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Is the Chinese Exclusion Case Still Good Law? (The President Is Trying to Find Out)

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IS THE CHINESE EXCLUSION CASE STILL GOOD LAW? (THE PRESIDENT IS TRYING TO FIND OUT)

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Though barely mentioned in the early court filings, the lurking issue in the constitutional challenges to President Trump's immigration bans—what opponents call the "Muslim ban"—is whether the 1889 Chinese Exclusion Case can still guide immigration law in the twenty-first century. The facts of the Chinese Exclusion Case are remarkably similar to the present litigation, and yet defenders of the President's policies have been notably reluctant to discuss the case.

INTRODUCTION

A spectre haunts the Department of Justice's ("DOJ") arguments in the cases challenging President Donald Trump's executive orders banning immigration from a list of Muslim countries.[1] It is the spectre of the Chinese Exclusion Case,[2] an 1889 decision that so closely parallels the present case that failing to mention it seems like a form of malpractice. The holding of the decision squarely favors the Trump Administration. Moreover, as professors of immigration law tell their students semester after semester, the Chinese Exclusion Case has never been overruled. And yet, when the first version of the travel ban was enjoined, the Department of Justice failed to mention the Chinese Exclusion Case in its filings to the District Court and in its emergency appeal to the

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[1] Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter First Executive Order]; Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) [hereinafter Second Executive Order].

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

Ninth Circuit.[3] Nor is it mentioned in the government's appeal to the Fourth Circuit against the enjoining of President Trump's second travel ban.[4]

Consider the basic facts of the Chinese Exclusion Case:

1. A blanket ban on immigration based on nationality.
2. Apparent animus as a motivation for the ban.
3. Refusal to allow re-entry even for legal residents.

President Trump's First Executive Order, as described in the Complaint filed by the State of Washington, contained all three of these features.[5] In the 1889 case, the ban was imposed by Congress, while the Trump ban was enacted by the President. But this may count for little. President Trump relied on a congressionally-enacted measure allowing the President to exclude a "class" of non-citizens.[6] After the First Executive Order was enjoined by the courts, the second version exempted current legal residents and visa holders.[7] Opponents continued to argue that the travel ban reflected anti-Muslim animus.[8]

The DOJ's evident reluctance to mention a case so substantively on point seems to suggest several possible things. First, to explicitly analogize Trump's policies to the openly racist Chinese Exclusion Act would be politically embarrassing, and might appear to concede that animus was the motivation for the Executive Orders. Second, the DOJ may believe that the Chinese Exclusion Case is not actually good law. Or, to put this another way, the Chinese Exclusion Case may be slipping into the anti-canon—a category of decisions that are understood to be un-citable as precedent, and relevant to courts only as a warning.[9]

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[3] Reply in Support of Emergency Motion for Stay Pending Appeal, Washington v. Trump, No. 17–35105 (9th Cir. Feb. 6, 2017), 2017 WL 492504. Nor, for that matter, did the brief amicus curiae filed by the State of Texas urging the Ninth Circuit to rehear the case en banc make any mention of the Chinese Exclusion Case. Motion for Leave to File Brief for State of Texas as Amicus Curiae in Support of Rehearing En Banc, Washington v. Trump, No. 17–35105 (9th Cir. Feb. 15, 2017), 2017 WL 729939.

[4] Brief for Appellants, Int'l Refugee Assistance Project v. Trump, No. 17-1351 (4th Cir. Mar. 24, 2017), ECF No. 36.

[5] *See* First Executive Order, *supra* note 1; Complaint at 6–8, 9, Washington v. Trump, No. 2:17–CV–00141–JLR (W.D. Wash. filed Jan. 30, 2017), 2017 WL 443297 (alleging animus).

[6] 8 U.S.C. §§ 1182(f), 1185(a) (2012).

[7] *See* Second Executive Order, *supra* note 1, at § 3 (exempting legal permanent residents and holders of valid visas).

[8] Response to Defendant's Notice of Filing of Exec. Order at 14, Washington v. Trump, No. 2:17–CV–00141–JLR (W.D. Wash. filed Mar. 9, 2017), http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/Response%20to%20Notice%20of%20EO%2003-09-2017.pdf [https://perma.cc/FLY5-C29Q] ("[T]he Second Executive Order are materially indistinguishable from provisions this Court already enjoined, and are motivated by the same religious animus as the First Executive Order.").

[9] *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 385–86 (2011) (defining the anticanon); Ian Bartrum, *The Constitutional Canon as Argumentative Metonymy,* 18 WM. & MARY BILL RTS. J. 327, 329 (2010) (defining an anticanonical text and the inverse of a canonical one, which serves as a marker for widely accepted, or widely disapproved, ideas).

To this end, it is worth mentioning that opponents of the Trump policies have been more willing than DOJ to call attention to the Chinese Exclusion Case. In seeking an injunction against the first travel ban, the Attorney General of Washington told the district court that the 1889 decision was a relic of a bigoted past, an episode to be learned from rather than a precedent to be followed.[10] I quote the reference in its entirety, to capture the tone of how the case was discussed:

> Accepting the President's approach would take us back to a period in our history when distinctions based on national origin were accepted as the natural order of things, rather than outlawed as the pernicious discrimination that they are. *Cf. Chae Chan Ping v. U.S.*, 130 U.S. 581, 595, 606 (1889) (sustaining the Chinese Exclusion Act because the Chinese "remained strangers in the land," constituted a "great danger [to the country]" unless "prompt action was taken to restrict their immigration," and were "dangerous to [the country's] peace and security").[11]

But if the Chinese Exclusion Case has become the kind of decision that no longer stands for its facial holding and can be mentioned mainly to caution a court to not repeat a historic mistake, it is still quite unclear what remains of the plenary power doctrine to which the case is understood to have given birth. Is it possible that the Chinese Exclusion Case is anti-canon, and yet plenary power might remain relevant, at least in some situations?

In this Essay, I want to make the argument that the validity of the Chinese Exclusion Case is the central question in the challenges to President Trump's travel bans. The facts are closely analogous. Moreover, the Chinese Exclusion Case is the seminal, canonical decision establishing vast federal power over immigration control. Resolving the present challenges to the Trump Executive Orders requires us to determine, once and for all, if that 1889 decision was rightly decided. But if that case cannot survive given what we know of constitutional law in the twenty first century, we must be precise about what exactly the Court got wrong 128 years ago.

I. THE EXCLUSION OF CHAE CHAN PING

The Chinese Exclusion Case—a.k.a. *Chae Chan Ping v. United States* – is the kind of canonical (or anti-canonical?) Supreme Court decision for which the specific facts and holding fade into the background in favor of the meaning that judges and lawyers come to ascribe to it over time.[12] But given the factual

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[10] *See* 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 (2000) (arguing that the Court's early, expansive descriptions of federal immigration authority were exaggerated because they came in cases affirming racially discriminatory laws during a time when the Court also upheld racist laws directed at citizens).

[11] Motion for Temporary Restraining Order at 20–21, Washington v. Trump, No. 2:17–CV–00141–JLR (W.D. Wash. filed Jan. 30, 2017), 2017 WL 511013.

[12] *See* Bartrum, *supra* note 9, at 329 ("[A] canonical text takes on its own metonymic meanings-sometimes quite apart from its literal textual meaning-within the practice of constitutional law.").

similarities with President Trump's policies, we need to return to fundamentals. What was the actual dispute, and what did the Supreme Court actually say?

Chae Chan Ping was a Chinese man who settled in San Francisco in 1875.[13] He had the misfortune to arrive in the United States during a period of intense anti-Chinese xenophobia. In 1882, Congress enacted the Chinese Exclusion Act, prohibiting new Chinese immigrants from arriving, but not expelling those already here—essentially a policy analogous to Trump's Second Executive Order.[14] In 1887, Mr. Chae decided to make a temporary visit to China, with every intention of returning to his home in San Francisco.[15] Following the procedure established by Congress at the time of his departure, he requested and received a certificate from the federal government entitling him to return.[16]

On September 7, 1888, after his visit to China, he left Hong Kong on a steamship called the Belgic, carrying his U.S. return certificate.[17] But on October 1, 1888, Congress passed a new law, which contained some very bad news for Mr. Chae: "[I]t shall be unlawful for any Chinese laborer . . . who shall have departed . . . and who shall not have returned before the passage of this act, to return to or remain in the United States."[18]

This 1888 policy is a close analogue to Trump's First Executive Order. When Congress passed this new provision, Mr. Chae was already at sea, slowly making his way back to San Francisco. It would be another eleven years before Guglielmo Marconi tested the first shore-to-ship wireless telegraph, so it seems safe to assume that Mr. Chae spent his time in transit having absolutely no idea that the United States might not welcome him home. The Belgic arrived in San Francisco on October 8, 1888, which for Mr. Chae was eight days too late.[19] Following the new statute, the official in charge of the port of San Francisco refused to honor Mr. Chae's year-old re-entry certificate.[20] Prohibited from disembarking, Mr. Chae found himself detained on board the boat that brought him.[21]

Mr. Chae pursued a doomed legal struggle all the way to the Supreme Court.[22] The case presented the Court with a novel question: Could Congress enact an immigrant exclusion law? Although the Constitution gives Congress the enumerated authority to enact laws regulating naturalization, it actually

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[13] Chae Chan Ping v. United States, 130 U.S. 581, 582 (1889).
[14] *Id*. at 597.
[15] *Id*. at 582.
[16] *Id*.
[17] *Id*.
[18] *Id*. at 599.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] The case involved many legal claims, only some of which matter for present purposes. For instance, the Court first considered whether the statute could be invalidated by a bilateral treaty with China, which I will not explore here. *Id*. at 589, 600–03.

does not say anything explicitly about immigration laws, or laws regulating the mere entry of foreigners. The Court answered this with an emphatic "yes." It cited federal power over foreign relations and commerce,[23] and went on at greater length about the importance of immigration control to national sovereignty: "Jurisdiction over its own territory. . . is an incident of every independent nation. It is a part of its independence. . . . The power is constantly exercised; its existence is involved in the right of self-preservation."[24] This aspect of the Court's holding means only that Congress has the power to enact restrictions on immigration. This clearly remains good law today.[25] Moreover, the Court acknowledged, at least in passing, that sovereign powers are still restricted by the Constitution.[26] The decisive question should have been whether the Chinese Exclusion Act, and its particular application to Mr. Chae, was consistent with the Constitution.

The Court in *Chae Chan Ping* gave these questions relatively little attention. It never considered the possibility that excluding all Chinese people because of rampant anti-Chinese racism might pose a problem under the Equal Protection Clause. Raising such a claim for a Chinese man would have posed a doctrinal challenge, since at the time the Court was of the opinion that the "main purpose of [the Fourteenth Amendment] was the freedom of the African race."[27] Moreover, the Court did not apply the Equal Protection Clause to the federal government until the twentieth century.[28] But focusing on doctrine probably misses the point. The Supreme Court decision itself is evidence of how mainstream anti-Chinese animus was at the time, repeating the popular paranoia that America would be "overrun" by the Chinese.[29]

The Court only briefly considered the possibility that even if a general Chinese exclusion were permissible, Mr. Chae's individual rights were violated because he had been a legal resident of the U.S., and had a permit promising to let him re-enter. The Court said that this is a question for the political branches

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[23] *Id*. at 629.

[24] *Id*. at 603–04, 608.

[25] *See* Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.").

[26] *Chae Chan Ping*, 130 U.S. at 604 ("The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the constitution itself . . .").

[27] The Slaughterhouse Cases, 83 U.S. 36, 37 (1872).

[28] *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (finding reverse incorporation of equal protection through the Fifth Amendment).

[29] *Chae Chan Ping*, 130 U.S. at 595 ("The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace. The differences of race added greatly to the difficulties of the situation.").

of government, not the judiciary.[30] Moreover, the Court framed the question entirely as a matter of foreign relations, so that only the government of China might plausibly pose a complaint, not Mr. Chae as an individual.[31]

The Court's emphatic endorsement of federal authority over immigration, coupled with its reluctance to seriously consider constitutional limitations on that authority, established the basic parameters for immigration law for more than a century.[32] Despite blistering criticism, the plenary power doctrine endured largely intact through the end of the twentieth century.[33] This doctrine has seemed less robust in the twenty-first century—though it remains quite difficult to define exactly where it stands.[34] Donald Trump assumed the presidency in the midst of this constitutional ambiguity.

II. ADDRESSING THE ELEPHANT IN THE ROOM

Mr. Chae's ordeal developed slowly on board a nineteenth century steamship crossing the Pacific. It was re-enacted at higher speed in January 2017 when legal residents and visa holders were stranded and detained at airports around the world.[35] A legal permanent resident who lived with her fiancée in Grand Rapids, Michigan was stranded in Iran after she had gone to visit her family there.[36] A medical resident from Chicago was prevented from returning after he had left the country to get married.[37] A producer for CNN, a legal per-

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[30] *Id*. at 609 ("Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition, and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination.").

[31] *Id*. ("If there be any just ground of complaint on the part of China, it must be made to the political department of our government.").

[32] *See* Stephen Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1984) (defining the concept and evolution of plenary power); *see also* Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 135–37 (2015) (tracing the evolution of the doctrine to the present).

[33] *See* Stephen Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995).

[34] *See* Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21 (2015).

[35] *See* Dan Merica, *How Trump's Travel Ban Affects Green Card Holders and Dual Citizens*, CNN.COM (Jan. 29, 2017, 8:36 PM), http://www.cnn.com/2017/01/29/politics/donald-trump-travel-ban-green-card-dual-citizens/index.html [https://perma.cc/8VFV-GTPS].

[36] Doug Reardon, *Travel Ban: Local Man's Fiancée Stranded in Iran*, FOX 17 (Jan. 30, 2017, 7:29 AM), http://fox17online.com/2017/01/29/travel-ban-local-mans-fiancee-stranded-in-iran/ [https://perma.cc/HDQ7-TCQW].

[37] Jason Meisner, *2 Stranded Overseas by Trump Travel Ban Allowed to Return to Chicago*, CHICAGO TRIB. (Feb. 1, 2017, 5:20 PM), http://www.chicagotribune.com/news/local/breaking/ct-trump-immigration-ban-court-met-20170201-story.html [https://perma.cc/VVE7-TBUF].

manent resident, was detained at the Atlanta airport while trying to return home.[38] Up to thirteen people were detained at the Seattle-Tacoma International Airport.[39] The government eventually said that 746 people, including legal residents, were detained at U.S. ports after the initial ban went into effect before it was enjoined by the courts; opponents of the ban said the real number was higher.[40]

Despite the reluctance of the parties and courts to address it head on, much depends on whether we think the Chinese Exclusion Case was rightly decided. If it was rightly decided, then it would seem that Trump's immigration bans are probably constitutional. If it was wrongly decided, it is important to explain precisely what is wrong with it. If the Chinese Exclusion Act was invalid because it was motivated by impermissible animus, then the Trump bans—including the Second Executive Order—are probably invalid as well. If the Chinese Exclusion Act was substantively valid, but if Mr. Chae was individually entitled to return to the U.S., then it would seem that Trump's first ban was invalid (because it excluded legal immigrants from returning to the country), but the second ban would be permissible (because it applies only to new applicants for admission).

The individualized claim for legal residents and visa holders is the most straightforward under existing precedents. As the Court of Appeals for the Ninth Circuit found in upholding the injunction against the First Executive Order, there is ample Supreme Court authority for the rule that non-citizens in the U.S. have procedural due process rights.[41] In particular, in the 1963 decision *Rosenberg v. Fleuti*, the Court held that returning legal residents have a right to a hearing before they are excluded from re-entering the country.[42] A blanket ban based on nationality deprives people of this procedural right.[43] Thus, it seems clear that under constitutional law as we now know it, Chae Chan Ping should have been allowed to come back to San Francisco. In this way, at least, the Chinese Exclusion Case was wrongly decided.

But now that the Second Executive Order exempts returning legal residents, we must face a more difficult question: Was the Chinese Exclusion Act constitutional as applied to new immigrants? The legislation was dripping in

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[38] Ellen Eldridge, *CNN Producer Detained in Atlanta Files Lawsuit Against Immigration Order*, AJC.COM (Feb. 1, 2017, 11:13 AM), http://www.ajc.com/news/crime--law/cnn-producer-detained-atlanta-files-lawsuit-against-immigration-order/dWQqxhufKIuOi8W4nsUWdM/ [https://perma.cc/T89R-4ZBF].

[39] Complaint, *supra* note 5, at 4.

[40] Liz Robbins, *U.S. List of Those Detained for Trump's Travel Ban Is Called Incomplete*, N.Y. TIMES (Feb. 24, 2017), https://www.nytimes.com/2017/02/24/nyregion/travel-ban-trump-detained.html?_r=0 [https://perma.cc/E332-RJ8U].

[41] Washington v. Trump, 847 F.3d 1151, 1165 (9th Cir. 2017).

[42] Rosenberg v. Fleuti, 374 U.S. 339, 460 (1963).

[43] *Id.* ("Nor has the Government established that the Executive Order provides lawful permanent residents with constitutionally sufficient process to challenge their denial of re-entry.").

racism, and so the natural impulse is to reach for the Equal Protection Clause. But the challenge is not simple. Nationality-based discrimination runs throughout immigration law.[44] To argue against all nationality discrimination in immigration would be ambitious, to say the least.[45] Since the passage of the Chinese Exclusion Act there has never been a time when the United States had an immigration policy based entirely on individualized criteria, with country of citizenship playing no role.

The easier (not to say, easy) route is to argue that discriminatory measures in immigration are invalid if they are motivated by animus, whether anti-Chinese racism in 1889 or anti-Muslim prejudice in 2017.[46] In the 2017 litigation, this animus question has been framed through the lens of the Establishment Clause, specifically the requirement that government action must have a secular purpose.[47] The District Court in Maryland, for example, enjoined the second iteration of the travel ban because of "President Trump's animus towards Muslims and intention to impose a ban on Muslims entering the United States."[48]

A challenge to the Chinese Exclusion Act would not easily fit within the rubric of the Establishment Clause. But essentially the same inquiry into animus could take place under the Equal Protection Clause, derived primarily from Justice Kennedy's opinion in *Romer v. Evans*, where the Court held that even under rational basis review a policy would fail equal protection scrutiny if it imposed a "broad and undifferentiated disability on a single named group" that is "inexplicable by anything but animus."[49] The idea that evidence of animus

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[44] *See, e.g.*, 8 U.S.C. § 1152 (2012) (setting per country limitations on immigration); *see also* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration,* 46 UCLA L. REV. 1 (1998); *cf.* Kagan, *supra* note 32 (the Court has been more willing to abandon plenary power with regard to procedural due process than substantive constitutional rights).

[45] *Cf. Washington*, 847 F.3d at 1162 (stating alienage distinctions in immigration are "closely connected to matters of foreign policy and national security.").

[46] Response to Defendants' Notice of Filing of Exec. Order, *supra* note 8, at 14 ("[T]he Second Executive Order are materially indistinguishable from provisions this Court already enjoined, and are motivated by the same religious animus as the First Executive Order.").

[47] *See* Hawai'i v. Trump, No. 17–00050 DKW–KSC, 2017 WL 1167383, at *5 (D. Haw. Mar. 29, 2017) (citing the first prong of the "*Lemon* test" in *Lemon v. Kurtzman,* 403 U.S. 602, 612–13 (1971)).

[48] *See* Int'l Refugee Assistance Project v. Trump, No. TDC–17–0361, 2017 WL 1018235, at *11–14 (D. Md. Mar. 15, 2017) (applying the Lemon test, and concluding: "These statements, which include explicit, direct statements of President Trump's animus towards Muslims and intention to impose a ban on Muslims entering the United States, present a convincing case that the First Executive Order was issued to accomplish, as nearly as possible, President Trump's promised Muslim ban. . . . These statements [] continue to explain the religious purpose behind the travel ban in the Second Executive Order.").

[49] Romer v. Evans, 517 U.S. 620, 632 (1996).

may invalidate policies that otherwise might be permissible has become a key feature of equal protection doctrine.[50]

It should be understood that challengers to the executive orders must overcome two separate hurdles here. First, they must convince the courts that animus, if proven, would invalidate an immigration restriction. This is probably the biggest hurdle, simply because the courts have never had the occasion to address it, at least not since the Chinese Exclusion Case. The Ninth Circuit, in leaving the injunction against the First Executive Order in place, said that the allegations of anti-Muslim animus "raise serious allegations and present significant constitutional questions."[51] But the Court of Appeals withheld judgment on whether animus would in fact invalidate an immigration ban.[52]

The proposition that animus can invalidate an immigration ban attracted strong dissents on the Ninth Circuit from Judge Bybee and Judge Kozinski, even as the litigation against the second version of the ban was just getting started. Judge Bybee argued that an immigration ban is an inherent act of national sovereignty, and requires deference from the judiciary.[53] Judge Kozinski added ridicule against the idea that Donald Trump's anti-Muslim statements as a presidential candidate could be used to show his official actions as President lacked a secular purpose.[54]

These objections call for several responses.

First, it is curious that Judge Bybee did not mention *Zadvydas v. Davis*, where the Supreme Court in 2001 stated that plenary power over immigration is, in fact, limited by the Constitution.[55] Judge Bybee based himself primarily on much older cases holding that the executive has essentially unreviewable power to exclude immigrants. *Zadvydas* does not directly rebut this claim. It dealt directly only with procedural due process for people inside the countr. But the decision says that plenary power is limited, and gives no reason why the Establishment Clause or the Equal Protection could not be invoked. Like DOJ, Judge Bybee also makes no mention of the Chinese Exclusion Case, but the gist of his argument is that not much has changed since the late nineteenth century in terms of judicial scrutiny of immigration policy.

Second, Judge Kozinski's emphatic objection to considering statements by the President during the campaign may imply a problem for the Trump Administration. The DOJ is arguing that "courts evaluating a presidential policy directive should not second-guess the President's stated purpose by looking be-

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[50] Derrick Darby & Richard E. Levy, *Postracial Remedies*, 50 U. MICH. J. L. REFORM 387, 465–66 (2017).

[51] Washington v. Trump, 847 F.3d 1151, 1168 (9th Cir. 2017).

[52] *Id*.

[53] Washington v. Trump, No. 17-35105, slip op. at 16–17, 24 (9th Cir. 2017) (Bybee, J., dissenting) (arguing that all that was required to uphold an immigration exclusion is "a facially legitimate and bona fide reason," (citing Kleindienst v. Mandel, 408 U.S. 753, 770 (1972))).

[54] *Id*., slip op. at 10–14 (Kozinski, J., dissenting).

[55] Zadvydas v. Davis, 533 U.S. 678, 695 (2001).

yond the policy's text and operation."[56] Under this view, it hardly seems to matter whether the President says "I hate Muslims" during the campaign or once in office. Why, then, does Judge Kozinski care whether Donald Trump said something as a candidate or in an official capacity? Judge Kozinski's narrower objection to considering campaign statements hints that perhaps at least some statements by the President might be fair game.[57] If that is the case, then in a sense DOJ will already of lost the normative argument.

Third, it is revealing that neither Judge Bybee nor Judge Kozinski are willing to argue that an immigration ban could be openly discriminatory against Muslims. Nor is the DOJ willing to go quite that far. No one is arguing that the President could impose a full-on "No Muslims Allowed" rule. But if the President really has vast authority to exclude classes of immigrants, why not? The arguments defending the Trump policies instead are directed at what kind of evidence a court should consider to test for animus, and how searching or deferential the inquiry should be. This is also an implicit normative concession that federal power over immigration really is limited, and judicial scrutiny is proper. We are really just arguing, as we so often do in constitutional cases, about the proper level of scrutiny.

If the animus-based challenges to the Second Executive Order are allowed to move forward, the next hurdle would be to actually prove the allegation that animus, as opposed to legitimate national security concerns, led to the immigration ban. The Administration will likely argue that the Second Executive Order is not a blanket ban because it allows requests for individual waivers.[58] The Second Executive Order also makes some effort to show a genuine security basis for banning immigration from the listed countries.[59] The factual inquiry into animus would prove an additional opportunity for judges to defer to the executive branch. A judge could hold that animus is theoretically impermissible, but find that the policies might have been enacted even if the President and his advisors had never expressed disapproval of Muslims.[60]

Nevertheless, the mere ability to investigate this would be a significant victory for opponents of President Trump's policies. As Thomas B. Nachbar wrote recently, "In the hands of the modern Court, rationality analysis has

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[56] Brief for Appellants, *supra* note 4, at 45.

[57] To be clear, while I may agree that a court should be cautious about mechanically relying on rhetorical excess of a campaign, it would seem highly artificial to ignore such statements, especially early in a presidential term. Moreover, it is not clear that such a line could ever be coherent, since current office holders are also political campaigners. Presidents run for re-election, governors run for president, and so on.

[58] Second Executive Order, *supra* note 1, at § 3.

[59] *Id*., § 1(e).

[60] *Cf*. Richard Fallon, *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 555–56 (2016) ("Upon a determination that the legislature had forbidden purposes, the Court ruled, a lower court should ascertain whether the legislature would have reached the same decision even in the absence of a discriminatory intent.").

turned on its head the traditional refusal of courts to look into legislative motivation, a dramatic development in its own right."[61]

If applicable to immigration, the rule against animus would represent an important, though fairly moderate, substantive constitutional limitation on immigration policy. It would allow many forms of nationality discrimination, if based on neutral criteria, especially when the rules do not impose across-the-board disabilities on a disfavored class of people. The visa waiver program might represent a good example of a nationality-based immigration control that could survive an anti-animus rule.[62] But an anti-animus rule would likely disallow an immigration policy premised on xenophobia—especially the belief that people defined by immutable, fundamental characteristics are inherently less desirable.

The question of whether animus can be a part of immigration policymaking is urgent. In addition to the travel ban affecting Muslims, the President has spent much effort portraying Mexicans as having a propensity for crime.[63] During the campaign, a Trump supporter told MSNBC that Mexican culture is "causing problems. If you don't do something about it, you're going to have taco trucks on every corner."[64] As a constitutional matter, can such opinions be the motivation for immigration policies? Since throughout history, immigration law has often been supported by precisely this kind of popular opinion,[65] an anti-animus rule would represent an important turn away from the past. But not everyone wants to make this turn.

CONCLUSION

President Trump has argued that sovereign nations have an unfettered right to choose who should immigrate, including based on cultural assumptions about

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[61] Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1660 (2016).

[62] *See Visa Waiver Program*, U.S. VISAS: U.S. DEP'T STATE, https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html [https://perma.cc/7W65-TD74] (last visited Apr. 10, 2017) (listing the discretionary criteria for a country to be added to the visa waiver program).

[63] *See, e.g.,* Michelle Ye Hee Lee, *Fact Checker: Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm_term=.5d2981ed3ea2 [https://perma.cc/HVN6-54RE]; Peter Beinart, *Trump Scapegoats Unauthorized Immigrants for Crime*, ATLANTIC (Mar. 1, 2017), https://www.theatlantic.com/politics/archive/2017/03/trump-scapegoats-unauthorized-immigrants-for-crime/518238/ [https://perma.cc/SMN5-MXUS].

[64] Niraj Chokshi, *Taco Trucks on Every Corner: Trump Supporters' Anti-Immigration Warning*, N.Y. TIMES (Sept. 2, 2016), https://www.nytimes.com/2016/09/03/us/politics/taco-trucks-on-every-corner-trump-supporters-anti-immigration-warning.html?_r=0 [https://perma.cc/V6LB-392C].

[65] *See* Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59 (2004) (arguing that American immigration laws in general are an index of which groups are subject to popular disfavor at any given time).

which groups will be "able to successfully assimilate."[66] The nineteenth century Supreme Court in the Chinese Exclusion Case expressed similar concern about Chinese immigrants: "It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living."[67] While many government lawyers appear to be reluctant to cite that case, its reasoning seems quite close in many ways to the thinking of our current president.

The last time the Supreme Court cited the Chinese Exclusion Case was in 2001. The Court referenced the case only for the narrow proposition that sovereign power over immigration is subject to constitutional limits.[68] In 2017, the Ninth Circuit cited the Chinese Exclusion Case for exactly the same principle.[69] Given the government's reluctance to cite it, and judges' recent tendency to construe its meaning in favor of constitutional rights for immigrants, it seems that there is an implicit understanding that Mr. Chae was wronged. He should have been allowed to come home to San Francisco. Thus, the urgent question may not be *if* the Chinese Exclusion Case was wrongly decided, but *why*. Was it merely a problem of procedural due process? Or was Mr. Chae first and foremost the victim of impermissible bigotry?

These questions have been lurking in immigration law for a very long time. Up to know, the courts have mostly danced around the edges, leaving much ambiguous. But that may not last. President Trump seems intent on finally getting clear answers. After all these years, can we finally, conclusively decide whether the Chinese Exclusion Act was constitutional?

The President needs to know.

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[66] *See Transcript of Donald Trump's Immigration Speech*, N.Y. TIMES (Sept. 1, 2016), https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html [https://perma.cc/K6VX-VSS5] ("We also have to be honest about the fact that not everyone who seeks to join our country will be able to successfully assimilate. Sometimes it's just not going to work out. It's our right, as a sovereign nation, to choose immigrants that we think are the likeliest to thrive and flourish and love us.").

[67] Chae Chan Ping v. United States, 130 U.S. 581, 595 (1889).

[68] Zadvydas v. Davis, 533 U.S. 678, 695 (2001).

[69] Washington v. Trump, 847 F.3d 1151, 1162 n.6 (9th Cir. 2017).