

# ARTICLES

## THE TRAVEL BAN DECISION, ADMINISTRATIVE LAW, AND JUDICIAL METHOD: TAKING STATUTORY CONTEXT SERIOUSLY

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### ABSTRACT

*The Supreme Court's deferential decision upholding President Trump's travel ban muted longtime values of judicial craft. Consider the interaction of constitutional and statutory interpretation. In her dissent, Justice Sotomayor likened the Court's decision in Trump v. Hawaii to Korematsu v. United States, in which the Court rejected an equal protection challenge to a conviction arising from the Japanese-American internment. Writing for the Hawaii majority, Chief Justice Roberts rejected the comparison. Lost in the clamorous debate about Korematsu's substantive relevance was an important methodological point: The Hawaii Court could have taken a page from another decision on the internment, Ex Parte Endo, which held that a key component of the internment exceeded the scope of Congress's delegation to the Executive. Instead, the Hawaii Court coupled a mechanical defense of the travel ban on statutory grounds with an unconvincing analysis of the plaintiffs' Establishment Clause claim.*

*The prime flaw in the Court's Establishment Clause analysis was its puzzling reliance on rational basis review decisions, such as City of Cleburne v. Cleburne Independent Living Center, that subjected government action to far more searching means-ends scrutiny than the Hawaii majority was willing to employ. The robust inquiry in those cases contrasted with the Hawaii majority's blinkered deference. An approach more attuned to judicial craft would have recognized this problem and pivoted toward a statutory holding against the travel ban. Practicing foreign affairs deference, the Hawaii majority instead read an*

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*immigration law provision in isolation from its statutory context. That move failed to acknowledge earlier cases such as Kent v. Dulles, which tempered Executive overreach during the Cold War, and more recent administrative law decisions such as King v. Burwell, which examined the overall scheme of the Affordable Care Act to interpret a provision governing health care exchanges.*

*This article critiques Hawaii’s flawed Establishment Clause and statutory analyses, applying the wisdom of Ex Parte Endo, the Cold War cases, and the recent administrative law decisions. That approach also highlights the risks of the Hawaii Court’s undue deference. In method, Hawaii’s deference resembles the Korematsu holding that Justice Robert Jackson’s dissent warned was a “loaded weapon” aiding further executive branch abuses. This article offers a toolkit for defusing that dangerous weapon and making sense of legislative delegation on immigration issues.*

#### TABLE OF CONTENTS

INTRODUCTION . . . . .	161
I. EO-3: ORIGINS, OPERATION, AND RECEPTION IN THE COURTS . . . . .	163
A. <i>The INA and EO-3</i> . . . . .	163
B. <i>The Supreme Court Weighs In</i> . . . . .	166
II. STRUCTURAL SPILLOVER AS A DIFFERENCE-MAKER IN CONSTITUTIONAL AND STATUTORY INTERPRETATION . . . . .	167
III. JUDICIAL METHOD ECLIPSED: THE TRAVEL BAN AND THE ESTABLISHMENT CLAUSE . . . . .	170
A. <i>The Reasonable Observer Test’s Poor Fit with Foreign     Affairs</i> . . . . .	171
B. <i>Persistent Complexity in Parsing Presidential Statements.</i>	173
C. <i>The Hawaii Majority’s Methodological Travails</i> . . . . .	176
1. EO-3 and Facial Legitimacy . . . . .	176
2. EO-3’s Vulnerability Under “Rational Basis with Bite”	178
3. EO-3’s Failure to Fit the <i>Cleburne</i> Rational Basis Cases. . . . .	180
4. <i>The Hawaii Majority’s Tepid Response</i> . . . . .	183
IV. CONTROLLING EXECUTIVE EXCESS: CONTEXT AND CONSTITUTIONAL AVOIDANCE IN STATUTORY INTERPRETATION . . . . .	185

A.	<i>Avoidance and Blunting Invidious Impacts: The Japanese-American Internment Cases</i> . . . . .	185
B.	<i>The Court and the Cold War</i> . . . . .	187
C.	<i>Reading Regulatory Statutes in Context</i> . . . . .	192
1.	Interpretive Harmony and the Regulatory State . . . . .	193
2.	Reading Statutes in Context: Executive Action Benefiting Immigrants . . . . .	195
V.	THE <i>HAWAII</i> COURT'S MISSED OPPORTUNITY: WHY EO-3 FAILS TO FIT THE INA . . . . .	199
A.	<i>How EO-3 Undermines the INA's Priority on Family Reunification</i> . . . . .	199
B.	<i>The Majority's Misuse of Precedent</i> . . . . .	201
C.	<i>Hawaii's Truncated Analysis of Past Practice</i> . . . . .	203
D.	<i>EO-3 as a De Facto National Origin Quota</i> . . . . .	207
	CONCLUSION . . . . .	209

#### INTRODUCTION

As the Supreme Court's decision in *Trump v. Hawaii*<sup>1</sup> showed, dire predictions often drive judicial deference. According to Chief Justice Roberts, who wrote the majority opinion,<sup>2</sup> the statutory arguments advanced by the challengers of President Trump's travel ban<sup>3</sup> (EO-3)<sup>4</sup> would have "cramped" the exercise of power that Congress delegated to the President in the Immigration and Nationality Act (INA).<sup>5</sup> Similarly, Chief Justice Roberts asserted that accepting the challengers' Establishment Clause arguments regarding President Trump's statements could affect the "authority of the Presidency itself."<sup>6</sup> The majority opinion warned against what this Article refers to as "structural spillover," or the danger that a judicial decision against the Executive or Congress could impair the effective performance of the political branches in the roles that the Framers envisioned. However, the *Hawaii* majority failed to recognize that structural spillover has a flip side: undue deference, which can obscure the courts' distinctive virtues of "judgment,"

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

2. Justices Kennedy, Thomas, Alito, and Gorsuch joined this opinion; Justice Kennedy also wrote a brief concurrence, while Justice Thomas concurred to address the issue of nationwide injunctions. Justice Sotomayor wrote a dissenting opinion, in which Justice Ginsburg joined. Justice Breyer wrote another dissent, in which Justice Kagan joined.

3. See Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

4. For ease of reference, this Article distinguishes September 2017 proclamation from the two earlier executive orders (EOs) on the subject issued by President Trump, using the abbreviation EO-3.

5. *Hawaii*, 138 S. Ct. at 2412.

6. *Id.* at 2418.

“moderation,” and independence.<sup>7</sup>

To manage both sides to such spillover, the Court should have relied on statutory interpretation, holding that EO-3 exceeded the power that Congress delegated to the President.<sup>8</sup> For earlier proponents of judicial restraint such as Justice Felix Frankfurter, statutory interpretation was a vital resource in curbing executive abuses without the structural spillover caused by a constitutional holding.<sup>9</sup> Holding that an executive action exceeds the scope of statutory delegation avoids serious constitutional questions<sup>10</sup> and gives the political branches space to tailor their approaches without the rigidity of a constitutional rule. Even when a given reading of a statute will *not* trigger constitutional issues, courts will decline to read a single statutory provision “in isolation,” and will instead construe a statute as a “harmonious whole” to respect Congress’s “overall scheme.”<sup>11</sup> In either instance, courts will consult past practice of the political branches to confirm the plausibility of particular reading.<sup>12</sup>

In *Hawaii*, a statutory holding would have cured several methodological problems in the majority opinion. It would have sidestepped the gaps in the Court’s constitutional holding that EO-3 satisfied the highly deferential “facially legitimate and bona fide” standard,<sup>13</sup> as well as its alternative holding that EO-3 passed muster under rational basis review. The Court’s precedents on the “facially legitimate and bona fide” standard lacked demonstrable indicia of bad faith such as candidate Donald Trump’s anti-Muslim statements. Moreover, the majority’s view that EO-3 also survived rational basis review<sup>14</sup> did not apply the robust means-end scrutiny of equal protection cases cited by the Court, such as *City of Cleburne v. Cleburne Independent Living Center*.<sup>15</sup> A statutory holding against EO-3 would also have harmonized more effectively with the INA’s antidiscrimination provision<sup>16</sup> and

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7. See THE FEDERALIST NO. 78, at 467-70 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

8. Both the Fourth and Ninth Circuits had relied in part on statutory arguments in affirming injunctions against EO-3. See *Hawaii v. Trump*, 878 F.3d 662, 684 (9th Cir. 2017); *International Refugee Assistance Project (IRAP) v. Trump*, 883 F.3d 233, 289-305 (4th Cir. 2018) (en banc) (Gregory, J., concurring); *id.* at 311-19 (Keenan, J., concurring).

9. *United States v. Witkovich*, 353 U.S. 194, 201 (1957); Philip P. Frickey, *Getting From Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397 (2005).

10. See *Crowell v. Benson*, 285 U.S. 22, 60-61 (1932); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568 (1988).

11. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

12. *Kent v. Dulles*, 357 U.S. 116, 121-24 (1958).

13. *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018).

14. *Id.* at 2420 (assuming that rational basis review is appropriate and finding that EO-3 passed muster under this standard). This Article concedes that the Court was correct that the “reasonable observer” standard often used in Establishment Clause cases was too intrusive for the complex foreign relations and national security issues at stake in the travel ban case. See *id.* at 2418-19 (arguing for judicial caution in foreign relations matters characterized by “changing political and economic circumstances”); see also *infra* notes 88-121 and accompanying text (noting problems with Establishment Clause case against EO-3).

15. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (cited in *Hawaii*, 138 S. Ct. at 2420).

16. See 8 U.S.C. § 1152(a)(1)(A) (barring discrimination in decisions on immigrant visas).

elaborate statutory scheme governing visa processing.<sup>17</sup> The *Hawaii* majority instead opted for a mechanical deference that earlier advocates of judicial restraint such as Justice Frankfurter had rejected as insufficiently nuanced. This article seeks to reclaim the promise of those earlier precedents.

The article is in five Parts. Part I briefly provides the factual background for EO-3 and summarizes the opinions in *Trump v. Hawaii*. Part II introduces the problem of structural spillover, recognizing that spillover can affect both the political branches' freedom of action and the courts' reputation. Part III examines the constitutional issues raised by EO-3, concluding that difficult challenges plagued both the majority opinion's efforts to justify EO-3 and the dissent's argument that EO-3 was constitutionally infirm. Part IV discusses two statutory responses to executive overreach that the Court has employed when it wishes to defuse the risks of a constitutional ruling: 1) constitutional avoidance, and 2) reading a statute in context. Part V critiques the *Hawaii* majority's departure from these responses to instead read one provision of the INA in isolation, divorced from the legislature's intention to combat discrimination.

## I. EO-3: ORIGINS, OPERATION, AND RECEPTION IN THE COURTS

President Trump issued EO-3 in September 2017, as the third executive measure taken that year on entry of foreign nationals into the United States. Prior to issuance of EO-3, President Trump issued an EO in January 2017 (EO-1) and a revised EO (EO-2) in March 2017. This Part reviews the content of each EO, as well as the relevant provisions of the INA.<sup>18</sup> It also briefly summarizes the opinions in *Trump v. Hawaii*, in which the Supreme Court upheld EO-3 against challenges based on the statute and the Establishment Clause.

### A. *The INA and EO-3*

The INA enumerates forms of legal status for both immigrants—those who intend to stay permanently in the United States—and nonimmigrants.<sup>19</sup>

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17. *Hawaii*, 138 S. Ct. at 2443-44 (Sotomayor, J., dissenting).

18. See Peter Margulies, *Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, 2018 MICH. ST. L. REV. 1, 49-51.

19. See *Toll v. Moreno*, 458 U.S. 1, 13 (1982) (noting that the INA is a “comprehensive and complete code covering all aspects of admission of aliens to this country” (citing *Elkins v. Moreno*, 435 U.S. 647, 664 (1978))). The Supreme Court has long held that Congress has plenary power over immigration, despite the absence of clear references to immigration in the Constitution. Compare David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 44 (2015) (discussing the most plausible arguments for judicial deference), with Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism?*, 68 OKLA. L. REV. 57, 61-62 (2015) (arguing that recent Supreme Court decisions relying on constitutional values in interpreting immigration statutes heralded eventual demise of deference); see also Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1842-78 (1993) (noting role of states and less pronounced federal regulation of immigration during first century of United States' existence); cf. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 262 (in critiquing judicial deference to Congress, observing that “it ignores reality to hold

Immigrants to the United States fall into categories such as “immediate relatives” of U.S. citizens, including spouses, children, and parents,<sup>20</sup> as well as spouses and children of lawful permanent residents (LPRs).<sup>21</sup> The immigrant category also includes foreign nationals who have received “employment-based visas” because they have special talents or will fill a skilled vocational slot for which citizens or LPRs are unavailable.<sup>22</sup> Nonimmigrants, who by definition intend only to stay in the United States temporarily and for a specific purpose, include students, business travelers, temporary workers in agriculture and other fields, and tourists.<sup>23</sup> Congress has established detailed criteria for visa eligibility,<sup>24</sup> along with additional criteria for admissibility to the United States, including bars on admission for otherwise-eligible foreign nationals who have committed crimes, engaged in terrorism, suffer from serious communicable diseases, or pose a risk of dependence on the government for their financial support.<sup>25</sup> Under the INA, State Department consular officials abroad typically make decisions about visa applicants’ eligibility and admissibility.<sup>26</sup>

Two particular provisions of the INA are crucial to the statutory backdrop of EO-3.<sup>27</sup> The first, added in 1952 at the height of the Cold War, is 8 U.S.C. § 1182(f) (the “entry provision”), and authorizes the President to “suspend the entry of all aliens or any class of aliens” when that entry is “detrimental to the interests of the United States.” The second, added in 1965 as part of a massive liberalization of the INA,<sup>28</sup> is 8 U.S.C. § 1152(a)(1)(A) (the “nondiscrimination provision”), in which Congress provided that no individual shall

that every provision concerned with immigration, as applied to every fact situation it might encompass, is so intimately rooted in foreign policy that the usual scope of judicial review would hamper the effective conduct of foreign relations”); Linda Kelly, *Republican Mothers, Bastards’ Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557 (2000) (critiquing foundations of plenary power doctrine and application to gender roles); Matthew J. Lindsay, *Disaggregating “Immigration Law”*, 68 FLA. L. REV. 179 (2017) (analyzing distinctive components of immigration that may require varying levels of deference); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002) (contending that plenary power is fading phenomenon).

20. 8 U.S.C. § 1151(b) (2018).

21. *Id.* § 1153(a).

22. *Id.* § 1153(b). In the employment-based visa category, issues can arise about whether an employer has defined a job in a fashion that unduly excludes citizens or LPRs. *Compare Fogo de Chao (Holdings) Inc. v. DHS*, 769 F.3d 1127 (D.C. Cir. 2014) (in case involving employment of chefs at Brazilian steakhouses, declining to extend deference to agency ruling that “specialized knowledge” required of employment-based visa applicant for “specialty occupation” under 8 U.S.C. § 1184(i)(1) could not include cultural knowledge only available to persons who had grown up in particular Brazilian culture and tradition); *id.* at 1152 (Kavanaugh, J., dissenting) (arguing that agency ruling was entitled to deference and consistent with statutory presumption against restrictions that would limit employment opportunities for citizens and LPRs).

23. 8 U.S.C. § 1101(a)(15) (listing categories of nonimmigrants).

24. *Trump v. Hawaii*, 138 S. Ct. 2392, 2442-44 (2018) (Sotomayor, J., dissenting).

25. *See, e.g.*, 8 U.S.C. § 1182(a)(2) (listing criminal grounds for inadmissibility); *id.*, § 1182(a)(3) (listing security and related grounds).

26. *Hawaii*, 138 S. Ct. at 2442-44 (Sotomayor, J., dissenting).

27. Margulies, *Bans, Borders, and Sovereignty*, *supra* note 18, at 51-54.

28. *See* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 279-83 (1996).

“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.”

In late January, 2017, President Trump relied on the entry provision in issuing EO-1, which temporarily halted entry of foreign nationals from seven countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—and all persons granted refugee status abroad.<sup>29</sup> The EO suspended entry for the seven-country nationals for 90 days, and entry of refugees for 120 days.<sup>30</sup> EO-1 included current nonimmigrant visa-holders (VHs), such as doctors working on a temporary basis in U.S. hospitals or university students returning from travel abroad during the holiday recess. The order also did not expressly exclude returning LPRs from its restrictions.<sup>31</sup> At airports around the country, chaos reigned as immigration officials detained and in some cases summarily removed VHs despite lawful commitments in the United States, such as continuation with university education or a posting at a U.S. hospital.<sup>32</sup>

In March, 2017, after EO-1 encountered a rocky reception in the lower federal courts, President Trump revoked this measure and replaced it with Executive Order No. 13780 (EO-2).<sup>33</sup> EO-2 stated that the pause in admissions was designed to “improve . . . screening and vetting protocols and protocols” for visa and refugee processing,<sup>34</sup> and to ensure that inadequately screened or vetted persons did not enter the U.S. as that review took place. This revised EO expressly exempted LPRs and current VHs, removed Iraq from the list of countries whose nationals were affected, and instituted a waiver program based on the “national interest,” compliance with international agreements or understandings, undue hardship, and other factors.<sup>35</sup> After the Fourth and Ninth Circuits upheld injunctions against EO-2, the Supreme Court granted certiorari.<sup>36</sup> However, EO-2 expired before the Court could rule on the merits.<sup>37</sup>

President Trump issued EO-3 in September 2017. EO-3 is indefinite in duration, although it is subject to review every 180 days. Initially, EO-3 suspended entry of both immigrants and some or all classes of nonimmigrants from Chad, Iran, Libya, North Korea, Syria, and Yemen.<sup>38</sup> The

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29. *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2083 (2017) [hereinafter IRAP] (chronicling facts in the course of granting a stay that modified injunction against EO-2, which President Trump had issued after EO-1).

30. *Id.*

31. *See* *Washington v. Trump*, 847 F.3d 1151, 1165 (9th Cir. 2017) (finding that EO did not expressly exempt LPRs and that subsequent statements by White House Counsel disclaiming intent to include LPRs did not bind the Executive).

32. *Id.* at 1157.

33. Exec. Order No. 13,780, 82 Fed. Reg. 13209 (2017) [hereinafter EO-3]; *see also* *Trump v. Hawaii*, 138 S. Ct. 2392, 2403-04 (2018) (discussing chronology).

34. *See* EO-3, § 1(a).

35. *See id.* § 6(c) (waiver provisions); *id.* § 6(b) (lowering refugee cap).

36. *IRAP*, 137 S. Ct. 2080 (2017).

37. *Trump v. Hawaii*, 138 S. Ct. 2392, 2404 (2018). The Court also vacated the lower court decisions as moot. *Id.*

38. *Id.* at 2406.

administration had dropped Sudan from the list. In addition, EO-3 bars the entry of immigrants from Somalia, subjects Iraqi nationals to heightened screening, and bars nonimmigrant entry of certain Venezuelan government officials and their families. Ultimately, the administration found that Chad had complied with various U.S. government requests, and officials removed it from the EO-3 list. EO-3 also includes a waiver process, which requires a foreign national otherwise covered by the EO to show that the bar to entry would result in undue hardship, that she does not present a threat, and that her entry would be in the national interest.<sup>39</sup> EO-3 does permit the admission of refugees and most students.<sup>40</sup>

### B. *The Supreme Court Weighs In*

In June, 2018, the Supreme Court held in a 5-4 decision that EO-3's challengers were not entitled to preliminary injunctive relief, since they had not shown a likelihood of success on their claims under either the INA<sup>41</sup> and the Establishment Clause.<sup>42</sup> With respect to the statutory claim, Chief Justice Roberts' opinion for the Court cited the "plain language" of the INA's "entry" provision, 8 U.S.C. § 1182(f),<sup>43</sup> and the deference "traditionally accorded" the President in national security and foreign relations.<sup>44</sup> Deference also carried the day with respect to the Establishment Clause. Citing the need for deference, the majority declined to apply the "reasonable observer" test that it has often used in Establishment Clause cases involving school prayer, religious symbols, and aid to religious groups.<sup>45</sup> Applying a test that had figured in previous immigration cases on criteria for the entry of foreign nationals, the Court held that EO-3 was "facially legitimate and bona fide."<sup>46</sup> In addition, in an alternative holding, the Court found that EO-3 survived rational basis review.<sup>47</sup> The Court suggested limits to deference by purporting to overrule *Korematsu v. United States*,<sup>48</sup> in which the Court had upheld a conviction arising out of the shameful Japanese-American internment of World War II. In a concurrence that turned out to be valedictory in fact as well as flavor, Justice Kennedy observed that, ultimately, compliance with the Constitution was the responsibility of both public officials and the people themselves.<sup>49</sup>

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39. EO-3, § 3(c).

40. *Hawaii*, 138 S. Ct. at 2405-06.

41. *Id.* at 2415.

42. *Id.* at 2423.

43. *Id.* at 2408 (asserting that language accorded the President "broad discretion to suspend the entry of aliens into the United States").

44. *Id.* at 2409.

45. *Id.* at 2420 n. 5.

46. *Id.* at 2418-20.

47. *Id.* at 2420-21.

48. *Korematsu v. United States*, 323 U.S. 214 (1944).

49. *Hawaii*, 138 S. Ct. at 2424.



The majority's effort to overrule *Korematsu* was a response to the critique of deference in Justice Sotomayor's dissent, in which Justice Ginsburg joined. Justice Sotomayor linked the majority's deferential stance with the infamous *Korematsu* ruling, predicting that the *Hawaii* decision would similarly "endure" as a stain on the Court's reputation.<sup>50</sup> In seeking a more robust limit on the Court's deference, Justice Sotomayor was curiously reticent on the statutory question. Justice Sotomayor noted that EO-3's broad restrictions appeared inconsistent with the "painstaking detail" and "reticulated scheme [in the INA] regulating the admission of individuals to the United States."<sup>51</sup> However, Justice Sotomayor declined to address what she termed the challengers' "complex" statutory arguments,<sup>52</sup> even though she acknowledged the Court's "prudential rule" of avoiding constitutional decisions when statutory grounds will suffice.<sup>53</sup> Instead of addressing the statutory arguments, Justice Sotomayor focused on the Establishment Clause challenge to EO-3, asserting that the Court should have applied the "reasonable observer" test that it has often invoked in such cases. Citing then candidate Donald Trump's well-known call for a "total and complete shutdown of Muslims entering the United States,"<sup>54</sup> Justice Sotomayor asserted that EO-3 failed the "reasonable observer" standard as well as rational basis review.<sup>55</sup>

Justice Breyer, joined by Justice Kagan, also dissented. Justice Breyer's dissent was in some ways a counterpoint to Justice Sotomayor's dissenting opinion. While Justice Sotomayor declined to address the challengers' "complex" statutory argument, Justice Breyer provided a detailed explanation of why the parsimonious implementation of EO-3's waiver provisions<sup>56</sup> counseled leaving lower court injunctions against the measure in effect and remanding for further factfinding on the statutory and constitutional merits.<sup>57</sup> However, apart from the fact-specific questions that he raised about EO-3's waiver process, Justice Breyer also did not develop the argument that EO-3 violated the INA.<sup>58</sup>

## II. STRUCTURAL SPILLOVER AS A DIFFERENCE-MAKER IN CONSTITUTIONAL AND STATUTORY INTERPRETATION

The *Hawaii* majority's reasoning is a prime example of concern about structural spillover. Court decisions do more than merely decide individual

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50. *Id.* at 2448.

51. *Id.* at 2443.

52. *Id.* at 2434.

53. *Id.* at 2433-34 (citing *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993)).

54. *Id.* at 2435.

55. *Id.* at 2441-42.

56. *Id.* at 2431-33.

57. *Id.* at 2433. Since the Court only decided that a preliminary injunction was not appropriate, the district court will have an opportunity to consider in further proceedings whether problems with the waiver process or other aspects of EO-3's implementation call for a permanent injunction. *Id.* at 2433.

58. *Id.* at 2433. Instead, Justice Breyer stated that if he had to decide the merits at this point, he would cite Donald Trump's statements as candidate and President as evidence of impermissible "antireligious bias." *Id.*

cases. They also send signals to policymakers about the parameters of discretion. Each case sends such signals, and courts worry that their lack of political accountability and limited access to information do not equip them to adequately weigh the signals' impact.<sup>59</sup> That concern is particularly pronounced in constitutional cases, where a decision may hinder the political branches' future collaboration and leave the public with no remedy short of the cumbersome process of constitutional amendment. Unfortunately, this concern fails to acknowledge that deference also has spillover effects, injuring the courts' reputation for independence and blinking at policymakers' surrender to the passions of the moment.<sup>60</sup>

Deferential jurists believe that both the outcome of a decision and the methodology the Court applies can have adverse impacts on the political branches' ability to function within the Constitution's structure.<sup>61</sup> In *Hawaii*, Chief Justice Roberts asserted that the Establishment Clause argument by EO-3's challengers had implications not merely for the current occupant of the White House, but for the "Presidency" itself.<sup>62</sup> Chief Justice Roberts warned that the challengers' argument would entail the "delicate" parsing of statements by presidents and political candidates.<sup>63</sup> The dictionary defines the word, "delicate," as "needing careful treatment . . . because easily damaged . . . [or] to avoid causing trouble. . ."<sup>64</sup> A "delicate" task is difficult, but not *impossible*. By using the adjective "delicate" to describe this interpretive task, Chief Justice Roberts appeared to suggest that a decision that appeared straightforward, as the *Hawaii* dissenters viewed analysis of Donald Trump's statements,<sup>65</sup> could nonetheless prompt future interpretive mishaps and mixed signals for policymakers. For the majority, those concerns about the

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59. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (noting that "national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain the impact of certain conduct difficult to assess"); see also *Hawaii*, 138 S. Ct. at 2419 (warning that "when it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part of the courts is marked'") (citing *Holder*, 561 U.S. 1 (2010)).

60. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (praising potential of judicial review for curbing "ill humors" that cloud deliberation by the political branches).

61. Scholars have viewed matters of judicial methodology, including efforts to craft manageable standards, as "trans-substantive" concerns that affect a range of legal doctrines, including those relevant to both statutory and constitutional interpretation. See, e.g., RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 38 (2001) (discussing concerns about implementation of constitutional norms and values that help shape formulation of legal standards); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1107-12 (2017) (discussing nature and operation of interpretive rules); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (discussing how court's choice of legal standard contributes to under- or over-enforcement of norms); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 30-50 (2004) (analyzing prophylactic rules such as *Miranda* that prevent violations of constitutional rights); Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005).

62. *Hawaii*, 138 S. Ct. at 2418.

63. *Id.*

64. *Delicate*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/delicate> (last visited August 2, 2018).

65. *Hawaii*, 138 S. Ct. at 2435-36 (Sotomayor, J., dissenting).

future, as well as concerns about the current case, prompted the need for a greater quantum of deference than the dissenters were prepared to provide.

Justice Kennedy's concurrence reinforced the methodological concern at the core of the Court's choices about structural spillover. Invoking a factor that drove his opinion for the Court in *Ziglar v. Abbasi*<sup>66</sup> on suits for damages in national security cases,<sup>67</sup> Justice Kennedy suggested the process of adjudication itself could "intrude" on the executive branch's foreign affairs prerogatives.<sup>68</sup> In addition, Justice Kennedy appeared to concede that the methodological challenges that drive judicial deference sometimes lead to *underenforcement* of constitutional norms.<sup>69</sup> Judicial concern with structural spillover might leave even *illegal* official action free from "judicial scrutiny or intervention."<sup>70</sup> That concession flowed from Justice Kennedy's plaintive note that officials are not "free to disregard the Constitution and the rights it proclaims and protects" and are bound by their "oath" to preserve the Constitution even when the courts cannot "correct or even comment" on official actions.<sup>71</sup> Justice Kennedy's language acknowledged that in some proportion of cases, officials will *not* make the right choice, but courts' concerns about structural spillover will preclude a remedy. In that abject cohort of cases, Justice Kennedy, like Justice Frankfurter in an earlier decision, *Dennis v. United States*,<sup>72</sup> identified the diligence and good faith of the political branches and the people as the only effective protection for constitutional norms.

However, a method of judicial review that predictably yields underenforced norms can engender spillover effects of its own. Consider deferential jurists' solicitude for collaboration between the political branches. That value figured prominently in the Japanese-American internment precedents that the Court sought to at least partially disavow in *Hawaii*. In *Hirabayashi v. United States*,<sup>73</sup> the Court upheld a conviction of a defendant who had failed to comply with the terms of a military order issued during the early stages of the Japanese-American internment. The Court justified this outcome by observing that Congress and the President were "acting together . . . in cooperation."<sup>74</sup> Justice Sotomayor's dissent in *Hawaii* rightly pointed out the

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66. *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

67. See Peter Margulies, *Curbing Remedies for Official Wrongs: The Need for Bivens Suits in National Security Cases*, 68 CASE W. RES. L. REV. 1153, (2018); compare Andrew Kent, *Are Damages Different?: Bivens and National Security*, 87 S. CAL. L. REV. 1123 (2014) (praising the Court's wariness about suits for damages), with Carlos M. Vazquez & Steven I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509 (2013) (critiquing limits on suits for damages against errant officials); see generally Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281 (contending that suits for damages can prompt excessive risk-aversion by public officials).

68. *Hawaii*, 138 S. Ct. at 2424; see also *Abbasi*, 137 S. Ct. at 1860.

69. See Sager, *supra* note 61.

70. *Hawaii*, 138 S. Ct. at 2424.

71. *Id.*

72. *Dennis v. United States*, 341 U.S. 494, 546-55 (1950).

73. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

74. *Id.* at 91-92.

incongruity in the majority's simultaneous deference toward EO-3 and retreat from deference in its overruling of *Hirabayashi's* companion in the anti-canon, *Korematsu v. United States*.<sup>75</sup> Justice Jackson's dissent in *Korematsu* famously called the majority's deferential turn in that case a "loaded weapon" that would impel future political branch excesses and decimate the courts' reputation for independent judgment.<sup>76</sup> In *Trump v. Hawaii*, Justice Sotomayor alluded to Justice Jackson's warning.<sup>77</sup> Seeking to disarm the "loaded weapon" of its earlier holding in *Korematsu*, the *Hawaii* majority announced what everyone already knew: that Jackson had been correct in critiquing *Korematsu* as "gravely wrong" when it was decided and ever since.<sup>78</sup> Nevertheless, as Justice Sotomayor observed, the *Hawaii* majority's holding stuck with the deferential stance that Jackson had deplored.

As a matter of legal doctrine, Chief Justice Roberts may have been right in sharply distinguishing *Korematsu* from *Hawaii*.<sup>79</sup> *Korematsu's* upholding of a key building block in the internment of U.S. citizens and LPRs was a materially more serious blow to constitutionalism than EO-3's restrictions on foreign nationals located abroad, who are not subject to U.S. laws and therefore have no reciprocal claim to U.S. legal protections.<sup>80</sup> However, that point does not address the impact of the *methodological* shortcomings in the *Hawaii* majority's constitutional analysis, which we take up in the next section.

### III. JUDICIAL METHOD ECLIPSED: THE TRAVEL BAN AND THE ESTABLISHMENT CLAUSE

The Establishment Clause analyses of both the *Hawaii* majority and Justice Sotomayor's dissent each suffer from substantial methodological flaws. Justice Sotomayor's dissent relied on a rigid application of the "reasonable observer" test<sup>81</sup> that the Court has often construed loosely when dual purposes are in play, even in the relatively contained context of public religious displays.<sup>82</sup> The dissent failed to acknowledge the challenges inherent in constructing a unitary "reasonable observer" amidst the "changing world

75. *Hawaii*, 138 S. Ct. at 2447-48 (citing *Korematsu v. United States*, 323 U.S. 214, 245-46 (1944)).

76. *Korematsu*, 323 U.S. at 245-46.

77. *Hawaii*, 138 S. Ct. at 2448.

78. *Id.* at 2423.

79. *Id.* at 2443 (contrasting "forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race . . . [with] facially neutral order denying certain foreign nationals the privilege of admission").

80. Setting the precise contours of the Constitution abroad is a sensitive task beyond the scope of this Article. Compare GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996) (arguing for expansive vision of constitutional rights), with Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 COLUM. L. REV. 1029, 1038-41 (2015) (arguing that historically sources of legal authority provided only modest protection to foreign nationals outside a state or to foreign nationals participating in an armed conflict inside a state).

81. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 772-73 (1995) (O'Connor, J., concurring).

82. *Id.* at 763-68 (plurality opinion); *Van Orden v. Perry*, 545 U.S. 677, 692 (2005)

conditions”<sup>83</sup> that the political branches regularly encounter in national security and foreign affairs. Moreover, Justice Sotomayor’s dissent sought to show the impermissible animus behind EO-3 by parsing Donald Trump’s statements as a candidate and then as President.<sup>84</sup> Supreme Court precedent and Justice Sotomayor’s own dissent revealed that parsing the statements of any president—even one as given as President Trump to outrageous public utterances—can be complex.<sup>85</sup> However, the majority’s efforts to select and apply a workable standard of review also foundered, since the precedents the majority cited<sup>86</sup> require a more searching inquiry than the majority deigned to provide.<sup>87</sup>

### A. *The Reasonable Observer Test’s Poor Fit with Foreign Affairs*

The *Hawaii* majority was correct in noting that the “reasonable observer” standard that the Court has intermittently used in matters governing public religious displays<sup>88</sup> does not provide the political branches with the “flexibility. . . to respond to changing world conditions.”<sup>89</sup> This lack of fit is in part a symptom of a more general problem that Establishment Clause precedents have often lacked a “clear test of religious validity.”<sup>90</sup> The existence of dual purposes for government measures has complicated the Court’s application of specific tests even in the ordinary domestic context of alleged symbolic support for religion.<sup>91</sup> The dynamic foreign affairs area compounds the problem of multiple motives and audiences, making construction of a unitary “reasonable observer” even more challenging.

As Robert Putnam observed in a classic piece,<sup>92</sup> foreign relations is a game played on multiple levels. Policymakers must placate international partners,

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83. *Hawaii*, 138 S. Ct. at 2419-20 (citing *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976)).

84. *Id.* at 2437-38.

85. See *infra* notes 88-121 and accompanying text. Professor Shalini Ray has articulated a useful burden-shifting test that eases this problem, although it does not wholly eliminate it. See Shalini Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. \_\_\_ (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3131044](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3131044).

86. *Hawaii*, 138 S. Ct. at 2420 (citing, *inter alia*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)).

87. The issue of the Establishment Clause’s original rationale is beyond the scope of this Article. Cf. Richard Fallon, *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 70 n. 47 (2017) (canvassing theories and expressing doubt that “modern Establishment Clause questions should be resolved in exclusive reliance on any reasonably disputable claim about original constitutional meaning”); compare Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 351-52 (2002) (arguing that freedom of conscience was the original driving force behind the Establishment Clause); with Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 322-37 (2011) (critiquing “freedom of conscience” explanation on descriptive and normative grounds).

88. *Hawaii*, 138 S. Ct. at 2418.

89. *Id.* at 2419-20 (citing *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976)).

90. Fallon, *supra* note 87, at 686; see also *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion) (asserting that various tests the Court has suggested are “no more than helpful signposts”) (citation omitted); *id.* at 699 (Breyer, J., concurring) (observing that “no single mechanical formula . . . can accurately draw the constitutional line in every case”).

91. *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring).

92. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988).

parry the moves of international adversaries, and accommodate domestic constituencies. Mixed motives and shifting agendas are perennial components of governance in this sphere. No roadmap, recipe, or multi-factor test can do justice to this complex undertaking.<sup>93</sup>

Mixed motives are a mainstay even in the domestic domain. Consider, for example, the imposition of a tax. As the Court recognized in *NFIB v. Sebelius*,<sup>94</sup> in upholding the Affordable Care Act as an exercise of the taxing power, Congress may impose a tax to raise revenue.<sup>95</sup> However, legislators enacting a tax will also often intend to “affect conduct.”<sup>96</sup> For example, the ACA’s individual mandate encouraged individuals to procure health insurance. Similarly, taxes on cigarettes discourage smoking. However, Chief Justice Roberts, writing for the Court in *NFIB*, noted that the presence of a motive besides raising revenue did not in and of itself disqualify the measure as a valid exercise of the taxing power.

Mixed motives are just as ubiquitous in foreign affairs, where application of a rigid constitutional test could undermine productive collaboration between the political branches. Consider congressional efforts to *assist* certain religious groups suffering persecution abroad, such as the Lautenberg Amendment, which singles out certain specific religious groups for favorable legal treatment of asylum claims.<sup>97</sup> Under accepted Establishment Clause principles, assistance to a specific religious group is *just as suspect* as measures that appear to harm specific groups. Both potentially “entangle” the government in religion in a way that the Establishment Clause precludes.<sup>98</sup> Legislators may well have had a range of motives for this measure: some may have wished to aid particular groups out of solidarity with their religious beliefs; others may have simply wished to respond to episodes of persecution that seemed particularly compelling. Regardless, the Lautenberg Amendment treated some religious groups better than others. Its statutory presumption spared the legislatively favored groups from the rigorous adjudication process for asylum claims based on religious

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93. See also James D. Fearon, *Domestic Political Audiences and Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577 (1994) (discussing interplay between domestic political imperatives and course of international diplomacy); cf. Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1634 (2014) (suggesting in analyzing domestic war powers that “the actual and effective balance between presidential and congressional powers over war and peace in practice necessarily depends on shifting assumptions and policy choices about how best to secure U.S. interests against potential threats”).

94. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

95. *Id.* at 564-67.

96. *Id.* at 567.

97. See 8 U.S.C. § 1157 (b)(2)(A) (1989) note and subsequent amendments, providing that, “[a]llies who are (or were) nationals and residents of an independent state of the former Soviet Union or of Estonia, Latvia, or Lithuania and who are Jews or Evangelical Christians shall be deemed” to be presumptive refugees); see also Margulies, *Bans, Borders, and Sovereignty*, *supra* note 18, at 69 (discussing Lautenberg Amendment in context of EO-3); cf. Michael J. Churgin, *Is Religion Different: Is There a Thumb on the Scale in Refugee Convention Appellate Court Jurisdiction in the United States? Some Preliminary Thoughts*, 51 TEX. INT’L L.J. 213, 215 (2016) (asserting that legislation inappropriately distinguishes between religious groups).

98. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

persecution. Other groups were not so fortunate. They had to go through the interviews and hearings that the asylum process requires, with no assurance that they would prevail on the merits.

In situations not involving foreign affairs, such favorable legislative treatment would have constituted a colorable violation of the Establishment Clause. However, the Lautenberg Amendment, which Congress eventually expanded to include other groups such as religious minorities from Iran,<sup>99</sup> allowed Congress to proactively address the acute persecution suffered by such groups.<sup>100</sup> Without the discretion to select certain groups, at least as an initial matter, the legislation may well have failed to pass. As the *Hawaii* majority suggested about the structural spillover engendered by the challengers' theory of the Establishment Clause,<sup>101</sup> a rigid standard would have stymied the political branches' ability to respond to a pressing foreign policy problem.

### B. *Persistent Complexity in Parsing Presidential Statements*

The *Hawaii* majority also cautioned that courts' need for a "delicate" touch in handling presidential statements<sup>102</sup> could result in structural spillover if the judiciary was not up to that sensitive task. Appreciating the potential for such spillover does not entitle the President to absolute deference on both constitutional and statutory claims—indeed, the *Hawaii* majority's excessive deference regarding the challengers' statutory claim is the primary subject of this Article. However, the potential for spillover does counsel caution, particularly in fashioning constitutional rules.

As an example, consider a statement that Justice Sotomayor cited in her *Hawaii* dissent<sup>103</sup> as proving President Trump's discriminatory purpose: his observation in March, 2017 that EO-2 was a "watered-down version" of EO-1,<sup>104</sup> which courts had struck down as reflecting impermissible animus. In fairness, President Trump's March, 2017 description of EO-2 was not the most damning evidence of animus with respect to the succession of entry restrictions in that year. That title doubtless belongs to then candidate Trump's call for a "total and complete shutdown of Muslim immigration to the United States."<sup>105</sup> Nevertheless, President Trump's March 2017 description of EO-2 appears prominently in Justice Sotomayor's dissent. As it turns out, this common description means quite different things to different people, as Supreme Court precedent and Justice Sotomayor's own dissent proved.

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99. See 8 U.S.C. § 1157, § (b)(1)(C) note.

100. See Josh Blackman, *The Legality of the 3/6/17 Executive Order, Part III: The Establishment Clause*, Josh Blackman's Blog (March 15, 2017), <http://joshblackman.com/blog/2017/03/15/the-legality-of-the-3617-executive-order-part-iii-the-establishment-clause/> (discussing background of legislation).

101. *Trump v. Hawaii*, 138 S. Ct. 2392, 2418-19 (asserting that complex judgments about foreign affairs "are frequently of a character more appropriate to either the Legislature or the Executive" than the courts) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)).

102. *Id.* at 2418.

103. *Id.* at 2437.

104. See Devlin Barrett, *Officials to appeal travel-ban ruling*, WASH. POST, March 18, 2017, at A4.

105. *Hawaii*, 138 S. Ct. at 2436 (Sotomayor, J., dissenting).

According to Justice Sotomayor, President Trump's characterization of EO-2 as "watered-down" constituted an admission that EO-2 entailed only cosmetic changes from EO-1, which courts had already invalidated. For Justice Sotomayor, the "watered down" description thus confirmed that EO-2 contained the same anti-Muslim bias that had contaminated EO-1.<sup>106</sup> However, Justice Sotomayor's subtle framing of President Trump's language contributed heavily to this impression.<sup>107</sup> According to Justice Sotomayor, Trump told a political rally shortly after issuance of EO-2 that this second iteration of the entry ban was "just a 'watered-down version of the first'" ban, which the Administration had revoked after its poor judicial reception.<sup>108</sup> Justice Sotomayor inserted the word, "just,"—here meaning "only" or "merely"<sup>109</sup>—immediately before President Trump's phrase, "watered-down version." This seemingly mundane interpolation does a great deal of work, prodding the reader toward Justice Sotomayor's view that the phrase connotes a purely superficial change. Without Justice Sotomayor's interpolation, the phrase "watered-down" stands on its own. In that stark light, its meaning is fundamentally different, as both longstanding Supreme Court readings and usage elsewhere in Justice Sotomayor's dissent illustrate.

The Supreme Court has *repeatedly* read the term, "watered-down," in a sense precisely opposite to Justice Sotomayor's in the above passage: as connoting a *material* change, not merely a surface alteration. In *Malloy v.*

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106. In this passage, Justice Sotomayor may have been thinking of the definition in the Cambridge English Dictionary. See *Watered-down*, CAMBRIDGE ENGLISH DICTIONARY ONLINE, <https://dictionary.cambridge.org/us/dictionary/english/watered-down> (last visited July 22, 2018) (explaining that "watered-down idea or opinion has been made less extreme than it originally was, usually so that people are more likely to accept it"). However, this definition does not necessarily support Justice Sotomayor's account, since "less extreme" can refer to changes that are substantial, not merely superficial. The other common definition reinforces that "watered-down" connotes substantial changes. See *Watered-down*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/water%20down> (last visited July 22, 2018) (explaining that the verb, "water down," means "to reduce or temper the force or effectiveness of"). Merriam-Webster's example confirms that the phrase refers to modifying an item to substantially alter its nature or use. See *id.* (as an example, positing bars or restaurants that "watered down the cocktails while jacking up their prices"); see also *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 353 (1977) (asserting that in passing law barring racial discrimination in employment, Congress did not "destroy or water down" seniority rights of current white employees); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (cautioning that police officers must receive more than "watered-down version" of constitutional rights); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2237 (2015) (Kagan, J., concurring) (critiquing tendency to "water down strict scrutiny to something unrecognizable").

107. See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 271-72 (2011) (in discussing "framing effects," noting that "large changes in preferences . . . are sometimes caused by inconsequential variations in the wording of a choice problem").

108. *Hawaii*, 137 S. Ct. at 2437 (emphasis added). Video of President Trump's comment is widely available. See *Trump: Judge blocked a 'watered down' travel ban*, POLITICO, March 16, 2017, <https://www.politico.com/video/2017/03/trump-judge-blocked-a-watered-down-travel-ban-062492>; see also Louis Nelson, *Trump slams Justice Department for 'watered down' travel ban*, POLITICO, June 5, 2017, <https://www.politico.com/story/2017/06/05/trump-travel-ban-justice-department-239131> (quoting President Trump as tweeting that Justice Department lawyers "should have stayed with the original Travel Ban, not the watered-down, politically correct version they submitted" to the Supreme Court).

109. The Cambridge Dictionary includes this as the third meaning of the word. See *Just*, CAMBRIDGE ENGLISH DICTIONARY ONLINE, <https://dictionary.cambridge.org/us/dictionary/english/just> (last visited Aug. 3, 2018).



Hogan,<sup>110</sup> the Court held that, pursuant to the Fourteenth Amendment, the Fifth Amendment's rule against compelled self-incrimination applied to the states.<sup>111</sup> To find this robust incorporation, the Court had to determine whether the Fourteenth Amendment mandated state compliance with the strong array of Bill of Rights protections that the Warren Court had advanced, or with a vastly diluted substitute. Writing for the Court, Justice Brennan denied that the Fourteenth Amendment imposed on states only a "watered-down, subjective version of the individual guarantees of the Bill of Rights."<sup>112</sup> The "watered-down" version that Justice Brennan disavowed would have entailed a material diminution in the vigor of rights protections. The *Malloy* Court emphatically rebuffed that result. Justice William O. Douglas, concurring in the 1963 landmark right-to-counsel case, *Gideon v. Wainwright*,<sup>113</sup> advanced the same understanding of the phrase "watered-down" as connoting a radical reduction.<sup>114</sup> More recently, in *McDonald v. City of Chicago*,<sup>115</sup> the Court declared that the full force of *Second Amendment* protections applied to the states, instead of the radically diluted "watered-down" version that the municipal defendant had advanced.<sup>116</sup>

Indeed, Justice Sotomayor's tendency in dissents—exemplified in the travel ban case and previously<sup>117</sup>—has been to use "watered down" as a descriptor in precisely the same way as other Supreme Court opinions: as connoting a material dilution. In her travel ban dissent, Justice Sotomayor relied on this meaning to criticize the majority opinion, which she faulted for mistaken application of a "watered-down legal standard,"<sup>118</sup> mere pages after suggesting that the *opposite* meaning applied to President Trump's rhetoric. Reinforcing her reliance on the accepted judicial meaning of the phrase, Justice Sotomayor suggested that the majority had embarked on "an effort to short circuit" constitutional guarantees.<sup>119</sup> Of course, either short-circuiting or watering down the Bill of Rights would entail a profound change in American constitutionalism. That shift is far more substantial than the purely superficial change that Justice Sotomayor attributed to President Trump's use of the same language.

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110. *Malloy v. Hogan*, 378 U.S. 1 (1964).

111. Cf. Peter Margulies, *Enjoining the Revised Refugee EO: The Hawaii District Court "Waters Down" the Separation of Powers*, LAWFARE, March 30, 2017, <https://www.lawfareblog.com/enjoining-revised-refugee-eo-hawaii-district-court-waters-down-separation-powers>.

112. *Malloy*, 378 U.S. at 10-11 (citing *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960) (Brennan, J., dissenting)).

113. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

114. *Id.* at 346 (rejecting view that Bill of Rights protections governing the states pursuant to the Fourteenth Amendment are "lesser" or "watered-down" versions of the robust protections that constrain the federal government).

115. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

116. *Id.* at 765 (noting that the Court had decisively "abandoned 'the notion that the Fourteenth Amendment applies. . . a watered-down version' of the Bill of Rights to the states) (citing *Malloy*, 378 U.S. at 10-11).

117. See *Perry v. New Hampshire*, 565 U.S. 228, 261 (2012) (Sotomayor, J., dissenting) (asserting that majority's position will "water down" the standard governing unreliable eyewitness identifications).

118. *Trump v. Hawaii*, 138 S. Ct. 2392, 2440.

119. *Id.*

Admittedly, President Trump's often crass public utterances are not the most obvious case study in the subtleties of multiple meanings.<sup>120</sup> Perhaps more than any president in history, Donald Trump has regularly issued public pronouncements that have sparked legitimate outrage. However, Trump's dismal track record actually reinforces the majority's wariness about the "delicate" task of parsing presidential statements.<sup>121</sup> If distinguished judges can mangle even the meaning of Trump's florid pronouncements, parsing presidential language may spawn a dangerous spillover that unduly encumbers future White House occupants.

### C. *The Hawaii Majority's Methodological Travails*

In *Trump v. Hawaii*, the Establishment Clause's tangled jurisprudence caused headaches for both the dissent and the majority. In his opinion for the Court, Chief Justice Roberts offered not one, but two possible standards of review: "facially legitimate and bona fide," and rational basis.<sup>122</sup> Unfortunately, the case law's guidance regarding EO-3 is more equivocal than the majority claimed it to be. Indeed, the decisions that Chief Justice Roberts cited in his rational basis analysis point to a far more probing review.

#### 1. *EO-3 and Facial Legitimacy*

The Court first articulated the "facially legitimate and bona fide" standard in the 1972 case of *Kleindienst v. Mandel*.<sup>123</sup> In *Mandel*, the Court considered the lawfulness of the government's denial of a nonimmigrant visa to a foreign academic with avowedly "revolutionary Marxist" views whom U.S. citizens

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120. Moreover, as Justice Sotomayor noted in her dissent, Trump's campaign comments were at least as troubling as the comments that the Court had held constituted "hostility" toward religion requiring invalidation of a state decision against a baker who refused to produce a specialty cake for a same-sex couple. See *Hawaii*, 138 S. Ct. at 2446-47 (citing *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1729-30 (2018) (criticizing state commissioner's express refusal to permit respondent's religious belief to "justify" conduct that would otherwise clearly violate state antidiscrimination law)).

121. *Id.* at 2418. One commentator has suggested that courts use statements by candidates or public officials only regarding the issue of intent. See Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 721 (2017). While that approach makes sense, the *Hawaii* majority was correct that parsing even such statements in the foreign affairs arena presents special problems. For the same reason, earlier Establishment Clause decisions considering statements are not foolproof guides for the realm of foreign affairs. Those cases address religious practice. For example, in *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, the Supreme Court held that a courthouse display of the Ten Commandments that the legislature had endorsed "'in remembrance and honor of Jesus Christ'" violated the Establishment Clause. 545 U.S. 844, 851 (2005). In *Larson v. Valente*, the Court invalidated a state law that curbed religious congregations' fundraising outside of the proverbial "passing the hat" in church services. 456 U.S. 228, 254 (1982). One legislator described his colleagues as "hot to regulate the Moonies." *Id.* at 254. Candidate and President Trump's comments, while clearly outside the pale, do not address religious practice. While those comments should not be out of bounds for courts, their relationship to foreign affairs and national security merits special judicial care to avoid chilling future occupants of the White House who will—one hopes—find Presidents Washington and Eisenhower to be sounder guides. See *Hawaii*, 138 S. Ct. at 2418 (noting past presidential statements). The statutory argument against EO-3 advanced in this Article relies on structure and past practice, and therefore makes reliance on presidential statements unnecessary.

122. *Hawaii*, 138 S. Ct. at 2419-20.

123. *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972).

had invited to speak.<sup>124</sup> The Court, in an opinion by Justice Blackmun, found that the exclusion was “facially legitimate and bona fide” and hence did not violate the First Amendment. Supporting this conclusion, Justice Blackmun related the State Department’s assertion<sup>125</sup> that the applicant had abused the terms of a previous visa by participating in fundraising activities in the United States which his prior visa had not expressly authorized.

In *Kerry v. Din*,<sup>126</sup> the Court, this time with a concurrence by Justice Kennedy that was necessary for an outcome in the government’s favor, held that the State Department had met the “facially legitimate and bona fide” standard when it denied a visa to an Afghan national seeking to enter the United States as an immigrant. The visa applicant and his spouse, a U.S. citizen, argued that the State Department had violated the due process rights of the U.S. citizen spouse by declining to even identify the specific ground of inadmissibility that the State Department relied on in denying the application. Instead of identifying the specific ground, the government had informed the applicant and his spouse only that the denial was based on a national security provision, which describes “dozens” of provisions in the INA.<sup>127</sup> In explaining that the failure to identify a specific subsection of the INA did not violate the “facially legitimate and bona fide” standard, Justice Kennedy asserted that the visa applicant had worked for the Taliban, supplying a neutral basis for the consular officer’s concern.<sup>128</sup>

In *Hawaii*, President Trump’s statements provide a disturbing backdrop not present in either *Mandel* or *Din*. Consider merely the statements made by candidate Trump cited by Chief Justice Roberts in his opinion for the Court. In a statement unlike any made by a major party presidential candidate in more than seventy years, candidate Trump called for a “total and complete shutdown of Muslims entering the United States.”<sup>129</sup> This call, included in a “Statement on Preventing Muslim Immigration,” remained on the Trump campaign’s website until May 2017.<sup>130</sup> That single statement, widely publicized during the campaign, was a far more sweeping and derogatory generalization about a religious group than anything in the earlier Supreme Court cases articulating the “facially legitimate and bona fide” standard. To fully explain its finding that Trump’s statements did not adversely affect EO-3’s compliance with *Mandel*, the majority needed to do more than dutifully list a couple of the many troubling statements that candidate Trump had uttered or highlight the “delicate” nature of parsing statements by candidates and sitting presidents. It would have been appropriate to forthrightly assess whether the statements vitiated the stated grounds for EO-3’s restrictions. The majority’s

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124. *Id.* at 756.

125. *Id.* at 757-58.

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

127. *Id.* at 2145 (Breyer, J., dissenting).

128. *Id.* at 2141 (Kennedy, J., concurring).

129. *Hawaii*, 138 S. Ct. at 2417.

130. *Id.*

failure to integrate candidate Trump's statements into its analysis of EO-3 left a yawning gap at the heart of its opinion.

## 2. *EO-3's Vulnerability Under "Rational Basis with Bite"*

The majority's treatment of rational basis review is even more troubling than its handling of the facially legitimate and bona fide standard. This section of the majority opinion has two tracks. One track applies rational basis review with the Court's customary layer of deference, relying on the government's stated justifications and prognostications about the future. The other track cites Supreme Court precedent, including *City of Cleburne v. Cleburne Living Center*.<sup>131</sup> These latter cases use an approach long ago named "rational basis with bite,"<sup>132</sup> entailing a more bracing form of means-ends scrutiny. In the *Hawaii* majority opinion, this more rigorous scrutiny was nowhere in evidence. The result is a marked lack of support for the majority opinion.

Chief Justice Roberts noted that *Cleburne* actually involved relatively searching scrutiny of a local ordinance that required a special permit for the operation of a group home for persons with mental retardation.<sup>133</sup> In holding that the ordinance did not pass muster under the Equal Protection Clause, the *Cleburne* Court asserted that it was applying rational basis review.<sup>134</sup> Nevertheless, the Court's review turned out to be quite searching in practice. The Court found that the ordinance was radically underinclusive, since the town's chosen means for addressing its stated goals failed to address a large swath of conduct that apparently undermined those objectives. In defending the ordinance, the town listed rationales for the special permit requirement such as concerns about traffic, congestion, and the group home's location within a portion of the town that climate scientists had estimated could flood every 500 years.<sup>135</sup> However, the ordinance did not impose the special permit requirement on other uses in the area, such as fraternity houses, dormitories, and hospitals, that might pose similar concerns.<sup>136</sup> This marked underinclusiveness demonstrated that the ordinance did not stem from a rational tailoring of means to goals. Once the Court found that the ordinance did not reflect a rational matching of means to ends, that left one plausible explanation for

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131. 473 U.S. 432 (1985).

132. Cf. Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1319-33 (2018) (arguing that rational basis review often offers more probing review, even outside the "rational basis with bite" line of precedent).

133. *Hawaii*, 138 S. Ct. at 2420 (citing *Cleburne*, 473 U.S. at 448-50).

134. *Cleburne*, 473 U.S. at 441-47 (declining to hold that persons with mental retardation constituted a quasi-suspect class such that classifications that disadvantaged the group required intermediate scrutiny). The Court cited concerns that this Article has cited under the rubric of structural spillover: according to Justice White, who wrote for the Court, people with mental retardation have "wide variation in . . . abilities and needs," calling for "flexibility" on the part of government in efforts to respond to those needs. *Id.* at 445.

135. *Id.* at 449-50.

136. *Id.* at 447-50.

the measure: impermissible animus.<sup>137</sup> The Court's searching scrutiny stands in stark contrast to the minimal scrutiny that the *Hawaii* majority applied to EO-3.

This marked lack of means-ends fit also figured heavily in the two other rational basis review cases cited by the majority.<sup>138</sup> In *Department of Agriculture v. Moreno*, the Court found the fit inadequate in a federal statutory provision that barred receipt of food stamps by households comprised of unrelated people. The government had suggested that the provision would deter fraud, on the theory that people who are unrelated are more likely to form a household for purely expedient reasons such as access to food stamps.<sup>139</sup> The Court, in an opinion by Justice Brennan, dismissed this argument, noting that the statute already contained an array of anti-fraud provisions that more closely targeted the conduct at issue.<sup>140</sup> In addition, the Court noted, the statute was underinclusive: Individuals intent on fraud could apply for food stamps as individuals and structure their living arrangements to form *separate* households under the statute, thereby evading the bar.<sup>141</sup> The statute was also *over*-inclusive: according to Justice Brennan, individuals not able to restructure their living arrangements in this way were more likely to be persons actually *eligible* for benefits, such as indigent mothers with dependent children who wished to share housing to reduce costs and make their scant income go further.<sup>142</sup> That overinclusiveness drove the Court's holding that the statute at issue was unconstitutional.

In *Romer v. Evans*, the Court, in an opinion by Justice Kennedy, struck down an amendment to the Colorado constitution that barred any future measure safeguarding the rights of gay, lesbian, or bisexual individuals. While the Court held that the Colorado constitutional provision violated equal protection because it singled out this group for special legal obstacles, Justice Kennedy also mentioned the means-ends fit analysis that the Colorado Supreme Court had applied.<sup>143</sup> Colorado had sought to justify the measure on

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137. The oral argument provides a flavor of the *Cleburne* Court's focus on the means-ends nexus. For example, when the attorney for the town mentioned the proposed group home's location on a 500-year flood plain, Justice Rehnquist asked whether the city had a "general policy against building" in this area. The town's attorney conceded that the town had not barred construction for other non-group home uses. Transcript of Oral Argument at 3-4, *Cleburne*, 473 U.S. 432 (No. 84-468). Later, in a textbook case of how *not* to respond to a question from the bench, the following exchange occurred: Justice Stevens asked the town's lawyer about the factual finding made by the district court that the town permitted many other uses in the area that were the same in all pertinent respects as the group home. *Id.* at 9. The town's lawyer maintained that the finding of the district court was not "material here." *Id.* Justice Stevens replied, "Well, it is pretty material to me, I will tell you that." *Id.* at 10.

138. See *Hawaii*, 138 S. Ct. at 2420 (citing *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) and *Romer v. Evans*, 517 U.S. 620 (1996)).

139. *Moreno*, 413 U.S. at 535.

140. *Id.* at 536-37.

141. *Id.* at 537.

142. *Id.* at 537-538 (noting provision's adverse impact would fall principally on individuals "so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility").

143. *Romer*, 517 U.S. at 629, 631.

the ground that barring protection for gay, lesbian, and bisexual individuals conserved resources for combating discrimination against suspect classes, such as racial minorities.<sup>144</sup> The Colorado Supreme Court had rejected this argument as underinclusive, noting that Colorado law also protected many *other* non-suspect classes defined by an array of traits such as “age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, [or] physical or mental disability of an individual or his or her associates.” Yet Colorado did not subject this legion of other groups to the special legal disabilities the constitutional amendment had imposed on persons who were gay, lesbian, or bisexual.<sup>145</sup> The Colorado amendment’s failure to demonstrate means-ends fit was part of the backdrop for the Supreme Court’s holding that invidious animus was the only plausible explanation for the measure.<sup>146</sup>

### 3. *EO-3’s Failure to Fit the Cleburne Rational Basis Cases*

Nothing in the *Hawaii* majority opinion even approached the robust means-ends scrutiny in the *Cleburne* line of cases. The majority’s principal substitute for that bracing inquiry was a reference to the “worldwide review process” that supposedly undergirded EO-3.<sup>147</sup> A Court less inclined to mechanical deference might have asked itself how that worldwide process conducted by “multiple Cabinet officials”<sup>148</sup> in the administration of President Donald Trump had sealed itself off from candidate Trump’s noxious statements. Moreover, a Court that was conscientious about its reliance on *Cleburne* could also have simply decided that the proof was in the pudding. That hardheaded look at EO-3 would have amply demonstrated its failure to pass muster.

EO-3 suffers from the same manifest lack of fit that marred the measures that the Court struck down in *Cleburne* and the other rational basis cases cited by the *Hawaii* majority. With respect to the persons that the order covers, EO-3 is both over- and underinclusive. The same two flaws plague the list of countries in EO-3. I discuss each in turn.

EO-3 is overinclusive regarding the categories of individuals covered. As Justice Sotomayor indicated in her dissent, EO-3’s restrictions on immigrants’ entry cover infants and others who cannot possibly pose a threat.<sup>149</sup> Vetting adults can be challenging, although consular officials perform that task hundreds of thousands of times per year. Vetting young children requires little more than a doctor’s note and a DNA test. Moreover, children under the age of 12 rarely have criminal records or terrorist experience that would

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144. *Id.* at 631, 635.

145. *Evans v. Romer*, 882 P.2d 1335, 1346 n. 9 (Colo. 1994) (cited in *Romer*, 517 U.S. at 629).

146. *Romer*, 517 U.S. at 632.

147. *Hawaii*, 138 S. Ct. at 2421.

148. *Id.*

149. *Hawaii*, 138 S. Ct. at 2445 (Sotomayor, J., dissenting).

render them inadmissible. Information security is also not a major concern for this group; young children will typically not need to cover up travel that might raise concerns, such as efforts to join ISIS forces in Syria or Iraq. Finally, a young child is unlikely to have skeletons in his or her closet that would remain under wraps until after the child's entry into the United States and is also not likely to commit crimes immediately after her entry. For this cohort, a foreign country's cooperation on removal from the United States is irrelevant. Vetting young children surely does not require the sweeping restrictions imposed by EO-3.

The categories of individuals covered by EO-3 also show obvious *underin-*clusiveness. EO-3 imposes few restrictions on *nonimmigrant* visa applicants, such as students, tourists, or business travelers.<sup>150</sup> While Chief Justice Roberts cited this as a factor showing that EO-3 did not target Muslims per se,<sup>151</sup> the exemption of most nonimmigrants is more compelling as evidence of EO-3's lack of means-ends fit.<sup>152</sup> Students, tourists, and business travelers pose far greater potential national security threats than infants do. Indeed, the 9/11 hijackers all entered the United States on nonimmigrant visas.<sup>153</sup> If difficulties with vetting apply to infants, those difficulties apply with far greater force to students, tourists, and other nonimmigrant visa applicants. Moreover, since nonimmigrants' countries of origin value the ability of their nationals to obtain an education or business opportunities in the United States, the exemption for this group lessens the leverage that EO-3 may gain over countries to drive improvements in vetting. EO-3's carve-out for this group thus casts substantial doubt on the nexus between the measure's stated goals and the means it employs.

EO-3's list of covered countries also fails to fit the measure's goals.<sup>154</sup> Those goals are three-fold: a country should collaborate with the United States and the international community regarding, 1) sound, up-to-date identity-management protocols, including issuance of electronic passports embedded with the passport-holder's biographic and biometric data and providing information to other countries and international organizations about lost or stolen passports; 2) national security and public-safety information, such as data about terrorism or security threats; and, 3) national security and public-safety risk assessment, including repatriation of its own nationals subject to a final order of removal in the United States.<sup>155</sup>

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150. *Id.*

151. *Hawaii*, 138 S. Ct. at 2422.

152. *Id.* at 2445 (Sotomayor, J., dissenting).

153. David Johnston, *6 Months Late, I.N.S. Notifies Flight School of Hijackers' Visas*, N.Y. TIMES, March 13, 2002, at A16 (noting that half a year after September 11 attacks, immigration officials had sent an education institution notices that it had approved student visas for two of the hijackers, including the U.S. ringleader, Mohamed Atta).

154. See Margulies, *Bans, Borders, and Sovereignty*, supra note 18, at 63-65.

155. See EO-3, § 1(c).

First consider the identity-management issue. Viewed from one perspective, EO-3 is over-inclusive.<sup>156</sup> Four of the listed countries—Iran, Libya, Somalia, and Venezuela—issue electronic passports.<sup>157</sup> Moreover, the respected international law enforcement agency, Interpol, has described Iran as “very strong” in sharing information on lost or stolen passports,<sup>158</sup> while Libya, Somalia, Syria, and Venezuela also share significant data.<sup>159</sup> Demonstrating its lack of means-ends fit, EO-3 is also demonstrably *under*-inclusive on identity management. Almost 100 unlisted countries do not issue electronic passports.<sup>160</sup> Moreover, over 150 unlisted countries are either sparing or completely silent regarding lost or stolen passports.<sup>161</sup>

On sharing national security and public-safety data, the listed country Yemen uses a system developed in the United States—the Personal Identification Secure Comparison and Evaluation System (PISCES)—to report terrorist incidents.<sup>162</sup> For its part, Iran coordinates with the Iraqi government and with Syria in the armed conflict with ISIS, in which the United States also plays a vital role.<sup>163</sup> To be effective, this collaboration must involve some information-sharing. Whether U.S. officials consider that degree of information-sharing to be sufficient is difficult to discern from the face of EO-3, which provides no objective baseline for this factor regarding the frequency or volume of information-sharing expected.

Moving to acceptance of nationals with a U.S. final order of removal,<sup>164</sup> EO-3’s lack of fit is also salient. Among the countries covered by EO-3, the United States has designated only Iran as failing to cooperate.<sup>165</sup> Many unlisted countries practice noncooperation that is far broader in scope. According to the conservative Center for Immigration Studies, as of the middle of 2016 there were 2,718 Iranians with final orders of removal who remained in the United States; 901 of those Iranian nationals had committed

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156. Analyst David Bier of the Cato Institute has undertaken the most diligent and methodical review of EO-3’s criteria. See David Bier, *Travel Ban is Based on Executive Whim, Not Objective Criteria*, CATO AT LIBERTY (Oct. 9, 2017); see also Brief for Amicus Curiae The Cato Institute in Support of Respondents, *Trump v. Hawaii*, No. 17-965 (March 23, 2018), <https://www.cato.org/blog/travel-ban-based-executive-whim-not-objective-criteria>; [https://www.supremecourt.gov/DocketPDF/17/17-965/39755/20180323095217542\\_Cato%20Amicus%20Brief.pdf](https://www.supremecourt.gov/DocketPDF/17/17-965/39755/20180323095217542_Cato%20Amicus%20Brief.pdf) (discussing sources).

157. Int’l Civ. Aviation Org. (ICAO), *ICAO Public Key Directory (PKD) Participants*, <https://icao.int/Security/FAL/PKD/Pages/ICAO-PKDParticipants.aspx>.

158. Bier, *supra* note 156.

159. *Id.*

160. *Id.*; ICAO, *supra* note 157.

161. Bier, *supra* note 156; U.S. House of Representatives Committee on Homeland Security, Subcommittee on Border and Maritime Security, *Passport Fraud: An International Vulnerability* (Apr. 4, 2014) (testimony of officials Alan Bersin and John Wagner), <https://www.dhs.gov/news/2014/04/04/written-testimony-plyc-office-international-affairs-and-cbp-office-field-operations>.

162. Bier, *supra* note 157; U.S. Dep’t of State, Country Reports on Terrorism 2016, at 25, 234 (describing Chad and reporting on Yemen, respectively), <https://www.state.gov/documents/organization/272488.pdf>.

163. Bier, *supra* note 157.

164. EO-3, § 1(c)(iii).

165. Bier, *supra* note 157.



crimes in the United States that were the basis for their removal orders.<sup>166</sup> In contrast, unlisted Vietnam had 8,437 total nationals in the United States subject to final orders of removal; 7,560 of those cases involved orders of removal arising out of criminal convictions here. Compared with Iran, Vietnam has over 800% more foreign nationals in the United States subject to final orders of removal based on criminal convictions. Another unlisted country, Laos, has 3,755 foreign nationals subject to final orders of removal for criminal convictions in the United States: that is 400% more than Iran.<sup>167</sup> Yet Laos has been subject only to sanctions imposed on its government officials and their dependents who wish to travel to the United States, while the United States has imposed no sanctions on Vietnam. These are just two of the many unlisted countries whose nationals with crime-based orders of removal far exceed those of Iran.<sup>168</sup>

While courts should not seek to micromanage the details of immigration policy, EO-3's lack of fit on repatriation of nationals with crime-based removal orders is telling. Iran's noncooperation, which is far exceeded by other, non-covered countries, represents the *best* case for matching EO-3's means to its stated goals. Yet, even here, EO-3 uses a sledgehammer to squash a gnat. The modest relative scope of Iran's noncooperation and the lack of evidence of noncooperation by other listed countries in this regard both illustrate EO-3's mismatch between ends and means.

#### 4. *The Hawaii Majority's Tepid Response*

Instead of addressing EO-3's manifest lack of means-ends fit, the *Hawaii* majority gestured toward three features of EO-3: its provisions for waivers, periodic review, and exceptions for nonimmigrants. None of these features materially enhances EO-3's means-ends fit.

As Justice Breyer noted in his dissent, the waiver appears to be both opaque in operation and largely illusory in practice.<sup>169</sup> To obtain a waiver, a noncitizen from the affected countries must show that: 1) denying entry would cause the noncitizen "undue hardship;" 2) entry would not pose a threat to the U.S.; and 3) entry would be "in the national interest."<sup>170</sup> The government has offered only sparse guidance on how individuals can meet the above criteria, particularly the "undue hardship" prong.<sup>171</sup> Moreover, the State

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166. See Jessica Vaughan, *The Non-Departed: 925,000 Aliens Ordered Removed Are Still Here*, Center for Immigration Stud. (June 30, 2016), <https://cis.org/Vaughan/NonDeparted-925000-Aliens-Ordered-Removed-Are-Still-Here>.

167. *Id.* Similarly exceeding Iran, Cambodia had 1,464 nationals subject to final orders of removal based on criminal convictions.

168. *Id.*; cf. Aline Barros, *Trump Administration Strikes Multiple Deportation Deals; What's in Them?*, VOICE OF AMERICA, March 3, 2018, <https://www.voanews.com/a/trump-administration-multiple-deportation-pacts/4279219.html> (noting that current list of "recalcitrant" countries also includes China, Eritrea, Hong Kong, and Myanmar).

169. *Trump v. Hawaii*, 138 S. Ct. 2392, 2341 (2018).

170. EO-3, § 3(c).

171. *Hawaii*, 138 S. Ct. at 2431.

Department has granted only a “miniscule” number of waivers, even to individuals who would seem to have a strong *prima facie* case of undue hardship, such as children requiring medical treatment.<sup>172</sup> This is not the kind of careful tailoring that the *Cleburne* line of cases requires.

The periodic review process<sup>173</sup> similarly fails the tailoring test. Just as it is artificial to separate the various iterations of the travel ban from the signals sent by candidate Trump, any periodic review will necessarily reflect President Trump’s toxic influence. Since EO-3 lacks means-ends fit, believing that a periodic review presided over by the same players will do better typifies the triumph of hope over experience. Chief Justice Roberts flagged the Trump administration’s removal of three countries—Iraq, Sudan, and Chad—from the list of countries covered by various iterations of the travel ban.<sup>174</sup> Given the under- and overinclusive nature of EO-3 and the countries still covered, the removal of these three countries barely scratches the surface of EO-3’s arbitrary nature.

Finally, the exceptions for nonimmigrant visas do not perform the tailoring job that the drafters of EO-3 failed to do at its inception. As Justice Breyer pointed out in his dissent, officials have approved only a small number of student visas from listed countries.<sup>175</sup> These numbers constitute a mere fraction of the number of visas that earlier administrations had approved annually.<sup>176</sup> If this is tailoring at all, it is truly shoddy merchandise.

Shorn of this excess fabric, the *Hawaii* majority’s argument for EO-3’s constitutional validity reduces to the familiar theme of deference. For example, Chief Justice Roberts cited to his earlier opinion for the Court in *Holder v. Humanitarian Law Project*,<sup>177</sup> in which the Court expressed reluctance about second-guessing Congress’s judgment on “sensitive and weighty interests of national security and foreign policy.”<sup>178</sup> However, in this respect, *Humanitarian Law Project* is another example of the spillover of deferential decisions on judicial credibility and independence. In that decision, the Court upheld a statute that prohibited “material support” to groups designated by

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172. *Id.* For example, a ten-year-old with cerebral palsy received a waiver only after Supreme Court justices inquired specifically about her case during the travel ban oral argument. See 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* 19 (June 2018), [https://ccrjustice.org/sites/default/files/attach/2018/06/CCR\\_YLS\\_June2018\\_Report\\_Window-Dressing-the-Muslim-Ban.pdf](https://ccrjustice.org/sites/default/files/attach/2018/06/CCR_YLS_June2018_Report_Window-Dressing-the-Muslim-Ban.pdf).

173. *Hawaii*, 138 S. Ct. at 2422.

174. *Id.*

175. *Id.* at 2432 (noting that 258 student visas were issued for Iranians, 29 for Libyans, 40 for Yemenis, and none for Somalians). The *Hawaii* plaintiffs will have an opportunity to demonstrate the waiver provisions’ inadequacy in federal district court, where the case returned for proceedings on permanent injunctive relief after the Supreme Court vacated the preliminary injunction issued below. See HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* 204 (2018) (noting that, “[o]n remand, discovery can now proceed, and evidence of government discrimination in individual cases can be introduced”).

176. *Hawaii*, 138 S. Ct. at 2433 (Breyer, J., dissenting).

177. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

178. *Hawaii*, 138 S. Ct. at 2422 (citing *Humanitarian Law Project*, 561 U.S. at 33-34).

the Secretary of State as foreign terrorist organizations (FTOs).<sup>179</sup> Violations of the statute at issue in *Humanitarian Law Project* entailed *specific conduct* by individuals who coordinated their actions with FTOs. The Court's rationale for upholding the statute did not encompass government action against persons who had committed no specific conduct, but merely happened to be close relatives of U.S. citizens or other otherwise visa-eligible individuals affected by EO-3. In citing this language from *Humanitarian Law Project* despite its lack of application to the different context of EO-3, the majority in *Hawaii* inadvertently demonstrated that spillover happens in both directions, tilting future courts toward inapposite deference as well as sometimes risking impairment of the political branches' prerogatives.

#### IV. CONTROLLING EXECUTIVE EXCESS: CONTEXT AND CONSTITUTIONAL AVOIDANCE IN STATUTORY INTERPRETATION

The poor fit of EO-3 under the *Cleburne* line of probing rational basis cases should have driven the Court to a different method and outcome: finding that EO-3 exceeded Congress's delegation to the Executive under the INA. Two sturdy strands of statutory interpretation could have achieved this result: 1) the avoidance doctrine, which would have relied on the Constitution in reading the INA to preclude EO-3's sweeping assertion of executive power,<sup>180</sup> and, 2) administrative law's "major questions" doctrine,<sup>181</sup> which would have relied on the INA's structure and on past practice. These doctrines are related: avoidance cases may also cite statutory structure and past practice, while major-questions decisions sometimes unfold against the backdrop of the constitutional concern with excessive delegations to administrative agencies. The Court has relied on both approaches to combat executive branch excess. Either would have sidestepped the methodological problems engendered by the contradiction between the probing scrutiny of the *Cleburne* line of precedent and the uncritical deference that the *Hawaii* Court displayed toward EO-3.

##### A. *Avoidance and Blunting Invidious Impacts: The Japanese-American Internment Cases*

The blinkered deference of the *Hawaii* majority actually compares *unfavorably* with the Court's earlier handling of the legal challenges to the Japanese-American internment. Justice Sotomayor did not go this far in her vigorous dissenting opinion; she limited herself to asserting that the majority

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179. 18 U.S.C.A. § 2339B.

180. See Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71; Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000); see also Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 551-60 (2018) (discussing interaction between stakes in given decision and level of plausibility required in reading statute to avoid constitutional problems).

181. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

opinion reprised the structural spillover that Justice Jackson warned about in his *Korematsu* dissent. Terming the majority opinion an echo of *Korematsu* elicited an indignant denial by Chief Justice Roberts.<sup>182</sup> However, *Ex Parte Endo*,<sup>183</sup> the Court's final word on the internment, illustrates that the Court ultimately brought down the curtain on this appalling episode by invoking the same avoidance canon that the *Hawaii* majority disdained.<sup>184</sup>

In *Endo*, Justice William O. Douglas, writing for the Court, held that the Executive lacked statutory authority to detain concededly loyal Japanese-Americans. Douglas noted that such detention would offend the Due Process Clause, as well as fundamental notions of fairness, by detaining individuals without specific evidence of the need for this severe step.<sup>185</sup> The government, by the time the Court announced both *Endo* and *Korematsu* on December 18, 1944, knew both that the overwhelming majority of detained persons were in fact loyal and that sorting them out would be straightforward.<sup>186</sup> As a practical matter, therefore, *Endo* prompted the release of most detainees and paved the way for the wind-down of the entire internment program.<sup>187</sup>

To reach this significant result, Justice Douglas relied on interpretation of the statute governing the initial evacuation of Japanese-Americans from their homes on the West Coast. Construing the statute as silent on whether the government could subsequently detain concededly loyal individuals, Douglas filled the gap with the avoidance canon, which counsels that courts read statutes to avoid substantial constitutional questions. According to Justice Douglas, the Due Process Clause would have barred the detention of concededly loyal U.S. citizens.<sup>188</sup> Citing the avoidance canon, Justice Douglas

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182. *Hawaii*, 138 S. Ct. at 2423.

183. *Ex parte Mitsuyo Endo*, 323 U.S. 283, 294 (1944).

184. See PETER IRONS, JUSTICE AT WAR 341-46 (1983); Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003); cf. Jerry Kang, *Watching the Watchers: Enemy Combatants in the Internment's Shadow*, 68 L. & CONTEMP. PROBS. 255, 267 (2005) (suggesting that *Endo*'s use of statutory interpretation relied more on canon that Court would not assume Congress intended an unconstitutional result absent a clear statement of Congress's intent rather than on most plausible evidence of shared intent of the political branches, which indicated that each branch well understood that initiation of forced evacuation of Japanese-Americans from West Coast would result in detention of many loyal U.S. citizens and lawful residents); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 512 (1945) (suggesting that the Court "strenuously construed" the statute authorizing evacuation to avoid finding that the law also authorized continued detention of concededly loyal Japanese-Americans). The approach described in this Article is entirely consistent with describing the avoidance canon as a useful interpretive convention or legal fiction, as opposed to a method for excavating the likely subjective intent of a collective body such as Congress. See generally Richard Fallon, *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 538-41 (2016) (discussing difficulties with ascribing intent to collective body such as legislature).

185. *Endo*, 323 U.S. at 299 & n. 23 (noting that the Court had "consistently given a narrower scope" to legislation that "appeared on its face to violate a specific prohibition of Constitution") (citing, *inter alia*, *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring)).

186. ERIC L. MULLER, AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II (2007) (discussing evolution of loyalty examinations for internees); cf. Kermit Roosevelt, ALLEGIANCE 316-31 (2015) (providing fictionalized but well-sourced account of loyalty process).

187. Irons, *supra* note 184, at 345.

188. *Endo*, 323 U.S. at 299.

construed the statute in light of the Due Process Clause as not authorizing that drastic option.<sup>189</sup>

The avoidance canon did a great deal of work in *Endo*. Viewed strictly as a matter of parsing Congress's likely intent, *Endo* seems contrived: as Justice Roberts noted in his concurrence, in enacting a statute requiring compliance with military orders governing evacuation, Congress almost certainly contemplated that mass detention would follow.<sup>190</sup> That said, the majority opinion in *Endo* enabled the Court to manage structural spillover. As *Korematsu* demonstrated, the Court was unwilling to hold that the *Constitution* barred the entire internment program from its inception.<sup>191</sup> That reluctance was "gravely wrong," as the *Hawaii* majority somewhat belatedly acknowledged.<sup>192</sup> However, that tragic reticence rested on a fear, alluded to by Justice Douglas in *Endo*,<sup>193</sup> that a broad constitutional holding would chill the government's ability to respond to national security threats. At the same time, *Endo* showed that a majority of the Court was unwilling to lend its imprimatur to the most plausible reading of Congress's enactment, which would have authorized the indefinite and indiscriminate detention of Japanese-Americans that in fact occurred. As the threat from Japan eased in the dwindling days of the war and the harsh reality of internment began to sink in for many Americans, the Court saw a need to reassert the values of the Due Process Clause to restrain future government excesses and mitigate the courts' complicity.<sup>194</sup> *Endo*'s avoidance-based statutory holding enabled the Court to achieve these goals, albeit in an imperfect fashion. At least in this respect, the Court's overall adjudication of the Japanese-American internment was *superior* to the *Hawaii* Court's heedless upholding of EO-3.

## B. *The Court and the Cold War*

In cases responding to the repression wrought by McCarthyism and the Cold War, the Court also made robust use of statutory interpretation.<sup>195</sup>

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189. *Id.*

190. *Id.* at 309 (noting that Congress in exercising oversight over the executive branch held extensive hearings and received reports on the government Relocation Authority implementing the internment program, and appropriated funds for its operation).

191. *Korematsu v. United States*, 323 U.S. 214, 217 (1944) (asserting that "we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time" of the initial military evacuation order in 1942).

192. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

193. *Endo*, 323 U.S. at 298-99 (noting that the Constitution "committed to the Executive and to Congress the exercise of the war power [which] necessarily gave them wide scope for the exercise of judgment and discretion so that war might be waged effectively and successfully").

194. See Irons, *supra* note 184, at 323-25 (discussing Chief Justice Harlan Fiske Stone's efforts to secure consensus on Court); see also *id.* at 307-08 (noting that briefing to the Court by lawyers in Justice Department, who had long been troubled by legal defense of the internment program, came close to conceding statutory point).

195. See *Kent v. Dulles*, 357 U.S. 116 (1958) (holding that Congress had not authorized denying passport because applicant had refused to provide affidavit regarding his alleged Communist Party membership); *Cole v. Young*, 351 U.S. 536 (1956) (holding that Congress had not authorized summary termination of line-level government employee because of national security concerns); *United States v. Rumely*, 345

During this period, the Court, including Justice Felix Frankfurter—the guiding spirit of judicial restraint—frequently alluded to the need to preserve fairness and deliberation. Importantly, however, that concern with structural spillover emerged in the wake of *Dennis v. United States*,<sup>196</sup> in which a deferential Supreme Court upheld a statute prohibiting membership in an organization such as the Communist Party that advocated the overthrow of the U.S. government.<sup>197</sup> In *Dennis*, the opinion of the Court by Chief Justice Vinson and Justice Frankfurter’s extended concurrence both expressed concern about the consequences of undue judicial intrusion on the political branches.

In *Dennis*, the Court upheld the Smith Act, which prohibited membership in organizations that advocated the violent overthrow of the U.S. government. Writing for a plurality of four Justices, Chief Justice Vinson placed structural spillover front and center, noting that the stakes in the case concerned nothing less than government’s ability to protect the nation from “violence, revolution, and terrorism.”<sup>198</sup> Justices Frankfurter and Jackson concurred. Justice Frankfurter’s concurrence cited the political branches’ duty to safeguard U.S. sovereignty.<sup>199</sup> For Frankfurter, Congress’s power to outlaw speech calling for the government’s violent overthrow dovetailed with the government’s power and duty to secure the country against foreign threats, including the presumed foreign masters of the U.S. Communist Party. Quoting from the case that established Congress’s plenary power over immigration, Frankfurter inveighed that the “highest duty of every nation” is to “preserve its independence, and give security against foreign aggression and encroachment.”<sup>200</sup> Frankfurter, ever the champion of judicial self-restraint, also invoked the “narrow limits of judicial authority.”<sup>201</sup>

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U.S. 41, 44-46 (1953) (construing scope of congressional resolution establishing investigative committee in light of First Amendment rights of subjects of investigation); *Scales v. United States*, 367 U.S. 203 (1961) (requiring proof of both “active” membership in Communist Party and specific intent to overthrow government through force and violence); *Yates v. United States*, 354 U.S. 298 (1957) (reading specific intent requirement into statute prohibiting membership in Communist Party); cf. ROBERT JUSTIN GOLDSTEIN, *AMERICAN BLACKLIST: THE ATTORNEY GENERAL’S LIST OF SUBVERSIVE ORGANIZATIONS* 221-35 (2008) (suggesting that Supreme Court decisions reduced impact government’s list of subversive organizations); WALTER F. MURPHY, *CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS* 246 (1962) (describing the Court’s brief move in 1959 and 1960 from robust use of the avoidance canon to greater deference as a “tactical withdrawal, not a rout”); Frickey, *supra* note 9; Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2161-62 (2015) (discussing Court’s decision in *Rumely*); but see DAVID COLE, *ENEMY ALIENS* 142-44 (2003) (acknowledging Court’s role but suggesting that it did not do enough to address abuses prompted by anti-Communist hysteria).

196. *Dennis v. United States*, 341 U.S. 494 (1951).

197. Almost twenty years later, the Court overruled *Dennis* and announced that the First Amendment protected extreme political views, including the abstract advocacy of violence. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); cf. *Elonis v. United States*, 135 S. Ct. 2001, 2009-10 (2015) (in case of defendant who had posted material online that others viewed as threatening harm, requiring proof of specific intent to threaten another with bodily harm as predicate for conviction under statute prohibiting transmission of threats in interstate commerce).

198. *Dennis*, 341 U.S. at 501.

199. *Id.* at 519.

200. *Id.* (quoting *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889)).

201. *Id.* at 526.

With this conclusion out of the way, Justice Frankfurter then turned to the countervailing concern with structural spillover that would dominate his participation in Court decisions on Cold War measures for much of the next decade. Frankfurter cautioned that the Smith Act “could be used unreasonably by those in power against hostile or unorthodox views.”<sup>202</sup> Justice Frankfurter directly questioned the wisdom of the Smith Act, warning that overly zealous efforts to address perceived foreign threats are a “danger within ourselves . . . which will make us . . . intolerant, secretive, suspicious, cruel, and terrified of internal dissension.”<sup>203</sup> In addition, Frankfurter stressed the importance of fair procedures, including subjecting government to “the strictest standards of proof” when it sought to denaturalize or remove an individual on ideological grounds.<sup>204</sup>

Heeding Frankfurter’s warning, the Court through the 1950s reduced the risk of structural spillover on the courts prompted by the deferential turn in *Dennis*. The avoidance canon was an important element in this array of decisions, but not the only part. For example, in *Kent v. Dulles*,<sup>205</sup> Justice Frankfurter joined the majority opinion by Justice Douglas holding that the Passport Act did not delegate to the President the power to deny a passport to a U.S. citizen who had declined to answer on his application whether he was or had been a member of the Communist Party. The majority opinion cited due process and the right to travel as strong factors narrowing the statute’s delegation to the executive branch.<sup>206</sup> However, avoiding the constitutional question was not the sole basis for the Court’s decision. Instead, Justice Douglas, following the dissent by Judge Bazelon in the D.C. Circuit,<sup>207</sup> cited the long record of administrative practice on passports as *not* including questions about Communist Party membership.<sup>208</sup> Justice Douglas, in cleaning up

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202. *Id.* at 546.

203. *Id.* at 554-55 (citing George F. Kennan, *Where Do You Stand on Communism?*, N.Y. TIMES MAGAZINE, May 27, 1951, at 53).

204. *Id.* at 531; *see also id.* at 526 (with respect to need for “fairness of procedure” and due regard for government discretion’s “impact on individuals”) (citing Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951)).

205. *Kent v. Dulles*, 357 U.S. 116 (1958).

206. *Id.* at 129 (terming right to travel a “personal right” within the “liberty” protected by the Fifth Amendment barring curbs based on an individual’s political beliefs and mandating that courts “construe narrowly all delegated powers that curtail or dilute” this right to be free from content-based regulation by the state). Subsequent cases indicated that government could impose curbs on travel that were general—not triggered by an individual’s beliefs—or stemmed from the duties owed to the government by former government employees. *See Zemel v. Rusk*, 381 U.S. 1 (1965) (upholding general restrictions on travel to Cuba); *Regan v. Wald*, 468 U.S. 222 (1984) (holding that statute authorized the President to impose general curbs on such travel); *Haig v. Agee*, 453 U.S. 290 (1981) (upholding revocation of former CIA agent’s passport); *cf. Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2101-03 (2005) (praising post-*Kent* case law as exhibiting appropriate deference); *but see HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 141 (1990) (criticizing *Agee*); Jeffrey Kahn, *International Travel and the Constitution*, 56 UCLA L. REV. 271, 305-13 (2008) (arguing that post-*Kent* travel decisions clashed with constitutional norms).

207. *Briehl v. Dulles*, 248 F.2d 561, 580-83 (D.C. Cir. 1957) (Bazelon, J., dissenting).

208. *Kent*, 357 U.S. at 127-28 (citing vitiated “allegiance” to the United States, such as service to a foreign power, and illegal conduct, including passport fraud, as the bases for past denials).

*Dennis's* structural spillover on the courts, also acknowledged the damage done by *Korematsu*. Justice Douglas felt obliged to distinguish *Korematsu's* holding on the ground that the Court's deference in that case pertained only to wartime.<sup>209</sup> Douglas then cited to his earlier opinion in *Endo* as curbing excessive delegations that trenched on constitutional values.<sup>210</sup>

Just as the Cold War Court used statutory interpretation in *Kent* to protect U.S. citizens' choices to travel abroad, it also pushed back on government overreach in immigration law. Here, concerns about statutory structure joined the avoidance canon. Consider *United States v. Witkovich*,<sup>211</sup> in which Justice Frankfurter wrote for the Court, which held that the INA limited immigration officials' detention of a foreign national already slated for deportation. Congress had enacted a provision whose text appeared to confer wide authority on officials to question foreign nationals, subjecting the latter to criminal prosecution if they failed to provide the information sought.<sup>212</sup> The government asserted that this provision justified continued detention of a resident foreign national for the purpose of pressuring that individual to disclose information about possible current ties to the Communist Party.<sup>213</sup> Ever the careful student of statutory structure,<sup>214</sup> Frankfurter acknowledged that the government's power to question a foreign national seemed unbounded under this provision, if it were read "in isolation and literally."<sup>215</sup> However, Frankfurter rejected what he termed the "tyranny of literalness."<sup>216</sup> Instead, Frankfurter read the provision in light of the INA "as a whole," as well as its legislative history and the avoidance canon.<sup>217</sup> Informed by these concerns, Frankfurter found that Congress did not intend to confer upon immigration officials a power of "broad supervision" resembling the power government exerts over convicted felons on probation.<sup>218</sup> Instead of a broad-ranging warrant for any and all questions, Frankfurter construed the statute as only authorizing questions about a foreign national's "availability for deportation."<sup>219</sup> The text of the provision on questions *informed* Frankfurter's

209. *Id.* at 128 (noting that "the Nation was then at war . . . [n]o such showing of extremity . . . has been made here").

210. *Id.* at 129.

211. *United States v. Witkovich*, 353 U.S. 194 (1957).

212. *Id.* at 195-96. As written, the statute required that a foreign national in receipt of a final order of deportation "give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper," citing then 8 U.S.C. § 1252(d)(3), 68 Stat. 1232.

213. *Witkovich*, 353 U.S. at 198-99.

214. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

215. *Witkovich*, 353 U.S. at 199.

216. *Id.*

217. *Id.*; see also *United States v. Rumely*, 345 U.S. 41, 44-46 (1953) (invoking avoidance to narrow congressional resolution establishing investigative committee to inquire into expressive activity); cf. Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in FELIX FRANKFURTER: THE JUDGE 30, 52 (Wallace Mendelson ed., 1964) (noting that when Frankfurter interpreted a particular statutory provision, "he saw it, not in isolation, but as a part of the historic unfolding of federal statute law . . . each statute must be read in the light of the policy expressed in others").

218. *Witkovich*, 353 U.S. at 200.

219. *Id.* at 201.



reading; it did not *dictate* a result which would have failed to fit the statute as a whole.<sup>220</sup>

In pondering the relevance of Frankfurter's approach to the regulation of *entry* into the United States by foreign nationals, it is only fair to acknowledge that the Court through *Hawaii* has been deferential.<sup>221</sup> However, a pathway for a more robust approach to judicial review is available in Frankfurter's cogent dissent in *United States ex rel. Knauff v. Shaughnessy*.<sup>222</sup> Against the same Cold War backdrop, the Court declined to vacate a government finding that Knauff was inadmissible on national security grounds. Ellen Knauff was a World War II refugee from Czechoslovakia, whom the Court acknowledged had served "efficiently and honorably" with both the British Royal Air Force and the U.S. War Department in Germany. In 1948, Knauff married a U.S. veteran and became eligible for an immigrant visa under the War Brides Act, which Congress had enacted to facilitate the entry of foreign spouses of U.S. service members. The U.S. government denied her admission, citing national security concerns—eventually shown to be wholly unfounded—that it refused to disclose to Knauff or the Court. The government relied on a provision giving the President authority to block the entry of foreign nationals "prejudicial to the interests of the United States."<sup>223</sup> In *Knauff*, the Court upheld the government's refusal to permit Knauff's entry.

The Court's decision in *Knauff* elicited powerful dissents from Justice Frankfurter and from Justice Robert Jackson, perhaps the Court's foremost student of the separation of powers. Each justice asserted that the Court had failed to grasp the place of the War Brides Act in the INA's overall landscape and had wrongly read the entry provision in isolation from the rest of the statute.

Frankfurter noted that Congress passed the War Brides Act to overcome the barriers to family reunification imposed by the rigid national origin quotas

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220. The Court has regularly sought in immigration cases involving LPRs to interpret the INA in a fashion that promoted fair notice and avoided needless forfeitures of legal status. See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (arguing that courts have relied on statutory construction to temper immigration law). However, when Congress has made its intentions clear, the Court has typically been deferential. Compare *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (holding that Constitution did not prohibit Congress from expressly authorizing retroactive application of INA provision making Communist Party membership basis for removal), with *INS v. St. Cyr*, 533 U.S. 289, 315-16 (2001) (declining to construe immigration statute as retroactive absent clear statement from Congress); cf. Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998) (asserting that Constitution bars retroactive application); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000) (canvassing political and legal correlates of harsh immigration laws and recommending judicial responses).

221. See *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring) (citing "'Congress's plenary power to make rules for the admission'" of foreign nationals) (citation omitted).

222. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 541-42 (1950); see also Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933 (1995).

223. This was a predecessor of today's 8 U.S.C. § 1185(a)(1), a cognate of § 1182(f).

then in effect. In the War Brides Act, Congress recognized the “dominant regard which American society places upon the family.”<sup>224</sup> Allowing the fruits of that recognition to be “arbitrarily . . . taken away” by government “fiat” and obliging U.S. veterans’ spouses to “run the gauntlet of administrative discretion” would read a carefully wrought remedial statute in a “decimating spirit.”<sup>225</sup> Frankfurter counseled that courts should avoid such a parsimonious construction unless “the letter of Congress is inexorable.”<sup>226</sup>

Justice Jackson’s dissent, joined by Frankfurter and Justice Hugo Black, also argued against reading the statute to permit the “abrupt and brutal exclusion of the wife of an American citizen without a hearing.”<sup>227</sup> Jackson declined to read the statute in this rigid fashion. Instead, Jackson would have imposed a clear statement rule, demanding “more explicit language” from Congress to authorize the “break up [of] the family of an American citizen . . . without notice of charges . . . [or] evidence of guilt.”<sup>228</sup>

The attention to the statutory landscape and to past practice in the Court’s Cold War precedents and the dissents by Frankfurter and Jackson in *Knauff* provide a template for curbing structural spillover through statutory interpretation. The Cold War Court’s decisions often assisted individuals imperiled by arbitrary administrative action. In the administrative state, avowedly benevolent programs can also entail an agency’s disregard of statutory context and past practice. The next section addresses the interpretive approach that the Court has recently taken to curb agency efforts at regulation or largesse unmoored from legislative context.

### C. *Reading Regulatory Statutes in Context*

Frankfurter’s observation that a single statutory provision cannot be read “in isolation” presages more recent administrative law precedents that require reading a statute as a “harmonious whole.”<sup>229</sup> Like Frankfurter’s assessment of the statutory landscape, these more recent cases partake of “common sense”<sup>230</sup> and a sense of proportion. Exercising practical judgment under this approach curbs structural spillovers in agency arbitrariness. In delegating power to agencies through statutory text, Congress does not typically “hide elephants in

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224. *Knauff*, 338 U.S. at 549.

225. *Id.* at 548-49.

226. *Id.* at 548.

227. *Id.* at 550.

228. *Id.* at 552. Subsequent developments vindicated Frankfurter’s and Jackson’s positions. After members of Congress proposed private bills that would have remedied *Knauff*’s predicament, the attorney general agreed to provide *Knauff* with the administrative hearing. A hearing officer found that the government’s charges against *Knauff* were the product of misinformation. *Knauff* became an LPR, joining her husband in the United States. See Weisselberg, *supra* note 222.

229. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); cf. John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228 (2000) (expressing skepticism about *Brown* as unduly intrusive in interpreting open-ended statutory provisions).

230. *Brown & Williamson Tobacco*, 529 U.S. at 133.

mouseholes.”<sup>231</sup> A court should carefully scrutinize administrative assertions that a single provision confers sweeping power, weighing that claim against contrary indications in the “overall statutory scheme.”<sup>232</sup> That scrutiny casts doubt on some wide-ranging regulatory programs.<sup>233</sup> It also indicated that President Obama’s Deferred Action for Parents of Americans (DAPA) program exceeded Congress’s delegation to the Executive and makes the legality of the Deferred Action for Childhood Arrivals (DACA) program a close question.<sup>234</sup>

### 1. *Interpretive Harmony and the Regulatory State*

The Court has invoked this practical judgment to deny deference under both steps required under *Chevron v. Natural Resources Defense Council*:<sup>235</sup> 1) whether the statute is ambiguous,<sup>236</sup> and, 2) given ambiguity, whether agency action is reasonable. In each situation, the avoidance canon is also part of the landscape, since broad, standardless delegations may raise constitutional problems.<sup>237</sup> However, even if broad delegations do not raise constitutional concerns, the Court will still determine how a specific provision fits into the entire statutory context, informed by past practice.

In *FDA v. Brown & Williamson Tobacco Corporation*,<sup>238</sup> the Court considered the overall statutory landscape in determining that the federal Food and Drug Act unambiguously barred efforts by the Food and Drug Administration (FDA) to regulate tobacco products, including potentially banning them altogether. Writing for the Court, Justice O’Connor cited signposts in the legal landscape indicating that Congress had placed tobacco products off limits for the FDA. Congress had repeatedly enacted legislation with knowledge of the FDA’s longstanding previous view that it lacked such regulatory power under

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231. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

232. *Brown & Williamson Tobacco*, 529 U.S. at 133; *see also* *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (construing meaning of “exchange” under Affordable Care Act); Doerfler, *supra* note 180, at 561-64 (offering cautious praise of decision in *King*); Abbe R. Gluck, *Justice Scalia’s Unfinished Business in Statutory Interpretation: Where Textualism’s Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053 (2017) (same); Mila Sohoni, *King’s Domain*, 93 NOTRE DAME L. REV. 1419, 1425-26 (2018) (same).

233. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442-44 (2014); *cf.* Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1944-54 (2017) (criticizing *Utility Air*); Sohoni, *supra* note 232 (explaining result in *Utility Air*).

234. *See infra* notes 260-77 and accompanying text.

235. *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

236. Discerning whether a statute is ambiguous may itself be a complex inquiry, fraught with the risk that a judge’s subjective leanings will induce a particular outcome. *See* Brett M. Kavanaugh (Book Review), 129 HARV. L. REV. 2118, 2136 (2016) (observing that “there is often no good or predictable way for judges to determine whether statutory text contains ‘enough’ ambiguity to . . . resort to . . . *Chevron* deference” or other interpretive devices such as the avoidance canon).

237. *See* *United States v. Nichols*, 784 F.3d 666, 667-77 (10th Cir. 2015) (Gorsuch, J., dissenting from rehearing en banc) (suggesting that delegation problems could attend broad reading of provision of Sex Offender Registration and Notification Act (SORNA) that gave Attorney General to decide certain matters regarding obligations of offenders whose convictions preceded passage of the legislation); *see also* *Gundy v. United States*, 138 S. Ct. 1260 (2018) (granting writ of certiorari to the Second Circuit on this question).

238. *Brown & Williamson Tobacco*, 529 U.S. 120 (2000). On the application of this case to executive action regarding immigration, *see* Peter Margulies, *Deferred Action and the Bounds of Agency Discretion: Reconciling Policy and Legality in Immigration Enforcement*, 55 WASHBURN L.J. 143, 147-148 (2015).

the statute.<sup>239</sup> Indeed, over the course of several decades after the public had acquired knowledge of the harms caused by smoking, Congress had rejected legislation that would have specifically authorized regulation by the FDA.<sup>240</sup> Instead, Congress had declared that, “the marketing of tobacco constitutes one of the greatest basic industries of the United States . . . and stable conditions therein are necessary to the general welfare.”<sup>241</sup> Rather than prohibit the sale of tobacco products, Congress had authorized the government to address the health risks caused by tobacco through warnings in packaging and advertising.<sup>242</sup> Justice O’Connor observed that these provisions would be futile and superfluous if Congress had authorized the FDA to simply prohibit the sale of tobacco products.<sup>243</sup> In light of these statutory signals, Justice O’Connor inferred that the agency had exerted power beyond Congress’s delegation.

In addressing *Chevron’s* second step—an inquiry into the reasonableness of agency action—the Court has lately also assessed both statutory structure and past practice, focusing on Justice Frankfurter’s counsel that the Court not construe a statutory provision “in isolation.” In *Utility Air Regulatory Group v. EPA*,<sup>244</sup> the Court held that it was unreasonable for the agency to include greenhouse gases such as carbon dioxide under the definition of “any air pollutant” in the Clean Air Act’s permitting program for Prevention of Significant Deterioration (PSD) in air quality. The Environmental Protection Agency (EPA) argued in *Utility Air* that the term, “any air pollutant,” under the PSD program included greenhouse gases.<sup>245</sup> As support, the EPA cited the Supreme Court’s decision in *Massachusetts v. EPA*,<sup>246</sup> that the agency’s overall regulatory authority extended to “any air pollution agent.”<sup>247</sup> The *Massachusetts* Court had defined this term to include “all airborne compounds of whatever stripe,” including greenhouse gases.<sup>248</sup> On the surface, therefore, the statutory definition appeared to include greenhouse gases.

Pushing back on EPA’s sweeping definition of “any air pollutant” in *Utility Air*, the Court in a 5-4 decision held that reading the phrase “any air pollutant” under the PSD “in isolation” from the PSD’s context and intended purpose would undermine the statute.<sup>249</sup> According to Justice Scalia, who wrote for the Court, that context included the EPA’s own candid acknowledgment that placing greenhouse gases within the PSD program would exponentially expand that program<sup>250</sup> beyond the “large industrial sources” that

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239. *Brown & Williamson Tobacco*, 519 U.S. at 144.

240. *Id.*

241. *Id.* at 136-37.

242. *Id.* at 138-39.

243. *Id.* at 139-40.

244. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014).

245. *Id.* at 2440.

246. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

247. *Id.* at 528.

248. *Id.* at 529.

249. *Id.* at 2442.

250. *Id.* at 2444.

Congress had sought to curb.<sup>251</sup> EPA's proposed expansion of the PSD to include greenhouse gases would cover tens of thousands of ordinary "commercial and residential uses," including apartment houses and department stores.<sup>252</sup> Since EPA *agreed* that regulating this flood of new sources would be impractical and counterproductive,<sup>253</sup> the *agency* had proposed new triggers for the PSD program "of its own choosing" that would have exempted most of these sources.<sup>254</sup> In essence, Justice Scalia asserted, EPA's ungainly efforts to corral the many moving parts set in motion by its statutory theory amounted to a "rewrite . . . [of] clear portions of the statute."<sup>255</sup> That extensive rewrite exceeded Congress's delegation<sup>256</sup> and pushed the separation-of-powers envelope.<sup>257</sup> For the Court, viewing "any air pollutant" as a phrase with varying meanings depending on its place in the statutory scheme was more faithful to the structure of the Clean Air Act and to the agency's past practice.<sup>258</sup>

## 2. *Reading Statutes in Context: Executive Action Benefiting Immigrants*

In preparing for analysis of EO-3 under a contextual view of the INA, it is instructive to examine the judicial response to two programs of President Obama designed to *benefit* immigrants: DAPA<sup>259</sup> and DACA.<sup>260</sup> Each

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251. EPA Tailoring Rule, 75 Fed. Reg. 31514, 31557 (June 3, 2010). That expansion would have occurred because, addressing pollutants covered by the PSD program, the Clean Air Act requires permits for sources that emit over 250 tons per year, or 100 tons for certain stationary sources such as power plants. *See* 42 U.S.C. § 7479(1) (setting quantitative limits); *id.*, § 7475(a)(3)(A) (barring emissions exceeding those limits). EPA *conceded* that Congress intended those limits to apply only to emission of harmful particulate matter such as coal dust from large stationary sources such as electric plants and the like. Tailoring Rule, 75 Fed. Reg. 31514, 31557. To address this apparent clash with legislative intent, EPA proposed unilaterally *raising* allowable limits beyond express statutory thresholds for the large number of additional sources, such as apartment buildings, that its new interpretation would have covered. *Utility Air*, 134 S. Ct. at 2444. The Court viewed this suggestion as an impermissible departure from limits set by Congress. *Id.* at 2444-46.

252. *Utility Air*, 134 S. Ct. at 2443.

253. For example, the agency estimated that annual permit applications for the Clean Air Act program at issue would have jumped from 800 to 82,000 and permits for a related program also addressed by the proposed rule change would have increased from 15,000 to approximately 6.1 million. *Id.* (citation omitted). It also calculated that annual administrative costs would increase from under \$100 million to over \$20 billion. *Id.* In addition, the agency conceded that "decade-long delays" would routinely affect most major construction projects. *Id.*

254. *Id.* at 2445.

255. *Id.* at 2446.

256. *Id.* at 2445.

257. *Id.* at 2446.

258. *Id.* at 2444-46.

259. *See* Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs, Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, and R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. (Nov. 20, 2014); *see also* Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183 (2015) (analyzing DAPA's legality); *cf.* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015) (arguing for expansive view of presidential power to benefit immigrants); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U.L. REV. 583, 614-18 (2017) (suggesting that deference to Executive in immigration law will vary with context); Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029 (2017) (analyzing scope of presidential authority).

260. *See* Memorandum for David Aguilar, Acting Commissioner, U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services., and John Morton,

program made use of deferred action, a form of discretionary administrative relief.<sup>261</sup> Courts rightly concluded that DAPA, which the Obama administration projected to be a much larger program, exceeded Congress's narrow delegation and parted with past practice.<sup>262</sup> DACA fits Congress's delegation, although the analysis here illustrates why the question is a close one.

President Obama's proposed DAPA program entailed granting work authorization and a renewable reprieve from removal to over four million of the roughly 11 million undocumented noncitizens in the United States—approximately 40% of the total. It is useful to recall here that the INA carefully specifies groups that are eligible to receive immigrant visas and acquire a pathway to citizenship in the United States. In limiting these favored groups to carefully tailored categories, Congress has repeatedly expressed concern that higher-than-specified levels of immigration could affect the employment prospects of U.S. citizens and LPRs.<sup>263</sup> That concern drove the 1986 Congress to enact sanctions on employers hiring undocumented workers as part of a legislative bargain that also legalized over a million undocumented immigrants.<sup>264</sup>

As a corollary to its tailored visa categories, Congress has limited the access of people *without* a legal status to relief such as a reprieve from

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Director, U.S. Immigration and Customs Enforcement, from Janet Napolitano, Secretary of Homeland Security, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 2* (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (hereinafter Napolitano DACA Memo); see also Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105 (2014) (analyzing DACA).

261. *Reno v. Am.-Arab Anti-Discrimination Comm. (AADC)*, 525 U.S. 471, 483–84 (1999) (noting that “[a]t each stage [of the removal process] the Executive has discretion to abandon the endeavor . . . in a regular practice (which had come to be known as ‘deferred action’) of exercising that discretion for humanitarian reasons or simply for its own convenience”). The Court held in *AADC* that Congress had precluded judicial review of decisions to *deny* deferred action. *Id.* at 487 (suggesting that Congress had precluded such review to avoid disruptions in removal proceedings). The preclusion of judicial review for denials of deferred action indicates that no individual has a legal entitlement to this relief or to its renewal if the agency conferred it for a finite period.

262. See *Texas v. United States*, 809 F.3d 134, 178–82 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016); cf. Peter Margulies, *Deferred Action and the Bounds of Agency Discretion: Reconciling Policy and Legality in Immigration Enforcement*, 55 WASHBURN L.J. 143, 159 (2015) (observing that, “[h]aving balked at the relatively modest discretionary benefits provided by EVD . . . Congress would surely bridle at the cornucopia of benefits provided by DAPA”); Daphna Renan, *Presidential Norms*, 131 HARV. L. REV. 2187, 1258–59 (2018) (discussing DAPA in overall context of unwritten executive branch norms); see also Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. LAW & POL. 213 (2015) (arguing that DAPA overstepped presidential authority).

263. H.R. Rep. No. 104-469, at 111 (1996) (finding that access to U.S. jobs was “magnet” for unlawful migration).

264. See Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394; cf. S. Rep. No. 99-132, at 16 (1985) (describing the 1986 legalization as a “‘one-time only’ program”). Seeking to reassure Congress and other stakeholders that grants of deferred action, typically including a work permit, *outside* IRCA would be small in number, the Justice Department stated in 1987 that the “number of aliens authorized to accept employment [pursuant to deferred action outside IRCA] is quite small and the impact on the labor market is minimal.” See U.S. Dep’t of Justice, Immigr. & Naturalization Service, *Employment Authorization; Classes of Aliens Eligible*, 52 Fed. Reg. 46,092 (Dec. 4, 1987) (emphasis added). Indeed, officials claimed that the number of work authorizations was so small that it was “previously considered to be *not worth recording*.” *Id.* at 46,093 (emphasis added).

removal and a work permit. For example, successive administrations had granted what immigration officials called “extended voluntary departure” (EVD) to individuals in removal proceedings who had no path available to obtain a legal status, thus allowing those individuals to stay in the United States indefinitely. In 1996, Congress limited EVD to 120 days.<sup>265</sup> Congress took this action because, as immigration officials conceded, “[t]oo often, voluntary departure has been sought and obtained by persons who have no real intention to depart.”<sup>266</sup> Congress’s curtailment of EVD would be futile if the Executive could wink at those limits with unbounded awards of deferred action.<sup>267</sup>

While Congress did mention “deferred action” in the INA, statutory acknowledgment of this practice extends only to foreign nationals with a clear pathway to a legal status. For example, consider applicants for a U or T visa, which Congress made available respectively to victims of crime generally and victims of trafficking in particular.<sup>268</sup> Immigration officials granted deferred action to applicants for U and T visas to ensure orderly determinations about eligibility for these visas; removing applicants would have disrupted this process, which typically requires face-to-face interviews at local immigration offices in the United States. Congress quickly acknowledged the wisdom of this expedient.<sup>269</sup> While immigration officials have granted deferred action even when that is not a “bridge” to an available legal status, these equitable grants have been small in number, centered on hardships such as illness or old age.<sup>270</sup>

Virtually none of the over 4 million prospective DAPA recipients could have used deferred action as a bridge to a legal status that would be available within a reasonable time. For most DAPA recipients, the wait for a legal status would be between ten and *thirty* years, including ten years spent abroad because of INA provisions that hinder acquisition of legal status by persons who have entered the United States unlawfully.<sup>271</sup> Addressing the lack of a bridge to legal status for most prospective recipients, the Obama

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265. See 8 U.S.C. § 1229c(a)(2)(A).

266. See U.S. Dep’t of Justice, *Immigr. & Naturalization Service & Executive Office for Immigr. Rev., Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312, 10324 (March 6, 1997).

267. Cf. *Texas v. United States*, 809 F.3d 134, 180 (5th Cir. 2015) (discussing basis for holding that DAPA exceeded delegation). The Justice Department Office of Legal Counsel memorandum supporting DAPA conceded that its impact would be substantial. See Memorandum from Karl R. Thompson, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, to the Sec’y of Homeland Sec. and the Counsel to the President, *The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* 31 (Nov. 19, 2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> (acknowledging that “the potential size of the program is large”).

268. See 8 U.S.C. § 1101(a)(15)(T), (U).

269. See *id.* § 1227(d)(1).

270. SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* (2015).

271. See OLC Memorandum, *supra* note 267, at 29 n. 14 (discussing statutory obstacles to DAPA recipients’ gaining legal status).

administration claimed power to award deferred action under generic provisions of the INA giving senior officials power to set rules<sup>272</sup> or instructing employers that they could legally hire foreign nationals who had received work authorization. Citing proportion and common sense, the Fifth Circuit held that the INA did not hide the “elephant” of sweeping executive discretion in the “mousehole” of these generic provisions, which had to be read in light of express restrictions on such discretion elsewhere in the statute.<sup>273</sup>

DACA’s legality is a closer question. This program—like DAPA eminently defensible on policy grounds—awarded deferred action to a smaller cohort: undocumented children whose parents brought them to the United States. As with DAPA, one defining element of this group is the lack of any path, such as asylum, to a legal status under the INA. Moreover, although the number of DACA recipients is smaller than the pool of prospective DAPA recipients would have been, its absolute numbers are still large: over 800,000 individuals currently participate.<sup>274</sup> That said, DACA recipients can marshal equities that distinguish them from individuals who would have received benefits under DAPA. DACA recipients had no voice in their parents’ decision to enter the country. In addition, DAPA recipients have forged close social and cultural ties to the United States<sup>275</sup> and often have no ongoing relationship to their countries of origin. Deferred action under DACA thus more closely resembles equitable relief from a range of hardships, including serious illness, disability, and extreme youth or old age, that has long been a feature of the immigration system.<sup>276</sup>

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272. See 8 U.S.C. § 1103(a)(3) (2012) (authorizing officials to “establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority *under the provisions of this [Act]*”) (emphasis added).

273. *Texas v. United States*, 809 F.3d 134, 180-81 (5th Cir. 2015).

274. See *NAACP v. Trump*, 315 F. Supp. 3d 457, at 461 (D.D.C. Aug. 3, 2018).

275. See Napolitano DACA Memo, *supra* note 260, at 2 (noting that many DACA recipients have “already contributed to our country in significant ways”).

276. See Wadhia, *supra* note 270; but see Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013) (asserting that DACA exceeded presidential authority). Recently, courts have addressed whether the Trump administration has made findings that are legally sufficient to support its decision to end the DACA program. In the absence of congressional action codifying some version of DACA, the legal challenges to DACA’s rescission will be dispositive. In June, 2018, the Department of Homeland Security issued a memorandum that sought for the second time to explain its decision to rescind DACA. See *Memorandum from Secretary Kirstjen M. Nielsen* (June 22, 2018), [https://www.dhs.gov/sites/default/files/publications/18\\_0622\\_S1\\_Memorandum\\_DACA.pdf](https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf) (hereinafter *Nielsen Memorandum*). That memorandum relied on the Fifth Circuit’s decision in *Texas v. United States*, 809 F.3d 134 (2015), determining that DAPA did not fit the INA’s “comprehensive scheme.” *Nielsen Memorandum*, at 2. Since DACA is similar to DAPA in a number of material respects, Secretary Nielsen indicated that the invalidation of DAPA also raised “serious doubts about [DACA’s] legality.” Secretary Nielsen asserted that those doubts constituted a sufficient basis for ending the program. Despite the discretionary nature of deferred action, a more detailed explanation would have put the rescission on firmer legal footing. See *NAACP v. Trump*, 315 F. Supp. 3d 457 (D.D.C. Aug. 3, 2018). Determining that the June memorandum did not require a change in the court’s prior conclusion that the DACA rescission was arbitrary and capricious, the *NAACP* court faulted Secretary Nielsen for relying too heavily on the Fifth Circuit’s decision invalidating DAPA and for failing to address how DACA was inconsistent with the INA’s scheme. *Id.* at 472. DACA’s differences from DAPA warrant a different judgment about its legality. Admittedly, as



## V. THE *HAWAII* COURT'S MISSED OPPORTUNITY: WHY EO-3 FAILS TO FIT THE INA

In light of the Court's two strands of precedent—the first on avoidance and tempering executive branch excess and the second on contextual reading of statutes in administrative law—the *Hawaii* Court had a clear path available to hold that EO-3 exceeded the scope of Congress's delegation under the INA. Signposts on that path would have prominently featured statutory structure, context, and past practice. While the *Hawaii* majority's statutory reading purported to address these points, its analysis fell into the trap that the Court's precedents have flagged: reading a single provision in isolation—here the entry provision, 8 U.S.C. § 1182(f), relied on by President Trump. Chief Justice Roberts' opinion for the Court gave a rigid account of the INA comprehensive scheme, far from the contextual approach that Justice Scalia had employed for the Clean Air Act in *Utility Air*. In addition, Chief Justice Roberts' account of past practice was stilted and mechanical. The majority's flawed approach to the statutory issue only served to underline the severe tensions in its Establishment Clause analysis.

### A. *How EO-3 Undermines the INA's Priority on Family Reunification*

The central problem with EO-3 is reconciling how 8 U.S.C. § 1182(f) fits within the “overall statutory scheme.” The Supreme Court's precedents state unequivocally that a single provision such as § 1182(f) cannot be read in “isolation.” Instead, courts should read that provision in the “context” of the statute “as a whole.”<sup>277</sup> As Chief Justice Roberts acknowledged in his opinion for the Court in *King v. Burwell*,<sup>278</sup> that interpretive task is not mechanical; it requires an effort to understand “context.”<sup>279</sup>

Understanding the context of § 1182(f) centers on reconciling the admittedly broad language of this 1952 addition to the INA with Congress's full-scale rethinking of the INA in 1965.<sup>280</sup> In 1965, Congress modified the INA in two essential respects. First, it made family reunification the “foremost”

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with DAPA, DACA promulgated “public policies of non-enforcement . . . for broad classes and categories” of otherwise removable foreign nationals. Nielsen Memorandum, at 2. However, the Nielsen memorandum did not adequately address arguments for DACA's legality, including its parallels with earlier exercises of prosecutorial discretion for hardships such as youth, age, or disability. A fuller explanation would also have helped deflect arguments that DACA's rescission violated equal protection, in light of the prevalence of Mexican nationals and Central Americans among DACA recipients and President Trump's negative comments about these groups. See *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 518-20 (9th Cir. 2018). Moreover, the substantial disruption threatened by the proposed DACA rescission also justified awarding preliminary relief pending a fuller explanation of DHS's legal concerns. See *id.* at 520-21 (Owens, J., concurring). Finally, on a policy level, the plight of DACA recipients is compelling. Those compelling equities buttress the case for prompt congressional action to codify DACA.

277. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

278. *King v. Burwell*, 135 S. Ct. 2480 (2015).

279. *Id.* at 2489 (citing *Brown & Williamson Tobacco*, 529 U.S. at 133).

280. See Chin, *supra* note 28.

priority in granting immigrant visas.<sup>281</sup> Second, Congress did away with the most serious statutory obstacle to family reunification: the national origin quota system. This system hindered family reunification for decades by subjecting particular countries and regions to rigid numerical limits.<sup>282</sup> To reinforce its decisive rejection of national origin quotas, Congress enacted the INA's antidiscrimination provision, 8 U.S.C. § 1152(a)(1)(A), which barred discrimination on the basis of national origin in the issuance of immigrant visas.

Under the INA's scheme, trained U.S. State Department consular officials decide visa applications based on a complex, often iterative process.<sup>283</sup> For consular officers, managing uncertainty is paramount. Consular officials determine in hundreds of thousands of cases each year whether an applicant is eligible for a visa—for example, as a spouse, parent, or child of a U.S. citizen—and whether the applicant is inadmissible for one of a host of reasons specified in the INA, such as being a member of a terrorist group,<sup>284</sup> having a criminal record or serious communicable disease, or lacking a source of financial support in the United States.<sup>285</sup> When consular officials do not receive information from the applicant that enables them to determine eligibility and admissibility, they can either request further evidence or simply deny the visa application.<sup>286</sup> That iterative approach to resolving uncertainty is endemic to consular decision-making, as Congress surely understood at the time of the 1965 amendments.<sup>287</sup>

Recent legislation concerning the visa waiver program illustrates Congress's faith in consular officials' ability to handle uncertainty. The visa waiver program allows nationals of certain countries to travel to the United States as nonimmigrants if those countries meet certain security requirements.<sup>288</sup> Congress in 2015 provided that nationals of countries participating in the visa waiver program would have to go through the ordinary consular process if they had spent time in a "country or area of concern" including Iraq or Syria.<sup>289</sup> In other words, faced with the risk that individuals who had spent time in areas riven by armed conflict and had acquired terrorist ties could enter the United States under the visa waiver program, Congress

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281. U.S. Senate Committee on the Judiciary, 89th Cong., 1st sess., Report No. 748 accompanying H.R. 2580, at 13 (Sept. 15, 1965) (hereinafter 1965 Senate Judiciary Committee Report)

282. *Id.* at 14 (noting that for several decades, the INA had either absolutely prohibited the immigration and naturalization of Asians or authorized annual grant of 2,000 visas to this group).

283. *Kerry v. Din*, 135 S. Ct. 2128, 2140-41 (2015) (Kennedy, J., concurring).

284. *See* 8 U.S.C. § 1182(a)(3)(B).

285. *Din*, 135 S. Ct. at 2140-41 (Kennedy, J., concurring).

286. *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1155-56 (D.C. Cir. 1999). To allow the consular officer free rein in this process, judicial review of visa denials is generally unavailable. *Id.* at 1156-57; *see generally* Leon Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 *San Diego L. Rev.* 887, 895-97 (1989).

287. *See* Wildes, *supra* note 287, at 895-97 (tracing the doctrine of consular nonreviewability to case law from the 1920s, including *Ulrich v. Kellogg*, 30 F.2d 984 (D.C. Cir. 1929)).

288. 8 U.S.C. § 1187(a)(1), (2).

289. *Id.* at § 1187(a)(12).

imposed a time-honored cure: proceeding through the rigors of consular processing.

Putting together these elements into an “overall scheme” suggests limits on § 1182(f), which authorizes the President to deny entry to “any” foreign national or group of foreign nationals whose admission could be detrimental to the interests of the United States. Read in isolation, that language might seem to authorize the draconian restrictions of EO-3, which indefinitely barred applicants for immigrant visas from several countries, subject to an onerous and opaque waiver process.<sup>290</sup> However, as the Cold War precedents counsel and the Court recently cautioned in *Utility Air*, courts should not read statutory provisions in isolation.<sup>291</sup> In using the word, “any,” Congress may have something more tailored in mind. Meaning that initially appears plain may seem more nuanced once the court considers the overall context of the statute.<sup>292</sup>

In addressing the contours of the authority conferred by § 1182(f), the overall scheme of the INA post-1965 might suggest that the President had limited power to exclude persons for particular conduct that clashed with U.S. foreign or immigration policy. That power would be interstitial, supplementing the ordinary visa application process, but not supplanting it for a period of indefinite duration. Without this constraint in place, the Executive could invoke § 1182(f) to undermine the INA’s prioritizing of family reunification and its rejection of national origin quotas. Such a result would be inconsistent with Congress’s comprehensive scheme.

### B. *The Majority’s Misuse of Precedent*

Beyond an isolated look at § 1182(f), the *Hawaii* majority’s support for its statutory holding is thin. For example, Chief Justice Roberts cited language from *Holder v. Humanitarian Law Project*,<sup>293</sup> in which the Court rejected a constitutional challenge to a federal *statute* that barred material support of terrorist organizations. Finding that the First Amendment did not prohibit Congress from prohibiting speech performed in “coordination with” State-Department-designated foreign terrorist organizations such as Hamas or Al Qaeda, the *Humanitarian Law Project* Court invoked the “considered judgment of Congress and the Executive” and the deference due to such joint determinations by the political branches.<sup>294</sup> The language in *Humanitarian Law Project* that Chief Justice Roberts quoted about a “preventive measure”<sup>295</sup> and the leeway afforded “empirical conclusions” referred to a *statute* enacted by Congress and the findings that Congress made as part of the

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290. *Trump v. Hawaii*, 138 S. Ct. 2392, 2432-33 (Breyer, J., dissenting).

291. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2440-44 (2014).

292. *Id.*

293. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (cited in *Hawaii*, 138 S. Ct. at 2409).

294. *Id.* at 36.

295. *Id.* at 35 (cited in *Hawaii*, 138 S. Ct. at 2409).

legislative process. While *Humanitarian Law Project* surely is an example of judicial deference, its discussion of the flexibility afforded by the Constitution to Congress in foreign affairs did not address *Hawaii's* statutory question about the scope of Congress's delegation to the President under the INA.

The majority's reliance on *Sale v. Haitian Centers Council*<sup>296</sup> is similarly misplaced. Chief Justice Roberts cited *Sale* to counter an argument that EO-3's challengers *never made*: that courts should engage in a "searching inquiry" regarding whether EO-3 was "justified from a policy perspective."<sup>297</sup> However, the challenge to EO-3 was never about policy *per se*. It was about EO-3's fit with the INA and the Establishment Clause. While EO-3's challengers did argue that EO-3 failed even a rudimentary test of means-ends rationality, that argument largely served to highlight EO-3's lack of fit with either source of legal authority.

Moreover, the passage from *Sale* that Chief Justice Roberts quoted has only modest relevance to the issue in *Hawaii*. In *Sale*, the Court, in an opinion by Justice Stevens, held that the U.S. Refugee Act of 1980 did not apply extraterritorially, upholding a longstanding presidential policy of interdicting migrants in the Caribbean who often asserted they were refugees and sought to enter the United States without visas.<sup>298</sup> That holding had implications for the Refugee Act's protections, such as an individual's right to an interview about his or her fear of persecution in her home country and an appearance before a U.S. immigration judge. According to the Court, those protections did not apply to migrants on the high seas who lacked U.S. visas and had failed to avail themselves of statutory processes for seeking refugee status at U.S. consulates abroad.<sup>299</sup> Since the Court's familiar presumption against extraterritorial application of U.S. statutes obviated the duty to make such safeguards available, the President was free to use his "chosen method" of interdicting inadmissible migrants on the high seas, even if that method imposed a "greater risk of harm" on the individuals that the United States intercepted.<sup>300</sup>

The leeway that the President possessed in *Sale* stemmed from the Court's application of its presumption against extraterritorial application of statutes.<sup>301</sup> *Sale* thus has only limited relevance to the group harmed by EO-3. This group is comprised of otherwise eligible and admissible visa *applicants* and their U.S. citizen and LPR sponsors, who have all meticulously followed rules for visa processing. The majority in *Hawaii* acknowledged that the

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296. *Sale v. Haitian Centers Council*, 509 U.S. 155, 187-88 (1993) (cited in *Hawaii*, 138 S. Ct. at 2409).

297. *Hawaii*, 138 S. Ct. at 2409.

298. *Sale*, 509 U.S. at 187-88.

299. *Id.*

300. *Id.*

301. *Id.* at 188; *see also* *Kiobel v. Royal Dutch Petro.*, 569 U.S. 108 (2012); *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018). Admittedly, Justice Stevens noted that presidential responsibility over foreign affairs gave the presumption of extraterritoriality "special force." *Sale*, 509 U.S. at 188.

INA's antidiscrimination provision covered these visa applicants.<sup>302</sup> However, the *Hawaii* majority then narrowly interpreted the antidiscrimination provision in a way that clashed with the INA's overall scheme and did not gain support from the Court's more modest holding in *Sale*.

It is true that the Court has often inferred a broader scope of delegation in matters concerning national security and foreign affairs.<sup>303</sup> However, that deference has not been absolute, as the curbs on presidential power in *Ex Parte Endo*<sup>304</sup> and *Kent v. Dulles*<sup>305</sup> demonstrate. Moreover, there is good reason to view the INA as cabining delegation to the President. The statutory schemes that prompted an inference of broader delegation did not include countervailing provisions, such as the INA's nondiscrimination provision, or priorities, such as Congress's elevation in 1965 of family unification as a "foremost" concern. In addition, in *Medellin v. Texas*,<sup>306</sup> a case concerning a treaty obligation of the United States, the Court held that the President *lacked* the power to order states to comply with the treaty's terms.<sup>307</sup> That decision also encompassed the differences between statutes and treaties, the role of the federal courts in enforcing certain treaty terms, and the relationship between the federal government and the states.<sup>308</sup> Nevertheless, the willingness of the Court to recognize that such interests tempered executive power in *Medellin* contrasts with the mechanical deference accorded EO-3.

### C. Hawaii's Truncated Analysis of Past Practice

EO-3 also does not comport with past practice under § 1182(f). In cases like *Kent v. Dulles*,<sup>309</sup> the Court treated past practice as instructive regarding the nature of the statutory scheme at issue.<sup>310</sup> The *Hawaii* majority considered this dimension, although it was more grudging in its acknowledgment of past practice's role<sup>311</sup> and failed to recognize that past uses of § 1182(f) have been far more tailored and targeted.

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302. *Hawaii*, 138 S. Ct. at 2413.

303. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (arguing that in foreign affairs the President has an advantage over Congress and the judiciary in acquiring, analyzing, and protecting information); *Regan v. Wald*, 468 U.S. 222 (1984) (upholding presidential action to limit travel to Cuba); see also JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006) (urging expansive view of presidential authority); Bradley & Goldsmith, *supra* note 206, at 2102 (suggesting approval of result in *Wald*); but see KOH, NATIONAL SECURITY CONSTITUTION, *supra* note 206, at 140-41 (criticizing Court's decision in *Wald* as conflicting with statutory scheme).

304. *Ex parte Mitsuyo Endo*, 323 U.S. 283, 294 (1944).

305. *Kent v. Dulles*, 357 U.S. 116 (1958).

306. *Medellin v. Texas*, 552 U.S. 491 (2008).

307. *Id.* at 523-24.

308. *Cf. Bond v. United States*, 134 S. Ct. 2077, 2088-89 (2014) (narrowing interpretation of Chemical Weapons Convention Implementation Act of 1998 to avoid trenching on state authority over ordinary criminal justice matters).

309. *Kent v. Dulles*, 357 U.S. 116 (1958).

310. *Id.* at 122-23; see also *supra* notes 205-210 (discussing Court's rationale in *Kent*).

311. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2413 (2018) (discussing past practice as contingent aid to interpretation, predicated on needless urge to "confine expansive language [of § 1182(f)] in light of its past applications").

In his opinion for the Court, Chief Justice Roberts first compared EO-3 favorably with past practice, asserting that its recommendations were “more detailed.”<sup>312</sup> The majority’s lauding of EO-3’s “detailed” language is flawed in two respects. First, as noted in our discussion of the disconnect between the Court’s minimal constitutional scrutiny and the *Cleburne* line of equal protection cases the majority cited as authoritative,<sup>313</sup> EO-3’s vaunted detail masked its woeful absence of means-ends fit. No amount of detail can justify or explain excluding infants because of national security concerns or permitting consular officers to vet students but not close relatives of U.S. citizens or LPRs. Viewed in this light, EO-3’s “detail[]” resembles a diligently drawn map of Tolkien’s Middle Earth<sup>314</sup>—intriguing for aficionados but of little practical use in the worlds of policy and law.<sup>315</sup>

Second, the *Hawaii* majority’s stress on the superiority of EO-3’s detail to past practice under § 1182(f) masks the careful tailoring of those earlier examples. Precisely because most past examples reflected careful tailoring *at their inception*, they did not need the surface detail that the majority in *Hawaii* found so compelling. Consider President Clinton’s 1996 suspension of entry for “members of the Sudanese government and armed forces.”<sup>316</sup> Chief Justice Roberts derided this measure’s brevity, noting that the restriction took only “one sentence” to articulate.<sup>317</sup> However, as Chief Justice Roberts noted elsewhere in his opinion,<sup>318</sup> President Clinton’s order incorporated by reference an entire United Nations *Security Council Resolution*,<sup>319</sup> which imposed restrictions on Sudanese government personnel because of Sudan’s failure to extradite individuals accused of attempting to assassinate Egyptian president Hosni Mubarak at the behest of a terrorist group.<sup>320</sup> Moreover, President Clinton’s order did not restrict the entry of *all* nationals

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312. *Id.* at 2409.

313. See *supra* notes 122-153 and accompanying text.

314. Maps of Tolkien’s world are common. See LOTR Project, *Map of Middle Earth* (last visited [the map, not the place] Aug. 13, 2018), <http://lotrproject.com/map/#zoom=3&lat=-1315.5&lon=1500&layers=BTTTT>.

315. It is possible that Chief Justice Roberts’ main concern in the discussion of EO-3’s “detail[]” was on the plaintiffs’ claim that the INA requires specific and express findings for every presidential invocation of § 1182(f). Some judges below made this assertion. See *International Refugee Assistance Project (IRAP) v. Trump*, 883 F.3d 233, 316 (4th Cir. 2018) (Keenan, J., concurring). A requirement of specific and express findings for every use of this statutory power would be burdensome, particularly in light of that provision’s broad language. See also *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n. 2 (D.C. Cir. 1986) (R. Ginsburg, J.) (describing language as “sweeping”). However, the *Hawaii* majority also criticized the plaintiffs’ assertion that an order of EO-3’s unprecedented scope should demonstrate rudimentary means-ends fit. *Hawaii*, 138 S. Ct. at 2409 (criticizing challengers’ claim that EO-3 is underinclusive because it permits nonimmigrants from listed countries to enter the United States). This Article argues that a showing of means-ends fit is required both by the INA’s comprehensive scheme and antidiscrimination provision and by the *Cleburne* line of cases that the *Hawaii* majority cited in its Establishment Clause analysis. See *supra* notes 277-291 and accompanying text.

316. Presidential Proclamation No. 6958, 3 CFR 133 (1996).

317. *Hawaii*, 138 S. Ct. at 2409.

318. *Id.* at 2413.

319. See U.N. SCR 1054 (26 Apr 1996), <http://unscr.com/en/resolutions/doc/1054>.

320. *Id.* at para. 3, (cited in Pres. Proclamation 13662); see also Youssef M. Ibrahim, *Egyptian Groups Says It Tried to Kill Mubarak*, N.Y. TIMES, July 5, 1995, at A3.

of Sudan,<sup>321</sup> but only entry of those Sudanese officials likely to enter the United States in their official capacity—the very group singled out by the Security Council. President Clinton’s restriction thus tracked international efforts to address Sudan’s harboring of President Mubarak’s would-be assassins. The “one sentence” in this order that Chief Justice Roberts disparaged was all that President Clinton *needed* to indicate the United States’ effort to comply with the Security Council’s terrorism-related resolution.

Viewed more broadly, executive practice markedly diverges from the sweeping multi-country ban on immigration in EO-3. Most uses of § 1182(f) wield authority in a tailored fashion that targets small, discrete groups of foreign nationals.<sup>322</sup> For example, President Ronald Reagan barred associates of the then Panamanian strong-man, Manuel Noriega.<sup>323</sup> More recently, President Obama—in an example cited by Chief Justice Roberts<sup>324</sup>—barred entry of Russians in the financial, energy, mining, engineering, or defense sectors.<sup>325</sup> The selection of covered occupations was not random; it covered persons most likely to be involved in the action that the President responded to: the Russian annexation of Crimea and illegal use of force in Ukraine.<sup>326</sup> President Obama did not target *all* Russians, let alone Russians *plus* all individuals from other countries. In this sense, President Obama’s action had a nexus to combating internationally lawless action that is wholly lacking in EO-3.

The three previous exercises of § 1182(f) authority involving larger groups were more carefully tailored than President Trump’s travel ban. Two of these examples—involving an immigration dispute with Cuba<sup>327</sup> and high-seas interdiction,<sup>328</sup> respectively—entailed attempts to control “mass migration” of inadmissible foreign nationals to the United States. The third was part of the U.S. response to Iran’s detention of U.S. diplomatic personnel in blatant violation of international law<sup>329</sup>—a crisis in which the Supreme Court in 1981 upheld broad use of executive authority.<sup>330</sup> Moreover, these orders either did not cover immigrant visa applicants *at all*—as with high-seas interdiction—or else included exceptions for many visa applicants that far exceeded the narrowly drafted waiver provisions in EO-3.

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321. See *Hawaii*, 138 S. Ct. at 2413 (conceding that President Clinton’s order was “directed at subsets of aliens from the countries at issue”).

322. See Kate M. Manuel, *Executive Authority to Exclude Aliens: In Brief*, Cong. Res’ch Serv., at 3-12 (Jan. 23, 2017) (recounting past practice regarding § 1182(f)).

323. *Id.* at 10.

324. *Hawaii*, 138 S. Ct. at 2413.

325. Presidential Proclamation No. 13662, 3 CFR 233 (March 20, 2014).

326. *Id.* Chief Justice Roberts acknowledged in his opinion for the Court in *Hawaii*. 138 S. Ct. at 2413.

327. Presidential Proclamation No. 5517 (1986).

328. Presidential Proclamation No. 4865 (1981) (upheld in *Sale v. Haitian Centers Council*, 509 U.S. 155, 187-88 (1993)).

329. Pres. Carter, *Sanctions Against Iran Remarks Announcing U.S. Actions* (Apr. 7, 1980).

330. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

The Cuba mass migration example stemmed from the Castro regime's 1980 authorization of the Mariel boatlift, in which 125,000 inadmissible Cuban nationals took to the sea and "arrived . . . in Florida aboard a flotilla of small boats."<sup>331</sup> None of the "Marielitos" had visas for travel to the United States. Moreover, according to the Fourth Circuit, Cuban authorities had "taken advantage" of the boatlift to "give criminals the option to remain in prison or to leave for the United States."<sup>332</sup> Immigration officials in the United States found that approximately 25,000 of the inadmissible migrants had criminal records and detained 2,000 when they sought to enter the country.<sup>333</sup> In December, 1984, Cuba and the United States reached an agreement providing that Cuba would accept the return of over 2,500 of the Marielitos with criminal histories in exchange for a U.S. undertaking to streamline legal immigration from Cuba.<sup>334</sup> Cuba suspended its compliance in May, 1985,<sup>335</sup> and the U.S. almost immediately started walking back compliance with its undertakings, limiting visa approvals from the U.S. interests section in Havana. Cuban authorities tried to evade these restrictions by selling Cuban nationals exit permits at extortionate prices to facilitate applications at U.S. consulates in other countries.<sup>336</sup> In 1986 President Reagan responded by issuing an order restricting visa approvals for Cuban nationals from *any* U.S. diplomatic station abroad, with the important exception of immediate relatives of U.S. citizens.<sup>337</sup>

Although the majority opinion in *Hawaii* discounted the differences between EO-3 and President Reagan's Cuba measure,<sup>338</sup> the contrast seems stark between an order that categorically bars immigration from several countries and President Reagan's order, which responded to systematic Cuban efforts to facilitate "illicit migration"<sup>339</sup> to the United States. EO-3, sporting all the "detail[]" hailed by the *Hawaii* majority, did not claim that a country covered by the travel ban had aided and abetted unlawful migration to this country. Moreover, Reagan's action had a vital safety valve, since it expressly exempted all immigration of immediate relatives of U.S. citizens. EO-3 lacks any such tailoring.

Similarly, Carter's measures regarding Iranian immigration during the hostage crisis came in response to Iran's flagrant violation of the principle of diplomatic immunity—a core tenet of international law recognized by the

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331. See *Palma v. Verdeyen*, 676 F.2d 100, 101 (4th Cir. 1982) (cited in *Clark v. Suarez Martinez*, 543 U.S. 371, 374 (2005)).

332. *Palma*, 676 F.2d at 101.

333. *Id.*

334. *Gisbert v. U.S. Atty. Gen.*, 988 F.2d 1437, 1439 n. 4 (5th Cir. 1993).

335. *Id.*

336. See Gerald M. Boyd, *Reagan Acts to Tighten Trade Embargo of Cuba*, N.Y. TIMES, Aug. 23, 1986, § 1, at 3 (reporting that Reagan administration officials asserted that Cuban authorities sought fees up to \$30,000 for exit permits).

337. See Proclamation No. 5,517, § 2.

338. *Trump v. Hawaii*, 138 S. Ct. 2392, 2413 (2018) (viewing distinction as too "refined" to be material).

339. See Proclamation No. 5,517 (Preamble).



Framers.<sup>340</sup> The threat to U.S. diplomatic personnel during the hostage crisis was orders of magnitude more severe than whatever attenuated harm might conceivably flow from the illusory or de minimis recalcitrance that EO-3's ersatz detail purported to diagnose. Moreover, Carter's measure contained a carve-out for close relatives of persons in the United States.<sup>341</sup> Again, EO-3's absence of tailoring offers a glaring contrast.

#### D. *EO-3 as a De Facto National Origin Quota*

If the *Hawaii* majority's perfunctory look at past practice lacks precision, its painfully narrow reading of the INA's nondiscrimination provision, 8 U.S.C. § 1152(a)(1)(A), distorts Congress's overall plan. Chief Justice Roberts refused to acknowledge the remedial intent of the 1965 immigration amendments. In 1965, Congress decisively rejected the national origin quotas that had dominated U.S. immigration law for decades—quotas roundly denounced by presidents of both parties, including Harry Truman, Dwight Eisenhower, John Kennedy and Lyndon Johnson.<sup>342</sup> In enacting the INA's nondiscrimination provision, which bars national-origin discrimination in the issuance of immigrant visas, Congress sought to prevent administrative backsliding toward the discredited quota regime. Chief Justice Roberts' anodyne account of EO-3 as a neutral product of interagency review overlooked its targeting of nationals from particular countries that largely share one material attribute: a Muslim-majority population. The INA's antidiscrimination mandate makes such crude distinctions the province of Congress, not the executive.

The majority opinion relied on a formalistic distinction between § 1182(f)'s grant of presidential authority over "entry" of foreign nationals to the United States and § 1152(a)(1)(A)'s prohibition on discrimination in issuance of immigrant *visas*.<sup>343</sup> According to the majority, there was no clash between President Trump's broad reading of § 1182(f) and the INA's nondiscrimination provision; the two provisions simply occupy "different spheres."<sup>344</sup> For the majority, visa issuance merely addresses threshold eligibility for a visa,

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340. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004).

341. See *U.S. Immigration Policy Regarding Iranian Nationals, Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 96th Cong., at 28 (1980) (testimony of Dep. Ass't Sec'y of State Elizabeth Harper).

342. See, e.g., 98 Cong. Rec. 8021, 8083 (1952) (including President Truman's message on his veto—which Congress overrode—of the quota-ridden 1952 McCarran-Walter Act, in which Truman cautioned that "the present quota system . . . discriminates, deliberately and intentionally, against many of the peoples of the world"); Cong. Research Serv., *U.S. Immigration Law and Policy: 1952-1979*, at 115 (1979) (quoting Message from the President Relative to Immigration Matters, H.R. Doc. No. 85-85, at 1 (1957)) (alerting Congress that the quota system "operate[d] inequitably"); Pres. John F. Kennedy, Letter to the President of the Senate and to the Speaker of the House on Revision of the Immigration Laws (July 23, 1963) (advising Congress that the "national-origin quota system was "an anachronism . . . [that] discriminates among applicants for admission into the United States on the basis of accident of birth"); Pres. Lyndon B. Johnson, Annual Message to the Congress on the State of the Union (Jan. 8, 1964) (declaring that "a nation that was built by the immigrants of all lands can ask those who now seek admission: 'What can you do for our country?' But we should not be asking: 'In what country were you born?'"').

343. *Trump v. Hawaii*, 138 S. Ct. 2392, 2414 (2018).

344. *Id.*

including ascertaining that a visa applicant is a close relative of his or her sponsor or fits within other visa criteria. Under this view, admissibility concerns a wholly separate inquiry: whether the applicant has committed a crime, engaged in terrorism, suffers from a communicable disease such as tuberculosis or in any other way runs afoul of express conditions in the INA.<sup>345</sup>

This analysis arbitrarily bifurcates eligibility and admissibility determinations. Consular officials routinely make *both* determinations *before* they issue a visa.<sup>346</sup> Indeed, a consular official's denial of a visa based on national security inadmissibility grounds was the subject of *Kerry v. Din*,<sup>347</sup> a 2015 decision that the majority cited approvingly.<sup>348</sup> Immigration officials at U.S. ports of entry can bar admission of newly arriving foreign nationals if those officials determine that the noncitizen has committed a crime or is otherwise inadmissible.<sup>349</sup> However, primary responsibility for both eligibility and admissibility decisions resides with consular officials. The majority's mechanistic distinction ignores this ground truth of immigration practice.<sup>350</sup>

Even more to the point, the majority failed to grasp how Congress's landmark 1965 overhaul of the INA fits with § 1182(f), which Congress enacted in 1952. As noted, above, the 1965 amendments marked a decisive pivot from the national origin quotas that had hamstrung the INA for decades. Congress passed the nondiscrimination provision, § 1152(a)(1)(A), to prevent administrative backsliding to that discredited era. Under traditional canons of statutory interpretation, the later, more specific provision should modify the earlier section.<sup>351</sup> Without a more robust reading of the nondiscrimination provision than the *Hawaii* majority could muster, the Executive could use § 1182(f) to recreate the national origin quotas that Congress had rejected in 1965. EO-3 is a de facto national origin quota in exactly that sense.

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345. *Id.*

346. *See supra* notes 126-148 and accompanying text.

347. *Kerry v. Din*, 135 S. Ct. 2128, 2140-41 (2015) (Kennedy, J., concurring).

348. *Hawaii*, 138 S. Ct. at 2419.

349. *Id.* at 2414.

350. The majority noted that the INA sometimes treats visa issuance and admissibility as distinct events. *Hawaii*, 138 S. Ct. at 2414 n. 3. While that is true, it has little relevance for reading the INA's nondiscrimination provision. Instead, the INA's distinctions between visa issuance and admissibility are important to the statutory scheme because admissibility often plays a role when a foreign national has already entered the United States. For example, a foreign national in the United States who seeks to "adjust" his or her status to lawful permanent residence will first have to demonstrate admissibility. See 8 U.S.C. § 1255(a); see also Jill E. Family, *Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication*, 31 J. Nat'l Ass'n L. Jud. 45, 60 n. 65 (2011) (noting that "to . . . adjust status, the foreign national must be admissible into the United States"). Of course, one could argue that EO-3's terms may also play a role in such determinations, since EO-3 suspends "entry" of nationals of certain countries into the United States, and for many purposes under the INA "entry" and "admission" are interchangeable. *Hawaii*, 138 S. Ct. at 2414 n. 4. The larger problem of statutory interpretation remains the one identified in the text: such a sweeping view of § 1182(f) would allow the President to systematically discriminate between countries in a fashion that Congress sought to prevent in 1965.

351. *See International Refugee Assistance Project (IRAP) v. Trump*, 883 F.3d 233, 304 (4th Cir. 2018) (Gregory, J., concurring) (citing, *inter alia*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 648 (2012)).

By declining to give the INA's nondiscrimination provision a robust reading in keeping with Congress's intent in 1965, the *Hawaii* majority failed to heed Justice Frankfurter's warning in *United States v. Witkovich*<sup>352</sup> regarding the risks of reading a statutory provision "in isolation" from the rest of Congress's handiwork.<sup>353</sup> That inattention was all the more salient in light of the serious methodological flaws with the majority's Establishment Clause analysis, particularly its dilution of the means-ends scrutiny in the *Cleburne* line of cases.<sup>354</sup> A statutory holding that EO-3 exceeded Congress's delegation to the President would have enabled the Court to avoid exposing these flaws to public view. In this sense, both *Ex Parte Endo*<sup>355</sup> and the Court's Cold War case law<sup>356</sup> pointed to a superior path for pushing back against Executive excess. The *Hawaii* majority's failure to follow that path represents a retreat from the Court's best interpretive traditions.

#### CONCLUSION

When the Supreme Court makes a decision, it also makes a prediction, express or implied, about the effects of that decision. That is true for a unanimous decision on a technical point of law. Focus on consequences is even more salient with a 5-4 decision, such as *Trump v. Hawaii*, on a conspicuous government policy. In such a decision, just as with the Japanese-American internment or Cold War cases, the Court makes methodological choices as well as substantive ones. The Court's methodological choices in *Trump v. Hawaii* rank among its worst in decades.

The *Hawaii* majority was clearly cognizant of the importance of these methodological choices and of the risk of structural spillover. Those concerns drove Chief Justice Roberts' reminder to the dissent that parsing the meaning of presidential statements is not merely about the White House's current occupant, but also about "the Presidency" itself. The same concerns animated Justice Kennedy's valedictory concurrence, with its recognition—so reminiscent of Justice Frankfurter's concurrence in *Dennis*—that public officials and the people themselves are often the last line of defense for constitutional values.

That is where the resemblance to Justice Frankfurter stops. Frankfurter's commitment to judicial craft encompassed not only the Hamlet-like musings of his *Dennis* concurrence and his vote for the majority in *Korematsu*, but also participation in cases that pushed back against government excess such as *Endo*, *Witkovich*, and *Kent*. Frankfurter recognized that managing structural spillover entails not only preserving the prerogatives of the political branches, but also the reputation of the Court.

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352. *United States v. Witkovich*, 353 U.S. 194 (1957).

353. *Id.* at 199.

354. *See supra* notes 122-153 and accompanying text.

355. *Ex parte Mitsuye Endo*, 323 U.S. 283, 294 (1944).

356. *See Frickey, supra* note 9.

In contrast, the *Hawaii* majority's methodological approach to the Establishment Clause analysis of EO-3 demonstrated no comparable awareness of the judiciary's need for reasoned elaboration of its decisions. The Establishment Clause issue also highlighted a failure of judicial craft from Justice Sotomayor, whose parsing of President Trump's statement that EO-2 "watered down" EO-1 ignored longtime Supreme Court constructions of that phrase, as well as her own usage. That failure highlighted the majority's apt anxiety that construing presidential statements is a "delicate" enterprise. However, the methodological flaw in the majority's approach to the Establishment Clause issue was far more serious.

In relying on the *Cleburne* line of cases, the *Hawaii* majority wanted to have it both ways. Those cases apply a robust brand of means-ends scrutiny, as in *Cleburne*'s own cavil that the defendant town's special permit ordinance for group homes did not apply to other uses with similar impacts, such as dormitories and hospitals. The *Hawaii* majority wished to advertise its allegiance to these "rational basis with bite" cases, without actually committing itself to their robust methodology. As Justice Sotomayor's dissent pointed out, even a passing nod to serious investigation of EO-3's operation would have led to the recognition that the young children among those excluded by EO-3 do not pose a national security threat. Justice Frankfurter, who along with Justice Jackson dissented from the Court's denial of relief to an immigrant war bride in *Knauff*, would surely have partaken of this insight. However, the *Hawaii* majority seemed more concerned with the *appearance* of review than its substance, just as the "detailed" text of EO-3 that Chief Justice Roberts touted in his majority opinion had no more real-world impact than the exquisite precision one might find in an online map of Harry Potter's Hogwarts.

The right methodological call, given the Establishment Clause's poor service as a vehicle for either supporting or striking down EO-3, would have been to find that EO-3 exceeded the scope of delegation under the INA. Justice Frankfurter joined in this statutory solution in *Endo* and many of the Court's Cold War cases after the nadir represented by *Dennis*. As the Court had done on the question of the Food and Drug Administration's statutory authority to regulate tobacco in *Brown & Williamson*, the Court could have found that EO-3's sweeping restrictions on immigrant visas were foreign to the comprehensive scheme of the INA and inimical to the sea change that Congress wrought in 1965, when it rejected national origin quotas and enacted a non-discrimination provision to preclude administrative backsliding to that discredited regime. Instead, the *Hawaii* majority relinquished this opportunity, relying on a mechanical distinction between visa issuance and admission that ignored the import of Congress's 1965 reforms.

In fairness, the dissenters were little help on this score: Justice Sotomayor, in a puzzling turn of phrase, pronounced the statutory issue too "complex." Handling complexity is surely part of the Justices' job description. Justice Breyer also declined to fully engage on the statutory point, although Justice

Breyer's focus on the illusory and opaque nature of EO-3's waiver provisions did provide a valuable blueprint for future litigation beyond the preliminary injunction that the Court vacated.

In great cases such as *Trump v. Hawaii*, it is tempting to overlook method to obtain the right result. With its concern for "the Presidency," the *Hawaii* majority acknowledged the need to resist that temptation. However, the majority's deferential posture unduly discounted deference's own cost to the courts' institutional standing. In so doing, the majority failed to heed Justice Jackson's warning in *Korematsu* that a decision that grants the political branches too much leeway can linger like a "loaded weapon." A statutory decision against EO-3 would have defused that weapon. The *Hawaii* majority should have embraced that opportunity, instead of relying on a mechanical approach that read one provision in isolation from the statute's context.