put the Court in a position to do so when it enacted the Chinese Exclusion Act in 1882 and elected not to repeal the Act until 1943.[214] Interestingly, even during the time that the Chinese Exclusion Act was on the books, Congress did not enact another categorical ban on immigration based on race. Further, Congress has not attempted to pass such a ban since repealing the Chinese Exclusion Act. This fact hints at Congress's perception of its authority to regulate immigration law in a way that, without plenary power, would violate the Constitution.

More indicative of Congress's perception that *The Chinese Exclusion Case* is not good law are Senate and House of Representatives resolutions lamenting the passage of Chinese exclusion laws.[215] In resolutions celebrating Asian/Pacific Heritage Month for the last several years, the House of Representatives (House) has characterized the Chinese Exclusion Act as one of several "injustices faced by Asian American . . . communities throughout United States history."[216] In a concurrent Senate and House resolution to "condemn all prejudice against individuals of Asian and Pacific Island ancestry in the United States," Congress characterized the Chinese Exclusion Act as a discriminatory

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[209] *See supra* Parts I, II.

[210] *See infra* notes 214–244 and accompanying text.

[211] *See infra* III.B.1.

[212] *See infra* Part III.B.2.

[213] *See infra* Part III.B.3.

[214] Act of Dec. 17, 1943, ch. 344, 57 Stat. 600 (repealing the Chinese Exclusion Act, setting an immigration quota preference, and redefining the criteria for citizenship).

[215] H.R. Res. 683, 112th Cong. (2012) (resolving "[t]hat the House of Representatives regrets the passage of legislation that adversely affected people of Chinese origin in the United States because of their ethnicity"); S. Res. 201, 112th Cong. (2011) ("[e]xpressing the regret of the Senate for the passage of discriminatory laws against the Chinese in America, including the Chinese Exclusion Act").

[216] H.R. Res. 1316, 111th Cong. (2010) ("[c]elebrat[ing] the contributions of Asian Americans and Pacific Islanders to the United States").

law.[217] Congress further encouraged executive agencies to act in "accordance with existing civil rights laws" and asserted that individuals of Asian ancestry were entitled to due process rights.[218]

2. The Supreme Court

Besides its relative silence on the contours of the plenary power in recent decisions, the Supreme Court has distanced itself from *The Chinese Exclusion Case* through both the frequency and the manner in which the Court cites the case. Supreme Court Justices have cited *The Chinese Exclusion Case* in majority, concurring, or dissenting opinions more than thirty times since the Court issued the decision in 1889.[219] All but one of those references occurred prior to 1978.[220] Besides a few cases that cite to *The Chinese Exclusion Case* for a statutory interpretation or treaty-related issue, every pre-1978 citation characterized *The Chinese Exclusion Case* as standing for Congress's broad authority to legislate immigration law.[221] For example, in *Boutilier v. INS*, the 1967

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[217] 145 CONG. REC. S10497 (daily ed. Aug. 5, 1999) (statement by Senator Dianne Feinstein after submitting S. Con. Res. 53, 106th Cong. (2000)).

[218] S. Con. Res. 53, 106th Cong. (2000).

[219] *See* Zadvydas v. Davis, 533 U.S. 678, 695 (2001); *id.* at 703 (Scalia, J., dissenting); Fiallo v. Bell, 430 U.S. 787, 792 (1977); Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973); Kleindienst v. Mandel, 408 U.S. 753, 765 (1972); *id.* at 770, 781–82 (Douglas, J., dissenting); Graham v. Richardson, 403 U.S. 365, 377 (1971); Zschernig v. Miller, 389 U.S. 429, 442 (1968) (Stewart, J., concurring); Boutilier v. Immigr. & Naturalization Serv., 387 U.S. 118, 123–24 (1967); Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 96 (1961); Bonetti v. Rogers, 356 U.S. 691, 698–99 (1958); Reid v. Covert, 354 U.S. 1, 18 n.34 (1957); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953); Dennis v. United States, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring); Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring); Hines v. Davidowitz, 312 U.S. 52, 63 (1941); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 317 (1936); United States v. N.Y. & Cuba Mail S.S. Co., 269 U.S. 304, 313 (1925); Lapina v. Williams, 232 U.S. 78, 88 (1914); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 289 (1904); Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903); Li Sing v. United States, 180 U.S. 486, 452–53 (1901); La Abra Silver Min. Co. v. United States, 175 U.S. 423, 460 (1899); United States v. Wong Kim Ark, 169 U.S. 649, 686 (1898); Wong Wing v. United States, 163 U.S. 228, 230 (1896); Lem Moon Sing v. United States, 158 U.S. 538, 541–42 (1895); *In re* Debs, 158 U.S. 564, 579 (1895); Lees v. United States, 150 U.S. 476, 480 (1893); Fong Yue Ting v. United States, 149 U.S. 698, 705–08 (1893); *id.* at 734 (Brewer, J., dissenting); *id.* at 745 (Field, J., dissenting); Lau Ow Bew v. United States, 144 U.S. 47, 63 (1892); Horner v. United States, 143 U.S. 570, 578 (1892); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

[220] *See supra* note 219.

[221] *See Fiallo*, 430 U.S. at 792; *Almeida-Sanchez*, 413 U.S. at 272 (1973); *Mandel*, 408 U.S. at 765; *id.* at 770, 781–824 (Douglas, J., dissenting); *Graham*, 403 U.S. at 377; *Zschernig*, 389 U.S. at 442 (Stewart, J., concurring); *Boutilier*, 387 U.S. at 123–24; *Subversive Activities Control Bd.*, 367 U.S. at 96; *Bonetti*, 356 U.S. at 698–99; *Shaughnessy*, 345 U.S. at 210; *Dennis*, 341 U.S. at 519 (Frankfurter, J., concurring); *Bridges*, 326 U.S. at 161 (Murphy, J., concurring); *Hines*, 312 U.S. at 63; *Curtiss-Wright Export Corp.*, 299 U.S. at 317; *N.Y. & Cuba Mail S.S. Co.*, 269 U.S. at 313; *Lapina*, 232 U.S. at 88; *United States ex rel. Turner*, 194 U.S. at 289; *Wong Kim Ark*, 169 U.S. at 686; *Wong Wing*, 163 U.S. at 230; *Lem Moon Sing*, 158 U.S. at 541–42; *Lees*, 150 U.S. at 480; *Fong Yue Ting*,

Court opinion cited *The Chinese Exclusion Case* in asserting that "[i]t has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."[222] Similarly, in the Supreme Court's 1972 case *Kleindienst v. Mandel*, a dissenting opinion relied on *The Chinese Exclusion Case* in asserting that "Congress . . . ha[s] the power to exclude any class of aliens from these shores."[223] Other formulations of the Court's pre-1978 characterization of *The Chinese Exclusion Case* were similarly broad.[224]

That the Court would characterize *The Chinese Exclusion Case* as standing for sweepingly broad authority to regulate immigration with few constitutional restraints is unremarkable to anyone familiar with *The Chinese Exclusion Case* itself. What is remarkable, however, is that (a) the Court has only cited to the case once since 1977, a marked departure from an earlier period when it cited the case thirty times, (b) the Court has never cited *The Chinese Exclusion Case* after the events of September 11, 2001, and (c) despite the Court considering the merits of over a dozen cases in which the government brief relied on *The Chinese Exclusion Case*,[225] the Court's only recent citation to the case occurred in its 2001 opinion in *Zadvydas v. Davis*.[226] The Court's use of the case was anything but typical relative to its thirty prior citations. The

149 U.S. at 705–08; *id.* at 734 (Brewer, J., dissenting); *id.* at 745 (Field, J., dissenting); *Nishimura Ekiu*, 142 U.S. at 659.

[222] *Boutilier*, 387 U.S. at 123.

[223] *Mandel*, 408 U.S. at 770 (Douglas, J., dissenting).

[224] *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. at 210 ("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."), *superseded by statute*, 8 U.S.C. § 1252I(2), *as recognized in* DHS v. Thuraissigiam, 140 S. Ct. 1959 (2020); *N.Y. & Cuba Mail S.S. Co.*, 269 U.S. at 313 ("The power of Congress to forbid aliens and classes of aliens from coming within the borders of the United States is unquestionable."); *Lapina*, 232 U.S. at 88 ("The authority of Congress over the general subject-matter is plenary; it may exclude aliens altogether, or prescribe the terms and conditions upon which they come into or remain in this country."); *United States ex rel. Turner*, 194 U.S. at 289 ("Repeated decisions of this court have determined that Congress has the power to exclude aliens from the United States . . . .").

[225] *See* Brief for the Petitioners at 43, Zadvydas v. Davis, 533 U.S. 678 (2001) (No. 00-38), 2000 WL 1784982; Brief for the Respondents at 19–20, *id.* (No. 99-7791); Brief for Gerald R. Ford, Lee H. Hamilton, Carla A. Hills, and Certain Other Former U.S. Government Officials as Amici Curiae Supporting Respondent at 11 n.14, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (No. 99-474); Brief for the Respondents at 21, 24, 26, 32, 45, Jean v. Nelson, 472 U.S. 846 (1985) (No. 84-5240); Brief for the Immigration and Naturalization Service at 35 n.21, INS v. Chadha, 462 U.S. 919 (1983) (Nos. 80-1832, 80-2170, 80-2171); Brief of the United States House of Representatives at 34–35, *id.* (Nos. 80-1832, 80-2170, 80-2171); Brief for the United States as Amicus Curiae at 32 n.23, Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480 (1983) (No. 81-920); Motion for Leave to File and Brief of the Honorable Thomas P. O'Neill, Jr., Speaker; the Honorable Frank Thompson, Jr., Chairman and the Honorable William L. Dickinson, Committee on House Administration, of the United States House of Representatives as Amici Curiae at 53, United States v. Helstoski, 442 U.S. 477 (1979) (Nos. 78-349, 78-546).

[226] 533 U.S. at 695.

Court characterized *The Chinese Exclusion Case* as *a limit* on congressional power to regulate immigration rather than the affirmation of sweeping grant of authority for which it has historically stood.

In *Zadvydas*, the Court considered a habeas petition that a noncitizen in immigration detention filed.[227] An immigration court had found him removable, but no country would accept him.[228] The relevant statute allowed the Attorney General to detain noncitizens indefinitely pending deportation.[229] Indefinite detention, the Court opined, would be unconstitutional.[230] In the majority opinion, Justice Breyer cited to *The Chinese Exclusion Case* to support the assertion that congressional authority in immigration is "limited 'by the Constitution itself and considerations of public policy and justice which control, more or less the conduct of all civilized nations.'"[231] This characterization of *The Chinese Exclusion Case* is a vast departure from prior references and is puzzling in light of the actual holding and result of *The Chinese Exclusion Case*. A more typical depiction of *The Chinese Exclusion Case* appeared only in Justice Scalia's *Zadvydas* dissent.[232] The majority's recharacterization points to the accumulation of dark matter pulling against *The Chinese Exclusion Case*'s actual holding.

The Supreme Court issued the *Zadvydas* opinion on June 28, 2001, less than three months before the terrorist attacks of September 11, 2001.[233] The tide of public opinion regarding immigration would turn drastically in the wake of the attacks.[234] But the Supreme Court did not subsequently include any reference to *The Chinese Exclusion Case* in its opinions on the merits even though the government raised it in its briefs to the Court on at least four occasions.[235]

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[227] *Id.* at 684, 686.

[228] *Id.* at 684.

[229] *Id.* at 688.

[230] *Id.* at 697.

[231] *Id.* at 695 (quoting Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889)).

[232] *Id.* at 703 (Scalia, J., dissenting) (citing to *The Chinese Exclusion Case* to support the proposition that "[l]ike a criminal alien under final order of removal, an inadmissible alien at the border has no right to be in the United States"). Justice Thomas joined the dissent. *Id.*

[233] *See* Linda Greenhouse, *The Supreme Court: The Issue of Confinement; Supreme Court Limits Detention in Cases of Deportable Immigrants*, N.Y. TIMES, June 29, 2001, at A1.

[234] For notation on changes to immigration law and the creation of Department of Homeland Security, see Barbara Hines, *An Overview of U.S. Immigration Law and Policy Since 9/11*, 12 TEX. HISP. J.L. & POL'Y 9 (2006); James A.R. Nafzinger, *Immigration and Immigration Law After 9/11: Getting It Straight*, 37 DENV. J. INT'L L. & POL'Y 555 (2009); Heidee Stoller et al., *Developments in Law and Policy: The Costs of Post-9/11 National Security Strategy*, 22 YALE. L. & POL'Y REV. 197 (2004).

[235] *See* Brief for the Petitioner at 15, Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (No. 15-1191); Brief for the United States at 17, Flores-Villar v. United States, 564 U.S. 210 (2011) (No. 09-5801); Motion for Leave to File Brief Out of Time and Brief of Amicus Curiae Immigration Reform Law Institute in Support of Respondents, Kiyemba v. Obama, 559 U.S. 131 (2010) (No. 08-1234); Brief for the Petitioners at 15, 16, 23, Benitez v. Mata, 540 U.S. 1147 (2004) (No. 03-878),

Even when the Supreme Court considered the Trump administration's ultimate executive order banning citizens of several predominately Muslim countries from entering the United States, the Court did not raise the plenary power doctrine.[236] Rather, the majority held that President Trump's order was not based on religion and therefore avoided the entire question of whether, and to what extent, the Court's usual approach to Establishment Clause challenges applied in the immigration context.[237]

3. The President

The executive branch of the federal government has also acted as if *The Chinese Exclusion Case* is no longer controlling. Even at the time of the repeal of the Chinese Exclusion Act in 1943, President Roosevelt expressed doubts over whether the Act was consistent with constitutional principles. In an address before Congress, he described the Act as an "anachronism[] in our law," a "mistake," and an "injustice" that was "long overdue" for correction.[238]

Fast forward to the twenty-first century. Presidential statements about *The Chinese Exclusion Case* or plenary power in general demonstrate significant doubts about the case's viability today. President Obama referred to the Chinese Exclusion Act as part of a "long history of injustice" and celebrated the Act's repeal in proclamations related to the celebration of Asian American and Pacific Islander Heritage Month.[239]

Most interesting, perhaps, are President Trump's statements and actions leading up to his signing of the executive order banning immigration from five predominantly Muslim countries.[240] During his campaign for the presidency, then-candidate Trump promised to ban the entry of Muslims.[241] His issued order, however, did not refer to any faith or religion, but rather to specific coun-

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2004 WL 1080689; Brief for the Respondent at 15, 16, 23, *id.* (No. 03-7473); Brief for the Respondent at 24, Nguyen v. INS, 533 U.S. 53 (2001) (No. 99-2071).

[236] *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[237] *Id.* at 2418 (noting that the challenged executive order was "facially neutral toward religion").

[238] President Franklin D. Roosevelt, Message to Congress on Repeal of the Chinese Exclusion Laws (Oct. 11, 1943), https://www.presidency.ucsb.edu/documents/message-congress-repeal-the-chinese-exclusion-laws [https://perma.cc/9LTE-KRAV]; *see also* President Franklin D. Roosevelt, Statement on Signing the Bill to Repeal the Chinese Exclusion Laws (Dec. 17, 1943), https://www.presidency.ucsb.edu/documents/statement-signing-the-bill-repeal-the-chinese-exclusion-laws [https://perma.cc/JWE4-YPKU] (discussing the repeal of the Chinese Exclusion Act and noting that the two countries could continue their war effort against Japan free of this "unfortunate barrier").

[239] Proclamation No. 9108, 79 Fed. Reg. 25,641 (May 6, 2014); Proclamation No. 8965, 78 Fed. Reg. 26,211 (May 3, 2013).

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

[241] *See* Epstein & Nicholas, *supra* note 1; Healy & Barbaro, *supra* note 1; Johnson & Weigel, *supra* note 1.

tries.[242] Why did he not specifically refer to Muslim noncitizens in his order? His advisers feared that courts would invalidate the order as unconstitutional. In fact, news outlets reported on a conversation between President Trump and former New York City Mayor Rudy Giuliani in which President Trump said he wanted a "Muslim ban" but he wanted to know how to do it legally.[243] Giuliani explained that advisers intentionally framed the order to target nations that posed national security threats rather than individuals' religious affiliation to pass legal muster.[244]

Giuliani's explanation is significant in light of my prior discussion of plenary power—*The Chinese Exclusion Case* and its progeny, all of which remain on the books today, suggest that the President and/or Congress may indeed have authority to categorially bar entry of noncitizens based on religion. If President Trump and his advisers believed that *The Chinese Exclusion Case* and early plenary power cases were still good law, they likely would not have been concerned over specifically referencing religion. Dark matter, however, informed their decision to avoid the mention of religion.

In light of the relevant actors' behavior in the realm of plenary power, it is inaccurate to describe *The Chinese Exclusion Case* and the virtually limitless depiction of plenary power that it represents as "good law." When actors appear to deliberately shape their behavior to distance themselves from a case, they are responding to dark matter that pulls against the weight of the case. The plenary power doctrine is no longer merely a function of the ordinary matter of law. It is also a function of any dark matter that surrounds it.

C. Why Is The Chinese Exclusion Case *Still on the Books?*

Given the accumulation of dark matter in this area, it is tempting to relegate *The Chinese Exclusion Case* to the "anticanon" of American constitutional law, a collection of now-obsolete cases that serve as cautionary tales in jurisprudence. After all, the two cases that scholars most readily recognize as part

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[242] *See* Exec. Order No. 13,769, § 3(c) (banning immigration based on country of origin, not religion).

[243] Amy B. Wang, *Trump Asked for a 'Muslim Ban,' Giuliani Says—And Ordered a Commission to Do It 'Legally,'* WASH. POST (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.db7a72fc1baf [https://perma.cc/PVB9-L8TQ].

[244] *Id.* Former New York City Mayor Rudy Giuliani stated:

> And what we did was, we focused on, instead of religion, danger—the areas of the world that create danger for us . . . . [w]hich is a factual basis, not a religious basis. Perfectly legal, perfectly sensible. And that's what the ban is based on. It's not based on religion. It's based on places where there are substantial evidence that people are sending terrorists into our country.

Id.

of the anticanon, the Supreme Court's 1896 decision in *Plessy v. Ferguson*[245] and its 1857 decision in *Dred Scott v. Sandford*,[246] espouse repugnant race-based classifications similar to the type upheld in *The Chinese Exclusion Case*. But *The Chinese Exclusion Case* does not fit neatly in the anticanon's curio cabinet of extinct but venomous laws.

Many scholars have discussed the anticanon.[247] Though there is not perfect agreement on all of the cases that make up the anticanon, there is consensus on what the anticanon represents.[248] The anticanon includes cases that are recognized as no longer good law, usually because they have been overturned, but are so fundamentally inimical to a modern understanding of the constitution that we—legal scholars and commentators—cannot look away.[249] We cite

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[245] *See* Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896) (upholding the "separate but equal" doctrine), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[246] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 528–29 (1857) (holding that slaves did not qualify as citizens under the Constitution), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[247] *See* JACK M. BALKIN, LIVING ORIGINALISM 313–14 (2011) (considering famous anticanonical cases and arguing that these decisions are important to the contemporary political discussion); Jack M. Balkin, *"Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 681−82 (2005) (asserting that anticanonical cases exemplify how courts should avoid approaching constitutional interpretation); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018−19 (1998) [hereinafter Balkin & Levinson, *The Canons of Constitutional Law*] (noting that canonical and anticanonical cases continue to shape modern constitutional theory); Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at* Dred Scott, 82 CHI.-KENT. L. REV. 49, 76 (2007) (arguing that it is important to justify why anticanonical cases were wrongly decided as a matter of law); Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1469 n.112 (2000) (originating the term "anti-precedents" for this group of reviled cases); Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1422 n.172, 1439–40, 1443 (2013) (noting that modern courts will sometimes analogize to these cases to develop their constitutional arguments against a particular conclusion); Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253, 255–56, 282 (2016) (classifying anticanonical cases as "constitutional meme[s]" that aid judicial opinion writing); Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 267, 285, 287 (2012) (citing the 1907 Supreme Court case *Lochner v. New York* as the quintessential anticanonical decision); M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 305 n.100 (highlighting the importance of these anticanonical cases' dissenting opinions in shaping future doctrinal changes); Gerard N. Magliocca, *Preemptive Opinions: The Secret History of* Worcester v. Georgia *and* Dred Scott, 63 U. PITT. L. REV. 487, 487–88, 496 n.46 (2002) [hereinafter Magliocca, *Preemptive Opinions*] (noting that shifting attitudes, rather than legal errors, lead some cases to become anticanonical); Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 927–29 (2003) (linking the development of Section I of the Fourteenth Amendment and the anticanonical 1857 Supreme Court *Dred Scott v. Sandford* decision). Some scholars have referred to these same cases as "anti-precedents." *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381, 388, 390, 396, 403, 427, 466, 470 n.583 (2011) [hereinafter Greene, *Anticanon*] (employing the term "antiprecedent" as a substitute for anticanon); Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 UTAH L. REV. 319, 389 (same).

[248] *See* Greene, *Anticanon*, *supra* note 247, at 388–90 (arguing that there is consensus on only four cases—*Dred Scott*, the Supreme Court's 1896 opinion *Plessy v. Ferguson*, *Lochner*, and the Supreme Court's 1944 case *Korematsu v. United States*).

[249] *See id.* at 386–87.

to them as examples of how a legal system can go awry.[250] Professor Jamal Greene argues that cases in the anticanon have three features, one of which requires that a case be overturned to be anticanonical.[251]

The Chinese Exclusion Case is firmly outside the ambit of the anticanon, although it wields much less influence than it once did. Anticanon cases occupy pages in law reviews, not as legitimate sources of law, but as artifacts of a darker time.[252] In contrast, textbooks cite *The Chinese Exclusion Case* as the foundation of immigration law rather than a ghost of past law.[253] In law reviews, the case elicits criticism and calls for its overturning rather than reflections on its historical significance.[254] Anticanon cases are recognized as bad law; in fact, when the Supreme Court cites them, it does so negatively.[255] The Court no longer cites *The Chinese Exclusion Case*, and its most recent citation twenty years ago in *Zadvydas* was a positive citation for a proposition that is in tension with *The Chinese Exclusion Case*'s very holding.[256] The Supreme

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[250] *See id.* at 387; Magliocca, *Preemptive Opinions*, *supra* note 247, at 487.

[251] Greene, *Anticanon*, *supra* note 247, at 384.

[252] *See id.* at 386–87.

[253] *See, e.g.*, T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 151–59 (8th ed. 2016) (including *The Chinese Exclusion Case* in the "Foundations of Immigration Law" chapter); STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 108 (4th ed. 2005) (introducing *The Chinese Exclusion Case* as "the granddaddy of all immigration cases—an early decision that continues to influence the law today"); ARNOLD H. LEIBOWITZ, IMMIGRATION LAW AND REFUGEE POLICY § 1.03 (1983). For an interesting discussion on why *The Chinese Exclusion Case* and the Supreme Court's 1893 decision in *Fong Yue Ting v. United States* are "notably absent from the legal curriculum" and how this represents a failure to come to terms with the United States' history of racism, see Janel Thamkul, Comment, *The Plenary Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 CALIF. L. REV. 553, 555 (2008).

[254] *See, e.g.*, Cleveland, *supra* note 75, at 126−27 (stating that the Court's arguments in *The Chinese Exclusion Case* were "flawed in a number of respects"); Louis Henkin*, The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 862 (1987) ("As a blanket exemption of immigration laws from constitutional limitations, [*The*] *Chinese Exclusion* [*Case*] is a 'relic from a different era.' That era was one in which constitutional restraints were deemed inapplicable to actions by the United States outside its territory . . . . It was an era before United States commitment to international human rights; before enlightenment in and out of the United States brought an end both to official racial discrimination at home and to national-origins immigration laws . . . ." (quoting Reid v. Covert, 354 U.S. 1, 12 (1957))); Berta Esperanza Hernández-Truyol, *Nativism, Terrorism, and Human Rights: The Global Wrongs of* Reno v. American-Arab Anti-discrimination Committee, 31 COLUM. HUM. RTS. L. REV. 521, 542–43 (2000) ("On the basis of stereotypes, xenophobia, paranoia, and racism [*The Chinese Exclusion Case*] endorses the transmogrification of the plaintiffs into terrorists because of their beliefs, thoughts, and associations. Because of who they are, plaintiffs have no rights to free speech or association, which are well established constitutional and international human rights.").

[255] Greene, *Anticanon*, *supra* note 247, at 397–98.

[256] *See supra* Part III.B.2.

Court has legally repudiated anticanon cases.[257] *The Chinese Exclusion Case* has escaped legal elimination.[258]

Rather, *The Chinese Exclusion Case*—and the principle it stands for—is in a state of suspended animation. It is, to put it in more vivid terms, in deep freeze under a layer of permafrost. As such, *The Chinese Exclusion Case* is unlikely to exert much influence on the modern development of the law. Ironically, though, the very permafrost that insulates the law from *The Chinese Exclusion Case*'s influence also insulates the case itself from reexamination. Unless a legal actor attempts to exhume and defrost it, *The Chinese Exclusion Case* may never see the light of day. *The Chinese Exclusion Case*'s persistence "on the books" despite actors' mistrust of its validity provides an interesting case study of the conditions under which dark matter is likely to accumulate. Here, dark matter operates to counteract *The Chinese Exclusion Case*'s holding. To mix metaphors, dark matter has slowly frozen the case and accumulated over the top of it.

So what makes a case susceptible to this deep freeze? What factors lead to the accumulation of dark matter to counteract and yet preserve a case's holding? *The Chinese Exclusion Case*'s state of suspended animation is a function of three factors. Subsection 1 discusses the case's foundational role in the field of immigration law.[259] Subsection 2 addresses its consistency with then-accepted cultural and legal norms.[260] Subsection 3 focuses on the large gaps in time between instances of Court re-evaluation. [261]

1. Foundational Role

The Chinese Exclusion Case is more than an outdated expression of xenophobia and racism, though it is indeed that. The case plays an important foundational role in immigration law because it established the federal government's authority to regulate immigration law to the exclusion of any state efforts in that field. [262] Moreover, in its opinion, the Court anchored the power to regulate immigration law to pre-constitutional sovereignty rather than to a specific text in the Constitution.[263] In essence, then, *The Chinese Exclusion*

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[257] *See, e.g.*, Case, *supra* note 247, at 1469 n.112 (noting that the modern Court employs antiprecedent as a tool of persuasion to show how the opposing view would be consistent with those anticanonical decisions); Greene, *Anticanon*, *supra* note 247, at 396 (noting that anticanonical cases are decisions that the legal community—including scholars and Supreme Court Justices— rejects as bad law).

[258] *See supra* Parts III.A, B.

[259] *See infra* Part III.C.1.

[260] *See infra* Part III.C.2.

[261] *See infra* Part III.C.3.

[262] Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889).

[263] *Id.*

Case is the written expression of law upon which all of immigration law rests. There is no constitutional anchor separate from the case.

Accordingly, overturning *The Chinese Exclusion Case* would call into question the origin of Congress's authority and undermine the established understanding of immigration law. Although this is certainly something the Supreme Court could do, the Court is unlikely to do so even if it has the choice. Dark matter gives the Court an option: instead of overturning a foundational case, the Court can simply rely on dark matter to constrain behavior.

2. Consistency with Then-Contemporary Cultural and Legal Norms

The norms in place when the Court decided *The Chinese Exclusion Case* also play a role. Overturning a case is easiest when the case can be accurately described as wrongly decided in the first place. If a case is clearly consistent with the cultural and legal norms of its time, overturning the case requires recognition that the law has changed. The risk of recognizing a change in the law is heightened when the case at issue plays a foundational role in an area of law, as described above. In addition, a case consistent with extant norms is more likely to be repeatedly cited over time in ways that incrementally ignore the repugnant aspects of the case while preserving core concepts.[264] *The Chinese Exclusion Case* was consistent with the legal norms of the time—as Professor Chin has described in his scholarship, Asians experienced discriminatory laws and treatment across all areas of the law during the era of Chinese exclusion.[265]

Professor Greene has recognized this factor—a case being consistent with the legal and cultural norms of its time—as one characteristic of the anticanon of American jurisprudence.[266] The anticanon cases are no longer good law but are repeatedly cited as counter-examples and comparison cases throughout legal commentary and in modern Supreme Court opinions.[267] One way to think of dark matter, then, is as the substance that ultimately results in a case's relegation to the anticanon. *The Chinese Exclusion Case* may never be overturned and thereby become a part of the anticanon because dark matter has already

[264] *See supra* Part III.B.2.

[265] *See* Chin, *supra* note 63, at 285 (predicting that the "next decades will bring new threats that are perceived by some to be as serious as the Yellow Peril of the 1880s and the Red Menace of the 1950s" and prompt attempts to pass exclusionary immigration regulations); Chin, *supra* note 12, at 22–36; Wendy L. Rouse, *Between Two Worlds: Chinese Immigrant Children and the Production of Knowledge in the Era of Chinese Exclusion*, 3 KNOW: J. ON THE FORMATION KNOWLEDGE 263, 264 (2019) (noting that Chinese immigrants "faced substantial barriers to entry" to the United States during the Exclusion era).

[266] Greene, *Anticanon*, supra note 247, at 384 (contending that "traditional modes of legal analysis arguably support the results in anticanon cases").

[267] *Id.* at 383.

changed behavior sufficiently to undermine the necessity of overturning the case itself.

3. Passage of Time

The longer a case remains on the books, the longer it is likely to remain on the books. Dark matter has a reinforcing effect after a certain tipping point. If dark matter doesn't result in a case being overturned, then it simply obscures the case and undermines its validity until it quietly fades away. This is why the chances of *The Chinese Exclusion Case* being overturned are slim. It would take a highly aberrational law or executive order to provide the impetus for overturning the case. Congress and the President are unlikely to enact or announce such a law, although the travel ban—and the resulting 2018 Supreme Court opinion in *Trump v. Hawaii*—comes as close as we have seen in decades.[268]

IV. Dark Matter Outside the Plenary Power Universe

My discussion of dark matter and its interaction with the ordinary matter of law may seem, so far, quite particular to *The Chinese Exclusion Case* and immigration law's plenary power doctrine. That context admittedly gave rise to my thesis that informal norms could significantly weaken formal norms while simultaneously insulating those formal norms from modification or rescission. This phenomenon, however, is neither unique to constitutional immigration law nor to areas of law that are governed primarily by case law. It is not even unique to areas of law governed by public law. Dark matter norms can arise in any area of law to weaken and displace the ordinary matter of law.

To limit the scope of my paper, I do not catalog every potential example or type of example of this phenomenon. Instead, I focus here on two additional case studies, both of them based on Supreme Court decisions.[269] These examples illustrate the operation of the three factors discussed in Part III.C in two new contexts.

The first case study, outlined in Part IV.A, highlights the 1944 opinion in *Korematsu v. United States*, in which the Supreme Court upheld an executive order that Japanese Americans be removed from their homes and housed in internment camps during World War II.[270] Like *The Chinese Exclusion Case*, *Korematsu*'s reputation is, at best, tainted. Scholars have thoroughly rejected and criticized the case.[271] Until the 2018 Supreme Court decision in *Trump v. Hawaii*, *Korematsu* was on a trajectory similar to that of *The Chinese Exclusion Case*. In *Trump v. Hawaii*, however, the Supreme Court suggested that

[268] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).
[269] *See infra* Parts IV.A, B.
[270] 323 U.S. 214 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392.
[271] *See infra* note 291 and accompanying text.

Korematsu is no longer good law.[272] Chief Justice Roberts explicitly rejected *Korematsu* in his opinion even though it was unrelated to the Trump executive order at issue, and therefore may have been purposefully avoiding the very issue he saw looming in *Trump v. Hawaii*: how could the Court reject and repudiate ordinary matter that is insulated by dark matter norms before that ordinary matter is invoked and revived? Without Chief Justice Roberts's express repudiation that moved the case towards the anticanon, *Korematsu* had all the markings of a precedent that would remain insulated from review for the long term as described in Part III.C.[273] *Korematsu*'s relative youth, as compared to *The Chinese Exclusion Case*, and its less significant foundational role, likely explain the diverging trajectory.

My second case study highlights ordinary matter that, while insulated by dark matter from review, is unlikely to be revived or invoked in a way that is in tension with the dark matter that surrounds it. In the much-reviled 1927 opinion of *Buck v. Bell*, the Supreme Court upheld the forced sterilization of a woman.[274] The case has never been overturned. In contrast to *The Chinese Exclusion Case* and *Korematsu*, *Buck* is missing some of the hallmarks that I described in Part III.C.[275]

Besides further illustrating the way dark matter may or may not insulate ordinary matter's staying power, these case studies also usefully illustrate different legal actors' responsiveness to dark matter, which sets the stage for Part V of this Article. I begin with *Korematsu* in Section A,[276] and *Buck* follows in Section B.[277]

A. Korematsu v. United States

Korematsu needs no introduction.[278] Lawyers and law students recognize *Korematsu* as a stain on American history. It was the lever that allowed the U.S. government to intern Japanese Americans in "Relocation Centers" far from their homes based on nothing more than their race.[279] Like *The Chinese*

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[272] *Trump v. Hawaii*, 138 S. Ct. at 2423 ("*Korematsu* has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority.").

[273] *See supra* Part III.C.

[274] 274 U.S. 200, 207 (1927).

[275] *See supra* Part III.C.

[276] *See infra* Part IV.A.

[277] *See infra* Part IV.B.

[278] 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[279] *Id.* at 221; *see also* Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 946 (2004) (noting that the Supreme Court's reasoning in *Korematsu* "conforms to what we now call racial profiling"); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 503–04 (1945) (arguing that the Court in *Korematsu* "solemnly accepted and gave the prestige of its support to dangerous racial myths about a minority group"); Susan Kiyomi Serrano & Dale Minami, Korematsu v. United States*: A "Constant Caution" in a Time of Crisis*, 10

Exclusion Case, *Korematsu* has lurked under the surface of a heavy layer of dark matter. Unlike *The Chinese Exclusion Case*, though, the Supreme Court recently seized an opportunity to discredit it following decades of silence. *Korematsu*'s trajectory illustrates the difficulty of revisiting ordinary matter that no longer serves as the primary constraint on behavior, as well as the risk of that ordinary matter resurfacing.

In 1942, Fred Toyasaburo Korematsu was arrested and convicted for failure to comply with an order to leave his home, as required by an "Exclusion Order" authorizing the Secretary of War to remove people of Japanese ancestry from designated military areas.[280] The Supreme Court upheld Korematsu's conviction.[281] In doing so, the Court found that the executive order at issue, though "immediately suspect" because it "curtail[ed] the civil rights of a single racial group," was nonetheless within the war powers of Congress and the Executive war powers.[282]

The decision quickly slid into the background as dark matter accumulated around it. Subsection 1 below discusses the dark matter around the *Korematsu* decision.[283] Subsection 2 explores the divergent paths of *Korematsu* and *The Chinese Exclusion Case*.[284]

1. Dark Matter Surrounding *Korematsu*

Since the Supreme Court's 1944 opinion, *Korematsu* has been almost universally deserted by scholars, commentators, and legal actors alike. This

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ASIAN L.J. 37, 41 (2003) (acknowledging that the *Korematsu* Court has been "intensely criticized for . . . [it's] embrace of racial stereotypes about Japanese Americans").

[280] *Korematsu*, 323 U.S. at 215.

[281] *Id.* at 217–18. Interestingly, Justice Jackson, who dissented, suggested that perhaps the Court should have remained deliberately silent on Japanese internment to avoid creating precedent: "A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution." *Id.* at 246 (Jackson, J., dissenting). Of course, it may be that silence would have been just as loud and damaging as the majority's election to uphold Japanese internment. *See* Tribe, *supra* note 162, at 65 ("Silences, whether in the Constitution itself or in authoritative judicial pronouncements about what the Constitution requires, allows, or forbids, cannot be meaningfully evaluated without comparing them to the array of alternatives—comparing them to the background of soundings that those silences interrupt or replace.").

[282] *Korematsu*, 323 U.S. at 216. Though *Korematsu* is often thought of as upholding the entire relocation program for Americans of Japanese ancestry, *Korematsu*'s holding was limited to the order to leave certain areas. Because Fred Korematsu was convicted only for disobeying the Exclusion Order, and not for refusing to report to a Relocation Center, the Court declined to address the constitutionality of Assembly and Relocation Centers, and limited its holding to the validity of the 1942 Congressional Act and Subsequent Executive and Exclusion Order. Of course, the core issue—whether rights could be curtailed based on race—would have been the same regardless of which part of the government's relocation plan had been at issue. Every piece was explicitly based on race and ethnic origin.

[283] *See infra* Part IV.1.

[284] *See infra* Part IV.2.

evidences significant dark matter pulling against *Korematsu*'s weight. Here, I focus on the three branches of the federal government to illustrate the existence of dark matter that conflicts with the holding of *Korematsu*, beginning in subsection a with Congress.[285] Subsection b discusses the Supreme Court,[286] and subsection c examines the executive.[287]

a. Congress

Congress has repeatedly indicated its rejection of *Korematsu*. Less than ten years after Korematsu brought his case to the Supreme Court, Congress passed an Act to compensate Japanese American government employees who had received pay cuts or demotions during the internment era.[288] In 1988, Congress passed an act formally apologizing for the internment of Japanese Americans.[289] The Act pardoned individuals who, like Korematsu, had violated the executive orders.[290] Moreover, it provided twenty thousand dollars as compensation to each Japanese American who had been interned (or their surviving immediate family members)[291] and allocated funds for research and educational programs about Japanese American evacuation, relocation, and internment.[292] Lastly, the Act made documents relating to Japanese American internment publicly available.[293]

More recently, Congress passed several acts and resolutions to memorialize Japanese American relocation and internment. For example, in 2004, the House addressed a resolution to acknowledge a "National Day of Remembrance" of those interned during World War II.[294] In 2005, the Senate passed a resolution honoring Fred Korematsu[295] and Congress passed a bill to preserve "the historic confinement sites," or relocation centers, where Japanese Ameri-

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[285] *See infra* Part IV.1.a.

[286] *See infra* Part IV.1.b.

[287] *See infra* Part IV.1.c.

[288] Act of July 15, 1952, ch.755, 66 Stat. 634. The Act "provide[d] benefits for certain Federal employees of Japanese ancestry who lost certain rights with respect to grade, time in grade, and rate in compensation by reason of any policy or program of the Federal Government with respect to persons of Japanese ancestry during World War II." *Id.*

[289] Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. §§ 1989b-1–1989b-9 (1988) (current version at 52 U.S.C. §§ 4211–4220)). It "acknowledge[d] the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II." *Id.*

[290] 50 U.S.C. § 1989b-1.

[291] *Id.* § 1989b-4.

[292] *Id.* § 1989b-5.

[293] *Id.* § 1989b-6.

[294] *See* H.R. REP. NO. 108-410 (2004).

[295] S. Res. 126, 109th Cong. (2005) (entitled "Honoring Fred T. Korematsu for His Loyalty and Patriotism to the United States and Expressing Condolences to His Family, Friends, and Supporters on His Death").

cans were sent during WWII.[296] In 2016, a Senate resolution resolved to remember the lessons learned from *Korematsu*.[297] Finally, in 2017, both the Senate and the House passed resolutions acknowledging January 30 as "Fred Korematsu Day of Civil Liberties and the Constitution."[298]

b. The Supreme Court

The strongest judicial repudiation of *Korematsu* is embodied in Chief Justice Roberts's opinion in *Trump v. Hawaii*, and so I begin there. Chief Justice Roberts wrote:

> Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.
>
> The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—"has no place in law under the Constitution."[299]

Chief Justice Roberts's passage was the culmination of decades of Supreme Court discomfort and reimagining of *Korematsu*. In the seventy-five

[296] 151 CONG. REC. H10321–26 (daily ed. Nov. 16, 2005).

[297] 162 CONG. REC. S1001–03 (daily ed. Feb. 24, 2016).

[298] H.R. Res. 144, 115th Cong. (2017) ("[r]ecognizing the importance of establishing a national 'Fred Korematsu Day of Civil Liberties and the Constitution'"); S. Res. 38, 115th Cong. (2017) ("[r]ecognizing January 30, 2017, as 'Fred Korematsu Day of Civil Liberties and the Constitution'").

[299] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (quoting Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392). For how the dissent raised *Korematsu*, see *id.* at 2447–48 (Sotomayor, J., dissenting). The dissent compares *Trump v. Hawaii* to *Korematsu* first by claiming that the executive order is both rooted in stereotypes and hiding information from the public. *Id.* at 2447. It then claims that the Court is using the same arguments (national security) that it did in *Korematsu* to continue to sanction "gravely wrong" practices. *Id.*

years since the *Korematsu* decision, only twenty-four Supreme Court majority opinions have cited the majority opinion in *Korematsu*.[300]

The Court has instead relied on *Korematsu*, rather counterintuitively, as a standard for *protection* of minority groups. Most of the Court's citations to *Korematsu* cite it as precedent for the proposition that national origin and race-based classifications are subject to strict scrutiny.[301] In much the same way that *The Chinese Exclusion Case* was most recently cited in a Supreme Court opinion for a proposition that is almost diametrically opposed to its overall holding and significance, *Korematsu* has been reimagined and re-molded to be consistent with the dark matter that has accumulated around it.

This rejection and reimaging of *Korematsu* has occurred despite repeated efforts to use *Korematsu* to justify government action. The government has cited *Korematsu* in its briefs before the Supreme Court at least forty times.[302]

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[300] *See Trump v. Hawaii*, 138 S. Ct. at 2423; Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (plurality opinion); Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990), *overruled by Pena*, 515 U.S. 200; City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); McCleskey v. Kemp, 481 U.S. 279 (1987); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Mathews v. Lucas, 427 U.S. 495 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); Lindsey v. Normet, 405 U.S. 56 (1972); Graham v. Richardson, 403 U.S. 365 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974); Hunter v. Erickson, 393 U.S. 385 (1969); Loving v. Virginia, 388 U.S. 1 (1967); Zemel v. Rusk, 381 U.S. 1 (1965); McLaughlin v. Florida, 379 U.S. 184 (1964); Kent v. Dulles, 357 U.S. 116 (1958); Bolling v. Sharpe, 347 U.S. 497 (1954); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Lichter v. United States, 334 U.S. 742 (1948); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Hurd v. Hodge, 334 U.S. 24 (1948); Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948).

[301] *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Grutter v. Bollinger, 539 U.S. 306, 351–52 (2003) (Thomas, J., concurring in part and dissenting in part); Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 n.8 (1985) (Brennan, J., dissenting); Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring); *Bakke*, 438 U.S. 265; *Mathews*, 427 U.S. 495; *Frontiero*, 411 U.S. 677; *Lindsey*, 405 U.S. 56; *Richardson*, 403 U.S. 365; *Shapiro*, 394 U.S. 618; *Hunter*, 393 U.S. 385; *Loving*, 388 U.S. 1; *McLaughlin*, 379 U.S. 184; *Bolling*, 347 U.S. 497; *Hurd*, 334 U.S. 24.

[302] *See* Reply Brief for the Petitioners at 13, Ashcroft v. Abbasi, 137 S. Ct. 1843 (2017) (No. 15-1359), 2017 WL 117334; Reply Brief for the Petitioners at 7, Ashcroft v. Turkmen, 137 S. Ct. 293 (2016) (No. 15-1359), 2016 WL 4487705; Reply Brief for Petitioners Dennis Hasty and James Sherman at 10, *Abbasi*, 137 S. Ct. 1843 (No. 15-1363), 2017 WL 167314; Brief Amicus Curiae of U.S. Senator Arlen Specter in Support of Petitioners at 10, Boumediene v. Bush, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196), 2007 WL 2441578; Brief for the Respondents in Opposition at 38, *Hamdi*, 542 U.S. 507 (2004) (No. 03-6696), 2003 WL 23189498; Brief of the United States as Amicus Curiae Supporting Petitioner at 13, *Metro Broad., Inc.*, 497 U.S. 547 (No. 89-453), 1989 WL 1126975; Brief for the United States *passim*, United States v. Hohri, 482 U.S. 64 (1987) (No. 86-510), 1987 WL 880429 (citing to *Korematsu* while defending against a civil suit brought by nineteen former Japanese internees); Reply Brief for the United States *passim*, *Hohri*, 482 U.S. 64 (No. 86-510), 1987 WL 880442; Reply Brief for the United States at 9, 13 n.10, United States v. Salerno, 481 U.S. 739 (1987) (No. 86-87), 1987 WL 880539; Brief for the United States at 17, *Salerno*, 481 U.S. 739 (No. 86-87), 1986 WL 727530; Brief for the Respondents at 33 n.15, Jean v. Nelson, 472 U.S. 846 (1985) (No. 84-5240), 1985 WL 670051; Appellee's Brief on the Merits at 36 n.17, Murphy v. Hunt, 455 U.S. 478 (1982) (No. 80-2165), 1981 WL 390301; Brief for the Petitioner at 18, 27 n.20, Haig v. Agee, 453

The Court cited *Korematsu* in its majority opinion in only nine of those cases.[303] Only one of those, the Court's 1952 case of *Harisiades v. Shaughnessy*,

U.S. 280 (1981) (No. 80-83), 1980 WL 339656 (citing to *Korematsu* to support the proposition that wartime exigencies can prompt restrictions on liberty that would be impermissible in peacetime); Brief for the Petitioner at 18, 27 n.20, Muskie v. Agee, 449 U.S. 818 (1980) (No. 80-83), 1980 WL 339656; Brief for the United States at 19 n.28, United States v. Truong Dinh Hung, 667 F.2d 1105 (4th Cir. 1981) (Nos. 76-5176, 78-5177), 1979 WL 212414; Brief for the Petitioners at 31 n.31, Kissinger v. Halperin, 452 U.S. 713 (1981) (No. 79-880), 1980 WL 339266; Brief for Respondents at 48 n.194, United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979) (Nos. 78-432, 78-435, 78-436), 1979 WL 199727; Brief for Respondent at 55 n.52, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187993; Brief for the United States at 24, Beer v. United States, 425 U.S. 130 (1976) (No. 73-1869), 1975 WL 173739; Brief for the United States at 20, Keeble v. United States, 412 U.S. 205 (1973) (No. 72-5323), 1973 WL 172344; Brief for the Appellees at 15 n.11, 18 n.14, *Frontiero*, 411 U.S. 677 (1973) (No. 71-1694), 1972 WL 137566; Brief for the United States at 30 n.48, United States v. Scotland Neck City Bd. Of Educ., 407 U.S. 484 (1972) (Nos. 70-130, 70-187), 1971 WL 133501 (citing to *Korematsu* to contend that state governments must satisfy a heavy burden to justify state action that is based on a suspect classification); Brief for the Respondent at 191, Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1 (1961) (No. 12), 1960 WL 98819; Brief for the United States at 39, Gore v. United States, 357 U.S. 386 (1958) (No. 668), 1958 WL 91915; Brief for the Respondent at 35, Dayton v. Dulles, 357 U.S. 144 (1958) (No. 621), 1958 WL 92037; Brief for the United States at 40, Heikkinen v. United States, 355 U.S. 273 (1958) (No. 89), 1957 WL 87075; Brief for the United States at 29, Prince v. United States, 352 U.S. 322 (1957) (No. 132), 1956 WL 89217; Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument at 23–24, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Nos. 1, 2, 3, 5), 1953 WL 48699; Brief for the Appellee at 64, 74 n.38, Int'l Longshoremen's & Warehousemen's Union, Local 37 v. Boyd, 347 U.S. 222 (1954) (No. 195), 1954 WL 73405; Supplemental Brief for the United States on Reargument at 140, *Brown*, 347 U.S. 483 (No. 1), 1953 WL 78291; Brief for the Respondent Shaughnessy at 10, 38, Chew v. Colding, 344 U.S. 590 (1953) (No. 17), 1952 WL 82372; Brief for the United States at 35, United States v. Carroll, 345 U.S. 457 (1953) (No. 442), 1953 WL 78383; Brief for Respondents at 21–22, *Bolling*, 347 U.S. 497 (No. 8), 1952 WL 47280; Brief for the United States at 23 n.8, United States v. Caltex (Phil.), Inc., 344 U.S. 149 (1952) (No. 16), 1952 WL 82369 (citing *Korematsu* in support of the statement that the Supreme Court had previously upheld substantial restrictions on the liberty of American citizens); Brief for the United States at 93, *Harisiades*, 342 U.S. 580 (Nos. 43, 206, 264), 1951 WL 81966; Brief for the United States at 232–33, Dennis v. United States, 341 U.S. 494 (1951) (No. 336), 1950 WL 78653; Brief for Appellee at 14, 64, 97, 100, Am. Commc'ns Ass'n v. Douds, 339 U.S. 382 (1950) (Nos. 10, 13), 1949 WL 50660; Brief for Respondents at 21, *Takahashi*, 334 U.S. 410 (1948) (No. 533), 1948 WL 47430; Consolidated Brief for Petitioners at 117, *Hurd*, 334 U.S. 24 (1948) (Nos. 290, 291), 1947 WL 44429; Consolidated Reply Brief for Petitioners at 16 n.17, *Hurd*, 334 U.S. 24 (1948) (Nos. 290, 291), 1948 WL 47573; Brief for the United States at 59, Duncan v. Kahanamoku, 327 U.S. 304 (1946) (Nos. 14, 15), 1945 WL 48869; Brief for the United States at 40, Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) (Nos. 78-160, 78-161), 1979 WL 199253; Brief for the Appellant at 47, Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (Nos. 2, 3), 1961 WL 101711.

[303] *See Trump v. Hawaii*, 138 S. Ct. at 2423; *Hamdi*, 542 U.S. at 2650 (citing to Justice Murphy's dissent in *Korematsu*, which argued that courts have the authority to review military decisions to see if the armed forces overstepped their discretion); *Metro Broad., Inc.*, 497 U.S. at 564 n.12 (disputing Justice Kennedy's invocation of *Korematsu* as an example of "benign" suspect classifications); *Bakke*, 438 U.S. at 287, 291–92, 299 (citing to *Korematsu* to contend that not all suspect classifications are unconstitutional, but that courts must subject them to stringent judicial scrutiny); *Frontiero*, 411 U.S. at 682 n.9 (citing to *Korematsu* to note that suspect classifications are subject to judicial scrutiny); *Bolling*, 357 U.S. at 499 n.3; *Harisiades*, 342 U.S. at 589 n.16, 520 n.17; *Takahashi*, 344 U.S. at 413, 418; *Hurd*, 334 U.S. at 30.

like *Korematsu*, was decided in the government's favor.[304] In dozens of additional cases before the Court, the preceding courts of appeals opinions cited *Korematsu*,[305] with only a handful of the subsequent Supreme Court opinions including the citation.[306]

Even when the Court has issued opinions that uphold government action, the Court has gone to great lengths to avoid citing *Korematsu*. In *Trump v. Hawaii*, the very same opinion in which he unequivocally rejected *Korematsu*, Chief Justice Roberts relied on *Harisiades*, one of only two cases to cite *Korematsu* for expansion of federal power.[307] The principles from *Harisiades* that Chief Justice Roberts relied on to uphold President Trump's executive order come from *Korematsu*.[308] In other words, Chief Justice Roberts utilized tenets that came out of *Korematsu*, but he chose to cite an indirect precedent instead.

Dissenting Justices have been increasingly reluctant to rely on *Korematsu* for expanding federal power. In two early cases where the majority held for non-governmental parties, dissenting Justices Clark and Jackson cited *Korematsu* in their arguments that military and defense establishments are rarely, if ever, subject to judicial review.[309] Since 1961, however, even dissenting opinions have stopped citing *Korematsu* as a standard for expanded federal power. Instead, one dissenting opinion recognized and gave a nod to the dark matter surrounding *Korematsu*. In 1993, in *Reno v. Flores*, Justice Stevens, in dissent, wrote that although the majority's opinion in favor of the attorney general was

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[304] *See* 342 U.S. 580, 592 (1952).

[305] *See, e.g.*, Ledezma-Cosino v. Sessions, 857 F.3d 1042, 1050 n.2 (9th Cir. 2017) (Kozinski, J., concurring) (noting that the Supreme Court first announced the strict scrutiny standard in *Korematsu*); Kosilek v. Spencer, 774 F.3d 63, 113 (1st Cir. 2014) (en banc) (Thompson, J., dissenting) (contending that the majority upholding the Department of Correction's denial of gender reassignment surgery would one day be viewed like *Korematsu* and other notorious decisions); Jacobs v. Barr, 959 F.2d 313, 315 (D.C. Cir. 1992) (citing to *Korematsu* and noting that Fred Korematsu and others had their convictions for violating internment orders vacated after it later emerged that the government had "misrepresented and suppressed evidence" that would demonstrate that racial animus, not military necessity, spurred the internments); Prostrollo v. Univ. of S.D., 507 F.2d 775, 781 (8th Cir. 1974) (citing to *Korematsu* as an example of national origin being a suspect classification).

[306] *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013); *Seattle Sch. Dist, No. 1*, 551 U.S. 701; Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (plurality opinion); Goldman v. Weinberger, 475 U.S. 503 (1986) (Brennan, J., dissenting); *Fullilove*, 448 U.S. 448 (Powell, J., concurring); *Richardson*, 430 U.S. 365; Zemel v. Rusk, 381 U.S. 1 (1965); Lichter v. United States, 334 U.S. 742 (1948).

[307] *Trump v. Hawaii*, 138 S. Ct. at 2418 ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power." (quoting *Harisiades*, 342 U.S. at 588–89) (alterations in original)).

[308] *Harisiades*, 342 U.S. at 588–89 ("It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.").

[309] Greene v. McElroy, 360 U.S. 474, 516 (1959) (Clark, J., dissenting); Terminiello v. City of Chicago, 337 U.S. 1, 34 (1949) (Jackson, J., dissenting).

similar to *Korematsu*, he understood their hesitation about utilizing the case even though it was still on the books.[310] Justice Stevens pointed to a number of factors, including the absence of an ongoing war and Congress's apology for Japanese internment, as explanations for the Court's unwillingness to treat *Korematsu* as good law.[311]

Beyond the Court's express rejection (without formal overturning) of, deliberate silence on, and reimagining of *Korematsu*, there are additional indicators of dark matter within the judiciary. In the twenty-nine Senate confirmation hearings after *Korematsu* that resulted in Supreme Court Justice appointments, no one has expressed affirmative support for Japanese American internment.[312] In many of those hearings, the nominees have instead expressed disdain for the holding of *Korematsu*.[313] They have denounced *Korematsu* by agreeing with statements that *Korematsu* was a "tragic decision,"[314] a "great constitutional traged[y],"[315] "wrongly decided,"[316] and not "applicable precedent for the Court to consider,"[317] and by praising Justice Murphy's dissent in *Korematsu*.[318]

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[310] Reno v. Flores, 507 U.S. 292, 344 n.30 (1993) (Stevens, J., dissenting).

[311] *Id.*

[312] There have been thirty Supreme Court Justices appointed since 1944, but one Justice, Harold Hitz Burton, did not have a Senate hearing. Andrew Glass, *Truman Nominates GOP Senator to Supreme Court, Sept. 18, 1945*, POLITICO (Sept. 18, 2017), https://www.politico.com/story/2017/09/18/truman-nominates-gop-senator-to-supreme-court-sept-18-1945-242739 [https://perma.cc/36HB-P6D7]. He was unanimously confirmed the day after his nomination without a hearing. *Id.*

[313] It is unclear at what point *Korematsu* became the byword for unconstitutional oppression. It seems that it was not considered wrong in the years immediately after it was decided, but it has become tainted over time. In fact, Justice Tom Campbell Clark's former 1942 employment as "Coordinator of Alien Property Control of the Western Defense Command and Chief of Civilian Staff for Japanese War Relocation" did not preclude his confirmation in 1949. *See Nomination of Tom C. Clark, of Texas, to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 81st Cong. 3 (1949) (listing that title under then-Judge Clark's "[e]xperience"). Neither did Justice Earl Warren's position as Attorney General in California during the exclusion of Japanese Americans from the West Coast preclude his confirmation in 1986. David Alan Sklansky, *Japanese Internment Case Not "Good Law,"* STANFORD L. SCH.: LEGAL AGGREGATE (Nov. 18, 2016), https://law.stanford.edu/2016/11/18/korematsu-is-not-good-law/ [https://perma.cc/N88X-WVKH].

[314] *The Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 209–10 (1993).

[315] *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 418 (2006).

[316] *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 117 (2009).

[317] *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 226 (2017).

[318] *Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 225–27 (1994) ("I have rather always admired Justice Murphy's opinion.").

Notably, despite his strong language in *Trump v. Hawaii*, Chief Justice Roberts is the only Supreme Court nominee who hesitated when asked about *Korematsu* during his Senate confirmation hearing. In response to a question about *Korematsu*, he pointed out that it had not "technically been overruled."[319] Perhaps recognizing the tension between existing dark matter and the ordinary matter of the case's holding, he explained, "it's widely recognized as not having precedential value."[320] He further opined that the legal arguments justifying *Korematsu* are impermissible now.[321]

Furthermore, Justice Kavanaugh, whose Senate confirmation hearings occurred after Chief Justice Roberts penned *Trump v. Hawaii*, grappled with the significance of Chief Justice Roberts's rejection of *Korematsu* during his hearings. He explained that the Supreme Court took an opportunity to note that a precedential case was no longer good law, even though *Trump v. Hawaii* did not raise a question that directly implicated *Korematsu*.[322]

c. The President

Relative to Congress and the Supreme Court, U.S. presidents have been more ambivalent toward *Korematsu*. The executive branch relied on the *Korematsu* ruling to justify, for example, presidential power to block Iranian assets or halt transactions with Iranian nationals in 1980.[323] Since President Reagan signed a bill apologizing to Japanese Americans in 1988,[324] however, presidents from both political parties have generally distanced themselves from *Korematsu*. In 1998, President Clinton awarded Fred Korematsu the Presidential Medal of Freedom.[325] On January 17, 2001, President Bush issued a proclamation establishing a monument at the former Minidoka Relocation Center in south central Idaho.[326] In press briefings, President Bush's press representa-

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[319] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 241 (2005).

[320] *Id.*

[321] *Id.*

[322] *Sen. Hirono at Kavanaugh Hearing*, C-SPAN (Sept. 7, 2018), https://www.c-span.org/video/?c4748146/sen-hirono-kavanaugh hearing [https://perma.cc/43BH-VNUF].

[323] Presidential Powers Relating to the Situation in Iran, 4 Op. O.L.C. 115, 115–20 (1979) (addressing potential responses to the seizure of the United States embassy in Tehran).

[324] Katherine Bishop, *Day of Apology and 'Sigh of Relief,'* N.Y. TIMES (Aug. 11, 1988), http://www.nytimes.com/1988/08/11/us/day-of-apology-and-sigh-of-relief.html [https://perma.cc/528H-GMVS] (describing "President Reagan's signing of legislation that provides for payments and apologies to Japanese-Americans who were forcibly relocated in World War II").

[325] *Fred Korematsu Awarded Presidential Medal of Freedom*, C-SPAN (Mar. 14, 2017), https://www.c-span.org/video/?c4660995/fred-korematsu-awarded-presidential-medal-freedom [https://perma.cc/A9J7-M7CQ] (providing video clip of Bill Clinton at the *Presidential Medal of Freedom Awards* on January 15, 1998).

[326] Proclamation No. 7395, 66 Fed. Reg. 7347 (Jan. 17, 2001) (entitled "Establishment of the Minidoka Internment Monument").

tives repeatedly refused to rely on the *Korematsu* decision to justify executive actions such as a military order establishing parameters for the detention and trials of terrorists, and the treatment of prisoners at Guantanamo Bay, even though *Korematsu* remained on the books.[327] On May 20, 2011, under President Obama's administration, the Solicitor General's office issued a public "confession of error" regarding its involvement in the *Korematsu* decision.[328] The written confession remains on the office's website today.[329]

President Trump took a different approach to *Korematsu*. In defending his originally proposed ban on the entry of Muslims into the United States, he explained, "Take a look at what F.D.R. did many years ago. He did the same thing."[330] This, of course, was likely a reference to Japanese internment. The possibility that an executive—in this case, the President—may be less constrained by dark matter and may revive long-rejected ordinary matter is more fully explored in Part V below.[331] Here, it is enough to note that dark matter is never a guarantee that formal law is no longer relevant, especially when a member of the executive branch is willing to revive that ordinary matter.

2. Twin Trajectories: *Korematsu* and *The Chinese Exclusion Case*

In many ways, *Korematsu* and its subsequent treatment parallels that of *The Chinese Exclusion Case*. Like *The Chinese Exclusion Case*, *Korematsu* is widely rejected. Both cases survived into the twenty-first century without being overturned. *Korematsu*, however, has sustained what is likely a fatal blow. Chief Justice Roberts unequivocally crossed *Korematsu* off the map.[332] Whether *Korematsu* as a formal matter has been eliminated—whether its star, however obscured by dark matter and absent from the map of precedent, has actually disappeared—is debatable.[333] *Korematsu* was, after all, not directly at issue in

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[327] The White House, Press Briefing by Press Secretary Scott McClellan (June 16, 2005), https://georgewbush-whitehouse.archives.gov/news/releases/2005/06/20050616-5.html [https://perma.cc/T6N5-EDY3]; The White House, Press Briefing by Press Secretary Ari Fleischer (Nov. 19, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011119-6.html [https://perma.cc/UPL8-EZ7U].

[328] *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, U.S. DEP'T OF JUST. ARCHIVES (May 20, 2011), https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases [https://perma.cc/T4AP-9AAW]. The public confessional was issued by Neal Katyal, the Acting Solicitor General. *Id.*

[329] *Id.*

[330] Adam Liptak, *Travel Ban Case Is Shadowed by One of Supreme Court's Darkest Moments*, N.Y. TIMES (Apr. 16, 2018), https://www.nytimes.com/2018/04/16/us/politics/travel-ban-japanese-internment-trump-supreme-court.html [https://perma.cc/8CME-4UWJ].

[331] *See infra* Part V.

[332] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (emphasizing that *Korematsu* was an erroneous decision in 1944 and still is today).

[333] Erwin Chemerinsky, Korematsu v. United States*: A Tragedy Hopefully Never to Be Repeated*, 39 PEPP. L. REV. 163, 172 (2011); Greene, *Anticanon*, *supra* note 247, at 422–27, 456–60; Katyal,

Trump v. Hawaii. But any litigator, court, or President who relies on *Korematsu* is extremely unlikely to find support and may instead trigger a swift overturning in the Supreme Court. Why has *Korematsu*'s trajectory led to such a blatant and obvious rejection when *The Chinese Exclusion Case* has escaped mention, and therefore lingers behind dark matter? The answer lies in the differences between the two cases with respect to the factors I identified in Part III.C, and which I discuss in detail below.[334] Subsection a compares the cases' foundational roles. Subsection b assesses the cases' consistency with then-contemporaneous law.[335] Lastly, subsection c analyzes the impact of their age.[336]

a. Foundational Role

The *Korematsu* opinion includes the first articulation of the strict scrutiny standard for constitutional review.[337] The Supreme Court has cited *Korematsu* for this proposition more than seventeen times[338] while noting that *Korematsu* is one of only two cases to have passed the strict scrutiny test.[339] Because it is the

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supra note 35, at 641–56; A. Reid Monroe-Sheridan, *"Frankly Unthinkable": The Constitutional Failings of President Trump's Proposed Muslim Registry*, 70 ME. L. REV. 1, 32 (2017); Serrano & Minami, *supra* note 279, at 47; Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 307.

[334] *See supra* Part III.C.

[335] *See infra* Part IV.A.2.a.

[336] *See infra* Part IV.A.2.b.

[337] Grutter v. Bollinger, 539 U.S. 306, 351 (2003) (Thomas, J., concurring in part and dissenting in part) (noting that the strict-scrutiny test "was first enunciated in *Korematsu*"). In *Korematsu*, Justice Black wrote:

> It should be noted, to begin with, that all legal restrictions which curtail the 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.

Korematsu v. United States, 323 U.S. 214, 216 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018). Compare this to Justice Murphy's dissent characterizing the majority opinion as the "legalization of racism." *Id.* at 242 (Murphy, J., dissenting); Greg Robinson & Toni Robinson, Korematsu *and Beyond: Japanese Americans and the Origins of Strict Scrutiny*, 68 L. & CONTEMP. PROBS. 29, 31 (2005).

[338] *See, e.g.*, *Grutter*, 539 U.S. at 351 (Thomas, J., concurring in part and dissenting in part); Mathews v. Lucas, 427 U.S. 495, 504 n.10 (1976); Frontiero v. Richardson, 411 U.S. 677, 682 n.9 (1973); Graham v. Richardson, 403 U.S. 365, 372 (1971). *But see* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1277 (2007) ("It would surely also be misleading to say that the Court began applying strict scrutiny in *Korematsu*, which upheld a race-based classification based on uncertain evidence, even though *Korematsu* contains language that would later be cited to support the modem form of strict scrutiny review.").

[339] *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 307 (2013); Missouri v. Jenkins, 515 U.S. 70, 121 (1995) (Thomas, J., concurring); Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J. concurring); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 297 n. 37 (1978). In one concurring opinion, Justice Brennan noted that *Korematsu* and the Supreme Court's 1943 decision in *Hira-*

early ancestor of modern strict scrutiny, *Korematsu* was well positioned to play a foundational role in constitutional law. But its role was not as significant as that of *The Chinese Exclusion Case*, which established the federal government's very power to regulate immigration. This difference may help explain the divergence of *Korematsu*'s trajectory and the Court's repudiation of it in *Trump v. Hawaii*.

b. Consistency with Then-Contemporary Cultural and Legal Norms

Scholars have exhaustively analyzed the racism that underlay *Korematsu* and the executive order at issue in the case.[340] That racism was consistent with long time cultural norms that intensified during the World War II era. In 1944, when the Supreme Court decided *Korematsu*, segregation of and discrimination against racial and ethnic minorities was pervasive.[341] After Japan's attack on Pearl Harbor, Japanese Americans became the focus of suspicion and blatant discrimination that manifested itself in art, cartoons, magazine articles, propaganda, exclusions from educational institutions, and violence.[342] The law mirrored these racist attitudes in its intolerance of Asians more generally. It was not until 1943 that Congress ended Chinese exclusion era immigration policies that barred entry into the united States and prohibited naturalization of persons of Chinese ancestry.[343] But existing national origin and race based immigration laws ensured that very few Chinese immigrants could enter even after the repeal of Chinese exclusion laws.[344] It would be decades before the

bayashi v. United States are cases generally thought to establish strict scrutiny. *Bakke*, 438 U.S. at 358 n.34 (Brennan, J., concurring in judgment in part and dissenting in part).

[340] Craig Green, *Ending the* Korematsu *Era: An Early View from the War on Terror Cases*, 105 NW. U. L. REV. 983 (2011) (discussing and cataloguing scholarship that focuses on the impact of race-based discrimination in *Korematsu* and offering an alternative analysis of *Korematsu* that focuses on the then-contemporary view of executive authority rather than race).

[341] *See* Pamela J. Smith, *Our Children's Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children*, 42 HOW. L.J. 133, 166 (1999) (describing attitudes toward segregation in the South during the 1940s); *see also* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 70–73 (1988) (describing World War II segregation in the workplace, the military, housing, and more).

[342] *See, e.g.*, Nancy Brcak & John R. Pavia, *Racism in Japanese and U.S. Wartime Propaganda*, 56 HISTORIAN 671 (1994); Eric Langowski, *Education Denied: Indiana University's Japanese American Ban, 1942 to 1945*, 115 IND. MAG. HIST. 65 (2019); *How to Tell Japs from the Chinese*, LIFE MAG., Dec. 22, 1941, at 81, 81–82; Wang Xiaofei, *Movies Without Mercy: Race, War, and Images of Japanese People in American Films, 1942–1945*, 18 J. AM.-E. ASIAN RELATIONS 11 (2011).

[343] Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

[344] *See id.* The National Origins Act limited immigration from each country based on the percentage of the total U.S. population from that country as of a particular year. This was meant to preserve the mostly white racial makeup of the United States. *See* Immigration Act of 1924, ch. 190, 43 Stat. 153.

quotas, which resulted in very low immigration from China and Asia generally, were replaced by the Immigration and Nationality Act of 1965.[345]

Furthermore, the rationale of protecting the American public from espionage that the Court used to justify detaining Japanese Americans in *Korematsu* was prevalent in American culture during the late 1940s and 1950s as McCarthyism spread across the country.[346] Executive orders and congressional acts to screen communists out of federal employment and to protect the nation from communist conspiracy were in place well into the 1950s.[347]

c. Passage of Time

It is with respect to this factor—the passage of time—that *The Chinese Exclusion Case* and *Korematsu* differ most. *The Chinese Exclusion Case* has lived over 130 years. *Korematsu*, in comparison, is still young, with just seventy-six years on the books. Sixty years ago, when *The Chinese Exclusion Case* was at the same point in its trajectory that *Korematsu* is now, the 1889 Supreme Court case *Chae Chan Ping v. United States* was still being cited positively.[348] *Korematsu*, however, had already begun to make appearances in anticanon lists and to be negatively described in the 1980s and 1990s.[349] *The Chinese Exclusion Case*, in the meantime, was falling off the judicial radar, and the Court's silence with respect to it may have insulated it from ever being reviewed.

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[345] Act of Oct. 3, 1965, Pub. L. No. 89-263, 79 Stat. 911 (codified in scattered sections of 8 U.S.C.).

[346] The beginning of the Cold War brought fear and apprehension about communism. John Glaser & Christopher A. Preble, *High Anxiety: How Washington's Exaggerated Sense of Danger Harms Us All*, CATO INST. (Dec. 10, 2019), https://www.cato.org/study/high-anxiety-how-washingtons-exaggerated-sense-danger-harms-us-all#introduction [https://perma.cc/Z3V5-8QX7].

[347] *See, e.g.*, Communist Control Act of 1954, ch. 886, 68 Stat. 775 (codified at 50 U.S.C. §§ 841–844); Exec. Order No. 9835, 12 Fed. Reg. 1935 (Mar. 21, 1947).

[348] *See, e.g.*, Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 96 (1961) (citing to *The Chinese Exclusion Case* while upholding a mandatory registration requirement for Communist Party members); Bonetti v. Rogers, 356 U.S. 691, 698–99, 699 n.9 (1958) (citing to *The Chinese Exclusion Case* to support the government's ability to exclude "resident alien[s]" who left the country from returning based on past or current Communist Party memberships); Reid v. Covert, 354 U.S. 1, 18 n.34 (1957) (citing to *The Chinese Exclusion Case* to support the proposition that a treaty is entitled to the same weight as federal legislation).

[349] *See, e.g.*, Balkin & Levinson, *The Canons of Constitutional Law*, *supra* note 247, at 1018 (describing *Korematsu* as anticanonical in a 1998 article); Dean Masaru Hashimoto, *The Legacy of* Korematsu v. United States*: A Dangerous Narrative Retold*, 4 UCLA ASIAN PAC. AM. L.J. 72, 77–78 (1996) (noting that "[s]ince the 1980s, various individuals, groups, and courts have pronounced *Korematsu* insignificant . . . . [but] the [Supreme] Court has not explicitly overruled it").

B. Buck v. Bell

In *Buck*, the Supreme Court upheld forced sterilization under Virginia law.[350] This case provides a contrast to *Korematsu* and *The Chinese Exclusion Case*. Like *Korematsu* and *The Chinese Exclusion Case*, *Buck* has been significantly weakened by an accumulation of dark matter. But *Buck* is not likely to be revived or revisited. Unlike the other two cases examined in this Article, *Buck* plays no foundational role in any area of law and was not obviously consistent with contemporaneous legal norms. Here, I very briefly describe the case, reference evidence of the dark matter that surrounds it, and explain the distinction between *Buck*, on the one hand, and *Korematsu* and *The Chinese Exclusion Case*, on the other.[351]

Carrie Buck, whose mother had been committed to an institution for the "feeble minded," had likewise been institutionalized for "feeblemindedness" at the age of seventeen after giving birth to a baby out of wedlock.[352] When social workers examined the baby, named Vivian, they concluded that she too was at risk, noting, "[T]here is a look about it that is not quite normal."[353] Buck was subsequently surgically sterilized, presumably to prevent her from having additional "feebleminded" children.

Buck claimed that this sterilization violated her Fourteenth Amendment right to equal protection and due process, and she took the case to the Supreme Court.[354] In 1927, the Court rejected Buck's argument and upheld the Virginia law.[355] The result of this case is undoubtedly shocking to the modern reader, but Justice Holmes's logic may be more so:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[356]

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[350] Buck v. Bell, 274 U.S. 200 (1927).

[351] *See infra* notes 352–386 and accompanying text.

[352] *Buck*, 274 U.S. at 205. Further research uncovered that Buck was not in fact mentally ill but that she had been raped by her foster parents' nephew. The family put her in the mental institution in order to blame a mental condition instead of taking the fault and accompanying consequences. *See* Alessandra Suuberg, Buck v. Bell*, American Eugenics, and the Bad Man Test: Putting Limits on Newgenics in the 21st Century*, 38 LAW & INEQ.: J. THEORY & PRAC. 115, 121 (2020).

[353] ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 2 (2014); Stephen Jay Gould, *Carrie Buck's Daughter*, 2 CONST. COMMENT. 331, 337 (1985).

[354] *Buck*, 274 U.S. at 205.

[355] *Id.*

[356] *Id.* at 207 (citation omitted).

This case provides an example of dark matter operating outside the immigration context. In subsection 1 below I discuss the dark matter surrounding *Buck*.[357] Subsection 2 compares the way dark matter has played out differently with *Buck* than with *The Chinese Exclusion Case*.[358]

1. Dark Matter Surrounding *Buck v. Bell*

Like *Korematsu* and *The Chinese Exclusion Case*, scholars have universally rejected *Buck*,[359] judges have avoided and reimagined it (as described below), and everyone else has largely forgotten it. But *Buck* has never been formally overturned. Justice Thomas most recently cited *Buck* as a lamentable moment in Supreme Court history in which the Court gave legitimacy to the eugenics movement. He called on the Court to address its history: "Although the Court declines to wade into these issues today, we cannot avoid them forever."[360]

Avoidance is, indeed, a fair characterization of the Court's treatment of *Buck*. As early as 1942, just fifteen years after *Buck* was decided, the Court distanced itself from its own holding. In *Skinner v. Oklahoma*, the Court again addressed the issue of forced sterilization.[361] In this case, the court ruled the forced punitive sterilization of prison inmates unconstitutional while leaving the *Buck* precedent intact.[362] Justice Douglas's opinion uneasily navigated *Buck*—he recognized its existence and its significance while asserting that the case at hand was distinct.[363]

Buck later appeared in Supreme Court opinions during the 1970s as support for more general propositions. In this reimagining, the Court cited *Buck* as an example of a state being able to legally place restrictions on privacy,[364] a state having the interest to protect its citizens,[365] and the changing standard of equal protection.[366]

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[357] *See infra* Part IV.B.1.

[358] *See infra* Part IV.B.2.

[359] *See, e.g.*, Corinna Barrett Lain, *Three Supreme Court "Failures" and a Story of Supreme Court Success*, 69 VAND. L. REV. 1019, 1032 (2016) (emphasizing that the Supreme Court's 1927 decision in *Buck v. Bell* is widely reviled and has been relegated to the Supreme Court "hall of shame"); Victoria Nourse, Buck v. Bell*: A Constitutional Tragedy from a Lost World*, 39 PEPP. L. REV. 101, 102 (2011) (describing the tragic nature of *Buck* and contending that it was not just a morally reprehensible decision, but also was legally erroneous).

[360] Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1793 (2019) (Thomas, J., concurring) (per curiam).

[361] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

[362] *Id.*

[363] *Id.* at 544–45 (distinguishing *Bell* because it involved an inheritable trait, unlike the case at hand).

[364] Roe v. Wade, 410 U.S. 113, 154 (1973).

[365] Doe v. Bolton, 410 U.S. 179, 215 (1973) (Douglas, J., concurring).

[366] Zablocki v. Redhail, 434 U.S. 374, 395 (1978).

The last time the Court cited *Buck* in a majority opinion was in its 2001 case *Board of Trustees of the University of Alabama v. Garrett*.[367] There, the claimants raised challenges to employer conduct under the Americans with Disabilities Act (ADA).[368] The majority merely mentioned *Buck* in a footnote to recognize that the Court had previously held that harsh measures may be legal, but also noted that states no longer use such harsh measures.[369] In many ways, this virtually insignificant footnote evidences the difficulty of addressing ordinary matter that is surrounded by dark matter—*Buck* remains, but the context in which it arose is largely gone.

In 2004, Justice Souter cited *Buck* in his *Tennessee v. Lane* concurring opinion.[370] There, the plaintiffs had alleged a violation of Title II of the ADA because they were denied access to the state courthouse.[371] Justice Souter referred to *Buck* as an unpalatable relic of times past[372] and distinguished the case at hand from *Buck.*[373] Most recently in 2019, Justice Thomas cited *Buck* in a concurrence to a case discussing the possible eugenic uses of abortion.[374] As mentioned above, Justice Thomas did not address the actual issue of whether eugenic abortions were allowed but rather urged the Court to consider the role of eugenics, a subject that it has avoided since *Buck*.[375]

2. *Buck v. Bell*'s Diverging Trajectory

Justice Thomas's statement accurately observes the challenge of overturning precedent that lurks under dark matter. However, *Buck* is less likely than *The Chinese Exclusion Case* and *Korematsu* (before *Trump v. Hawaii*) to resurface in any meaningful way. Unlike *The Chinese Exclusion Case* and *Korematsu*, *Buck* does not have the benefit of playing a foundational role in any area of law.[376] Neither is it obviously in line with the prevailing sentiments and cultural norms of its time.[377] I explore these factors in more detail below. Subsection a discusses *Buck*'s relatively inconsequential role in the development of law.[378] Subsection b

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[367] 531 U.S. 356 (2001).

[368] *Id.*

[369] *Id.* at 369 n.6.

[370] Tennessee v. Lane, 541 U.S. 509, 534 (2004) (Souter, J., concurring).

[371] *Id.* at 513 (majority opinion).

[372] *Id.* at 534 (Souter, J., concurring).

[373] *Id.*

[374] Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1786 (2019) (Thomas, J., concurring) (per curiam).

[375] *Id.* at 1793.

[376] *See* 274 U.S. 200, 208 (1927).

[377] *See infra* notes 382–386 and accompanying text.

[378] *See infra* Part IV.B.2.a.

analyzes whether the case aligned with norms at the time of the decision.[379] Lastly, subsection c explores the effect of passage of time since *Buck*.[380]

a. Foundational Role

The fact that courts cite *Buck* for propositions that vary widely from case to case suggests that *Buck* has not come to represent any particular foundational proposition. Rather, it is known for its specific facts and for its jarring description of Buck. Indeed, it is hard to find any meaningful legal doctrine in *Buck* at all. It is merely five paragraphs long, the majority of which is devoted to a restatement of facts and procedural history and a defense of eugenics more generally.[381]

b. Consistency with Then-Contemporary Cultural and Legal Norms

Additionally, it is unclear that *Buck*'s holding was consistent with widely accepted cultural norms of the day. Though the eugenics movement was gaining steam at the time, experts hotly disputed the legitimacy and desirability of eugenics.[382] Proponents argued that by controlling human reproduction, the human race could be improved, while critics questioned the science and motivation behind those claims.[383] Many state courts had already found eugenic sterilization unconstitutional[384] or had entirely denounced the movement.[385] Cultural norms that supported forced sterilization were, for the most part, short lived and fleeting as the eugenics movement became associated with perceptions of Nazi Germany.[386]

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[379] *See infra* Part IV.B.1.b.

[380] *See infra* Part IV.B.1.c.

[381] *See Buck*, 274 U.S. at 205–08.

[382] Michelle Oberman, *Thirteen Ways of Looking at* Buck v. Bell*: Thoughts Occasioned by Paul Lombardo's* Three Generations, No Imbeciles, 59 J. LEG. EDUC. 357, 359 (2009); *see also* Edward J. Larson, *Anti-canonical Considerations*, 39 PEPP. L. REV. 1, 5 (2011) (noting that "in 1927, eugenics was on the rise").

[383] Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900–1930*, 16 LAW & HIST. REV. 63, 63–67 (1998). Today, the discriminatory objectives and results of the eugenics movement are well recognized. *See* Gregory Michael Dorr, *Principled Expediency: Eugenics,* Naim v. Naim*, and the Supreme Court*, 42 AM. J. LEGAL HIST. 119 (1998); Note, *Regulating Eugenics*, 121 HARV. L. REV. 1578, 1582 (2008) ("The eugenics of the first half of the twentieth century is rightly considered abhorrent. Couched in faux scientific language, eugenics policies were at bottom motivated more by racism, classism, and colonial subjugation than by any real concern for genetic fitness.").

[384] Larson, *supra* note 382, at 5.

[385] Nourse, *supra* note 359, at 103.

[386] Maura McIntyre, Note, Buck v. Bell *and Beyond: A Revised Standard to Evaluate the Best Interests of the Mentally Disabled in the Sterilization Context*, 2007 U. ILL. L. REV. 1303, 1308. Forced sterilization of Native American women, however, continued into the 1970s. *1976: Government Admits Unauthorized Sterilization of Indian Women*, NAT'L LIBR. MED.: NATIVE VOICES,

c. Passage of Time

Buck is almost one hundred years old, and almost fifty years have passed since a court relied on it for a decision. The length of time *Buck* has remained on the books without being reaffirmed, in conjunction with its lack of any foundational role and its inconsistency with then-contemporaneous cultural norms, severely reduces the chances that *Buck* will play any meaningful role in the future development of the law. Unlike *The Chinese Exclusion Case* and *Korematsu*, *Buck* is likely to disappear from memory except to the extent that that scholars and judges continue to use it as an example of decision-making gone awry. Of course, nothing is guaranteed. As described below, dark matter does not eliminate ordinary matter; rather, it can constrain behavior in a way that prevents legal actors from relying on ordinary matter. Whether ordinary matter has any power depends entirely on the extent to which legal actors feel constrained by dark matter.

V. DARK MATTER'S EFFECT ACROSS BRANCHES OF GOVERNMENT

Dark matter can constrain the behavior of some legal actors more than others. Below, in Section A, I describe the factors that may result in dark matter constraining legislative branch actors in more significant ways than it does other legal actors.[387] In Section B, I discuss how dark matter limits the judiciary. Finally, in Section C, I describe the reasons for which executive branch actors may be the least constrained of all the branches by dark matter.[388]

A. Legislative Branch

Dark matter likely asserts the greatest pull and binding power on legislatures, primarily as a function of a legislative body's aggregative dynamic. Many people must agree to the enactment of any piece of legislation.[389] Where significant dark matter has accumulated, it is unlikely that there will be individuals who wield enough influence over legislation to outweigh the more

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https://www.nlm.nih.gov/nativevoices/timeline/543.html [https://perma.cc/4XVD-577E] (noting that "3,406 American Indian women [were sterilized] without their permission between 1973 and 1976").

[387] *See infra* Part V.A.

[388] *See infra* Part V.B.

[389] CHARLES B. CUSHMAN JR., AN INTRODUCTION TO THE U.S. CONGRESS 61 (2006) ("Bills earning a majority of votes on the floor can go to the Senate for its consideration."); *see* WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 421 (9th ed. 2014) (observing three preconditions for a bill becoming a law, all requiring that many people be in agreeance: "First, a member makes a bill a top priority and is willing to expend the time and effort to *build sufficient support* to guarantee its passage. Second, a *large group of constituents in multiple jurisdictions* make passing a bill more politically attractive than doing nothing. Third, Congress is forced to respond to an event so tragic or compelling that *the event itself overwhelms all possible criticism*." (emphasis added) (quoting Senator Orrin Hatch)).

generalized recognition of that dark matter among other legislators. This is simply a matter of probabilities: if there is a general sense that rounding up people of a certain race and incarcerating them is illegal, then there are not likely many people on a legislature that have a contrary view.[390] In a majoritarian legislative process, minority opinions have little ultimate influence.[391]

In addition, legislators are subject to re-election every few years. Many have the opportunity to stay in office indefinitely, both in the United States Congress and in many state legislatures. The electoral process and opportunity for continued tenure in office can discourage legislators from supporting legislation that the majority of constituents would understand as inappropriate, intolerable, or even contrary to superseding (constitutional) law.[392]

B. Judicial Branch

Courts are quite constrained by dark matter, too. Like legislatures, the structure of the U.S. judicial system includes an aggregative process in that a single judge's opinion is not necessarily determinative. The fact that decisions can be appealed, often to panels of judges, means that even a judge with an outlying opinion (one that does not recognize the weight of dark matter) will not have the final say.[393] This is certainly true of the U.S. Supreme Court, where any given case may be heard by up to nine Justices. Dark matter constrains U.S. courts, however, somewhat less than legislatures because courts are more bound to ordinary matter than lawmaking bodies.[394] When legisla-

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[390] This is because the legislature, especially the House, was specifically designed "to reflect the interests of [the representatives'] constituents." CUSHMAN, *supra* note 389, at 48.

[391] *See* Keith Krehbiel et al., *A Theory of Competitive Partisan Lawmaking*, 3 POL. SCI. RSCH. & METHODS 423, 424 (2015) ("[T]he minority party is neither seen nor heard, and the majority party is the big winner."); Alan E. Wiseman & John R. Wright, *The Legislative Median and Partisan Policy*, 20 J. THEORETICAL POL. 5, 5 (2008) ("[I]n the event that the majority party organization exerts no influence over the legislative process, and in the event that all policies then default to the legislative median, policy outcomes will still substantially favor the majority party over the minority.").

[392] Some literature, however, suggests that the election process may actually bias outcomes in favor of more extreme candidates in certain situations. *See* David W. Brady et al., *Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate?*, 32 LEGIS. STUD. Q. 79, 80 (2007) ("[P]rimary constituencies tend to favor more-extreme candidates than do general-election constituencies . . . ."). *But see* Andrew B. Hall & Daniel M. Thompson, *Who Punishes Extremist Nominees? Candidate Ideology and Turning Out the Base in US Elections*, 112 AM. POL. SCI. REV. 509, 509 (2018) ("Combining a regression discontinuity design in close primary races with survey and administrative data on individual voter turnout, we find that extremist nominees—as measured by the mix of campaign contributions they receive—suffer electorally, largely because they *decrease* their party's share of turnout in the general election, skewing the electorate towards their opponent's party.").

[393] *See* Jeffrey A. Lefstin, *The Measure of the Doubt: Dissent, Indeterminacy, and Interpretation at the Federal Circuit*, 58 HASTINGS L.J. 1025, 1033 (2007) ("Appellate judges, when interviewed, maintain that they seek to reach consensus even if it means compromising on their own view of how a case should be decided.").

[394] *See* Timothy R. Johnson, *The Supreme Court Decision Making Process*, *in* OXFORD RESEARCH ENCYCLOPEDIA: POLITICS (2016), http://politics.oxfordre.com/view/10.1093/acrefore/978019

tures act, they can overwrite any ordinary matter of law, except for constitutional provisions.[395] They can also avoid legislating in an area that they perceive to already be adequately regulated by dark matter.[396]

Courts, however, must account for the ordinary matter of law—precedents and statutes in their decision-making.[397] Dark matter may, of course, influence their interpretation of that ordinary matter, but they are not free to ignore it. In addition, courts have little choice regarding the cases that come before them. Although legislatures may simply decide not to take up an issue for legislation, courts cannot ignore a case that is before them.[398] Once again, dark matter may affect the way a court decides a case, but where dark matter has not constrained ex ante the situation that gave rise to the case, a court must either ignore, dismiss, or give voice to that dark matter. When it ignores or dismisses dark matter, a court weakens it.

C. Executive Branch

The least constrained legal actors are likely those in the executive branch of government. This is not to say that they are unconstrained by dark matter. To the contrary, as illustrated by the example of President Trump turning to advisers for advice on how to implement a "Muslim ban," legal, dark matter

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0228637.001.0001/acrefore-9780190228637-e-98# [https://perma.cc/3VZV-Q2C6] ("Respecting precedent is an informal norm, but the Court must also follow certain formal rules such as those set out in the Constitution. Because the Constitution gives Congress the power to override Supreme Court decisions, the justices must account for the preferences of Congress when deciding where to set policy in a particular area of law."); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1366 (1988) ("Generally . . . it is inappropriate for courts to create new legal rules when the legislature is more institutionally competent to act.").

[395] *See* U.S. CONST. art. I, § 8, cl. 18; *id.* art. VI, cl. 3; Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810) (acknowledging that "one legislature is competent to repeal any act which a former legislature was competent to pass; and one legislature cannot abridge the powers of a succeeding legislature").

[396] *See* Michael J. Teter, *Recusal Legislating: Congress's Answer to Institutional Stalemate*, 48 HARV. J. ON LEGIS. 1, 3 (2011) (discussing how Congress overcomes congressional gridlock via "recusal legislating" and how "Congress recognizes that its own structural weaknesses prevent meaningful action on an issue on which there is policy consensus" and thus employs recusal legislation "as a means for overcoming the institutional or political hurdles that often seem to prevent the passage of important legislation").

[397] Johnson, *supra* note 394 ("[I]f the Court frequently ignored its own legal precedents its credibility as a judicial institution might be questioned, and it could potentially lose legitimacy—its main source of power."); Jack Knight & Lee Epstein, *The Norm of* Stare Decisis, 40 AM. J. POL. SCI. 1018, 1029 (1996) ("[A] norm favoring precedent is a fundamental feature of the general conception of the function of the Supreme Court in society at large. To the extent that compliance with this norm is necessary to maintain the fundamental legitimacy of the Supreme Court, such a belief will constrain the justices from deviating from precedent in a regular and systematic way.").

[398] *See* FED. R. CIV. P. 3, 41 (providing in two separate rules how a party commences an action, and also only allowing dismissal if a party files for it); FED. R. CRIM. P. 4(a) (stating that a judge *must* issue a warrant for arrest when probable cause exists that a crime was committed).

also affects the executive branch. But the nature of the executive branch of government, which often carries out the decisions and priorities of a single person rather than aggregating those of multiple decision-makers, results in a higher probability of an individual's idiosyncratic understanding of the law, rather than a more generalized shared understanding, affecting policy.[399]

This very concern may have partially motivated Justice Kagan's question during oral arguments in *Trump v. Hawaii*.[400] She described a hypothetical "out-of-the-box kind of president" who had expressed vehement anti-Semitic views prior to taking office.[401] She asked whether prior statements could be considered to determine that an eventual ban on entry of travelers from Israel was based on religion, even if the ban language did not mention religion.[402] By characterizing the hypothetical president as "out-of-the-box," Justice Kagan recognized that it would only take one legal actor who felt less constrained by dark matter norms to revive or give voice to norms repudiated long ago.

This discrepancy in the way that dark matter constrains legal actors in the three branches of government raises challenging questions for the examples of dark matter discussed here. Is dark matter enough to prevent another enactment of race-based immigration legislation, for example? Can we rely on a generalized and shared understanding? Or does this reliance risk the unearthing and thawing of *The Chinese Exclusion Case*?

CONCLUSION

Dark matter in the law poses a fascinating and potentially problematic tension. On the one hand, the development of dark matter allows the law to develop and progress without revisiting the ordinary matter of law. As actors become constrained by dark matter, the relevancy of the ordinary matter, even if more permissive, wanes. On the other hand, dark matter does not formally eliminate ordinary matter; it lurks beneath the veil of dark matter, ready to be invoked by Justice Kagan's hypothetical "out-of-the-box kind of president" or another legal actor over whom dark matter exerts less pull. This is not merely a theoretical risk. President Trump's initial plan for a travel ban based on religion is a prime example of such a risk materializing. More recently, reports have surfaced that women held in an immigration detention center were sterilized without their consent, echoing the sentiments that gave rise to the Court's

[399] *See* Anna Spain Bradley, *Cognitive Competence in Executive-Branch Decision Making*, 49 U. CONN. L. REV. 713, 730 (2017) ("Once appointed or otherwise selected, the law does not govern the particular choices an executive-branch decision maker makes or how she or he makes them. Yet . . . an individual's beliefs and biases can impel and even determine decision outcomes that affect the nation and the world.").

[400] 138 S. Ct. 2392, 2423 (2018).

[401] Transcript of Oral Argument at 18, *id.* (No. 17-965).

[402] *See id.*

1927 decision *Buck v. Bell*.[403] The increasing anti-Asian sentiment in the United States during the COVID-19 pandemic threatens some of the same communities targeted during the Chinese exclusion and Japanese internment eras.[404]

The question, then, is whether and how to address court precedents like the ones examined in this Article when they are obscured by dark matter. I have provided some factors above that might help determine when dark matter alone is sufficient to guard against revival of a precedent. *Buck*, for example, may be sufficiently abandoned even if not formally overturned, but there is no guarantee. In the case of court precedent, U.S. legal structures prevent courts from addressing and overturning cases that are not raised in a live controversy before them. Chief Justice Roberts, perhaps recognizing this tension, took an opportunity in 2018 in *Trump v. Hawaii* to reject the holding of the 1944 Supreme Court case *Korematsu v. United States*, even though *Korematsu*, as he wrote, was not implicated in *Trump v. Hawaii*.[405] Perhaps it is time to similarly reject *The Chinese Exclusion Case*, precisely because it might resurface in today's political climate. Without a formal overturning of *The Chinese Exclusion Case*, we cannot close a chapter of history that, although obscured and perhaps shielded by dark matter, serves as the foundation of the observable constitutional immigration universe.

[403] *See* Caitlin Dickerson et al., *Immigrants Say They Were Pressured into Unneeded Surgeries*, N.Y. TIMES (Sept. 29, 2020), https://www.nytimes.com/2020/09/29/us/ice-hysterectomies-surgeries-georgia.html [https://perma.cc/7LBB-9NP2].

[404] *See* Zolan Kanno-Youngs, *Biden Announces Actions to Combat Anti-Asian Attacks*, N.Y. TIMES (Mar. 30, 2021), https://www.nytimes.com/2021/03/30/us/politics/biden-anti-asian-violence.html [https://perma.cc/2AB5-N5VN].

[405] 138 S. Ct. 2392, 2423 (2018).