# Plenary Power and Animus in Immigration Law

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*After a campaign denigrating Muslims as "sick people," blaming the children of Muslim Americans for terrorism, and promising to "shut down" Muslim immigration, and mere days after his inauguration, President Donald J. Trump banned the nationals of seven majority-Muslim countries from entry into the United States. In the litigation that followed, one question persisted: how should courts analyze an exclusion order when the President invokes a national security justification, and there is also direct evidence of racial or religious animus? The United States Supreme Court reviews exclusion decisions deferentially for the existence of a "facially legitimate and bona fide reason," under* Kleindienst v. Mandel, *but explicit animus raises a key question: what effect, if any, does explicit presidential animus have on this deferential standard of review?*

*In* Trump v. Hawaii, *the Supreme Court reversed the lower court's grant of a preliminary injunction against the third version of the travel ban. The majority deferred to the President's national security justification, despite smoking gun evidence of anti-Muslim animus, because it determined that animus was not the "sole" motive for the travel ban. In dissent, Justice Sotomayor argued that a reasonable observer would conclude that the travel ban's "primary purpose" was to express hostility toward Muslims, and deference was unwarranted. At the root of this debate is a disagreement about the proper analysis of mixed motives.*

*Analyzing deference and analogous doctrines in other areas of law, this Article argues for a third way: that courts should use a mixed motives framework invalidating a contested law where the same law would not have been promulgated but for animus. Under this approach, plaintiffs must "plausibly" allege animus with "sufficient particularity." Upon plaintiff's motion for a preliminary injunction, the government must proffer some evidence of an independently sufficient justification, apart from animus, for the challenged policy. Ultimately, the plaintiffs must prove that animus was a necessary motive for the contested law. This framework invalidates laws lacking sufficient non-animus justification*

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*but permits laws for which animus is not a necessary motive. This Article seeks to offer a way for courts to capture better the benefits of immigration deference while minimizing the costs.*

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## I. INTRODUCTION

On January 27, 2017, Tareq and Ammar Aziz, brothers from Yemen, flew into Dulles International Airport outside Washington, D.C. to reunite with their father, Aquel, a U.S. citizen.[1] After landing, however, officers told them their visas were "canceled" and sent them back on the first flight to Ethiopia, where Ethiopian officials confiscated their identification papers. President Donald J.

[1] Rachel Weiner & Paul Schemm, *These Brothers Were Forced out by Trump's Executive Order. On Monday, They Moved to the U.S.*, WASH. POST (Feb. 6, 2017), https://www.washingtonpost.com/local/public-safety/these-brothers-were-forced-out-by-trumps-executive-order-on-monday-they-moved-to-the-us/2017/02/06/0a150fec-e977-11e6-80c2-30e57e57e05d_story.html?utm_term=.446a349249a2 [https://perma.cc/BLP7-ZW3G].

Trump's first travel ban thwarted their reunion, "a year and a half in the making."[2]

Aquel Aziz first came to the United States as a student in 2001 and eventually became a permanent resident and then a citizen.[3] He lived in Flint, Michigan. For years, Aquel sent money to help support his sons, who were living with their mother, Aquel's ex-wife. The boys lived well, and then the civil war in Yemen started. Gunfire was commonplace, and then "Saudi-led airstrikes began," and conditions worsened.[4] The boys witnessed the victims of these attacks, dead or limbless, and knew they had to escape. With no U.S. embassy in Yemen, obtaining visas required them to travel some distance. They traveled by car and air to Djibouti—via Qatar—for interviews at the U.S. embassy there. On January 25, their applications for permanent residency, or "green cards," were approved. On January 27, the brothers arrived at Dulles, leaving Yemen's bloodshed behind them. However, reporters note that Customs and Border Patrol (CBP) officials stopped them, telling them, "Yemenis, this way."[5] CBP officials detained and handcuffed the brothers and then told them that their "visas were canceled."[6] The brothers asked if they could call their lawyer, but the officials said no, "[I]t's a presidential order. You can't do anything."[7] Officials then instructed the brothers to sign the papers presented to them or be barred from entering the United States for five years.[8] Not understanding what they were signing, the brothers signed away their right to permanent residence and were removed on the next flight to Ethiopia.[9] Unfortunately, in Ethiopia, officials confiscated the brothers' Yemeni passports, effectively erasing any path of exit, trapping them in a country where they had no status.[10]

The Aziz brothers were just two of thousands of noncitizens whose life plans were upended by President Trump's travel bans.[11] These bans against foreign nationals, mostly from majority-Muslim countries,[12] have revived

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[2] *Id.*; *see also* Washington v. Trump, 847 F.3d 1151, 1157 (9th Cir. 2017) (per curiam) (describing "immediate and widespread" impact of the ban, including "that thousands of visas were immediately canceled, hundreds of travelers with such visas were prevented from boarding airplanes bound for the United States or denied entry on arrival, and some travelers were detained").

[3] Weiner & Schemm, *supra* note 1.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Weiner & Schemm, *supra* note 1.

[10] *Id.*

[11] *See* Amrit Cheng, *The Muslim Ban: What Just Happened?*, ACLU (Dec. 6, 2017), https://www.aclu.org/blog/immigrants-rights/muslim-ban-what-just-happened [https://perma.cc/CDW7-RGQY] (describing impact on families).

[12] The last of the three travel bans barred nationals from Venezuela and North Korea as well. *See* Proclamation No. 9645, Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other

dormant questions about whether courts must defer to the political branches under the "plenary power" doctrine[13] even where the President demonstrates animus toward a racial or religious group.

Although Congress, and not the President, possesses "plenary power" in immigration law,[14] Congress has delegated exclusion power to the President through 8 U.S.C. § 1182(f),[15] and courts have characterized other discretionary exclusions as "plenary."[16] Moreover, some scholars and judges contend even today that the President possesses "inherent" power to exclude noncitizens.[17] "Plenary" suggests "absolute" power, but most scholars and judges today regard such a notion as incompatible, or at least in serious tension, with a Constitution granting the federal government only limited powers.[18] Most interpret "plenary power" to mean some form of nonjusticiability, and in immigration law

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Public-Safety Threats, 82 Fed. Reg. 45161, 45166, at § 2(d), (f) (Sept. 24, 2017) (describing reasons for including North Korea and Venezuela).

[13] Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581, 599–600 (1889). Critics contend that "plenary power" lacks a textual basis in the Constitution, despite the attempt to ground it in the Naturalization Clause of U.S. Const. Art. I, § 8, cl. 4. *See* Ilya Somin, *The Constitutional Rights of Noncitizens*, LEARN LIBERTY (Apr. 30, 2017), http://www.learnliberty.org/blog/t-he-constitutional-rights-of-noncitizens [https://perma.cc/UCV6-KDJE]. Courts have also described it as an "inherent power" of every sovereign. *See* United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (describing the exclusion of noncitizens as "a fundamental act of sovereignty" and arguing that it stems not from a legislative delegation, but "is inherent in the executive power to control the foreign affairs of the nation"). Alternatively, Professor David A. Martin characterizes plenary power as a federalism doctrine, one ensuring the dominance of the federal government vis-à-vis the states in immigration law. *See* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 31 (2015).

[14] I.N.S v. Chadha, 462 U.S. 919, 940 (1983) (describing *Congress's* power over noncitizens as plenary) (emphasis added); Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 478 (2009).

[15] Immigration and Nationality Act of 1995 § 212(f), 8 U.S.C. § 1182(f) (2018).

[16] *See* Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972).

[17] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Thomas, J., concurring) (citing *Knauff*); *Knauff*, 338 U.S. at 542; United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) (stating that the "powers of external sovereignty did not depend upon the affirmative grants of the Constitution"); Washington v. Trump, 858 F.3d 1168, 1183 n.8 (9th Cir. 2017) (Bybee, J., dissenting from denial of rehearing *en banc*) (citing *Knauff* for the proposition that the President possesses the inherent power to exclude noncitizens); Martin, *supra* note 13, at 36 ("[A]sserting jurisdiction over a territory, which includes authority to choose which noncitizens to admit or exclude, is simply part of what it means to be a sovereign nation.").

[18] *See* Fong Yue Ting v. United States, 149 U.S. 698, 757–58 (1893) (Fields, J., dissenting) (dismissing notion of an "inherent" power to deport foreigners); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 120–21 (1996); Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 385 (2004) ("The notion that a federal power can derive from another source or be inherent in sovereignty is at odds with this tradition.").

specifically, it amounts to deference.[19] With respect to exclusion laws, courts will uphold a decision for any "facially legitimate and bona fide" reason, the standard first articulated in *Kleindienst v. Mandel*.[20]

Defenders of plenary power deference argue that the doctrine preserves the President's ability to act quickly and flexibly, enabling him to balance competing considerations without being second-guessed by courts in areas where the President often has superior expertise and responsibility.[21] Critics contend, however, that judicial deference in this arena often leaves serious gaps in constitutional protection for noncitizens and essentially legitimates invidious discrimination.[22] Expansive discretion may also lead to inefficiency, waste, and poor policy design because deference preserves a space for laws based on stereotypes, lax presumptions, and other poor reasoning.[23]

Does this laxity between means and ends extend to the President's motives? In the wake of President Trump's travel bans, the question becomes: how should courts analyze constitutional challenges to an exclusion order where the President offers a national security rationale for the order, but plaintiffs also have direct evidence of the President's racial or religious animus toward the

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[19] *See* NEUMAN, *supra* note 18, at 134 ("The more enduring legacy of the *Chinese Exclusion Case* in constitutional doctrine is not the claim that constitutional limits on the immigration power do not exist, but . . . that courts should be wary of enforcing them."), and 138 (describing "the application of 'political question' reasoning—either as a denial of justiciability or as an extraordinarily deferential standard of review"); Cox, *supra* note 18, at 382–83.

[20] *Mandel*, 408 U.S. at 770. Although a point of debate, many judges applied *Mandel* to the travel bans. *See* Washington v. Trump, 847 F.3d 1151, 1162 (9th Cir. 2017) (per curiam); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 591 (4th Cir. 2017), *vacated as moot*, 138 S. Ct. 353 (2017) (mem.). The Supreme Court applied *Mandel* as well. *See Trump v. Hawaii*, 138 S. Ct. at 2419–20.

[21] *See* Martin, *supra* note 13, at 42; *see also* William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 884 n.20 (2013). *See generally* Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1079–90 (2008) (identifying legal and epistemic authority bases for deference).

[22] *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 8–9 (1998) (arguing that plenary power doctrine was born in cases "authorizing racial discrimination—and sympathetic to that discrimination"); 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, 15 (2002) (noting the association of inherent powers decisions with the rise in "nativist, nationalistic, and authoritarian impulses among the nation's political elites that justified the subjugation of 'inferior' peoples").

[23] *See* Margaret H. Taylor, Demore v. Kim: *Judicial Deference to Congressional Folly*, *in* IMMIGRATION STORIES 343, 345 (David A. Martin & Peter H. Schuck eds., 2005) (arguing that mandatory detention of noncitizens pending removal, purportedly justified by Congress's plenary power, is wasteful and ineffective).

individuals the order targets?[24] Under 8 U.S.C. § 1182(f), the President has the authority to exclude noncitizens whose entry he determines would be "detrimental" to U.S. interests.[25] Courts have reviewed the scope of this authority under *Mandel*.[26] As the lower courts adjudicated the multiple lawsuits, two competing interpretations of the *Mandel* standard emerged. The first, advanced by the government and accepted by a number of federal appellate judges, would shield the President's exclusion directives from judicial scrutiny so long as he articulates one "facially legitimate" reason, no matter how insubstantial, even if he also expresses animus toward the excluded group.[27] The second, articulated by the Fourth Circuit majority in *Int'l Refugee Assistance Project v. Trump*, extends deference only to good faith deliberations.[28] On this view, where plaintiffs "plausibly allege" bad faith, such as animus, with "sufficient particularity," deference evaporates, and courts may apply strict scrutiny.[29] In sum, the lower courts that analyzed the effect of the President's anti-Muslim statements on the validity of his travel bans have taken one of two views: full, continued deference, provided the President supplies even one legitimate reason for the challenged policy[30] or, alternatively, no deference at all.[31]

The Supreme Court's decision in *Trump v. Hawaii*, reversing the Ninth Circuit's affirmance of the district court's grant of a preliminary injunction, mirrored this debate.[32] The majority adopted the view that the government's articulation of one legitimate reason, no matter how flimsy, could insulate the

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[24] Other scholars have posed a version of this question. *See* Michael Kagan, *Is the Chinese Exclusion Case Still Good Law? (The President Is Trying to Find Out)*, 1 NEV. L.J. F. 80, 81 (2017).

[25] Immigration & Nationality Act of 1995 § 212(f), 8 U.S.C. § 1182(f) (2018). Under the tripartite framework articulated in Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, also known as the *Steel Seizure Case*, the President's power is at its "maximum" when "the President acts pursuant to an express or implied authorization by Congress." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952).

[26] *See* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 591 (4th Cir.), *vacated as moot*, 138 S. Ct. 353 (2017) (mem.); Washington v. Trump, 858 F.3d 1168, 1179 (9th Cir. 2017) (Bybee, J., dissenting from denial of rehearing *en banc*).

[27] *See Washington v. Trump*, 858 F.3d at 1183 (arguing that a law excluding noncitizens should not be invalidated unless animus is the *sole* purpose of the law) (emphasis added).

[28] *Int'l Refugee Assistance Project*, 857 F.3d at 592 ("And having concluded that the 'facially legitimate' reason proffered by the government is not 'bona fide,' we no longer defer to that reason and instead may 'look behind' EO-2.").

[29] *See id.* at 593 (applying strict scrutiny to plaintiffs' Establishment Clause claims).

[30] *See Washington v. Trump*, 858 F.3d at 1183 (Bybee, J., dissenting from denial of rehearing *en banc*).

[31] *See Int'l Refugee Assistance Project*, 857 F.3d at 591.

[32] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018). As noted above, however, the Supreme Court assumed the "sole" motive standard applied but did not decide the question.

ban from further scrutiny under *Mandel*,[33] while the dissenters found deference unwarranted because of the ban's discriminatory "primary purpose."[34]

This Article, however, rejects both extremes—the former for confusing deference for abdication, and the second for requiring excessive precision by the political branches in a realm implicating foreign affairs.[35] Drawing on Equal Protection, Establishment Clause, and Due Process jurisprudence, this Article argues that courts should use a mixed motives analysis to review an exclusion law where plaintiffs have direct evidence of animus. This framework requires the plaintiff to allege racial or religious animus with particularity and for the defendant to then come forward with evidence of a legitimate national security justification, with the plaintiff carrying the ultimate burden of proof that animus was a "but-for" motive behind the exclusion policy.[36] This approach preserves substantial deference while holding accountable purveyors of animus and, thus, takes both deference and animus seriously. As explained below, the "but-for" mixed motives framework ultimately offers no defense from the implementation of animus-driven policy where the same policy would have been adopted regardless of animus, but this approach nonetheless has expressive value.[37] It offers resort to legal process to advance the values of legitimacy and accountability while respecting the separation of powers.[38]

Part II provides an overview of the travel ban litigation and illustrates the two views of plenary power deference that emerged in the litigation—absolute deference that tolerates any amount of animus and deference that evaporates upon a showing of any animus. Part III explains the concept of deference generally and the evolution of plenary power deference specifically. Part IV examines Equal Protection and Establishment Clause jurisprudence relevant to racial and religious discrimination and further examines in an analogous setting, that of vindictive prosecution, how courts analyze discretionary decisions where

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[33] *Id.* at 2419–20.

[34] *Id.* at 2445 (Sotomayor, J., dissenting).

[35] For the argument that subjecting exclusion law to normal constitutional analysis "throw[s] . . . the baby [out] with the bathwater," see Peter Margulies, *Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, 2018 MICH. ST. L. REV. 1, 66 (2018).

[36] For an explanation of the four principal motive standards in the law, see Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1159–60 (2018) (arguing that nearly all motive standards in the law reduce to just four: sole, but-for, primary, and any). Although Professor Verstein "avoids" using any causation language, it is useful in this Article's analysis. *Id.* at 1124.

[37] *See* Kagan, *supra* note 24, at 89 (suggesting that review of animus-driven exclusion policy might survive scrutiny if animus was not a "but for" cause of the challenged law); *cf.* Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083, 2147 (2017) (arguing for laws protecting people against discrimination on the basis of marital status and sexual orientation, in part due to the "expressive value in laws proclaiming certain kinds of discrimination to be impermissible and unacceptable").

[38] *But see* Jacob T. Levy, *The Limits of Legalism*, NISKANEN CTR. (Nov. 27, 2017), https://niskanencenter.org/blog/the-limits-of-legalism/ [https://perma.cc/ZJ8R-HQL3] (arguing that the only serious check on abuses of plenary power is politics).

the decisionmaker has exhibited animus. Drawing on insights from this jurisprudence, this Article proposes a mixed motives framework to analyze animus-based immigration law. Under this framework, plaintiffs must plead animus with sufficient particularity, and defendants must come forward with evidence showing that animus was not necessary to the challenged law.[39] Plaintiffs will not win merely upon a showing that animus "tainted" the exclusion law or that animus predominated over an independently sufficient legitimate justification. But the exclusion law also will not survive judicial scrutiny simply upon defendants' showing that *some* other motive also played a role. Part V applies this framework to the Trump travel bans. Finally, it further considers the most likely objections to this approach. In so doing, this Article takes both deference and animus seriously and seeks to introduce nuance into a largely binary discussion of immigration deference.

## II. TRAVEL BAN LITIGATION OVERVIEW

The travel ban litigation serves as a valuable setting for analyzing what effect animus should have on plenary power in immigration. Each of the three bans raised distinct legal issues, and the numerous lawsuits challenging the bans featured a variety of statutory and constitutional claims.[40] Despite the array of claims, they all allude to a single question: whether, and under what circumstances, might direct evidence of animus undermine or even defeat the President's broad authority in immigration. This Part describes the claimed statutory basis for the travel bans, the factual background providing direct evidence of animus, and the court decisions that grappled with whether to defer to the President under the circumstances, culminating in the Supreme Court's decision.

Most scholars and jurists characterize the President's authority in immigration law as delegated by Congress, but some continue to regard it as an inherent power of the Executive.[41] 8 U.S.C. § 1182(f) states:

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[39] *See* Verstein, *supra* note 36, at 1137–39 (describing the "But-For Motive standard").

[40] *See Litigation Documents & Resources Related to Trump Executive Order on Immigration*, LAWFARE, https://lawfareblog.com/litigation-documents-resources-related-trump-executive-order-immigration [https://perma.cc/59DC-WLGU] [hereinafter *Litigation Documents*].

[41] *See* Cox & Rodriguez, *supra* note 14, at 461 (describing these two views). *Compare* Hawaii v. Trump, 878 F.3d 662, 685 (9th Cir. 2017) (stating that Congress delegates to the President his authority in immigration law), *and* Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (noting that executive discretion in immigration is not "boundless"), *with* Washington v. Trump, 858 F.3d 1168, 1175 (9th Cir. 2017) (Bybee, J., dissenting from denial of rehearing en banc) (characterizing the President's power to exclude noncitizens as "inherent"). Prior to *Kleindienst v. Mandel*, several exclusion cases had characterized Congress's power to exclude as an "inherent" power, but they also tended to refer to the political branches without distinguishing Congress from the Executive. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.[42]

Presidents have historically used this power to suspend entry by groups of noncitizens joined by more than mere nationality.[43] For example, President Barack Obama suspended entry of noncitizens "who are determined to have 'contributed to the situation in Burundi in specified ways"; President Ronald Reagan excluded those who arrived "from the high seas."[44] Although prior practice indicates that presidents typically define the suspended class with greater specificity, § 1182(f) does not, by its own terms, expressly bar nationality-based exclusion.[45]

Courts have generally regarded executive action in immigration as more susceptible to review than legislative action. In *Kleindienst v. Mandel*, the Supreme Court reviewed the Attorney General's discretionary denial of a waiver of inadmissibility to a noncitizen for the existence of a "facially legitimate and bona fide" reason.[46] In so doing, it distinguished executive discretion from legislative acts more generally.[47] Although *Mandel* concerned judicial review of the Attorney General's discretionary decision rather than an executive order articulating criteria for exclusion, courts have applied *Mandel* in other settings, including the travel ban litigation.[48]

Apart from the legal background, the factual setting for the travel bans is also important. Critics note that President Trump has a long history of expressing animus toward people of color and Muslims, during his campaign

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[42] Immigration and Nationality Act of 1995, § 212(f), 8 U.S.C. § 1182(f) (2018).

[43] Indeed, scholars have argued that past practice supports construing § 212(f) as applying only to exigent circumstances involving diplomacy or military affairs, where the President's power is greatest. *See* Brief of *Amici Curiae* Immigration Law Scholars on the Text and Structure of the Immigration and Nationality Act in Support of Respondents at 1–2, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965).

[44] KATE M. MANUEL, CONG. RESEARCH SERV., R44743, EXECUTIVE AUTHORITY TO EXCLUDE ALIENS: IN BRIEF 7, 10 (2017); *see also* Sale v. Haitian Ctrs. Council, 509 U.S. 155, 187–88 (1993) (upholding legality of executive order establishing policy of Haitian interdiction).

[45] MANUEL, *supra* note 44, at 1–2.

[46] Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

[47] *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 581 (1990) (describing *Mandel*'s distinction between "executive actions and legislative acts," the former subject to "facially legitimate and bona fide" review and the latter not similarly constrained).

[48] *See* Fiallo v. Bell, 430 U.S. 787, 795, 798 (1977); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2419–20 (2018); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 594 (4th Cir. 2017), *vacated as moot*, 138 S. Ct. 353 (2017) (mem.); Washington v. Trump, 858 F.3d 1168, 1182–83 (9th Cir. 2017) (Bybee, J., dissenting).

and after taking the oath of office.[49] In December 2015, candidate-Trump proposed a "complete shutdown" of Muslim entry into the United States.[50] His campaign website featured a "Statement on Preventing Muslim Immigration," which renewed his call for a complete shutdown.[51] That following spring, he stated that "Islam hates us."[52] Later that same month, he again proposed shutting down Muslim entry.[53] After suicide bombings in Brussels, Trump told reporters, "You have to deal with the mosques, whether we like it or not, I mean, you know these attacks aren't . . . done by Swedish people."[54] After winning the election, the president-elect confirmed his earlier plans.[55] He also repeatedly admitted to swapping the term "Muslim" for a focus on particular nations to evade constitutional scrutiny.[56] Finally, former New York City Mayor Rudy Giuliani admitted publicly that the President considered the forthcoming policy to be a "Muslim ban," but that the President sought Giuliani's advice about "do[ing] it legally."[57]

All of this culminated in the issuance of the first ban. On January 27, 2017, the President's first Executive Order (EO-1) took effect,[58] triggering "chaos" in airports across the country.[59] Legal permanent residents who were abroad saw their green cards canceled upon arrival,[60] and other noncitizens arriving in U.S. airports lost their right to enter mid-flight.[61]

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[49] David Leonhardt & Ian Prasad Philbrick, Opinion, *Donald Trump's Racism: The Definitive List*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html [on file with *Ohio State Law Journal*].

[50] *Id.*

[51] *Int'l Refugee Assistance Project*, 857 F.3d at 594.

[52] *Id.*

[53] *Id.*

[54] Jenna Johnson & Abigail Hauslohner, *'I Think Islam Hates Us': A Timeline of Trump's Comments About Islam and Muslims*, WASH. POST (May 20, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?utm_term=.dc8b86ea3e85 [https://perma.cc/49JT-8RXZ].

[55] *Int'l Refugee Assistance Project*, 857 F.3d at 594.

[56] *Id.*

[57] *Id.*

[58] Exec. Order No. 13769, Protecting the Nation from Foreign Terrorist Entry into the United States, 3. C.F.R, 2017 Comp. 272 (2017) [hereinafter EO-1].

[59] Katie Bo Williams, *Kelly Shoulders Blame for Troubled Travel Ban Rollout*, THE HILL (Feb. 7, 2017), http://thehill.com/policy/national-security/318399-kelly-shoulders-blame-for-troubled-travel-ban-rollout [https://perma.cc/JG6Y-G625] ("Press reports have characterized the initial rollout of the ban as chaotic at best, while critics of the ban labeled it inhumane at worst."); *see also* Michael C. Dorf, *Will the Supreme Court Back Trump's Third Attempt at a Travel Ban?*, NEWSWEEK (Jan. 25, 2018), http://www.newsweek.com/will-supreme-court-back-trumps-third-attempt-travel-ban-790740 [https://perma.cc/SX3U-47RS].

[60] *See* Weiner & Schemm, *supra* note 1.

[61] *Trump Executive Order: White House Stands Firm over Travel Ban*, BBC NEWS (Jan. 30, 2017), http://www.bbc.com/news/world-us-canada-38790629 [https://perma.cc/DU9W-

Noncitizens' families and employers, states, and various interested nonprofit organizations immediately challenged the ban. Several federal district courts preliminarily enjoined the first ban, in whole or in part.[62] In the first appellate decision addressing the validity of EO-1, the Ninth Circuit denied the government's motion to stay the district court's nationwide injunction pending appeal of that injunction.[63] The appeals court acknowledged the government's substantial authority to regulate immigration but determined that "important constitutional limitations" constrained this authority.[64] The court concluded that the President's "policy determinations" in immigration law were entitled to deference but were not unreviewable.[65] The court emphasized EO-1's impact on legal permanent residents,[66] who have substantial constitutional rights.[67] The court determined that the government was unlikely to succeed on appeal and that the balance of hardships and the public interest militated against a stay.[68] Thus, the court denied the government's motion for a stay pending appeal.[69]

After courts enjoined EO-1, the President issued a second Executive Order (EO-2), this one applying again temporarily, but only to individuals abroad who had never received a visa to travel to the United States.[70] Individuals affected had no right of entry; some commentators argued that they lacked any constitutional rights.[71] Plaintiffs challenging EO-1 and EO-2 asserted statutory

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4XL5] ("Those who were already mid-flight were detained on arrival - even if they held valid US visas or other immigration permits.").

[62] *See, e.g.*, Washington v. Trump, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) (order granting temporary restraining order); Darweesh v. Trump, No. 17 Civ. 480 (AMD), 2017 WL 388504, at *1 (E.D.N.Y. Jan. 28, 2017) (order granting preliminary injunction). For a complete list of all legal challenges to the travel bans, see *Litigation Documents*, *supra* note 40.

[63] Washington v. Trump, 847 F.3d 1151, 1169 (9th Cir. 2017) (per curiam).

[64] *Id.* at 1162 (citing Zadvydas v. Davis, 533 U.S. 678, 695 (2001)).

[65] *Id.* at 1164.

[66] *Id.* at 1165–66 (discussing EO-1's impermissible impact on legal permanent residents).

[67] *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.").

[68] *Washington v. Trump*, 847 F.3d at 1167–68.

[69] *Id.* at 1169.

[70] Exec. Order No. 13780, Protecting the Nation from Foreign Terrorist Entry into the United States, 3 C.F.R, 2017 Comp. 301, 306–07 [hereinafter EO-2].

[71] *See* Josh Blackman, *The Legality of the 3/6/17 Executive Order, Part II: The Due Process Clause Analysis*, LAWFARE (Mar. 12, 2017), https://lawfareblog.com/legality-3617-executive-order-part-ii-due-process-clause-analysis [https://perma.cc/C6HS-TD7X]. However, noncitizens' lack of a constitutional right to entry does not insulate immigration law from judicial scrutiny where those laws impact citizens' interests. *See also* Fiallo v. Bell, 430 U.S. 787, 807 (1977) (Marshall, J., dissenting) ("It is irrelevant that aliens have no constitutional right to immigrate and that Americans have no constitutional right to compel the admission of their families. The essential fact here is that Congress did choose to extend such privileges to American citizens but then denied them to a small class of citizens. When

and constitutional claims,[72] arguing that the federal government, through the President, had impermissibly disparaged Muslims as dangerous,[73] despite both EOs' ostensible facial neutrality.[74] Even before the President promulgated these particular travel bans, scholars had argued that the Establishment Clause would allow plaintiffs challenging such bans to invoke structural limits on the government's conduct, regardless of whether excluded noncitizens had constitutional rights.[75] Thus, commentators found the courts' receptivity to the Establishment Clause claim unsurprising.

Several courts preliminarily enjoined EO-2 as well,[76] and the eventual appellate decisions expressed two competing visions of *Mandel*. The Fourth Circuit, in affirming the district court's preliminary injunction against EO-2, determined that the President's campaign fulminations and post-inauguration statements disparaging Muslims constituted evidence of his improper purpose in enacting EO-2.[77] The appeals court initially determined that the President's extensive power to exclude noncitizens had no effect on plaintiffs' standing to assert and likelihood of prevailing on their Establishment Clause claim.[78] Central to the court's analysis was the President's long history of campaign promises, website language, and tweets regarding the need to "shut down" Muslim immigration.[79] The court sidestepped the government's assertion of "plenary power" by applying the logical inverse of Justice Kennedy's

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Congress draws such lines among citizens, the Constitution requires that the decision comport with Fifth Amendment principles of equal protection and due process.").

[72] Statutory claims included a claim that the travel bans violated INA § 202, which prohibits discrimination in the issuance of visas. Constitutional claims included claims under the First Amendment's Establishment Clause. *See* U.S. CONST. amend. I; *see also* Complaint for Declaratory and Injunctive Relief 32, Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570 (D. Md. 2017) (No. 8:17-cv-00361-TDC), *aff'd*, 883 F.3d 233 (4th Cir.), *vacated*, No. 17-1194, 2018 WL 1051821 (June 28, 2018) (mem.).

[73] *See* Complaint for Declaratory and Injunctive Relief, Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570 (D. Md. 2017) (No. 8:17-cv-00361-TDC), *aff'd*, 883 F.3d 233 (4th Cir.), *vacated*, No. 17-1194, 2018 WL 1051821 (June 28, 2018) (mem.).

[74] Professor Gerald Neuman has argued that EO-1 and EO-2 were not facially neutral, considering their multiple references to "honor" killings. *See* Gerald Neuman, *Neither Facially Legitimate Nor Bona Fide—Why the Very Text of the Travel Ban Shows It's Unconstitutional*, JUST SECURITY (June 9, 2017), https://www.justsecurity.org/41953/facially-legitimate-bona-fide-why-unconstitutional-travel-ban/ [https://perma.cc/CB5N-LKRE].

[75] *See* Steven Vladeck, *What's Missing from Constitutional Analyses of Donald Trump's Muslim Immigration Ban*, JUST SECURITY (Dec. 10, 2015), https://www.justsecurity.org/28221/missing-constitutional-analyses-donald-trumps-muslim-immigration-ban/ [https://perma.cc/UD8Z-WP74].

[76] *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 566 (D. Md. 2017), *aff'd in part and vacated in part*, 857 F.3d 554 (4th Cir. 2017), *vacated*, 138 S. Ct. 353 (2017) (mem.).

[77] Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 594–95 (4th Cir. 2017), *vacated as moot*, 138 S. Ct. 353 (2017) (mem.).

[78] *Id.* at 586.

[79] *Id.* at 576.

conclusion in *Kerry v. Din*.[80] Where plaintiffs had plausibly alleged animus with sufficient particularity, as in the instant case, the President's judgment was not entitled to deference.[81] Thus, although a national security purpose is "facially legitimate," the President's own statements evinced bad faith, rendering them mere pretext—and certainly not "bona fide."[82] Thus, the court proceeded to apply "longstanding Establishment Clause doctrine" to EO-2.[83] The Ninth Circuit similarly upheld a preliminary injunction against the measure but on statutory rather than constitutional grounds.[84] The court determined that EO-2 violated the Immigration and Nationality Act by "exceeding the President's authority under [§ 1182(f)], discriminating on the basis of nationality."[85]

Dissenting judges on both courts decried the majorities' lack of deference to the President. The Fourth Circuit's dissenters faulted the majority for considering extrinsic evidence of purpose.[86] On their view, a court cannot review a facially neutral EO, and no evidence of purpose, even "smoking gun" evidence of animus, may be considered.[87] A group of judges on the Ninth Circuit expressed similar frustration when the court denied an internal motion for rehearing en banc.[88] These judges argued that any animus the President exhibited should not automatically invalidate the ban because the President *also* claimed to have legitimate reasons for prohibiting the entry of nationals of the designated countries.[89] On this view, evidence of animus should never lead a court to invalidate an executive order that excludes or imposes burdens on select noncitizens unless animus is the *sole* reason for the executive order.[90]

Without expressing its view on the merits, the Supreme Court granted the government's motion to stay the injunctions as to noncitizens lacking "any bona fide relationship with a person or entity in the United States,"[91] and, at the close

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[80] *Id.* at 592; Kerry v. Din, 135 S. Ct. 2128, 2141 (2015).

[81] *Int'l Refugee Assistance Project*, 857 F.3d at 592 (Niemeyer, J, dissenting).

[82] *Id.*

[83] *Id.*

[84] Hawaii v. Trump, 859 F.3d 741, 782 (9th Cir. 2017), *vacated*, 138 S. Ct. 2392.

[85] *Id.*

[86] *Int'l Refugee Assistance Project*, 857 F.3d at 647–48.

[87] *Id.* at 648 ("In looking behind the face of the government's action for facts to show the alleged bad faith, rather than looking for bad faith on the face of the executive action itself, the majority grants itself the power to conduct an extratextual search for evidence suggesting bad faith, which is exactly what three Supreme Court opinions have prohibited.").

[88] Washington v. Trump, 858 F.3d 1168, 1183 (9th Cir. 2017) (Bybee, J., dissenting in the denial of en banc rehearing).

[89] Washington v. Trump, 858 F.3d at 1183 (Bybee, J., dissenting from denial of en banc rehearing) ("So long as there is *one* 'facially legitimate and bona fide' reason for the President's action, our inquiry is at an end.").

[90] *Id.*

[91] Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (finding that equities balanced in favor of allowing injunction to take effect with respect to noncitizens with "any bona fide relationship with a person or entity in the United States," but not with respect to those lacking such a relationship). Notably, the Court did not cite authority for this standard, suggesting it was sui generis.

of EO-2's 90-day duration, vacated the Fourth Circuit's order as moot.[92] On October 23, 2017, the President issued his third travel ban, this one styled as a "Proclamation" rather than an Executive Order.[93] The Proclamation stated that the President had concluded an extensive study of the security procedures in specified countries and found them lacking.[94] To address purportedly inadequate vetting procedures, he was indefinitely suspending entry from eight countries, all majority-Muslim, except for Venezuela and North Korea.[95] Plaintiffs challenged the Proclamation as well, and federal district courts in Hawaii and Maryland issued preliminary injunctions.[96] The Ninth Circuit affirmed in part and vacated in part,[97] ruling that the indefinite temporal scope of the ban and its extensive revision to terrorism-related grounds of inadmissibility flouted the careful scheme Congress had created.[98] The Supreme Court granted certiorari.[99]

In *Trump v. Hawaii*, a majority of the Justices assumed without deciding that they could properly consider the President's extrinsic statements of animus.[100] After offering an abridged summary of the President's anti-Muslim animus, the Court then changed the subject, suggesting that presidents speak for the nation in a variety of ways, citing Muslim-friendly statements by Presidents Dwight Eisenhower and George W. Bush.[101] In so doing, the Court failed to consider whether, *considering extrinsic statements of animus*, the stated national

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[92] Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 353 (2017) (mem.).

[93] *See* Proclamation No. 9645, Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45161, 45161 (Sept. 24, 2017).

[94] *Id.*

[95] *Id.* at § 2(d), (f); *cf. The NSEERS Effect: A Decade of Racial Profiling, Fear, and Secrecy*, PENN STATE LAW RIGHTS WORKING GRP. 37 n.5 (May 2012), https://pennstatelaw.psu.edu/_file/clinics/NSEERS_report.pdf [https://perma.cc/M4GG-KHLW] (describing inclusion of North Korea as a "fig leaf" to "provide political cover" for discriminatory policy after the attacks of September 11, 2001).

[96] Hawaii v. Trump, 265 F. Supp. 3d 1140, 1155 (D. Haw. 2017) (holding that EO's use of national origin as a proxy for dangerousness violated the INA), *aff'd in part and vacated in part*, 878 F.3d 662 (9th Cir.), *rev'd*, 138 S. Ct. 2392 (2018). The Hawaii federal court initially issued a TRO, which "converted to a preliminary injunction three days later." *See* HILLEL R. SMITH & BEN R. HARRINGTON, CONG. RESEARCH SERV., LSB10017, OVERVIEW OF 'TRAVEL BAN' LITIGATION AND RECENT DEVELOPMENTS 5 (2018).

[97] *Hawaii v. Trump*, 878 F.3d at 622, 702.

[98] *Id.* at 673.

[99] Trump v. Hawaii, 138 S. Ct. 923, 923–24 (2018) (mem.). The Supreme Court requested briefing on the constitutional claim. *Id.* at 924. In addition, after the certiorari grant, the Fourth Circuit affirmed the District Court's grant of a preliminary injunction against the Proclamation on constitutional grounds. Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 269 (4th Cir. 2018) (holding that "the face of the Proclamation, read in the context of President Trump's official statements, fails to demonstrate a primarily secular purpose"), *vacated*, No. 17-1270, 2018 WL 1256938 (2018) (mem.).

[100] Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018).

[101] *Id.* at 2417–18.

security justifications could still be characterized as "bona fide."[102] Instead of requiring the government to disavow the President's animus,[103] the Court merely determined that animus was not the sole motive for the bans because the President had later articulated a national security rationale.[104] Thus, the Court concluded that plaintiffs were not likely to prevail on their Establishment Clause claim.[105] Having reached the same conclusion with respect to plaintiffs' statutory claims, the Court reversed the lower court's grant of a preliminary injunction and remanded for further proceedings.[106]

In her dissenting opinion, Justice Sotomayor, joined by Justice Ginsburg, determined that *Mandel* applied to individual visa or waiver adjudications, but not to a presidential exclusion order.[107] She then analyzed the President's animus at greater length.[108] Applying traditional Establishment Clause jurisprudence, she determined that a reasonable observer would understand the exclusion order to have the "primary purpose" of expressing anti-Muslim hostility.[109] Justices Breyer and Kagan also dissented, discerning the exclusion order's unlawful purpose from the waiver provision's function as mere "window dressing."[110]

The Supreme Court's preliminary resolution of the litigation leaves a number of issues unsettled. What is the relevance of the President's extrinsic statements in the analysis, assuming, as the majority did, that the Court has the power to "look behind" the face of the order? Will national security always defeat animus, no matter how convincing the evidence of illegitimate motive, and how flimsy the evidence of a national security rationale? Does the necessity or sufficiency of these two motives matter? On remand, courts must determine the proper analysis, as the Supreme Court assumed the appropriate framework without deciding it.

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[102] *See* Adam Cox et al., *The Radical Supreme Court Travel Ban Opinion—But Why It Might Not Apply to Other Immigrants' Rights Cases*, JUST SECURITY (June 27, 2018), https://www.justsecurity.org/58510/radical-supreme-court-travel-ban-opinion-but-apply-immigrants-rights-cases/ [https://perma.cc/KU4V-MXAQ].

[103] The topic of a disavowal arose at oral argument, with Chief Justice Roberts asking whether a disavowal of animus now would cure the constitutional defect; plaintiffs' counsel conceded that it would. *See* Transcript of Oral Argument at 62, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965).

[104] Trump v. Hawaii, 138 S. Ct. at 2421 (characterizing as "legitimate" the Proclamation's purpose of "preventing entry of nationals who cannot be adequately vetted.").

[105] *Id.* at 2423.

[106] *Id.*

[107] *Id.* at 2440 (Sotomayor, J., dissenting).

[108] *Id.* at 2443.

[109] *Id.* at 2445.

[110] *Trump v. Hawaii*, 138 S. Ct. at 2433 (Breyer, J., dissenting).

Immigration law's "plenary power" doctrine, first announced in the nineteenth century *Chinese Exclusion Case*,[111] has traditionally required deference to congressional judgments—including animus[112] —but subsequent developments in constitutional law have raised doubts about the legality and desirability of such a result.[113] When analyzing how direct evidence of animus alters deference, a court faces the question not merely of *whether* to defer, but *to what extent*.[114] If impermissible motive matters at all, a reviewing court will have to select a motive standard.[115] In his illuminating study of mixed motive standards across the law, Professor Andrew Verstein argues that the multitude of motive standards that courts use generally correspond to only four standards: sole, but-for, primary, and any.[116] "Sole motive" favors defendants strongly, as it leads a court to invalidate a law only where an improper motive—such as racial animus—is the "sole motive" for the challenged act.[117] The presence of any proper motive, thus, leads to a defense victory. The "but-for" motive standard also favors the defense and supports invalidation only where an improper motive is necessary.[118] The "primary motive" standard requires only that the plaintiff prove that the improper motive was greater in magnitude than the proper motive, even if both reasons are sufficient on their own.[119] Thus, a plaintiff could recover based on a defendant's impermissible racial animus, even if the defendant would have made the same decision anyway, so long as defendant's racial animus exceeds its non-racist motive. Finally, the "any motive" standard favors plaintiffs, as it supports invalidation upon a showing of "taint," the existence of *any* improper motive behind the challenged act.[120]

The travel ban litigation in the lower courts revealed two conflicting approaches to deference amid direct evidence of animus, and unsurprisingly, judges' choice of a motive standard governed the result. Judge Bybee and other

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[111] The *Chinese Exclusion Case* involved a challenge to an Act of Congress. *See* Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581, 599–600 (1889).

[112] *Id.* at 596; *see also* Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring) (noting that Congress is responsible for immigration laws, even if those laws reflect "xenophobia generally").

[113] For one, the Equal Protection Clause had not yet been read into the Fifth Amendment's Due Process Clause to apply to the federal government. *See* Bolling v. Sharpe, 347 U.S. 497 (1954); *see also* Kagan, *supra* note 24, at 90 (arguing that immigration law's tolerance for animus has diminished but remains uncertain).

[114] *Cf.* Horwitz, *supra* note 21, at 1066 ("The relationship between deference and the law's contextual dilemma is complex. But it is clear that there is an intimate relationship between these two phenomena.").

[115] *Cf.* Richard Fallon, *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 529 (2016) (arguing that courts should *never* invalidate laws "s*olely* because of the subjective intentions of those who enacted it") (emphasis added).

[116] Verstein, *supra* note 36, at 1159.

[117] *Id.* at 1139.

[118] *Id.* at 1137.

[119] *Id.* at 1134.

[120] *Id.* at 1141.

dissenting judges on the Ninth Circuit endorsed a "sole motive" standard, which upholds an exclusion law unless animus is the *sole* motive.[121] This standard assures a government victory in nearly all cases, for the government can almost always articulate a post-hoc rationalization for a discriminatory law.[122] This view guts *Mandel* by requiring only facial legitimacy, thus representing one extreme on the deference spectrum. The other extreme, exemplified by the majority decision in *IRAP v. Trump*, however, strips the government of deference upon a showing of any animus.[123] Although this might sound like a "but-for" test, further analysis reveals it resembles the "taint" theory more closely: good faith is a precondition for deference, and the presence of *any* animus means the precondition has not been met.[124] This motive standard in connection with exclusion, however, risks exposing sensitive political judgments to an exacting level of scrutiny—one that the Supreme Court has suggested is better suited for a discriminatory state law rather than a presidential exclusion order.[125] Thus, the travel ban litigation displays two approaches to analyzing the fundamental question running through challenges to successive EOs.

The Supreme Court's resolution, too, rested on choice of motive standard.[126] In allowing a post-hoc national security justification to immunize an order otherwise infected with animus, the Court adopted the "sole motive" standard described above.[127] The Court's application of this standard, however,

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[121] *See* Washington v. Trump, 858 F.3d 1168, 1183 (9th Cir. 2017) (Bybee, J., dissenting from denial of rehearing en banc); *cf.* Verstein, *supra* note 36, at 1139–41 (describing the sole motive standard).

[122] Other judges have questioned the use of extrinsic evidence of animus, but for reasons explained below, our constitutional jurisprudence allows reliance on such evidence, especially when vindicating equality interests. *Cf.* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 648 (4th Cir. 2017) (Niemeyer, J., dissenting), *vacating as moot*, 138 S. Ct. 353 (2017) (mem.).

[123] *See Int'l Refugee Assistance Project*, 857 F.3d at 591. The majority characterized EO-2 as "solely" motivated by animus, but the court did not engage in any analysis regarding the quantum of animus vis-à-vis stated reasons for the ban, such as national security. As a result, the court did not engage in a mixed motives inquiry, instead adopting an all-or-nothing approach. Any showing of animus meant the entire motive was animus. Professor Fallon argues that courts should subject a challenged statute to heightened scrutiny where legislators have breached their "deliberative obligations" by pursuing "constitutionally forbidden aims or . . . tak[ing] official actions based on constitutionally forbidden motives," specifically where greater than half the legislators have forbidden subjective intent. *See* Fallon, *supra* note 115, at 530. On this reasoning, a unitary actor, the President, possessing a forbidden subjective intent might similarly render the "norms of deference" inapplicable. *Id.*

[124] *See Int'l Refugee Assistance Project*, 857 F.3d at 591.

[125] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018); Graham v. Richardson, 403 U.S. 365, 375 (1971) (holding that state laws limiting welfare benefits to citizens violate noncitizens' rights to equal protection).

[126] *Trump v. Hawaii*, 138 S. Ct. at 2420.

[127] *Id.*

undermines its stated power to consider plaintiffs' extrinsic evidence.[128] That is, the Court "considered" plaintiffs' evidence by actually considering *only* the government's evidence. Once the government articulated a national security objective and offered supporting facts, the plaintiffs' extrinsic evidence did not matter at all. This turns *Mandel* on its head, allowing the government to demonstrate the "bona fide" nature of its "facially legitimate" reason without considering any facts showing that the stated reason is a sham. Moreover, in selecting the "sole motive" standard, the Court mischaracterized a number of cases—principally *Korematsu*,[129] but also the Equal Protection animus cases.[130]

Justice Sotomayor's rival analysis calls for examining the allegations with clear eyes,[131] but her use of the "primary purpose" standard is similarly vulnerable to critique. Although it differs slightly from the "taint" standard used by the Fourth Circuit in *IRAP v. Trump*, it rejects deference and calls for invalidation when animus predominates over legitimate justifications. Although a reasonable approach, it overlooks the possibility that an exclusion order can have more than one independently sufficient justification. Thus, the Supreme Court's analysis of the plaintiffs' likelihood of success on their Establishment Clause claim is vulnerable on many counts, and the need remains for a compelling analysis of plenary power and animus.

## III. PLENARY POWER DEFERENCE

Understanding the role of deference in immigration law[132] requires explaining the concept of deference generally and briefly retelling the history of the so-called "plenary power doctrine." Since its origins in the nineteenth century, the plenary power doctrine has taken on different meanings: initially, it meant absolute federal power over borders, as well as the nonjusticiability of challenges to immigration law.[133] Through the twentieth century, it evolved from strict nonjusticiability to a highly deferential standard of review. Specifically, the Supreme Court has ruled that it will uphold decisions excluding noncitizens from entry so long as the government advances a "facially legitimate

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[128] *Id.* ("[W]e assume that we may look behind the face of the Proclamation to the extent of applying rational basis review.").

[129] Korematsu v. United States, 323 U.S. 214 (1944), *overruled by Trump v. Hawaii*, 138 S. Ct. at 2423.

[130] *See infra* Part IV.

[131] *See Trump v. Hawaii*, 138 S. Ct. at 2433–35 (Sotomayor, J., dissenting).

[132] I am referring here to *constitutional* deference, not other forms of deference, such as courts' deference to agency interpretations of statutes under the *Chevron* doctrine. *Cf.* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 707 (1997) (describing the "extraordinary constitutional deference" the Court gives to Congress and the Executive in immigration matters).

[133] NEUMAN, *supra* note 18, at 138. In the travel ban litigation, the government has argued that the President's exclusion decisions are unreviewable by the judiciary.

and bona fide" reason for the exclusion.[134] While developments in constitutional law over the last century have eroded the plenary power doctrine's scope, especially as to procedural due process claims and challenges to indefinite detention,[135] courts have not extended these developments to first-time visa applicants with no existing ties to the United States—the very population excluded by the President's revised travel ban.[136]

Before defining deference and tracing the path of the plenary power doctrine, it is important to note that both the courts and Congress circumscribe the President's role in exclusion law. Congress possesses principal authority to regulate immigration.[137] The *Chinese Exclusion Case* announced plenary power in the course of considering the validity of a congressional act.[138] Although the Supreme Court has not always clearly distinguished between congressional and presidential authority in immigration law,[139] the Court has repeatedly noted that "over no conceivable subject is *the legislative power of Congress more complete*."[140] Professors Adam Cox and Cristina Rodriguez have argued that Congress's power vis-à-vis the President is greater at the "front end," when screening noncitizens for admission, while the President's power is greater at the "back end," when selecting noncitizens for removal.[141] Thus, while Congress has tremendous latitude in defining the criteria of admission and removal, the President retains significant discretion to determine the proper targets for removal.[142] Ultimately, the President's delegated authority in the realm of exclusion is a small part of a comprehensive legislative scheme,[143] but the President's responsibilities in foreign, diplomatic, and military affairs have often led courts to defer to the President's judgments in immigration law as well. For this reason, a full discussion of the evolution of plenary power is useful.

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[134] Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

[135] *See* Yamataya v. Fisher (*Japanese Immigration Case*), 189 U.S. 86, 100 (1903) ("[T]his court has never held . . . that administrative officers . . . may disregard the fundamental principles that inhere in 'due process of law.'"); Zadvydas v. Davis, 533 U.S. 678, 695 (2001); Motomura, *supra* note 47, at 587.

[136] *See* Motomura, *supra* note 47, at 587.

[137] *Id.* at 553.

[138] Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581, 606–07 (1889).

[139] *See* Cox & Rodriguez, *supra* note 14, at 461 ("[T]he Court's continued inattention to the scope of the President's power over immigration policy has given rise to doctrinal confusion.").

[140] Fiallo v. Bell, 430 U.S. 787, 792 (1977) (emphasis added).

[141] Cox & Rodriguez, *supra* note 14, at 463–65 (further arguing for the President to have greater authority in front-end screening).

[142] *Id.* at 464.

[143] *See* Brief of *Amici Curiae* Immigration Law Scholars on the Text & Structure of the Immigration & Nationality Act in Support of Respondents, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965).

### A. *Defining Deference*

Deference is born of discretion. "[D]iscretion is the power given to a person with authority to choose between two or more alternatives, when each of the alternatives is lawful."[144] Discretion would be illusory without deference, as courts could nullify an actor's choice without granting that actor the flexibility or *discretion* they are supposed to have.

Deference is "a decisionmaker following a determination made by some other individual or institution that it might not otherwise have reached had it decided the same question independently."[145] In essence, deference is where a decisionmaker sets aside "its own judgment" and follows "the judgment of another decisionmaker . . . in circumstances in which the deferring decisionmaker . . . *might* have reached a different decision."[146] Scholars have identified two bases of deference: legal authority and expertise.[147] Deference based on legal authority is a "status-based" justification and appears, for example, when courts are reviewing judgments of the political branches or administrative agencies.[148] On this view, judicial deference to agencies is based primarily on Congress's implied delegation of lawmaking power to agencies, thus exemplifying "legal authority" deference.[149] Deference based on expertise, or "epistemic authority," on the other hand, refers to the superior knowledge of the decisionmaker receiving deference, or its "comparative institutional competence."[150]

"Norms of deference" typically require decisionmakers to act in good faith,[151] while animus reveals bad faith.[152] Thus, if good faith is a precondition of deference, animus could very well defeat deference. Whether a good faith requirement makes sense as a prerequisite to deference depends on what work deference is doing. When an entity's expertise drives a court's deference, a court

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[144] AHARON BARAK, JUDICIAL DISCRETION 7 (1989).

[145] Horwitz, *supra* note 21, at 1072 (2008) (citing Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 665 (2000)); *see also* Ronald J. Krotoszynski, Jr., *Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 742 (explaining that *Chevron* justified deference to administrative agencies on the implied delegation rationale instead of expertise).

[146] Horwitz, *supra* note 21, at 1073.

[147] *Id.* at 1078; Krotoszynski, *supra* note 145, at 737.

[148] Horwitz, *supra* note 21, at 1080.

[149] *Id.*

[150] *Id.* at 1085.

[151] *See* Fallon, *supra* note 115, at 530.

[152] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (state law violated equal protection where it was based purely on the moral disapproval of same-sex relationships); Romer v. Evans, 517 U.S. 620, 634 (1996) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (stating that a "bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest" to create law); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 888 (2012).

seeks to permit the presumptively superior judgment of the entity to prevail, to avoid second-guessing a judgment call.[153] Thus, a consular official reviewing a visa application is entitled to deference because of her superior knowledge of local conditions and expertise in adjudicating visas.[154] Accordingly, a court will not substitute its judgment for that of the consular official absent a showing of bad faith.[155] Where the whole point of deference is to enable better policy-making, or better individual decisions, it makes sense to reduce or even eliminate deference when the evidence shows that the decisionmaker is motivated by bad faith.[156]

When structural considerations dominate a court's deference, however, a court applies only the mildest form of judicial review in order to preserve space for "rough-hewn"[157] measures that make no pretense of being *better policy*, but instead, reflect legal judgments about the allocation of power.[158] Here, an implied good faith requirement makes less sense because the rationale for deference is not to enhance the quality of policy or individual decisions; instead, deference functions simply to honor an allocation of responsibility between branches of the government.[159] Decisions entrusted to the President are entrusted to him, regardless of how he executes them.[160] Given the dual nature of deference to the President in immigration law, based both on expertise and legal authority, a good faith requirement is plausible but not inevitably correct.[161]

Immigration deference follows from the political branches' discretion.[162] When actors—whether the President or a prosecutor—have discretion to make judgments, to carefully balance a range of factors, courts typically scrutinize those actors' decisions less rigorously.[163] Courts *defer* to decisions made in another actor's lawful exercise of discretion.[164] Those actors are given the

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[153] *See* Horwitz, *supra* note 21, at 1104 n.215.

[154] *See* James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 53–54 (1991).

[155] *See* Kerry v. Din, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring).

[156] *See id.*; Fallon, *supra* note 115, at 530 (arguing for elevated judicial scrutiny where legislators have breached their deliberative obligations).

[157] Martin, *supra* note 13, at 47.

[158] Horwitz, *supra* note 21, at 1080.

[159] *See id.*

[160] *See id.*

[161] *See id.* at 1080. *But see* Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. (2019) (forthcoming June 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3260593 [https://perma.cc/RC3H-D36D] (arguing that Article II of the Constitution limits "presidents only to exercise their power when it is motivated in the public interest rather than in their private self-interest, consistent with fiduciary obligation in the private law").

[162] Kanstroom, *supra* note 132, at 709 ("Indeed, U.S. immigration law . . . might best be described as a fabric of discretion and judicial deference.").

[163] Horwitz, *supra* note 21, at 1079.

[164] *Id.*

flexibility and freedom to arrive at the result they think best.[165] Immigration deference in part recognizes the need for the President and Congress to use their discretion without the judiciary's intrusion,[166] and this discretion to establish exclusion criteria is best illustrated by the nineteenth and twentieth century plenary power cases.

### B. *Plenary Power in the Nineteenth and Twentieth Centuries*

The Supreme Court established the plenary power doctrine in *Chae Chan Ping v. United States*, also known as the *Chinese Exclusion Case*.[167] Ping was a Chinese national who had lived in San Francisco for a dozen years, arriving well before the Chinese Exclusion Act of 1882.[168] In 1868, the United States had entered into a treaty with China to permit migration by Chinese nationals such as him.[169] However, racism and fears of economic competition fueled domestic frustration with Chinese immigration, prompting Congress to pass the Chinese Exclusion Act of 1882, suspending immigration of additional Chinese laborers.[170] Before leaving on a visit to China in 1887, Ping obtained a certificate, to which he was entitled, to ensure reentry to the United States.[171] One week before his return to the United States in 1888, however, Congress passed the Scott Act, declaring all reentry certificates invalid, and barring all Chinese laborers from re-entering the country.[172] Accordingly, when Ping arrived on a ship at the port of San Francisco, the shipmaster detained him.[173] Ping filed a habeas corpus action, and the lower courts denied his petition.[174] The Supreme Court, upon review, held that Ping had no right to enter based on his certificate, the United States' treaty commitment notwithstanding, because Congress had overridden his authorization with the Scott Act.[175] In a decision with numerous references to the inherent authority of sovereign nations to control their borders, as well as racist language decrying the Chinese as

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[165] *Id.* at 1085.

[166] *See* Martin, *supra* note 13, at 38 (noting that judicial deference to immigration action arose from "the Court's understanding of proper institutional roles, given the complex dynamics in the foreign affairs realm").

[167] Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581, 609 (1889); Gabriel J. Chin, *The Origins of Plenary Power*, *in* IMMIGRATION STORIES 7, 11 (David A. Martin & Peter H. Schuck eds., 2005). An excellent and classic source for the history of Chinese immigrants' rights litigation is CHARLES MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH CENTURY AMERICA (1994). I thank Jean Stefancic for directing me to it.

[168] Chin, *supra* note 167, at 7.

[169] *Id.* at 8.

[170] *Chinese Exclusion Case*, 130 U.S. at 599; Chin, *supra* note 167, at 8, 11.

[171] Chin, *supra* note 167, at 11.

[172] *Id.*

[173] *Id.* at 12.

[174] *Id.* at 12.

[175] *Chinese Exclusion Case*, 130 U.S. at 600–02.

unassimilable, the Court determined that it lacked the power to decide questions regarding the validity of the statute, even amid claims that the statute violated an earlier treaty commitment.[176] The Court described Congress's expansive exclusion power, reasoning:

> That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.[177]

The Court further quoted an earlier decision of Chief Justice Marshall, noting that the jurisdiction of the United States within its own territory "is susceptible of no limitation not imposed of by itself."[178] Viewing migration as a matter between sovereigns, the United States' decision to cede control would effectively transfer power to another sovereign.[179] The Court further referenced both the Legislature's and the Executive's longstanding power to exclude foreigners, but this act of combining the political branches, or speaking of them as though their powers were coextensive, was carefully dismantled only paragraphs later.[180] Specifically, the Court distinguished the Chinese Exclusion Act from a contemporaneous law that granted the President the authority to expel dangerous noncitizens, noting that the latter "was passed during a period of great political excitement," "was never brought to the test of judicial decision in the courts of the United States," and regardless, was not before the Court presently.[181]

Scholars have argued that, despite numerous references to sovereignty, the *Chinese Exclusion Case* is not about sovereignty.[182] The dominant interest, instead, is federalism, specifically, establishing federal primacy vis-à-vis the states in making and enforcing immigration law.[183] However, emphasizing federalism over sovereignty does not defeat the "absolute power" interpretation of plenary power that the *Chinese Exclusion Case* advances.[184]

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[176] *Id.* at 602.
[177] *Id.* at 603–04.
[178] *Id.* at 604.
[179] *Id.*
[180] *Id.* at 607, 610.
[181] *Chinese Exclusion Case*, 130 U.S. at 611.
[182] Martin, *supra* note 13, at 31.
[183] *Chinese Exclusion Case*, 130 U.S. at 610; Martin, *supra* note 13, at 35.
[184] Other exclusion cases reinforced this result. In *Nishimura Ekiu v. United States*, a Japanese immigrant challenged her exclusion under the public charge ground of inadmissibility. 142 U.S. 651, 662 (1892). The governing statute empowered immigration officials to exclude noncitizens in their sole discretion, and the Supreme Court determined that the statute was valid under the federal government's "inherent" immigration power. *Id.* at 659, 663; *see* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons*

The Supreme Court continued interpreting plenary power as "absolute power" in a number of cases throughout the twentieth century, relying on a mix of national security and inherent authority justifications. In *Knauff v. Shaughnessy*, the Supreme Court held that an immigration regulation authorized the Attorney General to exclude a foreign wife of an American veteran husband on national security grounds without notice, a hearing, or an opportunity to respond, even though Congress had provided for the admission of such wives under the War Brides Act.[185] The Court observed that the political branches' "inherent authority" to exclude noncitizens emanated from its power to control the nation's foreign affairs.[186] Thus, during a national emergency, Congress could properly delegate that power to the President, and in so doing, it could authorize a "broad exercise" of power, even if it seemingly conflicted with a statute granting the privilege of entry.[187] In a famous encapsulation of the plenary power doctrine's vast reach at the time, the Court ruled, "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[188] Such a rule licenses Congress to define its own constraints, with a promise of nonjusticiability to boot. Unsurprisingly, this conception of due process prompted multiple dissents.

The dissenting Justices interpreted the War Brides Act not to permit the Attorney General to exclude the foreign wife of an American veteran husband without traditional due process protections.[189] Justice Frankfurter reasoned that, through the War Brides Act, Congress intended to extend the privilege of entry to the foreign brides of American veterans of World War II.[190] He found it improbable that the exclusion regulation permitted the Attorney General to exclude Knauff, considering the statute.[191] Justice Jackson invoked the avoidance canon of statutory interpretation, concluding that "Congress will have to use much more explicit language" to authorize breaking up an American citizen's family and finding "serious misconduct" by his noncitizen wife without notice, evidence, and an opportunity to be heard.[192]

Similarly, in *Shaughnessy v. United States ex rel. Mezei*, the Supreme Court upheld the permanent exclusion and indefinite detention of a noncitizen, without a hearing, based on secret information.[193] Mezei hailed from Romania and had lived for many years in Buffalo, New York, with his American citizen wife.[194]

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*from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 946 (1995) (describing *Nishimura Ekiu*).

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

[186] *Id.* For criticism of the nexus between immigration and foreign affairs as overblown, see NEUMAN, *supra* note 18, at 135.

[187] *Knauff*, 338 U.S. at 543.

[188] *Id.* at 544.

[189] *Id.* at 548–49 (Frankfurter, J., dissenting).

[190] *Id.* at 549–50.

[191] *Id.*

[192] *Id.* at 551–52 (Jackson, J., dissenting).

[193] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213 (1953).

[194] *Id.* at 208.

He left the United States to visit his dying mother in Eastern Europe and returned after nineteen months.[195] Although Mezei succeeded in obtaining a visa from Europe to travel to the United States, he was temporarily excluded upon arrival.[196] Instead of admitting Mezei, the government detained him at Ellis Island pending the Attorney General's final decision.[197] Once the Attorney General deemed him permanently excludable, again, without a hearing, and based on secret evidence, the government tried to find a third country to take him.[198] None would.[199] Accordingly, Mezei remained stranded at Ellis Island indefinitely.[200] The Court described detention powers during times of national emergency as expansive and coextensive with the power to exclude.[201] The Court determined that Mezei had broken his continuing presence in the United States, thus rendering him an excludable noncitizen rather than a returning permanent resident entitled to greater constitutional protections.[202] Notwithstanding Mezei's actual detention on U.S. soil, i.e., at Ellis Island, the Court regarded him as not yet "on the threshold," thus outside the scope of constitutional protection.[203]

The dissenters acknowledged the vast power to exclude but deemed unconstitutional Mezei's indefinite detention without procedural due process. In his stirring dissent, Justice Jackson argued that preventive detention itself did not violate substantive due process, but that indefinite detention of individuals based on future dangerousness, determined by secret evidence and without a hearing, was unconstitutional, even for an excludable noncitizen.[204] This view suggests that even excludable noncitizens might have a procedural due process right to know the basis of their continued detention, even if not a right to challenge substantive exclusion provisions.[205]

The *Knauff* and *Mezei* view of plenary power as absolute tolerates outright animus,[206] but a series of cases subsequently revealed a potential role for judicial review of substantive removal criteria. In *Harisiades*, the Court rejected First Amendment and Fifth Amendment challenges to the Alien Registration Act as applied to a long-time resident of the United States and Greek national whom the government sought to deport for past membership in the Communist

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[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.* at 209.

[199] *Mezei*, 345 U.S. at 209.

[200] *Id.* at 217 (Black, J., dissenting).

[201] *Id.* at 210.

[202] *Id.* at 214. The Court recognized these greater protections for permanent residents in *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953).

[203] *Mezei*, 345 U.S. at 212; *see also* Weisselberg, *supra* note 184, at 951 (discussing role of "entry fiction").

[204] *Mezei*, 345 U.S. at 224 (Jackson, J., dissenting).

[205] *See id.*

[206] *See id.* at 210 (majority opinion); United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950).

Party.[207] The Court ruled that the expulsion of long-time resident noncitizens, "a practice that bristles with severities," was nonetheless an important foreign policy tool "inherent in every sovereign state,"[208] and that the Court could not declare "congressional alarm" about the Communist threat "a fantasy or a pretense."[209] This language suggests, however, that were a congressional enactment to lack *any basis in fact*, judicial review might be warranted, thus distinguishing the view from an "absolute power" view.[210] Moreover, the Court held that immigration statutes are "*largely* immune from judicial inquiry or interference,"[211] suggesting the *possibility* of some judicial involvement.[212]

The opinions in *Harisiades* captured the full spectrum of the debate. In his concurring opinion, Justice Frankfurter described the exclusion power as virtually boundless:[213]

> But whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress. Courts do enforce the requirements imposed by Congress upon officials in administering immigration laws . . . and the requirement of Due Process may entail certain procedural observances . . . . But the underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens shall be allowed to stay, are for Congress exclusively to determine even though such determination may be deemed to offend American traditions and may, as has been the case, jeopardize peace.[214]

Critically, Justice Frankfurter spoke of Congress, not the President.[215] However, the Supreme Court has not always distinguished Congress and the President when discussing the federal immigration power.[216] Regardless, Justice Frankfurter's description of "crude and cruel" immigration laws[217] perfectly captures the costs of immigration deference—the potential for poor design, harsh impact, as well as animus.

In contrast, the dissenting Justices characterized the removal power as one *implied* from sovereignty, and thus, subservient to the *express* guarantees of the Fifth Amendment's Due Process Clause.[218] Expressing skepticism about the

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[207] Harisiades v. Shaughnessy, 342 U.S. 580, 596 (1952).

[208] *Id.* at 587–88.

[209] *Id.* at 590.

[210] *See id.*

[211] *Harisiades*, 342 U.S. at 580 (Frankfurter, J., concurring) (emphasis added).

[212] *See* Peter H. Schuck, Kleindienst v. Mandel: *Plenary Power v. the Professors*, *in* IMMIGRATION STORIES 186 (Peter H. Schuck & David A. Martin eds., 2005).

[213] *See Harisiades*, 342 U.S. at 596–99 (Frankfurter, J., concurring).

[214] *Id.* at 597.

[215] *See id.*

[216] *See* Mathews v. Diaz, 426 U.S. 67, 81–82 (1976) (noting that "reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization").

[217] *Harisiades*, 342 U.S. at 597 (Frankfurter, J., concurring).

[218] *Id.* at 599 (Douglas, J., dissenting).

very notion of "inherent authority," the dissent rejected the notion of a permanent taint from, in this case, past membership in the Communist Party.[219] Specifically, the dissenters rejected the majority's conclusive presumption that past membership means a person is "forever dangerous to our society."[220] The dissent specifically rejected the view of Congress's deportation power as substantively boundless, noting that absolute power would be "inconsistent with the philosophy of constitutional law which we have developed for the protection of resident aliens."[221]

Decades later, the Supreme Court articulated a much more robust, albeit still highly deferential, vision of judicial review of the Attorney General's discretionary decision to exclude a noncitizen. In *Kleindienst v. Mandel*, the Court upheld the Attorney General's decision not to waive a finding of a noncitizen's inadmissibility because the Attorney General had offered a "facially legitimate and bona fide" reason for the waiver denial.[222] In that case, Ernest Mandel, a renowned Marxist professor, had obtained a visa to speak at Stanford and other universities during a trip to the United States.[223] On previous trips, he had unwittingly violated the terms of his visa.[224] Everyone, including the Supreme Court, seemed to understand the real reason was the Attorney General's distaste for his Marxist views.[225] Even though "bona fide" can mean "genuine" and "in good faith,"[226] the Court declined to consider possible pretext.[227] Instead, it accepted the government's explanation for the denial, here that Mandel had previously violated the terms of his visas.[228] Such a reason would insulate a consular officer's decision from further scrutiny.[229]

The Supreme Court cases that discuss *Mandel* have reaffirmed the standard's limited strength. In *Fiallo v. Bell*, the Court upheld the validity of a statute that conditioned an immigration benefit on both the sex of the parent and the legitimacy of the parent-child relationship, which plaintiffs assailed as "'double-barreled' discrimination."[230] In that case, Congress made an immigration privilege available to illegitimate children of American citizen mothers or foreign mothers of illegitimate citizen children, but not to

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[219] *Id.* at 598.

[220] *Id.*

[221] *Id.*

[222] 408 U.S. 753, 770 (1972).

[223] *Id.* at 756–57.

[224] *Id.* at 758 (noting that Mandel "had engaged in activities beyond the stated purpose" during a previous trip to the United States).

[225] *See* Schuck, *supra* note 212, at 182–83 ("It did not trouble [Justice] Blackmun that [the reason given for refusing Mandel a waiver of his inadmissibility] was certainly a sham and a pretext.").

[226] *See Bona Fide*, MERRIAM-WEBSTER (2018), https://www.merriam-webster.com/dictionary/bona%20fide [https://perma.cc/QE3E-4QAB].

[227] *See Kleindienst*, 408 U.S. at 762.

[228] *Id.*

[229] *Id.*

[230] Fiallo v. Bell, 430 U.S. 787, 797 (1977).

illegitimate children of American citizen fathers or foreign fathers of illegitimate citizen children.[231] Rejecting Equal Protection and Due Process challenges, the Court ruled that Congress's plenary power in immigration law authorized its use of illegitimacy as a rough measure of the closeness of ties between fathers and illegitimate children.[232] Thus, the Court has applied the *Mandel* standard to a federal statute, albeit not in the exclusion context, and *not* simply to individual consular decisions.[233]

The Supreme Court's other discussion of *Mandel* prior to the travel ban litigation occurred in *Kerry v. Din*.[234] In that case, Din, a U.S. citizen, sought to compel an explanation for the denial of a visa to her Afghan husband, but the Court rejected Din's claim.[235] In its visa denial, the U.S. State Department cited 8 U.S.C. § 1182(a)(3)(B), which renders inadmissible any noncitizen who has engaged in terrorist activity,[236] but the explanation offered no details as to what activity her husband had engaged in or what evidence the government had considered.[237] Applying *Mandel*, Justice Kennedy's controlling opinion reasoned that Din had received a reason that was "facially legitimate and bona fide."[238] Citing a statutory basis of ineligibility constituted a "facially legitimate" reason because Congress has plenary power to define the grounds of inadmissibility, and the consular officer cited one of these grounds.[239] The citation to 8 U.S.C. § 1182(a)(3)(B) also satisfied the requirement for a "bona fide factual basis" because the statute defines factual predicates.[240] Even though the State Department had given the plaintiff in *Mandel* a much more detailed description of the basis of his visa denial, i.e., his noncompliance with the conditions of his prior visas, *Mandel* involved a provision granting the Attorney General "nearly unbridled discretion" to adjudicate waivers.[241] In contrast, the State Department had applied a statutory ground for inadmissibility in the *Din* Case.[242] Justice Kennedy also noted that Din had admitted that her husband had worked for the Taliban, which provided "at least a facial connection to terrorist

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[231] *Id.* at 798.

[232] *Id.* at 799–80. *But see* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017) (invalidating gender-based classification in immigration law on equal protection grounds without any mention of plenary power or *Fiallo*).

[233] *See Fiallo*, 430 U.S. at 799.

[234] Kerry v. Din, 135 S. Ct. 2130 (2015).

[235] *Id.* at 2131.

[236] *See id.* at 2132 (citing Immigration and Nationality Act § 212 (a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) (2012)).

[237] *Id.*

[238] *Id.* at 2140 (Kennedy, J., concurring); *see* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 590 n.15 ("We agree that Justice Kennedy's opinion sets forth the narrowest grounds for the Court's holding in *Din* and likewise recognize it as the controlling opinion.").

[239] *Id*. at 2140.

[240] *See Kerry*, 135 S. Ct. at 2140 (citing Immigration and Nationality Act § 212 (a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) (2012)).

[241] *Id.* at 2140–41 (citing Kleindienst v. Mandel, 408 U.S. 753, 769 (1972)).

[242] *Id.* at 2141.

activity."[243] Crucially, he noted that the Court lacked the authority to "look behind" the government's stated reason for denying Din's husband's visa, "[a]bsent an affirmative showing of bad faith on the part of the consular officer who denied [Din's husband] a visa," "plausibly alleged with sufficient particularity."[244] Notably absent from *Mandel*, *Fiallo*, and *Din* was any direct evidence of government animus.

### C. *Plenary Power and Equal Protection*

Modern plenary power doctrine has receded with respect to procedural due process, and to some extent, equal protection. Specifically, the Supreme Court has applied equal protection's rational basis review to federal alienage classifications.[245] However, beyond these settings, courts have avoided issuing explicitly constitutional decisions announcing the scope of immigrants' rights.[246] In particular, courts evaluating noncitizens' equal protection challenges to immigration laws (as opposed to non-immigration laws that distinguish on the basis of alienage) have relied on the constitutional avoidance canon to interpret the relevant statutes or regulations as not authorizing discrimination.[247] For example, in *Jean v. Nelson*, a class of Haitian asylum seekers challenged the practice of the Immigration and Nationality Service (INS) to detain all arriving Haitians.[248] The asylum seekers asserted a range of claims, statutory and constitutional,[249] including that the INS's implementation of the parole regulation violated the Equal Protection Clause.[250] The district court granted the asylum seekers' statutory claim,[251] and the Eleventh Circuit affirmed on constitutional grounds.[252] Rehearing the case en banc, the Eleventh Circuit determined that the Fifth Amendment's guarantee of Due Process did not apply to "unadmitted" noncitizens, considering the government's plenary

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[243] *Id.*

[244] *Id.*

[245] In *Mathews v. Diaz*, the Supreme Court upheld a statute making a public supplemental medical insurance program available to citizens and only some noncitizens, namely, those who had resided in the United States for at least five years. 426 U.S. 67, 87 (1976). Finding the statutory provision "unquestionably reasonable," the Court dismissed plaintiffs' equal protection challenge, which had alleged invidious discrimination based on alienage. *Id.* at 83. *Diaz* confirmed the political branches' flexibility to distinguish between citizens and noncitizens, and further, among different classes of noncitizens, for purposes of distributing benefits. *Id.* at 81. But it also confirmed the applicability of rational basis review to such distinctions. *Id.* at 83.

[246] Motomura, *supra* note 47, at 573.

[247] *Id.*

[248] Jean v. Nelson, 472 U.S. 846, 849 (1985).

[249] *Id.*

[250] *Id.* at 849.

[251] *Id.* at 850.

[252] *Id.* at 851.

authority to control its borders.[253] Upon review, the Supreme Court determined that the INS parole regulations did not authorize race or national origin discrimination, thus obviating the need to reach the constitutional question.[254] Instead, the Court vacated the Eleventh Circuit's decision and remanded to the district court to consider whether INS officers were in fact honoring the regulation's race neutrality.[255] In dissent, Justices Marshall and Brennan decried the majority's failure to provide a constitutional remedy.[256] The dissent further rejected broad dicta from *Mezei* suggesting that "an undocumented alien detained at the border does not enjoy *any* constitutional protections," noting that this dicta "can withstand neither the weight of logic nor that of principle, and has never been incorporated into the fabric of our constitutional jurisprudence."[257]

Other cases have indicated, without expressly holding, that noncitizens lack constitutional protection from selective enforcement. In *Reno v. American-Arab Anti-Discrimination Committee*, for example, noncitizens sought to enjoin deportation proceedings against them because the Attorney General had allegedly targeted them for deportation due to their political affiliation with the Popular Front for the Liberation of Palestine.[258] Such targeting, they claimed, violated their First and Fifth Amendment rights.[259] While the Attorney General was appealing the district court's grant of an injunction to the noncitizens, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), which stripped the federal courts of jurisdiction to review a range of decisions by the Attorney General.[260] The Supreme Court decided that the federal courts lacked jurisdiction over the selective enforcement claim.[261] Moreover, Justice Scalia noted that selective enforcement claims are especially rare and weak because they "invade a special province of the Executive—its prosecutorial discretion."[262] In dicta, the Court denied that noncitizens had any constitutional right to assert a selective enforcement claim, emphasizing the importance of Executive discretion in this realm and the "less compelling" interests of noncitizens who are deportable regardless.[263] However, Justice Scalia reserved judgment on "the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing

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[253] *Id.* at 852.

[254] *Jean*, 472 U.S. at 857.

[255] *Id.* at 857.

[256] *Id.* at 858 (Marshall, J., dissenting).

[257] *Id*. at 868 n.69.

[258] Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 473 (1999); *see also* Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237, 1266 (2016) (discussing *Am.-Arab Anti-Discrimination Comm.*).

[259] *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 474.

[260] *Id.* at 475.

[261] *Id.* at 476, 492.

[262] *Id.* at 489.

[263] *Id.* at 491.

considerations can be overcome."[264] Thus, although noncitizens generally have no constitutional right against selective enforcement, it remains an open question whether noncitizens with direct evidence of animus might persuade the federal courts to intervene.

Plaintiffs lacking direct evidence of animus continued to fail in challenging immigration regulations on equal protection grounds after the attacks against the United States on September 11, 2001. Pursuant to 8 U.S.C. § 1303(a), the Department of Homeland Security (DHS) instituted the National Security Entry-Exit Registration System (NSEERS) for male noncitizens from specified countries, almost all Muslim or Arab.[265] Those found not in compliance with existing immigration laws were placed in deportation proceedings.[266] Civil liberties groups challenged NSEERS, but no court invalidated the program.[267] In *Rajah v. Mukasey*, the Second Circuit rejected petitioners' equal protection claim specifically.[268] The court recognized the political branches' broad power in immigration and noted that only rational basis review applied to the special registration regulation.[269] Considering the national security threat that 9/11 revealed, the government could rationally require foreign nationals, Muslim and non-Muslim, from majority-Muslim countries to register without offending the Constitution.[270] The NSEERS challengers, however, lacked direct evidence of animus, and the regulation's mere focus on foreign nationals from Muslim or Arab countries failed to support an inference of that form of hostility.[271]

Despite numerous failed equal protection challenges to immigration laws, and the Supreme Court's "green light" to animus-based exclusion policy in its initial resolution of the travel ban litigation,[272] the proper framework for analyzing plenary power and animus requires greater clarification. Accordingly,

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[264] *Id*.

[265] Immigration and Nationality Act § 263(a), 8 U.S.C. § 1303(a) (2012); *see also* Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law?*, 66 EMORY L.J. 669, 692 (2017); *see also* PENN STATE LAW RIGHTS WORKING GRP., *supra* note 95 (discussing the effects of NSEERS).

[266] *See* Kareem Shora & Shoba Sivaprasad Wadhia, *NSEERS: The Consequences of America's Efforts to Secure Its Borders*, AM.-ARAB ANTI-DISCRIMINATION COMM. 11 (Mar. 31, 2009), http://www.adc.org/wp-content/uploads/2016/12/NSEERS-ADC-Report.pdf [https://perma.cc/8QVK-N2NK].

[267] Rajah v. Mukasey, 544 F.3d 427, 448 (2d Cir. 2008); Kandamar v. Gonzales, 464 F.3d 65, 73 (1st Cir. 2006) (listing all cases rejecting constitutional challenges to NSEERS).

[268] *Rajah*, 544 F.3d at 438 n.39.

[269] *Id.*

[270] *Id.*

[271] *Id.* at 438 (describing how the Second Circuit "agree[d] that a selective prosecution based on an animus of that kind would call for some remedy," but then found no such animus in the instant case).

[272] Adam Serwer, *The Supreme Court's Green Light to Discriminate*, THE ATLANTIC (June 26, 2018), https://www.theatlantic.com/politics/archive/2018/06/the-supreme-courts-green-light-to-discriminate/563756/ [https://perma.cc/MQ2W-2NNQ].

it becomes important to assess what benefits deference brings and what costs it imposes.

### D. *The Costs and Benefits of Plenary Power Deference*

Deference in the immigration context has specific costs and benefits. It grants the President flexibility to respond to international events,[273] but it also promotes lazy, imprecise policies, including policies based on stereotypes rather than evidence.[274] While defenders of plenary power deference regard these policies as valuable "rough-hewn" measures,[275] others decry their harsh, often unjust results.[276] Consider, now, the principal benefits and costs of deference to the President's exclusion of noncitizens.

The most celebrated benefit of immigration deference is the flexibility it grants the political branches to conduct foreign affairs and respond to international developments.[277] Under the traditional understanding of plenary power deference, the political branches may use immigration restrictions as tools for conducting foreign affairs.[278] As noted above, Congress has delegated exclusion power to the President,[279] and the President has used this power at various points over the last several decades to impose a targeted suspension on entry of people who had engaged in specific proscribed conduct.[280] Even outside of the exclusion context, examples of "productive" executive deference abound. President Carter used his authority under INA § 215 (8 U.S.C. § 1185) to recall Iranian students during the hostage crisis at the American embassy in Tehran.[281] Under the circumstances, no matter how tenuous the link between recalling Iranian students and pressuring the Iranians holding Americans as hostages, the President's use of this authority was widely viewed as a justified, useful "rough-hewn" measure.[282] For reasons echoing the political question doctrine, courts

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[273] Martin, *supra* note 13, at 33.

[274] *See generally* Demore v. Kim, 538 U.S. 510, 516–17 (2003) (noting a circuit split and respondent's challenge to statutory framework mandating detention of certain immigrants without bail); Taylor, *supra* note 23, at 361–63.

[275] *See* Martin, *supra* note 13, at 47.

[276] *See* Cleveland, *supra* note 22, at 14–15 (noting that the doctrine's origins "lie in a peculiarly unattractive, late-nineteenth-century nationalist and racist view of American society and federal power").

[277] Martin, *supra* note 13, at 42.

[278] *Id.*

[279] *See* Immigration and Nationality Act § 212(f), 8 U.S.C. § 1182(f) (2018).

[280] Manuel, *supra* note 44, at 6–10 (listing the instances where presidents have exercised the exclusion power pursuant to INA § 212(f) over the past several decades).

[281] *See* Narenji v. Civiletti, 617 F.2d 745, 746–47 (D.C. Cir. 1979); Manuel, *supra* note 44, at 11; Martin, *supra* note 13, at 42–43.

[282] *See* Martin, *supra* note 13, at 42–44, 47 (discussing why immigration deference was necessary in the Iranian hostage crisis and noting that "rough-hewn actions that initially seem outsized or individually unfair might need to be in the mix to respond to, or to help shape, actions that others are taking abroad").

typically decline to disturb Congress's choice of exclusion and removal criteria or the President's exercise of power delegated under the INA, and this allows the political branches to use immigration restrictions as tools in conducting foreign affairs.[283]

Granting the President and Congress such latitude, however, comes at a cost. It enables the political branches to promulgate inefficient policies based on lazy thinking. In *Demore v. Kim*, for example, the Supreme Court recognized Congress's substantial discretion to manage the removal of noncitizens.[284] The question before the Court was the constitutionality of mandatory detention without individualized bond hearings to consider the traditional criteria for civil detention, namely, dangerousness and flight risk.[285] Instead of providing for the hearings, Congress essentially *presumed* all removable noncitizens with certain criminal convictions to be dangerous or flight risks.[286] Invoking the plenary power doctrine, the Court upheld the mandatory detention statute as applied to legal permanent residents, citing the latitude Congress enjoys in the immigration context.[287] The Court explicitly stated that when it comes to immigrants, Congress can legislate less precisely, thus tolerating inefficiency, waste, and loosely-justified legislation.[288]

The NSEERS special registration program, discussed above, also illustrates the costs of executive discretion. The program targeted men from Arab and

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[283] *See Narenji*, 617 F.2d at 748 (finding that President's regulation requiring Iranian students to report to the INS to review compliance with terms of their non-immigrant visas was squarely within his judgment within the "field of foreign policy"). Given the President's otherwise expansive authority in foreign affairs and associated expertise, the President is entrusted to make sensitive calculations and judgment calls that balance a range of domestic and foreign policy interests. Courts are not suited for this job. *Id.*; *cf.* Louis Fisher, The Law*: Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRESIDENTIAL STUD. Q. 139, 139–40 (2007) (noting that Chief Justice John Marshall had once referred to the President as a "sole organ" for conducting foreign affairs, which the Supreme Court later invoked erroneously to support a "plenary, exclusive, and inherent authority" of the President in waging war as Commander-in-Chief).

[284] Demore v. Kim, 538 U.S. 510, 521–22 (2003) (citing Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)).

[285] *Id.* at 527–28.

[286] *See id.* at 528.

[287] *Id.* at 521–22 ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976))).

[288] *See id.*; Taylor, *supra* note 23, at 361–63. Another example of costly Executive discretion is President Obama's decision to detain large numbers of Central American migrant children to deter future child migrants. While this effort was lauded by some as an appropriate measure to control migration pressure, see Martin, *supra* note 13, at 46, others characterized it as a humanitarian crisis. *See* Johnathon Hiskey et al., *Understanding the Central American Refugee Crisis: Why They Are Fleeing and How U.S. Policies Are Failing to Deter Them*, AM. IMMIGR. COUNCIL (Feb. 1, 2016), https://www.americanimmigration council.org/research/understanding-central-american-refugee-crisis [https://perma.cc/LG K3-U8Z2].

predominantly Muslim countries, later adding North Korea as a "fig leaf."[289] It focused on men based on the demographics of the 9/11 hijackers, thereby implementing a national racial profiling policy.[290] This produced lasting harm to families and communities.[291] For example, the program separated family members from deported male relatives, often the primary income-earners, thus subjecting the remaining family members to considerable hardship or even homelessness.[292] Moreover, serious questions arose about the efficacy of the program, as studies show it produced not a single terrorism-related conviction, although the Bush Administration maintained that information about the program was "classified" and that NSEERS had helped identify nearly a dozen "terrorism suspects."[293]

Thus, deference to the President in immigration matters imposes costs as well as benefits on society. When confronted with presidential animus, such as that associated with President Trump's travel bans,[294] courts must consider how to capture the benefits of deference—the legitimate functions of presidential discretion in matters relating to foreign affairs—while minimizing the costs, namely animus-laced policies doing serious injustice.

## IV. THE IMPACT OF ANIMUS: EQUAL PROTECTION, RELIGION CLAUSES, AND VINDICTIVE PROSECUTION

Forbidden government intent encompasses racial and religious animus and takes a variety of forms.[295] Courts routinely determine what effect direct evidence of animus should have, but they rarely consider its effect when they owe special deference to a decisionmaker expressing animus. This Part defines "animus" and describes how courts analyze animus under the Equal Protection Clause incorporated into the Fifth Amendment and the religion clauses of the First Amendment.[296] It then considers the doctrine of prosecutorial discretion as an analogy to plenary power deference. It focuses specifically on the claim of vindictive prosecution, a claim based on due process that allows a criminal defendant to seek dismissal of charges brought by a prosecutor due to animus. Current jurisprudence shows that, once a criminal defendant proffers direct evidence of animus, the prosecutor must then prove that animus was not

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[289] Wadhia, *supra* note 265, at 692. North Korea's function as a "fig leaf" continues, as the Trump Administration added it to the list of banned countries in the third iteration of the travel ban. PENN STATE LAW RIGHTS WORKING GRP., *supra* note 95, at 37 n.5.

[290] PENN STATE LAW RIGHTS WORKING GRP., *supra* note 95, at 6, 9.

[291] *Id.* at 5–6.

[292] *Id.* at 24.

[293] *Id.* at 31.

[294] *See* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 594–95 (4th Cir. 2017).

[295] Fallon, *supra* note 115, at 554–58.

[296] U.S. CONST. amends. I, V.

necessary to the decision to bring charges.[297] In other words, the prosecutor must prove that animus was not a "but-for" cause of the charges. Vindictive prosecution offers a compelling analogy to claims of presidential animus in immigration law because it contains two crucial elements: a deference or discretion doctrine and direct evidence of animus.[298] On this analogy, even a decisionmaker with tremendous discretion and authority is nonetheless accountable for improper motive. By analogy to vindictive prosecution, courts confronting claims of discriminatory exclusion due to presidential animus should similarly adopt a mixed motives framework using a "but-for" motive standard.

## A. *The Equal Protection Backdrop*

Equal protection jurisprudence allows a court to invalidate a facially neutral law if a forbidden government intent, such as racial animus, is a motivating factor.[299] Although scholars have persuasively argued for refocusing judicial attention toward substantive norms and away from lawmakers' subjective motives or biases,[300] existing precedent allows courts to consider animus and call lawmakers to account when it appears.

### 1. *Defining "Animus"*

Animus generally means "a usually prejudiced and often spiteful or malevolent ill will."[301] The concept encompasses hostility, rivalry, opposition, and antipathy.[302] In the equal protection context, the Supreme Court has interpreted "animus" to mean a "desire to harm," the existence of private bias, or fear based on stereotypes.[303] Animus may also appear as "expressing an

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[297] *See, e.g.*, United States. v. Jarrett, 447 F.3d 520, 525 (7th Cir. 2006); United States v. Wilson, 262 F.3d 305, 314–15 (4th Cir. 2001).

[298] Although the President's power to remove a noncitizen already here, rather than excluding a noncitizen who has not yet effectuated an entry, is a stronger analogy to vindictive prosecution, both prosecutorial discretion and plenary exclusion power are associated with well-established deference doctrines. My purpose is to understand how courts treat animus in the context of deference, and the vindictive prosecution analogy serves this purpose.

[299] *See generally* Hunter v. Underwood, 471 U.S. 222, 222 (1985) (holding that a facially neutral provision in the Alabama constitution disenfranchised and discriminated against blacks).

[300] Fallon, *supra* note 115, at 529. *But see* Michael C. Dorf, *Even a Dog: A Response to Professor Fallon*, 130 HARV. L. REV. F. 86, 94 (Dec. 9, 2016) (arguing for caution in adopting Fallon's proposal due to "sweeping" effect of rejecting the doctrine of double effect on areas such as criminal law, tort law, and anti-discrimination law).

[301] *Animus*, MERRIAM-WEBSTER (2018), https://www.merriam-webster.com/dictionary/animus [https://perma.cc/N894-S3BS].

[302] *Id.*

[303] Pollvogt, *supra* note 152, at 901–08.

ideology of white supremacy."[304] Professor William Araiza links the concept of "animus" to the classic problem of factionalism, which manifested in the nineteenth century as "class legislation," or legislation passed to achieve private rather than public ends.[305] Professor Araiza has also persuasively linked animus to subordination, understood as the burdening of a group without a "plausible public-welfare justification."[306] The concept of dignity further clarifies the meaning of animus, for a "common feature of the animus cases is that they feature [a] denial of equal human status."[307] As for the effects of animus, its presence is generally the only reason for which a law will fail rational basis review.[308]

Scholars have lamented the courts' failure to define animus, what constitutes evidence of animus, and what impact a finding of animus will have on a legal challenge.[309] The concept, in short, is radically "undertheorized."[310] The United States' history of race-based slavery, wartime detention, and nativism makes racial animus a core concern of the federal courts,[311] but research also suggests that animus can have a detrimental effect on social function in the present day.[312] When a law embodies or implements animus, it stands to impede social function.[313] Thus, while constitutional jurisprudence does not clearly define animus and its effects, the concept remains important, and a finding of animus can lead a court to invalidate a law.

### 2. *The Impact of Animus on a Facially Neutral Law*

Noncitizens within the United States are entitled to equal protection of the laws, and evidence that government officials are applying a facially neutral law in a racially discriminatory way may lead to its invalidation. In *Yick Wo v. Hopkins*, the Supreme Court held that a facially neutral municipal ordinance

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[304] *Id.* at 915–17 (discussing Loving v. Virginia, 388 U.S. 1, 11–12 (1967)).

[305] *See* WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 14–24 (2017).

[306] *See id.* at 167.

[307] *Id.* at 171.

[308] *See* Pollvogt, *supra* note 152, at 889.

[309] *See* Araiza, *supra* note 305, at 118–19 (discussing scholars' efforts to construe the Court's animus jurisprudence).

[310] *Id.* at 74.

[311] *See* Pollvogt, *supra* note 152, at 916 (discussing Loving v. Virginia and noting the Court's emphasis on the antimiscegenation law's "origin in the institution of slavery and in notions of racial integrity and nativism" (citing Loving v. Virginia, 388 U.S. 1, 6 (1967))).

[312] I thank Richard Delgado for raising this point. *See* JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY 3–4 (1970).

[313] *See generally* KOVEL, *supra* note 313, at 225 (discussing how racism, which "served a stabilizing function in American culture for many generations," is now incompatible with current ideals and with "advanced industrial life"); Pollvogt, *supra* note 152, at 907 (noting that "laws based on animus . . . function to express and enforce private bias against a particular social group, regardless of whether that bias itself is widely held or based in moral or religious considerations.").

regulating laundries in San Francisco violated equal protection because administrators enforced the law in a manner that discriminated against Chinese immigrants.[314] In that case, 200 Chinese immigrants had been denied licenses to operate laundries, despite satisfying all relevant criteria, while eighty similarly situated non-Chinese persons had successfully obtained laundry licenses.[315] The city admitted that it denied the licenses based on race. The Court held:

> No reason for [the denial of licenses to Chinese applicants] is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution.[316]

*Yick Wo* demonstrates noncitizens' entitlement to equal protection while present in the United States, but it also demonstrates that animus can doom the application of a facially neutral law when racial animus is the sole motive for the challenged application.[317]

Equal protection applies to immigrants within the United States, but equal protection challenges to *immigration laws* are rarely successful. The federal government's alienage classifications receive rational basis scrutiny, which means the government wins if it has a merely rational basis for the classification.[318] Similarly, the federal government has latitude to make distinctions among noncitizens based on national origin, especially in connection with admission and removal.[319] For example, when the Supreme Court first articulated the plenary power doctrine in *Chae Chan Ping*, it declined to review the explicitly racist Chinese Exclusion Act.[320] As noted earlier, however, the Equal Protection Clause did not yet apply to the federal government, and thus, there was no basis for subjecting any federal law to such scrutiny, let alone an *immigration* law.[321]

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[314] Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886).

[315] *Id.* at 359; *see also* Charles J. McClain, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA 11617 (1994) (describing laundry litigation).

[316] *Yick Wo*, 118 U.S. at 374.

[317] *See* Fallon, *supra* note 115, at 551. *Yick Wo* presents a rare case in which government officials simply offered no legitimate purpose for the disparate enforcement of the challenged law. 118 U.S. at 374.

[318] Mathews v. Diaz, 426 U.S. 67, 81–84 (1976).

[319] *See* Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979).

[320] Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581, 606–07 (1889).

[321] *See supra* Part I.

Outside of immigration law, a line of cases provides for a robust "rational basis" review where a law embodies animus toward an unpopular group.[322] In cases like *U.S. Department of Agriculture v. Moreno*,[323] *City of Cleburne v. Cleburne Living Center*,[324] *Romer v. Evans*,[325] and *United States v. Windsor*,[326] the Supreme Court applied rational basis review to invalidate laws or decisions that exhibited "a bare . . . desire to harm a politically unpopular group."[327] These cases, too, involved laws passed or decisions taken due to purportedly legitimate considerations; but evidence of animus gave the court latitude to perform a more searching review to determine the *real* reason for the challenged law or decision.[328] In these cases, the courts imposed an evidentiary burden on defendants to prove their motives rather than merely resting on hypothesized purposes.[329]

Outside of these core "animus" cases, analysis of discriminatory intent[330] in equal protection has spawned a variety of tests for invalidity. Initially, the Court

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[322] U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 535, 538 (1973).

[323] *Id.* at 537–38 (holding that where Congress sought to preclude "hippies" living in communes from accessing the food stamps program, a distinction between married and unmarried households did not rationally further Congress's anti-fraud goal, but instead, embodied animus against an unpopular group); *see* Araiza, *supra* note 305, at 29–30.

[324] City of Clerburne v. Clerburne Living Ctr., 473 U.S. 432, 448 (1985) (holding that a city violated equal protection by requiring that a proposed home for the intellectually disabled obtain a special permit not required of other "multiple-dwelling facilities").

[325] Romer v. Evans, 517 U.S. 620, 635 (1996) (holding that, where Colorado voters amended the state constitution to preclude gay and lesbian persons from claiming protection under anti-discrimination laws, the amendment had made gays and lesbians "a stranger to its laws").

[326] United States v. Windsor, 570 U.S. 744, 746 (2013) (finding that the Defense of Marriage Act was motived by impermissible animus because its "principal effect [was] to identify a subset of state-sanctioned marriages and make them unequal").

[327] *See, e.g.*, *id.* at 2693.

[328] *Id.*; *see* ARAIZA, *supra* note 305, at 142–43. A separate area of equal protection jurisprudence suggests that the Equal Protection Clause's prohibition on discrimination against a "class-of-one" is not implicated in every case involving animus. However, the animus in these cases resembles a personal vendetta and does not encompass racial or religious animus. In *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000), the Supreme Court recognized so-called "class-of-one" equal protection claims, wherein individuals could challenge irrational disparate treatment, not based on their identity as members of a protected *class*, but simply as individuals. The Supreme Court held in *Olech* that a plaintiff asserting a class-of-one claim need not prove animus. In his concurring opinion, Justice Breyer noted that Olech had pleaded an "extra factor," which the appeals court had termed "vindictive action" or "illegitimate animus." *Id.* at 565–66 (Breyer, J., concurring). In *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 609 (2008), the Court clarified that animus is not only unnecessary, but also insufficient. *See* William D. Araiza, *Flunking the Class-of-One/Failing Equal Protection*, 55 WM. & MARY L. REV. 435, 466–67 (2013).

[329] *See* ARAIZA, *supra* note 305, at 125.

[330] I am not suggesting that "discriminatory intent" is synonymous with "animus," but that the doctrinal framework for analyzing discriminatory intent is ultimately useful for

established a "but-for" test for racial discrimination cases. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court ruled that a plaintiff could prevail on an equal protection claim by proving that racial animus was a "but-for" cause of the challenged decision.[331] In that case, plaintiffs petitioned to rezone a tract of land in the Village of Arlington Heights to build affordable housing, which black families primarily would inhabit.[332] After a series of public meetings, where at least some members of the public espoused concern about black families moving in, the Village Plan Commission ("Village") denied the petition to rezone, and plaintiffs sued, arguing that the Village denied the petition to prevent black families from moving into the area in question.[333] The district court denied relief, but the court of appeals reversed in part. On review, the Supreme Court determined that an improper motive alone would not invalidate a decision or law.[334] Instead, in a case of mixed motives, the plaintiffs would have to show that the same decision would not have been made but-for the racially discriminatory purpose.[335] Lacking direct evidence of Village officials' racial animus, plaintiffs could not overcome the Village's race-neutral reason for denying the rezoning petition, namely that the area had always been zoned for single family homes.[336]

The Supreme Court has also suggested that an improper racially discriminatory purpose automatically taints a facially neutral law.[337] In *Hunter v. Underwood*, the Supreme Court invalidated Article VIII, § 182 of the Alabama Constitution of 1901, which excluded persons convicted of crimes involving "moral turpitude" from voting in state elections.[338] The record revealed that delegates to Alabama's Constitutional Convention of 1901 convened for the purpose of establishing "'white supremacy" 'within the limits

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analyzing "animus." *See* Araiza, *supra* note 305, at 130–31 (describing discriminatory intent as *analogous* to animus).

[331] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 n.21 (1977); Fallon, *supra* note 115, at 555–56 (describing "but-for" standard articulated in *Arlington Heights*).

[332] *Arlington Heights*, 492 U.S. at 257.

[333] *Id.* at 257–59.

[334] *Id.* at 270–71 n.21.

[335] *Id.* Professor Richard Fallon has argued that this "misunderstands the relevant constitutional question." Fallon, *supra* note 115, at 579. Rather than inquiring whether the same law would have been passed regardless of forbidden motive, the question is "whether a court should defer to the legislature's judgment that a challenged statute comports with constitutional norms." *Id*. His conclusion that a breach of deliberative obligations should end deference appears to support the lower courts' suspension of plenary power deference upon a showing of animus, but it does not grapple with the special case of executive deference in immigration law.

[336] *Arlington Heights*, 429 U.S. at 270.

[337] *See* Hunter v. Underwood, 471 U.S. 222, 231–32 (1985); Verstein, *supra* note 36, at 1144.

[338] 471 U.S. at 223.

imposed by the Federal Constitution.'"[339] In litigation, however, the state argued that the purpose of the challenged provision "was to prevent the resurgence of Populism by disenfranchising practically all of the blacks and a large number of [poor] whites."[340] The Court relied heavily on the Court of Appeals' determination that "there could be no finding that there was a competing permissible intent for the enactment of § 182."[341] As Professor Andrew Verstein has explained, rather than remanding to the trial court to determine the relative strengths of the two stated purposes, i.e., whether the desire to reduce the black voting population was truly a "but-for" motive for the provision, the Supreme Court concluded that the permissible purpose of disenfranchising poor whites "would not render nugatory" the improper purpose of discriminating against blacks.[342] Thus, the Supreme Court purported to apply a "but-for" test but actually appeared to find the racist taint of anti-black discrimination insurmountable.[343]

When the government invokes national security, however, the Court has taken a different approach. *Korematsu v. United States* offers insight into the dilemma of judges evaluating racially discriminatory laws peddled on national security grounds. In that case, the petitioner, Fred Toyosaburo Korematsu, sought to vacate his conviction for violating a civilian exclusion order that applied during World War II only to individuals of Japanese ancestry, including American citizens such as petitioner himself.[344] The majority noted that facially discriminatory laws, such as the executive orders at issue, were subject to "the most rigid scrutiny," in keeping with equal protection jurisprudence.[345] Nonetheless, the majority upheld petitioner's conviction and the underlying orders on account of "the real military dangers which were presented."[346] In their view, national security concerns—even if formulated vaguely as race-based suspicion of disloyalty—justified a facially discriminatory internment law.

In dissent, Justice Murphy described military discretion as broad, but not unlimited, and noted that laws based on pleas of military necessity can only be justified on the grounds of "a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger."[347] In the instant case,

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[339] *Id.* at 229 (quoting 1 Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to Sept. 3rd, 1901, at 8 (1940)).

[340] *Id.* at 230 (quoting Cross-Examination of Dr. J. Mills Thornton, 4 Record 73–74, 80–81).

[341] *Id.* at 225.

[342] *See* Verstein, *supra* note 36, at 1144; *Hunter*, 471 U.S. at 232.

[343] *See* Verstein, *supra* note 36, at 1144.

[344] Korematsu v. United States, 323 U.S. 214, 216 (1944), *overruled by* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

[345] *Id.*

[346] *Id.* at 223.

[347] *Id.* at 234 (Murphy, J., dissenting).

Justice Murphy decried the government's reliance on "questionable racial and sociological grounds not ordinarily within the realm of expert military judgment," such as claims that those individuals of Japanese ancestry performed "emperor-worship ceremonies" and the existence of Japanese language schools suggested "group disloyalty."[348] Further, the government's failure to provide individualized investigations and hearings on loyalty—procedures used for people of German or Italian descent—underscored the impermissible racial discrimination motivating the exclusion orders.[349] In his famous dissent, Justice Jackson acknowledged the judiciary's limited competence to review military decisions, which are often based on secret evidence and unproven assumptions.[350] He noted that courts often have access only to reports of questionable credibility and "unsworn, self-serving" statements by military officials.[351] Thus, courts must necessarily accept "the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint."[352] By reviewing and approving of the contested orders, however, the Court risks transforming a "passing incident" into "the doctrine of the Constitution."[353] Although the majority appeared to regard *Korematsu* as a mixed motives case, where both racial prejudice and national security played a role, the dissent saw it as a "sole motive" case, one in which individuals of Japanese ancestry were interned "solely" because of their race.[354] In its travel ban decision, the Supreme Court announced that *Korematsu* "was overruled" but failed to admit that the government had justified the orders at issue there, too, on national security grounds.[355]

## B. *Religious Discrimination*

The First Amendment's religion clauses also support invalidation of laws motivated by animus toward an unpopular religious group, and the Supreme Court in this setting appears to use the "any" motive standard rather than the "but-for" motive standard.[356] In relevant part, the First Amendment states: "Congress shall make no law respecting an establishment of religion, or

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[348] *Id.* at 236–37.

[349] *Id*. at 241.

[350] *Korematsu*, 323 U.S. at 245 (Jackson, J., dissenting).

[351] *Id.*

[352] *Id.*

[353] *Id.* at 246.

[354] *Id.* at 226 (Roberts, J. dissenting).

[355] *See* Joseph Fishkin, *Why Was Korematsu Wrong?*, BALKINIZATION (June 26, 2018), https://balkin.blogspot.com/2018/06/why-was-korematsu-wrong.html [https://perma.cc/92VU-K3VK]; *see also* Anil Kalhan, Trump v. Hawaii *and Chief Justice Roberts's "Korematsu Overruled" Parlor Trick*, ACS BLOG (June 29, 2018), https://www.acslaw.org/acsblog/trump-v-hawaii-and-chief-justice-roberts's-"korematsu-overruled"-parlor-trick [https://perma.cc/39V4-PT24].

[356] *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

prohibiting the free exercise thereof."[357] In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court considered the validity of a city ordinance that banned the ritual slaughter of animals.[358] Members of a church practicing the Santeria faith, for which animal sacrifice is a central practice, challenged the ordinance as a violation of the First Amendment.[359] The Court found the ordinances facially neutral, references to "ritual" notwithstanding, but it determined that the purpose and effect of the law was to suppress "the central element of the Santeria worship service."[360] Drawing on equal protection jurisprudence, the Court determined that the city had adopted the challenged ordinances "because of" rather than "in spite of" of the impact on Santeria religious practice.[361] In particular, the Court found the record to reveal abundant evidence of lawmakers' hostility to Santeria.[362] In contrast, compliance with the Free Exercise Clause requires lawmakers to ensure that their "sole reasons for imposing the burdens of law and regulation are secular."[363] As a result, the Court invalidated the ordinance and appeared to use the rigorous "any" motive standard to police laws burdening religious practice.[364]

Analysis of Establishment Clause claims similarly turns on a purpose inquiry.[365] In *McCreary County v. ACLU of Kentucky*, the Supreme Court affirmed a preliminary injunction against a Ten Commandments display in various county courthouses in Kentucky.[366] The Court reaffirmed the centrality of the purpose inquiry and determined that secular purposes articulated as litigation positions could not negate an apparent predominantly religious purpose.[367] Holding that the Establishment Clause demands "governmental neutrality between religion and religion, and between religion and nonreligion,"[368] the Court ruled that support was "ample" for the district court's finding that the Ten Commandments display had a predominantly religious purpose, post-hoc secular explanations notwithstanding.[369] Ultimately, the religious discrimination jurisprudence stands out for the central role of objective purpose in determining the validity of official acts. *Church of Lukumi* also suggests that lawmakers' animus toward an unpopular religion may contribute

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[357] U.S. CONST. amend. I.
[358] *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 524, 526.
[359] *Id.* at 523–25.
[360] *Id.* at 534.
[361] *Id.* at 540–41.
[362] *Id.* at 541.
[363] *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 547.
[364] *Id*. at 546.
[365] McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 850 (2005); Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).
[366] 545 U.S. at 881.
[367] *Id.* at 871.
[368] *Id.* at 860.
[369] *Id.* at 881.

to a court's decision to invalidate a facially neutral law.[370] Although the Court's language varies, and setting aside potentially important distinctions between "purpose" and "motive,"[371] it appears that the Court uses a motive standard intolerant of any quantum of animus.[372] However, this jurisprudence does not offer guidance regarding the effect of plenary power deference on the analysis of animus.[373]

### C. *Animus and Prosecutorial Discretion: Vindictive Prosecution*

Mainstream constitutional law offers some guidance on the impact of animus on a facially neutral law, but it does not address the impact of a deference doctrine like immigration's plenary power. Analogies are hard to find because so rarely are officials granted as much discretion as the President in exercising his statutory authority under 8 U.S.C. § 1182(f). A useful analogy, however, appears in the context of criminal prosecution. Similar to the President identifying classes of noncitizens for exclusion, prosecutors have broad latitude to bring charges.[374] Courts seldom interfere in those decisions, instead giving deference to executive judgments in both settings.[375] Nonetheless, the presence of animus triggers a role for the courts in both settings. Specifically, in criminal law, the doctrine known as "vindictive prosecution"[376] provides a cause of

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[370] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993); *see also* Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problem of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 30 (1993) (arguing that "[w]hat made the city's action [in Babalu Aye] violate the First Amendment was that it *in fact* targeted, and punished, only those animal sacrifices which were religious in character," not merely that the city "set out" to do so). This confirms doctrine holding that, discriminatory purpose alone, without discriminatory effects, is not actionable in such a case.

[371] See Fallon, *supra* note 115, at 531.

[372] The Court reaffirmed this intolerance for government officials' disparagement of an individual's religious beliefs s in its recent decision in Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729 (2018) (cataloguing commission's "hostility" toward baker Jack Phillips' "sincere religious beliefs").

[373] Scholars and jurists have observed that the Establishment Clause is typically applied in cases dealing directly with religious beliefs or practices, or with conduct supporting religious institutions, and they have questioned the propriety of extending the Establishment Clause to the different context of the travel ban. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018) (discussing how the application of the Establishment Clause here is different from the "conventional" Establishment Clause case). Nonetheless, the Supreme Court considered the Establishment Clause but selected a motive standard much more tolerant of animus. I thank Peter Margulies for raising this point.

[374] *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996).

[375] *See, e.g.*, *id.*

[376] *See* United States v. Goodwin, 457 U.S. 368, 373, 377 (1982) (describing Court's presumption of prosecutorial vindictiveness when "action detrimental to the defendant has been taken after the exercise of a legal right"). For an example of alleged vindictive prosecution with an immigration nexus, see Paul Elias, *Garcia Zarate Gets Time Served for Gun Charge in Kate Steinle Shooting Death Case*, NBC BAY AREA (Jan. 5, 2018),

action for individuals prosecuted out of animus. Although the analogy of vindictive prosecution to plenary power in exclusion is weaker than the analogy to the President's discretion in the realm of removal,[377] the analogy remains useful because vindictive prosecution includes both a highly discretionary decision (whether to bring charges), one typically entitled to deference, and allegations of animus.[378]

When probable cause supports charges against a defendant, a prosecutor enjoys broad discretion to bring charges.[379] This is the essence of prosecutorial discretion. Prosecutors consider factors such as "resource limitations, law enforcement priorities, needs or wishes of the victim, and the perceived public interest" when deciding whether to bring charges.[380] Prosecutorial discretion intends to promote efficiency and other values.[381] Accordingly, a defendant typically has no right to challenge an indictment otherwise based on probable

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https://www.nbcbayarea.com/news/local/Jose-Ines-Garcia-Zarate-Sentencing-Kate-Steinle-2015-Fatal-Shooting-San-Francisco-Pier-468127093.html [https://perma.cc/G3LM-F9XQ]. Kate Steinle, a San Francisco woman, was killed when Jose Ines Garcia Zarate fired a gun he found by the pier, and the bullet ricocheted and struck her. President Trump focused on Zarate's status as a five-time-deported undocumented immigrant to bolster support for a wall between Mexico and the U.S. After a jury acquitted Zarate of murder in state court, the U.S. Attorney sought to bring gun charges on Zarate involving the same offense. Zarate's attorney decried the prosecution as a violation of double jeopardy and a politically-motivated "vindictive prosecution." *Id.*

[377] *See* Cox & Rodriguez, *supra* note 14, at 464. I thank Fatma Marouf for raising this point.

[378] Defendants usually have greater success in bringing vindictive prosecution claims post-trial, challenging, for example, a prosecutor's decision to try a defendant on new charges that were available during the defendant's first unsuccessful trial. *See* United States v. Wilson, 262 F.3d 305, 319 (4th Cir. 2001). Structural racism permeates all levels of the criminal justice system, and one might wonder whether a cause of action originating in criminal law can offer a meaningful check on animus. *See* Radley Balko, *There's Overwhelming Evidence That the Criminal-justice System Is Racist. Here's the Proof*, WASH. POST (Sept. 18, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/?utm_term=.aa6aac71325d [https://perma.cc/PT9M-UKMR]. The search for a compelling analogy, however, is no guarantee of finding an appropriate remedy for the problem of racial and religious animus. Rather, the hope is to better understand what courts already do in similar cases. If courts do not remedy discrimination where decisionmakers are owed deference in, say, criminal law, that suggests that the courts are unlikely to provide relief in an exclusion setting.

[379] *See* United States v. Armstrong, 517 U.S. 456, 464 (1996).

[380] Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1244 (2011).

[381] *Id.*

cause.[382] Prosecutors, like the Executive, enjoy a "presumption of regularity."[383]

Prosecutorial discretion has limits, however, and "[t]he Constitution prohibits the government from undertaking a prosecution based solely on a vindictive motive."[384] Defendants can seek dismissal of charges against them upon proffering "clear evidence" of prosecutorial animus to overcome the presumption of regularity.[385] Criminal defendants asserting vindictive prosecution claims at the pretrial stage must come forward with objective evidence of prosecutorial animus rather than inferences based on speculation.[386] They typically must possess "smoking gun"[387] evidence of a prosecutor's animus, such as the prosecutor's public or private statements or documents evincing the government's improper motive.[388] Once the plaintiff does so, the burden shifts to the government to demonstrate a legitimate purpose for the prosecution, specifically that the prosecutor's animus toward the defendant was not a "but-for" cause of the prosecution.[389]

The federal appeals courts that have considered vindictive prosecution claims tend to equate "but-for" cause with "sole motive."[390] In *United States v. Jarrett*, the Seventh Circuit explained that a criminal defendant can succeed on

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[382] *See Armstrong*, 517 U.S. at 464–65 ("In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978))).

[383] *Id.*

[384] United States v. Jarrett, 447 F.3d 520, 524 (7th Cir. 2006); *see also* United States v. Goodwin, 457 U.S. 368, 380 n.12 (1982) (noting that lack of a presumption of vindictiveness does not "foreclose the possibility that a defendant might prove through objective evidence an improper prosecutorial motive," and specifically, that prosecutor's conduct was "solely to 'penalize' the defendant and could not be justified as a proper exercise of prosecutorial discretion").

[385] *Jarrett*, 447 F.3d at 524–25 (interpreting "prosecutorial animus" to mean "a personal stake in the outcome of the case or an attempt to seek self-vindication").

[386] *Id.* at 525.

[387] *Id.* at 527.

[388] *Id.* (finding it significant that defendant seeking dismissal of charges failed to "produced any public or private statement by a prosecutor manifesting animus toward him; any document that might establish bad motives on the part of the government; or any similar 'smoking gun'").

[389] *Id.* at 525 (noting that once defendant proffers objective evidence of the prosecutor's vindictive motive, "[a] court must be persuaded that the defendant would not have been prosecuted but for the government's animus or desire to penalize him").

[390] *See id.* at 524; United States v. Wilson, 262 F.3d 305, 314 (4th Cir. 2001); Verstein, *supra* note 36, at 1161 & tbl.1. Constitutional law scholars have also tended to equate the two standards. *See* Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 119 (1971) (discussing proof that illicit motive was "sole" or "dominant" motive as tantamount to proving that, "but for the decisionmaker's desire to promote an illicit objective, the decision would not have been made").

a vindictive prosecution claim only upon proving that, but for the animus, the criminal defendant would not have been prosecuted.[391] However, the court characterized the defendant's claim as asserting that the prosecutor's "sole purpose" in charging him was to remove him as counsel for another party.[392] Similarly, in *United States v. Wilson*, the Fourth Circuit explained that establishing prosecutorial vindictiveness requires showing that "(1) the prosecutor acted with genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus."[393] In the same citation, however, the court cited the Supreme Court's decision in *Goodwin* for the proposition that "'charges must be brought 'solely to penalize' the defendant and could not be justified as a proper exercise of prosecutorial discretion.'"[394] Thus, judges speak imprecisely about whether a criminal defendant must prove animus is the sole motive for the prosecution or a but-for motive.[395] As it turns out, the distinction matters, for the sole motive standard operates to "give the . . . case to the defendant."[396] If animus matters at all to the resolution of these claims, the sole motive standard must be rejected, and such a rejection is consistent with the vindictive prosecution cases described above.

Ultimately, criminal defendants have a right under equal protection and due process not to be prosecuted based on their protected characteristics or merely due to prosecutorial animus, even if the defendant is properly charged otherwise.[397] Despite prosecutors' substantial discretion, "smoking gun"

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[391] 447 F.3d at 528.

[392] *Id.* at 530.

[393] 262 F.3d at 314. In *Wilson*, the court discussed the availability of a presumption of vindictiveness absent direct evidence. It suggested that such a presumption would be warranted where a prosecutor initially decided not to try the defendant "on an additional available charge" but later did so "after the defendant's successful appeal." *Id.* at 319. In such a case, courts could draw an inference that "the only material fact different the second time around—the defendant's successful appeal of his original conviction," prompted the second prosecution. *Id.* On this view, a defendant can receive a presumption of vindictiveness where the *only* possible motive is vindictiveness. *Id.*

[394] *Id.* at 314 (quoting United States v. Goodwin, 457 U.S. 368, 380 n.12 (1982).

[395] *See Jarrett*, 447 F.3d at 524; *see also* Verstein, *supra* note 36, at 1161; *cf.* Hartman v. Moore, 547 U.S. 250, 262–63 (2006) (rejecting defendant's *Bivens* claim against a prosecutor based on a postal inspector's animus toward defendant, which subsequently caused the prosecutor to bring charges, where probable cause supported the charges regardless).

[396] *See* Verstein, *supra* note 36, at 1140.

[397] Selective prosecution claims are closely related claims arising out of the requirement of equal protection. Prevailing on a selective prosecution claim requires proof of discriminatory impact and discriminatory intent. *See* United States v. Armstrong, 517 U.S. 456, 464–66 (1996). The Supreme Court has suggested that plaintiffs asserting these claims typically possess evidence of discriminatory impact but lack evidence of the prosecutor's discriminatory intent in prosecuting them. Accordingly, these plaintiffs must produce evidence of discriminatory effect to obtain discovery to prove the prosecutor's discriminatory intent. *Id.* at 464.

animus triggers a process for sorting through the prosecutor's motives, potentially involving a burden-shifting framework.[398]

## D. Trump v. Hawaii *in the Supreme Court*

This discussion regarding the correct analytic approach must contend with the Supreme Court's ultimate resolution of the travel ban litigation. As noted above, the Court reversed the Ninth Circuit's decision affirming the district court's grant of a preliminary injunction, finding plaintiffs unlikely to prevail on their statutory or constitutional claims.[399] As to the constitutional claim, the Court determined that plaintiffs had standing, and their Establishment Clause claim was justiciable because plaintiffs faced a concrete hardship of being separated from family members due to the travel ban.[400] The Court then considered the merits, concluding that the case before it differed substantially from "the conventional Establishment Clause case"[401] because of the political branches' broad latitude in establishing the criteria for admission of noncitizens.[402] The Court determined that *Mandel* applied, but that the government had accepted a more searching analysis. It then decided that it could consider the President's statements of anti-Muslim animus, but only to the extent consistent with "rational basis review,"[403] which the Court took to require no more than a plausible relationship between the exclusion order and the government's stated national security objective.[404] Ultimately, the Court acknowledged its authority to consider the President's statements of animus, but then did nothing with them. The statements had no effect on the analysis, let alone the outcome, because the Court determined that animus was not the "sole" motive behind the exclusion order.[405]

Responding to Justice Sotoymayor's dissent, the Court denied *Korematsu's* relevance to the analysis of the travel ban, even though the President himself likened the initial travel ban to President Roosevelt's internment of Americans of Japanese descent during World War II.[406] The Court specifically characterized *Korematsu* as "morally repugnant," involving an internment order

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[398] *See Jarrett*, 447 F.3d at 525, 527.

[399] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

[400] *Id.* at 2416.

[401] *Id.* at 2418.

[402] *Id.* at 2418–19.

[403] *Id.* at 2420.

[404] *Id.* at 2421–23.

[405] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2421 (2018).

[406] While on the campaign trail, Trump likened his proposed "Muslim ban" to President Roosevelt's internment of people of Japanese ancestry during World War II. Adam Liptak, *Travel Ban Is Shadowed by One of Supreme Court's Darkest Moments*, N.Y. TIMES (Apr. 16, 2018), https://www.nytimes.com/2018/04/16/us/politics/travel-ban-japanese-internment-trump-supreme-court.html [on file with *Ohio State Law Journal*]; *see* Fishkin, supra note 355.

"solely and explicitly on the basis of race."[407] As even the majority opinion in *Korematsu* makes clear,[408] however, that case has never been considered one in which the government offered *no justification apart from animus*.[409] Indeed, the government in that case argued that national security justified the civilian exclusion order, and the *Korematsu* majority invoked that very justification in upholding Fred Korematsu's conviction.[410]

Apart from its suspect discussion of *Korematsu*, the Court in *Trump v. Hawaii* unconvincingly distinguished the animus cases from the instant case.[411] The Court characterized the animus cases as ones involving a single motive—animus—and no legitimate justifications. However, as scholars have noted, in each of those cases, government officials defended the challenged actions by invoking some legitimate public purpose.[412] In *Moreno*, the claimed legitimate purpose was limiting the potential for abuse;[413] in *Cleburne*, it was concerns about traffic and overcrowding;[414] and in *Romer*, it was denying "homosexuals special rights."[415] Nonetheless, because of the discernible presence of animus in each case, either from legislative history,[416] zoning commission hearings,[417] or from the text of the enactment itself,[418] the Court refused to accept defendants'

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[407] Trump v. Hawaii, 138 S. Ct. at 2423.

[408] Korematsu v. United States, 323 U.S. 214, 216 (1944), *overruled by id.*

[409] *See* Fishkin, *supra* note 355; *see also* Anil Kalhan, *Trump v. Hawaii and Chief Justice Roberts's "Korematsu Overruled" Parlor Trick*, ACS BLOG (June 29, 2018), https://www.acslaw.org/acsblog/trump-v-hawaii-and-chief-justice-roberts's-"korematsu-overruled"-parlor-trick [https://perma.cc/39V4-PT24] (discussing how the Court in *Korematsu* did not "grapple with the underlying racism of a policy that purports to rests on grounds other than racial discrimination").

[410] *Korematsu*, 323 U.S. at 223.

[411] *See* Trump v. Hawaii, 138 S. Ct. at 2420–21.

[412] *See* ARAIZA, *supra* note 305, at 32, 38, 55.

[413] United States Dep't of Agric. v. Moreno, 413 U.S. 534, 535 (stating "the Government maintains that the challenged classification should nevertheless be upheld as rationally related to the clearly legitimate governmental interest in minimizing fraud in the administration of the food stamp program."); *see* ARAIZA, *supra* note 305, at 32.

[414] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 436–38, 438 & n.7 (1985) (describing the city's concern that the Cleburne Living Center (CLC) group home would be overcrowded with thirteen residents rather than the state regulation's maximum of six residents); *see* ARAIZA, *supra* note 305, at 38.

[415] Romer v. Evans, 517 U.S. 620, 626, 638 (1996) (discussing the Colorado amendment that prohibits "special treatment of homosexuals"); *see* ARAIZA, *supra* note 305, at 55.

[416] *See Moreno*, 413 U.S. at 535 ("The legislative history that does exist, however, indicates that that amendment was intended to prevent so called 'hippies' and 'hippie communes' from participating in the food stamp program."); *see also* ARAIZA, *supra* note 305, at 31.

[417] *See City of Cleburne*, 473 U.S. at 436–37, n.4, 465, n.17 (describing the City of Cleburne's historical precedent of discriminating against intellectually disabled individuals through city ordinances); ARAIZA, *supra* note 305, at 38.

[418] *See Romer*, 517 U.S. at 635; ARAIZA, *supra* note 305, at 55–56.

post-hoc rationalizations.[419] Instead, the presence of direct evidence of animus led the Court to apply a more searching rational basis review.[420] Rather than requiring plaintiffs to prove that official action was undertaken solely based on animus, the animus cases contemplated mixed motives as well.[421] The Court's failure to acknowledge this will likely produce confusion in the lower courts, and the need for a proper analytic approach has only grown since the Court's initial assessment of plaintiffs' claims.

## V. A PATH FORWARD: A ROLE FOR THE COURTS

Courts that have analyzed the effect of President Trump's anti-Muslim statements on the validity of his travel bans have taken one of two views: full, continued deference, provided the President supplies even one legitimate reason for the challenged policy[422] or, alternatively, no deference at all.[423] The above discussion, however, reveals a third way that offers greater clarity and promise: a mixed motives analysis that parses the relative contributions of animus and potentially legitimate motives behind an exclusion law. Consider how such a framework might apply to the Trump travel bans on remand in the lower courts and the most likely objections to this application.

### A. *Applying a Mixed Motives Framework to the Travel Bans*

This Article contends that the "facially legitimate and bona fide" standard of review applicable to exclusion decisions under *Kleindienst v. Mandel* should also apply to exclusion laws such as the travel bans.[424] Although some judges contend that the greatest possible deference must be shown to the political branches' discretionary choice of criteria for admission and removal, the Supreme Court has indicated that courts retain the authority to review exclusion

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[419] *See* ARAIZA, *supra* note 305, at 119; Steve Sanders, *Making It Up: Lessons for Equal Protection Doctrine from the Use and Abuse of Hypothesized Purposes in the Marriage Equality Litigation*, 68 HASTINGS L.J. 657, 700 (2017) (noting the Court's failure to credit post-hoc rationalizations in the animus cases).

[420] *See* ARAIZA, *supra* note 305, at 119.

[421] *See* United States v. Windsor, 570 U.S. 744, 765, 798–99 (2013); Brief of Constitutional Law Scholars as *Amici Curiae* in support of Respondents at 25, Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (No. 16–1436); Cristina M. Rodriguez, Trump v. Hawaii *and the Future of Presidential Power over Immigration*, 2017-18 ACS SUP. CT. REV. 161, 187–88 (2018), https://www.acslaw.org/wp-content/uploads/2018/11/ACS-Supreme-Court-Review-2018-Final.pdf [https://perma.cc/L4WC-42YZ].

[422] *See* Washington v. Trump, 858 F.3d 1168, 1183 (9th Cir. 2017) (Bybee, J., dissenting from denial of reconsideration en banc).

[423] *See* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 592 (4th Cir. 2017), *vacated as moot*, 138 S. Ct. 353 (2017) (mem.). As noted, however, the Supreme Court assumed the "sole" motive standard applied but did not decide the question.

[424] *See supra* Part II; Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018) (stating that *Mandel* applies to an exclusion order).

laws for at least some minimal factual basis.[425] Moreover, the government's failure to assert the power to explicitly discriminate based on race or religion, the strongest form of plenary power authority, strengthens the case for judicial review.[426] At oral argument, the Solicitor General conceded that even a facially neutral exclusion order would be unconstitutional under *Mandel* if the President ordered the Cabinet to "keep out a particular race or a particular religion, no matter what."[427] Thus, only a milder version of plenary power is at issue: the power to enact a facially neutral exclusion law *in part* with a discriminatory purpose, i.e., with the partial objective of barring admission of an unpopular group defined by race or religion due to an irrational fear or hatred of that group.[428] It is *this* combination—facial neutrality and some degree of lawmaker animus—that this Article addresses.

Even though the Supreme Court agreed with many lower court judges that *Mandel* applies to the travel bans, judges disagree about the permissibility of considering "extrinsic evidence" of a law's purpose, such as the President's speeches and tweets, under *Mandel*.[429] Several judges on the Fourth and Ninth Circuits have argued that *Mandel* does not permit consideration of extrinsic evidence because "facially legitimate" means courts may look only to the face of the exclusion law and "bona fide" does not permit "looking behind" the Executive's stated reasons.[430] This interpretation is baffling, as it eliminates the requirement that the reason be "bona fide." If a requirement that a reason be "bona fide" does not authorize a court to review *public statements* constituting

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[425] *Cf.* Harisiades v. Shaughnessy, 342 U.S. 580, 590 (1952) (noting that the court could not "declare that congressional alarm about a coalition of Communist power . . . is either a fantasy or a pretense," and that "no responsible American would say that there . . . are now no possible grounds on which Congress might believe that Communists in our midst are inimical to our security"); Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972).

[426] Margo Schlanger, *Symposium: Could This Be the End of Plenary Power?*, SCOTUSblog (July 14, 2017), http://www.scotusblog.com/2017/07/symposium-end-plenary-power/ [https://perma.cc/N5NN-L4SQ] (referring to this argument as the "dog that is not barking in the night"); *see also* Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 322 (4th Cir. 2018) (Wynn, J., concurring) (noting that neither the government nor the dissenting Justices defended the President's power to invidiously discriminate based on a protected classification, such as race, sex, or religion).

[427] *See* Transcript of Oral Argument at 25, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965).

[428] *Cf.* Neuman, *supra* note 74 (arguing that EO-1 was not facially neutral because it refers to "honor killings" and preference for Christian refugees). Thus, an even milder form of plenary power remains—the power to issue facially neutral order, but with animus as *one* of at least two motives.

[429] *Compare* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 591–92, 594 (finding it permissible to consider the President's extrinsic statements) *vacated as moot*, 138 S. Ct. 353 (2017) (mem.), *with id.* at 652 (Niemeyer, J., dissenting) (finding it impermissible to consider the President's extrinsic statements).

[430] *See Int'l Refugee Assistance Project*, 857 F.3d at 648 (Niemeyer, J., dissenting); Washington v. Trump, 858 F.3d 1168, 1183 (9th Cir. 2017) (Bybee, J., dissenting from the denial of reconsideration en banc).

direct evidence of improper motive, how *else* would a plaintiff ever be able to show a "facially legitimate" reason was *not* bona fide?[431] If courts lack even this power, then the standard is better understood as "facially legitimate," full stop.

Judges reluctant to "look behind" stated reasons for Executive policy correctly observe that the search for a "bona fide" reason would not authorize courts to grant plaintiffs' discovery to establish an executive's improper purpose.[432] However, when the Executive himself places his allegedly improper motive into public discourse,[433] the plaintiffs are not then seeking the court's assistance in prying into the Executive's private deliberations.[434] In such circumstances, *Mandel's* concern for taking the Executive's stated reasons at face value does not apply.[435] Thus, courts can and should consider the President's speeches and tweets in cases such as the travel ban litigation.[436]

Finally, the typical wariness about invalidating laws, especially ones entitled to deference, based solely on improper motive springs from a fear or suspicion that the court would be participating in a "charade."[437] On this view, invalidating an executive order would be futile if the President could promulgate

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[431] Notably, the Solicitor General conceded in the argument before the Supreme Court that a President's extrinsic statements to Cabinet officials after taking the oath of office could undermine the facial legitimacy of his stated reason for an entry ban under *Mandel*. *See* Transcript of Oral Argument at 25, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965).

[432] *See Int'l Refugee Assistance Project*, 857 F.3d at 648 (Niemeyer, J., dissenting). *But cf.* Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1225 (2018) (cataloguing "evidentiary instruments available for identifying impermissible motives," including civil discovery).

[433] *See Int'l Refugee Assistance Project*, 857 F.3d at 594.

[434] *Cf.* United States v. Armstrong, 517 U.S. 456, 468 (1996) (denying plaintiffs' discovery as to discriminatory intent absent a showing of discriminatory impact); Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (holding that the court will not "look behind" Executive's stated reason when it is both "facially legitimate and bona fide"). For a defense of judges considering extrinsic evidence of purpose in *Korematsu* and the travel ban cases, see Ian Samuel & Leah Litman, *No Peeking? Korematsu and Judicial Credulity*, TAKE CARE (Mar. 22, 2017), https://takecareblog.com/blog/no-peeking-korematsu-and-judicial-credulity [https://perma.cc/K32P-92J3].

[435] *See Mandel*, 408 U.S. at 770. Moreover, recent criticisms of efforts to ascribe a unitary intent or purpose to a multi-member body, like Congress, have less force when considering the intent or purpose of a single individual: the President. Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 139 (2017).

[436] Shaw, *supra* note 435, at 139. *But cf.* Jacob T. Levy, *The Weight of the Words*, NISKANEN CTR. (Feb. 7, 2018), https://niskanencenter.org/blog/the-weight-of-the-words/ [https://perma.cc/2GTW-C793] (arguing that President Trump's political speech is a form of political action, one that has the power to "undermine the existence of shared belief in truth and facts," and should not be ignored); *see also* Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. (forthcoming 2018) (arguing that presidential intent is properly considered for purposes of evaluating the constitutionality of an executive order, as illustrated by the travel ban litigation).

[437] John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1214 (1970).

the same executive order, but this time, stay off Twitter.[438] The wrinkle in the instant case, however, is that the President is *trading* on animus. Far from inadvertently disclosing his private thoughts, he purposely shares his prejudices to appeal to his base, to reassure them of his racism, especially at moments when he might be perceived as showing generosity toward sympathetic noncitizens, such as Deferred Action for Childhood Arrival (DACA) recipients, or making deals with political adversaries.[439] For this reason, the danger of enmeshing the courts in a "charade" is especially low.[440] Thus, courts should consider the President's speech as direct evidence of animus.

For judges who accept this proposition, however, a further question remains: what motive standard should apply? In the lower courts, judges vacillated between the "sole motive" and "any motive" standard,[441] and in the Supreme Court, the majority selected "sole motive," and two of the dissenters applied the "primary motive" standard.[442] In so doing, all of these judges overlooked the remaining option: "but-for" motive.[443] Cases like *Church of Lukumi* and *McCreary County* suggest that either the "any motive" or "primary motive" standards typically apply to religious discrimination cases. Under *Church of Lukumi*, the presence of *any* improper motive invalidates a law because it means that the law was not passed with purely innocent motives.[444] Similarly, under *McCreary*, a law fails Establishment Clause scrutiny if it does not have a "predominantly" secular purpose.[445] This does not mean a government enactment cannot have a religious purpose, but, simply, that it must *also* have a stronger, independently sufficient secular purpose to be valid.[446]

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[438] *See id.*

[439] *See* Taegan Goddard, *Trump Bragged to Friends About 'Shithole' Remark*, POL. WIRE (Jan. 14, 2018), https://politicalwire.com/2018/01/14/trump-bragged-friends-shithole-remark/ [https://perma.cc/R3CG-V82V].

[440] *See* Ely, *supra* note 437, at 1214. *But see* Brest, *supra* note 390, at 139 (arguing for judicial review of motivation even in discretionary choices).

[441] *See supra* Part II.

[442] *Compare* Trump v. Hawaii, 138 S. Ct. 2392, 2420–21 (2018) (analyzing whether the exclusion order was "'inexplicable by anything but animus'"), *with id.* at 2438 (Sotomayor, J., dissenting) (using the "primary purpose" test under Establishment Clause jurisprudence).

[443] *See* Verstein, *supra* note 36, at 1161 (listing four widespread motive standards). *But see* Andrew Verstein, *The Failure of Mixed Motives Jurisprudence*, 86 U. CHI. L. REV. (forthcoming 2019) (arguing that all other motive standards are superior to the "but-for" standard).

[444] 508 U.S. 520, 547 (1993).

[445] McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 860 (2005); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[446] *See* Verstein, *supra* note 36, at 1134 (discussing "primary motive" as a more plaintiff-friendly standard, requiring only that the impermissible motive exceed the permissible one, even if both are independently sufficient to motivate the contested enactment).

These standards, perhaps reflecting the Framers' special concern for religious freedom,[447] demand a great deal from the government. Plenary power deference in immigration law does not.[448] As a result, courts must consider whether a more deferential motive standard should apply to religious discrimination challenges to immigration law. Based on a careful review of equal protection jurisprudence and the analogy to prosecutorial discretion, this Article contends that the "but-for" motive standard provides a compelling, sensible alternative.[449]

The analogy between prosecutorial discretion and Executive discretion in immigration law helps explain the appeal of this approach. Just like a prosecutor deciding whether to bring charges against a potential defendant or set policy for their department, the President has broad discretion to suspend the entry of certain noncitizens and to develop a policy articulating the criteria for exclusion.[450] Just as courts are reluctant to intrude on a prosecutor's discretion in criminal law, courts hesitate to intrude on the President's policy choices regarding admission and removal of noncitizens.[451] However, direct evidence of animus alters the court's role in the criminal law and should have the same effect in the immigration setting. In criminal law, courts can intervene in a prosecutor's decision to bring charges against a defendant amid direct evidence of prosecutorial animus.[452] Although courts do not currently recognize selective immigration enforcement claims, under *Reno v. American-Arab Anti-Discrimination Committee*[453] the Supreme Court has reserved the possibility of recognizing a claim in "a rare case in which the alleged basis of discrimination is so outrageous" to overcome the Court's general skepticism toward such claims.[454] This appears to preserve space for a kind of "vindictive" immigration enforcement claim. Ultimately, even an opinion evincing minimal concerns for

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[447] *See McCreary Cty.*, 545 U.S. at 876 (discussing Framers' concerns for preserving religious conscience as well as "guard[ing] against the civic divisiveness that follows when the government weighs in on one side of religious debate").

[448] *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (requiring only a "facially legitimate and bona fide" reason for an exclusion decision).

[449] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 492 U.S. 252, 270–71 n.21 (1977); Kagan, *supra* note 24, at 89.

[450] The prosecutor's discretion follows from the Executive's delegation to prosecutors to enforce the Nation's laws, *United States v. Armstrong*, 517 U.S. 456, 464 (1996), and the President's discretion itself follows from Congress's delegation under Immigration and Nationality Act § 212(f), 8 U.S.C. § 1182(f) (2018). Again, the more apt analogy would be to the President's removal authority, but the critical features of vindictive prosecution—discretion and animus—remain useful.

[451] *See Armstrong*, 517 U.S. at 464; Narenji v. Civiletti, 617 F.2d 745, 748 (1979).

[452] United States v. Jarrett, 447 F.3d 520, 524–25 (7th Cir. 2006).

[453] Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999).

[454] *See id*.

the rights of noncitizens in removal proceedings preserves the possibility of judicial review of conscience-shocking animus.[455]

This analogy is imperfect for several reasons. First, prosecutors, unlike the President, are bound by ethical rules of conduct.[456] Second, prosecutors bring charges against discrete defendants, while the President creates broad policy. When it comes to immigration law and foreign affairs, the courts do not demand precision in policymaking either. Ultimately, however, this analogy underscores that executive action to advance an end *other than the public welfare*, under the guise of executive discretion, warrants greater scrutiny.[457]

Under the proposed mixed motives framework, inspired by courts' treatment of vindictive prosecution claims, plaintiffs challenging an exclusion EO must come forward, as they have in the travel ban litigation, with direct evidence of the President's animus.[458] Once plaintiffs proffer this evidence, the government should produce evidence indicating that animus was not a "but-for" motive for the contested law.[459] The government must produce evidence showing that a legitimate purpose, such as national security, constitutes an *independently sufficient* reason for the law[460]—not merely "an independent" reason.[461] The plaintiff must ultimately prove that animus was essential.[462]

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[455] *Cf.* Rochin v. California, 342 U.S. 165, 172 (1952) (holding police conduct "shock[ed] the conscience" where the police broke into a criminal defendant's home, attempted to dislodge capsules from defendant's mouth, and then handcuffed him and transported him to the hospital, where defendant's stomach was pumped against his will and produced two morphine capsules).

[456] *See, e.g.*, MODEL RULES OF PROF'L. CONDUCT rr. 3.3, 3.6, 3.8 (AM. BAR ASS'N 2013) (requiring, respectively, candor to the tribunal, limiting trial publicity, and requiring timely disclosure of exculpatory evidence, among other obligations).

[457] *See* ARAIZA, *supra* note 305, at 109–10.

[458] *See* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 591–92, 594 (4th Cir. 2017), *vacating as moot*, 138 S. Ct. 353 (2017) (mem.).

[459] *See* United States v. Jarrett, 447 F.3d 520, 525 (7th Cir. 2006); Verstein, *supra* note 36, at 1137–38.

[460] *See* Verstein, *supra* note 36, at 1137–38.

[461] *Cf.* Trump v. Hawaii, 138 S. Ct. 2392, 2421 (2018) ("But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification."); Washington v. Trump, 858 F.3d 1168, 1183 (9th Cir. 2017) (Bybee, J., dissenting from the denial of reconsideration en banc).

[462] This motive standard finds support in statements by attorneys litigating the case as well as scholarly commentary. For example, at oral argument, counsel for the plaintiffs conceded that the President's disavowal of his earlier anti-Muslim statements would render the exclusion order constitutional. On that reasoning, the order becomes valid because animus is no longer a necessary motive behind it. *See* Transcript of Oral Argument at 62–63, Trump v. Hawaii, 138 S. Ct. 2392 (No. 17-965). In addition, Professor Michael C. Dorf has argued that any "reasonable observer" would agree that the travel bans would not have been promulgated "but for" the President's anti-Muslim animus. Michael Dorf, *SCOTUS Travel Ban Argument Post-Mortem and the Surprising Relevance of Korematsu*, DORF ON LAW (Apr. 25, 2018), http://www.dorfonlaw.org/2018/04/scotus-travel-ban-argument-post-mortem.html [https://perma.cc/2B43-YMKL]; *see also* Marty Lederman, *Contrary to*

As discussed above, the proposed framework is workable. But it also expresses a compelling view of what plenary power means: a deference doctrine that gives a certain freedom to the political branches to establish the criteria for admission, but not a license to implement animus. It is the discretion to choose among legitimate ends. When the President publicly chooses a mix of legitimate and illegitimate ends, acting with mixed motives, he should be permitted to enact policy for which the legitimate motives are sufficient; and he should be prohibited from enacting policy for which the illegitimate motive is necessary. Why? Official acts necessarily motivated by illegitimate motives are not exercises of discretion; they are violations of it. And if an illegitimate motive is ultimately *unnecessary* to the policy and a legitimate justification is sufficient standing alone, that illegitimate motive cannot be said to have made a difference. The proposed framework preserves the President's discretion to advance legitimate ends.[463]

This approach also seeks to create a process for developing an evidentiary record from which the Court can evaluate the role of animus. The first step is for plaintiffs to file a complaint pleading animus with "particularity."[464] Plaintiffs would likely seek a preliminary injunction. Defendants would then come forward with evidence of a sufficient legitimate purpose. To substantiate that purpose, defendants might attach affidavits or declarations from national security specialists, Cabinet officials, and even historians who can comment on the consistency of the contested executive orders with prior orders in previous Administrations. Ultimately, plaintiffs will have to undermine the independent sufficiency of the government's stated reason. For example, in the travel ban litigation, plaintiffs could demonstrate the "sham" nature of the waiver process.[465] Challenges to exclusion orders are unlikely to be amenable to resolution at the preliminary injunction phase. Through the creation of an evidentiary record, however, the court acquires the tools needed to evaluate whether the government's objectives are in fact "bona fide," to discern if the stated justification is sufficient. Courts must consider the full factual record,

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*Popular Belief, the Court Did Not Hold that the Travel Ban Is Lawful–Anything but*, JUST SECURITY (July 2, 2018), https://www.justsecurity.org/58807/contrary-popular-belief-court-hold-travel-ban-lawful-anything-but-which-ruling-justice-kennedys-deference-presidents-enforcement-ban-indefensible/ [https://perma.cc/7QJ4-3356] (noting that "the Travel Ban would not exist but for its foreseeable effect in excluding Muslims from entry"). Although these commentators were not arguing for the "but-for" motive standard vis-à-vis the other three main options, it is telling that it is a standard invoked so widely in the debate (except in the courts).

463 *But see* Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 104 VA. L. REV. (forthcoming 2019) (arguing that an illegitimate motive alone is and should be sufficient to render official action unconstitutional).

464 FED. R. CIV. P. 8(a); Kerry v. Din, 135 S. Ct. 2128, 2141 (2015).

465 Trump v. Hawaii, 138 S. Ct. 2392, 2445 (2018) (Sotomayor, J., dissenting) (describing plaintiffs' contention that the waiver process was "nothing more than a sham").

including whether the existence of some facts undermine the likelihood of other facts being true.[466]

The framework proposed herein is designed for the exceptional present times, but it aims to address an old question in immigration law that will likely arise periodically. Critics note that the President has accused Mexico of sending criminals into the United States,[467] called for a "shutdown" of Muslim immigration,[468] expressed sympathy for Nazis,[469] and disparaged, in vulgar language, black and brown countries from which many migrants hail.[470] His "smoking gun"[471] animus should not escape judicial notice when such comments communicate the legal purpose for his actions.[472] Taking notice, however, does not require a radical reworking of immigration law. Instead, when the President inserts racial or religious animus into public discourse of his own accord, *Mandel* itself permits courts to demand that the government pay an

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[466] For a discussion of a "mixed motives" presumption in the national security and criminal law setting, see Lee Ross Crain, Note, *The Legality of Deliberate Miranda Violations: How Two-Step National Security Interrogations Undermine Miranda and Destabilize Fifth Amendment Protections*, 112 MICH. L. REV. 453, 485–86 (2013). Crain argues that a "mixed motives" presumption would mean that courts would not regard evidence of a permissible motive, such as national security, as undermining the simultaneous existence of an impermissible motive when law enforcement engage in two-step interrogations, the first without the *Miranda* warning, and then the second with it. *Id.*

[467] Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm_term=.25cf9373bb83 [https://perma.cc/8VD3-9YAC].

[468] Greg Sargent, *Is This a 'Muslim Ban'? Look at the History–and at Trump's Own Words*, WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/blogs/plum-line/wp/2017/01/31/is-this-a-muslim-ban-look-at-the-history-and-at-trumps-own-words/?utm_term=.95333035a102 [https://perma.cc/7VC3-97VS] (arguing that Trump's language does not definitively prove the ban is a "Muslim" ban, but his remarks leave room to argue that the ban has an improper discriminatory intent and effect).

[469] *See* Michael D. Shear & Maggie Haberman, *Trump Defends Initial Remarks on Charlottesville; Again Blames 'Both Sides'*, N.Y. TIMES (Aug. 15, 2017), https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html [on file with *Ohio State Law Journal*].

[470] Julie Hirschfeld Davis et al., *Trump Alarms Lawmakers with Disparaging Words for Haiti and Africa*, N.Y. TIMES (Jan. 11, 2018), https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html [https://perma.cc/T8TZ-U6ME]. Unsurprisingly, the President's animus has led to equal protection challenges to many of his Administration's immigration law decisions, specifically the rescission of DACA and Temporary Protected Status (TPS) for persons from Honduras and El Salvador. *See, e.g.*, Regents of the Univ. of Calif. v. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1018 (N.D. Cal. 2018).

[471] United States v. Jarrett, 447 F.3d 520, 527 (7th Cir. 2006).

[472] *See* Shaw, *supra* note 435, at 139.

"animus tax" in the form of fully litigating its motives.[473] In this manner, courts may maintain two cherished values: deference and dignity.[474]

## B. *Objections*

One may anticipate several objections: (1) excluded noncitizens lack any constitutional rights, thus straining the analogies to equal protection and vindictive prosecution; (2) courts need to respect the political branches' national security judgments regardless of animus; and (3) the proposed approach lacks teeth and essentially results in a "sole motive" analysis used by a majority of justices in *Trump v. Hawaii*.

First, critics are likely to assert that equal protection jurisprudence and the vindictive prosecution analogy are strained or inapt because noncitizens outside of U.S. territory lack any rights of entry or equal protection.[475] Challenges to a facially neutral exclusion law enacted out of racial or religious animus would invariably entail an assertion of equal protection rights, rights those excludable noncitizens outside of the U.S. ostensibly lack.[476] Two points are relevant. First, in previous challenges to exclusion decisions, the weakness or complete lack of constitutional rights of noncitizens outside the U.S. has not precluded judicial review of exclusion decisions because citizens have brought suit to vindicate *their* constitutional rights.[477] Second, the presence of "smoking gun" animus changes the nature of the analysis, for even when constitutional interests are "minimal," the Supreme Court has recognized the potentially unique circumstances presented by "outrageous discrimination."[478] If severe animus can make removable noncitizens' "minimal"[479] constitutional interests more robust, then it could also enhance the importance of constitutional interests implicated, however indirectly, by exclusion laws as well. Essentially, when direct evidence of animus is at hand, the Court might consider equal protection more of a structural constraint on the government, much like the religion clauses,[480] rather than an individual right that noncitizens can assert.

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[473] *See* Kerry v. Din, 135 S. Ct. 2128, 2141 (2015); Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

[474] *See* AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 205–08 (2015) (discussing evidence of human dignity as a constitutional value in the U.S. Constitution).

[475] *See* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 666 (4th Cir. 2017) (Agee, J., dissenting), *vacating as moot*, 138 S. Ct. 353 (2017) (mem.).

[476] *See* NEUMAN, *supra* note 18, at 7–8 (describing the territorial conception of constitutional rights).

[477] *See Mandel*, 408 U.S. at 764.

[478] *See* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999).

[479] *Id.*

[480] *Cf.* H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 246 (2011) (describing an equal protection case as premised on the view that the government must pursue a "legitimate public

Next, critics might contend that national security interests require accepting policy based on stereotypes or ordinarily suspect classifications. The political branches have often relied on this flexibility to respond to international events or implement policies perceived to enhance safety.[481] Although the political branches have substantial discretion to balance factors, privilege some values over others, and design policy, the rare case of policy accompanied by "smoking gun" animus differs from the usual scenario because it implicates the structural considerations noted above. Scholars have further disputed the concept of "national security exceptionalism,"[482] and courts have warned against giving national security "talismanic" power.[483] Permitting any government policy to be implemented simply because government officials invoke national security would create a reservoir of absolute power that would undermine our legal system's design.[484]

Finally, from the other side of the debate, critics might argue that the proposed framework lacks teeth, offering scrutiny insufficient to vindicate the important rights and interests at stake. On this view, the government would nearly always be able to show that it would have made the same decision regardless of animus simply by proffering expert views of the President's national security team.[485] The President might quite easily be able to satisfy the evidentiary requirement. Where the President can articulate *a* legitimate reason, will courts meaningfully quantify the relative contribution of that reason and the proffered animus? Or will they, in effect, use the "sole motive" standard

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purpose" when intruding on liberty and making statutory classifications); Vladeck, *supra* note 75.

[481] *See supra* Part II.

[482] Ganesh Sitaraman & Ingrid Wuerth, *National Security Exceptionalism and the Travel Ban Litigation*, LAWFARE (Oct. 12, 2017), https://www.lawfareblog.com/national-security-exceptionalism-and-travel-ban-litigation [https://perma.cc/EBF4-GCER] (rejecting view that "all national security cases as a group should be subject to different analysis than cases not related to national security" as unable to "withstand logical scrutiny").

[483] Hawaii v. Trump, 859 F.3d 741, 774 (9th Cir. 2017) ("National security is not a 'talismanic incantation' that, once invoked, can support any and all exercise of executive power under [INA § 212(f)]."), *vacating as moot*, 138 S. Ct. 377 (2017) (mem.); *see also* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1948 (2015) ("In sum, foreign relations law may not actually be so different from ordinary domestic law."). *But see* Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018) (discussing "admission and exclusion of foreign nations" as a political judgment "largely immune" from judicial review).

[484] *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 217–18 (1953) (Black, J., dissenting); Cox, *supra* note 18, at 423.

[485] Sufficient evidence might consist of declarations from national security experts or other officials regarding the identification systems in countries around the world, or experts who could speak to the relative threat posed by the banned countries. Ironically, plaintiffs in the travel ban litigation marshaled this sort of evidence to undermine the ban's purported national security benefits, thus supporting the view that the bans were based on invidious discrimination. *See* Joint Declaration of Madeleine K. Albright et al. at 4–5, Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105).

suggested by dissenting judges in the travel ban litigation?[486] Admittedly, this mixed motives framework is deferential, but it nonetheless requires the President to prove that he has an *independently sufficient* legitimate reason for pursuing the same policy.[487] This requirement of independent sufficiency means that courts will have to seriously scrutinize the evidence and conclude that legitimate reasons fully support the policy, and that the President's animus, while ugly, was essentially "harmless error."[488]

The proposed approach further has expressive value.[489] It condemns irrational hostility toward a class of people defined by a characteristic that the courts would regard as "protected" were these people within U.S. territory. Further, it signals to citizens and noncitizens here and abroad that even the President cannot both openly use animus as a currency with his base and simultaneously hide it from the courts.[490] It forces the government to stop, slow down, and pay an "animus tax" in the form of explaining itself, demonstrating the legitimacy of its enactment. Even if animus-laced policies remain in place, the process of proving and sorting motives forces the Executive to take responsibility for its full set of motives.[491]

## VI. CONCLUSION

As Justice Frankfurter observed in his concurring opinion in *Harisiades*, plenary power in immigration has historically permitted laws both "crude and cruel," and at the time he wrote, laws embodying racial or religious animus as well.[492] Since that time, constitutional and immigration law have evolved, and the plenary power doctrine has receded in many domains.[493] Under 8 U.S.C.

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[486] *See* Washington v. Trump, 858 F.3d 1168, 1183 (9th Cir. 2017) (Bybee, J., dissenting).

[487] *See* Verstein, *supra* note 36, at 1137 n.112. In contrast, the Supreme Court made no inquiry into the existence of an independently *sufficient* justification. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2421 (2018) ("[W]e must accept [the President's] independent justification.").

[488] *See* Dorf, *supra* note 462 (arguing that animus was the but-for cause of the bans, and that some serious level of scrutiny would ordinarily be required under such circumstances); Kagan, *supra* note 24, at 89 (noting that the "mere ability to investigate [the President's motives] would be a significant victory [for plaintiffs]").

[489] *Cf.* Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 696 (2012) (noting anti-discrimination law's expressive value).

[490] *See* Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 257 (4th Cir. 2018) ("[W]e conclude that the Proclamation is unconstitutionally tainted with animus toward Islam."), *vacated by* 2018 WL 1256938 (2018).

[491] *See* Kagan, *supra* note 24, at 89–90. *But cf.* Levy, *supra* note 38. Levy argues that the question of how to constrain the President is transsubstantive, implicating not only the President's exclusion power, but his pardon power, his power to fire the special counsel, and other areas where the President enjoys near-absolute power. In such a situation, we risk casting the courts as saviors, but as Levy argues, real constraints will require politics. *Id.*

[492] Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring).

[493] Motomura, *supra* note 47, at 610–11.

§ 1182(f), the President possesses a power that lacks clear boundaries.[494] The search for limits, however, should encompass the full set of limits – separation of powers, Congress's promulgation of an intricate statutory scheme, as well as improper motive.[495]

Where animus influences a law that would ordinarily be entitled to deference, courts have generally responded in one of two ways. First, judges have argued for continuing to defer to the President and for ignoring his extrinsic statements, or considering them but nonetheless allowing the government to respond with a legitimate reason for the law, however pretextual or insubstantial.[496] Second, courts have deemed the animus to be a form of bad faith, allowing them to apply heightened scrutiny, and requiring the government to supply a compelling justification for acting as it did and demonstrate that it has used the least restrictive means for achieving it.[497] This Article, however, argues that there is a third way: a mixed motives framework using a "but-for" motive standard. This framework strives to preserve deference to the political branches' judgments without mistaking animus for expertise.

Critics observe that President Trump's travel bans sowed chaos at home and abroad. Given that his Executive Orders did what he, for months, had said he would do, this result may surprise some. On the other hand, perhaps Americans and noncitizens planning to visit for work or family reasons could not believe that the President, a person who took the oath of office, and not merely a candidate engaged in electioneering, would bar noncitizens without the traditional reasons for invoking 8 U.S.C. § 1182(f). The President's exceptional use of the political branches' plenary power to exclude noncitizens further inverted norms[498] with his public remarks denigrating Muslims, and the courts have since faced a difficult challenge in drawing a line between deference and abdication. The Supreme Court's reasoning in *Trump v. Hawaii* calls for reform. With sensitive, important interests at stake, a more nuanced approach to deference and animus is needed as the lower courts consider challenges to the travel ban on remand, and for the future. This Article aspires to offer precisely such an approach.

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494 *See* MANUEL, *supra* note 44, at 1. ("Neither the text of Section 212(f) nor the case law to date suggests any firm legal limits upon the President's exercise of his authority to exclude aliens under this provision.").

495 *See, e.g.*, Brief of *Amici Curiae* Immigration Law Scholars on the Text and Structure of the Immigration and Nationality Act in Support of Respondents at 4, Trump v. Hawaii 138 S. Ct. 2392 (2018) (No. 17-965).

496 *See, e.g.*, Washington v. Trump, 858 F.3d 1168, 1183 (9th Cir. 2017) (Bybee, J., dissenting).

497 Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 591–93 (4th Cir. 2017), *vacating as moot*, 138 S. Ct. 353 (2017) (mem.).

498 *See* Levy, *supra* note 436 (discussing President Trump's "norm inversion").