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# The Perpetual “Invasion”: Past as Prologue in Constitutional Immigration Law

Matthew J. Lindsay\*

Donald Trump ascended to the presidency largely on the promise to protect the American people—their physical and financial security, their culture and language, even the integrity of their electoral system—against an invading foreign menace.<sup>1</sup> Only extraordinary defensive measures, including “extreme vetting” of would-be immigrants, a ban on Muslims entering the United States, and a 2,000-mile-long wall along the nation’s southern border could repel the encroaching hordes.<sup>2</sup> If candidate Trump’s scapegoating of unauthorized migrants and refugees was disarmingly effective, it was also eerily familiar to those of us who study the history of immigration law and policy. Indeed, the trope of an immigrant “invasion” has long been a rhetorical mainstay of American political discourse. Much less well understood, however, is the extent to which the invasion trope has also shaped the federal government’s vast, extra-constitutional, and largely unrestrained authority to exclude or expel noncitizens from the United States.

This Article describes the origin of that authority in the nativist movements of the late-nineteenth century, including both the virulent anti-Chinese crusade that culminated in the Chinese

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\* Associate Professor, University of Baltimore School of Law. For their valuable insight and criticism, I’m grateful to Kim Reilly, and to the participants in the DePaul College of Law Faculty Seminar.

1. See, e.g., Max Fisher & Amanda Taub, *How Donald Trump Hacked the Politics of Foreign Policy*, N.Y. TIMES (Oct. 19, 2016), <https://www.nytimes.com/2016/10/20/world/americas/donald-trump-foreign-policy.html>.

2. See *infra* notes 96–100 and accompanying text.

Exclusion Act, and the decades-long and ultimately successful campaign to severely curtail the immigration of “new” Europeans from Southern and Eastern Europe. The legacy of this history endures to the present, as the Supreme Court continues to account for its broad deference to the political branches on immigration matters in terms of an inextricable connection between immigration regulation and the conduct of national security. This Article concludes by considering whether President Trump’s unusually candid (unusual, at least, during the last half-century) deployment of the invasion trope might have an edifying effect on the Supreme Court in *Trump v. Hawaii*, the travel ban case, as the justices contemplate the implications of deferring to a President whose campaign-season political demagoguery has now mutated to official United States policy.

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In March of 1882, United States Senator John P. Jones of Nevada sought to correct a dangerous misapprehension about the nation’s founding principles.<sup>3</sup> The authors of the Declaration of Independence, he instructed, had never “intended to say that all men of all races were equal.”<sup>4</sup> Rather, “free institutions [were] a monopoly of the favored races,” and none but the “Caucasian race” had proved “capable of treading freedom’s heights with firm and unwavering step.”<sup>5</sup> Congress adopted the legislation championed by Senator Jones, the Chinese Exclusion Act, by overwhelming majorities in both houses.<sup>6</sup> Less than three years later, however, the Caucasian race’s steady march toward “freedom’s heights” appeared to stall, and Congress was again called upon to secure the nation against foreign degradation. It was pure folly to believe “that our advanced and vigorous race [cannot] be . . . deteriorated by coming in contact with other races or people,” declared Representative Martin Foran.<sup>7</sup> Unless lawmakers took swift action, a U.S. Senator agreed, “within a brief space dangers as great as those that have overthrown monarchs and despots may with ruthless rage assail the institutions of republican freedom.”<sup>8</sup> This

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3. 13 CONG. REC. 1740 (1882).

4. *Id.*

5. *Id.* at 1742.

6. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58.

7. 15 CONG. REC. 5351 (1884).

8. 16 CONG. REC. 1624 (1885).

time, however, it was not the "little brown man,"<sup>9</sup> but rather legions of European "pauper laborers" descending upon the nation's cities and factories that impelled Congress to "consider whether it may not be patriotic and prudent . . . to modify existing views as to the Declaration of Independence and the universal rights of man."<sup>10</sup> Congress again obliged, and passed the Contract Labor Act of 1885, prohibiting the admission of European migrants who had embarked for the United States after having entered into a labor contract with an American employer.<sup>11</sup>

Soon thereafter, the Supreme Court bolstered the restrictionist program by endowing Congress and the Executive with a vast, extra-constitutional authority to exclude or expel noncitizens from the United States. As Justice Stephen Field wrote for a unanimous Court in the 1889 *Chinese Exclusion Case*, if the nation was to "preserve its independence, and give security against foreign aggression and encroachment" from the "vast hordes" of unassimilable laborers "crowding in upon us,"<sup>12</sup> it was essential that federal policymakers be clothed with a plenary authority that was beyond the reach of judicially enforceable constitutional constraints. Field famously dwelled on Chinese immigrants' social insularity and uncivilized, servile habits of life and labor.<sup>13</sup> They "remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country,"<sup>14</sup> Field complained—a failure to assimilate that he attributed to intractable "differences of race."<sup>15</sup>

For Justice Field, as for many late-nineteenth-century jurists and statesmen, the effects of cheap, servile Chinese labor on American workers was less a commercial problem than one of national security—of defending the nation against what he called the "Oriental invasion."<sup>16</sup> "[I]f . . . the government of the United States . . . considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its

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9. 13 CONG. REC. 1743 (1882).

10. 16 CONG. REC. 1624 (1885).

11. Contract Labor Act of 1885, ch. 164, 23 Stat. 332.

12. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889).

13. *See id.* at 595.

14. *Id.*

15. *Id.*

16. *Id.*

peace and security,”<sup>17</sup> he declared, “their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.”<sup>18</sup> Such a policy, moreover, was “conclusive upon the judiciary.”<sup>19</sup> Although this wholesale reorganization of federal authority marked a radical break with historical practice, the Court portrayed the new regime as a natural concomitant of sovereign nationhood grounded in timeless principles of international law.<sup>20</sup> Three years later, the Court confirmed that this novel, extra-constitutional federal immigration power extended beyond the exigencies of Chinese exclusion, to the nation’s general immigration laws.<sup>21</sup> In holding that a federal immigration inspector’s decision to deny admission to a Japanese woman was not reviewable in federal court, the Court set out the formulation of federal authority that would become the primary rhetorical touchstone for subsequent immigration cases:

It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war.<sup>22</sup>

As a question of national sovereignty, the Court reasoned, the decision to deny admission to would-be immigrants had been consigned exclusively to the “political departments” of the federal

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17. *Id.* at 606.

18. *Id.*

19. *Id.*

20. *See id.* at 604.

21. *See* *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

22. *Id.* (internal citations omitted). Federal immigration officials had denied entry to *Nishimura Ekiu* under a provision of the Immigration Act of 1891 excluding from the United States “persons likely to become a public charge.” Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084. The 1891 Act had further assigned exclusive authority to administer the immigration laws, including the inspection of immigrants, to a national Superintendent of Immigration lodged within the U.S. Treasury Department, and made final the decisions of federal inspection officers “touching the right of any alien to land,” subject to review only by the Superintendent and Treasury Secretary. *Id.* §§ 7–8.

government.<sup>23</sup> It therefore lay beyond “the province of the judiciary” to order “that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States . . . shall be permitted to enter.”<sup>24</sup> At least with respect to non-resident foreigners, “the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”<sup>25</sup>

Four years later, in *Fong Yue Ting v. United States*,<sup>26</sup> the Court extended this principle to the expulsion of resident aliens. At issue was a provision of the Geary Act of 1892, authorizing the arrest and deportation of any Chinese laborer legally present within the United States who failed either to obtain a special “certificate of residence” or, in the alternative, to produce a “credible white witness” to attest that the laborer had been a resident of the United States before the adoption of the Chinese Exclusion Act in 1882.<sup>27</sup> A majority of six justices upheld the certificate requirement.<sup>28</sup> “The right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace,” the Court declared, was “an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare.”<sup>29</sup> Accordingly, the constitutional right of due process, “the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.”<sup>30</sup> Three justices, including Stephen Field, lodged

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23. *Nishimura Ekiu*, 142 U.S. at 659.

24. *Id.* at 660.

25. *Id.* The Court did create a narrow opening for procedural review a decade later when it indicated that administrative officers could not “disregard the fundamental principles that inhere in ‘due process of law.’” *Kaoru Yamataya v. Fisher (Japanese Immigrant Case)*, 189 U.S. 86, 100 (1903). Although noncitizens’ procedural challenges virtually always failed, the *Japanese Immigrant Case* did establish a formal doctrinal foothold for procedural due process claims that subsequently afforded meaningful, if still highly deferential, judicial review. *See Landon v. Plasencia*, 459 U.S. 21, 33 (1982) (holding that a returning alien was entitled to due process in her exclusion hearing).

26. 149 U.S. 698 (1893).

27. *See id.* at 727. The “credible white witness” alternative to the certificate of residence was introduced in a rule issued by the Secretary of the Treasury, who was charged with enforcing the certificate requirement. *See id.* at 726–27.

28. *See id.* at 732.

29. *Id.* at 711.

30. *Id.* at 730. The Court has continued to insist on the essentially “civil”

vigorous dissents.<sup>31</sup>

Of course, neither nativism nor political movements to restrict immigration were unique to the late nineteenth century.<sup>32</sup>

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nature of deportation proceedings. *See, e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (“Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.”); *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“Consistent with the civil nature of the proceedings, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.”).

31. *See Fong Yue Ting*, 149 U.S. at 732 (Brewer, J., dissenting); *id.* at 744 (Field, J., dissenting); *id.* at 761 (Fuller, C.J., dissenting). Both Field and Justice David Brewer objected that, as persons residing lawfully within the United States, the petitioners were entitled to the protection of the Constitution, and that the registration requirement imposed punishment without due process of law. *See id.* at 733 (Brewer, J., dissenting); *id.* at 759 (Field, J., dissenting). Field’s dissent hinged on what he called the “wide and essential difference” between “legislation for the exclusion of Chinese persons . . . and legislation for the deportation of those who have acquired a residence.” *Id.* at 746. But the author of the *Chinese Exclusion Case* also made a point to attack what he viewed as the majority’s improper conflation of alien friends with alien enemies. *See id.* at 748. “Aliens from countries at peace with us,” he explained, “domiciled within our country by its consent, are entitled to all the guarantees for the protection of their persons and property which are secured to native-born citizens.” *Id.* at 754. Justice Brewer went further, delivering a biting condemnation of the very notion of unrestricted, extra-constitutional authority:

This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found[?] . . . Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? . . . The expulsion of a race may be within the inherent powers of a despotism.

*Id.* at 737 (Brewer, J., dissenting).

32. Policymakers and charity administrators had long decried European governments’ alleged “dumping” of their poor into the United States, and regulators from immigrant-receiving seaboard states acted aggressively to protect their citizens from the burden of supporting “foreign paupers.” Kunal M. Parker, *State, Citizenship and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts*, 19 L. & HIST. REV. 583, 601 (2001); Hidetaka Hirota, *The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy*, 99 J. AM. HIST. 1092, 1098–99 (2013). The southern states excluded “negro seamen” and other foreign blacks from their territory throughout the antebellum era. KUNAL M. PARKER, MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000, at 105–07, 117–18 (2015); Anna O. Law, *Lunatics, Idiots, Paupers, and Negro Seamen—Immigration Federalism and the Early American State*, 28 STUD. AM. POL. DVT. 107, 122–24 (2014); Mary Sarah Bilder, *The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 792–93 (1996). California

Notwithstanding the long-running, regionally variable ebb and flow of restrictionist sentiment, however, well into the post-Civil-War period federal policy was premised on a broad confidence both in the economic value of immigrants' labor and, particularly for Europeans, in their prospects for assimilation.<sup>33</sup> So long as immigrants were properly diffused throughout the nation, the consensus held, the warm bath of economic freedom, abundant land, and republican political fellowship would dissolve away the residue of Old World oppression, infusing newcomers with economic and political independence, habits of strenuous labor, and devotion to their adopted nation.<sup>34</sup> Throughout this era of relative confidence, the individual states (under their police power)<sup>35</sup> and the federal government (under Congress' commerce power)<sup>36</sup> governed immigration concurrently, with the balance of authority shifting gradually toward the latter. And indeed, until the 1880s, neither the immigrant-receiving seaboard states nor the federal government inhibited a substantial portion of would-be foreign migrants.<sup>37</sup>

In the decades following the Civil War, however, this confidence in assimilation was shattered by a two-front immigration "crisis" that contemporaries variably labeled the "coolie trade" (for Chinese laborers) and the crisis of "foreign pauper

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lawmakers sought since the 1850s to bar the entry of additional Chinese laborers, and lobbied Congress for a federal exclusion law. CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* 10–25 (1994). Finally, anti-European nativists had demanded for decades that Congress defend American democracy against foreign corruption by lengthening the period of residency required for naturalization. See Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 CONN. L. REV. 743, 764–65 (2013).

33. See Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, *supra* note 32, at 764.

34. *Id.*

35. See *id.* at 747; see also HIDETAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES & THE 19TH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* (2017) (describing state regulation of foreign "paupers"); Law, *supra* note 32 (describing state regulation of the foreign poor, criminals, diseased, and disabled); Allison Brownell Tirres, *Ownership Without Citizenship: The Creation of Noncitizen Property Rights*, 19 MICH. J. RACE & L. 1, 33–40 (2013) (describing state regulation of alien property rights).

36. See Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, *supra* note 32, at 747.

37. See *id.* at 763–86.

labor” (for Europeans).<sup>38</sup> In contrast to the so-called “foreign paupers” of the past, whose economic dependency had drawn periodic attention from lawmakers, charity administrators, and immigration restrictionists, Chinese “coolies” and European “pauper laborers” not only labored willfully for a wage; they competed in the labor market with a vengeance, corrupting that market precisely through an *excess* of economic competitiveness.<sup>39</sup> Pauper laborers robbed “American” workers of the ability to provide their families with a “civilized” standard of living, the critique held, and thereby degraded not only the labor market, but also the economic “independence” of native workers.<sup>40</sup>

The “crisis of pauper labor,” as it was called, appeared fundamentally different, and vastly more consequential for immigration law and policy, than the various immigration “crises” identified by earlier generations of restrictionists.<sup>41</sup> If left unchecked, contemporaries worried, wage competition between American workers and “dependent” foreign laborers would drive a wedge through the center of postbellum American political economy, decoupling the citizenly virtues so essential to the political health of the republic and the economic instrument on which the industrial order depended—the wage contract.<sup>42</sup> As the California Senate declared in 1877, pauper labor had made “[t]he vaunted ‘dignity of labor’ . . . a biting sarcasm” and a “burlesque on the policy of emancipation.”<sup>43</sup> The dangers ascribed to foreign migration had fundamentally changed, and could no longer be mitigated or managed by restricting access to political participation. By jeopardizing the living wage—the essential condition of republican independence in the post-Civil War era—foreign pauper laborers’ mere presence within the United States imperiled the health of American citizenship.

Contemporaries might have interpreted the “crisis of pauper labor” as a referendum on the moral integrity of the industrial wage system, and thus advocated reforms designed to address structural economic changes, such as the deskilling of labor and increasingly

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38. *See id.* at 794.

39. *See id.*

40. *See id.*

41. *See id.*

42. *See id.*

43. CAL. SEN. REP. OF ITS SPEC. COMM. ON CHINSE IMMIGRATION, CHINESE IMMIGRATION: SOCIAL, MORAL AND POLITICAL EFFECT 6–7 (1878).

intense wage competition. And indeed, labor unionists and their allies did just that.<sup>44</sup> Beginning in the late 1870s and early 1880s, however, legislators, judges, social scientists, and reformers increasingly understood a worker's devotion to maintaining an "American" standard of living, and his refusal to labor for a wage that could not sustain that standard, as a critical measure of economic and moral fitness. Accordingly, they diagnosed eroding standards of living among wage workers less as a fundamental political-economic problem rooted in the industrial labor system, than as evidence of the dubious worthiness of foreign laborers themselves. With remarkable consistency, moreover, they cast such unworthiness in terms of unskilled laborers' fundamental, indelible *foreignness*, often rendered in the increasingly resonant language of race. The trope of foreignness thus described not only the absence of formal citizenship, but a deeper, more elemental estrangement from the defining political-economic values of post-Civil War republican civilization. European and Chinese laborers' pathological underconsumption—their willingness to work for starvation wages; their apparent contentment to live in overcrowded, vermin-infested hovels and to subsist on rotten, disease-ridden food—was the product of hereditary dispositions ingrained over centuries.

Through the discourse of indelible foreignness, contemporaries re-imagined the American polity as a social and political body whose health depended less on the vitality of its political and economic institutions than on the collective natural endowments of its constituent members. Without the requisite economic conditions and racial material, they contended, simply immersing foreign laborers in republican political culture afforded little value as a force of assimilation. In short, republicans were born, rather than made. The future of the republic could thus be preserved only by repelling the foreign menace that threatened to degrade it.

In this context, the invasion trope was more than a stock image of nativist demagoguery. The passages quoted above from the *Chinese Exclusion Case* convey the flavor of that trope as it applied to the Chinese.<sup>45</sup> And indeed, cries of racial invasion permeated

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44. William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 787–88 (1985).

45. See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889).

the anti-Chinese crusade as it swept eastward from California in the late 1870s and early 1880s, from the speeches and petitions of western politicians and labor leaders; to the editorial pages of national newspapers and debates in Congress; to the legal arguments of the Executive branch; and finally, to the decisions of the Supreme Court.<sup>46</sup> As the United States Solicitor General declared in 1892, it was “generally conceded that the most insidious and dangerous enemies to the State are not the armed foes who invade our territory, but those alien races who are incapable of assimilation, and come among us to debase our labor and poison the health and morals of the communities in which they locate.”<sup>47</sup>

Lawmakers deployed the same trope of foreign invasion to condemn the degradation of American labor and citizenship by the foreign pauper laborers of Southern and Eastern Europe. They were “the Goths and Vandals of the modern era,” explained a U.S. Senator in 1884.<sup>48</sup> “They come only to lay waste, to degrade, and to destroy. They bring with them ignorance, degraded morals, a low standard of civilization, and no motive to intended American citizenship.”<sup>49</sup> Foreign pauper laborers appeared animated not by a desire for independence, or self-improvement, or material comfort, but by raw animal instinct. “Like the vast flights of grasshoppers and locusts . . . they sweep down upon our fields of labor to devour and strip from us the benefit of our customs and of the laws protecting American labor, and they take their flight again back to the breeding places from which they came.”<sup>50</sup> Once again, this is not merely colorful hyperbole. The invasion trope and the discourse of indelible foreignness infused the era’s highly successful immigration restriction campaigns, and underwrote the deeper and more enduring process of noncitizens’ constitutional estrangement.

Today, more than a century later, federal regulation of noncitizens remains constitutionally exceptional, outside of and largely insulated from mainstream constitutional norms. Under this “plenary power doctrine,” as constitutional immigration law is conventionally known, federal authority to regulate immigration

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46. See, e.g., ANDREW GYORY, *CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT* 261, 270, 277–78, 281 (1998).

47. Brief for the Respondents at 55, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

48. 15 CONG. REC. 5369 (1884) (statement of Sen. Cutcheon).

49. *Id.*

50. *Id.*

derives not from any enumerated power, but is rather “an incident of sovereignty belonging to the government of the United States.”<sup>52</sup> The authority is thus exclusive to the federal government, and its exercise by Congress or the President is buffered against judicially enforceable constitutional constraints.<sup>53</sup> Critically, the Court continues to justify the constitutional exceptionalism of immigration power with reference to the purportedly intricate connection between immigration regulation and “basic aspects of national sovereignty, more particularly our foreign relations and the national security.”<sup>54</sup>

When a noncitizen encounters governmental authority outside of the immigration context—for example, as an employee, criminal defendant, or business licensee—she enjoys the same slate of constitutional protections as a citizen.<sup>55</sup> The moment a court determines that a federal law or enforcement action qualifies as a regulation of immigration *per se*, however, it triggers a constitutionally exceptional authority, the exercise of which lies largely beyond the scope of constitutional review.<sup>56</sup> This is true even when the constitutional protection being asserted—for example, the First Amendment, the Due Process Clause, or the Equal Protection Clause—makes no distinction between “persons” and “citizens.”<sup>57</sup> Nor does it matter whether the underlying basis

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52. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889).

53. This is not to suggest that the plenary power doctrine always wholly immunizes immigration-related federal lawmaking from meaningful constitutional review. *See Landon v. Plasencia*, 459 U.S. 21, 34–35 (1982) (recognizing returning non-citizens’ right to due process in exclusion hearings); *Mathews v. Diaz*, 426 U.S. 67, 82–83 (1976) (applying rational basis review to federal alienage discrimination).

54. *Galvan v. Press*, 347 U.S. 522, 530 (1954). *See also Demore v. Kim*, 538 U.S. 510, 522 (2003) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.” (citation omitted)).

55. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). *See also Wong Wing v. United States*, 163 U.S. 228, 233–34, 238 (1896) (striking down on Fifth and Sixth Amendment grounds a federal statute imposing imprisonment at hard labor on aliens determined in a summary administrative proceeding to be in the country illegally).

56. *See, e.g., Diaz*, 426 U.S. at 81.

57. The Due Process and Equal Protection Clauses protect “persons” without regard to citizenship. U.S. CONST. amend. XIV, § 1. The Supreme Court has long acknowledged as much when reviewing *state* laws discriminating on the basis of alienage. *See Yick Wo*, 118 U.S. at 369

for removal bears even a colorable connection to foreign affairs or national security—for example, whether the noncitizen in question is a suspected terrorist mastermind or a teenage petty criminal. The consequences for noncitizens are often profound. Long-term legal residents lack robust constitutional protections against often-lengthy detention during removal proceedings<sup>58</sup> or selection for removal based on otherwise constitutionally protected speech or associations.<sup>59</sup> Noncitizens outside the United States lack a legal interest in admission sufficient even to challenge their exclusion; and on the few occasions that the Court has reviewed a visa denial—always in cases brought by United States citizens—it has refused to subject the decision to more than nominal scrutiny.<sup>60</sup>

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(observing that the Due Process and Equal Protection Clauses of the Fourteenth Amendment were “universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality”). The First Amendment is framed as a general restraint on Congress. See U.S. CONST. amend. I. The only potentially meaningful exception is the Privileges and Immunities Clause of the Fourteenth Amendment, prohibiting the states from “abridg[ing] the privileges or immunities of citizens of the United States.” *Id.* amend. XIV, § 1.

58. See *Demore*, 538 U.S. at 513.

59. See *Reno v. Am. Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491–92 (1999). Accordingly, scholars and courts alike have long noted the constitutional exceptionalism of federal immigration regulation, decried the injustice that it produces, and called for greater constitutional protection for noncitizens. See, e.g., T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 196 (2002); DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 15–20* (2007); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 13 (1996); PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 19 (1998); T. Alexander Aleinikoff, *Citizens, Aliens, Membership, and the Constitution*, 7 CONST. COMMENT. 9, 9–10 (1990); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1704 (1992).

60. See *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring) (Because the challenged visa denial rested on a “facially legitimate and bona fide reason,” the Court should “neither look behind the exercise of that discretion, nor test it by balancing its justification against the constitutional interests of citizens the visa denial might implicate.” (internal quotations and citation omitted)); *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1976) (The government’s position that “substantive policy regulating the admission of aliens . . . [is] not an appropriate subject for judicial review” is at odds with “[o]ur cases reflect[ing] acceptance of a limited judicial responsibility under the Constitution even with respect to . . . the admission and exclusion of aliens.”); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (“The power of congress to

The Government's defense of President Trump's authority to issue the current travel ban rests squarely on this well-established (if not entirely consistent) judicial posture of broad deference in exclusion matters. As the discussion below suggests, both the Government and the justices tend to avoid even citing the original plenary power decisions, preferring to rely instead on a series of staunchly deferential exclusion and deportation cases decided in the 1950s, in which international communism rather than racial invasion loomed as the foremost threat to national sovereignty and security.<sup>61</sup> And indeed, over the course of the twentieth century, as the overt nativism and racism that animated the *Chinese Exclusion Case* and *Fong Yue Ting* faded from both federal immigration law and respectable political and judicial discourse, the trope of immigrant invasion likewise disappeared from the Court's immigration decisions and the Government's briefs.<sup>62</sup> Of course,

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exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy . . . enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications." (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895)); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." (citations omitted)).

61. See, e.g., *Galvan v. Press*, 347 U.S. 522, 531–32 (1954) (upholding deportation of long-term legal resident based on past membership in Communist Party); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215–16 (1953) (upholding exclusion and indefinite detention of noncitizen on Ellis Island without a hearing); *Harisiades v. Shaughnessy*, 342 U.S. 580, 591 (1952) (upholding deportation of long-term legal resident based on past membership in Communist Party); *Knauff*, 338 U.S. at 546–47 (upholding exclusion of noncitizen wife of an American citizen, without a hearing and on the basis of secret evidence). In fact, the national security cases of the Cold War era are notable today for their failure to command anything approaching judicial consensus about the metes and bounds of the federal immigration power. See Matthew J. Lindsay, *Disaggregating "Immigration Law,"* 68 FLA. L. REV. 179, 219–24 (2016).

62. For the past half-century, in particular, federal law governing eligibility for admission to the United States has generally reflected the more pluralistic, inclusive dimension of the national heritage. The civil rights revolution arrived in immigration law in 1965, when Congress finally eliminated the seven-decades-long near-total exclusion of immigrants from the so-called Asian-Pacific triangle and abandoned a National Origins Quota system that had severely restricted immigration from other countries outside of western and northern Europe since the 1920s. Act of Oct. 3, 1965, Pub. L. No. 89-236, sec. 1, § 201(e), sec. 2, § 201(a)–(b), 79 Stat. 911–912; see generally Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273

neither is obliged to acknowledge the overwrought nativism that marked the origins of plenary power, and one might even interpret the omission of the foundational anti-Chinese cases as a sign of “progress.” Yet that omission is also an act of historical forgetting, the necessary consequence of which is to obscure the vision of racial invasion that nourished and animated the plenary power doctrine at its inception. This is particularly relevant when the Government claims, as it typically does, that the challenged regulation implicates foreign affairs and national security.<sup>63</sup> One contention of this Article is that President Trump’s unapologetic scapegoating of noncitizens has made newly visible the tropes of racial invasion and existential threat embedded in the federal immigration power more than a century ago—a theme I return to below.

First, however, consider the extent to which the Government’s defense of the travel ban relies on a claim of virtually unfettered, constitutionally exceptional authority.<sup>64</sup> “The exclusion of aliens is a fundamental act of sovereignty’ that the Constitution entrusts to the political branches,”<sup>65</sup> the Government argues—a sovereign right that “stems not alone from the legislative power but is inherent in the executive power to control the foreign affairs of the nation”<sup>66</sup> and is “largely immune from judicial inquiry or interference.”<sup>67</sup> The wide breadth of executive judgement and discretion is embodied in the “fundamental and longstanding”

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(1996).

63. It likewise suppresses consideration of why a body of federal law that is overwhelmingly concerned with ordinary matters of labor, crime, and access to public services, should be “conclusive upon the judiciary”—that is, why a regulatory domain dominated by patently unexceptional subject matter has been consigned to the “political branches,” where the government’s conduct is buffered against constitutional review. See Lindsay, *Disaggregating “Immigration Law,”* *supra* note 61.

64. At the time of this writing, the Supreme Court has granted certiorari for the challenge to EO-3, *Trump v. Hawaii*, 138 S. Ct. 923, 923 (2018), but the Government has not yet submitted its brief on the merits. The following discussion thus relies on the Government’s August 2017 Brief to the Court defending EO-2, and the Government’s Petition for Certiorari in the current challenge to EO-3. See Brief for the Petitioners, *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (Nos. 16-1436 and 16-1540) (filed Aug. 10, 2017); Petition for Writ of Certiorari, *Hawaii*, 138 S. Ct. 923 (No. 17-965) (filed Jan. 5, 2018).

65. Brief for the Petitioners, *supra* note 64, at 23 (quoting *Knauff*, 338 U.S. at 542).

66. *Id.*

67. *Id.* (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)); see also Petition for Writ of Certiorari, *supra* note 64, at 27.

principle of “consular nonreviewability.”<sup>68</sup> That principle applies “regardless of the manner in which the Executive decides to deny entry to an alien abroad”<sup>69</sup> and, the Government argues, buffers President Trump’s Proclamation against judicial review, making the challengers’ statutory claims nonjusticiable and their Establishment Clause claim subject only to “minimal scrutiny.”<sup>70</sup>

I focus here on the Government’s constitutional arguments, because that is where President Trump’s unabashed nativist demagoguery may bear most directly on the justices’ willingness to scrutinize the Proclamation’s asserted rationale.<sup>71</sup> The Government and the challengers agree with both the Fourth and Ninth Circuit Courts of Appeal that, under established precedent, a court will uphold an exclusion order against constitutional challenge so long as the Government provides a “facially legitimate

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68. Brief for the Petitioners, *supra* note 64, at 24.

69. *Id.* at 25.

70. *See id.*

71. With respect to the nonjusticiability of the challengers’ statutory claims, the Government insists that “the denial or revocation of a visa for an alien abroad ‘is not subject to judicial review’” absent “affirmative authorization” by Congress. *Id.* at 24. This presumption of nonreviewability, and of the President’s wide latitude in questions of exclusion more generally, also directly inform the Government’s argument that § 1182(f) of the INA, authorizing the President to “suspend the entry of all aliens or any class of aliens” whose entry he “finds . . . would be detrimental to the interests of the United States,” 8 U.S.C. § 1182(f), confers a “sweeping proclamation power” that the President may wield unfettered either by the Establishment Clause or the INA’s prohibition against nationality-based discrimination in the issuance of visas. *See id.* at 40. Section 1152(a)(1)(A) of the INA provides: “[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.” 8 U.S.C. § 1152. Congress added that nondiscrimination provision in the Immigration and Nationality Act of 1965—thirteen years after the adoption of § 1182(f) in the Immigration and Nationality Act of 1952. Act of Oct. 3, 1965, Pub. L. No. 89-236, sec. 2, § 201(a), 79 Stat. 9112. “Congress placed no restrictions on which ‘interests’ count or what ‘detriment[s]’ suffice for the President to invoke his suspension authority, committing all of those matters to the President’s judgment and discretion,” the Government argues. Brief for the Petitioners, *supra* note 64, at 41. Judicial deference is “especially warranted,” moreover, because a President’s determinations to “suspend the entry of aliens . . . directly implicate his foreign-affairs and national-security powers”—a domain of presidential authority in which courts are “utterly unable to assess” the “adequacy” and “authenticity” of his reasons. *Id.* at 42. In short, the President’s judgment with respect to the exclusion of noncitizens is “not subject to review.” *Id.* at 42.

and bona fide reason.”<sup>72</sup> That is a very low bar; just how low, however, is a critical subject of dispute. The Court’s last word on the issue, the 2015 case of *Kerry v. Din*, sheds the most light on the disputed meaning of that phrase, and thus on the current justices’ disposition toward presidential claims of unfettered discretion to exclude noncitizens.<sup>73</sup> In *Din*, a five-justice majority rejected United States citizen Fauzia Din’s due process challenge to the exclusion of her noncitizen husband, Kanishka Berashk, on unspecified “national security” grounds.<sup>74</sup> The opinion for the Court, which represented the views of only three justices, endorsed the Government’s claim of “consular absolutism”—the notion that there is no right to judicial review of a rejected visa application, even when the plaintiff is a U.S. citizen.<sup>75</sup> Justice Breyer’s dissenting opinion, which was joined by Justices Ginsburg, Sotomayor, and Kagan, rejected consular absolutism and concluded that the Government’s bare citation to the statutory provision under which Berashk was excluded, while refusing to reveal the specific factual basis for the denial, did not constitute due process of law.<sup>76</sup> Justice Kennedy’s concurring opinion, which was joined

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72. *Id.* at 62.

73. 135 S. Ct. 2128 (2015). Eight of the nine current justices participated in *Din*. Justice Gorsuch had not yet joined the Court.

74. *Id.* at 2141.

75. The opinion for the Court was written by Justice Scalia, who has since been succeeded by Justice Gorsuch, and joined by Justice Thomas and Chief Justice Roberts. *Id.* at 2131.

76. Justice Breyer’s dissent upholds a long tradition of vigorous judicial protest against the Court’s reflexive deference in immigration matters. See Lindsay, *Disaggregating “Immigration Law,”* *supra* note 61, at 215–24. That history began with Justice Field and Brewer’s withering condemnation in *Fong Yue Ting v. United States* of the “indefinite and dangerous” doctrine of “powers inherent in sovereignty.” 149 U.S. 698, 737 (1893) (Brewer, J., dissenting). It continued with Justice Douglas and Black’s powerful dissents in Cold War-era cases such as *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 550–52 (1950) (Jackson, J., dissenting) and *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 217–18 (1953) (Black, J., dissenting). In *Mezei*, Black compared the Attorney General’s “unreviewable discretion” under the plenary power doctrine with the arbitrary ruthlessness of twentieth-century Europe’s most infamous authoritarians. See *id.* This sentiment endures in modern opinions such as Justice Souter’s forceful four-justice dissent in *Demore v. Kim*, insisting that “the basic liberty from physical confinement at the heart of due process” demands that the government prove a “sufficiently compelling” reason before it can “lock away” a removable noncitizen. 538 U.S. 510, 541, 549, 551 (2003) (Souter, J., dissenting); Although Justice Breyer’s dissent in *Kerry v. Din* is more restrained in both tone and substance, his insistence that the denial of a noncitizen’s visa

by Justice Alito, provided the fourth and fifth votes upholding the exclusion, and was therefore controlling.<sup>77</sup> Kennedy, like the four dissenters, rejected consular absolutism, but nevertheless concluded that merely by citing the INA’s so-called “terrorism bar”—a complex provision containing dozens of distinct reasons for denying a visa application<sup>78</sup>—the Government had provided a facially legitimate bona fide reason for Berashk’s exclusion, and thereby satisfied the requirement of due process.<sup>79</sup>

Justice Kennedy’s position in *Kerry v. Din*—his acknowledgement that a U.S. citizen-petitioner can have a judicially reviewable constitutional interest in the exclusion of a noncitizen, paired with a highly deferential posture toward the Government’s asserted reason for that exclusion<sup>80</sup>—suggests that, of all the members of the *Din* majority who remain on the Court, he is perhaps most primed for edification regarding the newly manifest perils of perfunctory judicial review in exclusion cases. At first blush, it is difficult to conceive how Kennedy, who has a deserved reputation as a defender of constitutional liberty, could have concluded in good faith that merely gesturing to a wide-ranging statutory assortment of possible reasons for denying a visa application provides meaningful protection against arbitrary or otherwise improper governmental conduct—the essence of constitutional due process. And indeed, in virtually any context other than immigration, such judicial “review” would appear little more than an empty gesture to the rule of law. Viewed in the context of the Court’s immigration jurisprudence, however, Kennedy’s position becomes, if not persuasive, at least intelligible. Like the Government’s argument in *Trump v. Hawaii*,<sup>81</sup> Kennedy’s concurrence in *Din*<sup>82</sup> relies heavily on the 1972 case *Kleindienst v.*

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application interferes with a constitutional liberty interest (albeit that of the noncitizen applicant’s American spouse, rather than the noncitizen himself), and that such interference warrants “individualized adjudication,” including the “ordinary application of Due Process Clause procedures,” resonates with longstanding pleas both on and off the court to end to immigration law’s century-long constitutional exile. *See Din*, 135 S. Ct. at 2144 (Breyer, J., dissenting).

77. *Din*, 135 S. Ct. at 2139–41 (Kennedy, J., concurring).

78. 8 U.S.C. § 1182(a)(3)(B) (2012).

79. *Din*, 135 S. Ct. at 2139–41 (Kennedy, J., concurring).

80. *Id.*

81. *See, e.g.*, Petition for Writ of Certiorari, *supra* note 64, at 18.

82. 135 S. Ct. at 2139–41 (Kennedy, J., concurring).

*Mandel*.<sup>83</sup> There, the Supreme Court rejected a constitutional challenge to the Government's exclusion of Ernest Mandel, a Belgian journalist, scholar, and self-described "revolutionary Marxist,"<sup>84</sup> on the ground that, during a previous visit to the United States, Mandel had failed to "conform to his itinerary and limit his activities to the stated purposes of his trip."<sup>85</sup> The Court acknowledged that Mandel's exclusion implicated the petitioners' (American scholars who had invited Mandel to an academic conference in the United States) First Amendment right to hear him speak, but declined to approach the Government's proffered reason skeptically, and to inquire whether it was mere pretext for the real reason for Mandel's exclusion—namely, disapproval of his ideas.<sup>86</sup>

As far as Justice Kennedy was concerned, the "reasoning and holding in *Mandel* control[ed]" in *Din*.<sup>87</sup> So long as a visa denial that burdened the constitutional interest of a U.S. citizen rested on a "facially legitimate and bona fide reason," Kennedy wrote, quoting from *Mandel*, "courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against' the constitutional interests of citizens the visa denial might implicate"—an act of judicial deference that had "particular force in the area of national security."<sup>88</sup> "Given Congress' plenary power to 'suppl[y] the conditions of the privilege of entry into the United States,'" he reasoned, "it follows that the Government's decision to exclude an alien it determines does not satisfy one or more of those conditions is facially legitimate under *Mandel*."<sup>89</sup>

Yet Kennedy must have realized that to sanction the opacity of the Government's decision to exclude Berashk even while acknowledging *Din*'s constitutional interest in the integrity of that decision requires more than a straightforward application of *Mandel*. Notwithstanding the *Mandel* Court's forthright affirmation of the plenary power doctrine and its refusal to "look behind" the Government's asserted reason for Mandel's exclusion,<sup>90</sup>

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83. 408 U.S. 753 (1972).

84. *Id.* at 756.

85. *Id.* at 758.

86. *Id.* at 768–69.

87. *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring).

88. *Id.* at 2140 (quoting *Mandel*, 408 U.S. at 770).

89. *Id.* at 2140 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542, 543 (1950)).

90. *See Mandel*, 408 U.S. at 770.

the Government had in fact provided the citizen-petitioners in that case with substantially more “process” than Kennedy requires in *Din*.<sup>91</sup> Critically, the Government had informed Mandel of the concrete facts that purportedly led to his visa denial—specifically, his failure to comply with the “conditions and limitations attached to his [prior] visa issuance.”<sup>92</sup> Kennedy evades this critical distinction by pointing to the “discrete factual predicates” enumerated in the statute under which Berashk’s visa application was denied.<sup>93</sup> This is a slight-of-hand that evacuates the right to due process of anything resembling individualized consideration. In this respect, Kennedy’s opinion more closely resembles the Court’s pre-Warren-era exclusion decisions, which all but acknowledged that constitutional due process in immigration proceedings was an empty shell.<sup>94</sup> In short, Kennedy assumes that

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91. 135 S. Ct. at 2141 (Kennedy, J., concurring).

92. *Mandel*, 408 U.S. at 758–59.

93. *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring).

94. Consider *Yamataya v. Fisher* (*The Japanese Immigrant Case*), which is generally credited with creating a narrow opening for procedural review (which the Chinese Exclusion Case and *Fong Yue Ting* had appeared to bar). 189 U.S. 86 (1903). Notwithstanding the political departments’ broad authority to exclude or expel aliens, the Court reasoned, administrative officers “may [not] disregard the fundamental principles that inhere in due process of law.” *Id.* at 100. While such language may appear to stake out for the Court a meaningful role in insuring procedural fairness, the actual outcome of *Yamataya* tells a very different story. *Yamataya*, a Japanese woman, had been excluded from the United States based on a federal immigration inspector’s finding that she was “likely to become a public charge.” *Id.* at 87. *Yamataya* appealed, claiming that she had not been afforded a meaningful opportunity to challenge the inspector’s decision. The Court acknowledged that the petitioner lacked “knowledge of our language; that she did not understand the nature and import of the questions propounded to her; that the investigation made was a ‘pretended’ one; and that she did not, at the time, know that the investigation had reference to her being deported from the country,” but nevertheless concluded that such personal “misfortune . . . constitutes no reason . . . under any rule of law, for the intervention of the court.” *Id.* at 101–02. Or consider *Knauff*, in which the Court upheld the exclusion of Ellen Knauff, the German wife of an American citizen, without a hearing and on the basis of secret evidence. 338 U.S. 537, 539, 547 (1950). “Whatever the procedure authorized by Congress is,” the Court famously declared, “it is due process as far as an alien denied entry is concerned.” *Id.* at 544 (citations omitted). *Knauff* presented such a sympathetic figure, and her plight was considered such a travesty of justice, that the Attorney General (after considerable prodding from Congress) eventually granted her a full exclusion hearing. That hearing ultimately resulted in her admission to the United States as a permanent resident after it was determined that her exclusion as a national security risk had been based on “unsubstantiated

Din held a protected liberty interest in the Government's consideration of her husband's visa application, yet denies that that interest entitled either her or Berashk to any information that would enable them to comprehend, let alone challenge, the reasons for his exclusion.<sup>95</sup>

What, if anything, does Justice Kennedy's controlling opinion in *Din* suggest about his disposition in *Trump v. Hawaii*? Once one grants, as Kennedy did in *Din*, that the Government's exclusion of a noncitizen can impair the constitutional rights of citizens and legal residents, such extraordinary deference is comprehensible only where there is no obvious reason to doubt that the Government has acted in good faith. And then came Donald Trump. For the past two years, Donald Trump—first as a candidate, then as President—has offered spectacular proof that the invasion metaphor continues to resonate with many Americans.<sup>96</sup> He announced his candidacy with lurid images Mexican drug dealers and rapists pouring into the country<sup>97</sup>—a problem that could only be solved, he insisted, by constructing a “great wall on our southern border.”<sup>98</sup> Then came the flood of Islamic terrorists posing as refugees of the Syrian civil war. His solution? A “total and complete shutdown of Muslims entering the United States.”<sup>99</sup> Nor was this simply election-season hyperbole uttered spontaneously during the fervor of a campaign rally, but rather a considered

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hearsay.” Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 958–64 (1995).

95. See *Din*, 135 S. Ct. at 2139 (Kennedy, J., concurring).

96. Both the challengers and the Fourth Circuit detail this history at length in support of their Establishment Clause analyses. See *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 594–600 (4th Cir. 2017); Brief in Opposition at 2–8, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (No. 16-1436).

97. Donald Trump stated: “When Mexico sends its people, they're not sending their best. 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 crime. They're rapists.” *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), [https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm\\_term=.2clab2c28407](https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm_term=.2clab2c28407).

98. *Id.*

99. Jenna Johnson, *Trump Calls for “total and complete shutdown of Muslims entering the United States,”* WASH. POST (Dec. 7, 2015), [https://washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm\\_terms=.bfbf614a81fb](https://washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_terms=.bfbf614a81fb) (quoting Trump Campaign press release).

position set forth in a formal “Statement on Preventing Muslim Immigration” that was featured on Trump’s campaign website for a year-and-a-half, including during the first five months of his presidency.<sup>100</sup> In short, Trump promised voters that he alone could repel the invasion of the United States by foreign terrorists and other criminals, and they responded. Then, all of seven days into his presidency, he made good on his promise by issuing the first of three successive orders banning migrants from several predominantly Muslim countries from entering the United States.<sup>101</sup> That order was soon replaced by a second,<sup>102</sup> and then, nearly six months later, by the third and current iteration,<sup>103</sup> which indefinitely prohibits travel to the United States by citizens of six majority-Muslim countries (Chad, Iran, Libya, Somalia, Syria, and Yemen) and North Korea.<sup>104</sup>

Both the challengers and the Fourth and Ninth Circuits grant that the Government possesses plenary federal power to exclude noncitizens, but insist that such power “is not tantamount to a Constitutional blank check.”<sup>105</sup> Even *Mandel* and *Din* do not “completely insulate [exclusion] decisions from any meaningful review.”<sup>106</sup> Rather, the “bona fide” requirement<sup>107</sup> conditions the “longstanding principle of deference to the political branches”<sup>108</sup> on

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100. “Statement on Preventing Muslim Immigration” was posted on Trump’s website on December 7, 2015. *Int’l Refugee Assistance Project*, 857 F.3d at 594. Notably, the Statement was taken down in early May 2018, five months after Trump’s inauguration as President and shortly before oral argument before the Fourth Circuit on EO-2. Brief in Opposition, *supra* note 96, at 25 n.15.

101. Exec. Order No. 13769, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017).

102. Exec. Order No. 13780, Protecting the Nation from Foreign Terrorist Entry into United States, 82 Fed. Reg. 13202 (Mar. 6, 2017).

103. Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45161 (Sept. 24, 2017).

104. *Id.* at 45165–67.

105. *Int’l Refugee Assistance Project*, 857 F.3d at 590; see *Hawaii v. Trump*, 878 F.3d 662, 679 (9th Cir. 2017); Brief in Opposition, *supra* note 96, at 46.

106. *Int’l Refugee Assistance Project*, 857 F.3d at 590; see also *Hawaii*, 878 F.3d at 679 (“Although the political branches’ power to exclude aliens is ‘largely immune from judicial control,’ it is not *entirely* immune . . . . Moreover, this case is not about individual visa denials, but instead concerns the ‘President’s promulgation of sweeping immigration policy.’” (internal citations omitted)).

107. *Int’l Refugee Assistance Project*, 857 F.3d at 589 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)).

108. *Id.* (citing *Mandel*, 408 U.S. at 767).

the Government's "good faith."<sup>109</sup> As the Fourth Circuit explains, Justice Kennedy's concurrence in *Din* established "that where a plaintiff makes 'an affirmative showing of bad faith' that is 'plausibly alleged with sufficient particularity,' courts may 'look behind' the challenged action to assess its 'facially legitimate' justification."<sup>110</sup> Accordingly, the court reads Kennedy's opinion not as an injunction against judicial scrutiny, but rather "to require that we step away from our deferential posture and look behind the stated reason for the challenged action."<sup>111</sup> Once authorized to "look behind" the national security rationale set forth in the Proclamation, to candidate and President Trump's extensive record of anti-Muslim statements (including his candid characterizations of the first travel ban as a "Muslim ban"<sup>112</sup>) the Fourth Circuit had little difficulty concluding that EO-2's "stated national security interest was provided in bad faith, as a pretext for its [anti-Muslim] purpose."<sup>113</sup> Justice Kennedy may well find that analysis persuasive. After all, if, as the Government maintains, the abundant, highly public evidence of President Trump's anti-Muslim demagoguery counts for nothing, it is difficult to view the circumscribed judicial "review" that Kennedy endorsed in *Din* as anything but an empty formalism. If he is prepared to affirm that it is not an empty formalism, and to inquire whether the Government's "facially neutral" reason for banning 150 million people from entering the United States is mere pretext for religious discrimination, it is entirely possible to strike down the travel ban on constitutional grounds without dismantling the plenary power doctrine.

I want to propose, however, that when we view President Trump's nativist bombast in light of the 120-year history of constitutional exceptionalism in immigration matters, it suggests still more far-reaching implications. As this Article explained above, in the late nineteenth century the Supreme Court translated the political trope of indelible foreignness into a potent and durable rationale for extra-constitutional authority, forging the immigration power into an instrument of national "self-

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109. *Id.* at 590–91 (citing *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., dissenting)).

110. *Id.* (quoting *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring)).

111. *Id.* at 591.

112. *Id.* at 575.

113. *Id.* at 592.

preservation” to be deployed against invading armies of racially degraded, economically and politically unassimilable foreigners.<sup>114</sup> Even today, generations after the United States abandoned Chinese exclusion and national origins quotas, immigrants’ *constitutional* estrangement—the principle that foreignness *per se* rightly dictates the nature of the authority to which they are subject—remains an axiomatic feature of the federal immigration power. For modern judicial and scholarly defenders of immigration exceptionalism, the indecorous rhetoric that clutters the historical origins of the plenary power doctrine does not diminish its legal soundness and continued legitimacy. Once we strip away the Court’s racism and the overwrought metaphor of alien invasion, the argument runs, the Government’s inherent power to control the admission and expulsion of non-citizens remains, as a logical concomitant of national sovereignty. After all, outside of the Naturalization Clause the Constitution is silent on the federal government’s power to regulate immigration; but such authority must exist somewhere.<sup>115</sup>

Yet as I have argued, the invasion trope was not merely anachronistic dicta; rather, it enabled the Court to bridge the gaping chasm between its novel legal rationale for federal authority and the decidedly quotidian purpose and subject matter of most immigration lawmaking and enforcement. It was precisely immigrants’ fundamental, indelible foreignness—their racial difference, their inability to assimilate, their destructive effect on American citizenship—that gave substance to the metaphor of racial invasion, and thus to the analogy between immigration regulation and war. Indeed, the tropes of invasion and war conjure Congress’s Article I authority to “repel [i]nvasions”<sup>116</sup> and “declare [w]ar”<sup>117</sup> without strictly invoking them, and thereby also summon the tradition of judicial deference toward those archetypal “political” powers. The Court’s declared objective of national self-

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114. See *supra* notes 12–31 and accompanying text.

115. It bears noting that even if one concedes that the principle of territorial sovereignty implies an authority to govern the rights of noncitizens to enter into and remain within territory, it does not follow that such authority must be exercised beyond the reach of mainstream constitutional norms, and that noncitizens must be denied important constitutional rights to which they, as persons, would otherwise be entitled.

116. U.S. CONST. art. 1, § 8, cl. 15.

117. *Id.* art. 1, § 8, cl. 11.

preservation against invading foreign races cannot, therefore, be swept aside like some unseemly rhetorical debris from a bygone era, cluttering the logically sound foundation of immigration exceptionalism. Rather, President Trump's nativist demagoguery—his disarmingly unapologetic scapegoating of unauthorized migrants, refugees, and many would-be immigrants—makes newly visible plenary power's long-observed premises. President Trump reminds us, in short, that the trope of alien invasion remains the cornerstone of the entire legal edifice.<sup>118</sup>

As apprehensive as many of us are about the Court's review this spring of the President's Proclamation, the case does offer the justices a rare opportunity to consider the plenary power doctrine in its most honest, unvarnished form. Might the bizarre tableau of the travel ban, especially the President's remarkable public statements referring to it as a "Muslim ban," and cynically acknowledging that its ostensible focus on nations rather than religion is a fig leaf, cause them to think more critically than they have in the past about the Government's rote invocation of national security? One can hope.

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118. See Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, *supra* note 32, at 812.