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Quieting the Court: Lessons from *The Muslim Ban Case*

Avidan Y. Cover*

The Supreme Court's Muslim ban decision in *Trump v. Hawaii* calls into question the civil rights litigation enterprise insofar as lawsuits challenge the U.S. government's injurious 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 same 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, this 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, this 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 the family and universal values.

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I. INTRODUCTION

The United States Supreme Court’s Muslim ban decision in *Trump v. Hawaii*¹ raises an important question for civil-rights attorneys seeking protection for their clients from the U.S. government’s harmful 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?

Civil-rights attorneys have long sought refuge for their clients in court when government action threatens people’s constitutional rights. Advocates look to an independent judiciary to act as a check on the political branches, curbing majoritarian excesses. 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.

Since the 9/11 terrorist attacks, the Supreme Court has issued opinions that generally endorse the government’s national security policies and practices, including, but not limited to, long-term detention, abusive security measures, and criminalizing the teaching of international humanitarian law.³ Rather than serve as a check on the President and his invocation of

¹ This Article refers to *Trump v. Hawaii*, 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 adopt arguments, cases, and terminology that invariably validate government policies; language matters. By denominating the case as *The Muslim Ban Case* (similar to *The Chinese Exclusion Case* née *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)), this Article aims to resist validating the *Trump v. Hawaii* opinion in linguistic fashion. It is my hope that the Article raises additional questions over whether and how advocates resist legally validating the ban and future harmful government policies.

² Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1351 (2006) [hereinafter Waldron, *Judicial Review*] (quoting CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 109 (1997)).

³ See *infra* Part I.A–E. 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*] (cataloguing judicial fact-finding and deference in post-9/11 cases). Judicial deference is not merely a post-9/11 casualty; upholding executive action in the national security context has a long history. *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*

foreign affairs powers and execution of counterterrorism policies, the Court's opinions—even the “wins”—often legitimize the President's actions. Civil-rights advocates thus do not simply “lose” national security cases in the Supreme Court. 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 domestic contexts far removed from national security and foreign affairs. The government and courts may thus seek to leverage *The Muslim Ban Case*—an opinion about the President's extensive authority to limit the entry of aliens⁴ to the country—to broaden presidential powers as they relate to policies within the United States and weaken individuals' antidiscrimination protections.

The Trump presidency heightens concerns that judicial validation of belligerent national security policies 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 rely on expansive Article II theories of a powerful Executive.⁵ The Muslim ban proclamation is a prime example.⁶ Second, Pres-

80 (2015). Such scrutiny, however, may often serve to legitimize, 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 about the long-term effect on civil liberties. See Cover, *Presumed Imminence*, *supra* at 1418–19; Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 11–20 (2008); BREYER, *supra* 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 As Justice Sotomayor noted in her dissent in *The Muslim Ban Case*, “many consider ‘using the term “alien” to refer to other human beings’ to be ‘offensive and demeaning.’” *The Muslim Ban Case*, 138 S. Ct. at 2443, n.7 (Sotomayor, J., dissenting) (quoting *Flores v. U.S. Citizenship & Immigration Serv.*, 718 F.3d 548, 551 n.1 (6th Cir. 2013)). I employ the term in the Article only “to be consistent with the statutory language” that Congress has chosen and “to avoid any confusion in replacing a legal term of art with a more appropriate term.” *Id.*

⁵ 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 L. GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* at 21–25, 40–41 (2012) [hereinafter *GOLDSMITH, POWER AND CONSTRAINT*] (contending that the Obama administration largely accepted the Bush administration's national security policies). The Trump administration's arguments and policy at issue in *The Muslim Ban Case* bear some similarity to 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), *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 sixteen from twenty-four Muslim-majority states and North Korea to register with the government and provide data enabling monitoring and immigration-law enforce-

ident Trump’s two Supreme Court appointments—Brett Kavanaugh and Neil Gorsuch—will likely cement for a generation the Court’s deferential national security posture of negligibly limiting the Executive.⁷ Third, Presi-

ment. *See generally* *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008) (upholding National Security Entry–Exit Registration System (NSEERS) program). *See also* *The Muslim Ban Case*, 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 Waddell, *America Already had a Muslim Registry*, ATLANTIC (Dec. 20, 2016), <https://www.theatlantic.com/technology/archive/2016/12/america-already-had-a-muslim-registry/511214/> [<https://perma.cc/MW4M-3ULZ>] (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 visa to a citizen’s foreign spouse, even if there is “undeniable proof” of racist reasons for the denial. Transcript of Oral Argument at 12, *Kerry v. Din*, 135 S. Ct. 2128 (2015) (No. 13-1402) https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/13-1402_k536.pdf [<https://perma.cc/3U2W-NM73>]. 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. Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<https://perma.cc/3ZSV-8P43>]. DACA authorized undocumented individuals who had entered the United States as children to apply for deferral of removal. Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/EXF8-ADDG>]. 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, 146 (5th Cir. 2015). An equally divided Supreme Court affirmed the Fifth Circuit’s judgment. *United States v. Texas*, 136 S. Ct. 2271 (2016) (Mem.). As this article goes to publication, the Supreme Court is reviewing the Ninth Circuit’s decision that the Trump administration’s rescission of DACA was unlawful. *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, *U.S. Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (2019). This unfavorable judicial treatment of executive authority stands apart from most of the Court’s opinions on presidential power, raising questions of 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 that were barely recognizable from the separation-of-powers arguments they marshaled in *The Muslim Ban Case* and in other cases discussed in this article.

⁶ *See The Muslim Ban Case*, 138 S. Ct. at 2418–20 (discussing presidential authority to issue Muslim ban).

⁷ *See* Helen Klein Murillo et al., *Neil Gorsuch on National Security Law*, LAWFARE (Feb. 1, 2017, 2:51 PM), <https://www.lawfareblog.com/neil-gorsuch-national-security-law> [<https://perma.cc/Y7WW-VEJJ>] (inferring from then-Judge Gorsuch’s deferential decisions in the policing context that he would rule similarly in national security-related cases and noting his “[n]arrow, but [d]eferential, [i]mmigration [r]ulings”); Jonathan Hafetz, *Judge Kavanaugh’s Record in National-Security Cases*, SCOTUSBLOG (Aug. 29, 2018, 11:02 AM),

dent 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 when it comes to the government's stance on national security.⁸ Civil-rights advocates, however, cannot simply capitulate to government policies that target and harm immigrants and minority groups.

Litigation may serve as a necessary corrective to executive overreach and curtailment of marginalized groups' civil liberties. Filing lawsuits at the early stages of the Muslim ban rollout enabled thousands of people to enter the United States and forestall their forcible return to other nations.⁹ Civil-rights groups have seen their prominence rise, largely due to their ramped up litigation efforts against Trump.¹⁰ But in litigating, these organizations

<https://www.scotusblog.com/2018/08/judge-kavanaugh-record-in-national-security-cases/> [https://perma.cc/C7ZV-L4JW] (surveying then-Judge Kavanaugh's national security opinions and describing his jurisprudence as having "consistently articulated a broad view of executive power, a narrow conception of the judiciary's role (at least absent express instruction by Congress), and skepticism toward the enforcement of individual rights under the Constitution.").

⁸ See Burgess Everett & Marianne Levine, *McConnell Preps New Nuclear Option to Speed Trump Judges*, POLITICO (Mar. 6, 2019, 7:45 AM), <https://www.politico.com/story/2019/03/06/trump-mcconnell-judges-1205722> [https://perma.cc/X34E-4UEC] (noting Trump's appointment of "roughly 20 percent of the Circuit Court seats in the country after just two years in office" has resulted in "few, if any, vacancies there for a potential Democratic president in 2021"). See also 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®ion=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").

⁹ See, e.g., Maeve Higgins, *Opinion, 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> (discussing civil-rights advocates efforts to support refugees and immigrants from the seven majority Muslim countries banned by President Trump).

¹⁰ Anthony D. Romero, *Here Is the ACLU's 7-Point Plan of Action to Take on the Trump Administration*, ACLU (Jan. 19, 2017, 9:15 PM), <https://www.aclu.org/blog/civil-liberties/executive-branch/here-aclu-7-point-plan-action-take-trump-administration> [https://perma.cc/4FBZ-JDUW] ("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."). See also Joel Lovell, *Can the A.C.L.U. Become the N.R.A. for the Left?*, N.Y. TIMES (July 2, 2018), <https://www.nytimes.com/2018/07/02/magazine/inside-the-aclu-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); Liam Stack, *Donations to A.C.L.U. and Other Organizations Surge After Trump's Order*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/us/aclu-fund-raising-trump-travel-ban.html> (describing ACLU and National Immigration Law Center's increase in number and size of donations). In the fifteen 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). Lovell, *supra*.

may want to consider approaches that avoid constitutional issues in favor of statutory claims. In fashioning such claims litigants may avoid precedents with wider constitutional repercussions and confine holdings to respective legislation. They also may want to 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. Ultimately, however, civil-rights advocates should not limit their appeals to the courtroom.

Civil-rights advocates must not abandon litigation as an advocacy tool, but they should explore other means, concentrating, for example, on electoral efforts at both the congressional and presidential levels.¹¹ 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 because it violated congressionally-passed Uniform Code of Military Justice provisions.¹² 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.¹³ The indefinite and expanding nature of national

¹¹ See Faiz Shakir, *How the ACLU Plans to Engage in the 2018 Midterm Elections*, ACLU (Jan. 11, 2018, 11:45 AM), <https://www.aclu.org/blog/mobilization/how-aclu-plans-engage-2018-midterm-elections> [https://perma.cc/R8MJ-TRYS] (describing how “the ACLU plans to do electoral work in a serious way for the first time” but remain non-partisan). See also Shadi Hamid, *The Travel Ban, the Law, and What's 'Right'*, ATLANTIC (June 28, 2018), <https://www.theatlantic.com/ideas/archive/2018/06/trump-travel-ban-supreme-court/564044/> [https://perma.cc/JTD2-FB26] (characterizing *The Muslim Ban Case* as “correct,” though perhaps not “right,” and proposing that instead of litigating “[m]oral judgments on constitutionally and legally muddy debates . . .” advocates are better served by “. . . persuading as many of our fellow citizens that they should stop voting for anti-Muslim presidents.”).

¹² See *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (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, 704 (2008).

¹³ 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, 7:14 AM), <https://www.politico.com/story/2018/12/24/democrats-911-war-powers-military-1074808> [https://perma.cc/8YBN-VYR7] (addressing congressional interest in revising the 2001 Authorization for Use of Military Force, which three presidents have relied on when 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*, GUARDIAN (Mar. 15, 2019, 5:24 PM), <https://www.theguardian.com>

security threats and the concomitant concentration and expansion of power in the executive branch demands civil-rights advocates' increased attention to the electoral process.

Advocacy groups should also 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 more often than not, 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.

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 may invite the Supreme Court's validation of executive branch policies. Rather than run to the courts, this article argues that advocates should explore varied approaches outside litigation that channels a broader understanding of national identity that might embrace foreign family members and refugees. Part I addresses the case against litigation, by examining how *The Muslim Ban Case* is no aberration, but rather is the product of a national security jurisprudence upholding executive branch policies and is a harbinger of future judicially validated civil-rights violations. Part I also addresses several problematic aspects shared by *The Muslim Ban Case* and other national security cases, which illustrate the danger of the Supreme Court's review. Part II considers legal scholarship cautioning against advocacy that relies heavily on litigation. Part II 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 IV addresses the case for litigation in the face of these specific and general concerns. 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.

II. THE SPECIFIC CASE AGAINST LITIGATION

The Muslim Ban Case illustrates the lengths to which the Court defers to the President in the context of national security context. After purporting to consider President Trump and his advisors' numerous anti-Muslim statements in connection with the Muslim ban, the Court upheld Proclamation No. 9645¹⁴ because, on its face, the ban supported legitimate national security interests.¹⁵ The Court acknowledged the 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.¹⁶ The Court's inclination to divorce presidential policy from its 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.¹⁷

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. Thus, *The Muslim Ban Case* is not an anomaly; it is a warning of what is to come. Accordingly, the opinion 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.

¹⁴ Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, Proclamation No. 9645, 3 CFR § 135 (2018).

¹⁵ *Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct. 2392, 2420–23 (2018).

¹⁶ *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 today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim.”).

¹⁷ 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. Colo. 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*).

A. Deference

The Court echoed its prior 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."¹⁸ Courts have frequently justified their supine review on any number of considerations, including the action or precipitating event's temporary or emergent nature, the international or foreign affairs dimension, and the issue's complexity, imprecision, or secrecy.¹⁹

The Court relied, for example, on *Ziglar v. Abbasi*, which held that executive officials enjoy immunity from lawsuits brought by non-citizens abused while in detention immediately following the 9/11 terrorist attacks.²⁰ The Court rejected the former detainees' lawsuit, in part, because judicial review of the executive branch's national security decisions intrudes on constitutional separation of powers.²¹

Similarly, the Court relied on *Holder v. Humanitarian Law Project*, which held that teaching international law to members of a terrorist organization constitutes material support of terrorism.²² 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" regarding "questions of national security."²³

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 minority groups' legal interests. And the reasoning itself only reinforces and calcifies the deferential posture for future national security cases.

¹⁸ *The Muslim Ban Case*, 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)).

¹⁹ See Cover, *Presumed Imminence*, *supra* note 3, at 1453–55 (discussing cases).

²⁰ *The Muslim Ban Case*, 138 S. Ct. at 2419; *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1869 (2017).

²¹ *Ziglar*, 137 S. Ct. at 1861.

²² *The Muslim Ban Case*, 138 S. Ct. at 2419; *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010).

²³ *The Muslim Ban Case*, 138 S. Ct. at 2419 (quoting *Holder*, 561 U.S. at 34). 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 *Chi. & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948)).

B. Heightened Executive Power

The Court frequently premises its deferential analysis on the relative skill and expertise of the political branches.²⁴ 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 made the case for a stronger presidency and downplayed the President's precise conduct. While purporting to give equal weight to the general and specific—"we must consider not only the statements of a particular President, but also the authority of the Presidency itself"—the Court ultimately paid little heed to President Trump's remarks.²⁵ 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.²⁶

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.²⁷ 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.²⁸ But the 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."²⁹ Ele-

²⁴ 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"); *Holder*, 561 U.S. at 35 (describing political branches as "uniquely positioned" to assess how particular activities relate to and impact terrorism and foreign policy).

²⁵ *The Muslim Ban Case*, 138 S. Ct. at 2418.

²⁶ *Id.* ("But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility.").

²⁷ *Id.* at 2408.

²⁸ *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. In the first category, the President's "authority is at its maximum" when he "acts pursuant to an express or implied authorization of Congress," 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." *Id.* at 637. Here, the President acts on his "independent" authority, without "either a congressional grant or denial of authority." *Id.* 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.

²⁹ *The Muslim Ban Case*, 138 S. Ct. at 2424 (Thomas, J., concurring).

vating presidential authority on such ambiguous bases, separate from constitutionally express or implied grants, “invite[s] political abuse and endanger[s] individual liberties.”³⁰ 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 any serious discussion of the policy’s motivations or its impact on the plaintiffs and others similarly situated. In a not so subtle fashion, the Court pushes aside 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[.]”³¹ the Court devoted only three brief paragraphs to the statements.³² In contrast to the majority’s “highly abridged account,”³³ Justice Sotomayor’s dissent documents the statements in numerous paragraphs, bringing the Proclamation’s background of anti-Muslim animus to the forefront.³⁴

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”³⁵

³⁰ Louis Fisher, *The Unitary Executive and Inherent Executive Power*, 12 U. PA. J. CONST. L. 569, 589 (2010).

³¹ *The Muslim Ban Case*, 138 S. Ct. at 2417.

³² *See id.*

³³ *Id.* at 2435 (Sotomayor, J., dissenting).

³⁴ *See id.* at 2435–38.

³⁵ Proposed Third Amended Complaint for Declaratory and Injunctive Relief at ¶ 54, *Hawaii v. Trump*, 258 F. Supp. 3d 1188 (D. Haw. 2017) (No. 1:17-cv00050-DKW-KSC), https://www.hoganlovells.com/~/_media/hogan-lovells/pdf/hawaii/2017_10_10_367_1_proposed_third_amended_complaint_and_inj.pdf [<https://perma.cc/C3U8-N9PM>] [hereinafter, Proposed Third Amended Complaint] (quoting Press Release, Donald J. Trump for President, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015)).

- 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.”³⁶
- 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.”³⁷
- After President Trump signed the first Executive Order iteration of the ban, his legal advisor 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.’”³⁸
- 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 down version of the first one,” 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.”³⁹
- Among his many statements on Twitter supporting the Muslim ban, President Trump tweeted: “The travel ban into the United States should be far larger,

³⁶*Id.* at ¶ 57 (quoting *Anderson Cooper 360 Degrees: Exclusive Interview with Donald Trump*, CNN (Mar. 9, 2016, 8:00 PM), <http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html> [https://perma.cc/TDA3-23W5]).

³⁷*Id.* at ¶ 62 (quoting *Meet the Press with Chuck Todd*, NBC (July 24, 2016), <https://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706> [https://perma.cc/W322-NPD3]).

³⁸*Id.* at ¶ 70 (quoting Amy B. Wang, *Trump Asked for a ‘Muslim Ban,’ Giuliani Says—and Ordered a Commission to Do It Legally*, WASH. POST (Jan. 29, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/> [https://perma.cc/LBS4-3HSV]).

³⁹*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://time.com/4703622/president-trump-speech-transcript-travel-ban-ruling/> [https://perma.cc/V372-V5V9]).

tougher and more specific[] but stupidly, that would not be politically correct!”⁴⁰

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,”⁴¹ but that “we must consider not only the statements of a particular President,”⁴² and that “the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.”⁴³ 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.”⁴⁴ 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.”⁴⁵

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, might seemingly justify looking away from the anti-Muslim statements and focusing instead on the abstracted question of the denial of entry to foreign nationals.⁴⁶ 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*, 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 9/11 terrorist attacks.⁴⁷ In holding that the plaintiff’s allegations were implausible because they were “conclusory,” the majority characterized specif-

⁴⁰ *Id.* at ¶ 87 (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 15, 2017, 3:54 AM), <https://twitter.com/realDonaldTrump/status/908645126146265090> [<https://perma.cc/FL4H-VGFR>]).

⁴¹ *Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct. 2392, 2420 (2018).

⁴² *Id.* at 2418.

⁴³ *Id.* at 2423.

⁴⁴ *Id.* at 2418.

⁴⁵ *Id.*

⁴⁶ *See id.* at 2416.

⁴⁷ *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

ic paragraphs as “bare assertions” without considering the complaint as a whole and numerous other paragraphs supporting the discrimination claims.⁴⁸ 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).”⁴⁹ Thus, the Court often justifies its deference to the Executive on an inverse relationship between high presidential acumen and minimal impact on the targeted population. The Court appears predisposed to ignore or explain away the harms that outgroups suffer, creating a “willful-blindness” within the Supreme Court.

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.⁵⁰ In addressing Japanese-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: “[t]o 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.”⁵¹ There too the Court denied any racist element and then elevated the security interests: war, military necessity, exigency, and political branch determinations.⁵² 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. *The Muslim Ban Case* is another example of how even when such animus is present, it does not *offend* the Constitution.

⁴⁸ *Id.* The dissent saw the majority’s interpretation of the complaint’s facts as highly selective. *See id.* at 697–99 (Souter, J., dissenting) (“The fallacy of the majority’s position, however, lies in looking at the relevant assertions in isolation. . . . 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.”) (internal quotations omitted).

⁴⁹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). *See also Iqbal*, 556 U.S. at 696 (Souter, J., dissenting) (explaining that at this stage in the pleadings the allegations are assumed to be true).

⁵⁰ *See The Muslim Ban Case*, 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 that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission.”).

⁵¹ *Korematsu v. United States*, 323 U.S. 214, 223 (1944), *abrogated by The Muslim Ban Case*, 138 S. Ct. at 2423.

⁵² *See Korematsu*, 323 U.S. at 223–24.

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.⁵³

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."⁵⁴ The Court explained that the "national security and foreign affairs context" affected the "scope of the constitutional right" and "standard of review," leading it to reject the Establishment Clause's "*de novo* 'reasonable observer' inquiry."⁵⁵ 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.⁵⁶ But the plaintiffs were not those seeking entry to the United States; they were American citizens within the confines of the country.⁵⁷

The Court then claimed that the foreign affairs-national-security-entry context should require it to apply "a more constrained standard of review," that requires "asking only whether the policy is facially legitimate and bona fide."⁵⁸ However, apparently because the government conceded at oral argument that reviewing the President's disparaging comments was proper, the Court acknowledged that it could "look behind the face of the Proclamation."⁵⁹ 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 official's denial of a visa when there is "an affirmative showing of bad faith."⁶⁰ Jus-

⁵³ See Maryam 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/> [https://perma.cc/UB2V-V59F].

⁵⁴ *The Muslim Ban Case*, 138 S. Ct. at 2418.

⁵⁵ *Id.* at 2418, 2420 nn.5 & 6.

⁵⁶ See *id.*

⁵⁷ *Id.* at 2406.

⁵⁸ *Id.* at 2420 & n.5.

⁵⁹ *Id.*

⁶⁰ *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring).

tice Kennedy’s level of review would have seemed warranted given the alleged liberty interests implicating the family relationship.⁶¹

Instead, the Court deviated from even the “circumscribed review” precedent, holding that its “look behind” would entail only “rational basis review.”⁶² 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.”⁶³ The Court never once addressed its failure to utilize Justice Kennedy’s analysis that is vital where plaintiffs credibly allege ill motive.

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.”⁶⁴ 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.⁶⁵ Indeed, although the Court indicated it would review the statements, the Court’s “highly abridged account” of the statements lacked any substantive discussion.⁶⁶

The Court also departed from the analytical approach it had utilized in prior cases alleging discriminatory motivation. 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*, the Court did not simply accept Colorado’s claims that the landlords’ freedom of association, discomfort with homosexuality, and preserving government re-

⁶¹ See *infra* Part IV.C.5.

⁶² *The Muslim Ban Case*, 138 S. Ct. at 2420.

⁶³ See *id.* at 2440 & n.5 (Sotomayor, J., dissenting) (“Finally, even assuming that *Mandel* and *Din* apply here, they would not preclude us from looking behind the face of the Proclamation because plaintiffs have made ‘an affirmative showing of bad faith,’ by the President who, among other things, instructed his subordinates to find a ‘lega[ll]’ way to enact a Muslim ban.”) (quoting *Din*, 135 S. Ct. at 2141).

⁶⁴ *Id.* at 2420. 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*, 570 U.S. 744, 770 (2013) (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973)).

⁶⁵ *The Muslim Ban Case*, 138 S. Ct. at 2420–23.

⁶⁶ *Id.* at 2435 (Sotomayor, J., dissenting).

sources to fight discrimination against other groups justified the state constitutional amendment's prohibition on ordinances protecting the gay community from discrimination.⁶⁷ 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.⁶⁸

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 "extrinsic evidence," "look behind," and "probe the sincerity of the stated justifications for the policy," the Court engaged in no such inquiry.⁶⁹ The Court found that the government's reasons proffered for the Proclamation were sufficient. But a judicial review that discounts evidence—as was in ample supply here—of the "bare . . . desire to harm a politically unpopular group" will inevitably accept any pretext and sanction the policy.⁷⁰

E. Precedent and Contagion

The Muslim Ban Case's ambiguity as to what triggers its circumscribed inquiry raises concerns about the clarity and scope of its applicability. 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 increas-

⁶⁷ *Romer v. Evans*, 517 U.S. 620, 635 (1996).

⁶⁸ *Id.* at 631–34. *See also* *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540–41 (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").

⁶⁹ *The Muslim Ban Case*, 138 S. Ct. at 2420; *id.* at 2418.

⁷⁰ *Romer*, 517 U.S. at 634 (alteration in original) (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

⁷¹ *The Muslim Ban Case*, 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. *See also id.* at 2424 (Kennedy, J., concurring) (characterizing *The Muslim Ban Case* as one entailing "the conduct of foreign affairs").

ing deference raise concerns about 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 cases have had far-reaching consequences, impacting case law in as routine areas as standing, pleading standards, and government immunity.

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 heavily weigh the interference litigation might pose.⁸⁰ It may also 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 solely a byproduct of national security litigation. But this context may have played a precipitating or aggravating role.

And in *Clapper v. Amnesty International USA*, 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’”⁸² The Court held the plaintiffs could not satisfy the requirement despite their showing that their conduct fell within the ambit of the challenged act's interceptive

⁷⁷ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

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 *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013).

scope, and the government's past monitoring, motive, and capability to intercept such communications.⁸³ The national security context undoubtedly influenced the Court, compelling it to explicitly note that "separation-of-powers principles" called for judicial reticence.⁸⁴ But courts may not cabin *Clapper* to the foreign intelligence gathering context. It is possible that the opinion will have a "transsubstantive" effect, requiring a heightened showing for standing in a range of settings beyond national security and foreign affairs.⁸⁵

Similar transsubstantive questions arise over the *Bivens* doctrine.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 that may limit federal government liability beyond the national-security context.

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. But lower courts have cited *The Muslim Ban Case* with approval in deferring to executive actions in the military context⁸⁸ and denying equal protection claims brought by parents of foreign nationals outside the United States who allege discrimination based on presidential statements.⁸⁹ In

⁸³ See *id.* at 408–10. See also *id.* at 427–31 (Breyer, J., dissenting) (recounting reasons government was likely to intercept plaintiffs' communications and noting that "certainty is not, and never has been, the touchstone of standing.>").

⁸⁴ *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") (citations omitted).

⁸⁵ See Alan Z. Rozenstein, *Clapper Opinion Recap: Supreme Court Denies Standing to Challenge NSA Warrantless Wiretapping*, LAWFARE (Feb. 26, 2013, 9:17 PM), <https://www.lawfareblog.com/clapper-opinion-recap-supreme-court-denies-standing-challenge-nsa-warrantless-wiretapping>

⁸⁶ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (holding that persons injured by federal agents' constitutional violation—here, of the Fourth Amendment—may seek money damages in federal court).

⁸⁷ *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860–63 (2017).

⁸⁸ See *Doe 2 v. Shanahan*, 755 F. App'x 19, 24–25 (D.C. Cir. 2019) (per curiam) (relying on *The Muslim Ban Case* as support for its deferring to the military's decision to exclude transgender individuals from military service).

⁸⁹ See generally *S.A. v. Trump*, 363 F. Supp. 3d 1048 (N.D. Cal. 2018) (holding that *The Muslim Ban Case's* "circumscribed inquiry" applied to an equal protection challenge asserting discriminatory intent brought by parents legally within the United States whose children would be denied entry into the country because of the termination of the Central American Minors program). In *S.A.*, the court rejected the plaintiffs' argument "that the court should infer from President Trump's anti-Latino statements that the government acted with discrimina-

contrast, other lower courts have restricted *The Muslim Ban Case* to circumstances that implicate the rights of foreign nationals seeking entry to the United States⁹⁰ and national security or foreign policy concerns.⁹¹ Other

tory animus and thus violated their equal-protection rights” because they relied on “cases that do not involve the admission of foreign nationals into the United States. . . .” *Id.* at 1095. *See also* Gutierrez-Soto v. Sessions, 317 F. Supp. 3d 917, 930–31 (W.D. Tex. 2018) (applying *The Muslim Ban Case*’s deferential standard to Mexican citizens’ equal protection challenge to their detention and revocation of humanitarian parole by immigration officials).

⁹⁰ *See* Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec., 908 F.3d 476, 519–20 (9th Cir. 2018) (holding *The Muslim Ban Case* inapposite and does not preclude plaintiffs’ constitutional challenge to the government’s rescission of the Deferred Action for Childhood Arrivals program based in part on “the physical location of the plaintiffs within the geographic United States”), *cert. granted*, Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 139 S. Ct. 2779 (2019); *Saget v. Trump*, 375 F. Supp. 3d 280, 367 (E.D.N.Y. 2019) (holding “deferential standard employed in *The Muslim Ban Case* does not apply to . . . constitutional challenges to Haiti’s TPS [Temporary Protected Status] termination” brought by Haitian nationals within the United States); *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 666 (S.D.N.Y. 2019) (rejecting *The Muslim Ban Case*’s deferential standard for analyzing plaintiffs’ claim that adding citizenship question to census violates equal protection under the Fifth Amendment’s Due Process Clause. “It is one thing to uphold an Executive Branch decision that could ‘reasonably be understood to result from a justification independent of an unconstitutional purpose in a context where the President exercises nearly ‘plenary’ power.’”) (citation omitted), *aff’d in part, rev’d in part and remanded on other grounds*, Dep’t of Commerce v. New York, 139 S. Ct. 2551 (2019); *CASA de Md., Inc. v. Trump*, 355 F. Supp. 3d 307, 322–23 (D. Md. 2018) (rejecting *The Muslim Ban Case*’s deferential standard for analyzing Salvadoran nationals’ equal protection challenge to termination of El Salvador’s TPS designation); *Serv. Women’s Action Network v. Mattis*, 352 F. Supp. 3d 977, 988 (N.D. Cal. 2018) (rejecting *The Muslim Ban Case*’s deferential standard as required for “reviewing military decisions” in analyzing women soldiers and marines’ equal protection challenges to restrictive assignment policies and segregated training); *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1105–06 (N.D. Cal. 2018) (rejecting *The Muslim Ban Case*’s deferential standard for analyzing Haitian, Nicaraguan, Salvadoran, and Sudanese nationals’ equal protection challenge to termination of their nations’ TPS designations); *Presente v. U.S. Dep’t of Homeland Sec.*, 332 F. Supp. 3d 393, 411–12 (D. Mass. 2018) (rejecting *The Muslim Ban Case*’s deferential standard for analyzing Haitian, Honduran, and Salvadoran nationals’ equal protection and due process challenge to termination of their nations’ TPS designations); *NAACP v. U.S. Dep’t of Homeland Sec.*, 364 F. Supp. 3d 568, 576 (D. Md. 2019) (rejecting *The Muslim Ban Case*’s deferential standard for analyzing Haitian nationals’ equal protection challenge to termination of Haiti’s TPS designation). *See also* E. Bay Sanctuary Covenant v. Trump, 909 F.3d 1219, 1249–50 (9th Cir. 2018) (citing 8 U.S.C. § 1182(f) (2018)); *Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct. 2392, 2408 (2018) (rejecting government’s contention that “President’s authority to suspend aliens from entering the country, and to do so by proclamation” permitted President to deny eligibility for asylum to those who illegally entered the country by not presenting themselves at a port of entry because “the rule of decision imposes the penalty on aliens already present within our borders”); Alison Frankel, *Judges to DOJ: Don’t Overread Supreme Court’s Ruling in Trump v. Hawaii (The Muslim Ban Case)*, REUTERS (July 27, 2018, 1:47 PM), <https://www.reuters.com/article/legal-us-otc-hawaii/judges-to-doj-dont-overread-supreme-courts-ruling-in-trump-v-hawaii-idUSKBN1KH2DT> (describing early lower court decisions rejecting the government’s reliance on *The Muslim Ban Case* and observing “even great victories can pale in exaggeration”).

courts have distinguished the ban as a policy the President established under a broad grant of power from Congress.⁹² Courts have also emphasized the ban's facial neutrality as to protected groups.⁹³ Some courts have also stressed the "worldwide, multi-agency review" that the government purported to rely on in issuing the Proclamation to distinguish other restrictive policies from falling under *The Muslim Ban Case* precedent.⁹⁴

Courts have also struggled over the degree to which *The Muslim Ban Case* permits courts to consider extrinsic evidence under its deferential standard of review. Some lower courts have stressed that the Supreme Court's "look behind" means that "[j]udicial review, though more deferential than traditional strict scrutiny, remains fact based."⁹⁵ But other courts have construed *The Muslim Ban Case* to direct a court reviewing matters relating to national security and foreign affairs not to "substitute" [its] own 'predictive judgments,' or its own 'evaluation of the underlying facts,' for those of the President.⁹⁶ Yet in the domestic context, lower courts have

⁹¹ See *Regents of the Univ. of Cal.*, 908 F.3d at 520 ("[O]ur case differs from *Hawaii* in several potentially important respects, including . . . the lack of a national security justification for the challenged government action . . ."); *Saget*, 375 F. Supp. 3d at 367; *New York*, 351 F. Supp. 3d at 666 ("Nothing in the opinion indicates that this 'circumscribed inquiry' applies outside of the 'national security and foreign affairs context,'" and which, if applied more broadly, "would decimate [Equal Protection] jurisprudence altogether"); *CASA de Md., Inc.*, 355 F. Supp. 3d at 323; *Serv. Women's Action Network*, 352 F. Supp. 3d at 988; *Ramos*, 336 F. Supp. 3d at 1105; *Centro Presente*, 332 F. Supp. 3d at 411–12; *NAACP*, 364 F. Supp. 3d at 576.

⁹² See, e.g., *Ramos*, 336 F. Supp. 3d at 1105–06.

⁹³ *Saget*, 375 F. Supp. 3d at 367; *Karnoski v. Trump*, 328 F. Supp. 3d 1156, 1160 (W.D. Wash. 2018) (denying government motion for protective order in challenge to military service ban on openly transgender people).

⁹⁴ See *Karnoski*, 328 F. Supp. 3d at 1160 (holding that *The Muslim Ban Case* does not preclude discovery in lawsuit over military's transgender ban).

⁹⁵ *Ramos*, 336 F. Supp. 3d at 1108. See also *Robinson v. Purkey*, No. 3:17-cv-01263, 2018 WL 5023330, at *8 (M.D. Tenn. June 11, 2018) ("The *Trump v. Hawaii* court's analysis, however, was, if anything, notable for being particularly situationally-minded and fact-intensive."). But the nature and scope of review is hardly clear. As one district court noted, the Court failed to "explain[] the precise contours of its inquiry." *Texas v. United States*, 328 F. Supp. 3d 662, 708–09 (S.D. Tex. 2018) ("Trump v. Hawaii only speaks to the circumstances under which a court may look behind the Executive's discretionary exclusion of certain aliens to determine whether the decision was motivated by unconstitutional reasons.").

⁹⁶ *Doe 2 v. Shanahan*, 917 F.3d 694, 720 (D.C. Cir. 2019) (Williams, J., concurring) (quoting *Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct. 2392, 2421–22 (2018)). Judge Williams explained that *The Muslim Ban Case's* deferential review—"uphold the [challenged] policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds"—should apply to a ban on transgender individuals serving in the military. *Id.* at 731 (alteration in original) (quoting *The Muslim Ban Case*, 138 S. Ct. at 2420). Judge Williams reasoned that the lenient review should apply because inquiry into such national security issues "raises concerns for the separation of powers' by intruding on the Presi-

also cited *The Muslim Ban Case* as reflecting an “evolving First Amendment jurisprudence suggest[ing] that courts should consider the historical and social context underlying a challenged government action to determine whether the action was neutral or motivated by hostility toward religion.”⁹⁷

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.⁹⁸ These scholars contend 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).”⁹⁹

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.¹⁰⁰

dent’s constitutional responsibilities” and “‘when it comes to collecting evidence and drawing inferences’ on questions of national security, ‘the lack of competence on the part of the courts is marked.’” *Id.* at 732 (quoting *The Muslim Ban Case*, 138 S. Ct. at 2419). *See also* Yafai v. Pompeo, 924 F.3d 969, 973 (7th Cir. 2019) (addressing visa application denial, holding that, per *Mandel* and *Din*, “a reviewing court looks to the face of the order only” and noting that “at the request of the government, [*The Muslim Ban Case*] Court assumed that it could look behind the face of the order given the circumstances of that case. . . . [and] carefully confined [that assumption] as one ‘for our purposes today’”); *Doe 2 v. Shanahan*, 755 F. App’x 19, 24–25 (D.C. Cir. 2019) (quoting *The Muslim Ban Case*, 138 S. Ct. at 2421–22) (dissolving injunction against military’s transgender ban). However, at least one district court held that, notwithstanding “significant similarities between the Court’s deference to Congress in military affairs and its deference to the President in immigration affairs. . . the *Trump [v. Hawaii]* decision is tangential, at best, to” an equal protection challenge to male-only military draft registration requirement. *Nat’l Coal. for Men v. Selective Serv. Sys.*, 355 F. Supp. 3d 568, 577 (S.D. Tex. 2019). The court therefore applied a heightened level of scrutiny. *Id.* at 578 (citing *Rostker v. Goldberg*, 453 U.S. 57, 72 (1981)).

⁹⁷ *New Hope Family Servs., Inc. v. Poole*, 387 F. Supp. 3d 194, 213 (N.D.N.Y. 2019); *Moses v. Ruzskowski*, No. S-1-SC-34974, 2018 WL 6566646, at *9 (N.M. Dec. 13, 2018).

⁹⁸ *See* Adam Cox et al., *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/> [<https://perma.cc/N4PX-R75S>].

⁹⁹ *Id.* Cox et al. further contend that the Muslim ban’s “doctrinal approach is irrelevant to other cases, even if those cases involve the rights of noncitizens.” *Id.*

¹⁰⁰ *See* Robert Barnes, *Trump Officials Aggressively Bypass Appeals Process to Get Issues Before Conservative Supreme Court*, WASH. POST (Oct. 23, 2018), 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 [<https://perma.cc/SJP8-JE5J>]. The Trump administration has not always been successful. The Supreme Court rejected a government request

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 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.¹⁰¹

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.¹⁰² The Court also may have validated the ban by improving its most extreme features through a protracted legal process in the lower courts, which it oversaw both through its engagement and its silence.¹⁰³ As a result of the government's changes, the third version

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, 3:56 PM), <https://www.scotusblog.com/2018/12/justices-rebuff-government-on-asylum-ban/> [<https://perma.cc/T28N-TTUY>].

¹⁰¹ CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 52 (1960).

¹⁰² See Hamid, *supra* note 11 (“[*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.”).

¹⁰³ Dara Lind, *How Trump’s Travel Ban Became Normal*, VOX (June 26, 2018, 10:43 AM), <https://www.vox.com/2018/4/27/17284798/travel-ban-scotus-countries-protests> [<https://perma.cc/X8PR-PH2S>].

of the Muslim ban was still a ban, but different in form and asserted rationale, which enabled the Court to uphold its validity. Prior national security cases illustrate a comparable legitimacy-through-litigation process.

Jack Goldsmith argues that the limits on presidential power imposed by “the GTMO habeas cases . . . also empowered the presidency and the military, directly and indirectly. . . .”¹⁰⁴ In Goldsmith’s account, civil-rights advocates’ legal challenges to executive detention at Guantanamo, led to the “ironic[]” and unintended consequences of securing indefinite detention in the rule of law.¹⁰⁵

Goldsmith explains that, “as a result of judicial and legislative interventions . . . there is no doubt now that these [executive counterterrorism] practices . . . are lawful and legitimate within the American constitutional system.”¹⁰⁶ The very fact of judicial and legislative consideration amounted more to “caveats,” which “empowered” rather than weakened the presidency.¹⁰⁷ While allowing that “the courts and Congress imposed significant constraints 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.”¹⁰⁸ Similarly, the Court’s rulings encouraged the political branches to improve counterterrorism policies such as detention review.¹⁰⁹ But such “improvements” were largely procedural, leaving detainees indefinitely at Guantanamo. Thus, while the system of checks and balances “works,” it fails to fundamentally alter the Executive’s actions or substantively protect individuals’ civil rights.¹¹⁰

¹⁰⁴ GOLDSMITH, POWER AND CONSTRAINT, *supra* note 5, at 194.

¹⁰⁵ *Id.* at 196.

¹⁰⁶ *Id.* at 194.

¹⁰⁷ *Id.*

¹⁰⁸ *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.*

¹⁰⁹ *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.

¹¹⁰ *See* Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1016 (2008) (observing that “war on terror” litigation in U.S. courts has been fixated on process to a degree that is peculiar . . . and there is something particular about American legal culture at this moment in time that provides at least part of th[e] explanation”); *id.* at

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.¹¹¹ Though the Court famously intoned after the 9/11 terrorist attacks that "a state of war is not a blank check for the President," 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.¹¹²

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.¹¹³ 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.¹¹⁴ 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.¹¹⁵

Regarding jurisdiction, *The Muslim Ban Case* is similar to other "judicial victories" in that the Court rejected the government's arguments based on the consular non-reviewability doctrine that the challenge to the travel ban

1092 ("Unfortunately, the 'war on terror' litigation thus far seems to have resulted in a great deal of process, and not much justice.").

¹¹¹ See Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 J. LEGAL EDUC. 433, 448–49 (2010); Martinez, *supra* note 110, at 1014–15.

¹¹² *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 533 (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") (emphasis added).

¹¹³ See Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122, 127–30 (2011).

¹¹⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) ("Nothing prevents the President from returning to Congress to seek the authority he believes necessary."). See Martinez, *supra* note 110, at 1030.

¹¹⁵ 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 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.").

was not justiciable.¹¹⁶ The Court resisted government contentions that because aliens had no right to enter the United States and that excluding aliens was “a fundamental act of sovereignty” by a political branch, courts could only review exclusions where Congress so expressly authorized.¹¹⁷ But judicial review is not a vindication of the rights asserted.¹¹⁸ The Court “assume[d] without deciding” that it could review the plaintiffs’ statutory claims.¹¹⁹ 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.¹²⁰

¹¹⁶ See *Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct. 2392, 2407 (2018). 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. *Id.* (citing *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 153 (2013)).

¹¹⁷ *Id.* (quoting *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542–543 (1950)).

¹¹⁸ See BLACK, *supra* note 101, at 52. The ongoing litigation saga over jurisdiction and detainee rights at Guantanamo Bay evidences the less than inevitable relationship between justiciability and rights and remedies. See *Rasul v. Bush*, 542 U.S. 466, 483 (2004) (holding that courts have statutory jurisdiction to review Guantanamo Bay detainees’ habeas claims but failing to address potential constitutional violations). It would take another four years before the Court held that the Constitution’s Suspension Clause applied at Guantanamo, and that the Detainee Treatment Act was “an inadequate substitute for habeas corpus.” *Boumediene v. Bush*, 553 U.S. 723, 771–72 (2008). But detainees languish at Guantanamo still. The Court has repeatedly denied detainees’ subsequent petitions for certiorari over the continuing congressional and constitutional bases for detention. See, e.g., *al-Alwi v. Trump*, 139 S. Ct. 1893, 1894 (2019) (Breyer, J., dissenting from denial of certiorari) (“al-Alwi faces the real prospect that he will spend the rest of his life in detention based on his status as an enemy combatant a generation ago, even though today’s conflict may differ substantially from the one Congress anticipated when it passed the AUMF,” and prior armed conflicts that influenced international humanitarian law) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion)).

¹¹⁹ *The Muslim Ban Case*, 138 S. Ct. 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. *Id.* 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 Ctr. 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. *Sale*, 509 U.S. at 159. See also *id.* at 188 (“Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested. That presumption 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 Exp. Corp.*, 299 U.S. 304 (1936)).

¹²⁰ *The Muslim Ban Case*, 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 Marty Lederman, *Contrary to Popular Belief, the Court Did Not Hold That the Travel Ban Is Lawful—Anything But. (Which Makes Its Ruling,*

The judicial process, including the Court's direct involvement, pushed the government to amend, validate, and possibly sanitize the Muslim ban.¹²¹ The first iteration of the Muslim ban was hastily issued within one week of President Trump's inauguration and 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; (7) banned all other refugees' entry for 120 days; and (8) directed officials to prioritize refugee claims of religious minorities facing persecution (which appeared to select Christian minorities for special protections).¹²² The rollout of the order led to detentions of hundreds, chaos at airports, panic for thousands of foreign nationals and their family members, as well as public protests, multiple lawsuits, and the firing of the attorney general for refusing to defend the order.¹²³

Justice Kennedy's Deference, and the President's Enforcement of the Ban Even More Indefensible.), BALKANIZATION (July 2, 2018), <https://balkin.blogspot.com/2018/07/contrary-to-popular-belief-court-did.html> [<https://perma.cc/ZH27-SHYT>]. But the Court held that the question went to the merits rather than justiciability. See *The Muslim Ban Case*, 138 S. Ct. at 2416; *infra* Part IV.C.5.

¹²¹ See generally Lind, *supra* note 103 (observing that changes to the ban over the course of litigation "normalized" the policy, which likely influenced the Supreme Court's ruling). See also *Timeline of the Muslim Ban*, ACLU WASH., <https://www.aclu-wa.org/pages/timeline-muslim-ban> [<https://perma.cc/F5HP-NXRL>] (last visited Dec. 27, 2019) (providing a timeline of the Muslim ban and related litigation).

¹²² Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017). See Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

¹²³ See *Litigation Documents & Resources Related to the Travel Ban*, LAWFARE, <https://www.lawfareblog.com/litigation-documents-resources-related-travel-ban> [<https://perma.cc/ZF6E-42R5>] (last updated Dec. 23, 2018) (providing documents from various cases litigating the Muslim ban as of December 23, 2018); 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 [<https://perma.cc/9JML-LGC9>]; Ryan Lizza, *Why Sally Yates Stood Up to Trump*, NEW YORKER (May 22, 2017), <https://www.newyorker.com/magazine/2017/05/29/why-sally-yates-stood-up-to-trump> [<https://perma.cc/A7HJ-RY6X>]. See generally 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-Dressing-the-Muslim-Ban.pdf [<https://perma.cc/N53A-3WYU>] (documenting ongoing challenges that Yemeni-American families face due to ban); Letter from Cardozo Law Clinics et al., to John Roth, DHS Inspector general, Abuses in the Aftermath of the Executive Order on Immigration (Feb. 6, 2017), <https://cardozo.yu.edu/news/cardozo-report-abuses-aftermath-executive-order->

The general uniformity of successful legal challenges¹²⁴ prompted the government to issue a new order only six weeks later.¹²⁵ 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”¹²⁶ 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 minority” exemption and the Syria-specific ban.¹²⁷ Despite the changes, lower courts continued to enjoin the Muslim ban’s enforcement nationwide.¹²⁸

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 members or particular entities in the United States.¹²⁹

In September 2018, President issued a third version of the Muslim ban.¹³⁰ 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.¹³¹ After district courts granted preliminary injunctions, the Supreme Court granted stays pending both the

immigration (documenting twenty-six accounts of alleged abuses and violations suffered by immigrant detainees at airports due to initial ban).

¹²⁴ 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 v. Trump*, 241 F. Supp. 3d 539 (D. Md.), *aff’d in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017), *cert. granted*, 137 S. Ct. 2080 (2017), and *vacated and remanded sub nom. Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 353 (2017).

¹²⁵ See Exec. Order No. 13,780, 82 Fed. Reg. 13209.

¹²⁶ Order Granting Motion for Temporary Restraining Order at 8–9, *Hawai’i v. Trump*, CV. NO. 17-00050 DKW-KSC (D. Haw. Mar. 15, 2017), <https://www.aclu.org/legal-document/state-hawaii-and-ishmael-elshikh-vs-donald-j-trump-et-al-order> [<https://perma.cc/Q28L-7UY3>] (citation omitted).

¹²⁷ See Exec. Order No. 13,780, 82 Fed. Reg. 13209.

¹²⁸ See, e.g., *Hawai’i v. Trump*, 241 F. Supp. 3d 1119, 1123 (D. Haw. 2017).

¹²⁹ See *Int’l Refugee Assistance Project*, 137 S. Ct. at 2088.

¹³⁰ See Proclamation No. 9645, 3 CFR § 135 (2018).

¹³¹ See *id.*

government's appeals to the Fourth and Ninth Circuits and petitions for certiorari, allowing the third version of the ban to go into effect.¹³²

In addition to the substantive changes to the ban, the government offered more detailed security justifications for the restrictions with each iteration.¹³³ 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.¹³⁴ The Court thus issued its opinion on a very similar yet differently positioned policy, finding that the worldwide process provided “persuasive evidence that the entry suspension has a legitimate grounding in national security concerns” and that the plaintiffs therefore would not likely succeed on the merits.¹³⁵

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, “[t]he 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.”¹³⁶

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.¹³⁷ Yet, as Justice Breyer warned, and the majority dismissed as “but a piece of the picture,”¹³⁸ the minimal waiver grants—e.g., the State Department reported approving two waivers out of 6555 eligible applicants in the Proclamation’s first month¹³⁹—called into

¹³² See *Trump v. Hawaii*, 138 S. Ct. 542, 2017 WL 5987406 (2017); *Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 542, 2017 WL 5987435 (2017).

¹³³ See *Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct. 2392, 2403–06 (2018) (discussing the rationale and purposes of Proclamation No. 9645).

¹³⁴ Proclamation No. 9645, § 1(c).

¹³⁵ *The Muslim Ban Case*, 138 S. Ct. at 2421.

¹³⁶ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 129 (1962). See also *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (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.”).

¹³⁷ See *The Muslim Ban Case*, 138 S. Ct. at 2422–23 (discussing Proclamation No. 9645, § 3).

¹³⁸ *Id.* at 2423 n.7 (citation omitted).

¹³⁹ *Id.* at 2431 (Breyer, J., dissenting).

question whether the government was applying the waiver program and “excluding Muslims who satisfy the Proclamation’s own terms?”¹⁴⁰ Recent data indicate that the government denies ninety-eight percent of waiver applications.¹⁴¹ The waiver program has demonstrably “not mitigated the ban’s effects on thousands of families in dire circumstances.”¹⁴² 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 society¹⁴³—enables it to issue the “final” pronouncement on a contested matter, adding to the opinion’s legitimacy, if not infallibility.¹⁴⁴ 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 Supreme Court review so predictably results in validating presidential power and eroding marginalized groups’ rights such that they should forsake litigation, instead 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.

III. 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 of blunting executive powers that impair minority groups’ rights. Taking a normative approach, Jeremy Waldron questions locating disputes over rights within the Judicial branch.¹⁴⁵ He contends that such reliance “distracts [society] with side-issues about precedent, texts, and interpretation” and “is politically illegitimate . . . privileging majority voting among a

¹⁴⁰ *Id.* at 2430 (Breyer, J., dissenting). The majority discounted Justice Breyer’s arguments as based on “selective statistics, anecdotal evidence, and a declaration from unrelated litigation” and inappropriate under rational basis review. *Id.* at 2423 n.7.

¹⁴¹ Betsy Fisher & Samantha Power, Opinion, *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>.

¹⁴² *Id.*

¹⁴³ See Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2251 (2019) (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”).

¹⁴⁴ 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.”).

¹⁴⁵ See Waldron, *Judicial Review*, *supra* note 2, at 1351.

small number of unelected and unaccountable judges.”¹⁴⁶ Moreover, the notion of courts as guardians of minority rights may rest on a faulty premise concerning judicial elites’ sympathies and beliefs.¹⁴⁷ Waldron refutes that assumption, concluding that “[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.”¹⁴⁸

Predating the 9/11 attacks, Mark Tushnet questioned liberals’ historical reliance on judicial review over political advocacy to protect individual rights.¹⁴⁹ 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.”¹⁵⁰ Second, “[w]hen people lose in the Supreme Court, they really lose, because the rest of the society may come to think not merely that their claims lacked constitutional force, but that their claims had no moral justification whatever.”¹⁵¹ Tushnet’s observations enjoy equal, if not greater, force in the national security and immigration contexts.

Joseph Margulies and Hope Metcalf maintain that the post-9/11 civil rights “interventionist” litigation strategy and narrative suffers from amnesia.¹⁵² 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.¹⁵³ Even apparent legal

¹⁴⁶ *Id.* at 1353.

¹⁴⁷ *Id.* at 1405.

¹⁴⁸ *Id.* at 1404.

¹⁴⁹ 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 . . .”).

¹⁵⁰ *Id.* at 141. See also Stephen Wizner & Jane Aiken, *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”).

¹⁵¹ TUSHNET, *supra* note 149, at 138.

¹⁵² Margulies & Metcalf, *supra* note 111, at 444.

¹⁵³ *Id.* 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”).

victories may alarm certain quarters and generate backlash.¹⁵⁴ 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.¹⁵⁵

Noting the "contingent character of rights in American society,"¹⁵⁶ 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."¹⁵⁷

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 a tool, for fear that their efforts had the opposite of their intended effect—legitimizing, rather than eliminating—the Israeli occupation.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰ The Court's

¹⁵⁴ See *id.* at 462–63, 471.

¹⁵⁵ 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 (2010).

¹⁵⁶ Margulies & Metcalf, *supra* note 111, at 440. See also STUART SCHEINGOLD, *THE POLITICS OF RIGHTS* 5 (2d ed. 2004). Scheingold criticizes a "myth of rights" as "premised on a direct linking of litigation, rights, and remedies with social change." *Id.* He doubts that courts will often fashion apposite rights with attendant remedies that produce desired social transformation. *Id.*

¹⁵⁷ Margulies & Metcalf, *supra* note 111, at 440 (citing Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 393–94 (1987)).

¹⁵⁸ See MICHAEL SFARD, *THE WALL AND THE GATE: ISRAEL, PALESTINE, AND THE LEGAL BATTLE FOR HUMAN RIGHTS* 21–24, 30–36 (2018).

¹⁵⁹ DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 2–3, 197 (2002).

¹⁶⁰ See KRETZMER, *supra* note 159, at 2–3; SFARD, *supra* note 158, at 21–24, 30–36; JOHN REYNOLDS, *LEGITIMISING THE ILLEGITIMATE? THE ISRAELI HIGH COURT OF JUSTICE AND THE OCCUPIED PALESTINIAN TERRITORY* 45 (AL-HAQ, 2010) (asking "whether continued involvement with the [High Court of Justice] simply assists in strengthening the occupation, and on a broad community level, works against the human rights causes being fought for"); Ronen Shamir, "Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High

review may have ameliorated the policy's harshest effects, but it also bestowed legal legitimacy on the occupation, thus solidifying it.¹⁶¹

But the litigation critics are not absolutists. Waldron acknowledges that litigation may serve as a necessary tool to confront racial or religious pathologies.¹⁶² Further, Tushnet's critique serves to elevate methodological consciousness rather than eliminate litigation as a tool.¹⁶³ Margulies and Metcalf also do not entirely renounce litigation so much as they call for a broader and more effective approach.¹⁶⁴ (Margulies in particular has been at the forefront of post-9/11 litigation advocacy). 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 potentially corroding and legitimating effects.¹⁶⁵ 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 marginalized group rights.

IV. 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's duty to her client supersedes policy concerns about judicial vindication.¹⁶⁶ Given the client's vulnerable posture, a lawyer would not be doing her job were she not to seriously consider pursuing 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

Court of Justice, 24 L. LAW & SOC'Y REV. 781, 783 (1990) (contending that Israeli High Court of Justice's rulings "legitimized Israeli rule over the territories").

¹⁶¹ See KRETZMER, *supra* note 159, at 197–98; Shamir, *supra* note 160, at 783.

¹⁶² See Waldron, *Judicial Review*, *supra* note 2, at 1352.

¹⁶³ See TUSHNET, *supra* note 149, at 137–41.

¹⁶⁴ See Margulies & Metcalf, *supra* note 111, at 463–64.

¹⁶⁵ See SFARD, *supra* note 158, 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").

¹⁶⁶ As Israeli human rights lawyer Michael Sfar observes, "A human rights worldview does not condone sacrificing the individual for the greater good (especially when this 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."

litigation or particular forms of litigation might well constitute legal malpractice and/or moral bankruptcy.¹⁶⁷

Many civil-rights advocates will face situations that require them to pursue a litigation route that will possibly benefit their individual client while producing “bad law” that may adversely affect others. In *Ashcroft v. al-Kidd*, counsel for Abdullah al-Kidd filed a civil lawsuit challenging 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.¹⁶⁸ The Court held that such detention based on a valid warrant, regardless of improper motive, did not violate the Fourth Amendment.¹⁶⁹ 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.¹⁷⁰ However, the Court reasoned that 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.”¹⁷¹ Though the Court arguably expanded the legal justifications for detention under the Fourth Amendment, Mr. al-Kidd ultimately received compensation from the government—an impossible outcome without litigation.¹⁷²

Litigation also may be the least-worst option given the political branches’ disinclination to restrain the Executive.¹⁷³ Litigation does enjoy

¹⁶⁷ See MODEL RULES OF PROF’L CONDUCT, r. 1.3 cmt. 1 (AM. BAR ASS’N 2016) (“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.”); SFARD, *supra* note 158, at 451.

¹⁶⁸ *Ashcroft v. al-Kidd*, 563 U.S. 731, 734 (2011).

¹⁶⁹ *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) (“Nowhere in al-Kidd’s complaint is there any concession that the warrant gained by the FBI agents was validly obtained.”).

¹⁷⁰ See *id.* at 747–49 (Ginsburg, J., concurring) (questioning the need to address the constitutional claims). See also *id.* at 751–53 (Sotomayor, J., concurring) (questioning the need to address the constitutional claims).

¹⁷¹ *Id.* at 735.

¹⁷² See Richard A. 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> [<https://perma.cc/E82Y-6E9F>].

¹⁷³ See *infra* Part III.A.

its successes, particularly within the lower courts.¹⁷⁴ And its critics may exaggerate litigation's failures, the legitimacy adverse opinions enjoy, and the contagion effects of unfavorable opinions.¹⁷⁵

A. The Only-Branch Option

However unsuccessful one views the litigation endeavor in the national security sphere, there appear to be 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, as evidenced by the scant declarations of war and Congress's resistance to crafting a new authorization for use of military force subsequent to the 9/11 terrorist attacks.¹⁷⁶

Second, and closely related, Congress has endowed the President with significant authorities—including ceding emergency powers and delegating enforcement and implementation authority—and greater latitude to pursue national security and intelligence priorities.¹⁷⁷ That delegation is in full view

¹⁷⁴ See *infra* Part III.B.

¹⁷⁵ See *infra* Part III.C, E.

¹⁷⁶ See BARBARA SALAZAR TORREON & SOFIA PLAGAKIS, CONG. RESEARCH SERV., INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2018 (July 17, 2019), <https://fas.org/sgp/crs/natsec/R42738.pdf> [<https://perma.cc/N5QV-4Y9J>] (noting that there have been eleven war declarations relating to five distinct wars: War of 1812, Mexican-American War, Spanish-American War, World War I, and World War II); Fred Kaplan, *Congress Needs to Take Responsibility for America's Wars*, SLATE (May 23, 2019), <https://slate.com/news-and-politics/2019/05/aumf-congress-syria-barbara-lee.html> [<https://perma.cc/6MNP-AKMM>] (observing that “Congress has relapsed into passivity, letting ‘the imperial presidency’ resume,” by failing to amend or repeal the 2001 Authorization for Use of Military Force, on which three presidents have relied for nearly eighteen years to justify military operations in twelve countries).

¹⁷⁷ 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 No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019). Though Congress terminated the emergency declaration by joint resolution, President Trump vetoed that unusual legislative defiance. Jacobs, *supra* note 13. Civil-rights advocates and plaintiffs (including sixteen states) have challenged the President's efforts to re-appropriate funding to the wall that Congress authorized for other military purposes. See *e.g.*, Complaint at 4, *Sierra Club v. Trump*, No. 19-CV-00892-HSG, 2019 WL 2715422 (N.D. Cal. June 28, 2019). See also Priscilla Alvarez & Joyce Tseng, *Tracking the Legal Challenges to Trump's Emergency Declara-*

in the immigration context where *The Muslim Ban Case* plaintiffs unsuccessfully challenged the Proclamation as exceeding the authority Congress delegated to the President.¹⁷⁸

Third, Congress responds to popular pressures to ensure security.¹⁷⁹ As a result, most anti-terrorism or national security legislation will meet the perceived needs of the majority but may disregard minority groups' inter-

tion, CNN POLITICS (June 5, 2019), <https://edition.cnn.com/2019/02/20/politics/national-emergency-declaration-lawsuit-tracker/index.html> [<https://perma.cc/57T2-TYUZ>] (describing and providing links to six pending lawsuits regarding the President's national emergency declaration). In a trajectory similar to *The Muslim Ban Case*, lower courts enjoined the President's redirection of military funding only to have the Supreme Court stay the injunction. *Sierra Club*, 2019 WL 2715422, at *1, *denying stay*, 929 F.3d 670 (9th Cir. 2019), *granting stay*, *Trump v. Sierra Club*, No. 19A60, 2019 WL 3369425 (Mem.) (July 26, 2019). President Trump predicted that very course of events:

[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, 8:55 AM), <https://nypost.com/2019/02/19/trump-bashes-lawsuit-from-radical-left-states-over-national-emergency-declaration/> [<https://perma.cc/9JEU-A3F2>] (quoting President Trump). See also Aziz Huq, *Has the Supreme Court Already Decided the Wall Case?*, POLITICO MAG. (Feb. 19, 2019), <https://www.politico.com/magazine/story/2019/02/19/trump-national-emergency-border-wall-225164> [<https://perma.cc/795P-8R4L>] (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 that may result in similar judicial approval of executive action. See Elizabeth L. Goitein, *Trump's Hidden Powers*, BRENNAN CTR. FOR JUST. (Dec. 5, 2018), <https://www.brennancenter.org/blog/trump-hidden-powers> [<https://perma.cc/8E6N-A3RY>] (locating 136 existing statutory authorities for president to declare national emergency and noting that Congress has not rescinded such powers over past forty years); Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, ATLANTIC (Jan./Feb. 2019), <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/> [<https://perma.cc/J9XE-7GQ4>]. See generally BRENNAN CTR. FOR JUST., A GUIDE TO EMERGENCY POWERS AND THEIR USE (2019), https://www.brennancenter.org/sites/default/files/legislation/Emergency%20Powers_Privntv2.pdf [<https://perma.cc/A8AL-RLYL>] (listing legal frameworks, statutory authorities, and conditions for the president to declare emergencies).

¹⁷⁸ See *Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct 2392, 2410–11 (2018) (rejecting arguments that the Muslim ban “countermand[s] Congress’ considered policy judgments” concerning alien entry given legislated vetting systems and Visa Waiver Program).

¹⁷⁹ See JOHN MUELLER & MARK G. STEWART, PUBLIC OPINION AND COUNTERTERRORISM POLICY, CATO INST. 1 (2018), <https://www.cato.org/sites/cato.org/files/pubs/pdf/white-paper-public-opinion-counterterrorism-policy.pdf> [<https://perma.cc/27FP-T8Q7>] (“Public opinion is the primary driver behind the extensive and excessive counterterrorism efforts undertaken since 9/11, and officials and elites are more nearly responding to public fear than creating it.”).

ests.¹⁸⁰ 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.¹⁸¹

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.¹⁸² Though advocates and courts may construe the opinion narrowly,¹⁸³ *Zivotofsky II* affords the executive branch "arguments for presidential exclusivity in a case that holds that the President can ignore a foreign relations statute."¹⁸⁴

Civil-rights advocates 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 Constitution's first three articles.¹⁸⁵ 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, stating "[i]t is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their

¹⁸⁰ Cover, *Presumed Imminence*, *supra* note 3, at 1458–59; CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* 214–17 (2005).

¹⁸¹ 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, 1454 (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.").

¹⁸² *Zivotofsky v. Kerry* (*Zivotofsky II*), 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").

¹⁸³ *Id.* at 2088 (acknowledging that, apart from the "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," although the opinion may permit a limiting gloss).

¹⁸⁴ Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 114 (2015).

¹⁸⁵ See, e.g., *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men."); Steven Kautz, *Liberty, Justice, and the Rule of Law*, 11 YALE J.L. & HUMAN. 435, 444 (1999) ("Civil government is first and fundamentally the *rule of law*: where men may not be judges in their own case; where there is government of laws, not of men.").

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 actually is.¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸

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.¹⁸⁹ Many litigation efforts appear unmitigated

¹⁸⁶ See *Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct. 2392, 2424 (Kennedy, J., concurring). Justice 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).

¹⁸⁷ See Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012), <https://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html> [<https://perma.cc/2TZ4-DM69>] (describing the Department of Justice Office of Legal Counsel (OLC) targeted-killing memo as concluding that the Due Process Clause “could be satisfied by internal deliberations in the executive branch”).

¹⁸⁸ 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, *Faithfully Executing the Laws: Internal Legal Constraints on 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 W. 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 Muslim ban was highly unusual, both for her refusal to implement the President’s policy but also because she was a temporary office holder—not a presidential appointee. Lizza, *supra* note 123. President Trump subsequently fired her. Such internal defiance is unlikely to occur with great frequency.

¹⁸⁹ See, e.g., Dahlia Lithwick, *Trump Is Losing His War Against the Courts*, SLATE (Nov. 20, 2018, 5:25 PM), <https://slate.com/news-and-politics/2018/11/donald-trump-losing-courts-jurisprudence.html> [<https://perma.cc/MF3C-U8S5>] (noting “the massive and consequential [lower court] rulings against this president and his administration that are logged

victories, in which lower courts vindicated the individual's rights or struck down the national security or immigration policy in whole or in part.¹⁹⁰ In many of these cases, the government settled or did not appeal, leaving these victories in place.¹⁹¹ A civil-rights advocate cannot ignore these 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 discovery and Freedom of Information Act lawsuits.¹⁹² 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 nation-

every week and rarely viewed in the aggregate," including within the national security-immigration contexts).

¹⁹⁰ See, e.g., *Hassan v. N.Y.C.*, 804 F.3d 277, 289–92, 301 (3d Cir. 2015) (holding that Muslim plaintiffs' allegations that New York City Police Department engaged in intensive and widespread surveillance of them based on their religious identity satisfies the injury requirements of standing and must overcome "heightened equal protection review"); *Doe v. Mattis*, 889 F.3d 745, 768 (D.C. Cir. 2018) (requiring that government provide seventy-two 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, 11:15 AM), <https://www.aclu.org/blog/national-security/detention/us-citizen-detained-without-charge-trump-administration-year> [<https://perma.cc/H324-Z7AU>] (reporting that due to litigation and as part of settlement agreement, the government released American client detained for more than one year).

¹⁹¹ See, e.g., *Hassan*, 804 F.3d 277 (government did not petition for certiorari); *Doe*, 889 F.3d 745 (government did not petition for certiorari); Hafetz, *supra* note 190 (discussing settlement).

¹⁹² See Freedom of Information Act, 5 U.S.C. § 552 (2018); *CLA 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> [<https://perma.cc/9F96-Q4ZE>]. Freedom of Information Act (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 E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1118–23 (2017). See also *id.* at 1120 ("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.").

wide 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.¹⁹³

The Muslim Ban Case and related cases fit within the 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 results were in enabling people to gain entry to the United States and the unification of families. The nationwide injunctions halted the order's impact everywhere and for significant periods of time—hardly an incremental or negligible legal interference. Ultimately, the government altered both its legal position and the content of the ban in responses to the successive litigation victories.¹⁹⁴

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.¹⁹⁵ In this respect, civil rights litigants might view the litigation process—if not the Supreme Court's decision and opinion—as a success.¹⁹⁶

Moreover, 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.”¹⁹⁷ The legal dispute and resolution of competing

¹⁹³ See GOLDSMITH, POWER AND CONSTRAINT, *supra* note 5, at 178, 195.

¹⁹⁴ See *supra* Part I.F.

¹⁹⁵ See Lind, *supra* note 103 (“[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.”).

¹⁹⁶ 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”).

¹⁹⁷ Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835, 871–72 (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.” Martin Luther King, Jr., Address at the Conclusion of the Selma to Montgomery March (Mar. 25, 1965), in A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF MARTIN LUTHER KING, JR. 131 (Clayborne Carson & Kris Shepherd eds. 2001). In challenging the Muslim ban, numerous advocates and scholars contended that a more protective individual rights regime ushered in by the Warren Court could

constitutional principles and underlying values “can provoke broader discourse about the moral controversies of the day.”¹⁹⁸ The Muslim ban litigation provides a counter-narrative to national security prerogatives, maintaining that inclusive immigration and anti-discrimination should prevail over naked anti-Muslim prejudice and arbitrary use 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.

President Trump’s 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,¹⁹⁹ limitations on

not abide nineteenth-century conceptions of government sovereignty that would permit discrimination in determining entry of aliens. *See, e.g.*, Brief for Immigration, Family, and Constitutional Law Professors as Amici Curiae Supporting Respondents at 12–14, *Hawaii v. Trump*, 138 S. Ct. 2392 (2018) (No. 17–965), https://www.supremecourt.gov/DocketPDF/17/17-965/41696/20180330154938785_17965bsacImmigrationFamilyAndConstitutionalLawProfessors.pdf [<https://perma.cc/ZZW6-PL27>] (arguing that the Supreme Court’s changes to its domestic equal protection and fundamental rights jurisprudence favorably impacted its review of the government’s immigration policies); Adam Cox, *Why 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/> [<https://perma.cc/B92N-C2K> K]. *See also infra* Section IV.C.4 (explaining how immigration law has generally trended toward greater protections for noncitizens). Though the Court in *The Muslim Ban Case* 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 limiting its standard of review over aliens’ entry to rational basis. *The Muslim Ban Case*, 2418–20 (2018). *See also 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)).

¹⁹⁸ Tsai, *supra* note 197, at 879. 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 1168, 1185 (9th Cir. 2017) (Bybee, J., dissenting) (“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.”).

¹⁹⁹ *Ms. L. v. U.S. Immigration & Customs Enft*, 310 F. Supp. 3d 1133, 1141 (S.D. Cal. 2018) (enjoining Department of Homeland Security from separating migrants and asylum

judicial review of adverse asylum decisions,²⁰⁰ and limitations on locations where people may seek asylum.²⁰¹ Even if these cases prove ultimately less successful in the Supreme Court, the short-term victories may justify the litigation.

C. Pyrrhic Losses

The Muslim Ban Case's legitimacy and adverse precedential effects may also be overstated. Future courts, commentators, society, and history may ultimately regard the opinion as distasteful and wrongly decided. Indeed, many scholars and jurists considered *Korematsu*—which *The Muslim Ban Case* smugly overruled—mistaken and one of several stains on the Supreme Court's history.²⁰² Despite Justice Jackson's admonition that the Court's validation of "racial discrimination" and "transplanting American citizens . . . lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need,"²⁰³ *Korematsu* has been more an epithet, part of an anticanon that even the most ardent advocates of presidential power omitted as legal support.²⁰⁴ *The Muslim Ban Case* may enjoy a similar legacy. But the line between canonical and anticanonical may be blurry, and a consensus may not emerge for decades. In the in-

seekers from their minor children and ordering reunification), *modified*, 330 F.R.D. 284 (S.D. Cal. 2019).

²⁰⁰ Compare *Thuraissigiam v. U.S. Dep't of Homeland Sec.*, 917 F.3d 1097, 1119 (9th Cir. 2019) (holding statutory restriction on habeas review of negative asylum determination for arriving alien violates Suspension Clause), *cert. granted*, 2019 WL 5281289 (Aug. 5, 2019) (No. 19-161), with *Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422, 450 (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 (2017).

²⁰¹ *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1121 (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 granted a later request for a stay of a district court's order enjoining the government's rule barring people from seeking asylum at the southern border unless they were first denied asylum in a third country. *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922 (N.D. Cal. 2019) (Mem.), *stay granted*, *Barr v. E. Bay Sanctuary Covenant*, 2019 WL 4292781 (Sept. 11, 2019) (Mem.). The asylum-bar litigation's pattern echoes that of *The Muslim Ban Case* and the wall litigation, *supra* footnote 177 and accompanying text.

²⁰² See Jamal S. Greene, *The Anticanon*, 125 HARV. L. REV. 379, 398–402, 422–27, 456–60 (2011).

²⁰³ *Korematsu v. United States*, 323 U.S. 214, 246 (Jackson, J., dissenting), *abrogated by Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct. 2392 (2018).

²⁰⁴ See Greene, *supra* note 202, 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").

terim, *The Muslim Ban Case* Court may realize Justice Jackson's worry, in which the Muslim ban "becomes the doctrine of the Constitution" with "a generative power of its own."²⁰⁵

Critics also contest that the Court's pronouncements on executive actions validate the 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."²⁰⁶ Azmy challenges the purported improvements or limitations on executive power, decrying the lack of accountability and transparency in the current system.²⁰⁷ 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.²⁰⁸

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.²⁰⁹ More specifically, 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*."²¹⁰ Moreover, Azmy condemns the "is-ought conflation" that Goldsmith's analysis employs.²¹¹ Judicial review, as currently applied—and as *Korematsu's* anticanonical legacy demonstrates—may not be legitimate; it is "insufficiently robust" and too deferential.²¹²

²⁰⁵ *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

²⁰⁶ 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).

²⁰⁷ *Id.* at 31–43.

²⁰⁸ See Lind, *supra* note 103 ("The travel ban has been assimilated into normal political discourse and policymaking. It has become normalized, for better or worse.").

²⁰⁹ Azmy, *supra* note 206, at 48.

²¹⁰ *Id.*

²¹¹ *Id.* See also Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 n.146 (1983) [hereinafter Cover, *Nomos and Narrative*] (citing Abraham Lincoln, Lincoln-Douglas Debates (July 10, 1858), in 2 A. LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 484, 495 (R. Basler ed. 1953)) (discussing Abraham Lincoln's view on the interpretive authority of *Dred Scott* (Scott v. Sandford, 60 U.S. 393 (1857))) ("[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.").

²¹² Azmy, *supra* note 206, at 48.

Azmy's critique raises important question as to legitimacy: legitimate according to whom?²¹³ As he observes, Goldsmith—and the observation applies equally to Jackson, Black, and Bickel—addresses only “legitimacy *within* the U.S. constitutional system.”²¹⁴ Azmy argues that this narrow view of legitimacy ignores the vital perspectives of victims, history, and the international community.²¹⁵ Azmy's insistence on forming legal meaning and legitimacy based on multiple 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.²¹⁶ The consequences for victims

²¹³ Tara Leigh Grove 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 143, at 2252. *See also id.* at 2253 (concluding from 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”).

²¹⁴ Azmy, *supra* note 206, at 60.

²¹⁵ *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 also* David S. Law & Mila Versteeg, *The Declining Influence of the United States 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 is Now Guiding Fewer Nations*, N.Y. TIMES (Sept. 17, 2008), <https://www.nytimes.com/2008/09/18/us/18legal.html> [<https://perma.cc/2EXD-SK92>] (documenting decline in international community's citation to the 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' unfavorable international reputation).

²¹⁶ 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* Press Release, ACLU, ACLU Comment on Trump Appeal of Muslim Ban Ruling (Mar. 17, 2017), <https://www.aclu.org/press-releases/aclu-comment-trump-appeal-muslim-ban-ruling> [<https://perma.cc/WK2F-3QXG>] (noting Omar Jadwat's, director of the ACLU's Immigrants' Rights Project and counsel for several Muslim ban plaintiffs, comments on the government's appeal of a district court's order enjoining the ban) (“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* Press Release, ACLU, ACLU Comment on Supreme Court Muslim Ban Ruling (June 26, 2018), <https://www.aclu.org/press-releases/aclu-comment-supreme-court-muslim-ban-ruling> (noting Jadwat's comments after defeat in Supreme Court) (“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.”). Jadwat's 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 211, at 43 (“The position that only the state creates law thus confuses the sta-

are inevitably severe, history's verdict still waits, and the world's opinion is of questionable relevance within the United States.²¹⁷

D. Opposition to Other Civil-Rights Litigation

Critics have long questioned civil-rights litigants' focus on advocacy through the courts.²¹⁸ Numerous women's rights and same-sex marriage advocates, for example, criticized litigation strategies and championed legislative approaches.²¹⁹ 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.²²⁰ Arguably, the success at the Supreme Court in *Roe v. Wade*²²¹ and *Obergefell v. Hodges*²²² 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 the courts.²²³

For immigrants and other groups generally affected by national securities policies, however, the majoritarian process may be even less hospitable than the courts. 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 policies. National security and immigration litigation

tus 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.”).

²¹⁷ 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.” *The Muslim Ban Case*, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring).

²¹⁸ See *supra* Part II.

²¹⁹ See, e.g., Ruth Bader 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 cases such as *Brown v. Board of Education* and *Goodridge v. Department of Public Health*, which “judicially mandate[] social reform[,] may mobilize greater resistance than change accomplished through legislatures or with the acquiescence of other democratically operated institutions.”).

²²⁰ Ginsburg, *supra* note 219, at 385; Klarman, *supra* note 219, at 475.

²²¹ *Roe v. Wade*, 410 U.S. 113 (1973).

²²² *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

²²³ Ginsburg, *supra* note 219, at 382.

differ 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 or useful. Third, the often reactive and clandestine nature of national security measures challenge popular efforts to embrace alternative policies. Finally, the rooted fear of minority groups attached to so many national security measures may prove to be a psychological obstacle to mobilizing an opposition. In this context litigation may be the best refuge.

E. Overstating Spillover Risks

Concerns that national-security-related decisions will weaken domestic law and civil-liberties protections may be overblown. 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.²²⁴ But fears over *The Muslim Ban Case's* transsubstantive impacts are not unwarranted.²²⁵

The Muslim Ban Case reads as a vindication of the policy's bigoted motivations, stating unequivocally that the nature of untrammelled 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 the history of 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 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.

V. 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,

²²⁴ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (upholding citizen-detainee's due process rights related to the battlefield). See also *supra* Part I.E (discussing post-Muslim ban lower court opinions).

²²⁵ See *supra* Part I.E.

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.”²²⁶ 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.”²²⁷ Considering these cautions and engaging in such calculations could prove vital to the success of advocacy in the national security context.

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.²²⁸ 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 litigation, Margulies and Metcalf maintain that “lawyering (and even litigation) can make real differences in the lives of marginalized people.”²²⁹ In these instances, however, litigation should not be the only route.

Multiple and varied forms of extralegal advocacy aimed at transformational change may support and inform direct representation and individualized litigation. These efforts should buttress or even alter the rights framework that underlies any judicial challenge.²³⁰ 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 manipula-

²²⁶ TUSHNET, *supra* note 149, at 137 n.22 (accompanying text at 216).

²²⁷ *Id.* at 141 n.27 (accompanying text at 216) (noting that cautions refers to “[c]autions about what we can actually accomplish help deflate our sense that we are essential contributors to social change”).

²²⁸ *See id.* at 137 n.22 (accompanying text at 216).

²²⁹ Margulies & Metcalf, *supra* note 111, at 471.

²³⁰ *See id.* (“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.”).

tion of unfolding events.”²³¹ 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 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 framework that affirms our common humanity should prove less susceptible to nationalistic impulses and less subservient to powers deriving from national sovereignty.

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.²³² 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.

Litigants also should attempt to domesticate their claims as much as possible, notwithstanding the national-security or foreign-affairs elements.²³³ Clients also may be better served by litigation strategies that do

²³¹ *Id.* at 463.

²³² 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 158, 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. *Id.* Organizations could continue to file individual cases on behalf of clients relating to particular legal issues. *Id.* at 30. The draft contemplated a collective organizational international legal strategy, from which any legal action would be subject to an organization’s approval. *Id.* at 30–31. *See also* REYNOLDS, *supra* note 160, at 49 (discussing potential “comprehensive or partial boycott against the [High Court of Justice]” but noting the need to balance that strategy “against the losses suffered by Palestinians”). *See also* Wizner & Aiken, *supra* note 150, at 1008 n.41 (cautioning that impact litigation risks privileging lawyer and organizational interests over those of clients).

²³³ *See supra* notes 94–105 and accompanying text (discussing courts and scholars’ distinguishing of *The Muslim Ban Case* based in part because it involved aliens seeking entry and alleged national security concerns).

not focus on constitutional rights, animus, or separation of powers, but rather concentrate on factual underpinnings.²³⁴ Yet even when facts are contested, the Court is still more likely to accede to the President's version.²³⁵ But litigants should prioritize cases with "good facts," conscious of the aphorism that "bad facts make bad law."²³⁶ 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.²³⁷

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.²³⁸ 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

²³⁴ I am indebted to Andrew Pollis for this important strategic suggestion. See also Cox et al., *supra* note 98 (explaining that *The Muslim Ban Case* outcome owes much to "the fact that it was a case involving questions of motive and proof" and concerned "immigration policies implicating national security").

²³⁵ See *Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct. 2392, 2422 (2018) ("[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 *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010)); 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).

²³⁶ Attribution for the common saying is hard to come by. Its judicial lineage appears to derive from Justice Oliver Wendell Holmes' statement that "[g]reat cases, like hard cases, make bad law." *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

²³⁷ See, e.g., *Ashcroft v. al-Kidd*, 563 U.S. 731, 744 (2011); *supra* footnotes 168–72 and accompanying text (discussing *al-Kidd* and the Court's expanding bases for detention under the material witness statute based in part on the majority's view that the plaintiff conceded that the warrant was validly obtained).

²³⁸ In opposing the government's petition for certiorari, Hawaii raised the additional question, "3. 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, *Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct. 2392 (2018) (No. 17-965), https://www.supremecourt.gov/DocketPDF/17/17-965/27771/20180112172848825_Trump%20v.%20Hawaii%20Brief%20in%20Opposition.pdf [https://perma.cc/Y7TR-ELW2]. Having ruled in Hawaii's favor on statutory grounds, the Ninth Circuit did not address its constitutional claims. *Hawaii v. Trump*, 878 F.3d 662, 690–92 (9th Cir. 2017) (explaining its holding that Proclamation exceeds statutory authority under § 1182(f) avoids ruling that the statute, as the government construed its wide grant of presidential power, amounts to an unlawful delegation). The Court directed the parties to address the Establishment Clause question as well. *The Muslim Ban Case*, 138 S. Ct. 923, 924 (2018).

preference for Christians.²³⁹ 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.”²⁴⁰ However, the First Amendment’s religious clauses invariably “overlap,”²⁴¹ with the Establishment Clause’s “prohibition of denominational preferences . . . inextricably connected with the continuing vitality of the Free Exercise Clause.”²⁴² Though litigants included within their causes of action claims that invoked Free Exercise violations,²⁴³ complaints appeared to emphasize the Establishment Clause violation.²⁴⁴

²³⁹ Exec. Order No. 13,769, 82 Fed. Reg. 8,977, § 5(b) (Jan. 27, 2017), *revoked by* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). 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 INT’L (Mar. 30, 2018), <https://christianfreedom.org/president-trump-gives-new-hope-to-persecuted-christians/> [<https://perma.cc/NJW5-ENME>] (quoting Interview by David Brody with President Trump, CBN NEWS (Jan. 27, 2017), <https://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees> [<https://perma.cc/8K6P-GSE3>]) (“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.”).

²⁴⁰ 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. Brief for Becket Fund for Religious Liberty as Amicus Curiae in Support of Neither Party at 19–20, *Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct. 2392 (2018) (No. 17–965), https://www.supremecourt.gov/DocketPDF/17/17-965/38672/20180312184651975_Becket%20Amicus-Trump%20v%20Hawaii%20amicus%20-%20as%20filed.pdf [<https://perma.cc/PCR8-5K2F>] (“Put simply, government disfavor toward one religion does not—standing alone—establish another. But it does potentially violate free exercise.”).

²⁴¹ *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

²⁴² *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 for Becket Fund for Religious Liberty, *supra* note 240, at 29 n.8 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 536 (1993); *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990)).

²⁴³ *See, e.g.*, Third Amended Class Action Complaint for Declaratory and Injunctive Relief at ¶¶ 310–15, *Does v. Trump*, 328 F. Supp. 3d 1185 (W.D. Wash. 2018) (No. 2:17-cv-00178-JLR), 2017 WL 6017688, <https://www.aclu-wa.org/docs/third-amended-class-action-complaint-declaratory-and-injunctive-relief-doe-et-al-v-trump> [<https://perma.cc/U63R-RZX8>] (denominating Count One as “First Amendment—Establishment, Free Exercise, Speech and Assembly Clauses”); Proposed Third Amended Complaint, *supra* note 35 (asserting distinct Establishment Clause and Free Exercise Clause counts).

²⁴⁴ *See, e.g.*, Third Amended Class Action Complaint, *Does*, 328 F. Supp. 3d (No. 2:17-cv-00178-JLR), *supra* note 243, at ¶ 9 (“[T]he current set of orders remain in contravention of [t]he clearest command of the Establishment Clause . . . that one religious denomination

Second, litigants may have believed that Establishment Clause claims would more likely overcome standing hurdles than Free Exercise Clause claims.²⁴⁵ Establishment Clause claims may permit an observer to challenge the offending government policy whereas Free Exercise claims would require a showing of personal harm.²⁴⁶ 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.²⁴⁷

cannot be officially preferred over another.”) (quoting *Larson*, 456 U.S. at 244)); *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 ¶¶ 177, 188, (describing examples of President Trump’s intent to preference Christian faith); Proposed Third Amended Complaint, *supra* note 35, 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/> [<https://perma.cc/7JZ8-X8JP>].

²⁴⁵ See Kristen Waggoner, *Symposium: Navigating Animus and Accommodation*, SCOTUSBLOG (June 27, 2018, 11:08 AM), <https://www.scotusblog.com/2018/06/symposium-navigating-animus-and-accommodation/> [<https://perma.cc/KA5C-6HZ5>] (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. Lupu, et al., *The Imperatives of Structure: The Travel Ban, the Establishment Clause, and Standing to Sue*, TAKE CARE (Apr. 3, 2017), <https://takecareblog.com/blog/the-imperatives-of-structure-the-travel-ban-the-establishment-clause-and-standing-to-sue> [<https://perma.cc/TJY4-7UW9>] (“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.”).

²⁴⁶ See *Flast v. Cohen*, 392 U.S. 83, 106 (1968) (granting taxpayer standing to challenge expenditures under the Establishment Clause). See generally *Van Orden v. Perry*, 545 U.S. 677 (2005) (addressing Establishment Clause claim brought by a person who frequently “encounters” Ten Commandment monument’s placement on the state capitol grounds). See also *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 224 n.9 (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.”).

²⁴⁷ See Lupu, et al., *supra* note 245 (contending that the Establishment Clause “addresses the character of government independent of any particular claim of rights” and thus may protect non-citizens’ “rights”). In his concurrence in *The Muslim Ban Case*, 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 *Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct. 2392, 2424 (2018) (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)).

Finally, the plaintiffs may have thought they were more likely to succeed on the merits because a mere showing of an establishment of religion would violate the Constitution, regardless of the government's security interests.²⁴⁸ In addition, the relief would be systemic overhaul rather than piecemeal and personal to each plaintiff's injury.²⁴⁹

But the plaintiffs might have fared better 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 might have subjected the claims to a strict-scrutiny analysis.²⁵⁰ Such a balancing of interests might have provided the Court with a "compromise between the per se violations characteristic of the establishment clause and the excessive deference characteristic of rational basis."²⁵¹ To be sure, such speculation is just that; it is impossible to know how the Supreme Court would have ruled on a Free Exercise Clause claim.

²⁴⁸ See *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859 (2005) ("[W]hether government action has 'a secular legislative purpose' has been a common, albeit seldom dispositive, element of our [Establishment Clause] cases.") (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)); 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 245 ("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 for the Becket Fund for Religious Liberty, *supra* note 240, 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)).

²⁴⁹ Brief for the Becket Fund for Religious Liberty, *supra* note 240, 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 & ST. 311, 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.'" (internal citation omitted), *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.").

²⁵⁰ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."); Brief for the Becket Fund for Religious Liberty, *supra* note 240, 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"). Compare *Larson v. Valente*, 456 U.S. 228, 246 (1982) (applying strict scrutiny to an Establishment Clause claim), *with* Brief for the Becket Fund for Religious Liberty, *supra* note 240, at 29 n.8 (arguing the case should be treated as Free Exercise Clause precedent).

²⁵¹ Waggoner, *supra* note 245.

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.²⁵² Yet the potentially distinct treatment of religious clause claims underscores the need for litigants to strategize in selecting their initial claims, which claims to emphasize, and which to 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.²⁵³ 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.²⁵⁴ 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 subject to enforcement."²⁵⁵ 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.²⁵⁶ To the Supreme Court this may appear to be judicial hubris that it will be tempted to pull back and restrain.

Bringing only a statutory claim may also avoid the wider fallout that asserting a constitutional claim may elicit. Whereas the former implicates only the validity of a specific and limited legislative fiat, the latter invites a pronouncement on the constitutional system, rights, and governance. But

²⁵² See *The Muslim Ban Case*, 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.").

²⁵³ Although the Supreme Court granted certiorari to include the question, "[w]hether the global injunction [barring enforcement of the travel ban] is impermissibly overbroad," Petition for a Writ of Certiorari at I, *Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct. 2392 (2018) (No. 17-965), the Court deemed it unnecessary to decide the issue. *The Muslim Ban Case*, 138 S. Ct. at 2423.

²⁵⁴ See *The Muslim Ban Case*, 138 S. Ct. 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").

²⁵⁵ Howard M. Wasserman, "Nationwide" Injunctions are Really "Universal" Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 338 (2018).

²⁵⁶ *Id.* Class-action lawsuits may similarly raise concerns over judicial policymaking. See MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE CLASS ACTION LAWSUIT 41, 46, 61 (2009).

more cautious litigation restricted to statutory claims may not increase 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.²⁵⁷ 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”—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.²⁵⁸ 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.

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.²⁵⁹ Yet the groups’ reten-

²⁵⁷ See Brief in Opposition, *The Muslim Ban Case*, *supra* note 238, 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).

²⁵⁸ KRETZMER, *supra* note 159, at 3.

²⁵⁹ The ACLU, for example, describes its work on immigrants’ rights as including “targeted impact litigation, advocacy, and public outreach.” *Immigrants’ Rights*, subsection What’s at Stake, ACLU, <https://www.aclu.org/issues/immigrants-rights#act> [https://perma.cc/8NQA-F7ME] (last visited Dec. 30, 2019) (providing information on immigrants, government policies, litigation, and opportunities for people to take action). See, e.g., Repeal Trump’s Anti-Immigrant Bans, ACLU, https://action.aclu.org/petition/repeal-trumps-anti-immigrant-bans?ms_aff=NAT&initms_aff=NAT&ms=190410_immigrantrights_noban&initms=190410_immigrantrights_noban&ms_chan=web&initms_chan=web [https://perma.cc/QRC8-TX6W] (last visited Dec. 30, 2019) (“Now is the time to raise our voices and make clear that we will not allow the Muslim, refugee, and asylum bans in our America. Add your name demanding that Congress pass the NO BAN Act.”) (emphasis omitted). Scott Cummings observes that many legal organizations such as the ACLU and the Center for Constitutional Rights employ advocacy strategies and tactics that he characterizes as “movement lawyering.” Scott Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1688 (2017). Cummings defines “movement lawyering” as “the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain democratic social change goals that they define.” *Id.* at 1690 (italization omitted).

tion of litigation as a core tenet demonstrate that advocacy approaches are flexible and diverse, not 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.²⁶⁰

First, the Court's deferential national-security analysis means that who holds the levers of power is of utmost importance—particularly the President.²⁶¹ Presidential elections have profound consequences on the Supreme Court, the rest of the judiciary's composition, as well as their likely rulings in the national-security-immigration sphere.²⁶² Accordingly, advocacy groups should incorporate electoral strategies within their general efforts at transforming the national security-immigration space.²⁶³ The theoretical conception of litigation as entirely nonpartisan possibly delayed some groups from adopting overt political and electoral strategies.²⁶⁴

²⁶⁰ An online video campaign offers a powerful non-litigation example of advocacy against the Muslim ban, which emphasizes the ban's human impact in a visceral way, having "crowdsourced 106 videos from Iranians, Americans, Iranian-Americans, Syrian-Americans, Syrians, Somalians, and Yemeni individuals who are affected by the ban." *Travel Ban Through the Eyes of Those Who Are in It*, IN IT, <https://in-it.com/travelban> [<https://perma.cc/2PAJ-3M4D>] (last visited Dec. 30, 2019) [hereinafter IN IT]; Bob Ortega, *Separated by the Travel Ban, These Couples are Taking to Video to Plead Their Case*, CNN (May 28, 2019 11:08 AM), <https://edition.cnn.com/2019/05/24/us/travel-ban-separation-video-campaign-invs/index.html> [<https://perma.cc/FA9H-3JQ4>]. The campaign encourages people to call on Congress to conduct oversight, clarify the waiver process, and provide an immediate family exemption to the ban. IN IT, *supra*. Groups such as America's Voice offer additional approaches as it seeks "to harness the power of American voices and American values to enact policy change that guarantees full labor, civil and political rights for immigrants and their families," including working with "faith-based" groups. *About*, AMERICA'S VOICE, <https://americasvoice.org/about-us/> [<https://perma.cc/Y6FX-RH6A>] (last visited Dec. 30, 2019).

²⁶¹ See John Yoo & Robert J. Delahunty, Opinion, *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> [<https://perma.cc/MVM8-YJPY>]; Hamid, *supra* note 11.

²⁶² See generally *The Muslim Ban Case*, 138 S. Ct. 2392 (2018) (The Justices' alignment in *The Muslim Ban Case* evidences the electoral relationship to judicial outcomes with the familiar five Republican appointees comprising the majority and the four Democrat appointees joining in dissent.).

²⁶³ See, e.g., Shakir, *supra* note 11 (discussing the ACLU's first "serious" involvement in elections, attempting "to increase voters' understanding and awareness of civil liberties issues").

²⁶⁴ See, e.g., *Social Welfare Organizations*, IRS, <https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations> [<https://perma.cc/2UF8-L5CV>] ("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.").

Advocates should not, however, confuse or conflate partisan opposition to the Trump presidency with support for historically marginalized groups. Notwithstanding appeals to intersectionality and the record number of minority women elected in the 2018 midterm elections, most politicians are unlikely to advocate non-citizen rights, particularly at times of perceived threat. The USA PATRIOT Act votes tallies—98-1 in the Senate; 357-66 in the House²⁶⁵—in a Democratically-controlled Congress immediately after the 9/11 attacks demonstrate the nonpartisan allure of targeting out-groups' rights in crises.²⁶⁶

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 detainees.²⁶⁷ The support for these measures, while often regionalized or localized, indicate fertile ground for some popular advocacy.²⁶⁸ Fostering more localized resistance to imposition of federal immigra-

²⁶⁵ 147 CONG. REC. 20, 465–66; 147 CONG. REC. 20, 742.

²⁶⁶ See, e.g., USA Patriot Act 2001, 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).

²⁶⁷ By one count, more than 170 states, cities, and counties have laws, policies, or practices that limit cooperation with federal officials concerning information about, and access to, aliens within their jurisdictions for purposes of enforcing federal civil immigration law. See Bryan Griffith & Jessica M. Vaughan, *Map: Sanctuary Cities, Counties, and States*, CTR. FOR IMMIGR. STUD., <https://cis.org/Map-Sanctuary-Cities-Counties-and-States> [<https://perma.cc/XH9M-V2BZ>] (last updated Apr. 16, 2019). 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 Chi. v. Sessions*, 888 F.3d 272, 279 (7th Cir. 2018) (citing CHI., ILL. MUN. CODE § 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 CHI., ILL. MUN. CODE § 2-173-005). 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 the city was likely to succeed on the merits because the attorney general lacked statutory authority to impose the conditions. *Id.* at 283–88.

²⁶⁸ Polling on the Muslim ban, however—while of questionable reliability—suggests opinions largely divide along partisan lines. See Grace Sparks, *Americans Have Been Split on Trump's Travel Ban for a While*, CNN POLITICS (June 26, 2018), <https://edition.cnn.com/2018/06/26/politics/travel-ban-polling/index.html> [<https://perma.cc/QNM4-RTV6>] (describing varied poll results on the Muslim ban).

tion 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.²⁶⁹ Enabling these collective responses should aid targeted groups in escaping the narrow and stultifying confines of judicial precedent and the dry rhetoric of law.²⁷⁰

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 organizations a seat at the table if not the head. They may even represent these groups as their clients.²⁷¹ 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 endemic to the traditional civil rights movement's legalistic advocacy and top-down leadership, reflect the viability of the non-hierarchical approach.²⁷²

²⁶⁹ See, e.g., Brief for The Cato Institute as Amicus Curiae Supporting Respondents at 1, *Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct. 2392 (2018) (No. 17-965), https://www.supremecourt.gov/DocketPDF/17/17-965/39755/20180323095217542_Cato%20Amicus%20Brief.pdf [<https://perma.cc/9WYG-KF2T>] (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”).

²⁷⁰ Stella Elias describes these and similar state and local efforts as forms of “immigration status ‘covering.’” Stella Burch Elias, *Immigrant Covering*, 58 WM. & MARY L. REV. 765, 831–41 (2017). The positive consequences may include expanded “opportunities for immigrants . . . [in] education, employment, and access to goods and services,” “psychological benefits” due to allayed fears of deportation, and “treat[ment] on par with U.S. citizens.” *Id.* at 842–43. However, Elias cautions, such “covering” laws are tainted by their “[i]mpermanence, vulnerability, and absolute reliance on the continued good grace of the majority.” *Id.* at 849.

²⁷¹ Scott Cummings explains that representing these “mobilized clients”—groups “that play a leadership role in social change campaigns”—achieves at least purposes. Cummings, *supra* note 259, at 1691. The representation (1) “associates lawyers with organized groups that have the capacity to disrupt and thereby influence politics”; (2) ensures greater lawyer accountability due to mobilized clients’ “structure and authority”; and (3) improves representation because mobilized clients hold “legitimate authority derived from engagement with and leadership of affected constituency members.” *Id.* at 1691–92.

²⁷² See, e.g., Barbara Ransby, Opinion, *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> [<https://perma.cc/EP36-8M9K>]; Jelani Cobb, *The Matter of Black Lives*, NEW YORKER (Mar. 6, 2016), <https://www.newyorker.com/magazine/2016/03/14/where-is-black-lives-matter-headed> [<https://perma.cc/2HBF-FXRS>].

These groups offer alternative narratives to the dominant legal discourse.²⁷³ Liberated from legal briefs and precedent, they provide various conceptions of liberty, community, nationality, culture, and identity.²⁷⁴ Witness the power and prevalence of Shepard Fairey’s “We the People” poster depicting a young woman in a hijab made from an American flag.²⁷⁵ The image offers a visceral, inclusive and patriotic vision of American identity distinct from the Court’s abstracted and parsimonious opinion.²⁷⁶

²⁷³ 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 211, 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”).

²⁷⁴ See, e.g., AMERICA’S VOICE, *supra* note 260 (describing its mission as utilizing “the power of American voices and American values to enact policy change that guarantees full labor, civil and political rights for immigrants and their families”); IN IT, *supra* note 260 (“That’s why we decided to create a collective voice showing what the Ban means for the nationals of the banned countries and also expose how it is being implemented.”).

²⁷⁵ 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> [<https://perma.cc/Q4ML-W2WA>]. 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.” *About The Campaign*, AMPLIFIER, <https://amplifier.org/campaigns/we-the-people/> [<https://perma.cc/HDX4-9HR2>] The campaign provided free images to download as “new symbols of hope to combat the rising power of nationalism, bigotry, and intolerance.” *Id.* The campaign works “with change movements, educators, and innovative thinkers to bring We The People into schools and communities around the country.” *Id.*

²⁷⁶ Cover, *Nomos and Narrative*, *supra* note 211, 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.²⁷⁸ Rather than a clash of Western and Muslim civilizations—a narrative heralded since the 9/11 attacks²⁷⁹—and one of Trump's supporting rationales for the Muslim ban²⁸⁰—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

²⁷⁷ *About The Campaign*, *supra* note 275.

²⁷⁸ Roaa H. Ali, *The Women's March That Welcomed the Hijab as a Sign of Dissidence: Pink, Rainbows, and an American-Flag Hijab*, 3 INTERDISC. PERSPS. ON EQUAL. AND DIVERSITY at 1, 4 (2017), <http://journals.hw.ac.uk/index.php/IPED/article/view/51/32>.

²⁷⁹ *Id.* at 6.

²⁸⁰ See *Anderson Cooper 360 Degrees: Exclusive Interview with Donald Trump*, CNN TRANSCRIPTS (Mar. 9, 2016, 8:00 PM), <http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html> [<https://perma.cc/YN9T-NW74>] ("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.").

their American identity, nor are their bodies an offense to the national body.²⁸¹

But a greater shift is needed to normalize the hijab—Muslim identity—within American cultural and legal frameworks. That transformation must embrace a common humanity that transcends the dominant theories of the state and social contract.

C. Finding National Identity in Family and Religion

Margulies and Metcalf maintain that the legalistic battle over rights obscures the fight over national identity.²⁸² Despite my skepticism about 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. Thus, a more inclusive and extralegal 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.

Rights may be generally defined as “benefits secured for persons by rules regulating the relationships between those persons and other persons subjects to those rules.”²⁸³ These rights also may be defined in relation to the state, as in the Bill of Rights.²⁸⁴ But social contract theory vests the state with tremendous power over the rights holders. Hobbes located in a

²⁸¹ Ali, *supra* note 278, at 7.

²⁸² See Margulies & Metcalf, *supra* note 111, at 463.

²⁸³ See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 203-04 (2d ed. 2011) (emphasis omitted).

²⁸⁴ 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; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”).

“Common Power”—the Leviathan or mortal god—the only solution to humanity’s warring against itself and “invasion of Forraigners.”²⁸⁵ The people consented to the Common Power’s governance through mutual covenants with one another.²⁸⁶

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”).²⁸⁷ 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.”²⁸⁸

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.²⁸⁹ Yet they become subjects to “any earthly power” only through “express consent.”²⁹⁰ 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.”²⁹¹ 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.

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.²⁹² 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.”²⁹³ So conceived, Waldron’s “incremental”,

²⁸⁵ THOMAS HOBBS, *LEVIATHAN* 131 (Oxford Univ. Press 1929) (1651).

²⁸⁶ *Id.* at 131–32.

²⁸⁷ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 259 (George Routledge & Sons 2d ed. 1887) (1689).

²⁸⁸ *Id.* at 268.

²⁸⁹ *Id.* at 265.

²⁹⁰ *Id.* 257.

²⁹¹ *Id.* at 259–60.

²⁹² *Id.* at 242.

²⁹³ Jeremy Waldron, *John Locke: Social Contract Versus Political Anthropology*, 51 *REV. OF POLITICS* 3, 19–21, 23 (1989) (quoting LOCKE, *supra* note 287) [hereinafter Waldron, *John Locke*].

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.”²⁹⁴ 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.²⁹⁵

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”)²⁹⁶ and attributed early societies’ subsistence to the care of “nursing fathers.”²⁹⁷ Waldron contends that one may employ the “almost natural” consent theory as “a way of characterizing a particular set of historical events, such as the gradual emergence of a polity out of a family.”²⁹⁸ 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.²⁹⁹

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.³⁰⁰ The family is a model subsidiarity—an associational group which fulfills social functions “not at the lowest possible level, but rather at the right lev-

²⁹⁴ *Id.* at 25.

²⁹⁵ *Id.* at 20.

²⁹⁶ LOCKE, *supra* note 287, at 245. *See also* Waldron, *John Locke*, *supra* note 293, at 19–20.

²⁹⁷ LOCKE, *supra* note 287.

²⁹⁸ Waldron, *John Locke*, *supra* note 293, at 24–25.

²⁹⁹ *Id.* at 25.

³⁰⁰ *See, e.g.*, Abby M. McCloskey, *Beyond Growth*, 41 NAT’L AFF. (2019), <https://www.nationalaffairs.com/publications/detail/beyond-growth?smid=nytcore-ios-share> [<https://perma.cc/2UPT-TPBE>] (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).

el.”³⁰¹ 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.”³⁰² Rather, “it is the family, which has the most direct line into the formation of the habits, manners and social mores that bring about the coordination of society’s parts.”³⁰³ 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.³⁰⁴ 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 “Forrainers,” 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.

³⁰¹ Dominic Burbidge, *The Inherently Political Nature of Subsidiarity*, 62 AM. J. JURIS. 143, 144 (2017) (quoting Jonathan Chaplin, *Subsidiarity and Social Pluralism*, in GLOBAL PERSPECTIVES ON SUBSIDIARITY 72 (Michelle Evans & Augusto Zimmerman eds. 2014)) (emphasis omitted).

³⁰² *Id.* at 158.

³⁰³ *Id.*

³⁰⁴ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 231 (1972) (holding that the state may not compel Amish parents to send children to school until age sixteen). 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.*

. . . .

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 the nation of which the foreigners are subjects [I]ts determination is conclusive upon the judiciary.³⁰⁵

This plenary-power doctrine³⁰⁶—a political theory of state power and citizenship—enables a legal and political narrative that harbors racist, xenophobic, and nationalistic instincts along with deference to the political branches.³⁰⁷ 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.”³⁰⁸ 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.”³⁰⁹

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-energating origins. *Mandel* relied heavily on *The Chinese Exclusion Case*, *Fong Yue Ting v. United States*, and the plenary power doctrine in holding that it would “not look behind” the Executive’s denial of entry to a foreign person implicating an American citizen’s First Amendment right to receive information and hear ideas, when the government acts “on

³⁰⁵ *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603, 606 (1889).

³⁰⁶ See generally Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13 (2003) (discussing how the plenary power doctrine affects ongoing jurisprudence).

³⁰⁷ 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 HOBBS, *supra* note 285, at 211–12 (“And therefore the interpretation of all Lawes 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.”).

³⁰⁸ *The Chinese Exclusion Case*, 130 U.S. at 595.

³⁰⁹ *Korematsu v. United States*, 323 U.S. 214, 218–19 (1944).

the basis of a facially legitimate and bona fide reason.”³¹⁰ As Justice Marshall wryly noted in his dissent, “[t]hese cases are not the strongest precedents in the United States Reports.”³¹¹

4. Communitarian Immigration Principles

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.³¹² 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.³¹³

Monumental changes in constitutional law, as expressed in the prohibition on racial segregation in *Brown v. Board of Education*³¹⁴ and following developments in civil-rights laws challenged discriminatory classifications restrictions on non-citizens’ entry.³¹⁵ Similarly, alien-focused decisions such as *Plyler v. Doe*,³¹⁶ which held that, on equal protection grounds, Texas could

³¹⁰ *Kleindienst v. Mandel*, 408 U.S. 753, 765, 770 (1972) (citing *The Chinese Exclusion Case*, 130 U.S. at 609; *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)). “The Court without exception has sustained Congress’ ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.’” *Id.* at 766 (quoting *Boutilier v. Immigration and Naturalization Serv.*, 387 U.S. 118, 123 (1967)).

³¹¹ *Id.* at 781 (Marshall, J., dissenting). Justice Marshall goes on to reference *The Chinese Exclusion Case*, 130 U.S. 581 (1889) and *Fong Yue Ting*, 149 U.S. 698 (1893).

³¹² 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”).

³¹³ See Cox, *supra* note 197 (“[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.”). See also Motomura, *supra* note 312, at 566–67 (contending that case law protecting aliens’ rights and “other developments in the law of individual rights, have provided the normative foundation for results at odds with strict application of the plenary power doctrine”); Schuck, *supra* note 312, at 64 (attributing developing expanded government duty and non-citizens’ “legal protections” in the exclusion process to “abstract principles gleaned from the congeries of domestic law norms, including constitutional due process and equal protection, the Refugee Act of 1980, and judicially elaborated communitarian values”).

³¹⁴ *Brown v. Bd. of Educ. of Shawnee Cty., Kan.*, 347 U.S. 483, 495 (1954).

³¹⁵ See Motomura, *supra* note 312, at 566; Cox, *supra* note 197.

³¹⁶ See generally *Plyler v. Doe*, 457 U.S. 202 (1982).

not deny non-citizen children a public education, recognized that citizenship alone could not be a basis for acceptance into American society and provision of legal rights.³¹⁷

The Immigration and Nationality Act (INA) 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.”³¹⁸ 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.”³¹⁹ As part of its anti-discrimination design, INA, 18 U.S.C. § 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.”³²⁰

Immigration policy’s preferences for family reunification go back almost a century.³²¹ But in eradicating the national origins quotas, the 1965 Amendments further clarified the prioritization of family relationships in

³¹⁷ See Motomura, *supra* note 312, 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 312, at 54 (arguing that *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”). Just one year prior to *The Muslim Ban Case*, the Court again accepted the progressive influence of domestic constitutional law on immigration classifications, holding that the Equal Protection Clause prohibited requiring different durations for fathers and mothers’ presence in the United States in determining U.S. citizenship of children born abroad to unwed parents. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017). There, the Court rejected arguments from *Fiallo v. Bell*, 430 U.S. 787 (1977), which concerned immigration entry preferences for non-citizen children born to mothers, and its assertion that “minimal scrutiny (rational-basis review)” should apply. *Morales-Santana*, 137 S. Ct. at 1693. Whereas, *Fiallo* gave “Congress’ ‘exceptionally broad power’ to admit or exclude aliens,” *Morales-Santana*’s claim was that of a U.S. citizen, thus requiring heightened scrutiny under established constitutional law. *Id.* at 1693–94 (quoting *Fiallo*, 430 U.S. at 792, 794). The Court has also recognized that an alien’s presence—even unlawful—within the United States provides the person greater legal protections than someone who has not yet entered the country. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (holding detention of removable alien exceeding six months presumptively unreasonable).

³¹⁸ See Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill, 2 PUB. PAPERS 1037–40 (1966).

³¹⁹ *Olsen v. Albright*, 990 F. Supp. 31, 37 (D.D.C. 1997).

³²⁰ 8 U.S.C. § 1152(a)(1)(A) (2018).

³²¹ WILLIAM A. KANDEL, CONG. RESEARCH SERV., U.S. FAMILY-BASED IMMIGRATION POLICY 2 (2018).

allocating family-sponsored immigrant visas.³²² 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.³²³

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."³²⁴ Revealing its hand early, the Court stated that the statute "exudes deference to the President in every clause."³²⁵ The Court proceeded to reject arguments that the President must provide "sufficient[ly] detail[ed]" findings that would allow for judicial review.³²⁶ 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.³²⁷ Nowhere does the Court even reference the judicial and legislative watersheds that had commentators poised to bury the plenary power doctrine.³²⁸

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,

³²² See Johnson, *supra* note 318 ("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 to those already here.").

³²³ 8 U.S.C. § 1153(a) (2018).

³²⁴ 8 U.S.C. § 1182(f) (2018).

³²⁵ *Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct. 2392, 2408 (2018).

³²⁶ *Id.* at 2409.

³²⁷ *Id.* at 2413–15.

³²⁸ 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 prohibiting discrimination on the basis of religion in visa and entry decisions. H.R. 2214, 116th Cong. (2019); S. 1123, 116th Cong. (2019). The bills would also 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, imposing congressional notification and consultation requirements, and voiding all executive orders and proclamations constituting the current Muslim ban. H.R. 2214; S. 1123.

and has no wish, to protect.”³²⁹ 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.³³⁰ 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.³³¹

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 government’s treatment of non-citizens seeking entry to the United States.³³² *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 by affording protections to American Muslim citizens whose family members have been denied entry.

5. Judicial Betrayal of Family and Religion

The Muslim Ban Case most profoundly disappoints in its failure to keep faith with the protections Congress affords immigrant family members and the protections the Constitution guarantees religious minorities. 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: “[o]nly by diluting the meaning of a fundamental liberty inter-

³²⁹ Schuck, *supra* note 312, 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.”).

³³⁰ Schuck, *supra* note 312, at 49.

³³¹ *Id.* at 50.

³³² 8 U.S.C. § 1153(a) (2018); Waldron, *John Locke*, *supra* note 293, at 24–25; Schuck, *supra* note 312, at 50.

est 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."³³³ 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.³³⁴ 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 found the visa denial did not satisfy procedural due process guarantees.³³⁵

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 unsupported" and "outside the arena of public debate and legislative action."³³⁶ 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."³³⁷ 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.³³⁸

Only eleven days after the Court issued its ruling in *Din*, the Court delivered *Obergefell v. Hodges*, upholding a constitutional right to same-sex marriage as vested in the Due Process Clause.³³⁹ There, Justice Kennedy explained how the right to marry "safeguards children and families,"³⁴⁰ 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

³³³ *Kerry v. Din*, 135 S. Ct. 2128, 2136 (2015) (plurality opinion).

³³⁴ *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.").

³³⁵ *Id.* at 2142 (Breyer, J., dissenting).

³³⁶ *Id.* at 2133–34 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

³³⁷ *Id.* at 2136 (quoting E. P. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965* at 518 (1981)).

³³⁸ *Id.* at 2142–43 (Breyer, J., dissenting).

³³⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2588 (2015).

³⁴⁰ *Id.* at 2590.

daily lives.”³⁴¹ 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 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.”³⁴² The Court 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.”³⁴³ But concern for maintaining the family relationship 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.”³⁴⁴ The Court explained that it would not decide the spiritual and

³⁴¹ *Id.* at 2600 (quoting *United States v. Windsor*, 570 U.S. 744, 772 (2013)).

³⁴² *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017). 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 a university and 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 (Mem.) (2017) (staying in part *Hawaii v. Trump*, 871 F.3d 646 (9th Cir. 2017)).

³⁴³ *Hawaii*, 871 F.3d at 658, 658 n.8. *See Hawaii*, 138 S. Ct. 1 (Mem) (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.” *Hawaii*, 871 F.3d at 658 (quoting *Moore v. City of E. 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.” *Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct. 2392, 2422 (2018).

³⁴⁴ Proposed Third Amended Complaint, *supra* note 35; *The Muslim Ban Case*, 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

dignitary interest claim because the family separation claims offers a “more concrete injury.”³⁴⁵

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.”³⁴⁶ 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.³⁴⁷ And the Court has long recognized the vital relationship between family and religion.³⁴⁸

In arriving at its adumbrated, deferential review, the Court resisted 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.”³⁴⁹ 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.³⁵⁰

Respondents at 27–28, *Trump v. Hawaii (The Muslim Ban Case)*, 138 S. Ct. 2392 (2018) (No. 17-965) https://www.supremecourt.gov/DocketPDF/17/17-965/39833/20180323141105422_17-965bs--Merits%20Response--AS%20FILED.pdf [https://perma.cc/SG2E-KHFC] (emphasis omitted).

³⁴⁵ *The Muslim Ban Case*, 138 S. Ct. at 2416.

³⁴⁶ *Id.*

³⁴⁷ *See* Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 224 n.9 (1963). 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. *See id.* The “direct affect” accentuates the importance of religion to family and identity.

³⁴⁸ *See, e.g.,* Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) (“The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice”); Ass’n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (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) (Brennan, J., dissenting) (“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.”).

³⁴⁹ *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring).

³⁵⁰ *Compare The Muslim Ban Case*, 138 S. Ct. at 2419 (“[O]ur opinions have reaffirmed and applied [*Mandel’s*] deferential standard of review across different contexts and constitutional claims.”), *with id.* at 2440 n.5 (Sotomayor, J., dissenting) (maintaining that, under *Mandel* and

The Court ultimately did not address whether the Establishment Clause's scope provided a legal interest in the admission of foreign family members.³⁵¹ 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.³⁵²

The Muslim ban is therefore doubly pernicious. It simultaneously keeps family members of Muslim-Americans 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.’”³⁵³ Thus, Muslim citizens do not enjoy the same protections for their religious exercise as do citizens of other faiths.³⁵⁴

The Court reinforced its message of religious bigotry through its decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, which it released only twenty-four days earlier.³⁵⁵ 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.³⁵⁶

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.”³⁵⁷ But in contrast to

Din, “an affirmative showing of bad faith,” requires “looking behind the face of the Proclamation” (quoting *Din*, 135 S. Ct. at 2141).

³⁵¹ *Id.* at 2416.

³⁵² *Id.* at 2418–19, 2423.

³⁵³ *Id.* at 2434 (Sotomayor, J., dissenting) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000)).

³⁵⁴ *Id.* at 2446–47 (noting the Court's more exacting scrutiny of religious discrimination claim asserted by a Christian baker in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring)).

³⁵⁵ See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018)

³⁵⁶ *Id.* at 1723–24.

³⁵⁷ *The Muslim Ban Case*, 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 discrimina-

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.³⁵⁸ 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 decision making body.”³⁵⁹ 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,”³⁶⁰ and compounds the message that some groups' religions and their intimate liberty interests merit less protection than others.

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.³⁶¹ The Court thus employed its rights analysis within a context of national security that immediately elevated the government interest and diminished the individual interest.³⁶²

tion 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 *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (“The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination.”); *id.* at 540 (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 both direct and circumstantial evidence.”) (quoting *Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). The alternative view maintains that invoking different religious clauses should receive distinct analysis. *See supra* notes 238–51 and accompanying text.

³⁵⁸ *Masterpiece*, 138 S. Ct. at 1729–31.

³⁵⁹ *Id.* at 1731 (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 540).

³⁶⁰ *The Muslim Ban Case*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting).

³⁶¹ 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 for Immigration, Family, and Constitutional Law Professors, *supra* note 197, at 20–21 (citing *Plyler v. Doe*, 457 U.S. 202, 223 (1982)); Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U.L. REV. 1309, 1338–39 (2017).

³⁶² 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, and environment which is physically healthy and in which the weak can go about without fear of the whims of the strong.” FINNIS, *supra* note 283, at

But if we reconceive national identity along “communitarian principles” 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.³⁶³ 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.”³⁶⁴ An even braver Court might also have looked beyond the family unit and considered the constitutional values and human relationships, which would 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.³⁶⁵ 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.

VI. CONCLUSION

Surveying the Supreme Court’s opinions during wartime, Chief Justice Rehnquist said: “While we would not want to subscribe to the full sweep of the Latin maxim—*Inter Arma Silent Leges*—in time of war the laws are silent, perhaps we can accept the proposition that though the laws are not

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.

³⁶³ Schuck, *supra* note 312, at 49–50.

³⁶⁴ *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 271 (4th Cir. 2018), *as amended* (Feb. 28, 2018), *cert. granted, judgment vacated*, 138 S. Ct. 2710 (2018).

³⁶⁵ 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. *Trump v. Hawaii*, 138 S. Ct. 1 (Mem) (2017). These refugees had already undergone and cleared eighteen to twenty-four months screening processes, which would have found they satisfied legal refugee status, security, and medical requirements. *Hawaii v. Trump*, 871 F.3d 646, 660 (9th Cir. 2017). 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. *Id.*

silent in wartime, they speak with a muted voice.”³⁶⁶ 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 xenophobia and racism in the name of security.³⁶⁷ 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.

³⁶⁶ Chief Justice William H. Rehnquist, Remarks at the 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 [https://perma.cc/J7BA-DBTK].

³⁶⁷ *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. *Id.*