Process Scrutiny: Motivational Inquiry and Constitutional Rights

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Judicial inquiries into political branch motivation have long bedeviled courts and scholars. Especially vexing are questions regarding judicial review of facially neutral government action. The canonical decision in this arena, Washington v. Davis, holds that facially neutral legislation or administrative action resulting in a disparate impact on the basis of race or gender will not on its own trigger heightened scrutiny. In order to invoke more careful scrutiny of government action, there must be evidence of discriminatory intent. Many scholars understand the Court’s intent doctrine to license malintent by encouraging policymakers to conceal invidious purposes behind facially neutral language. For this reason, many argue that Davis is a low point for equal protection that fails to address the many forms of state-sponsored discrimination.

This Article offers a different approach to motivational inquiries by examining how the political process itself can be an important site of information. Legislative and executive decision-making—or “small-p” process—can bear heavily on the question whether the government has acted properly or improperly. This idea of “small-p” process scrutiny stands in contradistinction to a more well-established notion, famously articulated by process theorist John Hart Ely, that flaws within deliberative processes can invite, if not require, judicial protection of excluded interests. Ely’s classic rationale for heightened scrutiny was based upon the Constitution’s role in preserving accessibility to the political process—what I call “Big-P” process. Small-p processes, by contrast, concern more evident procedures, such as the quality or duration of deliberation, the involvement of experts, the facilitation of regular public hearings and open debate, or the documentation of studies and reasoning behind various policies.

This Article seeks to overcome the difficulties of uncovering and operationalizing “Big-P” process failure by showing how a breakdown in more evident and easily detectable kinds of process failure can help bring to the surface forms of improper intent that are otherwise hard to see. I posit that courts can rely upon “small-p” indicia to decipher motivation, especially where there is no record of Big-P political failure or similar smoking-gun evidence of discrimination. By shifting the inquiry from interest-group dynamics in the legislative process to more
ordinary forms of process, I offer a method that is available to courts to surface malintent (or vindicate government intent) trans-substantively, and in ways already established in 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 grounded in the political branches’ own chosen practices. Yet if 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 deliberative procedure, setting the stage for evasion.

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INTRODUCTION

Judicial inquiries into political branch motivation have long bedeviled courts and scholars.\(^1\) Especially vexing are questions regarding judicial review of facially neutral government action. The canonical decision in this arena, Washington v. Davis, holds that facially neutral legislation or administrative action resulting in a disparate impact on the basis of race or gender will not on its own trigger heightened scrutiny.\(^2\) In order to trigger more careful scrutiny of government action, there must be evidence of discriminatory intent. Many scholars understand the Court’s intent doctrine to license malintent by encouraging policymakers to conceal invidious purposes behind facially neutral language. For this reason, many argue that Davis is a low point for equal protection that fails to address the many forms of state-sponsored discrimination, not least because of the inherent difficulties discerning intent in such contexts.\(^3\)

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

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

\(^3\) See, e.g., Reva Siegel, Why Equal Protection No Longer Protects: The Evolving
This Article offers a different approach to motivational inquiries by examining how the political process itself can be an important site of information. Legislative and executive decision-making—or “small-p” process—can bear heavily on the question whether the government has acted properly or improperly. This idea of “small-p” process scrutiny stands in contradistinction to a more well-established notion, famously articulated by process theorist John Hart Ely, that flaws within deliberative processes can invite, if not require, judicial protection of excluded interests. Ely’s classic rationale for heightened scrutiny was based upon the Constitution’s role in preserving accessibility to the political process—what I call “Big-P” process. Small-p processes, by contrast, concern more evident

*Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111, 1136 (1997) (arguing that the intent doctrine comprises a larger body of case law formally ending substantive equality and is an illustration of how modern equal protection doctrine “no longer protects”); Girardeau A. Spann, *Good Faith Discrimination*, 23 WM. & MARY BILL RTS. J. 585, 623 (2015) (arguing “that the current Washington v. Davis and Feeney distinction between actuating and incidental intent has outlived any usefulness that it may ever have had”); Yvonne 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 R. Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 Conn. L. Rev. 931, 944 (2008) (advancing “the more fundamental argument that Davis was wrong because the injury of racial inequality exists irrespective of the motives of the defendants in a particular case”). Cf. Kenji Yōshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 764 (“If legislators have the wit—which they generally do—to avoid words like ‘race’ or the name of a particular racial group in the text of their legislation, the courts will generally apply ordinary rational basis review. This tendency is true even if the state action has an egregiously negative impact on a protected group.”); Bertrall L. Ross, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 FORDHAM L. Rev. 175 (2013) (arguing that the equal protection intent standard created has been applied inconsistently).


procedures, such as the quality or duration of deliberation, the involvement of experts, the facilitation of regular public hearings and open debate, or the documentation of studies and reasoning behind various policies.

Though 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 help us to see 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 in determining whether a particular minority deserves representation-reinforcing judicial review. This Article seeks to overcome the difficulties of uncovering and operationalizing “Big-P” process failure by showing how a breakdown in more evident and easily detectable kinds of process failure can help bring to the surface forms of improper intent that are otherwise hard to see. I posit that courts can rely upon “small-p” indicia to decipher motivation, especially where there is no record of Big-P political failure or similar smoking-gun evidence of discrimination. By shifting the inquiry from interest-group dynamics in the legislative process to more ordinary forms of process, I offer a method that is available to courts to surface malintent (or vindicate government intent) trans-substantively, and in ways already established in doctrine.

A number of recent cases provide powerful evidence that small-p procedures can provide a basis for enhanced judicial scrutiny on the one hand, or a vindicating mechanism on the other. From voter identification to LGBT rights.
from takings\textsuperscript{10} to affirmative action,\textsuperscript{11} and from national security\textsuperscript{12} to military personnel policies,\textsuperscript{13} courts rely on small-p process to analyze the legitimacy of government action. And the analysis can work in both directions. The government’s lack of procedural care can invite greater scrutiny and form a basis for invalidation. Or, conversely, where the government can demonstrate a thorough vetting method, reviewing courts sustain governmental action notwithstanding the otherwise questionable motives of government actors—and even go so far as remove the taint of improper motivation.

\textit{Hawaii v. Trump} is a paradigmatic example of both phenomena.\textsuperscript{14} In the aftermath of the travel ban’s first two iterations, lower courts anxious about striking down the law based on the President’s campaign statements routinely focused on small-p process, noting how the Executive’s lack of coordination, deliberation or consultation with agency experts lessened the case for deference.\textsuperscript{15} On the other hand, by the time the third version of the ban reached the Supreme Court, Chief Justice Roberts could tout the Administration’s strong small-p

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\textsuperscript{10} See infra notes 121-131 and accompanying text.
\textsuperscript{11} See infra notes 132-134 and accompanying text.
\textsuperscript{12} See infra notes 141-150 and accompanying text.
\textsuperscript{13} See infra notes 186-198 and accompanying text.
\end{flushleft}
procedures, including a “comprehensive” and “worldwide” multi-agency review as well as a robust waiver provision.\(^\text{17}\)

Ultimately, this Article lays the foundation for better understanding and application of discriminatory intent doctrine—a line of precedent that, while receiving tremendous scholarly attention,\(^\text{18}\) cannot be fully comprehended without a full grappling with, and accounting of, its underlying procedural roots. While the dynamic relationship between process failure and improper motive (or its close cousin, animus)\(^\text{19}\) finds some expression in the Court’s equal protection

\(^{16}\) See, e.g., Hawaii 138 S. Ct. at 2404 (noting that the President “directed a worldwide review”); id. (describing temporary measures until “completion of the worldwide review”); id. at 2408 (“The President lawfully exercised [his] discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest.”); id. (the President ordered “DHS and other agencies to conduct a comprehensive evaluation of every single country’s compliance with the information and risk assessment baseline,” followed by “a Proclamation setting forth extensive findings describing how deficiencies in the practices of select foreign governments . . . deprive the Government of [information],” and concluded “that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries.”); id. at 2412 (noting how “the multi-agency review process [determined] whether those high-risk countries provide a minimum baseline of information to adequately vet their nationals”); id. at 2421 (“The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies.”). The government made repeated references to this process throughout the briefing, see, e.g., Brief for the Petitioners at 2, 5, 15, 16, 30, 58, 60, 63-66, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965) and at the outset of oral argument before the Supreme Court. See Transcript of Oral Argument at 3, Trump v. Hawaii, 138 S. Ct 2392 (2018) (No. 17-965) (“Mr. Chief Justice, and may it please the Court: After a worldwide multi-agency review. . . .”).

\(^{17}\) See Hawaii 138 S. Ct. at 2406 (noting “case-by-case waivers when a foreign national demonstrates undue hardship, and that his entry is in the national interest and would not pose a threat to public safety” and that “[t]he Proclamation further directs DHS to assess on a continuing basis whether entry restrictions should be modified or continued, and to report to the President every 180 days”); id. at 37 (noting that the Proclamation calls for continued assessments by DHS, periodic updates to the President and guidance to consular officials). See also Proclamation No. 9645, 82 Fed. Reg. 45161, 45169 (Sept. 24, 2017) (establishing waiver program for, inter alia, foreign nationals who had previously been admitted to the United States for the purposes of work or study; those with “significant contacts” with the United States; those with “significant business or professional obligations”; close family members who are either lawful permanent residents or U.S. citizens; youth and those needing medical care; those employed by the government).

\(^{18}\) See infra note 26.

\(^{19}\) William D. Araiza, Animus and Its Discontents, ___ FLA. L. REV. (forthcoming [2019]) (manuscript at 39) (on file with author) (“[T]he Court’s animus jurisprudence has
jurisprudence—and in particular Justice Powell’s decision in Village of Arlington Heights v. Metropolitan Housing Development Corporation)—commentators have largely overlooked how procedural regularity can serve as a constitutional compass directing further judicial inquiry into the underlying intent of a given law or policy. Indeed, Powell’s process-based criteria provide especially helpful indicators in uncovering forms of discrimination that are often harder to see. And a number of recent cases support this Article’s thesis that the “due process of lawmaking” and governmental motivation are often perceived in lockstep fashion, a point that has special salience for novel rights claims.

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 if 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 deliberative procedure, setting the stage for evasion.

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21 Siegel, supra note 3 at 1134 (the court “continued to emphasize that plaintiffs might draw upon evidence of racial impact to prove a claim of discriminatory purpose” but after Feeney, the Court made clear that it had raised quite a formidable barrier to plaintiffs challenging facially neutral state action”); Haney-López, infra note 22, at 1814 (“The rise of colorblindness and malicious intent, however, destroyed the capacity of equal protection to actually protect non-Whites. In this account, Davis and contextual intent more generally suffer the fate of victims. It is a sad indicia of how far equal protection has devolved, that the villain of the 1970s is today’s honored dead.”).
22 See, e.g., Sheila Foster, Intent and Incoherence, 72 TUL. L. REV. 1065, 1130 (1998) (noting that the “evidentiary” approach codified in Arlington Heights enables courts to more deftly tread the “fine line” between deference and scrutiny); Ian F. Haney-López, Intentional Blindness, 87 N.Y.U. L. REV. 1779, 1809, 1814-15 (2012) (arguing that, irrespective of what it and Davis have come to represent to both scholars and the Court itself, Arlington Heights “helpfully” established a framework through which “[c]ontextual intent” can aid courts’ efforts to discern racial discrimination). But cf. Yoshino, supra note 3, at 764 (arguing that “in Personnel Administrator of Massachusetts v. Feeney, the Court defined “discriminatory purpose” so stringently that it made all the evidentiary bases enumerated in Arlington Heights, including disparate impact, almost irrelevant”).
23 See Hans A. Linde, Due Process of Lawmaking, 55 NEB. L. REV. 197 (1976). See also infra notes
24 See infra Part V.B (discussing the implications of process scrutiny in the context of novel or peripheral rights claims).
process” need not be quantifiable, it should be objectively measurable to generate accountability.

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 evolution of a doctrine of process scrutiny in the context of legislation, focusing on Arlington Heights as well as 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 objective features of process scrutiny and its effect on emerging rights claims.

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

A. The Relationship between Discriminatory Intent and Process Failure

Courts understandably face great anxiety around questions of political branch motivation that no single device—procedural or otherwise—can entirely dispel. A familiar but fundamental difficulty with identifying improper governmental intent is whether it is even possible to aggregate the thoughts and motives of individual officials to produce a single governmental intent. This problem has been vigorously and fruitfully argued, particularly with regard to legislative intent. Some academics argue that such aggregation is sound in theory and workable in practice. Others argue by contrast that any attempt to discern rulings allow for a situation in which “exactly the same law or practice that the Court had found objectionable would survive constitutional attack if political authorities, in a second go-round, avoided the initial process error”).

26 See, e.g., RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 53 (2012) (providing an account of group intention as a collective expression of “we-intentions” held by individual legislators); see also Richard H. Fallon Jr., Constitutionally Forbidden Legislative Intent, 130 HARV. L. REV. 523, 537 (2016) (“Despite well-known questions about whether Congress as a collective body can possess intentions or purposes, there are circumstances under which courts might coherently ascribe a collective intent to the legislature based on the intentions or motivations of individual legislators.”); see also Dorf, supra note 1, at 88-90 (arguing that Fallon’s analysis need not be limited to the legislative context, “as opposed to the broader relevance of intent in law”); see also Katherine Shaw, Speech, Intent, and the President, 104 CORNELL L. REV. __, 14-15 (forthcoming 2018) (observing that that discerning illegitimate intent in the executive context should be much more straightforward as an evidentiary matter given the lack of aggregation and is in fact already routine in judicial review); but cf. Huq, supra note 1, at 1286 (arguing that discriminatory intent challenges lose force as the context shifts from legislative action to dispersed executive discretion, due in part to the case-by-case decisional approach
legislative intent via aggregation is conceptually incoherent and thus doomed to failure. 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. This divide is also reflected in federal court precedent, including the Supreme Court’s failed experiment to dispense with motivational analysis in constitutional adjudication.

The difficulties of engaging in an intent-based analysis are often compounded by the heavily fact-dependent nature of legislative intent. As Richard Fallon has pointed out, legislative intent is a “protean concept,” inevitably colored by the particular fact pattern it inhabits. As a result, the judicial approach to identifying improper legislative intent is commonly described as inconsistent and problematic across different cases and contexts. Indeed, in 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.”

Indeed, the presumption that one can know with certainty the internal attitudes, emotions and biases of a single person, let alone an entire legislative body, places on judges, in all but the most flagrant instances, a demand to be mind-characteristic of executive actors).


28 See RONALD DWORIN, LAW’S EMPIRE 317-33 (1986) (detailing the struggles of determining which legislators’ intentions count, how these intentions combine, which mental states count as intentions, and how to deal with conflicting intentions); see also Robert C. Farrell, Legislative Purpose and Equal Protection’s Rationality Review, 37 VILL. L. REV. 1, 2 (1992) (“If legislative purpose is the mere aggregation of the motivations of individual legislation, then there seems to be no escaping the conclusion that the very idea of legislative purpose is incoherent.”); Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994) (“Intent is elusive for a natural person, fictive for a collective body.”).


30 See supra note 2.

31 Fallon, supra note 1, at 553.

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

33 Araiza, supra note 19, at 24-25.
Such a role imposes an impossible expectation fraught with numerous problems—requiring subjective judgment about the internal beliefs, attitudes and intentions of others that exists outside a legislative or policy document; determining if the degree of influence of those divined attitudes and biases constitutes animus; and so forth. Furthermore, such an expectation demands that judges be indefensibly reductive—reducing not only an individual’s thoughts and attitudes to a single intent, but that of an entire legislative body. For these reasons, an objective approach, in which judicial review is couched in the broader context and process of a given policy, may provide courts with a useful lens that avoids resorting to entirely subjective impressions or a psychoanalysis of the minds of the lawmakers themselves.

The emerging doctrine of “process scrutiny” provides such a framework. On the one hand, process scrutiny holds government institutions to their own standard, rather than creating a new one; on the other hand, the framework has the potential to aid courts in seeing forms of discrimination that are ordinarily less visible.

B. Process Scrutiny and the Court’s Intent Standard

The connection between procedural scrutiny and governmental intent dates back to Justice Stone’s famous footnote four in Carolene Products noting how certain defects in the process of law-making could require stricter judicial scrutiny and a narrowing of the usual presumption of constitutionality. Forty years later, the Warren Court’s process-oriented activism in fields such as criminal procedure, political expression and equal protection inspired John Hart Ely’s seminal exposition of the ideas modestly advanced in Carolene Products. Ely found in the Warren Court’s constitutional decisions a “deep structure” that was


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

38 Ely found in the Warren Court’s constitutional decisions a “deep structure” that was
drew on *Carolene Products* to describe the Equal Protection Clause as a mechanism to vindicate access to the political process so that all groups can take part in the benefits of representative government.\(^{39}\) 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.”\(^{40}\) This meant that the Court should be concerned with participation, not on identifying and protecting substantive values. When the political process has been restricted in some way, the Court must intervene to unclog the channels of access.\(^{41}\)

Although Ely believed that heightened judicial scrutiny would effectively smoke out improper legislative motivation,\(^{42}\) his theory does not provide much clarity regarding the appropriate use of that level of scrutiny. He argues that heightened scrutiny is warranted only when a law burdens a “suspect classification”\(^{43}\) and that the real linchpin for determining suspect classifications should be the presence of prejudice.\(^{44}\) Yet he does not explain how a court would know whether a given law is founded on prejudice in the first place. This is a problem because, assuming that lawmakers have the ability to hide improper motivation behind facially neutral laws, and given a broader judicial reluctance to

\(^{39}\) For Ely, these decisions evinced two main concerns: “clearing the channels of political change” and “correcting certain kinds of discrimination against minorities.” *Id.*

\(^{40}\) Ely links this constitutional commitment to process to paragraphs two and three of *Carolene Products’* famous footnote four. The second paragraph suggests that the appropriate function of the Court is “to make sure the channels of political participation and communication are kept open.” *Id.* at 76. The third paragraph “suggests that the Court should also concern itself with what majorities do to minorities.” *Id.* Ely thinks these two concerns fit together and demonstrate the principal concern of the Warren Court: that everyone have access to the political process to take part in the benefits of representative government. *Id.* at 74-75.

\(^{41}\) *Id.* at 77.

\(^{42}\) Ely cautions against looking to lawmakers’ motivations in cases of outright constitutional violations because in those cases the constitutional violation is enough to warrant striking down the legislation regardless of the motivations of the lawmakers. Thus, he argues that judicial exploration of lawmakers’ motivations is only appropriate when there is a claim that a “constitutionally gratuitous” benefit has been improperly withheld. *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 if the Constitution or is essential to the effective functioning of a democratic government (or both)—the reasons it was denied are irrelevant.” *Id.*

\(^{43}\) *Id.* at 145-46.

\(^{44}\) *Id.* at 153.
afford heightened scrutiny to many “new” equal protection claimants.\textsuperscript{45} Ely’s representation reinforcement may make it hard to uncover forms of discrimination that may go underground or otherwise be harder to see.

Four years before Ely famously emphasized the Constitution’s role in guarding the accessibility of the political process by examining the function of process at the macro level, the eminent Judge and scholar Hans Linde penned a seminal article about procedural review focusing on micro-level procedures.\textsuperscript{46} Linde was especially critical of cases such as \textit{United States Department of Agriculture v. Moreno}\textsuperscript{47} that applied more searching forms of rational basis review. Under this new and dangerous model of judicial review, courts would bring to balance “competing needs and ideals” and, only then, “relate[] the conclusion to phrases in the Constitution when possible.”\textsuperscript{48} For Linde, this got the whole point of judicial review backwards: rather than make substantive value judgments about “legislative purposes or their relative weights,”\textsuperscript{49} courts could look examine the legislative means and engage a second-order question of “instrumental rationality.”

Linde focused on smaller-scale rules (arguably, small-p procedures) that legislative bodies imposed on their internal activities.\textsuperscript{50} These could be rules governing deliberation and voting, budgeting restrictions, scheduling, reapportionment or the structuring of committees.\textsuperscript{51} While \textit{The Due Process of Lawmaking} did not draw explicit connections between process and legislative motivation,\textsuperscript{52} shortly thereafter Supreme Court decisions began to link unconstitutional motivation and procedural irregularity. After a brief period in the early 1970s when the Supreme Court appeared to dispense with intent-based inquiries altogether in constitutional analysis,\textsuperscript{53} motivational analysis soon took center stage in major constitutional interpretations of equal protection.\textsuperscript{54} And those

\textsuperscript{45} See \textit{supra} note 27.
\textsuperscript{46} See generally, Linde, \textit{supra} note 23.
\textsuperscript{47} 413 U.S. 528 (1973).
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id., at 241-42.
\textsuperscript{51} Id., at 242.
\textsuperscript{52} See \textit{supra} note 48 and accompanying text.
\textsuperscript{53} Palmer v. Thompson, 403 U.S. 217 (1971) (overruling constitutional challenge to decision by Jackson, Mississippi, to close down its pools rather than integrate them).
subsequent decisions have focused less on the kind of deliberative and participatory failures Ely had in mind, and more on the kinds of small-p process Linde had in mind. The result was an important, if incomplete, doctrinal relationship between deviations in small-p process and governmental motivation.

II. THE HIDDEN LEGACY OF ARLINGTON HEIGHTS

The connection between small-p process failure and improper motivation finds important expression in the “discriminatory intent” cases of the 1970s. When the Court in Washington v. Davis\(^\text{55}\) established that the disparate racial impact of a law would generally not, without more, trigger the same exacting scrutiny as explicit classifications, it was not completely blind to the difficulty its intent standard might place on equal protection litigators. Thus, Davis allowed that the Court could infer an improper motivation from the surrounding circumstances and context of a given governmental policy.\(^\text{56}\) The Court’s “totality of the facts” language left an open door to more substantial methods of scrutiny than ephemeral attempts to divine intent.

A. Arlington Heights’ Quiet Strain of Proceduralism

One year after Davis was decided, the Court drew on the intent standard in Village of Arlington Heights v. Metropolitan Housing Development Corporation, sustaining a town’s denial of a proposed rezoning effort that would produce racially integrated housing units.\(^\text{57}\) Although Powell refused to consider evidence of racial impact as tantamount to an express racial classification, he affirmed Davis’s recognition that the Court should look at the “totality of the facts” to infer motivation from the surrounding circumstances and context of a given governmental policy.\(^\text{58}\) Powell also went further to articulate a list of considerations that could be probative of discriminatory intent.

Powell non-exhaustive list\(^\text{59}\) describes those elements a court can use to discern intent. The list clearly includes procedural and non-procedural factors, with


\(^{56}\) Id. at 242 (“Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including [that] the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.”).

\(^{57}\) Arlington Heights, 429 U.S. at 256.

\(^{58}\) Id. at 266 (“Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”).

\(^{59}\) Id. at 268 (noting that the list of “subjects of proper inquiry in determining whether
some falling at the intersection of process and substance. But certain key factors are unambiguous and a clear invitation to examine government process as part of an intent-based inquiry of relevant factors largely based on procedural analysis. Thus, while Powell focused on the historical background of a given policy, which might reveal “a series of official actions taken for invidious purposes” or “the specific sequence of events” leading up to a given act, one factor stands out from Powell’s list as affirmatively inviting a baseline oriented procedural analysis: that “departures from normal procedur[e] [] might afford evidence that improper purposes are playing a role.” And the centrality of small-p process has become apparent as courts in a variety of contexts have relied on Powell’s procedural benchmarks to ferret out improper motivation.

1. Arlington Heights’ Application in the Voter ID Cases

The procedural features of Powell’s framework have been highly influential in a number of voter identification decisions. While the cases raise evident concerns about the very exclusionary practices that were of concern to Ely, 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 and Veasey v. Abbott, are illustrative of how courts’ difficulty actualizing certain aspects of representation reinforcement have not eliminated the possibility of meaningful judicial review altogether. The decisions are remarkable for how they link motivational inquiry with the kinds process concerns that Powell identified in Arlington Heights.

a. NAACP and Small-p Process

After Shelby County v. Holder invalidated the Voting Rights Act’s preclearance regime, states unleashed punishing new voter ID restrictions that

racially discriminatory intent existed” did not “purport[] to be exhaustive”).

60 Id. at 267
61 Id.
62 Id. Powell also also mentioned “[s]ubstantive departures” and “the relevant legislative or administrative history.” See id. at 267-68.
63 Cf. Carolene Products, 304 U.S. at 152 n.4.
64 831 F.3d 204, 214 (4th Cir. 2016).
65 830 F.3d 216 (5th Cir. 2016) (en banc), cert. denied, 137 S. Ct. 612.
66 133 S. Ct 2612, 2651 (2013). Shelby County officially retired the formula previously used to determine which districts required preclearance under the Voting Rights Act and freed many states and counties from having to submit proposed changes in voting laws to the Department of Justice or a three-judge panel.
67 Anthony J. Gaughan, Illiberal Democracy: The Toxic Mix of Fake News,

Electronic copy available at: https://ssrn.com/abstract=3403723
Process Scrutiny

were challenged on both statutory and constitutional grounds. In North Carolina, the legislature abruptly passed an “omnibus” voting reform law that reduced the list of acceptable forms of photo identification for in-person voting, eliminated same-day registration and preregistration for individuals age 16 and 17, reduced the number of early voting days from 17 to ten and scrapped a provisional voting process for out-of-precinct voting. 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 Act and the Fourteenth Amendment.

The Fourth Circuit did not ignore substantive concerns about racial discrimination and voter disenfranchisement, from “the inextricable link between race and politics in North Carolina” to 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. Yet the court ultimately resolved the case on

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68 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).


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

71 See id. at 217-18.

72 See id. at 217.

73 See id.


75 NAACP, 831 F.3d at 219, 241.

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

77 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
procedural grounds, engaging in a 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 [t]he sequence of events signals discriminatory intent.” 78

Indeed, examples of “[d]epartures from the normal procedural sequence” were rife. First was the issue of timing: the voter ID provisions were announced the day after *Shelby County* removed the very preclearance requirement that would have likely prevented those provisions from becoming law. 79 The Fourth Circuit saw this as suspicious under *Arlington Heights*’ instruction to consider the “specific sequence of events leading up to the challenged decision.” 80 Furthermore, rather than introduce the voting rules as part of a new, stand-alone bill, the General Assembly simply tacked them onto existing legislation that already bore the features of ordinary law, “swiftly expand[ing] an essentially single-issue bill into omnibus legislation”—a clear departure from procedural norms. 81

While the pre-*Shelby County* version of the bill received three weeks of public debate and had even garnered some bipartisan support, that bill sat dormant for two months while *Shelby County* loomed and was not revisited until the Court excised the preclearance procedure from the Voting Rights Act. 82 The new post-*Shelby County* bill was three times as long as the original bill 83 and “rushed . . . through the legislative process” 84 without being marked up by a committee—again, a clear indication of procedurally anomalous conduct. The court went on to observe that “neither this legislature—nor, as far as we can tell, any other legislature in the Country—has ever done so much, so fast, to restrict access to the franchise.” 86 By interpreting the government’s motivation through the prism of small-p procedure, the court was able to find malintent.87

78 *Id.* at 227 (internal citations omitted).

79 *See id.* at 214.


81 *Id.* at 216.

82 *Id.*

83 *Id.*

84 *Id.* at 228.

85 *Id.*

86 *Id.* at 228.

87 Indeed, there were other indications in *McCory* that pointed more directly to invidious intent—in particular the legislature’s request for racial data. With each data point the legislature received, a new provision was added, amended or removed, but all seemed to have the same purpose: disenfranchising African American voters. *See id.* at 216-18. For

racial history and racially polarized voting.”). The court also explained that well over 85% of African Americans voted for Democratic candidates in the two previous presidential elections. *See id.* at 226.
b. **Veasey and Small-p Process**

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

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example, the original bill permitted the use of all government-issued identification; when the racial data revealed that African Americans were less likely to possess certain types of identification, the new bill was amended to permit only those types of identification African Americans carried less frequently. See id. at 216. When lawmakers learned that African Americans predominantly utilized early voting procedures, the legislature curbed that provision, shortening early voting by a full week. See id. 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. See id. at 217-18.

88 See *Veasey v. Abbott*, 830 F.3d 216, 225 (5th Cir. 2016) (en banc) (allowing drivers’ licenses, personal identification cards, military identification cards, U.S. citizenship certificates, U.S. passports, licenses to carry a concealed handgun, or Election Identification Certificates, provided these forms of ID were issued by the proper agency and have not been expired for more than sixty days).

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

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

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

92 *Id.* at 238.
(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. . . .

The court was equally troubled by the legislature’s decision, despite its awareness of the disproportionate impact the law would have on historically marginalized groups, to reject additional proposals to curb that impact. Tying this to small-p process scrutiny, the Court noted that the law’s proponents “largely refused to explain the rejection of those amendments,” something that “was out of character for sponsors of major bills.” These procedural irregularities contributed to the Fifth Circuit sustaining the lower court’s finding of improper motivation.

Veasey is a powerful example of how small-p 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.

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93 Id. at 238 (citations omitted). The court went on to note that these procedural oddities were only present with regard to SB-14; none of the other pressing legislation received the same special treatment. See id.
94 Id. at 237.
95 Id. (citations omitted).
96 Id. at 239. NAACP and Veasey reveal a related point about process failure and improper motivation that is worthy of mention. In both cases, the courts were explicit that any purportedly legitimate justification for a problem that the court concludes is fabricated quickly loses legs, creating the space for a finding of improper motivation. In NAACP, for example, the Fourth Circuit accused the North Carolina legislature of manufacturing a phony narrative for its voter ID law, “impos[ing] cures for problems that [do] not exist,” 831 F.3d at 214, while in Veasey, the Fifth Circuit called out the legislature for ignoring its procedures for the sake of addressing an “almost nonexistent problem.” 830 F.3d at 239. See also Joseph Landau, Broken Records: Reconceptualizing Rational Basis Review to Address “Alternative Facts” in the Legislative Process, 73 VAND. L. REV. __ (forthcoming 2020).
97 See, e.g., Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979)
the Court could draw on the vast procedural irregularities of SB-14 to help surface the underlying discriminatory intent.

2. Beyond Arlington Heights: Process Scrutiny and Judicial Invalidation

In addition to NAACP and Veasey, lower courts have drawn on small-p process concerns to allow suits to proceed beyond preliminary stages of litigation and even enjoin policies concerning school desegregation,\(^98\) fair housing and land use,\(^99\) the dormant commerce clause,\(^100\) electoral redistricting and allocation of public benefits.\(^101\) Those courts have invoked Arlington Heights’ multi-factor test, finding improper motive based on a lack of procedural regularity in government decision-making. For example, an Arizona district court recently set aside a facially neutral state law that prohibited ethnic studies courses by finding the policy’s enactment and enforcement to be motivated by improper motivation.\(^102\) In addition to derogatory statements made by legislators, the court relied on irregularities in the process of enactment.\(^103\) Beyond evidence of discriminatory

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\(^{102}\) See Gonzalez v. Douglas, 269 F. Supp. 3d 948 (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 enactment and/or enforcement of [the state law] § 15–112 here challenged was motivated, at least in part, by an intent to discriminate against [] students on the basis of their race or national origin”).

\(^{103}\) See Gonzalez, 269 F. Supp 3d at 965-68.
intent in enactment, the court pointed to procedural irregularities like reliance on one-sided investigations as evidence of discriminatory intent in enforcement.\textsuperscript{104} And in litigation challenging an Alabama voter ID law, a federal district court looked to procedural irregularity—that, among other things, the time for debating the bill had been severely constrained—as sufficient evidence of discriminatory motive to survive a motion to dismiss.\textsuperscript{105} Finally, in challenges to newly enacted electoral maps, departures from normal procedures in the events prior to enactment—including intentional constraints on debate and violations of rules for public hearings—was sufficient for a Texas district court to find that the City of Pasadena, Texas, had enacted an unconstitutional electoral map with a discriminatory intent to dilute Latino votes.\textsuperscript{106}

\textbf{B. Process Scrutiny and Legislative Vindication}

Process scrutiny works in both directions: while courts might treat with greater scrutiny legislative acts that undermine well-established procedures, they might also give leeway to otherwise suspect policy choices that are the result of a thorough vetting. Indeed, \textit{Washington v. Davis} itself could conceivably stand as an example.\textsuperscript{107} 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.\textsuperscript{108} Not only did the police force make “affirmative efforts . . . to recruit black officers,”\textsuperscript{109} but record evidence supported the government’s claim that the exam was directly related to the training needs and requirements of the police force.\textsuperscript{110} Indeed, the extensive expert testimony fleshed out a relatively robust small-p process. In briefing, Corporation Counsel relied on studies by numerous experts to support the claim that the entrance exam was a reasonable, impartial, and objective predictive tool to establish ability to be trained. This included a study by the U.S. Civil Service Commission and affidavits from research psychologists and other educational

\textsuperscript{104} Id. at 968-70.
\textsuperscript{105} \textit{See} Greater Birmingham Ministries v. Merrill, 250 F. Supp. 3d 1238, 1245 (N.D. Ala. 2017). However the defendant, Secretary of State John Merrill, did ultimately prevail against the plaintiff’s constitutional claims on his motion for summary judgment. \textit{See} Greater Birmingham Ministries v. Merrill, 284 F. Supp. 3d 1253, 1279 (N.D. Ala. 2018).
\textsuperscript{108} 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.
\textsuperscript{109} Id. at 246.
\textsuperscript{110} Id. at 251.
testing experts.\textsuperscript{111} Other authorities bolstered that evidence by noting the “need for police recruits to possess the verbal ability to be trained which Test 21 is designed to measure.”\textsuperscript{112} Given this broader context—one bearing little to no trace of irregularity, and one in which the plaintiffs affirmatively disclaimed any allegation of discriminatory motivation\textsuperscript{113}—the Court concluded that the “changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that a police officer qualifies on the color of his skin rather than ability.”\textsuperscript{114}

The 1981 case \textit{Rostker v. Goldberg} also illustrates the vindicating potential of small-p process.\textsuperscript{115} \textit{Rostker} upheld the constitutionality of an all-male selective service policy under heightened scrutiny.\textsuperscript{116} The Court rested heavily on the extensive nature of Congress’s deliberations,\textsuperscript{117} including robust debate over female inclusion through “extensive[] . . . hearings, floor debate, and in committee.”\textsuperscript{118} 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.”\textsuperscript{119} Importantly, \textit{Rostker} did not defer flatly to the military’s judgment on matters of personnel, instead scaling deference according to procedural rigor—an evaluation of “how the political branches [] made the policy choice at issue.”\textsuperscript{120}

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112 \textit{Id.} at 18. The authorities cited are judicial and administrative, including observations from 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. \textit{Id.} at 19-21.
113 426 U.S. at 251.
114 Davis, 426 U.S at 247 (internal citaions and quotation marks omitted).
116 \textit{Id.} at 69.
117 \textit{Id.} at 72-74.
118 \textit{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.” \textit{Id.}
119 \textit{Id.} at 74. These extensive deliberations gave the Court confidence that Congress was not acting “unthinkingly or reflexively and not for any considered reason.” \textit{Id.} at 72-74 (citing \textit{Califano v. Goldfarb}, 430 U.S. 199, 222-23 (1977) (Stevens, J., concurring)). In \textit{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.” \textit{Califano}, 430 U.S. at 222-23.
120 See Daphna Renan, \textit{Presidential Norms and Article II}, 131 \textit{Harv. L. Rev} 2188, 2260 (2018). Indeed, after \textit{Rostker}, a number of lower courts upheld the U.S. military’s
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The 2005 Supreme Court case *Kelo v. City of New London* illustrates a similar use of process scrutiny to validate government decision-making in the very different context of unconstitutional takings.\(^{121}\) *Kelo* arose out of a decision by the City Council of New London, Connecticut,\(^{122}\) authorizing the purchase or acquisition of property by the exercise of eminent domain as part of an initiative to redevelop an economically depressed neighborhood.\(^{123}\) When a group of property owners challenged the policy as an improper taking under the Fifth Amendment,\(^{124}\) *Kelo* 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.\(^{125}\) Justice Kennedy’s concurrence also noted how New London’s integrated plan, based on “elaborate

“Don’t Ask, Don’t Tell” policy regarding gay, lesbian and bisexual servicemembers by noting the political branches’ “extensive examination” of the policy they later adopted. See Thomasson v. Perry, 80 F. 3d 915, 922 (4th Cir. 1996) (en banc). This included a military working group, a commissioned study by the RAND Corporation, as well as “regular consultations with the Joint Chiefs of Staff and leaders of each service, . . . [close study of] the history of the military’s response to social change, and consult[ation] [with] legal experts.” Renan, *supra* note 120, at 2261. These “exhaustive efforts of the democratically accountable branches of American government,” the court of appeals stressed, “is precisely [why] they deserve judicial respect.” *Thomasson*, 80 F. 3d at 923. Although these decisions turned on deference to the Executive, rather than to Congress, in the context of military affairs, the Court gives substantial weight to either of the political branches, provided it demonstrates a sound process.


\(^{122}\) *Id.* at 473-75. New London acted through its legislature to create a private nonprofit entity called the New London Development Corporation (NLDC) that would lead the planning process and seek state regulatory approvals on the city’s behalf. See *id.* at 473. The NLDC negotiated with private land owners to purchase most of the property that was subject to the redevelopment plan. Those who did not consent to selling their land, like the plaintiffs, had their land condemned and acquired by eminent domain. *Id.* at 474. When NLDC’s plan was fully approved, the City Council designated NLDC to act as its agent and delegated the city’s eminent domain power. *Id.* at 475.

\(^{123}\) Throughout its opinion, the Supreme Court explicitly treats the city and NLDC as interchangeable, referring to both as acting in a legislative capacity. See *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); *see also* Connecticut Home Rule Act, Conn. Gen. Stat. § 7-199 (2013) (stipulating that any municipality “shall have the power to (1) adopt and amend a charter which shall be its organic law”).

\(^{124}\) *Kelo*, 545 U.S. at 475.

\(^{125}\) *Id.* at 483-84.
procedural requirements,” alleviated concerns that such takings would be abused or put to “suspicious use,” benefiting only private interests.126

Although the invocation of eminent domain for public use is constitutionally legitimate and generally uncontroversial, it can be divisive because of equity concerns such takings can engender.127 And the Kelo decision was not without political backlash.128 Indeed, some scholars have resolved those concerns by associating Kelo with Ely’s theory of representation reinforcement.129 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.130 Thus, even as Kelo provides a broad interpretation of the “public purpose” doctrine that affords “legislatures broad latitude in determining what public needs justify the use of the takings power,”131 the careful, deliberative process in the record provided an important basis for deference.

126 Id. at 493 (Kennedy, J., concurring).
127 See Nestor 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 . . . under the Equal Protection Clause”).
129 See Charles E. Cohen, The Abstruse Science: Kelo, Lochner, and Representation Reinforcement in the Public Use Debate, 46 DUQ. L. REV. 375 (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.”;
130 While Justice Stevens deferred to the majoritarian political process as bearing the trappings of legitimacy, Justice O’Connor’s dissent identified failings not only in 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, 454 U.S. at 502-04. Justice O’Connor found that the political process was 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, the dissent warns that the majority’s deferential test, which allows any secondary public benefit to satisfy the public purpose doctrine, fails to articulate what a comprehensive, deliberate legislative process is, with no floor to indicate the point below which a court would cease to defer. Id. at 504. For an analysis of how Justice Stevens’s adoption of a 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, 276 (2016).
131 Id. at 480-83.
A number of school redistricting and affirmative action cases also provide examples in which adherence to good process promotes legislative deference. In the 2016 case Fisher v. University of Texas, Justice Kennedy’s decision upholding the University of Texas’s affirmative action policy credited an admissions policy that was supported by a “reasoned, principled explanation,” a detailed “year-long study” and expert affidavits from admissions officers.132 And lower courts have relied on similar evidence to uphold school redistricting measures that have a disparate racial impact. For example, in reviewing a district court’s decision that the Nashville public school system’s “student assignment plan” was not motivated by discriminatory intent despite a segregative effect,133 the Sixth Circuit affirmed the holding, pointing to evidence of a “well-defined, well-regulated, and transparent” decision-making process that included formation of an authoritative task force.134

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As these cases demonstrate, process scrutiny can be important to resolving questions about underlying legislative motivation not only in the voting rights, Free Exercise and takings contexts, but also where both facially neutral policies and race-conscious 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 the lack thereof) and policy vindication (or the lack thereof).

132 Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2211(2016) (upholding policy under strict scrutiny as sufficiently tailored to advance a compelling interest of fostering diversity) (citing Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 310, (2013). 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).

133 The plan ended the practice of busing students from racially isolated areas to schools in racially diverse, high-income neighborhoods. See Spurlock v. Fox, 716 F.3d 383, 385 (6th Cir. 2013). 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 which would not necessarily be the same school they previously attended. See id.

134 Spurlock, 716 F.3d at 397–98; see also Doe v. Arkansas Dep’t of Educ., No. 4:15-CV-623-DPM, 2016 WL 5539617, at *8 (E.D. Ark. 2016) (holding that the Department of Education’s process of passing emergency regulations and hiring administrative officers despite a lack formal credentials was not sufficiently unusual, but rather plausibly showed “representative government pursuing divisive but not unconstitutional policy”).
III. EXECUTIVE BRANCH PROCESS AND DISCRIMINATORY INTENT

The connections between procedural regularity and malintent are not limited to the legislative context; indeed, Arlington Heights specifically referenced the administrative context,\(^{135}\) and the same relationship between governmental processes and judicial review can be found in the context of executive action—in particular forms of executive action, especially presidential action, that are largely exempt from APA review.\(^ {136}\) 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 power\(^{137}\)—small-p process plays a remarkably important role in the scaling of judicial review.

A. Small-p Process and the Trump Travel Ban

The connection between small-p process and executive motivation has been important in the judicial rulings surrounding President Trump’s immigration-related executive actions that bar entry to individuals from a range of Muslim-majority countries.\(^ {138}\) While most commentators frame the travel ban litigation through the President’s repeated expressions of hostility against the Muslim faith,\(^ {139}\) courts at all levels of the federal judiciary have tended to scale deference


\(^{136}\) See generally Adrian Vermeule, Our Schmittian Administrative Law, 122 HARV. L. REV. 1095 (2009) (noting the myriad of ways, under statute and case law, that presidential functions are largely exempt from the purview of the judicial review mechanism of administrative law); id. at 1108 ("[T]he Supreme Court has twice stated that the President is not an agency" subject to the APA). See also infra notes 243-244 and accompanying text.

\(^{137}\) See United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319-20 (1936) (holding that the Court will defer to the “plenary and exclusive power of the President ... in the field of international relations”); Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (holding that when the President exercises delegated power to make “rules for exclusion of aliens” for “a facially legitimate and bona fide reason,” the court will not question it or balance it against other constitutionally protected interests); see also Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 TEX. L. REV. 1, 162 (2002) (“[T]he United States regularly maintains, and the courts frequently agree, that federal immigration laws should be subject to little or no judicial review . . . .”).


\(^{139}\) 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.”

Electronic copy available at: https://ssrn.com/abstract=3403723
based on their impression of the strength, or weakness, of the policies’ small-p procedures. In the lower courts, judges repeatedly linked process failure with constitutional invalidity. By contrast, the Supreme Court credited good process as a reason to give the Administration the benefit of the doubt. The more the government could show its policy was thoroughly vetted, the less the President’s disparaging remarks about Islam seemed to matter.\textsuperscript{140} \textit{Trump v. Hawaii} thus provides an object lesson in the importance of small-p process in the scaling of judicial 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,\textsuperscript{141} judges immediately entered temporary restraining orders prohibiting its enforcement.\textsuperscript{142} These early cases, which were


\textsuperscript{141} 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. \textit{Id}.

upheld by the federal courts of appeal.\footnote{143} drew a number of connections between intent and small-p process, including the absence of “expert agencies with broad experience on the matters” and “no evidence that . . . a deliberative process took place.”\footnote{144} In addition to those procedural irregularities, courts noted the “highly particular ‘sequence of events,’” including efforts by President Trump and his surrogates to find “legal” bases to ban Muslims from entering the country, as reason to block the policy.\footnote{145}

The Trump Administration revoked its order in response to these early rulings and made a number of modifications,\footnote{146} yet courts continued to cite process flaws as evidence of malintent. In one major case, the Fourth Circuit emphasized the petitioner and others similarly situated violates their rights to Due Process and Equal Protection

\footnote{143} See Washington v. Trump, 847 F.3d 1151, 1164 (9th Cir. 2017) (“The Government has not shown that the Executive Order provides what due process requires, such as notice and a hearing prior to restricting an individual’s ability to travel.”); Aziz v. Trump, 234 F. Supp. 3d 724, 736 (E.D. Va. 2017) (The Commonwealth is likely to succeed on its Establishment Clause claim because it produced evidence that the travel ban was motivated by religious animus).

\footnote{144} Aziz, 234 F. Supp. 3d. at 736; see also id. (contrary to the ordinary expected rollout of an order of this magnitude and significance, “there is evidence that the president’s senior national security officials were taken by surprise”).

\footnote{145} Id. at 737 (granting plaintiffs a preliminary injunction on their Establishment Clause claims). Courts also took issue with other procedural oddities, such as the administration’s abrupt reversal on whether lawful permanent residents (LPRs) were subject to the same travel restrictions as all other nationals from the designated countries. One court rejected the government’s effort to invoke a post-hoc White House counsel interpretation to cure due process concerns raised by a rule restricting entry to LPRs. The court refused to accept the government’s about-face regarding LPRs when it “offered no authority establishing that the White House counsel is empowered to issue an amended order superseding the Executive Order signed by the President and now challenged by the States,” a “proposition [that] seems unlikely.” See Washington, 847 F.3d at 1165. In light of the government’s changing interpretations of the order’s effect on LPRs, the court expressed skepticism that the Trump Administration would not revert back to denying entry to LPRs once again. See id.

\footnote{146} Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017). The second order removed Iraq from the list of affected countries, exempted lawful permanent residents from the travel ban and removed the indefinite ban on Syrian nationals. This order also eliminated language providing lower-level discretion to make exceptions to the refugee ban for foreign nationals of “minority” faiths in their home countries—an effort largely seen as attempting to give preference to Christian asylum-seekers. Int’l Refugee Assistance Project, 857 F.3d 554, 633 (4th Cir. 2017).
the procedural flaw of excluding national security agencies from the decision-making process. This court also noted the post hoc nature of the national security rationale as well as government evidence that undermined the very effectiveness of the President’s policy. As with the first iteration, small-p procedural concerns provided evidence of improper governmental intent. Within these initial cases, the concepts of process failure and unconstitutional motivation were closely linked.

2. Travel Ban 3.0: Process and Executive Vindication

The Trump Administration’s third version of the travel ban, issued via presidential proclamation, took pains to address the lower courts’ concerns about small-p process. Government lawyers repeatedly touted a “worldwide”

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147 *Int'l Refugee Assistance Project*, 857 F.3d at 591-92.
148 See *id.* at 592 (citing DHS report that the second iteration of the ban would not “diminish the threat of potential terrorist activity” as reason to find the government’s proffered purpose pretextual).
149 See *id.* at 572, 601 (noting that the Order “drips with religious intolerance, animus, and discrimination,” and “cannot be divorced from the cohesive narrative linking it to the animus that inspired it”). At around the same time as the Fourth Circuit decision, the district court in Hawaii issued its own preliminary injunction, barring enforcement of Sections 2 and 6 of the second iteration of the travel ban, Hawaii v. Trump, 241 F.Supp.3d 1119, 1140 (D. Haw. 2017), which was affirmed in large part by the Ninth Circuit Court of Appeals, Hawaii v. Trump, 859 F.3d 741, 774, 779 (9th Cir. 2017). On a petition for a stay of the preliminary injunction, the Supreme Court did not directly address the Fourth and Ninth Circuit rulings that found the Government’s national security reasoning for EO-2 unconvincing, but it left the injunction in place with respect to parties trying to enter the country who have a bona fide relationship with an entity or person in the United States. *See* Trump v. *Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017). The Court vacated its decision as moot after the order expired based on its own terms. Trump v. *Int'l Refugee Assistance*, 138 S. Ct. 353 (2017).
150 Proclamation 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) (indefinitely restricting the entry of certain nationals from Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen).
151 According to the government, DHS went through a detailed process in identifying which countries had information-sharing practices insufficient for the United States to vet foreign nationals entering the United States from those countries, identifying eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela and Yemen. *See* *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 591 (D. Md. 2017). The Acting Secretary of Homeland Security recommended entry restrictions on foreign nationals from each of those countries except Iraq. *See id.* Although Somalia’s practices were found sufficient, the Secretary still recommended entry restrictions for Somalian nationals as well. *See id.* Despite the DHS’s more tailored evaluation of the national security risk
process that involved close consultation with experts, a centerpiece of Chief Justice Roberts’ *Trump v. Hawaii* majority opinion that repeatedly touted good process as “a justification” for the entry ban that was “independent of unconstitutional grounds.” Although Roberts did not ignore the presence of the President’s patently biased statements, he recognized that, in addition to the Proclamation’s facial neutrality, it appeared to satisfy the judicial requirement of

associated with nationals from each of the designated countries, “49 former national security, foreign policy, and intelligence officials . . . state that ‘[a]s a national security measure,’ the Proclamation is ‘unnecessary’ and is of ‘unprecedented scope.’” *Id.* at 593.

Further procedural problems with the Proclamation include that “concrete evidence” shows “country-based bans are ineffective,” the Proclamation fails to block nationals from certain countries with a non-Muslim majority that have “widely-documented” information sharing deficiencies, no nationals from the designated countries have committed terrorist acts in the United States in the last 40 years, and no intelligence shows that nationals from the designated countries pose a terrorist threat to the United States. *Id.*

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153 138 S. Ct. 2392 (2018); see supra notes 16-17 and accompanying text. By contrast, the lower courts continued to find contradictions in the agency review process as undermining the government’s national-security-based justifications. For example, a federal district court in Maryland concluded that the plaintiffs sufficiently alleged a “misalignment between the stated national security goals of the ban and the means implemented to achieve them,” suggesting that the Government’s stated reason for the ban was not bona fide and not entitled to a presumption of deference. *See Int’l Refugee Assistance Project*, 265 F. Supp. 3d at 618. The court rejected the government’s contention that the Proclamation was issued through the “routine operations of the government bureaucracy,” and concluded that not only did the government present such weak evidence to that end, but combined with public statements and historical events suggesting religious animosity, the plaintiffs would likely prevail on an establishment clause claim. *Id.* at 628. The court thus granted an injunction, barring enforcement of the travel ban only with respect to foreign nationals with a bona fide relationship with a person or organization in the United States. *See id.* at 631. However, the Supreme Court issued a stay of that order pending disposition of the government’s appeal. Soon afterward, the Supreme Court granted the government’s petition for certiorari following a Ninth Circuit affirmance of a Hawaii district court order enjoining enforcement of the Proclamation. *Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 542 (2017).

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

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

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a bona fide national security rationale promulgated through a careful and robust process.\textsuperscript{156}

\section*{B. Ex Ante and Ex Post Proceduralism}

The discussion of small-p process, up until now, has focused on \textit{ex ante} proceduralism. \textit{Ex ante} procedures concern the quality of deliberation, involvement of experts, facilitation of regular public hearings and open debate and documentation of studies or other evidence underlying a given policy. \textit{Ex post} procedures, by contrast, concern a coordinate institution’s ability to follow its own stated procedures—including adherence to allowances, exceptions or other promised mechanisms within the law itself. To invoke language from \textit{Arlington Heights}, \textit{ex post} procedural defects can concern “departures” from an expected norm or baseline.\textsuperscript{157} While the \textit{Hawaii} litigation provides an object lesson in the role of \textit{ex ante} procedures in shaping constitutional discourse and doctrinal arguments about governmental power, deference and rights, it also says a lot about \textit{ex post} procedures. And a number of seminal pre-\textit{Hawaii} Supreme Court decisions also draw connections between \textit{ex post} procedures and judicial deference to the President.

1. Ex Ante and Ex Post Proceduralism in \textit{Hawaii}

Chief Justice Roberts made it clear in \textit{Hawaii} that the Proclamation could be vindicated based on the rigor of \textit{ex ante} procedures—specifically, the “world-wide” and “multi-agency” review underlying the enactment.\textsuperscript{158} But Roberts also relied on the availability of \textit{ex post} procedures—discretionary hardship waivers within the Proclamation—that further reinforced its “legitimate national security” foundations.\textsuperscript{159} Justice Breyer and Justice Sotomayor each wrote dissenting opinions linking \textit{ex ante} or \textit{ex post} process failure with improper motivation.\textsuperscript{160}

\begin{footnotesize}
\begin{enumerate}
\item[156] See \textit{supra} note 17.
\item[157] See \textit{generally supra} Part II.A (discussing \textit{Arlington Heights’} consideration of “departures from normal procedure[s]” as evincing intent).
\item[158] \textit{Hawaii} 138 S. Ct. at 2404, 2408.
\item[159] \textit{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. \textit{Id} at 2422-23.
\item[160] 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
\end{enumerate}
\end{footnotesize}
Breyer focused on *ex post* procedures—namely the government’s actual implementation of the Proclamation’s waiver provisions. As he explained, the actual issuance of case-by-case exceptions would help decipher whether “the Proclamation is a ‘Muslim ban,’ [or] a ‘security-based’ ban.” Because, within the first month of the Proclamation, only two waivers were granted out of 6,555 eligible applicants, Breyer believed the policy likely failed *ex post* review. Breyer also noted that, by the time of *Hawaii*, other promised *ex post* procedures had not been issued—still another reason to subject the Proclamation to more careful scrutiny. Whereas Breyer focused on *ex post* procedure, Sotomayor expressed doubt regarding the veracity of the government’s *ex ante* procedures:

exemptions and waivers can and should help us answer this question.” *Id.* at 2429 (Breyer, J. dissenting).

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

*162 Id.* at 2431. Breyer argued that, even as the number of granted waivers increased over time, it was still surprisingly low relative to the number of likely eligible individuals. *Id; see also id.* at 2431-32 (noting the contrast between the Proclamation’s stated exemptions for those with significant business or professional obligations, close family ties in the U.S., asylum seekers, refugees and certain nonimmigrant visas and the miniscule number of waivers approved). For example, between December 8, 2017 and January 8, 2018, the State Department received almost 7,000 applications from visa-eligible nationals of listed countries. As of March 2018, waivers were granted to less than 1.5% of the otherwise visa-eligible and admissible applicants. Torbati & Rosenberg, *Exclusive: Visa Waivers Rarely Granted Under Trump’s Latest U.S. Travel Ban: Data*, Reuters (Mar. 6, 2018), https://www.reuters.com/article/us-usa-immigration-travelban-exclusive/exclusive-visa-waivers-rarely-granted-under-trumps-latest-u-s-travel-ban-data-idUSKCN1GI2DW.

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

*164 Breyer closed his dissent by also suggesting that an *ex ante* analysis would support setting aside the Proclamation as well. *See Hawaii*, 138 S.Ct. at 2433 (noting, as a reason to set aside the Proclamation, “the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements also set forth in Justice Sotomayor’s opinion”).
including a professed “worldwide” review producing only 17 pages of material.\footnote{See id. at 2443 (Sotomayor, J., dissenting). For Chief Justice Roberts, any quantitative floor would be arbitrary. Id. at 2421. A 17-page report could be highly substantive, with a reasoned basis in expert analysis and extensive supporting materials which simply were not accessible by FOIA request. Id. Thus, even if the policy was overbroad in its reach, as the dissent argued, because of the complexity and sensitivity involved in the national security context, the Court could not substitute its judgement and the executive was entitled to deference. Id.} For Sotomayor, the majority’s \textit{ex ante} analysis allowed “the President to hide behind an administrative review process that the Government refuses to disclose to the public.”\footnote{Id. at 2443 (Sotomayor, J., dissenting).}

As the case turns to the merits on remand, \textit{ex ante} or \textit{ex post} review in the lower courts could prompt further findings into whether the Proclamation is about religious discrimination or national security.\footnote{Cf. Noah Feldman, \textit{Take Trump’s Travel Ban Back to Court}, BLOOMBERG (June 29, 2018, 12:29 PM), https://www.bloomberg.com/view/articles/2018-07-27/trump-loyalist-s-subpoena-is-momentous-turn (noting that the challengers on remand “could seek discovery to uncover new evidence of Trump’s thinking, including, potentially, drafts of the executive order or memos about it” and that if this discovery was allowed, “Who knows what they might reveal”).} Indeed, lower courts could even read the majority’s decision in \textit{Hawaii}—relying as it does on procedure as a reason for vindication\footnote{See supra notes 16-17 and accompanying text.}—to support a more rigorous review of the policy’s underlying vetting.\footnote{While discovery on such questions could be critical, it remains unclear whether the government will be ordered to produce it. As Justice Kennedy noted in his concurrence, the President retains substantial deference, especially concerning discovery that might delve into sensitive matters of national security. See \textit{Hawaii}, 138 S. Ct. at 2424 (Kennedy, J. concurring).} Although the government at first appeared listening, more recent results are mixed: while the U.S. State Department reported as of January 31, 2019 that 2,673 applicants were “cleared for waivers”\footnote{Visa Information Resources, \textit{June 26 Supreme Court Decision on Presidential Proclamation 9645}, U.S. DEP’T OF STATE, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/june_26_supreme_court_decision_on_presidential_proclamation9645.html (last visited June 2, 2019).}—a number that does not confirm the actual numbers of waivers granted (and should thus be regarded cautiously)\footnote{See id. ("Many of those applicants already have received their visas.")}. Indeed, by June 1,
2019, the government had not updated its January 2019 figure. Thus, even as the Trump Administration claims victory over its travel restrictions in Hawaii, lower courts may still need to grapple with various aspects of the Administration’s processes to ensure that they remain meaningful—something more than a token commitment made just for litigation.

2. The Executive and Ex Ante/Ex Post Procedure

Hawaii was not the first time that ex ante or ex post procedural review has figured into major Supreme Court rulings of presidential action. Many of the post-9/11 decisions involving the “war on terror” have been described as largely procedural in nature.173 Hamdan v. Rumsfeld174 invoked both ex ante and ex post process scrutiny to rule on the legality of military commissions at Guantanamo Bay. In terms of its actual holding, the Court applied ex post proceduralism,

https://www.nytimes.com/2018/07/01/world/americas/travel-ban-trump-how-it-works.html (noting that “[o]n the same day the Supreme Court announced its decision,” the State Department released data showing that “out of 33,176 waiver applications received through April 30, only 579 had been granted, about 2 percent”); Betsy Fisher and Samantha Power, The Trump Administration Is Making a Mockery of the Supreme Court, N.Y. TIMES (Jan. 27, 2019), https://www.nytimes.com/2019/01/27/opinion/trump-travel-ban-waiver.html (observing, based on successful waiver grants in well-publicized cases involving “tragic circumstances” and “celebrity testimonials,” that “[w]aivers appear to be given reliably only when much publicity is brought to bear”).

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

rejecting the President’s commissions for failure to adhere to a requirement under the Uniform Code of Military Justice requiring that commissions follow an “impracticability” finding regarding the use of courts martial. Shortly after the decision, Neal Katyal observed how ex ante procedure—specifically the lack of deliberation and inter-agency dialogue within the George W. Bush Administration—doomed its post-9/11 policies regarding the detention and trial of terror suspects in the courts. The commissions in Hamdan were especially prone to judicial defeat because they lacked buy-in from the Executive Branch’s own experts. “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.”

In an important ruling regarding discovery obligations for Guantanamo cases, the D.C. Circuit in Bismullah v. Gates, applying ex post process scrutiny, placed onerous demands on the government, essentially requiring that it restart the entire evidence-gathering process with respect to each and every detainee because of a failure to follow procedures it had created to vet detention decisions at Guantanamo. While the Court had endorsed the proposition in Hamdi v. Rumsfeld that “fair process can be provided by nonjudicial decisionmakers,”

175 Id. at 623.
177 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.”).
179 501 F.3d 178 (D.C. Cir. 2007). See Bismullah v. Gates, 514 F.3d 1291, 1295 n.5 (D.C. Cir. 2008) (quoting Decl. of James M. McGarrah, Rear Admiral (Ret.), U.S. Navy ¶¶ 4–6, 10–13 (May 31, 2007) (noting, inter alia, that tribunals were unable to verify that they had examined all the relevant, available information; agencies routinely denied requests for confirmation by Guantanamo personnel that the agency had no exculpatory information on a particular detainee; and exculpatory evidence was withheld from tribunals if it was believed to be ‘duplicative’ or ‘not relat[ing] to a specific allegation being made against the detainee’).
180 Bismullah v. Gates, 501 F.3d 178, 180 (2007). Declarations and empirical data undermined the presumption that the government had followed its own procedures, and as a result of these lapses the litigation became more focused on the agency’s compliance with process. See Decl. of Stephen Abraham, Lieutenant Colonel, U.S. Army Reserve, ¶¶ 5-24, Bismullah, 501 F.3d 178 (D.C. Cir. June 15, 2007) (No. 06-1197) (disclosing failures in the evidence-gathering process and a failure to adhere to the government’s procedures); Decl. of James M. McGarrah, Rear Admiral (Ret.), U.S. Navy, ¶¶ 4-6, 10-13, Bismullah, 501 F.3d 178 (D.C. Cir. May 31, 2007) (No. 06-1197) (same).
181 Trevor W. Morrison, Suspension and the Extrajudicial Constitution, 107 Colum.
detainees were often victorious in court when noting the government’s failure to follow its own procedures. Indeed, the government’s lapses in \textit{ex post} procedure may have influenced the Supreme Court’s decision to restore habeas in \textit{Boumediene v. Bush} and strike down an alternate review system fashioned by the political branches.\footnote{Boumediene v. Bush, 553 U.S. 723 (2008).} To understand why \textit{Boumediene} provides an object lesson in \textit{ex post} procedure, one need only recall that the Supreme Court had initially \textit{denied} certiorari in April 2017, only to reverse itself two months later, after the parties moved for rehearing and provided declarations attesting to the executive branch’s inadequate implementation of its own standards and procedures.\footnote{Boumediene v. Bush, 549 U.S 1328 (2007) (mem.), vacated, 551 U.S. 1160 (2007) (mem.). See also Landau, supra note 173, at 694.}

\textbf{C. The Trump Administration’s Ban on Transgender Servicemembers}

In a recent essay, former White House Counsel Neil Eggleston notes how President Trump’s decision to disregard the executive’s own internal operating rules has doomed a number of his signature policies in court.\footnote{See W. Neil Eggleston & Amanda Elbogen, \textit{The Trump Administration and the Breakdown of Intra-Executive Legal Process}, 127 Yale L.J. F. 825 (2018).} For Eggleston, 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.”\footnote{Id. at 826.} In cases challenging the Trump Administration’s policy blocking transgender individuals from serving in the military, courts have linked small-\textit{p} process with invidious intent. While agencies maintain discretion to choose not to enforce certain policies or to rescind them, procedural irregularity still impels courts in both constitutional and statutory contexts to link procedural irregularity with improper motivation.

injunctions have been either stayed or lifted, merits litigation remains before several lower courts that have focused heavily on ex ante process scrutiny. Those courts, all of which granted preliminary injunctions, noted clear procedural defects such as a lack of inter-agency review that did not involve the Secretary of Defense and which left the Pentagon largely flummoxed as well as related concerns that the abruptness of the administration’s reversal of prior policy evinced “discrimination[] of an unusual character.”


190 See, e.g., Doe 1 v. Trump, 275 F. Supp. 3d 167, 212-13 (D.D.C. 2017), vacated sub nom. Doe 2 v. Shanahan, 755 F. App’x 19 (D.C. Cir. 2019). Despite Trump’s claim that the policy was fashioned “after consultation with my Generals and military experts,” news accounts indicated that Secretary Mattis was only informed of it one day before it was announced. Julie Hirschfield Davis & Helene Cooper, Trump Says Transgender People Will Not Be Allowed in the Military, N.Y. TIMES (July 26, 2017) (noting the “haste” that left the White House unprepared to answer basic questions, and Secretary Mattis’s purported unhappiness).

191 See Brian Feldman, The Pentagon Was Just as Confused by Trump’s Ominous Tweet as You Were, SELECT ALL (July 26, 2017, 4:06PM), http://nymag.com/selectall/2017/07/the-pentagon-was-just-as-confused-by-trumps-tweet-as-you.html (describing military officials anticipating a strike on North Korea in the few minutes between the first and second tweets).

One case in particular, *Doe 1 v. Trump*,\(^{193}\) contrasted the transgender ban not only with the exhaustive process in *Rostker*\(^{194}\) but also the extensive procedures underlying the policy of transgender inclusion that President Trump inherited.\(^{195}\) All of the subsequent federal district court rulings agreed with *Doe 1*,\(^{196}\) noting “departure[s] from normal procedure,”\(^{197}\) such as “the absence of any considered military policymaking process” as well as “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, eliciting criticism from retired generals and members of Congress.\(^{198}\)


\(^{194}\) *Rostker v. Goldberg*, 453 U.S. 57 (1981); see also Renan, *supra* note 120 and accompanying text.

\(^{195}\) 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 1*, 275 F. Supp. 3d at 214. 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 procedural 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.” *Doe 1*, 275 F. Supp. 3d at 214 (emphasis added). Similarly, the Obama Administration’s policy was the result of an elaborate process that included a working group of senior civilian and uniformed officers, a 91-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 to be a mere smokescreen for a top-down directive—a reason to refuse the Trump Administration the deference it claimed it was owed. *Id.* at 179-80, 182, 184, 213. See *Doe 1*, 275 F. Supp. 3d 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 120, at 2261.


\(^{198}\) *Id.* at 770-71. As one court explained, “the 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 on transgender ban—“led the military leaders to resoundingly
In the wake of these lower court injunctions, the Department of Defense engaged a second process culminating in a 44-page report announcing a refinement of its transgender military policy.199 While the merits of the revised policy remain in litigation, the changes provided a sufficient basis for the D.C. Circuit to lift the lower court’s injunction, and, owing to that injunction and a stay of injunction imposed by the Supreme Court,200 the new policy is currently in effect while litigation over its merits continues.201

IV. PROCESS SCRUTINY IN INSTITUTIONAL CONTEXT

A. Motivational Inquiries and Institutional Context

Courts have invoked process scrutiny to justify closer inspection of the actions of both legislative and executive acts at the state and federal levels, and often without explicit reference to the way that institutional concerns such as federalism, separation of powers and/or institutional competency might alter the analysis. While the surrounding case law offers little by way of explicit guidance, it is unlikely that reviewing courts see these divergent contexts as following a single standard. Consider, for example, the difference between Trump v. Hawaii on the one hand and Masterpiece Cakeshop v. Colorado Civil Rights Commission202 on the other. In Masterpiece, the Court conducted 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 conclude there was no justification for the ban.” Stockman, 2017 WL 9732572, at *18. 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 I, 275 F. Supp. 3d at 215.

199 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 “creation of a panel of military and medical experts, the consideration of new evidence gleaned from the implementation of the policy on the service of transgender individuals instituted by then-Secretary of Defense Ash Carter [] and a reassessment of the priorities of the group that produced the Carter Policy”). It is important to note, however, that the D.C. Circuit noted these procedural differences not for their effect on the merits of the policy, but rather as evidence of a change in law or fact to warrant dissolution of the earlier injunction. Id. at 22.


201 Doe 2, 755 F. App’x at 23.

do business with a gay couple. The Court found that the taint of animus raised by the remarks of a single commissioner were not adequately cleansed by the commission’s multi-member structure or the subsequent rounds of state court review, including de novo review before a state appellate court. In that particular context, “even subtle departures from neutrality” on matters of religion constituted improper state-sponsored discrimination. A few days 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.

Although many scholars expressed difficulty reconciling the two cases, the difference may indeed be explained by the divergent institutional and

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203 Masterpiece, 138 S. Ct. at 1729 (describing the absence of a “neutral and respectful” enforcement based on the statement of one commissioner that equated certain religious beliefs with the defense of slavery and the Holocaust). Some commentators argue that the Court essentially manufactured these apparent problems with the commission’s ruling in order to “duck” thornier questions at the intersection of non-discrimination and free speech. Michael Dorf, Masterpiece Cakeshop Ruling Should (But Probably Won’t) Doom the Travel Ban, DORF ON LAW (June 4, 2018, 11:33 AM). http://www.dorfonlaw.org/2018/06/masterpiece-cakeshop-ruling-should-but.html.

204 Masterpiece, 138 S. Ct. at 1729 (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”).


207 See Ilya Somin, The Supreme Court’s Indefensible Double Standard in the Travel-Ban Case and Masterpiece Cakeshop, Vox (June 27, 2018, 9:40 AM), https://www.vox.com/the-big-idea/2018/6/27/17509248/travel-ban-religious-discrimination-christian-muslim-double-standard (noting that “the different results in the two cases arise from the application of a double standard between immigration (especially when linked to national security) and other areas of government policy”); see also Hawaii, 138 S. Ct. at 2447 (Sotomayor, J., dissenting) (expressing dismay over the inconsistencies

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substantive contexts. While the Hawaii Court appears to have been chastened by separation of powers concerns that were especially prominent given the overlapping contexts of national-security and immigration, the Masterpiece Court found itself less constrained in the “very different context [of] an adjudicatory body deciding a particular case.” Thus, despite 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,” Masterpiece involved adjudication before a state civil rights commission—and, in that context, the Court appeared comfortable not only divining motivation, but doing so in a way that ascribed the views of one member to the entire panel.

B. Conventional Critiques of Process Scrutiny

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

between the majority opinions in Hawaii and Masterpiece Cakeshop).


209 Id. (emphasis added).

kind of improper intrusion into the prerogative of a co-equal branch that confuses Congress for a lower court or an administrative agency. While the state courts have a more fully developed doctrine of procedural review, the federal system generally leaves the correction of process failure to the political branches.

C. Process Scrutiny and “Semi-Substantive” Review


See supra note 5 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 23, at 242-44 (expressing confidence that the political branches will remedy procedurally deficient laws by reenacting them or through non-enforcement). Judicial review of procedure is somewhat more common in state courts. See Frickey & Smith, supra note 210, 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 & Smith, supra note 212; Robert F. Williams, State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement, 48 U. Pitt. L. Rev. 797 (1987). 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. Linde, supra note 23, at 241-42.
Moreover, there is an emerging literature, some building on Ely’s theory of representation reinforcement, others on Linde, 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. This form of “semi-substantive” review of legislation has a rich pedigree—extending as far as back *McCulloch v. Maryland*—and takes on manifold forms. It can be expressed by a court’s questioning of how a law is enacted—as in *United States v. Lopez*, which turned in part on a lack of sufficient legislative findings; of any legislative intent which can be imputed onto a law—as in *Washington v. Davis*; of the time period in which a law was enacted as measured against more contemporary mores and usefulness—as in *Griswold v. Connecticut* and *Lawrence v. Texas*, and of the

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214 See supra Part I.A.


216 Coenen, supra note 210, at 2870.

217 See id. at 2845. *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 210, 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 210, at 1720-23. In subsequent cases, the Court continued to dedicate substantial analysis to perceived procedural inadequacies in various pieces of federal legislation. See Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 640 (1999) (concluding the Patent Remedy Act was not sustainable under Section 5, in part because the legislative record showed “no pattern of patent infringement by the States, let alone a pattern of constitutional violations”); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89-90 (2000) (finding that the Age Discrimination in Employment Act went beyond Section 5 authority after searching the legislative record for evidence that the law was congruent and proportional to the identified unconstitutional conduct); Bd. of Trustees 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 Disability Act because the legislative record contained insufficient evidence of State discrimination against the disabled).

218 See Coenen, supra note 210, at 2848.

219 See id. at 2849-50.
institution or body enacting the law—as in Regents of the University of California v. Bakke. 220

For its adherents, semi-substantive review has an inherently “self-limiting” nature, as the reviewing court is simply remanding to the enacting body to adhere to well-established principles of deliberation when it next proposes the law. 221 And 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. 222 For others, such decisions wrongly transplant the democratic deliberation mechanisms associated with APA review of administrative action to statutory interpretation. 223

D. Reconciling Small-p Process with the Court’s Animus Doctrine

Given the reluctance to second-guess political branch process, the Supreme Court has often sidestepped review of small-p process to focus more squarely on substantive motivation. During the past 25 years, the Court’s “animus” doctrine has largely overshadowed (if not overtaken) an Arlington Heights-style framework of discriminatory intent. For this reason, the animus doctrine is widely seen to be a powerful tool to root out discrimination. 224 This doctrinal shift may

220 See id. at 2852.
221 See id. at 2872.
222 Id. at 2867.
223 See Frickey & Smith, supra note 210, at 1710 (describing the judicial scrutiny of administrative action, where the court examines the records of trial-like hearings for sufficient evidence to justify the agency’s determination). Frickey and Smith’s critique harkens back to Linde, who rejected heightened procedural review of the legislative process as missing the whole point of judicial review: rather than make substantive value judgments about “legislative purposes or their relative weights,” id. at 1711, courts were examining—improperly, according to Linde—the legislative means and engaging a second-order analysis of discredited Lochnerism, or “instrumental rationality.” Linde, supra note 23, at 204.
224 See Dale Carpenter, Windsor Products: Equal Protection from Animus, 2013 S. Ct. Rev. 183, 284 (2013) (arguing that animus “is successfully doing the work that arguments for heightened scrutiny have failed to do in equal protection cases challenging anti-gay discrimination”); Daniel O. Conkle, Evolving Values, Animus, and Same-Sex Marriage, 89 IND. L.J. 27, 38-42 (2014) (noting the role of animus in Romer and Windsor but concluding that reaching this holding under substantive due process or equal protection grounds would be more prudent); 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

Electronic copy available at: https://ssrn.com/abstract=3403723
have occurred because courts were reluctant to review a legislative record with skepticism unless there were traces of political exclusion or minority capture.225

While there is some disagreement about the cases that actually comprise the Court’s animus canon,226 the 1996 case of Romer v. Evans is widely recognized as the paradigm illustration.227 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.228 Testing the law against rational basis review, as the

(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, 626-27 (2011) (noting that because “the Court will not grant suspect classification or other heightened scrutiny to same-sex couples, the ruling on DOMA will be governed by the rational basis standard,” such that it can be defeated by a finding of animus, or by reaching a “tipping” point in the evolution of social mores); Susannah W. Pollvogt, Unconstitutional Animus, 81 FORDHAM L. REV. 887, 889 (2012) (arguing that “animus . . . functions as a doctrinal silver bullet” for groups that lack suspect class status); Animus and Sexual Regulation, 127 HARV. L. REV. 1767, 1767-68 (2014) (arguing that because animus is “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”).


226 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 also Lawrence v. Texas, 539 U.S. 558 (2003); U.S. v. Windsor, 570 U.S. 744 (2013). See Carpenter, supra note 224, at 187 (writing prior to Obergefell please verify) that “[t]he animus quadrilogy overlaps a gay-rights trilogy that has charted the remarkable rise of respect for the dignity and rights of homosexuals”); Animus and Sexual Regulation, supra note 224, at 1767 (“A central feature of the Supreme Court’s recent gay rights jurisprudence has been an awareness of—and antagonism toward—government actions fueled by animus toward sexual minorities. . . . [A]niti-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.”) (internal citations omitted.


228 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 264.
Court had done in *United States Department of Agriculture v. Moreno* and *City of Cleburne v. Cleburne Living Center.* 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.” The Court thus invalidated Amendment 2 as motivated by invidious intent.

The Supreme Court’s holding in *Romer* stands in stark contrast to the process-driven analysis of the Colorado Supreme Court. Invoking Ely and Big-P process, the Colorado Supreme Court had focused on the way that Amendment 2 undermined the participatory rights of gays, lesbians and bisexuals, who—unlike everyone else—were required to amend the state constitution prior to enacting favorable law. By handling the case through the prism of democratic deliberation rather than motivation, the Colorado Court avoided an inquiry into the intent of those who voted for it. While Kennedy did not ignore entirely the Big-P disenfranchising aspects of Amendment 2, his opinion focused heavily on the link between improper motivation and norm irregularity, highlighting Amendment 2’s undermining of historical legal traditions rather than the ordinary workings of

\[\text{\footnotesize 229 413 U.S. 528 (1973).}\]

\[\text{\footnotesize 230 473 U.S. 432 (1985).}\]

\[\text{\footnotesize 231 *Romer*, 517 U.S. at 631-32. Kennedy noted that the law “impose[d] a special disability” upon gays, lesbians and bisexuals, who were “forbidden the safeguards that others enjoy or may seek without constraint.” Id. at 631.}\]

\[\text{\footnotesize 232 Kennedy wrote for the Court, “We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do.” Id. at 635.}\]

\[\text{\footnotesize 233 Evens v. Romer, 854 P.2d 1270, 1276 (Colo. 1993), cert. denied, 510 U.S. 959 (1993) (finding that Amendment 2 interfered with “the fundamental right to participate equally in the political process” and “impair[ing] a group’s ability to effectively participate . . . in the process by which government operates” requiring, on remand, that the State meet the most exacting level of scrutiny).}\]

\[\text{\footnotesize 234 The Colorado Court’s decision to handle the case on such grounds reflected Ely’s argument that judicial exploration of motivations is unnecessary in cases of outright constitutional violation, because in those cases the violation suffices to warrant striking down the legislation regardless of the motivations of the lawmakers. As Ely explained, judicial exploration of motivations is only appropriate when there is a claim that a “constitutionally gratuitous” benefit has been improperly withheld. Ely, supra note 4, at 145. In cases “where what is denied is something [to which] the claimant has a constitutional right—because it is granted explicitly by the terms if the Constitution or is essential to the effective functioning of a democratic government (or both)—the reasons it was denied are irrelevant.” Id.}\]

\[\text{\footnotesize 235 *Romer*, 517 U.S. at 631 (observing how Amendment 2 limited the ability of gays, lesbians and bisexuals to “obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State’s view, by trying to pass helpful laws of general applicability”).}\]

The evolution of animus as a talismanic proxy for improper motivation has obscured the kinds of small-p frameworks that had influenced *Arlington Heights* as well as *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, a case importing the *Arlington Heights* standard into the Free Exercise Context. *Romer*, by avoiding an Ely-style analysis (as the Colorado Supreme Court had done), elevated the idea of *norm deviation* to occupy a more central role in constitutional adjudication. One might criticize those more recent decisions, and their shift away from canonical substantive doctrines (such as heightened scrutiny or fundamental rights) or Ely-style Big-P process, as resting on weaker

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236 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. 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 627-29. In the argot of *Arlington Heights*, Amendment 2 engaged in “[d]epar[tures from the normal procedural sequence” as well as “[s]ubstantive departures” reflective of an improper legislative purpose. *Arlington Heights*, 429 U.S. at 267.

237 *Windsor* invalidated Section 3 of the Defense of Marriage Act (“DOMA”). 133 S. Ct. 2675 (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”; federal law had previously 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-based immigration) or in Social Security (to verify income criteria). *Windsor*, 133 S. Ct. at 2690. DOMA upended 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 2692.


239 See, e.g., Michael C. Dorf, *A Publicity Updated and Then Three Thoughts on Justice Scalia’s Dissent in Windsor*, DORF ON LAW (June 28, 2013, 10:37 AM), http://www.dorfonlaw.org/2013/06 (“[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 (and sex distinctions are already subject to heightened scrutiny) or because LGBT persons have been subject to a history of discrimination that continues to this day (albeit to a lesser extent than in the past)’’); see also Peter Nicolas, *Obergefell’s Squandered Potential*, 6 CAL. L. REV. CIRCUIT 137, 138 (2015) (arguing that “Justice Kennedy
foundation and prone to future alteration\textsuperscript{240}—or even reversal.\textsuperscript{241} If Romer provides a prime illustration of the ascendancy of animus as the chief mechanism for rooting out improper political branch motivation, it also highlights a significant (and unfortunate) replacement of process-based mechanisms, whether through representation reinforcement or process scrutiny, with more squarely norm-based mechanisms. And while the two kinds of interpretations can be overlapping, they have important differences.

\textit{Hawaii} is interesting from this perspective because the Court invoked Romer’s “animus” standard as an apparent compromise doctrine that would provide for a more careful consideration of extrinsic evidence than prevailing national security and immigration doctrines.\textsuperscript{242} Of course, the majority and dissenting Justices reached entirely different outcomes on the import of the squandered an important opportunity to leave a more enduring gay rights legacy”); Leonore Carpenter & David S. Cohen, A Union Unlike Any Other: Obergefell and the Doctrine of Marital Superiority, 104 GEO. L.J. ONLINE 124, 125 (2015) (“With Obergefell, the Supreme Court had an opportunity to write an opinion that would have advanced lesbian and gay rights by focusing on an equality analysis and clarifying whether sexual orientation is a suspect class. Instead, \textit{Obergefell} is largely a lengthy paean to traditional marriage that advances fundamentally conservative notions of family and intimate relationships.”).

\textsuperscript{240} Cf. Henry P. Monaghan, The Supreme Court, 1974 Term – Foreword: Constitutional Common Law, 89 HARV. L. REV. 1, 2 (1975) (observing how “a surprising amount of what passes as authoritative constitutional ‘interpretation’ is best understood as something of a quite different order—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”).


\textsuperscript{242} Chief Justice Roberts’s majority opinion “look[ed] behind the face of the Proclamation to . . . apply[] rational basis review” and thus entertained extrinsic evidence in the form of President Trump’s remarks about Islam. Trump v. Hawaii, 138 S. Ct. 2392, 2402 (2018). Justice Kennedy’s concurring opinion went so far as to see in this standard of review “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.”” Id. at 2424 (Kennedy, J., concurring).
President’s statements, illustrating the difficulty courts have with motivational analysis. At the same time, Hawaii reflects a similar reluctance to hold the President to any particular set of baseline procedures. 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. Presidential acts are largely exempt from the strictures of the APA, making the underlying deliberations (or lack thereof) of presidential decision-making ordinarily non-justiciable. For this reason, scholars have argued that judicial review of executive branch behavior tends to be largely deferential and that the inherent flexibility within administrative law in any event allows courts to tone down review where presidential action is concerned.

V. THE NORMATIVE IMPLICATIONS OF PROCESS SCRUTINY IN RIGHTS CASES

While it is clear that process scrutiny has trans-substantive aspirations across legislative and executive, and state and federal, contexts, it should not be applied in an undiscriminating way, heedless of context. But the fact that small-p process scrutiny might vary across different contexts—from reviewing presidential action versus an administrative functionary, or across federal and state contexts or when addressing international affairs versus domestic subject matter—should not alter the basic idea that a lack of process can provide important grounds for subjecting a given law or policy to heightened review for purposes of better understanding governmental motivation. While it is beyond the scope of this Article to provide a comprehensive treatment of these contextual differences, the discussion highlights their salience, laying a foundation for future work.

243 See supra note 136 and accompanying text. The APA requires, inter alia, publication of a general notice of proposed rulemaking, see 5 U.S.C.A. § 553(b) (2012), notice and opportunity for participation by interested individuals and entities, see id. § 553(c), and “a concise general statement of [the] basis and purpose” for any rule the agency adopts. Id.

244 See supra note 136 and accompanying text.

245 Id.

246 See Vermeule, supra note 136, at 1136 (focusing on national security and related emergencies); see also Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245 (2001) (characterizing the presidency as the new center of the administrative state, and arguing that courts have recognized the relevance of Chevron deference, while rejecting “hard look” review, in the context of the presidency); Eric A. Posner & Cass R. Sunstein, Chevronizing Foreign Relations Law, 116 Yale L.J. 1170 (2007), 1200-01 (highlighting judicial deference to the executive in foreign relations).

247 Additional questions for future analysis are precisely what amount of good or bad process evidence would be required in specific areas of constitutional adjudication as well
A. Process Scrutiny and Objectivity

One attraction of a procedural approach is that it provides a set of objective criteria for motivational analysis, offering a more concrete and identifiable set of benchmarks that can address—and potentially avoid—many of the current difficulties of ascertaining the motives of lawmakers, including concerns the inquiry reduces to nothing more than an 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 review of constitutional claims by groups that do not receive special solicitude under current constitutional doctrines. Of course, process scrutiny has drawbacks as well—in particular that it could allow legislatures to favor form over substance and use spurious procedures to achieve judicial validation for problematic 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.

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 policy-making, 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 is couched in more objective analysis. In such cases, process scrutiny avoids the need to divine the collective animus of a legislature or a 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—animus toward the victim—becomes, if not irrelevant, far less necessary to proving the prosecution’s case. Similarly, in the case studies explored in this Article, the observable and recorded steps taken by legislative or executive actors in creating law and policy provide easily recognized and objective evidence of intent.

Of course, different jurists will disagree, even in their assessment of 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

as how cases of mixed motive/mixed purpose might be handled.
the government claimed to follow, such that a faulty process, combined with discriminatory statements, supported a finding that it was grounded in animus.\footnote{248} But the Supreme Court, relying on the same record, found it sufficient to warrant deferential review and preclude the Court from substituting its own judgment in this policy area.\footnote{249} In other words, while the Supreme Court and lower court opinions in \textit{Hawaii} reflect the notion that courts are more likely to defer to policies couched in “good process,” and less so during moments of “bad process,” the plaintiff’s task in proving that a policy is inexplicable on grounds other than animus remains a difficult hurdle, especially if the court has already deemed legislative or administrative process sufficiently “regular.”

Especially because contemporary forms of discrimination are often less overt (and thus easier to mask) than when the Court’s discriminatory intent doctrine was born,\footnote{250} a requirement of even circumstantial evidence of discriminatory intent can present roadblocks for plaintiffs seeking to invalidate legislation under the Court’s Equal Protection jurisprudence. This is even more true because, under ex ante review,\footnote{251} legislative bodies of average sophistication can hide subtle forms of discrimination under processes that satisfy superficial standards of deliberateness. Thus, one serious concern with small-p procedural frameworks is that they too easily allow legislatures to use procedure as a fig leaf, concealing malintent while obtaining judicial validation for problematic policies.\footnote{252}

Along similar lines, Shirin Sinnar criticizes \textit{Hawaii} as simply providing “a detailed roadmap for the return of racial origin quotas.”\footnote{253} After \textit{Hawaii}, she writes,

\begin{quote}
[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
\end{quote}

\footnote{248} See \textit{supra} notes 143-147 and accompanying text.
\footnote{249} \textit{Trump v. Hawaii}, 138 S. Ct. 2392, 2421 (2018) (concluding that, based on the thorough process the government followed, “we cannot substitute our own assessment for [that of] the Executive["].)
\footnote{250} See Russell K. Robinson, \textit{Unequal Protection}, 68 STAN. L. REV. 151, 172 (2016); see also \textit{supra} note 27.
\footnote{251} See \textit{supra} note 165-225 and accompanying text.
\footnote{252} Cf. Jenny S. Martinez, \textit{Process and Substance in the “War on Terror,”} 108 COLUM. L. REV. 1013, 1031-32 (2008) (noting cases in which “process is intentionally used to avoid difficult substantive questions” in “a deliberate attempt by the government to delay and ultimately avoid adjudication of the merits”).
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.

Sinnar suggests that the political branches can game a procedural requirement by paying lip service to, and by executing a vacuous pro forma compliance with, a process that does nothing to remove its underlying prejudicial content. As she notes, one serious danger of a process-based approach is that a “process”—insincere, insufficient, but a process nonetheless—could satisfy formal requirements without any substantive content demonstrating a strong, well-considered policy. So long as the roadmap is followed, the government appears subject to little accountability.

Indeed, 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 it went to great lengths to do so in Masterpiece.254 These observations underscore the perennial concern that judicial review invites application of policy preferences, in particular when deciding whether or not to apply heightened scrutiny, and that even tests which measure objective, procedural rigor are still prone to the ideological and subjective influences of the Justices themselves.255


255 One additional decision from the Court’s 2017-18 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 decided a racial gerrymandering case on appeal from a Texas district court decision to strike down a redistricting plan as violative of statutory and constitutional rules against discrimination in the redistricting process, including the Voting Rights Act. Abbott v. Perez, 138 S. Ct. 2305 (2018). In 2017, invoking Arlington Heights, a Texas district court found that the 2013 redistricting plan passed by the Texas legislature for the United States House of Representatives, Texas House of
B. Small-p Process Scrutiny and Emerging Rights Claims

Nevertheless, the form of review that this article describes—using procedural irregularity as a basis for applying more careful judicial scrutiny—remains highly important in thinking about how courts resolve rights disputes. While a theory of representation-reinforcement successfully describe the function of the court in protecting against wholesale exclusion, they leave something to be desired in securing concrete protections. A model which instead looks to objective indices of procedural regularity through small-p process will not only require a qualitative assessment of the context of a given policy but also match the process of legislative and policy enactment with long-established and more objective standards. Indeed, the approach may be less subject to political swings on the bench while serving as an effective mechanism for identifying improper legislative intent, perhaps even more so than current methods.

Indeed, many of our most vulnerable populations are subject not only to harsh substantive laws but procedurally defective ones as well. From undocumented foreign nationals facing harsh immigration restrictions,

Representatives and Texas Senate had discriminatory effect and was “discriminatory at its heart.” Perez v. Abbott, 274 F. Supp. 3d 624, 651 (W.D. Tex. 2017), appeal dismissed sub nom. Morris v. Texas, 138 S. Ct. 747 (2018), and rev’d and remanded, 138 S. Ct. 2305 (2018). This holding was informed in significant part by procedural irregularity in enactment. Specifically, the lower court relied on evidence that the bill was passed quickly during a special session without any deliberative review to remove discriminatory “taint” from a 2011 plan which had previously been struck down, and thus with an intent to carry through those discriminatory terms. 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 “past discrimination cannot . . . condemn governmental action that is not itself unlawful” the plaintiffs’ evidence of “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. Id. at. 2328. 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.”

256 See generally Ely, supra note 4.
transgender individuals denied access to bathrooms, to convicted sex offenders subject to severe punishments after they have been released from the criminal


258 See HUMAN RIGHTS CAMPAIGN FOUND., ANTI-TRANSGENDER LEGISLATION SPREADS NATIONWIDE, BILLS TARGETING TRANSGENDER CHILDREN SURGE 2 (2016), http://assets.hrc.org/files/assets/resources/HRC-Anti-Trans-Issue-Brief-FINAL-REV2.pdf?ga=2.1071877772106740331.1507582781-564253486.1507582781 (describing 44 anti-transgender bills filed, “more than double” the previous year’s legislative session, ranging from limiting access to medical care to expanding state “First Amendment Defense Act” bills to allow publicly funded programs to refuse transgender individuals service); see also G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 715, 721 (4th Cir. 2016), vacated and remanded, 137 S. Ct. 1239 (2017) (deferring to the Department of Education’s regulations providing for “comparable” separate sex bathroom facilities, as interpreted in an opinion letter by the Department’s Office for Civil Rights to apply to transgender individuals “consistent with their gender identity,” and subsequently remanded when the Department of Education withdrew that opinion letter); Sam Williamson, Note, G.G. ex rel. Grimm v. Gloucester County School Board: Broadening Title IX’s Protections for Transgender Students, 76 MD. L. REV. 1102, 1103 (2017) (arguing that the Fourth Circuit should have conducted an independent analysis, extending the major questions doctrine and looking to Title VII case law); Adam Liptak, Supreme Court Won’t Hear Major Case on Transgender Rights, N.Y. TIMES (Mar. 6,
justice system, to criminal defendants charged under laws reacting to the perceived existence of the juvenile “superpredator”—an invented persona—governments have increasingly enacted laws and policies woefully lacking in fact-based analysis.

259 Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017). In Packingham, the Supreme Court invalidated, on First Amendment grounds, a North Carolina statute making it a felony for registered sex offenders to access social media sites with minors as members. Id.; see also Keri Burchfield et al., Public Interest in Sex Offenders: A Perpetual Panic?, 15 CRIMINOLOGY, CRIM. JUST. L., & SOC’Y, Dec. 2014, at 96, 97–102 (examining whether a perpetual moral panic exists against sex offenders that prompts increasingly restrictive legislation); Max B. Bernstein, Note, Supervised Release, Sex-Offender Treatment Programs, and Substantive Due Process, 85 FORDHAM L. REV. 261, 295–96 (2016) (arguing against mandating penile plethysmograph testing as a condition of federal supervised release as a constitutional violation of the right against bodily intrusions); Beth Schwartzapfel, I Married a Sex Offender, MARSHALL PROJECT (Feb. 18, 2016, 10:00 PM), https://www.themarshallproject.org/2016/02/18/i-married-a-sex-offender (describing a law that requires special marks on the passports of sex offenders as part of the “never-ending punishment” of life on the sex-offender registry); Roger N. Lancaster, Panic Leads to Bad Policy on Sex Offenders, N.Y. TIMES: OPINION (Feb. 20, 2013), https://www.nytimes.com/roomfordebate/2013/02/20/too-many-restrictions-on-sex-offenders-or-too-few/panic-leads-to-bad-policy-on-sex-offenders (asserting that laws that provide “for the indefinite detention of sex offenders after the[y] complet[e] . . . their sentences,” “‘child safety zone’ laws,” and lifelong GPS monitoring systems fail any classic criminal punishment justification, from rehabilitation to deterrence).


At a time when our country finds itself more divided, and our politics more partisan, than ever,\textsuperscript{262} party leaders, concerned that the ordinary sunlight of committee hearings and floor debates will frustrate or scuttle their plans, increasingly choose to dispense with ordinary procedural requirements to pursue highly partisan goals.\textsuperscript{263} Many of these laws target “discrete and insular” groups—African-American voters,\textsuperscript{264} Muslim foreign nationals,\textsuperscript{265} transgender


\textsuperscript{263} See \textsc{Barbara Sinclair}, \textsc{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, \textit{Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model}, 86 COLUM. L. REV. 223, 223 (1986) (“We live in a time of widespread dissatisfaction with the legislative outcomes generated by the political process. 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.”).

\textsuperscript{264} See \textit{supra} notes 57-96 and accompanying text.

\textsuperscript{265} See \textit{supra} notes 141-172 and accompanying text.
individuals. Others target much larger swaths of the polity—Democrats, Blue State liberals, consumers of health care. As legislators shrug off ordinary

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266 Kevin M. Barry, et al., A Bare Desire to Harm: Transgender People and the Equal Protection Clause, 57 B.C. L. REV. 507 (2016) (arguing that transgender people are a quasi-suspect or suspect class, and thus transgender classifications warrant heightened scrutiny); S. Elizabeth Malloy, What Best to Protect Transsexuals from Discrimination: Using Current Legislation or Adopting a New Judicial Framework, 32 WOMEN’S RTS. L. REP. 283 (2011) (analyzing the viability of current discrimination laws for protecting transgender individuals and concluding that a new category should be developed); Vittoria L. Buzzelli, Transforming Transgender Rights in Schools: Protection from Discrimination Under Title IX and the Equal Protection Clause, 121 PENN ST. L. REV. 187 (2016) (asserting transgender persons should receive protection as a quasi-suspect class); Anthony R. Enriquez, Note, Assuming Responsibility for Who You Are: The Right to Choose “ Immutable” Identity Characteristics, 88 N.Y.U. L. REV. (2013) (arguing for application of heightened scrutiny to transgender individuals despite the so-called mutability of the characteristic); Isaac Saidel-Goley. Note, Romer v. Evans and House Bill 2: Déjà Vu All Over Again, 38 WOMEN’S RTS. L. REP. 23 (2016) (arguing that heightened scrutiny should apply to transgender classifications, however animus-motivated laws, like HB-2, fail even under rational basis review).

267 See Common Cause v. Rucho, 279 F. Supp. 3d 587, 597 (M.D.N.C. 2018) (invalidating redistricting plan motivated by a desire not “to advance any democratic or constitutional interest” but merely “to advantage Republican candidates”); Whitford v. Gill, 218 F. Supp. 3d 837, 890 (W.D. Wis. 2016) (holding as unconstitutional a partisan gerrymandering plan intended “to secure the Republican Party’s control of the state legislature”).


269 Shortly after the 2016 election, Republicans immediately pursued two bills to overhaul Obamacare, doing most of their work outside the ordinary process, operating in secret and deliberately bypassing a number of ordinary congressional procedures. Matt O’Brien, Why Republicans were in Such a Hurry on Health Care, WASH. POST (Mar. 25, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/03/25/why-republicans-were-in-such-a-hurry-on-health-care/?utm_term=.833a336951ed (attributing the first
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 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 for helping courts understand their claim 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 be also 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 Masterpiece Cakeshop

shows, deployment of this form of procedural review will not always guarantee protections for the most vulnerable and politically powerless.

To be sure, laws invalidated on a process-based theory 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 renew a sense of legitimacy among the political branches and authority on the bench.