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Quieting the Court: Lessons from The Muslim-Ban Case

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The Supreme Court's Muslim-ban decision in Trump v. Hawaii *and the confirmation of Brett Kavanaugh to the Supreme Court call into question the civil rights litigation enterprise insofar as it challenges the U.S. government's national security and immigration policies. Litigants and advocacy organizations should employ an array of strategies and tactics to avoid the Court's rulings that almost uniformly defer to, and thus validate, the government's national security and immigration practices.*

This article maintains that The Muslim-Ban Case *was a predictable outgrowth of the Supreme Court's national security-immigration jurisprudence that champions executive power at the expense of marginalized groups, in particular non-citizens. The article provides a typology of these cases' features and examines how* The Muslim-Ban Case *exhibits these characteristics but also exceeds recent precedents in its disregard of the ban's bigoted motivations and its excessive deference to the President.*

In light of The Muslim-Ban Case *and the judiciary's conservative trajectory, the article proposes that civil rights lawyers and legal advocacy organizations assess whether their litigation risks validating the President's arrogation of power and the concomitant suppression of minority groups' liberties. Recognizing the at-times life-saving and moral necessity of litigation, the article first offers discrete litigation strategies that may avoid future adverse decisions. The article then examines extra-judicial forms of advocacy that groups and individuals may adopt in order to secure and develop marginalized groups members' liberties. This project entails challenging the current legal rights framework's underlying ideas of American identity, which privileges national sovereignty and citizenship. The article proposes a more inclusive framework that imposes duties on the state to non-citizens through connections of family and on the basis of universal values.*

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INTRODUCTION

The Supreme Court's Muslim-ban decision in *Trump v. Hawaii*[1] and the confirmation of Justice Kavanaugh raise an important question for civil-rights attorneys seeking protection for their clients from the U.S. government's national security policies: Should they stop litigating? Or more specifically, what strategies should civil-rights advocates employ to avoid the Supreme Court's rulings that almost uniformly defer to, and thus validate, the government's national-security practices?

On its face, the question seems absurd. When government action threatens constitutional rights, what self-respecting civil-rights attorney would not seek refuge for her client in the courts? Who would not expect the independent judiciary to act as a check on the political branches? But in the national security realm—particularly at the Supreme Court stage—good intentions and high expectations often lead to negative, long-term consequences for the very people and principles their advocates seek to protect. The proposed opposition to litigating is thus both specialized and opportunistic—very much "a sometime thing"[2]—aimed at protecting minority and immigrant rights in the national security context.

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[1] This article refers throughout its text above the footnotes to *Hawaii v. Trump*, 138 S. Ct. 2392 (2018), as *The Muslim-Ban Case*. In doing so, I underscore the article's thesis, which is that, in litigating national security-civil rights cases in the courts—and the Supreme Court in particular—advocates succumb to an inhospitable legal rights framework that reiterates narratives, which heighten executive power and diminish marginalized and immigrant groups' interests. These narratives entail adopting arguments, cases, and terminology that invariably validate government policies. Language matters. By denominating the case as *The Muslim-Ban Case* (not dissimilar to *The Chinese Exclusion Case* née *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)), the article resists validating the opinion in linguistic fashion. It is my hope that the article as a whole raises additional questions over how and whether advocates resist legally validating the ban and future harmful government policies.

[2] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 114 YALE L.J. 1346, 1351 (2006) (quoting CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 109 (1997)) [hereinafter Waldron, *Judicial Review*].

Since the September 11 terrorist attacks, the Supreme Court has issued opinions that generally endorse national security policies and practices, ranging from long-term detention to abusive security measures to criminalizing the teaching of international humanitarian law.[3] Civil-rights advocates thus do not simply "lose" national security cases in the Supreme Court. Rather than serve as a check on the President and his invocation of foreign affairs powers and execution of counterterrorism policies, the Court's opinions—even the "wins"—often legitimate the President's actions. And by vindicating national security policies, the Court provides precedents for the political branches and the judiciary to follow and build on in the future. These opinions embolden aggressive counterterrorism actions, with potential spillover into contexts far removed from national security such as domestic police powers. Indeed, *The Muslim-Ban Case* may weaken general immigration and anti-discrimination law.

The Trump presidency heightens concerns that judicial validation of belligerent national security polices is likely to increase in the coming years for at least three reasons. First, President Trump acts with less restraint than prior presidents, adopting policies that both aggressively curtail constitutional rights and rest on expansive Article II theories of a powerful Executive.[4] The

[3] *See generally* Avidan Y. Cover, *Presumed Imminence: Judicial Risk Assessment in the Post-9/11 World*, 35 CARDOZO L. REV. 1415 (2014) [hereinafter Cover, *Presumed Imminence*]. Judicial deference is not merely a post-9/11 casualty; upholding executive action in the security context has a long history. *See id.* at 1443-45. Justice Breyer contends that the Court has "moved from an attitude of deference to one of scrutiny" in national security cases. STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 80 (2016). Such scrutiny, however, may often serve to legitimate, rather than check, presidential power. *See infra* Part I.F. Moreover, the constancy of the national surveillance state and the prospect of a "forever war" elevate worries over the long-term effect on civil liberties. *Id.* at 1418-19; Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 11-20 (2008); BREYER, at 81 (suggesting that the Court has more readily accepted post-9/11 cases to review because of the indefinite nature of terrorist threats).

[4] However, presidents of both political parties commonly assert broad executive powers in the national security and immigration contexts, impinging on non-citizens and minorities' rights. *See, e.g.*, JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11

Muslim-ban proclamation is a prime example. Second, and more importantly, President Trump's two Supreme Court appointments—Kavanaugh and Neil Gorsuch—will likely cement for a generation the Court's deferential national security posture of negligibly limiting the Executive.

21-25, 40-41 (2012) [hereinafter GOLDSMITH, POWER AND CONSTRAINT] (contending Obama administration largely accepted Bush administration's national security policies). The Trump administration's arguments and policy at issue in *The Muslim-Ban Case* bear some similarity to those of preceding administrations. The Bush administration commonly asserted that the President enjoyed unreviewable powers in responding to terrorist attacks. *See, e.g.*, Gherebi v. Bush, 352 F.3d 1278, 1299 (9th Cir. 2003), *cert. granted, judgment vacated*, 542 U.S. 952 (2004) (observing that government's theory permitted it to detain indefinitely, "and to do with [ ] these detainees as it will, when it pleases, without any compliance with any rule of law of any kind, without permitting [a detainee] to consult counsel, and without acknowledging any judicial forum in which its actions may be challenged."). The Bush administration also conducted a program that required alien males over the age of 16 from 24 Muslim-majority states and North Korea to register with the government and provide data enabling monitoring and immigration-law enforcement. *See* Rajah v. Mukasey, 544 F.3d 427 (2d Cir. 2008) (upholding National Security Entry–Exit Registration System (NSEERS) program). *See also* Hawaii, 138 S. Ct. at 2419, 2421 (citing *Rajah* in support of deference and history of government programs applying to non-immigrant aliens from Muslim-majority countries); Kaveh Wadell, *America Already Had a Muslim Registry*, THE ATLANTIC (Dec. 20, 2016), https://www.theatlantic.com/technology/archive/2016/12/america-already-had-a-muslim-registry/511214/ (noting similarities between President-elect Trump's proposed targeting of Muslims with, and possible expansion of, NSEERS). The Obama administration argued—in strikingly similar fashion to the Trump administration's arguments in *The Muslim-Ban Case*—that courts could not review a State Department consulate official's denial of a visas to a citizen's foreign spouse, even if there is "undeniable proof" of racist reasons for the denial. Kerry v. Din, No. 13-1402, Transcript Oral Arg., at 12 (Feb. 23, 2015), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/13-1402_k536.pdf.
Of course, President Obama's most relevant executive acts here were his Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and Deferred Action for Childhood Arrivals (DACA) programs. DAPA permitted illegal immigrants who were parents of citizens or lawful permanent residents to be lawfully present in United States. DACA authorized undocumented individuals who had entered the United States as Children to apply for deferral of removal. The Fifth Circuit affirmed a district court's injunction against the DAPA's implementation and DACA's expansion, holding that the programs exceeded the President's authority. Texas v. United States, 809 F.3d 134 (5th Cir. 2015). An equally divided Supreme Court affirmed the Fifth Circuit's judgment. United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (per curiam). This unfavorable judicial treatment of executive authority stands apart from most of the Court's opinions on presidential power, raising questions whether the courts were motivated more by anti-immigrant and nativist impulses than concern over illegitimate exercise of power. On the other hand, civil rights advocates readily embraced claims of discretionary executive power, barely recognizable from the separation-of-powers arguments they marshaled in *The Muslim-Ban Case* and in others cases discussed in this article.

Moreover, President Trump has overhauled much of the federal judiciary, naming numerous judges to the lower courts who are not likely to sympathize with civil-rights attorneys' pleas when it comes to the government's national-security policies.[5]

Litigation will never be entirely avoidable. Nor should it be. As the early stages of the Muslim-ban rollout demonstrated, it was lawyers and their lawsuits that meant the difference for thousands of people permitted entry into the United States and not sent back to other nations.[6] Civil rights groups have seen their prominence rise, largely due to their ramped up litigation efforts against Trump.[7] But in litigating, they may want to consider approaches that avoid constitutional issues in favor of statutory claims, prioritize individual clients over impact litigation and policy challenges, seek out settlements, and forego appealing to the Supreme Court should they lose in lower courts.

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[5] *See* Burgess Everett & Marianne Levine, *McConnell preps new nuclear option to speed Trump judges*, POLITICO, March 6, 2019, https://www.politico.com/story/2019/03/06/trump-mcconnell-judges-1205722 (describing Trump's appointing of "roughly 20 percent of the Circuit Court seats in the country after just two years in office," resulting in "few, if any, vacancies there for a potential Democratic president in 2021"); Thomas Kaplan, *Trump Is Putting Indelible Conservative Stamp on Judiciary*, N.Y. TIMES, July 31, 2018, https://www.nytimes.com/2018/07/31/us/politics/trump-judges.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news (noting that President Trump had more circuit court nominees confirmed "than any other president had secured at this point in his presidency since the creation of the regional circuit court system in 1891").

[6] *See, e.g.*, Maeve Higgins, *God Bless America, and Her Lawyers*, N.Y. TIMES, Jan. 26, 2019, https://www.nytimes.com/2019/01/26/opinion/sunday/immigration-lawyers-travel-ban.html.

[7] Anthony D. Romero, *Here Is the ACLU's 7-Point Plan of Action to Take on the Trump Administration*, Jan 19, 2017, 9:15 PM, https://www.aclu.org/blog/here-aclus-7-point-plan-action-take-trump-administration ("We will be the David to the federal government's Goliath. The ACLU has 300 litigators, spread out among our national headquarters and each of the 50 states."); Joel Lovell, *Can the A.C.L.U. Become the N.R.A. for the Left?*, N.Y. TIMES MAGAZINE, July 2, 2018, https://www.nytimes.com/2018/07/02/magazine/inside-the-aclus-war-on-trump.html (quoting ACLU Executive Director Anthony Romero on how litigation and public advocacy caused the Trump administration to back down on its family separation policy); *id.* (noting that in 15 months after the election, ACLU memberships more than quadrupled from 400,000 to 1.84 million and annual donations increased from between $3 and $5 million to $120 million).

Civil-rights advocates must not abandon litigation as an advocacy tool, but they should explore other means, prioritizing, for example, electoral efforts at both the congressional and presidential levels.[8] Congress, as a political branch, may be better positioned to act as a check on the President. Indeed, in one of its less equivocal rejections of post-9/11 national security policies, the Court struck down the Defense Department's military commissions largely on the grounds that it violated congressionally-passed Uniform Code of Military Justice provisions.[9] On the other hand, Congress (especially a veto-proof majority) has rarely sought to restrain the President in his execution of national security related powers, deferring in a fashion similar to the judiciary.[10] The indefinite and expanding nature of national security threats and the concomitant concentration and expansion

[8] *See, e.g.*, Faiz Shakir, *How the ACLU Plans to Engage in the 2018 Midterm Elections*, ACLU, Jan. 11, 2018 https://www.aclu.org/blog/mobilization/how-aclu-plans-engage-2018-midterm-elections (describing how the "ACLU plans to do electoral work in a serious way for the first time" but remain non-partisan); Shadi Hamid, *The Travel Ban, the Law, and What's 'Right'*, THE ATLANTIC, June 28, 2018, https://www.theatlantic.com/ideas/archive/2018/06/trump-travel-ban-supreme-court/564044/ (characterizing *Muslim-Can Case* as "correct," though perhaps not "right," and proposing that instead of litigating "[m]oral judgments on constitutionally and legally muddy debates . . . they're best rendered by persuading as many of our fellow citizens that they should stop voting for anti-Muslim presidents").

[9] *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006). Some scholars have questioned whether the decision actually hinged on a congressional limitation, viewing the military commissions as a constitutionally suspect executive action taken in the absence of congressional action. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 709 (2008).

[10] A new Democratically controlled House of Representatives may embrace legislation limiting the Executive's military-related powers, but whether a full Congress will ultimately enact such laws is doubtful. *See* Bryan Bender & Gregory Hellman, *Democrats vow new scrub of post-9/11 war powers*, POLITICO, Dec. 24, 2018, https://www.politico.com/story/2018/12/24/democrats-911-war-powers-military-1074808 (addressing congressional interest in revising the 2001 Authorization for Use of Military Force, which three presidents have relied in executing military action well beyond responding to the 9/11 terrorist attacks). Congress did vote to terminate the President's recent emergency declaration intended to obtain border-wall funding, but the President vetoed the legislation. Ben Jacobs, *Trump overrules Congress with veto to protect border emergency declaration*, THE GUARDIAN, March 15, 2019, https://www.theguardian.com/us-news/2019/mar/15/trump-veto-national-emergency-declaration-resolution-senate.

of power in the executive branch thus demands civil rights advocates' increased attention to the electoral process.

Advocacy groups should continue to concentrate on local and group-minded expressions of dissent. The embrace of refugees and protests against the Muslim ban—often spearheaded by community and religious groups—offer a vision of American society distinct from the Court's highly statist and executive-led structure, which discounts the rights of non-citizens. These extra-legal sources provide a more inclusive basis for a national identity, which may eclipse an entrenched-rights framework that disfavors marginalized groups, particularly immigrant populations in national security contexts. Reconceiving and strengthening American identity along familial lines may prove more effective in protecting outgroups, appropriating from the family unit shared characteristics that influence personal identity, community, morality, and religious beliefs. Such a basis for identity may foster greater acceptance of non-citizens, in particular those in familial relationships with U.S. citizens.

This article contends that *The Muslim-Ban Case* confirms the judiciary's endorsement of the executive branch's increasing aggrandizement of power in the national-security and immigration context, resulting in violations of non-citizens' freedoms and interests. In seeking to vindicate non-citizens' rights in court, litigants instead provoke the Supreme Court's validation of executive branch policies. Rather than run to court, this article argues that advocates should explore varied approaches outside litigation that channel differing but acceptable understandings of national identity. Part I addresses the case against litigation, examining how *The Muslim-Ban Case* is no aberration, but is instead the product of a national security jurisprudence upholding executive branch polices, and a harbinger of future judicially validated civil-rights violations. The section addresses several problematic aspects common to *The Muslim-Ban Case* and national security

cases, which support avoiding the Supreme Court's review. Part II considers legal scholarship cautioning against advocacy that relies heavily on litigation. The section also discusses how legal-advocacy groups in Israel and the Occupied Palestinian Territories either abandoned litigation or considered doing so after they found that the Israeli High Court of Justice legitimated the government's occupation policies and practices. Part III addresses the case for litigation in the face of these specific and general concerns. Finally, Part IV proposes several strategies civil-rights advocates and attorneys should consider when weighing and waging litigation in the national security context. Part IV concludes with a series of extra-judicial advocacy proposals, which includes an alternative framework to the confining legal-rights model that litigants invariably adopt in court.

I. THE SPECIFIC CASE AGAINST LITIGATION

The Muslim-Ban Case illustrates the lengths to which the Court defers to the President in the national security context. After purporting to consider President Trump and his advisers' numerous anti-Muslim statements in connection with the Muslim ban, the Court upheld Proclamation No. 9645[11] because, on its face, the ban supported legitimate national security interests.[12] The Court acknowledged a voluminous record evidencing the President's animus toward Muslims, but ultimately found that, independent of its history, the Proclamation was a neutral and rational means to further security interests and therefore the plaintiffs were not likely to succeed on their Establishment Clause claim.[13] The Court's inclination to divorce presidential policy from its

[11] Proclamation No. 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats," (Sept. 24, 2017), 82 Fed. Reg. 45161.

[12] *Hawaii*, 138 S. Ct. at 2420-23.

[13] *See id.* at 2423 ("[T]he Government has set forth a sufficient national security justification to survive rational basis review. We express no view on the soundness of the policy. We simply hold

starkly discriminatory motivations and intent lays bare the illusory limitations that constrain the President. At the very least, individual rights—particularly those of the most marginalized and unpopular—hold little consequence to the Court when the President invokes national security.[14]

Although the case is unique in that no prior Executive had so transparently and amply provided id-fueled, tweet-filled insights into a policy's discriminatory purposes, the opinion's reasoning inexorably follows from the Court's earlier pronouncements on national security policies. It is no anomaly; rather, *The Muslim-Ban Case* is a warning of what is to come. The opinion thus presents a useful case study for examining the problematic features of the Court's national security jurisprudence that may militate against future civil rights litigation. The following discusses these common features.

A. Deference

The Court echoed prior opinions' holdings that courts should exercise deference in weighing the President's national security and immigration decisions, explaining that "our inquiry into matters of entry and national security is highly constrained."[15] Courts have frequently justified their supine review on any number of considerations, including the action or precipitating event's

today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim.").

[14] In contrast, only weeks prior to *The Muslim-Ban Case* opinion, the Court held that state government officials' statements reflected unacceptable anti-religious animus against a Christian baker who refused to customize a wedding cake for a same-sex couple. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018) ("The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to the affirmance of the order—were inconsistent with what the Free Exercise Clause requires"). *See infra* Part IV.C.5 (discussing inconsistencies between *Masterpiece* and *The Muslim-Ban Case*).

[15] *Hawaii*, 138 S. Ct. at 2420. *See also id.* at 2419 ("*Mandel*'s narrow standard of review 'has particular force' in admission and immigration cases that overlap with 'the area of national security.'" (quoting *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring) (citing Kleindienst v. Mandel, 408 U.S. 753 (1972))).

temporary or emergent nature; the international or foreign affairs dimension; and the issue's complexity, imprecision, or secrecy.[16]

The Court relied on its 2017 holding in *Abbasi v. Ziglar* that executive officials enjoy immunity from lawsuits brought by non-citizens abused while in detention immediately following the September 11 terrorist attacks.[17] The Court rejected the former detainees' lawsuit because, it held in part, judicial review of the executive branch's national security decisions intrudes on constitutional separation of powers.[18]

Similarly, the Court relied on *Humanitarian Law Project v. Holder*, which held that teaching international law to members of a terrorist organization constitutes material support of terrorism.[19] There the Court deferred to government assertions about threats posed by such teaching due to the judiciary's "lack of competence" in "collecting evidence and drawing inferences on questions of national security".[20]

These precedents and their citation foretold *The Muslim-Ban Case*'s predictable outcome and reflect the jurisprudence at the nexus of national security and non-citizens. The Court's deferential default produces inevitably limited inquiries and standards of review favorable to the government, maximizing presidential authority and minimizing injury to the government's legal interests. And

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[16] *See* Cover, *Presumed Imminence*, *supra* note 3, at 1453-55 (discussing cases).

[17] *Hawaii*, 138 S. Ct. at 2419 (quoting Ziglar v. Abbasi, 137 S.Ct. 1843, 1861 (2017)).

[18] *Hawaii*, 138 S. Ct. at 2419 (quoting Abbasi, 137 S.Ct. at 1861).

[19] *Hawaii*, 138 S. Ct. at 2419 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010)) (internal quotation marks omitted).

[20] *Hawaii*, 138 S. Ct. at 2419 (quoting *Humanitarian Law Project*, 561 U.S. at 34 (internal quotation marks omitted). The Court also relied on precedents of deference that predate the post-9/11 era. *See, e.g.*, *id.* at 2421 ("But we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.'" (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948))).

the reasoning itself only reinforces and calcifies the deferential posture for future national security cases.

B. Heightened Executive Power

The Court frequently premises its deferential analysis on the relative skill and expertise of the political branches.[21] In *The Muslim-Ban Case*, the Court elevated the abstract power of the presidency over the particular actions of President Trump. In so doing it both made the case for a stronger presidency and minimized the President's precise conduct. While purporting to give equal weight to the general and specific—"we consider not only the statements of a particular President, but also the authority of the Presidency itself"[22]—the Court ultimately paid little heed to President Trump's remarks. The opinion thus retains an air of unreality, trafficking in the theoretical over the concrete and circumscribing any problematic evidence through the forgiving lens applied to presidential actions—"addressing a matter within the core of executive responsibility."[23]

The Court's paean to executive power also reads gratuitously, divorced from its earlier analysis in the opinion where it held that, under 8 U.S.C. § 1182(f), Congress authorized the President to issue the proclamation.[24] It may be implicit that the Court considered the President to act at his height of powers under the *Youngstown* analysis because of the congressional grant.[25] But the

[21] *See* Boumediene v. Bush, 553 U.S. 723, 797 (2008) (noting that "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people."); Humanitarian Law Project, 561 U.S. at 35 (describing political branches as "uniquely positioned" to assess how particular activities relate to and impact terrorism and foreign policy).

[22] *Hawaii*, 138 S. Ct. at 2418.

[23] *Id.*

[24] *Id.* at 2408.

[25] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Justice Jackson's three situations and "legal consequences" is the dominant model courts utilize in assessing presidential power in foreign affairs. *Id.* In the first category, the President's "authority is at its maximum" when he "acts pursuant to an express or implied authorization of Congress,"

focus on presidential authority in the abstract when addressing the Establishment Clause claim, without reference to Congress, comes dangerously close to endorsing Justice Thomas's view that "the President has inherent authority to exclude aliens from the country."[26] Elevating presidential authority on such ambiguous bases, separate from constitutionally express or implied grants, "invite[s] political abuse and endanger individual liberties."[27] Clarity on the President's source of power is therefore vital.

C. Diminished Harm

In addition to elevating executive authority, the Court's deference entails minimizing the harm suffered by litigants. Absent from *The Muslim-Ban Case* is significant discussion of the policy's impact (or its motivations) on the plaintiffs and any others similarly situated. In not so subtle fashion, the Court pushes to the side the victims—American Muslims and their family members.

First, the Court's review of the record is cursory at best. Though the Court acknowledged that "[a]t the heart of plaintiffs' case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation",[28] the Court devoted but three brief paragraphs to summarizing the statements.[29] Contrast the majority's "highly abridged account"[30] with Justice

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requiring the "widest latitude of judicial interpretation." *Id.* at 635-37. The second category is "a zone of twilight" where the President and Congress may or may not enjoy "concurrent authority." Here, the President acts on his "independent" authority, without "either a congressional grant or denial of authority." *Id.* at 637. Finally, the President's "power is at its lowest ebb" when he acts in a way "incompatible with the expressed or implied will of Congress," demanding that such measures "be scrutinized with caution." *Id.* at 637-38.

[26] *Hawaii*, 138 S. Ct. at 2424 (Thomas, J., concurring).

[27] Louis Fisher, *The Unitary Executive and Inherent Executive Power*, 12 U. PA. J. CONST. L. 569, 589 (2010).

[28] *Hawaii*, 138 S. Ct. at 2417.

[29] *See id.*

[30] *Id*. at 2435 (Sotomayor, J., dissenting).

Sotomayor's dissent, in which she documents 13 paragraphs to Trump's statements reflecting the Proclamation's background of anti-Muslim animus.[31]

These statements are not inscrutable, but egregious, in their focus on, and malice toward, Muslims:

- As part of his presidential campaign, then candidate Trump issued a press release, stating: "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States."[32]

- Candidate Trump said, "I think Islam hates us. . . we can't allow people coming into this country who have this hatred of the United States . . . [a]nd of people that are not Muslim."[33]

- Responding to the suggestion that he might be rolling back the Muslim ban idea, candidate Trump stated, "I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim."[34]

- After President Trump signed the first Executive Order iteration of the ban, his legal adviser Rudy Giuliani explained, "[W]hen [Mr. Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"[35]

- In response to the Supreme Court's partial injunction of the second Executive Order implementing the ban, President Trump described the order as a "watered

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[31] *See id.* at 2435-38.

[32] Hawaii v. Trump, [Proposed] Third Amended Complaint for Declaratory and Injunctive Relief, No. 1:17-cv00050-DKW-KSC (Oct. 10, 2017), ¶ 54, https://www.hoganlovells.com/~/media/hogan-lovells/pdf/hawaii/2017_10_10_367_1_proposed_third_amended_complaint_and_inj.pdf (quoting Press Release, Donald J. Trump for President, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015) (attached as Ex. 2)).

[33] *Id*. at ¶ 57 (quoting Anderson Cooper 360 Degrees: Exclusive Interview with Donald Trump (CNN television broadcast Mar. 9, 2016, 8:00 PM EST), transcript available at https://goo.gl/y7s2kQ).

[34] *Id*. at ¶ 62 (quoting Meet the Press (NBC television broadcast July 24, 2016), transcript available at https://goo.gl/jHc6aU).

[35] *Id.* at ¶ 70 (quoting Amy B. Wang, Trump asked for a 'Muslim ban,' Giuliani says – and ordered a commission to do it 'legally', The Washington Post (Jan. 29, 2017), https://goo.gl/Xog80h).

> down version of the first one . . . tailor[ed] [by] . . . the lawyers," adding, "I think we ought to go back to the first one and go all the way, which is what I wanted to do in the first place."[36]

- Among his many statements on Twitter supporting the Muslim ban, President Trump tweeted: "The travel ban into the United States should be far larger, tougher and more specific but stupidly, that would not be politically correct!"[37]

Despite the teeming public record, the Court did not actually *consider* the impact of these statements. The majority opinion explained it "may consider plaintiffs' extrinsic evidence,"[38] but that "we must consider not only the statements of a particular President,"[39] and "that the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation."[40] But it rejected the plaintiffs' formulation of the harm—that "this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition."[41] Instead, the Court limited its inquiry to "the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility."[42]

The Court's "contextualization" explains in part a standard of review that necessarily ignores the fact and import of the President's statements. The Court's holding that the plaintiffs had standing because of their separation from family, rather than from any dignitary and spiritual harm,

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[36] *Id.* at ¶ 84 (quoting Katie Reilly, Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak', Time (Mar. 16, 2017), https://goo.gl/UcPHfg).

[37] *Id.* at ¶ 87 (quoting Donald J. Trump (@realDonaldTrump), Twitter (Sept. 15, 2017, 6:54 AM EDT), https://goo.gl/CGtXnD).

[38] *Hawaii*, 138 S. Ct. at 2420.

[39] *Id.* at 2418.

[40] *Id.* at 2423.

[41] *Id.* at 2418.

[42] *Id.*

might seemingly justify looking away from the anti-Muslim statements themselves and focusing instead on the abstracted question of denying entry to foreign nationals.[43] Though the Court's remarks on executive power read anodyne, the larger legal meaning is severe and substantive: American Muslims' Establishment Clause claims, even when alleging injuries of family disruption and religious humiliation, are weak and of little import, even where religious animus motivates government policy.

In *Ashcroft v. Iqbal*,[44] the Court similarly disregarded the plaintiffs' allegations that federal government officials issued discriminatory policies resulting in the arrest and detention of thousands of Arab Muslim men after the September 11 terrorist attacks. In holding that the plaintiff's allegations were implausible because they were "conclusory," the majority characterized specific paragraphs as "bare assertions" without considering the complaint as a whole and numerous other paragraphs supporting the discrimination claims.[45] The Court's reading is particularly questionable given that, at the motion-to-dismiss stage, the Court should have "assum[ed] that all the allegations in the complaint are true (even if doubtful in fact)."[46]

These "willful-blindness" features are present in the very case the Court insisted has no connection with the Muslim ban and claimed to have overruled.[47] In addressing Japanese-

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[43] *See id*. at 2416.

[44] 556 U.S. 662 (2009).

[45] *Id.* at 681. The dissent saw the majority's interpretation of the complaint's facts as highly selective. *See id.* at 697-98 (Souter, J., dissenting); *id.* at 698 ("The fallacy of the majority's position, however, lies in looking at the relevant assertions in isolation."); *id.* at 698-699 ("Taking the complaint as a whole, it gives Ashcroft and Mueller "'fair notice of what the . . . claim is and the grounds upon which it rests.'") (citations and internal quotation marks omitted).

[46] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). *See also* Iqbal, 556 U.S. at 696 (Souter, J., dissenting).

[47] *See Hawaii*, 138 S. Ct. at 2423 ("*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

American citizen Fred Korematsu's conviction for violating the World War II-era military's exclusion order (which required the removal and detention of all citizens of Japanese ancestry), the Court also denied that the case was about animus. "To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race."[48] There too the Court denied any racist element and then elevated the security interests: war, military necessity, exigency, and political branch determinations.[49] Just as *The Muslim-Ban Case* Court cast aside or minimized evidence of Trump's anti-Muslim motivations, so too did the *Korematsu* Court dilute or deny the consideration of race in the internment of Japanese Americans. In some ways, *The Muslim-Ban Case* is worse. It holds that even if such animus is present, it does not offend the Constitution.

D. Weakening Standards

The Court altered several judicial standards of review in sustaining the Muslim ban. The Court's subverting of standards of review reflects a pattern in national security cases in which the Court crafts an outcome-determinative standard of review that will not disturb the Executive's policy. Of equal concern is whether the reduced standards of review may expand beyond the already ambiguously defined national security context to other areas of law.[50]

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that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission.").

[48] Korematsu v. United States, 323 U.S. 214, 223 (1944), *abrogated by Hawaii*, 138 S. Ct. 2392.

[49] *See id.* at 224.

[50] *See* Maryah Jamshidi, *The Travel Ban: Part of a Broad National Security Exceptionalism in U.S. Law*, JUST SECURITY, July 3, 2018, https://www.justsecurity.org/58794/travel-ban-part-broad-national-security-exceptionalism-u-s-law/

The Court explicitly stated that it would not treat the plaintiffs' claim that the ban was motivated by religious animus as a "conventional Establishment Clause claim."[51] The Court explained that the "national security and foreign affairs context"[52] affected the "scope of the constitutional right" and "standard of review,"[53] leading it to reject the Establishment Clause's "*de novo* 'reasonable observer' inquiry."[54] In so doing, the Court minimized the constitutional right asserted and departed entirely from established First Amendment case law. The Court's "national security and foreign affairs" language suggests a limiting principle that might preclude applying the diluted standard to run-of-the-mill Establishment Clause cases.[55] But the plaintiffs were not those seeking entry to the United States; they were American citizens within the confines of the country.

The Court then claimed that the foreign-affairs-national security-entry context should require it to apply "a more constrained standard of review"[56], "asking only whether the policy is facially legitimate and bona fide".[57] However, apparently because the Government conceded at oral argument that reviewing the President's disparaging comments was proper, the Court acknowledged (grudgingly?) that it could "look behind the face of the Proclamation."[58] Tellingly, the Court did not adopt Justice Kennedy's 2015 controlling concurrence in *Kerry v. Din*, which held that courts should "look behind" the proffered reasons of a Department of State consulate

[51] *Hawaii*, 138 S. Ct. at 2418.

[52] *Id.* at 2420 n.5.

[53] *Id.* at 2418.

[54] *Id.* at 2420 n.5.

[55] *See id.*

[56] *Id.*

[57] *Id.* at 2420.

[58] *Id.* at 2420 (citing Tr. of Oral Arg. 16–17, 25–27).

official's denial of a visa when there is "an affirmative showing of bad faith."[59] That level of review would have seemed warranted given the alleged liberty interests implicating the family relationship.[60]

Instead, the Court deviated from even the "circumscribed review" precedent, holding that its "look behind" would entail only "rational basis review."[61] It is possible to read the Court's analysis as sui generis—a product of the government's unique concession to reviewing past presidential statements. But at the very least, the Court appeared to reject—at least by omission—Justice Kennedy's "look behind" analysis, also avoiding any determination that the extrinsic evidence rises to an "affirmative showing of bad faith."

Finally, the Court also manipulated the traditional rational-basis review it purported to apply. The Court explained that it "will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds."[62] The Court did not, however, address the policy's potentially discriminatory purposes; it was a one-sided analysis that only considered the government's arguments, inevitably permitting pretexts for discriminatory policies as legitimate interests. Indeed, although the Court indicated it would review the statements, the Court's "highly abridged account"[63] of statements lacked any substantive discussion.

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[59] 135 S. Ct. at 2141 (Kennedy, J., concurring).

[60] *See infra* Part IV.C.5.

[61] *Hawaii*, 138 S. Ct. at 2420.

[62] *Id.* The Court also appeared to depart from its long-held view that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–535 (1973))

[63] *Hawaii*, 138 S. Ct. at 2435 (Sotomayor, J., dissenting).

The novel rational-basis approach also deviates from prior cases on which the Court claimed to rely; in these cases, the Court considered *both* the government interests supporting the policy and the challengers' assertions of animus. For example, in *Romer v. Evans*,[64] the Court did not simply accept Colorado's claims that the landlords' freedom of association, discomfort with homosexuality, and preserving government resources to fight discrimination against other groups justified the state constitutional amendment's prohibition on ordinances protecting the gay community from discrimination.[65] Instead, the Court also considered and weighed against these interests whether Amendment 2 was overbroad and motivated by animosity toward the gay and lesbian community.[66]

The Muslim-Ban Case, despite its brief citation to a few of President Trump's anti-Islamic statements, never analyzed the statements as reflecting possible animus. Though the Court suggested that it would consider this "extrinsic evidence,"[67] "look behind",[68] and "probe the sincerity of the stated justifications for the policy",[69] the Court engaged in no inquiry. The Court found that the government's reasons proffered for the Proclamation were sufficient. But a judicial

[64] 517 U.S. 620 (1996)

[65] *Id.* at 635.

[66] *Id.* at 631-34. *See also* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 540–541 (1993) (addressing how plaintiffs may prove Establishment Clause, Free Exercise Clause, and Equal Protection Clause violations with evidence of discriminatory purpose through "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history").

[67] *Hawaii*, 138 S. Ct. at 2420.

[68] *Id.*

[69] *Id.* at 2418.

review that discounts evidence—as was in ample supply here—of the "bare . . . desire to harm a politically unpopular group"[70] will inevitably accept any pretext and sanction the policy.

E. Precedent and Contagion

Also characteristic of various national security cases is *The Muslim-Ban Case* Court's varying and ambiguous treatment of the context where judicial deference is warranted. The opinion describes a wide arena in which the Executive may act with primacy and little restraint. The majority alternatively describes the context in which the Muslim ban operates as, "national security"[71], "entry"[72], "admission"[73], "immigration[74]", "international affairs,"[75] or "foreign affairs."[76] In some instances, these contexts overlap. These multiple triggers for increasing deference raise concerns over when the Court will modulate executive action.

Whether *The Muslim-Ban Case* will ultimately weaken Establishment Clause, Equal Protection Clause, or immigration standards of review in different contexts remains to be seen. But the Court's decisions in other national-security related cases have had far-reaching consequences, impacting case law in as routine areas as standing, pleading standards, and government immunity.

[70] *Romer*, 517 U.S. at 634 (quoting *Moreno*, 413 U.S. at 534).

[71] *Hawaii*, 138 S. Ct. at 2409, 2419-20, 2422.

[72] *Id.* at 2419-20.

[73] *Id.* at 2419.

[74] *Id*.

[75] *Id.* at 2409.

[76] *Id.* at 2419, 2422; *id.* at 2424 (Kennedy, J., concurring) (characterizing case as one entailing "the conduct of foreign affairs.").

In *Iqbal*, the Court articulated a parsimonious pleading standard for what constituted "plausible" claims. [77] The post-9/11 detention context and allegations against the attorney general and FBI director likely influenced the new test.[78] The Court appeared sympathetic to the unique situation and the federal defendants' actions, rendering it less inclined to find plausible a discriminatory motive in the detention rather than a "common sense" decision.[79] The terrorist-attacks context also may have led the Court to more heavily weigh the interference litigation might pose.[80] It also may explain the Court's gratuitous rejection of supervisory liability, an issue that the government appeared to have conceded.[81] As a consequence of the opinion, plaintiffs in contexts far removed from national security matters now face greater hurdles at the pleading stage. To be sure, the Court's limitations on pleading standards is not only a byproduct of national-security litigation. But this context may have played a precipitating or aggravating role.

And in *Clapper v. Amnesty Int'l USA*,[82] the Court appeared to tighten its Article III standing requirements, holding that plaintiffs' fear of the government's interception of their communications under amendments to the Foreign Intelligence Surveillance Act was too speculative, insisting "that threatened injury must be 'certainly impending.'"[83] The Court held the

[77] 556 U.S. 662.

[78] *See id.* at 670 (noting Second Circuit Judge Jose Cabranes's "concern at the prospect of subjecting high-ranking Government officials—entitled to assert the defense of qualified immunity and charged with responding to 'a national and international security emergency unprecedented in the history of the American Republic'—to the burdens of discovery on the basis of a complaint as nonspecific as respondent's") (citation omitted).

[79] *See id.* at 679, 682.

[80] *See id.* at 670, 685-86.

[81] *See id.* at 683.

[82] 568 U.S. 398 (2013).

[83] *Id*. at 409.

plaintiffs could not satisfy the requirement despite their showing that their conduct fell within the ambit of the challenged act's interceptive scope, and the government's past monitoring, motive, and capability to intercept such communications.[84] The national security context undoubtedly influenced the Court, impelling it to explicitly note that "separation-of-powers principles" called for judicial reticence.[85] But courts may not cabin *Clapper* to the foreign intelligence gathering context; the opinion may have a "tran-substantive" effect, altering standing doctrine in a range of settings.[86]

In *Abbasi*, the Court clarified its already anemic and minimal implied damages remedy for federal actors' constitutional violations, holding that a *Bivens* remedy did not extend to a post-9/11 detention policy.[87] Though future litigants may attempt to distinguish *Abbasi* on its unique facts, the opinion serves as yet another precedent limiting federal government liability.

It is too early to determine *The Muslim-Ban Case*'s precedential breadth for executive discretion in the security-immigration sphere and its limiting principles.[88] But lower courts have

[84] *See id.* at 410-14. *See also id.* at 427-30 (Breyer, J., dissenting) (recounting reasons government was likely to intercept plaintiffs' communications); *id.* at 431 (noting that "*certainty* is not, and never has been, the touchstone of standing") (emphasis in original).

[85] *Id.* at 408. *See also id.* at 409 ("[W]e have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs.").

[86] *See* Alan Z. Rozenshtein, Clapper *Opinion Recap: Supreme Court Denies Standing to Challenge NSA Warrantless Wiretapping*, LAWFARE, (Feb. 26, 2013), https://www.lawfareblog.com/clapper-opinion-recap-supreme-court-denies-standing-challenge-nsa-warantless-wiretapping.

[87] *Abbasi*, 137 S. Ct. at 1860-63.

[88] As of May 3, 2019, a Westlaw search finds that 86 cases have cited *The Muslim-Ban Case*. Of these, Westlaw indicates that in 13 cases the courts distinguished *The Muslim-Ban Case*; in 3 others, the courts declined to extend it to their case. [A more refined analysis of these results is forthcoming.]

cited *The Muslim-Ban Case* with approval in deferring to executive actions in the military context[89] and denying equal protection claims brought by foreign nationals outside the United States who allege discrimination based on presidential statements.[90] In contrast, other lower courts have restricted *The Muslim-Ban Case* to circumstances that implicate security concerns[91] or the rights of foreign nationals seeking entry to the United States.[92]

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[89] *See* Doe 2 v. Shanahan, No. 18-5257, 2019 WL 102309, at *2 (D.C. Cir. Jan. 4, 2019) (citing *Hawaii* as support for its deferring to the military's decision to exclude transgender individuals from military service).

[90] *See* S.A. v. Trump, No. 18-CV-03539-LB, 2018 WL 6470253, at *35-37 (N.D. Cal. Dec. 10, 2018) (relying on *Hawaii* in refusing to consider President Trump's anti-Latino statements as reflecting discriminatory animus, accepting government's "facially legitimate and bona fide reasons for terminating [Central American Minors' Parole Program]", which affects foreign nationals outside the United States, and therefore dismissing plaintiffs' Equal Protection claims).

[91] *See, e.g.*, New York v. U.S. Dep't of Commerce, No. 351 F.Supp.3d 502, 666-67 (S.D.N.Y. Jan. 15, 2019), *cert. granted before judgment on appeal*, 139 S. Ct. 953 (enjoining Secretary of Commerce's inclusion of citizenship question on 2020 census questionnaire) (characterizing Muslim ban opinion's call for deferential review of facially neutral policies as a "circumscribed inquiry" limited to the "national security and foreign affairs context", which if applied more broadly, "would decimate [Equal Protection] jurisprudence altogether").

[92] *See* Centro Presente v. U.S. Dep't of Homeland Security, Civ. No. 18-10340, 2018 WL 3543535, (D. Mass. July 23, 2018). The federal district court of Massachusetts rejected the Government's reliance on *Hawaii* in favor of applying rational basis review and dismissing plaintiffs' challenge to government's termination of Temporary Protected Status (TPS) for El Salvador, Haiti, and Honduras. The district court distinguished the TPS case, offering up a limiting reading of *The Muslim-Ban Case*, finding that the opinion rested on two key factors: "[1] the limited due process rights afforded to foreign nationals seeking entry into the United States, and [2] the particular deference accorded to the Executive in making national security determinations." *Id.* at *12 (citing Hawaii, 138 S. Ct. at 2418-20). The court determined that the TPS plaintiffs were distinct because they were already present in the United States and thus merited greater due process and that the TPS decisions did not hinge on issues relating to national security or the U.S. national interests. *Id.* at *12. The court ultimately held that adhering to rational basis "review under *Arlington Heights* [*v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977),] would not vitiate the deference that courts typically afford the other branches in immigration policy, but would only limit that deference upon a proper showing of unlawful animus on the basis of a protected category." *Id.* at *13. *See also* Alison Frankel, *Judges to DOJ: Don't Overread Supreme Court's Ruling in* Trump v. Hawaii, REUTERS, July 27, 2018, https://www.reuters.com/article/legal-us-otc-hawaii/judges-to-doj-dont-overread-supreme-courts-ruling-in-trump-v-hawaii-idUSKBN1KH2DT.

Some scholars have argued that *The Muslim-Ban Case* should not apply to any number of immigrants-rights cases, including the Trump administration's policies concerning the detention of asylum-seeking families and detainee abortion access.[93] They argue the case's reach should be limited to (1) its facts, which entailed "questions of motive and proof; and (2) its subject, which concerned "'immigration policies' (or perhaps immigration policies implicating national security)."[94]

Despite several lower courts' disinclination to extend *The Muslim-Ban Case*, the Supreme Court will likely have the final say on the opinion's legacy. In fact, the Trump administration has frequently circumvented the normal appeals process to obtain relief in the Supreme Court, attempting to wrest sympathetic interpretive control at an earlier stage.[95]

Still, no matter what factual and contextual limitations future courts may apply to *The Muslim-Ban Case,* they cannot fully cleanse its message. The case holds that the chief federal officer may repeatedly utter the foulest and most offensive statements about a particular minority group in

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[93] *See* Adam Cox, Ryan Goodman, & Cristina Rodriguez, *The Radical Supreme Court Travel Ban Opinion–But Why It Might not Apply to Other Immigrants' Rights Cases*, JUST SECURITY (June 27, 2018), https://www.justsecurity.org/58510/radical-supreme-court-travel-ban-opinion-but-apply-immigrants-rights-cases/.

[94] *Id.* Cox, Goodman, and Rodriguez further contend that the Muslim ban's "doctrinal approach is irrelevant to other cases, *even if those cases involve the rights of noncitizens*." *Id.* (emphasis in original).

[95] *See* Robert Barnes, *Trump Officials Aggressively Bypass Appeals Process to Get Issues Before Conservative Supreme Court*, WASH. POST (Oct. 23, 2018), at https://www.washingtonpost.com/politics/courts_law/trump-officials-aggressively-bypass-appeals-process-to-get-issues-before-conservative-supreme-court/2018/10/23/ce38b9da-d612-11e8-83a2-d1c3da28d6b6_story.html?utm_term=.94c234cb78d4 . The Trump administration has not always been successful. The Supreme Court rejected a government request to stay a district court order enjoining the administration's policy of holding ineligible for asylum all immigrants who cross illegally into the United States from Mexico, while the Government appeals to the Ninth Circuit. *See* Amy Howe, *Justices Rebuff Government on Asylum Ban*, SCOTUSBLOG (Dec. 21, 2018), https://www.scotusblog.com/2018/12/justices-rebuff-government-on-asylum-ban/.

support of a policy that disproportionately targets these group members, and available legal remedies will not concern themselves with that animus.

F. Legitimacy

Civil-rights advocates often seek judicial review in order to curb government violations of individual rights. In doing so, they may animate the checks and balances embedded in the constitutional structure. But as Charles Black observed, the Court's interpretation is more likely to uphold the violation:

> [T]he prime and most necessary function of the Court has been that of validation, not that of invalidation. What a government of limited powers needs, at the beginning and forever, is some means of satisfying the people that it has taken all steps humanly possible to stay within its powers. That is the condition of its legitimacy, and its legitimacy, in the long run, is the condition of its life. And the Court, through its history, has acted as the legitimator of the government.[96]

Whatever its moral failings and limitations as precedent, *The Muslim-Ban Case* vindicates President Trump's policy *judicially*. The Court provided its legitimating stamp of approval, determining the ban is likely a constitutionally acceptable exercise of power.[97] The Court also may have validated the ban by improving its most extreme features though a protracted legal process in the lower courts, which it oversaw both through its engagement and its silence.[98] As a result of the Government's changes, the third version of the Muslim ban was still a ban, but different in form and asserted rationale, which enabled the Court to uphold the its validity.

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[96] CHARLES BLACK, THE PEOPLE AND THE COURT 52 (1960.)

[97] *See* Hamid, *supra* note 8 ("[*The Muslim-Ban Case*] contributes to the legitimization and mainstreaming of anti-Muslim bigotry. That's certainly how it will be interpreted by millions of Americans.").

[98] Dara Lind, *How Trump's Travel Ban Became Normal*, VOX, June 26, 2018, https://www.vox.com/2018/4/27/17284798/travel-ban-scotus-countries-protests.

Jack Goldsmith similarly argues that the limits on presidential power imposed by "the GTMO habeas cases . . . also empowered the presidency and the military, directly and indirectly."[99] In Goldsmith's account, civil-rights advocates' legal challenges to executive detention at Guantanamo, led to the "ironic" and unintended consequences of rooting indefinite detention in the rule of law.[100]

Goldsmith explains that, "as a result of judicial and legislative interventions . . . there is no doubt now that the [executive counterterrorism] practices are lawful and legitimate within the American constitutional system."[101] The very fact of judicial and legislation consideration amounted more to "caveats," which "empowered" rather than weakened the presidency.[102] While allowing that "the courts and Congress imposed significant restraints on these traditional practices by the Commander in Chief," Goldsmith argues that the Court's limitations "also affirmed the legitimacy of the practices in the round" and "placed these practices on a much firmer foundation than they were during the early unilateralist era of George W. Bush."[103] Similarly, the Court's rulings encouraged the political branches to improve counterterrorism policies such as detention review.[104] But such "improvements" were largely procedural, leaving detainees indefinitely at

[99] GOLDSMITH, POWER AND CONSTRAINT, *supra* note 4, at 194.

[100] *Id.* at 196.

[101] *Id.* at 194.

[102] *Id.*

[103] *Id.* at 195. The successive Obama administration adopted many of these practices, further entrenching certain U.S. counterterrorism policies. *See id.* The Court's sanctioning of many of these policies may have impelled Obama to continue these policies because they were now legally "approved." *Id.*

[104] *See id.* at 231. Goldsmith further contends that while the Executive has amassed greater power after the 9/11 attacks, corresponding accountability and transparency mechanisms such as inspectors general, litigants, politics, and the press operate effectively, which "belies the many apocalyptic claims that we are living in an era of unrestrained presidential power." *Id.* at 48, 252.

Guantanamo. Thus, while the system of checks of checks and balances "works," it fails to fundamentally alter the Executive's actions or substantively protect individuals' civil rights.

Others are not as sanguine as Goldsmith about the Court's contributions, arguing that its opinions support only the modest proposition that where particular liberties are implicated some sort of process must be afforded.[105] Though the Court famously intoned after the September 11 terrorist attacks that "a state of war is not a blank check for the executive," the Court's national security opinions often only establish some modicum of its own jurisdiction, but afford little protection for individual rights, particularly non-citizens' rights.[106]

Decisions based on Separation of Powers principles rather than the Bill of Rights similarly offer little protection for the targets and victims of national security policies.[107] Thus, the Court's invalidation of the military commissions in *Hamdan*, for example, amounted to much less a victory for detainee fair-trial rights, and more an insistence on legislative authorization of the tribunals.[108] Ongoing detention at Guantanamo, the D.C. Circuit's resistance to releasing detainees, and resumption of military commissions under congressional authorization reveal the Guantanamo opinions' limitations. The state of affairs reflects the hollowness and risk of litigated solutions.[109]

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[105] *See* Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 J. LEGAL EDUC. 433, 448-49 (2011); Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1014-15 (2008).

[106] Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004). Critically, the rest of the "blank-check" sentence reads: ". . . when it comes to the rights of the Nation's *citizens*." *Id.* (emphasis added). *See also id.* at 532 (holding "that a *citizen*-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker").

[107] *See* Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122, 127-30 (2011).

[108] 548 U.S. at 636 (Breyer, J., concurring) ("Nothing prevents the President from returning to Congress to seek the authority he believes necessary."); Martinez, *supra* note 105, at 1030.

[109] *See, e.g.*, Kim Lane Scheppele, *The New Judicial Deference*, 92 B.U. L. REV. 89, 165 (2012) ("In the terrorism cases, the Supreme Court appeared to expand its powers, stand up to the political

As regards jurisdiction, *The Muslim-Ban Case* is similar to other "judicial victories" in that the Court rejected government arguments based on the consular non-reviewability doctrine that the challenge to the travel ban was not justiciable.[110] The Court resisted government contentions that because aliens had no right to enter the United States and that excluding aliens was "'a fundamental at of sovereignty'" by a political branch, courts could only review exclusions where Congress so expressly authorized.[111] But judicial review is not a vindication of the rights asserted. The Court "assume[d] without deciding" that it could review the plaintiffs' statutory claims.[112] In addition, the Court held that it had jurisdiction over the plaintiffs' constitutional challenge, finding they had standing based on the travel ban's prohibition on their relatives' entry.[113]

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branches, and change the course of the anti-terror campaign by announcing that the President was constrained by law. . . . The Court's public decisions disguised the small effects they actually had because the petitioners could not get much benefit from these rulings without more, much more.").

[110] *See Hawaii*, 138 S. Ct. at 2407. The Court noted that the government had not identified any provision in the Immigration and Nationality Act that expressly stripped the Court of jurisdiction over the statutory claims. *See id*. (citing Sebelius v. Auburn Regional Medical Center, 568 U.S. 145, 153 (2013)).

[111] *Id.* at 2407 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542–543 (1950)).

[112] *Id*. at 2407. As the Court observed, it had previously confronted similar arguments that courts could not review political branch decisions relating to the exclusion of aliens. Then and here, the Court did not directly address the judicial review argument but decided the merits of the statutory claim. *See id.* (citing Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993)). In *Sale*, the Court ultimately held that statutory and treaty prohibitions on returning refugees to countries where they face likely persecution did not apply in international waters, thus upholding an executive order directing the interdiction of Haitian boats and forced repatriation of passengers without determining their refugee status. 509 U.S. at 159. *See also id.* at 188 (noting that presumption that "Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested. . . has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility." (citing United States v. Curtiss–Wright Export Corp., 299 U.S. 304 (1936)).

[113] *Hawaii*, 138 S. Ct. at 2416. The Court found that "a person's interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact." *Id.* The Court might have held that it lacked jurisdiction because the Establishment Clause did not afford the plaintiffs "a legally protected interest in the admission of particular foreign nationals." *Id. See also* Marty Lederman, *Contrary to Popular Belief, the Court Did Not Hold that the Travel*

The judicial process, including the Court's direct involvement, pushed the government to amend, validate, and possibly sanitize the Muslim ban.[114] The first iteration of the Muslim ban, hastily issued within one week of President Trump's inauguration, addressed foreign national entry in several extraordinary ways. The Executive Order (1) banned entry of seven majority-Muslim countries' nationals, specifically from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen; (2) applied to nationals who had already been issued visas; (3) applied to lawful permanent residents; (4) applied to dual nationals; (5) reduced the intake of refugees from 110,000 to 55,000; (6) indefinitely suspended entry of all Syrian refugees; and (7) banned all other refugees' entry for 120 days but provided an exception and possible case-by-case exception for religious minorities facing religious persecution (which appeared to select Christian minorities for special protections).[115] The rollout of the order led to detentions of hundreds, chaos at airports, panic for thousands of foreign nationals and their family members, public protests, multiple lawsuits, and the firing of the attorney general for refusing to defend the order.[116]

Ban is Lawful—Anything But. (Which Makes Its Ruling, Justice Kennedy's Deference, and the President's Enforcement of the Ban Even More Indefensible.), n.2 (July 2, 2018), https://balkin.blogspot.com/2018/07/contrary-to-popular-belief-court-did.html. But the Court held that the question went to the merits rather than justiciability. *See Hawaii*, 138 S. Ct. at 2416. *See infra* Part IV.C.5.

[114] *See generally* Lind, *supra* note 98. A timeline of the Muslim ban and related litigation is available at ACLU Washington, *Timeline of the Muslim Ban*, https://www.aclu-wa.org/pages/timeline-muslim-ban.

[115] *See* Exec. Order No. 13,769, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 8977 (Jan. 27, 2017); *See* Exec. Order No. 13,780, "Protecting the Nation from Foreign Terrorist Entry into the United States," (82 Fed. Reg. 13209) (March 9, 2017).

[116] *See Litigation Documents & Resources Related to the Travel Ban*, LAWFARE BLOG (Dec. 23, 2018), https://www.lawfareblog.com/litigation-documents-resources-related-travel-ban (providing documents from various cases litigating Muslim ban as of December 23, 2018); CENTER FOR CONSTITUTIONAL RIGHTS & YALE LAW SCHOOL RULE OF LAW CLINIC, WINDOW DRESSING THE MUSLIM BAN: REPORTS OF WAIVERS AND MASS DENIALS FROM YEMENI-AMERICAN FAMILIES STUCK IN LIMBO (June 2018), https://ccrjustice.org/sites/default/files/attach/2018/06/CCR_YLS_June2018_Report_Window-

The general uniformity of successful legal challenges[117] prompted the Government to issue a new order only six weeks later.[118] In court, the Government explained that the new order "clarifies and narrows the scope of Executive action regarding immigration, extinguishes the need for emergent consideration, and eliminates the potential constitutional concerns."[119]

The Second Executive Order fixed some of the prior order's more egregious errors. The revised Muslim ban (1) removed Iraq (a close U.S. ally) from the banned countries; (2) clarified that the ban applied only to foreign nationals outside the United States who lacked a proper visa at the time of the first ban's issuance; (3) exempted lawful permanent residents, dual nationals, and certain foreign nationals previously granted entry (including asylum); (4) provided for waivers on a case-by-case basis; and (5) removed from the refugee restrictions the "religious

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Dressing-the-Muslim-Ban.pdf (documenting ongoing challenges that Yemeni-American families face due to ban); CARDOZO LAW CLINICS ET AL., REPORT ON ABUSES IN THE AFTERMATH OF THE EXECUTIVE ORDER ON IMMIGRATION, Feb. 6, 2017, https://cardozo.yu.edu/news/cardozo-report-abuses-aftermath-executive-order-immigration (documenting 26 accounts of alleged abuses and violations suffered by immigrant detainees at airports due to initial ban); Aaron Blake, *Trump's Travel Ban is Causing Chaos— and Putting His Unflinching Nationalism to the Test*, WASH. POST, Jan. 29, 2017, https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/president-trumps-travel-ban-is-causing-chaos-dont-expect-him-to-back-down/?utm_term=.ecdd6c2f8beb; Ryan Lizza, *Why Sally Yates Stood Up to Trump*, THE NEW YORKER, May 22, 2017, https://www.newyorker.com/magazine/2017/05/29/why-sally-yates-stood-up-to-trump.

[117] *See, e.g.*, Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *appeal dismissed*, No. 17-35105, 2017 WL 3774041 (9th Cir. Mar. 8, 2017); Int'l Refugee Assistance Project (IRAP) v. Trump, 241 F. Supp. 3d 539 (D. Md.), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017), *as amended* (May 31, 2017), *as amended* (June 15, 2017), *cert. granted*, 137 S. Ct. 2080, 198 L. Ed. 2d 643 (2017), *and vacated and remanded sub nom.* Trump v. IRAP, 138 S. Ct. 353 (2017).

[118] *See* Exec. Order No. 13,780.

[119] Order Granting Motion for Temporary Restraining Order, *Hawaii v. Trump*, CV. NO. 17-00050 DKW-KSC, (D. Hawaii Mar. 15, 2017), https://www.aclu.org/legal-document/state-hawaii-and-ishmael-elshikh-vs-donald-j-trump-et-al-order, (citing Notice of Filing of Executive Order 4–5, ECF No. 56 (citing Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017)).

minority" exemption and the Syria-specific ban.[120] Despite the changes, lower courts continued to enjoin the Muslim ban's enforcement nationwide.[121]

In June 2017, the Supreme Court granted certiorari. In addition to granting the Government's petitions, the Court allowed portions of the ban to go into effect, though not as to persons with a "bona fide relationship" to family or particular entities in the United States.[122]

In September 2018, President issued a third version of the Muslim ban.[123] The Proclamation removed Sudan from the list of banned countries but added Chad, North Korea, and some Venezuelan nationals to the banned list of majority-Muslim nations.[124] After district courts granted preliminary injunctions, the Supreme Court granted stays pending both the government's appeals to the Fourth and Ninth Circuits and petitions for certiorari, allowing the third version of the ban to go into effect.[125]

In addition to the substantive changes to the ban, the government offered more detailed security justifications for the restrictions with each iteration.[126] The third ban, in particular, delineated how a "worldwide review" and multi-agency process led to the Proclamation's identification of countries and limitations on entry.[127]The Court thus issued its opinion on a very similar, yet differently positioned, policy, finding that the worldwide process provided "persuasive evidence

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[120] *See* Exec. Order No. 13,780.

[121] See, e.g., *Hawai'i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017).

[122] *See* IRAP, 137 S. Ct. at 2088.

[123] *See* Proclamation No. 9645.

[124] *See id.*

[125] *See Hawaii*, 138 S. Ct. 542 (Mem.) (2017); Trump v. IRAP, 138 S. Ct. 542 (Mem.) (2017).

[126] *See Hawaii*, 138 S. Ct. at 2403-06 (discussing rationale and purposes of Proclamation No. 9645).

[127] Proclamation No. 9645, §§ 1, 2.

that the entry suspension has a legitimate grounding in national security concerns" and that the plaintiffs therefore would not likely succeed on the merits.[128]

Judicial review thus acts as a legitimating force, even where it acts to restrain the President in relatively minimal ways. The constitutional validation is so much more pronounced when the Court upholds the Executive's action. As Alexander Bickel explained, "the Court's prestige, the spell it casts as a symbol, enable it to entrench and solidify measures that may have been tentative in the conception or that are on the verge of abandonment in the execution."[129]

The Court's treatment of the Muslim ban's waiver provisions illustrates the perils of judicial vindication. The majority viewed favorably the Proclamation's waiver program as a means to enable humanitarian exceptions and support legitimate security interests, seemingly granting a good-faith presumption to the President.[130] Yet as Justice Breyer warned, and the majority dismissed as "but a piece of the picture,"[131] the minimal waiver grants—the State Department reported approving two waivers out of 6,555 eligible applicants in the Proclamation's first month[132]—suggested that the Government was not applying the waiver program and "excluding Muslims who satisfy the Proclamation's own terms."[133] Recent data indicate that the Government

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[128] *Hawaii*, 138 S. Ct. at 2421, 2423.

[129] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 129 (1962). *See also Korematsu*, 323 U.S. 246 (Jackson, J., dissenting) ("[O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens.").

[130] *See Hawaii*, 138 S. Ct. at 2422-23 (discussing Proclamation No. 9645, § 3).

[131] *Id.* at 2423 n.7 (citation omitted).

[132] *See id*. at 2431 (Breyer, J., dissenting).

[133] *Id.* at 2430. The majority discounted Justice Breyer's arguments as based on "selective statistics, anecdotal evidence, and a declaration from unrelated litigation" and inappropriate under rational review. *Id*. at 2423 n.7

denies 98 percent of waiver applications.[134] The waiver program has demonstrably "not mitigated the ban's effects on thousands of families in dire circumstances."[135] Yet the opinion entrenches these possibly tentative measures as lawful and legitimate.

The hierarchical place that the Supreme Court holds in the legal system—and possibly society[136]—enables it to issue the "final" pronouncement on a contested matter, adding to the opinion's legitimacy, if not infallibility.[137] Its assertion of jurisdiction therefore offers the potential to check other branches but also to dominate interpretation of contested rights. What advocates must therefore ask is whether inviting the Court's review so predictably results in a validation of presidential power and erosion of marginalized group rights that they should quit the Court, focusing on other means of, and forums for, advocacy that can protect these groups and reconstitute a definition of the state and peoples' rights. As I explain in the next part, this question has arisen before.

II. THE GENERAL CASE AGAINST LITIGATION

Both prior and subsequent to the advent of the national surveillance state, scholars and civil-rights advocates warned against litigation as a means to blunting executive powers that impair minority groups' rights. Taking a normative approach, Jeremy Waldron questions locating disputes

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[134] Betsy Fisher & Samantha Power, *The Trump Administration Is Making a Mockery of the Supreme Court*, N.Y. TIMES, Jan. 27, 2019, https://www.nytimes.com/2019/01/27/opinion/trump-travel-ban-waiver.html.

[135] *Id.*

[136] *See* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma* (April 17, 2019), 124 HARV. L. REV. ___ (forthcoming 2019) (invited book review essay), available at https://ssrn.com/abstract=, at 11 (noting that although "the Court's public approval rating has dropped, the overall level of confidence in the Court has nonetheless remained reasonably high, particularly as compared to Congress and the President").

[137] *See* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

over rights within the Judicial Branch.[138] He contends that such reliance "distracts [society] with side issues of precedent, texts, and interpretation", and is "politically illegitimate . . . privileging majority voting among a small number of unelected and unaccountable judges."[139] Moreover, the notion of courts as guardians of minority rights may rest on a faulty premise concerning judicial elites' sympathies and beliefs. That assumption refuted, Waldron concludes: "A practice of judicial review cannot do anything for the rights of the minority if there is no support at all in the society for minority rights."[140]

Predating the 9/11 attacks, Mark Tushnet questioned liberals' historical reliance on judicial review over political advocacy to protect individual rights.[141] Tushnet faults a myopic litigation approach for both its hubris and underestimating of harm. First, "[l]awyers are likely to overestimate the contributions we can make to social progress, for obvious and understandable reasons. Cautions about what we can actually accomplish help deflate our sense that we are essential contributors to social change."[142] Second, "[w]hen people lose in the Supreme Court, they really lose, because the rest of society may come to think not merely that their claims lacked constitutional force, but that their claims had no moral justification whatever."[143]

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[138] *See* Waldron, *Judicial Review*, *supra* note 2, at 1351.

[139] *Id.* at 1353.

[140] *Id.* at 1404.

[141] *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 129 (1999). *See also id.* at 65 ("It would be a mistake to think that the public's [constitutional rights] definitions have to be the same as the ones the Court offers . . .").

[142] *Id.* at 141. *See also* Jane H. Aiken & Stephen Wizner, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 1008 n.41 (2004) (warning that "lawyer-driven" and "organization-driven" impact and reform-minded litigation, as opposed to "client-driven" efforts, may be perceived as using the law "to empower lawyers to determine in the abstract what is in the public interest" rather than "to struggle for social justice for the poor").

[143] TUSHNET, *supra* note 141, at 138.

Finally, Joseph Margulies and Hope Metcalf maintain that the post-9/11 civil rights "interventionist" litigation strategy and narrative suffers from amnesia. In celebrating the judiciary in the face of a "legally deviant" executive, the legal argument minimizes the long American history of suppressing marginalized groups in the name of security.[144] Even apparent legal victories may alarm certain quarters and generate backlash.[145] Richard Fallon similarly suggests that the Court's "War on Terror" decisions are "politically constructed," insofar as the Justices decide issues based on anticipated popular reception and respect of political branches.[146]

Noting the "contingent character of rights in American society,"[147] Margulies and Metcalf explain that a rights-based litigation approach is not likely to prove successful "for marginalized people with little political capital. To be effective, therefore, we must look beyond the courts and grapple with the hard work of long-term change with, through and, perhaps, in spite of law."[148]

Contemplating rejecting litigation as a tool of advocacy in the face of judicial resistance to minority rights arguments and undue deference to state security claims is not unique to the United States. In Israel and the Occupied Palestinian Territories, civil rights groups and individual lawyers variously considered abandoning—or did abandon—litigation as tool, for fear that their efforts had the opposite of their intended effect—legitimating, rather than eliminating—the Israeli

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[144] Margulies & Metcalf, *supra* note 105, at 444-45. *See id*. at 470-71 (arguing that the interventionist position "failed because it was premised upon a legalistic view of rights that simply cannot be squared with the reality of the American political experience").

[145] *See id*. at 462, 471.

[146] Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science,* 110 COLUM. L. REV. 352, 363-70 (2010).

[147] Margulies & Metcalf, *supra* note 105, at 440 (citing STUART SCHEINGOLD, THE POLITICS OF RIGHTS 5 (2ed. 2004)).

[148] Margulies & Metcalf, *supra* note 105, at 440 (citing Mari J. Matsuda, *Looking to the Bottom: Critical Leal Studies and Reparations,* 22 HARV. C.R.-C.L. L. REV. 323, 393-94 (1987)).

occupation.[149] David Kretzmer observed that Israeli High Court opinions often sent the message that the military's action had been vetted and were found, by an independent body, to comply with the rule of law.[150] Such rulings had the effect of softening the Israeli position in the eyes of the world, as well as bestowing legitimacy on the actions to the Israeli public and military.[151] While in some instances, the Court's review resulted in ameliorating the harshest effects of policies, the opinions also bestowed legal legitimacy so as to avoid politically confronting the issue of, and thus solidified, the occupation.[152]

But the litigation critics are not absolutists. (Margulies in particular has been at the forefront of post-9/11 litigation advocacy.) Waldron allows that litigation may serve as a necessary exception to confront racial or religious pathologies.[153] Tushnet's critique serves to elevate methodological consciousness rather than eliminate litigation as a tool.[154] And Margulies and Metcalf do not entirely despair of litigation so much as they call for a broader and more effective approach.[155] Finally, in the almost two decades since Kretzmer voiced his critique, lawyers continue to challenge the Israeli occupation in court, albeit mindful of litigation's limitations and

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[149] See MICHAEL SFARD, THE WALL AND THE GATE: ISRAEL, PALESTINE, AND THE LEGAL BATTLE FOR HUMAN RIGHTS 21-24; 30-36 (2018).

[150] DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 2-3, 197-98 (2002); JOHN REYNOLDS, LEGITIMISING THE ILLEGITIMATE: THE ISRAELI HIGH COURT OF JUSTICE AND THE OCCUPIED PALESTINIAN TERRITORY, AL-HAQ (2010).

[151] *See* KRETZMER, *supra* note 150, at 2-3; SFARD, *supra* note 149, at 21-24; 30-36; REYNOLDS, *supra* note 151; Ronen Shamir, *"Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice*, 24 LAW & SOC'Y REV. 781, 783 (1990) (contending that Israeli High Court of Justice's rulings "legitimized Israeli rule over the territories").

[152] *See* KRETZMER, *supra* note 150, at 197-98; Shamir, *supra* note 151, at 783.

[153] *See* Waldron, *Judicial Review*, *supra* note 2, at 1352.

[154] *See* TUSHNET, *supra* note 141, at 137-141.

[155] *See* Margulies & Metcalf, *supra* note 105, at 463.

potentially corroding and legitimating effects.[156] The following section accordingly addresses the arguments in favor of litigation with an eye toward fashioning a hybrid approach to challenging executive power and the related discounting of marginal group rights.

III. THE CASE FOR LITIGATION

The argument in favor of litigation is straightforward. A civil-rights lawyer's obligation is to aid her client, protect the client from illegitimate constitutional and statutory violations, and uphold the Constitution itself, which may include arguing in favor of institutional alignments in the form of constitutional separation of powers. Particularly when her client faces deportation, removal, detention, or other infringements of personal liberty, a lawyer may have little recourse but to seek legal protection even at risk of the underlying policy's ultimate judicial vindication.[157] Given the client's vulnerable posture, a lawyer would not be doing her job were she to not consider and often pursue injunctive relief, seeking to stay or enjoin executive actions that may disrupt family units, send people back to dangerous environments, or detain them. To swear off litigation or particular forms of litigation might well constitute legal malpractice and/or moral bankruptcy.[158]

The situation many a civil-rights advocate faces may entail pursing a litigation route that will possibly benefit her individual client while producing "bad law" that may adversely affect others.

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[156] *See* SFARD, *supra* note 149, at 450 (characterizing "litigation as the most effective tool in the fight for human rights in the context of the occupation"); *id.* at 452 (concluding "that the active cost of High Court losses and participation in its proceedings has diminished over the years").

[157] As Israeli human rights lawyer Michael Sfard observes, "A human rights worldview does not condone sacrificing the individual for the greater good (especially when the good is speculative and indirect)." *Id.* at 451. My mentor and great civil-rights lawyer Larry Lustberg would often say, "If you are winning all your cases, you aren't taking the right cases."

[158] *See, e.g.*, MODEL RULES PROF'L CONDUCT. R. 1.3 Diligence – Comment, Lawyer-Client Relationship [1] ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.").

In *Ashcroft v. al-Kidd*, [159] counsel for Abdullah al-Kidd filed a civil lawsuit over his sixteen-day detention, alleging that the attorney general had authorized a policy of improperly holding terrorism suspects under the material-witness statute, 18 U.S.C. § 3144, when it lacked sufficient evidence to otherwise charge them.[160] The Court held that such detention based on a valid warrant, regardless of improper motive, did not violate the Fourth Amendment.[161] The Court could have avoided making this ruling under the qualified-immunity doctrine and simply held that the law was not clearly established at the time, thereby affording Attorney General Ashcroft immunity.[162] But, the Court reasoned, correcting the lower court's holding "ensures that courts do not insulate constitutional decisions at the frontiers of the law from our review or inadvertently undermine the values qualified immunity seeks to promote."[163] Though the Court arguably expanded the legal justifications for detention under the Fourth Amendment, Mr. al-Kidd, the individual detained for sixteen days, ultimately received compensation from the government—an impossible outcome without litigation.[164]

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[159] 563 U.S. 731 (2011).

[160] *Id.* at 734.

[161] *Id.* at 734; *id.* at 740 ("Because al-Kidd concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant; we find no Fourth Amendment violation."). Justice Ginsburg disagreed with the majority's characterization. *Id.* at 748 n.1 (Ginsburg, J., concurring in judgment) ("Nowhere in al-Kidd's complaint is there any concession that the warrant gained by the FBI agents was validly obtained.").

[162] *See id.* at 747-49 (Ginsburg, J., concurring in judgment) (questioning need to address constitutional claims); *see id*. at 751-53 (Sotomayor, J., concurring in judgment) (same).

[163] *Id*. at 735.

[164] *See* Richard Serrano, *Muslim American caught up in post-9/11 sweep gets an apology*, L.A. TIMES, Feb. 14, 2015, http://www.latimes.com/nation/la-na-detainee-apology-20150214-story.html.

Litigation also may be the "least-worst option" given the political branches' disinclination to restrain the Executive. Litigation does enjoy its successes, particularly within the lower courts. And its failures, the legitimacy adverse opinions enjoy, and their contagion-effects may be overstated.

A. The Only-Branch Option

However unsuccessful one views the litigation endeavor in the national security sphere, there appear few other options in the face of an even-more-deferential legislative branch. Advocacy routes that appeal to the majoritarian, representative branch are likely to meet even less success than those initiated in the courts for at least four reasons. First, Congress has seemingly accepted that the Executive retains the most expertise in the national security sphere and is the most functionally equipped to act. Indeed, Congress has also acceded to the view that congressional limitations may encumber the President when it needs the utmost discretion to make swift decisions and act decisively. Witness the scant declarations of war and Congress's resistance to crafting a new authorization for use of military force subsequent to the September 11 terrorist attacks.

Second, and much related, Congress has invested the President with significant authorities, ceding emergency powers, delegating enforcement and implementation authority, and granting greater latitude in pursuing national security and intelligence priorities.[165] That delegation is in full

[165] Raising concerns over national security and unlawful migration, President Trump recently invoked congressional grants of emergency authority under sections 201 and 301 of the National Emergencies Act, 50 U.S.C. §§ 1601-51 (in addition to asserting executive authority under Article II) to declare a national emergency at the southern border and direct military forces to assist the Department of Homeland Security and utilize construction authority under 10 U.S.C. § 2808. Proclamation 9844, "Declaring a National Emergency Concerning the Southern Border of the United States," (Feb. 15, 2019), 84 Fed. Reg. 4949. Though Congress terminated the emergency declaration by joint resolution, President Trump vetoed that unusual legislative defiance. Jacobs, *supra* note 10. Civil-rights advocates, in addition to other plaintiffs, including 16 states, have now

view in the immigration context where *The Muslim-Ban Case* plaintiffs unsuccessfully challenged the Proclamation as exceeding the authority Congress delegated to the President.[166]

Third, Congress responds to popular pressures to ensure security. As a result, most anti-terrorism or national security legislation will meet the perceived needs of the majority but may

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challenged the national emergency declaration. *See*, *e.g.*, Sierra Club et al. v. Trump et al., Complaint for Declaratory and Injunctive Relief , No. 3:19-CV-00892, (N.D. Cal. Feb. 19, 2019), https://www.aclutx.org/sites/default/files/field_documents/1-main.pdf. *See also* Priscilla Alvarez & Joyce Tseng, *Tracking the legal challenges to Trump's emergency declaration,* CNN.com (Apr. 23, 2019), https://edition.cnn.com/2019/02/20/politics/national-emergency-declaration-lawsuit-tracker/index.html (describing and providing links to six pending lawsuits over the President's national emergency declaration). For many of the reasons discussed within this article—and under the reasoning of *The Muslim-Ban Case*—litigation over the President's national emergency declaration is likely to receive the Supreme Court's imprimatur. President Trump predicted a litigation trajectory over the emergency declaration similar to that of *The Muslim-Ban Case*:

> [T]hey will sue us in the Ninth Circuit, even though it shouldn't be there . . . And we'll possibly get a bad ruling and then we'll get another bad ruling and then we'll end up the Supreme Court, and then hopefully we'll get a fair shake and we'll win in the Supreme Court, just like the ban.

Mark Moore, *Trump bashes lawsuit from 'Radical Left' states over national emergency declaration*, N.Y. POST, Feb. 19, 2019, https://nypost.com/2019/02/19/trump-bashes-lawsuit-from-radical-left-states-over-national-emergency-declaration/ (quoting President Trump); *see also* Aziz Huq, *Has the Supreme Court Already Decided the Wall Case?*, POLITICO, Feb. 19, 2019, https://www.politico.com/magazine/story/2019/02/19/trump-national-emergency-border-wall-225164 (noting parallels with *The Muslim-Ban Case* and the latter's "predictive quality").

Congress has provided the President with scores of other laws to invoke in asserting emergency powers. *See* BRENNAN CENTER FOR JUSTICE, TRUMP'S HIDDEN POWERS, Dec. 5 (2019), https://www.brennancenter.org/blog/trump-hidden-powers (locating 136 existing statutory authorities for president to declare national emergency and noting that Congress has not rescinded such powers over past 40 years); BRENNAN CENTER FOR JUSTICE, EMERGENCY POWERS AND A GUIDE TO THEIR USE, https://www.brennancenter.org/sites/default/files/legislation/Emergency%20Powers_Printv2.pdf (tables listing legal frameworks, statutory authorities, and conditions for president's declaring emergencies); Elizabeth Goiten, *What the President Could Do If He Declares a State of Emergency*, THE ATLANTIC (Jan./Feb. 2019), https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/.

[166] *See Hawaii*, 138 S. Ct. at 1410-11 (rejecting arguments that the Muslim ban "countermand[s] Congress' considered policy judgments" concerning alien entry given legislated vetting systems and Visa Waiver Program).

slight minority groups' interests.[167] A majoritarian branch of government is not as likely to concern itself with how executive actions or statutory enactments disadvantage smaller groups or non-constituents.[168]

Fourth, the Court's 2015 opinion in *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)* raises questions whether Congress may properly limit the President's power in the foreign relations context.[169] Though advocates and courts may construe the opinion narrowly,[170] *Zivotofsky II* affords the executive branch "arguments for presidential exclusivity in a case that holds that the President can ignore a foreign relations statute."[171]

The civil-rights advocate also cannot put much stock in the Executive's own self-restraint. A "trust us" approach is entirely at odds with the distinct branches of government embedded in the

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[167] Cover, *Presumed Imminence*, *supra* note 3, at 1459; CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 214-17 (2005).

[168] Numerous scholars, however, contend that judges are also susceptible to prejudice and bias when confronted with matters involving national-security policies impacting historically marginalized groups. *See* Cover, *Presumed Imminence*, *supra* note 3, at 1431-42 (discussing impact of cognitive errors on judicial fact-finding in the terrorism context); Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 119 (2005) ("[L]eft to their own devices in times of stress, people, including judges, tend to vastly exaggerate and react against the threats posed by disfavored groups."); Ramzi Kassem, *Implausible Realities:* Iqbal*'s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN ST. L. REV. 1443, 1452-53 (2010) ("[T]he subjective, common sense standard applied by the judiciary will likely tilt towards mainstream, majority group views that include a dose of skepticism towards claims of invidious discrimination against minority groups, particularly unpopular, insular ones.").

[169] 135 S. Ct. 2076, 2094, 2096 (2015) (holding that Congress has exclusive "power to recognize foreign states and governments and their territorial bounds" and that "Congress cannot command the President to contradict an earlier recognition determination in the issuance of passports").

[170] The opinion may permit a limiting gloss, acknowledging that, apart from the President's "formal power to recognize a foreign government . . . Congress has an important role in other aspects of foreign policy, and the President may be bound by any number of laws Congress enacts." *Id.* at 2088.

[171] Jack Goldsmith, Zivotofsky II *as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 114 (2015).

Constitution's first three articles. The Constitution does not abide such blind faith. Justice Kennedy's concurrence in *The Muslim-Ban Case*, in which he calls on President Trump to act in a measured fashion ("It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs."), but maintains that "the statements and actions of Government officials are not subject to judicial scrutiny or intervention", underscores how anemic the check.[172] Even a self-imposed "Executive due process," as envisaged by the Obama administration, for example, cannot satisfy the civil-rights advocate who seeks to protect marginalized community members.[173] Here, one would cede to the Executive an adjudicative function, leaving it to evaluate its own security interests—a state of affairs no less incompatible with constitutional separation of powers or the historical account of unchecked Executive treatment of minority groups.[174]

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[172] *See Hawaii*, 138 S. Ct. at 2424 (Kennedy, J., concurring). Kennedy was well aware of how little comfort the international community might feel in light of the unfettered discretion that the Court provided President Trump. *See id*. ("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.") (emphasis added).

[173] *See* Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012 (describing Justice Department Office of Legal Counsel (OLC) targeted-killing memo as concluding that Due Process Clause "could be satisfied by internal deliberations in the executive branch").

[174] Others forms of Executive self-checking are no more satisfactory. Though some scholars suggest that the OLC may limit Executive power by providing "objective and accurate legal interpretation" to the President, *see* Dawn E. Johnsen, *Constitutional 'Niches': The Role of Institutional Context in Constitutional Law: Faithfully Executing the Laws: Internal Legal Constraints of Executive Power*, 54 UCLA L. REV. 1559, 1596 (2007), others view skeptically the potential for such independent advice, considering the OLC a more political position, *see* Norman Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN L. REV. 1931, 1933-36 (2008). *See also* Avidan Y. Cover, *Supervisory Responsibility for the Office of Legal Counsel*, 25 GEO. J. LEGAL ETHICS 269, 274 (2012) (describing "the aspirational view that the job of the Attorney General is to be an independent, impartial interpreter of the law. . . [and] the historically based or realist view that the Attorney General and OLC attorney can be considered a legal policy figure"). Acting Attorney General Sally Yates's refusal to defend President Trump's first executive order authorizing the Mulsim ban was highly unusual, both for her refusal to implement the President's policy but also because she was a temporary office

B. Litigation's Successes

The account of litigation as a host of good intentions imperiling the Bill of Rights may be overstated. Civil-rights advocates can point to marked successes in the lower courts.[175] Many litigation efforts appear unmitigated victories, in which lower courts vindicated the individual's rights or struck down the national security or immigration policy in whole or in part.[176] In many of these cases, the government settled, did not appeal, or the Supreme Court denied certiorari, leaving these victories in place.[177] A civil-rights advocate cannot ignore these most positive of realistic possibilities.

Litigation success also cannot be measured by one metric. Litigation has various objectives apart from systematic change or injunctive relief. Civil-rights advocates have sometimes obtained information about government practices and ensured transparency and accountability through

holder—not a presidential appointee. Lizza, *supra* note 116. President Trump subsequently fired her. Such internal defiance is unlikely to occur with great frequency.

[175] *See, e.g.*, Dahlia Lithwick, *Trump Is Losing His War Against The Courts*, SLATE (Nov. 20, 2018), https://slate.com/news-and-politics/2018/11/donald-trump-losing-courts-jurisprudence.html (noting "the massive and consequential [lower court] rulings against this president and his administration that are logged every week and rarely viewed in the aggregate," including within the national security-immigration contexts).

[176] *See, e.g.*, Hassan v. City of New York, 804 F.3d 277, 289-92, 301 (3d Cir. 2016) (holding Muslim plaintiffs' allegations that New York City Police Department engaged in intensive and widespread surveillance of them based on their religious identity satisfy standing-injury requirements and must overcome "heightened equal protection review"). Doe v. Mattis, 889 F.3d 745, 768 (D.C. Cir. 2018) (requiring that Government provide 72 hours' notice prior to transferring detainee from one country to another); Jonathan Hafetz, *U.S. Citizen, Detained Without Charge by Trump Administration for a Year, Is Finally Free*, ACLU (Oct. 29, 2018), https://www.aclu.org/blog/national-security/detention/us-citizen-detained-without-charge-trump-administration-year (reporting that due to litigation and as part of settlement agreement Government released American client detained for more than one year).

[177] *See, e.g.*, *Hassan*, 804 F.3d 277 (Government did not petition for certiorari.); Doe, 889 F.3d 745 (same).

discovery and Freedom of Information Act lawsuits.[178] Litigation also may draw out government positions in argument and briefing that had previously gone undisclosed. Lawsuits also may result in settlements, softening a government policy's impact or securing monetary compensation for an injured client. In addition, courts may issue temporary relief that may mean all the difference for a detained client and her family.

Even when litigants ultimately lose in the Supreme Court, advocates may secure important victories for marginalized groups' interests through the legal process, earning short-term reprieves, ranging from forestalling detention to temporarily restraining a policy's implementation to a nationwide injunction. In some instances, legal challenges and initial victories at the lower-court stages may impel the Government to moderate or alter its policies, achieving benefits for affected clients and potentially securing the program's constitutional footing.[179]

The Muslim-ban litigation and related cases fit within this account of mixed success. Immediately following the first Executive Order's issuance, civil-rights advocates initiated legal challenges, resulting in near-unanimous judicial victories for the plaintiffs. The most important net result was in enabling people to gain entry to the United States and unify families. The nationwide injunctions halted the order's impact everywhere and for significant periods of time—hardly an

[178] *See* 5 U.S.C. § 552; *CIA Releases Dozens of Torture Documents in Response to ACLU Lawsuit*, ACLU (June 14, 2016), https://www.aclu.org/news/cia-releases-dozens-torture-documents-response-aclu-lawsuit. FOIA litigation in the national security context has, however, enjoyed very limited success due in part to over-classification and the Act's exemptions for national security. *See* David Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PENN. L. REV. 1097, 1118-23 (2017); *id.* at 1121 ("FOIA has proven so profoundly unresponsive to the rise of national security secrecy—and therefore to the rise of government secrecy—that we might even say there is an element of *transparency theater* in the conceit that the Act secures the people's right to know.").

[179] *See* GOLDSMITH, POWER AND CONSTRAINT, *supra* note 4, at 178, 195.

incremental or negligible legal interference. And the Government altered both its legal position and the content of the ban in responses to the successive litigation victories.[180]

As a result of the legal fight against the Muslim ban, the Court's eventual ruling addressed a policy very different from the initial order President Trump signed almost eighteen months earlier. The legal fights thus significantly mitigated many of the ban's most pernicious aspects, spared hundreds of individuals' deportation and denial of entry, and reinforced the rule of law and role of the judiciary.[181] In this respect, civil rights litigants might view the litigation process—if not the Supreme Court's decision and opinion—a success.[182]

The Trump overhaul of the judiciary also may not mean the complete eradication of civil rights claims in the national security and immigration contexts. Despite *The Muslim-Ban Case*, civil rights litigants have since enjoyed several victories in the lower courts concerning restrictive immigration policies such as migrant-family separation,[183] limitations on judicial review of

[180] *See supra* discussion Part I.F.

[181] *See* Lind, *supra* note 98 ("[T]he policies in the ban have changed substantially. And it's hard to deny that the current version of the ban is much, much more moderate than the first.").

[182] *See id.* (describing the litigation as "a victory for the ban's opponents" because "courts (perhaps inspired by the resistance in the streets) forced the administration to keep its ambitions within the scope of what was legally permissible, and the administration complied.").

[183] Ms. L. v. U.S Immigration & Customs Enf't, 310 F. Supp. 3d 1133, 1141 (S.D. Cal. 2018), *modified*, No. 18-CV-0428 DMS (MDD), 2019 WL 1099789 (S.D. Cal. Mar. 8, 2019) (enjoining Department of Homeland Security from separating migrants and asylum seekers from their minor children and ordering reunification).

adverse asylum decisions,[184] and limitations on locations where people may seek asylum.[185] Even if these cases prove ultimately less successful in the Supreme Court, the short-term victories may justify the litigation.

Yet regardless of a court's holding, constitutional litigation that challenges policies such as the Muslim ban is "a powerful publication of dissent," articulating "fundamental principles of law and broader conceptions of the public good."[186] The legal dispute and resolution of competing

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[184] Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097 (9th Cir. 2019) (holding statutory restriction on habeas review of negative asylum determination for arriving alien violates Suspension Clause). *Compare with* Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422 (3d Cir. 2016) (addressing similar circumstances and holding that arriving aliens did not enjoy constitutional rights and could not therefore seek protection under the Suspension Clause), *cert. denied*, 137 S.Ct. 1581, 197 L.Ed.2d 705 (2017).

[185] E. Bay Sanctuary Covenant v. Trump, 354 F. Supp. 3d 1094 (N.D. Cal. 2018) (enjoining the President, DHS, and DOJ from implementing rules that would deny asylum to anyone who does not enter a specific port of entry), *stay denied*, Trump v. E. Bay Sanctuary Covenant, 139 S. Ct. 782 (2018). The Supreme Court's denial of a stay at the injunctive relief stage also may signal to the government that it may not enjoy success on the merits and lead it to amend its policy.

[186] Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835, 871, 872, (2002). Civil rights litigants often challenge legal precedents based on a dynamic and progressive view of the law. The posture fits well within the civil rights movement's confrontation of legal shibboleths, encapsulating Dr. Martin Luther King, Jr.'s aspirational phrase that "the arc of the moral universe is long, but it bends toward justice." Remarks by Dr. Martin Luther King, Jr., "Our God is Marching On," Mar. 25, 1965, at https://kinginstitute.stanford.edu/our-god-marching.In challenging the Muslim ban, numerous advocates and scholars contended that a more protective individual rights regime ushered in by the Warren Court could not abide nineteenth-century conceptions of government sovereignty that would permit discrimination in determining entry of aliens. *See, e.g.*, Brief of Amici Curiae Immigration, Family, and Constitutional Law Professors in Support of Respondents at 12-14, Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965), https://www.supremecourt.gov/DocketPDF/17/17-965/41696/20180330154938785_17-965bsacImmigrationFamilyAndConstitutionalLawProfessors.pdf (arguing that Supreme Court's changes to its domestic equal protection and fundamental rights jurisprudence favorably impacted its review of government's immigration policies); Adam Cox, W*hy a Muslim Ban is Likely to be Held Unconstitutional: The Myth of Unconstrained Immigration Power*, JUST SECURITY (Jan. 30, 2017), https://www.justsecurity.org/36988/muslim-ban-held-unconstitutional-myth-unconstrained-immigration-power/ (same); *see also infra* Part IV.C.4. Though the *Muslim-Ban Case* Court evaded fully confronting this idea of importing progressive domestic constitutional law to the national security and immigration context by characterizing the ban as "facially neutral," the Court relied squarely on long-held ideas of sovereignty in limning its standard of review over

constitutional principles and underlying values "can provoke broader discourse about the moral controversies of the day."[187] The Muslim-ban litigation provided a counter-narrative to national security prerogatives, maintaining that inclusive immigration and anti-discrimination should prevail over naked anti-Muslim prejudice and arbitrary use of and abuse of power. Failing to legally challenge national security policies may therefore undermine democratic deliberation, ceding to the government a self-serving and highly statist constitutional interpretation.

C. Pyrrhic Losses

The Muslim-Ban Case's legitimacy and adverse precedential effects also may be overstated. Future courts, commentators, society, and history may ultimately regard the opinion as distasteful and wrongly decided. Indeed, scholars and jurists considered *Korematsu*—which *The Muslim-Ban Case* smugly overruled—mistaken and one of several stains on the Supreme Court's history.[188] Despite Justice Jackson's admonition that the Court's validation of "racial discrimination" and "transplanting American citizens . . . lies about like a loaded weapon, ready

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aliens' entry to rational basis. *Hawaii*, 138 S. Ct. at 2418-20; *id.* at 2418 ("For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'") (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

[187] Tsai, *supra* note 186, at 878. Importantly, judges identified with both political parties echoed the sentiment of respect for the law in response to President Trump's attacks on the lower courts for their adverse rulings. *See, e.g.*, Washington v. Trump, 858 F.3d 1158, 1185 (8th Cir. 2017) (Mem.) (Bybee, J., dissenting from the denial of reconsideration en banc):

> The personal attacks on the distinguished district judge and our colleagues were out of all bounds of civic and persuasive discourse—particularly when they came from the parties. It does no credit to the arguments of the parties to impugn the motives or the competence of the members of this court; ad hominem attacks are not a substitute for effective advocacy. Such personal attacks treat the court as though it were merely a political forum in which bargaining, compromise, and even intimidation are acceptable principles. The courts of law must be more than that, or we are not governed by law at all.

[188] *See* Jamal S. Greene, *The Anticanon*, 125 HARV. L. REV. 379, 398-402, 422-27, 456-60 (2011).

for the hand of any authority that can bring forward a plausible claim of an urgent need,"[189] *Korematsu* has been more an epithet, part of an anticanon that even the most ardent advocates of presidential power omitted as legal support.[190] *The Muslim Ban Case* might well enjoy a similar legacy. But the line between canonical and anticanonical may be blurry, and a consensus may not emerge for decades. In the interim, *The Muslim-Ban Case* may realize Justice Jackson's worry, in which the Muslim ban "becomes the doctrine of the Constitution" with "a generative power of its own."[191]

Critics also contest that the Court's pronouncements on executive actions validate Establishment Clause or Equal Protection violations or achieve a security-rights equilibrium. Baher Azmy questions first the methodological and empirical bases of Jack Goldsmith's "legal legitimacy."[192] Azmy challenges the purported improvements or limitations on executive power, decrying the lack of accountability and transparency in the current system.[193] But it remains the case that it was likely the very improvements to the first and second versions of the Muslim ban that civil rights advocates forced the President to make, which "normalized" the ban, possibly enabling a Chief Justice Roberts or Justice Kennedy to uphold the ban.[194]

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[189] *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

[190] *See* Greene, *supra* note 188, at 400 (observing "that at no time since September 11 has any U.S. government lawyer publicly used the *Korematsu* decision as precedent in defending executive detention decisions").

[191] *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

[192] Baher Azmy, *An Insufficiently Accountable Presidency: Some Reflections on Jack Goldsmith's Power and Constraint*, 45 CASE W. RES. J. INT'L L. 23, 27 (2012).

[193] *Id*. at 31-42.

[194] *See* Lind, *supra* note 98 ("The travel ban has been assimilated into normal political discourse and policymaking. It has become normalized, for better or worse.").

Azmy also disputes the normative claims to legitimacy, which, Goldsmith argues, the current national security framework enjoys. Azmy does not perceive the Court as some Delphic Oracle, nor, he suggests, does the public. In particular, he questions whether "judicial intervention provides a legitimating role in light of the public disapproval of judicial decisions such as *Brown v. Board of Education* (in the South), *Roe v. Wade*, or *Kelo v. New London*."[195] Moreover, Azmy condemns the "is-ought conflation" that Goldsmith's analysis employs.[196] Judicial review, as currently applied—and as Korematsu's anticanonical legacy demonstrates—may not be legitimate; it is "insufficiently robust" and too deferential.[197]

Azmy's critique raises important question as to legitimacy: legitimate according to whom?[198] As he observes, Goldsmith—and the observation applies equally to Jackson, Black, and Bickel—address only "legitimacy within the U.S. constitutional system."[199] Azmy argues that this narrow view of legitimacy ignores the vital perspectives of victims, history, and the international community.[200] Azmy's insistence on forming legal meaning and legitimacy based on multiple

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[195] Azmy, *supra* note 192, at 48.

[196] *Id. See also* Robert M. Cover, *The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 54 n.146 (1983) [hereinafter Cover, *Nomos and Narrative*] ("[T]he only deference due the Court's authority is to refrain from direct resistance to its specific edicts. We are under no obligation . . . to relate our understanding of the law, and our projection of that understanding, to the Court's interpretation.") (discussing Abraham Lincoln's views on the interpretive authority of *Dred Scott*. (citing Scott v. Sandford, 60 U.S. (19 How.) 393 (1857))).

[197] Azmy, *supra* note 192, at 48.

[198] Tara Leigh Groves explains that the Court's legitimacy (and hence their opinions) is variable, noting that several scholars "argue that members of the public tend to support the Court if it rules 'their way' in salient cases." Grove, *supra* note 136, at 12. *See also id.* (concluding form scholarship that "if the Supreme Court repeatedly issues 'conservative' (or 'progressive') decisions in high-profile cases, its institutional reputation will eventually decline with the 'loser' group").

[199] Azmy, *supra* note 192, at 60.

[200] *See id*. at 60-62. The international community is unlikely to view the opinion as legitimate. For a couple decades, foreign courts have looked less and less to the United States Supreme Court for guidance. *See* David S. Law & Mila Versteeg, *The Declining Influence of the United States*

perspectives is well taken. But in going to the Court, advocates necessarily succumb to the United States Supreme Court's rhetoric and authority, for better or worse.[201] The consequences for victims are inevitably severe, history's verdict still waits, and the world's opinion is of questionable relevance within the United States.[202]

Constitution, 87 N.Y.U. L. REV. 762, 766-68, 779-85 (2012) (noting decline in foreign courts' citation to U.S. Supreme Court opinions, and attributing the disfavor to, in part, the country's unique Constitution, including its brevity and lack of amendments); Adam Liptak, *U.S. Court, a Longtime Beacon, Is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, https://www.nytimes.com/2008/09/18/us/18legal.html (documenting decline in international community's citation to U.S. Supreme Court and possible explanations to include the Court's conservative bent, the Court's general resistance to citing foreign law, access to other national courts' opinions, and the United States's unfavorable international reputation).

[201] In the course of the Muslim-ban litigation, civil-rights advocates selectively drew from the courts' holdings as sources of moral validity or invalidity. *Compare* Omar Jadwat, director of the ACLU's Immigrants' Rights Project and counsel for several Muslim-ban plaintiffs, commenting on the Government's appeal of a district court's order enjoining the ban (Mar. 17, 2017) ("President Trump's Muslim ban has fared miserably in the courts, and for good reason—it violates fundamental provisions of our Constitution. We look forward to defending this careful and well-reasoned decision in the appeals court.") *with* Jadwat, commenting after defeat in Supreme Court (June 26, 2018) ("This ruling will go down in history as one of the Supreme Court's great failures. . . The court failed today, and so the public is needed more than ever. We must make it crystal clear to our elected representatives: If you are not taking actions to rescind and dismantle Trump's Muslim ban, you are not upholding this country's most basic principles of freedom and equality."). The comments also reflect the litigant's dynamic perceptions of the courts' institutional legitimacy and at least one post-litigation advocacy route and alternative source for legal meaning. And they align with Robert Cover's skepticism that the Court's interpretive authority should follow from its hierarchical position. Cover, *Nomos and Narrative*, *supra* note 196, at 43 ("The position that only the state creates law thus confuses the status of interpretation with the status of political domination. It encourages us to think that the interpretive act of the court is privileged in the measure of its political ascendance.").

[202] Justice Kennedy anticipated an international backlash to the opinion and its vindication of the Muslim ban when he invoked "[a]n anxious world" in pleading to the President "to adhere to the Constitution and to its meaning and its promise." *Hawaii*, 138 S. Ct. at 2424 (Kennedy, J., concurring).

D. Opposition to Other Civil Rights Litigation

Critics have long buffeted civil rights litigants' focus on advocacy through the courts.[203] Numerous women's rights and same-sex marriage advocates, for example, criticized litigation strategies and championed legislative approaches.[204] These critics often eschewed litigation out of fear of an inhospitable Court (and thus unfavorable outcomes on the merits) and a belief that their causes would be better served by approval through a democratic, rather than anti-majoritarian, path.[205] Arguably, the success at the Supreme Court in *Roe v. Wade*[206] and *Obergefell v. Hodges*[207] vindicate the litigation route. But some critics maintain that the larger social change sought by advocates in these areas would have been better served and secured through popular referendum and democratic process rather than through courts.[208]

Criticism of other civil-rights advocates' litigation focus enjoys, however, less salience for immigrants and other groups generally affected by national securities policies. Whereas some abortion and gay-rights advocates marshaled credible arguments that legislative advocacy, statewide appeals, and popular measures could achieve aims similar to those via lawsuit, these avenues may not prove as fruitful for immigrants and other groups targeted by national security

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[203] *See supra* Part. II.

[204] *See, e.g.*, Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 381 (1985). ("*Roe* ventured too far in the change it ordered. The sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress".); Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 475 (2005) (cautioning that Massachusetts Supreme Judicial Court's same-sex marriage decision "may mobilize greater resistance than change accomplished through legislatures or with the acquiescence of other democratically operated institutions.").

[205] Ginsburg, *supra* note 204, at 381; Klarman, *supra* note 204, at 475.

[206] 410 U.S. 113 (1973).

[207] 135 S. Ct. 2584 (2015).

[208] Ginsburg, *supra* note 171, at 381.

policies. National-security and immigration litigation differs in at least three ways. First, state and local ballot or popular initiatives provide a less plausible forum for advocacy because most national security measures fall within the federal government's exclusive authority. Second, Executive dominance over national security measures and legislative capitulation (even in areas such as immigration) may render appeals to legislatures less effective and useful. Third, the often reactive and clandestine nature of national security measures challenge popular efforts to embrace alternative policies. Finally, the fear attached to so many national security measures aimed at minority groups may prove a psychological obstacle to mobilizing popular opposition. Litigation may be the best refuge.

E. Overstating spillover risks

Litigation proponents also may characterize as overblown the concerns that national security-related decisions will weaken domestic law and civil-liberties protections. Advocates and judges are capable of distinguishing cases pertaining to immigration and national security from cases that feature domestic matters. Indeed, even judges who sympathize with executive prerogatives in the security and immigration context may exhibit greater skepticism when the issues address citizens or fall more clearly within a domestic law enforcement context.[209]

And yet. *The Muslim-Ban Case* reads as a vindication of the policy's bigoted motivations, stating unequivocally that the nature of untrammeled executive power in the national security and immigration arena affords the President's pretexts great latitude. It is again a victory of process over substance. Viewed in this light, the opinion, and thus the litigation, may be read as a form of theater. The rule of law becomes a rhetorical device, in which the Court and courts have cajoled

[209] *See, e.g.*, *Hamdi*, 542 U.S. at 536 (upholding *citizen*-detainee's due process rights related to the battlefield). *See also supra* Part I.E (discussing post-Muslim-ban lower court opinions).

out of the presidency a limiting principle that amounts to: don't be sloppy; don't be too obvious. The Executive will receive a presumption of regularity for any of its policies—no matter the evidence of religious bigotry—provided the process appears legitimate on its face. But advocates have other strategies and resources to leverage in supporting non-citizens and other marginalized groups.

IV. QUIETING THE COURT

Advocates seeking systemic changes to particular social-justice issues must assess which approaches will prove most effective at social transformation. Tushnet suggests that if activists have "a choice between investing [their] resources in a legal strategy and investing in some other strategy, such as community mobilization through its churches . . . . it may make sense to avoid investing in a legal strategy even though the strategy would result in victories in court."[210] At base, such strategizing around the risks attendant to litigation informs advocates' cost-benefit analysis. As a matter of resource allocation, Tushnet contends that "the cautions serve to improve the accuracy of the calculation of the possible benefit of investing in legal action rather than in something else—street demonstrations, public opinion campaigns, or whatever."[211]

Adopting Tushnet's "cost-benefit" approach, advocates (legal and otherwise) confronting the national security apparatus on behalf of marginalized groups (often non-citizens of color) must consider all advocacy strategies. Litigation cannot come off the table. There are, in particular, too many individuals targeted by the state whose liberty is jeopardized, and, who without immediate appeal to the courts, will suffer substantial and often irrevocable harms. Despite their critique of post-9/11 civil rights ligation, Margulies and Metcalf maintain that "lawyering (and even

[210] TUSHNET, *supra* note 141, at 137 n.22 (accompanying text at 216).

[211] *Id*. at 141 n.27 (accompanying text at 216).

litigation) can make real differences in the lives of marginalized peoples."[212] In these instances, however, litigation should not be the only route.

Varied forms of advocacy seeking greater transformational change may better support and inform direct representation and individualized litigation. These efforts should buttress or even alter the rights framework that underlies any judicial challenge.[213] Advocates also should consider strategies that, given the Court's likely resistance to overhauling a policy and the potential legitimizing of the policy, do not entail direct attacks.

Margulies and Metcalf argue that lawyers and academics must reconceive the oft-litigated disputes over rights and ideal models of the state "as a battle over political resources and how they have been, and continue to be, mobilized to create narratives about national identity—an identity that is alternately threatened or calmed depending on the symbolic manipulation of unfolding events."[214] Advocates should therefore, when possible, exercise non-litigation strategies to establish narrative alternatives to the brittle individual rights framework that reflexively supports federal government policies restraining immigrant interests. Efforts should be undertaken at all levels—media, public advocacy, electoral, and academic—to transform conceptions of identity and the relationships the American social contract undergirds.

This section first addresses some discreet avenues within litigation that may avoid the Supreme Court's validating reach. The section then proposes a new understanding of immigrant relationships to the state that may prove more resistant to xenophobic assertions of American

[212] Margulies & Metcalf, *supra* note 105, at 463.

[213] *See id.* at 471 ("As a beginning, scholarship should be more attuned to the limitations of the judiciary, and mindful of the complicated tendency of narratives to generate backlash and counter-narratives.").

[214] *Id.* at 463.

identity rooted in the state institution as purveyor of security. and appeal to conservative segments of society that prize non-governmental institutions of family and religion.

A. Revised Litigation Approach

Working within the litigation realm, advocates should generally seek to maximize claims that will aid their particular client. However, they should resist efforts to dismantle national security policies through impact litigation.[215] Courts may be more inclined to rule in favor of particular individuals and their particular case or controversy rather than a class action challenging a nationwide policy.

Clients also may be better served by litigation strategies that do not focus on constitutional rights, animus, or separation of powers, but rather concentrate on factual underpinnings. Yet even when facts are contested, the Court is still more likely to accede to the President's version.[216] But litigants should prioritize cases with "good facts," conscious of the aphorism that "bad facts make

[215] Michael Sfard shares in his book a draft resolution that Israeli human rights attorneys and legal organizations collectively considered, but ultimately rejected, concerning their legal advocacy strategy in the Occupied Territories. SFARD, *supra* note 149, at 30-31. The draft proposed that an organization would not engage in public interest litigation before the High Court of Justice—aimed at altering or stopping policies and legislation—without collective organizational approval. Organizations could continue to file individual cases on behalf of clients relating to particular legal issues. The draft contemplated a collective organizational international legal strategy, from which any legal action would be subject to an organization's approval. *Id.* Sfard recounts how his legal organization, the Association for Civil Rights in Israel, rejected the proposal but stated that it would employ "timely discretion with to the petitions we file to the High Court of Justice" with an emphasis on exposing the occupation's "unacceptable fundamental assumptions" and "substantial human rights abuses." *Id.* at 32. Sfard contends that boycotting the Court "could only have worked if all the relevant organizations had come on board." *Id. See also* Aiken & Wizner, *supra* note 142, at 1008 n.41 (cautioning that impact litigation risks privileging lawyer and organizational interests over those of clients).

[216] *See* Hawaii, 138 S. Ct. at 2422 ("[T]he Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving 'sensitive and weighty interests of national security and foreign affairs.'" (quoting *Humanitarian Law Project*, 561 U.S. at 33–34)); Cover, *Presumed Imminence*, *supra* note 3, at 1440-50 (describing how confirmation bias, availability heuristic, and probability neglect infect judicial fact-finding in the national security context in favoring government policies).

bad law." Lawyers advocating in the courts should thus draft their complaints mindful of what facts may invite or enable the courts to build on the edifice of executive power and presidential discretion in the national security and immigration context.[217]

The choice of constitutional claim also may make a difference in the Court's analysis and outcome. For example, in *The Muslim-Ban Case* litigation, lawyers appeared to emphasize the Establishment Clause claim over the Free Exercise Clause claim.[218] Litigants—and as a result, the courts—may have focused on the Establishment Clause claim for at least three reasons. First, the initial executive order included a religious-minority exception to its ban on refugee admission, which appeared a thinly disguised preference for Christians.[219] Coupled with the restrictions on entry by aliens from seven Muslim-majority nations, the order appeared to run most afoul of the Establishment Clause's proscription to "make no law respecting an establishment of religion."[220]

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[217] *See, e.g.*, al-Kidd, 563 U.S. 731; *supra* footnotes 159-64 and accompanying text (discussing *al-Kidd* and Court's expanding bases for detention under the material witness statute based in part on majority's view that plaintiff conceded warrant was validly obtained).

[218] In opposing the government's petition for certiorari, Hawaii raised the additional question, "Whether Proclamation No. 9645 violates the Establishment Clause." Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at i, *Hawaii*, 138 S. Ct. 2392, https://www.supremecourt.gov/DocketPDF/17/17-965/27771/20180112172848825_Trump%20v.%20Hawaii%20Brief%20in%20Opposition.pdf. Having ruled in Hawaii's favor on statutory grounds, the Ninth Circuit had not addressed its constitutional claims. The Court directed the parties to brief and argue the Establishment Clause question as well.

[219] Exec. Order No. 13,769, § 5(b). Contemporaneous with the order, President Trump suggested he wanted to prioritize the admission of Christian refugees. *See President Trump gives new hope to persecuted Christians*, Christian Freedom International, Mar. 30, 2018, https://christianfreedom.org/president-trump-gives-new-hope-to-persecuted-christians/ (quoting President Trump, Christian Broadcasting Network (Jan. 27, 2017)) ("If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair.").

[220] U.S. CONST. amend. I. However, the Becket Fund for Religious Liberty argued in its amicus curiae brief to the Supreme Court that the parties and lower courts had wrongly addressed an Establishment Clause claim when the appropriate claim sounded under the Free Exercise Clause.

However, the First Amendment's religious clauses invariably "overlap,"[221] with the Establishment Clause's "prohibition of denominational preferences . . . inextricably connected with the continuing vitality of the Free Exercise Clause."[222] Though litigants included within their causes of action claims that invoked Free Exercise violations,[223] complaints appeared to stress the Establishment Clause violation.[224]

See Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Neither Party at 19-20, *Hawaii*, 138 S. Ct. 2392, https://www.supremecourt.gov/DocketPDF/17/17-965/38672/20180312184651975_Becket%20Amicus-Trump%20v%20Hawaii%20amicus%20-%20as%20filed.pdf ("Put simply, government disfavor toward one religion does not—standing alone—establish another. But it does potentially violate free exercise."); *id.* at

[221] Engel v. Vitale, 370 U.S. 421, 430 (1962).

[222] Larson v. Valente, 456 U.S. 228, 245 (1982). The Becket Fund contended that the Court's later cases "treat *Larson* as essentially Free Exercise precedent," which "is consistent with *Larson*'s application of strict scrutiny." Brief Amicus Curiae of the Becket Fund, *supra* note 220, at 29 n.8 (citing *Lukumi*, 508 U.S. at 536; Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 877 (1990)).

[223] *See, e.g.*, Doe et al. v. Trump et al., Third Amended Class Action Complaint for Declaratory and Injunctive Relief, No. 2:17-cv-00178-JLR (Nov. 6, 2017), ¶¶ 310-15, https://www.aclu-wa.org/docs/third-amended-class-action-complaint-declaratory-and-injunctive-relief-doe-et-al-v-trump (denominating Count One as "First Amendment – Establishment, Free Exercise, Speech and Assembly Clauses"); Hawaii, [Proposed] Third Amended Complaint, No. 1:17-cv00050-DKW-KSC, *supra* note 32 (asserting distinct Establishment Clause and Free Exercise Clause counts).

[224] *See, e.g.*, Doe, Third Amended Class Action Complaint, No. 2:17-cv-00178-JLR, *supra* note 223, at ¶ 9 ("[T]he current set of orders remain in contravention of '[t]he clearest command of the Establishment Clause . . . that one religious denomination cannot be officially preferred over another.' *Larson v. Valente*, 456 U.S. 228, 244 (1982)"); *id.* at ¶ 312 ("EO-3 and the October 2017 Agency Memo violate the Establishment Clause by singling out Muslims for disfavored treatment. They have the purpose and effect of inhibiting religion, and are neither justified by, nor closely fitted to, any compelling governmental interest."); *id.* at ¶¶ 170-71, 177, 188, (describing examples of President Trump's intent to preference Christian faith); Hawaii, [Proposed] Third Amended Complaint, No. 1:17-cv00050-DKW-KSC, *supra* note 32, at ¶ 108 ("[T]he orders require the State to tolerate a policy designed to disfavor the Islamic faith, in violation of the Establishment Clause of both the federal and state constitutions."). ACLU Legal Director David Cole similarly stressed the Establishment Clause violation in his early statements on the Executive Order. David Cole, *We'll See You in Court: Why Trump's Executive Order on Refugees Violates the Establishment Clause*, JUST SECURITY, JAN. 28, 2017, https://www.justsecurity.org/36936/well-court-trumps-executive-order-refugees-violates-establishment-clause/

Second, litigants may have believed that Establishment Clause claims would more likely overcome standing hurdles than Free Exercise Clause claims.[225] Establishment Clause claims may permit an observer to challenge the offending government policy whereas Free Exercise claims would require a showing of personal harm.[226] Moreover, the more generalized bases for standing and structural protections afforded by the Establishment Clause make it less susceptible to challenges relating to the personal protections the Constitution affords to aliens outside the United States.[227]

Finally, plaintiffs may have thought they would more likely succeed on the merits because a mere showing of an establishment of religion would violate the Constitution, regardless of the

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[225] *See* Kristen Waggoner, *Symposium: Navigating animus and accommodation*, SCOTUSBLOG (Jun. 27, 2018, 11:08 AM), https://www.scotusblog.com/2018/06/symposium-navigating-animus-and-accommodation/ (speculating that Hawaii "likely wanted to take advantage of the fact that lower courts have created looser standing requirements for establishment clause claims — sometimes finding standing based on mere spiritual and dignitary injury"); Ira C. Lapu, Peter J. Smith, & Robert W. Tuttle, *The Imperatives of Structure: The Travel Ban, the Establishment Clause, and Standing to Sue*, TAKE CARE BLOG (Apr. 3, 2017), https://takecareblog.com/blog/the-imperatives-of-structure-the-travel-ban-the-establishment-clause-and-standing-to-sue ("Whether or not such claims of injury [stigmatization and separation from family members] are sufficient for standing to press other types of claims, the more capacious doctrine under the Establishment Clause should permit standing here.")

[226] *See* Flast v. Cohen, 392 U.S. 83 (1968) (granting taxpayer standing to challenge expenditures under the Establishment Clause); Van Order v. Perry, 545 U.S. 677 (2005) (addressing Establishment Clause claim brought by a person who frequently "encounters" Ten Commandments on the state capitol grounds). *See also Abington School District v. Schempp*, 374 U.S. 203, 224 (1963) ("[T]he requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed.").

[227] See Lapu, Smith, & Tuttle, *supra* note 225 (contending that Establishment Clause "addresses the character of government independent of any particular claim of rights" and thus may protect non-citizens' "rights"). In his concurrence, Justice Thomas appeared to reject any Free Exercise Clause claim concerning aliens seeking entry to the United States, perhaps validating the litigants' prioritizing the Establishment Clause claim. *See Hawaii*, 138 S. Ct. at 2424 (Thomas, J., concurring) ("The plaintiffs cannot raise any *other* First Amendment claim, since the alleged religious discrimination in this case was directed at aliens abroad." (emphasis added.) (citing United States v. Verdugo–Urquidez, 494 U.S. 259, 265 (1990)).

government's security interests.[228] In addition, the relief would be systemic overhaul rather than piecemeal and personal to each plaintiff's injury.[229]

One wonders how the plaintiffs would have fared had they received a more fulsome hearing on their Free Exercise Clause claims. Had they been able to show that they suffered distinct injuries caused by the ban, such as the denigration of their faith and exercise of religion with family members, the Court should have subjected the claims to a strict-scrutiny analysis.[230] Such a balancing of interests might have provided the Court with a "compromise between the per se

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[228] *See McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859 (2005) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) ("[W]hether government action has 'a secular legislative purpose' has been a common, albeit seldom dispositive, element of our [Establishment Clause] cases."); Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in* Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 20 LEWIS & CLARK L. REV. 1265, 1277 (2017) ("Once a practice . . . is judicially determined to be an establishment of religion, the case is over. Competing government interests play no part."); Waggoner, *supra* note 225 ("Hawaii surely knew that domestic establishment clause violations are typically treated as per se improper. No strict scrutiny. No balancing of interests. That would have provided an easy way to circumvent the national-security interests asserted by the government."); Brief Amicus Curiae of the Becket Fund, *supra* note 220, at 30 ("'Establishment Clause violations . . . are usually flatly forbidden without reference to the strength of governmental purposes.'" (quoting *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008) (McConnell, J.)).

[229] Brief Amicus Curiae of the Becket Fund, *supra* note 220, at 29 (describing scope of Establishment Clause remedy to include invalidating Proclamation as "far broader than necessary to provide relief to the specific plaintiffs before the courts" under the Free Exercise Clause). *Compare* Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & STATE 311 (2000) ("Because of its structural character, the task of the Establishment Clause is to limit government from legislating or otherwise acting on any matter 'respecting an establishment of religion.'") *with id.* at 320 ("[T]he redressing of a personal harm to an individual's religious belief or practice is the Free Exercise Clause's only function.").

[230] *See* Lukumi, 508 U.S. at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."); Brief Amicus Curiae of the Becket Fund, *supra* note 220, at 31 (contending that "under the more appropriate Free Exercise Clause analysis, courts should analyze whether the order is neutral and generally applicable and then, if appropriate, apply strict scrutiny to determine its constitutionality"). But in *Larson*, the Court did apply strict scrutiny to an Establishment Clause claim. 456 U.S. at 245. *Compare with* Brief Amicus Curiae of the Becket Fund, *supra* note 220, at 29 n.8 (arguing the case should be treated as Free Exercise Clause precedent).

violations characteristic of the establishment clause and the excessive deference characteristic of rational basis."[231]

Admittedly, this is all hypothetical, backseat-driver commentary. Litigants will generally assert any non-frivolous claims in the hopes that something will obtain relief for their clients. The Court's prior machinations to find in favor of the Executive—which included finding the Proclamation was neutral—suggest that the Court would have similarly manipulated the Free Exercise Clause standards.[232] Yet the potentially distinct treatment of religious clause claims underscores the need for litigants to strategize in selecting their initial claims, and consider which claims to emphasize and appeal or decline to appeal.

The request for relief also may inform the judicial outcome. The nationwide injunction illustrates the dilemma a civil-rights attorney faces.[233] On behalf of a single litigant, the immigration or civil-rights lawyer need not seek such relief. But as a matter of ceasing a draconian policy inveighing on thousands of people's interest, it is logically and legally supportable. Yet demanding such relief identifies well for the court many of the tensions the Supreme Court's jurisprudence in this area reflects.[234] A nationwide injunction dramatically expands a single district judge's powers over the parties before her to apply to "the universe of persons who might be

[231] Waggoner, *supra* note 225.

[232] *See Hawaii*, 138 S. Ct. at 2419 ("[T]his Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen.").

[233] Although the Supreme Court directed the parties to brief and argue the question, "[w]hether the global injunction barring enforcement of the travel ban is impermissibly overbroad," the Court deemed it unnecessary to decide the issue. *Id.* at 2423.

[234] *See id.* at 2429 (Thomas, J., concurring) (rejecting arguments that nationwide injunctions "ensure that individuals who did not challenge a law are treated the same as plaintiffs who did, and . . . give the judiciary a powerful tool to check the Executive Branch" as improper "policy judgments" that "are [in]consistent with the historical limits on equity and judicial power").

subject to enforcement."[235] It multiplies one client's power in the national security and immigration context and transforms a single case into a disputation on a national policy.[236] For the Supreme Court this may appear judicial hubris that the Court will be tempted to pull back and restrain. Similar concerns attend to class-action lawsuits.

Bringing only Administrative Procedure Act (APA) and statutory claims also may avoid the same level of legitimacy that a Court affords via constitutional claims. But APA and statutory claims may not heighten chances of success and only delay the inevitable constitutional claims. Such constitutional avoidance may not be possible at the Supreme Court level, nor may it always be prudent lawyering.[237] Moreover, defendants may raise constitutional claims in defenses or in arguments so it is not a full-proof solution.

Litigants also should not be too proud or focused on policy transformation to reject settlements. Once under the "court's shadow"[238]—the ever looming possibility of an adverse ruling, or interlocutory orders to disclose sensitive and embarrassing information—the Government may settle and grant a requested reprieve or remedy. The role of the client may mitigate the lawyers' fixation on policy change. But not always. Clients too may seek such transformation and the lawyer may be beholden to the client. In using these varied litigant strategies, lawyers should work within the larger and extra-judicial context; supporting, but directing less, the larger project of social transformation and inclusion.

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[235] Howard Wasserman, *"Nationwide" Injunctions are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. (2018), available at: https://ecollections.law.fiu.edu/faculty_publications/343, at 2.

[236] *Id.*

[237] *See* Brief in Opposition, Hawaii, 138 S. Ct. 2392, *supra* note 218, at i, (raising Establishment Clause violation for Supreme Court review despite the Ninth Circuit's ruling on solely statutory grounds, presumably to better insulate it from an adverse ruling).

[238] KRETZMER, supra note 150, at 3.

B. Non-Judicial Approaches

Prominent civil rights organizations' incorporation of political campaigning, public education, lobbying, and digital advocacy all reflect the logical appeal of diversified, non-litigious advocacy. Yet the groups' retention of litigation as a core tenet demonstrate that advocacy approaches are flexible and diverse; not as binary as Tushnet's analysis suggests. Advocacy groups can walk and chew gum at the same time. Given the Court's rooted support of the Executive and likely enduring antipathy to immigrant rights in the national security context, groups should marshal alternative approaches (and consequently shift resources) to change both thinking and thinkers.

First, the primacy of the political branches in the Court's deferential national security analysis means that who holds the levers of power is of utmost importance—particularly the President.[239] The consequences of the presidential election have profound consequences on the Supreme Court and rest of the judiciary's composition and their likely rulings in the national security-immigration sphere. Accordingly, advocacy groups should incorporate electoral strategies within their general efforts at transforming the national security-immigration space. The theoretical conception of litigation as entirely non-partisan possibly delayed some groups from adopting overt political and electoral strategies.[240]

Advocates should not, however, confuse or conflate partisan opposition to the Trump presidency with support for historically marginalized groups. Notwithstanding appeals to

[239] *See* John Yoo & Robert J. Delahunty, *Supreme Court travel ban decision moves left's fight with Trump from the courts to the ballot box*, FOX NEWS (June 27, 2018), https://www.foxnews.com/opinion/supreme-court-travel-ban-decision-moves-lefts-fight-with-trump-from-the-courts-to-the-ballot-box; Hamid, *supra* note 8.

[240] *See, e.g.,* IRS, Social Welfare Organizations, https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations ("Thus, a section 501(c)(4) social welfare organization may further its exempt purposes through lobbying as its primary activity without jeopardizing its exempt status. An organization that has lost its section 501(c)(3) status due to substantial attempts to influence legislation may not thereafter qualify as a section 501(c)(4) organization.").

intersectionality and the record number of minority women elected in the 2018 mid-term elections, most politicians are unlikely to advocate non-citizen rights, particular at times of perceived threat. The USA PATRIOT Act votes tallies—98-1 in the Senate; 357-66 in the House[241]—in a Democratically-controlled Congress immediately after the September 11 attacks demonstrates the nonpartisan allure of targeting out-groups' rights in crises.[242]

Second, advocates should build on the local interests that federal government overreach on immigration issues may present. The federal government's primacy in anti-immigration efforts has also turned on its head the simplistically conceived liberal-centralized government, conservative-local-and-state government alignments. Local legislative efforts may enjoy some limited success, as illustrated by local measures enacted relating to "welcoming" or "sanctuary" cities and limits on local law-enforcement cooperation with detainers.[243] The support for these measures, while

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[241] *See* H.R.3162 - Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Bill History, https://www.congress.gov/bill/107th-congress/house-bill/3162/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D.

[242] *See, e.g.*, PUB. L. NO. 107-56, §. 412 (Oct. 26, 2001), 115 Stat. 350-51, codified at 8 U.S.C. 1226A (authorizing Attorney General to detain foreign nationals suspected of terrorism on reduced standards of suspicions ("reasonable grounds to believe") and for initial seven-day periods and extended periods after immigration-related charges).

[243] By one count, more than 170 states, cities, and counties have laws, policies, or practices that limit cooperating with federal officials concerning information about, and access, to aliens within their jurisdictions for purposes of enforcing federal civil immigration law. *See* CENTER FOR IMMIGRATION STUDIES, *Map 1: Sanctuary Cities, Counties, and States* (Updated Apr. 16, 2019), https://cis.org/Map-Sanctuary-Cities-Counties-and-States. For example, the Chicago Municipal Code, Welcoming City Ordinance provides "that immigrant community members, whether or not documented, should be treated with respect and dignity by all City employees." *City of Chicago v. Sessions*, 888 F.3d 272, 279 (7th Cir. 2018) (quoting Welcoming City Ordinance, § 2-173-005). The ordinance proscribes city employees from providing immigration status information to, or generally assisting, Immigration and Customs Enforcement officials for detention purposes based only on civil immigration law. *Id*. (citing Welcoming City Ordinance, § 2-173-020, -030, -042). The Seventh Circuit upheld a district court's injunction against the attorney general's conditioning federal law enforcement grants on providing federal officials access to meet with aliens and notice of their release dates, which ran afoul of Chicago's ordinance. *Id.* at 278-80. The court found that

often regionalized or localized, indicate fertile ground for some popular advocacy.[244] Fostering more localized resistance to imposition of federal immigration mandates, in partnership with the local group chapters and religious group mobilization through refugee sponsorship, sanctuary sites, and protests, are vital forms of expression and transformation of the dialogue. The government's national security policies have also rankled libertarian notions of government, providing potentially fertile ground for rethinking the state relationship to security and rights.[245] Enabling these collective responses should aid targeted groups in escaping the narrow and stultifying confines of judicial precedent and the dry rhetoric of law.

Third, the most prominent civil rights groups should be willing to get out of the way of, or at least permit, nascent, organic, non-hierarchical non-groups a seat at the table if not the head. Widespread mobilization, whether emanating via online groups, places of worship, or on the street, is potentially more agile and responsive than is the law or the courts to extreme actions by the President. Moreover, these more-representative advocacy groups need not be captive of dominant legal strategies and dominating legal strategists, i.e., lawyers. The rise of groups like Black Lives Matters and Occupy Wall Street, which some characterize as a partial response to infirmities

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the city was likely to succeed on the merits because the attorney general lacked statutory authority to impose the conditions. *Id.* at 283-88.

[244] Polling on the Muslim ban, however—while of questionable reliability—suggests opinions largely divide along partisan lines. Grace Sparks, *Americans Have Been Split on Trump's Travel Ban for a While*, CNN.com (June 26, 2018), https://edition.cnn.com/2018/06/26/politics/travel-ban-polling/index.html (describing varied poll results on Muslim ban).

[245] See, e.g., Brief for Amicus Curiae The Cato Institute in Support of Respondents at 1, Hawaii, 138 S. Ct. 2392, https://object.cato.org/sites/cato.org/files/pubs/pdf/hawaiivtrumpamicus.pdf (describing "[t]he Cato Institute [a]s a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government.").

endemic to the traditional civil rights movement's legalistic advocacy and top-down leadership, reflect the viability of the non-hierarchical approach.[246]

These groups offer alternative narratives to the dominant legal discourse.[247] Liberated from legal briefs and precedent, they provide various conceptions of liberty, community, nationality, culture, and identity. Witness the power and prevalence of Shepard Farey's "We the People" poster depicting a young woman in hijab made from an American flag.[248] The image offers a visceral, inclusive and patriotic vision of American identity distinct from the Court's abstracted and parsimonious opinion.[249]

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[246] *See, e.g.*, Barbara Ransby, *Black Lives Matter is Democracy in Action*, N.Y. TIMES (Oct. 21, 2017), https://www.nytimes.com/2017/10/21/opinion/sunday/black-lives-matter-leadership.html; Jelani Cobb, *The Matter of Black Lives*, THE NEW YORKER (March 14, 2016), https://www.newyorker.com/magazine/2016/03/14/where-is-black-lives-matter-headed.

[247] *See* Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1502-06 (2018) (describing varied forms of "[r]esistance to Muslim Bans outside of the courtroom"). *See also* Cover, *Nomos and Narrative*, *supra* note 196, at 17-18 (explaining that "diverse and divergent narrative traditions within the nation" challenge and influence the meaning of the "authoritative text" and that "exercises a destabilizing influence upon power").

[248] *See* Amah-Rose Abrams, *Shepard Fairey Releases 'We the People' Series to Protest Trump*, ARTNET NEWS (Jan. 20, 2017), https://news.artnet.com/art-world/shepard-fairey-releases-we-the-people-series-824468. According to the Amplifier Foundation's website, "We the People is a nonpartisan campaign dedicated to igniting a national dialogue about American identity and values through public art and story sharing." The campaign provided free images to download as "new symbols of hope to combat the rising power of nationalism, bigotry, and intolerance." The campaign works "with change movements, educators, and innovative thinkers to bring We the People into schools and communities around the country." We the People Campaign, https://amplifier.org/campaigns/we-the-people/.

[249] Cover, *Nomos and Narrative*, *supra* note 196, at 11 ("[T]he creation of legal meaning—'jurisgenesis'—takes place always through an essentially cultural medium.").

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The potent image, which was held aloft in marches and protests following the President's inauguration and afterward, challenges the "otherizing" of Muslims and Muslim women in particular. Rather than a clash of western and Muslim civilizations—a narrative heralded since the September 11 attacks[251]— and one of Trump's supporting rationales for the Muslim ban[252]—the image merges and celebrates Muslim and American identity. Roaa Ali identifies the simultaneously subversive and patriotic message the poster conveys:

> By appropriating the ultimate signifier of national patriotism, the American flag, as a signifier of religious identity that is visibly female; those Muslim women reclaimed their gender and religious identity as decidedly American. That stars-and-stripes hijab is a political statement denoting that these women's Muslim identity is not at odds with their American identity, nor are their bodies an offense to the national body.[253]

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[250] We the People Campaign, *supra* note 248.

[251] Roaa Ali, T*he Women's March that Welcomed the Hijab as a Sign of Dissidence: Pink, Rainbows, and an American-flag Hijab*, INTERDISCIPLINARY PERSPECTIVES ON EQUALITY AND DIVERSITY Vol. 3, No. 1, at 7 (2017), http://journals.hw.ac.uk/index.php/IPED/article/view/51/32.

[252] *See* Anderson Cooper 360 Degrees: Exclusive Interview with Donald Trump (CNN television broadcast Mar. 9, 2016, 8:00 PM EST) ("I think Islam hates us. . . we can't allow people coming into this country who have this hatred of the United States . . . [a]nd of people that are not Muslim.") (transcript available at https://goo.gl/y7s2kQ).

[253] Ali, *supra* note 251, at 8.

Ultimately, a greater shift is needed to normalize the hijab—Muslim identity—within American cultural and legal frameworks.

C. Finding National Identity in Family and Religion

Margulies and Metcalf maintain that the legalistic battle over rights obscures the fight over national identity.[254] Despite my skepticism over whether an actual national identity exists, the underlying observation and challenge are well taken. As this article has discussed, unchecked political power invariably wields its authority most negatively on non-citizens and minority groups during crises, permitting the height of political powers to adversely target those who are least-represented and have the least rights. A more inclusive and extra-legal narrative is needed.

1. Nationalistic Rights Theory

The difficult rights terrain has its roots in social-contract theory, which is wedded to principles of sovereignty, a powerful executive to ward off invaders, and political society membership. The traditionally and legally confined definition of rights is therefore unlikely to avail non-citizens and marginalized groups in the national security context. Rethinking that rights framework may offer new ways of thinking about alternative narratives and legal consequences under which security-based fears do not inevitably translate into the state's infringement of both minority group and non-citizens' interests.

A right may be defined generally as A's freedom to exercise her liberty insofar as it is compatible with B's freedom to exercise his liberty.[255] These rights also may be defined in relation to the state, as in the Bill of Rights.[256] Hobbes located in a "Common Power"—the Leviathan or

[254] Margulies & Metcalf, *supra* note 105, at 463.

[255] *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 216 (2011). Rules and laws regulate these persons' relationships and their rights. *Id.* at 203-04.

[256] *See, e.g.*, U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press,

mortal god—the only solution to humanity's warring against itself and "invasion of Forraigners."[257] The people consented to the Common Power's governance through mutual covenants with one another.[258]

Locke's conception of the state departs from Hobbes in that it operates under the familiar tripartite government framework (entailing "indifferent and upright judges" and use of force "to prevent or redress foreign injuries, and secure the community from inroads and invasion").[259] But Locke still vested near-exclusive powers in the Executive relating to "war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth."[260]

Locke's social-contract theory also envisions that people utilize the democratic process to realize "the peace, safety, and public good of the people," which must include preserving liberty and property.[261] Yet they become subjects to "any earthly power" only through "express consent."[262] Any lesser relationship to a government, via "tacit consent", which "foreigners" might enjoy through owning property, "makes not a man a member of that society."[263] Though Locke's theory undergirds a rationale for resisting political institutions, it also defines the boundaries of the society's membership and its attendant duties and rights.

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or the right of the people peaceably to assemble and to petition the government for a redress of grievances.").

[257] THOMAS HOBBES, LEVIATHAN 127 (1651).

[258] *Id.* at 128.

[259] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 299 (II, § 131) (1689).

[260] *Id.* at 315 (II, § 146).

[261] *Id.* at 299 (II, § 131).

[262] *Id.* 291 (II, § 119).

[263] *Id*. at 293-92 (II, §§121-22).

2. Family Members' "Almost Natural Consent" to the State

Locke recognized a latent ambiguity in his theory insofar as not every person in society could have expressly consented to its governance.[264] Jeremy Waldron addresses the possible gap in membership by proposing a third form of "almost natural" consent to the political system, "in the sense that they have grown up with it and acquiesced in its development and in its authority at every stage."[265] So conceived, an "incrementalist," evolutionary form of consent may cohere with a contractualist theory, even though "*the whole process* was not the subject of anyone's intentions and that the overall direction of the development was unforeseen."[266] These notions of natural consent to membership and its obligations also should inform the development of rights held by those who did not formally assent to the political society's governance.[267]

Those in close or familial relationships to members hold potentially viable claims to membership and equal rights in that political society. In illustrating "natural consent" to an authority and formation of political societies, Locke's anthropological account focused on the family example ("the government commonly began in the father")[268] and attributed early societies' subsistence to "nursing fathers' tender and careful of the public weal."[269] Waldron contends that one may employ the "almost natural consent" theory as "a way of characterizing a particular set

[264] *Id.* at 272-73 (II, § 100).

[265] Jeremy Waldron, *John Locke: Social Contract Versus Political Anthropology*, 51 THE REVIEW OF POLITICS 3, 19-21, 23 (1989) (quoting LOCKE, II, § 75) [hereinafter Waldron, *John Locke*].

[266] *Id.* at 25 (emphasis in original).

[267] *Id.* at 20.

[268] LOCKE, II, *supra* note 259, at 276 (II, § 105). *See also* Waldron, *John Locke*, *supra* note 265, at 19-20.

[269] LOCKE, II, *supra* note 259, at 284 (II, § 110). *See also* Waldron, *John Locke*, *supra* note 265, at 19-20.

of historical events, such as the gradual emergence of a polity out of a family."[270] Examining relationships between individuals and the state entails using "judgment to discern" whether people have consented so far as to satisfy Locke's theory and thus enjoy the rights afforded by the political society.[271]

Under the "almost natural consent" theory, we might determine that foreign family members and U.S. citizens enjoy relationships ("liberty interests") such that the government should view favorably the former group's admission to the United States. The role of family may assist in refashioning the rights framework, which will prove politically and morally acceptable in the national security-immigration context.

The emphasis on family may also hold some appeal to some conservative and libertarian groups who tend to disfavor government intrusion.[272] The family is a model subsidiarity—an associational group which fulfills social functions "'not at the lowest possible level, but at the right level.'"[273] The notion of family and subsidiarity resists transferring all authority to the central government. Dominic Burbidge advises "that the need to coordinate the pursuit of specific good in order to arrive at the common good is not a responsibility specific to the state."[274] Rather, "it is the family which has the most direct line into the formation of the habits, manners and social mores

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[270] Waldron, *John Locke*, *supra* note 265, at 25.

[271] *Id.*

[272] *See, e.g.*, Abby M. McCloskey, *Beyond Growth*, 38 NATIONAL AFFAIRS (Winter 2019), https://www.nationalaffairs.com/publications/detail/beyond-growth?smid=nytcore-ios-share (observing that conservative vision recognizes "economy will be strong and inclusive only if it's built on a foundation of close ties among families and communities" rather than through government programs).

[273] Dominic Burbidge, *The Inherently Political Nature of Subsidiarity*, 62 AM. J. JURIS. 143, 144 (2017) (quoting Jonathan Chaplin, "Subsidiarity and Social Pluralism," in MICHELLE EVANS & AUGUSTO ZIMMERMAN, ed., GLOBAL PERSPECTIVES ON SUBSIDIARITY 72 (2014)).

[274] *Id.* at 158.

that bring about the coordination of society's parts."[275] And among these parts, which the family coordinates, is of course, religion.

Thus to resist family unification on religious grounds implicates two core and interdependent features of one's personal and collective identities; it is why the family and religion have long been seen as intertwined and fundamental to American identity.[276] The Court's refusal to recognize that the Muslim ban amounted to this two-fold violation of ideals and principles highly valued by the American social compact is tragic—particularly because it knew otherwise.

3. Plenary Power

Early court opinions on admitting foreign nationals to the United States are not pretty. They traffic in themes not all that distinct from Hobbes' and Locke's fears of invading "Forraigners," powerful governance, and exclusive social membership even when the state's interest is not security-related. Thus, in *The Chinese Exclusion Case* the Court readily deferred to Congress, upholding its exclusion and expulsion of Chinese laborers who had left the United States prior to the passage of the relevant law:

> Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy.
>
> . . . .
>
> If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with

[275] *Id.*

[276] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding state may not compel Amish parents to send children to school until age 16). The Court in *Yoder* emphasized the importance of "traditional concepts of parental control over the religious upbringing and education of their minor children" and that "an intrusion by a State [such as compelling the Amish to go to school] into family decisions in the area of religious training would give rise to grave questions of religious freedom." *Id.* at 231.

> the nation of which the foreigners are subjects. . . . [I]ts determination is conclusive upon the judiciary.[277]

This plenary-power doctrine[278]—a political theory of state power and citizenship—enables a legal and political narrative that harbors racist and nationalistic instincts along with deference to the political branches.[279] Thus the Court indulged the nativist and populist sentiments that Chinese "immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization."[280] And in *Korematsu*, the Court revealed how tenuous are the legal protections for citizens of particular national or ethnic backgrounds when it deferred to the military's judgment that, "[l]ike curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country."[281]

The Muslim-Ban Case Court's adoption of the *Kleindienst v. Mandel* standard of review cannot be easily separated from the latter opinion's xenophobic and judicially-enervating origins. *Mandel* relied heavily on *The Chinese Exclusion Case* and *Fong Yue Ting v. United States* and the plenary power doctrine[282] in holding that it would "not look behind" the Executive's denial of entry to a

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[277] 130 U.S. at 603, 606.

[278] *See, e.g.*, Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The Plenary Power Justification for On-Going Abuses of Human Rights*, 10 ASIAN AM. L.J. (2003) (discussing how plenary power doctrine affects ongoing jurisprudence).

[279] *See* Olsen v. Albright, 990 F. Supp. 31, 37 (D.D.C. 1997) ("During most of its history, the United States openly discriminated against individuals on the basis of race and national origin in its immigration laws."). Hobbes echoes in this judicial deference, allowing little daylight between the state and the court's legal interpretation. *See* HOBBES, *supra* note 257, at 128 ("[A]nd therefore the interpretation of all laws dependeth on the authority sovereign; and the interpreters can be none but those, which the sovereign, (to whom only the subject oweth obedience) shall appoint.").

[280] 130 U.S., at 595.

[281] 323 U.S. at 218-19 (relying on Hirbayashi v. United States, 320 U.S. 81, 93 (1943)).

[282] 408 U.S. at 765 (citing *The Chinese Exclusion Case*, 130 U.S. 581; Fong Yue Ting v. United States, 149 U.S. 698 (1893)); *Mandel*, 408 U.S. at 766 ("The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who

foreign person implicating an American citizen's First Amendment right to receive information and hear ideas, when the government acts "on the basis of a facially legitimate and bona fide reason."[283] As Justice Douglas wryly noted in his dissent, "[t]hese cases are not the strongest precedents in the United States Reports."[284]

4. Communitarian Immigration Principles

But both before, and certainly after, *Mandel* there has been a rising legal and collective consciousness that non-citizens form an integral part of the nation, quite apart from an express consent or citizenship status, and merit constitutional and judicial protections.[285] As courts recognized the rights of individuals in the domestic context, including those of minorities and in particular aliens, it became harder to rationalize not affording fundamental rights to those persons seeking admission to the country.[286]

possess those characteristics which Congress has forbidden.'" (quoting Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (1967)).

[283] *Mandel*, 408 U.S. at 762, 770.

[284] *Id.* at 781–82 (Douglas, J., dissenting) (citing *The Chinese Exclusion Case*, 130 U.S. 581; Fong Yue Ting, 149 U.S. 698).

[285] *See* Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 79 (2017) ("[C]ommentators have been discussing the 'demise' of plenary power for decades."); Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545, 566 (1990) ("By the 1950's, aliens' rights decisions beyond the scope of immigration law already conflicted with assumptions implicit in the plenary power doctrine."); Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1, 49 (1984) (attributing changes in immigration law to "the emergence of new, 'communitarian' public law norms").

[286] *See* Cox, *supra* note 186 ("[T]he Supreme Court has never upheld an immigration policy that openly discriminated on the basis of race or religion during a period of constitutional history when such a policy would have been clearly unconstitutional in the domestic context."); Motomura, *supra* note 285, at 566; Schuck, *supra* note 285, at 49.

Monumental changes in constitutional law, as expressed in the prohibition on racial segregation in *Brown v Board of Education*[287] and following developments in civil-rights laws challenged discriminatory classifications restrictions on non-citizens' entry.[288] Similarly, alien-focused decisions such as *Plyer v. Doe*,[289] which held that, on equal-protection grounds, Texas could not deny a public education, recognized that citizenship alone could not be a basis for acceptance into American society and provision of legal rights.[290]

The Immigration and Nationality Act Amendments of 1965 also reflected this same tendency, introducing principles of non-discrimination that are at the heart of *The Muslim-Ban Case*. In signing the INA into law, President Johnson explained that its purpose was to alleviate the "harsh injustice of the national origins quota system."[291] Reflecting the national moment of turning from anti-discriminatory policies, Congress passed the INA "alongside the Civil Rights Act of 1964 and the Voting Rights Act of 1965."[292] As part of its anti-discrimination design, INA, § 1152(a)(1)(A) reads: "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."[293]

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[287] 347 U.S. 483 (1954).

[288] Motomura, *supra* note 285, at 566; Cox, *supra* note 186.

[289] 457 U.S. 202 (1982).

[290] See Motomura, *supra* note 285, at 584 ("*Plyler* recognized the membership of these undocumented children in American society as an accomplished fact, and further recognized that they could not be excluded by fiat from constitutional rights and privileges."); Schuck, *supra* note 285, at 54 (*Plyler* "may mark a fundamental break with classical immigration law's concept of national community and of the scope of congressional power to decide who is entitled to the benefits of membership.").

[291] *See* President Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill, Liberty Island, New York, 546 Pub. Papers 1037, 1038 (Oct. 3, 1965).

[292] *Olsen*, 990 F.Supp. at 37.

[293] 8 U.S.C. § 1152(a)(1)(A).

Immigration policy's preferences for family reunification go back almost a century.[294] But in eradicating the national origins quotas, the 1965 Amendments further clarified the prioritization of family relationships in allocating family-sponsored immigrant visas.[295] The current provision, INA, § 1153, prioritizes allotting visas to (1) unmarried sons and daughters of citizens; (2) spouses and unmarried sons and unmarried daughters of permanent resident aliens; (3) married sons and married daughters of citizens; and (4) brothers and sisters of citizens.[296]

In its review of the plaintiffs' statutory claims, *The Muslim-Ban Case* Court rejected the legislative emphasis on nondiscrimination and family preservation in issuing immigrant visas. Ignoring Congress's more recent expressions of fundamental American values, the Court held that the ban was a proper use of presidential authority under INA, § 1182(f), 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 to be appropriate."[297] Revealing its hand early, the Court stated that the statute "exudes deference to the President in every clause."[298] The Court proceeded to reject arguments that the President must provide "sufficient[ly] detail[ed]" findings that would allow for judicial review.[299] The Court also rejected the notion that the anti-discrimination statute could be read so broadly as to apply to the President's authority to suspend entry based on nationality.[300]

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[294] William A. Kandel, *U.S. Family-Based Immigration Policy*, Congressional Research Service, at 2 (Feb. 9, 2018), https://fas.org/sgp/crs/homesec/R43145.pdf.

[295] *See* President Johnson, Remarks at the Signing of the Immigration Bill, *supra* note 291, at 1038 ("This bill says simply that from this day forth those wishing to immigrate to America shall be admitted on the basis of their skills and their close relationship with those already here.").

[296] 8 U.S.C. § 1153(a).

[297] 8 U.S.C. § 1182(f).

[298] 138 S. Ct. at 2408.

[299] *Id.* at 2409.

[300] *Id.* at 2413-15.

Nowhere does the Court even reference the judicial and legislative watersheds that had commentators poised to bury the plenary power doctrine.[301]

More than three decades ago, Peter Schuck asked whether these same judicial and legislative developments reflected "communitarian" principles that "the government owes legal duties to all individuals who manage to reach America's shores, even to strangers whom it has never undertaken, and has no wish, to protect."[302] Schuck suggested that the expansion of government duties and emphasis on group rights planted the seeds for broadening conceptions of national identity and related rights and duties.[303] Recognizing that "individuals, societies and nations are bound to each other by pervasive interdependencies", Schuck derived the following "moral and legal consequences" for society:

> [S]ocially accepted values should augment consent as a basis for imputing legal duties; that the conception of national sovereignty should be weakened in order to define the relationship between the United States and aliens in terms of morally significant, informal social interactions; and that membership in our national community should depend not upon formalistic criteria but upon the functional social linkages actually forged between aliens and the American people.[304]

Familial relationships, as recognized in the INA's family-reunification preferences, provide the "almost natural consent" and "social linkages" with Americans for imposing duties on the

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[301] Following *The Muslim-Ban Case*, members of Congress introduced bills that would, among other things, amend 8 U.S.C. § 1152(a)(1)(A) to include prohibit discrimination on the basis of religion in visa and entry decisions, and amend 8 U.S.C. 1182(f) to limit the President's suspension-of-entry power by clarifying that § 1152(a)(1)(A) applies, requiring factual findings, and imposing congressional notification and consultation requirements, as well as void all executive orders and proclamations constituting the current Muslim ban. H.R. 2214, 116th Cong. (Apr. 10, 2019); S. 1123, 116th Cong. (Apr. 10, 2019).

[302] Schuck, *supra* note 285, at 4. Justice Breyer has similarly suggested that globalization and international interdependence call into question some legal citizen-alien distinctions. BREYER, *supra* note 3, at 85 ("[I]n a world of extensive travel and immigration, of worldwide commerce, and of the Internet, the 'foreignness' of an alien is not quite what it used to be.").

[303] Schuck, *supra* note 285, at 49.

[304] *Id.* at 50.

Government's treatment of non-citizens seeking entry to the United States. *The Muslim-Ban Case*, however, demonstrates that the Court still operates under the racist and xenophobic vestiges of the plenary power doctrine, ignoring universal anti-discriminatory principles and resists accommodating and expanding the national community through affording protections to American Muslim citizens whose family members have been denied entry.

5. Judicial Betrayal of Family and Religion

The Court's ambivalence concerning foreign family relationships was on display in the 2015 *Kerry v. Din* opinion. Justice Scalia penned a plurality in which he declared: "Only by diluting the meaning of a fundamental liberty interest and jettisoning our established jurisprudence could we conclude that the denial of the non-citizen spouse [Berashk's] visa application implicates any of Din's fundamental liberty interests."[305] Justice Kennedy (along with Justice Alito) would have assumed the spouse had such a liberty interest. but found that the notice of visa denial satisfied due process.[306] Dissenting for the four-member minority, Justice Breyer recognized a person's liberty interest in "the freedom to live together with her [foreign national] husband in the United States" and instead would have found the visa denial did not satisfy procedural due process guarantees.[307]

The Scalia-Breyer dispute over liberty interests concerning foreign family member relationships fits within the familiar debate over the meaning and sources of constitutional rights. For Scalia, "claims to any implied fundamental rights" are suspect because they are "textually

[305] 135 S. Ct. at 2136 (plurality opinion).

[306] *See id.* at 2139 (Kennedy, J., concurring). *See also id.* ("Today's disposition should not be interpreted as deciding whether a citizen has a protected liberty interest in the visa application of her alien spouse.").

[307] *Id.* at 2142 (Breyer, J., dissenting).

unsupportable" and "'outside the arena of public debate and legislative action.'"[308] Scalia pointedly discounts Congress's "'continuing and kindly concern . . . for the unity and the happiness of the immigrant family'" as "a matter of legislative grace rather than fundamental right."[309] Breyer would have held that the liberty interests in marriage and to live with her husband in the United States rested within the purposes and objectives of the Due Process Clause as well as legislative immigration provisions reflecting concern for the family unit.[310]

Only eleven days after the Court issued its ruling in *Din*, the Court delivered *Obergefell v. Hodges*,[311] upholding a constitutional right to same-sex marriage as vested in the Due Process Clause. There, Justice Kennedy explained how the right to marry "safeguards children and families,"[312] and "allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.'"[313] The liberty interest in family unity would seem now established.

At its heart though, a debate over the breadth of constitutional rights devolves into questions of *whose* interests. Recognizing the familial relationship's significance not only invites a multiplicity of legal rights and meanings but invariably enlarges the society.

These tensions roil just below the surface of *The Muslim-Ban Case*. The Court could not ignore the ban's widespread disruptive impact on families. The Court initially gestured toward the significance of relationship with foreign family members in interlocutory orders. In partially

[308] *Id*. at 2133-34 (plurality) (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

[309] *Id.* at 2136 (plurality) (quoting EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965 518 (1981)).

[310] *Id.* at 2142-43 (Breyer, J., dissenting).

[311] 135 S. Ct. 2584 (2015).

[312] *Id.* at 2590.

[313] *Id.* at 2600 (quoting United States v. Windsor, 570 U.S. 744, 772 (2013)).

granting a stay sought by the government, the Court held that the Muslim ban "may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States."[314] The Court ultimately accepted that "a close familial relationship" could consist of family members, including parents, children, siblings, "grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States."[315]

Concern for maintaining the family relations proved fleeting. Instead, the Court's invocation of family became a Trojan horse. The Court accepted as a basis for standing the plaintiff Dr. Ismail Elshikh's allegations that, for example, the ban injured him "by preventing him from reuniting with his relatives," but not by "denigrating him as a Muslim and an Imam."[316] The Court explained that it would not decide the spiritual and dignitary interest claim because the family-separation claims offers a "more concrete injury."[317]

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[314] IRAP, 137 S. Ct. at 2088. The Court held that "for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading [the ban]." *Id.* Relationships between a university and admitted student, and employer and employee, or an invited lecturer satisfied the Court's criteria. *Id.* The Court later clarified, however, that the ban would apply to refugees with formal assurances from resettlement agencies. *See* Trump v. Hawaii, 138 S. Ct. 1 (2017) (Order) (staying in part *Hawai'i v. Trump*, 871 F.3d 646 (9th Cir. 2017).)

[315] Hawai'i, 871 F.3d at 658 & n.8; Hawai'i, 138 S. Ct. 1 (leaving intact Ninth Circuit's elaboration on family relationships). The Court's broad understanding of family rested on the "'the accumulated wisdom of civilization, gained over the centuries and honored throughout our history' that was worthy of constitutional protection." *Hawai'i*, 871 F.3d at 658 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 505 (1977)). *The Muslim-Ban Case* majority also emphasized that the Proclamation's waiver program, which may apply to "foreign national[s] seek[ing] to reside with a close family member" supported the "Government's claim of a legitimate national security interest." *Hawaii,* 138 S. Ct. at 2422.

[316] *Hawaii,* Third Amended Complaint, No. 1:17-cv00050-DKW-KSC, *supra* note 32, at ¶ 110, 111-14; Hawaii, 138 S. Ct. at 2416 (describing plaintiffs' arguments that the ban "'establishes a disfavored faith' and violates 'their own right to be free from federal [religious] establishments.'" (citing Brief for Respondents 27–28 (emphasis deleted)).

[317] *Hawaii*, 138 S. Ct. at 2416.

Yet the Court immediately questioned whether the plaintiffs could establish an Establishment Clause violation because the ban does not apply to them, "but to others seeking to enter the United States."[318] This twist of reasoning is neither logical nor consistent with precedent. Parents may, for example, assert, along with their children, Establishment-Clause claims relating to statutes compelling the children to read the bible in public schools.[319]And the Court has long recognized the vital relationship between family and religion.[320]

In arriving at its adumbrated, deferential review, the Court resisted the its own seeming evolution on constitutional rights claims involving non-citizens' entry to the United States. Six Justices in *Kerry v. Din* had endorsed "look[ing] behind" the government's reasons denying admission to non-citizen family members when there was "an affirmative showing of bad faith."[321] But *The Muslim-Ban Case* majority adopted *Mandel*'s abstracted embrace of executive power over *Din*'s attention to family, discarding its potentially heightened standard when family interests are implicated in the immigration context.

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[318] *Id.* at 2416.

[319] *See* Schempp, 374 U.S. at 224 n.9. The *Schempp* Court considered the parents "directly affected" by the state law, but family members within the United States are similarly "directly affected" by the ban. The "direct affect" accentuates the importance of religion to family and identity.

[320] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 802 (1983) ("The Establishment Clause embodies a judgment, born of a long and turbulent history, that, in our society, religion 'must be a private matter for the individual, the family, and the institutions of private choice. . .'") (quoting Lemon, 403 U.S. at 625); Ass'n of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 154, 90 S. Ct. 827, 830, 25 L. Ed. 2d 184 (1970) ("A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause.") (citing *Schempp*, 374 U.S. 203). Even secular "religious" events entwine the family. *See* Lynch v. Donnelly, 465 U.S. 668, 710 (1984) ("When government decides to recognize Christmas day as a public holiday, it does no more than accommodate the calendar of public activities to the plain fact that many Americans will expect on that day to spend time visiting with their families, attending religious services, and perhaps enjoying some respite from pre-holiday activities.").

[321] 135 S. Ct. at 2141.

The Court ultimately did not address whether the Establishment Clause's scope provided a legal interest in the admission of foreign family members.[322] But an Establishment Clause violation, as manifested in the Government's disfavoring a religion, invariably amounts to an attack on the family—its traditions, rituals, morality, and identity. The ban inhabits that destructive effect in its fullest form. The cruel irony is that the form of the Establishment Clause violation—its barrier on entry to foreign family members—is precisely what afforded the policy its deferential review and resistance to allegations of any religious animus.[323]

The Muslim ban is therefore doubly pernicious. It simultaneously keeps Muslim-Americans' family members outside the United States, rupturing their family and faith, and also tells them, as "members of minority faiths 'that they are outsiders, not full members of the political community.'"[324] Muslim citizens do not enjoy the same protections for their religious exercise as do citizens of other faiths.

The Court reinforced its message of religious bigotry through its decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,*[325] which it released only twenty-four days earlier. There, the Court held there that several Colorado Civil Rights Commissioner's statements reflected animosity to religion such that they violated the Free Exercise Clause when they ruled that a Christian bakery shop owner's refusal on religious grounds to create a cake for a same-sex couple's wedding violated the state's anti-discrimination law.[326]

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[322] *Hawaii,* 138 S. Ct. at 2416.

[323] *Id.* at 2418-19, 2423.

[324] *Id.* at 2434 (Sotomayor, J., dissenting) (quoting Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 309 (2000)).

[325] 138 S. Ct. at 1732.

[326] *Id.* at 1723-24.

Both *Masterpiece* and *The Muslim-Ban Case* addressed "whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals' fundamental religious freedom."[327] But in contrast to *The Muslim-Ban Case*, the *Masterpiece* Court rigorously reviewed the commissioners' statements—fewer in number and less disparaging than the President's tweets and press releases—for religious animus.[328] The *Masterpiece* Court did indeed "look behind" the commission process, assessing "'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.'"[329] To be sure, the facts of that case took place squarely within domestic confines. But the Court's wildly divergent standard of review in *The Muslim-Ban Case* "erodes the foundational principles of religious tolerance that the Court elsewhere has so emphatically protected,"[330] and compounds the message that some groups' religions and their intimate liberty interests merit less protection than others.

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[327] *Hawaii*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting). Although *Masterpiece* and *The Muslim-Ban Case* address distinct religious clause claims, the analysis should arguably be the same. *See id.* at 2442 ("[U]nder Supreme Court precedent, laws 'involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause.'" (quoting *Colorado Christian Univ.*, 534 F.3d at 1266 (citations omitted))); *Lukumi*, 508 U.S. at 534 ("The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination."); *id.* at 540-41 (discussing how addressing neutral laws under either the Free Exercise Clause or the Establishment Clause "'requires an equal protection mode of analysis,'" which entails "determin[ing] the [law's] object from direct and circumstantial evidence." (quoting Walz v. Tax Comm'n of New York City, 397 U.S. 664, 696 (1970) (Harlan, J., concurring) (citation omitted)). The alternative view that invoking different religious clauses should receive distinct analysis is discussed at footnotes 218-32 and accompanying text.

[328] 138 S.Ct. at 1729-31.

[329] *Id.* at 1731 (quoting Lukumi, 508 U.S. at 540).

[330] *Hawaii*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting).

The cowardice of *The Muslim-Ban Case* lies in its refusal to champion Congress's (the popular representative body) progressive opposition to discrimination and preferences for family cohesion in immigration as expressed in the INA, and to uphold the family's integral role to religious belief, as protected by the Establishment Clause.[331] The Court thus employed its rights analysis within a context of national security that immediately elevated the government interest and diminished the individual interest.[332]

But if we reconceive national identity along "communitarian principles"[333] and allow that the familial relationship is integral to our polity via "almost natural consent" and to the Establishment Clause, the weighing of interests may shift, at least to the extent that a court should review a policy's hateful motivations. This is what the Court should have done when it considered not simply the interest of the adverse parties, but the "public interest"—"the possibility of a complete, intact family to tens of thousands of Americans."[334] An even braver Court might also have looked beyond the family unit and considered the constitutional values and human relationships, which

[331] The Court also might have considered that the interests in family integrity and freedom from religious animus "reinforce each other" and therefore "heighten scrutiny of a claim that might seem at first to merit more deferential review." Brief of Amici Curiae Immigration, Family, and Constitutional Law Professors, *Hawaii*, 138 S. Ct. 2392, *supra* note 186, at 20-21 (citing Plyler, 457 U.S. at 223; Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1338–39 (2017)).

[332] This is the way rights are so often measured against one another. John Finnis explains that rights require "certain sorts of milieu—a context or framework of mutual respect and trust and common understanding which is physically heathy and in which the weak can go about without fear of the whims of the strong." FINNIS, *supra* note 255, at 216. Rights may be restricted on the basis then of public morality or public order. *Id.* These principles could support greater security at the expense of individual rights. But so too could such principles or another rights framework limit and inform rights based on the sanctity of the human relationship.

[333] Schuck, *supra* note 285, at 49-50.

[334] IRAP v. Trump, 883 F.3d 233, 271 (4th Cir.), *as amended* (Feb. 28, 2018), *cert. granted, judgment vacated*, 138 S. Ct. 2710, c*ert. granted, judgment vacated*, 138 S. Ct. 2710 (citation omitted).

might prohibit the United States from denying entry on the basis of religion to all non-citizens, including refugees, regardless of familial connection to the United States.[335] But that is not our Court. Advocates must look first to other forums in which to vindicate the universal and American values of nondiscrimination, religious freedom, protection of refugees, and family reunification. Only under the shadow of this new social contract should we expect the Court to heavily scrutinize the government's exclusion of foreign family members and refugees.

CONCLUSION

Surveying the Supreme Court's opinions during wartime, Chief Justice Rehnquist wrote: "While we would not want to subscribe to the full sweep of the Latin maxim—Inter Arma Silent Leges—that in time of war the laws are silent, perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice."[336] That is one view—a decidedly judicial view, entrenched in legal schema that favor a powerful executive and ignore marginalized victims. It is a judicial posture that has enabled the Court to embrace nationalistic

[335] A year prior to its final ruling in *The Muslim-Ban Case*, the Court showed its disregard for refugees, granting in part a stay of the Ninth Circuit's ruling that would have enjoined the ban against those refugees with formal assurances from a resettlement agency. Hawaii, 138 S. Ct. 1. These refugees had already undergone and cleared 18-to-24 months screening processes, which would have found they satisfied legal refugee-status, security, and medical requirements. *Hawai'i*, 871 F.3d at 660. They also would have already established substantial connections to the United States. The Ninth Circuit explained that in reaching a formal assurance of location, resettlement agencies "consider whether a refugee has family ties in a certain locality, whether the local agency has the language skills necessary to communicate with the refugee, whether the refugee's medical needs can be addressed in the local community, and whether employment opportunities are available and accessible." *Id*. These connections also merited constitutional protection and meaningful judicial review. At the time, there were 23,958 refugees with these formal assurances.

[336] Remarks of Chief Justice William H. Rehnquist 100th Anniversary Celebration of the Norfolk and Portsmouth Bar Association, Norfolk, Virginia (May 3, 2000), https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_05-03-00.

xenophobia and racism in the name of security.[337] But revising litigation and advocacy approaches to incorporate multiple perspectives of identity, community, and the state may overcome that judicial and legal stasis. Thus in order to best preserve and protect marginalized group members' liberty interests—including such universal and American values as religion and family—advocates should not quit the Court, but quiet its voice.

[337] *Id.* Rehnquist contended that judicial deference during wartime "represents something more than some sort of patriotic hysteria that holds the judiciary in its grip." *Id.* But, as the foregoing demonstrates, the legal rights framework in which advocates contest security and individual liberties, accommodates and nurtures "patriotic hysteria" by prioritizing executive power and accentuating citizenship, and thus stigmatizes and delegitimizes non-citizen interests.