Dark Matter in the Law

D. Carolina Núñez

J. Reuben Clark Law School
Brigham Young University
“Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what’s going on.”

Trump-Pence Campaign Press Release, December 7, 2015
“Trump’s Anti-Muslim Plan is Awful. And Constitutional.”


“I believe Trump’s unprecedented proposal would violate our Constitution.”

Chae Chan Ping v. United States (1889)

1875: Ping arrives in U.S.

1882: Chinese Exclusion Act Effective

1887: Ping leaves United States with return certificate

October 1, 1888: Scott Act invalidates certificates

September 7, 1888: Ping Leaves China to return to U.S.

October 7 or 8, 1888: Ping arrives in U.S.
“Plenary Power” Over Immigration

• Committed to political branches
• Few Constitutional limits
• Limited judicial review
• Derives from sovereignty, rather than from an enumerated power
Yick Wo v. Hopkins (1886)
### Plenary Power in Immigration Law

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## Landmark Cases

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How do cases end up in the zombie column?

formal legal norms (ordinary matter)

informal legal norms (dark matter)
Informal norms can pull against and even *negate* formal law in a way that *insulates* the case from being formally overturned.
Dark Matter Surrounding *The Chinese Exclusion Case*

- Executive hesitancy to use the breadth of power suggested by Chinese Exclusion Case

- Supreme Court reluctance to cite + re-characterization of Chinese Exclusion Case

- Congress’s failure to enact anything that approaches the full breadth authorized in *The Chinese Exclusion Case*. 
Conditions Evidencing Existence of Robust Dark Matter Norms

• Significant time has elapsed since the precedent acknowledged as legitimate

• Precedent plays a functional or foundational role in the area of law
Dark Matter’s Limits

Dark matter constrains some actors more than others.
Korematsu v. United States (1944)
So what?