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Systemic Racism in the U.S. Immigration Laws

KEVIN R. JOHNSON*

This Essay analyzes how aggressive activism in a California mountain town at the tail end of the nineteenth century commenced a chain reaction resulting in state and ultimately national anti-Chinese immigration laws. The constitutional immunity through which the Supreme Court upheld those laws deeply affected the future trajectory of U.S. immigration law and policy.

Responding to sustained political pressure from the West, Congress in 1882 passed the Chinese Exclusion Act, an infamous piece of unabashedly racist legislation that commenced a long process of barring immigration from all of Asia to the United States. In upholding the Act, the Supreme Court in an extraordinary decision that jars modern racial sensibilities declared that Congress possessed "plenary power"—absolute authority—over immigration and that racist immigration laws were immune from judicial review of their constitutionality.

The bedrock of U.S. immigration jurisprudence for more than a century and never overruled by the Supreme Court, the plenary power doctrine permits the treatment of immigrants in racially discriminatory ways consistent with the era of Jim Crow but completely at odds with modern constitutional law. The doctrine enabled President Trump, a fierce advocate of tough-as-nails immigration measures, to pursue the most extreme immigration program of any modern president, with devastating impacts on noncitizens of color.

As the nation attempts to grapple with the Trump administration's brutal treatment of immigrants, it is an especially opportune historical moment to reconsider the plenary power doctrine. Ultimately, the commitment to remove systemic racism from the nation's social fabric requires the dismantling of the doctrine and meaningful constitutional review of the immigration laws. That, in turn, would open the possibilities to the removal of systemic racial injustice from immigration law and policy.

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INTRODUCTION

A series of brutal police killings of African Americans, including George Floyd and Breonna Taylor, in 2020 sparked a sustained popular challenge to systemic racism in the U.S. criminal justice system.[1] Black Lives Matter protests in cities across the United States put systemic racism at the forefront of the national consciousness. This Essay contends that, similar to the systemic racism embedded in criminal law enforcement, racism historically has plagued the U.S. immigration system and continues to do so to this day. With systemic racism under attack in the criminal justice system, this is no less than an ideal moment in history for a dedicated effort to bring racial justice to immigration law.

Throughout its history, the United States has experienced sporadic xenophobic outbursts, often tinged with heavy doses of racism.[2] On several notable and historic occasions, California's outbursts against immigrants spread nationally. In the late 1800s, for example, California, a relatively young state at the time comprised of land primarily seized through what many historians believe was a war of racial aggression with Mexico, was nothing less than a hotbed of hostility toward Chinese immigrants.[3] Long forgotten by the general public,[4] anti-Chinese agitation in the Golden State pushed the U.S. Congress to enact the first—and fervently anti-Chinese—comprehensive federal immigration laws. The desire to exclude Chinese immigrants from the United States, which could not be accomplished by the individual states, fueled the federalization of immigration law and wholesale displacement of state law. As discussed in this Essay, the Supreme Court's blanket rejection of constitutional challenges to those discriminatory laws—in fact immunizing them from

1. *See* Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), https://time.com/5851855/systemic-racism-america/ [https://perma.cc/BBM2-JVQC].

2. *See generally* ERIKA LEE, AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES (2019) (analyzing the periodic outbursts of xenophobia in U.S. history).

3. *See infra* Parts II–III.A.

4. *See* Michael Luo, *The Forgotten History of the Purging of Chinese from America*, NEW YORKER (Apr. 22, 2021), https://www.newyorker.com/news/daily-comment/the-forgotten-history-of-the-purging-of-chinese-from-america [https://perma.cc/UF8R-UE7C].

constitutional review—laid the groundwork for the systemic racial injustice that thrives in today's immigration laws and their enforcement.

More than a century later, California again proved to be a national immigration trendsetter. Even though California today has declared itself to be a sanctuary state,[5] ferocious anti-immigrant sentiment in the state reappeared long after the anti-Chinese activism of the late 1800s. After a campaign fueled by hostility toward people of Mexican ancestry, Californians in 1994 in a racially polarized vote overwhelmingly passed an undisputedly anti-immigrant initiative known as Proposition 187, an immigration milestone that, among other things, would have stripped undocumented immigrants of virtually any and all public benefits and kicked them out of the public schools.[6] Lopsided political support for the initiative among California voters convinced Congress to pass tough federal immigration and welfare reform legislation.[7] Other states later responded to popular concerns with immigration from Mexico through laws building on Proposition 187.[8]

California's immigration experience thus has repeatedly influenced immigration developments at the national level. Surprisingly enough, the impacts of the Chinese exclusion laws, which resulted from powerful political support emanating from nineteenth century California, continue to reverberate in modern U.S. immigration law and enable systemic racism to flourish in the contemporary immigration system. This Essay specifically analyzes how anti-Chinese activism marred by murderous violence in a small California mountain town triggered a racial chain reaction culminating in a series of discriminatory immigration laws over more than a century.

Responding to sustained political demands from the West, Congress in 1882 passed the Chinese Exclusion Act,[9] the first comprehensive piece of federal immigration legislation. Federalizing immigration regulation, the Act displaced state laws seeking to regulate immigration. Moreover, universally—and rightfully—

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5. *See* S.B. 54, 2017–2018 Reg. Sess., 2017 Cal. Stat. ch. 495; *see also* Rose Cuison Villazor, *Reflecting on California and Prop. 187: From the Anti-Immigrant State to the Sanctuary State*, 53 U.C. DAVIS L. REV. 2015, 2017–19 (2020) (reviewing California's transformation from a state that passed an anti-immigrant measure like Proposition 187 to a sanctuary state that, to the extent legally permissible, protects immigrant residents from federal immigration enforcement).

6. A federal court held that federal immigration law preempted most of Proposition 187. *See* League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997). Similarly, courts struck down various state laws similar to Proposition 187 for unconstitutionally infringing on the federal power to regulate immigration. *See, e.g.*, Arizona v. United States, 567 U.S. 387 (2012) (invalidating core provisions of Arizona's controversial S.B. 1070); United States v. South Carolina, 720 F.3d 518 (4th Cir. 2013) (same for South Carolina immigration enforcement law); United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012) (Alabama law); Ga. Latino All. Hum. Rts. v. Governor of Ga., 691 F.3d 1250 (11th Cir. 2012) (Georgia law).

7. *See* Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1630–35 (1997) (acknowledging the national impacts of anti-Chinese political agitation in California during the Chinese exclusion era and, more recently, the groundswell of popular support in California for Proposition 187).

8. *See* Kevin R. Johnson, *Proposition 187 and Its Political Aftermath: Lessons for U.S. Immigration Politics After Trump*, 53 U.C. DAVIS L. REV. 1859, 1866–75 (2020).

9. Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882).

condemned by contemporary scholars as a shameful piece of racist legislation, the Chinese Exclusion Act commenced a prolonged congressional effort to exclude Chinese and other Asian immigrants from the United States. Generations of discriminatory laws followed.

In upholding the Chinese Exclusion Act, the Supreme Court in 1889 took the extraordinary step of declaring that Congress possessed "plenary power" over immigration that courts could not disturb; by doing so, the Court in effect immunized the immigration laws from ordinary constitutional review.[10] Despite being more consistent legally with its pro-segregation contemporary, *Plessy v. Ferguson* (1896)[11] than the modern civil rights icon *Brown v. Board of Education* (1954),[12] the Court has repeatedly failed to overrule *The Chinese Exclusion Case*. The Court instead has applied the decision, or cases following it, on many occasions through to the present.[13] Absent the threat of judicial intervention, Congress later extended the ban on Chinese immigration to immigrants from all of Asia and severely restricted the immigration of other disfavored races and groups, including, but not limited to, the poor, disabled persons, political minorities, women, and gays and lesbians.[14] Despite its inconsistency with modern constitutional law, *The Chinese Exclusion Case* and its progeny continue to serve as an impervious shield to constitutional challenges to contemporary immigration laws and policies.

By consistently precluding meaningful constitutional review of the immigration laws, the Supreme Court enabled the concerted effort of the Trump administration to aggressively enforce the immigration laws with a zeal unlike any other modern presidency. Its "sweeping, high-profile immigration enforcement initiatives—along with its inflammatory anti-immigrant rhetoric—mark[ed] the ascendance of immigration restrictionism to the highest levels of the executive branch that is entirely without modern precedent."[15] The controversial—some might describe it as heartless—policy of separating migrant Central American children from their parents exemplifies the frightening lengths that President Trump went in the name of

10. *See* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889); *see infra* Part III.A.

11. 163 U.S. 537 (1896).

12. 347 U.S. 483 (1954).

13. *See infra* Part III.B.

14. *See infra* notes 96–98 and accompanying text (citing sources).

15. Anil Kalhan, *Revisiting the 1996 Experiment in Comprehensive Immigration Severity in the Age of Trump*, 9 DREXEL L. REV. 261, 262 (2017).

enforcing the immigration laws.[16] Other examples abound, with some harsh measures continuing to remain in place after Trump left office.[17]

As the nation comes to grips with how the Trump administration punished immigrants in the dogged pursuit of a restrictionist immigration agenda as well as generally considers the eradication of systemic racial injustice in modern America, it is an especially appropriate moment to reconsider the modern constitutional immunity of the immigration laws, which today finds itself dramatically out of synch with contemporary constitutional law.

History reveals that the wholesale deference to Congress was the product of deplorable and widespread racism, along with deadly violence, against Chinese immigrants in the 1800s. A now-anomalous Supreme Court decision and its progeny have allowed generations of discriminatory immigration laws and policies to stand to the present day. Critical inquiry into the continuing efficacy of the plenary power doctrine is especially necessary and appropriate because the modern immigration laws built on the plenary power doctrine have systematic, and adverse, racial impacts. Those impacts were exacerbated as enforced by the Trump administration and its singular dedication to immigration restrictions and aggressive enforcement directed primarily at noncitizens of color.[18]

Part I of this Essay reviews the concerted political pressure at the state and local levels, especially in California, in the 1800s to banish Chinese immigrants through a web of laws, economic boycotts, and brutal violence that amounted to what today would be called an ethnic cleansing. Part II recounts a long-forgotten episode of murderous violence by white vigilantes against Chinese workers—known as the Trout Creek Outrage—in a small mountain town in California. Allowing that racist violence to go unpunished, an all-white jury acquitted a group of white defendants of murder and arson charges. Anti-Chinese agitation in that town had powerful state and national reverberations. Part III traces the legacy of state and local anti-Chinese violence and political agitation, including federal immigration legislation that effectively barred future Chinese immigration and ultimately immigration from all of Asia, to the United States. In upholding those laws, the Supreme Court created a stout legal foundation allowing unvarnished discrimination against Asian and other

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16. *See* Carrie F. Cordero, Heidi Li Feldman & Chimène I. Keitner, *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 430, 435–36 (2020). *See generally* Mariela Olivares, *The Rise of Zero Tolerance and the Demise of Family*, 36 GA. ST. U.L. REV. 287 (2020) (reviewing the Trump administration's use of family separation as a tool of U.S. immigration enforcement). Long after the policy was rescinded, some migrant children separated from their parents had not been reunited with them because of deficient governmental record-keeping. *See* Priscilla Alvarez, *Parents of 368 Migrant Children Separated at Border Under Trump Have Still Not Been Found, Court Filing Says*, CNN (June 30, 2021, 6:58 PM), https://www.cnn.com/2021/06/30/politics/migrant-children-separated-border-trump/index.html [https://perma.cc/3NW6-AQ8U].

17. *See infra* text accompanying notes 121–36 (reviewing the Trump administration's stringent immigration policy measures).

18. *See generally* Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575 (2019) (analyzing how the Trump administration's string of immigration initiatives disparately impacted noncitizens of color).

disfavored immigrants to run rampant for more than a century. That foundation provided President Trump with a largely unencumbered path to pursue scores of punitive, discriminatory, and, to many Americans, terrifying and unacceptable immigration policies.

Forged in the era of Jim Crow when radically different racial sensibilities dominated the political and legal landscape than do today, the plenary power doctrine—even though occasionally narrowed, ignored, or otherwise avoided by the courts—continues in many cases to severely constrict the rights of immigrants and allows to stand unforgiving immigration policies, from the ban on Muslim immigration to the summary deportation of asylum seekers.[19] Forged in a time of unapologetic racism, that antiquated legal approach must be eliminated root and branch if one hopes to eradicate the systemic racism embedded in the modern immigration laws and policies, which mirror that resulting from the contemporary enforcement of the criminal laws.[20] While the nation seeks to reckon with systemic racial injustice in criminal law enforcement and U.S. society generally, addressing the same exact evil in the U.S. immigration system is long overdue. To do so, the constitutional review of immigration law and policy must be completely untethered from its racist roots.

I. STATE AND LOCAL ANTI-CHINESE AGITATION IN THE 1800S

In the 1800s, the demand for labor to build the transcontinental railroad, combined with political and economic turmoil in China, brought significant numbers of Chinese immigrants to the United States.[21] A much-lauded national achievement, completion of the railroad literally united the nation from the Atlantic to the Pacific Oceans.[22] Unfortunately, after construction of the railroad and subsequent national

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19. *See infra* text accompanying notes 121–26.

20. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (10th anniversary ed. 2020) (analyzing the stark disparate impacts on African Americans of the contemporary criminal justice system in the United States). The comparison of the criminal justice and immigration systems is most appropriate in light of the fact that the modern federal removal machinery relies heavily on criminal removals. *See* Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594 (2016). Racially disparate criminal law enforcement inexorably leads to racially disparate immigration enforcement. *See generally* Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RSRV. L. REV. 993 (2016) (analyzing disparate impacts of criminal removals on Latinx immigrants); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599 (2015) (to the same effect).

21. *See generally* GORDON H. CHANG, GHOSTS OF GOLD MOUNTAIN: THE EPIC STORY OF THE CHINESE WHO BUILT THE TRANSCONTINENTAL RAILROAD (2019) (reviewing the travails of Chinese immigrants who built the U.S. transcontinental railroad). Around the same general time period, Chinese miners, who came to the United States in numbers after the discovery of gold in California, also were the subject of antipathy, discriminatory laws, and, at times, violence. *See id.* at 69–70.

22. *See generally* STEPHEN E. AMBROSE, NOTHING LIKE IT IN THE WORLD: THE MEN THAT BUILT THE TRANSCONTINENTAL RAILROAD 1863–1869 (2000) (chronicling the construction of the transcontinental railroad).

economic turbulence, political agitation and horrific violence against the Chinese plagued the western part of the country.[23] As current events sadly attest, racial animus directed at Asian Americans survives to this day in the United States.[24]

Throughout the 1800s, Chinese immigrants settled in numbers in the American West. Employers valued the ready supply of relatively inexpensive and pliable labor. Blaming Chinese workers for driving down wages, white workers responded with robust political mobilization, widespread discrimination, and outright violence against the Chinese. In advocating punitive measures directed at immigrant workers, angry white workers and labor organizations demonized Chinese immigrants for working for inhuman, "coolie" wages.[25] As a result, sustained political agitation pushed for the banishment of the Chinese from the country.[26] The movement to remove Chinese immigrants from the United States represented part of a bitter and mean-spirited economic struggle, fomented by unbridled racism, which lasted for decades.

With a significant Chinese population, the State of California emerged as the epicenter of a potent anti-Chinese political movement.[27] Led by Denis Kearney, a "demagogue of extraordinary power,"[28] the Workingmen's Party, a labor organization, coined the uncompromising and unequivocal slogan "The Chinese must go!"[29] In a widely publicized "manifesto," the Party elaborated on the economic and racial justifications for its goal of banishing the Chinese:

> Before you and before the world we declare that the Chinaman must leave our shores. We declare that white men, and women, and boys, and girls, cannot live as the people of the great republic should and compete with the single Chinese coolie in the labor market. We declare that we cannot hope to drive the Chinaman away by working cheaper than he

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23. *See infra* Part II.B. (detailing an egregious example of anti-Chinese violence in the mountain town of Truckee, California).

24. *See, e.g.*, ASIAN AM. BAR ASS'N OF N.Y., A RISING TIDE OF HATE AND VIOLENCE AGAINST ASIAN AMERICANS IN NEW YORK DURING COVID-19: IMPACT, CAUSES, SOLUTIONS (2021), https://cdn.ymaws.com/www.aabany.org/resource/resmgr/press_releases/2021/A_Rising_Tide_of_Hate_and_Vi.pdf [https://perma.cc/A4R6-UA6V].

25. *See* ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT 246 (1998).

26. *See generally* BETH LEW-WILLIAMS, THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA (2018) (analyzing the widespread discrimination and violence against Chinese immigrants in the United States in the 1800s).

27. *See generally* ELMER CLARENCE SANDMEYER, THE ANTI-CHINESE MOVEMENT IN CALIFORNIA (1991 ed.) (documenting the emergence of the powerful anti-Chinese movement in nineteenth century California). For insightful historical analysis of the emergence of white supremacy as a guiding principle for social organization in California and Texas, see TOMÁS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA (1994); NEIL FOLEY, THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE (1999).

28. CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA 79 (1996).

29. *See generally* GYORY, *supra* note 25, at 37–109 (reviewing in detail the emergence of the powerful Workingmen's Party under Denis Kearney's leadership).

> does. None but an enemy would expect it of us; none but an idiot could hope for success; none but a degraded coward and slave would make the effort. *To be an American, death is preferable to life on a par with the Chinaman.*[30]

Besides economic concerns with Chinese labor, racial, cultural, language, religious, and other differences contributed to the popular hostility directed at Chinese immigrants.[31] Passionate anti-Chinese sentiment in the 1800s resulted in the proliferation of discriminatory state, and ultimately federal, laws. That, however, was far from the end of such laws, with anti-Asian sentiment, once unleashed, possessing extraordinary staying power. In the early twentieth century, for example, many western states passed laws restricting the ownership of real property by immigrants from Asia.[32] Anti-Asian sentiment reflected in the so-called alien land laws later contributed to the groundswell of public support for the shameful internment of Japanese citizens and noncitizens during World War II.[33]

As the incendiary rhetoric and the continuing series of discriminatory laws suggest, powerful racial passions fueled the virulent anti-Chinese political movement. That activism proved incredibly effective. Racial hatred all too often resulted in the discriminatory—and frequently violent—treatment of Chinese immigrants. Part II considers one especially stark and troubling episode, which unfortunately typified the era and helps demonstrate the raw power of anti-Chinese animus.

II. THE TROUT CREEK OUTRAGE AND ITS AFTERMATH

Against a backdrop of anti-Chinese political agitation and widespread discrimination against the Chinese, the Trout Creek Outrage in 1876 exemplifies the

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30. SANDMEYER, *supra* note 27, at 65 (quoting the Workingmen's Party manifesto) (emphasis added).

31. *See infra* text accompanying note 93 (discussing the Supreme Court decision upholding the Chinese Exclusion Act of 1882, which acknowledged the congressional determination that Chinese immigrants could not assimilate into U.S. society). Commentators have alleged at various times in U.S. history that immigrants fail to assimilate into mainstream American society. *See* Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican American Experience*, 85 CAL. L. REV. 1259, 1277–86 (1997) (analyzing the persistent claims that Mexican immigrants and U.S. citizens of Mexican ancestry, fail to assimilate into U.S. society).

32. *See, e.g.*, Frick v. Webb, 263 U.S. 326 (1923) (upholding a California law prohibiting the ownership of real property by noncitizens "ineligible to citizenship," a bar that applied almost exclusively to immigrants from Asia who, as non-whites, were barred by the law at that time from naturalization). *See generally* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (10th anniversary ed. 2006) (analyzing the application of the whiteness requirement for the naturalization of immigrants).

33. *See* Korematsu v. United States, 323 U.S. 214 (1944) (rejecting a constitutional challenge to the internment of persons of Japanese ancestry—citizens as well as noncitizens—during World War II), *overruled by* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018); Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 56–57 (1998).

lawless mob violence directed at Chinese immigrants in the American West.[34] It culminated in a spectacular town celebration of an all-white jury's acquittal of a group of white defendants who in the dead of night ambushed Chinese workers, killing one of them.[35] Widespread vigilante violence against the Chinese bore a striking resemblance to the savage campaign of terror, including public lynchings, waged against African Americans during Reconstruction and well into the twentieth century.[36]

A. The Truckee Method: "The Chinese Must Go!"

To complete the transcontinental railroad through the rugged Sierra Nevada mountains, Chinese workers risked their lives drilling tunnels through rock in hazardous terrain. Political support in the small settlement of Truckee, California, near what is now known as Donner Summit, named after the famous party of doomed settlers,[37] and close to California's eastern border with Nevada, coalesced around what would become popularly known as the "Truckee method" for purging Chinese residents.[38] Such purges occurred in many western towns in a "series of Chinese removals that were intentional and systematic [and] organized . . . by leading figures within each community."[39] The Truckee method, an early version of what later became popularly known as a policy of self-deportation advocated for by some contemporary political leaders and policy analysts,[40] called for an economic boycott of Chinese businesses and workers combined with violence against the Chinese community. The Truckee method amounts to a tool of what today might be characterized as an ethnic cleansing.

The Truckee method sought to vigorously encourage the Chinese to leave town or self-deport. Sporadic violence, up to and including race riots, was integral to the strategy of encouraging the flight of Chinese residents. Unfortunately, "[t]he history of anti-Chinese violence in Truckee is as old as the town itself."[41]

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34. Guy Coates, *The Trout Creek Outrage*, TRUCKEE-DONNER HIST. SOC'Y, https://www.truckeehistory.org/the-trout-creek-outrage.html [https://perma.cc/EWZ8-CZTS] (providing a detailed account of the Trout Creek Outrage).

35. *See* JEAN PFAELZER, DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS 171–72 (2007).

36. *See* Calvin Cheung-Miaw & Roland Hsu, *Before the "Truckee Method": Race, Space, and Capital in Truckee's Chinese Community, 1870-1880*, 45 AMERASIA J., 68, 68 (2019).

37. *See generally* MICHAEL WALLIS, THE BEST LAND UNDER HEAVEN: THE DONNER PARTY IN THE AGE OF MANIFEST DESTINY (2017) (documenting the Donner Party's tragic cross-country journey to the West Coast).

38. *See* ADAM GOODMAN, THE DEPORTATION MACHINE: AMERICA'S LONG HISTORY OF EXPELLING IMMIGRANTS 14–20 (2020); PFAELZER, *supra* note 35, at 167–97.

39. Robert L. Tsai, *Racial Purges*, 118 MICH. L. REV. 1127, 1128 (2020) (book review essay).

40. *See, e.g.*, Lucy Madison, *Romney on Immigration: I'm for "Self-Deportation,"* CBS NEWS (Jan. 24, 2012, 12:44 AM), https://www.cbsnews.com/news/romney-on-immigration-im-for-self-deportation/ [https://perma.cc/UU99-WDN8]. *See generally* K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878 (2019) (analyzing the history of policies in the United States encouraging self-deportation by immigrants).

41. Adam Goodman, *A Campaign of Forced Self-Deportation*, LAPHAM'S Q.:

B. The Trout Creek Outrage

One tragic episode exemplifies the racist violence—and the failure of the law to punish it—directed at Chinese immigrants in the small mountain town of Truckee, California. One summer night in 1876, a group of white men set fire to two cabins along Trout Creek in which Chinese workers lived.[42] As the workers fled for their lives, the white ambushers shot them, killing one Chinese man. Notably, one of the defendants tried for the violent rampage, Jack Reed, later served as Truckee's town constable, the equivalent of its sheriff.[43]

In the investigation that followed, Calvin McCullough and G.W. Getchell confessed to police to participating in planning the ambush of the Chinese workers. Getchell said that a group of men planned the attack at a meeting of the local chapter of the Caucasian League, a fervent anti-Chinese group. In pursuit of the Truckee method, the League organized efforts to discourage employers from hiring Chinese workers and to boycott Chinese businesses; it also organized violence against Chinese residents.[44] Caucasian League chapters in other California towns engaged in anti-Chinese violence like that perpetrated in Truckee.[45]

A grand jury indicted seven men on murder and arson charges in the Trout Creek case.[46] The case attracted considerable press attention.[47] As one might expect given

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ROUNDTABLE (July 1, 2020), https://www.laphamsquarterly.org/roundtable/campaign-forced-self-deportation [https://perma.cc/J6KN-PBJK].

42. The facts about the Trout Creek Outrage in the following two paragraphs of the text are drawn from *The Chinese Outrage at Truckee*, DAILY EVENING BULL. (S.F., Cal.) (Aug. 15, 1876), https://infoweb.newsbank.com/apps/readex/?p=EANX (search in search bar for "The Chinese Outrage at Truckee"; then follow "The Chinese Outrage at Truckee" hyperlink). Nevada County Superior Court (California) records stored at the Doris Foley Historical Research Library in Nevada City, California include a handwritten reference to the trial in the Trout Creek case. *See* District Court Orders (Nevada County Superior Court), vol. 6, pp. 505–10 (1876) (on file with author). However, a review of the court records failed to uncover a trial transcript or other documents from the case. Information about the trial in this Essay therefore primarily comes from newspaper and other contemporary accounts.

43. *See* Mark McLaughlin, *Parting Shot for Truckee Lawman*, SIERRA SUN (Truckee, Cal.) (Sept. 2, 2014), https://www.sierrasun.com/news/local/parting-shot-for-truckee-lawman/ [https://perma.cc/8J64-3CXA]; Guy Coates, *Gunfight in Truckee - the Reed Teeter Duel*, TRUCKEE-DONNER HIST. SOC'Y, https://www.truckeehistory.org/gunfight-in-truckee---the-teeter-reed-duel.html [https://perma.cc/KD73-GMSF].

44. *See* SUCHENG CHAN, THIS BITTERSWEET SOIL: THE CHINESE IN CALIFORNIA AGRICULTURE, 1860-1910, at 370–72 (1989).

45. *See* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1254 (1993) (discussing how a Caucasian League chapter organized mob violence against the Chinese in the northern California town of Chico).

46. *See Indicted for Murder*, SANTA BARBARA DAILY PRESS (Aug. 16, 1876), https://cdnc.ucr.edu/ [https://perma.cc/U6DC-P9GA] (search in search bar for "Trout Creek murder case"; then follow "Morning Press" hyperlink under "Publication"; then follow "THE EiETBEN WEB. A Servian Victory. [ARTICLE]" hyperlink).

47. *See The Trout Creek Murder Case: Witnesses Brought from Truckee on Attachment*, SACRAMENTO DAILY UNION (Sept. 28, 1876), https://cdnc.ucr.edu/ [https://perma.cc/U6DC-P9GA] (search in search bar for "'The Trout Creek Murder Case' special by telegraph to the

the nature of the crime, the racial dimension to the violence featured prominently in the newspaper coverage. According to the *Sacramento Daily Union*, one of the white defendants was "a smooth-faced, beardless young man, about 28 years of age, with a good forehead, blue eyes, and a timid, frank look, that is very unlike your ideal murderer."[48] In stark contrast, a San Francisco newspaper story on the Trout Creek case referred to "the vicious Chinese element,"[49] a common opinion of Chinese immigrants in the day.

At trial, "[t]he vigilantes were represented by Truckee's most respected attorney and newspaperman, Charles McGlashan. . . . With the Trout Creek murder trial, he would establish his leadership in the anti-Chinese movement and launch his political career."[50] "[A] nativist who pioneered a new method of effecting mass expulsion through self-deportation,"[51] McGlashan penned commentary entitled *The Cue Klux Klan* that was published in his newspaper in which he suggested that bounties be paid to people who cut off the ponytails of Chinese men, "as is the case with pelts of wolves, cayotes [sic] and like vermin."[52] McGlashan later was elected to the California Assembly.[53]

The prosecution's case was open-and-shut. At trial, G.W. Getchell testified that he and the defendants volunteered at a Caucasian League meeting to "give the Chinamen a scare."[54] After taking a gun from another member of the League, Getchell and the defendants went to Trout Creek, where they poured oil on two cabins and set them on fire.[55] When Ah Ping fled his burning cabin with an empty can to get water from the nearby creek to put out the fire, the defendants shot and killed him.[56] According to a newspaper account, Ah Ping's body was riddled with forty-eight bullets.[57]

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record"; then follow the second "THE TROUT CREEK MURDER CASE. [ARTICLE]" hyperlink); *The Truckee Chinese Case: The Murder of Ah Ping*, DAILY EVENING BULL. (S.F., Cal.) (Sept. 27, 1876), https://infoweb.newsbank.com/apps/readex/?p=EANX (search in search bar for "the Murder of Ah Ping"; then follow "The Truckee Chinese Case. the Murder of Ah Ping" hyperlink).

48. *The Trout Creek Murder Case: Attorney General Hamilton Appears for the People*, SACRAMENTO DAILY UNION (Sept. 27, 1876), https://cdnc.ucr.edu/ [https://perma.cc/U6DC-P9GA] (search in search bar for "Attorney General Hamilton Appears for the People."; then follow "THE TROUT CREEK MURDER CASE. [ARTICLE]" hyperlink).

49. *The Trout Creek Outrage*, DAILY EVENING BULL. (S.F., Cal.), Aug. 17, 1876), at 1, GALE PRIMARY SOURCES, Doc. No. GALEIGT3002377964.

50. PFAELZER, *supra* note 35, at 173.

51. GOODMAN, *supra* note 38, at 10.

52. *Id.* at 18.

53. See SUE FAWN CHUNG, CHINESE IN THE WOODS: LOGGING AND LUMBERING IN THE AMERICAN WEST 126 (2015).

54. *The Trout Creek Murder Case: Continuation of the Testimony*, SACRAMENTO DAILY UNION (Sept. 29, 1876), https://cdnc.ucr.edu/ [https://perma.cc/U6DC-P9GA] (search in the search bar for "The Trout Creek Murder Case: Continuation of the Testimony"; then follow "THE TROUT CREEK MURDER CASE. [ARTICLE]" hyperlink).

55. *See The Truckee Chinese Case: The Murder of Ah Ping*, *supra* note 47.

56. *See id.*

57. *See The Trout Creek Murder Case: Attorney General Hamilton Appears for the People*, *supra* note 48.

One of the Chinese workers, Ah Fook, testified that he saw a man shoot Ah Ping.[58] Another, Ah Lang, showed the jury scars from gunshot wounds to his head, arms, legs, and body.[59] Ah Joe testified that, as the fires burned, he heard "voices in the American language."[60]

Testifying for the defense, the president and vice president of the Truckee Caucasian League denied that the chapter had organized the attack on the Chinese workers.[61] To discredit Getchell, defense witnesses testified that he was drunk on the night of the ambush and that he later revealed a plan to profit from the arrests.[62] According to one witness, the other confessor, McCullough, also said in jail that the defendants "were innocent of murder; that it was a put up job by [a detective] to get Chinese money."[63] Defense witnesses testified that a detective offered them five hundred dollars to corroborate the fabricated confessions of McCullough and Getchell.[64]

With lightning-like efficiency, "[t]he all-white jury took *just nine minutes to acquit*" the white defendants.[65] "Upon learning of the outcome, Truckee's white residents rejoiced, firing a cannon for each exonerated man."[66] Popular in an era when juries acquitted whites accused of violently terrorizing African Americans through lynchings and other violence, jury nullification by the all-white jury carried the day.[67]

Newspapers questioned whether the jury had done justice in the Trout Creek case. The *Sacramento Daily Union* proclaimed that "[t]he people of Truckee cannot clear themselves of the responsibility so easily. If Chinamen had made a similar attack upon a white cabin, and killed a white man, we are inclined to think that there would have been far less trouble in" obtaining a murder conviction.[68]

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58. *See The Trout Creek Murder Case: Witnesses Brought from Truckee on Attachment*, *supra* note 47.

59. *See The Trout Creek Murder Case: Continuation of the Testimony*, *supra* note 54.

60. *Id.*

61. *See The Trout Creek Murder Case: The Prosecution Rests—Evidence for the Defense*, SACRAMENTO DAILY UNION (Sept. 30, 1876), https://cdnc.ucr.edu/ [https://perma.cc/U6DC-P9GA] (search in the search bar for "The Trout Creek Murder Case 'The Prosecution Rests-Evidence for the Defense'"; then follow "THE TROUT CREEK MURDER CASE. [ARTICLE]" hyperlink).

62. *See id.*

63. *Latest Pacific Coast Dispatches*, DAILY EVENING BULL. (S.F., Cal.), Oct. 2, 1876, at 1, GALE PRIMARY SOURCES, Doc. No. GALEIGT3000348917.

64. *See id.*

65. GOODMAN, *supra* note 38, at 15 (emphasis added).

66. *Id.*

67. *See* Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 212 (1972) ("The numerous occasions in the South in which white juries acquit white defendants of crimes against Blacks attest to [jury nullification's] power in a very dramatic way.").

68. *The Trout Creek Murder Case*, SACRAMENTO DAILY UNION (Oct. 6, 1876), https://cdnc.ucr.edu/ [https://perma.cc/U6DC-P9GA] (search in search bar for "public opinion sanctions the verdict"; then follow "THE TROUT CREEK MURDER CASE. [ARTICLE]" hyperlink).

Truckee's efforts to drive the Chinese out of town had immediate impacts on neighboring communities:

> In nearby Truckee, vigilantes had successfully driven out hundreds of Chinese, and refugees were pouring into Nevada City. "Will our citizens do some of this agitating," queried the editors of [a Nevada City newspaper], "or do they want Nevada City to become a harbor of refuge for all the Mongolians who will not be tolerated in other towns of the coast?" The answer came in the form of rallies, boycotts, and harassment. Violence begot more violence.[69]

As recounted above, the Trout Creek Outrage did not end the bloodthirsty violence against Truckee's Chinese community. For example, the Caucasian League in 1878 organized a violent rampage of about 500 white citizens, destroying houses and businesses in the Chinatown section of Truckee.[70]

In a time when white mob violence against African Americans occurred with frightening regularity in the United States,[71] white mob violence directed at the Chinese occurred frequently in Western towns.[72] The ambush at Trout Creek unfortunately typified the violence in the West engaged in by white citizens against Chinese residents. "In October 1880, an armed mob of up to three thousand attacked the Denver Chinese community . . . . The rioters, aiming to expel all Chinese from the city, burned residences, looted, and beat Chinese men and women, killing one."[73] Accepted as normal and permissible at that time in U.S. history, violence against people of color with town leaders' participation and support was frequently not subject to legal sanction.

Dedicated pursuit of the Truckee method resulted in the desired exodus of Chinese residents from town. While the 1870 Census showed that Chinese persons comprised nearly one-quarter (402 of 1655) of all persons in Meadow Lake (the unincorporated area that now constitutes the city of Truckee),[74] Asian Americans today comprise little more than one percent of its population.[75] Now a bustling tourist destination

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69. LEW-WILLIAMS, *supra* note 26, at 129.

70. *See* Cheung-Miaw & Hsu, *supra* note 36, at 78.

71. *See generally* AFRICAN AMERICAN LIFE IN THE POST-EMANCIPATION SOUTH, 1861-1900: BLACK FREEDOM/WHITE VIOLENCE, 1865-1900 (Donald G. Nieman ed., 1994) (reviewing post-Civil War violence by whites against African Americans in the United States).

72. *See, e.g.*, ISAAC H. BROMLEY, THE CHINESE MASSACRE AT ROCK SPRINGS, WYOMING TERRITORY, SEPTEMBER 2, 1885 (2018); SCOTT ZESCH, THE CHINATOWN WAR: CHINESE LOS ANGELES AND THE MASSACRE OF 1871 (2012); R. Gregory Nokes, *"A Most Daring Outrage": Murders at Chinese Massacre Cove, 1887*, 107 OR. HIST. Q. 326 (2006); *see also* Ethan Blue, *From Lynch Mobs to the Deportation State*, 2017 L., CULTURE & HUMANS. 1 (analyzing the relationship between the violence directed at Chinese immigrants in the late 1800s and the emergence of the modern U.S. immigration removal system).

73. CHANG, *supra* note 21, at 231.

74. U.S. CENSUS OFFICE 1870, TABLE III. POPULATION TO CIVIL DIVISIONS LESS THAN COUNTIES 91, https://www2.census.gov/library/publications/decennial/1870/population/1870a-12.pdf [https://perma.cc/SFQ3-29CP].

75. *See Quick Facts: Truckee Town, California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/truckeetowncalifornia [https://perma.cc/LUU7-F268].

surrounded by ski resorts and golf courses, Truckee is virtually devoid of any remnant of its rich Chinese history.[76] The Trout Creek Outrage is a long-forgotten part of the town's bitter racial legacy.

C. California's Response to Chinese Immigrants

Brutal incidents like the Trout Creek Outrage had a lasting impact on state and national politics. Anti-Chinese political agitation in California cities successfully pressured the state government to pass laws that discriminated against the Chinese. "Both the California legislature and the California courts became leaders in government attempts to exclude and discriminate against the Chinese. California's legal oppression of the Chinese culminated in the state constitutional convention of 1878, the express purpose of which was to write anti-Chinese provisions into the [state] constitution."[77] California's new constitution "denied Chinese the right to vote, prohibited their employment by private corporations, and purported to prohibit 'Asiatic coolieism' as a form of human slavery."[78]

The California Constitution's assault on the rights of the Chinese failed to end the political campaign against them. Racial animus directed at the Chinese continued unabated. In fact, anti-Chinese political agitation continued at full steam in California:

> In the September 3, 1879 general election, the voters in California were asked to vote on [a] plebiscite on the continuance or prohibition of Chinese immigration. The election was a landslide. *Only 883 (0.54%) ballots were cast in favor of continued Chinese immigration and 154,638 (95.8%) against*. . . . [T]he verdict was clear: in overwhelming numbers the voters in California voted to send a message that they were opposed to future Chinese immigration.[79]

Attesting to the strength and durability of the animus against Chinese immigrants, anti-Chinese political agitation continued for years after Congress passed discriminatory immigration legislation in 1882.[80] In 1886, a statewide anti-Chinese convention endorsed the Truckee method to spur Chinese residents to leave the state, if not more accurately, flee for their lives.[81] Part III discusses how and why anti-Chinese sentiment led to a potent national response to Chinese immigration, which,

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76. *See Did You Know ... Truckee's Chinese Population Was Run out of Town?*, SIERRA SUN (Truckee, Cal.) (Aug. 2, 2007), https://www.sierrasun.com/opinion/did-you-know-truckees-chinese-population-was-run-out-of-town/ [https://perma.cc/Q86F-9BBW].

77. Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1944 (2000) (footnote omitted).

78. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 114 (2002).

79. Charles P. Reichmann, *Anti-Chinese Racism at Berkeley: The Case for Renaming Boalt Hall*, 25 ASIAN AM. L.J. 5, 16 (2018) (emphasis added) (footnote omitted).

80. *See infra* Part III.

81. *See* PFAELZER, *supra* note 35, at 192.

due to the Supreme Court's approach to upholding the law, would have impacts on generations of immigrants.

III. FEDERAL RESPONSES TO ANTI-CHINESE AGITATION AND THEIR LEGACY

Political pressures and violence against the Chinese in the West had powerful reverberations on the national political landscape. This Part considers how the aggressive anti-Chinese movement in California culminated in the passage of the first comprehensive—and unabashedly racist—federal immigration law. In upholding that law, the Supreme Court decided *The Chinese Exclusion Case* in a manner that has had monumental impacts on immigrants of color, and other unpopular noncitizens, in the development of the U.S. immigration laws. That milestone law also marked the beginning of the comprehensive federal regulation of immigration, which remains firmly in place to the present day. Federal legislation accomplished anti-Chinese goals in ways the states' immigration regulation never could.

A. The Chinese Exclusion Laws and The Chinese Exclusion Case

As we have seen, anti-Chinese political agitation dominated Western politics in the late 1800s. In the West, where many Chinese immigrants settled, political pressures to end Chinese immigration initially spurred state legislatures to act.[82] Such pressures ultimately led to action at the federal level. State and local political attacks on Chinese immigrants culminated in the enactment of the first comprehensive federal law regulating immigration to the United States.

The Chinese Exclusion Act of 1882[83] "mark[ed] the beginning of a period of more than eight decades (1882-1965) in which the immigration policy of the United States was officially racist."[84] With the nation torn apart by the Civil War, competing political forces vied for the loyalties of the young state of California, in which animosity toward the Chinese flourished.[85] Seized through a racially-charged war with Mexico, the fledgling state was a product of racial tensions.[86]

Support from the Golden State proved pivotal to congressional enactment of the Chinese Exclusion Act.[87] As the California legislature admitted more than a century later, "pervasive anti-Chinese sentiments . . . in California and the American West" prevailed during the late nineteenth century, with "California lobb[ying] Congress for years to strictly prohibit immigration from China, and in 1882, [the state] was successful in convincing Congress to enact the Chinese Exclusion Act."[88]

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82. *See supra* Parts I–II.

83. Pub. L. No. 47-126, 22 Stat. 58 (1882).

84. Roger Daniels, *Foreword* to SANDMEYER, *supra* note 27, at 3.

85. *See* GYORY, *supra* note 25, at 7–8.

86. *See generally* ALMAGUER, *supra* note 27 (analyzing racial tensions in California and the evolution of white supremacy as a guiding principle for social organization in the state).

87. *See* Harris, *supra* note 77, at 1944–46.

88. S.J. Res. 23, 2013–2014 Leg., Reg. Sess. (Cal. 2014), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201320140SJR23 [https://perma.cc/B2NW-WERA].

One might wonder why national legislation was necessary to address parochial regional concerns with Chinese immigrants. Put differently, Chinese immigrants had not settled in, and thus were not a political issue in much of the United States. The answer is relatively straightforward. As the law evolved, a federal approach to immigration proved necessary to accomplish the strident and persistent anti-Chinese goals of the western states. Throughout the 1800s, the Supreme Court repeatedly invalidated efforts by the states to severely restrict, if not end outright, the immigration of Chinese and other disfavored groups into their jurisdictions.[89] Rather than recognizing that the Chinese possessed any legal rights, the Court held that the federal government, not the states, possessed the exclusive power to regulate immigration to the United States. Federal primacy over the admission to, and removal of immigrants from, the United States continues through to this day.[90] With state regulation of immigration barred, federal action proved necessary to restrict Chinese immigration. Put simply, racial goals popular in the West thus could only be realized through federal legislation. Unfortunately for the Chinese, "the . . . federal immigration laws . . . were far more discriminatory than anything the states could have passed."[91] Moreover, national in scope and uniform in application, federal law had much more far-reaching impacts than the laws of any one state.[92]

With the passage of the Chinese Exclusion Act of 1882, Congress began a sustained process dedicated to ending immigration to the United States from China, and later from all of Asia. The Supreme Court facilitated such efforts in extraordinary fashion. In *Chae Chan Ping v. United States* (The Chinese Exclusion Case), the Court in 1889 held that, if Congress "considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, ... *its determination is conclusive upon the judiciary*."[93] The Court thus gave birth to what is now known as the plenary power doctrine, with Congress and the Executive Branch possessing complete and absolute authority—denominated plenary power—over immigration.

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89. *See, e.g.*, Chy Lung v. Freeman, 92 U.S. 275 (1876) (invalidating on constitutional grounds a California law that required noncitizens entering the state to post bonds). *See generally* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993) (analyzing the history of efforts by the states to regulate immigration before Congress passed comprehensive federal immigration legislation).

90. *See* Arizona v. United States, 567 U.S. 387, 394 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.") (citation omitted). In light of federal power over immigration, the Supreme Court struck down most of Arizona's controversial state immigration enforcement law for intruding on the federal power to regulate immigration. *See id.* at 400–10; *see also supra* note 6 and accompanying text (referring to courts striking down, on federal preemption grounds, modern state laws attempting to regulate immigration).

91. Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 705 (2005); *see* ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 211–52 (2008).

92. More than a century later, the Trump administration directed a remarkably similar set of policies primarily at Latinx noncitizens. *See generally* Kevin R. Johnson, *Trump's Latinx Repatriation*, 66 UCLA L. REV. 1444 (2019) (analyzing the Trump administration's systematic removal of Latinx noncitizens).

93. 130 U.S. 581, 606 (1889) (emphasis added).

Notably, Chinese-Americans in the 1800s refused to allow discrimination against them to go unchallenged. With immigrants constituting a discrete, insular, and disenfranchised minority, one would expect them to regularly lose in the political process.[94] They undoubtedly did. However, with financial support from Chinese business interests, the Chinese community responded in an organized fashion, resorting to the courts to fervently resist discrimination through challenges to discriminatory immigration and other laws.[95] As exemplified by *The Chinese Exclusion Case*, resistance through the courts proved futile in most instances. Although modern constitutional law would seem to require careful review of laws disadvantaging immigrants in light of the fact that they are discrete and insular minorities, the plenary power doctrine absolutely barred *any* judicial review of the immigration laws and continues to do so today.

While Chinese immigrants were the initial targets of the first comprehensive U.S. immigration laws, subsequent laws targeted other disfavored groups. In the wake of *The Chinese Exclusion Case*, Congress passed laws restricting immigration to the United States not just from China but from all of Asia.[96] Building on Asian exclusion, Congress in 1924 enacted a law creating a national origins quotas system that favored the immigration of whites from northern Europe while discriminating against southern and eastern Europeans, who were believed at the time to constitute inferior races of people.[97] The national origins quotas system remained in place until 1965, when the civil rights movement and changing racial sensibilities moved Congress to eliminate the blatant and indefensible racial discrimination in the immigration laws.[98] Thus, the political process, not the courts, ended express Asian exclusion and did away with the national origins quotas system.

The Supreme Court in *The Chinese Exclusion Case* abandoned any judicial role in checking racial discrimination in the U.S. immigration laws and allowed to stand

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94. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

95. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (invalidating the selective enforcement of a San Francisco ordinance against Chinese laundries). *See generally* MCCLAIN, *supra* note 28 (chronicling the organized resistance of the Chinese community to discrimination in the 1800s).

96. *See* Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1123–27 (1998).

97. *See* Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924). *See generally* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (rev. ed. 2002) (analyzing the powerful influence of anti-immigrant sentiment on congressional enactment of the Immigration Act of 1924).

98. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965); *see also* 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 (1996) (analyzing critically the impacts of the 1965 Act on the increase of immigration from Asia to the United States). *See generally* THE IMMIGRATION AND NATIONALITY ACT OF 1965: LEGISLATING A NEW AMERICA (Gabriel J. Chin & Rose Cuison Villazor eds., 2015) (offering various perspectives on the Immigration Act of 1965).

an unabashedly anti-Chinese immigration law. The lack of constitutional review mandated by the decision, with Congress having what the Court characterized as plenary power over immigration, in turn, enabled Congress to exercise such power to pass generations of discriminatory immigration laws to attack the Chinese, Asians, and other unpopular immigrants of the day.[99] That immunity predictably resulted in devastating impacts on generations of noncitizens.

Today, racial discrimination continues to thrive in the U.S. immigration laws, although now, consistent with modern civil rights sensibilities, it is largely accomplished through color-blind and race-neutral means.[100] Nonetheless, discriminatory impacts abound in the administration and enforcement of those laws. For example, the vast majority of noncitizens removed from the United States today are Latinx, even though the laws do not specifically target them.[101] In addition, annual per country ceilings on immigration from any single nation, exclusionary rules for admission, and race-based enforcement result in discriminatory immigration outcomes. The Chinese exclusion laws thus became the Latinx exclusion laws.

Through *The Chinese Exclusion Case* and its progeny, the Supreme Court created nothing less than an absolute immunity from constitutional constraints in the U.S. government's treatment of immigrants of color. That immunity allowed Congress and the executive branch to act on the nation's worst instincts, which is precisely what happened for the next century. Despite the fact that *The Chinese Exclusion Case* upheld an undisputedly racist law, the Supreme Court has never overruled the decision.[102] Consequently, the decision's pernicious impacts on noncitizens of color and other disfavored groups continue to this day.

B. The Contemporary Impacts of Chinese Exclusion

The Chinese Exclusion Case established the foundation for the immigration exceptionalism that continues to insulate the U.S. immigration laws and policies from constitutional review.[103] However, "[t]here are . . . well-documented cracks in the plenary power doctrine. . . . The Supreme Court continues to dance around the .

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99. *See generally* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995) (analyzing the impact of the Chinese exclusion laws, and the Supreme Court's upholding of them, on the evolution of U.S. immigration law and its enforcement).

100. *See generally* Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV. 313 (2012) (analyzing the disparate racial impacts on Latinx persons of the passage of state immigration enforcement laws and the failure to pass federal immigration reform).

101. *See* Johnson, *supra* note 92, at 1470.

102. *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998).

103. *See* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361 (1999); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1981–89 (2013).

. . doctrine in some cases, but also gives it influence at other times."[104] Specifically, the Court in some instances has inched toward limited constitutional review of the immigration laws and policies,[105] sometimes creatively evaded the plenary power doctrine and its unforgiving results,[106] and occasionally invalidated provisions of the immigration laws without even mentioning the doctrine.[107] The tension between the plenary power doctrine and modern constitutional law has directly contributed to the inconsistency of the Court's approach to constitutional review of the immigration laws and policies.

Nonetheless, with no review as the starting point of the analysis, courts today often engage in grudging constitutional review of immigration law and policy.[108] Even though "deportation may result in the loss 'of all that makes life worth living,'"[109] more limited judicial review than that seen generally in the law is the norm in removal and other immigration matters. Similarly, a variant of the plenary power doctrine generally precludes any judicial review of visa denials by State Department consular officers, which can have dramatic impacts on noncitizens seeking to come to the United States and, for example, rejoin their families or accept employment.[110] In contrast, when a law or policy implicates the rights of U.S.

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104. Jill E. Family, *Threats to the Future of the Immigration Class Action*, 27 WASH. U. J.L. & POL'Y 71, 100 (2008) (footnotes omitted).

105. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (engaging in extremely limited constitutional review and upholding the travel ban); *infra* text accompanying notes 124–26 (discussing *Trump v. Hawaii*); Kleindienst v. Mandel, 408 U.S. 753 (1972) (applying a narrow standard of judicial review of the denial of a visa application and upholding the visa denial).

106. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (refusing to apply the plenary power doctrine to preclude judicial review of a challenge to an immigrant's indefinite detention because to do so would raise "serious" constitutional questions); Rosenberg v. Fleuti, 374 U.S. 449 (1963) (interpreting the immigration statute to avoid deciding whether the exclusion of homosexual immigrants from the United States was constitutional). *See generally* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) (analyzing how the Supreme Court has employed due process norms to effectively afford substantive constitutional protections to immigrants); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (showing how the courts have used "phantom norms" to interpret the immigration laws and avoid the application of the plenary power doctrine).

107. *See infra* text accompanying notes 130–34 (discussing examples).

108. *See*, *e.g.*, Landon v. Plasencia, 459 U.S. 21, 32–33 (1982) (beginning the analysis of judicial review with discussion of the plenary power doctrine decisions as limiting the rights of a lawful permanent resident seeking to return to the United States after a brief weekend trip to Mexico); *see also* Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118 (2018) (analyzing the plenary power doctrine's continuing impact on legal challenges to immigrant detention); 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, 13 (2003) ("The Chinese exclusion cases provide a valuable lens through which we can look at the significant role that the plenary power doctrine exercises in contemporary American jurisprudence.").

109. Bridges v. Wixon, 326 U.S. 135, 147 (1945) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

110. *See, e.g.*, Patel v. Reno, 134 F.3d 929, 931 (9th Cir. 1997) ("Normally a [State

citizens, modern constitutional law generally demands robust judicial review.[111] Put simply, the plenary power doctrine of immigration law, forged in the era of Chinese exclusion and consistent with the racial segregation of Jim Crow,[112] is dramatically out of synch with modern constitutional law.[113] Still, it remains the law of the land.

The hands-off approach to constitutional review of *The Chinese Exclusion Case* signaled to Congress that it could treat immigrants as it saw fit and the courts would not interfere. As the Supreme Court acknowledged in 1976, "[with] the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[114] Over the twentieth century, people of color, political minorities, persons with disabilities and infirmities, women, the poor, real and suspected criminals, and other disfavored—and politically powerless—groups suffered the wrath of the U.S. immigration laws.[115]

As noted above, the immunity from constitutional review established by *The Chinese Exclusion Case* remains largely intact. Even when the Supreme Court famously advanced racial justice through path-breaking decisions such as *Brown v. Board of Education*,[116] it simultaneously reaffirmed in unequivocal terms the uncompromising and devastating impacts of the plenary power doctrine on the constitutional rights of immigrants.[117] The Court continues to cite *The Chinese*

Department] consular official's discretionary decision to grant or deny a visa petition is not subject to judicial review."). As with the plenary power doctrine, courts in certain respects have limited the doctrine of consular nonreviewability of visa denials. *See* Desiree C. Schmitt, *The Doctrine of Consular Nonreviewability in the Travel Ban Cases:* Kerry v. Din *Revisited*, 33 GEO. IMMIGR. L.J. 55 (2018).

111. *See, e.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (invalidating the application of federal labor law on First Amendment grounds); District of Columbia v. Heller, 554 U.S. 570 (2008) (striking down a handgun ban for violating the Second Amendment).

112. *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (rejecting a constitutional challenge to the segregation of African Americans and adopting the "separate but equal" doctrine), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

113. *See, e.g.*, T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996).

114. Mathews v. Diaz, 426 U.S. 67, 79–80 (1976).

115. *See generally* KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS (2004) (analyzing the history of the U.S. immigration laws' discrimination against disfavored groups of noncitizens).

116. 347 U.S. 483 (1954).

117. *See* Galvan v. Press, 347 U.S. 522, 531 (1954) (rejecting a challenge to the removal of a Mexican immigrant based on Communist Party membership in the United States and observing that to "the extent of the power of Congress [is] under review, there is not merely 'a page of history' . . . but a whole volume" of decisions barring constitutional review of the immigration laws); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) ("[I]t is not within the province of any court, unless expressly authorized by law, to review the [immigration] determination of the political branch of government.") (citations omitted); 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); Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring) ("[W]hether immigration laws have been crude and cruel, whether

Exclusion Case and its offspring as controlling authority limiting, and in some instances eliminating, judicial review.[118] Moreover, the lower courts regularly rely on the plenary power doctrine to shield immigration laws and policies from meaningful constitutional review.[119] The continued vitality of immigration exceptionalism—and lack of constitutional review—can be seen in the exceedingly slow development of the constitutional rights of immigrants.[120]

As this review of Supreme Court decisions demonstrates, the plenary power doctrine of immigration law remains alive and well. Indeed, the Supreme Court in 2020 in *Department of Homeland Security v. Thuraissigiam*, which upheld the summary removal without due process of a Sri Lankan asylum seeker apprehended in the United States, invoked an unvarnished version of the doctrine.[121] Besides rejecting a challenge based on the constitutional bar to the suspension of habeas corpus review,[122] the Court relied on, among other cases, two Cold War-era plenary power decisions to reject a Due Process challenge to the expedited removal of an asylum seeker without a hearing, judicial review, or any modicum of due process.[123]

Similarly, the Supreme Court in *Trump v. Hawaii* relied on plenary power precedent to apply a narrow standard of review to uphold President Trump's bar on the admission of noncitizens into the United States from a group of predominantly Muslim nations.[124] Engaging in exceedingly narrow review and largely discounting Donald Trump's numerous anti-Muslim statements, the Court uncritically accepted the national security justification offered by the Trump administration for the Muslim ban.[125] Justice Sotomayor dissented, finding that "a reasonable observer would conclude that the [travel ban] was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications."[126]

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they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress.").

118. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 765–66 (1972); Graham v. Richardson, 403 U.S. 365, 377 (1971).

119. *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 277 (4th Cir. 2018); Hawaii v. Trump, 878 F.3d 662, 695 n.22 (9th Cir. 2017), *rev'd and remanded*, 138 S. Ct. 2392 (2018); Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 440 (3d Cir. 2016).

120. *See* Rosenbaum, *supra* note 108.

121. 140 S. Ct. 1959, 1982–83 (2020).

122. U.S. CONST. art. I, § 9, cl. 2.

123. The plenary power decisions primarily relied on by the Court were *Shaughnessy v. United States* ex rel. *Mezei*, 345 U.S. 206 (1953), and *United States* ex rel. *Knauff v. Shaughnessy*, 338 U.S. 537 (1950), which invoked the plenary power doctrine to completely bar constitutional review of the U.S. government's decision based on secret evidence to bar noncitizens from entering the United States. *See Thuraissigiam*, 140 S. Ct. at 1982. Scholars have roundly criticized the decisions. *See, e.g.*, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1391–96 (1953).

124. 138 S. Ct. 2392, 2418–19 (2018); *see also* Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13 (2019) (analyzing the role of the plenary power doctrine in the Supreme Court's decision in *Trump v. Hawaii*).

125. *Trump v. Hawaii*, 138 S. Ct. at 2415–23.

126. *Id.* at 2438 (Sotomayor, J., dissenting). For criticism of the Supreme Court's decision in *Trump v. Hawaii*, see Robert S. Chang, *Whitewashing Precedent: From* The Chinese

Not coincidentally in light of the plenary power doctrine's modern application, the Muslim ban and many of the Trump administration's other immigration measures are remarkably similar to policy initiatives taken in the era of Chinese exclusion, including mass detention, denial of admission, removals, and more.[127] The policies all too often have been left undisturbed by the courts. In addition, as occurred during the Chinese exclusion era, hate crimes against Asian and Latinx persons sadly enough plague the nation today.[128]

In a few instances, however, the Supreme Court has engaged in ordinary constitutional review of congressional immigration decisions. For example, in *Sessions v. Dimaya,* the Court relied on ordinary substantive due process principles to strike down a criminal removal ground as unconstitutionally vague.[129] Similarly, in *Sessions v. Morales-Santana*, the Court found that a gender distinction in the nationality laws discriminating against men in bestowing citizenship on their children violated the Equal Protection guarantee.[130] Without even mentioning the plenary power doctrine, those decisions engaged in mainstream constitutional review of provisions of the immigration and nationality laws. The Court's straight-forward analysis in those decisions fits comfortably into modern constitutional law but deviates sharply from the cases applying the plenary power doctrine.

As the conflicting Supreme Court decisions on the judicial review of the immigration laws make clear, the Court's modern immigration decisions are at war. Meaningful constitutional review is a powerful intellectual force, but so is the long tradition of no judicial review of the immigration laws and policies, with *The Chinese Exclusion Case* as its anchor. The expedited removal and travel ban decisions are powerful examples. In addition, in the same year that the Supreme Court invoked the plenary power doctrine to uphold expedited removal,[131] the Court held that the Trump administration's rescission of the Deferred Action for Childhood Arrivals (DACA) policy, affording limited relief to noncitizens brought to the United States as children, was arbitrary and capricious in violation of basic administrative law principles; however, consistent with the plenary power tradition, a plurality of the Court reasoned that the racial animus required to prove an equal protection claim had not been plausibly established.[132] The constitutional claim, according to the plurality,

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Exclusion Case *to* Korematsu *to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183 (2018); Jill E. Family, *The Executive Power of Political Emergency: The Travel Ban*, 87 UMKC L. REV. 611 (2019); Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475 (2018).

127. *See* Stuart Chinn, *Trump and Chinese Exclusion: Contemporary Parallels with Legislative Debates Over the Chinese Exclusion Act of 1882*, 84 TENN. L. REV. 681 (2017).

128. *See supra* note 24 (hate violence against Asians); Kevin R. Johnson & Joanna E. Cuevas Ingram, *Anatomy of a Modern-Day Lynching: The Relationship Between Hate Crimes Against Latina/os and the Debate over Immigration Reform*, 91 N.C. L. REV. 1613, 1617–28 (2013) (Latinx persons); Suzanne Gamboa, *Rise in Reports of Hate Crimes Against Latinos Pushes Overall Number to 11-Year High*, NBC NEWS (Nov. 16, 2020, 5:01 PM), https://www.nbcnews.com/news/latino/rise-hate-crimes-against-latinos-pushes-overall-number-highest-over-n1247932 [https://perma.cc/HD86-4VQF] (same).

129. 138 S. Ct. 1204 (2018).

130. 137 S. Ct. 1678 (2017).

131. *See supra* text accompanying notes 121–23.

132. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915–

could not survive the pleading stage. The plurality reached that conclusion despite the fact that nearly ninety percent of DACA recipients, who stood to be directly affected by rescission of the policy, were Latinx[133] and President Trump repeatedly vilified Latinx immigrants.[134]

Although the Supreme Court sometimes has engaged in full-blown constitutional review of immigration laws and policies,[135] the plenary power doctrine serves as a miserly starting point in most cases for analyzing the question of the appropriate standard of judicial review. By maintaining the plenary power foundation of immigration law and its baseline of no constitutional review, considerable judicial maneuvering is necessary to ensure even the most minimal of review. In the end, as exemplified by the Muslim ban decision,[136] limited constitutional review fails to adequately protect noncitizens of color.

Put simply, even though it constitutes at least some judicial review and thus deviates from the extreme version of the plenary power doctrine, limited constitutional review like that employed in some cases by the Supreme Court has proven to be ineffective at rooting out racism from the contemporary, mostly color-blind and race-neutral, U.S. immigration laws and policies. As a result, the nation has immigration laws and policies built on racist foundations without the judicial tools necessary to root out the racism baked into those laws. Currently, the political process, which often fails to fairly consider the interests of discrete and insular minorities like immigrants (who cannot vote), is the only avenue available to noncitizens to secure some form of legal protection.[137] Consequently, it should not be surprising that the immigration laws and policies have the disparate racial impacts that we see today.

CONCLUSION

Anti-Chinese agitation at the state and local levels in the 1800s led to violence and widespread discrimination.[138] In the small town of Truckee, California, the Trout Creek Outrage exemplified the murderous violence, built on a sturdy foundation of

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16 (2020).

133. *See Top Countries of Origin for DACA Recipients*, PEW RSCH. CTR. (Sept. 25, 2017), https://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/ft_17-09-25_daca_topcountries/ [https://perma.cc/LTC9-YBV4].

134. *See, e.g.*, Eli Watkins & Abby Phillip, *Trump Decries Immigrants from "Shithole Countries" Coming to US*, CNN (Jan. 12, 2018, 9:53 AM), https://www.cnn.com/2018/01/11/politics/immigrants-shithole-countries-trump/index.html [https://perma.cc/9PV5-U3ZX]; "*Drug Dealers, Criminals, Rapists": What Trump Thinks of Mexicans*, BBC NEWS (Aug. 31, 2016), https://www.bbc.com/news/av/world-us-canada-37230916 [https://perma.cc/U745-YKVV].

135. *See supra* text accompanying notes 132–34.

136. *See supra* text accompanying notes 128–30.

137. *See* Kevin R. Johnson, *Bringing Racial Justice to Immigration Law*, 116 NW. U. L. REV. ONLINE 1, 11–15 (2021) (analyzing how contemporary immigrant rights activism may facilitate future immigration reform).

138. *See supra* Parts I, II.

discrimination, against Chinese immigrants.[139] Years of local and state agitation and violence eventually led to the first federal immigration laws.[140]

The anti-Chinese history of the mountain town of Truckee is interesting. However, it is far more than that. As this nation deals with a racial reckoning, we must look at the influence of the nation's immigration history on contemporary legal doctrine. The violent anti-Chinese agitation in the West paved the way for the federal Chinese Exclusion Act of 1882 and *The Chinese Exclusion Case*. That monumental decision, upholding a racist law in a time when separate but equal was the law of the land, remains the foundation for today's lack of constitutional review of immigration laws and policies. The absence of meaningful review is precisely why the nation repeatedly sees policies like the Muslim ban, separation of migrant children from their parents, and worse when it comes to immigrants. Put differently, contemporary U.S. immigration law is built on racist foundations, with the seminal plenary power doctrine decision's very name—*The Chinese Exclusion Case*—leaving no doubt about that racism.

The Chinese Exclusion Case has been criticized to no end but remains the law of the land.[141] In thinking anew about its modern impacts, we should interrogate its racist roots and how the case fits comfortably into Jim Crow and unbridled white supremacy. That, in turn, requires us to consider the history of anti-Chinese agitation, ethnic cleansing through the Truckee method, and legal abominations such as the Trout Creek Outrage. This Essay is one step in excavating that history in hopes of provoking creative thinking about the racist roots of immigration exceptionalism and how to end it.[142] Such analysis may at some point contribute to the overruling of *The Chinese Exclusion Case* and dismantling of the plenary power doctrine. Only then can a meaningful effort be made to end systemic racial injustice in the U.S. immigration laws.

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139. *See supra* Part II.

140. *See supra* Part III.

141. *See, e.g.*, *supra* note 113 (citing authorities).

142. Another example of such an effort is Gabriel J. Chin & John Ormonde, *The War Against Chinese Restaurants*, 67 DUKE L.J. 681 (2018) which incisively analyzes state and local efforts during the era of Chinese exclusion to regulate Chinese restaurants out of existence as a moral and economic danger to U.S. society.