

From the Chinese Exclusion Act to the Muslim Ban: An Immigration System Built on Systemic Racism

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INTRODUCTION

On January 27, 2017, the first version of President Donald Trump’s travel ban [hereinafter the Muslim Ban or the Ban] went into effect. It targeted nationals from Muslim majority countries including Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.¹ It also indefinitely barred Syrian refugees, cut the total number of refugees allowed to be resettled to the United States by more than half, suspended the refugee admissions program, and prioritized the admission of non-Muslim religious minorities.² While the first Muslim Ban was challenged in court, the Executive Order went through another iteration in March,³ until it settled in its final form in September 2017. In this Presidential Proclamation, President Trump indefi-

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¹ Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

² *Myth v. Fact: Trump’s Refugee and Immigration Executive Order*, HUMAN RIGHTS FIRST (Feb. 7, 2017), <https://www.humanrightsfirst.org/resource/myth-v-fact-trumps-refugee-and-immigration-executive-order> [<https://perma.cc/3W4Q-GXKA>].

³ Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

nately prohibited nationals from six Muslim-majority countries from entering the United States.⁴ This list included Iran, Libya, Somalia, Sudan, Syria, and Yemen, in addition to North Korea and all government officials from Venezuela.⁵ A month after the third iteration of the Muslim Ban was enacted, the portion banning refugees expired, so President Trump issued a separate Executive Order that slowed down the resettlement process and effectively dismantled the resettlement program.⁶ This new Refugee Ban imposed extreme vetting policies and introduced another 90-day ban on eleven countries, nine of which have a Muslim-majority population: Egypt, Iran, Iraq, Libya, Mali, Somalia, Sudan, Syria, and Yemen.⁷ Despite swift public outcry that denounced President Trump's executive orders as xenophobic, the Supreme Court of the United States upheld the third iteration of the ban on June 26th, 2018.⁸

Unsurprisingly, the implementation of the Bans resulted in devastating consequences for refugees and immigrants worldwide. In the short term, the confusion and chaos that ensued after the first Ban led to the detention of individuals in airports, stranded refugee families who were due to arrive in the United States abroad, and even resulted in the expulsion of refugee families who had just arrived to the United States.⁹ Subsequent iterations of the Ban would also indefinitely separate families, prohibit students from continuing their studies, and prevent sick individuals from accessing necessary medical treatment.¹⁰ And while the long-term impacts of the Ban are yet to be fully determined, one notable effect is the drastic decrease in the number of refugees resettled in the United States, particularly of Muslims—a decrease that will negatively impact refugee resettlement in the United States for years to come.¹¹

⁴ Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

⁵ *Id.*

⁶ Exec. Order No. 13,815, 82 Fed. Reg. 50055 (Oct. 24, 2017); *See* Susan Nahvi, *Trump's Muslim and Refugee Ban: Where are We Now?*, FRIENDS COMM. ON NAT'L LEGIS. (Jan. 24, 2018), <https://www.fcnl.org/updates/trump-s-muslim-and-refugee-ban-where-are-we-now-1222> [<https://perma.cc/KDN6-EF64>].

⁷ *Id.*

⁸ *Trump v. Hawaii*, 323 U.S. 214 (2018).

⁹ Jeremy Diamond & Steve Almasy, *Trump's Immigration Ban Sends Shockwaves*, CNN, (Jan. 30, 2017), <https://www.cnn.com/2017/01/28/politics/donald-trump-executive-order-immigration-reaction/> [<https://perma.cc/75T4-RUFA>].

¹⁰ *E.g.*, Sabrina Siddiqui, *'A Hellish Nightmare': How Trump's Travel Ban Hit a Syrian Refugee Family*, THE GUARDIAN (Jan. 30, 2017), <https://www.theguardian.com/world/2018/feb/04/syrian-refugee-family-trump-travel-ban-virginia> [<https://perma.cc/7S3B-ZUU6>]; Karen Zraick, *Iranian Students Set to Start at U.S. Universities Are Barred From Country*, N.Y. TIMES (Sept. 20, 2019) [hereinafter Zraick] <https://www.nytimes.com/2019/09/20/us/iranian-students-visas.html> [<https://perma.cc/H697-4TH6>]; *The Muslim Ban: Discriminatory Impacts and Lack of Accountability*, CTR. FOR CONST. RTS (Jan. 14, 2019) [hereinafter *The Muslim Ban*], <https://ccrjustice.org/home/get-involved/tools-resources/publications/muslim-ban-discriminatory-impacts-and-lack> [<https://perma.cc/5JNQ-E4PH>].

¹¹ Int'l Rescue Comm., *New IRC Analysis of US Refugee Resettlement Shows Vastly Reduced Arrivals at a Time of Record Global Need and Consistent Popular Support* (June 18, 2019) (on file with author); *see, e.g.*, Amanda Holpuch, *Trump Has Nearly Destroyed US Refugee Program, Experts Say*, THE GUARDIAN (Sept. 28, 2019), <https://www.theguardian.com/world/2019/sep/27/trump-refugee-cap-asylum-program> [<https://perma.cc/ETW6-5G6Y>].

In response to the Muslim Ban, thousands of individuals took to the streets to protest that the Ban did not align with “American values,”¹² but this article demonstrates that the Ban is a continuation of U.S. immigration policies that have long been driven by racism and exclusion. Although immigration to the United States was relatively unrestricted in the first few hundred years after the country’s founding, qualitative and quantitative restrictions were subsequently enacted to exclude nonwhite individuals from naturalizing. As immigration policies became increasingly predicated on one’s whiteness, judges sought to define the concept by creating “tests” based on common knowledge and science. These tests were designed to exclude nonwhite immigrants, including Muslims from traveling to the United States and becoming American long before the enactment of the Muslim Ban. When whiteness was no longer explicitly the test for allowing immigrants into the United States, various administrations used economic or national security arguments to continue to inhibit nonwhite individuals from immigrating—a tactic that the Muslim Ban adopted. Such racist immigration policy coming out of the legislative and executive branch has endured for centuries in part because of the plenary power doctrine, which allows the Supreme Court to ignore even overt animus under the guise of deferential review. Together, these arguments prove that despite the public outcry that erupted after the implementation of the Muslim Ban, the Muslim Ban fit right in with “American values.”

To work towards an immigration system that does not operate on racism and exclusion, it is necessary to document and discuss this country’s dark history. This article attempts to do just that. By no means an exhaustive summary of racist U.S. immigration policy, this article highlights the ways in which white supremacy has maintained and defined the U.S. immigration system, harming countless individuals in the process. Only once we confront the dark history of the U.S. immigration system and the legal mechanisms that prop it up will we be able to work towards legal solutions that contribute to a more inclusive immigration system.

I. AN OPEN DOOR FOR WHITE IMMIGRANTS

When European colonization of the United States first began in 1492, it was accompanied by an era of unrestricted immigration that lasted until 1875.¹³ The first ten presidents believed that immigration benefitted the

¹² See, e.g., Lauren Gambino, Sabrina Siddiqui, Paul Owen & Edward Helmore, *Thousands Protest Against Trump Travel Ban in Cities and Airports Nationwide*, THE GUARDIAN (Jan. 30, 2017), <https://www.theguardian.com/us-news/2017/jan/29/protest-trump-travel-ban-muslims-airports> [https://perma.cc/6NRE-LELG]; Joshua Kurtz, *Activists Protest Supreme Court Muslim Ban Decision*, HIAS (June 27, 2018), <https://www.hias.org/blog/activists-protest-supreme-court-muslim-ban-decision> [https://perma.cc/P5M8-7FPE].

¹³ Walter A. Ewing, *Opportunity and Exclusion: A Brief History of US Immigration Policy*, AM. IMMIGR. COUNCIL, 2 (Jan. 2012) [hereinafter Ewing], https://www.americanimmigrationcouncil.org/sites/default/files/research/opportunity_exclusion_011312.pdf [https://perma.cc/PSY2-6WKJ].

overall health and prosperity of the country, so they effectively established a pro-immigration consensus.¹⁴ Therefore, immigration policy during this time is often categorized as an open-door policy, one that was driven by the United States' need for labor.¹⁵

However, even during this era of relatively unrestricted immigration, the door was only open to some. Congress's first act to address immigration was the Naturalization Act of 1790, which recognized immigrants who were "free white persons" of "good moral character" as eligible for naturalization.¹⁶ This resulted in whiteness serving as a proxy for citizenship to the United States, an idea that would define subsequent U.S. immigration policy for centuries to come.¹⁷ The question of who was considered white, however, was not easily answered and often forced immigrants to prove their racial identity in order to be eligible to naturalize.

Deciding who would be considered white in the United States and therefore allowed to naturalize received particular attention when Irish Catholics began to migrate to the United States.¹⁸ Throughout the 1700s and 1800s, Irish migrants arrived to the U.S. to escape famine, comprising one of the earliest and largest non-English immigrant groups.¹⁹ However, many Irish immigrants identified as Catholic, which frustrated American Protestants who considered Catholics to be nonwhite.²⁰ Thus, the arrival of Irish Catholic immigrants ultimately resulted in the first successful anti-immigrant movement in the United States organized by the Know-Nothings.²¹

The Know-Nothings were one of the first white supremacist groups in the U.S. that opposed immigration and gained enough momentum to enter the political realm, reaching one million members at their peak.²² Not only did members have to be native-born white Protestants, they also rejected immigrants based on their religion and took an oath to resist foreign influences on the country.²³ Their success came from their ability to link "American values" to the image of an idealized past of the United States²⁴—an idea that "Make America Great Again" iterates. Around the same time, the Ku Klux Klan appeared in the North to defend "the country's schools, govern-

¹⁴ ROGER DANIELS, *GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882* 6 (2005).

¹⁵ Philip Martin & Elizabeth Midgley, *Immigration: Shaping and Reshaping America*, POPULATION BULL., 12 (Dec. 2006) [hereinafter Martin], <https://www.prb.org/wp-content/uploads/2006/12/61.4USMigration.pdf> [<https://perma.cc/JZJ8-T5KQ>].

¹⁶ Naturalization Act of 1790, 1 Stat. 103, 103–04 (1790) (repealed 1795).

¹⁷ Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11?"*, 7 J. GENDER RACE & JUST. 315, 319–20 (2003) [hereinafter Boswell].

¹⁸ Benjamin Oppenheimer, Swati Prakash & Rachel Burns, *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L. J. 1, 7–8 (2016).

¹⁹ *Id.*

²⁰ *Id.* at 9.

²¹ A. Cheree Carlson, *The Rhetoric of the Know-Nothing Party: Nativism as a Response to the Rhetorical Situation*, 54 S. COMM. J. 364, 364–65 (1989) [hereinafter Carlson].

²² *Id.* at 367.

²³ DANIELS, *supra* note 14, at 10.

²⁴ Carlson, *supra* note 21, at 276.

ment, and social conduct” against Catholic immigrants.²⁵ The Klan’s white supremacist, nativist ideologies were based on the idea that “American ideals” were too weak to withstand outside pressure, which necessarily meant that any foreigners would subvert American culture.²⁶ Contrary to the Klan’s approach, the Know-Nothings recognized that the country needed immigrants to succeed. Therefore, instead of arguing for the outright exclusion of Catholics, they focused their attention on the assimilation of immigrants and increasing the waiting time before naturalization.²⁷

This nativist rhetoric subsequently transformed into concrete law.²⁸ In particular, New York and Massachusetts experienced great influxes of Irish migrants in the 1840s and ‘50s and strengthened their laws to exclude Irish and Catholic immigrants from entering their borders in fear of them becoming economic burdens.²⁹ Their efforts resulted in the most advanced regulatory immigration systems among the seaboard states,³⁰ and the two states would successfully transform their nativist states laws into federal ones as immigration law shifted from state to federal control, resulting in the Immigration Act of 1882.³¹

Despite the initial anti-immigrant rhetoric Irish immigrants faced, both anti-Irish sentiment and the Know-Nothings dissipated as Irish Catholics were enveloped into the definition of white.³² Germans, Eastern European Jews, and Italians were also eventually categorized as white, despite facing similar racialization to that of the Irish when they immigrated to the United States.³³ Among the various reasons for the successful assimilation of European ethnic groups were their anti-Black attitudes and the expansion of the country westward, both of which provided a path for Europeans and white

²⁵ David Montgomery, *Presidential Address: Racism, Immigrants, and Political Reform*, 87 J. AM. HIST. 1253, 1269 (2001) [hereinafter Montgomery].

²⁶ Carlson, *supra* note 21, at 368.

²⁷ Erika Lee, *Immigrants and Immigration Law: A State of the Field Assessment*, 18 J. AM. ETHNIC HIST. 85, 88 (1999) [hereinafter Lee].

²⁸ *Id.* at 87. States had primary jurisdiction over immigration law prior to 1875. The only exception was naturalization, which was controlled by the federal government.

²⁹ Hidetaka Hirota, *The Moment of Transition: State Officials, the Federal Government and the Formation of American Immigration Policy*, 99 J. AM. HIST. 1092, 1095 (2013) [hereinafter Hirota].

³⁰ *Id.*

³¹ While not directly at issue in this article, it is important to note that the Immigration Act of 1882 created the public charge rule, a rule which was designed to exclude impoverished Europeans or poor, nonwhite immigrant populations in general. Immigration Act of 1882, 22 Stat. 214 (1882); *see generally*, Hirota, *supra* note 29. The Trump administration moved to expand the rule in 2018, which took effect nationwide in 2020, and the expansions are predicted to exclude green card applicants primarily from Asia, Latin America, and Africa. *See* Hamutal Bernstein, Dulce Gonzalez, Michael Karpman & Stephen Zuckerman, *Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019*, URBAN INST. 1, 3 (May 2020), https://www.urban.org/sites/default/files/publication/102221/amid-confusion-over-the-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-in-2019_2.pdf [https://perma.cc/D6SQ-E72D].

³² Oppenheimer et al., *supra* note 18, at 9; Carlson, *supra* note 21, at 376–379.

³³ Oppenheimer et al., *supra* note 18, at 7, 14, 17.

Americans to form a white, cohesive social group that marginalized other people including African-Americans, Indians, Asians, and Mexicans.³⁴

II. CLOSING THE DOOR FOR NONWHITE IMMIGRANTS

As European immigrants were categorized as white and immigration policy shifted from state to federal control, nativist rhetoric targeted a different population: Chinese immigrants.³⁵ In 1875, the U.S. passed the Page Law, which was the first federal immigration law that regulated the admission of immigrants to the United States.³⁶ Specifically, the Page Law restricted the entry of Chinese, Japanese, and other Asian laborers involuntarily brought to the U.S. While nativism and xenophobia had always been a part of U.S. immigration history, the Page Law marked the first time the federal government yielded to nativist demands and restricted immigration by law.³⁷

A federal law emerged at this time for two main reasons: changes in the racial, religious, ethnic, and cultural composition of the immigrant population triggered xenophobic reactions, and the growth of the nation state equipped the federal government with administrative capacity.³⁸ As the demographics of the immigrant population began to change from European to Asian migrants, white Americans grew more hostile towards immigrants, calling for legislation that placed qualitative restrictions on immigrants perceived as threatening. This would ultimately result in devastating legal consequences for Chinese immigrants who were categorized as nonwhite.³⁹ In this way, the exclusion of Chinese immigrants brought about an end to the so-called open-door era of U.S. immigration policy.⁴⁰

III. JUSTIFYING THE EXCLUSION OF NONWHITE IMMIGRANTS

A. *The Portrayal of Nonwhite Immigrants as Economic Threats*

The difference in legal outcomes for Chinese and Irish Catholic immigrants demonstrates the significance the racial category “white” has historically had on U.S. immigration policy. Because whiteness was not easily defined when the U.S. began to exclude Chinese immigrants, Chinese immigrants were often portrayed as economic threats to justify their race-based

³⁴ Monica McDermott & Frank L. Samson, *White Racial and Ethnic Identity in the United States*, 31 ANN. REV. SOC. 245, 251 (2005).

³⁵ Lee, *supra* note 27, at 89.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 88.

³⁹ Whiteness was still a prerequisite for citizenship at this time. Martin & Midgley, *supra* note 15, at 12.; Naturalization Act of 1790, 1 Stat. 103, 103–04 (1790).

⁴⁰ *Id.*

exclusion. In particular, the discovery of gold in California in 1848 attracted over 300,000 Chinese laborers.⁴¹ Before the passage of the Chinese Exclusion Act in 1882, Chinese laborers were welcomed into the U.S. because they worked in especially harsh conditions for long hours and received low wages.⁴² As soon as Chinese laborers began to see economic success, however, exclusionary immigration policy followed, including the Chinese Exclusion Act of 1882.⁴³ Not only did the Act suspend the entry of Chinese laborers for ten years, it rendered Chinese immigrants ineligible for naturalization.⁴⁴

While the belief that Chinese immigrants were economic threats resulted in restrictive immigration policy, a similar view of the Irish Catholics did not. Instead, through legislation and court proceedings, the state legitimized the racialization and subjugation of Chinese immigrants, but not of the Irish Catholics. For example, while the state gave the Irish the ability to naturalize and the right to vote, it did not do the same for Chinese laborers, largely under the justification that Chinese individuals did not meet the definition of “free white persons.”⁴⁵ Among the three racial categories that existed at that time, courts often grouped Chinese immigrants as Indigenous or Black instead of white.⁴⁶

Ultimately, the influx of Chinese immigrants forced courts to grapple with the definition of white, causing whiteness to become more than a race; whiteness granted individuals the rights and privileges of citizenship that nonwhite individuals could not attain.⁴⁷ This notion was exemplified in *Chae Chan Ping v. United States*, also known as the *Chinese Exclusion Case*.⁴⁸ Chae Chan Ping was a Chinese citizen and legal resident of San Francisco who decided to visit China twelve years after he arrived to the United States. While he was abroad, an amendment was passed to the Chinese Exclusion Act, resulting in the denial of his re-entry into the United States.⁴⁹ Although he subsequently challenged the denial, the Supreme Court rejected his challenge, acknowledging the Act’s racist rationale in their opinion but accepting it as legitimate.⁵⁰

In an attempt to define Chinese immigrants as nonwhite and therefore preclude them from citizenship, Justice Stephen Field emphasized the supposed differences between Chinese immigrants and American citizens. His

⁴¹ Oppenheimer et al., *supra* note 18, at 19.

⁴² Martin & Midgley, *supra* note 15, at 12.

⁴³ *Id.* at 19–20.

⁴⁴ The Chinese Exclusion Act would be extended again in 1892 for another ten years and indefinitely in 1902. Ewing, *supra* note 13, at 3.

⁴⁵ Erin L. Murphy, *Prelude to Imperialism: Whiteness and Chinese Exclusion in the Reimagining of the United States*, 18 J. Hist. Soc. 457, 470 (2005).

⁴⁶ *Id.* at 470–72.

⁴⁷ *See id.* at 460.

⁴⁸ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *see also* *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (demonstrating that even U.S. citizenship could not guarantee individuals with Chinese ancestry the rights and privileges associated with whiteness).

⁴⁹ *Chae Chan Ping*, 130 U.S. at 581–82.

⁵⁰ Oppenheimer et al., *supra* note 18, at 22.

unanimous opinion explained that Chinese individuals in the United States were “adhering to the customs and usages of their own country,” which made it “impossible for them to assimilate with our people, or to make any change in their habits or modes of living.”⁵¹ Well-known figures like Theodore Roosevelt also celebrated the passage of the Act, claiming that Chinese individuals should be kept out of the country because their presence was “ruinous to the white race” and threatened democracy.⁵²

Throughout the 1900s, other Asian immigrant groups faced discriminatory immigration policies as well, such as the Japanese. For example, in 1907 President Roosevelt persuaded the Japanese government to enter into the Gentlemen’s Agreement, which resulted in Japan denying passports to Japanese laborers intending to enter the U.S.⁵³ The goal of the informal agreement was to ease tensions arising within the United States as a result of the growing presence of Japanese workers. In 1917, this exclusionary policy was expanded when Congress created a geographic zone known as the “Asia-Pacific Triangle” specifically designed to prohibit Asians, including the already barred Chinese, from immigrating to the United States.⁵⁴

Just six years later, the Supreme Court cemented the idea that citizenship was predicated on whiteness in *United States v. Baghat Singh Thind*.⁵⁵ Here, the Court rejected an Indian immigrant’s right to naturalize on the grounds that children born to Hindu parents “would retain indefinitely the clear evidence of their ancestry”— an ancestry that the Supreme Court determined was incompatible with whiteness and therefore citizenship.⁵⁶ Prior to this decision, debates in the courts about the boundaries of whiteness revolved around two main theories: common knowledge and scientific evidence.⁵⁷ The court in *Thind*, however, ultimately rejected the role of science in racial assignments. Because science justified the categorization of some individuals with dark skin as Caucasian, courts began to discredit science as the measure of whiteness.⁵⁸ In other words, because science could not guarantee whites superiority in a racial hierarchy, courts instead made common knowledge the arbiter of whiteness, holding that “free white persons” were

⁵¹ *Chae Chan Ping*, 130 U.S. at 595.

⁵² Motoe Sasaki, *Excludable Aliens vs. One Nation People: The U.S. Chinese Exclusion Policy and the Racialization of Chinese in the United States and China*, 23 JAPANESE J. AM. STUD. 27, 33 (2012) [hereinafter Sasaki].

⁵³ Julia G. Young, *Making America 1920 Again? Nativism and US Immigration, Past and Present*, 5 J. MIGRATION & HUM. SEC. 217, 221 (2017).

⁵⁴ Boswell, *supra* note 17, at 324.

⁵⁵ *United States v. Baghat Singh Thind*, 261 U.S. 204 (1923).

⁵⁶ *Id.* at 215.

⁵⁷ IAN HANEY LÓPEZ, *WHITE BY LAW* 5–7 (1996).

⁵⁸ This transformation occurred over a series of cases, including *In re Ah Yup*, 1 F. Cas. 223 (C.C.D. Cal. 1878), and *Ozaarwa v. United States*, 260 U.S. 178 (1922). However, the *Thind* case best demonstrates the divergence of science and common knowledge in “determining one’s racial category.” In *Thind*, the Court believed that the inclusion of brown and Black individuals meant that science had been manipulated to create a broader category of Caucasians. *Thind*, 261 U.S. at 213–215.

words that could be interpreted through the common individual's understanding.⁵⁹

To further confine immigration to “western and northern European stock”—an idea that was driven by prominent eugenicists at the time⁶⁰—Congress enacted a quota in 1910 that limited the number of eastern and southern Europeans entering the country.⁶¹ This discriminatory quota was made permanent with the passage of the National Origins Act of 1924.⁶² The Act lowered the number of immigrants allowed into the U.S. to 150,000 individuals, as opposed to the previous cap of 350,000, and limited the percentage of individuals from each nationality to two percent of the members of that nationality present in the U.S.⁶³ A more complex quota would govern U.S. immigration policy from 1929 until 1952, the year Congress enacted the Immigration and Nationality Act and formally removed whiteness as a prerequisite for citizenship.⁶⁴

Throughout the mid-1900s, other racist restrictions began to lift. In 1943, Congress repealed the Chinese Exclusion Act,⁶⁵ and in 1963 President Kennedy proposed immigration reforms that would formally remove national origin as a barrier to immigration. His quantitative system relied on skills needed in the United States, family ties to U.S. citizens, and priority registration. It also included the first cap for immigrants coming from the Western Hemisphere.⁶⁶ These reforms attempted to end racial and ethnic exclusion and continue to define today's immigration system.⁶⁷ Despite this apparent progress, however, immigration policies to come would continue to operate on an exclusionary basis but with national security as the justification.

⁵⁹ By using common knowledge to determine who was white, the Court furthered the notion that whiteness stemmed from physical differences among individuals. This left the Court to decide which physical differences were not white, paving the way for them to create a legal construct of whiteness. *Id.*

⁶⁰ Boswell, *supra* note 17, at 325 (citing U.S. Comm'n On Civil Rights, *The Tarnished Golden Door: Civil Rights Issues In Immigration* 8 (1980)).

⁶¹ Desmond King, *Liberal and Illiberal Immigration Policy: A Comparison of Early British (1905) and US (1924) Legislation*, 1 *TOTALITARIAN MOVEMENTS & POL. RELIGIONS* 78, 82 (2000) [hereinafter King].

⁶² Boswell, *supra* note 17, at 325.

⁶³ King, *supra* note 61, at 81–82.

⁶⁴ This act is also known as the McCarran-Walter Act. Boswell, *supra* note 17, at 324–25.

⁶⁵ Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), repealed by Act of Dec. 17, 1943, ch. 344 § 1, 57 Stat. 600 (1943).

⁶⁶ Boswell, *supra* note 17, at 326–27

⁶⁷ See Muzaffar Chishti, Faye Hipsman & Isabel Ball, *Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States*, *MIGRATION POLY INST.: MIGRATION INFO. SOURCE* (Oct. 15, 2015), <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states> [<https://perma.cc/5MW4-38TC>].

B. *The Portrayal of Nonwhite Immigrants as National Security Threats*

While the United States appeared to be advancing towards less racist immigration policies in the mid-1900s, exclusionary policies directed at non-white individuals were still enacted but now justified under the guise of national security. During the open-door era of immigration, national security justifications were less of a concern as colonial leaders in the U.S. believed that the strength of the country depended on the size of its population.⁶⁸ Therefore, the country looked to immigrants to provide protection and wealth in case of catastrophic events like war.⁶⁹ While the founders did have some concerns that immigrants could expose Americans to foreign spies or use ethnic and racial violence to cause disruption in society, national security did not define immigration policy.⁷⁰

This changed leading up to the Chinese Exclusion Act, where Chinese individuals were portrayed as a direct threat to the peace and security of the United States. U.S. citizens feared that the growing number of Chinese immigrants would result in an “Oriental invasion,”⁷¹ in addition to the “race suicide” of Anglo-Americans.⁷² Such ideas permeated the Supreme Court, which also endorsed the idea that Chinese individuals posed a threat to national security because of their supposed inability to assimilate into American society. Specifically, the Supreme Court espoused the notion that the growing number of Chinese immigrants would ultimately result in a separate “Chinese settlement within the state” that had no interest in the U.S. or its institutions.⁷³

Ultimately, nativist rhetoric directed at Asian immigrants paved the way for immigration policy to be utilized as an instrument of national self-defense against racially suspect immigrants throughout the mid 1900s.⁷⁴ For example, in 1942 President Franklin Roosevelt issued Executive Order 9066, which allowed the military to enact policies necessary to preserve national security, including the relocation and incarceration of individuals with Japanese ancestry.⁷⁵ Fred Korematsu’s violation of this order resulted in the landmark case *Korematsu v. United States*.⁷⁶ Although the Court in *Korematsu* explained that all legal restrictions curtailing the rights of a single ra-

⁶⁸ Robbie Totten, *National Security and U.S. Immigration Policy*, 39 J. INTERDISC. HIST. 37, 38–39 (2008).

⁶⁹ *Id.* at 46.

⁷⁰ *See id.* at 43.

⁷¹ *Chae Chan Ping v. United States*, 130 U.S. 581, 595–96 (1889).

⁷² For more information on how the usage of the word “invasion” was instrumental in developing an American national identity and in gatekeeping who belonged, see Erika Lee, *The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping*, 21 J. AM. ETHNIC HIST. 36, 43 (2010).

⁷³ *Id.*

⁷⁴ Matthew Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 7 (2010).

⁷⁵ Exec. Order No. 9,066, 3 C.F.R. 1092 (1943).

⁷⁶ 323 U.S. 214 (1944).

cial group were immediately suspect, they upheld the constitutionality of the order by using national security as a means to justify racial discrimination.⁷⁷

Recent U.S. presidents have continued to use national security to justify racist and exclusionary immigration policies. After the September 11, 2001 attacks, national security became the dominant lens through which immigration policy was viewed under the Bush administration, and funding for immigration programs linked to “homeland security” experienced exponential growth.⁷⁸ Immigration enforcement was also restructured from the local to federal level, linking immigration to intelligence and law enforcement, which in turn resulted in a closer connection between immigration and counterterrorism campaigns that disproportionately impacted Muslims.⁷⁹ For example, one of the principal tactics used by the Bush Administration was detaining noncitizens with possible ties to terrorism.⁸⁰ As evidenced by the “National Security Entry and Exit Registration System” (NSEERS), these ties were often assumed on the specious basis of national origin. Initiated in 2002, NSEERS targeted men from predominantly Arab and Muslim countries including Iran, Iraq, Libya, Sudan, Syria, Somalia, North Korea, and Yemen—countries that have all been included in iterations of Trump’s Muslim Ban.⁸¹ NSEERS operated on the false notion that individuals from a particular religion or nationality were more likely to commit acts of terrorism, but the program unsurprisingly failed to meet its declared objective of identifying suspects involved in terrorism-related crimes.⁸² Other efforts under the Bush Administration that connected immigration to national security and disproportionately impacted Muslims include: the FBI conducting interviews with Muslim and Iraqi immigrants to detect and prevent Al-Qaeda acts of reprisal, Department of Homeland Security (DHS) launching Operation Liberty Shield and requiring the detention of asylum seekers from thirty-three countries where Al-Qaeda was known to operate, and the Department of Justice (DOJ) designating several thousand men as

⁷⁷ *Id.* at 216, 220.

⁷⁸ MICHELLE MITTELSTADT, BURKE SPEAKER, DORIS MEISSNER, MUZAFFAR CHISHTI, THROUGH THE PRISM OF NATIONAL SECURITY: MAJOR IMMIGRATION POLICY AND PROGRAM CHANGES IN THE DECADE SINCE 9/11, MIGRATION POL’Y INST. 1, 2 (Aug. 2011).

⁷⁹ *Id.* at 5.

⁸⁰ Shoba S. Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L REV. 1485, 1491 (2010).

⁸¹ *Id.* at 1503.

⁸² The NSEERS registration consisted of three main components. First, individuals from the listed countries were required to be fingerprinted, photographed, and interrogated about their background when entering or exiting the country. Second, individuals had to re-register thirty days after their initial registration at a port-of-entry and annually if they stayed in the United States for over a year. Lastly, individuals were required to register each time they left the United States. Despite costing American taxpayers more than \$10 million annually, there is no evidence that NSEERS led to the identification of any individual suspected of terrorism. Instead, it devastated family members and communities. RIGHTS WORKING GROUP, THE NSEERS EFFECT: A DECADE OF RACIAL PROFILING FEAR, AND SECRECY 15–16 (May 2012); *National Security Entry-Exit Registration System (NSEERS) Freedom of Information Act (FOIA) Request*, CTR. FOR CONST. RTS (Apr. 15, 2019), <https://ccrjustice.org/home/what-we-do/our-cases/national-security-entry-exit-registration-system-nseers-freedom>.

“priority absconders” because they hailed from “countries in which there ha[d] been al-Qaeda terrorist presence or activity.”⁸³

Moreover, in 2003, immigration-related functions once carried out by the DOJ’s Immigration and Naturalization Service were transferred to DHS, solidifying the fact that the administration viewed immigration as a national security issue.⁸⁴ The creation of DHS was the largest reorganization of federal government responsibilities since the creation of the Defense Department post-World War II, centralizing 22 federal agencies,⁸⁵ expanding U.S. Customs and Border Protection (CBP), and creating U.S. Immigration and Customs Enforcement (ICE).⁸⁶ During its initial stages, DHS even released a memo explaining that the Department considered in their analysis race, ethnicity, and an individual’s connections to countries associated with acts of terrorism when there was a compelling government interest, demonstrating that profiling individuals based on their nationality was permissible and even preferred during the Bush Administration.⁸⁷

The Obama Administration also manipulated immigration law in the name of national security.⁸⁸ Critics of the Obama Administration have drawn attention to the ways in which his administration conflated immigration with counterterrorism programs and utilized lower due process protections afforded to immigrants to heighten surveillance and racially and religiously profile individuals.⁸⁹ Additionally, Muslims during President Barack Obama’s tenure were subjected to preventive detention, exclusion based on their political views, and potentially unconstitutional racial profiling.⁹⁰ And while the NSEERS program was indefinitely suspended in 2011, the Obama administration continued to disproportionately detain and deport Muslims, in addition to denying them immigration benefits, by portraying lawful activities that they engaged in as dangerous.⁹¹ In using national security as a justification for the targeting of Muslims, U.S. policy positioned

⁸³ MITTELSTADT ET AL., *supra* note 78, at 6–7.

⁸⁴ Wadhia, *supra* note 80, at 1513.

⁸⁵ Dara K. Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 676 (2006).

⁸⁶ *History of ICE*, U.S. IMMIGR. & CUSTOMS ENFT (July 12, 2022), <https://www.ice.gov/features/history> [<https://perma.cc/FT47-5H9S>].

⁸⁷ Wadhia, *supra* note 80, at 1513 (citing Memorandum from Tom Ridge, Sec’y. of the Dep’t of Homeland Security, on The Department of Homeland Security’s Commitment to Race Neutrality in Law Enforcement Activities (June 1, 2004)).

⁸⁸ Sudha Setty, *Obama’s National Security Exceptionalism*, 91 CHI.-KENT. L. REV. 91, 106 (2016) [hereinafter Setty]. See also Desirée Colomé-Menéndez, Joachim A. Koops & Daan Weggemans, *A Country of Immigrants No More? The Securitization of Immigration in the National Security Strategies of the United States of America*, 7 GLOBAL AFF. 1 (2021) (analyzing the National Security Strategies published between 2002 and 2017 to explain how the Obama administration reintroduced immigration as a security issue for the U.S.).

⁸⁹ Setty, *supra* note 88. For a more detailed analysis of how the Obama administration’s counterterrorism programs impacted Muslim, Arab, and South Asians, see also, Sudha Setty, *Country Report on Counterterrorism: United States of America*, 62 AM. J. COMP. L. 634 (2014).

⁹⁰ Setty, *supra* note 88, at 108.

⁹¹ CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, N.Y.U., ASIAN AM. LEGAL DEF. & EDUC. FUND, UNDER THE RADAR: MUSLIMS DEPORTED, DETAINED, AND DE-

Muslim populations within the U.S. as a suspect and foreign group deserving of government discipline, a belief the Muslim Ban was predicated on.

C. *The Racialization of Muslim Immigrants as Nonwhite*

Despite Islam being a religion with adherents from countless racial and ethnic backgrounds, Muslims immigrating to the U.S. have been racialized as nonwhite and precluded from citizenship since the Naturalization Act of 1790.⁹² In particular, the cases that reached the Supreme Court in the early 1900s highlight the problems that arose for Muslims when the courts attempted to establish who was white by law.⁹³ As demonstrated in cases where Christian, Middle Eastern immigrants were categorized within the statutory definition of whiteness and were therefore able to naturalize, Christianity often served as a proxy for whiteness.⁹⁴ Although early Muslim migrants tried to persuade judges they were white, they were unsuccessful due to Orientalist views that framed Islam as incompatible with Christianity and therefore whiteness.⁹⁵

NIED ON UNSUBSTANTIATED TERRORISM ALLEGATIONS 2 (2011), <https://chrgj.org/wp-content/uploads/2016/09/undertheradar.pdf> [<https://perma.cc/VK8G-S8AJ>].

⁹² Khaled Beydoun, *Muslim Bans and the (Re)Making of Political Islamophobia*, 2017 U. ILL. L. REV. 1733, 1741–47 (2017) (arguing that the Naturalization Act of 1790 operated as a *per se* ban on Muslims as a person’s faith served as a proxy for whiteness or otherness) [hereinafter Beydoun].

⁹³ Because race is a social construct, it is in part a legal construct as well. The law has been used to create racial boundaries, define racial identities, and assign relative privilege and/or disadvantage in society. One way the law has created race is by defining the meaning of white and nonwhite, choosing which traits code as what race, and assigning that to individuals. LÓPEZ, *supra* note 57, 1–24. Although Islam is a religion and not a race, Islamophobia is often classified as racism because it is a structural, racial project that maintains the race-based subordination of marginalized groups and upholds white supremacist thought. In fact, the facial lens on which Islamophobia operates is why a set of physical traits and characteristics can label someone as Muslim, despite their actual religion or nationality. ERIK LOVE, ISLAMOPHOBIA AND RACISM IN AMERICA 2–4 (2017). Outside of the law, the racialization of Muslims is less determined by the absence of ethnic and racial uniformity among them, but more on the narrow gaze of those who do the racializing. See Neil Gotanda, *The Racialization of Islam in American Law*, 637 ANNALS AM. ACAD. POL. & SOC. SCI. 184, 13–14 (2011). Anti-Muslim racism often implies that Muslim identity, and any negative characteristics associated with Islam, are innate and unchangeable. Anna Sophie Lauwers, *Is Islamophobia (Always) Racism?*, 7 CRITICAL PHIL. RACE 306, 306 (2019).

⁹⁴ Beydoun, *supra* note 92, at 1743.

⁹⁵ *Id.* at 1742–43. Initially, Orientalist thought positioned immigrant Muslims as threats to domestic interests. However, as Black Muslims who embraced Islam adopted a liberation ideology against White Supremacy, Orientalist thought merged with anti-Black sentiment, and Islam became associated with militant Blackness, radicalism, and violence. Its adherents, therefore, were categorized as anti-American individuals who threatened democracy and foreign interests. For more information, see, Sahar Aziz, *Orientalism, Empire, and The Racial Muslim*, in OVERCOMING ORIENTALISM: ESSAYS IN HONOR OF JOHN L. ESPOSITO 221 (Tamara Sonn, ed., 2021). The current racialization of Muslims often operates on two tropes: the “Muslim terrorist” and the “good Muslim.” The good Muslims are model minorities who can assimilate in the United States while the Muslim “terrorists” remain permanently foreign due to their supposed opposition to U.S. goals and foreign policy. This racialization is similar to that the Chinese faced in U.S. history, when they were perceived to be unable to assimilate into U.S. life because of their race. See generally Gotanda, *supra* note 93.

As courts began to use religion as a proxy for whiteness, they simultaneously grappled with how skin color impacted one's categorization as white, facing particular difficulty in classifying dark-skinned Arabs who were also Christian. For example, in the 1913 case *Ex parte Shahid*, William Shahid was an Arab Christian who attempted to rebut the notion that he was Muslim.⁹⁶ The judge, however, viewed Shahid's skin, which he described as the color "of a walnut," as proof that Shahid was in fact Muslim.⁹⁷ The judge came to this conclusion by interpreting "free white persons" to mean the same it did in 1790, limiting whiteness to Christian Europeans and their descendants.⁹⁸ In this way, *Ex parte Shahid* helped create a legal white identity through a two-step process: first by deciding who was and was not white, and second by subjugating nonwhites and excluding them from privileges like the right to naturalize.⁹⁹

To be able to articulate what whiteness meant, the judge in *Ex parte Shahid* also offered the idea that whiteness was an inherited and a commonly recognized truth—one that Muslims did not belong to.¹⁰⁰ This notion was solidified in the 1942 case *In re Ahmed Hassan*,¹⁰¹ where the petitioner attempted to prove his whiteness using both common knowledge and science, despite the role of science being rejected earlier in *United States v. Baghat Singh Thind* and *Ex parte Shahid*. Ultimately, the court in *In re Ahmed Hassan* ruled that Arabs were not white for a variety of reasons, among them being that they hailed from the "Mohammedan world," could not assimilate or intermarry due to their Muslim beliefs, and their skin color differed from the Europeans.¹⁰² In this case, the judge relied on both skin color and the trope that Islam was incompatible with Christianity to delineate the boundaries of whiteness. Thus, regardless of what test a judge was relying on in delineating the boundaries of whiteness, judges were reluctant to conclude that Muslims could or should be categorized as white under the law.

⁹⁶ 205 F.812, 813 (E.D.S.C. 1913).

⁹⁷ *Ex parte Shahid*, 205 F. 812, 813 (E.D.S.C. 1913).

⁹⁸ *Id.* at 814 (the judge determined the meaning of "free white persons" to be "all persons belonging to the European races, then commonly counted as white, and their descendants." He went on to stipulate that this definition "would not mean a 'Caucasian' race; a term generally employed only after the date of the statute and in a most loose and indefinite way." Acknowledging the difficulties that arose with defining whiteness through "ocular inspection," however, he relied on geography as it was "at least capable of uniform application" and "avoid[ed] the uncertainties of shades of color and invidious discriminations as the race of individuals.").

⁹⁹ LOPEZ, *supra* note 57, at 19–20.

¹⁰⁰ See *Ex parte Shahid*, 205 F. at 814, 816. The inheritability of whiteness was made clear through the judge's determination that only the descendants of Europeans were white. While he acknowledged the illogical definition he proposed, explaining that whiteness "may not, ethnologically or physiologically speaking, be a very clear and logical construction," he still insisted that whiteness was only supposed to include "fair-complexioned people." He then noted that the argument that Jews and Christians would be excluded from such a definition was "unworthy of consideration," yet did not extend the same courtesy to Muslims.

¹⁰¹ 48 F. Supp. 843, 845 (E.D. Mich. 1942).

¹⁰² *Id.*

Moreover, while the “free white persons” citizenship requirement was formally removed in 1944, legal barriers implemented in recent history continue to categorize Muslims as nonwhite, thereby precluding them from certain rights and privileges granted to white people. This is perhaps most salient with the implementation of the NSEERS program. In total, the program targeted 25 countries, of which all but two were Muslim majority.¹⁰³ Targeting such a broad geographic region demonstrated that national security did not serve as the sole justification of each country’s inclusion, especially when considering the fact that most of the countries were allies of the United States.¹⁰⁴ Instead, an individual’s “blood relationship” to Islam incited the creation of the registration system,¹⁰⁵ playing on the notion presented in *Ex parte Shabid* that whiteness was inheritable. By making the defining criterion of registration the inheritability of Islam, the registration positioned Islam as an innate and unchanging characteristic, one that negated whiteness and inclusion in the U.S. permanently.¹⁰⁶

The Muslim Ban went one step further than the NSEERs program by prohibiting Muslims from even entering the country, demonstrating that legal barriers designed to racialize and exclude Muslims from the country were becoming harsher and more effective. On January 27, 2017, President Trump issued the first iteration of the Muslim Ban through an Executive Order titled “Protecting the Nation from Foreign Terrorist Entry into the United States.”¹⁰⁷ The Order restricted the entry of immigrants and nonimmigrants from countries with predominantly Muslim populations, and its stated purpose was to protect Americans from individuals who had hostile attitudes toward the United States.¹⁰⁸ Countries were supposedly selected based on terrorist threats they posed to the U.S.¹⁰⁹ A bipartisan group of experts, however, argued that the order would in fact harm the country’s national security and foreign policy interests.¹¹⁰ One consular officer even described Trump’s proposed waiver process as fraudulent.¹¹¹

¹⁰³ These countries included: Iran, Iraq, Libya, Sudan, Syria, Egypt, Tunisia, Algeria, Morocco, Somalia, Eritrea, Yemen, Kuwait, Saudi Arabia, United Arab Emirates, Qatar, Oman, Bahrain, Lebanon, Jordan, Pakistan, Indonesia, Bangladesh, Afghanistan, and North Korea. Moustafa Bayoumi, *Racing Religion*, 6 THE NEW CENTENNIAL REV. 267, 273 (2006).

¹⁰⁴ *Id.* at 283.

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at 278.

¹⁰⁷ Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Experts argued that the Ban furthered ISIS and al-Qaida’s narrative that the West is the enemy of Islam and responded to political rhetoric instead of data, among other things. Nina Totenberg, *Why Dozens of National Security Experts Have Come Out Against Trump’s Travel Ban* (Apr. 24, 2018), <https://www.npr.org/2018/04/24/604949251/why-dozens-of-national-security-experts-have-come-out-against-trumps-travel-ban> [https://perma.cc/DE8C-ZKS9].

¹¹¹ *Id.*; Jeremy Stahl, “*The Waiver Process is Fraud*”, SLATE (June 15, 2018), <https://slate.com/news-and-politics/2018/06/trump-travel-ban-waiver-process-is-a-sham-two-consular-officers-say.html> [https://perma.cc/H9AR-64SY].

The Trump administration justified the Muslim Ban using section 212(f) of the Immigration and Nationality Act,¹¹² which allows the President to suspend the entry of immigrants if their entry is found to be “detrimental to the interests of the United States.”¹¹³ While the Ban states that the national security standards to process visas, immigration petitions, and the background checks of the banned countries were lacking, Trump’s historic targeting of Muslim majority countries and Islamophobic comments demonstrate that his immigration policy was also a reflection of his nativist attitude towards Muslims.¹¹⁴ Specifically, his nativist attitude and resulting policies draw on historical immigration trends that privilege the “free white persons” and weaponize the law to subjugate nonwhite groups and exclude them from the rights and privileges that are granted to white individuals.¹¹⁵ Just like Justice Field argued in 1882 that it was impossible for Chinese individuals to assimilate into American culture, President Trump has consistently argued that Islam itself is incompatible with American society, portraying Muslims as outsiders, enemies, and others who should not be offered citizenship.¹¹⁶ In furtherance of this narrative, Trump has publicly questioned the allegiance of American Muslims to the United States, insinuating that Muslims are unable to uphold American civic values and assimilate into the United States.¹¹⁷ For example, the stated purpose of the first iteration of the Muslim Ban included the line: “The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law,”¹¹⁸ making the assumption that individuals from the banned countries espoused violent ideologies that were in direct opposition to the U.S. Constitution. This rhetoric portrays Muslims as intrinsically un-American.¹¹⁹ Yet in contrast, the first Muslim Ban also prioritized refugee claims of religious-based persecution so long as the individual belonged to a minority religion in the individual’s country.¹²⁰ Given that the countries were predominantly Muslim, this meant that Christians and other non-Muslim religious minorities would be prioritized for admittance to the United States. Less than a week after the first Ban was issued, Trump explicitly stated that persecuted Christians would be given priority over other refu-

¹¹² Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

¹¹³ Notably, various administrations prior to Trump have used the Immigration and Nationality Act (INA) to justify racist immigration policy in the name of national security. See KATE M. MANUEL, CONG. RESEARCH SERV., R44743, EXECUTIVE AUTHORITY TO EXCLUDE ALIENS: IN BRIEF 1 (2017) (citing P.L. 82–414, § 212(e), 66 Stat. 188 (June 27, 1952)).

¹¹⁴ Young, *supra* note 53, at 228–29.

¹¹⁵ Nadine Naber & Junaid Rana, *The 21st Century Problem of Anti-Muslim Racism*, JADALIYYA (July 25, 2019), <https://www.jadaliyya.com/Details/39830> [<https://perma.cc/7B3A-KLA3>].

¹¹⁶ Ruth Braunstein, *Muslims as Outsiders, Enemies, and Others: The 2016 Presidential Election and the Politics of Religious Exclusion*, 5 AM. J. CULTURAL SOC. 355, 357–58 (2017).

¹¹⁷ *Id.*

¹¹⁸ Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

¹¹⁹ Braunstein, *supra* note 116, at 357–58.

¹²⁰ Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

gees,¹²¹ emphasizing that religion continued to serve as a proxy for whiteness and therefore eligibility for citizenship.

Trump has also made many claims suggesting he views immigrants from regions including Latin America, the Middle East, and Africa to be a cultural threat to white Americans,¹²² echoing Theodore Roosevelt's claim that the Chinese were "ruinous to the white race,"¹²³ except this time applied to a much larger group of potential nonwhite immigrants. Trump has also drawn direct comparisons to migration patterns in Europe, claiming that immigration is changing Europe's fabric and causing it to lose its culture—a phenomenon that he wants to avoid in the United States.¹²⁴ When discussing the "American culture" that he is concerned about losing, Trump often defines it in reference to popular white supremacist symbols like confederate statues, making his rhetoric popular among white nationalists.¹²⁵

Then in January 2020, Trump expanded the ban to six more countries that have significant Muslim populations, including Nigeria, Eritrea, Sudan, Tanzania, Kyrgyzstan, and Myanmar.¹²⁶ The reasoning given for the expansion was that the six countries were not meeting certain baseline standards for security criteria and had deficiencies in sharing terrorist, criminal, or identity information, leading to national security concerns.¹²⁷ However, critics were quick to point out several anomalies in the proclamation, proving that it selectively applied criteria for deciding which countries to ban.¹²⁸ For example, DHS initially labeled 47 countries as inadequate for their "identity-management protocols, information-sharing practices, and risk factors;" however, only seven of those countries became the target of the Muslim

¹²¹ Daniel Burke, *Trump Says US Will Prioritize Christian Refugees*, CNN (Jan. 30, 2017), <https://www.cnn.com/2017/01/27/politics/trump-christian-refugees/index.html>.

¹²² See generally Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197 (2019).

¹²³ Sasaki, *supra* note 52, at 27, 33.

¹²⁴ Srikantiah & Sinnar, *supra* note 120, at 199 (quoting Donald J. Trump (@realDonaldTrump), TWITTER (June 19, 2018, 6:52 AM)).

¹²⁵ *Id.* at 198. In a tweet, he explained that he was "sad to see the history and culture of our great country being ripped apart with the removal of our beautiful statues and monuments." Libby Cathey, *Trump's History of Defending Confederate 'Heritage' Despite Political Risk: Analysis*, ABC NEWS (June 11, 2020), <https://abcnews.go.com/Politics/trumps-history-defending-confederate-heritage-political-risk-analysis/story?id=71199968> [<https://perma.cc/D28R-88NS>]. White supremacist groups today continue to use nativist arguments motivated by racially oriented beliefs to unify their base against immigration to the United States. In particular, popular white supremacists Stephen Bannon and Sebastian Gorka, who were formally part of the Trump administration, believe that Islam is an enemy ideology that the United States is engaged in war with because Islam inherently opposes fundamental American Judeo-Christian values. This echoes what Protestant Americans first argued when Catholic immigrants began to arrive on the shores of the United States. See Jeffrey Haynes, *Donald Trump, 'Judeo-Christian Values,' and the 'Clash of Civilizations'*, 15 REV. FAITH & INT'L AFF. 66, 68 (2017).

¹²⁶ Proclamation No. 9983, 85 Fed. Reg. 6699 (2020).

¹²⁷ *Id.*

¹²⁸ See Harsha Panduranga, Faiza Patel & Michael W. Price, *Extreme Vetting and the Muslim Ban*, BRENNAN CTR. FOR JUST. 12—13 (Oct. 2, 2017), https://www.brennancenter.org/sites/default/files/2019-08/Report_extreme_vetting_full_10.2_0.pdf [<https://perma.cc/9WJT-BF8X>].

Ban.¹²⁹ Moreover, DHS still recommended a travel ban for some countries like Somalia even though they met all baseline requirements.¹³⁰ Lastly, the main adviser behind the ban was Stephen Miller, whose leaked emails put on full display his affinity for ending nonwhite immigration to the United States due to his belief that nonwhite immigration constituted an attack on the country.¹³¹ Overall, the lack of objective data used to fashion the Muslim Ban, combined with the authorship by white supremacists, demonstrates that the Muslim Ban is a subjective immigration policy designed to exclude Muslim, or nonwhite populations—one that is in line with the historical racist and exclusionary policies the country has long operated on.

IV. THE SUPREME COURT'S HISTORY OF EXCLUSION: FROM CHAE CHAN PING TO THE MUSLIM BAN

Given the exclusionary history of U.S. immigration policy, it is not surprising that the Supreme Court in *Trump v. Hawaii* upheld the Muslim Ban despite its overtly racist nature.¹³² In justifying the outcome of the case amid national outcry, the majority largely relied on the plenary power doctrine, a doctrine that has racist underpinnings and has long been used to exclude nonwhite immigrant groups. The plenary power doctrine affords the federal government practically unchecked power to make decisions related to immigration policy,¹³³ and scholars posit that its origins lie in *Chae Chan Ping v. United States*.¹³⁴

The Court in *Chae Chan Ping* upheld the Chinese Exclusion Act of 1882, finding that the federal government had the right to exclude immigrants on any basis, including race and nationality,¹³⁵ as national security decisions were “conclusive upon the judiciary.”¹³⁶ Four years later in *Fong Yue Ting v. United States*,¹³⁷ the Court expanded its deferential stance when it upheld a federal statute that made Chinese laborers presumptively deportable, determining that the lack of due process the petitioners faced was constitutionally irrelevant because of Congress’s plenary power over immigration.¹³⁸ Together, these early cases formed the backbone of the plenary power doctrine and the Court’s extreme deference with regards to im-

¹²⁹ *Id.* at 14.

¹³⁰ *Id.*

¹³¹ Harsha Panduranga, *Trump’s Expanded Travel Ban: New countries, Same Bigotry*, BRENNAN CTR. FOR JUST. (Feb. 11, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/trumps-expanded-travel-ban-new-countries-same-bigotry> [https://perma.cc/S5QZ-XVWH].

¹³² 138 S. Ct. 2392 (2018).

¹³³ David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 584, 594 (2017).

¹³⁴ *Id.* at 595.

¹³⁵ *Id.*

¹³⁶ *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

¹³⁷ 149 U.S. 698, 728 (1893).

¹³⁸ Rubenstein & Gulasekaram, *supra* note 133, at 584, 594.

migration policy, leading to a concept known as immigration exceptionalism.¹³⁹

Since its racist inception, the plenary power doctrine has been used to uphold racist and exclusionary immigration policies that target nonwhite populations.¹⁴⁰ For example, federal courts have used the doctrine to justify deportations based on national origin, excluding or deporting people based on their political beliefs, denying individuals the right to due process in deportation proceedings, and allowing indefinite detention pending deportation.¹⁴¹ The doctrine also justified the detention of Muslim, Middle Eastern, and South Asian immigrants after September 11, 2001;¹⁴² the federal government's holding of American Indian resources in trust; and its avoidance of extending constitutional protections to the residents of external U.S. colonies.¹⁴³ Most relevant to this article, however, is the application of the plenary power in *Trump v. Hawaii*, which mirrors the application of the doctrine in *Korematsu*.¹⁴⁴

The Court in *Trump v. Hawaii* found that the Executive Order authorizing the Muslim Ban did not exceed the President's authority, was facially neutral, and would survive even if the President's intent was examined as the order was based on legitimate purposes.¹⁴⁵ While the Court in *Trump* claimed to overrule a narrow version of *Korematsu*, it actually embraced the decision's logic by relying on the plenary power to justify judicial passivity in the immigration context in the face of overt animus.¹⁴⁶ In both *Korematsu* and *Trump*, the Court argued that the judiciary did not have the institutional

¹³⁹ The plenary power doctrine is the reason that immigration law is often described as operating outside the purview of mainstream constitutional law, leading to what some describe as immigration exceptionalism. For more information, see generally, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (tracking the rise of the plenary power as the dominant principle of immigration law and how that led to phantom norm decisions); David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015) (arguing that the plenary power has remained a defining feature of immigration law despite the wide condemnation of *Chae Chan Ping v. United States* because of the Court's concern that lower courts would undervalue governmental interests if given wider authority to review); Rubenstein & Gulasekaram, *supra* note 133 (reconciling immigration exceptionalism across constitutional dimensions including rights, federalism, and separation of powers).

¹⁴⁰ See Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to *Korematsu* to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183, 1192–1202 (2018).

¹⁴¹ Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 24 (2003).

¹⁴² *Id.* at 20–24.

¹⁴³ *Id.* at 27–28.

¹⁴⁴ Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived *Korematsu**, 128 YALE L.J. F. 641, 645 (2019).

¹⁴⁵ *Trump v. Hawaii*, 138 S. Ct. 2392, 2410, 2418, 2420–21. (2018).

¹⁴⁶ Erik K. Yamamoto & Rachel Oyama, *Masquerading Behind a Façade of National Security*, 128 YALE L. J. 688 (2019) (citing Anil Kalhan, *Trump v. Hawaii and Chief Justice Roberts's "Korematsu Overruled" Parlor Trick*, AM. CONST. SOC'Y (June 29, 2018), <https://www.acslaw.org/acslblog/trump-v-hawaii-and-chief-justice-robertss-korematsu-overruled-parlor-trick> [<https://perma.cc/BY3M-M7P3>]).

competence necessary to review other branches' decisions when it came to matters of national security.¹⁴⁷ While the Court in *Korematsu* focused on its lack of military expertise, the Court in *Trump* explained that it could not substitute its own assessment for that of the Executive's predictive judgment.¹⁴⁸ Moreover, both majorities refused to consider the broader context behind the policies, did not thoroughly examine the evidence, allowed for improper information to go uncorrected, and rejected the dissent's characterization of the facts, which recognized the racial animus and is discussed later in this section.¹⁴⁹ In this way, the Court intentionally refused to examine the exclusionary motives behind the policies, despite their overt racist nature that treated an entire religious group and nationality as suspect.¹⁵⁰

In granting such wide deference to the executive branch in cases like *Trump*, *Korematsu*, *Fong Yue Ting*, and *Chae Chan Ping*, the Court has taken an active role in creating a racist immigration system that excludes entire groups of nonwhite individuals. What's worse is that while attorneys and advocates may have previously experienced discomfort in citing to a widely repudiated case like *Korematsu* to justify the Court's blind deference to the executive, attorneys can now openly cite *Trump* without fear of similar reprisal, creating new precedent that allows the judicial branch to more easily defer to the executive regarding racist and exclusionary immigration policies that infringe on fundamental liberties.¹⁵¹ Inevitably, such extreme deference will continue to allow immigration policy to operate on an exclusionary basis even in the presence of explicit animus.

In light of the plenary power doctrine's historically exclusionary application, the doctrine has recently shown signs of erosion amidst changing views among the legislature, judiciary, and the public at large.¹⁵² In response, justices on the Supreme Court must find a new way to balance deference to executive actions regarding immigration, with the explicit animus that some-

¹⁴⁷ Katyal, *supra* note 144.

¹⁴⁸ *Id.*

¹⁴⁹ For a detailed analysis of the similarities between *Korematsu* and *Hawaii* see generally *id.* (arguing that while *Korematsu* was overturned in *Hawaii*, the outcome of *Hawaii* recreated the doctrine under another name and maintains the Court's extreme deference given to the Executive Branch).

¹⁵⁰ Moreover, the majority invoked *Kleindienst v. Mandel* in their opinion to explain that the Court does not look beyond potentially legitimate reasons offered by the executive branch in cases that involve immigration supposedly impacting national security. *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018) (citing 408 U.S. 753 (1972)). *Kleindienst*, however, involved a challenge to decisions made by federal officials that denied entry to individual foreign nationals whereas the Muslim Ban prevents an entire group from entering the country. Earl M. Maltz, *The Constitution and the Trump Travel Ban*, 22 LEWIS & CLARK L. REV. 391, 399 (2018).

¹⁵¹ See Yamamoto & Oyama, *supra* note 146, at 716.

¹⁵² *Id.* at 720–21. While the plenary power doctrine has received steady criticism over time, some argue that the plenary power remains intact because the Supreme Court is concerned that lower courts will undervalue governmental interests if given greater authority to review political branch decisions. For a more thorough discussion, see David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015).

times motivates such actions.¹⁵³ Countless scholars and practitioners of immigration law have proposed solutions regarding how to challenge the application of the plenary power doctrine to better respond to explicit animus driving executive actions. For example, instead of granting total or no deference to the political branches, Sahlini Bhargava Ray has proposed an intermediate solution for courts. She suggests that courts use a mixed motives framework to invalidate a contested law where the same law would not be promulgated but for animus.¹⁵⁴ In this scenario, a plaintiff would plead animus with particularity, while the defendants would have an opportunity to rebut a claim of animus with evidence of a sufficient legitimate purpose. Ray's proposed solution would thus allow the executive to enact policy when its motives are legitimate and sufficient, while allowing courts to inhibit the executive from enacting policy in which the illegitimate motive is necessary for the executive action.¹⁵⁵ Similar anti-animus frameworks have been proposed by other scholars, including Shawn E. Fields, who has advocated for an intent inquiry that would allow courts to reject any immigration decision made with "invidious, unconstitutional norms."¹⁵⁶ Such a framework, he argues, would likely strike down immigration policies that violate constitutional norms.¹⁵⁷

Others have argued that the *Trump* opinion left room to push for heightened judicial scrutiny where immigration and foreign affairs are not directly involved and where the government curtails fundamental liberties due to national security reasons.¹⁵⁸ Perhaps the most compelling example of such a view emerges from Justice Sonia Sotomayor's dissent in *Trump v. Hawaii*. In her dissent, Justice Sotomayor first provides a historical overview of President Trump's anti-Muslim statements to demonstrate how the executive used national security as a façade for its anti-Muslim animus, explaining that a "reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus."¹⁵⁹ In the face of such discriminatory motives, Justice Sotomayor explained that future courts should not be precluded from examining the motivation behind executive actions when plaintiffs af-

¹⁵³ Karla McKanders, *Deconstructing Invisible Walls: Sotomayor's Dissents in an Era of Immigration Exceptionalism*, 27 WM. & MARY J. WOMEN & L. 95, 97 (2020).

¹⁵⁴ Sahlini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13, 61 (2019) (arguing that judges should be able to consider statements the President utters in public discourse, addressing the oft cited concern posed in *Mandel* that the Executive's stated reasons should be taken at face value, and that courts should consider whether a more deferential motive standard should apply to religious discrimination challenges to immigration law by applying a "but-for" motive standard).

¹⁵⁵ *Id.* at 67.

¹⁵⁶ Shawn E. Field, *The Unreviewable Executive? National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731, 775 (2017).

¹⁵⁷ *Id.*

¹⁵⁸ Yamamoto & Oyama, *supra* note 146, at 718–19 (citing Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. (1990)).

¹⁵⁹ McKanders, *supra* note 153, at 101 (citing *Trump v. Hawaii*, 138 S. Ct. at 2434–36).

firmatively make a showing of bad faith, triggering a heightened level of judicial review.¹⁶⁰ Scholars like Karla McKanders have convincingly argued that Justice Sotomayor's dissent is thus a step towards a more stringent standard of review for executive actions when freedom of religion and the Establishment Clause are implicated, requiring courts to examine whether an executive policy is pursuing legitimate state interests.¹⁶¹ A more stringent standard of judicial review may allow for a more thorough examination of the executive branch's actions and may thus better balance the constitutional rights of nonwhite immigrants.

With the mounting criticism against the plenary power doctrine, it is possible that an era of blind deference and immigration exceptionalism may soon come to an end. In the absence of such change, blind deference to previous executive actions provide a forewarning of the harmful consequences exclusionary executive actions can have on individuals around the world, as seen with the devastating human impact from the Chinese Exclusion Act to the Muslim Ban. Advocates should thus continue to push for heightened scrutiny that balances individual interests with legitimate government concerns in a framework that acknowledges the need to honor the rights of noncitizens and citizens alike. Moreover, such legal solutions should be driven by a heightened sense of urgency. For as long as policies driven by animus are subject to incredibly deferential review, people will continue to suffer at the hands of the U.S. government.

V. THE HUMAN IMPACT OF THE MUSLIM BAN

The outcome of *Trump v. Hawaii* and the Muslim Ban disrupted the lives of individuals worldwide. Even after the initial chaos subsided, immigrants continued to be confronted with the fallout of the Ban. In some cases, the Ban indefinitely separated family members like the Ghazouls. The Ghazouls arrived in the United States one day before the enactment of the Muslim Ban.¹⁶² They initially left their hometown Homs, Syria on foot in 2014 and applied for refugee status upon reaching Jordan.¹⁶³ Their daughter, however, had just married and did not immediately file her application for refugee status.¹⁶⁴ This decision marked the indefinite separation of the

¹⁶⁰ *Id.* at 105.

¹⁶¹ *Id.* at 109. Other scholars have also demonstrated how the equal protection doctrine with regards to immigrants is exceptional because of the plenary power doctrine. The level of scrutiny for equal protection depends on whether an immigrant is present in the United States lawfully and whether a state or federal classification is at play, undermining the doctrine of equal protection for immigrants. For more information see Jenny-Brooke Condon, *Equal Protection Exceptionalism*, 69 RUTGERS U. L. REV. 563 (2017).

¹⁶² Sabrina Siddiqui, *'A Hellish Nightmare': How Trump's Travel Ban Hit a Syrian Refugee Family*, THE GUARDIAN (Jan. 30, 2017), <https://www.theguardian.com/world/2018/feb/04/syrian-refugee-family-trump-travel-ban-virginia> [<https://perma.cc/7S3B-ZUU6>].

¹⁶³ *Id.*

¹⁶⁴ *Id.*

Ghazouls from their daughter, who remains in Jordan.¹⁶⁵ The Ghazouls represent but one family among hundreds. Research carried out by the Bridge Initiative analyzed 549 cases and found that the Ban resulted in the separation of one in four children from their parents, one in ten from their siblings, and one in three individuals from their partners.¹⁶⁶

In other cases, the Muslim Ban kept individuals from accessing life-saving medical treatment, and only those with the most severe medical cases were granted waivers for themselves or family members.¹⁶⁷ Shaima Swileh, a Yemeni national, was in Egypt when she applied for an I-130 visa to come to the United States with her husband and son Abdullah Hassan, a two-year-old who was suffering from a genetic brain condition and was on a ventilator in San Francisco.¹⁶⁸ While Shaima's husband and son were U.S. citizens, she was not.¹⁶⁹ Although her visa application was going well, Shaima was informed in January 2018 that her application would not proceed unless she qualified for a waiver because of the Muslim Ban.¹⁷⁰ As Abdullah's condition worsened, Shaima's husband made the difficult decision to bring Abdullah to the United States for care without his wife. Eventually, Shaima's story was covered by mainstream media, and three members of Congress wrote a letter requesting an expedited decision on the visa waiver.¹⁷¹ Abdullah died one week after Shaima was reunited with her only child.¹⁷² Had there not been media intervention, it is likely that Shaima would not have been able to reunite with her son and husband.

Moreover, students, and particularly Iranians, were unable to pursue their higher education in the United States, despite having valid visas. While students with F-1 visas were technically exempt from the Muslim Ban, they faced heightened scrutiny when interacting with CBP.¹⁷³ In most of the deported students' cases, CBP questioned whether or not the students' work

¹⁶⁵ *Id.*

¹⁶⁶ *The Muslim and African Bans*, BRIDGE (July 2, 2019), <https://bridge.georgetown.edu/research-publications/reports/the-muslim-and-african-bans/> [<https://perma.cc/FQ4D-X5VD>].

¹⁶⁷ *The Muslim Ban*, *supra* note 10.

¹⁶⁸ Keith Allen & Chris Boyette, *The Family of a Boy on Life Support Is Trying to Get an Expedited Visa for His Mother to See Him, Group Says*, CNN (Dec. 18, 2018), <https://www.cnn.com/2018/12/17/us/oakland-child-life-support-yemeni-mother-travel-ban/index.html> [<https://perma.cc/WHQ3-K97Z>].

¹⁶⁹ *Id.*

¹⁷⁰ Sandra E. Garcia, *Yemeni Mother Gets Travel Ban Waiver to Visit Dying Son in California*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/yemen-mom-travel-ban-dying-son.html?action=Click&module=RelatedCoverage&pgtype=Article®ion=footer> [<https://perma.cc/5MJ2-Y3BT>].

¹⁷¹ Christina Caron, *Son of Yemeni Mother Dies Soon After She Won Visa Battle with U.S. to See Him*, N.Y. TIMES (Dec. 29, 2018), <https://www.nytimes.com/2018/12/29/world/abdullah-hassan-yemeni-toddler-dies.html> [<https://perma.cc/6U4R-QNLN>].

¹⁷² *Id.*

¹⁷³ Caleb Hampton, *'Treated like a Terrorist': US Departs Growing Number of Iranian Students Valid Visas from US Airports*, THE GUARDIAN (Jan. 14, 2020), <https://www.theguardian.com/us-news/2020/jan/14/they-treated-me-like-a-terrorist-the-vetted-iranians-blocked-from-the-us> [<https://perma.cc/3JM9-MG25>].

violated U.S. sanctions on Iran's government, while others said CBP accused them of hiding connections with the Iranian government.¹⁷⁴ To obtain a visa, the students had already gone through an extensive vetting process and in some cases were willing to accept single-entry visas that would prohibit them from seeing family members for years. Despite this, many were sent home and had their student visas cancelled,¹⁷⁵ and some students were even banned for five years from returning to the United States, a trend that immigration lawyers say began in 2019 and intensified amid political tensions between the United States and Iran in early 2020.¹⁷⁶ For example, Mohammed Elmi was 31 years old when he was on his way to join his wife in California and start his PhD.¹⁷⁷ In preparing for the move, he had left his job and depleted most of his savings.¹⁷⁸ Yet upon arrival to the United States, Elmi was held for over twenty-four hours, searched, and repeatedly questioned, with many of the questions having surfaced during the visa application process months earlier.¹⁷⁹ Even so, Elmi was told that he could go back to Iran voluntarily or be deported and subsequently banned for five years. Left with no option, Elmi flew back to Iran without a job, money, or his wife.¹⁸⁰

The Muslim Ban also detrimentally impacted immigration trends worldwide. By fiscal year 2018, Muslim arrivals experienced the sharpest decline in resettlement, even though many refugees originate from Muslim-majority countries.¹⁸¹ Just in fiscal year 2017 to 2018, admissions of Christian refugees were down 36% while admissions of Muslim refugees declined by 85%.¹⁸² The two non-Muslim countries included in the third iteration of the ban, Venezuela and North Korea, were not impacted to a similar extent as the restrictions against Venezuela were limited to certain governmental officials while immigration from North Korea to the U.S. was already in-

¹⁷⁴ *Id.* Other Iranian students were chained and detained in U.S. Immigration and Customs Enforcement facilities where they were forced to strip naked, questioned about their opinions on political events in the Middle East, denied the opportunity to speak with family members, asked to sign documents saying they planned to overstay their visas, and had their electronics confiscated. Caleb Hampton & Caitlin Dickerson, *'Demeaned and Humiliated': What Happened to These Iranians at U.S. Airports*, N.Y. TIMES (Jan. 25, 2020), <https://www.nytimes.com/2020/01/25/us/iran-students-deported-border.html> [<https://perma.cc/DN2X-4HZ9>].

¹⁷⁵ Karen Zraick, *Iranian Students Set to Start at U.S. Universities Are Barred From Country*, N.Y. TIMES (Sept. 20, 2019), <https://www.nytimes.com/2019/09/20/us/iranian-students-visas.html> [<https://perma.cc/AS6H-RVEH>].

¹⁷⁶ Jihan Abdalla, *Iranian Students with Valid Visas Turned Back at US Borders*, AL JAZEERA (Feb. 4, 2020), <https://www.aljazeera.com/news/2020/02/iranian-students-valid-visas-turned-borders-200202163132629.html> [<https://perma.cc/7BBX-XNXC>].

¹⁷⁷ Hampton, *supra* note 173.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Int'l Rescue Comm., *New IRC Analysis of US Refugee Resettlement Shows Vastly Reduced Arrivals at a Time of Record Global Need and Consistent Popular Support* (June. 18, 2019) (on file with the author).

¹⁸² *Id.*

credibly limited.¹⁸³ The Muslim Ban's negative impact also extended beyond the refugee community. By December 2018, approvals for immigrant visas from the 48 majority Muslim countries had fallen by 30% while nonimmigrant visa approvals were down 18%.¹⁸⁴ In addition, short-term visas granted to Iranians fell from 1,650 per month in fiscal year 2017 to 501 the following year.¹⁸⁵

As demonstrated, the Muslim Ban has had a detrimental impact on Muslim communities worldwide, and it will continue to be felt by these communities long after it is reversed—families may very well remain separated, students may not be able to continue their studies, and individuals will not be able to gain back the time that they lost—largely due to their classification as nonwhite. To fundamentally alter the future of the U.S. immigration system and halt the exclusion of individuals labeled as nonwhite, the legal field must be willing to not only acknowledge the system's racist history, but must also commit to working towards solutions that dismantle the racist system in place to make way for a more inclusive one.

CONCLUSION

As evidenced, anti-immigrant sentiment directed towards nonwhite individuals has existed in the United States since the first non-Protestant immigrants began arriving on the shores of the country. These nativist sentiments were transformed into exclusionary immigration policies directed at individuals categorized as nonwhite, demonstrated by the difference in treatment of Chinese immigrants compared to Irish immigrants. For the next century, immigration policy continued to exclude nonwhite individuals through qualitative and quantitative restrictions. In order to justify these restrictions, nonwhite immigrants were portrayed as economic and national security threats to the United States.

Among the subsequent immigrant groups deemed to be non-white were Muslims. Judges relied on “tests” related to common knowledge and science to create legal boundaries of whiteness that Muslims did not belong to, demonstrating that Muslims were excluded from entry into the United States long before the Muslim Ban. The Ban, therefore, is simply an extension of racist U.S. immigration policy that excludes individuals deemed nonwhite. Despite the overt racist nature of the Ban, legal challenges to the Ban and other immigration policies rooted in white supremacy have largely not succeeded due to immigration exceptionalism that arises from the plenary power doctrine, a doctrine that the Supreme Court has relied on for centuries to exclude nonwhite immigrants.

¹⁸³ *The Muslim Ban*, *supra* note 10.

¹⁸⁴ David J. Bier, *Trump Cuts Muslim Refugees 91%, Immigrants 30%, Visitors by 18%*, CATO INST. (Dec. 7, 2018), <https://www.cato.org/blog/trump-has-cut-christian-refugees-64-muslim-refugees-93> [<https://perma.cc/9RFY-C9XJ>].

¹⁸⁵ Chishti et al., *supra* note 67.

Although Donald Trump lost the 2020 election, racist immigration policy in the U.S. exists beyond one presidential administration—it has deep roots in the U.S. immigration system that continue to shape immigration policies implemented today. To change the course of immigration policy, there must be an honest reckoning with this country’s dark immigration history, one that not only acknowledges its racist nature but also posits legal arguments that challenge the application of the plenary power doctrine, especially in the presence of evident animus. Until this is accomplished, the United States will continue to uphold white supremacist policies that exclude individuals deemed nonwhite, harming countless people in the process.