

## Article II and Antidiscrimination Norms

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### Abstract

*The Supreme Court's judgment in Trump v. Hawai'i validated a prohibition on entry to the United States from several largely Muslim-majority countries, and at the same time repudiated a longstanding precedent associated with the Japanese-American internment of World War II. This Article closely analyzes the relationship of these twin holdings. It uses their dichotomous valances as a lens onto the legal scope for discriminatory action by the federal executive. Parsing the various ways in which the internment of the 1940s and the 2017 exclusion order can be reconciled, the Article identifies a generative tension between the two holdings. Contrary to the Court's apparent assumption, the internment cannot easily be rejected if the 2017 travel ban is embraced: There is no analytically defensible and practicably tractable boundary between the two. Recognizing this disjunction and explaining why the Court's effort to separate past from present practice cannot prevail, I argue, reveals what might be called an "Article II discretion to discriminate." By identifying and mapping this species of executive discretion, the Article offers a novel critique of the Court's recent construction of executive power in light of historical precedent and consequentialist justifications. It further illuminates the downstream distributive and regulatory consequences of executive power in the context of ongoing judicial constriction of Article II discretion over regulatory choices.*

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## Introduction

When can the federal government disadvantage a suspect class because of an animus against it? When the Supreme Court in its June 2018 *Trump v. Hawai'i* decision validated the so-called 'travel ban'—prohibiting entry by nationals from largely Muslim-majority countries<sup>1</sup>—it also repudiated a longstanding precedent related to the Japanese-American internment of World War II, *Korematsu v. United States*.<sup>2</sup> The brevity of the Court's presentation seeds a puzzle: Why did the Court's five-Justice majority conclude that these twin holdings were compatible? How, as a constitutional matter, can exclusion circa 2017 be embraced (however gingerly) while internment circa 1942-45 is kept firmly at bay?

The terms of this reconciliation will likely be consequential both in practical terms and as a matter of constitutional theory. An integration of the Travel Ban Case's two holdings matters practically since it will shape whether, or under what circumstances, the federal executive has power to act adversely by relying on negative stereotypes or facial classifications concerning a suspect class. This follows, it is important to flag, without regard to whether one believes animus tainted the travel ban's gestation. The reconciliation of the Travel Ban Case's two holdings is also theoretically salient because of the light it casts on the historical and structural assumptions of Article II jurisprudence. Understanding the basic terms of structural constitutionalism illuminates Article II's potential as an engine of, rather than an abatement of, invidious social stratification.

In this Article, I deploy the disjunctive twin holdings of the Travel Ban Case as a means toward identifying and anatomizing an "open-textured" Article II discretion to discriminate.<sup>3</sup> Its first task is a close doctrinal dissection of the potential ways to synthesize the case's two holdings into a coherent whole. There are, to be sure, superficial differences between the scope, objects, and effects of the Japanese internment and the 2017 travel ban that might allow some constitutional partitioning. But I conclude that none of the potential doctrinal distinctions yields a tenable demarcation between the prohibited and the permitted. Even the most robust—the citizenship line—proves far more permeable than at first blush seems. Rather than peeling exclusion and internment apart, close analysis of these two holdings in a wider doctrinal setting therefore reveals a plethora of parallelisms and a poverty of plausible separations. If the Travel Ban Case's two holdings are to be held in view simultaneously, therefore, it will require what F. Scott Fitzgerald once called "a first-rate intelligence."<sup>4</sup>

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<sup>1</sup> *Trump v. Hawai'i*, 138 S. Ct. 2392, 2421 (2018) (upholding the executive order "because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility"). I will call this "the Travel Ban Case" hereinafter to avoid confusion; I use the term "travel ban" because it seems to avoid the more normatively charged and conclusory terms employed by both sides of the public debate.

<sup>2</sup> *Id.* at 2423 ("Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—"has no place in law under the Constitution."). The decision in *Korematsu v. United States*, 323 U.S. 214 (1944), is discussed in more detail at *infra* text accompanying notes 50 to 55.

<sup>3</sup> *Cf.* H.L.A. HART, *THE CONCEPT OF LAW* 128-36 (2d ed. 1994) (borrowing this term from linguist Fredrich Waisman to capture the possibility that even precise legal terms might generate large domains of uncertain application).

<sup>4</sup> *Cf.* F. SCOTT FITZGERALD, *THE CRACK-UP* 69 (1945) ("The test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function.").

My second, more substantial and ambitious, aim is to explore the historical and analytic foundations of the open-textured Article II discretion to discriminate authority. A reconstruction of its rationales reveals both formalist and functionalist ground. But the authority to discriminate cannot be grounded on either text or structures. The historical record, replete with instances of discriminatory executive action, does not support the proposition that coercive executive power will generate more public goods than harms when allowed to act in a discriminatory fashion. Comparative institutional competence, moreover, falls flat as justification for judicial deference once it is conceded that the executive will make policy in the first instance, with courts' role limited to a verification of its rationality and the absence of animus. The embrace of judicial deference to executive discretion is achieved at the cost of asymmetrical blindness to the harm inflicted on suspect minorities. Perhaps even most importantly, this Article II discretion to discriminate cannot and should not be surveyed in isolation. For it will predictably interact with other strands of Article II jurisprudence so as to shape the policy outcomes and policy-making calculus of the federal government. Rather than a cost-justified insulation of sound executive discretion, the Article II discretion to discriminate hence will have the dynamic effect of distorting federal governance, somewhat akin to a subsidy for an inefficient domestic industry, with outcomes that have no clear correlation to aggregate social welfare. Counter-intuitively, therefore, judicial expansion of Article II discretion likely works over time to undermine the efficient federal production of valued public goods.

The titular locution here is an important constraint on my claim: It is Article II and Article II alone that now comes packaged with open-textured discretion to discriminate on the basis of suspect classification, and to do so relatively candidly. This diverges from standard accounts of antidiscrimination norms along two margins. First, it is often the case that a challenged executive action is predicated on an authorizing federal law, such that it superficially makes more sense to talk of the action as a joint product of Congress and the executive. Indeed, both internment and the travel ban rested on some arguable claim to statutory authority.<sup>5</sup> But in both cases, I show, the impetus and design of the challenged policy came from the executive.<sup>6</sup> Congressional imprimaturs of approval, such as they were, were notional in both cases. The Japanese-American internment, for example, began as an executive order.<sup>7</sup>

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<sup>5</sup> The Japanese-American internment unfolding under the aegis of 18 U.S.C. § 97a, a federal statute that made it “a misdemeanor knowingly to disregard restrictions made applicable by a military commander to persons in a military area prescribed by him as such, all as authorized by an Executive Order of the President.” *Hirabayashi v. United States*, 320 U.S. 81, 83 (1943); *accord* *Korematsu v. United States*, 323 U.S. 214, 228 (1944) (citing the same statute); *The Travel Ban Case*, 138 S. Ct. 2392, 2408 (2018) (citing the language of 8 U.S.C. § 1182(f), and finding that it “grants the President broad discretion to suspend the entry of aliens into the United States”).

<sup>6</sup> In doctrinal terms, this means my analysis cuts across at least the first and the second categories from Justice Jackson’s taxonomy in the *Steel Seizure* case. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum .... When the President acts in absence of either a congressional grant or denial of authority, .... there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”). I focus on these two categories because there is only one case in which the Court has recognized the third category as controlling. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (noting that the “recognition” power at stake in that case fell within the third *Youngstown* category). My analysis does not place great weight on the existence of an independent Article II authority to act contrary to congressional intent in part because the cases with which I am concerned largely are not characterized by interbranch conflict of that kind.

<sup>7</sup> Executive Order 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

Only more than a month later did the military receive Congress's benediction in the form of a statute criminalizing violations of past and prospective orders.<sup>8</sup> As importantly, the judicial *rationales* for the narrowing of antidiscrimination norms flow from a theorization of Article II, and not an understanding of federal power in the aggregate. More strikingly, when it comes to discriminatory action, Congress alone does not enjoy the same margin of policy discretion as the executive branch.<sup>9</sup>

Article II glosses of executive action pursuant to federal statutes are, it bears noting, standard fare in the Supreme Court far afield from the questions examined here. Consider, for example, the Court's statement in *Heckler v. Chaney* that an administrative agency's decision not to regulate "shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."<sup>10</sup> On Justice Jackson's canonical formulation, the combination of Article I and Article II authorities creates the "strongest of presumptions and the widest latitude of judicial interpretation."<sup>11</sup> It commonly yields in practice "a presidential authority to complete legislative schemes" above and beyond the strict terms of legislative text.<sup>12</sup> Article II's penumbra, in short, penetrates and pervades much of what is formally denominated statutory law.

Despite this doctrinal homology, a discrepant Article II authority to discriminate is in tension with the prevailing view that constitutional antidiscrimination provisions under the Fifth and Fourteenth Amendments bind equally all official actors, whether federal or state.<sup>13</sup> In part, I suspect this is because scholarship on antidiscrimination has not engaged with developments in the separation of powers domain. To make sense of the discrepant power identified here, I will emphasize a rich history of discriminatory federal executive action subject to a distinct and different legal regime from state action. The federal commitment to

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<sup>8</sup> Act of March 21, 1942, codified at 18 U.S.C. §97a.

<sup>9</sup> See *infra* text accompanying notes 201 to 202 (discussing *United States v. Windsor*, 133 S. Ct. 2675 (2013)).

<sup>10</sup> *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (quoting U.S. Const., Art. II, § 3); accord *Wayte v. United States*, 470 U.S. 598, 607 (1985) (same for criminal prosecution power).

<sup>11</sup> *Youngstown Sheet & Tube*, 343 U.S. at 637 (Jackson, J., concurring).

<sup>12</sup> Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2287 (2006).

<sup>13</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217, 115 S. Ct. 2097, 2107, 132 L. Ed. 2d 158 (1995) (treating "the equal protection obligations imposed by the Fifth and the Fourteenth Amendments as indistinguishable); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."). To date, scholars mainly focused on various forms of selective incorporation that constrain the federal government more than the several states. Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1534 (2005) ("Whereas total incorporation contemplates that the Fourteenth Amendment makes all Bill of Rights guarantees applicable against the states, not all Bill of Rights provisions necessarily apply under selective incorporation."); see also Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155, 160 (2014) (discerning a "return of noncongruent equal protection"). As Rosen observes, selective incorporation has not yielded dividends in terms of increased state freedom of action, Rosen, *supra* at 160, and so the putatively narrower discretion on the part of the federal government under this doctrinal rubric can be safely ignored here.

antidiscrimination norms in both domestic<sup>14</sup> and immigration<sup>15</sup> policy contexts has been surprisingly tenuous, and seemingly conditional. My argument merely renders that historical genealogy of the Article II discretion to discriminate lucid and apparent as a prelude to considering its contemporary recovery, and implicit rehabilitation, in the Roberts Court's Article II jurisprudence. The latter's common-law constitutionalism, in other words, is a vehicle for the preservation and rehabilitation of bygone bouts of federal discrimination. It is a means for rehabilitating rather than repudiating past state depredations on constitutional equality.

A snapshot from history is useful to catalyze thinking about that history, and the disjunctive federal power to discriminate. Consider the tale of young Fred Oyama, an American citizen born and raised in the 1930s in southern California, where his non-citizen father Kajiro Oyama farmed and then endeavored to purchase for his son several acres of farmland.<sup>16</sup> Fred's life intersected with the Supreme Court's antidiscrimination doctrine twice. First, in 1942, Fred and his family were forcibly evacuated from their homes "along with all other persons of Japanese descent" as part of the Japanese-American internment.<sup>17</sup> The following year, the Supreme Court upheld a criminal conviction for a citizen's violation of a curfew order<sup>18</sup> issued by General John DeWitt that excluded all "persons of Japanese ancestry" from California and other Western states.<sup>19</sup> Fred didn't violate the curfew; but the Court's ruling determined his obligation to obey it. Second, in 1944, while Fred and his family remained interned far from their homes, the state of California filed a petition seeking to terminate Fred's property holdings on the theory that the 1913 Alien Land Law<sup>20</sup> prohibited aliens such as Kajiro from purchasing property on their citizen children's behalf. Although the Supreme Court had previously upheld California's prohibition of alien land ownership,<sup>21</sup> in 1948 a unanimous bench held that the state's Alien Land Law "deprives Fred Oyama of the equal protection of California's laws."<sup>22</sup> Fred got to keep his land. And five years later, the

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<sup>14</sup> See, e.g., IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 164 (2005) (defining "white affirmative action" as a central element of the New Deal); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (exploring the role of federal housing policy in driving residential segregation).

<sup>15</sup> Several excellent histories defined their focus in terms of the racial content of federal immigration policy, see, e.g., MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 18 (2004); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW, at xiv-xvii (1995); DANIEL J. TICHENOR, DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA 150-75 (2002). For a treatment of the legal history, see Patrick Weil, *Races at the Gate: A Century of Racial Distinctions in American Immigration Policy (1865-1965)*, 15 GEO. IMMIGR. L.J. 625, 627-38 (2001). I draw on these histories as needed but make no effort to recapitulate them.

<sup>16</sup> *Oyama v. California*, 332 U.S. 633, 636-37 (1948).

<sup>17</sup> *Id.* at 637.

<sup>18</sup> *Conduct of Enemy Aliens in Military Areas*, 7 Fed. Reg. 2543, 2544 (Mar. 24, 1942).

<sup>19</sup> *Hirabayashi v. United States*, 320 U.S. 81, 86-87 (1943) (upholding a conviction under a March 1942 statute imposing criminal penalties on anyone who "enter[s], remain[s] in, leave[s], or commit[s] any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War or by any military commander designated by the Secretary of War").

<sup>20</sup> Cal. Stats. Ch. 113, 1913 (May 19, 1913). Japanese farmers' "conspicuous success" and "gains in land tenure and crop production" catalyzed a sequence of restrictive property laws designed, in the words of the state's Attorney General, "to limit their presence by curtailing their privileges." Robert Higgs, *Landless by law: Japanese immigrants in California agriculture to 1941*, 38 J. ECON. HIST. 205, 215 (1978) (citation omitted).

<sup>21</sup> *Porterfield v. Webb*, 263 U.S. 225, 233 (1923).

<sup>22</sup> *Oyama*, 332 U.S. at 640.

California Supreme Court would rely on the *Oyama* judgment to invalidate the state's 1913 Alien Land Law.<sup>23</sup> Kajiro would therefore have no need for subterfuge or circumvention to preserve his son's patrimony.

Fred and Kajiro Oyamas' history exemplifies the divergent roles that discriminatory logics can play in state and federal decision-making.<sup>24</sup> Indeed, as if to illustrate and underscore the disjunction between federal and state actors, the *Oyama* Court relied on one of the Japanese internment decisions—an opinion that had been issued by an almost identical Court<sup>25</sup>—in embracing Fred's Equal Protection challenge.<sup>26</sup> What rendered a federal action lawful thus sufficed to doom the state's action. The disjunction is even more striking once it is recognized that it was the very same socioeconomic forces of discontent with Japanese economic success on the western seaboard that motivated both the 1913 California law and the 1942 internment.<sup>27</sup>

The sole scholarly article to address the federal immunity from antidiscrimination is a piercing 2004 analysis by Richard Primus of the Supreme Court's desegregation decision in *Bolling v. Sharpe*.<sup>28</sup> In an extensive survey of the Equal Protection jurisprudence in the half century after 1954, Primus demonstrated that “with respect to the heartland of equal protection—the defense of racial minority groups against governmental discrimination,” *Bolling's* application of equal protection norms to the federal government has yielded very few progeny.<sup>29</sup> His explanation is as compelling as it is ambiguous: “shared federal norms,” often implemented in the form of “statutory and administrative rules against discrimination” meant that the litigants had “little need” for constitutional rules, which did not materially diminish the practical burdens to suit that discrimination plaintiffs commonly confront.<sup>30</sup> Primus's explanation, though, does not explain the disjunction between *Oyama* and *Korematsu*—challenges to policies that emerged from the same toxic brew of racial nativism. More is needed to explain when our national government has been an engine of social progress, and when its actions have calcified social stratification.

In exploring this question, I am concerned principally with policies that embody (and hence might be challenged on the basis of) what colloquially can be called *discrimination against suspect classes*. The term “discrimination” has a range of possible meanings. It is used in constitutional doctrine to refer variously to a negative stereotype, a noncognitive animus, or the deployment of a suspect classification in the course of articulating a policy (such as

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<sup>23</sup> *Fujii v. California*, 242 P.2d 617 (Cal. 1952).

<sup>24</sup> *Oyama* himself thought the state property prohibition more onerous than federal internment. Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U.L. REV. 979, 981 (2010) (quoting correspondence with Fred Oyama). Without condescension, it seems worth asking whether there is a touch of adaptive preferences at work there.

<sup>25</sup> Justice Owen Roberts retired on July 31, 1945, and replaced by Justice Harold Burton.

<sup>26</sup> *Oyama*, 332 U.S. at 636 (quoting *Hirabayashi*, 320 U.S. at 81).

<sup>27</sup> On the common origin of these two measures in a widely held form of “racial nativism,” see Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" As A Prelude to Internment*, 40 B.C. L. REV. 37, 37–38 (1998). Earlier internment in World War I had similarly had a racial cast, albeit one that targeted Europeans. JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925*, at 210-12 (2002).

<sup>28</sup> 347 U.S. 497, 500 (1954) (mandating the desegregation of the District of Columbia's schools).

<sup>29</sup> Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 978–79 (2004).

<sup>30</sup> *Id.* at 1024-25.

affirmative action).<sup>31</sup> In specifying my topic, I will not distinguish precisely between these different conceptions; those distinctions are not relevant here. I also use the term “suspect classes” to refer broadly to minorities that tend to be objects of animus or negative stereotypes. In the constitutional doctrine, both race<sup>32</sup> and religion<sup>33</sup> have been identified as suspect classifications, even if religious classifications are typically litigated pursuant to the First Amendment’s religion clauses rather than the Equal Protection guarantee.<sup>34</sup>

My argument also has ramifications beyond the law of discrimination. To most observers, the Travel Ban Case was obviously a case about discrimination. It was plainly animated by President Trump’s statements “singling out Muslims for disfavored treatment.”<sup>35</sup> And in the absence of those statements, it is exceedingly unlikely that a legal challenge to the policy (if one had even been mounted) would have taken the public form and presence that the case in fact did. Yet, it is not a precondition of my analysis that a policy be challenged on antidiscrimination grounds. Indeed, one of the threshold challenges to the Japanese-American internment was framed on nondelegation grounds; Equal Protection concepts took a backseat because of uncertainty as to whether the Fifth Amendment’s Due Process Clause incorporated an antidiscrimination component.<sup>36</sup> The core challenges to the 2017 travel ban, similarly, initially sounded in statutory terms and on Establishment Clause grounds.<sup>37</sup> Moreover, at the back end of the litigation, a majority of the Supreme Court in 2018 rested its result partially on the authority of a First Amendment speech precedent.<sup>38</sup> The majority’s conclusion was also framed in stunningly broad terms, as pertaining to “[a]ny rule of constitutional law.”<sup>39</sup> Its logic thereby swept beyond the Establishment Clause, and encompassed other forms of invidious motivations. An analysis of discriminatory governance mechanisms, this intimates, cannot stop with a consideration of the law of discrimination. The shadow mapped here falls far afield.

The argument has three Parts. In the first Part, I introduce the Supreme Court’s interventions in respect to the Japanese-American internment and the travel ban. Because the latter has obviously received less scholarly attention, I provide a more detailed account of its origins and etiology. Part II then turns to the question whether the internment of the 1940s can be analytically distinguished from the exclusion of 2017. I conclude that it cannot, even by generous construction of the Court’s purported distinctions. Rather, I suggest that even the most robust dividing line (citizenship) ultimately fails to provide a satisfactory account of why

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<sup>31</sup> For a full catalog of discrimination’s varieties, see Aziz Z. Huq, *What is Discriminatory Intent?*, 103 CORNELL L. REV. --, at 10-21 (forthcoming 2018) [hereinafter “Huq, *Discriminatory Intent?*”], (analyzing the various roles of intent in the context of the Fourteenth Amendment).

<sup>32</sup> *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (declaring race a suspect classification).

<sup>33</sup> *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (listing religion as an inherently suspect distinction).

<sup>34</sup> Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1588 n.403 (2015).

<sup>35</sup> *Id.* at 2417.

<sup>36</sup> *Hirabayashi v. United States*, 320 U.S. 81, 83 (1943) (identifying both nondelegation and discrimination-based challenges); Primus, *supra* note 29, at 985 (“[A]t the end of the 1940s, the federal government’s obligation to avoid racial discrimination was articulated at the level of statutes and public policy rather than as a matter of constitutional equal protection.”); accord Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 883 n.13 (1998).

<sup>37</sup> *Travel Ban Case*, 138 S. Ct. at 2403 (noting jurisdiction of two questions, “whether the President had authority under the Act to issue the Proclamation, and whether the entry policy violates the Establishment Clause of the First Amendment”).

<sup>38</sup> *Id.* at 2419 (discussing *Kleindienst v. Mandel*, 408 U.S. 753 (1972)).

<sup>39</sup> *Id.* at 2419-20 (citation and quotation marks omitted).

the Japanese-American internment could not be recapitulated, *mutatis mutandis*, today. Part III situates the Court's theory of the Article II discretion to discriminate in historical and theoretical context. That theory, I suggest, is an unstable and ultimately incoherent confection of formalism and functionalist arguments, albeit one that demonstrates a certain solidarity with a historical commitment on the part of the federal government to the maintenance of social hierarchies. I conclude by looking forward to the likely future path of federal government development given the dynamic incentives created by an Article II discretion to discriminate.

## I. Two Histories of Exclusion and Internment

The Japanese-American internment and the travel ban are kindred policies. Both overtly restrain(ed) the diffusion of specific national, racial, or religious groups into and within the national demos. The project of demographic purification, however, was (is) pursued through the formal rubric of different non-discriminatory Article II authorities in the two cases. Both hence raise the question of how discriminatory terms can be woven into formally neutral, otherwise constitutionally justified, policies. This Part responds to that question by focusing on both policies' origins and legal trajectories as a platform for a consideration of whether the judicial repudiation of one can be squared with the embrace of the other. The aim of what follows, however, is to capture details salient to the constitutional questions, not to supply a full social history of the two policies and their impacts.<sup>40</sup>

### A. Internment (1942-45)

On February 19, 1942—one day after the Pearl Harbor attack—President Franklin Delano Roosevelt promulgated Executive Order 9066 authorizing military commanders to “prescribe military areas” from which “any and all persons may be excluded.”<sup>41</sup> Thirteen days later, General DeWitt proclaimed the entire Pacific coast a military area, citing the risk of “espionage” and “sabotage.”<sup>42</sup> Only then did Congress step in and legislate criminal penalties for those who were to “enter, remain in, leave, or commit any act in any military zone” contrary to the instructions of a military commander.<sup>43</sup> On the basis of that legislation, General DeWitt promulgated the critical Public Proclamation 3 establishing a daytime curfew for “all enemy aliens and all persons of Japanese ancestry within said Military Zones.”<sup>44</sup> Subsequently, 108 “exclusion orders” were issued requiring the departure of Japanese nationals and Japanese-Americans from the Pacific seaboard states.<sup>45</sup> Among them was Civilian Exclusion Order No. 34,<sup>46</sup> which served as the basis of a criminal prosecution lodged against Fred Korematsu.<sup>47</sup> The

<sup>40</sup> A compelling contemporaneous study of the Japanese-American internment is JACOBUS TENBROEK ET AL., *PREJUDICE, WAR, AND THE CONSTITUTION* (1954).

<sup>41</sup> Executive Order 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

<sup>42</sup> Pub. Proclamation No. 1, 7 Fed. Reg. 2320 (Mar. 2, 1942). A second proclamation, two weeks later, expanded the military zones. Public Proclamation No. 2, 7 Fed. Reg. 2405 (Mar. 16, 1942). Two days later, President Roosevelt mandated the creation of the War Relocation Authority. Exec. Order 9102, 7 Fed. Reg. 2165 (Mar. 2, 1942). This was done despite the absence of “consistent evidence either to allay or confirm” fears of active Japanese American disloyalty. PETER IRONS, *JUSTICE AT WAR* 27 (1983)

<sup>43</sup> Act of March 21, 1942, codified at 18 U.S.C. §97a.

<sup>44</sup> Pub. Proclamation No. 3, 7 Fed. Reg. 2543 (Mar. 24, 1942).

<sup>45</sup> Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 939 (2004).

<sup>46</sup> 7 Fed. Reg. 3967 (1942).

<sup>47</sup> *Korematsu v. United States*, 323 U.S. 214, 215-16 (1944); see also Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 498 & n. 30 (1945) (discussing regulatory context for prosecutions).

detained were initially held in assembly centers on the west coast. It was only after June 1942, and the decisive U.S. military victory at the Battle of Midway, that some 100,000 men, women, and children were moved to ten internment camps in the continental interior for terms of incarceration that would last up to three or more years.<sup>48</sup> Seventy percent of the detained were U.S. citizens.<sup>49</sup>

In three cases, the Supreme Court confronted and rejected constitutional and statutory challenges to different elements of the internment policy. The three cases train on different elements of the overall policy, and hinge on different legal reasoning. First, in its June 1942 decision in *Hirabayashi v. United States*, the Court rejected a nondelegation challenge and a Due Process challenge to a criminal conviction based on a violation of the curfew.<sup>50</sup> Second, in December 1944, the Court in *Korematsu v. United States* upheld a conviction for the failure to report to an assembly center pursuant to a military order.<sup>51</sup> The petition in that case sought reconsideration of the *Hirabayashi* judgment, and lodged a range of rights-based complaints, including an equal protection argument.<sup>52</sup> The Court held that “as in *Hirabayashi*’s case,” it could not “reject as unfounded” the military judgments upon which the conviction rested.<sup>53</sup> Finally, in *Ex Parte Endo*—decided the same day as *Korematsu*—the Court granted the habeas corpus petition of a concededly “loyal and law-abiding” American citizen of Japanese ancestry on the ground that the government lacked statutory authority to detain “citizens against whom no charges of disloyalty or subversion have been made” beyond the period “necessary to separate the loyal from the disloyal.”<sup>54</sup> No question of constitutional law, however, was resolved in *Endo*, although the canon of constitutional avoidance did seem to perform some labor constricting the ambit of detention authority.<sup>55</sup>

I defer until Part II a more detailed discussion of the analytic fabric of the internment decisions. That discussion is more sensibly situated in the context of a comparison to the

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<sup>48</sup> Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395, 1413 & n.46 (1999) (collecting contemporaneous evidence to the effect that Midway was widely understood to be a military pivot point when it occurred, obviating the risk of a west coast invasion).

<sup>49</sup> Kang, *supra* note 45, at 1013.

<sup>50</sup> 320 U.S. 81, 91-105 (1942). For a subsequent opinion relying on *Hirabayashi* to affirm another similar conviction, see *Yasui v. United States*, 320 U.S. 115 (1943).

<sup>51</sup> 323 U.S. at 221.

<sup>52</sup> *Id.* at 219 (“[P]etitioner challenges the assumptions upon which we rested our conclusions in the *Hirabayashi* case.”). *Korematsu*’s brief first set forth a nondelegation argument. It only then enumerated twelve individual rights violations, including Due Process, Bill of Attainder and Eighth Amendment ones. Brief for Appellant, in *Korematsu v. United States*, 1944 WL 42849, 323 U.S. 214 (1944), at 46-50. Item seven asserted that the conviction denied *Korematsu* “the equal protection of the laws which is implicit in the due process clause of the 5th Amendment.” *Id.* at 48.

<sup>53</sup> *Korematsu*, 323 U.S. at 219 (quoting *Hirabayashi*, 320 U.S. at 99).

<sup>54</sup> 323 U.S. 283, 295 (1944).

<sup>55</sup> *Id.* at 300 (reading detention authority on the assumption that “law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used”). Both Justice Murphy and Justice Roberts filed concurrences in which they expressly said they would not “avoid constitutional issues” but reach the Equal Protection issue. *Id.* at 308 (Roberts, J., concurring); *id.* at 307 (Murphy, J., concurring) (same). *But see* Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1954 (2003) (“[W]hat record we have of the drafting history of the *Endo* opinion suggests that Justice Douglas was aware of the avoidance cases, and their characteristic phrasings, but wanted to frame his own analysis differently.”).

Travel Ban Case. Nevertheless, it is worth dispelling preemptively a trio of potential misconceptions about these cases.

First, Justice Black’s opinion in *Korematsu* has attracted the lion’s share of scholarly and judicial opprobrium. Justices Sotomayor, Alito, Roberts, and Ginsburg all disavowed it in their confirmation hearing.<sup>56</sup> The Travel Ban Case also singles it out for distinctive obloquy and rejection.<sup>57</sup> But the key precedent in terms of doctrinal logic is in fact not *Korematsu*. It is *Hirabayashi*. The latter rejected both the nondelegation and the equality challenge, whereas the former explicitly relied upon and reaffirmed the latter.<sup>58</sup> Whatever “flawed reasoning or moral vacuity” infect *Korematsu* equally afflict *Hirabayashi*.<sup>59</sup> Given the explicit entanglement of the two decisions, I will assume for present purposes that the Travel Ban Case’s repudiation of *Korematsu* is also a repudiation of the relevant elements of *Hirabayashi*’s logic upon which the former relied.<sup>60</sup>

Second, the importance of discriminatory logics in the genesis of the internment and then the Court’s handling thereof are distinct questions; each is subtle in a different way. When President Roosevelt and General DeWitt acted, the constitutional status of federal racial classifications was at best unsettled. It was not clear the federal government was covered by equality norms related to race and national origin.<sup>61</sup> The question for them was hence one of political morality, rather than law. For there is no real question that the internments themselves were openly justified and implicitly understood by executive branch officials on the basis of rank anti-Japanese sentiment shared in particular by Roosevelt and DeWitt.<sup>62</sup> Contemporaries, indeed, understood the internment to be policy predicated on racial grounds, and condemned it as such.<sup>63</sup>

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<sup>56</sup> Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 393 (2011).

<sup>57</sup> The Travel Ban Case, 138 S. Ct. 2392, 2423 (2018).

<sup>58</sup> See *supra* text accompanying notes 50 to 53.

<sup>59</sup> Greene, *supra* note 56, at 425.

<sup>60</sup> I cannot exclude the possibility that in overruling *Korematsu*, Chief Justice Roberts’s majority opinion meant to leave *Hirabayashi* as good law insofar as the two cases share a common logical and argumentative core. This, indeed, would be one way to reconcile that element of the Travel Ban Case with the latter’s actual holding and effect. At least for now, I will assume that the maximally cynical view of the Court—as engaged in a mere display of casuistic rhetoric—is unwarranted. But you never know.

<sup>61</sup> Primus, *supra* note 29, at 985 (“[A]t the end of the 1940s, the federal government’s obligation to avoid racial discrimination was articulated at the level of statutes and public policy rather than as a matter of constitutional equal protection.”); accord Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 883 n.13 (1998).

<sup>62</sup> See GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 108, 110-12, 238 (2001) (documenting Roosevelt’s motivations regarding internment and his racist views about the Japanese generally); IRONS, *supra* note 42, at 57 (same); see also Rostow, *supra* note 47, at 497 (noting racially charged public campaign for internment). Justice Murphy’s dissent in *Korematsu* documented the “questionable racial and sociological grounds not ordinarily within the realm of expert military judgment” that permeated General DeWitt’s June 1943 Final Report on the Japanese Evacuation. *Korematsu v. United States*, 323 U.S. 214, 235-36 (1944) (Murphy, J., dissenting).

<sup>63</sup> Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court’s Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175, 176 (1945) (noting that the internment was “the first instance in which the applicability of a deprivation or restraint imposed by the Federal Government [upon a citizen] depended solely upon the citizen’s race or ancestry”).

The Court, by contrast, faced a different choice: Should it change extant doctrine in response to Roosevelt's and DeWitt's actions? If the Court failed in the Japanese-American internment cases, its primary sin was one of omission. It refused to change the law in a relevant way. This doesn't mean it didn't also commit sins of commission. Rather strikingly to the modern ear, the *Hirabayashi* Court did not merely accept the military judgment, but extensively endorsed the reasons for viewing Japanese Americans with suspicion—such as the “solidarity” with each other, the failure of their “assimilation as an integral part of the white population,” the teaching of Japanese nationalist propaganda” to their children, and the “irritation” of legalized discrimination, which “may well have tended to increase their isolation, and in many instances their attachments to Japan and its institutions.”<sup>64</sup> Reliance on negative racial stereotypes, in short, was not confined to the executive branch but contaminated the judiciary too.<sup>65</sup>

Finally, it is important to stress that none of the three internment cases pass upon the constitutionality of the internment itself. *Hirabayashi* concerned a curfew. *Korematsu* involved a refusal to report to an assembly center. In the latter case, Justice Black's majority opinion contorted itself to avoid addressing the detention.<sup>66</sup> An order to report to an assembly center, Black reasoned somewhat facetiously, would not necessarily have resulted in “detention in a relocation center” so the “lawfulness of one does not necessarily determine the lawfulness of the others.”<sup>67</sup> In closing, Black gestured to *Endo* for illumination of the constitutionality of the internment.<sup>68</sup> Yet *Endo* was a consciously, even aggressively, statutory decision that eschewed constitutional questions—to the dismay of the concurring Justices.<sup>69</sup>

*Korematsu* is in some respects therefore a strikingly weak choice as the nemesis of good constitutional judging. Its errors are parasitic, and ordinary of stare decisis.<sup>70</sup> The decision upon which it relies, *Hirabayashi*, overtly betrays the Court's sympathy with and eliciting of anti-Japanese stereotyping through a rather vile slander against Japanese-American children. At the same time, neither *Korematsu* nor *Hirabayashi* nor even *Endo* speaks to the

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<sup>64</sup> *Hirabayashi v. United States*, 320 U.S. 81, 96-98 (1943).

<sup>65</sup> Does such contamination require overt endorsement? Or is an enabling complicity enough? Because my inquiry here is legal rather than moral in focus, I do not pursue those questions in relation to the Travel Ban Case.

<sup>66</sup> This is not a new observation. Arval A. Morris, *Justice, War, and the Japanese-American Evacuation and Internment*, 59 WASH. L. REV. 843, 855 (1984) (describing the Court as “strain[ing] to separate the inseparable”); accord Kang, *supra* note 45, at 952. Irons notes that Black's distinction was “highly misleading” since “only a very few Japanese Americans” were not moved to the internment camps. IRONS, *supra* note 42, at 329.

<sup>67</sup> *Korematsu v. United States*, 323 U.S. 214, 221 (1944).

<sup>68</sup> *Id.* at 222.

<sup>69</sup> See *supra* text accompany note 55. Patrick Gudridge argues that “*Endo* closed the camps.” Gudridge, *supra* note 55, at 1934. He further suggests that *Korematsu*'s “sharp distinction between evacuation and detention . . . kept difficult inquiries at bay [and] limited any resulting injustice to only the relatively few individuals prosecuted for curfew or evacuation order violations.” *Id.* at 1946. But this is an exaggeration. *Endo* applied only to citizens—who made up only some two-thirds of the interned—and then only to “loyal and law-abiding” ones. Ex parte *Endo*, 323 U.S. 283, 295 (1944). A vast and murky league of discretion lies in that alliterative qualification.

<sup>70</sup> And if that is enough to damn an opinion, then the apple must fall far from the tree: For *Korematsu*, in turn, “receive[d] consistently positive citation . . . for its early articulation of the strict scrutiny standard.” Greene, *supra* note 56, at 456. Even this is a mistake. “Before the 1960s, there was no strict scrutiny as we know it today.” Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1275 (2007). Rather than one origin, Fallon emphasizes the numerosity of strict scrutiny's parentage.

constitutionality of the detention of 100,000 men, women, and children who were, by all accounts, uniformly innocent of any wrong-doing. Even in its titration of constitutional adjudication, therefore the Supreme Court pusillanimously managed to short-change some of the most marginalized and despised petitioners who clamored for their liberties before the bench.

## B. Exclusion (2017-)

Litigation concerning the travel ban arose against a pattern of public statements by officials, including the prevailing candidate for the presidency and subsequent occupant of the Oval Office, all of which bespoke unequivocal hostility to Muslim citizens and noncitizens alike. A full documentation of those statements occupies 26 pages of a brief filed before the Supreme Court.<sup>71</sup> I will not recite them all here, but note a choice few. The statements began with a call from the Republican candidate in the 2016 presidential race for “a total and complete shutdown of Muslims entering the United States” on the basis of the “great hatred towards Americans by large segments of the Muslim population.”<sup>72</sup> Exemplary campaign statements include Trump’s comment to CNN’s Anderson Cooper that “I think Islam hates us.”<sup>73</sup> After inauguration, the President continued to associate Islam uniquely with terrorism in a manner that suggested a categorical and necessary connection,<sup>74</sup> while his close advisors compared Islam to a “cancer”<sup>75</sup> and conceded that the chief executive sought to pursue anti-Muslim policies while using facially neutral terminology.<sup>76</sup> These statements occurred, moreover, in the context of a transnational rise in “authoritarian populism”<sup>77</sup> that mobilized electorates by appealing (often very successfully) to their fear of Islam as a violent and alien

<sup>71</sup> Brief for The Roderick & Solange MacArthur Justice Center as *Amicus Curiae* 5–31, in *Trump v. Hawai’i*, 138 S. Ct. 2392, (2018), at 5-31.

<sup>72</sup> Press Release, Donald J. Trump Presidential Campaign, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015) (originally published on donaldjtrump.com, later removed from the website, but available at <https://web.archive.org/web/20151207230751/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>); see also Jose A. DelReal, *Trump Campaign Staff Redirects, Then Restores, Mention of Muslim Ban from Website*, WA. PO. (Nov. 10, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/11/10/trump-campaign-staff-deletes-mention-of-muslim-ban-from-website> (noting Trump’s statements targeting the entry of Muslims to the United States).

<sup>73</sup> Interview by Anderson Cooper with Donald Trump, on *Anderson Cooper 360* (CNN television broadcast Mar. 9, 2016) (transcript available at <http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html> [<https://perma.cc/XZE8-XFBF>]).

<sup>74</sup> Dan Merica, *Trump Signs Executive Order to Keep Out ‘Radical Islamic Terrorists’*, CNN (Jan. 30, 2017, 2:02 PM), <http://www.cnn.com/2017/01/27/politics/trump-plans-to-sign-executive-action-on-refugees-extreme-vetting/> [<http://perma.cc/4BXH-NE3V>] (explaining that the President spoke of keeping out “radical Islamic terrorists” and prioritizing Christian refugees).

<sup>75</sup> Mattathias Schwartz, *Donald Trump’s National Security Adviser Michael Flynn Says Islam Is ‘Like a Cancer’*, THE INTERCEPT (Nov. 21, 2016, 12:10 PM), <https://theintercept.com/2016/11/21/donald-trumps-national-security-adviser-michael-flynn-says-islam-is-like-a-cancer/> [<https://perma.cc/Z6TB-ZQK7>].

<sup>76</sup> Amy B. Wang, *Trump Asked for a ‘Muslim Ban,’ Giuliani Says—and Ordered a Commission to Do It ‘Legally’*, WA. PO. (Jan. 29, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm\\_term=.6552b19442ee](https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.6552b19442ee) [<http://perma.cc/J27M-NGHQ>].

<sup>77</sup> The term was coined in a brilliant essay by the British-Caribbean cultural theorist Stuart Hall, *The Great Moving Right Show*, MARXISM TODAY, Jan. 1976, at 14-15, [http://banmarchive.org.uk/collections/mt/pdf/79\\_01\\_hall.pdf](http://banmarchive.org.uk/collections/mt/pdf/79_01_hall.pdf).

threat.<sup>78</sup> This political dynamic is a necessary piece of the context in which the litigation over the travel ban arose.

### 1. *The First Executive Order*

On Friday, January 27, 2017, a week after his inauguration, President Trump promulgated Executive Order 13769, prohibiting for 90 days the entry of all non-U.S. citizen nationals of Iraqi, Iranian, Libyan, Sudanese, Somali, Syrian, and Yemeni nationality.<sup>79</sup> Among other measures, this order also suspended the entry of refugees under the U.S. Refugee Admissions Program, and indefinitely suspended the entry of all Syrian refugees.<sup>80</sup> These measures, the order explained, were permissible applications of the president’s discretionary authority under § 212 of the Immigration and Naturalization Act (“INA”). Section 212—which was to be the legal foundation for all three versions of the travel ban—vests the president with authority to “suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem appropriate” upon making a finding that such entry “would be detrimental to the interests of the United States.”<sup>81</sup>

The order “caused mass confusion at airports and other points of entry” because of its abrupt and unanticipated imposition—as applied, passengers on on-bound flights at the time of order’s issuance were barred—coupled to an absence of any preparatory groundwork through the interagency process.<sup>82</sup> The measure, purportedly designed to enable “proper review and establishment of standards to prevent terrorist or criminal infiltration by foreign

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<sup>78</sup> For a descriptive survey of this political formation in an international context, see Aziz Z. Huq, *What is the Case against Muslims?*, in “THE EMPIRE OF DISGUST”: PREJUDICE, STIGMA, AND DISCRIMINATION IN INDIA AND THE U.S. (Martha Nussbaum, Aziz Huq, Vidhu Verma, and Zoya Hasan, eds. 2018).

<sup>79</sup> Exec. Order 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8977 (Jan 27, 2017) (hereinafter “Executive Order 1”).

<sup>80</sup> *Id.* §5.

<sup>81</sup> 8 U.S.C. § 1182(f). Prior to 2017, this provision had been employed on 44 occasions. Kate Manuel, *Executive Authority to Exclude Aliens: In Brief* 6-10 (January 23, 2017) <https://fas.org/sgp/crs/homsec/R44743.pdf>. All of these previous usages of § 212, however, largely involved far more narrowly defined categories of noncitizens, such as “officials of the North Korean government or Workers Party of North Korea,” or those who have participated in “serious human rights violations.” *Id.* at 1-2. The exception to this provoked perhaps the leading judicial treatment of § 212 prior to 2017. The Reagan, Bush I, and Clinton Administrations had since 1982 engaged in the practice of interdicting some persons fleeing Haiti when they were still outside U.S. territorial waters, for return to Haiti. This was deemed permissible notwithstanding statutory and international law restraints on removal to possible torture or ill-treatment. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 158-159 (1993); *id.* at 164 n.13 (noting president’s reliance on §212 authority). *Sale*, however, primarily concerned the scope of extraterritorial protections against transfers to torture, and so did not speak directly to the construction of Section 212. *Cf.* Manuel, *supra*, at 3-4 (discussing *Sale*, and suggesting that the latter’s construction of “entry” might influence the operation of § 212).

<sup>82</sup> *Hawai’i v. Trump*, 859 F.3d 741, 758 (9th Cir. 2017), *vacated and remanded*, 138 S. Ct. 377 (2017); *see also* Office of Inspector General, *DHS Implementation of Executive Order 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States*, Jan 18, 2018, at 5, <https://www.oig.dhs.gov/sites/default/files/assets/2018-01/OIG-18-37-Jan18.pdf> [hereinafter “OIG Report”] (finding that “DHS was largely caught by surprise by the signing of the EO and its requirement for immediate implementation,” having seen drafts only on the Tuesday and the Thursday before its promulgation). Again, there is a striking parallel with the Japanese-American internment. IRONS, *supra* note 42, at 77 (“Japanese-Americans confronted evacuation and internment almost bereft of direction.”).

nationals,”<sup>83</sup> was also ambiguous in scope. It was textually unclear as to its application to lawful permanent residents; the White House and the Department of Homeland Security initially offered conflicting answers to that coverage question.<sup>84</sup> As a result, U.S. residents of long-standing unfortunate enough to find themselves on an inbound international flight the day of the order’s promulgation were peremptorily detained at U.S. airports.<sup>85</sup>

Six days later, the District Court for the Western District of Washington issued a temporary injunction against this executive order, a measure confirmed on appeal to the Ninth Circuit Court of Appeals, in a suit filed by the states of Washington and Minnesota.<sup>86</sup> The preliminary relief was predicated on the Circuit Court’s conclusion that lawful permanent residents and nonimmigrant visa holders possessed a procedural due process interest that would be compromised by the first order.<sup>87</sup> Despite some initially heated rhetoric,<sup>88</sup> the Justice Department filed a motion to voluntarily withdraw the underlying appeal while a new executive order was prepared.

## 2. *The Second Executive Order*

On March 6, 2017, Attorney General Jeff Sessions and Secretary of Homeland Security John Kelly published a letter citing the September 11 attacks and purporting to ask the president to conduct a “thorough and fresh review of the particular risks to our Nation’s security from our immigration system.”<sup>89</sup> That same day, the President issued a fresh executive order (with the same title as the first) directing an interagency “worldwide review to identify whether, and if so what, additional information will be needed from each foreign country” for the purposes of passenger screening.<sup>90</sup> In order to “temporarily reduce investigative burdens on relevant agencies,” the new order imposed a new 90-day ban on travel by non-U.S. citizens or residents from all of the countries covered by the first order with the exception of Iraq.<sup>91</sup> The narrowing of the second order—to exclude legal residents and Iraqis—meant that only 180 million people were barred from entry based on their nationality.<sup>92</sup>

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<sup>83</sup> Department of Homeland Security, *Fact Sheet: Protecting The Nation From Foreign Terrorist Entry To The United States*, Jan. 29, 2017, <https://www.dhs.gov/news/2017/01/29/protecting-nation-foreign-terrorist-entry-united-states>.

<sup>84</sup> Dan Merica, *How Trump’s travel ban affects green card holders and dual citizens*, CNN, Jan. 28, 2017, <https://www.cnn.com/2017/01/29/politics/donald-trump-travel-ban-green-card-dual-citizens/index.html>.

<sup>85</sup> The executive order was deemed within 48 hours not to apply to lawful permanent residents. *Id.* Most of those detained in the initial order’s application received exceptions to enter. OIG Report, *supra* note 82, at 5.

<sup>86</sup> *Washington v. Trump*, 847 F. 3d 1151 (9th Cir. 2017) (per curiam), reconsideration en banc denied, 853 F.3d 933 (9th Cir. 2017).

<sup>87</sup> *Id.* at 1164-66.

<sup>88</sup> For an account of the President’s verbal attacks on the judges involved in this first stage of the litigation, see Fred Barbash, *Appeals court judges rebuke Trump for ‘personal attacks’ on judiciary, ‘intimidation,’* WA. PO., Mar. 16, 2017, [https://www.washingtonpost.com/news/morning-mix/wp/2017/03/16/appeals-court-judges-rebuke-trump-for-personal-attacks-on-judiciary-intimidation/?utm\\_term=.6d8b3afd0175](https://www.washingtonpost.com/news/morning-mix/wp/2017/03/16/appeals-court-judges-rebuke-trump-for-personal-attacks-on-judiciary-intimidation/?utm_term=.6d8b3afd0175).

<sup>89</sup> Letter from Hon. Jefferson Sessions and General John Kelly to President Donald Trump, March 7, 2017, [https://www.dhs.gov/sites/default/files/publications/17\\_0306\\_S1\\_DHS-DOJ-POTUS-letter.pdf](https://www.dhs.gov/sites/default/files/publications/17_0306_S1_DHS-DOJ-POTUS-letter.pdf).

<sup>90</sup> Exec. Order 13780, *Protecting the Nation From Foreign Terrorist Entry Into the United States*, 82 Fed. Reg. 13209, §2(c) (Mar. 6, 2017) [hereinafter “Executive Order 2”].

<sup>91</sup> *Id.*

<sup>92</sup> *Hawai’i v. Trump*, 859 F.3d 741, 771 (9th Cir. 2017), *vacated and remanded*, 138 S. Ct. 377 (2017).

The second ban was challenged again in a number of federal district courts.<sup>93</sup> A first judgment, issued by the District Court for the District of Hawai'i in a suit filed by the state of Hawai'i and a number of citizen residents resulted in a new preliminary injunction, this time on Establishment Clause grounds.<sup>94</sup> The Court rehearsed “significant and un rebutted evidence of religious animus driving the promulgation of the Executive Order and its related predecessor.”<sup>95</sup> (This judgment was disparaged by Attorney General Sessions as coming from “a judge sitting on an island in the Pacific.”<sup>96</sup>). The Ninth Circuit, upon appeal of that judgment, declined to reach the constitutional question but held that the second executive order exceeded presidential authority under § 212 of the INA.<sup>97</sup> The crucial element of this judgment was the Circuit Court’s observation that the second order “makes no finding that nationality alone renders entry [of all covered noncitizens] a heightened security risk.”<sup>98</sup> The government appealed both this ruling and a similarly unfavorable ruling to the Supreme Court. The Court granted certiorari and narrowed the preliminary injunctions to exclude those with a “bona fide” relationship with the United States; Justices Thomas, Alito and Gorsuch wrote separately to indicate their view that the government should prevail completely.<sup>99</sup> On the expiry of the second order on September 24, 2017, the Court dismissed the certiorari provision and vacated the Fourth Circuit’s judgment as moot.<sup>100</sup>

### 3. *The Third Executive Order*

The third version of the travel ban was promulgated on September 24, 2017.<sup>101</sup> Denominated a “proclamation,” this new order in effect tracked the two earlier orders in

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<sup>93</sup> The Civil Rights Litigation Clearing House of the University of Michigan Law School maintains a database of all of the challenges filed against different iterations of the ban. See Civil Rights Litigation Clearing House, *Civil Rights Challenges to Trump Refugee/Visa Order*, <https://www.clearinghouse.net/results.php?searchSpecialCollection=44>. As of August 1, 2018, the Clearing House lists 35 cases, albeit some that concern Freedom of Information Act requests related to the bans, rather than direct challenges. I do not map out all of the challenges to the bans here. Rather, I focus on the iteration of the legal challenge that ultimately came before the Supreme Court on certiorari from the Ninth Circuit, while also noting the important parallel action in the Fourth Circuit.

<sup>94</sup> *Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1136 (D. Haw. 2017).

<sup>95</sup> *Id.* at 1136. In the parallel litigation, one district court in Virginia concluded that the order “was not motivated by rational national security concerns,” but by impermissible bias. *Aziz v. Trump*, 234 F. Supp. 3d 724, 736 (E.D. Va. 2017). A second district court in Virginia held otherwise. *Sarsour v. Trump*, 245 F. Supp. 3d 719 (E.D. Va. 2017). In Maryland, a district court issued a preliminary injunction on statutory and constitutional grounds. *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 555-64 (D. Md.). The Fourth Circuit sitting en banc affirmed the preliminary injunction in a fragmented set of opinions that rested on both statutory and constitutional grounds. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), *cert. granted*, 137 S. Ct. 2080, 198 L. Ed. 2d 643 (2017), and *vacated and remanded sub nom. Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017).

<sup>96</sup> National Public Radio, *Hawai'i tells Sessions: 'Have Some Respect,'* April 12, 2017, <https://www.npr.org/sections/thetwo-way/2017/04/21/525050208/hawaii-tells-jeff-sessions-have-some-respect>.

<sup>97</sup> *Hawai'i v. Trump*, 859 F.3d at 762.

<sup>98</sup> *Id.* at 772 (“The Order does not tie these nationals in any way to terrorist organizations within the six designated countries.”).

<sup>99</sup> *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2083 (2017) (per curiam); *id.* at 2089 (Thomas, J., concurring in part and dissenting in part).

<sup>100</sup> *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017).

<sup>101</sup> Proclamation No. 9645, *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*. 82 Fed. Reg. 45161 (2017) [hereinafter “Executive Order 3”].

several material ways, but diverged in several important particulars. First, the third order described an interagency process of consultation in respect to the evaluation of security risks posed by different countries' nationals.<sup>102</sup> This process was said to have been headed by the Departments of Homeland Security and State, and to have focused on deficiencies in other nations' information sharing practices, or other "special circumstances" particular to that country.<sup>103</sup> Its quality and integrity have been subject to debate.<sup>104</sup>

Second, the new prohibitions extended further than previous iterations in the sense of covering more countries, but also cast a narrower net in the sense of including only certain classes of immigrant or nonimmigrant visa holders.<sup>105</sup> Some countries—Chad, Libya, and Iran—faced restrictions on immigrant and only certain nonimmigrant visas; a narrow band of Venezuelans aligned with the government were banned. And all Iranian, North Korean, and Syrians were denied entry.<sup>106</sup>

Third, the third order's restrictions were in form permanent, albeit subject to periodic revision. A Department of State "media note" suggested that "the restrictions are not intended to be permanent . . . and may be lifted as countries work with the U.S. government to ensure the safety of Americans."<sup>107</sup> Indeed, on April 10, 2018, the White House announced the removal of Chad from the executive order's reach.<sup>108</sup> Finally, the order contained a "waiver"

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<sup>102</sup> *Id.* §§1(c)-1(g).

<sup>103</sup> *Id.* §1(i) (describing Somalia as having adequate information sharing practices, but finding "special circumstances"); *id.* §1(h) (finding that Iraq had inadequate information sharing practices, but noting Iraqi cooperation in fighting terrorist groups as a justification for not extending the order to Iraq).

<sup>104</sup> *Cf.* *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 268 (4th Cir. 2018) (noting that "the Government chose not to make the review publicly available"). Justice Sotomayor's dissent observes the possibility of bias having entered into the review process, but is hindered from any more detailed showing because of the absence of information secured via discovery about that process. *The Travel Ban Case*, 138 S. Ct. 2392, 2442 (2018) (Sotomayor, J.). In other contexts, contemporaneous administrative process has proved vacuous. Michael Wines, *A Question's Murky Path onto the 2020 Census*, N.Y. TIMES, Jul. 25, 2018, at A12 (describing how initial account of how the administration chose to include a citizenship question in the 2020 Census "crumbled as more evidence has been unearthed" in discovery). It bears notice that no analogous process of discovery occurred in the travel ban litigation.

<sup>105</sup> Executive Order 3, §2.

<sup>106</sup> *Id.* An unusual, and otherwise unexplained feature of the order is its imposition of more restrictive conditions on immigrant as opposed to nonimmigrant visas. See STEPHEN LEGOMSKY & CRISTINA RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 260-77 (6th ed. 2015) (explaining that "nonimmigrant visas" encompass business visitors, tourists, temporary workers, and students, whereas "immigrant visas" is a catchall that captures the residuum, but is largely comprised of family reunification, employment, and "diversity" entries). It is not at all clear why those applying for immigrant visas would inspire greater concern than those applying for nonimmigrant visas. To the extent the concern is that a person may enter the country to commit an act of violence, it would seem that a (less regulated) tourist or business visitor visa would be preferable because it is easier to obtain. The order's focus on immigrants implies a greater concern for the more regulated population of those coming largely to settle in the United States.

<sup>107</sup> U.S. Department of State, *Presidential Proclamation Fully Implemented Today*, Dec. 8, 2017, <https://www.state.gov/r/pa/prs/ps/2017/12/276376.htm>.

<sup>108</sup> *U.S. lifts travel ban on Chad citizens: White House*, REUTERS, Apr. 11, 2018, <https://www.reuters.com/article/us-usa-chad-security/u-s-lifts-travel-ban-on-chad-citizens-white-house-idUSKBN1HH3FW>. It is worth noting that this occurred while the challenge to the order was sub judice before the Court, and would predictably have not have gone unobserved. *Cf.* *The Travel Ban Case*, 138 S. Ct. 2392, 2411 (2018) (noting Chad's removal).

provision that creates narrow discretion to issue waivers if an applicant makes a series of demanding showings to a consular officer or border official.<sup>109</sup>

States, individuals, and associations that had challenged the earlier travel bans renewed their legal objections on similar grounds. Again, the Hawai'i district court entered a preliminary injunction against its operation, and again, the Ninth Circuit Court of Appeals upheld the injunction on statutory grounds.<sup>110</sup> Key to this judgment was the Circuit panel's conclusion that "the Proclamation conflicts with the statutory framework of the INA by indefinitely nullifying Congress's considered judgments on matters of immigration," in particular by deploying § 212 as a broad-brush substitute for statutory provisions addressing security threats on an individualized basis and addressing security concerns through the visa waiver program.<sup>111</sup> The Fourth Circuit reached the same substantive result on constitutional grounds.<sup>112</sup> Pivotal to its conclusion was the finding that "the face of the Proclamation, read in the context of President Trump's official statements, fails to demonstrate a primarily secular purpose [but]...continues to exhibit a primarily religious anti-Muslim objective."<sup>113</sup>

#### 4. *The Supreme Court*

The Supreme Court, in a five-four decision, found the order to be within the scope of the president's § 212 authority and not in violation of the Establishment Clause. As with the Japanese internment cases, I defer critique of the case's constitutional reasoning until Part II, where it can be considered in tandem with the Japanese internment cases. Here, I set out its basic logic, including its justiciability and its statutory elements.

Before reaching any substantive question of law, the majority had to address threshold questions of constitutional and statutory justiciability, including both standing and the notion that an atextual emanation of the separation of powers (or some free-floating principle of immigration law) precluded review. Both points were addressed in oddly conclusory fashion. Hence, the Court addressed only the existence of Article III standing for the constitutional, and not the statutory question,<sup>114</sup> even though it had in an earlier opinion flagged the former.<sup>115</sup> It then noticed the "difficult question"<sup>116</sup> of whether constitutional and statutory challenges to

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<sup>109</sup> Executive order 3, §3(c) (allowing waiver upon a showing that "denying entry would cause the foreign national undue hardship"; "entry would not pose a threat to the national security or public safety of the United States"; and "entry would be in the national interest"). Waivers appear to be extremely rare. Yeganeh Torbani, *U.S. issued waivers to Trump's travel ban at rate of 2 percent, data shows*, REUTERS, Jul. 26, 2018, <https://www.reuters.com/article/us-usa-immigration-ban/us-issued-waivers-to-trumps-travel-ban-at-rate-of-2-percent-data-shows-idUSKBN1JN07T>. In a telling circularity, the State Department's own account of the waiver process suggests that consular officers look at the very databases that the travel ban's justifications assume to be unreliable. Letter of Mary K. Waters, Assistant Secretary Legislative Affairs, to Hon. Chris van Hollen, Feb. 22, 2018, at 2 <http://paaia.org/wp-content/uploads/2018/03/Van-Hollen-Response-Letter.pdf>.

<sup>110</sup> *Hawai'i v. Trump*, 265 F. Supp. 3d 1140 (D. Haw.), *aff'd in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017) (per curiam).

<sup>111</sup> 878 F. 3d at 685-86.

<sup>112</sup> *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233 (4th Cir. 2018).

<sup>113</sup> *Id.* at 268.

<sup>114</sup> *The Travel Ban Case*, 138 S. Ct. 2392, 2415–16 (2018). It had mentioned, without resolving, the standing question in general terms in its 2017 per curiam.

<sup>115</sup> *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2086 (2017) (per curiam) (referring, without resolving, the standing question).

<sup>116</sup> 138 S. Ct. at 2407.

entry policy were justiciable—a point that occupied a full thirteen pages of the Government’s brief<sup>117</sup>—and said merely it would “assume without deciding” justiciability. Given the constitutional character of the Government’s justiciability argument, this is a somewhat ill-fitting formulation.<sup>118</sup>

On the statutory question, the Court rejected the submission that the finding upon which the order rested was insufficient—reciting at length the interagency drafting process described in the order’s text—and declined to find “any textual limit on the President’s authority” under that provision.<sup>119</sup> Rather than cleaning separating statutory from constitutional analysis, Chief Justice Roberts again blurred the boundary between Article I and Article II<sup>120</sup> by invoking “the deference traditionally accorded the executive in this sphere.”<sup>121</sup> His analysis centrally rested on the vaguely stated impression that § 212 “exudes deference to the President in every clause.”<sup>122</sup> Other clauses of the INA were read narrowly, and practical tensions or puzzling, illogical consequences of the Government’s position were ignored.

Consider in this regard the challengers’ observation that the travel ban applied to only non-U.S. citizens who had already obtained a visa pursuant to a statutory framework that imposed on them the “burden” of demonstrating their eligibility.<sup>123</sup> Consular officers must deny a visa even if it only “appears” a person is ineligible.<sup>124</sup> Notice how this interacts with a subsequent categorical ban: It is only those who *meet* the burden of demonstrating that their documents and status are in order *given the known reliability of their nation’s government*, and who can overcome the ‘mere appearance’ of ineligibility threshold, who are barred entry. In effect, that is, the third executive order applied only to individuals who had already met the burden of demonstrating their eligibility for entry given their country’s imperfect documentation practices, and had proved the absence of any inadmissibility ground.

This would seem to be the kind of practical absurdity that, in other cases, the Roberts Court has resisted when reading statutes.<sup>125</sup> The Court’s response here, though, was a non-

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<sup>117</sup> Brief of Solicitor General in *Trump v. Hawaii*, 138 S. Ct. 2392, 2018 WL 1050350 (2018), at 17-30 [hereinafter “Gov’t Brief”].

<sup>118</sup> 138 S. Ct. at 2407. A possible explanation is the existence of division within the five Justice majority as to a justiciable controversy. At least implicitly, the Court must be read as rejecting the Solicitor General’s invitation to hold that “a fundamental separation-of-powers principle” foreclosed any review of a decision “to exclude aliens abroad generally.” Gov’t Brief, *supra* note 114, at 17.

<sup>119</sup> 138 S. Ct. at 2409-11.

<sup>120</sup> See *supra* text accompanying notes 10 to 11.

<sup>121</sup> 138 S. Ct. at 2409 (describing the “sphere” somewhat loosely in terms of “the context of international affairs and national security” (citation omitted)).

<sup>122</sup> *Id.* at 2411.

<sup>123</sup> 8 U.S.C. § 1361 (“[T]he burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this chapter . . .”); see also Brief of Respondents in *Trump v. Hawaii*, 138 S. Ct. 2392, 2018 WL 1468304 (2018), at 48-49.

<sup>124</sup> 8 U.S.C. § 1201(g) (“No visa or other documentation shall be issued to an alien if . . . it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible . . .”).

<sup>125</sup> See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015) (rejecting a reading of the Affordable Care Act that “would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very ‘death spirals’ that Congress designed the Act to avoid”); Abbe Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 66 (2015) (“One way to

sequitor: “Unless consular officials are expected to apply categorical rules [such as the third executive order] ... fraudulent or unreliable documentation may thwart their review ....”<sup>126</sup> Generously construed, this assumes that consular officers ignore the statutory burden of proof by relying on documents that are possibly “fraudulent or unreliable” under their own Department’s rules. That is, the Court’s logic here inverts the ordinary presumption of regularity.<sup>127</sup> It repudiates an absurd result of its statutory construction by assuming the existence of negligence or deliberate violation of the law by executive branch officials.<sup>128</sup>

Turning to the challengers’ claim under the Establishment Clause, the Court began by rejecting the government’s argument that evidence beyond the text of the order itself was irrelevant.<sup>129</sup> That evidence, however, played only a limited role in the Court’s decision. This was a consequence of two key analytic moves.

First, the Court distinguished between “the statements of a particular President,” and “the authority of the Presidency itself.”<sup>130</sup> By this rhetorical flourish, the majority shifted the focus of inquiry from the specific *individuals* occupying the White House to the generic *institution* of “Presidency.” This distinction recalls to a dichotomy proffered by the nineteenth century English constitutional theorist Walter Bagehot between the “dignified” parts of the constitution, which “excite and preserve the reverence of the population,” and “the efficient” element, “which ... in fact, works and rules.”<sup>131</sup> Ignore the working presidency, the Court in effect said, and pay attention to its reverence-inducing dignity.

In considering the institutional rather than the idiosyncratic presidency, the Court directed attention away from questions of discrimination. By framing “the admission and exclusion of foreign nationals” as a “fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control,” it invoked structural constitutional concerns arising from decisions that “implicate relations with foreign powers, or involve classifications defined in the light of changing political and economic circumstances.”<sup>132</sup> Here, what is initially a claim about *both* political departments ultimately turns on subject-matter expertise and institutional competencies particular to the executive.<sup>133</sup> In this fashion, a claim about joint power shifts gears to become a brief for Article II

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understand *King* is that the Chief Justice chooses the holistic side of textualism, one that has always shared with purposivism the assumption that Congress legislates rationally, with means to an end.”).

<sup>126</sup> 138 S. Ct. at 2411.

<sup>127</sup> *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926) (presumption of regularity supports official act of public officer).

<sup>128</sup> 138 S. Ct. at 2411.

<sup>129</sup> *Compare id.* at 2420 (holding that “we may consider plaintiffs’ extrinsic evidence”), *with* Gov’t Brief, *supra* note 114, at 66 (“Impugning the official objective of a formal national-security and foreign-policy judgment of the President based on campaign-trail statements is inappropriate and fraught with intractable difficulties.”).

<sup>130</sup> 138 S. Ct. at 2418.

<sup>131</sup> WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 7 (Miles Taylor, ed., 2001).

<sup>132</sup> 138 S. Ct. at 2418-19 (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quotation marks omitted)); *id.* at 2420 (suggesting that the case arose in the “national security and foreign affairs context”).

<sup>133</sup> In the immigration domain, many “early cases elide the difficult question of how the Constitution allocates immigration authority between the President and Congress.” Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 *YALE L.J.* 458, 472 (2009). In this respect, as in many others, the Travel Ban Case is a return to older jurisprudential practices. *See infra* text accompanying notes 188 to 191 (noting parallels to Progressive Era race jurisprudence).

authority.<sup>134</sup> Consistent with this framing, there is scant evidence suggesting the president was pursuing any policy agenda of either a contemporary or past Congress.<sup>135</sup> Moreover, the breadth of the “foreign affairs” and “national security” justifications, and their discontinuity from the Court’s tighter framing of the issue as concerning “the admission and exclusion of foreign nationals,”<sup>136</sup> suggests that the case should be understood as concerning Article II generally—not merely a pocket of immigration law.<sup>137</sup>

The second element of the majority’s arguments built on the assumption that it was the institutional, dignified executive that properly occupied the analytic lens, rather than the haphazard particulars of a given moment. With that assumption in hand, the Court framed its central constitutional inquiry as a “deferential” species of rational basis review<sup>138</sup> familiar from earlier generations of immigration jurisprudence.<sup>139</sup> The form of that review, however, is worth specifying in some detail because it diverges from the modality of rational basis review in other precincts of constitutional law.

To begin, the Court framed that the overall inquiry was aimed at determining whether a challenged policy “is plausibly related to the Government’s stated objective to protect the country and improve vetting processes.”<sup>140</sup> Applying this ‘plausibility’ standard, the Court suggested that if the existence of “persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.”<sup>141</sup> This was not the only formulation offered by the majority. Elsewhere, it suggested that unless the executive order was “inexplicable by

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<sup>134</sup> See *supra* text accompanying notes 10 to 11 (noting this blurring in the larger context of structural constitutional analysis). For an earlier treatment of immigration as an executive matter, see *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (stating that the powers to exclude and expel “may be exercised entirely through executive officers”).

<sup>135</sup> This does not distinguish the uses of § 212 at issue here. Adam B. Cox and Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 116 (2015) [hereinafter “Cox and Rodríguez, *President and Immigration Law Redux*”] (“Throughout the twentieth century, and up to the present, the President has used powers expressly delegated to him by Congress to advance his own immigration agenda.”).

<sup>136</sup> 138 S. Ct. at 2418.

<sup>137</sup> I build on this point in Part II, *infra*.

<sup>138</sup> 138 S. Ct. at 2418.

<sup>139</sup> See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.”); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (“Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 712 (1893) (“[In determining] whether the acts of the legislature or of the executive are consistent with the Constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government.”); *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (executive “determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers” [and]...“conclusive upon the judiciary”).

<sup>140</sup> 138 S. Ct. at 2420. Note how this echoes the “requirement of plausibility” that has been demanded when civil plaintiffs seek to overcome a motion to dismiss under Federal Rule of Civil Procedure 8(a)(2). *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); see also Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 23 (2010) (“Under the plausibility-pleading standard, the Court has vested trial judges with the authority to evaluate the strength of the factual “showing” of each claim for relief and thus determine whether it should proceed.”).

<sup>141</sup> *Travel Ban Case*, 138 S. Ct. at 2421. Moreover, there is some evidence in the opinion that it does not apply solely to First Amendment Religion Clause claims. *Id.* at 2418 (noting that earlier precedent “reaffirmed and applied [a] deferential standard of review across different contexts and constitutional claims” (emphasis added)).

anything [other than] animus,”<sup>142</sup> it would have to be sustained. Depending on the meaning of “inexplicable,” this standard might be glossed as more favorable to the government than a test that hinged on the production of “plausibl[e]” evidence. The Court also suggested, however, that what counts as “plausibl[e]” evidence encompassed a wide domain. Having rehearsed once the virtues of the “worldwide review process undertaken by multiple Cabinet agencies,” the majority also rejected the possibility of “substitut[ing] our own assessment for the Executive’s predictive judgments.”<sup>143</sup>

The standard of review applied by the Travel Ban Case majority, therefore, is distinct from one pursuant to which the state “has no obligation to produce evidence to sustain the rationality of a statutory classification.”<sup>144</sup> Applying the latter standard in the canonical cases first limning the operation of rational basis review, the Justices have been willing to hypothesize *ex post* reasons that “might have” justified a challenged state action.<sup>145</sup> It was quickly noted that the breadth of the judicial imagination meant that few challenged state actions would fall before this (inaptly named) ‘scrutiny.’<sup>146</sup>

But this is not the form of rational-basis standard applied in the Travel Ban Case. The Court’s application of that framework is focused on “evidence,” a term that implies a consideration of the actual reasons (rather than the universe of potential hypothesized reasons) for a challenged state action.<sup>147</sup> Indeed, the Court did look at the reasons supplied by the third executive order; it did not hypothesize its own. At the same time, the precise form of means-end rationality demanded by the Court was exceptionally weak. At best, its demand for ‘plausible’ reasons appears to track earlier rational basis jurisprudence that disallowed serious scrutiny of proffered justifications.<sup>148</sup> At the limit, the superficiality of such judicial consideration predetermines the outcome of review: Any minimally competent executive branch lawyer, after all, can almost always gin up *ex ante* a ‘plausible’ reason for a

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 2421-22.

<sup>144</sup> *Heller v. Doe*, 509 U.S. 312, 320 (1993).

<sup>145</sup> *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487 (1955) (hypothesizing rationales that a state legislature “might have” or “may have” had in enacting a statute to validate provisions distinguishing between ophthalmologists and optometrists on the one hand and opticians on the other); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (hypothesizing rationales that a state legislature might have had and stating that “[i]t would take a degree of omniscience which we lack to say” such a rationale was not the reason local authorities enacted the regulation).

<sup>146</sup> See Gerald Gunther, *The Supreme Court, 1971 Term-- Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972) (criticizing the Court for saving legislation by “exercising its imagination”). For a more recent recapitulation of this concern, see Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 760 (2011) (“Because judges could imagine many things, ordinary rational basis review was tantamount to a free pass for legislation.”).

<sup>147</sup> The Roberts Court has looked at hypothesized reasons for a state action, for example, in the postconviction habeas context, *see, e.g., Harrington v. Richter*, 562 U.S. 86, 102 (2011).

<sup>148</sup> *See, e.g., Heller*, 509 U.S. at 319 (holding that rational basis review does not “authorize ‘the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations’” (citation omitted)); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam) (asking whether a measure is “rationally related” to the putative state goal, a seemingly wholly etiolated standard). The Travel Ban Court unpersuasively suggested that its analysis tracked instances in which the Court has invalidated a measure because it is founded on “a bare...desire to harm a politically unpopular group.” *U. S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 449-50 (1985); *cf. Travel Ban Case*, 138 S. Ct. at 2421. But in cases such as *Moreno* and *Cleburne*, the problem was not that the state defendant lacked plausible reasons for the challenged action; the problem was that they were not plausible enough.

discriminatory policy.<sup>149</sup> If the executive declines to do so, it is likely because the political gains from engaging in untrammelled discrimination outweigh its legal risks.

Applying this standard, the Court offered a trio of arguments. Even on their face, these are hardly overwhelming. First, it underscored the absence of animus on the face of the order. This blinked, however, the presence of coded discriminatory terms in both of the earlier orders.<sup>150</sup> To the extent that the third order is naturally understood as a continuation and reiteration of those earlier,<sup>151</sup> this textual evidence seems unreasonably overlooked.

Second, the Court underscored the review process described in § 1 of the order. But it did so while declining to scrutinize whether it was a process that in fact deliberated to determine an outcome that was not *ex ante* foreordained. To anticipate a point that will play a greater role in Part III, the majority's willingness to endorse, mechanically and without meaningful scrutiny, an administrative process as legitimate and legitimating is in striking contrast to the same Justices' reluctance to credit the efforts of administrative agencies to settle on authoritative constructions of ambiguous federal statutes in the regulatory context.<sup>152</sup> The question of why procedural exertions by some regulatory agencies catalyzes judicial deference, and others provoke only skepticism from the federal bench, should be kept in mind for now.

Third, the Court pointed to the several ways in which the order was underinclusive as a prohibition based on religion, insofar as it excluded many Muslim countries; had been reworked to Iraq and Chad; and contained safety valves in the form of exceptions and

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<sup>149</sup> Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 490 (2004) (“[T]he [rational basis] standard's emphasis on deference at times leads courts to skip over the required step of evaluating the link between that permissible goal and the government's action.”). Counting against this reading is Justice Kennedy's concurrence which underscores the Court does 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.” 138 S. Ct. 2392, 2423 (2018) (Kennedy, J., concurring).

<sup>150</sup> Both the first and the second executive orders discuss “honor killings”—the homicide of a family member, typically female, due to the perpetrator's belief that the victim has shamed the family, usually by violating a religious tenet. LILA ABU-LUGHOD, DO MUSLIM WOMEN NEED SAVING? 113-14 (2013). The first an intent to prohibit “those who engage in acts of bigotry or hatred . . . including ‘honor’ killings.” Executive Order 1 §1 Both orders compel the Director of Homeland Security to collect information regarding “honor killings” perpetrated by foreign nationals. *Id.* §10(iii); Executive Order 2 §11. The practice of “honor killings” has never been tied to international terrorism. There is no known association between “honor killings” and the six countries at issue in this case—Iran, Libya, Somalia, Sudan, Syria or Yemen. *Cf.* K.M. Devries et al., *The Global Prevalence of Intimate Partner Violence Against Women*, 340 SCIENCE 1527, 1528 (2013) (finding that the incidence of intrafamilial violence exceeds 19 percent everywhere in the world except east Asia). Nor is there any connection between the incidence of “honor killings” and the likelihood that a government of one of those nations will supply information requested by U.S. immigration authorities. But the term “honor killing” has long been used to denigrate Islam as a violent and dangerous faith. KATHERINE PRATT EWING, *STOLEN HONOR: STIGMATIZING MUSLIM MEN IN BERLIN* 151–53 (2008); Leti Volpp, *Framing Cultural Difference: Immigrant Women and Discourses of Tradition*, 22 DIFFERENCES: J. OF FEMINIST CULTURAL STUD. 90, 90–91 (2011). Hence, the term “honor killing” is a way of misleadingly categorizing violence against women as a Muslim problem, and so “consolidating the stigmatization” of Muslim communities as deficient, backward, and prone to violence. ABU-LUGHOD, *supra*, at 113.

<sup>151</sup> As the Court did at other points, *See, e.g.*, The Travel Ban Case, 138 S. Ct. 2392, 2421 (2018) (noting the dropping of Iraq from the second order).

<sup>152</sup> *See, e.g.*, *Pereira v. Sessions*, 585 U.S. --, 2018 WL 3058276, at \*14 (June 21, 2018) (Kennedy, J., concurring); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment); *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 615-16 (2013) (Roberts, C.J., concurring) (Justice Alito joined Chief Justice Roberts's opinion).

waivers.<sup>153</sup> The argument from underinclusion is perhaps the weakest of the three reasons. No case law of which I am aware suggests that a finding of discrimination can be made only if it is shown that a defendant discriminated against all persons of the relevant class who came into his or her purview. Sexual harassment claims, for example, do not require a showing that any (let alone all) other women (or men) were objects of harassment. A race-based discrimination claim lodged against a police officer or prosecutor need not include evidence that the official discriminated against every member of the relevant race that came across their radar. And no one thinks that Jim Crow generally would have been any less offensive had a token African-American been allowed to shop at Woolworths.<sup>154</sup> Underinclusiveness, in short, is not usually thought to be evidence that discrimination is not at work.<sup>155</sup> The Court supplies no reason why this general principle should not be true in the Travel Ban Case.

The final element of the majority's decision is the most provocative, and most analytically fruitful, from my perspective: Responding to Justice Sotomayor's powerful dissent, which focused on the ample evidence of discriminatory intent and the absence of credible evidence of a national security justification, Chief Justice Roberts took umbrage at her invocation of the *Korematsu* decision.<sup>156</sup> I reproduce in full his response:

*Korematsu* has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation. The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—“has no place in law under the Constitution.”<sup>157</sup>

It is how this passage fits with the balance of the majority opinion that is the focus of the next Part—and the analytic pivot for a more careful consideration of the nature of Article II discretion in relation to discriminatory actions.<sup>158</sup>

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<sup>153</sup> *Id.* at 2420-23.

<sup>154</sup> On the insufficiency of “tokenism” more generally, see Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1214 & n.83 (2002). Of course, such tokenism would make circumvention of antidiscrimination norms trivial.

<sup>155</sup> Note that this is true even in cases such as *Romer v. Evans*, 517 U.S. 620 (1996), which are cited by the majority. See *Travel Ban Case*, 138 S. Ct. at 2420. The state of Colorado eliminated certain antidiscrimination protections from gays and lesbians; it did not (thankfully) require them to wear pink triangles, or to report for sterilization. Hence, Colorado's action was ‘underinclusive’ in the sense that it did not take animus to its logical extreme (and may not have directly burdened every LGBTQ person in the state).

<sup>156</sup> *Travel Ban Case*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting) (“Today's holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu* ....”).

<sup>157</sup> *Id.* at 2420 (citations and internal cross references omitted).

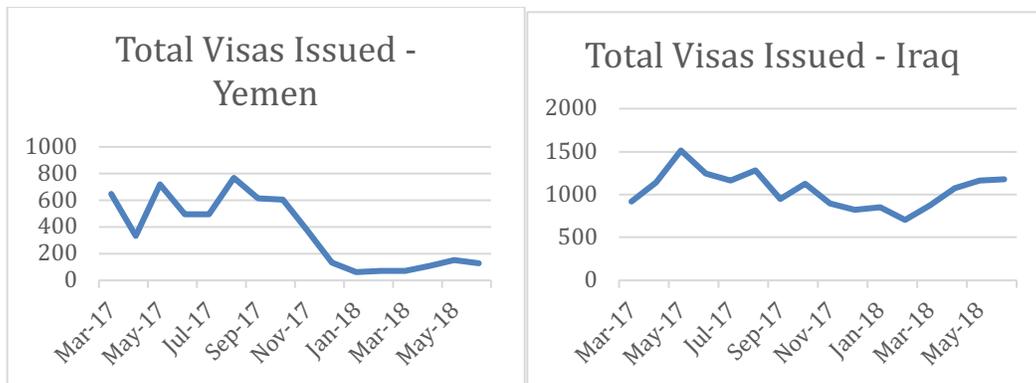
<sup>158</sup> Because my focus is on the central analytic nub of the Travel Ban majority, I will not analyze in any depth the two concurring and two dissenting opinions, except as they bear on the core holding and implication of the decision. But Justice Kennedy's concurrence is largely devoid of analytic content, while Justice Thomas's is

## 5. Consequences

Predictably, the numbers of immigrant and nonimmigrant visas to nationals of countries covered by the ban declined precipitously between 2016 and 2018. One study of visa issuances to nationals of Iran, Libya, Syria, Somalia, and Yemen suggests across-the-board drops by more than 50 percent.<sup>159</sup> More generally, the number of visas issued to individuals from any country sharply declined in 2017.<sup>160</sup> In tandem with the evidence of the infrequency of waivers, this data suggests that so long as the travel ban is in effect, rates of movement from the enumerated countries will remain minimal. Like the internment, the travel ban is an effective agent of demographic purification.

The travel ban's effect can also be decomposed by country. Figure 1 reports data on the aggregate number of immigrant and nonimmigrant visas issued for three countries that have been on all three iterations of the ban (Iran, Yemen, and Syria) and two countries that been on only one iteration of the ban (Chad and Iraq).

**Figure 1: Changes in Immigrant and Nonimmigrant Visa Issuance (March 2017-May 18)<sup>161</sup>**



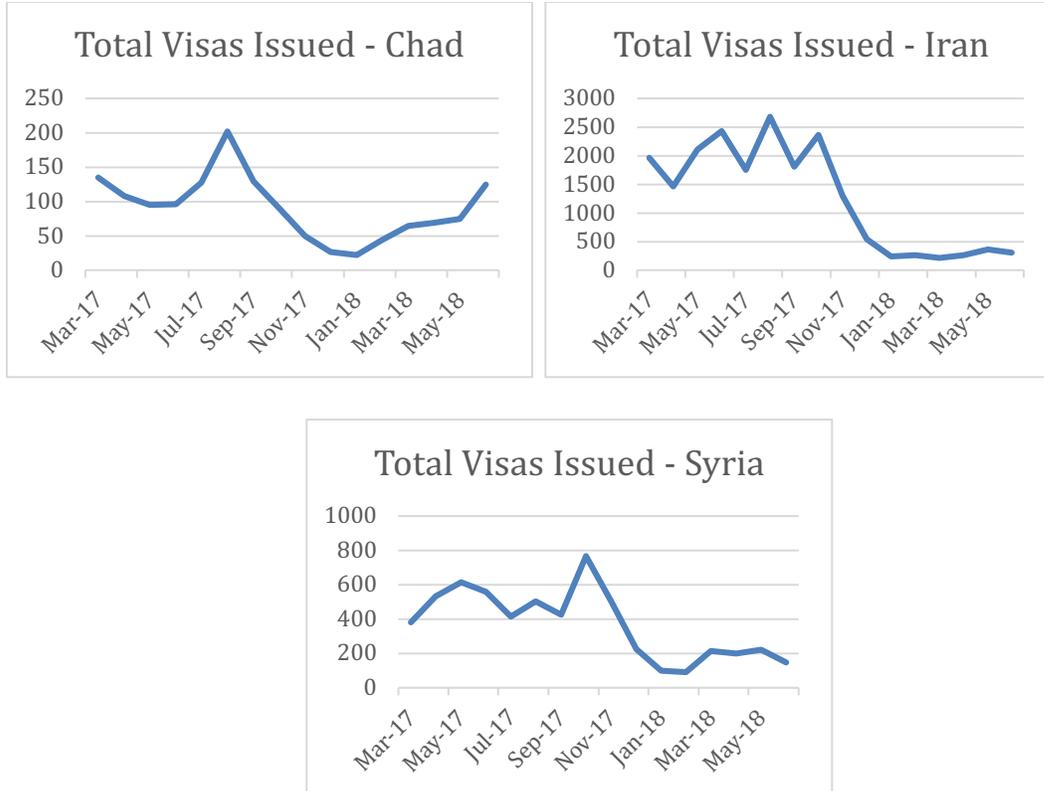
largely focused on the distinct question of nationwide injunctions that was extraneous to the case's resolution. *Id.* at 2423 (Kennedy, J., concurring); *id.* at 2424-30 (Thomas, J., concurring). Justice Breyer's dissent was focused on the need for additional factual consideration of the manner in which waivers under the order were being allocated. *Id.* at 2330-31.

<sup>159</sup> *The impact of Trump's travel ban*, THOMSON REUTERS, June 26, 2018,

<http://fingfx.thomsonreuters.com/gfx/rngs/USA-COURT-IMMIGRATION/010070WB1TZ/index.html>.

<sup>160</sup> Nahal Toosi, Ted Hesson, & Sarah Frostenson, *Foreign Visas Plunge under Trump*, POLITICO, Apr. 4, 2018, <https://www.politico.com/interactives/2018/trump-travel-ban-visas-decline/>.

<sup>161</sup> This figure reports data from the Department of State web site (<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics>). The State Department does not publicly report monthly data from prior to March 2017.



These figures provide some sense of the scale and timing of the ban’s impact on the affected nationalities, and show that for nationalities subject to the ban, its constraining effect is substantial in relation to the ex ante flow of arrivals.

\* \* \*

To summarize, both the statutory and the constitutional elements of the Travel Ban Case have notable analytic weaknesses or inconsistencies with other bodies of doctrine. More important—and the focus of the next Part—is how the decision’s central holding, and its repudiation of *Korematsu*, will interact to generate new constraints, or new opportunities for the discriminatory use of executive discretion.

## II. Between Internment and Exclusion

Constitutional doctrine does not abide in isolation. A solitary test, such as the rational-basis standard articulated by the Travel Ban Case majority, draws sense from its relative location within a wider network of doctrinal conjunctures and discontinuities. The meaning of a ruling, that is, depends to some extent on the opportunities and limitations created by consanguineous case-law.<sup>162</sup> Even if its meaning cannot be reduced to a single point-estimate,

<sup>162</sup> Constitutional law is not a “seamless web.” F.W. Maitland, *A Prologue to a History of English Law*, 14 L.Q.R. 13 (1898) (“Such is the unity of all history that any one who endeavors to tell a piece of it must feel that his first sentence tears a seamless web.”). Rather, there is a generative tension by the common lawyerly assumptions of intradoctrinal coherence and coherence across constitutional domains on the one hand, and the contrary fact of punctuated equilibriums in which changes to the larger political environment bleed into the jurisprudence

a richer sense of doctrinal context can nevertheless delineate a limited range of potential legal meanings. Hence it is important to understand how the decision to uphold the Travel Ban and the decision to overrule *Korematsu* can be reconciled.

More specifically, understanding the interaction between those holdings<sup>163</sup> is necessary to two undertakings. First, it can illuminate the space for the discriminatory exercise of discretion pursuant to Article II. Second, the calibration of that discretion will likely influence the allocation of policy-making efforts by the executive branch, the consequent manner in which federal institutions develop, and the extent to which they abet or hinder increasing social stratification. I take up the first question in this Part; the second set of queries are the focus of Part III.

I begin the analysis by isolating a series of five parallels between the Japanese-American internment case and the Travel Ban Case. The existence of these continuities should at minimum provoke uncertainty as to whether the cases from the 1940s are in fact substantively distinct from the 2018 decision. From these similarities, I turn to three possible margins along which the earlier trio of decisions can be distinguished from the later one. Each of these margins is plausible in light of the verbal content of the Travel Ban majority decision—and advocates seeking to cabin the latter would well rely on each of them. In developing this argument, I focus not just on the possibility of doctrinal walls being thrown up around the Travel Ban’s decision—but on the more practical question whether a distinction in fact would constrain the government from taking action akin to internment or exclusion. The possibility of substitution of doctrinal justifications for substantially similar policies, I emphasize, saps a formal distinction of relevance and utility. And it turns out that—at least where Article II powers are concerned—substitutability runs rampant.

### A. Continuities

There are a number of homologies in respect to the origins of and judicial responses to the Japanese-American internment and the travel ban. The reasons for their adoption, the kind of constitutional flaw at issue, the nature of the Court’s doctrinal response, and the most persuasive underlying account of the moral wrong of both policies—all of these line up quite precisely. As a result, correspondences can be discerned both between the policies of the 1940s and 2017, and the judicial responses in the two eras.

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through the appointment process, or through the anticipated response of Justices to anticipated political hostility. This tension cannot be fully resolved; projections from the incomplete body of doctrinal materials are therefore always provisional and subject to revision.

<sup>163</sup> I assume that the majority’s treatment of *Korematsu* is a holding, rather than dicta, even though “the generally accepted test provides little guidance” as to how to apply that distinction. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2041 (1994). The academic commentary contains two leading definitions of the distinction. Compare *id.* at 2048 (“[I]f the Supreme Court announces a multipart rule, and the case before the Court implicates only one part of the rule, the remaining portions would constitute dicta—at least so long as they are not required to explain why the Court adopts the portion of the rule it does apply.”), with Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 961 (2005) (“A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment.”). One could reasonably take different views on whether the *Korematsu* language is “required” to explain the case, or “based upon the facts of the case.”

First, both were policies likely adopted on the basis of diffuse social prejudice against a distinctive minority on the ground that the minority posed a distinctively large security threat. The evidence of animus against Japanese–Americans, shared by decision-makers such as Roosevelt, DeWitt, and California governor Earl Warren is by now well settled.<sup>164</sup> In respect to the Travel Ban, both the majority and the dissenting opinion of Justice Sotomayor recited a litany of presidential statements in which a categorical, derogatory characterization of a social group is offered on the ground of a purported association of that group with the commission of political violence. The majority opinion of Chief Justice Roberts noted, if only obliquely, the powerful evidence of invidious motive on the part of governmental actors.<sup>165</sup> Only Justice Thomas, in a casual aside, suggested an *absence* of discriminatory motive.<sup>166</sup> His negative inference is starkly at odds with his willingness and eagerness, the very same week, to infer prejudice from far more fragile evidence of animus, including one instance in which he read an ambiguous, off-the-cuff comment by a single official to impugn a decision to which that official’s views were not even necessary.<sup>167</sup>

A correlative of this commonality is that in both instances there was, in fact, no good evidence inculcating members of the targeted populations as a risky totality. In the Japanese-American internment case, there was “no consistent evidence either to allay or to affirm” fears of Japanese American involvement in pro-Japanese activities.<sup>168</sup> In the travel ban case, a study by the New America Foundation of terrorism cases found that “while a range of citizenship

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<sup>164</sup> See *supra* note 62. On Warren, see NGAI, *supra* note 15, at 176. On DeWitt, see *Acheson v. Murakami*, 176 F.2d 953, 957 (9th Cir. 1949) (“The major reason for General DeWitt’s deportation orders is his belief that these citizens, descended of an eastern Asiatic race, can never be determined to be loyal Americans.”).

<sup>165</sup> Chief Justice Roberts recited some of the “statements by the President and his advisers casting doubt on the official objective of the Proclamation,” and quoted a range of contrasting endorsements of religious tolerance by Washington, Eisenhower, and George W. Bush. *Travel Ban Case*, 138 S. Ct. 2392, 2417-18 (2018); see also *id.* at 2424 (Kennedy, J., concurring) (“An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.”).

<sup>166</sup> *Id.* at 2424 (Thomas, J., concurring) (“[E]ven on its own terms, the plaintiffs’ proffered evidence of anti-Muslim discrimination is unpersuasive.”).

<sup>167</sup> In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court (with Justice Thomas in the majority) invalidated a state administrative body’s finding that a bakery discriminated against a gay couple seeking a wedding cake on the ground that one of its members said that “one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.” 138 S. Ct. 1719, 1720 (2018). Justice Thomas joined that opinion and wrote separately to say “the Commissioners’ comments are certainly disturbing,” but “the discriminatory application of Colorado’s public-accommodations law is enough [to show a constitutional violation].” *Id.* at 1740 (Thomas, J., concurring). But the statement in question is at best ambiguous: The commissioner plainly did not say religion was “despicable,” but that the use of religion as a justification for harming others was “despicable.” Many religious people would fervently agree with the sentiment. It is very hard to see how this can be seen as “disturbing” while President Trump’s numerous and unequivocal statements are deemed insufficient evidence of discrimination. In his majority opinion in a First Amendment challenge to a California regulation of certain pregnancy advice services, Justice Thomas pointed to the “wildly underinclusive” scope of the state’s effort to suggest that raised a concern as to “whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.” *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018). Four Justices who joined that opinion wrote separately to say that saw no need to address viewpoint discrimination. *Id.* at 2378 (Kennedy, J., concurring). Again, Justice Thomas proved more willing to see discrimination than in the Travel Ban Case. It is important to ask what justifies this asymmetrical willingness to perceive the possibility of discriminatory motives.

<sup>168</sup> NGAI, *supra* note 15, at 174. Efforts to gather evidence of incriminating radio signals from Japanese-American communities had also failed by the time the internment was announced. *Id.* at 284.

status are represented, every jihadist who conducted a lethal attack inside the United States since 9/11 was a citizen or legal resident.”<sup>169</sup> Only three nondeadly attacks have been carried out in the United States by nationals of covered countries.<sup>170</sup> To the extent that the risk at issue is terrorism that causes a loss of life, therefore, the travel ban has no empirical basis.

Second, in both litigations, the challenge to the federal policy hinged on an allegation of discriminatory intent. It did not turn, however, on the *facial* content of the rule. In both instances, the challenged rule did contain a distinction based on national origin. But, in both cases, this distinction was legally irrelevant to the constitutional question before the Court. At the time of the Japanese-American internment cases, as noted, it was unclear whether the Fifth Amendment’s Due Process clause even included an antidiscrimination component. To the extent that it did, however, there was simply no authority at the time for the application of that rule to national origin.<sup>171</sup> The Court had on one prior occasion invalidated a Nebraska statute prohibiting the teaching of languages other than English as “arbitrary and without reasonable relation to any end within the competency of the state.”<sup>172</sup> But this is a far cry from treating nationality a suspect class.<sup>173</sup> Indeed, the first time in which that occurred was the *Oyama* case described in the Introduction—a case that is a direct legacy of the west coast internment.<sup>174</sup>

In the Travel Ban Case, no allegation of unconstitutionality on the basis of national origin discrimination was tendered. Rather, the *facial* validity of an order publicly advanced and embraced on the basis of discriminatory motives was simply irrelevant to the Establishment Clause question. Hence, in *Larson v. Valente*, the seminal precedent on denominational preferences, the Court invalidated a Minnesota statute regulating charitable solicitations but exempting “religious organizations that received more than half of their total contributions from members or affiliated organizations . . .”<sup>175</sup> The absence of a facial distinction between some faiths and others (as opposed to a distinction based on nonreligious behavior such as fund-raising habits) in the Minnesota statute did not save the measure from invalidation.

Chief Justice Roberts’s suggestion that the presence of *facial* discrimination in the Japanese-American internment distinguishes it from the travel ban therefore is misleading. Contrary to his opinion, the Japanese-American internment was not a government policy executed “explicitly on the basis of race,” as opposed to national origin; and in any case it cannot be distinguished from the travel ban on the basis of its verbal specification for the simple reason that race was not “facially” present in either case.<sup>176</sup> Rather, *both* the internment of the 1940s and the exclusion of 2017 were predicated—facially and explicitly—upon national

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<sup>169</sup> Peter Bergen et al., New America Foundation, *Part II: Who are the Terrorists?* (2017), <https://www.newamerica.org/in-depth/terrorism-in-america/who-are-terrorists/>

<sup>170</sup> John Mueller, ed., *Terrorism Since 9/11: The American Cases* (Jan. 2018), <https://politicalscience.osu.edu/faculty/jmueller/SINCE.pdf>.

<sup>171</sup> Yoshino, *supra* note 146, at 756 n.64.

<sup>172</sup> *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923).

<sup>173</sup> Indeed, the Court had previously endorsed federal laws in the immigration domain with naked national origin discrimination. *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698 (1983); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

<sup>174</sup> *See supra* text accompanying notes 16 to 27; Yoshino, *supra* note 146, at 756 n.64.

<sup>175</sup> 456 U.S. 228, 231 (1982).

<sup>176</sup> Travel Ban Case, 138 S. Ct. at 2420 (citations and internal cross references omitted).

origin rather than race. Moreover, the Chief Justice's prochronic errors do not end there: Inasmuch as he suggests that the *Korematsu* Court erred by not focusing on the facial content of the regulations, he condemns it for failing to apply a doctrinal test that was only applied starting in the 1970s.<sup>177</sup> His effort to say that the Japanese-American internment was different because it discriminated by race on its face, therefore, falls short.

Third, the same standard of judicial review was employed, albeit with slightly variant verbal expression, in both lines of cases. In the Travel Ban Case, the Court asked whether the challenged policy was "related to the Government's stated objective" and declined to look beyond the superficial validity of the reasons proffered by the state.<sup>178</sup> In the first Japanese internment case, the Court asked whether there was "any substantial basis for the conclusion ... that the curfew ... was necessary to meet the threat of sabotage and espionage."<sup>179</sup> And applying this standard, it underscored "the wide scope of judgment and discretion in determining the nature and extent of the threatened injury or danger."<sup>180</sup> Using similar language, *Korematsu* itself rested on the breadth of discretion awarded to the executive: "Here, as in the *Hirabayashi* case ... we cannot reject as unfounded the judgment of the military authorities and of Congress [and] cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour" internment was necessary.<sup>181</sup> What is this but the plausibility rubric of 2018 *avant la letter*?

The fourth commonality is related to the relationship between the available facts and the standard of review in both lines of cases. Given the known facts, the outcome of the standard of review in both cases ought to have been, and indeed was in fact, the same: the government winning. In both lines of cases there was a substantial national security threat lurking in the background—albeit one that in fact existed independently of, and did not in any meaningful way emanate from, the populations targeted by the coercive regulation. The form of rationality review employed across all the cases scanned for the existence of a threat. But it did not parse carefully the origin of the threat. Rather, under the operative standard of review, which can be framed either as requiring a showing of "plausibility,"<sup>182</sup> or as searching for a "substantial basis"<sup>183</sup> for the policy, it is enough for the government to identify *some* threat without any evidence linking that threat to the coercively targeted population with precision or predictive heft.

This claim may seem puzzling, given that I have pointed just now to the absence of any evidence that the specific populations at issue in these two cases in fact posed a security threat of any meaningful kind. But the key feature of the standard of review selected and applied by the Court in the 1940s and again in 2018 was that it did not require the government to produce such specific evidence. Rather, in both instances, the government was permitted to rely on evidence that pertained to a security threat related only in a general sense to the challenged policy. This general threat existed in both cases. In the months before the internment order, "the prospect of a Japanese attack on the mainland could not be dismissed

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<sup>177</sup> Huq, *Discriminatory Intent*, *supra* note 31.

<sup>178</sup> 138 S. Ct. at 2420.

<sup>179</sup> *Hirabayashi v. United States*, 320 U.S. 81, 95 (1943).

<sup>180</sup> *Id.* at 93.

<sup>181</sup> *Korematsu v. United States*, 323 U.S. 214, 219 (1944).

<sup>182</sup> *Travel Ban Case*, 138 S. Ct. at 2420.

<sup>183</sup> *Hirabayashi*, 320 U.S. at 95.

out of hand” given attacks by Japanese submarines off the west coast, sinking two vessels in December 1941.<sup>184</sup> Similarly, in the Travel Ban Case, there is no doubt that terrorist organizations such as the Islamic State do, in fact, operate from Syria and Yemen.<sup>185</sup>

Hence, in both cases, the standard of review adopted by the Court obviated the need for government lawyers to defend the substantive merits of the policy as *actually* applied. In the Japanese-American internment case, government lawyers were “relieved” by a delay in the briefing scheduled that gave them more time to prepare a defense of DeWitt’s key findings.<sup>186</sup> In the Travel Ban Case, the Government was never put to the pains of making any showing that the interagency process described in § 1 of the September 2017 order constituted a genuine investigation of what travel-related measures were warranted, and whether the reasons generated by that process were in fact relied upon.<sup>187</sup> It was never asked why, some fifteen years after the September 11 attacks, a barrier to entry of nationals who had not been involved in those attacks, or indeed any other fatal assaults, should suddenly be kept from entering American gates. The dissolving acid of deference, in both instances, ate completely away at any demand for particularity as to whether *these* men, women, and children had acted in such a way as to deserve coercion. Deference in turn invited the supervening intervention of a malignant animosity clothed with the delusive garb of homiletic abstraction.

This emasculated standard of review was once the rule rather than the exception in Equal Protection jurisprudence. Hence, in *Plessy v. Ferguson*, the Court tested the validity of Louisiana’s requirement of separate “white” and “colored” railroad carriages by asking whether it was “reasonable, and extend[ed] only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.”<sup>188</sup> In a telling verbal precursor to *Korematsu*, the *Plessy* Court framed its conclusion in terms of the difficulty of drawing a conclusion against the state.<sup>189</sup> Similarly, in *Williams v. Mississippi*, the Court upheld a suite of formally race-neutral restrictions that the state had imposed on the franchise with the aim of excluding African-Americans because of the absence

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<sup>184</sup> IRONS, *supra* note 42, at 27. Such evidence was widely credited beyond the west coast. See, e.g., Pacific Coast Aliens, N.Y. TIMES, Feb. 15, 1942, at E2 (finding “ample proof to substantiate Pacific Coast fears”).

<sup>185</sup> Shuaib Almosawa, Kareem Fahim & Eric Schmitt, *Islamic State Gains Strength in Yemen, Challenging Al Qaeda*, N.Y. TIMES, Dec. 14, 2015, <http://nyti.ms/1m0Gkep>; President Barack Obama, Statement by the President on ISIL (Sept. 10, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1>.

<sup>186</sup> IRONS, *supra* note 42, at 285. Indeed, the Government lawyers in *Korematsu* waved a “red flag” of warning about those facts, cautioning the Court “not ... to take judicial notice” of DeWitt’s findings. *Id.* at 286 (citation omitted).

<sup>187</sup> *Cf.* The Travel Ban Case, 138 S. Ct. 2392, 2442 (2018) (Sotomayor, J.) (casting doubt on the integrity of that process); *supra* footnote 104 (same).

<sup>188</sup> 163 U.S. 537, 550 (1896).

<sup>189</sup> *Id.* at 550-51 (“[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia ....”).

of a perfect fit between the regulated class and race.<sup>190</sup> The Japanese-American internment case and the Travel Ban Case inherit the logical structure of *Plessy* and *Williams* alike.<sup>191</sup>

The fifth and final point is the most crucial, if the most banal. The moral wrong of the Japanese-American and the moral wrong of travel ban are consonant: In both cases, officials acted upon an aversive and false stereotype to harm members of an ascriptive group because of their membership in that group. There is, in truth, little mysterious or difficult about this moral wrong. It is something “I and the public know/What all schoolchildren learn” the day they see someone bullied because they wear the wrong phenotype, carry the wrong faith, or love the wrong kind of person.<sup>192</sup> If there was a moral wrong to *Korematsu*, *Hirabayashi*—and, if my argument so far holds, the Travel Ban Case—it is failing to see, or to acknowledge “[w]hat all schoolchildren know.” It is the kind of elementary error of moral arithmetic, in short, that is so deeply rooted in the moral furniture of our lives, that it is hard to credit when made by those who are charged with being our better and our wiser soul.

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I began this section by noting the possibility of homologies between the two lines of cases at stake here. In the biological sciences, a homology is a similarity of “complex structures or patterns which are caused by a continuity of biological information.”<sup>193</sup> I have demonstrated here the existence of shared “complex structures” along five related margins. But are they due to a “continuity of ... information”? This is the question I take up now, by closely examining the possible doctrinal justifications for distinguishing the two era’s cases.

## B. Distinctions (and the Lack Thereof)

Let us recap the stakes briefly here. In distinguishing the Japanese-American internment cases and the Travel Ban Case, Chief Justice Robert drew on three distinctions. The former (1) concerned “concentration camps,” and not “entry” to the country; (2) was enacted “solely” and (3) “explicitly” on the “basis of race”; (4) was not “facially neutral”; and (5) was not problematic simply because it was taken by a “particular President,” i.e., because of an idiosyncratic motive.<sup>194</sup>

In developing the profound continuities between the two cases, I have demonstrated that reasons (2), (3), (4) and (5) do not in fact work as distinctions. The Japanese-American internment was not predicated “solely” on race: Not only did geographic location within the

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<sup>190</sup> 170 U.S. 213, 222 (1896) (“[T]he operation of the constitution and laws is not limited by their language or effects to one race. They reach weak and vicious white men as well as weak and vicious black men ....”). Williams had argued that Mississippi law required that jurors be qualified voters, yet the state’s suffrage criteria unconstitutionally excluded blacks.

<sup>191</sup> *Williams* “drew upon a dominant tradition in constitutional law that held legislative motive to be irrelevant.” Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 362 (1998).

<sup>192</sup> W.H. Auden, *September 1, 1939*, in ANOTHER TIME (rev. ed. 2007). By no means am I the first to make this sort of an argument. Cf. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960) (invoking “one of the sovereign prerogatives of philosophers - that of laughter” to answer the claim that separate could be equal in America).

<sup>193</sup> Gerhard Hanzpruzner, *The type of homology and their significance for evolutionary biology and phylogenetics*, 5 J EVOLUTIONARY BIO. 24, 25 (1992).

<sup>194</sup> The Travel Ban Case, 138 S. Ct. 2392, 2420 (2018).

U.S. play a role,<sup>195</sup> but it was national origin rather than race that was the designating criterion, much as it was for the travel ban. Both the travel ban and the key orders promulgated by General DeWitt, moreover, contained explicit national origin distinctions *on their face*.<sup>196</sup> So it is not the case that one was “explicitly” non-neutral, and the other wasn’t. (And recall that distinctions based on national origin did not trigger an Equal Protection concern until well after the Japanese-American internment cases were decided).<sup>197</sup> Rather, both defined a *subset* of a suspect class—Japanese-Americans and Muslims, respectively—and subjected them to intensified coercion. Finally, Chief Justice Roberts’s suggestion that motive was an issue for the Travel Ban, and not for the Japanese-American internment, is at odds with the existence of substantial evidence of individual motive in *both* cases.<sup>198</sup> In short, all but one of the distinctions he seeks to draw falls flat.

I want to offer now three further distinctions, building on Roberts’s reason (1), for distinguishing the Japanese-American internment cases from the Travel Ban Case. These are: (a) the difference between internment and exclusion; (b) the difference between the immigration power and the war power; and (c) the difference between citizens and non-citizens. In probing these points, I am not just trying to identify the formal boundary line between the Japanese-American internment cases, and the Travel Ban Case’s holding. I am also interrogating the latter’s domain. As I have argued, Chief Justice Robert’s core holding rested upon the institutional presidency’s authority to exercise discretion *de facto* animated by a discriminatory motive without scrutiny of, or a judicial response to, that motive.<sup>199</sup> Ascertaining how far this Article II discretion to discriminate extends is, at core, the central project of this Part.

The short answer is ‘quite a lot further than one might have thought.’ I reject distinctions (a) and (b) because they fail to accord either with the facts of the cases, or the known facts of the world. I think the citizen/noncitizen distinction in (c) is the most doctrinally plausible distinction. But other developments in the case-law have stripped that distinction of much of its practical force: Even if the Travel Ban Case could be invoked *against* a policy trained solely on citizens, I suggest, a weight of contrary precedent permits easy circumvention. When placed within the larger doctrinal context of Article II jurisprudence, there is no reason to think that an internment-like policy could not be implemented consistent with the existing precedent in respect to citizens.

Note again the important qualification here: This is a claim about Article II and not Article I. Both the Japanese-American internment and the Travel Ban Case concern executive actions taken pursuant to statutes. Because they arise at the confluence of congressional and executive action, it is not strictly possible to disentangle the separate penumbras of each

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<sup>195</sup> Japanese-Americans in Hawai’i, for example, were not interned because there were “too many ... to be moved.” Rostow, *supra* note 47, at 497.

<sup>196</sup> *See, e.g.*, Civilian Evacuation Order No. 1, March 24, 1942, 7 Fed. Reg. 2320 (1942).

<sup>197</sup> *See id.*

<sup>198</sup> Alternatively, Roberts’s reference to motive might be taken to suggest that motive should not have been relevant to either case. It is hard to see the force of this point. To be sure, *Korematsu* was in accord with then valid precedent holding that intent was not a touchstone of Equal Protection law. *See supra* text accompanying note 61. But both Equal Protection and Establishment Clause jurisprudence now treat motive as a relevant criterion. *See* Huq, *Discriminatory Intent*, *supra* note 31 (discussing cases).

<sup>199</sup> *See supra* text accompanying notes 131 to 132.

Article. Nevertheless, while the Japanese-American internment presented to the courts in terms of criminal infractions of a federal statute in both *Hirabayashi* and *Korematsu*, the criminal statute at issue did not in fact ratify the internments. Rather, it extended to “whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War.”<sup>200</sup> Hence, to the extent congressional authority for the internment existed, it would have to be inferred by an aggressive reading of a statute that by its own terms was relatively narrowly calibrated. Accordingly, to the extent one reads *Korematsu* and *Hirabayashi* as cases concerning the internment itself, Article II alone rather than bilateral political branch action is at stake.

In respect to the Travel Ban Case, it is striking to note that the Roberts Court has viewed congressional action, when challenged in isolation from any ambitious use of executive discretion, as subject to much more exacting scrutiny on antidiscrimination grounds. Consider in this regard two examples. The first is the Court’s recent decision *United States v. Windsor* invalidating § 2 of the Defense Against Marriage Act.<sup>201</sup> The *Windsor* Court’s analysis focused on whether that provision had the “purpose and effect of disapproval of [a] class.”<sup>202</sup> Yet this kind of “purpose” inquiry was precisely what the Travel Ban Court disavowed. And four years later—just twelve months before the Travel Ban Case—the Court in *Sessions v. Morales-Santana* unanimously invalidated what it deemed a “stunningly anachronistic” provision of the INA that treated unwed mothers and fathers differently for the purpose of establishing derivative citizenship.<sup>203</sup> The Court did so, moreover, by rejecting the Government’s reliance on precedent that provided architectonic support for the majority opinion in the Travel Ban Case.<sup>204</sup>

The contrast between *Windsor* and *Morales-Santana* on the one hand, and the Travel Ban Case on the other, suggests that a statute examined in isolation receives a different, more intense kind of scrutiny than the exercise of executive discretion backed by a statute.<sup>205</sup> Moreover, the justifications offered for maintaining the scope of discretion to discrimination in the Travel Ban Case were reasons that sound in the particular structure, design, and operation of the executive branch, rather than Congress.<sup>206</sup> Most tellingly, the Court in the latter case directly invoked “the President’s constitutional responsibilities in the area of foreign affairs.”<sup>207</sup>

In short, given the Court’s more stringent treatment of Article I action simpliciter, and its express invocation of exclusive Article II authority, any added quantum of discretionary authority to discriminate in the Travel Ban Case can be explained only in terms of the

<sup>200</sup> 18 U.S.C.A. § 97a (quoted in *Hirabayashi v. United States*, 320 U.S. 81, 87–88 (1943)).

<sup>201</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>202</sup> *Id.* at 2693.

<sup>203</sup> 137 S. Ct. 1678, 1693 (2017).

<sup>204</sup> In *Morales-Santana*, *id.* at 1693–94, the Court rejected the Government’s reliance on *Fiallo v. Bell*, 430 U.S. 787 (1977), whereas the Travel Ban Court cited it repeatedly as good authority, 138 S. Ct. 2392, 2418, 2420 (2018).

<sup>205</sup> I do not think it is plausible to say that *Windsor* can be explained by a lower standard of review, since the Court has not made sexuality a suspect trait; it is also hard to see why gender discrimination would receive less careful scrutiny than religious bias.

<sup>206</sup> Hence, the Court cited cases such as *Fiallo v. Bell*, 430 U.S. 787 (1977), and *Kerry v. Din*, 135 S. Ct. 2128 (2015). Travel Ban Case, 138 S. Ct. at 2418–19.

<sup>207</sup> *Id.* at 2419.

additional involvement of executive branch actors. In discussing the discretion to discriminate henceforth, I will therefore focus on its crucial Article II aspect.

1. *Internment v. Exclusion*

The first potential cut point between the earlier and the later cases hinges on the possibility that the Japanese-American internment cases involved “concentration camps,” while the Travel Ban case involved exclusion, i.e., the rejection of persons at the border. This distinction, however, is at odds with the facts of the case and belies the operation of the border as a juridical form.

To begin with a somewhat pedantic point, neither *Hirabayashi* nor *Korematsu* concerned the use of internment. *Hirabayashi* concerned the legality of a curfew order.<sup>208</sup> The *Korematsu* majority expressly and indignantly limited its ruling to the legality of an order to report to an assembly center pursuant to a military order.<sup>209</sup> Justice Black did not merely contort the facts to avoid passing on internment.<sup>210</sup> He also took marked exception to the dissent’s use of the term “concentration camp”<sup>211</sup> and cited *Endo* for the proposition that detention was a legally distinct matter.<sup>212</sup>

But perhaps this is being too lawyerly. Perhaps Chief Justice Roberts is not repudiating *Korematsu* for what it in fact held but for what it has come to stand for. On this reading—which swaps out a legal distinction for one based on inchoate public understanding—*Korematsu* is part of the “anti-canon” because it has come to stand in for internment writ large.<sup>213</sup> Rejecting *Korematsu*, the Travel Ban Court simply rejected that policy. It bears emphasis that this is an exceedingly generous reading of the opinion.

The distinction between entry and internment, however, is far less crisp than first appears. Presenting for entry at a U.S. border without what is deemed appropriate documentation often leads immediately to detention. This has long been so. In a pair of cases

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<sup>208</sup> *Hirabayashi v. United States*, 320 U.S. 81, 91-105 (1942).

<sup>209</sup> *Korematsu v. United States*, 323 U.S. 214, 221 (1944).

<sup>210</sup> See *supra* text accompanying notes 66 to 69.

<sup>211</sup> Compare *Korematsu*, 323 U.S. at 223 (“[W]e deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies.”), *with id.* at 226 (Roberts, J., dissenting) (characterizing the facts as a “case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry”). Was Black correct? There is no canonical definition of a “concentration camp” that distinguishes it from other forms of civilian internment. Cf. DAN STONE, *CONCENTRATION CAMPS: A SHORT HISTORY* 8-10 (217) (exploring this difficulty, and suggesting that the term captures “a total abandonment of law and the creation of zones of exception”); Klaus Mühlhahn, *The Concentration Camp in Global Historical Perspective*, 8 HIST. COMPASS 543, 544 (2010) (“[A] concentration camp is an internment center outside the regular legal order and outside *jus bellum*.”). No doubt Black was correct that the American camps were quite distinct from the Nazi camps that existed contemporaneously, STONE, *supra* at 34-56 (describing these camps’ development and uses), but that hardly removes the moral stain from them.

<sup>212</sup> *Korematsu*, 323 U.S. at 222 (“[*Endo*] graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected.”).

<sup>213</sup> Hence, Greene’s recent article on the “anti-canon” treats *Korematsu* as synonymous with the internment, even though Greene is far too careful a legal scholar to mistake the holding of that case. Greene, *supra* note 56, at 457-58 (discussing *Korematsu*). Interestingly, writing some thirteen years before that, Primus does not include *Korematsu* in his exemplary account of the anti-canon. Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998) (“*Lochner* and *Plessy* are paradigmatic examples of what is not the law ....”).

from the early 1950s, the Court permitted the indefinite detention of non-citizens arising without necessary papers.<sup>214</sup> The Government recently relied on those 1950s precedents in a challenge to the practice of holding noncitizens without bond pending removal,<sup>215</sup> a challenge in which the Government prevailed on statutory grounds.<sup>216</sup> The Government's successful reliance on that permitting indefinite detention of those arriving at the border, in the very same Term that the Travel Ban Case was argued and decided undermines the idea that what has been repudiated is internment (at least of noncitizens) as a per se matter.

Further, if we are not being legalistic, and instead if we understand Roberts to be speaking frankly in the demotic to say that internment—the en masse civilian detention based on status—is beyond the law, then we must still hesitate before the distinction he tries to carve. For if we are speaking plainly, it is not a distinction that accords with practice in the world—let alone practice that is blessed and embraced by the Court. Instead, we must recognize that the border, and the manner of its enforcement, is intimately bound today with the practice of internment. Indeed, if the wholesale relocation of populations employed during World War II has a contemporaneous parallel, it is in the use of internment as an instrument of immigration policy.

Consider just one element of immigration law that became highly salient in summer 2018: For almost the past two decades, the federal government has detained not just single individuals but whole families arriving and claiming political asylum.<sup>217</sup> Some 18,378 immigration proceedings concerned individuals in family detention before 2001 and 2016; this number is an undercount of the actual number of individuals in such detention during that period.<sup>218</sup> Conditions in immigration detention are often, moreover, inhumane.<sup>219</sup> The Department of Homeland Security's fiscal year 2016 budgetary request noted that it maintained 31,040 immigration detention beds for those presenting “flight risk.”<sup>220</sup> The Department's 2019 budgetary document requests funds for “52,000 beds (49,500 adult and 2,500 family).”<sup>221</sup> In practice, therefore, the regulation of entry is an occasion for the coercive infliction of detention of men, women and children at a scale not wholly dissimilar from the Japanese-American internment.

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<sup>214</sup> *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

<sup>215</sup> Brief for Petitioner at 19, *Jennings v. Rodriguez*, 138 S. Ct. 830, No. 15-1204 (2018).

<sup>216</sup> *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) (rejecting statutory challenge to the use of detention without bond hearings, but remanding for consideration of constitutional question).

<sup>217</sup> The authority to detain derives in the first instance from 8 U.S.C. § 1231(a)(6); see 8 C.F.R. § 241.4(a) (authorizing the Attorney General to detain certain aliens past the initial ninety-day removal period).

<sup>218</sup> Ingrid Eagly et. al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CAL. L. REV. 785, 803 (2018).

<sup>219</sup> *Id.* at 794, 829-30; see also Anonymous, *What my Six-Year Old Son and I Endured in Family Detention*, N.Y. TIMES, June 25, 2018, <https://www.nytimes.com/2018/06/25/opinion/family-detention-immigration.html>.

<sup>220</sup> U.S. Dep't of Homeland Sec., *Budget in Brief, Fiscal Year 2016*, at 54 (2016), [https://www.dhs.gov/sites/default/files/publications/FY\\_2016\\_DHS\\_Budget\\_in\\_Brief.pdf](https://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf).

<sup>221</sup> U.S. Dep't of Homeland Sec., *FY 2019 Budget in Brief* 5 (Feb. 2018), <https://www.dhs.gov/sites/default/files/publications/DHS%20BIB%202019.pdf>. En masse detention of immigrants is a relatively new phenomenon. In 1985, for example, only 5,000 people were held in immigration detention of all kinds. César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1466 (2015); see also Cody Mason, *The Sentencing project, Dollars and detainees: The Growth of For-Profit Detention* 3 (2012), [http://sentencingproject.org/doc/publications/inc\\_Dollars\\_and\\_Detainees.pdf](http://sentencingproject.org/doc/publications/inc_Dollars_and_Detainees.pdf) (documenting such growth).

Of course, this is not a distinctly American phenomenon.<sup>222</sup> The internment “city-camp” is rather the modal response to global waves of migration generated by civil strife and ethnic cleaning.<sup>223</sup> Rather than spaces of absolute exclusion from a polity, they are often liminal zones in which not only “segregating and exclusionary,” but also integrative activities unfold.<sup>224</sup> Such practices are striking in a liberal democratic context, where it is not always clear the idea of a border as colloquially understood can be sustained while also maintaining a commitment to liberal values, broadly understood. Under those conditions, the distinction between internment and entry regulation, in short, is unfaithful not just to the actual logic of the cases but also to the actuality of today’s “violent” borders.<sup>225</sup> It does not provide an adequate way to reconcile the Travel Ban Case’s two holdings.

## 2. *Immigration v. War*

But perhaps the distinction between internment and exclusion is pitched at the wrong level of generality. Instead, it may be more useful to look to the nature of the governmental authority, and to posit differently calibrated “internal limits” to distinguish the Japanese-American internment and the travel ban.<sup>226</sup> Indeed, the cases were decided pursuant to different constitutional powers. But this distinction is not one that can support the legal difference that the Court sought to establish.

In both *Hirabayashi* and *Korematsu*, there is citation to “[t]he war power of the national government,” characterized using Charles Evans Hughes’ terminology as “the power to wage war successfully.”<sup>227</sup> As Matthew Waxman has recently documented, Hughes’s “original statement in 1917 of the ‘power to wage war successfully’ was about *Congress’s* constitutional authority,” and not about the president.<sup>228</sup> Indeed, the other major wartime case in which Hughes’s dictum was invoked plainly concerned the scope of congressional authority in respect to certain government contracts.<sup>229</sup> As I have explained, while *Hirabayashi* and *Korematsu* may have concerned criminal violations of a federal statute, no statute directly and

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<sup>222</sup> In 2018, the world’s largest refugee camps were located in Cox’s Bazaar, Bangladesh, and Bidi Bidi, northern Uganda. Raptim, *World’s Largest Refugee Camps in 2018*, June 7, 2018, <https://www.raptim.org/largest-refugee-camps-in-2018/>.

<sup>223</sup> Michel Agier, *Between war and city: Toward an Urban Anthropology of Refugee Camps*, 3 ETHNOGRAPHY 317, 320 (2002).

<sup>224</sup> Nando Sigone, *Campzanship: reimagining the camp as a social and political space*, 19 CITIZENSHIP STUD. 1, 13 (2015) (reporting findings from an ethnographic study of camps of Roma expelled from the Balkans).

<sup>225</sup> Cf. OWEN JONES, *VIOLENT BORDERS: REFUGEES AND THE RIGHT TO MOVEMENT* (2017) (arguing that it is the legal regime of borders and their enforcement that produce violence, and that borders are not somehow ‘naturally’ violent places).

<sup>226</sup> For the use of this term to characterize executive power, see Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1298 (1988).

<sup>227</sup> *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (quoting Charles Evans Hughes, *War Powers Under the Constitution*, 42 A.B.A. REP. 232, 238 (1917); accord *Korematsu v. United States*, 323 U.S. 214, 224 (1944) (Frankfurter, J., concurring). Since *Korematsu* expressly relies on *Hirabayashi* as precedent, *id.* at 217, it is safe to treat both opinions as resting on the same theory of constitutional power.

<sup>228</sup> Matthew C. Waxman, *The Power to Wage War Successfully*, 117 COLUM. L. REV. 613, 618 (2017).

<sup>229</sup> *Lichter v. United States*, 334 U.S. 742, 746 (1948) (evaluating “the constitutionality, on its face, of the Renegotiation Act insofar as it is authority for the recovery of the excessive profits sought to be recovered by the United States”).

explicitly authorized the internments themselves.<sup>230</sup> Moreover, as glossed by Waxman, Hughes' account of constitutional war powers emphasized flexibility but within certain legal parameters, such that "interpretations of powers and rights [could] expand or contract but some particular structural processes never change."<sup>231</sup> It is far from clear that Hughes's principle, at least as originally intended, would have allowed the generation *ex nihilo*, of Article II authority to intern civilians.

The Travel Ban Case, in contrast, rested explicitly on the president's authority over "the admission and exclusion of foreign nationals," which it characterized as a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."<sup>232</sup> In addition, the Court underscored an "overlapping ... national security" authority reposed specifically in the President as a justification for limited judicial review.<sup>233</sup>

But it is hard to see why this immigration power could go further, and hence allow more varieties of discrimination, than the power to wage war successfully. In both cases, it is plausible to think that the President's authority over national security and foreign affairs had been successfully (even if not properly) invoked to justify a discriminatory act. If anything, I think the intuition should be that the invocation of the war power, in the wake of a major assault on U.S. soil and a congressional declaration of war, would sweep more broadly than any corresponding immigration authority. Thus, it is telling that Hughes would speak of the power to wage war successfully, and not the power to establish borders successfully. Nor does the case law, including recent decisions such as *Morales-Santana*, suggest that the immigration power is as elastic as the war power.<sup>234</sup> To the contrary, the Court has rejected the idea that the immigration power is "so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens."<sup>235</sup> Although the rights of noncitizen residents are greater than those of nonresidents, even nonresident aliens standing at the nation's threshold are not wholly bereft of constitutional rights against the arbitrary operation of immigration powers.<sup>236</sup>

No such analog right obtains in respect to the war power. To the contrary, it is telling that a person targeted in the executive pursuit of national security ends is typically bereft of any opportunity to challenge the quality of official motives either before or after the fact. In challenges to detention policies adopted after the September 11, 2001 attacks, for example, the Court defined federal authority to coerce in broad terms.<sup>237</sup> It then eliminated *ex post* platforms to challenge discriminatory uses of such prophylactic authority. Hence, in *Ashcroft*

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<sup>230</sup> See *supra* text accompanying notes 41 to 44.

<sup>231</sup> Waxman, *supra* note 228, at 635 (giving, as an example, the requirement that "legislation still requires the same majority bicameralism and presidential signature to become law").

<sup>232</sup> 138 S. Ct. 2392, 2418 (2018) (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

<sup>233</sup> *Id.* at 2419 (2018) (noting that "[j]udicial inquiry into the national-security realm raises concerns for the separation of powers" by intruding on the President's constitutional responsibilities in the area of foreign affairs" (citation and quotation marks omitted).

<sup>234</sup> See *supra* text accompanying notes 203 to 204.

<sup>235</sup> *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 (1976).

<sup>236</sup> See, e.g., *Kwock Jan Fat v. White*, 253 U.S. 454, 459 (1920) (rejecting exclusion on due process grounds); *Gegiow v. Uhl*, 239 U.S. 3, 9-10 (1915) (same); see also *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (noncitizens cannot be put to hard labor before being deported).

<sup>237</sup> See, e.g., *Ashcroft v. al-Kidd*, 563 U.S. 731, 739 (2011) (holding that the subjective reasons for which a material witness warrant was employed are irrelevant to its legality).

*v. Iqbal*, the Court declined to permit a discrimination claim against cabinet officials to proceed based on allegations of disparate targeting,<sup>238</sup> despite ample evidence that “the race or religion of individuals drove many investigative and arrest decisions in the wake of the September 11 attacks.”<sup>239</sup> Eight years later in *Ziglar v. Abbasi*, the Court more broadly extinguished the right to damages for constitutional violations inflicted in the course of a mass roundup of suspects in the 2001 attacks’ wake.<sup>240</sup> As one commentator noted “there was a racial dimension to the roundup in *Ziglar* that is reminiscent of what occurred in *Korematsu*.”<sup>241</sup> *Ziglar* was decided a year before the Travel Ban Case. The Chief Justice as well as Justices Kennedy, Alito, and Thomas joined both majorities. Their repudiation of *Korematsu* must be read, and discounted, in light of the policy *Ziglar* countenanced.

If the war power a priori is more robust and permits greater discretion than the immigration power, it would seem that the Japanese-American internment cases cannot be relegated to the space of the anti-canon, while the travel ban is preserved, on the ground that the federal government has more authority during wartime than over noncitizens. Hence, it cannot be the source of constitutional authority that reconciles the travel ban’s legality and the Japanese-American internment’s unconstitutionality.

### 3. *Citizen v. Noncitizen*

The final distinction between the travel ban and the Japanese-American internment hinges on the fact that the former targets noncitizens exclusively, whereas the latter is conventionally analyzed in terms of its effects on citizens. Citizenship was expressly part of the rationale offered by the Travel Ban Court majority, which characterized the “forcible relocation of *U.S. citizens* to concentration camps” as an “objectively unlawful” practice.<sup>242</sup> Although the Court did not elaborate on this point, it might have observed that even Justice Black, *Korematsu*’s author, would acknowledge five years after that decision the national government’s distinctively “broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.”<sup>243</sup> More recently, the Court has affirmed the impermissibility of most alienage distinctions when made by states,<sup>244</sup>

<sup>238</sup> 556 U.S. 662, 682 (2009) (“It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.”). The *Iqbal* opinion, moreover “rests on [a] plainly erroneous racial miscategorization” of the plaintiff as “Arab” rather than “Pakistani.” Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 250–51 (2009). Rather than repudiating the use of overbroad stereotypes, that is, the *Iqbal* Court reenacted them.

<sup>239</sup> Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379, 383 (2017).

<sup>240</sup> 137 S. Ct. 1843, 1856–57 (2017).

<sup>241</sup> Benjamin C. Zipursky, *Ziglar v. Abbasi and the Decline of the Right to Redress*, 86 FORDHAM L. REV. 2167, 2179 (2018).

<sup>242</sup> 138 S. Ct. 2392, 2423 (2018) (emphasis added).

<sup>243</sup> *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948) (invalidating California law limiting right to commercial fishing to citizens). But at the time of the Japanese-American internment cases, even states could discriminate against aliens, provided they did not do so in “plainly irrational” ways. *Clarke v. Deckebach*, 274 U.S. 392, 396–97 (1927) (upholding a Cincinnati ordinance that limited the issuance of pool hall licenses to citizens).

<sup>244</sup> See *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (describing aliens as a “discrete and insular minority,” and subjecting certain alienage distinctions by states to strict scrutiny); see also *Examining Bd. of Eng’rs*,

but left the federal government with broad discretion as a class to regulate noncitizens as such.<sup>245</sup>

Of all the possible distinctions to be carved between the internment and the travel ban for constitutional purposes, I think that citizenship is the one that is most consistent with the otherwise prevailing doctrine, and the one that is likely to prove the most stable. I anticipate that when the Court comes to construe its Travel Ban precedent, it will treat citizenship as the dividing line between what is permitted and what falls beyond the pale. But that is not to say that citizenship is an analytically or functionally satisfying line; it is rather the best of a rather bad lot. In my view, a citizenship distinction between the internment and the travel ban ought to be viewed with skepticism for three reasons: it does not fit the facts of the actual cases; it sits uncomfortably with the law; and it does not map accurately the limits of the federal government's coercive authority.

First, it is just false as a matter of fact to say that the internment affected only citizens while the travel ban affected only noncitizens. As previously noted, about a third of those confirmed in the interior in 1942-45 were not U.S. citizens.<sup>246</sup> This is not necessarily an embarrassment for Chief Justice Roberts's claim that citizenship bounds the permissible discretion to discriminate from unconstitutionality; the detention of roughly 30,000 non-citizens might have been a lawful supplement to a broadly unlawful policy.<sup>247</sup> But to the extent that his argument is glossed as a demotic rather than a legalistic one, intended to repudiate the Japanese-American internment and its judicial benediction, it seems rather troubling to observe that his rationale implicitly exempted roughly one third of the actual detentions from the ambit of his condemnation. Such a repudiation would be, if not hollow, than not an entirely candid one.

More seriously, it is not the case that the travel ban solely affected the rights of aliens. Indeed, the Court's own standing analysis, as well as its substantive Establishment Clause argument turned on the fact that there were citizens who had been materially harmed by the executive branch's action.<sup>248</sup> The travel ban, it should be recalled, prohibited family reunification. The harms thereby inflicted on U.S. citizens kept apart from families who remain trapped in physically perilous environments are very far from trivial.<sup>249</sup> Both as a matter of fact and of law, therefore, U.S. citizens fall within the perimeter of those harmed by the travel ban

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*Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 602-06 (1976) (applying strict scrutiny to strike down a Puerto Rico statute requiring an applicant for registration as a licensed engineer to be a U.S. citizen).

<sup>245</sup> See Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 628 (2008) (“[W]hereas state distinctions between citizens and noncitizens are subject to strict scrutiny, such distinctions drawn by the federal government are subject to only rational basis review.”).

<sup>246</sup> See *supra* text accompanying note 49.

<sup>247</sup> “Enemy aliens” have been treated as a distinct category amenable to detention in times of war since 1789. See An Act Respecting Alien Enemies (Alien Enemy Act), ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21-24).

<sup>248</sup> See, e.g., *The Travel Ban Case*, 138 S. Ct. 2392, 2416 (2018) (noting that “an American individual who has “a bona fide relationship with a particular person seeking to enter the country ... can legitimately claim concrete hardship if that person is excluded” (citation omitted)).

<sup>249</sup> Mallor Moench, *U.S. Citizen's Family Denied Visas Under Trump's Travel Ban. Then He Died By Suicide*, NBC NEWS, July 28, 2018, <https://www.nbcnews.com/news/us-news/u-s-citizen-s-family-was-denied-visas-under-trump-n895381>.

in ways that cast doubt on the validity of a citizenship distinction between it and the Japanese-American internment.

Second, it is not at all clear that citizenship marks, or at least should mark, the outer boundary of protection for the right against religious discrimination. Religious identity is a suspect class pursuant to the Equal Protection Clause and presumably under the equality component of the Fifth Amendment's Due Process Clause.<sup>250</sup> The Equal Protection Clause has been understood to extend to noncitizens as much as citizens since 1884.<sup>251</sup> While distinctions based on national origin might have a distinct relevance to immigration regulation so as to warrant a milder form of judicial scrutiny,<sup>252</sup> it is difficult to see why the same should be so of religion or race.<sup>253</sup> The idea that citizenship should mark the perimeter against the form of discrimination alleged to be at issue in the Travel Ban Case, therefore, is highly suspect.

Third, if the Roberts Court's repudiation of the Japanese-American internment was intended to generate a sense of security among citizens that they stand beyond the reach of any troublesome Article II discriminatory coercion, it should be cold comfort. In a range of contexts, the Court has been confronted with Article II claims of discretionary authority to coerce without ex ante justification in respect to citizens. None of these cases involve religious discrimination, but some concern discrimination based on political viewpoint. Across these cases, the Court has suggested that where the federal government invokes a national security justification, it has an almost wholly free hand in exercising discretion without being second-guessed for discriminatory reasons.

The judicial affirmation of Article II authority to coerce citizens begins with cases concerning the issuance of U.S. passports, which can be denied based on viewpoint differences on the ground that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."<sup>254</sup> In a decision cited by the Travel Ban Court,

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<sup>250</sup> *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Treating religion as a suspect class for Equal Protection purposes has a number of different consequences from its treatment under the First Amendment's Religion Clauses. See Joy Milligan, *Religion and Race: On Duality and Entrenchment*, 87 N.Y.U. L. REV. 393, 395–96 (2012) (noting tension between colorblindness regime under Equal Protection and the formal neutrality rule under the First Amendment). For present purposes, my point is more narrowly that alienage very clearly does not obviate Equal Protection antidiscrimination rights under existing doctrine.

<sup>251</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 368–59 (1886) (recognizing that the reference to "any person" in the Equal Protection Clause included aliens).

<sup>252</sup> Indeed, national origin distinctions in the immigration context need only have a rational basis, see *Narenji v. Civiletti*, 617 F.2d 745, 748 (D.C. Cir. 1980).

<sup>253</sup> This is especially so given the Court's increasing willingness to apply full-bore constitutional scrutiny to gender distinctions in the immigration context. See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017). Even though gender-based distinctions "have long shaped the composition of the American polity," Kristin A. Collins, *Equality, Sovereignty, and the Family in Morales-Santana*, 131 HARV. L. REV. 170, 171 (2017), the pedigree of history did not legitimize the persistence of discrimination today. Hence, the fact that immigration regulation has long hinged on implicit religious distinctions should be of no moment. For a famous invocation of religion as a touchstone for immigration regulation, see *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (Brewer, J.) ("[T]his is a Christian nation ....").

<sup>254</sup> *Haig v. Agee*, 453 U.S. 280, 292 (1981).

executives' suppression of citizens' speech based on viewpoint has been permitted, again on national security grounds, notwithstanding the First Amendment's free speech commitment.<sup>255</sup>

Nor are citizens immune from being detained on national security grounds in the absence of a criminal adjudication,<sup>256</sup> or from being transferred to another nation's custody where they may be not only detained but subject to torture.<sup>257</sup> The retail power to detain, and even transfer to another sovereign for detention, hence certainly exists in respect to individual citizens; it is far from clear why such power could not be exercised at the wholesale level.<sup>258</sup> Here, we see one way in which the distinction between the immigration and the war power might have implications for the Court's purported distinction—but not perhaps the intended ones. That is, even if the *immigration* power cannot be a wellspring for an institutional discretion free to be used against citizens in a discriminatory fashion without a judicial check, it is far from clear that the *war* power cannot be deployed as a source of the same discretion amenable to discriminatory use without judicial superintendence in precisely the same way. The distinction that the Travel Ban Case gestured toward to cabin the Japanese-American internment cases may instead provide a ground for their wider application.

Finally, to speak of a citizenship line assumes that the demarcation between citizenship and its absence is a firm one, which has not always been the case. It was only in the 1950s that the Court imposed constraints on denaturalization,<sup>259</sup> and only recently did it gloss the statutory denaturalization provisions to preclude citizenship stripping on “meager,” or clerical, grounds.<sup>260</sup> Given the federal government's success in eliciting ‘voluntary’ citizenship renunciations among the interned Japanese-Americans, especially those held in the harsh conditions of Tule Lake,<sup>261</sup> it might reasonably be doubted that these constraints will always

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<sup>255</sup> The Travel Ban Case, 138 S. Ct. 2392, 2419 (2018) (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), for the principle of broad deference to the executive's judgment on national security and foreign affairs matters). More generally, it is almost impossible for litigants to challenge the discriminatory use of criminal prosecutions. See *United States v. Armstrong*, 517 U.S. 456, 459, 470 (1996); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999); see also Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1566–67 (2018) (providing practical and doctrinal reasons for anticipating the unbounded and unregulated use of prosecutorial discretion in practice).

<sup>256</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (plurality opinion) (authorizing detention of a U.S. citizen as an “enemy combatant”).

<sup>257</sup> *Munaf v. Geren*, 553 U.S. 674, 694 (2008) (affirming “sovereign right” of another sovereign to prosecute a U.S. citizen, and to have then held in custody for transfer)

<sup>258</sup> Detainees might have access to a federal court to challenge the legal basis of their detention. In practice, such civil proceedings have not have a significant effect on detention practices concerning noncitizens. See Aziz Z. Huq, *The President and the Detainees*, 165 U. PA. L. REV. 499, 501-11 (2017) (documenting the limited effect of habeas review in military detention cases). The empirical scholarship thus suggests that judicial review via habeas corpus does not impose significant costs on detention.

<sup>259</sup> *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967) (rejecting “Congress’ power to take away a man's citizenship because he voted in a foreign election”); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) (invalidating on Equal Protection grounds a statute that stripped citizenship from naturalized citizens who resided overseas for more than three years on “the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born”).

<sup>260</sup> *Maslenjak v. United States*, 137 S. Ct. 1918, 1927 (2017) (“The statute [Congress] passed, most naturally read, strips a person of citizenship not when she committed any illegal act during the naturalization process, but only when that act played some role in her naturalization.”).

<sup>261</sup> For an account of the renunciations, see Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among “We the People,”* 76 OR. L. REV. 233, 242-47 (1997). Some of the renunciations were subsequently challenged and voided as coerced. *Acheson v. Murakami*, 176 F.2d 953, 957 (9th Cir. 1949).

prove practicably availing.<sup>262</sup> A right that in practice can be predictably bought off by the threat of ill-willed state coercion, though, is really not much of a right at all.

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In sum, even the most robust of the distinctions between the Japanese-American internment and the travel ban as exercises of an Article II discretion to discriminate—citizenship—is a fragile one. It fails to track the facts of either case. It makes a hash of the applicable Equal Protection jurisprudence, and—most importantly—masks the basic vulnerability of citizens to a range of coercive measures that can be employed using a discriminatory discretion. The scope of the Article II discretion to discriminate, therefore, is open-textured in the sense of no clearly marked outer perimeter.

To be clear, this does not mean that a policy akin to the Japanese-American internment is likely to be adopted today, or that, if adopted, it would meet no judicial hesitation. My aim here has been to show more modestly that there is no simple way to reconcile the Travel Ban Case’s two holdings. A correlate of that difficulty is that efforts to cabin the Article II discretion to instances akin to the travel ban are unlikely to be availing. Certainly, such discretion exceeds the regulation of noncitizen entry to the United States. It also extends beyond the federal government’s immigration powers to include its power to wage war. And at least arguably, it extends beyond the treatment of noncitizens, and characterizes certain armatures of citizenry regulation. To be clear, this is not to say that all or most exercises of official discretion will be, or even are likely to be, characterized by motives that would otherwise be condemned as discriminatory in other domains. Rather, the point is that there is only an evanescent and permeable barrier against that possibility

### III. The Article II Discretion to Discriminate

The central legacy of the Travel Ban Case is its formal recognition of an open-textured Article II discretion to discriminate. Judicial recognition of this discretion arises from the Court’s cleavage between “the statements of a particular President,” and “the authority of the Presidency itself.”<sup>263</sup> It arises from the majority’s explicit recognition of the ample documentation of invidious grounds for the travel ban, and its implicit recognition of their impermissibility—and its subsequent refusal to account for those reasons so long as a “plausibl[e]” reason could be given for the ban.<sup>264</sup> It is difficult to think of any other instance in which the Court has recognized the impermissible motives for a policy’s adoption—and then upheld the policy anyway.<sup>265</sup>

By privileging what the executive ought to be, and by giving short shrift what it was in plain sight for all to see, the Court elevated what Walter Bagehot called the “dignified” over

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<sup>262</sup> Cf. Ruth Ellen Wasem, *Trump administration now has naturalized citizens in its sights*, THE HILL, July 17, 2018, <http://thehill.com/opinion/immigration/396923-trump-administration-now-has-naturalized-citizens-in-its-sights> (documenting creation of a taskforce within the Department of Homeland Security to accelerate the rate of denaturalizations).

<sup>263</sup> The Travel Ban Case, 138 S. Ct. 2392, 2418 (2018); see *supra* text accompanying notes 130 to 131.

<sup>264</sup> 138 S. Ct. at 2418.

<sup>265</sup> I read the Court in roughly analogous instances to *avoid* the recognition of unconstitutional reasons, and not to say that unconstitutional reasons are present and simply do not matter.

the “efficient” presidency.<sup>266</sup> Because the dignified presidency works as a shield against constitutional challenges to the motives of executive branch actors, it works here as the outward, legitimizing aspect of a license to discriminate against suspect classes. For even if a discretion to discriminate cannot be openly condoned, the dignified presidency can be publicly embraced without cavil or apology. It can be, in extremis, the sober face of hate. In its original manifestation, of course, the idea of a dignified reading of the constitution had a different valence. Writing in mid-nineteenth century England, Bagehot confronted a system formally characterized by absolute parliamentary sovereignty, but in fact dominated by “ministers meeting in Cabinet” who could “get all the legislation they wanted and govern without let or hindrance.”<sup>267</sup> The dignified English constitution, on his account, was a “noble lie” shielding this benevolent system from the hoi polloi’s demands. If the contemporary Court’s validation of the dignified presidency over the actual presidency is a new “noble lie,” its relations to populist sentiment and social welfare are more ambiguous.

This Part excavates the legal justifications and the forward-facing consequences of the Article II discretion to discriminate. My aim is to enable a critical appreciation of what the Court has wrought, and what it bodes for the nation. A necessary caveat to this analysis is that, as Part II presaged, the boundaries of this discretionary authority are not easily demarcated. My effort to reconcile the Court’s validation of the travel ban and its condemnation of the Japanese-American internment, in other words, suggested that it will be difficult to inscribe a principled bound on the scope of such discretion. My analysis here does not aim to resolve that uncertainty. I assume here that the boundaries of the discretionary authority at stake here are open-textured in the sense of being ambiguous. Meaningful analysis can still proceed on the assumption that the discretion covers a large domain beyond the narrow category of entry to the United States, or even immigration more generally.

I begin by analyzing potential justifications for canonizing the dignified presidency, drawing on traditional tools of constitutional analysis. Accounting for a formalist account of the decision, and then two alternative functionalist justifications, I conclude that the Court’s conjunction of the dignified presidency with the discretion to discriminate has deeply flawed foundations. Concluding, I turn to the downstream consequences of the Article II discretion to discriminate suggest that these yield no better comfort. Paradoxically, the Court’s effort to grant the executive with operational discretion to pursue needful policies is likely to drive a flight to worse rather than better policies.

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<sup>266</sup> BAGEHOT, *supra* note 131, at 7 (distinguishing between those parts of a constitution that excite and preserve the reverence of the population,” and the element that “in fact, works and rules”).

<sup>267</sup> Robert Colls, *The Constitution of the English*, 46 HIST. WORKSHOP J. 97, 99-101 (1998).

## A. Justifications

The Travel Ban Court’s refusal to look beyond the dignified façade presented by “the authority of the Presidency itself”<sup>268</sup> to the actions of specific office holders seems to be based on an uneasy compound of what in separation-of-powers scholars call “formalist” and “functionalist” reasons.<sup>269</sup> Chief Justice Roberts’s account is “formalist” in the sense that it derives a relatively strict rule of separation,<sup>270</sup> implicitly based on a categorization of actions “as ‘legislative,’ ‘executive,’ or ‘judicial.’”<sup>271</sup> It diverges from formalism insofar as it does not rely on the “conventional meaning of the text.”<sup>272</sup> Rather, in asserting that the Court is dealing with “matters [that] may implicate ‘relations with foreign powers,’ or involve ‘classifications defined in the light of changing political and economic circumstances,’” Roberts appeals to the functionalist idea that the executive is more competent than the judiciary to make first-order policy judgments.<sup>273</sup> The argument, in short, blends formalist and functionalist elements in ways that undermine the utility of that distinction as a way of categorizing judicial decisions.<sup>274</sup>

Rather than ignoring either strand of Roberts’s argument, I consider first a formalist and then two different functionalist justifications for the Article II discretion to discriminate. In respect to the latter, I highlight separately the historical reasons and the institutional competence grounds for not looking beyond the presidency’s dignified façade.

### 1. Formalism

The modal formalist argument in separation-of-powers jurisprudence concerns the location of an official act. Canonical formalist opinions hence invalidate official actions on the ground that they were taken by the ‘wrong’ branch.<sup>275</sup> This textualism version of formalism

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<sup>268</sup> *Travel Ban Case*, 138 S. Ct. at 2418.

<sup>269</sup> Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) (distinguishing between “a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries), and a functional approach that stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened”).

<sup>270</sup> *Id.*

<sup>271</sup> Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 690 (1997).

<sup>272</sup> John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1958 (2011) (“Conventional wisdom further holds that, in contrast with functionalism, formalism calls upon interpreters to adhere to the conventional meaning of the text instead of resorting to the broad purposes underlying it.”).

<sup>273</sup> 138 S. Ct. at 2418

<sup>274</sup> *Cf.* Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 355 (2016) (expressing skepticism that a binary distinction between formalism and functionalism can usefully explain the Court’s separation-of-powers cases); Victoria F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 899 (2004) (explaining that formalism is often predicated on functionalist justifications).

<sup>275</sup> *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (holding that Congress may not vest power to execute budget reduction legislation in an officer who is not entirely within the President’s removal power); *INS v. Chadha*, 462 U.S. 919, 957-59 (1983) (holding that Congress may act legislatively only in accordance with bicameralism and presentment procedure, and may not attempt through legislative veto to interfere with the President’s execution of immigration laws).

has little explanatory force in respect to the Travel Ban Case, though, because neither Article I nor Article II mention an immigration power.<sup>276</sup>

Alternatively, a formalist Court can negate one branch's action (e.g., a federal statute) on the ground that the action impinged upon the domain or powers of a second branch.<sup>277</sup> The Travel Ban majority's argument for the dignified presidency, however, cannot wholly turn on a formalist argument about the appropriate location of immigration policy as between Congress and the executive. Indeed, as I have noted, the Travel Ban Court did not crisply distinguish between the scope of legislative and executive authority. It offered instead a blended, "unitary conception of immigration authority"<sup>278</sup> that shaded imperceptibly into a functionalist argument based on the prototypical expertise and competencies of the executive branch.<sup>279</sup>

A formalist logic of the appropriate locus of an official action, nevertheless, might explain the Court's decision to adopt a "deferential standard of review" in respect to the terms upon which § 212 authority is employed.<sup>280</sup> A formalist argument to this effect would start from the premise that judicial intrusion into a domain exclusively reserved for the presidency was itself a violation of the Separation of Powers. The Solicitor General, indeed, made this argument.<sup>281</sup> The Court expressly declined to adopt the posture of nonjusticiability he urged.<sup>282</sup> But the Court's elevation of the dignified presidency, with its concomitant grant of wide discretion to discriminate, might be read as a *sotto voce* endorsement of the Solicitor General's position.

The problem with this argument is that there is nothing in the Court's opinion to explain why it viewed judicial superintendence of immigration policy as constitutionally improper. Other policies, including the controversial deferred action program installed by President Obama, do not appear to have received deference that functioned akin to a nonjusticiability rule.<sup>283</sup> Nor can that division of constitutional labor be inferred from the text

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<sup>276</sup> Indeed, for roughly a century, immigration regulation was a state matter, not a federal matter. GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 19-49 (1996) (discussing the centrality of state regulation during the first two-thirds of the nineteenth century).

Another possibility, the Take Care Clause of Article II, provides insufficient guidance to be a plausible source of authority. Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836 (2016) (noting that the Take Care Clause has been glossed "either as a source of vast presidential power or as a sharp limitation on the powers of both the President and the other branches of government").

<sup>277</sup> *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2085 (2015) (endorsing, on formalist grounds, and "[a]s a matter of constitutional structure," the principle of "the President[s] control over recognition decisions").

<sup>278</sup> Cox and Rodríguez, *supra* note 133, at 469.

<sup>279</sup> See *supra* text accompanying notes 10 to 11. The leading account of the jurisprudence finds evidence of both a delegation model and an inherent Article II model of immigration powers. Cox and Rodríguez, *supra* note 133, at 482 ("Perhaps the President has some Article II authority over immigration at the same time that Congress possesses regulatory authority under Article I, such that the President could act in the immigration arena without statutory authorization.").

<sup>280</sup> *Travel Ban Case*, 138 S. Ct. 2392, 2419 (2018).

<sup>281</sup> Gov't Brief, *supra* note 114, at 17 (arguing that a "fundamental separation-of-powers principle" foreclosed any review of a decision "to exclude aliens abroad generally").

<sup>282</sup> *Travel Ban Case*, 138 S. Ct. at 2407.

<sup>283</sup> *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam) (affirming a preliminary injunction against a deferred action program).

of the Constitution. The latter does not textually specify the immigration power as an attribute of either Article I or Article II. And even if the text did, it is worth recalling that the rule in the Travel Ban Case was not limited to entry decisions, or even immigration. So a subject-specific nonjusticiability justification cannot wholly explain the language or scope of the decision. If there is a justification for prioritizing the dignified over the efficient constitution, therefore, it cannot be explained in formalist terms. Rather, it must appeal to one or another species of functionalist argument.

## 2. *Functionalism and History*

A first species of functionalist argument is Burkean in character: Presidents, this argument runs, have been exercising broad discretion without judicial superintendence to catch discriminatory actions in certain fields. This arrangement has generated sound policies without excessive discriminatory harms being inflicted. In this context, a Burkean logic of epistemic modesty counsels in favor of constrained judicial intervention.<sup>284</sup> Deference to executive-branch judgments is warranted simply because it has worked tolerably well in the past. A variant on the same logic points to the history of executive superintendence of immigration and national security as a source of accumulated knowledge and insight that the judiciary lacks. History, the argument goes, has generated expertise within the executive, and this in turn is the basis for deference.

These arguments are usefully considered closely in the immigration domain, even if the scope of the Article II discretion to discriminate spills over into other contexts, since that is the heartland of the Travel Ban Court's analysis. Although a complete reckoning of U.S. immigration policy over time is beyond the scope of this paper, a cursory overview of immigration enforcement trends belies the idea that improper stereotypes have not played a significant role in enforcement actions. It is by no means clear that history vouchsafes the efficiency of unsupervised executive discretion.

To begin with, it is well known that immigration statutes have been infected by racial and racist judgments since Congress began intervening in 1875. The first immigration statutes openly targeted Chinese migration to the west coast out of racist fears.<sup>285</sup> Early twentieth century statutory immigration law was so “manifestly ‘race-based,’ favoring the ‘Nordics’ of northern and western Europe” that it became an important model for Nazi lawyers drafting the Nuremberg laws.<sup>286</sup> Racial criteria persisted as part of statutory immigration law until 1952.<sup>287</sup> It would be startling indeed if the extent and duration of hierarchal racial ideas

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<sup>284</sup> Edmund Burke, *Reflections on the Revolution in France*, in THE PORTABLE EDMUND BURKE 416, 456-57 (Isaac Kramnick ed., 1999) (urging due regard for the “collective wisdom of the ages”).

<sup>285</sup> See, e.g., Act of Mar. 3, 1875, ch. 141, §§ 1, 18 Stat. 477 (repealed 1974) (regulating “the immigration of any subject of China, Japan or any Oriental country,” to prevent, inter alia, immigration “for lewd and immoral purposes”).

<sup>286</sup> JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW 35-36 (2017). Strikingly, Whitman recounts how Hitler in *Mein Kampf* accurately described American immigration laws and posited them as a “racial model.” *Id.* at 46. It is hard to imagine how enforcement actions could avoid being tainted by animus given this backdrop.

<sup>287</sup> Until 1952, only races indigenous to the Western Hemisphere were made eligible for naturalization. Nationality Act of 1940, ch. 3, § 303, 54 Stat. 1137, 1140 (repealed 1952); see also Mae M. Ngai, *The Architecture of Race in American Immigration Law: The Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 81 (1999) (illustrating the influence of racial ideas in the pivotal 1924 Johnson-Reed Act).

embodied in statutes did not seep into the institutional orientation and values of immigration agencies. Charged with the invigilation of racist immigration statutes, those agencies are likely to have internalized as a matter of culture and orientation some of the norms embedded in the statutory regime. Absent other evidence, it seems unreasonable to assume that those agencies are not oriented in part toward the preservation of prevailing racial norms.

Worse, the flow of discriminatory ideas ran in both directions. Ideas of racial hierarchy were elicited and disseminated by experts within the administrative apparatus. In a recent book, Katherine Benton-Cohn has documented how the Dillingham Commission, formed in 1907, purportedly a receptacle of “nonpartisan expertise” within the burgeoning administrative state, sharpened the binary distinction between “old,” largely northern European, immigrants and “new” immigrants from elsewhere in the world.<sup>288</sup> This distinction has “continued to structure immigration policy and to produce a racial subtext about ‘illegal aliens’ to the present day.”<sup>289</sup> Even after formal statutory law was scrubbed of racial distinctions, enforcement continued to have a racialized tenor. In the 1930s, for example, the Immigration and National Service (“INS”) conducted an aggressive repatriation campaign against Filipinos grounded in what the then Attorney General described as the principle of “Government of and for the White Race.”<sup>290</sup> Similarly, in the early 1950s, INS commissioner general Joseph Swing railed against “disease-ridden” women and children streaming across the Mexican border as justification for building a border fence.<sup>291</sup> Five years later, the INS’s San Francisco’s office began a “Chinese confession program” that aimed “to criminalize the entire community.”<sup>292</sup> The persistence of discretionary enforcement programs targeting vulnerable minorities (defined in both racial and national origins terms) beyond the achievement of formal neutrality in immigration law suggests that the culture of immigration enforcement agencies remained prone to discriminatory uses of policy discretion.

It would be an exaggeration to suggest that immigration enforcement is always or inevitably tainted with improper motive.<sup>293</sup> More modestly, even this brief historical account omits the pervasive influence of discriminatory statutory norms and periodic bouts of discriminatory enforcement against ethnic and national groups, such as Filipinos, Chinese, and Japanese.<sup>294</sup> Rather than a redoubt of administrative rationality, therefore, the history of immigration administration strongly suggests its permeability to broader patterns of popular animus. This openness in part results from the fact that immigration policy has often

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<sup>288</sup> KATHERINE BENTON-COHN, *INVENTING THE IMMIGRATION PROBLEM: THE DILLINGHAM COMMISSION AND ITS LEGACY* 4-5 (2018).

<sup>289</sup> *Id.* at 7.

<sup>290</sup> NGAI, *supra* note 15, at 117-26.

<sup>291</sup> *Id.* at 156.

<sup>292</sup> *Id.* at 200-23.

<sup>293</sup> For contrasting examples involving the government’s recognition of foreign-born nonmarital children of American mothers, see Kristin A. Collins, *Bureaucracy As the Border: Administrative Law and the Citizen Family*, 66 DUKE L.J. 1727, 1745 (2017); *cf. id.* at 1753 (noting moralistic “expressive” character of many administrative rules); Michael J. Churgin, *Immigration Internal Decisionmaking: A View from History*, 78 TEX. L. REV. 1633, 1650 (2000) (describing how agency opposition to a literacy test for migrants led President Taft to veto that measure, although the veto was later overcome).

<sup>294</sup> Erika Lee, *The “Yellow Peril” and Asian Exclusion in the Americas*, 76 PAC. HIST. REV. 537 (2007).

developed “in an ad hoc fashion,”<sup>295</sup> and been driven by the uncoordinated exercise of line officers’ “discretion delegated down through the immigration agencies and memorialized within decades of top-down directives.”<sup>296</sup> Osmotic absorption of prevailing racial norms is thus a function of decentralization and the diffusion of discretion.

In light of this history, it cannot be said with any confidence that policies adopted by executive branch entities in respect to immigration enforcement will be free of improper motive. Nor can it be said that judicial review to enforce antidiscrimination norms in respect to those agencies will be unjustified. The assumptions upon which a Burkean claim to deference would lie are therefore absent. At a minimum, this complicates Primus’s argument that the absence of constitutional rulings against the federal government on antidiscrimination grounds reflected “shared federal norms,” often implemented in the form of “statutory and administrative rules against discrimination.”<sup>297</sup> The federal government is not a unitary actor. In the mid-twentieth century, some elements of its regulatory state developed new modes of antidiscrimination enforcement with positive spillovers for women and racial minorities.<sup>298</sup> In contrast, immigration agencies took a different path. Contra Primus, therefore, the absence of constitutional antidiscrimination rulings cannot be explained as a matter of normative convergence.

History also provides needful context for the ample precedent in which courts exercised a light touch when supervising immigration decisions.<sup>299</sup> Placed in a historical context characterized by overt racial, and even racist, criteria proliferating in the law, and a judiciary at best abetting their application,<sup>300</sup> these precedents take on a less savory complexion. Rather than reflecting durable Burkean wisdom, these decisions are better understood as reflective of their time. To the extent they persist, they reflect the continuing compromises of a judiciary unwilling or unable to buck popular discriminatory sentiment. Hence, they are evidence of the constitutional common law method’s inability to work itself wholly free of historical lapses of political morality. To the contrary, they show how a system of constitutional stare decisis can conduce to the persistence of discriminatory postures through its reliance on an earlier generation’s accommodating precedent.

### 3. *Functionalism and Comparative Institutional Competence*

A history of discriminatory enforcement practices directly implicates the final, consequential justification for elevating the dignified presidency, while subsuming evidence of

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<sup>295</sup> Cox and Rodríguez, *President and Immigration Law Redux*, *supra* note 135, at 122 (underscoring the importance of “innovation[s] in] enforcement discretion that emerged to address particular contingencies and grew in scope over time”).

<sup>296</sup> Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173, 1186 (2016).

<sup>297</sup> Primus, *supra* note 29, at 1024-25.

<sup>298</sup> See, e.g., Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 804 (2010) (documenting how “in the late twentieth century equal protection followed a notably different path in administrative agencies than it did in the courts”).

<sup>299</sup> See cases cited in *supra* note 139.

<sup>300</sup> Besides *Hirabayashi*’s ode to the hermeneutics of Asian suspicion, see *supra* text accompanying notes 63 to 64, consider the trilogy of cases in which the Court vindicated a straitened account of white identity as a precondition of nationalization. See *Ozawa v. United States*, 260 U.S. 178 (1922); *United States v. Thind*, 261 U.S. 204 (1923); *Toyota v. United States*, 268 U.S. 402 (1925).

improper motive. This argument from the executive's comparative institutional advantage can be discerned in the Court's vague gestures toward "relations with foreign powers," and "classifications defined in the light of changing political and economic circumstances."<sup>301</sup> The Court in such passages seemingly does not imply that discriminatory rules constitute justified policy, such that they could survive strict scrutiny.<sup>302</sup> Rather, it seems to lean upon a rule utilitarian argument to the effect that judicial deference will, over the long term, produce better outcomes.<sup>303</sup> This consequentialist position in favor of deference, at least in its most sophisticated form,<sup>304</sup> builds on an implicit comparison between the outcomes produced by the executive acting alone and the outcomes produced by the executive operating under judicial review. Because the former is an improvement upon the latter<sup>305</sup>—perhaps because judicial view prevents justified actions or because it generates frictional transaction costs—it concludes that intensive judicial review is unwise on the ground that it makes everyone worse off. Consistent with this basic argument, the Roberts Court has embraced expertise in cases involving not just immigration but also national security.<sup>306</sup>

This consequentialist argument is deeply flawed. It rests on an idealized, and quite false, image of administrative expertise uninflected by prejudice or other errors. Even in the national security domain, policy-making over the past half century has often been characterized by deep and systematic error.<sup>307</sup> More profoundly, the argument is based on the unjustified assumption that experts embedded in specialized agencies will not be influenced by the same discriminatory preferences and beliefs that influence the balance of the population. That implicitly assumes that experts are as susceptible to bias as others, so there is no reason to subject them to the same sort of judicial scrutiny any other policy receives. But what justifies that assumption? It is simply a sort of idle class prejudice, odious in its own way, to assume that expertise or education guarantees some kind of immunity from bias.<sup>308</sup> To the

<sup>301</sup> The Travel Ban Case, 138 S. Ct. 2392, 2418–19 (2018) (citation omitted). For a more explicit version of this argument in the national security context, see *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010).

<sup>302</sup> Cf. *Johnson v. California*, 543 U.S. 499, 505 (2005) (requiring strict scrutiny when a suspect classification is used in the carceral context to mitigate the risk of violence).

<sup>303</sup> For a more precise formulation of this argument, see Eric Posner, *Judges v. Trump: Be careful what you wish for*, N.Y. TIMES, Feb. 15, 2017, at A27 ("Courts have historically deferred to the president on national-security matters because the president acts on the basis of classified information and may need to move quickly... If courts are now creating a "Trump exception" to settled law on presidential powers, we should also remember that our safety depends on a return to the era in which the courts ... trusted the president's word."); see also J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, in UTILITARIANISM: FOR & AGAINST 3, 9 (1973) (defining rule utilitarianism).

<sup>304</sup> It would be wrong and misleading to compare courts and the executive directly. The relevant question is almost never whether courts would make better first-order policy choices than officials because the option of courts as administrators is rarely on the table. It is rather whether the *addition* of judicial review to executive action would improve outcomes.

<sup>305</sup> It would be self-defeating to argue for deference against discrimination claims on the basis that the executive is subject to democratic accountability. Cf. Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865 (2007) (offering a defense of deference based on democratic accountability). Where bias is directed at a demographic minority, or a group without electoral power, democratic accountability is more likely to intensify than to assuage bias.

<sup>306</sup> See, e.g., *Humanitarian Law Project*, 561 U.S. at 34; *Travel Ban Case*, 138 S. Ct. at 2418–19.

<sup>307</sup> For a summary, see Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CAL. L. REV. 887, 905–18 (2012) (documenting seriatim policy failures in the counterterrorism domain).

<sup>308</sup> In the 1950s, psychologists led by Henry Garrett, a chaired professor at Columbia University, rallied in defense of racial segregation and a renewal of national security. Andrew S. Winston, *Science in the service of the far right: Henry E. Garrett, the LAEEE, and the Liberty Lobby*, 54 J. SOC. ISSUES 179 (1998); see also John P. Jackson Jr.,

contrary, as the Dillingham Commission's work suggests, expertise is no prophylaxis against animus.<sup>309</sup> And if there is no correlation between expertise and freedom from bias, the justification for deference from discrimination law cannot be defended on the ground that intensive scrutiny is simply not needed.

Moreover, when judicial review is narrowly focused on the vindication of antidiscrimination norms, and limited to cases in which there is extrinsic evidence of improper motives, the costs of such review are unlikely to outweigh its benefits. It is hard to see why this, more finely calibrated, species of judicial oversight impinge on justified policy choices, or impose unjustified transaction costs. Especially given a bureaucratic history of overtly discriminatory policy choices, a limited form of judicial review—let us say, available only *ex ante* and without any personal liability for officials—would militate against a reiteration of past animus-driven policies. Its principal transaction cost would be a tax on overt reliance on suspect classifications as proxies for security risk. Given the well-known perils of treating minorities as *per se* perilous, it is hard to see how this rescission would impinge on public good production. Indeed, it seems its most likely effect would be to militate against regressive forms of policy-making that concentrate burdens on defined minorities without fully offsetting gains in aggregate welfare, and to elicit more equitable distributions of state coercion. The retraction of judicial scrutiny, therefore, is more likely to undermine than to solidify aggregate social welfare.

In sum, formal and functionalist defenses of the dignified presidency as an adjunct to the Article II discretion to discriminate are unpersuasive. Notwithstanding contrary precedent, the case for a more robust judicial review, even if only in marginal cases where extrinsic evidence of improper motive avails, is powerful.

## B. Implications

If the Article II discretion to discriminate is entrenched behind the façade of the dignified presidency, it will alter the distribution of federal resources, the choice of federal policy tools, and ambient levels of social stratification. Such discretion matters because doctrine “in the public law domain can act as either a tax or a subsidy” by raising or lowering the expected cost of a particular course of action.<sup>310</sup> That cost may take the form of a damages award or injunction, or, more weakly, may take the form of the expenditures and hassle associated with a lawsuit. Rational government actors will respond to judicial decisions that raise the expected *relative* cost of one pathway in relation to another (or one goal in relation to a substantially similar alternative ambition) by reallocating resources. In consequence, a full range of constitutional doctrine's effects can be discerned only by a comparative analysis across notionally distinct policy domains.<sup>311</sup>

The Article II discretion to discriminate arises against the context of large shifts in the doctrinal plate tectonics. Its recognition coincides with an increasingly stringent judicial

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*The scientific attack on Brown v. Board of Education, 1954-1964*, 59 *Am. Psych.* 530 (2004) (describing a concerted effort by psychologists to have *Brown* overruled on scientific grounds).

<sup>309</sup> BENTON-COHEN, *supra* note 288, at 4-7.

<sup>310</sup> Huq & Lakier, *supra* note 255, at 1566.

<sup>311</sup> *Cf. id.* at 1571-74 (pursuing this comparative inquiry in a different domain of federal law).

superintendence of federal regulatory policy.<sup>312</sup> The resulting asymmetrical distribution of deference—strong for coercive actions, weak for regulatory policy—will likely influence the allocation of federal resources. All else being equal, the executive is now more likely to be able to achieve policy outcomes (of whatever sort) by resorting to its coercive instruments rather than its regulatory toolkit. In practical effect, the discretion recognized in the Travel Ban Case is a subsidy and a spur to what Pierre Bourdieu called “the right hand of the state,” while the minatory view of regulation works as a handicapping of “the social state,” which “safeguards the interests of the dominated, the culturally and economically dispossessed, [and] women.”<sup>313</sup> This asymmetrical tax on policy instruments will have predictable regressive effects. Less certain are the justifications, if any, the Court has for favoring one modality of policy-making by the federal state over another. There is no a priori reason to favor coercive instruments over regulatory instruments to generate public good. To the contrary, all else being equal, it seems likely that the former will have greater negative externalities—they are overtly coercive, after all—than the latter. It is hence a potent paradox of the Court’s intervention in the name of freeing the state’s hand to achieve public goods that it may well be pushing the federal government to rely on policy instruments with more frictional costs. It is a paradox that in the name of the nation the Court is pressing the federal government into approaches that hurt not only subordinated minority, but that harm us all.

Consider also the attendant implications for an understanding of Article III’s role in the constitutional scheme. The judicial recognition of an Article II discretion to discriminate rests on the assumption that antidiscrimination norms must be subordinated to other public policy goals in the absence of any demonstrated compelling state interest. In both the Japanese-American internment cases and the Travel Ban Case, therefore, federal courts failed to engage in the ordinary process of discovery-driven inquiry into the facts. In the former, the Court simply declined to address the legality of the internment itself, obviating the need for factual investigation.<sup>314</sup> In the latter, the Court largely resolved the constitutional question prior to, and without the benefit of, discovery on a motion for a preliminary injunction.<sup>315</sup> Such resort to fact-light adjudication has wider consequences. Because the Court serves as a focus of national policy debates, its choices about how to frame constitutional questions—and in particular its choices about which facts are relevant to those questions—can influence public understanding of consequential policies. Foreclosure of the public airing of relevant facts risks a “hermeneutic injustice,” in which significant facts are “obscured from collective understanding.”<sup>316</sup> By blinding the public to the existence and magnitude of an injustice, the Court perpetuates and deepens its wrong.

It is important to observe that such epistemic foreclosure is not always successful. Indeed, the Japanese-American internment is an instance in which the Court did not

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<sup>312</sup> See cases cited in *supra* note 152. A summary of recent developments is Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 943-55 (2018).

<sup>313</sup> PIERRE BOURDIEU, *FIRING BACK: AGAINST THE TYRANNY OF THE MARKET* 35 (2003) (describing the right hand of the state as “represented by the ministries of finance and budget as well as the repressive arm of the state (police, courts, prison, military)”).

<sup>314</sup> See *supra* text accompanying notes 66 to 69.

<sup>315</sup> *The Travel Ban Case*, 138 S. Ct. 2392, 2423 (2018) (reversing the grant of a preliminary injunction). The Court’s constitutional analysis ignored the limited factual record prior to discovery, and suppressed the possibility that discovery might alter that record.

<sup>316</sup> MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER & THE ETHICS OF KNOWING* 154-55 (2007).

“legitimiz[e] the federal government's World War II internment of people of Japanese descent.”<sup>317</sup> To the contrary, the Court’s 1948 decision in *Oyama*,<sup>318</sup> a mere five years after the *Korematsu* and long before the latter’s induction into the anticanon,<sup>319</sup> repudiated the very same form of animus given a pass in the internment decisions.

The pathway to an anti-canonization of the Travel Ban Case, for those who wish to travel it, is likely to be arduous and piecemeal, especially given the composition of the current Court. But it is hardly unimaginable. I have suggested that the deep moral wrong of not only that case, but also the Japanese-American internment case, was its failure to acknowledge what was plain for all others to see. This is not an error in logic or method. “Logic is silent on how to classify particulars—and this is not the heart of a judicial decision.”<sup>320</sup> It was an error that tracks precisely the *Plessy* Court’s claim that “enforced separation of the two races” as practiced in the Jim Crow South imposed no “badge of inferiority” unless “the colored race chooses to put that construction upon it.”<sup>321</sup> It is a failure of just perception, therefore, that finds its strongest antecedent in case law still rightfully viewed as repugnant and odious.

The test of constitutional antidiscrimination jurisprudence over the next generation, therefore, may turn on whether this parallel is properly recognized, or instead whether the Article II discretion to discriminate metastasizes beyond its present inchoate bounds.

### Conclusion

Judicial decisions, like elections, have consequences. The immediate consequence of the Travel Ban Case is the formal recognition of an Article II discretion to discriminate that, to date, has been at best implicit in the jurisprudence. The decision’s internal contradiction will generate only fragile constitutional restraint on the federal executive’s choice of discriminatory policies closely analogous to the internment of the 1940s or the exclusion of 2017 onward. Exact carbon copies of the Japanese-American exclusion might be beyond the Constitution’s bounds. But because the government has a wide variety of close substitutes that can mimic many (although perhaps not quite all) of the internment’s effects while evading any formal parallelism, it has a broad capacity to circumvent any collision with the law. In a febrile geopolitical environment characterized by a resurgence of exclusionary populism,<sup>322</sup> it seems fair to characterize this authority as a “loaded weapon” of sorts.<sup>323</sup>

The Article II discretion to discriminate recognized in the Travel Ban Case has uncertain bounds because of the difficulty of reconciling the Court’s twin holdings. But over time, those bounds will be settled. In part, this will happen through judicial application, and it is worth recalling here that *Oyama* follows *Korematsu*. But in important part, it will also happen through public discourse, through what Hannah Arendt called the “incessant talk” that

<sup>317</sup> Devon W. Carbado, *Yellow by Law*, 97 CAL. L. REV. 633, 648 (2009).

<sup>318</sup> *Oyama v. California*, 332 U.S. 633 (1948); see also text accompanying notes 16 to 27 (discussing *Oyama*).

<sup>319</sup> Greene, *supra* note 56, at 455-56 (discussing the timing of *Korematsu*’s negative treatment).

<sup>320</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 610 (1958).

<sup>321</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

<sup>322</sup> On the rise of populism and its relation to constitutional norms, see Aziz Z. Huq, *The People Versus the Constitution*, 116 MICH. L. REV. 1123 (2018).

<sup>323</sup> *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting) (“The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”).

redeems “the affairs of man from their inherent futility” by generating “certain concepts, certain guideposts for future remembrance.”<sup>324</sup> It will happen, I hope, through a measure of public remembrance and recognition of the basic moral wrong of failing to recognize a harmful act borne of hate.

This Article is a small contribution to that Arendtian project. It recognizes in that regard that the Court might have the last say as a matter of law, but has no authority to close the historical record. Facts will out; they are pesky that way. Whether the Article II discretion to discriminate remains part of our constitutional canon and our moral heritage, as a consequence, very much remains to be seen. At the very least, the choice is a matter too pressing and too pregnant with normative freight to be left to the fragile moral compass of the Roberts Court alone.

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<sup>324</sup> HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 220 (Penguin Books, 1973).