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# RACIAL CONTAGION: ANTI-ASIAN NATIONALISM, THE STATE OF EMERGENCY, AND EXCLUSION

STEWART CHANG\*

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## INTRODUCTION

On January 31, 2020, former President Donald Trump issued the first of a series of eight Executive Proclamations suspending immigration using the 2019 Novel Coronavirus (COVID-19) as a justification.<sup>1</sup> These proclamations have included bans on people traveling from China, Iran, the Schengen area, the United Kingdom, Canada, Mexico, and Brazil, as well as refugees, family members of lawful permanent residents, and business workers. Under the guise of public health and welfare, former President Trump deployed these orders to further his anti-immigrant agenda and promote his rhetoric of blaming immigrants for the economic downturn caused by the COVID-19 pandemic.

From the start, President Trump did not hide his disdain for immigrants, particularly those from non-white ethnic groups. He began his campaign for president by blaming immigration from Mexico for the economic woes of the United States, saying “When Mexico sends its people, they’re not sending their best. They’re not sending you. They’re not sending you. They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing

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1. See generally Exec. Order No. 13903, 85 Fed. Reg. 6721 (2020).

crime. They're rapists."<sup>2</sup> Throughout the campaign, he continually referred to immigration from Mexico as security threats, saying "El Chapo and the Mexican drug cartels use the border unimpeded like it was a vacuum cleaner, sucking drugs and death right into the U.S."<sup>3</sup> and "[y]ou look at countries like Mexico, where they're killing us on the border, absolutely destroying us on the border. They're destroying us in terms of economic development."<sup>4</sup>

Indeed, one of his first acts after taking office was to issue Executive Order 13767 which directed the government to construct a wall along the southern border between the United States and Mexico.<sup>5</sup> This was immediately followed by Executive Order 13768, which halted federal funding to any cities and counties that refused to cooperate with federal immigration enforcement.<sup>6</sup> Not long after, in May 2018, the Trump administration instituted its "zero tolerance" policy against unauthorized immigrants arriving from Mexico which led to the controversial family separations of children from their families.<sup>7</sup> These anti-immigrant policies, however, faced fierce criticism and were challenged in the courts with mixed results. Though district courts enjoined the president from appropriating funds for his border wall construction, a divided Supreme Court issued a stay of that order.<sup>8</sup> A federal district court issued an injunction blocking the enforcement of Executive Order 13768,<sup>9</sup> and another federal district court granted a preliminary injunction to halt the practice of family separation and order the immediate reunification of separated children with their parents.<sup>10</sup>

President Trump, however, had most success in restricting immigration through use of Section 212(f) of the Immigration and Naturalization Act. Section 212(f), which appears as Section 1182(f) in the United States Code, provides that "[w]henver the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation,

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2. Time Staff, *Here's Donald Trump's Presidential Announcement Speech*, TIME (Jun. 16, 2015), <https://time.com/3923128/donald-trump-announcement-speech/> [https://perma.cc/CCC2-U9VR].

3. Paola Scerdote, *The Mexican Cartel Identity: TThe [sic] effects of the representation of the Mexican community in the U.S.*, CUNY, <https://cuny.manifoldapp.org/read/cartel/section/d7128346-ac9f-411e-be74-26c242bd23cb> [https://perma.cc/7PFA-H97M] (last visited Jan. 7, 2022).

4. Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <https://time.com/4473972/donald-trump-mexico-meeting-insult> [https://perma.cc/GJ9D-JVNB].

5. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

6. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

7. *L. v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133, 1136–37 (S.D. Cal. 2018).

8. *See Trump v. Sierra Club*, 140 S. Ct. 1, 1 (2019).

9. *See Cnty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1219 (N.D. Cal. 2017).

10. *See L.*, 310 F. Supp. 3d at 1149–50.

and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.”<sup>11</sup> This was the authority he invoked when he issued Executive Order 13769, also known as the Muslim Ban, which banned foreign nationals from seven predominantly Muslim countries from visiting the United States for 90 days, suspended entry to the country of all Syrian refugees indefinitely, and prohibited any other refugees from coming into the country for 120 days.<sup>12</sup>

Facing significant challenges in the courts, the Trump administration amended the Muslim ban with Executive Order 13780 (Muslim Ban 2.0) and Presidential Proclamation 9645 (Muslim Ban 3.0) which removed refugees from the ban and added North Korea and Venezuela to the list of banned countries in an attempt to show that the ban was not exclusively targeting Muslims.<sup>13</sup> In *Trump v. Hawaii*, Justice Roberts found that in Section 212(f), Congress had delegated broad authority to the President to exclude aliens so long as he finds that they are detrimental to the interests of the United States and that the President fulfilled that textual requirement of Section 212(f) in the case of the Muslim Ban.<sup>14</sup>

Following the favorable decision for him in *Trump v. Hawaii*, the President continued to invoke 212(f) repeatedly to conduct his vision for immigration policy during the COVID-19 pandemic. Though initially the exclusions were country specific based on COVID-19 outbreaks, distinctions between the restrictions on European countries and Asian and Middle Eastern countries in respect to trade appeared to exhibit a racial bias, and eventually the President was emboldened to use COVID-19 as a justification to more broadly exclude Chinese graduate students and then all immigrants he deemed to be competition for American workers.<sup>15</sup> These policies were testing the limits of the emergency nature of 212(f) and how “national interest” is defined under 212(f), since these stances were not new and were a part of Trump’s immigration platform even before he became president.<sup>16</sup> In fact, his proclamations under 212(f) allowed the president success where his legislative agenda had previously failed. In the first year of his presidency, President Trump endorsed the Reforming American Immigration for Strong Employment (RAISE) Act, which sought to curtail

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11. 8 U.S.C. § 1182 (1952).

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

13. Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

14. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2408, 2411–12 (2018).

15. See generally Stuart Anderson, *Inside Trump’s Immigration Order to Restrict Chinese Students*, FORBES (Jun. 1, 2020), <https://www.forbes.com/sites/stuartanderson/2020/06/01/inside-trumps-immigration-order-to-restrict-chinese-students/?sh=19e6073a3bec> [https://perma.cc/458R-4UTD].

16. See generally *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/6S9Z-PF3G].

legal immigration by approximately one half, but it failed to come to a vote in the Senate, and two similar bills were introduced in subsequent years but also failed.<sup>17</sup> These bills would have had the most significant impact on Asian immigrants, as the majority of employment-based visas have been issued to immigrants from Asian countries.<sup>18</sup>

Throughout the pandemic, President Trump stoked anti-Asian sentiment, particularly against people of Chinese origin, not by targeting them as a people group, but constantly blaming China for the pandemic and calling it the “Chinese virus” and the “China plague.”<sup>19</sup> Since the President began employing anti-Chinese inflammatory rhetoric, there has been an upsurge in violence against Asian Americans across the nation.<sup>20</sup> As Tim Webster has argued, due to their racialization as perpetually foreign others, “Asians incite mistrust among the U.S. public, media, and political classes that is largely disproportionate to the threat they actually pose . . . [and as a] putative security threat, the rise of Asia is linked to the decline of the United States.”<sup>21</sup> However yet again, this is nothing new, as President Trump targeted China from the beginning. Trump centered his 2016 presidential campaign on a “Make America Great Again” platform that fiercely criticized American foreign trade relations, particularly with China.<sup>22</sup> Indeed Trump’s “America First” campaign strategy specifically attacked foreign competition with China as a chief target. He began his campaign by complaining how much China was “ripping us,”<sup>23</sup> and continued to lambast China on the campaign trail. Early in his campaign, he wrote an opinion piece in the Wall Street Journal, entitled “Ending China’s Currency Manipulation.”<sup>24</sup> China was also a central focus during his first debate with Hillary Clinton.<sup>25</sup> Concerning trade policies with China, in a campaign rally in Fort Wayne, Indiana on May 2, 2016, Trump decried, “We can’t continue to allow China to rape our country and that’s

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17. See generally RAISE Act, S. 354, 115th Cong. (1st Sess. 2017).

18. Asian Americans Advancing Justice, *Inside the Numbers: How Immigration Shapes Asian American and Pacific Islander Communities* 24, 44 (2019).

19. Vinay Harpalani, *Can “Asians” Truly Be Americans?*, 27 WASH. & LEE J. C. R. & SOC. JUST. 559, 565–66 (2021); see also Michele Goodwin & Erwin Chemerinsky, *The Trump Administration: Immigration, Racism, and Covid-19*, 169 U. PA. L. REV. 313, 318–19 (2021).

20. Harpalani, *supra* note 19.

21. Timothy Webster, *Why Does the United States Oppose Asian Investment?*, 37 NW. J. INT’L L. & BUS. 213, 256–57 (2017).

22. See, e.g., *Transcript of Donald Trump’s Immigration Speech*, *supra* note 16.

23. Time Staff, *supra* note 2.

24. Donald Trump, *Ending China’s Currency Manipulation*, WALL ST. J. (Nov. 9, 2015), <https://www.wsj.com/articles/ending-chinas-currency-manipulation-1447115601> [<https://perma.cc/SP5F-9PRU>].

25. See generally Hannah Beech, *Donald Trump Talked a Lot About China at the Debate. Here’s What China Thought About That*, TIME (Sept. 27, 2016), <https://time.com/4509121/china-presidential-debate-hillary-clinton-donald-trump/> [<https://perma.cc/ZFJ6-QKWE>].

what they're doing. It's the greatest theft in the history of the world."<sup>26</sup> Thus, President Trump's scapegoating of China to accomplish his restrictive immigration policies is not simply a result of COVID-19, but is in line with his entire policy platform from the beginning.

This article situates former President Trump's use of executive authority within a larger history of using public health and welfare as a means of promoting anti-immigrant policies rooted in nationalism and xenophobia. Trump is not the first, nor will be the last, politician to stoke nativist and racist anxieties for political gain. Part I examines the move towards Chinese exclusion in the United States during the late nineteenth century as a case study of how racist scapegoating of an Asian immigrant population for domestic economic problems slowly evolved into, and was legitimized by, legislation centered around public health and safety, and ultimately national security. Anti-Asian sentiment began as a regional West coast issue of labor competition, but exploded into a national issue as a public health and safety concern by connecting the Chinese population to disease and contagion. This led to the first federal immigration restrictions in the United States, the Page Act of 1875 that was quickly followed by the broader Chinese Exclusion Act of 1882. Chinese exclusion, moreover, created the foundation for the constitutional theory of plenary power, itself based on wartime powers of the federal government, as interpreted by the Supreme Court, that became the bedrock for all federal immigration power thereafter. Part II considers how national security, the rhetoric of war, and wartime emergency powers of the national government served as touchstones for continued structural discrimination against Asian American populations in the United States through the twentieth century and into the twenty-first century. National security and the need for broad discretionary powers of the federal government during states of emergency were the legal justifications for the disparate treatment of ethnic immigrant groups, which was endorsed by the Supreme Court in *Korematsu v. United States*<sup>27</sup> and *Trump v. Hawaii*.<sup>28</sup> Part III analyzes how this expansion of emergency federal immigration power in the wake of *Trump v. Hawaii* emboldened Trump to engage in more expansive exclusions increasingly blurred the lines between national security, national interest, and baseless xenophobic scapegoating.

The foundation of immigration law was birthed in xenophobia and a fear of contagion, which then established the powers of the federal government based on principles of national security and emergency crisis control. In fact, the very first federal immigration law instituted specifically targeted Chinese immigrants by defining them as a security risk to the

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26. Veronica Stracqualursi, *10 times Trump attacked China and its trade relations with the US*, ABC NEWS (Nov. 9, 2017), <https://abcnews.go.com/Politics/10-times-trump-attacked-china-trade-relations-us/story?id=46572567> [<https://perma.cc/MY3R-A5DS>].

27. *Korematsu v. United States*, 323 U.S. 214, 219–20 (1944).

28. *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018).

country as carriers of disease even though the true policy reason for their exclusion was labor competition with white laborers.<sup>29</sup> The recent elision of national economic interests with national security and public health, therefore, is consistent with historical immigration policy. For this reason, any reform or reversal of Trump's use of national security to accomplish his immigration agenda cannot simply look at the actions of one president, but must look to the deeper structural roots of the problem that enabled him in the first place.

### I. CONTAGION, YELLOW PERIL, AND EXCLUSION

Anti-Chinese sentiment fueled the first federal immigration laws in the United States in the nineteenth century. Prior to that time, immigration to the United States was generally open. A short-lived exception to this practice were the Alien and Sedition Acts, which were passed during the Adams administration using fear of impending war with France as an impetus for their passage.<sup>30</sup> The Alien and Sedition Acts were four laws that were passed in 1798, and included an amendment to the Naturalization Act of 1790 that extended the period of residency for naturalization from five to fourteen years; the Alien Enemy Act that conferred upon the President the power to deport without trial aliens from hostile countries; the Alien Friends Act that gave the President the same power to deport aliens he deemed dangerous; and the Sedition Act that made it illegal to "combine or come together, with the intent to oppose any measure or measures of the government," or to write, utter, or publish "any false, scandalous, and malicious writing or writings" against Congress or the president.<sup>31</sup> These laws, however, were primarily applied towards political enemies of the Federalist party, especially editors of Democratic-Republican newspapers who were critical of the Adams administration and sparked debate concerning First Amendment rights of free speech and free press that eventually led to the ouster of the Federalist party from power in the election of 1800.<sup>32</sup> After the election, the Alien Friends Act and the Sedition Act were allowed to expire, and the Naturalization Act was amended to reduce the residency requirement for naturalization back to five years instead of fourteen.<sup>33</sup> However, the Alien Enemies Act, which had no

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29. See U.S. DEP'T OF STATE, OFF. OF THE HIST., CHINESE IMMIGR. AND THE CHINESE EXCLUSION ACTS, <https://history.state.gov/milestones/1866-1898/chinese-immigration> [<https://perma.cc/K528-EJEK>].

30. See 50 U.S.C. §§ 21–24; see also History.com Editors, *Alien and Sedition Acts*, HIST. (Nov. 9, 2009), <https://www.history.com/topics/early-us/alien-and-sedition-acts> [<https://perma.cc/H2F3-L6XD>].

31. *Id.*

32. *Id.*

33. History.com Editors, *supra* note 30.

expiration date, remained but was not applied again until the twentieth century.<sup>34</sup>

Chinese immigrants first began arriving in large numbers to the United States in the middle of the nineteenth century, during this period of open immigration.<sup>35</sup> They were first drawn to California with the discovery of gold at Sutter's Mill and settled primarily in Northern California.<sup>36</sup> Soon afterwards, they became an attractive additional workforce for employers requiring unskilled labor, such as mining, farming, and other physically demanding work in the region. In particular, the Chinese were heavily recruited to supply labor for the building of the transcontinental railroad.<sup>37</sup> However, since Chinese laborers represented an alternative to the domestic labor pool that was increasingly becoming organized and unionized, domestic workers and small farmers viewed them as competition and a threat to domestic wages.<sup>38</sup> Growing resentment against the Chinese among labor groups eventually spurred a movement to exclude and expel them. The anti-Chinese movement, at this stage, was almost exclusively regional to the West coast, and focused on the issue of labor competition.<sup>39</sup>

White labor interests pressured the California legislature to take action against the Chinese. Since only free white persons were permitted to naturalize as citizens, Chinese immigrants were not able to offer any significant political resistance. Starting in 1850, California began enacting a series of laws that were hostile to the Chinese, in an effort to discourage their continued immigration. In 1850 California instituted a Foreign Miners' Tax, which imposed a twenty-dollar monthly tax on all foreign miners who were ineligible for citizenship.<sup>40</sup> In 1852, a California Assembly committee issued a report stating that most Chinese in America were indentured laborers in the service of foreign capitalists, and that their presence demeaned American laborers in California.<sup>41</sup> In 1855, California enacted "An Act to Discourage the Immigration to this State of Persons Who Cannot Become Citizens Thereof" which created a Passenger Tax that imposed a fifty-dollar tax on every person arriving from sea who was ineligible for citizenship.<sup>42</sup> In 1858, the California legislature enacted "An Act to Prevent the Further Immigration of Chinese or Mongolians to this

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34. *Id.*

35. *Id.*

36. *California Gold Rush*, BRITANNICA (Nov. 1, 2021, 6:48 PM), <https://www.britannica.com/topic/California-Gold-Rush> [https://perma.cc/RW9L-5QX3].

37. U.S. DEP'T OF STATE, *supra* note 29.

38. *Id.*

39. *Id.*

40. Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 536 (1984).

41. *Id.*

42. An Act to Discourage the Immigration to this State of Persons who cannot become Citizens thereof of Apr. 28, 1855, ch. 153, 1855 Cal. Stat. 194 (officially repealed, Act of Mar. 30, 1955, ch. 46, § 1, 1955 Cal. Stat. 487, 488).



State” which made the immigration of Chinese persons punishable by a fine or imprisonment from three months to a year.<sup>43</sup> Then in 1862, the California legislature enacted “An Act to Protect Free White Labor Against Competition with Chinese Coolie Labor, and to Discourage the Immigration of the Chinese into the State of California,” which required that any person “of the Mongolian race” pay a tax of \$2.50 per month, which was called the “Chinese Police Tax.”<sup>44</sup>

These discriminatory laws, however, were struck down one by one by the courts, which defined the limitations of state legislation to regulate Chinese immigration. In *People v. Downer*, the California Supreme Court struck down the 1855 Passenger Tax because it encroached upon federal commerce power.<sup>45</sup> California legislators attempted to defend the law by stating that the purpose of the Passenger Tax, which was to discourage the Chinese from immigrating into the state, was a proper exercise of state police power.<sup>46</sup> The court, however, disagreed. Citing the Passenger Cases, where the Supreme Court struck down New York and Massachusetts laws imposing head taxes on foreign passengers, the California Supreme Court, in *Downer*, found that the tax posed an undue burden on shipping companies, and therefore interfered with commerce, which was a power reserved for the federal government.<sup>47</sup>

The California Supreme Court similarly struck down the Chinese Police Tax in *Lin Sing v. Washburn*.<sup>48</sup> By basing the tax on racial background rather than immigration status, the act authorizing the Chinese Police Tax was written in a way as to avoid implications with federal commerce.<sup>49</sup> Nonetheless, the court found that California’s discriminatory treatment of the Chinese, by targeting a nationality of people, could damage foreign relations with China and thus have national ramifications on foreign commerce and trade.<sup>50</sup> Justice Cope, writing for the majority, particularly noted that “the act before us is a measure of special and extreme hostility to the Chinese, and that the power asserted in its passage is the right of the State to prescribe the terms upon which they shall be permitted to reside in it.”<sup>51</sup> This right, if carried to the extent to which it may be carried if the power exists, may be so used as to cut off all intercourse between them and the people of the State, and obstruct and block up the channels of

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43. An Act to Prevent Further Immigration of Chinese or Mongolians to this State of Apr. 26, 1858, ch. 529, 1858 Cal. Stat. 296 (repealed 1955).

44. An Act to Protect Free White Labor Against Competition with Chinese Coolie Labor, and to Discourage the Immigration of the Chinese into the State of California of Apr. 26, 1862, ch. 339, 1862 Cal. Stat. 462 (repealed 1939).

45. *People v. Downer*, 7 Cal. 169, 171 (Cal. 1857).

46. *Id.* at 170.

47. *Id.* at 171.

48. *Sing v. Washburn*, 20 Cal. 534, 585–86 (Cal. 1862).

49. *Id.* at 534.

50. *Id.* at 564.

51. *Id.* at 577.

commerce, laying an embargo upon trade, and defeating the commercial policy of the nation.”<sup>52</sup> The *Lin Sing* opinion also noted that the California Supreme Court had struck down the 1858 “Act to Prevent the Further Immigration of Chinese or Mongolians to this State” in an unpublished opinion.<sup>53</sup>

In this respect, the courts were signaling that the ability to promote or cease immigration of Chinese was an issue of foreign relations and commerce that was exclusively under the power of the federal government. If Chinese immigration was going to be curbed, it would take federal action to do so. However, the stance of the federal government on the Chinese appeared to be moving in the opposite direction as California. Indeed, in the years following the *Lin Sing* decision, the federal government was pursuing increased trade and commerce with China, which culminated with the granting of most favored nation status to China with the signing of the Burlingame-Seward Treaty of 1868.<sup>54</sup> Though the Chinese immigrants themselves lacked the political power to resist the passage of discriminatory laws in California, the federal government’s interest in international trade relations with China would curb this tide, at least temporarily. For the California interest of Chinese exclusion to be accomplished, not only would the Chinese problem need to be expanded to a federal issue, but that issue would need to trump the federal government’s interest in maintaining good foreign relations with China.

Anti-Chinese agitators on the West coast would soon have their chance on the national stage. The completion of the transcontinental railroad in 1869 suddenly flooded the labor market with thousands of unskilled Chinese workers. Since California alone could not possibly accommodate the sudden glut of unemployed Chinese workers, they began moving to other states. Indeed, the following year, an incident in Massachusetts ignited anti-Chinese sentiment in the East Coast, making the question of Chinese exclusion into a national issue. In June 1870, Calvin Sampson, the owner of a shoe factory in North Adams, Massachusetts, brought in seventy-five Chinese laborers as scab workers during a labor dispute with the Knights of St. Crispin Union.<sup>55</sup> Immediately afterwards, at its annual meeting in August 1870, the National Labor Union adopted an anti-Chinese stance, thereby drawing national attention to an issue that was originally localized to the West coast.<sup>56</sup> National legislation seeking to limit Chinese immigration, however, stalled for several years, indicating that the labor issue was not enough to garner the support needed in Congress.

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52. *Id.*

53. *Id.* at 534.

54. U.S. DEP’T OF STATE, OFF. OF THE HIST., THE BURLINGAME-SEWARD TREATY, 1868, <https://history.state.gov/milestones/1866-1898/burlingame-seward-treaty> [<https://perma.cc/3PBV-FSKL>].

55. Henry S. Cohn & Harvey Gee, “No, No, No, No!”: *Three Sons of Connecticut Who Opposed the Chinese Exclusion Acts*, 3 CONN. PUB. INT. L.J. 1, 34 (2003).

56. *Id.*

Several anti-Chinese bills were introduced in Congress from 1873 to 1875, mostly by Representative Horace Page of California. All of them failed, however, due again to the competing interest of the other legislators desiring to maintain healthy trade relations with China.<sup>57</sup>

The unifying interest that finally facilitated Chinese exclusion at the federal level was public health and morality. In *Lin Sing*, the court did signal that the police power of states permitted them “to exclude obnoxious persons, such as paupers and fugitives from justice,”<sup>58</sup> but reasoned that the discriminatory taxing of the Chinese was not an exercise of such power.<sup>59</sup> Thus, California began shifting the rhetoric of exclusion towards framing the Chinese as “obnoxious persons” who posed a threat to public health and morality and would therefore be subject to regulation under state police power. To achieve this, the legislature began targeting Chinese brothels. In March 1866, the California legislature passed “An Act for the Suppression of Chinese Houses of Ill Fame.”<sup>60</sup> In March 1870, the legislature passed “An Act to Prevent the Kidnapping and Importation of Mongolian, Chinese and Japanese Females, for Criminal or Demoralizing Purposes.”<sup>61</sup> Under this Act, if a passenger of a vessel was an Asian female, she was required to present evidence that she was immigrating voluntarily and that she was a “good person of correct habits and good character.” If she was unable to do so, the captain of the vessel carrying her could be charged with a misdemeanor punishable by a \$1,000 to \$5,000 fine or two to twelve months imprisonment.<sup>62</sup> During the 1873-74 legislative session, this Act was merged into Section 2952 of Chapter 1, Article 7, of the Political Code of California, and added lewd or debauched women as additional classifications of individuals to whom monetary bonds could be attached prior to disembarkation.<sup>63</sup>

This law came under challenge in what has come to be known as the case of the 22 Lewd Women.<sup>64</sup> On August 24, 1884, the steamship *Japan* landed in San Francisco carrying approximately 600 passengers from Hong Kong, eighty-nine of whom were women.<sup>65</sup> As authorized under the California Political Code, the California Commissioner of Immigration boarded the *Japan* and interviewed the eighty-nine women to ascertain whether any of them were prostitutes.<sup>66</sup> After the interviews, he determined that twenty-two of the eighty-nine women were “debauched women” under

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57. See generally Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 690–91 (2005).

58. *Sing v. Washburn*, 20 Cal. 534, 578 (Cal. 1862).

59. *Id.* at 578–80.

60. Abrams, *supra* note 57, at 677.

61. *Id.* at 674.

62. *Id.* at 675–76.

63. *Id.* at 677.

64. *See Chy v. Freeman*, 92 U.S. 275, 276 (1876).

65. *In re Ah Fong*, 1 F. Cas. 213, 214 (C.C.D. Cal. 1874).

66. *Id.*

the statute and ordered that the women would not be allowed to disembark unless \$500 bonds were posted on their behalf.<sup>67</sup> Neither the captain nor the owner of the vessel was willing to pay, and thus the women were ordered to be detained pending departure of the vessel.<sup>68</sup> The twenty-two women applied for a writ of habeas corpus with the California District Court, which ruled against them.<sup>69</sup> The court came to the factual conclusion that the women were indeed lewd and that their exclusion was a legitimate exercise of police power to preserve the "well-being and safety" of the state of California.<sup>70</sup> The women appealed to the Supreme Court, which issued its decision a week later in *Ex parte Ah Fook*.<sup>71</sup> Whereas previously the California Supreme Court had struck down discriminatory legislation targeting the Chinese as infringing upon federal power over commerce and foreign relations, this time the court agreed with the finding of the district court that the exclusion of Chinese prostitutes was a valid exercise of police power. With its police power, which the Court calls also the "power of self-protection,"<sup>72</sup> the state possesses broad discretion to exclude elements deemed threatening to public safety and public health. The California Supreme Court found the exclusion of prostitutes to be:

[O]f the same nature as the power which isolates those ill of contagious diseases, or those who have been in contact with such, or the power to prohibit the introduction of criminals or paupers. These powers are employed, not to punish for offenses committed without our borders, but to prevent the entrance of elements dangerous to the health and moral well-being of the community.<sup>73</sup>

Finally, the women appealed to the federal circuit court. In his decision in *In re Ah Fong*, Justice Stephen Field, riding circuit in San Francisco, found that the statute was an overly broad exercise of state police power and that it still trespassed on the federal power over commerce and foreign relations.<sup>74</sup> As a result, the twenty-two women were ordered freed. However, Justice Field left open the possibility of federal action on the issue, saying "if further immigration is to be stopped, recourse must be had to the federal government, where the whole power over this subject lies."<sup>75</sup> Though California's effort to exclude the Chinese by casting them as "obnoxious persons" that fall under state police power ultimately failed,

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67. *Chy*, 92 U.S. at 276.

68. *Id.*

69. *In re Ah Fong*, 1 F. Cas. at 214, 218.

70. *Abrams*, *supra* note 57, at 684–85.

71. 49 Cal. 402, 403 (1874).

72. *Id.* at 405.

73. *Id.* at 406–07.

74. *In re Ah Fong*, 1 F. Cas. at 218.

75. *Id.* at 217.

it nonetheless created a space to shift and expand the rhetoric of exclusion from labor to public health and safety.

As the crucial midterm election of 1874 neared, the “Chinese problem” began gathering bipartisan support. Though the Democrats were more unapologetically xenophobic in their intentions to protect white labor interests, the Republicans were more moderate in their stance. President Grant, in his annual address to the nation in 1874, signaled the need to frame the Chinese problem as a moral issue rather than a labor issue, saying:

[T]he great proportion of the Chinese immigrants who come to our shores do not come voluntarily, to make their homes with us and their labor productive of general prosperity, but come under contracts with head-men, who own them almost absolutely. In a worse form does this apply to Chinese women. Hardly a perceptible percentage of them perform any honorable labor, but they are brought for shameful purposes, to the disgrace of the communities where settled and to the great demoralization of the youth of these localities.<sup>76</sup>

Taking the cue of the President, anti-Chinese members of Congress narrowed the scope of national exclusionary proposals to prostitutes. In his opening speech introducing the Page Act,<sup>77</sup> Representative Horace Page focused on the public health crisis that Chinese prostitutes posed to the general population. The judiciary, in *In re Ah Fong*, had indicated that it would require federal legislative action to curb the threat of Chinese contagion from prostitutes. Representative Page, in his introduction of the Page Act, included a letter from the Commissioner of Immigration, stating “[i]t is well known that every city and town in this State has Chinese brothels in such numbers as to spread disease to the young and inexperienced of our population.”<sup>78</sup> The Page Act was passed with overwhelming support, was signed by President Grant, and effectively barred immigration of women from China unless they could prove that they were not prostitutes.<sup>79</sup>

Even after the Page Act, the subject of inquiry continued to be on disease and contagion. During an inquiry about Chinese immigration in 1876 before the California State Senate, a good portion of the medical

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76. 3 Cong. Rec. 3–4 (1874).

77. Page Act of 1875, Pub. L. No. 43-141, § 1, 18 Stat. 477 (1875).

78. Abrams, *supra* note 57, at 693.

79. See 3 Cong. Rec. 1599, 2161 (1875); see also Ulysses S. Grant, *Chinese Immigration, and the Page Act of 1875*, NAT’L PARK SERV., <https://www.nps.gov/articles/000/ulysses-s-grant-chinese-immigration-and-the-page-act-of-1875.htm> [<https://perma.cc/DJ48-S6VL>].

testimony centered around a concern of transmission of syphilis from the Chinese to the white population.<sup>80</sup> However, whereas the focus of the debate prior to the passage of the Page Act was on women, the attention now turned to the entire Chinese population that was dominated by men. As historian Nayan Shah states:

Since syphilis infection was imagined as emblematic of the Chinese race, its transmission was not restricted to sexual contact with Chinese women. Chinese men, in their capacity as domestic servants, were just as liable to infect white families. Since women represented a tiny proportion of the Chinese population and lived physically restricted in Chinatown, the threat Chinese men could pose in disseminating disease was far more ominous.<sup>81</sup>

Also in 1876, during a hearing before the United States Senate on the issue of Chinese immigration, medical testimony cited leprosy as another condition that was widespread in the Chinese population and would rise to epidemic proportions in the United States if Chinese immigration were allowed to continue.<sup>82</sup>

Representative Albert Shelby Willis, a Democrat from Kentucky, opened the debate on Chinese Exclusion in the House of Representatives by citing his own change of heart about the Chinese and arguing that exclusion had become a bipartisan issue.<sup>83</sup> He directly linked the Chinese threat to American labor to the “squalid” living conditions of the foreign aliens, and described how:

Crowded, huddled together, forty or fifty in a room not larger than would accommodate with decency and comfort one man with a family, discarding or disregarding all the usual ordinary appliances of personal civilization as to diet and clothing' cooking, eating, and sleeping in the same apartment, they have succeeded in reducing the cost of living to a minimum, and thus wherever located have forced the laboring classes to the wall.<sup>84</sup>

Later in the debate, Willis likened the Chinese to a pestilence, stating:

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80. *See generally* NAYAN SHAH, *CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO'S CHINATOWN* 85–90 (2001).

81. *Id.* at 89.

82. *Id.* at 99.

83. 13 Cong. Rec. 1976 (1882).

84. *Id.*

They are parasites, like those insects which fasten themselves upon vegetables or upon animals and feed and feed until satiety causes them to release their hold. They come to this country not to partake in the responsibilities of citizenship; they come here with no love for our institutions; they do not hold intercourse with the people of the United States except for gain; they do not homologate in any degree with them. On the contrary, they are parasites when they come, parasites while they are here, and parasites when they go.<sup>85</sup>

Representative George Cassidy, another Democrat from Nevada, echoed Willis' characterization, saying that the Chinese brought with them drugs and disease.<sup>86</sup>

The issue of Chinese Exclusion came under judicial review in *Chae Chan Ping v. United States*, also known as the Chinese Exclusion Case.<sup>87</sup> In 1888, Congress passed the Scott Act, which renewed the Chinese Exclusion Act and amended it to additionally forbid the reentry of Chinese immigrants even if they had previously been present in the United States.<sup>88</sup> Chae Chan Ping was a Chinese immigrant who had initially come to the United States in 1875, but had left on June 2, 1887 to temporarily visit China.<sup>89</sup> At the time, the law permitted him to return to the United States if he obtained a certificate of reentry, which he did.<sup>90</sup> However, while he was away, and in fact during his return trip to the United States, Congress passed the Scott Act, which rendered Ping's certificate of reentry void.<sup>91</sup> When Ping landed in the port of San Francisco, he was denied reentry by the collector of the port and ordered to remain detained on the steamship on which he had arrived.<sup>92</sup> Ping filed a writ of habeas corpus protesting his detention, claiming that the Scott Act was a contravention of the Burlingame Treaty.<sup>93</sup>

An earlier case, *Chy Lung v. Freeman*, had set the precedent of immigration control being in the exclusive jurisdiction of the federal government as a matter of international trade and foreign relations.<sup>94</sup> *Chy Lung v. Freeman* was an appeal of the earlier state court decisions in the case of the 22 Lewd Women. In *Chy Lung*, the Supreme Court ruled that

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85. *Id.* at 3358.

86. *Id.* at 1980.

87. *Ping v. United States*, 130 U.S. 581, 589 (1889).

88. *Scott Act of 1888*, IMMIGR. AND ETHNIC HIST. SOC'Y, <https://immigrationhistory.org/item/scott-act/> [<https://perma.cc/SRS8-RD7R>].

89. *Ping*, 130 U.S. at 582.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Chy v. Freeman*, 92 U.S. 275, 279–80 (1875).

immigration restriction was a power reserved for the federal government.<sup>95</sup> Though the Chinese women had already been ordered released in *Ah Fong*, they nonetheless brought a writ of error to the Supreme Court to reverse the rulings of the California state courts in order to test the constitutionality of the California statute. The Supreme Court overturned the California statute, finding that immigration control was a feature of foreign relations and foreign commerce, which was exclusively in the jurisdiction of the federal government.<sup>96</sup>

However, in *Chae Chan Ping*, the Supreme Court expanded federal immigration power beyond just the issues of commerce and diplomacy, and enshrined federal immigration control as an integral feature of national sovereignty and national security.<sup>97</sup> Though the power to limit immigration was not enumerated in the Constitution, the court reasoned that it was inherent in the issue of national sovereignty; the court asserted, “[j]urisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.”<sup>98</sup> The court identified the power to exclude aliens among the same powers of sovereign nations “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.”<sup>99</sup> Immigration control was a matter of national security, and the court stated:

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth.<sup>100</sup>

In the same way that a country is permitted to protect its borders against foreign invasion, so too was a country broadly permitted to exclude foreigners that it deemed undesirable and potentially damaging to the national interest.

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95. *Id.* at 280.

96. *Ping*, 130 U.S. at 610.

97. *Id.* at 603–04.

98. *Id.* at 604.

99. *Id.* at 606.

100. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).



Thus, the Court found the Chinese Exclusion to be within the plenary power of Congress over immigration matters. Subsequent cases would further solidify the plenary power of Congress over immigration. In *United States ex. rel. Knauff v. Shaughnessy*, the Supreme Court appealed again to the plenary power of Congress over immigration, saying “the exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.”<sup>101</sup> In *Mathews v. Diaz*, where an immigrant challenged the constitutionality of a federal statute that denied them access to federal Medicare because of their immigrant status, the Court reemphasized the sweeping breadth of Congress’ plenary power remarking, “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”<sup>102</sup>

## II. KOREMATSU, INTERNMENT, AND THE ENEMY WITHIN

Asians as national security threats would reemerge following the Japanese bombing of Pearl Harbor that brought the United States into World War II. Following the attack, President Franklin Roosevelt invoked the Enemy Alien Act to issue Executive Order 9066, where he authorized the Secretary of War and military commanders to exclude individuals they deemed to be threats to national security, regardless of citizenship, to be excluded from areas designated as military zones.<sup>103</sup> This order led to evacuation and internment of over 110,000 people of Japanese descent, 70,000 of whom were United States citizens.<sup>104</sup> The government justified this action as a military necessity to curb the threat of espionage and sabotage that might assist an enemy invasion of the West Coast.<sup>105</sup> Like a virus living within the body, the Japanese posed the threat of an enemy within that could compromise national security. Of the imagined types of invasions, American officials feared that Japan might launch biological weapons containing plague and disease against the West Coast.<sup>106</sup>

Executive Order 9066 famously came under constitutional challenge in *Hirabayashi v. United States*<sup>107</sup> and *Korematsu v. United*

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101. *Id.*

102. *Mathews v. Diaz*, 426 U.S. 67, 78 (1976).

103. Executive Order 9066, February 19, 1942; General Records of the United States Government, Record Group 11, National Archives.

104. Margaret Hu, *Crimmigration-Counterterrorism*, 2017 WIS. L. REV. 955, 974–75 (2017).

105. *Id.*

106. DONALD AVERY, BIOLOGICAL AND TOXIN WEAPONS: RESEARCH, DEVELOPMENT AND USE FROM THE MIDDLE AGES TO 1945, 190, 211 (Erhard Geissler & John Ellis van Courtland Moon eds., 1999).

107. *Hirabayashi v. United States*, 320 U.S. 81, 83–84 (1943).

*States*.<sup>108</sup> In *Hirabayashi v. United States*, the Supreme Court reasoned that conditions of national emergency justify exemption from constitutional protections. Gordon Hirabayashi had been convicted of disobeying an army curfew order issued only to people of Japanese ancestry living in the United States pursuant Executive Order 9066.<sup>109</sup> Though recognizing that the curfew targeted him because of his national origin and potentially an equal protection violation, the Supreme Court nevertheless upheld his conviction, reasoning:

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas.<sup>110</sup>

Desperate times demanded desperate measures, even if it meant suspension of constitutional protections.

Eighteen months later, the Supreme Court would rule on a challenge to another army order issued pursuant to Executive Order 9066, this time ordering the exclusion of people of Japanese ancestry from their homes in order to relocate them to the internment camps.<sup>111</sup> Fred Korematsu, an American citizen of Japanese ancestry, defied the exclusion order and remained in his home in San Leandro, California and was convicted of violating the order.<sup>112</sup> Korematsu appealed his conviction, asserting that the exclusion order targeted him because of his race and was therefore a violation of the Equal Protection clause of the Fourteenth Amendment.<sup>113</sup> In *Korematsu v. United States*, the Supreme Court applied strict scrutiny but found, as in *Hirabayashi*, that the military necessity arising from the danger of espionage and sabotage justified the discriminatory exclusion order.<sup>114</sup>

The same day as *Korematsu* was decided, the Supreme Court ruled that relocation of people of Japanese ancestry to the internment camps was

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108. *Korematsu v. United States*, 323 U.S. 214, 219–20 (1944).

109. *Hirabayashi*, 320 U.S. at 83–84.

110. *Id.* at 100.

111. *Korematsu*, 323 U.S. at 223.

112. *Id.* at 214.

113. *Id.* at 215–16, 218.

114. *Id.* at 216.

invalid in *Ex parte Endo*.<sup>115</sup> However, the Court ordered her release not on equal protection grounds, because she was being unlawfully targeted because of her national origin, but because the Court found that relocation was beyond the scope of what Executive Order 9066 authorized.<sup>116</sup> Thus, *Endo* leaves in place the validity of Executive Order 9066 and the emergency powers of the president to suspend constitutional protections in times of emergency as dictated in *Hirabayashi* and *Korematsu*.

In his concurrence in *Oyama v. California*, Justice Murphy, who previously had openly denounced the majority decision in *Korematsu* as racist, recounted the long history of discriminatory laws aimed at discouraging Asian immigration, noting in particular how similar strategies were deployed to target the Japanese in the same manner as the Chinese.<sup>117</sup> The Japanese, like the Chinese, were viewed as competition to white labor, and specifically in the agricultural sector. The Commission on Wartime Relocation and Internment of Civilians concluded that an important motivator for interment was economic competition, finding “[i]n part the hostility was economic, emerging in various white American groups who began to feel competition, particularly in agriculture, the principal occupation of the immigrants.”<sup>118</sup> As noted by Justice Murphy and Justice Roberts in their concurrences, the Court deftly avoids the Fourteenth Amendment constitutional questions of equal protection and due process by only focusing on the scope of permissible actions authorized under Executive Order 9066, rather than the validity of Executive Order 9066 itself.<sup>119</sup>

Though the motivation was economic, the discourse of exclusion and discrimination was couched in the discourse of public health and safety. In his *Oyama* concurrence, Justice Murphy notes how the language of contagion and squalid living conditions renewed public health and safety justifications for restrictions on Asians, saying:

The Japanese were depicted as degenerate mongrels and the voters were urged to save ‘California—the White Man's Paradise’ from the ‘yellow peril,’ which had somewhat lapsed in the public mind since 1913. Claims were made that the birth rate of the Japanese was so high that the white people would eventually be replaced and dire warnings were made that the low standard of living of the Japanese

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115. *Ex parte Mitsuye Endo*, 323 U.S. 283, 283 (1944).

116. *Id.* at 299.

117. *Oyama v. California*, 332 U.S. 633, 651–52 (1948).

118. COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 4 (1983).

119. *Oyama*, 332 U.S. at 651–52.

endangered the economic and social health of the community.<sup>120</sup>

Though the discourse of public welfare and national emergency were the justifiers, the motivation for Japanese internment was xenophobic racism caused by labor competition.

*Korematsu* instituted a principle of almost unrestricted judicial deference to executive decisions made under the auspices of national security and national emergency. In the wake of the September 11 attacks on the World Trade Center, public sentiment and public policy quickly turned to racial and religious scapegoating of immigrants from Muslim and Middle Eastern countries.<sup>121</sup> Amidst public fears of further terrorist attacks, Congress quickly passed the USA Patriot Act which significantly expanded the national security powers of the executive branch.<sup>122</sup> Immigration and Naturalization Services was disbanded and reorganized as a subsection of the newly formed Department of Homeland Security. In *Hamdi v. Rumsfeld*, Yaser Hamdi, a United States citizen, challenged his designation as an enemy combatant which therefore allowed for his indefinite detention.<sup>123</sup> The Supreme Court ruled in Hamdi's favor, but only insofar as he was entitled to a low-level hearing to determine whether he was an enemy combatant, which was a low bar for the government to justify continued indefinite detention.<sup>124</sup> Justice Souter, concurring with the judgment but dissenting in part, noted:

The plurality does, however, accept the Government's position that if Hamdi's designation as an enemy combatant is correct, his detention (at least as to some period) is authorized by an Act of Congress as required by § 4001(a), that is, by the Authorization for Use of Military Force, 115 Stat. 224 (hereinafter Force Resolution). Ante, at 2639–2642. Here, I disagree and respectfully dissent.<sup>125</sup>

In *Holder v. Humanitarian Law Project*, the Supreme Court upheld an overbroad statute that made it a crime to provide material support to a foreign terrorist organization.<sup>126</sup> Though the Court applied intermediate scrutiny, it deferred to a single conclusory affidavit proffered by the government to justify the statute. Justice Roberts, writing for the majority,

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120. *Id.*

121. Mariam Fam et al., *Two decades after 9/11, Muslim Americans still fighting bias*, AP NEWS, Sept. 7, 2021, <https://apnews.com/article/September-11-Muslim-Americans-93f97dd9219c25371428f4268a2b33b4> [<https://perma.cc/V7QD-6TPB>].

122. USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

123. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510–11 (2004).

124. *Id.* at 508.

125. *Id.* at 541.

126. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 1–2 (2010).

noted “[t]he Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.”<sup>127</sup>

The judicial deference to national security decisions of the executive branch resurfaced again in *Trump v. Hawaii*, which challenged the Muslim Ban.<sup>128</sup> When President Trump instituted the Muslim Ban, he himself made comparisons to Executive Order 9066 and Japanese internment, saying “Roosevelt did the same thing.”<sup>129</sup> Applying 212(f) of the Immigration and Nationality Act, President Trump declared that immigrants from predominantly Muslim countries posed a security risk to the nation and therefore would be excluded from entry into the United States.<sup>130</sup> In *Trump v. Hawaii*, Justice Roberts again granted great deference to the office of the President, saying “[w]hile we of course ‘do not defer to the Government’s reading of the First Amendment,’ the Executive’s evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving ‘sensitive and weighty interests of national security and foreign affairs.’”<sup>131</sup>

Section 212(f) was intended to be an emergency power. In *Abourezk v. Reagan*,<sup>132</sup> then Judge Ruth Bader Ginsburg writing for the D.C. Circuit found the Congressional delegation of discretion to be extensive, remarking:

[E]ven if the court were to find that subsection (27) cannot be applied to bar aliens whose mere entry would threaten United States foreign policy interests, the Executive would not be helpless in the face of such a threat. He may act pursuant to section 1182(f) to suspend or restrict “the entry of any aliens or any class of aliens” whose presence here he finds “would be detrimental to the best interests of the United States.” The President’s sweeping proclamation power thus provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in section 1182(a).<sup>133</sup>

In times of imminent threat, according to Ginsburg, the President is invested with authority to act swiftly on behalf of the national interest. However, problems arise when the same executive who is given expansive

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127. *Id.* at 35.

128. *Trump v. Hawaii*, 138 S.Ct. 2392, 2400, 2408 (2018).

129. Engy Abdelkader et al., *The Muslim Ban Revisited: Trump v. Hawaii Two Years Later*, 44 N.Y.U. REV. OF L. & SOC. CHANGE 248, 249 (2020).

130. *Id.*

131. *Trump*, 138 S.Ct. at 2422 (quoting *Holder*, 561 U.S. at 33–34).

132. *Abourezk v. Reagan*, 785 F.2d 1043, 1049 (D.C. Cir. 1986).

133. *Id.* at 1063.

powers in times of national emergency is also given the power to define what constitutes an emergency.

### III. THE CHINESE VIRUS AND THE COVID-19 TRAVEL BANS

Possibly emboldened by the deference given to him by the Supreme Court in *Trump v. Hawaii*, President Trump continued to use 212(f) as a means of creating new immigration exclusions. On October 4, 2019, he issued Proclamation 9945, also known as the Health Care Ban, which barred entry for immigrants who were unable to demonstrate that they would be covered under health insurance within thirty days of entry or that they have the financial resources to pay for reasonably foreseeable medical expenses.<sup>134</sup>

With the COVID-19 reaching global epidemic proportions at the start of 2020, President Trump issued a series of travel restrictions citing COVID-19 as a justification. Throughout the pandemic, President Trump evoked the discourse of national security, calling the virus the “invisible enemy” and saying that the country was engaged in a “war.”<sup>135</sup> At the same time, he repeatedly employed racially hostile language when referring to COVID-19, calling it the “Wuhan virus,” the “Chinese virus,” the “China plague,” and the “kung flu.”<sup>136</sup> By doing so, President Trump was engaging in racial scapegoating.

Several of these bans were country specific. On January 31, 2020 President Trump issued Proclamation 9984, which suspended and limited entry for immigrant and nonimmigrant aliens who were present in China during the fourteen days immediately preceding their attempted entry to the United States.<sup>137</sup> Following an outbreak of COVID-19 in Iran, President Trump issued Proclamation 9992 on January 29, 2020, similarly suspending entry for immigrants and nonimmigrants who had been present in Iran during the fourteen days immediately preceding their attempted entry to the United States.<sup>138</sup> Due to COVID-19 outbreaks across Europe, on March 11, 2020, the President issued Proclamation 9933 which restricted entry for immigrants and nonimmigrants who had been present in the “Schengen Area” during the fourteen days immediately preceding their attempted entry to the United States.<sup>139</sup> The Schengen Area is comprised of Austria,

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134. Proclamation No. 9945, 84 Fed. Reg. 53,991 (Oct. 4, 2019).

135. Libby Cathy, *Trump now calling coronavirus fight a ‘war’ with ‘invisible enemy’*, ABC NEWS (Mar. 17, 2020), <https://abcnews.go.com/Politics/trump-coronavirus-task-force-economic-public-health-steps/story?id=69646672> [<https://perma.cc/7XVT-3RCJ>].

136. Colby Itkowitz, *Trump Again Uses Racially Insensitive Term To Describe Coronavirus*, WASH. POST (June 23, 2020), [https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff\\_story.html](https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff_story.html) [<https://perma.cc/E3HP-9FN6>].

137. Proclamation No. 9984, 85 Fed. Reg. 6,709 (Jan. 31, 2020).

138. Proclamation No. 9992, 85 Fed. Reg. 12,855 (Feb. 29, 2020).

139. Proclamation No. 9993, 85 Fed. Reg. 15,045 (Mar. 11, 2020).

Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lichtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.<sup>140</sup> However, in Proclamation 9993, President Trump made a special note that he was continuing to allow the free flow of commerce between the United States and the Schengen Area, stating “[t]he free flow of commerce between the United States and the Schengen Area countries remains an economic priority for the United States, and I remain committed to facilitating trade between our nations.”<sup>141</sup> On March 20, 2020, President Trump issued Proclamation 9996, restricting travel for immigrants and nonimmigrants present in the United Kingdom during the fourteen days immediately preceding their attempted entry to the United States.<sup>142</sup> Like Proclamation 9993, Proclamation 9996 also permitted the continued flow of commerce from the United Kingdom and the Republic of Ireland to the United States. When President Trump added Brazil to the list of nations from which travel immigrant and nonimmigrant aliens would be barred entry to the United States with Proclamations 10041 and 10042 on May 24, 2020 and May 25, 2020,<sup>143</sup> he made the same notation about continuing trade relations. The notation about trade, however, did not appear in the earlier bans from China and Iran.

The differences in the trade exemptions were colored by President Trump’s foreign policy decisions. In an action consistent with his campaign stances on China, President Trump began a trade war with China in 2018.<sup>144</sup> As a preface to imposing tariffs or quotas on imports, President Trump has repeatedly called foreign imports a national security threat.<sup>145</sup> President Trump called the trade war with China an emergency, saying “I could declare a national emergency, I think when they steal and take out and intellectual property theft anywhere from \$300 billion to \$500 billion a year and when we have a total lost [sic] of almost a trillion dollars a year for

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140. Eur. Comm’n, *The Schengen visa*, [https://ec.europa.eu/home-affairs/what-we-do/policies/schengen-borders-and-visa/visa-policy/schengen-visa\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/schengen-borders-and-visa/visa-policy/schengen-visa_en) [<https://perma.cc/2GAA-X566>] (last visited Nov. 8, 2021).

141. Proclamation No. 9993, *supra* note 139, at 15,046.

142. Proclamation No. 9996, 85 Fed. Reg. 15,341 (Mar. 14, 2020).

143. Proclamation No. 10041, 85 Fed. Reg. 31,933 (May 24, 2020); Proclamation No. 10042, 85 Fed. Reg. 32,291 (May 25, 2020).

144. Ryan Hass & Adrian Denmark, *More pain than gain: How the US-China trade war hurt America*, BROOKINGS (Aug. 7, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/08/07/more-pain-than-gain-how-the-us-china-trade-war-hurt-america/> [<https://perma.cc/7RL3-MU3Q>].

145. Geoffrey Gertz, *Did Trump’s tariffs benefit American workers and national security?*, BROOKINGS (Sept. 10, 2021), <https://www.brookings.edu/policy2020/votervital/did-trumps-tariffs-benefit-american-workers-and-national-security/> [<https://perma.cc/JU2S-VLLJ>].

many years.”<sup>146</sup> Similarly, during his presidential campaign, Trump severely criticized the Joint Comprehensive Plan of Action, more commonly referred to as the Iran Nuclear Deal, which the United States and Iran negotiated in 2015.<sup>147</sup> By doing so, it allowed the United States to reimpose economic sanctions on Iran. In this respect, the differences in the trade provisions in the COVID-19 bans furthers Trump’s antagonistic trade policies with China and Iran.

More troubling, however, are the Executive Orders invoking 212(f) during the pandemic that departed from the region-specific COVID-19 bans and expanded the scope of presidential discretion in determining what qualified as “emergency national interest” that permitted the use of 212(f). Starting with Proclamation 10014, issued on April 22, 2020, President Trump used 212(f) to create a series of broad exclusions citing the effect of COVID-19 on the economy.<sup>148</sup> Proclamation 10014 prohibited entry of foreign aliens coming into the United States for work purposes for a period of sixty days. On June 22, 2020, in Proclamation 10052, President Trump claimed that the initial sixty-day exclusion of immigrant and nonimmigrant work visas had proved insufficient to protect American labor interests, and that there was still too much competition from foreign workers, and so he was extending the duration of Proclamation 10014 for an additional six months until December 31, 2020.<sup>149</sup> The proclamation also contained a provision allowing for its continued extension as necessary.<sup>150</sup> In fact, on December 31, 2020, President Trump issued Proclamation 10131 that extended Proclamations 10014 and 10052 until March 31, 2021.<sup>151</sup> Had Trump not lost the 2020 election, it is likely that he would have extended this exclusion indefinitely.

On May 29, 2020, President Trump issued Proclamation 10043.<sup>152</sup> Citing misappropriations of United States technologies and intellectual property by China, the proclamation restricted the entry of graduate students and postdoctoral researchers from China.<sup>153</sup> However, what is disturbing is that even though the Trump administration had been targeting China for the exact same reasons ever since the start of the

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146. Amanda Macias, *Trump on US-China trade war: ‘I could declare a national emergency’*, CNBC (Aug. 25, 2019), <https://www.cnbc.com/2019/08/25/trump-on-us-china-trade-war-i-could-declare-a-national-emergency.html> [<https://perma.cc/B886-83PX>].

147. See Colum Lynch, *Despite U.S. Sanctions, Iran Expands Its Nuclear Stockpile*, FP, (May 8, 2020, 2:21 PM) <https://foreignpolicy.com/2020/05/08/iran-advances-nuclear-program-withdrawal-jcpoa/> [<https://perma.cc/RSS6-B6EZ>].

148. Proclamation No. 10014, 85 Fed. Reg. 23,441 (Apr. 27, 2020).

149. Proclamation No. 10052, 85 Fed. Reg. 38,263 (June 22, 2020).

150. *Id.*

151. Proclamation No. 10131, 86 Fed. Reg. 417 (Dec. 31, 2020).

152. Proclamation No. 10043, 85 Fed. Reg. 34,353 (May 29, 2020).

153. *Id.*



administration,<sup>154</sup> President Trump used his emergency powers 212(f) in the midst of anti-Chinese sentiment during the COVID-19 pandemic to finally execute that policy. Like Executive Order 9066, Proclamation 10043 was issued without any evidence. In a study sponsored by the Johns Hopkins University Applied Physics Laboratory, political scientist Rory Truex finds that there is “insufficient evidence that academic/economic espionage by Chinese nationals is a widespread problem at US universities.”<sup>155</sup> Like Executive Order 9066, Proclamation 10043 capitalized on racialized mistrust of Asians living in the United States, associating them with a foreign threat purely by virtue of their ethnic background.

This occurred previously in the case of Dr. Wen Ho Lee, a naturalized United States citizen who worked at Los Alamos Nuclear Laboratory, and who was arrested and charged with selling information about the United States nuclear program to the Chinese government.<sup>156</sup> Dr. Lee was accused of espionage, put in solitary confinement for 278 days, and indicted on 59 counts of mishandling government information.<sup>157</sup> Dr. Lee was absolved of all counts except one count of mishandling computer files, which he pled guilty to.<sup>158</sup> Dr. Lee was released with time served.<sup>159</sup> During the acceptance of his plea, Judge James Parker, the federal judge overseeing his criminal case, apologized, saying “I believe you were terribly wronged by being held in custody pretrial in the Santa Fe County Detention Center under demeaning, unnecessarily punitive conditions. I am truly sorry that I was led by our executive branch of government to order your detention last December.”<sup>160</sup> Dr. Lee subsequently sued the United States government for violating his privacy, and obtained a settlement of \$1.6 million.<sup>161</sup> Though he was a United States citizen and not even born in China, but in Taiwan, he was presumed to have loyalties to China simply because of his ethnicity.<sup>162</sup> There are other cases, such as Dr. Xiaoxing Xi, a Temple University physicist who was accused of sending trade secrets to

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154. U.S. DEP’T OF JUST., ATTORNEY GEN. JEFF SESSIONS’S CHINA INITIATIVE FACT SHEET (2018) (“Chinese economic espionage against the United States has been increasing--and it has been increasing rapidly. Enough is enough. We’re not going to take it anymore.”).

155. Rory Truex, *Addressing the China Challenge for American Universities*, JOHNS HOPKINS APPLIED PHYSICS LAB’Y (2020), <https://apps.dtic.mil/sti/pdfs/AD1116897.pdf> [<https://perma.cc/7WV8-U6HH>].

156. *United States v. Lee*, 79 F. Supp. 2d 1280, 1281–82 (D.N.M. 1999).

157. *Id.* at 1282.

158. WEN HO LEE & HELEN ZIA, *MY COUNTRY VERSUS ME: THE FIRST-HAND ACCOUNT BY THE LOS ALAMOS SCIENTIST WHO WAS FALSELY ACCUSED OF BEING A SPY 2* (2001).

159. *Id.*

160. *Id.*

161. Margaret K. Lewis, *Criminalizing China*, 111 J. CRIM. L. & CRIMINOLOGY 145, 192 (2021).

162. Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1694 (2000).

China,<sup>163</sup> but the charges were later dropped. Similarly, Sherry Chen, a hydrologist working for the National Weather Service, was accused of sending government data to a former colleague in China, but all charges against her were also dropped.<sup>164</sup> Proclamation 10043 continues this trend of targeting scholars of Chinese descent for economic espionage with scant proof other than their ethnic background.

Furthermore, Proclamation 10043 illustrates the problem with investing the President's broad discretion to define the national interest, since the exclusion of Chinese students and researchers will likely be harmful to the national interest. Since Chinese students make up a large percentage of the graduate student population in the United States,<sup>165</sup> their exclusion will likely be more costly to the United States. Stuart Anderson, the executive director of the National Foundation for American Policy, a non-partisan public policy research organization focusing on trade and immigration, forecasts that:

Every 1,000 Ph.D.'s blocked in a year from U.S. universities costs an estimated \$210 billion in the expected value of patents produced at universities over 10 years and nearly \$1 billion in lost tuition over a decade, according to an analysis from the National Foundation for American Policy. That does not include other economic costs, such as the loss of highly productive scientists and engineers prevented from working in the U.S. economy or patents and innovations produced outside university settings.<sup>166</sup>

### CONCLUSION

In his dissent in *Korematsu*, Justice Jackson called the exclusion order a "legalization of racism," and warned that "[t]he principle then lies about like a loaded weapon ready for the hand of any authority that can

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163. See *United States v. Xi*, No. 16-22-5, 2018 U.S. Dist. LEXIS 128757 (E.D. Pa. Aug. 1, 2018) (denying a motion to dismiss the charges referenced); Matt Apuzzo, *After Missteps, U.S. Tightens Rules for Espionage Cases*, N.Y. TIMES (Apr. 26, 2016), <http://www.nytimes.com/2016/04/27/us/after-missteps-us-tightens-rules-for-national-security-cases.html> [<https://perma.cc/LCX3-FURR>].

164. See Andrew Chongseh Kim, *Prosecuting Chinese "Spies": An Empirical Analysis of the Economic Espionage Act*, 40 CARDOZO L. REV. 749, 761 (2018).

165. See Jacob Feldgoise & Remco Zwetsloot, *Estimating the Number of Chinese STEM Students in the United States*, CSET (Oct. 2020), <https://cset.georgetown.edu/publication/estimating-the-number-of-chinese-stem-students-in-the-united-states/> [<https://perma.cc/94LM-WYAK>] (reporting Chinese nationals comprise sixteen percent of all graduate STEM students).

166. Stuart Anderson, *Biden Keeps Costly Trump Visa Policy Denying Chinese Graduate Students*, FORBES (Aug. 10, 2021, 12:12 AM), <https://www.forbes.com/sites/stuartanderson/2021/08/10/biden-keeps-costly-trump-visa-policy-denying-chinese-grad-students/?sh=743c5bb23641> [<https://perma.cc/BU4W-6M7P>].

bring forward a plausible claim of an urgent need.”<sup>167</sup> In the past, racial animus has been easily guised in the form of national interest and imminent threat to the nation. Whereas racial animus and labor competition alone were not enough to justify the exclusion of the Chinese, public health and safety eventually carried the day in effecting their exclusion at the federal level. Similarly, though not a single person of Japanese ancestry was ever convicted of any serious crime of sabotage or espionage, national security and safety were deployed in the midst of World War II to dispossess thousands of Japanese Americans of their property and erase their competitive position in the farming industry on the West Coast.

Justice Roberts attempted to repudiate *Korematsu* in *Trump v. Hawaii* with the statement, “*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.’”<sup>168</sup> However, the deference that *Trump v. Hawaii* confers on the office of the President to determine national interest and emergency situations elides that distinction. Though couched within the exigent circumstances of the COVID-19 pandemic at the close of his presidency, President Trump’s use of presidential proclamations under 212(f) were thinly veiled attempts at accomplishing a restrictive immigration agenda he had touted even before the beginning of his presidency. Whereas in the nineteenth and twentieth centuries, national exigency was used as a facade to engage in racial animus, the COVID-19 bans illustrate how a president can easily frame racial animus as the exigent circumstance that justifies discrimination.

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167. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

168. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).