

PROCESS SCRUTINY: MOTIVATIONAL INQUIRY AND CONSTITUTIONAL RIGHTS

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The topic of political branch motivation has long bedeviled courts and scholars, especially when facially neutral government action is under constitutional challenge. The definitive decision in this realm, Washington v. Davis, holds that a finding of discriminatory intent is necessary to prompt more exacting scrutiny of facially neutral legislation or administrative action. One major problem with this rule is that it risks licensing malintent by encouraging policymakers to conceal invidious purposes behind seemingly nondiscriminatory language. For this reason, Davis is often seen as a low point for constitutional law that fails to address the many forms of state-sponsored discrimination.

This Article seeks to overcome some of the difficulties within the Court's intent standard by showing how process failure 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 useful indicators in discovering political branch motivation. These “small-p” procedures are different from the strain of procedural failure that preeminent process theorist John Hart Ely provides as a classic rationale for heightened scrutiny. While the elegance and power of Ely's theory has ensured its rightful place in our constitutional canon, the theory has a blind spot—it cannot ferret out many forms of discrimination that are hidden from plain sight by more sophisticated lawmakers. In shifting the inquiry from interest-group dynamics in the legislative or executive process to a procedural baseline set by the political branches themselves, this Article offers a method that courts can use to surface malintent (or vindicate government intent) trans-substantively and in ways that are consistent with established doctrine.

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

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grounded in the political branches' own chosen practices. Yet if process scrutiny offers powerful and revelatory indicators of governmental motivation, it also raises a number of concerns, including the risk of incentivizing or permitting an enacting body to camouflage substantive deficiencies by simply meeting a bare minimum level of deliberative procedure.

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INTRODUCTION

Judicial inquiries into political branch motivation have long bedeviled courts and scholars.¹ Especially difficult are questions regarding judicial review of facially neutral government action—whether legislative or executive—facing constitutional challenge. 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 a protected characteristic will not, without more, trigger heightened scrutiny.² More specifically, *Davis* requires evidence of discriminatory intent to prompt more careful scrutiny of government action.³ One major criticism of the Court’s intent doctrine is that it permits policymakers to conceal invidious purposes behind facially neutral language. For this reason, many argue that *Davis* perversely licenses state-sponsored discrimination by encouraging government actors to hide

1. See, e.g., Richard H. Fallon, Jr., Constitutionally Forbidden Legislative Intent, 130 Harv. L. Rev. 523, 528 (2016) [hereinafter Fallon, Constitutionally Forbidden Legislative Intent] (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”); 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 discriminatory intent is substantiated”). Importantly, Richard Fallon’s critique of the Supreme Court’s intent jurisprudence is limited to the “sometimes peculiar problems posed by judicial inquiries into the intentions of multimember legislative bodies,” not executive branch action. Fallon, Constitutionally Forbidden Legislative Intent, *supra*, at 530; see also Michael C. Dorf, Even a Dog: A Response to Professor Fallon, 130 Harv. L. Rev. Forum 86, 86–87 (2016), http://harvardlawreview.org/wp-content/uploads/2016/12/Vol.130_Dorf.pdf [<https://perma.cc/V8UR-QN59>] (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, 1479 (2018) (noting that “[i]ntent standards have practical limitations, and critics are right to point to difficulties in defining and proving intent,” but such standards carry with them the “virtue of deterring extremely damaging conduct”).

2. 426 U.S. 229, 242, 252 (1976) (upholding a police-officer entrance exam 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 *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 280–81 (1979) (upholding legislation giving preference for veterans in civil service positions despite the law’s discriminatory impact on female applicants); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–70 (1977) (holding that a town’s refusal to rezone a tract of land to allow for development of multifamily dwellings was not motivated by a racially discriminatory purpose or intent, despite the zoning decision’s disparate impact on the African American population).

3. *Davis*, 426 U.S. at 239 (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”).

their true motives behind facially neutral language, obscuring malicious intent from judicial review.⁴

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 useful indicators in deciphering 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.⁵ Ely's brand of process failure is based upon the Constitution's role in preserving access to the political process—what this Article refers to as “Big-P” process.⁶ In

4. See, e.g., Yvonne Elsiebo, *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”); Charles 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”); 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 “insulates many, if not most, forms of facially neutral state action from equal protection challenge”); 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”); cf. Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 Fordham L. Rev. 175, 183–84 (2012) (arguing that the equal protection intent standard the Court created has been applied inconsistently); Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 764 (2011) (“If legislators have the wit . . . to avoid words like ‘race’ or the name of a particular racial group in . . . 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.”).

5. See generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) (outlining “representation-reinforcing” judicial review as a mechanism for shoring up failures in the process of representative government).

6. See *id.* at 76 (“[I]t is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open.”); see also Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 Yale L.J. 1329, 1332–38 (2005) (discussing Ely's representation-reinforcement theory in the context of legislative apportionment); 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, 277–78 (1995) (contrasting the “process-based orientation” of Louis

contrast, small-p procedures are the more common political branch undertakings, or vetting processes, that culminate in acts of government.⁷

Though the elegance and power of Ely's theory has ensured its rightful place in our constitutional canon,⁸ the theory has a blind spot—it cannot ferret out many forms of discrimination that are hidden from plain sight by more sophisticated lawmakers. In a world in which invidious discrimination easily hides behind facially neutral language, Ely's theory provides little help for courts determining whether a particular group deserves representation-reinforcing judicial review. This Article suggests a means to fill the void in Ely's theory of Big-P process by showing how courts 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 discriminatory intent by operationalizing 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, 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.⁹

A number of recent cases provide powerful evidence that small-p procedures can provide a basis for enhanced judicial scrutiny on the one

Lusky's and Ely's interpretation of Footnote Four with Stone's view of the same as a statement of "the 'preferred position' of non-economic rights").

7. 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 governmental actors take that culminate in the promulgation of a law or the formation of an administrative rule or order. Oftentimes, "procedure" is used in a broader context than "process." 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").

8. See, e.g., 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 . . .").

9. 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).

hand or a vindicating mechanism on the other. From voter identification¹⁰ to LGBT rights,¹¹ from takings¹² to affirmative action,¹³ and from national security¹⁴ to military personnel policies,¹⁵ courts have frequently relied on small-p process to analyze the legitimacy of government action. And the analysis can work in two directions: While the government's lack of procedural care can invite greater scrutiny and form a basis for invalidation, reviewing courts will frequently sustain challenged acts having negative consequences for various groups when those acts are the result of a thorough process, even going so far as to remove the taint of improper motivation.¹⁶

The judicial response to the Trump Administration's travel ban is a paradigmatic example of both phenomena.¹⁷ In the aftermath of the travel ban's first two iterations, lower courts uncomfortable striking down executive action based exclusively 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 weakened the case for deference.¹⁸ In contrast, by the time the third version of the ban reached the Supreme Court, Chief Justice Roberts touted *ex ante* procedures, such as the policy's underlying "comprehensive" and "worldwide" review process,¹⁹ as well as *ex post* procedures in the form of exemptions, waiver provisions, and continued executive branch review.²⁰

10. See *infra* section II.A.1.

11. See *infra* notes 237–241 and accompanying text.

12. See *infra* notes 131–141 and accompanying text.

13. See *infra* notes 142–146 and accompanying text.

14. See *infra* notes 150–167 and accompanying text.

15. See *infra* notes 125–130, 196–213 and accompanying text.

16. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2393, 2409, 2421 (2018) (exemplifying judicial vindication of an executive action based on the perception of strong vetting measures, such as a "worldwide review process undertaken by multiple Cabinet officials and their agencies"); see also *infra* notes 19, 161–167 and accompanying text.

17. See *infra* sections III.A–III.B.1.

18. See *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 591–601 (4th Cir. 2017), vacated and remanded sub nom. *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017) (considering "the exclusion of national security agencies from the decisionmaking process, the post hoc nature of the national security rationale, and [other agency] evidence . . . that [the order] would not operate to diminish the threat of potential terrorist activity" in enjoining the second iteration of the Trump Administration's travel ban).

19. See, e.g., *Hawaii*, 138 S. Ct. at 2403–04 (noting that the President "directed a worldwide review"); *id.* at 2404 (describing temporary measures until "completion of the worldwide review"); *id.* at 2408–09 ("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 the Department of Homeland Security (DHS)] and other agencies to conduct a comprehensive evaluation of every single country's compliance with the information and risk assessment baseline."); *id.* ("[The President set] 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

Ultimately, this Article employs *ex ante* and *ex post* process scrutiny to lay a foundation for a better understanding and application of discriminatory intent doctrine—a line of precedent that, while receiving tremendous scholarly attention,²¹ cannot be fully comprehended without grappling with its underlying procedural roots. The dynamic relationship between process failure and improper motive (or its close cousin, animus)²² finds some expression in the Court’s equal protection jurisprudence, in particular Justice Powell’s decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*²³ However, commentators have largely overlooked the ways in which procedural regularity can serve as a constitutional compass directing further judicial inquiry into the underlying intent of a given law or policy.²⁴ Indeed, Powell’s process-based

restrict entry of aliens who could not be vetted with adequate information”); *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 undertaken by multiple Cabinet officials and their agencies.”). The government made repeated references to this process throughout its briefing before the Supreme Court, see, e.g., Brief for the Petitioners at 2, 4–5, 15–16, 30, 58, 60, 63–66, *Hawaii*, 138 S. Ct. 2392 (No. 17-965), 2018 WL 1050350, and at the outset of oral argument, see Transcript of Oral Argument at 3, *Hawaii*, 138 S. Ct. 2392 (No. 17-965), 2018 WL 2446100 (“Mr. Chief Justice, and may it please the Court: After a worldwide multi-agency review, the President’s acting Homeland Security Secretary recommended that he adopt entry restrictions on countries that failed to provide the minimum baseline of information needed to vet their nationals.”).

20. See *Hawaii*, 138 S. Ct. at 2406 (noting the Proclamation’s “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 its direction to DHS to continually assess entry restrictions and periodically report to the President); *id.* at 2422–23 (noting that the Proclamation calls for DHS and the State Department to issue guidance elaborating on circumstances that justify a waiver, as well as guidance to consular officers in determining eligibility for a waiver); see also Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,169 (Sept. 24, 2017) (establishing a waiver program for, *inter alia*, foreign nationals previously admitted for purposes of work or study; those with “significant contacts” or “significant business or professional obligations”; those with close family members who are legally present; youth and those needing urgent medical care; and those employed by the government).

21. See *supra* note 4.

22. See 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.”).

23. See 429 U.S. 252, 266–69 (1977) (“Departures from the normal procedural sequence . . . might afford evidence that improper purposes are playing a role.”).

24. See, e.g., Ian Haney-López, *Intentional Blindness*, 87 NYU. L. Rev. 1779, 1814 (2012) (“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[.]. . . [thus representing] a sad indicia of how far equal protection has devolved”); Siegel, *supra* note 4, at 1134 (explaining that 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

criteria provide especially helpful indicators in uncovering forms of discrimination that are easily masked using facially neutral language.²⁵ And a number of recent cases support this Article's thesis that the "due process of lawmaking"²⁶ and governmental motivation are often perceived in lockstep fashion, a point that has special salience for novel rights claims.²⁷

While this Article positions process scrutiny primarily as a tool to address 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,²⁸ and has been instructive in analyzing the fit between means and ends in relevant cases where heightened scrutiny applies.²⁹ The theory also has some overlap with "semisubstantive" constitutional theory,³⁰ and it places "bilateral endorsement" theory in new light as well.³¹

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.³²

that it had raised quite a formidable barrier to plaintiffs challenging facially neutral state action").

25. See, e.g., Sheila Foster, *Intent and Incoherence*, 72 *Tul. L. Rev.* 1065, 1130–31 (1998) (noting that the "evidentiary" approach codified in *Arlington Heights* enables courts to more deftly tread the "fine line" between deference and scrutiny); Haney-López, *supra* note 24, at 1809, 1814–15 (arguing that, irrespective of what it and *Davis* have come to represent to both scholars and the Court itself, *Arlington Heights* established a framework through which "[c]ontextual intent" can aid courts' efforts to discern racial discrimination); cf. Yoshino, *supra* note 4, 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").

26. See Hans A. Linde, *Due Process of Lawmaking*, 55 *Neb. L. Rev.* 197, 293 (1976) ("[T]he relevant question of due process in lawmaking is never what law was made, but how it was made."); see also *infra* notes 55–58 and accompanying text.

27. See *infra* section V.D (discussing the implications of process scrutiny in the context of novel or peripheral rights claims).

28. See *infra* notes 131–141 and accompanying text.

29. See *infra* notes 125–130, 142–146 and accompanying text.

30. See *infra* notes 253–261 and accompanying text.

31. See *infra* notes 221–232 and accompanying text.

32. Cf. Dan T. Coenen, *The Pros and Cons of Politically Reversible "Semisubstantive" Constitutional Rules*, 77 *Fordham L. Rev.* 2835, 2839 (2009) [hereinafter Coenen, *Pros and Cons of Semisubstantive Rules*] (noting how procedural rulings allow for a situation

Following this Introduction, Part I lays out the baseline relationship between small-p process and the Supreme Court's intent doctrine. Part II charts an evolving doctrine of process scrutiny in the context of legislation, focusing on *Arlington Heights* and a number of more contemporaneous examples. Part III demonstrates how the same dynamic of process scrutiny can be traced to judicial review of executive branch acts. Part IV explores the institutional dimensions of process scrutiny, including its institution- and issue-sensitive characteristics. Finally, Part V addresses normative implications, including the advantages and disadvantages of process-based approaches to deciphering intent, process scrutiny's relationship with the Court's "animus" doctrine, and the effect of process scrutiny on emerging rights claims.

I. SMALL-P PROCESS AND INTENT: ESTABLISHING A BASELINE

A. *The Relationship Between the Intent Standard 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.³³ Others argue, by contrast, that any attempt to discern legislative intent via aggregation is conceptually incoherent and thus doomed to failure.³⁴

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").

33. See, e.g., Richard Ekins, *The Nature of Legislative Intent* 52–57 (Timothy Endicott, John Gardner & Leslie Green eds., 2012) (providing an account of group intention as "a state of affairs when two or more persons hold a particular set of interlocking intentions"); Fallon, *Constitutionally Forbidden Legislative Intent*, *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."); 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); Katherine Shaw, *Speech, Intent, and the President*, 104 *Cornell L. Rev.* 1337, 1342–43, 1356–58 (2019) (citing Fallon for the idea that discerning illegitimate intent in the executive context does not entail the same aggregation problem as in the legislative context and that such inquiry is in fact already routine in judicial review).

34. See, e.g., Steven D. Smith, *Against "Civil Rights" Simplism: How Not to Accommodate Competing Legal Commitments* 7 (Univ. of San Diego Sch. of Law, Legal Studies Research Paper Series, No. 17-294, 2017), <https://www.ssrn.com/abstract=2991883> (on file with the *Columbia Law Review*) ("[A]rguments that centrally turn on ascriptions of

Ronald Dworkin, for instance, famously argued that even a preternaturally gifted judge would run into insurmountable difficulties trying to discover the intent of a legislature.³⁵ This divide is also reflected in federal court precedent,³⁶ including the Supreme Court's short-lived experiment to dispense with motivational analysis in constitutional adjudication.³⁷

The difficulties of engaging in motivational analyses are often compounded by the heavily fact-dependent nature of intent. As Professor Richard Fallon has pointed out, legislative intent is a "protean concept," inevitably colored by the particular fact pattern it inhabits.³⁸ As a result, the judicial approach to identifying improper legislative intent is commonly described as inconsistent and problematic across different cases and contexts.³⁹ 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."⁴⁰

Indeed, the presumption that one can know with certainty the internal attitudes, emotions and biases of a single person—let alone a multimember legislative body or administrative agency—appears dubious. One reason for skepticism is that such a presumption requires judges to be mind

animus to large classes of people are likely at best to vastly oversimplify a complex set of beliefs, perspectives, and motivations . . .").

35. 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). For additional criticism of attempts to determine the aggregate intentions of a legislature, see 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."); Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 *Vill. L. Rev.* 1, 11 (1992) ("If legislative purpose is the mere aggregation of the motivations of individual legislators, then there seems no escaping the conclusion that the very idea of legislative purpose is incoherent.").

36. See Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 *NYU. L. Rev.* 1784, 1795–857 (2008) (providing an account of the growing acceptance over time of judicial inquiry into legislative purpose).

37. 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), 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, 220–21 (1971). The City's obvious discriminatory purpose meant that black and white individuals would be equally unable to access public swimming pools. See *id.* at 220. Because the Court distanced itself from an interpretive approach based on legislative motivation, "[l]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).

38. Fallon, *Constitutionally Forbidden Legislative Intent*, *supra* note 1, at 553.

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

40. Araiza, *supra* note 22, at 175.

readers in all but the most flagrant instances.⁴¹ Such a role imposes an expectation fraught with numerous problems, if not altogether impossible. First, it requires subjective judgment about the internal beliefs, attitudes, and intentions of others that exist outside a legislative or policy document. It also requires the judge to determine whether the degree of influence of those divined attitudes and biases constitutes an intent to harm. Furthermore, such an expectation demands that judges be indefensibly reductive—reducing not only an individual’s thoughts and attitudes to a single intent but also the myriad strands of argumentation and preferences of an entire governmental 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 psychoanalyses of the minds of the lawmakers themselves.⁴²

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. It holds government institutions to their own standards (rather than the subjective impulses of individual jurists) while aiding courts to better address forms of discrimination that are less visible or otherwise likely to remain concealed.

B. *Process Scrutiny in Current Jurisprudence*

1. *Representation Reinforcement and Macroprocess.* — 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 lawmaking may trigger stricter judicial scrutiny and a narrowing of the usual presumption of constitutionality.⁴³ Forty years later, the Warren Court’s process-oriented activism in fields such as criminal procedure, political expression, and equal

41. See *United States v. Pub. Utils. Comm’n of Cal.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring) (describing the divining of 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”); see also *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 622 (1991) (Scalia, J., concurring) (arguing that the Court has “no way of knowing” Congress’s intent from legislative history).

42. Cf. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (warning against “judicial psychoanalysis of a drafter’s heart of hearts”).

43. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (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.” *Id.*; see also Ely, *supra* note 5, at 75–77.

protection inspired Ely's seminal exposition of the ideas modestly advanced in *Carolene Products*.⁴⁴ Ely drew on *Carolene Products* to describe the Equal Protection Clause as a mechanism to vindicate macrolevel process—namely, access to relevant political institutions allowing groups to take part in the benefits of representative government.⁴⁵ 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.”⁴⁶ This meant that the Court should be concerned with participation rather than identifying and vindicating substantive norms.⁴⁷ When the political process has been restricted in some way, the Court must intervene to unclog the channels of access.⁴⁸

Although Ely believed that heightened judicial review would effectively smoke out improper legislative motivation,⁴⁹ his theory does not provide much clarity regarding the appropriate use of such scrutiny. He argued that heightened scrutiny is warranted when a law burdens a “suspect classification”⁵⁰ and that the real linchpin for determining suspect classifications should be the presence of prejudice.⁵¹ Yet he did not explain how a court should determine whether a given law is

44. Ely, *supra* note 5, at 73–75 (finding in the Warren Court's constitutional decisions a “deep structure” that was neither clause bound nor value oriented, but instead “participational”). For Ely, these decisions evinced two main concerns: “clearing the channels of political change” and “correcting certain kinds of discrimination against minorities.” *Id.*

45. *Id.* at 76–77.

46. *Id.* at 92. Ely linked this constitutional commitment to process to paragraphs two and three of *Carolene Products*'s 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 thought these two concerns fit together and demonstrated 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 74–77.

47. See *id.* at 77 (suggesting that *Carolene Products* “focus[ed] not on whether this or that substantive value is unusually important or fundamental,” but rather on access to political participation).

48. *Id.*

49. Ely cautioned 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 argued that judicial exploration of lawmakers' motivations is only appropriate when there is a claim that a “constitutionally gratuitous” benefit has been improperly withheld. *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.* For a discussion of how the Court's more recent intent-based rulings undercut that approach, see *infra* notes 287–290 and accompanying text.

50. Ely, *supra* note 5, at 145–46.

51. *Id.* at 153.

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,⁵² legislatures remain adept at finding seemingly neutral ways to target various underrepresented groups.⁵³

2. *Due Process of Lawmaking and Microprocess.* — 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.⁵⁴ Linde appeared quite critical of the ideas expressed in *Carolene Products* that would later form the basis of Ely's representation-reinforcing theory of judicial review,⁵⁵ and he instead focused on a set of smaller-scale, microlevel procedures to inform his

52. See Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *Fordham L. Rev.* 887, 897 (2012) ("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."); Yoshino, *supra* note 4, 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.").

53. One example concerns "bathroom bans" aimed at preventing transgender individuals from accessing public restrooms corresponding to their gender identity. Many of these laws 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, e.g., 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> [<https://perma.cc/2CC9-RZPR>]; see also *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country* (2016), ACLU, <https://www.aclu.org/other/past-lgbt-nondiscrimination-and-anti-lgbt-bills-across-country> [<https://perma.cc/88GN-GHFM>] (last visited Aug. 2, 2019). For example, the text of North Carolina's Public Facilities Privacy & Security Act, ch. 3, 2016 N.C. Sess. Laws 12 (repealed 2017) (commonly referred to as "HB2") avoids making any explicit reference to transgender identity, see Amanda Wilcox, *Five Things to Know About North Carolina's House Bill 2*, PBS: NewsHour Extra (May 26, 2016), <https://www.pbs.org/newshour/extra/2016/05/five-things-to-know-about-north-carolinas-house-bill-2/> [<https://perma.cc/98P6-Z3T9>], a decision that appears intended to circumvent Supreme Court decisions invalidating governmental efforts to single out particular groups for unfavorable treatment, as established in *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), and its progeny. See *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating an amendment to the Colorado Constitution based on its targeting of gays, lesbians, and bisexuals); *infra* notes 283–285 and accompanying text (noting how *Moreno*, *City of Cleburne*, and *Romer* invalidated government action based on impermissible targeting of particular groups).

54. See generally Linde, *supra* note 26.

55. See *id.* at 209, 235; see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 151 n.4 (1938).

conception of a *Due Process of Lawmaking*.⁵⁶ While Linde argued that certain deliberative mechanisms such as considering evidence, attending committee meetings, or reading a bill before casting a vote cannot practically bind legislative bodies,⁵⁷ other rules such as 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 “due process” and matter greatly.⁵⁸

While *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 procedural irregularity with unconstitutional motivation. After a brief period in the early 1970s when the Supreme Court appeared to dispense with intent-based inquiries altogether in constitutional analysis,⁵⁹ motivational analysis soon took center stage in major constitutional interpretations of equal protection.⁶⁰ 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 rigor and governmental motivation.

II. THE HIDDEN SMALL-P LEGACY OF ARLINGTON HEIGHTS

The connection between small-p process and constitutional motivation finds important expression in the “discriminatory intent” cases of the 1970s. When the Court in *Washington v. Davis* established that the disparate racial impact of a law or policy would generally not, without more, trigger the exacting scrutiny applied to explicit classifications,⁶¹ it was not completely blind to the difficulty its intent standard might place on equal protection litigators. In fact, *Davis* invites courts to infer an improper motivation from the surrounding circumstances and context of a given governmental act.⁶² In that respect, the Court’s “totality of the facts” language effectively left an open door to more substantial methods

56. See Linde, *supra* note 26, at 237–40.

57. *Id.* at 224–27.

58. *Id.* at 240–42. Linde recognized, however, that the judicial remedy for such violations raised very difficult questions. *Id.* at 247.

59. See *supra* note 37.

60. For an overview of cases exemplifying this trend, see *supra* note 2.

61. 426 U.S. at 238–39.

62. *Id.* at 242 (“[A]n 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 . . . not infrequently true that the discriminatory impact . . . demonstrate[s] unconstitutionality because . . . the discrimination is very difficult to explain on nonracial grounds.”).

of scrutiny than ephemeral attempts to divine the intent of government actors.⁶³

A. *Process and Legislative Invalidation*

One year after *Davis* was decided, the Court drew on the intent standard in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, sustaining a town's denial of a proposed rezoning effort that would produce racially integrated housing units.⁶⁴ 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.⁶⁵ 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,"⁶⁶ 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 decisionmaker'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.⁶⁷

Powell's nonexhaustive list⁶⁸ of procedural factors, nonprocedural factors, and others falling 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 "[d]epartures from the normal procedur[e] . . . might afford evidence that improper purposes

63. *Id.*

64. 429 U.S. 252, 254–55 (1977).

65. See *id.* at 265–66.

66. *Id.* at 266.

67. *Id.* at 267–68 (citations omitted).

68. *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).

are playing a role.”⁶⁹ 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’s *Application in the Voter ID Cases*. — The procedural features of Powell’s framework have been highly influential in a number of recent voter identification decisions. While the cases raise serious issues that were also of concern to Ely,⁷⁰ courts have routinely resorted to an analysis of small-p process to strike down the laws in question. Two recent cases, *N.C. State Conference of the NAACP v. McCrory*⁷¹ and *Veasey v. Abbott*,⁷² 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 v. McCrory and Small-p Process*. — After *Shelby County v. Holder* invalidated the Voting Rights Act’s preclearance regime,⁷³ states unleashed punishing new voter ID restrictions⁷⁴ that were challenged on both statutory and constitutional grounds.⁷⁵ In North Carolina, the legislature abruptly passed an “omnibus” voting reform law⁷⁶ that reduced the list of acceptable forms of photo identification for in-person voting,⁷⁷ eliminated same-day registration and preregistration for individuals aged

69. *Id.* at 267.

70. See Ely, *supra* note 5, at 117–24 (discussing the right to vote as “central to a right of participation in the democratic process” and arguing that courts must “ensure not only that no one is denied the vote for no reason, but also that where there is a reason . . . it had better be a convincing one”).

71. 831 F.3d 204, 214 (4th Cir. 2016).

72. 830 F.3d 216 (5th Cir. 2016) (en banc).

73. 133 S. Ct. 2612, 2631 (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. See *id.*

74. 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. C.R. & Soc. Just.* 383, 409–10 (2017) (explaining that *Shelby County* “unleashed state legislatures to restrict access to polling stations on Election Day”).

75. 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*).

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

77. See *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 216 (4th Cir. 2016) (documenting the North Carolina legislature’s restrictions on permissible forms of voter ID).

sixteen and seventeen,⁷⁸ reduced the number of early voting days from seventeen to ten,⁷⁹ and scrapped a provisional voting process for out-of-precinct voting.⁸⁰ 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 Act⁸¹ and the Fourteenth Amendment.⁸²

The Fourth Circuit acknowledged substantive concerns about racial discrimination and voter disenfranchisement, including “the inextricable link between race and politics in North Carolina”⁸³ 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.⁸⁴ 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.⁸⁵ For example, the original bill allowed voters to present any kind of government-issued identification until racial data revealed that African Americans were less likely to possess certain types of documents. Following the acquisition of this data, the legislature amended the bill to permit only those types of identification African Americans carried less frequently.⁸⁶ When lawmakers learned that African Americans predominantly utilized early voting procedures, the legislature shortened early voting by a week.⁸⁷ 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.⁸⁸

78. See *id.* at 217–18.

79. See *id.* at 216.

80. See *id.*

81. Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301(a) (Supp. II. 2015)).

82. *NAACP*, 831 F.3d at 219, 241.

83. *Id.* at 214. Judge Diana Gribbon 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 (“[C]ontextual facts, which reveal the powerful undercurrents influencing North Carolina politics, must be considered in determining why the General Assembly enacted [the legislation].”).

84. See *id.* at 214, 226 (“[T]he General Assembly enacted [the rules] in the immediate aftermath of unprecedented African-American voter participation in a state with a troubled racial history and racially polarized voting.”). The court also explained that well over eighty-five percent of African Americans voted for Democratic candidates in the two previous presidential elections. See *id.* at 225.

85. See *id.* at 216–18.

86. *Id.* at 216.

87. *Id.*

88. See *id.* at 217–18.

Nevertheless, the court also 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.”⁸⁹ Indeed, there were widespread examples of “[d]epartures from the normal procedural sequence.”⁹⁰ First was the issue of timing: The intent to enact new voting laws was announced the day after *Shelby County* removed the very preclearance requirement that would likely have prevented those provisions from becoming law.⁹¹ The Fourth Circuit saw this as suspicious under *Arlington Heights*’s instruction to consider the “specific sequence of events leading up to the challenged decision.”⁹² 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”⁹³—a clear departure from procedural norms.

While the pre-*Shelby County* version of the bill occupied three weeks of public debate and had even garnered some bipartisan support, that bill sat dormant for two months while *Shelby County* loomed.⁹⁴ The General Assembly did not revisit the bill until the Court excised the preclearance procedure from the Voting Rights Act.⁹⁵ The new post-*Shelby County* bill was more than three times as long as the original bill⁹⁶ and was “rushed . . . through the legislative process”⁹⁷ without being marked up by a committee⁹⁸—yet another 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.”⁹⁹ 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.

89. *Id.* at 227 (first alteration in original) (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)).

90. *Id.* (alteration in original).

91. See *id.* at 214.

92. *Id.* at 227 (quoting *Arlington Heights*, 429 U.S. at 267).

93. *Id.* at 216.

94. *Id.* at 227.

95. *Id.*

96. See *id.* (stating that the bill’s length increased from sixteen pages to fifty-seven pages).

97. *Id.* at 228.

98. *Id.*

99. *Id.*

b. *Veasey v. Abbott 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),¹⁰⁰ which prohibited many standard forms of identification permitted in other states.¹⁰¹ The Fifth Circuit did not ignore substantive concerns such as Texas’s history of all-white primaries, literacy tests, secret ballots, and poll taxes,¹⁰² yet it deemed those practices too distant to evince improper intent within the current law.¹⁰³ On the other hand, where small-p process was concerned, “numerous and radical procedural departures . . . [gave] credence to an inference of discriminatory intent.”¹⁰⁴ 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.¹⁰⁵

The court was equally troubled by the legislature’s decision, despite its awareness of the disproportionate impact the law would have on his-

100. See 830 F.3d 216, 225 (5th Cir. 2016) (en banc).

101. Under SB 14, for example, one could not use state-issued identification from a state other than Texas, public assistance identification, student identification, or any federal government identification not enumerated in the law. *Veasey v. Perry*, 71 F. Supp. 3d 627, 642 (S.D. Tex. 2014), aff’d in part, vacated in part, rev’d in part, and remanded in part sub nom. *Abbott*, 830 F.3d 216. In light of these limitations on acceptable forms of identification, the district court deemed SB 14 the “strictest” voting law in the country. *Id.*; see also *Veasey v. Abbott*, Campaign Legal Ctr., <http://www.campaignlegalcenter.org/case/veasey-v-abbott-0> [<https://perma.cc/VW5B-64X9>] (last updated Apr. 27, 2018) (referring to SB 14 as the “nation’s strictest voter photo ID law”).

102. *Abbott*, 830 F.3d at 231. The trial court initially 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, *Abbott*, 830 F.3d at 272 (remanding certain aspects of the lower court’s analysis for clarification).

103. *Abbott*, 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 to discriminate. *Id.* at 232–33.

104. *Id.* at 238.

105. *Id.* The court went on to note that these procedural oddities were only present with regard to SB 14; none of the state’s other pressing legislative initiatives received such exceptional treatment. See *id.*

torically marginalized groups, to reject additional proposals to curb that impact.¹⁰⁶ Tying this observation to small-p process, the court noted that the law's proponents "largely refused to explain the rejection of those amendments,"¹⁰⁷ something that "was out of character for sponsors of major bills."¹⁰⁸ Such irregularities contributed to the Fifth Circuit's sustaining the lower court's finding of improper motivation.¹⁰⁹

Along with *NAACP, Abbott* powerfully illustrates 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.¹¹⁰ Still, the court could draw on the vast procedural irregularities of SB 14 to help surface the underlying discriminatory intent.

2. *Beyond Voter Identification.* — In addition to *NAACP* and *Abbott*, lower courts have drawn on small-p process concerns to find an improper motive in a number of additional contexts. 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.¹¹¹ In addition to derogatory statements made by legislators, the court relied on irregularities in the

106. *Id.* at 236.

107. *Id.* at 237.

108. *Id.* (quoting *Veasey v. Perry*, 71 F. Supp. 3d 627, 647 (S.D. Tex. 2014)).

109. *Id.* at 239. *NAACP* and *Abbott* 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 fabricated problem 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," *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016), while in *Abbott*, 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 more extensive treatment of judicial review of the legislative marshaling of "alternative facts," see Joseph Landau, *Broken Records: Reconceptualizing Rational Basis Review to Address "Alternative Facts" in the Legislative Process*, 73 *Vand. L. Rev.* (forthcoming 2020) [hereinafter Landau, *Broken Records*] (on file with the *Columbia Law Review*).

110. See, e.g., *Pers. Adm'r of Mass. 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).

111. See *Gonzalez v. Douglas*, 269 F. Supp. 3d 948, 972 (D. Ariz. 2017). The Tucson Unified School District's Mexican American Studies program was born 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.* 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 . . . challenged [state law] was motivated, at least in part, by an intent to discriminate against [Mexican American Studies] students [because] of their race or national origin").

process of enactment¹¹² such as reliance on one-sided investigations.¹¹³ Moreover, 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—were 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.¹¹⁴ Finally, courts have invoked small-p process concerns to allow suits to proceed beyond preliminary stages of litigation in cases concerning school desegregation,¹¹⁵ fair housing and land use,¹¹⁶ and the Dormant Commerce Clause.¹¹⁷

B. *Process and Legislative Vindication*

Process scrutiny works in two directions: While courts can apply greater scrutiny to governmental acts that undermine well-established procedures, they also give leeway to otherwise suspect policy choices that are the result of thorough vetting and sound processes. Indeed, *Washington v. Davis* conceivably stands as an example of the latter.¹¹⁸ 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.¹¹⁹ Beyond the police force’s “affirmative efforts . . . to recruit black officers,”¹²⁰ other record evidence supported the government’s claim that the exam was directly related to the training needs and requirements of the police force.¹²¹ Extensive expert testimony in that case demonstrated a relatively robust

112. See *Gonzalez*, 269 F. Supp. 3d at 965–68.

113. *Id.* at 968–70.

114. See *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 723–24 (S.D. Tex. 2017).

115. See *Stout ex rel. Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988, 1006–09 (11th Cir. 2018).

116. See, e.g., *Ave. 6E Investments, LLC v. City of Yuma*, 818 F.3d 493, 509 (9th Cir. 2018); *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1162 (9th Cir. 2013); *Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027, 1044 (11th Cir. 2008); *Inclusive Cmty. Project, Inc. v. U.S. Dep’t of Treasury*, No. 3:14-CV-3013-D, 2016 WL 6397643, at *14 (N.D. Tex. Oct. 28, 2016); *MHANY Mgmt. Inc. v. Inc. Village of Garden City*, 985 F. Supp. 2d 390, 416–18, 426–28 (E.D.N.Y. 2013), *aff’d sub nom. MHANY Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581 (2d Cir. 2016); *Hidden Vill., LLC v. City of Lakewood*, 867 F. Supp. 2d 920, 943–44 (N.D. Ohio 2012), *aff’d in part, rev’d in part*, 734 F.3d 519 (6th Cir. 2013); *Church of Scientology of Ga., Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1376 (N.D. Ga. 2012).

117. See, e.g., *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n*, 313 F. Supp. 3d 751, 761–69 (W.D. Tex. 2018).

118. See 426 U.S. 229, 245–52 (1976) (upholding an entrance exam for applicants to the D.C. Police Department in spite of its disparate racial impact).

119. *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).

120. *Id.* at 246.

121. *Id.* at 251.

small-p process. In briefing, Corporation Counsel relied on numerous expert studies to support the claim that the entrance exam was a reasonable, impartial, and objective tool to predict one's ability to be trained successfully.¹²² Given this broader context—bearing little to no trace of irregularity—and in which the plaintiffs affirmatively disclaimed any allegation of discriminatory motivation,¹²³ the Court found no basis to conclude that the police department had engaged in invidious discrimination.¹²⁴

The 1981 case *Rostker v. Goldberg* also illustrates the vindicating potential of small-p process.¹²⁵ *Rostker* upheld the constitutionality of an all-male selective service policy under heightened scrutiny.¹²⁶ The Court relied heavily on Congress's considerable deliberations of female inclusion,¹²⁷ including "extensive[] . . . hearings, floor debate, and in committee."¹²⁸ 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."¹²⁹ Importantly, *Rostker* did not defer flatly to the military's judgment on personnel matters; rather, the Court

122. This included a study by the U.S. Civil Service Commission and affidavits from research psychologists and other educational testing experts. Brief for Petitioner at *5–6, *Davis*, 426 U.S. 229 (No. 74-1492), 1975 WL 173557. Other judicial and administrative authorities, including statements by 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, bolstered the "need for police recruits to possess the verbal ability to be trained which [the challenged test] is designed to measure." *Id.* at *19–21.

123. *Davis*, 426 U.S. at 235 (noting the absence of any claim of "intentional discrimination or purposeful discriminatory acts").

124. *Id.* at 246 (concluding that the "changing racial composition of the . . . force in general, and the relationship of the test to the training program negated any inference that the Department discriminated [because] of race or that a 'police officer qualifies on the color of his skin rather than ability'" (quoting *Davis v. Washington*, 348 F. Supp. 15, 18 (D.D.C. 1972))).

125. See 453 U.S. 57 (1981).

126. *Id.* at 69, 78–79.

127. *Id.* at 72–74.

128. *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.* at 72.

129. *Id.* at 74 (internal quotation marks omitted) (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977)). These extensive deliberations gave the Court confidence that Congress was not acting "unthinkingly or reflexively and not for any considered reason." *Id.* at 72 (internal quotation marks omitted) (quoting Brief for the Appellees at 35, *Rostker*, 453 U.S. 57 (No. 80-251), 1980 WL 339849). 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 v. Goldfarb*, 430 U.S. 199, 222–23 (1977).

scaled deference based on its assessment of small-p process—namely “*how* the political branches [] made the policy choice at issue.”¹³⁰

The 2005 Supreme Court case *Kelo v. City of New London* illustrates a similar use of process scrutiny to validate government decisionmaking in the very different context of unconstitutional takings.¹³¹ *Kelo* arose out of a decision by the City Council of New London, Connecticut, authorizing the purchase or acquisition of property by the exercise of eminent domain as part of an initiative to redevelop an economically depressed neighborhood.¹³² When a group of property owners challenged the policy as an improper taking under the Fifth Amendment,¹³³ the Court upheld the city’s unusual use of eminent domain to spur economic development by crediting the “thorough deliberation” preceding the municipality’s “carefully considered” development plan.¹³⁴ Justice Kennedy’s concurrence also noted how New London’s integrated plan, based on “elaborate procedural requirements,” alleviated concerns that such takings would be abused or put to “suspicious” use, benefiting only private interests.¹³⁵

130. Daphna Renan, Presidential Norms and Article II, 131 *Harv. L. Rev.* 2187, 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 service members by noting the political branches’ “exhaustive review” 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. According to the Fourth Circuit in *Thomasson*, these “exhaustive efforts of the democratically accountable branches of American government . . . is precisely [why] they deserve judicial respect.” *Thomasson*, 80 F.3d at 923. These decisions turned on deference to the Executive, not Congress, but they complement *Rostker* by showing how the courts credit sound process as a reason to defer to the political branches.

131. See 545 U.S. 469, 483–84 (2005).

132. *Id.* at 473–75. New London acted through its legislature to create a private nonprofit entity called the New London Development Corporation (NLDC), which would lead the planning process and seek state regulatory approvals on the city’s behalf. See *id.* at 473. The NLDC negotiated with private landowners to purchase most of the property that was subject to the redevelopment plan. Those who did not consent to selling their land, like the petitioners, had their land condemned and acquired by eminent domain. *Id.* at 475. When the NLDC’s plan was fully approved, the City Council designated the NLDC to act as its agent and delegated the city’s eminent domain power. *Id.*

133. *Id.* at 475. Throughout its opinion, the Supreme Court explicitly treats the city and the NLDC as interchangeable, referring to both as acting in a legislative capacity. See, e.g., *id.* at 480 (deferring to the city in light of “our longstanding policy of deference to legislative judgments”); *id.* at 483 (noting that the Court “afford[s] legislatures broad latitude in determining what public needs justify the use of the takings power”); *id.* at 489 (deferring to the City’s judgment about the development plan in light of “the discretion of the legislative branch” on such matters (internal quotation marks omitted) (quoting *Berman v. Parker*, 348 U.S. 26, 36 (1954))).

134. *Id.* at 478, 483–84.

135. *Id.* at 493 (Kennedy, J., concurring).

Although the invocation of eminent domain for public use is constitutionally legitimate and generally uncontroversial, prior to *Kelo*, the Court had not considered the use of eminent domain to justify taking land that was then sold to private developers in the name of economic development.¹³⁶ This new breed of allowable takings is particularly divisive because of the equity concerns it can engender.¹³⁷ And the *Kelo* decision was not without political backlash.¹³⁸ Indeed, some scholars have resolved those concerns by associating *Kelo* with Ely's theory of representation reinforcement.¹³⁹ From the standpoint of process scrutiny, however, deference in *Kelo* is based less on protecting interests that might otherwise have been excluded from the ordinary workings of politics and more about sound small-p procedures.¹⁴⁰ Thus, even as *Kelo* provides a generous interpretation of the "public purpose" doctrine that affords "legislatures broad latitude in determining what public needs justify the use of the takings power,"¹⁴¹ the careful, deliberative process in the record provided an important basis for deference.

A number of affirmative action and school redistricting cases also reflect the idea that adherence to good process induces judicial def-

136. See *id.* at 477–83 (majority opinion) (explaining the generally accepted constitutional status of takings and providing examples of the Courts' Takings Clause jurisprudence leading up to *Kelo*).

137. See Nestor M. Davidson, The Problem of Equality in Takings, 102 Nw. U. L. Rev. 1, 5 (2008) (discussing the theoretical and jurisprudential problems of analyzing equality claims within the takings doctrine and arguing that instead they should "sound [directly] . . . under the Equal Protection Clause").

138. See Ilya Somin, The Story Behind *Kelo v. City of New London*—How an Obscure Takings Case Got to the Supreme Court and Shocked the Nation, Wash. Post: The Volokh Conspiracy (May 29, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/29/the-story-behind-the-kelo-case-how-an-obscure-takings-case-came-to-shock-the-conscience-of-the-nation/?utm_term=.8f9e13380235 (on file with the *Columbia Law Review*).

139. See Charles E. Cohen, The Abstruse Science: *Kelo*, *Lochner*, and Representation Reinforcement in the Public Use Debate, 46 Duq. L. Rev. 375, 378 (2008) ("[T]he *Kelo* Court signaled that, at least within this one area of substantive law, it had moved toward the school of constitutional interpretation known as 'representation reinforcement.'").

140. While Justice Stevens deferred to the majoritarian political process as bearing the trappings of legitimacy, Justice O'Connor's dissent identified failings in not only the exclusion of certain interests from the political process but also the majority's test for "ferreting out takings" that were exclusively for private benefit. *Kelo*, 545 U.S. at 502–05 (O'Connor, J., dissenting). Justice O'Connor found that the political process had been captured by the beneficiaries of the plan—namely, "those citizens with disproportionate influence and power"—to the exclusion of those with fewer resources. *Id.* at 505. Moreover, her dissent warned that the majority's deferential test, which allowed any secondary public benefit to satisfy the public purpose doctrine, failed to offer a clear standard for a comprehensive, deliberate legislative process and provided no floor to indicate the point below which deference would not obtain. *Id.* at 504. For further analysis of the idea that Justice Stevens's majoritarian approach amounted to judicial abdication, see Carol Necole Brown, Justice Thomas's *Kelo* Dissent: The Perilous and Political Nature of Public Purpose, 23 Geo. Mason L. Rev. 273, 275–76 (2016).

141. *Kelo*, 545 U.S. at 480–83.

erence. In the 2016 case *Fisher v. University of Texas at Austin*, the Court upheld the University of Texas's affirmative action policy, crediting an admissions process that was supported by a "reasoned, principled explanation,"¹⁴² a detailed "year-long study," and expert affidavits from admissions officers.¹⁴³ And lower courts have relied on similar evidence to uphold school redistricting measures that have a disparate racial impact. For example, in affirming a district court's decision that the Nashville public school system's "student-assignment plan"¹⁴⁴ was not motivated by discriminatory intent despite a segregative effect, the Sixth Circuit pointed to evidence of a "well-defined, well-regulated, and transparent" decisionmaking process that included formation of an authoritative task force.¹⁴⁵ Similarly, the Third Circuit declined to find discriminatory intent in a Lower Merion, Pennsylvania, school redistricting plan, in part because the district's process to select the new student assignment plan was "carried out over a number of months with the involvement of the public" and because the plan focused on neutral factors that were applied "consistently, regardless of race."¹⁴⁶

* * *

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 (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).

142. 136 S. Ct. 2198, 2211 (2016) (internal quotation marks omitted) (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013)).

143. See *id.* (upholding the policy under strict scrutiny as sufficiently tailored to advance a compelling interest of fostering diversity). Conversely, in dissent, Justice Alito accused the university of depicting its process in a "shifting" and "less than candid" manner. *Id.* at 2215 (Alito, J., dissenting).

144. *Spurlock v. Fox*, 716 F.3d 383, 385 (6th Cir. 2013). The plan ended the practice of busing students from racially isolated areas to schools in racially diverse, high-income neighborhoods. *Id.* These students now had to choose between attending a school in their own (largely African American and low-income) neighborhood or being bused to a distant school that would not necessarily be the same school they previously attended. *Id.* at 389.

145. *Id.* at 397.

146. *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 553–55 (3d Cir. 2011); see also *L.E.A. v. Bedford Cty. Sch. Bd.*, No. 6:15-cv-00014, 2015 WL 4460352, at *4 (W.D. Va. July 21, 2015) (finding that a school board's redistricting plan was not motivated by racial animus because the board held a public meeting during which plaintiffs could comment on the plan, and because the school's closure did not result in a disparate impact giving rise to an inference of discriminatory intent).

III. EXECUTIVE BRANCH PROCESS AND DISCRIMINATORY INTENT

The connections between procedural regularity and governmental intent are not limited to legislation. Indeed, *Arlington Heights* specifically applied its small-p analysis to the administrative context,¹⁴⁷ 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 review under the Administrative Procedure Act (APA).¹⁴⁸ 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 power¹⁴⁹—small-p process plays a remarkably important role in the scaling of judicial review.

147. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (noting that “legislative or administrative history” may be relevant in determining the existence of discriminatory intent).

148. While the APA triggers rigorous procedural requirements and judicial review mechanisms for 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 ways, under statute and case law, that presidential functions are largely exempt from the judicial review mechanisms of administrative law); see also *id.* at 1108 (noting that “the Supreme Court has twice stated that the President is not an agency” subject to the APA). In assessing executive action that is subject to APA review, scholars have argued that the inherent flexibility within administrative law allows (if not requires) courts to tone down review where such action is concerned. See Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 Yale L.J. 1170, 1200–01 (2007) (highlighting judicial deference to the Executive in foreign relations); Vermeule, *supra*, at 1122–25 (noting how in the context of executive action, courts greatly relax their review standards during times of emergency). Notwithstanding those insights, executive action is not immune to process scrutiny. See *infra* sections III.A–.C. Indeed, one might understand constitutional review of small-p executive process as congenial to the more conventional, process-based mechanisms through which the APA allows courts to oversee discretionary agency decisions on both process- and substance-based grounds. Cf. Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. Rev. 2029, 2070 (2011) (noting how “common staples of administrative law” such as hard look review under the APA “are relevant to constitutional decision making”); 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 [C]onstitutional concerns permeate ordinary administrative law, in particular doctrines of judicial review of agency action.”).

149. See *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972) (holding that when the President exercises delegated power to exclude foreign nationals for “a facially legitimate and bona fide reason,” the court will not question that policy choice or balance it against other constitutionally protected interests); *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”); 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 . . .”).

A. *Process and the Trump Travel Ban*

The important role of small-p process in judicial inquiries of executive motivation is reflected in decisions surrounding President Trump's immigration-related executive actions barring entry of individuals from a range of Muslim-majority countries.¹⁵⁰ While most commentators frame the travel ban litigation through the President's repeated expressions of hostility against the Muslim faith,¹⁵¹ 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. The more the government could show its policy was thoroughly vetted, the less the President's disparaging remarks about Islam seemed to undermine the case for deference.¹⁵² *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,¹⁵³ judges entered temporary restraining orders prohibiting the travel ban's enforcement.¹⁵⁴ These early

150. See Proclamation 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (third iteration); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (second iteration); Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (first iteration).

151. As Noah Feldman argued shortly after the ban was announced, when it comes to "President Donald Trump's travel ban, there's one word you need to focus on: animus." Noah Feldman, Opinion, The Key Word for Travel Ban Is 'Animus,' Bloomberg Opinion (June 4, 2017), <https://www.bloomberg.com/view/articles/2017-06-04/key-word-for-travel-ban-at-supreme-court-is-animus> [<https://perma.cc/WC2S-ZT7C>]. 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 Words Keep Hurting His Travel Ban, Time (Mar. 16, 2017), <http://time.com/4703614/travel-ban-judges-donald-trump-words/> [<https://perma.cc/234E-TKP3>]. In a series of subsequent statements about the proposed ban, then-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 "[t]he 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), <https://www.usatoday.com/story/news/politics/2017/06/11/what-president-trump-has-said-about-muslims-travel-ban/102565166/> [<https://perma.cc/B3GR-EQXF>].

152. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) ("[T]he issue before us is not whether to denounce [President Trump's] statements. It is instead the significance of those statements in reviewing a presidential directive, neutral on its face, addressing a matter within the core of executive responsibility.").

153. 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. See *id.* §§ 3(c), 5(a), 5(c) ("I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to [in other sections of the U.S. Code] would be detrimental to the interests of the United States . . .").

154. See *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) ("[T]he States have met their burden of demonstrating that they face

injunctions, which were upheld by the federal courts of appeal,¹⁵⁵ drew a number of connections between intent and small-p process. For instance, the U.S. District Court for the Eastern District of Virginia noted the absence of “expert agencies with broad experience on the matters” and the lack of “evidence that . . . a deliberative process took place.”¹⁵⁶ In addition to those procedural abnormalities, the district court 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 a reason to block the Executive Order’s implementation.¹⁵⁷

The Trump Administration revoked its order in response to these early rulings and made modifications,¹⁵⁸ yet 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

immediate and irreparable injury as a result of the signing and implementation of the Executive Order.”); *Darweesh v. Trump*, No. 17 Civ. 480 (AMD), 2017 WL 388504, at *1 (E.D.N.Y. Jan. 28, 2017) (“The 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”); *Aziz v. Trump*, No. 1:17-cv-116, 2017 WL 386549, at *1 (E.D. Va. Jan. 28, 2017) (“[R]espondents are forbidden from removing petitioners—lawful permanent residents at Dulles International Airport—for a period of 7 days from the issuance of this Order.”).

155. See, e.g., *Washington v. Trump*, 847 F.3d 1151, 1164, 1169 (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.”).

156. *Aziz v. Trump*, 234 F. Supp. 3d 724, 736 (E.D. Va. 2017) (internal quotation marks omitted); see also *id.* (noting that 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”).

157. *Id.* at 737 (quoting *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005)). 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. See *Washington*, 847 F.3d at 1165–66; *Aziz*, 234 F. Supp. 3d at 727–28. The Ninth Circuit rejected the government’s argument that a post hoc White House counsel interpretation cured due process concerns regarding the treatment of LPRs when the government “offered no authority establishing” the unlikely proposition “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.” See *Washington*, 847 F.3d at 1165–66. In any event, the court expressed skepticism that the Trump Administration would not simply revert back to denying entry to LPRs once again. See *id.*

158. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). The second order removed Iraq from the list of affected countries, exempted LPRs from the travel ban, and removed the indefinite ban on Syrian nationals. See *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 574–75 (4th Cir. 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,213, 13,215. This order also eliminated language—largely seen as attempting to give preference to Christian asylum seekers—that provided lower-level discretion to make exceptions to the refugee ban for foreign nationals of “minority” faiths in their home countries. *Int’l Refugee Assistance Project*, 857 F.3d at 574–75. But see Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,210 (arguing that the religious-minority language in the first order “was not motivated by animus toward any religion”).

agencies from the decisionmaking process, “the post hoc nature of the national security rationale,” and government evidence that undermined the effectiveness of the President’s policy.¹⁵⁹ Within these initial cases, the concepts of process failure and unconstitutional motivation were closely linked.¹⁶⁰

2. *Travel Ban 3.0: Process and Executive Vindication.* — The Trump Administration’s third version of the travel ban, issued via presidential proclamation,¹⁶¹ appeared to reflect the lower courts’ process-oriented concerns.¹⁶² Government lawyers repeatedly invoked a “worldwide” process that involved close consultation with experts.¹⁶³ Indeed, Chief Justice Roberts’s *Trump v. Hawaii* majority opinion repeatedly touted good process¹⁶⁴ as “a justification” for the entry ban that was “independent of

159. See *Int’l Refugee Assistance Project*, 857 F.3d at 591–92 (citing as a reason to find the government’s proffered purpose pretextual a DHS report stating that the second iteration of the ban would not “diminish the threat of potential terrorist activity”).

160. At around the same time as the Fourth Circuit decision in *International Refugee Assistance Project*, described supra at notes 158–159 and accompanying text, 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*, 245 F. Supp. 3d 1227, 1239 (D. Haw. 2017), and was affirmed in large measure by the Ninth Circuit, *Hawaii v. Trump*, 859 F.3d 741, 789 (9th Cir. 2017). On a petition for a stay of the preliminary injunction, the Supreme Court, without directly addressing the lower courts’ rationales, left the injunctions in place for those foreign nationals with 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, 2087–88 (2017). The Court vacated its decision as moot after the second version of the travel ban expired under its own terms. *Trump v. Int’l Refugee Assistance*, 138 S. Ct. 353, 353 (2017).

161. Proclamation 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (restricting indefinitely the entry of certain nationals from Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen).

162. According to the government, DHS underwent a detailed process to identify countries with insufficient information-sharing practices for the United States to vet foreign nationals entering from those countries. DHS identified 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 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.*

163. See Brief for the Petitioners at 13–16, 60–65, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 1050350; 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 [<https://perma.cc/BG7V-ND6B>] (“[The Solicitor General argued] the process leading to the proclamation was more deliberate than those that had led to earlier bans Those orders were temporary measures . . . while the proclamation was the product of extensive study and deliberation.”).

164. See 138 S. Ct. at 2409–10, 2412, 2421; see also supra notes 19–20 and accompanying text. By contrast, the lower courts continued to find procedural irregularities that undermined the case for deference. See *Int’l Refugee Assistance Project*, 265 F. Supp. 3d at 593. For example, a federal district court in Maryland found that despite DHS’s more tailored evaluation of the national security risk associated with

unconstitutional grounds.”¹⁶⁵ Although Roberts did not ignore the presence of the President’s patently biased statements,¹⁶⁶ he concluded that the Proclamation’s facial neutrality, coupled with its underlying vetting process, safeguarded its constitutionality.¹⁶⁷

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 compliance with, or departures from, an expected norm or baseline.¹⁶⁸ Moreover, it is not

nationals from each of the designated countries, “49 former national security, foreign policy, and intelligence officials . . . state[d] that ‘[a]s a national security measure,’ the Proclamation is ‘unnecessary’ and is of ‘unprecedented scope.’” *Id.* Further procedural problems with the Proclamation were that (1) “concrete evidence” shows “country-based bans are ineffective”; (2) the Proclamation fails to block nationals from certain countries with a non-Muslim majority that have “widely-documented” information-sharing deficiencies; (3) no nationals from the designated countries have committed terrorist acts in the United States in the last forty years; and (4) no intelligence shows that nationals from the designated countries pose a terrorist threat to the United States. *Id.* Finally, the court 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 *id.* 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 the government presented weak evidence to that end. *Id.* at 628. Combining these procedural anomalies with public statements and historical events suggesting religious animosity, the court found that the plaintiffs would likely prevail on an Establishment Clause claim. *Id.* 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 United States. See *id.* at 631. However, the Supreme Court issued a stay of that order pending disposition of the government’s appeal. See *Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 542, 542 (2017). 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, culminating in a ruling upholding the Proclamation. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

165. *Hawaii*, 138 S. Ct. at 2420.

166. See *id.* at 2417–18 (noting some of the President’s anti-Muslim rhetoric and contrasting how some presidents “have frequently 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”).

167. See *supra* note 20.

168. See *supra* section II.A (discussing *Arlington Heights*’s consideration of “departures from normal procedur[e]” as evincing intent).

uncommon for courts to highlight *ex ante* and *ex post* procedural review as significant to the outcome of a given decision. 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 requirement¹⁶⁹ 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.¹⁷⁰

1. *Trump v. Hawaii*. — 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. On the one hand, Chief Justice Roberts made it clear that the Proclamation could be vindicated based on the rigor of *ex ante* procedures—specifically, the “worldwide” and “multi-agency” review underlying the enactment.¹⁷¹ But Roberts also relied on the availability of *ex post* procedures—discretionary hardship waivers within the Proclamation itself—that further reinforced its “legitimate national security” foundations.¹⁷² For their part, Justice Breyer and Justice Sotomayor each wrote dissenting opinions linking *ex post* and *ex ante* process failure, respectively, with improper motivation.¹⁷³ 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.”¹⁷⁴ Given the exceedingly small number of waivers actually granted, Breyer found

169. See *supra* note 142–143 and accompanying text.

170. *Fisher v. Univ. of Tex. 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 . . .”).

171. *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018).

172. *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.

173. 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).

174. *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. . . . [However, the argument becomes significantly weaker] if the Government is not applying the system of exemptions and waivers that the Proclamation contains . . .”).

that the policy failed ex post scrutiny.¹⁷⁵ Breyer also noted the absence of other promised procedures, including guidance to consular officers for the issuance of hardship waivers, as another reason to doubt the Proclamation's validity.¹⁷⁶ In contrast to Breyer's focus on ex post mechanisms,¹⁷⁷ Sotomayor expressed doubt regarding the veracity of the government's ex ante procedures, including its professed "worldwide" review that consumed only seventeen pages of published material.¹⁷⁸ For Sotomayor, the majority approached its ex ante analysis too superficially, permitting "the President to hide behind an administrative review process that the Government refuses to disclose to the public."¹⁷⁹

In the wake of *Hawaii*, lower courts have paid special attention to the government's adherence to its promised procedures.¹⁸⁰ The U.S. District

175. *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 candidates. *Id.*; see also *id.* at 2431–32 (noting the contrast between the Proclamation's stated exemptions for those with significant family business or professional obligations or close family ties in the United States; asylum seekers; refugees; and those with certain nonimmigrant visas, and the miniscule number of waivers actually approved). For example, between December 8, 2017, and January 8, 2018, the State Department received more than 8,400 applications from visa-eligible nationals of listed countries. As of March 2018, waivers were granted to approximately one and a half percent of the otherwise visa-eligible and admissible applicants. Yeganeh Torbati & Mica 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> [<https://perma.cc/9THT-LART>]. Through October 31, 2018, that rate had increased to just under six percent. Press Release, Office of U.S. Senator Chris Van Hollen, Van Hollen Releases New State Department Data on Travel Ban (Apr. 5, 2019), <https://www.vanhollen.senate.gov/news/press-releases/van-hollen-releases-new-state-department-data-on-travel-ban> [<https://perma.cc/E45Y-E5UK>].

176. See *Hawaii*, 138 S. Ct. at 2431 (Breyer, J., dissenting). Breyer also indicated that an ex post review could help determine whether the President had made the kind of "finding" required by the statute to bar foreign nationals in the first place. See *id.* at 2430; see also 8 U.S.C. § 1182(f) (2012) (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").

177. Breyer also noted "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" as a reason to invalidate the Proclamation. *Hawaii*, 138 S. Ct. at 2433.

178. See *id.* at 2443 (Sotomayor, J., dissenting). For Chief Justice Roberts, on the other hand, any quantitative floor would be arbitrary. See *id.* at 2421 (majority opinion). A seventeen-page report could be highly substantive, with a reasoned basis in expert analysis and extensive supporting materials. *Id.* In any event, even if the policy was overbroad in its reach, as the dissent argued, because of the complexity and sensitivity of the national security context, the Court could not substitute its judgment for that of the Executive, which was entitled to deference. *Id.*

179. *Id.* at 2443 (Sotomayor, J., dissenting).

180. 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-court-unconstitutional-226103> [<https://perma.cc/K37C-58XG>] (noting

Court for 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.¹⁸¹ 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."¹⁸² In that case, both *ex ante* and *ex post* procedural failure supported an inference that the ban's stated national security purpose was a mere "pretext for discrimination."¹⁸³

2. *Beyond Hawaii*. — *Hawaii* was not the first time that *ex ante* or *ex post* procedural review has figured into major Supreme Court rulings on presidential action. Many of the post-9/11 decisions involving the "war on terror" have been described as largely procedural in nature.¹⁸⁴ As a

that the policy is under review not only to determine whether it was constitutionally enacted but also to ensure that its implementation is fair).

181. *Int'l Refugee Assistance Project v. Trump*, 373 F. Supp. 3d 650, 673 (D. Md. 2019).

182. *Id.* at 673–74. A recent decision out of the Eastern District of Michigan also cited allegations of a sham waiver program in its reasons for denying a motion to dismiss. *Arab Am. Civil Rights League v. Trump*, No. 17-10310, 2019 WL 3003455, at *5 (E.D. Mich. July 10, 2019).

183. *Int'l Refugee Assistance Project*, 373 F. Supp. 3d at 674. In addition, the plaintiffs in the Northern District of California have been allowed to proceed with a similar, APA-based challenge in light of well-established doctrine that administrative agencies are bound to follow their own rules and guidelines. See *Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1020–21 (N.D. Cal. 2019). *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 1021.

184. 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 U.S. 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 institutional process rather than substantive rights); Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 *Wash. L. Rev.* 661, 675–98 (2009) [hereinafter Landau, *Muscular Procedure*] (noting how courts used process in "muscular" ways after 9/11 by placing checks on coordinate branch activity that fell below a judicially imposed baseline level of procedure); cf. Jenny S. Martinez, *Process and Substance in the "War on Terror"*, 108 *Colum. L. Rev.* 1013, 1015 (2008) (observing that "most of the U.S. court decisions

prominent example, *Hamdan v. Rumsfeld* invoked both ex ante and ex post process scrutiny to rule on the legality of military commissions at Guantanamo Bay.¹⁸⁵ In terms of its actual holding, the Court applied ex post proceduralism, rejecting the President's commissions in light of his failure to adhere to a requirement in the Uniform Code of Military Justice that commissions be used only upon a finding that it would be "impracticable" to convene ordinary courts-martial.¹⁸⁶ Shortly after the decision, Professor and former Acting Solicitor General Neal Katyal observed how ex ante procedure—specifically the lack of deliberation and interagency dialogue within the George W. Bush Administration—doomed many of its post-9/11 policies. "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."¹⁸⁷ 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.¹⁸⁸

As another prominent example of ex post process scrutiny in the 9/11 context, the D.C. Circuit in *Bismullah v. Gates* placed onerous discovery demands on the government in Guantanamo detainee cases challenging confinement.¹⁸⁹ *Bismullah* essentially required the government to restart the entire evidence-gathering process, given its failure to follow its own vetting mechanisms for detention determinations.¹⁹⁰ While

concerning the 'war on terror' have not directly addressed . . . substantive rights claims" but rather "have mostly been about process").

185. 548 U.S. 557 (2006).

186. *Id.* at 623.

187. See Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 Harv. L. Rev. 65, 71 (2006); see also *id.* at 109–12 (referring to "executive action taken without the prior involvement of experts" and explaining that "*Hamdan* might stand for the proposition that the Administration's interpretation of Common Article 3 [of the Geneva Conventions] was not the product of a proper process").

188. *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").

189. 501 F.3d 178, 184–86, 192 (D.C. Cir. 2007) (ordering the government to produce in discovery not only the record presented to the Guantanamo tribunals but all "reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant" (internal quotation marks omitted) (quoting Memorandum from Paul Wolfowitz, Deputy Sec'y of Defense, to the Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal 1 (July 7, 2004) (on file with the *Columbia Law Review*))).

190. See *id.* at 193 (Rogers, J., concurring) ("[T]he Executive acknowledged that it has not utilized the procedure for compiling the [Combatant Status Review Tribunal (CSRT)] record that the Department of Defense specified in its publicly-announced procedures for conducting CSRTs."). 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 ex post procedure. See *Bismullah v. Gates*, 514 F.3d 1291, 1295 n.5 (D.C. Cir. 2008) (Ginsburg,

the Court had endorsed the proposition in *Hamdi v. Rumsfeld* that “fair process can be provided by nonjudicial decisionmakers,”¹⁹¹ detainees were often victorious in court by noting the government’s failure to follow its own procedures. Indeed, similar lapses in ex post procedure arguably influenced the Supreme Court’s decision to grant certiorari in *Boumediene v. Bush* and resolve the question whether the Constitution’s Suspension Clause applied to Guantanamo Bay.¹⁹² After all, the Supreme Court originally denied certiorari but reversed itself less than three months later, after the parties provided declarations attesting to the executive branch’s inadequate implementation of its own standards and procedures.¹⁹³

C. *Process and the Ban on Transgender Servicemembers*

In a recent essay, former White House Counsel Neil Eggleston and litigator Amanda Elbogen note how President Trump’s decision to disregard executive branch norms has doomed a number of his signature policies in court.¹⁹⁴ For Eggleston and Elbogen, the Trump Administration’s repeated defeats “serve as a warning to an unconventional administration that such process flaws invite judicial scrutiny and weaken public confidence in the President.”¹⁹⁵ For example, in cases challenging the Trump Administration’s policy blocking transgender individuals from serving in the military, courts have linked procedural irregularity with improper motivation.¹⁹⁶ In the wake of the President’s 2017 Twitter

C.J., concurring) (noting how on multiple occasions agencies “summarily denied” requests for confirmation by Guantanamo personnel that the agency had no exculpatory information on a particular detainee (quoting Decl. of Stephen Abraham, Lieutenant Colonel, U.S. Army Reserve ¶¶ 5–19 (June 15, 2007))); see also *id.* (“[T]he Recorder withheld from the Tribunal exculpatory Government Information if in his view it was ‘duplicative’ or ‘if it did not relate to a specific allegation being made against the detainee.’” (quoting Decl. of James M. McGarrah, Rear Admiral (Ret.), U.S. Navy ¶¶ 4–6, 10–13 (May 31, 2007))).

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

192. *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (finding that the Constitution’s Suspension Clause applied to Guantanamo Bay and invalidating the political branches’ alternate review system for habeas corpus review).

193. *Boumediene v. Bush*, 549 U.S. 1328 (2007), vacated, 551 U.S. 1160 (2007) (mem.); see also Landau, *Muscular Procedure*, *supra* note 184, at 694.

194. See W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 *Yale L.J. Forum* 825, 826 (2018), <https://www.yalelawjournal.org/forum/the-trump-administration-and-the-breakdown-of-intra-executive-legal-process> [<https://perma.cc/6Y8C-ZHGJ>]. For a comprehensive and illuminating discussion of the internal safeguards and norms underlying presidential policy decisions and their effect on judicial review, see generally Renan, *supra* note 130.

195. Eggleston & Elbogen, *supra* note 194, at 826.

196. Fred Barbash, Deanna Paul, Brittany Renee Mayes & Danielle Rindler, *Federal Courts Have Ruled Against Trump Administration Policies at Least 70 Times*, *Wash. Post* (Mar. 19, 2019), https://www.washingtonpost.com/graphics/2019/politics/trump-overruled/?utm_term=.ef418a870fb2 [<https://perma.cc/N87T-V7LY>] (noting the Trump

announcement banning transgender servicemembers,¹⁹⁷ four federal district courts invoked process scrutiny to grant preliminary injunctions enjoining the policy.¹⁹⁸ Although those injunctions have been either stayed¹⁹⁹ or lifted²⁰⁰ in the wake of a revised version of the policy that has gone into effect, litigation remains before several lower courts that have focused heavily on ex ante process scrutiny. As those courts have observed, the initial policy suffered from clear procedural defects such as a lack of interagency review, which excluded the Secretary of Defense²⁰¹ and left the Pentagon largely flummoxed,²⁰² as well as an abrupt reversal

Administration's lack of success defending its policies in court); Roundup: Trump-Era Deregulation in the Courts, Inst. for Policy Integrity, <https://policyintegrity.org/deregulation-roundup> [<https://perma.cc/J3T5-JCUU>] (last updated Aug. 30, 2019) (showing about an eight-percent success rate in litigation over the Trump Administration's deregulation efforts).

197. See Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017), <https://twitter.com/realDonaldTrump/status/890193981585444864> [<https://perma.cc/46YS-RC8J>]; Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017), <https://twitter.com/realDonaldTrump/status/890196164313833472> [<https://perma.cc/XK4K-3FLC>] (tweeting that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military").

198. See *Stockman v. Trump*, No. EDCV 17-1799 JGB (KKx), 2017 WL 9732572, at *15 (C.D. Cal. Dec. 22, 2017); *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305, at *7-8 (W.D. Wash. Dec. 11, 2017); *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017); *Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017), vacated sub nom. *Doe 2 v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019). One district court denied, on standing grounds, a request for a preliminary injunction prohibiting the Administration from ending the use of military resources to fund sex-reassignment surgeries. *Doe 1*, 275 F. Supp. 3d at 177. Other district courts, by contrast, found that plaintiffs met standing requirements and granted preliminary injunctions on that issue. See *Stockman*, 2017 WL 9732572, at *8-12, *16; *Karnoski*, 2017 WL 6311305, at *4, *10; *Stone*, 280 F. Supp. 3d at 766, 769. Two federal appeals courts denied partial stays pending appeal. See *Doe 1 v. Trump*, No. 17-15267, 2017 WL 6553389, at *1 (D.C. Cir. Dec. 22, 2017); *Stone v. Trump*, No. 17-2398, 2017 WL 9732004, at *1 (4th Cir. Dec. 21 2017).

199. See *Trump v. Stockman*, 139 S. Ct. 950 (2019) (mem.); *Trump v. Karnoski*, 139 S. Ct. 950 (2019) (mem.); *Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019).

200. See *Doe 2*, 755 F. App'x at 22.

201. See, e.g., *Doe 1*, 275 F. Supp. 3d at 212-13. Despite Trump's claim that the policy was fashioned after consultation with generals and military experts, news accounts indicated that Secretary Jim Mattis was only informed of it one day before it was announced. Julie Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y. Times (July 26, 2017), <https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html> [<https://perma.cc/NR85-LZ6S>] (noting the "haste" that left the White House unprepared to answer basic questions, and Secretary Mattis's purported unhappiness).

202. See Brian Feldman, *The Pentagon Was Just as Confused by Trump's Ominous Tweet as You Were*, N.Y. Mag.: Intelligencer (July 26, 2017), <http://nymag.com/selectall/2017/07/the-pentagon-was-just-as-confused-by-trumps-tweet-as-you.html> [<https://perma.cc/MCT6-GWHU>] (describing how obscurities in the President's language led some officials to anticipate a strike on North Korea in the few-minute gap between his first and second tweets about transgender military policy).

of a prior administration's policy, evincing "discrimination . . . of an unusual character."²⁰³

One case in particular, *Doe I v. Trump*,²⁰⁴ contrasted the Trump Administration's transgender policy with both the exhaustive process in *Rostker*²⁰⁵ and the extensive procedures underlying the policy of transgender inclusion that President Trump inherited.²⁰⁶ In a related case concerning the same transgender policy, the court keyed in on a number of "departure[s] from normal procedure,"²⁰⁷ including: "the absence of any

203. *Doe I*, 275 F. Supp. 3d at 213; see also Cristian Farias, In Case You Had Doubts, Trump's Military Transgender Ban Is Grossly Unconstitutional, N.Y. Mag: Intelligencer (July 27, 2017), <http://nymag.com/daily/intelligencer/2017/07/trumps-military-transgender-ban-is-grossly-unconstitutional.html> [<https://perma.cc/BKN4-QYSL>] (analyzing the transgender ban through an animus lens and comparing it to the travel ban); Stephen Peters, LGBT Military Groups Denounce Trump-Pence Implementation Plan for Transgender Military Ban, Am. Military Partner Ass'n (Mar. 23, 2018), <https://militarypartners.org/lgbt-military-groups-denounce-trump-pence-implementation-plan-for-transgender-military-ban/> [<https://perma.cc/SK55-KEKK>]; Scott Skinner-Thompson, Animus, Not Readiness: Trump & Mattis Move Full Steam Ahead on Unconstitutional Trans Military Ban, Just Security (Sept. 1, 2017), <https://www.justsecurity.org/44650/animus-readiness-trump-mattis-move-full-steam-unconstitutional-trans-military-ban/> [<https://perma.cc/P9M6-V9QB>].

204. 275 F. Supp. 3d at 167.

205. *Rostker v. Goldberg*, 453 U.S. 57 (1981); see also Renan, *supra* note 130, at 2260–62; *supra* notes 125–130 and accompanying text.

206. The government argued that under *Rostker*, presidential decisions around military policy—even those discriminating on the basis of gender—must be reviewed under "a highly deferential level of review." *Doe I*, 275 F. Supp. 3d at 214 (internal quotation marks omitted) (quoting Defendants' Motion to Dismiss and Opposition to Plaintiffs' Application for a Preliminary Injunction at 27, *Doe I*, 275 F. Supp. 3d 167 (No. 17-cv-1597) (CKK), 2017 WL 4685829). But courts highlighted the marked procedural differences between the two cases. The selective service policy at issue in *Rostker* was supported by a high level of deliberation and rigor that was noticeably absent in the case of the ban on transgender servicemembers. *Id.* (citing *Rostker*, 453 U.S. at 72). Beyond lacking the kind of study and analysis that warranted deference in *Rostker*, the record materials underlying the Trump transgender ban "were not supported and were in fact *contradicted* by the only military judgment available at the time." *Id.* (emphasis added). For its part, the Obama Administration's policy was the result of an elaborate process that included a working group of senior civilian and uniformed officers, a ninety-one page RAND Corporation report, and further procedures that in turn led to implementing memoranda for each branch of the Armed Forces. President Trump's tweet, by contrast, was preceded only by a press release and followed by a memorandum that the court found lacking in the ordinary features of executive lawmaking—a reason to refuse the Trump Administration the deference it claimed it was owed. *Id.* at 179–80, 182–84; see also *id.* at 213 (finding that the President's announcement, "without any of the formality or deliberative processes that generally accompany . . . major policy changes that will gravely affect the lives of many Americans," was "certainly" unusual). As Daphna Renan has observed, "The absence of the deliberative-presidency norm in the presidential conduct that gave rise to the transgender service members' prohibition . . . eliminates [those features and] conditions on which judicial deference is premised." Renan, *supra* note 130, at 2261.

207. *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017) (citing *Doe I*, 280 F. Supp. 3d at 213).

considered military policymaking process,” “the sharp departure from decades of precedent on the approach of the U.S. military to major personnel policy changes,” and the “shocking” nature of the presidential announcement, which took “the Secretary of Defense and other military officials” by surprise and elicited criticism from retired generals and members of Congress.²⁰⁸ Virtually all of the subsequent federal district court rulings agreed with *Doe 1*’s analysis.²⁰⁹

In the wake of these lower court injunctions, the Department of Defense engaged a second process culminating in a forty-four page report²¹⁰ announcing a refinement of its transgender military policy.²¹¹ While the renewed effort and enhanced procedure have not affected the merits of the ongoing challenges, the changes have provided a sufficient basis to vacate the lower court injunctions. As such, both the D.C. and Ninth Circuits referenced procedural differences between the first and second iterations of the policy as evidence of a change in law or fact warranting dissolution of the earlier injunctions,²¹² though litigation over the policy’s merits continues.²¹³

208. *Id.* at 768, 770–71. As another court explained, “[T]he only serious study and evaluation concerning the effect of transgender people in the armed forces”—namely, the RAND study and internal Defense Department analyses undertaken prior to the Obama Administration’s lifting of the transgender ban—“led the military leaders to resoundingly conclude there was no justification for the ban.” *Stockman v. Trump*, No. EDCV 17-1799 JGB (KKx), 2017 WL 9732572, at *14 (C.D. Cal. Dec. 22, 2017). Still another concluded that “[a] capricious, arbitrary, and unqualified tweet of new policy does not trump the methodical and systematic review by military stakeholders to understand the ramifications of policy changes.” *Stone*, 280 F. Supp. 3d at 771. Despite these stinging repudiations, courts have stressed that their decisions do not necessarily bind the military to the previous, comprehensive study, leaving it to the President to order further studies and reexamine the policy. See, e.g., *Doe 1*, 275 F. Supp. 3d at 215.

209. See *Stockman*, 2017 WL 9732572, at *16; *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305, at *7 (W.D. Wash. Dec. 11, 2017); *Stone*, 280 F. Supp. 3d at 769.

210. Dep’t of Defense, Department of Defense Report and Recommendations on Military Service by Transgender Persons (2018).

211. See *Doe 2 v. Shanahan*, 755 F. App’x 19, 23 (D.C. Cir. 2019) (noting the procedural efforts that went into the new policy, including “the creation of a panel of military and medical experts, the consideration of new evidence gleaned from the implementation of the policy . . . , and a reassessment of the priorities of the group that produced the Carter Policy”).

212. *Id.* at 22–23; see also *Karnoski v. Trump*, 926 F.3d 1180, 1199 (9th Cir. 2019) (noting that the defendants demonstrated a “significant change” in the facts to require the district court to assess whether the change warrants dissolution of the injunction). In one important respect, *Karnoski* appears to present an important victory for transgender rights, as the Ninth Circuit directed the lower court to consider the policy under intermediate scrutiny. *Id.* at 1199–201.

213. See *Doe 2*, 755 F. App’x at 23 (noting that the court has not yet decided the merits of the preliminary injunction); see also *Karnoski*, 926 F.3d at 1199 (remanding to the district court for consideration of the merits).

D. *Process Scrutiny in Hindsight: The Case of Korematsu*

Putting contemporary litigation aside, it is worth 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 Americans²¹⁴ and a low point in American constitutional history.²¹⁵ *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.²¹⁶ Even as the Court announced the rule that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,"²¹⁷ 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;²¹⁸ indeed, this is readily apparent from the military branch's cursory examination of the merits of the exclusion policy.²¹⁹ 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.²²⁰

As a related matter, *Korematsu* demonstrates the pitfalls of "bilateral endorsement" theory.²²¹ The theory, commonly attributed to Justice

214. 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. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). The Supreme Court affirmed *Korematsu's* conviction for defying the order. *Korematsu v. United States*, 323 U.S. 214 (1944), overruled by *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

215. See 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, 380 (2011) (identifying *Korematsu* among "the Supreme Court's worst decisions"); Issacharoff & Pildes, *supra* note 184, at 20 ("*Korematsu* is excoriated as one of the two or three worst moments in American constitutional history."); see also *Hawaii*, 138 S. Ct. at 2423 (overruling *Korematsu*).

216. *Korematsu*, 323 U.S. at 216.

217. *Id.*

218. Comm'n on Wartime Relocation & Internment of Civilians, *Personal Justice Denied* 18 (1982), <https://www.archives.gov/files/research/japanese-americans/justice-denied/summary.pdf> [<https://perma.cc/8TS9-K3NL>].

219. 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").

220. See *id.* at 217–19 (majority opinion) ("We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons . . . constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it." (internal quotation marks omitted) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943))).

221. The term "bilateral endorsement" was dubbed such by Samuel Issacharoff and Richard Pildes. See Issacharoff & Pildes, *supra* note 184, at 5–6.

Jackson's *Youngstown* concurrence eight years after *Korematsu*,²²² holds that judicial review should be extremely deferential when the legislative and executive branches agree on policy.²²³ In the parlance of Justice Jackson, presidential power is at its apex when taken with congressional backing—as arguably was the case in *Korematsu*.²²⁴ 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,²²⁵ 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 *Korematsu* dissent, Justice Murphy describes a procedural baseline appropriate for the circumstances, drawing on the more comprehensive treatment of citizens of German or Italian ancestry.²²⁶ 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.²²⁷ Further, he questioned the type of evidence advanced by the military as atypical of what a more procedurally sound process would have produced.²²⁸

The classification against the Japanese in *Korematsu* was overt. Indeed, the majority recognized as much by invoking strict scrutiny—at least on paper.²²⁹ 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 and

222. Notably, Justice Jackson dissented from the majority's holding in that case. See *Korematsu*, 323 U.S. at 242–48.

223. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–39 (1952) (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum A seizure executed by the President pursuant to an Act of Congress would be supported by . . . the widest latitude of judicial interpretation . . .”).

224. See *Korematsu*, 323 U.S. at 216–17 (noting that the prosecution of *Korematsu* began through a violation of an act of Congress and Executive Order 9066).

225. Cf. Sarah H. Cleveland, *Hamdi Meets Youngstown: Justice Jackson's Wartime Security Jurisprudence and the Detention of "Enemy Combatants,"* 68 Alb. L. Rev. 1127, 1135 (2005) (arguing that bilateral endorsement “runs the risk of inviting Congress and the Executive to collude in the violation of individual rights”); Issacharoff & Pildes, *supra* note 184, at 19 (“The risk of an entire nation, and its elected representatives, succumbing to wartime hysteria is ever present.”).

226. *Korematsu*, 323 U.S. at 241–42 (Murphy, J., dissenting).

227. See *id.* at 242.

228. See *id.* at 236–37 (majority opinion) (“Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment . . .”).

229. See *id.* at 216 (noting that the Court is applying “the most rigid scrutiny” as the restriction concerns “the civil rights of a single racial group”).

procedural rigor, may well have shone a brighter light on the invidious nature of the government's action, perhaps tilting the balance toward 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.²³⁰ 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.²³¹ A greater focus on or adherence to small-p process as a natural extension of such second-order reasoning²³² may well have curbed the Court's ill-fated, near-absolute deference to the Executive.

IV. PROCESS SCRUTINY IN INSTITUTIONAL CONTEXT

While it is clear that process scrutiny has transsubstantive aspirations across legislative and executive contexts at the state and federal levels, it should not be applied in an indiscriminating way, heedless of context. Its application also might differ when reviewing, for example, presidential action instead of action by an administrative functionary, or when

230. 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 flouted procedure in its pursuit of individuals it saw as combatants in the "war on terror"—even ignoring its own procedural standards. See Landau, *Muscular Procedure*, *supra* note 184, at 693–94. Courts 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 policies' underlying vetting mechanisms or when it failed to implement policy consistently with promised procedural standards. See *id.* at 689–96.

231. See *Korematsu*, 323 U.S. at 236–37, 241–42 (Murphy, J., dissenting) ("In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal . . . as to constitute a special menace to defense installations or war industries . . .").

232. Issacharoff & Pildes, *supra* note 184, at 44–45 (describing bilateral endorsement as not about first-order matters of substantive rights but rather the "second-order question" whether a given policy is grounded within the right institutional process).

addressing international affairs versus domestic subject matter. Yet such differences do not detract from the underlying connections between procedural rigor, governmental motivation, and judicial vindication. While it is beyond the scope of this Article to provide a comprehensive treatment of the contextual differences in which process scrutiny arises, this discussion highlights their salience, laying a foundation for future work.²³³

A. *Contextualizing Process Scrutiny*

While courts have invoked process scrutiny to justify closer inspection of the actions of both legislative and executive acts at the state and federal levels, little attention has been paid to the way that institutional concerns such as federalism, separation of powers, and institutional competency might alter the analysis. On the one hand, certain constitutional contexts seem to invite scrutiny of small-p process by necessity. Within strict scrutiny doctrine, process scrutiny is implied in the command that government action be narrowly tailored to meet a compelling governmental interest. Government actions, or “means chosen,” often entail an application of some procedure that invites review—whether in the *ex post* or *ex ante* form.²³⁴ A close analysis of small-p process in light of what would constitute a “normal” baseline given the government’s asserted interests seems required.²³⁵

On the other hand, it is unlikely that reviewing courts can or will apply a unitary or consistent standard, even across arguably similar cases—for instance, because of issue- or institution-specific concerns that may arise in any given case. Consider, for example, the seeming incoherence between *Trump v. Hawaii*²³⁶ and *Masterpiece Cakeshop, Ltd. v.*

233. Additional questions for future analysis include precisely what amount of good or bad process evidence would be required in specific areas of constitutional adjudication as well as how cases of mixed motive or mixed purpose might be handled. Another possible avenue of inquiry is to explore the potential connection between political polarization and baseline levels of *ex ante* deliberation in order to theorize how hyperpartisanship at various levels of government may compel a court to calibrate process-oriented judicial review. Cf. Landau, *Broken Records*, *supra* note 109, at 37–39 (arguing for a threshold judicial inquiry of baseline factual accuracy where legislation trammeling on individual rights results from the trafficking in “alternative facts”).

234. See *supra* section III.B.

235. For example, some affirmative action and school redistricting cases devote significant space to this instruction. See *supra* notes 142–146 and accompanying text. To illustrate, in *Fisher v. University of Texas at Austin*, given the overt racial classification evaluated under strict scrutiny, the Court emphasized a reluctance to afford deference to the means chosen by the University, while nonetheless crediting the procedural robustness of its planning and program design. See 136 S. Ct. 2198, 2208, 2211 (2016); see also *supra* text accompanying notes 125–130 (analyzing how an overt gender classification in *Rostker* invited a thorough evaluation of the *ex ante* procedures that preceded it).

236. 138 S. Ct. 2392 (2018).

Colorado Civil Rights Commission.²³⁷ In *Masterpiece*, the Court conducted a hair-splitting analysis of proceedings before a state civil rights commission to find that it improperly disparaged the religious views of an evangelical baker who refused to do business with a gay couple.²³⁸ The Court found that the taint of animus raised by the remarks of a single commissioner was not adequately cleansed by the commission's multi-member structure or the subsequent de novo review before a state appellate court.²³⁹ In that particular context, "even 'subtle departures from neutrality' on matters of religion" constituted improper state-sponsored discrimination.²⁴⁰ Yet a few weeks after the decision in *Masterpiece*, *Hawaii* upheld President Trump's entry restrictions on foreign nationals despite a regular outpouring of utterances evincing much more explicit animus toward a particular religion than in *Masterpiece*.²⁴¹

Although many scholars, as well as Justice Sotomayor in her *Hawaii* dissent, expressed difficulty reconciling the two cases,²⁴² the difference

237. 138 S. Ct. 1719 (2018).

238. See *id.* at 1729 (describing the absence of a "fair and neutral" hearing based on the statement of one commissioner who equated certain religious beliefs with the defense of slavery and the Holocaust). Some commentators argue that the Court may have exaggerated these apparent problems with the commission's ruling to avoid thornier questions at the intersection of nondiscrimination and free speech. See, e.g., Michael Dorf, *Masterpiece Cakeshop Ruling Should (but Probably Won't) Doom the Travel Ban*, Dorf on Law (June 4, 2018), <http://www.dorfonlaw.org/2018/06/masterpiece-cakeshop-ruling-should-but.html> [<https://perma.cc/4VCU-SEWJ>] ("Put simply, the stated rationale for the ruling in *Masterpiece* doesn't wash. At best, it is a masterpiece of ducking the hard questions.").

239. *Masterpiece*, 138 S. Ct. at 1729–30 (finding "no objection to [the disparaging] comments from other commissioners," no "mention [of] those comments" in the "later state-court ruling reviewing the Commission's decision," and no disavowal of the comments "in the briefs filed in this Court"). But see *id.* at 1751 (Ginsburg, J., dissenting) (arguing that any taint based on "the comments of one or two Commissioners" was removed after "several layers of independent decisionmaking").

240. *Id.* at 1731 (majority opinion) (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534 (1993)).

241. See *Hawaii*, 138 S. Ct. 2417 (describing statements made by Donald Trump and his surrogates expressing a desire to "ban Muslim immigration" during and after the 2016 presidential campaign); see also Matt Ford, *Why Trump Should Worry About the Supreme Court's Cakeshop Ruling*, *New Republic* (June 4, 2018), <https://newrepublic.com/article/148706/trump-worry-supreme-courts-cakeshop-ruling> [<https://perma.cc/Z8N5-6VNN>] ("If anything, Trump's remarks on the campaign trail present far more damning evidence of religious animus than anything said by a Colorado civil-rights commissioner."); Leah Litman, *Masterpiece Cakeshop and the Entry Ban, Take Care* (June 4, 2018), <https://takecareblog.com/blog/masterpiece-cakeshop-and-the-entry-ban> (on file with the *Columbia Law Review*) (describing "several aspects of the Court's opinion in *Masterpiece Cakeshop* that, if taken seriously, would dispose of several of the government's arguments in the entry ban litigation").

242. See, e.g., Ilya Somin, *The Supreme Court's Indefensible Double Standard in the Travel-Ban Case and Masterpiece Cakeshop*, *Vox* (June 27, 2018), <https://www.vox.com/the-big-idea/2018/6/27/17509248/travel-ban-religious-discrimination-christian-muslim-double-standard> [<https://perma.cc/54YE-Q29N>] (noting that "the different results in the two cases arise from the application of a double standard between immigration (especially

may indeed be explained by their divergent institutional and substantive contexts. While the *Hawaii* Court was mindful of separation of powers concerns, which were especially prominent given the overlapping contexts of national security and immigration,²⁴³ the *Masterpiece* Court found itself less constrained in the “very different context [of] an adjudicatory body deciding a particular case” of domestic consequence.²⁴⁴ Thus, despite broader disagreement “on the question whether statements made by *lawmakers* may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion,”²⁴⁵ the Supreme Court was willing to take such statements into account in *Masterpiece*, even going so far as to ascribe the views of one member to an entire panel where a state administrative adjudication was concerned.

B. *Critiquing Process Scrutiny*

The judicial reluctance to spell out precisely how institutional concerns might bear on process scrutiny may be related to a more deep-seated and long-held reluctance to delve into political branch process, especially in constitutional adjudication.²⁴⁶ Some scholars, for their part, have long argued that courts lack the institutional capacity to understand, much less second-guess, the wide-ranging inquiry that defines the legislative process.²⁴⁷ Other scholars have also equated procedural review

when linked to national security) and other areas of government policy”); see also *Hawaii*, 138 S. Ct. at 2446–47 (Sotomayor, J., dissenting) (expressing dismay over the inconsistencies between the majority opinions in *Hawaii* and *Masterpiece* related to the same question of government neutrality toward religion); *infra* note 275.

243. See *Hawaii*, 138 S. Ct. at 2419–20 (indicating a narrower, more constrained judicial inquiry in light of the immigration and national security issues at hand).

244. *Masterpiece*, 138 S. Ct. at 1730.

245. *Id.* (emphasis added).

246. See Linde, *supra* note 26, at 223–24, 227 (characterizing as unfeasible any judicially imposed obligation that lawmakers follow certain procedures such as considering evidence, attending committee meetings, or voting by proxy, as well as rejecting the idea “that due process makes such demands on the process of political decision”).

247. See Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. Rev. 1915, 1927 (2011) (identifying the most frequent objection to such review as a violation of the separation of powers); Coenen, *Pros and Cons of Semisubstantive Rules*, *supra* note 32, at 2869 (describing and countering the argument that judicial analysis of the legislative process would defy a “strong tradition of judicial noninterference in the internal operations of political decision makers”); Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. Chi. L. Rev. 655, 752 (2017) (analyzing the Supreme Court’s enrolled-bill doctrine, which accepts at face value Congress’s assertion that a given bill has passed both chambers, and describing the rule as a “species of the broader principle that the Court lacks power to police the internal procedures of the legislative branch”); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 Yale L.J. 1707, 1755 (2002) (criticizing arguments permitting the Court to second-guess congressional factfinding because the Court is not competent to “generaliz[e] about political processes”); Victor

with the kind of improper intrusion into the prerogative of a coequal branch that confuses Congress for a lower court or an administrative agency.²⁴⁸ While the state courts have a more fully developed doctrine of

Goldfeld, Note, Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Through Judicial Review of Congressional Processes, 79 N.Y.U. L. Rev. 367, 381 (2004) (arguing for review of legislative deliberation but refraining from encouraging review of, or demanding more rigorous, factfinding); cf. Phillip P. Frickey, The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and *United States v. Lopez*, 46 Case W. Res. L. Rev. 695, 697–98, 706–07, 728–29 (1996) (“My conclusion is that the approach taken in *Lopez* [scrutinizing Congress’s lack of findings in passing the Gun-Free School Zones Act of 1990] . . . in principle cannot be cabined short of having applications outside the review of commerce-power exercises.”).

248. See A. Christopher Bryant & Timothy J. Simeone, Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes, 86 Cornell L. Rev. 328, 369 (2001) (“The Court’s recent imposition of a requirement that Congress compile a formal legislative record in support of the exercise of its constitutional authority is not only inconsistent with the Court’s own precedents, but is also ill advised.”); William W. Buzbee & Robert A. Schapiro, Legislative Record Review, 54 Stan. L. Rev. 87, 90–91 (2001) (“Legislative record review . . . resurrects a form of scrutiny of congressional purposes that the Court long ago disavowed as unworkable and unjustifiable.”); Ruth Colker & James J. Brudney, Dissing Congress, 100 Mich. L. Rev. 80, 83 (2001) (“[T]he new activist majority has treated the federal legislative process as akin to agency or lower court decisionmaking; in doing so, the Court has undermined Congress’s ability to decide for itself how and whether to create a record in support of pending legislation.”); Frickey & Smith, *supra* note 247, at 1749–50 (“[T]he judicial intrusion into internal congressional processes seems in tension with the Constitution itself, which provides that each house is responsible for making its own rules. . . . It is [deeply problematic] for the Court to impose procedural obligations upon Congress going far beyond the Constitution or the houses’ own rules.”); Harold J. Krent, Turning Congress into an Agency: The Propriety of Requiring Legislative Findings, 46 Case W. Res. L. Rev. 731, 733–34 (1996) (“[R]equiring [legislative] findings may denigrate the respect due a coordinate branch of government.”); Glen Staszewski, Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy, 56 Vand. L. Rev. 395, 467–70 (2003) (“[J]udicial invalidation of congressional legislation raises separation of power concerns because Congress is a coordinate branch of government that is expressly authorized by the Constitution to make laws within the scope of its enumerated powers.”).

procedural review,²⁴⁹ the federal system generally leaves the correction of process failure to the political branches.²⁵⁰

Still, there is an emerging literature—some building on Ely’s theory of representation reinforcement,²⁵¹ others on Linde’s “due process of lawmaking”²⁵²—that engages a more expansive form of procedural review. Some scholars argue that a court should review the constitutionality of a law not only by review of its content (or substance) but also through its process of enactment.²⁵³ This form of “semisubstantive” review of legislation has a rich pedigree—extending as far back as *McCulloch v. Maryland*²⁵⁴—and takes on manifold forms. It can be expressed by a court’s questioning of how a law is enacted, including the

249. Notably, judicial review of procedure is somewhat more common in state courts. See, e.g., Frickey & Smith, *supra* note 247, at 1712 (noting the prevalence of state court review of certain procedural rules, particularly in the context of ballot initiatives); see also Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 *Utah L. Rev.* 957, 993–94 (noting the trend in state courts to give deference to legislative processes in assessing whether the underlying legislation comports with single-subject bill requirements); Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 *Harv. J. Legis.* 103, 103–05 (2001) (“State constitutions contain a variety of provisions governing legislative procedures.”); Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 *U. Pitt. L. Rev.* 797, 798 (1987) (“[T]he legislative articles of virtually all state constitutions contain a wide range of limitations on state legislative processes.”).

250. See *supra* note 248 and accompanying text. A further argument against judicial review of legislative procedure is grounded less in comparative institutional expertise and more in a certain confidence that the political branches have the willingness and inclination to correct their mistakes. On this view, legislatures will remedy flawed legislation, and if they fail to do so, executive branch officers will refuse to enforce. See Linde, *supra* note 26, at 242–44 (expressing confidence that the political branches will remedy procedurally deficient laws by reenacting them or through nonenforcement). This theory of self-regulatory politics suggests that even while a small number of legislators might “cut procedural corners,” their transgressions will be remedied by either the legislative body’s own oversight functions, the executive branch enforcement function, or the electorate, which will correct their representatives through either elections or referenda. *Id.* at 241–42.

251. See *supra* section I.B.1.

252. See *supra* section I.B.2.

253. See Coenen, *Pros and Cons of Semisubstantive Rules*, *supra* note 32, at 2838; see also Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 *S. Cal. L. Rev.* 1281, 1281–83 (2002) (“[When invoking semisubstantive review,] some procedural omission by the lawmaker—rather than an incurably substantive flaw in the end product of its work—lays the groundwork for a judicial intervention that invalidates the challenged rule or negates how that rule otherwise would operate.”).

254. See 17 U.S. 316 (4 Wheat.), 387 (1819) (suggesting that it is incumbent on the judiciary to “see that what has been done is not a mere evasive pretext, under which the national legislature travels out of the prescribed bounds of its authority, and encroaches upon state sovereignty, or the rights of the people.”); see also Coenen, *Pros and Cons of Semisubstantive Rules*, *supra* note 32, at 2870.

sufficiency of the governing body's legislative findings;²⁵⁵ the extent to which an improper intent can be imputed into a given law;²⁵⁶ the time period in which a law was enacted as measured against more contemporary mores and usefulness;²⁵⁷ and the relative accountability of the institution or body enacting the law.²⁵⁸

For its adherents, semisubstantive review has an inherently “self-limiting” nature by remanding to the enacting body rather than ruling the law out of bounds under any circumstances.²⁵⁹ Thus, when a court identifies an error or flaw in the process of enactment and invalidates a law under such review, the legislative body may proceed with enacting the same content into law, provided that it complies with the necessary “deliberation-enhancing” protocols.²⁶⁰ Critics of this form of review argue that it wrongly transplants the deliberative mechanisms associated

255. *Id.* at 2845 (discussing *United States v. Lopez*, 514 U.S. 549 (1995)). *Lopez* triggered a wave of criticism, with scholars strenuously opposing the idea that the Court might approve certain laws “as long as Congress engaged in due process of lawmaking by drafting statutes carefully and documenting, either by formal or informal findings, a connection between interstate commerce and the federal statute in question.” Frickey & Smith, *supra* note 247, at 1721. The Rehnquist Court reprised its “due deliberation” requirement in cases such as *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), underscoring the idea that deference would be forthcoming when federal law was supported by a meticulous factual record demonstrating a close fit between the particular aims of a given statute and the basis of constitutional power invoked to pass it. See Frickey & Smith, *supra* note 247, at 1720–23. In subsequent cases, the Court continued to dedicate substantial analysis to perceived procedural inadequacies in various pieces of federal legislation. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001) (finding Congress could not subject the states to money damages under the Americans with Disabilities Act because the legislative record contained insufficient evidence of *state* discrimination against the disabled); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89–90 (2000) (finding that the Age Discrimination in Employment Act could not override state sovereign immunity without congressional authority and searching the legislative record for evidence that the law was congruent and proportional to the identified unconstitutional conduct); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999) (concluding that suits against states under the Patent Remedy Act were not sustainable under Section 5 of the Fourteenth Amendment, in part because the legislative record showed “no pattern of patent infringement by the States, let alone a pattern of constitutional violations”).

256. See Coenen, *Pros and Cons of Semisubstantive Rules*, *supra* note 32, at 2848 (discussing *Washington v. Davis*, 426 U.S. 229 (1976)); see also *supra* notes 61–63 and accompanying text.

257. See Coenen, *Pros and Cons of Semisubstantive Rules*, *supra* note 32, at 2849–50 (discussing *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Lawrence v. Texas*, 539 U.S. 558 (2003)).

258. See *id.* at 2852 (discussing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

259. See *id.* at 2872 (“The key point is that semisubstantive decision making has a built-in self-limiting quality. . . . It seems strange to say that those ‘look never again’ rules interfere less with legislative integrity than do ‘look again’ rules that specifically invite legislative majorities to overturn the judiciary’s action.”).

260. *Id.* at 2867.

with APA review of administrative action to statutory interpretation.²⁶¹ By focusing on connections between the enactment process and governmental motive, process scrutiny shares some of the features of semi-substantive review, including normative concerns about political branch evasiveness through pro forma compliance with procedural standards. That issue, as well as several other related matters, is explored in the next Part.

V. THE NORMATIVE IMPLICATIONS OF PROCESS SCRUTINY

While representation reinforcement provides an appealing lens for understanding the function of the court in protecting against wholesale exclusion, it can leave something to be desired in terms of securing concrete protections.²⁶² A model which instead looks to objective indices of procedural regularity, or small-p process, will not only require a qualitative assessment of the context of a given policy but also draw on long-established and objective standards set by the political branches themselves. Such an approach may also be less subject to political swings on the bench and may serve as a more effective mechanism for identifying improper legislative intent than current methods. Of course, such an approach presents potential pitfalls as well.

A. *The Appeal of Process*

One attraction of a procedural approach is that it provides a set of objective criteria for motivational analysis. On this view, process scrutiny offers a more concrete and identifiable set of benchmarks that can address—and potentially avoid—many of the current difficulties involved with ascertaining the motives of lawmakers, including the concern that such an inquiry inevitably reduces to a mere ad hoc, subjective assessment. Moreover, to the extent that relatively powerless persons and marginalized groups often experience the greatest impact of a law or policy that is procedurally tainted, a process-based approach to motivational analysis can inform constitutional claims by groups that do not receive special scrutiny under current constitutional doctrines.²⁶³ Of course, process scrutiny has drawbacks as well—in particular, that it induces legislatures to favor form over substance and use spurious procedures to achieve judicial validation for discriminatory policies. Hence, the framework must be applied carefully, with courts ensuring that process not become a fig leaf behind which the government can avoid scrutiny.

261. See Frickey & Smith, *supra* note 247, at 1710–11.

262. See *supra* notes 44–53 and accompanying text.

263. See Yoshino, *supra* note 4, at 756–57 (noting the closure of heightened scrutiny to new classifications such as age, disability, and sexual orientation).

Still, when one reviews the process by which a policy or law was enacted and compares that process with the usual and established norms of law and policymaking, one has a baseline—or, at least, a range—of standard and normal ways of performing these tasks. When it is apparent that a law or policy under examination was enacted well outside the range of normal standards and procedures, the basis for judicial scrutiny occupies a more neutral ground. In such cases, process scrutiny avoids the need to divine the collective intent of a multimember legislature or psychoanalyze a coordinate branch of government based on mere speculation or subjective interpretations.

To illustrate, consider a metaphorical equivalent in the criminal context. In the case of a person charged with assault, evidence of a history of intemperate remarks or a hostile personality may not be entirely irrelevant, but it is far weaker evidence than showing the observable, measurable, and recorded steps a defendant took in carrying out an action. When the defendant's observable and measurable history of behavior carrying out an action—buying a baseball bat, going to the victim's house, washing blood off the bat, burying bloodied clothing—is sufficiently apparent, the defendant's state of mind—that is, animus toward the victim—becomes far less necessary to prove the prosecution's case. Similarly, as in the case studies explored in this Article, the observable and recorded steps taken by legislative²⁶⁴ or executive actors²⁶⁵ in creating law and policy provide more easily recognized and objective evidence of intent.

Of course, different jurists will disagree in their assessment of even such “objective” factors. Indeed, this is precisely what happened in *Hawaii*. For the lower courts, the events that led to the Proclamation were devoid of the thorough review the government claimed to follow, such that a faulty process, combined with discriminatory statements, supported a finding that the policy was grounded in animus.²⁶⁶ But the Supreme Court, relying on the same record, found sufficient vetting behind the policy to warrant deferential review.²⁶⁷ In other words, even when courts agree that a baseline level of procedural rigor is a necessary predicate for deference, plaintiffs may still face hurdles demonstrating a sufficient level of procedural irregularity if the reviewing court is prone to reflexively accept the government's claim to have followed procedural protocol.

264. See *supra* section II.A.

265. See *supra* Part II.

266. See *supra* Part III.

267. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2421–22 (2018) (concluding that, based on the thorough process the government followed, “we cannot substitute our own assessment for the Executive's predictive judgments”).

B. *The Disadvantages of Process*

Because contemporary forms of discrimination are often less overt (and thus easier to mask) than when the Court's discriminatory intent doctrine was born,²⁶⁸ a requirement of even circumstantial evidence of discriminatory intent can present roadblocks for plaintiffs seeking to invalidate legislation under the Equal Protection Clause. This is even truer because, under *ex ante* review,²⁶⁹ legislative bodies of average sophistication can hide subtle forms of discrimination under processes that satisfy superficial standards of deliberateness.²⁷⁰ Thus, one serious concern with jurisprudential frameworks that emphasize small-p process is that they may too easily allow legislatures to use procedure as a fig leaf, concealing malintent while obtaining judicial validation for problematic policies.²⁷¹

Adopting that view, Professor Shirin Sinnar has criticized *Hawaii* as providing "a detailed roadmap for the return of racial origin quotas."²⁷² After *Hawaii*, she writes,

[A]n administration choosing to ban, say, Mexicans, Central Americans, or Africans, need only do the following: 1) identify a legitimate objective, such as vetting nationals or deterring crime; 2) draft an order that cites that objective to exclude certain nationalities, while making no explicit reference to race; 3) leave out some countries from the order that are racially similar to the groups excluded and include others that are not, to avoid the appearance of bias; 4) generate a secret report based on a "worldwide" multi-agency review that purports to justify the country selection; 5) exempt some categories of immigrants from certain countries to appear less arbitrary; 6) allow for individual waivers, at least in theory; and 7) after the order is issued, make small modifications to appear responsive to changed conditions. As long as the administration does that, the President should feel free to dehumanize and race-bait all he wants on Twitter. Today's decision suggests that five justices of our highest Court will not object. Indeed, they have shown the way.²⁷³

268. See Russell K. Robinson, *Unequal Protection*, 68 *Stan. L. Rev.* 151, 172 (2016) ("[S]trict scrutiny rarely benefits people of color because modern racial discrimination does not rely on overt racial classifications to do its dirty work."). Where group behavior is concerned, differences of opinion and varying motivations make intent-based inquiries especially difficult to discern. See *supra* note 34 and accompanying text.

269. See *supra* section III.B.

270. See *supra* note 4 and accompanying text.

271. Cf. Martinez *supra* note 184, at 1031–32 (noting cases in which "process is intentionally used to avoid difficult substantive questions").

272. Shirin Sinnar, *Trump v. Hawaii: A Roadmap for New Racial Origin Quotas*, SLS Blogs: Legal Aggregate (June 26, 2018), <https://law.stanford.edu/2018/06/26/trump-v-hawaii-a-roadmap-for-new-racial-origin-quotas/> [https://perma.cc/QXL7-6XEY].

273. *Id.*

As Sinnar explains, one serious danger with a process-based approach is that an insincere and essentially vacuous “process” could satisfy a court’s formal requirement without any real commitment to a well-considered (or even remotely considered) policy.²⁷⁴ So long as the court’s requirement for pro forma process is followed, the government would be subject to little accountability.

In a similar vein, commentators have noted the peculiar way that the Supreme Court chose not to comb the record too deeply for evidence of animus in *Hawaii* while going to great lengths to do so in *Masterpiece*.²⁷⁵ These observations underscore the perennial concern that judicial review invites application of policy preferences, in particular when deciding whether to apply heightened scrutiny, and that even tests that measure objective procedural rigor are still prone to the ideological and subjective influences of the Justices themselves.²⁷⁶

274. See *id.*

275. See, e.g., Erwin Chemerinsky, Not a Masterpiece: The Supreme Court’s Decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, ABA, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/not-a-masterpiece/ [<https://perma.cc/9HLC-HXS9>] (last visited Aug. 27, 2019) (“It is ironic that [the evidence in *Masterpiece*] was deemed sufficient to find a violation of the First Amendment, when in the travel ban case—*Trump v. Hawaii*—the Court found no constitutional violation”); see also *supra* note 242. Commenters have noted a similar lack of record combing in the gerrymandering context. See, e.g., Cristian Farias, The Supreme Court Continues to Chip Away at Protections for Minority Voters, N.Y. Mag.: Intelligencer (June 25, 2018), <http://nymag.com/daily/intelligencer/2018/06/abbott-v-perez-supreme-court-rules-on-racial-gerrymandering.html> [<https://perma.cc/W94H-A4MT>].

276. One additional decision from the Court’s 2017 Term provides a further cautionary tale about the ability of jurists to find common ground in their mutual understandings of what legislative regularity actually is, as well as its constitutional implications. In *Abbott v. Perez*, the Supreme Court reviewed a Texas district court’s decision to strike down the state’s redistricting plan as violative of statutory and constitutional rules against discrimination in the redistricting process, including the Voting Rights Act. See 138 S. Ct. 2305, 2313–14, 2318 (2018). Invoking *Arlington Heights*, the Texas district court found that the Texas Legislature’s 2013 redistricting plan for the United States House of Representatives, Texas House of Representatives, and Texas Senate had a discriminatory effect and was “discriminatory at its heart.” *Perez v. Abbott*, 274 F. Supp. 3d 624, 643, 651–52 (W.D. Tex. 2017). This holding was informed in significant part by procedural irregularity in enactment. Specifically, the lower court relied on evidence that the Texas Legislature passed the bill quickly during a special session without any deliberative review to remove discriminatory “taint” from a 2011 plan that had previously been struck down. It followed that the discriminatory taint found in the 2011 plan carried over to the State’s 2013 plan. *Id.* at 652. However, in June 2018, the Supreme Court decided that evidence of “brevity of the legislative process [does not] give rise to an inference of bad faith.” *Abbott*, 138 S. Ct. at 2328–29. Because the legislative body had legitimate reasons for the process it followed and because “[p]ast discrimination cannot . . . condemn governmental action that is not itself unlawful,” the plaintiffs’ evidence of purportedly bad process could not overcome the presumption of constitutionality. *Id.* at 2324. Therefore, because the majority found the facts on the record to suggest that intent was legitimate and enough “good process” was followed, the Court did not apply heightened scrutiny to any circumstantial evidence. See *id.* at 2326–

Notwithstanding the concerns of Sinnar and others, the idea of process scrutiny, when followed carefully, need not spell absolute deference to makeshift procedures. On the contrary, courts can guard process scrutiny against governmental efforts to game process as a way to mask otherwise tainted policies. The lower court decisions both before and after *Hawaii* are evidence of this.²⁷⁷

C. *Process and Animus*

One additional point of interest concerns the relationship between process scrutiny and the Court's "animus" doctrine, which has largely overshadowed (if not overtaken) the *Arlington Heights* framework, especially during the past twenty-five years. For this reason, many scholars have concentrated on animus as a powerful tool to root out discrimination.²⁷⁸ While this doctrinal shift may have occurred because courts were reluctant to review a legislative record with skepticism unless there were clear traces of political exclusion or minority capture,²⁷⁹ it may be worth examining what gets lost when the Court shifts its inquiry from the connection between the process of lawmaking and governmental intent on the one hand to a more subjective, free-flowing inquiry into animus on the other.

30. The discrepancy between Justice Alito's analysis for the majority and the lower court's interpretation of process failure bears remarkable similarity to the differing analysis by the Supreme Court and the lower courts in *Hawaii* insofar as the travel ban is concerned. In both cases, the lower courts were willing to infer that past discriminatory statements attributed to the enacting body tainted, to some extent, any semblance of "good process."

277. See *supra* section III.A–B.

278. See Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 Sup. Ct. Rev. 183, 284 ("Animus analysis is successfully doing the work that arguments for heightened scrutiny have failed to do in equal protection cases challenging anti-gay discrimination."); Barbara J. Flagg, "Animus" and Moral Disapproval: A Comment on *Romer v. Evans*, 82 Minn. L. Rev. 833, 851–54 (1997) (arguing that, after *Romer*, "moral disapproval cannot be distinguished from animus" and concluding that "*Romer* does signal the beginning of a new era of equality for lesbians and gay men"); Steven Goldberg, *Beyond Coercion: Justice Kennedy's Aversion to Animus*, 8 U. Pa. J. Const. L. 801, 801 (2006) (arguing that the logic behind the animus doctrine can be extended to challenges under the Establishment Clause to invalidate laws that make "a reasonable observer feel like a pariah in the community"); David J. Herzig, *DOMA and Diffusion Theory: Ending Animus Legislation Through a Rational Basis Approach*, 44 Akron L. Rev. 621, 626–28 (2011) (explaining that because "the Court will not grant suspect classification . . . to same-sex couples, the ruling on DOMA will be governed by the rational basis standard," meaning it can be defeated by finding animus or reaching a "tipping" point in the evolution of social mores); Pollvogt, *supra* note 52, at 889 (arguing that "animus . . . functions as a doctrinal silver bullet" for groups that lack suspect class status); *Developments in the Law—Chapter Four: Animus and Sexual Regulation*, 127 Harv. L. Rev. 1767, 1767–68 (2014) [hereinafter *Animus and Sexual Regulation*] (arguing that because animus is a "nimble trope for framing and assessing negative attitudes toward sexual minorities by the political majority," it may be a powerful legal mechanism for "embracing legal priorities outside of the contemporary mainstream").

279. See Bertrall L. Ross II, *The State as Witness: Windsor, Shelby County, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. Rev. 2027, 2035 (2014).

While there is some disagreement about the cases that actually constitute the Court's animus canon,²⁸⁰ the 1996 decision *Romer v. Evans*²⁸¹ is widely recognized as a paradigm illustration. *Romer* invalidated Amendment 2, a ballot initiative that amended the Colorado Constitution to nullify all existing nondiscrimination protections for gays, lesbians, and bisexuals in Colorado and prohibited the enactment of new ones.²⁸² Testing the law against rational basis review, as the Court had done in *United States Department of Agriculture v. Moreno*²⁸³ and *City of Cleburne v. Cleburne Living Center*,²⁸⁴ Justice Kennedy found that the law in *Romer* did not "bear[] a rational relation to some legitimate end" and that the law "fails, indeed defies, even this conventional inquiry."²⁸⁵ The Court thus invalidated Amendment 2 as motivated by invidious intent.²⁸⁶

280. Most scholars attribute the flourishing of the doctrine to a series of rulings penned by Justice Kennedy that placed important boundaries on the scope of government action while expanding the substantive reach of due process and equal protection, primarily to gays and lesbians, beginning with *Romer v. Evans*, 517 U.S. 620 (1996), and culminating in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). See, e.g., *United States v. Windsor*, 570 U.S. 744, 770 (2013) (invalidating the Defense of Marriage Act's (DOMA) definition of marriage as restricted to being between a man and a woman on animus grounds); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (invalidating a Texas anti-sodomy law on animus grounds); *Carpenter*, supra note 278, at 187 (noting how animus-based decisions have "charted the remarkable rise of respect for the dignity and rights of homosexuals"); *Animus and Sexual Regulation*, supra note 278, at 1767 (noting that the Court has recently shown "awareness of—and antagonism toward—government actions fueled by animus toward sexual minorities" and that "anti-gay animus has played a recurring and pivotal role in the landmark trio of *Romer v. Evans*, *Lawrence v. Texas*, and, most recently, *United States v. Windsor*" (footnotes omitted)).

281. 517 U.S. 620.

282. See *id.* at 623–26. Amendment 2 also prevented any legislative or administrative arm of state or local government from enacting or enforcing any policies making "homosexual, lesbian or bisexual orientation" the basis for "minority status, quota preferences, protected status or claim of discrimination." *Id.* at 624.

283. 413 U.S. 528, 533 (1973). *Moreno* invalidated a provision of federal law that denied food-stamp benefits to households containing individuals unrelated by blood or marriage. *Id.* at 529. The Court cited record evidence that the legislature chose the classification to punish "hippie communes" by denying them benefits and held that such "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.* at 534 (emphasis added).

284. 473 U.S. 432, 446 (1985). *Cleburne* struck down a town's denial of a special permit for a group home for mentally disabled individuals that other group-living homes were not required to obtain. *Id.* at 450. The majority held that the city's justifications for the special permit did not amount to legitimate state interests because they were based in "mere negative attitudes, or fear" and "an irrational prejudice against the mentally [disabled]." *Id.* at 448, 450.

285. *Romer*, 517 U.S. at 631–32. Kennedy noted that the law "impose[d] a special disability" upon gays, lesbians, and bisexuals, who were "forbidden the safeguards that others enjoy or may seek without constraint." *Id.* at 631.

286. Kennedy wrote for the Court, "We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do." *Id.* at 635.

It should be noted, first, that the Supreme Court's holding in *Romer* largely abandoned the process-driven analysis of the Colorado Supreme Court. In the state court proceedings, Colorado's highest court invoked Ely and Big-P process to focus on how Amendment 2 undermined the participatory rights of gays, lesbians, and bisexuals, who—unlike everyone else—were required to amend the state constitution before enacting favorable law.²⁸⁷ By analyzing the case through the prism of democratic deliberation rather than motivation, the Colorado Supreme Court avoided an inquiry into the intent of those who voted for it.²⁸⁸ While Kennedy's opinion did not ignore entirely these Big-P disenfranchising aspects of Amendment 2,²⁸⁹ his opinion focused far more heavily on the way that Amendment 2 deviated from a set of established and historically grounded legal traditions and norms,²⁹⁰ an approach he reprised in *United States v. Windsor*, again drawing connections between norm regularity and unconstitutional motivation.²⁹¹

287. See *Evans v. Romer*, 854 P.2d 1270, 1276–77, 1286 (Colo. 1993) (finding that Amendment 2 interfered with “the fundamental right to participate equally in the political process” and “impair[ed] a group’s ability to effectively participate . . . in the process by which government operates,” and requiring on remand that the State meet the most exacting level of scrutiny), cert. denied, 510 U.S. 959 (1993).

288. The Colorado Supreme Court’s decision to handle the case on such grounds reflected Ely’s argument that judicial exploration of motivations is unnecessary in cases of outright constitutional violation. This is because in those cases the violation sufficed to warrant striking down the legislation regardless of the motivations of the lawmakers. As Ely explained, judicial exploration of motivations is only appropriate when there is a claim that a “constitutionally gratuitous” benefit has been improperly withheld. Ely, *supra* note 5, 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.*

289. See *Romer*, 517 U.S. at 631 (observing how Amendment 2 limited the ability of gays, lesbians, and bisexuals to “obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State’s view, by trying to pass helpful laws of general applicability”).

290. For example, Kennedy found it significant that Amendment 2 bucked “the structure and operation of modern antidiscrimination laws”—specifically, a century’s worth of state and local lawmaking that steadily (if incrementally) expanded upon the innkeeper’s common law duty to serve all customers, covering a larger number of entities and protecting a greater number of groups from discrimination. *Id.* at 627–29. Amendment 2 reversed that pattern by, for the very first time, *excluding* a group from those protections, disrupting an “emerging tradition of statutory protection” that, prior to Amendment 2, had “follow[ed] a consistent pattern.” *Id.* at 628. In the argot of *Arlington Heights*, Amendment 2 engaged in “[d]epartures from the normal procedural sequence” as well as “[s]ubstantive departures” reflective of an improper legislative purpose. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

291. *Windsor* invalidated section 3 of the DOMA. *United States v. Windsor*, 570 U.S. 744, 775 (2013). In *Windsor*, Kennedy again focused on DOMA’s unusual and unprecedented nature. Never before had Congress enacted “a single, across-the-board federal definition of marriage.” See Carpenter, *supra* note 278, at 251. Previously, federal law had displaced state-law definitions only in narrow and specific circumstances—for instance, in immigration law (to ensure the bona fides of marriages for purposes of family-

Animus's evolution as the archetype of improper motivation has obscured the kinds of small-p frameworks that influenced *Arlington Heights* and its progeny—a point that has significance for the case law and surrounding scholarship.²⁹² Thus, while some have criticized the animus line of cases²⁹³ for disclaiming any bright-line heightened scrutiny or fundamental rights analysis,²⁹⁴ and for being prone to future alteration²⁹⁵ or even reversal,²⁹⁶ *Romer's* sidestepping of a highly plausible,

based immigration) or in Social Security (to verify income criteria). *Windsor*, 570 U.S. at 764–65. DOMA upheld that “history and tradition of reliance on state law to define marriage,” altering the delicate state–federal balance by rewriting the definition of “marriage” in “over 1,000 federal statutes and the whole realm of federal regulations.” Id. at 765, 768.

292. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (importing the *Arlington Heights* standard into the context of the Free Exercise Clause to help determine whether a law is religiously neutral).

293. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (recognizing the freedom of same-sex couples to marry and noting that “[i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society”); *Windsor*, 570 U.S. at 770 (finding DOMA’s definition of marriage unconstitutional based on its “avowed purpose and practical effect . . . to impose a disadvantage . . . upon all who enter into same-sex marriages” and that “interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute”); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (invalidating laws criminalizing sodomy and, in so doing, observing that gays and lesbians “are entitled to respect for their private lives”).

294. See, e.g., Michael C. Dorf, A Publicity Update and then Three Thoughts on Justice Scalia’s Dissent in *Windsor*, Dorf on Law (June 28, 2013), <http://www.dorfonlaw.org/2013/06> [<https://perma.cc/5Q3Q-6JKE>] (“[I]t would seem much more straightforward for the Court simply to say that laws drawing distinctions based on sexual orientation are subject to heightened scrutiny, either because sexual orientation distinctions simply are sex distinctions . . . or because LGBT persons have been subject to a history of discrimination”); see also Leonore Carpenter & David S. Cohen, A Union Unlike Any Other: *Obergefell* and the Doctrine of Marital Superiority, 104 *Geo. L.J. Online* 124, 125 (2016), <https://georgetownlawjournal.org/articles/155/union-unlike-any-other> [<https://perma.cc/6DFR-NAW8>] (“With *Obergefell*, the Supreme Court had an opportunity to . . . advance[] lesbian and gay rights by focusing on an equality analysis and clarifying whether sexual orientation is a suspect class. Instead, *Obergefell* is largely a lengthy paean to traditional marriage that advances fundamentally conservative notions of family and intimate relationships.”); Peter Nicolas, *Obergefell's Squandered Potential*, 6 *Calif. L. Rev. Cir.* 137, 138 (2015), <https://scholarship.law.berkeley.edu/clrcircuit/81/> [<https://perma.cc/2Q5A-B294>] (arguing that “Justice Kennedy squandered an important opportunity to leave a more enduring gay rights legacy”).

295. Cf. Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 *Harv. L. Rev.* 1, 2–3 (1975) (observing that much constitutional interpretation is best understood as “a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress”).

296. See Chris Babits, How Would Brett Kavanaugh Rule on Conversion Therapy?, *Wash. Post* (July 12, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/07/12/how-would-brett-kavanaugh-rule-on-conversion-therapy/?utm_term=.0889c84e1508 (on file with the *Columbia Law Review*); Shannon Price Minter, All the Damage Brett Kavanaugh Could Do to LGBT Rights, *Advocate* (July 12,

process-based rationale has had effects of its own. Even as some saw the *Hawaii* Court's references to the "animus" standard as a consensus mechanism for evaluating President Trump's travel ban,²⁹⁷ the majority and dissenting Justices reached entirely different outcomes on the import of the President's statements, illustrating the difficulty courts have with motivational analysis and the reason why a process-based approach could be preferable.²⁹⁸

D. *Process Scrutiny and Emerging Rights Claims*

Process scrutiny could be both promising and dangerous for the protection of civil rights. On the one hand, underrepresented groups that lack majoritarian political gains may find it helpful to raise procedural malfunction as part of a larger strategy to galvanize support for their claims to substantive protection. While it is nearly impossible to prove that a law is "irrational," or that a law that burdens a particular community is so devoid of rationality that it can only be grounded in animus, using procedural malfunction as a proxy for motivation may restore more fully protective possibilities that are obscured under more traditional rights doctrines. On the other hand, as *Hawaii* indicates, the converse can also be true: The political branches' ability to demonstrate reasonable compliance with established procedural norms can be meaningful, if not dispositive, to avoiding the taint, or proving the absence, of improper intent. And, as both *Hawaii* and *Masterpiece Cakeshop* indicate, deployment of this form of procedural review will not always guarantee protections for plaintiffs who are part of vulnerable or politically powerless groups.

Yet many of the most vulnerable populations are subject not only to harsh substantive laws but procedurally defective ones as well. From transgender individuals denied access to bathrooms²⁹⁹ to undocumented

2018), <https://www.advocate.com/commentary/2018/7/12/all-damage-brett-kavanaugh-could-do-lgbt-rights> [<https://perma.cc/ZQN8-S5BF>]; Bob Moser, What Trump's Supreme Court Nomination Means for LGBTQ Rights, *Rolling Stone* (July 10, 2018), <https://www.rollingstone.com/politics/politics-news/what-trumps-supreme-court-nomination-means-for-lgbtq-rights-697941/> [<https://perma.cc/Y4PA-A79T>].

297. Justice Kennedy's concurring opinion in *Trump v. Hawaii* described the Court's invocation of rational basis review as reflecting "some common ground between the" majority and dissenting opinions, both of which "acknowledge that in some instances, governmental action may be subject to judicial review to determine whether or not it is 'inexplicable by anything but animus.'" See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (Kennedy, J., concurring) (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)).

298. See *id.* at 2420–21 (quoting *Romer*, 517 U.S. at 632, 635); see also *supra* sections III.A.2–B. Chief Justice Roberts's majority opinion "look[ed] behind the face of the Proclamation to . . . apply[] rational basis review" and thus apparently entertained at least some of President Trump's remarks about Islam. *Hawaii*, 138 S. Ct. at 2402.

299. For example, when the State of North Carolina passed HB2, see *supra* note 53, it chose to legislate through a flawed process that bespoke the legislature's ill will toward transgender people. The General Assembly abruptly convened a chaotic, one-day "special session." Dave Philipps, *North Carolina Bans Local Anti-Discrimination Policies*, N.Y.

foreign nationals facing harsh immigration restrictions,³⁰⁰ groups seeking to vindicate the Court's counter-majoritarian prerogative may want to highlight small-p process flaws as part of a two-front strategy grounded in procedural irregularity and invidious intent.

In short, at a time when our country finds itself more divided and our politics more partisan than ever,³⁰¹ party leaders, concerned that the ordinary sunlight of committee hearings and floor debates will frustrate or scuttle their plans, are increasingly choosing to dispense with pro-

Times (Mar. 23, 2016), <https://www.nytimes.com/2016/03/24/us/north-carolina-to-limit-bathroom-use-by-birth-gender.html> [<https://perma.cc/C96Z-ST5B>]. Legislators did not see the bill before it was released, and the legislation was “proposed and signed into law within 24 hours” due in large part to the myth that permitting transgender individuals to use those facilities “would lead to men posing as trans to sexually harass and assault women in women’s facilities.” German Lopez, HB2, North Carolina’s Sweeping Anti-LGBTQ Law, Explained, Vox, <https://www.vox.com/2016/2/23/11100552/charlotte-north-carolina-lgbtq-pat-mccrory> [<https://perma.cc/LFK4-FEYN>] (last updated Mar. 30, 2017) (describing the hasty rollout of HB2); Nina Martin, Why North Carolina’s New Anti-LGBT Law Is a Trojan Horse, ProPublica (Apr. 5, 2016), <https://www.propublica.org/article/why-north-carolinas-new-anti-lgbt-law-is-a-trojan-horse> [<https://perma.cc/9ZPP-W8BT>] (noting that the bill’s drafters called a special one-day session with a single day’s advance notice to consider the bill and did not release the text of the bill to the public until just before the committee hearings).

300. In one prominent example, when the State of Arizona in 2012 attempted to resist the Obama Administration’s Deferred Action for Childhood Arrivals (commonly known as DACA) program by denying its recipients state driver’s licenses, Arizona’s then-Governor Jan Brewer chose to do so through an executive order that short-circuited a state administrative process already underway. *Ariz. Dream Act Coal. v. Brewer*, 945 F. Supp. 2d 1049, 1069 (D. Ariz. 2013), rev’d and remanded, 757 F.3d 1053 (9th Cir. 2014). Before the administrative process had reached a conclusion, Brewer issued her executive order to make clear there would be “no drivers [sic] licenses for illegal people.” *Id.* at 1054–55. Brewer’s decision to override the State’s own experts, whose investigation was still in process, meant that the agency “had no discretion to reach a different conclusion.” *Id.* at 1069. These actions raised the concern that executive action was short-circuiting a state agency process and possibly countermanning the government’s own best evidence. The reviewing court, measuring Brewer’s actions against her justifications, found that her rationale would likely fail rational basis review. *Id.* at 1072.

301. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 *Calif. L. Rev.* 273, 276–81, 291–324 (2011) (describing, among other things, primary elections, gerrymandered election districts, and centralization of House and Senate power in the hands of party leaders as the structural causes behind the rise of extreme partisan polarization); *The Partisan Divide on Political Values Grows Even Wider*, Pew Research Ctr. (Oct. 5, 2017), <https://www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/> [<https://perma.cc/DZA9-V2W7>] (“The divisions between Republicans and Democrats on fundamental political values . . . reached record levels during Barack Obama’s presidency. In Donald Trump’s first year as president, these gaps have grown even larger.”); *Partisanship and Political Animosity in 2016*, Pew Research Ctr. (June 22, 2016), <http://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016/> [<https://perma.cc/6RKT-7NLN>] (“Partisans’ views of the opposing party are now more negative than at any point in nearly a quarter of a century.”).

cedural requirements to pursue highly partisan goals.³⁰² Many of these laws target “discrete and insular” groups—African American voters,³⁰³ Muslim foreign nationals,³⁰⁴ and transgender individuals,³⁰⁵ to name just a few. As legislators shrug off ordinary protocols with greater frequency, passing laws at breakneck speed on expedited timelines, deliberately shutting out dissenting voices and consultation with outside experts, and prohibiting open floor deliberation, the need for judicial protection may increase—especially when such concerns appear to reveal a hidden motive to exclude or punish an already-vulnerable group. In addressing those concerns, process scrutiny provides important tools to complement other constitutional theories, filling holes in the current doctrine, if not breaking some new ground.

CONCLUSION

Process scrutiny fills a gap in the Court’s intent doctrine while addressing the problem, noted by commentators, that the Supreme Court’s intent doctrine encourages policymakers to conceal invidious purposes behind facially neutral language. With its *ex post* and *ex ante* dimensions, small-*p* process-based frameworks bring important benefits, not least a set of objective criteria grounded largely in the political branches’ own chosen practices rather than substantive considerations of value and intent. Naturally, however, laws invalidated on the terrain of process could potentially (though not always) be reenacted through more ordinary procedures. And giving the courts the final word on process could imply ceding much of the ground of substance to the political branches, which many scholars (and some judges) will find worrisome. But during times of heightened partisan rancor and division, when rights are subject to whimsical or unpredictable infringements, process scrutiny has an obvious attraction. A renewed attention to clear, objective evidence of adherence to process in judicial review could rejuvenate a sense of legitimacy among the political branches and authority on the bench.

302. See Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress* 257 (5th ed. 2016) (“In recent Congresses, party leaders have perceived the circumstances to be ‘extraordinary’ considerably more frequently than in the past, in part at least because the high partisan polarization makes the crafting of legislation that can pass the chamber a more delicate political task.”). While the extent of procedural irregularity may be more pronounced than ever, it is not entirely a new phenomenon. See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 *Colum. L. Rev.* 223, 223 (1986) (“Too often the process seems to serve only the purely private interests of special interest groups at the expense of the broader public interest it was ostensibly designed to serve. . . . [T]he current distrust of government . . . is not new by any means.”).

303. See *supra* notes 71–109 and accompanying text.

304. See *supra* notes 150–167 and accompanying text.

305. See *supra* notes 197–213 and accompanying text.