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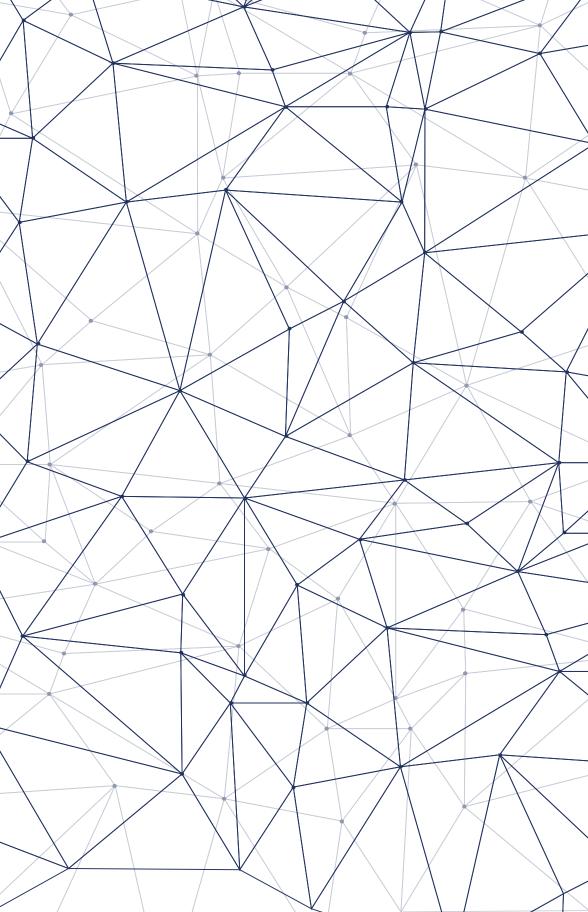
Fordham Law School Faculty Spotlight Journal





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Volume 6

Fordham Law School Faculty Spotlight Journal



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"Theoretical," "out of touch," "impractical." Critics often use these words to describe legal scholarship.

Chief Justice John Roberts reportedly asserts that he seldom reads or relies on law review articles. "Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar." ¹



The pieces in this issue of Fordham Law's *Faculty Spotlight Journal* challenge those critics and show that scholarship by our faculty—doctrinal, interdisciplinary, theoretical, and every combination thereof—does influence the law and has an impact on the real world. We stress how lawyers can use their skills of critical analysis to become thoughtful leaders in the law who question the status quo and make a difference. The work of our faculty contributes to that culture at Fordham Law.

Rebecca Kysar identifies a new category of legislation that Congress could use to overcome inertia. Joseph Landau discusses a number of process-based mechanisms to surface the intent behind facially neutral government action. Research by Andrew Kent, Ethan J. Lieb, and Jed Shugerman shows that clauses in the U.S. Constitution relating to "faithful execution" do not support imperial conceptions of the presidency and instead are connected to a history of limited executive power. Robin A. Lenhardt focuses critical attention on the role family law systems and structures have long played in shaping racial subordination and disadvantage in the United States.

The content of this journal represents a small sample of our faculty's work. Please visit our website to learn more about the work of all of our professors as well as our renowned student-edited journals, which are among the most cited in the country.

Please enjoy this issue of the *Faculty Spotlight Journal* and see for yourself how Fordham Law scholarship is making an impact throughout the legal profession and beyond.

Matthew Diller Dean and Paul Fuller Professor of Law

¹ Adam Liptak, (quoting Chief Justice Roberts's remarks at a judicial conference).

he U.S. Constitution twice imposes a command of faithful execution on the President: The President must "take Care that the Laws be faithfully executed" and must swear or affirm that he or she will "faithfully execute the Office."

Until now, no research illuminated where the concept of "faithful execution" came from or what it meant when the Constitution was written and adopted.

Original research by Andrew Kent, Ethan J. Leib, and Jed Shugerman shows that these clauses do not support imperial conceptions of the presidency and instead are connected to a history of limited executive power.



Andrew Kent Professor of Law

Ethan J. Leib John D.Calamari Distinguished Professor of Law

Jed Shugerman Professor of Law

In an article recently published in the *Harvard Law Review*, Professors Kent, Leib, and Shugerman discovered a history of faithful execution requirements stretching back at least to the Magna Carta. One of the first things the U.S. states and the new central government did after independence in 1776 was impose these requirements on their officials. Mining this historical record reveals a much fuller picture about the meaning of our Constitution's Faithful Execution Clauses. The historical record supports a conception of the clauses and hence the presidency that is *fiduciary* in nature: The President must execute the office and the laws diligently and honestly; must carefully stay within authorizations from the Constitution and the Congress; and must act only in the public interest and never solely from self-interested or corrupt motives. Many scholars, presidents, and jurists have relied on the clauses are in fact connected to a history of limited executive power.

As the article elaborates:

- The presidential oath looks quite different from the British monarch's coronation oaths.
- Instead, the president's oath parrots oaths for executive officials in mid-level and lower offices—officials who would have had mainly ministerial duties to carry out the standing law and no inherent prerogative to depart from it.
- As it became less acceptable over time to use one's office to extract private profits, faithful execution requirements became a mechanism to ensure officers did not engage in financial self-dealing.
- The oath and command of faithful execution rehabilitate a republican conception of the presidency against some recent historical work that urges a more monarchical understanding of the office.
- A president's choice not to enforce congressional laws because he or she dislikes Congress's policies runs afoul of the Constitution's command of faithful execution; this has implications for recent controversies about presidents failing to carry out Congress's laws, such as the Affordable Care Act, the Defense of Marriage Act, or immigration statutes.

The article was awarded the American Constitution Society's 2019 Richard D. Cudahy Writing Award at a ceremony in Washington, D.C., in June of 2019.

Faithful Execution and Article II

Harvard Law Review, Vol. 132, No. 8, page 2111

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INTRODUCTION

The faithfulness of a President to the Constitution, the laws, and the ideals and traditions of the United States is at issue as never before. The American people today are confronted with questions that go to the foundations of our constitutional system as a "government of laws, and not of men"¹ (or women). Presidential powers previously understood as plenary are being used in ways that many see as destructive of constitutional principles and norms. May a President fire senior law enforcement personnel, if the purpose is to protect himself or close associates from a criminal investigation? May a President use the pardon power or his control over classification and declassification of information for the same purposes? Does the Constitution have a plan for when it appears that a President may be motivated not by a view of the public good but by self-regarding or bad faith purposes?

We think that two frequently cited but poorly understood parts of the Constitution speak to these questions. Article II of the U.S. Constitution twice imposes a duty of faithful execution on the President, who must "take Care that the Laws be faithfully executed"² and take an oath or affirmation to "faithfully execute the Office of President."³ Although other public servants are "bound by Oath or Affirmation[] to support [the] Constitution,"⁴ no other officeholder has the same constitutional command of fidelity. And the language of faith appears nowhere else in the document, save the requirement that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."⁵

The two clauses requiring faithful execution look somewhat different from each other. One is a straightforward legal command — albeit using the passive voice — imposing a duty throughout tenure in office

¹ Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). The phrase is older. See, e.g., JOHN ADAMS, NOVANGLUS; OR, A HISTORY OF THE DISPUTE WITH AMERICA, FROM ITS ORIGIN, IN 1754, TO THE PRESENT TIME, NO. VII (1775), reprinted in THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 220, 226 (C. Bradley Thompson ed., 2000) [hereinafter ADAMS WRITINGS] ("Aristotle, Livy, and Harrington . . . define a republic to be a government of laws, and not of men.").

² U.S. CONST. art. II, § 3.

³ Id. § 1. We are not the first to note that these two clauses share the element of faithful execution. See, e.g., Patricia L. Bellia, Faithful Execution and Enforcement Discretion, 164 U. PA. L. REV. 1753, 1771–72 (2016); Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 GEO. L.J. 217, 261 (1994); David E. Pozen, Constitutional Bad Faith, 129 HARV. L. REV. 885, 907–08 (2016); Saikrishna Bangalore Prakash, The Executive's Duty to Disregard Unconstitutional Laws, 96 GEO. L.J. 1613, 1629–30 (2008).

⁴ U.S. CONST. art. VI, cl. 3.

⁵ Id. art. IV, § 1.

with respect to the laws. The other requires a promissory oath or affirmation with respect to the office, a single-occasion speech act with, in Anglo-American culture, a heavily religious flavor, notwithstanding the Constitution's command that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."⁶ Edward Coke, the seventeenth-century jurist revered by many American framers,⁷ wrote that an oath necessarily involves "calling Almighty God to witnesse."⁸

Over the centuries, the two Faithful Execution Clauses have produced wide-ranging jurisprudences and have been marshaled in many constitutional debates. The President's oath, often in combination with the so-called Take Care Clause, is invoked by participants in debates about the power of the President not to enforce or defend congressional laws on the ground of unconstitutionality.⁹ Both clauses have been cited by the executive branch as supporting an executive privilege to withhold internal documents¹⁰ and an authority to go beyond or even defy standing law to protect the nation in emergencies.¹¹ The Supreme Court has

⁸ Edward Coke, The Third Part of the Institutes of the Laws of England 164 (London, 1797) (1644). For an expression of this view by a prominent American lawyer at the Founding, see James Iredell, Address to the North Carolina Convention (July 30, 1788), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 192, 196 (Jonathan Elliott ed., Washington, D.C., 1836) [hereinafter ELLIOTT]. At the time the Constitution was written, the affirmation option was not viewed as an accommodation for atheists or non-Christians — it was for most Americans unthinkable that such persons would hold public office. See MARC W. KRUMAN, BETWEEN AUTHORITY & LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 47-49, 96-97 (1997) (discussing religious qualifications on officeholding in American states during the Founding era). Rather, the affirmation was an accommodation for Christians who belonged to Protestant sects (non-Anglican) that viewed oath-swearing as profane. See infra p. 2124. The No Religious Test Clause of the Constitution was understood to prohibit the kind of provisions found in Great Britain and some American states that required an oath or affirmation of orthodox Protestant Christian belief as a condition of holding office. See Note, An Originalist Analysis of the No Religious Test Clause, 120 HARV. L. REV. 1649, 1650-52 (2007).

⁹ See, e.g., Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18, 31–33 (1992); AKHIL REED AMAR, AMERICA'S CONSTITUTION 178–79 (2005); Christopher N. May, Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative, 21 HASTINGS CONST. L.Q. 865, 873–74 (1994); Daniel J. Meltzer, Lecture, Executive Defense of Congressional Acts, 61 DUKE L.J. 1183, 1195–96 (2012); Paulsen, supra note 3, at 261–62; Prakash, supra note 3.

¹⁰ See, e.g., Constitutionality of the OLC Reporting Act of 2008, 32 Op. O.L.C. 14, 16–17 (2008); Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Counsel Act, 10 Op. O.L.C. 68, 79 (1986).

¹¹ See, e.g., Brief for Petitioner at 2-4, 27–28, 98–100, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (No. 745); First Inaugural Address — First Edition and Revisions (Mar. 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 249, 253 (Roy P. Basler ed., 1953); *see also* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1257–58 (2004) (locating in the Presidential Oath Clause and constitutional structure "an overriding principle of constitutional and national self-preservation . . . that may even, in cases of extraordinary necessity, trump specific constitutional requirements").

⁶ Id. art. VI, cl. 3.

⁷ See BERNARD BAILVN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 30–31, 177, 225 (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 138–43 (1969).

agreed with the less aggressive proposition that the Take Care Clause, together with other parts of Article II, conveys a large measure of authority to defend the government and interests of the United States in the absence of standing law.¹²

The Take Care Clause is also part of the justifications for, among other things, the President's unfettered ability to remove the heads of at least some types of executive agencies;¹³ federal courts' strict requirement of Article III standing, limiting Congress's ability to grant broad citizen standing;¹⁴ and presidentially imposed oversight of agency rulemaking, such as mandatory cost-benefit analysis.¹⁵ Proponents of prosecutorial discretion as within the province of the Executive invoke the Take Care Clause,¹⁶ as do participants in related debates about policybased nonenforcement or suspension of statutes,¹⁷ and presidential impoundment of appropriated funds.¹⁸ Most concede that the clause's imposition of a duty to execute law implies that the President cannot make law,¹⁹ but some argue that it allows presidential "completion" of incomplete statutory regimes.²⁰

¹⁶ See, e.g., United States v. Armstrong, 517 U.S. 456, 464 (1996); Heckler v. Chaney, 470 U.S. 821, 832 (1985); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965).

¹⁷ See, e.g., Texas v. United States, 86 F. Supp. 3d 591, 614 (S.D. Tex. 2015), aff'd, 809 F.3d 134, 146 (5th Cir. 2015), aff'd by an equally divided Court, 136 S. Ct. 2271 (2016) (mem.) (per curiam) (presidential authority for a deferred action immigration program); SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EX-ECUTIVE 92-97 (2015) (exploring whether the "Faithful Execution Clause" was written to bar suspensions and dispensations); MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 124 (2007) (suggesting that the Take Care Clause bars the suspension power claimed by English monarchs); Robert J. Delahunty & John C. Yoo, Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause, 91 TEX. L. REV. 781, 784 (2013) (arguing "that the Constitution's Take Care Clause imposes on the President a duty to enforce all constitutionally valid acts of Congress in all situations and cases. In other words . . . there is simply no general presidential nonenforcement power"); Gillian E. Metzger, The Constitutional Duty to Supervise, 124 YALE L.J. 1836, 1878 (2015) (arguing that "the [Take Care] Clause at least embodies the principle that the President must obey constitutional laws and lacks a general prerogative or suspension power"); cf. U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 70 (D.D.C. 2015) (addressing whether "the Executive was unfaithful" to the ACA).

¹² See In re Neagle, 135 U.S. 1, 63-64 (1890).

¹³ See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 484 (2010); Myers v. United States, 272 U.S. 52, 117 (1926); see also Suspension of Officer, 18 Op. Att'y Gen. 318, 319 (1885) (citing the Presidential Oath Clause as well).

¹⁴ See, e.g., Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992); Allen v. Wright, 468 U.S. 737, 761 (1984); FEC v. Akins, 524 U.S. 11, 36 (1998) (Scalia, J., dissenting).

¹⁵ See, e.g., Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 VALE L.J. 2280, 2295–96 (2006) (discussing Executive Order No. 12,291, 3 C.F.R. 128 (1981), and Executive Order No. 12,866, 3 C.F.R. 638 (1993)).

¹⁸ See, e.g., Neil M. Soltman, Recent Development, *The Limits of Executive Power: Impound*ment of Funds, 23 CATH. U. L. REV. 359, 366–67 (1973).

¹⁹ See, e.g., Medellin v. Texas, 552 U.S. 491, 532 (2008); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

²⁰ See, e.g., Goldsmith & Manning, *supra* note 15, at 2303–04.

And in recent shorter works, we have suggested that the Take Care Clause and Presidential Oath Clause also speak to contemporary controversies about President Trump's use of the pardon power²¹ and his control over removal of officers in the Department of Justice.²²

Notwithstanding all of these claims about the clauses by the Executive, courts, and scholars, no one has actually figured out where the clauses came from or what they were understood to mean when they were drafted and adopted.²³ Writing about the Take Care Clause, but making a point that applies to the Presidential Oath Clause as well, Professors John Manning and Jack Goldsmith note that the Supreme Court tends to "treat[] the meaning . . . as obvious when it is anything but that," and fails to "parse the text" or "examine the clause's historical provenance."²⁴ Little said explicitly during the Philadelphia was Convention or the ratification debates in the states about the Faithful Execution Clauses,²⁵ but some scholars have noted that the Take Care Clause mirrors language found in the post-independence constitutions of Vermont, New York, and Pennsylvania, and a frame of government for colonial Pennsylvania.²⁶ Still, essentially nothing has yet been discovered or written about the origin and historical meaning of the "faithful execution" language they share.

This Article, then, is the first substantial effort to pursue the historical origins of the twin commands of faithful execution²⁷ and to link

²⁴ Id. at 1838.

²¹ See Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Two Legal Conclusions*, 16 GEO. J.L. & PUB. POL'Y (forthcoming 2019) (manuscript at 11–13) (on file with the Harvard Law School Library); Andrew Kent, Ethan Leib & Jed Shugerman, *Self-Pardons, Constitutional History, and Article II*, TAKE CARE BLOG (June 16, 2018), https://takecareblog.com/blog/self-pardons-constitutional-history-and-article-ii [https://perma.cc/SR2S-UTX7]; Jed Shugerman & Ethan J. Leib, *This Overlooked Part of the Constitution Could Stop Trump from Abusing His Pardon Power*, WASH. POST (Mar. 14, 2018), http://wapo.st/2pdoIzK [https:// perma.cc/48ZB-YSPE].

²² Ethan J. Leib & Jed Shugerman, *Mueller's Recourse*, SLATE (Mar. 19, 2018), https://slate.com/news-and-politics/2018/03/if-a-trump-official-fires-the-special-counsel-to-protect-trump-mueller-can-sue-to-keep-his-job.html [https://perma.cc/2C66-WG6H].

²³ See Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836 & n.9 (2016).

²⁵ See infra sections I.A–B, pp. 2121–32; see also MATTHEW A. PAULEY, I DO SOLEMNLY SWEAR: THE PRESIDENT'S CONSTITUTIONAL OATH 107 (1999) ("The wording of [the] oath occasioned little serious discussion during the Constitutional Convention."); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 63 (1994) ("[A]t the founding, the [Take Care Clause] received relatively little consideration by practically everyone in the debate.").

²⁶ See infra notes 297, 374 & 377–378 and accompanying text; see also PRAKASH, supra note 17, at 96 (noting the linguistic similarities); Bellia, supra note 3, at 1174 n.118 (same); Delahunty & Yoo, supra note 17, at 802–03 (same); Zachary S. Price, Enforcement Discretion and Executive Duty, 67 VAND. L. REV. 671, 693 n.75 (2014) (same).

²⁷ But see Ryan S. Killian, Faithfully Interpreting "Faithfully" (Feb. 17, 2014) (unpublished manuscript) (on file with the Harvard Law School Library) (concluding in a short essay drawing upon

these findings to the original meaning of Article II.²⁸ We do not enter the debates about how heavily originalist findings should ultimately weigh in the calculus of contemporary constitutional meaning, or about the best form of originalism. We are satisfied that our archaeological project here is justified by the fact that all, or nearly all, constitutional interpreters consider original textual meaning, informed by historical context, to be an important factor in constitutional interpretation,²⁹ and that all, or nearly all, varieties of originalists will find our methods reasonable.³⁰

So what does our new history show? The Faithful Execution Clauses are linked not only by common words, but also by a common historical purpose: to limit the discretion of public officials. The language of "faithful execution" at the time of the framing was very commonly associated with the performance of public and private offices — especially but by no means only those in which the officer had some control over the public fisc. The drafters at Philadelphia did not *ex nihilo* come up with the idea of having a chief magistrate who would take an oath of

²⁹ See, e.g., PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7–8 (1982); Michael C. Dorf, Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning, 85 GEO. L.J. 1765, 1798–800 (1997); Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 HARV. L. REV. 1189, 1244–45, 1252–58 (1987).

³⁰ Because we present overwhelming evidence that the Faithful Execution Clauses were written in the language of the law, but see John O. McGinnis & Michael B. Rappaport, The Constitution and the Language of the Law, 59 WM. & MARY L. REV. 1321, 1371 n.229 (2018) (finding the Take Care Clause to be ambiguous rather than purely in the language of the law), "original methods" originalists will be able to interpret the clauses as lawyers at the time of the Founding would have understood their technical meanings. See, e.g., John O. McGinnis & Michael B. Rappaport, Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction, 103 NW. U. L. REV. 751, 751–52 (2009). Moreover, because we show that the concept of faithful execution of office was so commonly used and well known, other public meaning originalists who seek to discern how informed lay people would have understood the Constitution should find our results valuable too. See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 92 (2004) (looking to the "meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment"); Michael D. Ramsey, Missouri v. Holland and Historical Textualism, 73 MO. L. REV. 969, 975 (2008) (discussing "educated and informed speakers of the time"). Finally, because most of the important drafters of the Constitution were lawyers or at least literate in law and government, see Meet the Framers of the Constitution, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/founding-fathers [https://perma.cc/NMJ4-JJ7D], originalists who focus on the intentions of the drafters should find our research about the legal and political meaning of "faithful execution" useful.

contemporaneous usage that "faithful execution" was a "boilerplate term of art," *id.* at 10, but also an example of the "anti-corruption principle' animating the Constitution," *id.* at 12).

²⁸ A search for original public meaning of the Constitution's text is currently the most widely accepted form of originalist inquiry. This method is sometimes also called "new originalism," "new textualism," or other names. It seeks to discern, as of the time of ratification of the constitutional text, "the meaning actually communicated to the public by the words on the page." Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 413 (2013); *see also* Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 FORDHAM L. REV. 757, 759 (2013) (stating that new originalism seeks to find "the objective linguistic meaning that the text of the Constitution would likely have had to an American audience at the time of adoption").

faithful execution and be bound to follow and execute legal authority faithfully. The models were everywhere. Governors of American colonies pre-independence, post-independence state governors, executive officers under the Articles of Confederation government, and other executives such as mayors and governors of corporations were required, before entering office, to take an oath for the due or faithful execution of their office. These officials were directed to follow the standing law and stay within their limited authority as they executed their offices just as the British monarch was by an oath taken at coronation. Anyone experienced in law or government in 1787 would have been aware of this because it was so basic to what we might call the law of executive officeholding.

Yet one of our most interesting findings here is that commands of faithful execution with duties that parallel Article II applied not only to senior government officials who might have been plausible models for the presidency in Article II, but also to a vast number of less significant officers. It turns out that the U.S. President, who today bestrides the globe in the world's most powerful office, has the commands of fidelity with antecedents dating back centuries in humble offices like town constable, weigher of bricks, vestryman of the church, recorder of deeds, and inspector of flax and hemp. In fact, this history shows that the framers did not borrow the language of the English coronation oaths (which did not include the word "faithful" or its synonyms), but instead borrowed from the "faithfulness" oaths of midlevel or lower offices. This, we argue, has historical and legal implications for debates among proponents of royalist and republican understandings of the presidency.³¹

As we will trace below, this imposition of a duty of fidelity on officers — through oaths and otherwise — by the time of the framing had three basic components or substantive meanings. Our first finding, consistent with usage reported in contemporaneous dictionaries, is that faithful execution was repeatedly associated in statutes and other legal documents with true, honest, diligent, due, skillful, careful, good faith, and impartial execution of law or office. Second, the faithful execution duty was often imposed to prevent officeholders from misappropriating profits that the discretion inherent in their offices might afford them. Third, the duty was imposed because of a concern that officers might act ultra vires; the duty of faithful execution helped the officeholder internalize the obligation to obey the law, instrument, instruction, charter, or authorization that created the officer's power.

³¹ Compare PRAKASH, supra note 17, and ERIC NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING (2014), with Julian Davis Mortenson, Article II Vests Executive Power, Not the Royal Prerogative, 119 COLUM. L. REV. (forthcoming 2019) (manuscript on file with authors).

What these three aspects of the duty of fidelity have in common is that they look a lot like *fiduciary* duties in the private law as they are understood today.³² The word "fiduciary" is derived from the Latin "fides," meaning "faith," and from "fiducia," meaning "in trust"³³ or a "position of trust" or "confidence."³⁴ Although decades of scholarship have traced the idea of public offices as "trusts" — private law fiduciary instruments — from Plato through Cicero and Locke,³⁵ and several scholars have found ways to make points of contact between that tradition and our constitutional tradition,³⁶ the Faithful Execution Clauses are substantial textual and historical commitments to what we would today call fiduciary obligations of the President. We do not claim that the drafters at Philadelphia took ready-made fiduciary law off the shelf and wrote it into Article II. But we do assert that the best historical understanding of the meaning of the Faithful Execution Clauses is that they impose duties that we today — and some in the eighteenth century as well — would call fiduciary.

Our narrative history takes the following form: Part I retells the story of the role of the Faithful Execution Clauses at the Constitutional Convention and in the ratification debates in the states. We also pursue linguistic usage and social practice of the eighteenth century to clarify what the Founding generation would have thought was involved in swearing an oath or affirming to faithfully execute an office, and being commanded to ensure that the laws are faithfully executed. These traditional sources of original meaning remain insufficient, however.

Part II thus performs a deeper historical inquiry into the meaning of faithful execution in the centuries leading up to the framing of the U.S.

³⁴ *Fiduciary*, BLACK'S LAW DICTIONARY (9th ed. 2009); 2 ROBY, *supra* note 33, at 98 & n.2; VINTER, *supra* note 33, at 1; *see* OXFORD LATIN DICTIONARY (P.G.W. Glare ed., 2d ed. 2012).

³⁵ See J.W. GOUGH, JOHN LOCKE'S POLITICAL PHILOSOPHY 136 (2d ed. 1973); C.E. VAUGHAN, STUDIES IN THE HISTORY OF POLITICAL PHILOSOPHY 143–57 (1939); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Principles and Public Offices*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 303 (Evan Criddle et al. eds., 2019).

³⁶ See, e.g., GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDER-STANDING THE FIDUCIARY CONSTITUTION 33-34 (2017); Paul Finn, The Forgotten "Trust": The People and the State, in EQUITY: ISSUES AND TRENDS 131, 131 (Malcolm Cope ed., 1995); Paul Finn, Public Trust and Public Accountability, 3 GRIFFITH L. REV. 224, 228 (1994); Robert G. Natelson, The Constitution and the Public Trust, 52 BUFF. L. REV. 1077, 1078-88 (2004) [hereinafter Natelson, The Public Trust]; Robert G. Natelson, Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders, 11 TEX. REV. L. & POL. 239, 245 (2007) [hereinafter Natelson, Judicial Review]; Robert G. Natelson, The Legal Origins of the Necessary and Proper Clause, in THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52, 52-53 (2010) [hereinafter Natelson, The Necessary and Proper Clause].

³² See Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1822 (2016).

³³ See Fiduciary, BLACK'S LAW DICTIONARY (9th ed. 2009); 1 BOUVIER LAW DICTIONARY 1075–76 (Stephen Michael Sheppard ed., 2012); 2 HENRY JOHN ROBY, ROMAN PRIVATE LAW IN THE TIMES OF CICERO AND OF THE ANTONINES 98 & n.2 (1902); THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 354 (C.T. Onions ed., 1966); ERNEST VINTER, A TREATISE ON THE HISTORY AND LAW OF FIDUCIARY RELATIONSHIP AND RESULTING TRUSTS 1 (3d ed. 1955).

Constitution. Our archaeology starts in English law in the period of Magna Carta and proceeds through the early modern era. We then explore the tumultuous seventeenth century of Stuart kings and two revolutions, where we can identify transitions in the meaning of "faithful execution" and the law of officeholding. We see this developed conception of faithful execution move through English law in Hanoverian Britain until 1787. We also focus attention on the other side of the Atlantic, studying North American colonial governments from their earliest days through the Revolution of 1776. We then examine post-independence governance in the U.S. states and at the national level under the Continental/Confederation Congress. On both sides of the Atlantic, then, we reveal oaths, commands, and bonds of faithfulness that have for centuries in the Anglo-American tradition applied to executive officers. We delineate which offices were given these duties of loyalty — and how the demand of faithfulness developed over time.

We then take these histories together in Part III to sketch an account of what the Faithful Execution Clauses in the U.S. Constitution would likely have been understood to mean in 1787. Our history supports readings of Article II of the Constitution that limit Presidents to exercise their power only when it is motivated in the public interest rather than in their private self-interest, consistent with fiduciary obligation in the private law. It also supports readings of Article II that tend to subordinate presidential power to congressional direction, requiring the President to follow the laws, instructions, and authorizations set in motion by the legislature. As a corollary, these conclusions tend to undermine imperial and prerogative claims for the presidency, claims that are sometimes, in our estimation, improperly traced to dimensions of the Take Care and Presidential Oath Clauses. What judicial precedent or historical "gloss"³⁷ after 1787 adds to the meaning of "faithful execution" is beyond the scope of our investigation here. But we think our historical reconstruction has continued relevance to ongoing debates about Article II.

It is, ultimately, not easy to know how to enforce the constitutional obligations we uncover. The correct method of interpreting and applying the Constitution in the present day is endlessly contested, because it is unclear how to evaluate a President's subjective motives and what to do about mixed motive cases.³⁸ Moreover, the enforcement mechanisms we found for commands of faithful execution run the gamut from judicial enforcement via damages, fines, injunctions, bond forfeiture, and criminal penalties, to impeachment and removal from office. But on the substance of the President's faithful execution duties in Article II, we conclude that their original meaning includes at least 1) a strong concern about avoiding ultra vires action; 2) proscriptions against profit, bad faith, and self-dealing; and 3) a duty of diligence and carefulness.

³⁷ See, e.g., Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 413 (2012).

³⁸ For a recent example of these difficulties, see the conflicting views in the briefs and opinions of the Justices in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the travel ban case; and see also Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1108–14 (2018).

he number of bills passed by Congress is rapidly approaching zero, with legislative gridlock at an all-time high.

Rebecca Kysar's research identifies a new category of legislation that Congress could use to overcome inertia. It is known as dynamic legislation—or legislation that updates itself automatically.



Rebecca Kysar Professor of Law

classic example of dynamic legislation is already used in the tax code, where parts of the code are indexed for inflation so that the rate brackets and certain deductions and credits do not get eroded by the rising cost of living. There is room, however, for Congress to use dynamic legislation in other contexts. Professor Kysar's work provides the following insights:

- From the perspective of democratic considerations, dynamic legislation holds the most promise compared with other tools that Congress uses to alleviate gridlock. One reason dynamic legislation outperforms other devices designed to combat status quo bias is because it leverages the resources of the administrative state without succumbing to excessive deference, does not impermissibly entrench the current majority, and is not as susceptible to the pathologies of the political economy and budget processes as some other tools.
- Dynamic legislation holds the most potential in areas where quantitative indices can be developed to minimize its design costs. It will also be desirable when the area of law presents acute concerns in the democratic categories outlined above—criteria in which dynamic legislation performs favorably. Notably, fiscal policy shares all of these qualities. This partially explains why this area already contains a greater degree of dynamic legislation than other areas.
- Yet dynamic legislation is underutilized in fiscal policy and other contexts. Using phase-ins and phase-outs that adjust according to varying circumstances, rather than static dates on the calendar, is one strategy that holds promise. So do countercyclical and regionally targeted laws. Laws might also be calibrated to one another or, like the 2017 tax proposals, to a budgetary goal.

Dynamic Legislation

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A. THE DEMOCRATIC BENEFITS OF DYNAMIC LEGISLATION

In recent years, Congress has lurched from one fiscal or budget crisis to another. Expiring tax laws, government shutdowns, debt ceiling limits, and sequesters have created an atmosphere of legislative chaos, requiring congressional action to avoid dire consequences. On the precipice of each cliff, real costs have ensued from the anticipation that Congress will fail to reach a deal. Future crises seem inevitable, as the nation's debt repeatedly approaches the ceiling, clashes over annual spending levels increase, sequestration continues to loom, and temporary tax policies once again take hold.

Yet these events are of Congress's own making, a direct and foreseeable product of the legal mechanisms it has created. Why then does Congress keep setting itself up for failure, creating games of chicken that have the potential to end catastrophically? In designing these mechanisms, Congress recognizes its limited capacity to respond to evolving circumstances. The legislative process contains a status quo bias, making congressional response to changing social, technological, environmental, economic, and foreign policy conditions challenging. Other factors have combined with constitutional design to create a system of government that, in the view of many, is hopelessly gridlocked. To compensate for the status quo bias in lawmaking, lawmakers have developed devices that aim to provide paths to legislative change, such as prodding Congress into action by threatening policy cliffs or crises.

Although scholars have long addressed extra-congressional means of addressing this status quo bias, such as judicial expansion of the common law, dynamic statutory interpretation, and agency delegation, only recently has focus shifted to these congressional tools. Assuming it is possible to achieve, locating the solution to legislative inertia within the lawmaking body itself, as opposed to the judiciary or agencies, is preferable from the perspective of institutional competence and separation of powers. Yet, as the legislative crises of the past decade demonstrate, those tools that Congress most often employs can have devastating effects. It thus seems wise to explore Congress's entire arsenal of status quo devices, including those that are less often exercised.

The congressional status quo devices can be divided into three main categories. Procedural mechanisms—like the reconciliation process—may eliminate barriers to legislating. I label these mechanisms "veto bridges" as an antonym to the often used "veto gates," which refer to those points in the legislative process that can derail legislative proposals. Laws may also prompt Congress to act through sunset dates or penalties like sequestration or other undesirable policy outcomes. I identify this category as "prompting legislation." Finally, the legislative product itself may automatically update without further action by Congress through the use of what I call "dynamic legislation." This type of legislation spontaneously adjusts legal rules to future circumstances based on predetermined, external criteria.

I contend that it is this last category—dynamic legislation—that has the most untapped potential from a democratic process perspective. Specifically, I argue that dynamic legislation outperforms the other status quo devices because it leverages the resources of the administrative state without succumbing to excessive deference, does not impermissibly entrench the current majority, and is not as susceptible to the pathologies of the political economy and budget processes. Democratic considerations, in other words, weigh in favor of dynamic legislation as a preferred tool against legislative inertia. This Article thus builds the case that dynamic legislation has much to offer *categorically*. It therefore departs from the scant scholarship that exists on the topic, which has traditionally judged dynamic legislation from the standpoint of the particular policies at issue.

Before addressing solutions to the status quo bias in American lawmaking, however, one may rightfully ask if there is even a problem. After all, the Constitution's many hurdles to lawmaking are part of its contemplated design, intentionally balancing between policy stability and the whims of majority rule. Gridlock in American politics is thus nothing new. In addition to the constitutional requirements of bicameralism and presentment, however, internal congressional practices such as committee approval and supermajority rules also create further, extra-constitutional obstacles to policymaking. In the current era, heightened partisanship and increasing demands upon Congress's constrained agenda have taken the political impasse to a degree and occurrence rate unimagined by the Framers. These dynamics have left a host of unaddressed problems plaguing the nation, and new strategies are needed to restore the functioning of the United States government. Dynamic legislation should be part of that toolset.

One way in which dynamic legislation outperforms the other status quo devices is its interaction with the administrative state. Delegation to agencies has long been recognized as a cure to the inability of Congress to respond to changing circumstances. The cost of this delegation, however, is congressional loss of control over policymaking. Congress could make such delegations temporary in order, for instance, to protect against a future President's policy preferences diverging from its own. A better solution, and one that does not require so many future legislative resources, might be to delegate to the agency but within automatically adjusting parameters.

Entrenchment considerations also support dynamic legislation. An implicit constitutional limitation on entrenchment prevents "one legislature [from] bind[ing] the legislative authority of its successors." At first glance, dynamic legislation seems to do just that by reducing the opportunities for future legislators to revisit policy choices of the past. But, as I will explain, it is actually less noxious from an entrenchment standpoint than prompting legislation, which demands significant legislative attention by generally reverting to older, less desirable policy. In so doing, prompting legislation crowds out other legislative agenda items. Worse, it does so at a single point in time, which can exacerbate the entrenchment effect if Congress's attention is divided on other matters. In contrast, dynamic legislation has the potential to *reduce* the demands upon Congress's agenda by freeing it from the obligation to update legislation continually in light of evolving circumstances.

Fairness and political economy considerations also weigh in favor of dynamic legislation. The transient nature of veto bridges, for instance, exacerbates troubling dynamics within Congress. A majority of each house can change its legislative rules. When those rules are used to expedite legislation, the result is often an impermanent set of parameters that changes along party lines. This makes procedural rules vulnerable to accusations of unfairness in the democratic process, which is especially troubling given their purported function of setting out neutral ground rules that apply equally to all participants in the lawmaking process.

Prompting legislation also suffers from fairness concerns because the triggering event—set to harm those least able to tolerate the default outcome—often falls on party lines. Sequestration, for instance, penalizes those who wish to keep spending levels constant. Sunsetted tax cuts, on the other hand, punish those who wish to keep tax cuts in place. Prompting legislation may further exacerbate partisanship by creating policy cliffs that can lead to games of chicken.

Dynamic legislation avoids these difficulties by not requiring, and indeed minimizing, future congressional actions. The policy is set to change depending on external conditions, and it is likely unclear at the outset who will benefit and who will be harmed from those automatic changes. It thus comes closer to placing interested parties behind the Rawlsian "veil of ignorance." Relatedly, dynamic legislation may produce less interest group activity since its long-term effects will be unknown. In stark contrast, prompting legislation will generally *increase* the extraction of rents from interest groups by creating a period during which benefits are likely to be distributed to knowable interest groups and by continually threatening policy cliffs.

Another significant but often overlooked axis along which we should measure the status quo devices is their interaction with the budget process. Prompting legislation has toxic effects upon this process. Devices like sequestration have generally proven to be too harsh or too lenient to be effective, and temporary legislation goes unpaid for due to budgetary gimmicks. Dynamic legislation does not provide the same opportunity for evasion of budgetary rules. Because dynamic legislation does not require subsequent congressional action, Congress cannot exploit differences in the budgetary treatment of two congressional actions—a dynamic that occurs in the context of prompting legislation.

From a practical perspective, each of the aforementioned tools have limitations. Veto bridges are unenforceable and non-substantive in nature. Prompting legislation disrupts planning by private and public actors. Dynamic legislation is often costly to design, requiring information upfront. The impact of these limitations is context-specific, but dynamic legislation holds the most potential in areas where quantitative indices can be developed to minimize its design costs. It also will be desirable when the area of law presents acute concerns in the democratic categories outlined above criteria in which dynamic legislation performs favorably.

Notably, fiscal policy shares all of these qualities. This partially explains why this area already contains a greater degree of dynamic legislation than other areas. Several features of the tax code, for instance, are indexed to inflation. Just recently, during consideration of the 2017 tax bill, lawmakers proposed that the bill's tax cuts be automatically ratcheted down if the bill failed to generate sufficient economic growth, and that other tax increases would be turned off if a revenue hurdle was met.

Other areas of fiscal policy also utilize dynamic legislation to some extent. For instance, certain unemployment insurance benefits are keyed off a state's overall unemployment level. Some features of Social Security are indexed for inflation, and Medicare premiums are tied to health care costs to an extent. Even still, dynamic legislation is underutilized in these and other contexts. The design features of dynamic legislation could be particularly useful in certain contexts.

B. POTENTIAL APPLICATIONS

1. Countercyclical Measures

In times of economic downturn, lawmakers and regulators can employ tools to assist in stabilizing the economy. Monetary policy is the most often employed countercyclical measure largely because the Federal Reserve can quickly adjust interest rates in response to economic conditions. Post–Great Recession, however, many economists have questioned whether monetary policy alone is a sufficient response, especially in the face of dramatic downturns. There might be a floor, for instance, to which interest rates can be lowered without harmfully impacting the dollar or creating future bubbles. Fiscal policy, such as increased spending and tax cuts, may then be necessary. Other advantages to fiscal policy are that they are often faster acting and can be crafted to reach specific recipients.

Still, economists and others often distrust countercyclical fiscal measures because of design difficulties. In order to be effective and not counterproductive, fiscal stimulus must be "timely, temporary, and targeted." Dynamic legislation can be utilized to achieve all three of these factors, and so could be employed in the countercyclical context, both in the tax and spending areas. First, dynamic legislation can be designed to immediately spring into life once a measure of economic weakness occurs, thus ensuring that the legislative response is timely. Possible triggers could be the unemployment rate, negative economic growth, or when the federal funds rate is at or near 0%. Dynamic legislation can also phase out as conditions, such as the unemployment rate, improve to ensure it is temporary. Finally, fiscal policy generally allows for target-ed relief—for instance to the middle and lower classes—in a way that monetary policy cannot. Dynamic legislation might offer the ability to target measures even further. For instance, it could be used to deliver benefits to those regions most affected by the

downturn. Regional provisions are discussed below.

Recent scholarship has focused on how the legal system might respond to macroeconomic conditions. For instance, Zachary Liscow has proposed that bankruptcy rules be "countercyclical," prescribing that bankruptcy judges consider the employment effects of their cases based on the unemployment rate. Although interesting, this proposal suffers from the critique that it stretches the institutional competence of the judiciary, which may be ill-equipped to make judgments concerning the economy at large. A Congress-centered approach that sets countercyclical measures into motion upon the presence of certain indicators as is proposed herein, does not face this structural critique.

2. Regionally Targeted Legislation

Another area where dynamic legislation could be effectively employed is legislation targeted to regions. Fine-tuning federal policy in this manner might generate positive welfare effects. Take, for instance, the fact that federal taxes are assessed on nominal incomes, without regard to cost of living differences between areas. This policy discourages taxpayers from working and living in higher-paying cities. Although salaries and property values adjust to make up for the federal tax disparity, the non-neutrality between tax bills in locales results in an inefficient employment distribution. Indexing taxes to local wages, however, would neutralize most of this distortion.

Automatically tying federal benefits to the specific needs of a region could also be beneficial from fairness and budgetary standpoints. In the countercyclical context, for instance, extensions of federal unemployment insurance are automatically triggered if state unemployment conditions exceed a certain threshold. This type of program has the potential to engender fairness by ensuring the residents of the neediest states receive benefits. It also saves costs by narrowly tailoring benefits and by allowing those benefits to be calculated with administrative ease.

Extending regional automatic mechanisms to other spending programs could produce similar benefits. Suppose, for instance, that Congress adopted measures to address the opioid epidemic, which is a nationwide crisis with varying and fluctuating degrees of severity across regions. It could decide to allocate funds on a continuing basis according to the extent of the crisis at the state level, using factors such as overdose and addiction rates. Other crises could be addressed in a similar manner. Ongoing disasterpreparedness funds, for instance, could be distributed to states in accordance with their climate-related risks. Or funds for adult education could be distributed to those states hit hardest by the overall decline in manufacturing jobs.

Dynamic legislation allows Congress to adapt federal policy to regional needs. The political events of the twenty-first century suggest widespread frustration that the federal government has failed to address the fact that the rewards and strains of the modern economy fall unevenly across states, creating winners and losers. We can expect that the complexities of challenges like globalization, the displacement of jobs by

technology, and climate change will continue to have varied, regional effects. Rather than employing blunt instruments, the federal government would benefit states by using carefully crafted remedies. With dynamic legislation, Congress can do so without needing to continually revisit the law and without ceding control over policy to the executive branch.

3. Intra-legal and Budgetary Measuress

a. Overall Budget Constraints

One most naturally thinks of dynamic legislation as allowing for the law to adjust based on external factors. Dynamic legislation, however, can also be used so that the law responds to changes within other parts of the legal system. This would create interesting opportunities to coordinate broad social policies across areas of law by tying them together. For instance, health care policy could be adjusted, not only for current health care costs, but also for current entitlement commitments and tax expenditures in the area.

Intra-legal measures might be especially powerful when used in conjunction with an overall budget constraint. In contrast to internal budget rules, the budgetary constraint could be built into the substance of the law. Congress thus would find it much less easy to evade. For instance, in the early 1980s, proposed legislation would have limited the amount of revenue lost to tax expenditures to no more than thirty percent of the net revenues collected in the fiscal year. The mechanism, however, was a procedural rule, enforced by a point of order, against any budget resolution that contained tax expenditures exceeding thirty percent of the recommended level for net revenue set forth in the resolution. Congress could thus easily evade the rule due to its procedural status.

One could imagine, however, this budget constraint, or something similar, embedded within the substantive statute. For instance, the prior year's revenues could dictate the total level of tax expenditures available to taxpayers. If revenue benchmarks are met, then the tax expenditures could be automatically granted in whole.

In the Social Security context, David Kamin has suggested that benefits and taxes be automatically adjusted if the system is projected to become insolvent. On the tax side, for instance, the payroll tax rates could be automatically increased (or decreased if the projections improve). On the spending side, benefits could be automatically reduced, perhaps hitting only new beneficiaries or those with higher lifetime earnings. To develop this further, it is also possible that the spending and tax changes be tied to one another. For instance, suppose lawmakers are committed to solvency but can tolerate only so much in benefit cuts. The tax increases could be structured such that they make up any shortfall in the system's solvency after taking into account the savings produced by the benefit cuts.

On a more ambitious level, David Scott Louk and David Gamage have argued that default budget policies, which are triggered if legislators do not pass a budget, could cure the games of chicken and negotiating failures that have come to define the "new fiscal politics." A default budget at the federal level could be implemented, they suggest, by updating the prior year's budget to reflect changes in population and the economy, assigning an agency the task of adjusting taxes and spending based on predetermined formulas.

b. "Reverse Earmarking"

Some states have experimented with tying revenues to budgetary constraints. At the federal level and in most states, the gas tax is calculated on a per-unit (typically gallon) basis, not as a percentage of purchase price. As a result, gas tax revenues do not increase as gasoline prices rise. Indeed, in the current era, increasing fuel efficiency and inflation have devastated revenues from the gas tax, both at the federal and state levels. In response, some states have begun indexing the gas tax rate to inflation or to a percentage of the price of gas. In a more unorthodox move, Nebraska adjusts the gas tax to the state's transportation spending in an attempt to ensure adequate revenues for transportation projects. Nebraska's gas tax is analogous to the practice of earmarking, which dedicates revenues to a specific purpose, but differs in important respects. Earmarking is pursued in order to guarantee steady sources of funding for the program at issue, but it is criticized for reducing the legislature's flexibility in establishing funding priorities. A tax like the Nebraska gas tax-let's call it "reverse earmarking"-allows the government to ascertain first its spending priorities in certain areas and then adjusts the tax accordingly to fund those priorities. This type of mechanism could ensure funding of specific government activities without forcing the government's hand as to spending levels ex ante.

States have also capped tax rates to maintain a static amount of revenue from year to year. This is done at the property tax level in response to concerns that local governments were receiving extra revenues as property values increased. These automatically adjusting rates generate the same amount of revenues from year to year even though the value of the tax base has changed. Reverse earmarking is essentially a less libertarian version of this mechanism, instead adjusting tax rates based on current government spending.

c. Tax "Triggers" and Responsible Tax Cutting

States have also recently experimented with so called tax "triggers," which phase in tax cuts or other tax reform measures when the state meets pre-established fiscal targets, such as growth in revenues. The triggers are justified on the basis of promoting fiscal responsibility, although the states' experiences on this front have been mixed. For instance, in 2014, Oklahoma tied tax cuts to estimated revenues as opposed to actual revenues, causing tax cuts to be triggered even though the state's deficits were rapidly increasing. The legislature was then forced to repeal the trigger so that a second round of tax cuts that were triggered when actual, realized revenue exceeded budgeted revenue. Revenues, in fact, increased, and the tax cuts are scheduled to go into effect in 2018.

Triggers have the potential to allow governments some degree of predictability in their revenue stream while also letting an increase in revenues to be designated for tax relief, allowing for a phenomenon that we might call "responsible tax cutting." Triggers could also assist in achieving consensus over broader tax reform. For instance, if agreement cannot be reached over appropriate revenue offsets for tax cuts, the cuts might be delayed to go into effect when revenue goals are attained. Experience with the triggers, however, underscores that they must be carefully designed—a lesson that can be extended to all dynamic legislation. In addition to accounting for actual revenues, triggers should also account for actual revenue growth rather than the effects of inflation or a temporary rebound in revenues. They should, for instance, be based on multi-year estimates of revenues and spending.

During the 2017 debate over tax reform, revenue triggers were explored. Senate deficit hawks proposed to roll back the tax cuts in TCJA if the law's deficit impact turned out to be worse than advertised. It is important, however, that any such triggers not be used in a symbolic fashion to justify unaffordable tax cuts. The targets contemplated in the TCJA trigger were too modest in comparison to the huge revenue losses of the bill, making up for only about 10% of the bill's increase to the debt in the budget window period.

Collectively, these examples show that states, as "laboratories of democracy," have already begun experimenting with dynamic legislation in the budgeting context. The federal government can benefit from their experiences. Indeed recent federal tax proposals seem to suggest that automatically adjusting budget-related measures are spreading to the national arena, although caution should be exercised in their design.

4. Pigouvian Taxes

Another area where dynamic legislation should be considered is in the Pigouvian tax context. Under economy theory, markets fail when parties do not bear the full costs of their actions, thereby producing negative externalities. Governments can impose Pigouvian taxes in the amount of such externalities, which thus causes the parties to internalize the costs of their actions. The parties are then able to make an economically efficient decision, weighing an action's full costs upon the world against its benefits.

Of course, assessing the social costs of the activity, and hence the correct level of taxation, still poses design challenges. Dynamic legislation could address one aspect of this complexity—the social costs of an activity, or the information used to calculate them, may not be static. A unit of pollution may impact society differently from year to year. In that case, a tax assessed on the pollution itself may be correct initially but may then deviate from the socially optimal level if the social harm per unit increases or decreases. For instance, new information may indicate that the climate is more sensitive to carbon dioxide emissions than previously thought. Dynamic legislation, perhaps coupled with delegation to a regulating entity, could dynamically adjust the tax rates to account for these changes.

Many in the environmental field challenge the idea that setting tax rates equal to the social costs of the pollution is sufficient since this will not necessarily result in the

reduction of emissions. The argument is that the tax must also be greater than the marginal cost of abatement, otherwise the polluting firm will not reduce emissions. Dynamic legislation could also be employed to address this challenge by dynamically adjusting the tax in response to whether current activities or behaviors, in this case emissions, exceed or fall short of a target level. Dynamic legislation, in this case, leverages the additional information that the implementation of the tax would provide—the cost of abatement.

One carbon tax proposal, for instance, would create an initial tax, coupled with a standard growth rate for the tax that would be applicable during a control period. Emission targets could be set for certain time intervals. If the targets were unmet, the imposition of a higher growth rate for the tax would be triggered, which would turn off once emissions fell below the target.

5. Nontraditional Phase-Ins and Phase-Outs

Another promising application would be to use dynamic legislation to phase-in legislative changes. There is an old adage that legal reforms produce winners and losers. Phase-ins can mitigate the negative impact upon certain parties. Typically, phase-ins work by gradually implementing policies as time passes. Rather than make the transition contingent on dates, however, one could employ dynamic legislation to make the provisions contingent upon the occurrence of external events. This type of phase-in could be particularly useful where new policies present uncertainties as to how they will interact with the real world. One could design the legislative phase-in so that the change is ratcheted up only after certain events occur or if there is evidence that the change is generating the desired effects.

For instance, central to a recent tax reform proposal was a cash flow destination-based tax, which would have turned the current corporate income tax into essentially a consumption tax. The plan was border adjusted, meaning that it excludes exports and taxes imports without deduction for costs. Controversially, the plan may have impacted prices on imports. Under economic models, the value of the dollar should, however, correspondingly increase, making the tax neutral vis-à-vis American consumers and importers. Skepticism in the business and investment community regarding the currency adjustments, however, turned out to be a major political obstacle to its enactment.

One way to assuage those nervous about relying on untested models would be to phase-in the tax, not simply across time, but to peg its introduction to the dollar adjustment. The tax rate could be designed such that it increases by a specified percentage for every x% increase in the dollar. This transition rule would minimize any negative effects on consumers and importers because the lower rate would cap the impact on consumer prices, perhaps assuaging critics to a sufficient degree to allow for enactment of the tax.

Tom Merrill and David Schizer's petroleum fuel price stabilization plan (PFSP) also proposes dynamic phase-ins. The PFSP would set a floor of \$3.50-\$4.00 per gallon

of gas and would assess a fuel levy if the price of gas fell below that threshold. The levy would rise as world oil prices fell and, conversely, would fall as prices rose. One version of the plan employs a traditional phase-in, raising the price threshold over time. However, another variation adopts a type of nontraditional phase-in by providing that the threshold trail any upward movements of the retail price, until the threshold is set to the desired level.

C. CONCLUSION

In summary, this Article argues that, along democratic axes, dynamic legislation categorically outperforms other devices—such as reconciliation, sequestration, and sunsets—that Congress uses to temper the status quo bias in American lawmaking. Dynamic legislation allows Congress to retain some control over policy by avoiding or narrowing delegation to agencies, without expending resources on constantly updating the law. Dynamic legislation frees later Congresses to effectuate their agenda, rather than to simply race against changing environs to keep original legislative bargains in place. Dynamic legislation also has the potential to function like a veil of ignorance rule—bestowing benefits and burdens upon unknown constituencies—and thus reduces interest group activity. Finally, by removing the need for future congressional actions, dynamic legislation reduces opportunities for budgetary gamesmanship. Dynamic legislation may even improve upon the budget process by statutorily peging policy to revenue goals.

As a result of these benefits, Congress should make more frequent and creative use of dynamic legislation, especially in areas of law that present democratic concerns and where the availability of quantitative measures reduces design costs, such as fiscal policy. Although our laws will never entirely be on autopilot, dynamic legislation equips Congress with a tool to better maintain its legislative intent across time. ourts and scholars have long found it difficult, if not impossible, to determine whether seemingly "neutral" government acts—that is, legislative and administrative decisions that lack any facially discriminatory language are the product of malicious intent.

Drawing on theory and practice, Joseph Landau discusses a number of processbased mechanisms to surface the intent behind facially neutral government action.



Joseph Landau Professor of Law

In *Process Scrutiny*, Professor Landau provides a framework to address problems within the current jurisprudence, demonstrating how the process of government decision-making can provide revelatory indicators of governmental intent. The theory of process scrutiny has the following core features:

- *Process Scrutiny* focuses on "small-p" process, including the quality or duration of deliberation, the involvement of experts, the facilitation of regular public hearings and open debate, as well as the documentation of studies and reasoning behind various policies.
- These more visible, small-p procedures are far easier to identify and put into practice than alternative procedural frameworks that have been proposed by other scholars.
- Such objective criteria help decipher political branch intent without resorting to a judge's subjective interpretation of a given policy.
- An inquiry into small-p process works in both directions: While courts accord greater scrutiny to legislative acts that undermine well-established procedures, they also give leeway to otherwise suspect policy choices that are the result of a thorough vetting.
- These review mechanisms are not limited to analysis of ex ante processes—for example, the quality of deliberation, involvement of experts, or other procedures that precede a government enactment. To the contrary, courts may also examine constitutionality through analyses of ex post procedures—that is, a government's ability to abide by the rules and procedures that are contained within a law or other enactment itself.

Process Scrutiny: Motivational Inquiry and Constitutional Rights

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INTRODUCTION

Judicial inquiries into political branch motivation have long vexed courts and scholars.¹ Especially difficult are questions regarding judicial review of facially neutral government action—whether legislative or executive—that are challenged on constitutional grounds. The canonical decision in this arena, Washington v. Davis, holds that facially neutral legislation or administrative action resulting in a disparate impact on the basis of race or gender will not, without more, trigger heightened scrutiny.² More specifically, Davis requires evidence of discriminatory intent to trigger more careful scrutiny of government action. One major criticism of the Court's intent doctrine is that it permits policymakers to conceal invidious purposes behind facially neutral language in statutes as well as various forms of executive action. For this reason, many argue that Davis perversely licenses state-sponsored discrimination by encouraging government actors to hide their true motives behind facially neutral language, obscuring malicious intent from judicial review.³

¹ See, e.g., Aziz Z. Huq, What is Discriminatory Intent?, 103 Cornell L. Rev. 1211, 1215 (2018) (observing that "the federal judiciary has not homed in upon a single definition of discriminatory intent, or a consistent approach to the evidentiary tools through which it is substantiated"); Richard H. Fallon Jr., Constitutionally Forbidden Legislative Intent, 130 Harv. L. Rev. 523, 528 (2016) (noting that Supreme Court cases display "varied approaches to the identification of legislative intent," some of which are "wholly coherent" and others which "manifest ambiguity"). Importantly, Fallon's critique of the Supreme Court's intent jurisprudence is limited to the "peculiar problems posed by judicial inquiries into the intentions of multimember legislative bodies." Id. at 530. See also Michael C. Dorf, Even A Dog: A Response to Professor Fallon, 130 Harv. L. Rev. 86, 86 (2016) (agreeing on the one hand that the Court's doctrine on impermissible legislative intent is mostly unsatisfactory, while challenging Fallon's decision to treat review of legislative action differently from executive and administrative action); Brandon L. Garrett, Unconstitutionally Illegitimate Discrimination, 104 Va. L. Rev. 1471, 1480 (2018) (noting that "[i]ntent standards have practical limitations, and critics are right to point to difficulties in defining and proving intent" but they carry with it the "virtue of deterring extremely damaging conduct").

² Washington v. Davis, 426 U.S. 229, 242 (1976) (upholding an entrance exam for police officers in the District of Columbia that African Americans tended to fail at higher rates than whites and refusing to apply more exacting scrutiny in the absence of compelling evidence of racially based motivation); see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (holding that a town's refusal to rezone a tract of land to allow for development of multi-family dwellings was not motivated by a racially discriminatory purpose or intent, despite the disparate impact the zoning decision had on the African-American population); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 280-81 (1979) (upholding legislation in Massachusetts giving preference for veterans in civil service positions despite the law's discriminatory impact on female applicants).

³ See, e.g., Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111, 1136 (1997) (arguing that the intent doctrine comprises a larger body of case law formally ending substantive equality and is an illustration of how modern equal protection doctrine "no longer protects"); Girardeau A. Spann, Good Faith Discrimination, 23 Wm. & Mary Bill Rts. J. 585, 623 (2015) (arguing "that the current *Washington v. Davis* and *Feeney* distinction between actuating and incidental intent has outlived any usefulness that it may ever have had"); Yvonne Elosiebo, Implicit Bias and Equal Protection: A Paradigm Shift, 42 N.Y.U. Rev. L. Soc. Change 451, 487 (2018) (arguing that because it is "nearly impossible ... to prove discriminatory purpose in court, ... *Washington v. Davis* should be overruled.");

This Article seeks to overcome the difficulties of operationalizing the Court's intent standard by showing how more easily detectable kinds of procedural failure—or "small p" process—can help surface forms of improper intent that are otherwise hard to see. A number of commonly used procedures—such as the quality or duration of deliberation, the involvement of experts, the facilitation of regular public hearings and open debate, and the documentation of studies and reasoning behind various policies—provide objective indicators that can be highly useful in discovering political branch motivation. Small-p procedures are different from the strain of procedural failure famously articulated by process theorist John Hart Ely that provides a classic rationale for heightened scrutiny.⁴ In contrast to Ely's brand of process failure based upon the Constitution's role in preserving accessibility to the political process—what this Article refers to as "Big-P" process⁵—are those more evident, small-p procedures commonly used by the political branches that govern the underlying vetting, or lack thereof, within a given act.⁶

Though the elegance and power of Ely's theory has ensured its rightful place in our constitutional canon,⁷ the theory has a blind spot—it cannot ferret out many forms of discrimination that are hidden from plain sight by more sophisticated lawmakers. And in a world in which invidious discrimination easily hides behind facially neutral language, Ely's theory provides little help for courts in determining whether a particular minority group deserves representation-reinforcing judicial review. This Article suggests a means to fill the void in Ely's theory of Big-P process theory by showing how courts

4 See generally John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

6 For the purposes of this Article, the words "procedure" and "process" are used largely interchangeably. References to "small-p" processes or procedures are intended to refer to any of the myriad steps taken by governmental actors that culminate in the promulgation of a law or the formation of an administrative rule or order. The former is often used in a broader context than the latter. Compare Procedure, Merriam-Webster's Collegiate Dictionary (11th ed. 2012) (defining procedure as "a series of steps followed in a regular definite order") with Process, Merriam-Webster's Collegiate Dictionary (11th ed. 2012) (defining process as "a series of actions or operations conducing to an end").

7 See, e.g., Harry H. Wellington, The Importance of Being Elegant, 42 Ohio State L. J. 427, 430 (1981); Richard A. Posner, Democracy and Distrust Revisited, 77 Va L. Rev. 641, 646 (1991) ("Ely's argument is ingenious, elegant, and plausible."); Jane S. Schacter, Ely and the Idea of Democracy, 57 Stan L. Rev. 737, 737 (2004) ("Ely's elegant extrapolation of footnote four has profoundly affected my own thinking..."); Alan M. Dershowitz, In Memoriam: John Hart Ely, 117 Harv. L. Rev. 1743, 1744 (2004) (describing Ely's theory as "elegant in its simplicity though often complex in its application.")

Charles R. Lawrence III, Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection," 40 Conn. L. Rev. 931, 944 (2008) (advancing "the more fundamental argument that *Davis* was wrong because the injury of racial inequality exists irrespective of the motives of the defendants in a particular case"); Cf. Kenji Yoshino, The New Equal Protection, 124 Harv. L. Rev. 747, 764 ("If legislators have the wit—which they generally do—to avoid words like 'race' or the name of a particular racial group in the text of their legislation, the courts will generally apply ordinary rational basis review. This tendency is true even if the state action has an egregiously negative impact on a protected group."); Bertrall L. Ross, The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard, 81 Fordham L. Rev. 175 (2013) (arguing that the equal protection intent standard created has been applied inconsistently).

⁵ See, e.g., Daniel A. Farber & Philip P. Frickey, Is *Carolene Products* Dead – Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation, 79 Cal. L. Rev. 685, 688 (1991) (defending the appropriateness of *Carolene Products*-style protection in the racial discrimination context, on the grounds that racial minorities have not achieved "full political equality"); Peter Linzer, The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely Vs. Harlan Fiske Stone, 12 Const. Comment. 277, 287 (1995) (contrasting the "process-based orientation" of Louis Lusky and Ely's interpretation of Footnote Four with Stone's view of the same as a statement of "the 'preferred position' of noneconomic rights"); Pamela S. Karlan, John Hart Ely and the Problem of Gerrymandering: The Lion in Winter, 114 Yale L. J. 1329, 1332-33 (2005) (discussing Ely's representation-reinforcement theory in the context of legislative apportionment).

can and have analyzed small-p process failures to shed light on forms of improper intent that are otherwise hard to see. In other words, there is ample room in the Court's intent doctrine to overcome the difficulties of uncovering and operationalizing Big-P process failure. By shifting the inquiry from interest-group dynamics in the legislative process to more ordinary forms of process, this Article calls on courts and commentators to consider how small-p indicia can surface intent across a range of legislative and administrative contexts, and in ways that are consistent with established doctrine. Furthermore, the strain of procedural review outlined in this Article is not limited to analysis of ex ante processes—for example, the quality of deliberation, involvement of experts, and other procedures that precede a government enactment. To the contrary, courts may also examine constitutionality through analyses of ex post procedures—that is, a government's ability to abide by the rules and procedures that are contained within a law or other enactment itself.⁸

A number of recent cases provide powerful evidence that small-p procedures can provide a basis for enhanced judicial scrutiny on the one hand, or a vindicating mechanism on the other. From voter identification to LGBT rights, from takings to affirmative action, and from national security to military personnel policies, courts rely on small-p process to analyze the legitimacy of government action. And the analysis can work in both directions. On the one hand, the government's lack of procedural care can invite greater scrutiny and form a basis for invalidation. Conversely, where the government can demonstrate a thorough vetting method, reviewing courts will frequently sustain challenged acts having negative consequences for various groups, and even go so far as to remove the taint of improper motivation.

Hawaii v. Trump is a paradigmatic example of both phenomena.⁹ In the aftermath of the travel ban's first two iterations, lower courts that seemed uncomfortable striking down executive action based on the President's campaign statements routinely focused on small-p process, noting how the Executive's lack of coordination, deliberation, or consultation with agency experts lessened the case for deference.¹⁰ By contrast, by the time the third version of the ban reached the Supreme Court, Chief Justice Roberts could tout the government's "comprehensive" and "worldwide" ex ante procedures,¹¹ as well as

⁸ See infra section III.B (analyzing both the ex ante and ex post dimensions of process scrutiny to show how courts may also vindicate governmental policies, or smoke out improper motivation, by scrutinizing an enacting body's ability or failure to conform to its own stated procedures).

⁹ Trump v. Hawaii, 138 S. Ct. 2393 (2018).

¹⁰ Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 601 (4th Cir. 2017), vacated and remanded sub nom., 138 S. Ct. 353 (2017).

¹¹ See, e.g., *Hawaii*, 138 S. Ct. at 2404 (noting that the President "directed a worldwide review"); id. (describing temporary measures until "completion of the worldwide review"); id. at 2408 ("The President lawfully exercised [his] discretion based on his findings—following a worldwide, multi-agency review— that entry of the covered aliens would be detrimental to the national interest."); id. (the President ordered "DHS and other agencies to conduct a comprehensive evaluation of every single country's compliance with the information and risk assessment baseline," followed by "a Proclamation setting forth extensive findings describing how deficiencies in the practices of select foreign governments ... deprive the Government of [information]," and concluded "that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries."); id. at 2412 (noting how "the multi-agency review process [determined] whether those high-risk countries provide a minimum baseline of information to adequately vet their nationals"); id. at 2421 ("The Proclamation, moreover, reflects the results of a worldwide review process

its ex post procedures, including a promised set of robust exemptions and guidance to agents in the field.¹²

Ultimately, this Article employs ex ante and ex post small-p process to lay a foundation for a better understanding and application of discriminatory intent doctrine—a line of precedent that, while receiving tremendous scholarly attention,¹³ cannot be fully comprehended without grappling with its underlying procedural roots. Although the dynamic relationship between process failure and improper motive (or its close cousin, animus)¹⁴ finds some expression in the Court's equal protection jurisprudence—and in particular Justice Powell's decision in Village of Arlington Heights v. Metropolitan Housing Development Corporation¹⁵—commentators have largely overlooked how procedural regularity can serve as a constitutional compass directing further judicial inquiry into the underlying intent of a given law or policy.¹⁶ Indeed, Powell's process-based criteria provide especially helpful indicators in uncovering forms of discrimination that are easily masked using facially neutral language.¹⁷ And a number of recent cases support this Article's thesis that the "due process of lawmaking"¹⁸ and governmental motivation are often perceived in lockstep fashion, a point that has special salience for novel rights claims.¹⁹

undertaken by multiple Cabinet officials and their agencies."). The government made repeated references to this process throughout the briefing, see, e.g., Brief for the Petitioners at 2, 5, 15, 16, 30, 58, 60, 63-66, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965) and at the outset of oral argument before the Supreme Court. See Transcript of Oral Argument at 3, Trump v. Hawaii, 138 S. Ct 2392 (2018) (No. 17-965) ("Mr. Chief Justice, and may it please the Court: After a worldwide multi-agency review...").

12 See *Hawaii* 138 S. Ct. at 2406 (noting "case-by-case waivers when a foreign national demonstrates undue hardship, and that his entry is in the national interest and would not pose a threat to public safety" and that "[t]he Proclamation further directs DHS to assess on a continuing basis whether entry restrictions should be modified or continued, and to report to the President every 180 days"); id. at 37 (noting that the Proclamation calls for continued assessments by DHS, periodic updates to the President and guidance to consular officials). See also Proclamation No. 9645, 82 Fed. Reg. 45161, 45169 (Sept. 24, 2017) (establishing waiver program for, *inter alia*, foreign nationals who had previously been admitted to the United States for the purposes of work or study; those with "significant contacts" with the United States; those with "significant business or professional obligations"; close family members who are either lawful permanent residents or U.S. citizens; youth and those needing medical care; those employed by the government).

13 See supra note 3.

14 William D. Araiza, Animus and Its Discontents, 71 Fla. L. Rev. 155, 185 (2019) ("[T]he Court's animus jurisprudence has built upon the foundational statements of its discriminatory intent jurisprudence.").
15 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266-69 (1977).

16 Siegel, supra note 3 at 1134 (the court "continued to emphasize that plaintiffs might draw upon evidence of racial impact to prove a claim of discriminatory purpose" but after *Feeney*, the Court made clear that it had raised quite a formidable barrier to plaintiffs challenging facially neutral state action"); Haney-López, *supra* note 3, at 1814 ("The rise of colorblindness and malicious intent, however, destroyed the capacity of equal protection to actually protect non-Whites. In this account, *Davis* and contextual intent more generally suffer the fate of victims. It is a sad indicia of how far equal protection has devolved, that the villain of the 1970s is today's honored dead.").

17 See, e.g., Sheila Foster, Intent and Incoherence, 72 Tul. L. Rev. 1065, 1130 (1998) (noting that the "evidentiary" approach codified in *Arlington Heights* enables courts to more deftly tread the "fine line" between deference and scrutiny); Ian F. Haney-López, Intentional Blindness, 87 N.Y.U. L. Rev. 1779, 1809, 1814-15 (2012) (arguing that, irrespective of what it and *Davis* have come to represent to both scholars and the Court itself, *Arlington Heights* "helpfully" established a framework through which "[c]ontextual intent" can aid courts' efforts to discern racial discrimination). But cf. Yoshino, supra note 3, at 764 (arguing that "in *Personnel Administrator of Massachusetts v. Feeney*, the Court defined "discriminatory purpose" so stringently that it made all the evidentiary bases enumerated in *Arlington Heights*, including disparate impact, almost irrelevant").

18 See Hans A. Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197 (1976). See also infra notes 48-49 and accompanying text.

19 See infra Part V.B (discussing the implications of process scrutiny in the context of novel or peripheral

One important advantage of a small-p process framework is that it is based less on substantive interpretations of value and intent—which can be highly contested and subjective—and more on objective criteria grounded in the political branches' own chosen practices. Yet even while process scrutiny offers powerful and revelatory indicators of governmental motivation, the theory also raises a number of concerns, including the risk of incentivizing or permitting an enacting body to camouflage other substantive deficiencies by simply meeting a bare minimum level of deliberation, setting the stage for evasion.²⁰ While "good process" need not be quantifiable, it should be objectively measurable to generate accountability.²¹

I. Small-p Process and Intent: Establishing a Baseline

A. The Relationship between Discriminatory Intent and Process Failure

Courts understandably face great anxiety around questions of political branch motivation that no single device—procedural or otherwise—can entirely dispel. A familiar but fundamental difficulty with identifying improper governmental intent is whether it is even possible to aggregate the thoughts and motives of individual officials to produce a single governmental intent. This problem has been vigorously and fruitfully argued, particularly with regard to legislative intent. Some scholars argue that such aggregation is sound in theory and workable in practice.²² Others argue by contrast that any attempt to discern legislative intent via aggregation is conceptually incoherent and thus doomed to failure.²³ Ronald Dworkin, for instance, famously argued that even a preternaturally

22 See, e.g., Richard Ekins, The Nature of Legislative Intent 53 (2012) (providing an account of group intention as a collective expression of "we-intentions" held by individual legislators); see also Fallon, supra note 1, at 537 ("Despite well-known questions about whether Congress as a collective body can possess intentions or purposes, there are circumstances under which courts might coherently ascribe a collective intent to the legislature based on the intentions or motivations of individual legislators."); see also Dorf, supra note 1, at 88-90 (arguing that Fallon's analysis need not be limited to the legislative context, "as opposed to the broader relevance of intent in law"); see also Katherine Shaw, Speech, Intent, and the President, 104 Cornell L. Rev.

rights claims).

²⁰ Cf. Dan T. Coenen, The Pros and Cons of Politically Reversible "Semisubstantive" Constitutional Rules, 77 Fordham. L. Rev. 2835, 2839 (2009) (noting how procedural rulings allow for a situation in which "exactly the same law or practice that the Court had found objectionable would survive constitutional attack if political authorities, in a second go-round, avoided the initial process error").

²¹ While this Article positions process scrutiny primarily as a tool to uncover hidden malintent in facially neutral equal protection cases, the theory has broader ambitions for constitutional law. First, process scrutiny appears to make a meaningful difference in cases involving unconstitutional takings (where intent is not recognized as a key doctrinal criterion), and has been instructive in analyzing the fit between means and ends in relevant cases where heightened scrutiny applies. The theory also has some overlap with "semi-substantive" constitutional theory, and it places "bilateral endorsement" theory in new light.

___, 14-15 (2018) (observing that discerning illegitimate intent in the executive context should be much more straightforward as an evidentiary matter given the lack of aggregation and is in fact already routine in judicial review); but cf. Huq, supra note 1, at 1286 (arguing that discriminatory intent challenges lose force as the context shifts from legislative action to dispersed executive discretion, due in part to the case-by-case decisional approach characteristic of executive actors).

²³ See Steven Douglas Smith, Against Civil Rights Simplism: How Not to Accommodate Competing Legal Commitments 7 (San Diego Legal Studies Paper No. 17-294, 2017), available at https://papers. ssrn.com/sol3/papers.cfm?abstract_id=2991883 ("arguments that centrally turn on ascriptions of animus to large classes of people are likely at best to vastly oversimplify a complex set of beliefs, perspectives, and motivations.").

gifted judge would run into insurmountable difficulties trying to discover the intent of a legislature.²⁴ This divide is also reflected in federal court precedent,²⁵ including the Supreme Court's short-lived experiment to dispense with motivational analysis in constitutional adjudication.²⁶

The difficulties of engaging in an intent-based analysis are often compounded by the heavily fact-dependent nature of legislative intent. As Professor Richard Fallon has pointed out, legislative intent is a "protean concept," inevitably colored by the particular fact pattern it inhabits.²⁷ As a result, the judicial approach to identifying improper legislative intent is commonly described as inconsistent and problematic across different cases and contexts.²⁸ Indeed, in Professor William Araiza's phrase, the "epistemological difficulty [of deciphering intent] would seem to send a strong cautionary signal about widespread use of the animus idea."²⁹

Indeed, the presumption that one can know with certainty the internal attitudes, emotions and biases of a single person, let alone a multi-member legislative body, places on judges, in all but the most flagrant instances, a demand to be mind-readers.³⁰ Such a role imposes an impossible expectation fraught with numerous problems—requiring subjective judgment about the internal beliefs, attitudes, and intentions of others that exists outside a legislative or policy document; determining if the degree of influence of those divined attitudes and biases constitutes an intent to harm; and so forth. Furthermore, such an expectation demands that judges be indefensibly reductive—reducing not only an individual's thoughts and attitudes to a single intent, but that of an entire legislative body. For these reasons, an objective approach, in which judicial review is couched in the broader context and process of a given policy, may provide courts with a useful lens that avoids resorting to entirely subjective impressions or a psychoanalysis of the minds of the lawmakers themselves.³¹

²⁴ See Ronald Dworkin, Law's Empire 317-33 (1986) (detailing the struggles of determining which legislators' intentions count, how these intentions combine, which mental states count as intentions, and how to deal with conflicting intentions); see also Robert C. Farrell, Legislative Purpose and Equal Protection's Rationality Review, 37 Vill. L. Rev. 1, 2 (1992) ("If legislative purpose is the mere aggregation of the motivations of individual legislation, then there seems to be no escaping the conclusion that the very idea of legislative purpose is incoherent."); Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol'y 61, 68 (1994) ("Intent is elusive for a natural person, fictive for a collective body.").

²⁵ See Caleb Nelson, Judicial Review of Legislative Purpose, 83 N.Y.U. L. Rev. 1785, 1795-857 (2008) (providing an account of the growing acceptance over time of judicial inquiry into legislative purpose).

²⁶ See infra note 51.

²⁷ Fallon, supra note 1, at 553.

²⁸ See, e.g., Huq, supra note 1, at 1211 (arguing that the Supreme Court has not provided a "crisp, single definition of 'discriminatory intent' that applies across institutions and public policy contexts"); Fallon, supra note 1, at 528 (observing that the Supreme Court "has failed to settle on a single, intelligible conception of legislative intent").

²⁹ Araiza, supra note 20, at 24-25.

³⁰ See U.S. v. Public Utilities Comm'n, 345 U.S. 295, 319 (1953) (Jackson, J., concurring) (describing divining legislative intent from legislative history as "psychoanalysis of Congress" and being "handicapped in that weird endeavor" because the "process seems to [be] not interpretation of a statute but creation of a statute"); Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 622 (1991) (Scalia, J., concurring) (agreeing with Justice Jackson's characterization).

³¹ Cf. McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 862 (2005) (warning against "judicial psychoanalysis of a drafter's heart of hearts").

The theory of "process scrutiny" provides such a framework. On the one hand, process scrutiny draws on latent Supreme Court doctrine and related dicta reflecting the constitutional salience of procedural regularity. On the other hand, process scrutiny breaks new ground by expanding the procedural mechanisms relevant to constitutional review, holding government institutions to their own standards (rather than generating them through the subjective impulses of individual jurists) while aiding courts to better address forms of discrimination that are less visible or that go underground.

B. Process Scrutiny and the Court's Intent Standard

1. Representation Reinforcement and Macro-Process

The connection between procedural scrutiny and governmental intent dates back to Justice Stone's famous footnote four in Carolene Products, which notes how certain defects in the process of law-making may require stricter judicial scrutiny and a narrowing of the usual presumption of constitutionality.³² Forty years later, the Warren Court's process-oriented activism in fields such as criminal procedure, political expression, and equal protection inspired John Hart Ely's seminal exposition of the ideas modestly advanced in Carolene Products.³³ Ely drew on Carolene Products to describe the Equal Protection Clause as a mechanism to vindicate macro-level process—namely, access to relevant political institutions allowing groups to take part in the benefits of representative government.³⁴ In Democracy and Distrust, Ely offered a methodical account of how the Constitution is "overwhelmingly dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values."³⁵ This meant that the Court should be concerned with participation, not on identifying and vindicating substantive norms. When the political process has been restricted in some way, the Court must intervene to unclog the channels of access.³⁶

Although Ely believed that heightened judicial scrutiny would effectively smoke out improper legislative motivation,³⁷ his theory does not provide much clarity regarding

36 Id. at 77.

³² United States v. Carolene Products Co., 304 U.S. 144 (1938). The Court indicated three categories of legislation that might require more robust judicial intervention: legislation that facially falls within a specific constitutional prohibition; legislation restricting political processes that cause undesirable legislation to be repealed; and legislation curtailing political processes relied upon to protect discrete and insular minorities. See id. at 152 n.4. See also Ely, supra note 4, at 73-75.

³³ Ely found in the Warren Court's constitutional decisions a "deep structure" that was neither clausebound nor value-oriented, but instead "participational." Ely, supra note 4, at 73-75. For Ely, these decisions evinced two main concerns: "clearing the channels of political change" and "correcting certain kinds of discrimination against minorities." Id.

³⁴ Ely, supra note 4, at 74-75.

³⁵ Id. at 92. Ely links this constitutional commitment to process in paragraphs two and three of *Carolene Products*' famous footnote four. The second paragraph suggests that the appropriate function of the Court is "to make sure the channels of political participation and communication are kept open." Id. at 76. The third paragraph "suggests that the Court should also concern itself with what majorities do to minorities." Id. Ely thinks these two concerns fit together and demonstrate the principal concern of the Warren Court: that everyone have access to the political process to take part in the benefits of representative government. Id. at 74-75.

³⁷ Ely cautions against looking to lawmakers' motivations in cases of outright constitutional violations because in those cases the constitutional violation is enough to warrant striking down the legislation regardless of the motivations of the lawmakers. Thus, he argues that judicial exploration of lawmakers' motivations is only appropriate when there is a claim that a "constitutionally gratuitous" benefit has been improperly withheld.

the appropriate use of that level of scrutiny. He argues that heightened scrutiny is warranted only when a law burdens a "suspect classification"³⁸ and that the real linchpin for determining suspect classifications should be the presence of prejudice.³⁹ Yet he does not explain how a court would know whether a given law is founded on prejudice in the first place. This is a problem because lawmakers have the ability to hide improper motivation behind facially neutral laws, and Ely's conception of representation reinforcement is not geared toward uncovering forms of discrimination that go underground or are otherwise hard to see. The same problem concerns discrimination against "new" equal protection claimants: notwithstanding the Supreme Court's reluctance to afford heightened scrutiny to additional categories of individuals,⁴⁰ legislatures remain adept at finding seemingly neutral ways to target various underrepresented groups.⁴¹

2. Due Process of Lawmaking and Micro-Process

Four years before Ely famously emphasized the Constitution's role in guarding the accessibility of the political process, the eminent Judge and scholar Hans Linde penned a seminal article taking a narrower view of judicial review of legislative process. Linde was quite critical of the ideas expressed in Carolene Products that would later form the basis of Ely's representation-reinforcing theory of judicial review,⁴² and he instead focused on a set of smaller-scale, micro-level procedures to inform his conception of a Due Process of Lawmaking. Linde argued that certain deliberative mechanisms, such as the consideration of evidence, attending committee meetings, or reading a bill before casting a vote should not be amenable to judicial review.⁴³ On the other hand, he argued that other

41 One clear example of this concerns "bathroom bans" aimed at preventing transgender individuals from accessing public restrooms corresponding to their gender identity, many of which were passed in the wake of the Supreme Court's decision upholding the freedom to marry for gays and lesbians in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), see Richard Socarides, North Carolina and the Gay-Rights Backlash, New Yorker (Mar. 28, 2016), https://www.newyorker.com/news/news-desk/north-carolina-and-the-gay-rights-backlash; see also Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country, ACLU (2016), https://www.aclu. org/other/past-lgbt-nondiscrimination-and-anti-lgbt-bills-across-country (last visited Feb. 14, 2018). In the case of North Carolina's Public Facilities Privacy & Security Act, ch. 3, 2016 N.C. Sess. Laws (repealed 2017) (commonly referred to as "HB2") (repealed 2017), while the governor and legislators who supported it stated a concern about keeping sexual predators out of women's bathrooms, the text of the bill itself reveals no such legislative purpose, with transgender identity, bathroom safety and privacy nowhere mentioned in the text of the act. Amanda Wilcox, Five Things to Know about North Carolina's House Bill 2, PBS (May 26, 2016), https://www.pbs.org/newshour/extra/2016/05/five-things-to-know-about-north-carolinas-house-bill-2/. This decision to avoid any explicit naming of the affected group appears intended to circumvent Supreme Court decisions rooting out governmental efforts to single out particular groups for unfavorable treatment, as established in United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973), and Romer v. Evans, 517 U.S. 620 (1996).

43 Id. at 224-27.

Id. at 145. In cases "where what is denied is something [to which] the claimant has a constitutional right because it is granted explicitly by the terms of the Constitution or is essential to the effective functioning of a democratic government (or both)—the reasons it was denied are irrelevant." Id.

³⁸ Id. at 145–46.

³⁹ Id. at 153.

⁴⁰ See Yoshino, supra note 3, at 756–57 ("Litigants still argue that new classifications should receive heightened scrutiny. Yet these attempts have an increasingly antiquated air in federal constitutional litigation, as the last classification accorded heightened scrutiny by the Supreme Court was that based on nonmarital parentage in 1977. At least with respect to federal equal protection jurisprudence, this canon has closed."); Susannah W. Pollvogt, Unconstitutional Animus, 81 Fordham L. Rev. 887, 897 ("Access to heightened scrutiny is generally foreclosed, as the Court has expressed great reluctance to acknowledge new suspect classifications, quasi-suspect classifications, or fundamental rights.").

⁴² See generally, Linde, supra note 24.

processes of lawmaking—such as rules governing the qualifications of legislators, terms of office, reapportionment and voting and quorum requirements imposed by constitutions or internal mandates—strike at the very heart of a conception of "due process" that should matter greatly to courts.⁴⁴

While The Due Process of Lawmaking did not draw any connection between procedural or deliberative rigor on the one hand and legislative motivation on the other, Supreme Court decisions shortly thereafter began to establish that very connection by linking unconstitutional motivation with procedural regularity. After a brief period in the early 1970s when the Supreme Court appeared to dispense with intent-based inquiries altogether in constitutional analysis,⁴⁵ motivational analysis soon took center stage in major constitutional interpretations of equal protection.⁴⁶ These subsequent decisions focused less on the kind of deliberative and participatory failures Ely had in mind, and more on a set of small-p processes drawn from commonly used lawmaking procedures. The result was an important, if incomplete, doctrinal relationship between procedural deviation and governmental motivation.

II. THE HIDDEN LEGACY OF ARLINGTON HEIGHTS

The connection between small-p process failure and improper motivation finds important expression in the "discriminatory intent" cases of the 1970s. When the Court in Washington v. Davis⁴⁷ established that the disparate racial impact of a law or policy would generally not, without more, trigger the exacting scrutiny applied to explicit classifications, it was not completely blind to the difficulty its intent standard might place on equal protection litigators. Thus, Davis allows Courts to infer an improper motivation from the surrounding circumstances and context of a given governmental act.⁴⁸ The Court's "totality of the . . . facts" language has effectively left an open door to more substantial methods of scrutiny than ephemeral attempts to divine the intent of government actors.⁴⁹

⁴⁴ Id. at 240-42. Linde recognized, however, that the judicial remedy for such violations raised difficult questions. Id. at 247.

⁴⁵ Five years before Washington v. Davis clarified that a requirement of purposeful discrimination would be necessary to trigger heightened scrutiny, 426 U.S. 229, 239–40 (1976) (discussed *infra* notes 53-55 and accompanying text), the Supreme Court appeared to reject an intent-based analysis. In *Palmer v. Thompson*, the Court endorsed the decision of the City of Jackson, Mississippi, to shut down all of its public swimming pools rather than integrate them under a desegregation order. 403 U.S. 217, 221 (1971). The City's obvious discriminatory purpose meant that neither black nor white individuals would be able to access public swimming pools. Because the Court distanced itself from an interpretive approach based on legislative motivation, "[1]ower courts ... assumed plausibly, though not inevitably, that the Court had opted instead for the impact theory of equal protection." Michael Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 297 (1991).

⁴⁶ See supra note 2.

⁴⁷ Washington v. Davis, 426 U.S. 229 (1976).

⁴⁸ Id. at 242 ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including [that] the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact. . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.").

⁴⁹ Id.

A. Arlington Heights' Quiet Strain of Proceduralism

One year after Davis was decided, the Court drew on the intent standard in Village of Arlington Heights v. Metropolitan Housing Development Corporation, sustaining a town's denial of a proposed rezoning effort that would produce racially integrated housing units.⁵⁰ Although the Court refused to accept the disproportionate racial impact of a law or policy as tantamount to an express racial classification, Justice Powell affirmed Davis's recognition that the Court should examine the "totality" of the facts to infer motivation from the surrounding circumstances and context of a given governmental act. Indeed, Powell developed that idea further, noting that the judicial inquiry into motivation "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," with a range of considerations that could be probative of discriminatory intent:

....The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.... The specific sequence of events leading up to the challenged decision also may shed some light on the decision-maker's purposes.... Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.... The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports....⁵¹

Powell's non-exhaustive list⁵² of procedural factors, non-procedural factors, and others that fall somewhere in between provides a clear invitation for courts to examine government process as part of an intent-based inquiry into constitutionally suspect government action. Among the various features of Powell's test, one stands out as affirmatively inviting a baseline procedural analysis: that "departures from normal procedur[e] [] might afford evidence that improper purposes are playing a role."⁵³ Indeed, the centrality of that factor has become apparent, as courts in a variety of contexts have relied on small-p process to ferret out improper motivation.

1. Arlington Heights' Application in the Voter ID Cases

The procedural features of Powell's framework have been highly influential in a recent number of voter identification decisions. While the cases raise evident concerns about the very exclusionary practices that were of concern to Ely,⁵⁴ courts have routinely resorted to an analysis of small-p process to strike down the laws in question. Two recent cases,

⁵⁰ Arlington Heights, 429 U.S. at 256.

⁵¹ Id. at 267-68 (emphases added).

⁵² Id. at 268 (noting that the list of "subjects of proper inquiry in determining whether racially discriminatory intent existed" did not "purport[] to be exhaustive").

⁵³ Id.

⁵⁴ Ely, supra note 4, at 117-24.

N.C. State Conference of the NAACP v. McCrory⁵⁵ and Veasey v. Abbott,⁵⁶ illustrate that the possibility of meaningful judicial review still exists, despite courts' difficulty actualizing certain aspects of representation reinforcement. The decisions are remarkable for how they link motivational inquiry with the kinds of process concerns that Powell identified in Arlington Heights.

a. NAACP and Small-p Process

After Shelby County v. Holder invalidated the Voting Rights Act's preclearance regime,⁵⁷ states unleashed punishing new voter ID restrictions⁵⁸ that were challenged on both statutory and constitutional grounds.⁵⁹ In North Carolina, the legislature abruptly passed an "omnibus" voting reform law⁶⁰ that reduced the list of acceptable forms of photo identification for in-person voting,⁶¹ eliminated same-day registration and pre-registration for individuals age 16 and 17,⁶² reduced the number of early voting days from 17 to ten,⁶³ and scrapped a provisional voting process for out-of-precinct voting.⁶⁴ In North Carolina State Conference of NAACP v. McCrory, the Fourth Circuit, applying Arlington Heights, permanently enjoined the challenged provisions as intentionally discriminatory under both section 2 of the Voting Rights Act⁶⁵ and the Fourteenth Amendment.⁶⁶

The Fourth Circuit acknowledged substantive concerns about racial discrimination and voter disenfranchisement, incuding "the inextricable link between race and politics in North Carolina"⁶⁷ and the legislature's curious interest in addressing voter fraud at the very moment when African-American voter turnout in North Carolina was, after decades of setbacks, finally reaching near-parity with that of the white population.⁶⁸

^{55 831} F.3d 204, 214 (4th Cir. 2016).

^{56 830} F.3d 216 (5th Cir. 2016) (en banc), cert. denied, 137 S. Ct. 612.

^{57 133} S. Ct 2612, 2651 (2013). *Shelby County* officially retired the formula previously used to determine which districts required preclearance under the Voting Rights Act and freed many states and counties from having to submit proposed changes in voting laws to the Department of Justice or a three-judge panel.

⁵⁸ Anthony J. Gaughan, Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration, 12 Duke J. Const. L. & Pub. Pol'y 57, 90 (2017) (noting that *Shelby County* "clear[ed] the way for partisan legislatures in the South...to reassert their control over voting rules"); Mark Rush, The Current State of Election Law in the United States, 23 Wash. & Lee J. Civil Rts. & Soc. Just. 383, 409-10 (2017) (explaining that *Shelby County* "unleashed state legislatures to restrict access to polling stations on Election Day").

⁵⁹ Carroll Rhodes, Federal Appellate Courts Push Back Against States' Voter Suppression Laws, 85 Miss. L.J. 1227, 1248 (2017) (explaining how the Fourth, Fifth, and Sixth Circuits have invalidated voter suppression laws that were enacted on the heels of *Shelby County*).

⁶⁰ Voter Information Verification Act, 2013 N.C. Sess. Laws 1505 (codified as amended in scattered sections of N.C. Gen. Stat.).

⁶¹ See N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 216 (4th Cir. 2016).

⁶² See id. at 217-18.

⁶³ See id. at 217.

⁶⁴ See id.

⁶⁵ Pub. L. No. 89-110, \$2, 79 Stat. 437, 437–38 (codified as amended at 52 U.S.C. \$10301(a)).

⁶⁶ *NAACP*, 831 F.3d at 219, 241.

⁶⁷ Id. at 214. Judge Motz, writing for the court, noted that voting in North Carolina had become so "racially polarized," with different races traditionally voting for different political parties, that it was possible for members of the legislature to enact laws "targeting [racial] groups unlikely to vote for them." Id. See also id. at 226 (noting that "contextual facts, which reveal the powerful undercurrents influencing North Carolina politics, must be considered in determining why the General Assembly enacted [the legislation]").

⁶⁸ See id. at 214, 226 ("[T]he General Assembly enacted [the rules] in the immediate aftermath of

Indeed, there were important indications of invidious intent in NAACP—in particular, the legislature's peculiar request for, and use of, racial data for the sole purpose of disenfranchising African-American voters.⁶⁹ For example, although the original bill permitted the use of all government-issued identification, when the racial data revealed that African Americans were less likely to possess certain types of identification, the legislature amended the new bill to permit only those types of identification African Americans carried less frequently.⁷⁰ When lawmakers learned that African Americans predominantly utilized early voting procedures, the legislature shortened early voting by a week.⁷¹ The law also limited same-day registration and out-of-province voting, two mechanisms the district court found were also utilized disproportionately by African Americans.⁷²

Nevertheless, the court gave significant weight to small-p process as part of its painstaking application of the Arlington Heights factors. Noting how "[d]epartures from the normal procedural sequence' may demonstrate "that improper purposes are playing a role," the Fourth Circuit concluded that the trial court "erred in refusing to draw the obvious inference that th[e] sequence of events signals discriminatory intent."⁷³

Indeed, examples of "[d]epartures from the normal procedural sequence" were rife. First was the issue of timing: the voter ID provisions were announced the day after Shelby County removed the very preclearance requirement that would have likely prevented those provisions from becoming law.⁷⁴ The Fourth Circuit saw this as suspicious under Arlington Heights' instruction to consider the "specific sequence of events leading up to the challenged decision."⁷⁵ Furthermore, rather than introduce the voting rules as part of a new, stand-alone bill, the General Assembly simply tacked them onto existing legislation that already bore the features of ordinary law, "swiftly expand[ing] an essentially single-issue bill into omnibus legislation"—a clear departure from procedural norms.⁷⁶

While the pre-Shelby County version of the bill received three weeks of public debate and had even garnered some bipartisan support, that bill sat dormant for two months while Shelby County loomed. The General Assembly did not revisit the bill until the Court excised the preclearance procedure from the Voting Rights Act.⁷⁷ The new post-Shelby County bill was three times as long as the original bill⁷⁸ and "rushed . . . through the legislative process"⁷⁹ without being marked up by a committee⁸⁰—again, a

unprecedented African American voter participation in a state with a troubled racial history and racially polarized voting."). The court also explained that well over 85% of African Americans voted for Democratic candidates in the two previous presidential elections. See id. at 226.

⁶⁹ See id. at 216-18.

⁷⁰ See id. at 216.

⁷¹ See id.

⁷² See id. at 217-18.

⁷³ Id. at 227 (internal citations omitted).

⁷⁴ See id. at 214.

⁷⁵ Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

⁷⁶ NAACP, 831 F.3d at 216.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id. at 228.

⁸⁰ Id.

clear indication of procedurally anomalous conduct. The court went on to observe that "neither this legislature—nor, as far as we can tell, any other legislature in the Country has ever done so much, so fast, to restrict access to the franchise."⁸¹ Thus, while there were undoubtedly clear markers of race-based motivation, unusual procedural circumstances played a critical role in aiding the court's awareness of legislative intent.

b. Veasey and Small-p Process

In Veasey v. Abbott, the Fifth Circuit linked small-p process with improper motivation in striking down a pre-Shelby County voter ID law known as Senate Bill 14 ("SB-14")⁸² that prohibited many standard forms of identification permitted in other states.⁸³ The Fifth Circuit did not ignore substantive concerns such as Texas's history of all-white primaries, literacy tests, secret ballots, and poll taxes,⁸⁴ yet it deemed those practices too distant to evince improper intent within the current law.⁸⁵ On the other hand, where small-p process was concerned, "numerous and radical procedural departures [gave] credence to an inference of discriminatory intent."⁸⁶ These included:

(1) getting special permission to file the bill under a low number reserved for the Lieutenant Governor's legislative priorities; (2) Governor Perry's decision to designate the bill as emergency legislation so that it could be considered during the first sixty days of the legislative session; (3) suspending the two-thirds rule regarding the number of votes required to make SB-14 a "special order"; (4) allowing the bill to bypass the ordinary committee process in the Texas House and Senate; (5) passing SB-14 with an unverified \$2 million fiscal note despite the prohibition on doing so in the 2011 legislative session due to a \$27 million budget shortfall; (6) cutting debate short to enable a three-day passage through the Senate; and (7) passing resolutions to allow the conference committee to add provisions to SB-14, contrary to the Legislature's rules and normal practice....⁸⁷

The court was equally troubled by the legislature's decision, despite its awareness of the disproportionate impact the law would have on historically marginalized groups, to

⁸¹ Id. at 228.

⁸² See Veasey v. Abbott, 830 F.3d 216, 225 (5th Cir. 2016) (en banc).

⁸³ SB-14 as deemed was deemed the "strictest" voting law in the country. *See* Veasey v. Perry, 71 F. Supp. 3d 627, 642 (S.D. Tex. 2014), aff'd in part, vacated in part, rev'd in part sub nom. Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016); see also Veasey v. Abbott, Campaign Legal Center, http://www.campaignlegalcenter. org/case/veasey-v-abbott-0 (last updated April 27, 2018). Under SB-14, for example, one may not use state identification from a state other than Texas, public assistance identification, student identification, or any federal government identification not enumerated in the law. See Perry, 71 F. Supp. 3d at 642 (listing the acceptable and unacceptable forms of ID under SB-14).

⁸⁴ The initial district judge found the law was enacted with discriminatory purpose, *Perry*, 71 F. Supp. 3d at 633, and the Fifth Circuit, sitting en banc, largely sustained that ruling. *Veasey*, 830 F.3d at 272 (remanding certain aspects of the lower court's analysis for clarification).

⁸⁵ *Veasey*, 830 F.3d at 232. The court also found that the more recent instances of discrimination cited in the district court record were simply less probative of an intent by the legislature to discriminate. Id. at 233. 86 Id. at 238.

⁸⁶ Id. at 238.

⁸⁷ Id. at 238 (citations omitted). The court went on to note that these procedural oddities were only present with regard to SB-14; none of the other pressing legislative initiatives such exceptional treatment. See id.

reject additional proposals to curb that impact. Tying this observation to small-p process, the Court noted that the law's proponents "largely refused to explain the rejection of those amendments,"⁸⁸ something that "was out of character for sponsors of major bills."⁸⁹ These procedural irregularities contributed to the Fifth Circuit sustaining the lower court's finding of improper motivation.⁹⁰

Veasey is a powerful example of how process scrutiny can shore up gaps in traditional intent doctrine. A pure "intent" analysis would have been insufficient under Davis and its progeny because of the difficulty proving that the legislature acted "because of, and not merely in spite of," the disproportionate impact.⁹¹ Still, the Court could draw on the vast procedural irregularities of SB-14 to help surface the underlying discriminatory intent.

2. Beyond Arlington Heights: Process Scrutiny and Judicial Invalidation

In addition to NAACP and Veasey, lower courts have drawn on small-p process concerns to allow suits to proceed beyond preliminary stages of litigation and even enjoin policies concerning school desegregation,⁹² fair housing and land use,⁹³ the dormant commerce clause,⁹⁴ and electoral redistricting and allocation of public benefits.⁹⁵ Those courts have invoked Arlington Heights' multi-factor test, finding improper motive based on a lack of procedural regularity in government decision-making. For example, an Arizona district court recently set aside a facially neutral state law that prohibited ethnic studies courses by finding the policy's enactment and enforcement to be motivated by discrimination.⁹⁶ In addition to derogatory statements made by legislators, the court

91 See, e.g., Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979) (requiring a showing that the government acted "because of, not merely in spite of" discriminatory impact to apply heightened scrutiny to facially neutral government action).

92 See Stout ex rel. Stout v. Jefferson Cty. Bd. of Educ., 882 F.3d 988 (11th Cir. 2018).

94 See Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n, No. 1:15-CV-134-RP, 2018 WL 1404409 (W.D. Tex. Mar. 20, 2018).

96 See Gonzalez v. Douglas, 269 F. Supp. 3d 948 (D. Ariz. 2017). The Tucson Unified School District's Mexican-American Studies program was borne out of a desegregation decree and aimed to engage Mexican-American students in their schoolwork by highlighting aspects of Mexican-American history and culture. Id.

⁸⁸ Id. at 237.

⁸⁹ Id. (citations omitted).

⁹⁰ Id. at 239. *NAACP* and *Veasey* reveal a related point about process failure and improper motivation that is worthy of mention. In both cases, the courts were explicit that any purportedly legitimate justification for a problem that the court concludes is fabricated quickly loses legs, creating the space for a finding of improper motivation. In *NAACP*, for example, the Fourth Circuit accused the North Carolina legislature of manufacturing a phony narrative for its voter ID law, "impos[ing] cures for problems that [do] not exist," 831 F.3d at 214, while in *Veasey*, the Fifth Circuit called out the legislature for ignoring its procedures for the sake of addressing an "almost nonexistent problem." 830 F.3d at 239. For a sustained treatment of the relationship between nonexistent problems and judicial review of legislation, see Joseph Landau, Broken Records: Reconceptualizing Rational Basis Review to Address "Alternative Facts" in the Legislative Process, 73 Vand. L. Rev. ____(forthcoming 2020).

⁹³ See Ave. 6E Investments, LLC v. City of Yuma, Ariz., 818 F.3d 493, 509 (9th Cir. 2018), cert. denied, 137 S. Ct. 295 (2016); Pac. Shores Properties, LLC v. City of Newport Beach, 730 F.3d 1142, 1162 (9th Cir. 2013); Young Apartments, Inc. v. Town of Jupiter, FL, 529 F.3d 1027, 1044 (11th Cir. 2008); Inclusive Communities Project, Inc. v. United States Dep't of Treasury, No. 3:14-CV-3013-D, 2016 WL 6397643, (N.D. Tex. Oct. 28, 2016); MHANY Mgmt. Inc. v. Inc. Vill. of Garden City, 985 F. Supp. 2d 390 (E.D.N.Y. 2013), aff'd sub nom. Mhany Mgmt., Inc. v. City of Nassau, 819 F.3d 581 (2d Cir. 2016); Hidden Vill, LLC v. City of Lakewood, Ohio, 867 F. Supp. 2d 920 (N.D. Ohio 2012), aff'd in part, rev'd in part, 734 F.3d 519 (6th Cir. 2013); Church of Scientology of Georgia, Inc. v. City of Sandy Springs, Ga., 843 F. Supp. 2d 1328, 1376 (N.D. Ga. 2012).

⁹⁵ See, e.g., Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260, 279 (E.D.N.Y. 2018).

relied on irregularities in the process of enactment.⁹⁷ Beyond evidence of discriminatory intent in enactment, the court pointed to procedural irregularities—such as reliance on one-sided investigations—as evidence of discriminatory intent in enforcement.⁹⁸ In separate litigation challenging an Alabama voter ID law, a federal district court looked to procedural irregularity—that, among other things, the time for debating the bill had been severely constrained—as sufficient evidence of discriminatory motive to survive a motion to dismiss.⁹⁹ Finally, in challenges to newly enacted electoral maps, departures from normal procedures in the events prior to enactment—including intentional constraints on debate and violations of rules for public hearings—was sufficient for a Texas district court to find that the City of Pasadena had enacted an unconstitutional electoral map with a discriminatory intent to dilute Latino votes.¹⁰⁰

B. Process Scrutiny and Legislative Vindication

Process scrutiny works in two directions: While courts can treat with greater scrutiny legislative acts that undermine well-established procedures, they might also give leeway to otherwise suspect policy choices that are the result of thorough vetting and sound processes. Indeed, Washington v. Davis itself conceivably stands as an example.¹⁰¹ Although the challenged entrance exam for applicants to the D.C. Police Department had a disparate racial impact on African-American applicants, the police force had made extensive efforts to diversify.¹⁰² Not only did the police force make "affirmative efforts . . . to recruit black officers,"¹⁰³ but record evidence supported the government's claim that the exam was directly related to the training needs and requirements of the police force.¹⁰⁴ Indeed, the extensive expert testimony fleshed out a relatively robust small-p process. In briefing, Corporation Counsel relied on studies by numerous experts to support the claim that the entrance exam was a reasonable, impartial, and objective predictive tool to establish the ability to be trained. This included a study by the U.S. Civil Service Commission and affidavits from research psychologists and other educational testing experts.¹⁰⁵ Other authorities bolstered that evidence by noting the "need for police recruits to possess the verbal ability to be trained which [the challenged test] is designed to measure."¹⁰⁶ Given

100 Patino v. City of Pasadena, 230 F. Supp. 3d 667 (S.D. Tex. 2017).

101 Washington v. Davis, 426 U.S. 229 (1976).

at 950-51. When Tucson school officials tried to end the program, the court held that Arizona school officials acted with racial animus. Id. at 973; see also Arce v. Douglas, 793 F.3d 968, 981 (9th Cir. 2015) (holding that there is "sufficient evidence to raise a genuine issue of material fact as to whether the enactment and/ or enforcement of [the state law] 515–112 here challenged was motivated, at least in part, by an intent to discriminate against [] students on the basis of their race or national origin").

⁹⁷ See Gonzalez, 269 F. Supp 3d at 965-68.

⁹⁸ Id. at 968-70.

⁹⁹ See Greater Birmingham Ministries v. Merrill, 250 F. Supp. 3d 1238, 1245 (N.D. Ala. 2017). However the defendant, Secretary of State John Merrill, did ultimately prevail against the plaintiff's constitutional claims on his motion for summary judgment. See Greater Birmingham Ministries v. Merrill, 284 F. Supp. 3d 1253, 1279 (N.D. Ala. 2018).

¹⁰² Id. at 235 (noting that the D.C. Police Department "had systematically and affirmatively sought to enroll black officers" and that "44% of new police force recruits had been black" in the years immediately preceding the litigation.

¹⁰³ Id. at 246.

¹⁰⁴ Id. at 251.

¹⁰⁵ Walter E. Washington, et al., Petitioners, v. Alfred E. Davis, et al., Respondents., 1975 WL 173557 (U.S.), 6.

¹⁰⁶ Id. at 18. The authorities cited are judicial and administrative, including observations from

this broader context—bearing little to no trace of irregularity, and in which the plaintiffs affirmatively disclaimed any allegation of discriminatory motivation¹⁰⁷—the Court concluded that the "changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that a police officer qualifies on the color of his skin rather than ability."¹⁰⁸

The 1981 case Rostker v. Goldberg also illustrates the vindicating potential of small-p process.¹⁰⁹ Rostker upheld the constitutionality of an all-male selective service policy under heightened scrutiny.¹¹⁰ The Court rested heavily on Congress's considerable de-liberations,¹¹¹ including robust debate over female inclusion through "extensive[] . . . hearings, floor debate, and in committee."¹¹² Based on those rigorous procedures, the Court satisfied itself that the resulting act was not a product of outmoded or "traditional way[s] of thinking about females."¹¹³ Importantly, Rostker did not defer flatly to the military's judgment on matters of personnel; rather, the Court scaled deference based on its assessment of procedural rigor—namely "how the political branches [] made the policy choice at issue."¹¹⁴

* * *

As these cases demonstrate, process scrutiny can help resolve questions about underlying legislative motivation where both race-conscious and facially neutral measures are concerned. The range of cases indicates the utility of process scrutiny within constitutional adjudication more generally. While the breadth of application leads to a host of institutional and normative considerations

107 426 U.S. at 251.

109 453 U.S. 57 (1981).

113 Id. at 74. These extensive deliberations gave the Court confidence that Congress was not acting "unthinkingly or reflexively and not for any considered reason." Id. at 72-74 (citing Califano v. Goldfarb, 430 U.S. 199, 222-23 (1977) (Stevens, J., concurring)). In *Califano*, the court held that "a rule which effects an unequal distribution of economic benefits solely on the basis of sex" was grounded in "habit" or an "automatic reflex" regarding traditional gender norms "rather than analysis or actual reflection." *Califano*, 430 U.S. at 222-23.

114 See Daphna Renan, Presidential Norms and Article II, 131 Harv. L. Rev. 2188, 2260 (2018). Indeed, after *Rostker*, a number of lower courts upheld the U.S. military's "Don't Ask, Don't Tell" policy regarding gay, lesbian, and bisexual servicemembers by noting the political branches' "extensive examination" of the policy they later adopted. See Thomasson v. Perry, 80 F. 3d 915, 922 (4th Cir. 1996) (en banc). This included a military working group, a commissioned study by the RAND Corporation, as well as "regular consultations with the Joint Chiefs of Staff and leaders of each service, . . . [close study of] the history of the military's response to social change, and consult[ation] [with] legal experts." Renan, supra, at 2261. These "exhaustive efforts of the democratically accountable branches of American government," the court of appeals stressed, "is precisely [why] they deserve judicial respect." *Thomasson*, 80 F. 3d at 923. Although these decisions turned on deference to the Executive, rather than to Congress, in the context of military affairs, the Court gives substantial weight to either of the political branches, provided it demonstrates a sound process.

the Executive Director of the International Association of Chiefs of Police and reports by the President's Commission on Law Enforcement and Administration of Justice. Id. at 19-21.

¹⁰⁸ Davis, 426 U.S at 247 (internal citations and quotation marks omitted).

¹¹⁰ Id. at 69.

¹¹¹ Id. at 72-74.

¹¹² Id. The Court elaborated on the extent of hearings within both chambers of Congress, noting in particular how the Senate "defeated, after extensive debate, an amendment which in effect would have authorized the registration of women." Id.

taken up in Parts IV and V, respectively, the next Part explores how, in the context of executive branch action, a similar relationship exists between procedural rigor (or lack thereof) and policy vindication (or lack thereof).

III. Executive Branch Process and Discriminatory Intent

The connections between procedural regularity and malintent are not limited to the legislative context. Indeed, Arlington Heights specifically applied its small-p analysis to the administrative context,¹¹⁵ and the same relationship between governmental processes and judicial review can be found in judicial review of executive action—especially presidential action largely exempt from APA review.¹¹⁶ In the following case studies, which involve national security and immigration policy as well as military personnel policy—areas of exclusive or nearly exclusive executive power¹¹⁷—small-p process plays a remarkably important role in the scaling of judicial review.

A. Small-p Process and the Trump Travel Ban

The relationship between small-p process and executive motivation has been important in the judicial rulings surrounding President Trump's immigration-related executive actions that bar entry to individuals from a range of Muslim-majority countries.¹¹⁸ While

117 See United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319-20 (1936) (holding that the Court will defer to the "plenary and exclusive power of the President . . . in the field of international relations"); Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (holding that when the President exercises delegated power to make "rules for exclusion of aliens" for "a facially legitimate and bona fide reason," the court will not question it or balance it against other constitutionally protected interests); see also 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, 162 (2002) ("[T]he United States regularly maintains, and the courts frequently agree, that federal immigration laws should be subject to little or no judicial review").

¹¹⁵ Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977) ("legislative or administrative history").

While the APA triggers rigorous procedural requirements and judicial review mechanisms for 116 most ordinary forms of agency action, it generally does not reach presidential action. See generally Adrian Vermeule, Our Schmittian Administrative Law, 122 Harv. L. Rev. 1095 (2009) (noting the myriad of ways, under statute and case law, that presidential functions are largely exempt from the purview of the judicial review mechanism of administrative law); id. at 1108 ("[T]he Supreme Court has twice stated that the President is not an agency" subject to the APA). Yet, even as scholars have argued that judicial review of executive branch behavior tends to be largely deferential and that, in any event, the inherent flexibility within administrative law allows (if not requires) courts to tone down review where presidential action is concerned, see id. at 1136 (focusing on national security and related emergencies); Eric A. Posner & Cass R. Sunstein, Chevronizing Foreign Relations Law, 116 Yale L.J. 1170 (2007), 1200-01 (highlighting judicial deference to the executive in foreign relations), executive action is not immune to process scrutiny, see infra Part III.A-C. In that regard, judicial review of executive action under the Constitution merges with the more conventional, processbased mechanisms through which the APA allows courts to oversee discretionary agency decisions on both process- and substance-based grounds. Cf. Gillian E. Metzger, Ordinary Administrative Law As Constitutional Common Law, 110 Colum L. Rev. 479, 483 (2010) ("Administrative law is generally understood as having constitutional as well as what I will call "ordinary law" components [,] [and] constitutional concerns permeate ordinary administrative law, in particular doctrines of judicial review of agency action."); see also Eric Berger, Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making, 91 B.U. L. Rev. 2029, 2070 (2011) (noting that "common staples of administrative law are relevant to constitutional decision making" while discussing hard look review under the APA).

¹¹⁸ See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (first iteration); Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017) (second iteration); Proclamation 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) (third iteration).

most commentators frame the travel ban litigation through the President's repeated expressions of hostility against the Muslim faith,¹¹⁹ courts at all levels of the federal judiciary have tended to scale deference based on their impression of the strength—or weakness—of small-p procedures. In the lower courts, judges repeatedly linked process failure with constitutional infirmity. By contrast, the Supreme Court credited good process as a basis for deference. The more the government could show its policy was thoroughly vetted, the less the President's disparaging remarks about Islam seemed to matter.¹²⁰ Trump v. Hawaii thus provides an object lesson in the way judges link small-p process with Executive deference.

1. Travel Bans 1.0 and 2.0: Process and Executive Invalidation

President Trump issued his travel ban seven days after taking office. Within days of the initial rollout,¹²¹ judges immediately entered temporary restraining orders prohibiting its enforcement.¹²² These early cases, which were upheld by the federal courts of appeal,¹²³ drew a number of connections between intent and small-p process, including the absence of "expert agencies with broad experience on the matters" and "no evidence that ... a deliberative process took place."¹²⁴ In addition to those procedural irregularities,

123 See Washington v. Trump, 847 F.3d 1151, 1164 (9th Cir. 2017) ("The Government has not shown that the Executive Order provides what due process requires, such as notice and a hearing prior to restricting an individual's ability to travel."); Aziz v. Trump, 234 F. Supp. 3d 724, 736 (E.D. Va. 2017) (The Commonwealth is likely to succeed on its Establishment Clause claim because it produced evidence that the travel ban was motivated by religious animus).

124 *Aziz*, 234 F. Supp. 3d. at 736; see also id. (contrary to the ordinary expected rollout of an order of this magnitude and significance, "there is evidence that the president's senior national security officials were taken by surprise").

As Noah Feldman argued shortly after the ban was announced, when it comes to "President 119 Donald Trump's travel ban, there's one word you need to focus on: animus." Noah Feldman, Key Word for Travel Ban is 'Animus', Bloomberg View (June 4, 2017, 10:10 AM), https://www.bloomberg.com/view/ articles/2017-06-04/key-word-for-travel-ban-at-supreme-court-is-animus; see also David Cole, Trump's Travel Bans—Look Beyond the Text, The New York Review of Books (May 11, 2017), http://www.nybooks. com/articles/2017/05/11/trumps-travel-bans-look-beyond-the-text/ (arguing that the travel ban has "taught Americans, and their judges, to be at once more skeptical of executive power and more solicitous of the rights of noncitizens."). Donald Trump first mentioned the travel ban during a press conference while campaigning for President in 2015: "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States ... " Ryan Teague Beckwith, President Trump's Own Word Keep Hurting His Travel Ban, Time (Mar. 16, 2017), http://time.com/4703614/travel-ban-judges-donald-trump-words/. In a series of subsequent statements about the proposed ban, candidate Trump said, "I think Islam hates us," "we're having problems with Muslims coming into the country," "I'm talking territory instead of Muslim," and "The Muslim ban is something that in some form has morphed into [an] extreme vetting from certain areas of the world." Alan Gomez, What President Trump Has Said About the Travel Ban, USA Today (June 11, 2017 10:42 AM), https://www.usatoday.com/story/news/politics/2017/06/11/what-president-trump-has-said-about-muslimstravel-ban/102565166/.

¹²⁰ Trump v. Hawaii, 138 S. Ct. 2393, 2418 (2018).

¹²¹ Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). The first iteration suspended refugee admissions for 120 days, indefinitely suspended the admission of Syrian refugees, and banned the immigrant and nonimmigrant entry of nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen. Id.

¹²² See Aziz v. Trump, No. 1:17-CV-116, 2017 WL 386549, at *1 (E.D. Va. Jan. 28, 2017) ("respondents are forbidden from removing petitioners—lawful permanent residents at Dulles International Airport—for a period of 7 days from the issuance of this Order."); Darweesh v. Trump, No. 17 CIV. 480 (AMD), 2017 WL 388504, at *1 (E.D.N.Y. Jan. 28, 2017) ("petitioners have a strong likelihood of success in establishing that the removal of the petitioner and others similarly situated violates their rights to Due Process and Equal Protection"); Washington v. Trump, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) ("the court finds that the States have met their burden of demonstrating that they face immediate and irreparable injury as a result of the signing and implementation of the Executive Order.").

courts noted the "highly particular 'sequence of events," including efforts by President Trump and his surrogates to find "legal" bases to ban Muslims from entering the country, as reason to block the policy.¹²⁵

The Trump Administration revoked its order in response to these early rulings and made a number of modifications,¹²⁶ yet, as with the first iteration, courts continued to cite process flaws as evidence of malintent. In one major case, the Fourth Circuit emphasized the procedural defect of excluding national security agencies from the decision-making process,¹²⁷ the post hoc nature of the national security rationale, as well as government evidence that undermined the very effectiveness of the President's policy.¹²⁸ Within these initial cases, the concepts of process failure and unconstitutional motivation were closely linked.¹²⁹

2. Travel Ban 3.0: Process and Executive Vindication

The Trump Administration's third version of the travel ban, issued via presidential proclamation,¹³⁰ took pains to address the lower courts' concerns about small-p process.¹³¹ Government lawyers repeatedly touted a "worldwide" process that involved close

129 At around the same time as the Fourth Circuit decision, a federal district court in Hawaii issued a preliminary injunction barring enforcement of certain sections of the second iteration of the travel ban. Hawaii v. Trump, 241 F.Supp.3d 1119, 1140 (D. Haw. 2017). The trial court was affirmed in large part by the Ninth Circuit Court of Appeals. Hawaii v. Trump, 859 F.3d 741, 774, 779 (9th Cir. 2017). On a petition for a stay of the preliminary injunction, the Supreme Court did not directly address the Fourth or Ninth Circuit rulings that found the Government's national security reasoning for EO-2 unconvincing, but it left the injunction in place with respect to those trying to enter the country who had a bona fide relationship with an entity or person in the United States. *See* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2088 (2017). The Court vacated its decision as moot once the second version of the travel ban expired based on its own terms. Trump v. Int'l Refugee Assistance, 138 S. Ct. 353 (2017).

130 Proclamation 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) (indefinitely restricting the entry of certain nationals from Chad, Iran, Libya, North Kora, Somalia, Syria, Venezuela, and Yemen).

131 According to the government, DHS went through a detailed process in identifying which countries had information-sharing practices insufficient for the United States to vet foreign nationals entering the United States from those countries, identifying eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela and Yemen. See Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 591 (D. Md. 2017). The Acting Secretary of Homeland Security recommended entry restrictions on foreign nationals from

¹²⁵ Id. at 737 (granting plaintiffs a preliminary injunction on their Establishment Clause claims). Courts also took issue with other procedural oddities, such as the administration's abrupt reversal on whether lawful permanent residents (LPRs) were subject to the same travel restrictions as all other nationals from the designated countries. One court rejected the government's effort to invoke a post-hoc White House counsel interpretation to cure due process concerns raised by a rule restricting entry to LPRs. The court refused to accept the government's about-face regarding LPRs when it "offered no authority establishing that the White House counsel is empowered to issue an amended order superseding the Executive Order signed by the President and now challenged by the States," a "proposition [that] seems unlikely." See *Washington*, 847 F.3d at 1165. In light of the government's changing interpretations of the order's effect on LPRs, the court expressed skepticism that the Trump Administration would not revert back to denying entry to LPRs once again. See id.

¹²⁶ Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017). The second order removed Iraq from the list of affected countries, exempted lawful permanent residents from the travel ban and removed the indefinite ban on Syrian nationals. This order also eliminated language providing lower-level discretion to make exceptions to the refugee ban for foreign nationals of "minority" faiths in their home countries—an effort largely seen as attempting to give preference to Christian asylum-seekers. Int'l Refugee Assistance Project, 857 F.3d 554, 633 (4th Cir. 2017).

¹²⁷ Int'l Refugee Assistance Project, 857 F.3d at 591-92.

¹²⁸ See id. at 592 (citing DHS report that the second iteration of the ban would not "diminish the threat of potential terrorist activity" as reason to find the government's proffered purpose pretextual); see also id. at 572, 601 (noting that the Order "drips with religious intolerance, animus, and discrimination," and "cannot be divorced from the cohesive narrative linking it to the animus that inspired it").

consultation with experts,¹³² a centerpiece of Chief Justice Roberts's Trump v. Hawaii majority opinion that repeatedly touted good process¹³³ as "a justification" for the entry ban that was "independent of unconstitutional grounds."¹³⁴ Although Roberts did not ignore the presence of the President's patently biased statements,¹³⁵ he recognized that, in addition to the Proclamation's facial neutrality, it appeared to satisfy the judicial requirement of a bona fide national security rationale promulgated through a careful and robust process.¹³⁶

B. Ex Ante and Ex Post Proceduralism

The discussion of small-p process, up until now, has focused on ex ante proceduralism. Ex ante procedures concern the quality of deliberation, involvement of experts, facilitation of regular public hearings and open debate, documentation of studies, and other evidence that a given policy has been thoroughly vetted. Ex post procedures, by contrast, concern a coordinate institution's ability to follow its own stated and published procedures—including adherence to allowances, exceptions, and other promised mechanisms within the law itself. Both ex ante and ex post procedural review can turn on adherence to, or departures from, an expected norm or baseline akin to what Justice Powell described in Arlington Heights.¹³⁷ Moreover, it is not uncommon for courts to highlight

132 Brief for the Petitioners at 15, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965); Adam Liptak, Supreme Court Allows Trump Travel Ban to Take Effect, N.Y. Times (Dec. 4, 2017), https://www.nytimes.com/2017/12/04/us/politics/trump-travel-ban-supreme-court.html?_r=0.

133 138 S. Ct. 2392 (2018); see supra notes 17-18 and accompanying text. By contrast, the lower courts continued to find contradictions in the agency review process as undermining the government's national-security-based justifications. For example, a federal district court in Maryland concluded that the plaintiffs sufficiently alleged a "misalignment between the stated national security goals of the ban and the means implemented to achieve them," suggesting that the Government's stated reason for the ban was not bona fide and not entitled to a presumption of deference. See Int'l Refugee Assistance Project, 265 F. Supp. 3d at 618. The court rejected the government's contention that the Proclamation was issued through the "routine operations of the government bureaucracy," and concluded that not only did the government present such weak evidence to that end, but combined with public statements and historical events suggesting religious animosity, the plaintiffs would likely prevail on an establishment clause claim. Id. at 628. The court thus granted an injunction, barring enforcement of the travel ban only with respect to foreign nationals with a bona fide relationship with a person or organization in the Unites States. See id. at 631. However, the Supreme Court issued a stay of that order pending disposition of the government's appeal. Soon afterward, the Supreme Court granted the government's petition for certiorari following a Ninth Circuit affirmance of a Hawaii district court order enjoining enforcement of the Proclamation. Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 542 (2017).

134 Hawaii, 138 S. Ct. at 2420.

135 See id. at 2417-18 (contrasting the way some presidents "have used [their] power to espouse the principles of religious freedom and tolerance on which this Nation was founded," while others "performed unevenly in living up to those inspiring words").

136 See supra note 18.

137 See generally supra Part II.A (discussing *Arlington Heights*' consideration of "departures from normal procedur[e]" as evincing intent).

each of those countries except Iraq. See id. Although Somalia's practices were found sufficient, the Secretary still recommended entry restrictions for Somalian nationals as well. See id. Despite the DHS's more tailored evaluation of the national security risk associated with nationals from each of the designated countries, "49 former national security, foreign policy, and intelligence officials . . . state that '[a]s a national security measure,' the Proclamation is 'unnecessary' and is of 'unprecedented scope.'" Id. at 593. Further procedural problems with the Proclamation include that "concrete evidence" shows "country-based bans are ineffective," the Proclamation fails to block nationals from certain countries with a non-Muslim majority that have "widely-documented" information sharing deficiencies, no nationals from the designated countries have committed terrorist acts in the United States in the last 40 years, and no intelligence shows that nationals from the designated countries pose a terrorist threat to the United States. Id.

both forms of procedural review as significant. In Fisher, for example, the Court not only detailed why adherence to ex ante procedure was significant to the school's satisfaction of strict scrutiny's narrow tailoring requirement but also instructed, in rather clear and unambiguous terms, a requirement that the university continue to make use of ex post procedures as a basis for the program's continued validity and judicial endorsement.¹³⁸

While the Hawaii litigation provides an object lesson in the role that ex ante procedures play in shaping constitutional discourse and doctrinal arguments about governmental power, deference, and rights, the Court also made ex post procedure a pillar of its finding that the ban was based on a legitimate national security interest. In the wake of Hawaii, lower courts have paid special attention to the government's adherence to its promised procedures. In that regard, Hawaii replicates a number of seminal post-9/11 Supreme Court decisions that focus on the Executive's adherence to both ex ante and ex post procedure as a basis for judicial deference, or the lack thereof.¹³⁹

1. Ex Ante and Ex Post Proceduralism in Hawaii

Chief Justice Roberts made it clear in Hawaii that the Proclamation could be vindicated based on the rigor of ex ante procedures—specifically, the "world-wide" and "multi-agency" review underlying the enactment.¹⁴⁰ But Roberts also relied on the availability of ex post procedures—discretionary hardship waivers within the Proclamation—that further reinforced its "legitimate national security" foundations.¹⁴¹ Justice Breyer and Justice Sotomayor each wrote dissenting opinions linking ex post and ex ante process failure, respectively, with improper motivation.¹⁴² Breyer focused on ex post procedures—namely the government's actual implementation of the Proclamation's waiver provisions. As he explained, the government's adherence to its waiver process would be determinative as to whether "the Proclamation is a 'Muslim ban,' [or] a 'security-based' ban."¹⁴³ But ex post scrutiny indicated that the policy was predicated on invidious discrimination given that, within the first month of the Proclamation, only two waivers were granted out of 6,555 eligible applicants.¹⁴⁴ Breyer also noted the absence of other

¹³⁸ Fisher v. Univ. of Texas at Austin, 136 S. Ct. 2198, 2210 (2016) ("Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances.").

¹³⁹ See infra notes 161-170 and accompanying text.

¹⁴⁰ Hawaii 138 S. Ct. at 2404, 2408.

¹⁴¹ Id. at 2422. Roberts also pointed to the "ongoing process" of reviewing entry restrictions for possible termination every 180 days, the "significant exceptions" and "carveouts" from the entry restrictions applicable to certain categories of foreign nationals, and the Proclamation's direction to DHS and the State Department to issue guidance to consular officers regarding the criteria for hardship waivers. Id. at 2422-23.

¹⁴² Breyer drew an explicit connection between procedural regularity and improper motivation, noting that while "[m]embers of the Court principally disagree about ... whether or the extent to which religious animus played a significant role in the Proclamation's promulgation or content ... the Proclamation's elaborate system of exemptions and waivers can and should help us answer this question." Id. at 2429 (Breyer, J. dissenting).

¹⁴³ Id. at 2430 ("[I]f the Government is applying the exemption and waiver provisions as written, then its argument for the Proclamation's lawfulness is strengthened...[But] if the Government is not applying the system of exemptions and waivers that the Proclamation contains, then its argument for the Proclamation's lawfulness becomes significantly weaker.").

¹⁴⁴ Id. at 2431. Breyer argued that, even as the number of granted waivers increased over time, it was still surprisingly low relative to the number of likely eligible individuals. Id., see also id. at 2431-32 (noting the contrast between the Proclamation's stated exemptions for those with significant business or professional

promised ex post procedures, including guidance to consular officers regarding the issuance of hardship waivers—still another reason to subject the Proclamation to more careful scrutiny.¹⁴⁵ In contrast to Breyer's focus on ex post mechanisms,¹⁴⁶ Sotomayor expressed doubt regarding the veracity of the government's ex ante procedures, including its professed "worldwide" review that consumed only 17 pages of published material.¹⁴⁷ For Sotomayor, the Court majority approached its ex ante in too thin a manner, permitting "the President to hide behind an administrative review process that the Government refuses to disclose to the public."¹⁴⁸

Ongoing challenges to the travel ban in the lower courts have invoked both ex ante and ex post procedural failure.¹⁴⁹ One court in the District of Maryland permitted a case to move past the motion to dismiss stage when the plaintiffs showed how inconsistencies in the government's selection of countries subject to the travel restrictions appeared to reflect discrepancies in the government's own baseline criteria, undermining any "presumption of rationality" as a basis for deference.¹⁵⁰ The trial court also noted substantial problems with the ban's implementation, including the lack of any promised guidance on consular implementation of the waiver program, systematic denials of seemingly meritorious cases, statistics showing that only two percent of waiver applications had been granted as of April 2018, and claims by former consular officials that the waiver process was a "fraud."¹⁵¹ Such indication of ex ante and ex post procedural failure supported an inference that the ban's stated national security purpose was a mere "pretext for discrimination."¹⁵²

obligations, close family ties in the U.S., asylum seekers, refugees and certain nonimmigrant visas and the minuscule number of waivers approved). For example, between December 8, 2017, and January 8, 2018, the State Department received almost 7,000 applications from visa-eligible nationals of listed countries. As of March 2018, waivers were granted to less than 1.5% of the otherwise visa-eligible and admissible applicants. Torbati & Rosenberg, Exclusive: Visa Waivers Rarely Granted Under Trump's Latest U.S. Travel Ban: Data, Reuters (Mar. 6, 2018), https://www.reuters.com/article/us-usa-immigration-travelban-exclusive/exclusive-visa-waivers-rarely-granted-under-trumps-latest-u-s-travel-ban-data-idUSKCN1GI2DW.

¹⁴⁵ See *Hawaii*, 138 S.Ct. at 2431 (Breyer, J. dissenting); id. at 2441 (Breyer, J. dissenting). Breyer also indicated that an ex post review could help determine whether the President had made the kind of "finding" contemplated by the statute on which it was based. See id. at 2430; see also 8 U. S. C. 1182(f) (vesting the President with authority to restrict the entry of foreign nationals whom he "finds . . . would be detrimental to the interests of the United States").

¹⁴⁶ However, Breyer closed his dissent by also suggesting that an ex ante analysis would support setting aside the Proclamation as well. See *Hawaii*, 138 S.Ct. at 2433 (noting, as a reason to set aside the Proclamation, "the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements also set forth in Justice Sotomayor's opinion").

¹⁴⁷ See id. at 2443 (Sotomayor, J., dissenting). For Chief Justice Roberts, any quantitative floor would be arbitrary. Id. at 2421. A 17-page report could be highly substantive, with a reasoned basis in expert analysis and extensive supporting materials which simply were not accessible by FOIA request. Id. Thus, even if the policy was overbroad in its reach, as the dissent argued, because of the complexity and sensitivity involved in the national security context, the Court could not substitute its judgement and the executive was entitled to deference. Id.

¹⁴⁸ Id. at 2443 (Sotomayor, J., dissenting).

¹⁴⁹ See Robert L. Tsai, Trump's Travel Ban Faces Fresh Legal Jeopardy, Politico (Mar. 27, 2019), https://www.politico.com/magazine/story/2019/03/27/trump-travel-ban-lawsuit-supreme-courtunconstitutional-226103.

¹⁵⁰ Memorandum Opinion on Motion to Dismiss at 36-37, Int'l Refugee Assistant Project (IRAP) v. Trump, No. 17-cv-361 (D. Md. May 2, 2019) (ECF No. 276).

¹⁵¹ Id. at 37.

¹⁵² Id. Plaintiffs in the Northern District of California have also been allowed to proceed with a challenge under the APA, based on established doctrine that administrative agencies are bound to follow their

In short, even as the Trump Administration claims victory in Hawaii, ongoing failures regarding the very procedures that induced judicial deference in the Supreme Court may render the policy open to ongoing attack. In that regard, Justice Breyer's Hawaii dissent that any sham waiver program could render the ban unconstitutional remains a basis for renewed litigation, potentially placing the policy in jeopardy.¹⁵³

2. The Executive and Ex Ante/Ex Post Procedure

Hawaii was not the first time that ex ante or ex post procedural review has figured into major Supreme Court rulings of presidential action. Many of the post-9/11 decisions involving the "war on terror" have been described as largely procedural in nature.¹⁵⁴ As a prominent example, Hamdan v. Rumsfeld¹⁵⁵ invoked both ex ante and ex post process scrutiny to rule on the legality of military commissions at Guantanamo Bay. In terms of its actual holding, the Court applied ex post proceduralism, rejecting the President's commissions for failure to adhere to a requirement under the Uniform Code of Military Justice mandating that commissions follow an "impracticability" finding related to the use of courts martial.¹⁵⁶ Shortly after the decision, Professor Neal Katyal observed how ex ante procedure—specifically the lack of deliberation and inter-agency dialogue within the George W. Bush Administration—doomed its post-9/11 policies regarding the detention and trial of terror suspects in the courts: "Through bypassing the interagency process, and squelching expertise under the aegis of political accountability, the Administration weakened the rationale for deference all on its own."157 On this view, the commissions in Hamdan were especially prone to judicial defeat because they lacked buy-in from the Executive Branch's own experts.¹⁵⁸

As another prominent example of ex post process scrutiny in the executive context, the

156 Id. at 623.

own rules and guidelines. Order re Motion to Dismiss at Emami v. Nielson, No. 18-cv-1587 (N.D. Cal. Feb. 4, 2019) (ECF No. 74). Ex post procedural failures, in particular the "blanket denials" of waiver applications, played a key role in the court's rationale for denying the motion to dismiss. Id. at 15-16.

¹⁵³ See Tsai, supra note 156.

¹⁵⁴ See, e.g., Richard H. Fallon, Jr., The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science, 110 Colum. L. Rev. 352, 395 (2010) (observing that "the Court's War on Terror habeas decisions manifest a far greater willingness to rule for petitioners on grounds of procedure than of substance"); Owen Fiss, The War Against Terrorism and the Rule of Law, 26 Oxford J. Legal Stud. 235, 244 (2006) (observing that Justice O'Connor's opinion in Hamdi v Rumsfeld, 542 US 507 (2004) "conceives of procedure as an instrument to arrive at correct decisions"); Samuel Issacharoff & Richard H. Pildes, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process approach to Rights During Wartime, 5 Theoretical Inquiries L. 1, 2 (2004) (arguing that courts have resolved cases pitting individual liberty against national security through the lens of procedural rather than substantive questions); Joseph Landau, Muscular Procedure: Conditional Deference in the Executive Detention Cases, 84 Wash. L. Rev. 661, 666 (2009) ("[C]ourts have [] put procedure to muscular uses—focusing on the means of coordinate branch decision-making, while still allowing the political branches to define the content of the substantive law."); Jenny S. Martinez, Process and Substance in the "War on Terror," 108 Colum. L. Rev. 1013, 1013 (2008) (observing that "most of the court decisions in cases challenging" policies enacted during the war on terror "have not directly addressed substantive rights claims" but rather "have almost all been about process.").

^{155 548} U.S. 557 (2006).

¹⁵⁷ See Neal Katyal, *Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice, 120 Harv. L. Rev. 65, 71 (2006); see also id. at 109-12.

¹⁵⁸ Id. at 71 (arguing that *Hamdan* "second-guessed the President's interpretations perhaps because those interpretations had not earned the approval of the bureaucracy, including the Judge Advocates General and the State Department.").

D.C. Circuit in Bismullah v. Gates placed onerous demands on the government regarding discovery obligations for Guantanamo detainee cases.¹⁵⁹ In Bismullah, the court essentially required the government to restart the entire evidence-gathering process with respect to each and every detainee after it became apparent that the government had failed to follow its own vetting mechanisms around detention determinations.¹⁶⁰ While the Court had endorsed the proposition in Hamdi v. Rumsfeld that "fair process can be provided by nonjudicial decisionmakers,"161 detainees were often victorious in court when noting the government's failure to follow its own procedures. Indeed, similar lapses in ex post procedure arguably influenced the Supreme Court's decision in Boumediene v. Bush to consider the applicability of the Constitution's Suspension Clause at Guantanamo Bay and invalidate the political branches' alternate review system.¹⁶² To understand why Boumediene provides an object lesson in ex post procedure, one need only recall that the Supreme Court had initially denied certiorari in April 2017, only to reverse itself less than three months later, after the parties moved for rehearing and provided declarations attesting to the executive branch's inadequate implementation of its own standards and procedures.¹⁶³

C. Process Scrutiny in Hindsight: The Case of Korematsu

Putting aside the contemporary litigation, there is value to reflecting on process scrutiny retrospectively. Consider, for example, its effect on Korematsu v. United States, a decision upholding an executive order authorizing the exclusion of Japanese-Americans¹⁶⁴ and a low-point in American constitutional history.¹⁶⁵ Korematsu features two prominent theories of judicial review, neither of which mitigated the tragic outcome. First, Korematsu is the Court's first invocation of the "strict scrutiny" standard.¹⁶⁶ Even as

^{159 501} F.3d 178 (D.C. Cir. 2007). See Bismullah v. Gates, 514 F.3d 1291, 1295 n.5 (D.C. Cir. 2008) (quoting Decl. of James M. McGarrah, Rear Admiral (Ret.), U.S. Navy ¶¶ 4–6, 10–13 (May 31, 2007) (noting, *inter alia*, that tribunals were unable to verify that they had examined all the relevant, available information; agencies routinely denied requests for confirmation by Guantánamo personnel that the agency had no exculpatory information on a particular detainee; and exculpatory evidence was withheld from tribunals if it was believed to be 'duplicative' or 'not relat[ing] to a specific allegation being made against the detainee').

¹⁶⁰ Bismullah v. Gates, 501 F.3d 178, 180 (2007). Declarations and empirical data undermined the presumption that the government had followed its own procedures, and as a result of these lapses the litigation became more focused on the agency's compliance with process. See Decl. of Stephen Abraham, Lieutenant Colonel, U.S. Army Reserve, ¶¶ 5-24, Bismullah, 501 F.3d 178 (D.C. Cir. June 15, 2007) (No. 06-1197) (disclosing failures in the evidence-gathering process and a failure to adhere to the government's procedures); Decl. of James M. McGarrah, Rear Admiral (Ret.), U.S. Navy, ¶¶ 4-6, 10-13, Bismullah, 501 F.3d 178 (D.C. Cir. May 31, 2007) (No. 06-1197) (same).

¹⁶¹ Trevor W. Morrison, Suspension and the Extrajudicial Constitution, 107 Colum. L. Rev. 1533, 1613 (2007).

¹⁶² Boumediene v. Bush, 553 U.S. 723, 771 (2008).

¹⁶³ Boumediene v. Bush, 549 U.S 1328 (2007) (mem.), vacated, 551 U.S. 1160 (2007) (mem.). See also Landau, supra note 161, at 694.

¹⁶⁴ During World War II, a presidential executive order authorized the military to issue exclusion orders against persons of Japanese ancestry residing in certain areas on the West Coast. The Supreme Court affirmed Korematsu's conviction for defying the order. Korematsu v. United States, 323 U.S. 214 (1944), abrogated by Trump v. Hawaii, 138 S. Ct. 2392 (2018).

¹⁶⁵ Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 631 n.4 (14th ed. 2001) ("Korematsu is a case that has come to live in infamy."); Jamal Greene, The Anticanon, 125 Harv. L. Rev. 379 (2011) (identifying Korematsu among "the Supreme Court's worst decisions"). See Issacharoff & Pildes, supra note 161, at 18-19 ("Korematsu is excoriated as one of the two or three worst moments in American constitutional history."). See also Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (overruling *Korematsu*).

¹⁶⁶ Korematsu v. United States, 323 U.S. 214, 216 (1944), overruled by Trump v. Hawaii, 138 S. Ct.

the Court announced the rule that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,"¹⁶⁷ it failed to give those words substance. The military's justifications for targeting Japanese persons are recognized today as having reflected "race prejudice [and] war hysteria" rather than fact;¹⁶⁸ indeed, this is readily apparent from their cursory examination.¹⁶⁹ While the Court paid lip service to a heightened standard of review, its deference to the government was near-absolute, as it unquestionably accepted the military's prejudicial and conclusory justifications.¹⁷⁰

As a related matter, Korematsu demonstrates the pitfalls of "bilateral endorsement" theory.¹⁷¹ The theory, commonly attributed to Justice Jackson's Youngstown concurrence eight years after Korematsu, holds that judicial review should be extremely deferential when the coordinate branches agree on policy.¹⁷² In the parlance of Justice Jackson, a president acting with congressional backing does so at the height of her powers—as arguably was the case in Korematsu.¹⁷³ Strict scrutiny doctrine, still in infancy, failed to spur even a mildly searching review of evidence that should have been heavily scrutinized and invalidated. To the extent that bilateral endorsement serves only to affirm government decisions in such situations,¹⁷⁴ the question then becomes: What gaps might process scrutiny have filled?

Concededly, it is counterintuitive to envision that a framework analyzing "departures from normal procedure" can help tackle actions taken during the abnormal times of war. Nevertheless, in his dissent, Justice Murphy describes a baseline of procedure he considered consistent and appropriate for the circumstances, drawing on the more procedurally robust treatment of citizens of German or Italian ancestry.¹⁷⁵ Murphy believed that, given the constitutional issues at stake, "normal procedure" would have entailed "hold[ing] loyalty hearings for the ... persons involved" rather than relying on government say-so.¹⁷⁶ Further, he questioned the type of evidence advanced by the military as atypical of what a more procedurally sound process would have produced.¹⁷⁷

Naturally, the classification against the Japanese in Korematsu was overt. Indeed, the

Id.

^{2392 (2018).}

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¹⁶⁸ United States, Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians, 18 (1983), https://www.archives.gov/research/japanese-americans/justice-denied.

¹⁶⁹ See Korematsu 323 U.S. at 235-36 (Murphy, J., dissenting) (finding the exclusion of Japanese-Americans to be based on an "erroneous assumption of racial guilt rather than bona fide military necessity" and utterly lacking in "reliable evidence").

¹⁷⁰ See id. at 217-18.

¹⁷¹ The term "bilateral endorsement" was dubbed by Issacharoff and Pildes, supra note 161.

¹⁷² Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-39 (1952) (Jackson, J., concurring).

¹⁷³ See Korematsu 323 U.S. at 216-17.

¹⁷⁴ Cf. Issacharoff & Pildes, supra note 161, at 19 ("The risk of an entire nation, and its elected representatives, succumbing to wartime hysteria is ever present."); Sarah H. Cleveland, Hamdi Meets Youngstown: Justice Jackson's Wartime Security Jurisprudence and the Detention of "Enemy Combatants," 68 Ala. L. Rev. 1127, 1135 (2005) (bilateral endorsement "runs the risk of inviting Congress and the executive to collude in the violation of individual rights").

¹⁷⁵ Korematsu 323 U.S. at 241-42 (Murphy, J., dissenting).

¹⁷⁶ See id. at 242.

¹⁷⁷ See id. at 236-37 ("Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment.").

majority recognized as much by invoking strict scrutiny—at least on paper. However, insofar as criticism of the decision has focused on the Court's turning a blind eye to the military's invidious intent, a greater adherence to small-p process, emphasizing the lack of evidentiary procedural rigor, may well have shone a brighter light on the invidious nature of the government's action, perhaps tilting the balance towards a less egregious outcome. At a minimum, Korematsu also showcases a patently weak application of strict scrutiny theory in which an additional layer of process scrutiny (given the defects that existed in Fred Korematsu's case) was much needed in the heavily deferential environment.

More generally, the theory of bilateral endorsement can be placed in new perspective when viewed through the lens of process scrutiny. Periods when the legislative-executive dynamism needed for effective interbranch oversight (or bilateral endorsement) is absent could feature identifiable defects in small-p process.¹⁷⁸ Moreover, as a procedural theory of review itself, bilateral endorsement, at its best, inherently invites process scrutiny because the executive's correct application of the legislative mandate will often entail correct application of mandated procedure. For instance, in Korematsu, the coordinate branches' collusion to repress the rights of Japanese citizens was marked by a weak procedural effort and production of evidence.¹⁷⁹ A greater focus on or adherence to small-p process scrutiny as a natural extension of the process-oriented review courts have since applied may well have curbed the Court's ill-fated, near-absolute deference to the executive.

¹⁷⁸ Such a problem seemed to define many of the war-on-terror policies initiated after the 9/11 attacks, as Congress remained largely passive throughout that tumultuous time. As Katyal explains, Congress "did not affirm or regulate President Bush's decision to use military commissions to try unlawful belligerents. It stood silent when President Bush accepted thinly reasoned legal views of the Geneva Conventions." Neal Kumar Katyal, Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within, 115 Yale L.J. 2314, 2319 (2006). Unchecked by the legislature, the executive flaunted procedure in its pursuit of individuals it saw as combatants in the war on terror—even ignoring its own procedural standards. See Landau, supra note 161, at 693-94. The Court wound up resolving a host of post-9/11 cases through the lens of procedural regularity, holding the executive accountable based on failures within its underlying vetting mechanisms or when it failed to adhere to its own procedural standards. See id. at 689-96.

¹⁷⁹ See Korematsu 323 U.S. at 236-67; id. at 241-42.

n current debates about race and inequality in the United States, we tend to forget a key institution: the family.

Robin A. Lenhardt's research focuses critical attention on the role family law systems and structures have long played in shaping racial subordination and disadvantage in the United States.

Lenhardt thus provides invaluable insights into the kinds of solutions that can be deployed to interrupt processes that "lock" families of color and their members into persistent inequality.



Robin A. Lenhardt Professor of Law

hitewashing the Family, to be published by the *Wisconsin Law Review*, builds on this foundation by offering an alternative, race-informed account of Moore v. City of East Cleveland, a U.S. Supreme Court precedent not typically associated with race. Professor Lenhardt draws on what is arguably the most comprehensive case file on Moore outside that developed by the lawyers in the case. She offers a vivid retelling of the case that situates the travails of plaintiff Inez Moore an African American grandmother who risked jail to challenge a zoning ordinance criminalizing extended families like her own—within the racial context of 1960s and 70s America. In so doing, Professor Lenhardt provides readers both with a window onto the case and the race effects of Justice Powell's opinion for the Court, which, in invalidating East Cleveland's ordinance, has become an essential part of the family law canon. In particular, her intervention uncovers:

- Moore's doctrinal role in divorcing race from family in the Court's jurisprudence;
- Archival documents highlighting Justice Powell and others' unwillingness to recognize the operation of race in Moore and to solidify color-blindness as a norm;
- Moore's significant influence on the evolution of the modern Court's equal protection jurisprudence, as evidenced in decisions such as University of California v. Bakke;
- The extent to which the concepts of "liberty" and "family" deployed in Moore not only assume family internalization of need, but—insofar as they speak to the impact of so-called "societal discrimination" on caregiving units—also suggest that already disproportionately disadvantaged families of color must ultimately bear that burden.

Importantly, the insights *Whitewashing the Family* offer are not merely doctrinal. Professor Lenhardt's contribution, which is part of a larger book project, also:

- Links Moore to the absence of sustained references to the family in public discourse on racial inequality today;
- Highlights how Moore and other family precedents contribute to distorting understanding of the very existence of racial inequality and its operation;
- Helps to identify the intersecting systems and structures that tether families of color to inequality; and
- Functions to map the contours of new and much needed solutions.

With a dynamic approach that puts race front and center and privileges the experiences of African Americans and other groups "on the ground," Professor Lenhardt's work opens the door to a better understanding of and responses to racial inequality and the devastating impact it has on families in the United States.

Whitewashing the Family

Wisconsin Law Review (forthcoming 2020)

I.

Introduction: Whitewashing the Family

"Why do they want to break up my family? ... These children need love like all children do, that's what I supply. I'm doing what any grandmother would do."¹

—Inez Moore

On May 17, 1974, Inez Moore, a widowed grandmother of little means, was found criminally liable of violating a City of East Cleveland, Ohio, ordinance.² Following municipal court proceedings, she was fined twenty-five dollars and sentenced to five days in jail.³ Inez Moore's crime notably involved none of the behavior one might expect to result in criminal punishment. She had not stolen, disrupted, or lied. Nor had she injured another person or their property.⁴ At the end of the day, her offense was one grandparents across the country arguably commit every day: loving a grandchild.⁵

One of the key features of East Cleveland's complex municipal code was that it precluded more than one dependent adult of the nominal head of the household from residing there with a child or another adult dependent. In effect, it criminalized certain extended household configurations.⁶ Unbeknownst to Inez, she ran afoul of those provisions when she moved into her new home at 1854 Garfield Road in that bedroom suburb of Cleveland. The duplex was meant to house Inez's grown daughter, Carol, and her son on one side.⁷ On the other, Inez would reside with several other family members.⁸ Those inhabitants included her adult son Dale Sr., his son, Dale Jr., her grandson, John Jr., and occasionally that child's father, John Sr., another of Inez's adult children.⁹ In time, however, one of the City's municipal inspectors, a Mr.

2 See City of East Cleveland v. Inez Moore, No. 162307 (East Cleveland Mun. Ct., May 17. 1974).

- 4 See id.
 - 5 Richard Carnell, Grandmother Fights for Privacy, Wis. St. J. May 15, 1977.

¹ Richard Carnell, Grandmother Fights for Privacy, Wis. St. J. May 15, 1977.

³ Brief and Assignment of Error for Appellant, at 2, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (No. 75-6289), 1976 WL 178725, at * 2 Court of Appeals, Eighth Appellate Dist., Ohio.

⁶ R.A. Lenhardt & Clare Huntington, *Foreword: Moore Kinship*, 85 Fordham L. Rev. 2551, 2552 (2017).

⁷ Peggy Cooper Davis, *Moore v. East Cleveland: Constructing the Suburban Family*, in Family Law Stories 77, 80 (Carol Sanger, e.d., 2008).

⁸ Moore v. City of East Cleveland, 431 U.S. 494, 496 (1977).

⁹ Id. at n.4. John Jr. was apparently an intermittent inhabitant of Inez's home, See id.

Raiford G. Williams, would disrupt this plan for family unification.¹⁰

On January 16, 1973, Inspector Williams delivered the first of three "Notice of Violation of Ordinance[s]" informing Mrs. Moore that, under municipal law, her seven-year old grandson John, was "an illegal occupant of suite 1854."¹¹ With the service of each such notice, city officials advised that Mrs. Moore bring her residence into compliance by simply sending John Jr.—a child whom Inez had cared for since 1968, when he was an infant and his mother died unexpectedly—to live elsewhere.¹² Each time Inez refused. For her, the importance of family was too great to permit a mere zoning ordinance to interfere with the familial ties that she had nurtured in building a familial unit that included seven adult children and a total of twenty-two grandchildren.¹³ She would later explain her determination not to yield to the city's dictates in these terms: "Throughout the United States ever since I was born, everyone has talked about the family living together, staying together, and praying together, and that's what I'm trying to do."¹⁴

The battle Inez Moore waged to ensure that her grandson could continue to reside with her, with the only mother he had ever truly known, would ultimately be fought in three state courts and eventually the United States Supreme Court, which embraced a version of Inez's own attitudes about family almost exactly three years after her conviction was certified.¹⁵ In the years hence, Justice Powell's plurality opinion in *Moore*—which in invalidating East Cleveland's zoning law, held that the East Cleveland ordinance simply "slice[d] too deeply into the family itself ""¹⁶—has become an essential precedent in the family law canon.¹⁷ The case marks the Court's modern embrace of substantive Due Process in the family relations realm.¹⁸ And it often gets cited for its recognition of the place of non-nuclear families in the constitutional scheme.¹⁹ Very few would associate *Moore* with race, as the primary opinion makes no mention of that subject at all.²⁰ However, in ways too often overlooked, *Moore*

16 *Id.*

17 See Lenhardt & Huntington, supra note 6, at 2552.

¹⁰ See Brief and Assignment of Error for Appellant, Court of Appeals, Eighth Appellate Dist., Ohio, at 2.

¹¹ Id.

¹² Moore, 431 U.S. at 496. Mrs. Moore, in many ways, was much more than a grandmother to both of her grandsons. Indeed, she was an integral part of their development, "shar[ing] parental responsibilities with [both of] their fathers." See Phil Wieland, Court Win Pleases This Grandmother, Plain Dealer, June 1, 1977; see also Davis, supra note 7, at 78.

¹³ Thomas J. Quinn, Zoning No; Family Yes: Court Strikes Down E. Cleveland Curb, Plain Dealer, June 1, 1977.

¹⁴ Grandmother Asks Top Court to Keep Her Family Together, Plain Dealer, Apr. 27, 1976. While fealty to family obviously drove Inez's actions in *Moore*, it bears noting that child welfare alternatives for African-American children in the Cleveland area were especially poor during this time. See Marian J. Morton, *Institutionalizing Inequality: Black Children and Child Welfare in Cleveland, 1859-1998*, 34 J. of Soc. Hist. 141 (2000).

¹⁵ *Moore*, 431 U.S. at 498 (drawing distinction between zoning provisions regulating related and unrelated persons in plurality decision overturning *Moore*'s conviction).

¹⁸ See Robert A. Burt, The Constitution of the Family, 1979 Sup. Ct. Rev. 329 (1979) (discussing,

inter alia, Supreme Court decisions concerning personal autonomy and familial rights under the Fourteenth Amendment's Due Process Clause).

¹⁹ See Lenhardt & Huntington, supra note 6.

²⁰ For important exceptions, see, e.g., Lenhardt & Huntington, supra note 6, ; Angela Onwuachi-

deserves recognition not just as a race-related case, but as one of the Court's most consequential decisions on race and inequality.

This Article tells the true story of *Moore* and its doctrinal role in whitewashing the institution of the family, in divorcing notions of family from those of race. It contends that, rather than natural or commonsensical, this separation reflects a concerted effort on the part of Justice Powell and others actively to preclude discussion of race in a kinship case where it was plainly a factor, leaving future generations with a whitewashed narrative that tells only part of the story. Drawing on what I believe is the most comprehensive case file on *Moore* outside of that developed by the lawyers in the case, it reveals that the Court's decision played a unique role in importing into family law a colorblind norm most often thought to characterize modern race jurisprudence²¹ and helped to solidify the Court's overall blindness to the cumulative racial effects of so-called "societal discrimination" in the United States.²² In doing so, the essay explicates *Moore*'s role in removing the family as a useful unit of analysis of persistent inequality and disadvantage in the race context. This loss is borne out in the absence of sustained references to the family in public discourse on racial inequality today. The Essay thus argues that the deleterious effects of the *Moore* decision are not solely doctrinal. It makes it plain that, ultimately, *Moore* has served to distort and undermine understanding of the very existence of racial inequality and its operation in society. To this extent, the intervention made in the pages that follow goes well beyond Moore itself. Ultimately, it concerns how we understand race, family, and equality today.

* * *

II.

Moore V. As a family Appeal for (Racial) Justice

"[East Cleveland's] housing ordinance and some other laws were designed to keep black people out of certain residential areas."²³ —Inez Moore

Standard accounts of *Moore* begin and end with the legal questions of family structure and choice it presented.²⁴ Certainly, the importance of such issues in the case, not to mention both family and constitutional law, cannot be gainsaid.²⁵ In many ways,

Willig, *Extending the Normativity of the Extended Family: Reflections on Moore v. City of East Cleveland*, 85 Fordham L. Rev. 2655 (2017); Davis, *supra* note 7.

²¹ For an important discussion of colorblindness and equal protection doctrine, *see, e.g.*, Osagie Obasagie, Blinded by Sight: Seeing Race Through the Eyes of the Blind (2013).

²² For a discussion of structural inequality and societal discrimination in equal protection doctrine, *see* R.A. Lenhardt, *Race Audits*, 62 Hastings L. J. 1527 (2910).

²³ Grandmother Asks Top Court to Keep Her Family Together, Plain Dealer, Apr. 28, 1976.

²⁴ Lenhardt & Huntington *supra* note 6, at 2552.

²⁵ Id.

however, they represent only the tip of the iceberg where that decision is concerned. Properly understood, the battle that Inez Moore waged against the City of East Cleveland was one for racial justice and inclusion, not just the right of familial choice.²⁶ For her, the two were inextricably bound. Understanding this and what her case truly involved requires an inquiry into the issues of race, class, and segregation that provided the backdrop against which the story of this doctrinally significant litigation played out.²⁷

The zoning provision at the center of the *Moore* litigation, while perhaps more intricate than most, was fairly representative of ordinances adopted by predominantly white municipalities amidst the Great Migration and its aftermath. This wave of African-American migration from roughly 1916 to 1960²⁸—attracting Inez Moore and millions of others from the Jim Crow South to northern cities in search of equal treatment and better economic prospects—led Whites to find refuge in suburban enclaves directly subsidized by the federal government.²⁹ It also spurred them to reinforce this exclusivity with ordinances that only accelerated the racial segregation of urban and suburban spaces.³⁰

* * *

Few metropolitan areas document this as comprehensively as that encompassing Cleveland, Ohio, a popular destination for black migrants and one of the most racially segregated areas in the country...³¹ During this time, black migrants there "faced tremendous obstacles once they arrived in the promised land."³² This was especially true in the area of housing.³³

* * *

On July 18, 1966, black Cleveland residents voiced their dissent by taking to the streets in the predominantly black Hough area, the poorest and most under-resourced ward in the city.³⁴ Four days later, after police and National Guard actions that only intensified the unrest, four black deaths, including those of two children; hundreds of

²⁶ Id.

²⁷ Id.

²⁸ See Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. Rev. 1161, 11208-10 (2008) (discussing black migration from the South).

²⁹ See Andrew H. Whittemore, *The Experience of Racial and Ethnic Minorities with Zoning in the United States*, 32 J. of Plan. Literature 16, 16 (2017).

³⁰ Id. at 17.

³¹ See Townsand Price-Spratlen & Avery M. Guest, *Race and Population Change: A Longitudinal* Look at Cleveland Neighborhoods, 17 Soc. Forum 105, 114 (2002) (noting "Cleveland was second only to Chicago in levels of segregation among the 50 largest metropolitan areas"). These housing issues affected both private and public housing options for African Americans in Cleveland. See, e.g., Todd M. Michney, Constrained Communities: Black Cleveland's Experience with World War II Public Housing, 40 J. of Soc. Hist. 933 (2007).

³² Leonard N. Moore, Carl B. Stokes and the Rise of Black Political Power 2 (2002).

³³ Id.

³⁴ Id. at 47-49.

police and civilian injuries; and many millions in property damages were recorded.³⁵ Thus far, no research suggests that Inez was directly affected by this rebellion,³⁶which, like an even larger eruption of black Clevelander concerns and violence in 1968, garnered the attention of the U.S. Civil Rights Commission and mention in the Kerner Commission's Report on Civil Disorders, which famously concluded in its report, released fifty years ago this past year, that "[o]ur country is moving toward two societies, one black, one white—separate and unequal."³⁷ At the same time, it clearly had other unexpected consequences important to understanding how Inez herself ultimately came to live in neighboring East Cleveland and the series of events that resulted in the Supreme Court judgment in her favor.³⁸

Incorporated in 1911, the City of East Cleveland began as a haven for middle and upper-class white homeowners.³⁹ The site of General Electric's famed Nela Park—the country's first industrial commons—it became so popular that, by 1920, it had had doubled in size and attracted a solid economic base.⁴⁰ By 1966, when violence broke out in neighboring Cleveland's Hough area, however, East Cleveland found itself in the midst of "tremendous racial change.^{*41}

* * *

White flight took root in East Cleveland in earnest as black newcomers like Inez arrived and white former residents continued to move elsewhere. . . .⁴² To put the impact of such a demographic shift on East Cleveland in sharp relief, "[i]n 1960 only 2.4% of East Cleveland's [roughly 40,000] residents" were African American. Less than ten years later, "that figure had reached more than 40%" and showed no signs of abatement.⁴³ This racial context stayed in place and even worsened as the *Moore* case unfolded.⁴⁴

In the early and mid-1960s, white leaders in East Cleveland took the position that "any attempt by the city to block black entry would be morally wrong."⁴⁵ So, unlike other jurisdictions, East Cleveland did not look actively to disrupt black in-migration Still, resident whites as well as middle-class blacks feared that "East Cleveland would become a ghetto, indistinguishable from the black and increasingly lower-class ghetto

³⁵ Id. at 48.

³⁶ A second major altercation between African-American residents of Cleveland and the police occurred on July 23, 1968, in the Glenville area located in the eastern part of the jurisdiction. *See* Arthur D. Little, East Cleveland: Response to Urban Change 7 (1969) (hereafter "Response to Urban Change").

³⁷ National Advisory Commission on Civil Disorders (1968).

³⁸ See Leonard N. Moore, Carl B. Stokes and the Rise of Black Political Power 44 (2003) (discussing Civil Rights Commission hearings on Cleveland). A similar outbreak of rioting occurred in 1968 during the tenure of Mayor Carl Stokes, the first African American to serve as mayor of a major United States city. *Id.*

³⁹ Davis, *supra* note 7, at 79.

⁴⁰ Id.

⁴¹ Leah Santosusso, East Cleveland (Images of America) 9 (2013).

⁴² *Id.*

⁴³ *Id.* at 7.

⁴⁴ Today, East Cleveland is more than 95% African American. [cite] Its economic fortunes have only grown more dire. Officials recently filed for bankruptcy on the city's behalf. [cite]

⁴⁵ See Keating, The Suburban Racial Dilemma: Housing and Neighborhoods 54–61 (1994).

across its western border."⁴⁶ City leaders thus decided to trade on their reputation for "good government"⁴⁷ and regulation, especially in zoning, a tool widely used, as noted earlier, to "exclud[e]... racial or economic" minorities.⁴⁸ In particular, they pledged to "strengthe[n] municipal services" and ensure "strict enforcement of housing codes" and other similar provisions.⁴⁹ This commitment—which was later taken up by the predominantly African-American City Commission in place during the *Moore* litigation—included not only enforcing existing rules, but apparently also creating or modifying new provisions where necessary.

Inez's initial contact with East Cleveland's enforcement mechanisms arose not in zoning, but in the education context, after John, Jr. was temporarily precluded from attending his local elementary school. It was only later, after Inez, with the help of Cleveland Legal Aid lawyers, initiated a class action prompting changes in school admission policy that zoning became a concern. School administrators reported Moore to zoning officials for noncompliance with a code provision "limit[ing] occupancy of a dwelling unit to members of a single family." In the process, they revealed the mutually reinforcing, trans-substantive, "adaptive" nature of the city's effective governance mechanism,⁵⁰ as well as the strength of several major concerns held by municipal leaders: "family instability," ⁵¹ school overcrowding;⁵² "border jumping,"⁵³ "violence."⁵⁴

Like many jurisdictions, East Cleveland "limit[ed] occupancy of a dwelling unit to members of a single family" under Section 1351.02 of its municipal code.⁵⁵ However, Section 1341.08, the provision Inez was ultimately charged with violating, established what constituted "family" for zoning purposes.⁵⁶ In many ways, the "unusual and

55 *Moore*, 431 U.S. at 496.

(c) father or mother of the nominal head of the household or of the spouse of the nominal head of household.

(d) notwithstanding the provisions of subsections (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of

⁴⁶ Id.

⁴⁷ Response to Urban Change, *supra* note 36, at 3.

⁴⁸ *Id.*

⁴⁹ *Id* at 3.

⁵⁰ See Elise C. Boddie, Adaptive Discrimination, 94 N.C. L. Rev. 1235 (2016) (discussing systems theory and ways in which racial discrimination changes adapts over time).

⁵¹ Davis, *supra* note 7.

⁵² See U.S. Supreme Court Brief for the Appellant, at p. 51.

⁵³ Phil Wieland, Court Win Pleases This Grandmother, Plain Dealer, June 1, 1977.

⁵⁴ Davis, *supra* note 7.

⁵⁶ *Id.* Section 1341.08 provided in relevant part that:

^{&#}x27;Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in single dwelling unit, but limited to the following:

⁽a) husband or wife of the nominal head of household.

⁽b) unmarried children of the nominal head of household or of the spouse of the nominal head of household, provided, however, that such unmarried children have no children residing with them.

complicated definitional section" it offered mirrored the nuanced position town officials tried to carve out for themselves on racial issues.⁵⁷ On one hand, officials wanted to be inclusive, declining, for example, to limit qualifying familial units to traditional nuclear families. . . . At the same time, they were clear in their intent to exclude certain families from their community. Section 1341.08-by precluding more than one dependent adult of the nominal head of a household to reside there with a child or another adult dependent—excluded Inez's household. It was seemingly designed to stop short of including all families, perhaps especially those extended African-American families headed by black women. 58 The 1965 publication of the Moynihan Report very negatively affected how such familial units were regarded across the country, describing them as "a tangle of pathology"59 whose "anti-social" proclivities "retard[ed] the progress of [African Americans] as a whole."60 And East Cleveland officials, first whites and then increasingly African Americans, seemed largely to have embraced this view of many of the black families moving into its borders.⁶¹ Indeed, "Response to Urban Change specifically referred "family instability" as "a characteristic of black urban ghettos" that East Cleveland could and should avoid."62

On its face, Section 1341.08 made no mention whatsoever of this context or the possible race-related concerns animating East Cleveland's zoning rules. To get any further insight into that one would have to consider the history, legislative and otherwise, of that provision and its adoption. Significantly, that history reveals that the precursor to Section 1341.08, Section 1.014, was enacted in 1953.⁶³ Notably, it deployed a definition of "family" different from that which ensnared the Moore family:

"any number of individuals related to the nominal head of the household as husband or wife, son or daughter, father or mother, sister or brother, or their spouses and dependent children living together as a single housekeeping unit and having facilities for cooking and sleeping in that part of the premises occupied by it. A 'family' may consist of one individual.⁶⁴

the household.

(e) a family may consist of one individual.

57 See Part I of the full article.

58 Stereotypes of black women as "welfare queens" and other undesirables proliferated during this period. *See Black Citizenship Through Marriage*, 66 Hastings L.J. 1317, 1341-34 (2015).

59 Id.

61 *Id.*

⁶⁰ Davis, *supra* note 7.

⁶² Id. (quoting Response to Urban Change).

⁶³ See Ord. No. 476; Nov. 17, 1953.

⁶⁴ Id.

The language incorporated in Section 1.014 was more capacious and defined family much more expansively. In short, it allowed for much greater diversity in family structure and form than Section 1341.08.⁶⁵

The shift to the ordinance language at issue in *Moore* was effectuated in 1966, a mere eight days after the earlier discussed Hough riots.⁶⁶ Emotions at the time ran high for those black Clevelanders suffering from poor living conditions and lack of opportunity,⁶⁷ but also for residents and officials in the jurisdictions that surrounded or, as in East Cleveland's case, abutted Cleveland.⁶⁸ The modification in zoning language so close in time to the riots plainly served an expressive purpose, setting the terms on which inclusion in the community could be won. It also performed a racial gatekeeping function, insofar as it provided a mechanism legally to exclude black housekeeping units from Cleveland farthest away in structure and operation from the nuclear family ideal prized by East Cleveland and other suburban jurisdictions. Inez Moore herself clearly understood this reality, explaining during one of the many interviews that she gave over the course of her case, that Section 1341.08 was "designed to keep black people out of certain residential areas."⁶⁹

⁶⁵ See id.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ *Grandmother Asks Top Court to Keep Her Family Together*, Plain Dealer, Apr. 27 (1976).



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Books:

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