

SPEECH, INTENT, AND THE PRESIDENT

Katherine Shaw†

Judicial inquiries into official intent are a familiar feature of the legal landscape. Across various bodies of constitutional and public law—from equal protection and due process to the First Amendment’s Free Exercise and Establishment Clauses, from the Eighth Amendment to the Dormant Commerce Clause, and in statutory interpretation and administrative law cases across a range of domains—assessments of the intent of government actors are ubiquitous in our law.

But whose intent matters to courts evaluating the meaning or lawfulness of government action? When it comes to statutes, forests have been felled debating the place of legislative intent. But, although the government conduct subject to challenge is frequently action by executive-branch officials, no coherent body of work attends in the same way to the role of intent and the executive—either its function across bodies of law, or the means by which it is established.

The novel rhetorical habits and strategies of President Donald Trump have already thrust questions of presidential intent into the spotlight in high-stakes recent and ongoing litigation. Both the Supreme Court and lower courts have struggled in these cases, with no real guiding principles regarding the significance of presidential statements, their relationship to presidential intent, or the relevance of intent in challenges to presidential action. These cases highlight the absence of any coherent conceptual framework for assessing the speech and intent of the President. This Article attempts to fill that gap.

| | |
|---|------|
| INTRODUCTION | 1338 |
| I. LEGISLATIVE INTENT: DOCTRINE AND DEBATES | 1345 |
| A. Legislative Intent in Ordinary Interpretation .. | 1345 |

† Professor of Law, Benjamin N. Cardozo School of Law. For helpful comments and conversations, I am grateful to Larry Alexander, Nick Bagley, Michael Coenen, Erin Delaney, Neal Devins, Bill Eskridge, Vic Fleischer, Tara Leigh Grove, Michael Herz, Anita Krishnakumar, Gillian Metzger, Luke Norris, Victoria Nourse, Daphna Renan, Adam Samaha, Micah Schwartzman, Mila Sohoni, Larry Solum, Glen Staszewski, Jeff Tulis, Evan Zoldan, and participants in workshops at Cardozo Law School, the University of San Diego School of Law, St. John’s School of Law, the Northwestern University Pritzker School of Law, Georgetown University Law Center, and the University of Michigan’s Administrative Law New Scholarship Roundtable. Patrick Glackin, David Goldman, Jess Honan, and Sam Stanton provided terrific research assistance on various aspects of this project.

| | | |
|------|--|------|
| B. | Constitutionally Suspect Legislative Intent ... | 1351 |
| II. | EXECUTIVE INTENT: DOCTRINE AND DEBATES | 1358 |
| A. | Constitutionally Suspect Intent Beyond the Legislature | 1358 |
| B. | Constitutionally Inflected Administrative Law | 1362 |
| 1. | <i>Administrative Law's "Unalterably Closed Mind" Doctrine</i> | 1362 |
| 2. | <i>Accardi v. Shaughnessy</i> | 1368 |
| C. | Intent in Ordinary Administrative Law | 1369 |
| D. | Intent in Regulatory Interpretation | 1370 |
| III. | DEVELOPING A FRAMEWORK FOR PRESIDENTIAL INTENT. | 1372 |
| A. | The Existing Authority | 1374 |
| 1. | <i>Case Law</i> | 1374 |
| 2. | <i>Commentary</i> | 1377 |
| B. | Analogies | 1378 |
| 1. | <i>Legislative History and Legislative Intent</i> .. | 1378 |
| 2. | <i>Ordinary Administrative Law</i> | 1385 |
| C. | Scope, Meaning, and Constitutionality | 1386 |
| D. | Application | 1392 |
| 1. | <i>Travel Ban</i> | 1392 |
| 2. | <i>"Sanctuary" Cities</i> | 1395 |
| 3. | <i>Military Service by Transgender Individuals</i> | 1396 |
| E. | Objections and Responses | 1397 |
| | CONCLUSION | 1399 |

INTRODUCTION

Two and a half years into the administration of Donald Trump, novel questions about the relationship between law, rhetoric, and executive power seem to arise almost daily. The President has reshaped the nature of presidential communication in ways that will reverberate for years to come. But whatever those long-term consequences for the presidency, the polity, or the constitutional order more broadly, one institution tasked with responding in the short term is the judiciary.

One particularly pressing set of questions facing the courts involves presidential speech, presidential intent, and the bearing of both on the meaning or lawfulness of presidential action. These questions have been thrust into the national spotlight in high-stakes litigation, including over the President's "travel

ban” directives.¹ Courts evaluating the lawfulness of those orders have wrestled with what weight to accord the President’s statements, both from the campaign and following inauguration, with very little guidance regarding the interpretive significance of those words, or their relationship to presidential intent or to the President’s constitutional or statutory authority. As the travel ban cases—and several others ongoing at the time of this writing²—make clear, courts for the most part lack any coherent interpretive framework for evaluating either speech or intent when it comes to the President. This piece, following previous work that focused on presidential speech more broadly,³ attempts to fill that gap.

Although President Trump’s novel rhetorical strategies have opened up a host of new questions regarding intent and the President, there is substantial existing law on the broader question of official intent and government actors.⁴ Indeed, judicial inquiries into government intent or purpose are ubiquitous in constitutional and public law.

First, a sophisticated body of literature and doctrine grapples with purpose and intent in statutory interpretation, focusing in particular on whether and how courts should consider extrinsic sources in construing ambiguous statutory terms.⁵ But this work remains focused on *legislative* intent; no analogous body of work attends to purpose and intent in the context of the executive, particularly where the government action in

¹ See *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) [hereinafter Proclamation No. 9645]; *Protecting the Nation from Foreign Terrorist Entry into the United States*, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) [hereinafter E.O. 13,780]; *Protecting the Nation from Foreign Terrorist Entry into the United States*, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter E.O. 13,769].

² This includes, among other things, the litigation over the President’s so-called “sanctuary cities” executive order, *Enhancing Public Safety in the Interior of the United States*, Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) [hereinafter E.O. 13,768]; see *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017), as well as the rescission of the Deferred Action for Childhood Arrivals (DACA) program. See *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018) *aff’d*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019); *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018), *cert. before judgment granted*, 139 S. Ct. 2779 (2019); *Batalla Vidal v. Duke*, 295 F. Supp. 3d 127 (E.D.N.Y. 2017), *cert. before judgment granted sub. nom. McAleenan v. Vidal*, 139 S. Ct. 2773 (2019).

³ See Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017) (arguing that courts should give legal effect to only certain presidential statements).

⁴ See *id.* at 99–115.

⁵ See *infra* Part I.

question comes in the form of directives issued by the President or other executive-branch actors.

At the same time, intent requirements are a familiar feature of the constitutional landscape. Across various bodies of doctrine—from equal protection and due process to the First Amendment’s Free Exercise and Establishment Clauses, from the Eighth Amendment to the Dormant Commerce Clause—judicially crafted tests direct courts to probe the purpose or intent of government actors.⁶ Although courts generally frame these tests with reference to statutes and decision-making bodies, rather than executive-branch players and executive action, a close look at the case law reveals that in all of these substantive constitutional-law domains, the relevant government actors can be legislative or executive.⁷ Executive intent, then, is very much present (if conceptually underdeveloped) in constitutional adjudication. And a number of administrative-law cases attend to the intent of subordinate actors within the executive branch, but without connecting their intent inquiries to the larger body of constitutional law on official intent, and often without articulating the constitutional values advanced by scrutinizing agency action to ascertain impermissible intent.

When the President takes some action, then, or issues a legal directive, there is surprisingly little direct authority on the relevance of purpose or intent, or the means by which those might be established, either for courts evaluating the consistency of that action or directive with the requirements of the Constitution, or when it comes to the task of ordinary interpretation.

Three examples, two real and the third a stylized version of actual events, help illustrate the types of disputes that implicate the questions at the heart of this Article. I introduce them briefly here and return to them in Part III.

- As a candidate, the President repeatedly promises to implement a “total and complete shutdown of Muslims entering the United States.”⁸ One week after his inaugu-

⁶ See *infra* Part I.

⁷ Indeed, under some circumstances, the actors may be functioning as adjudicators, as in the Court’s recent decision in *Masterpiece Bakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1730 (2018) (highlighting statements by members of “an adjudicatory body deciding a particular case”).

⁸ *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the U.S.’*, NBC NEWS (Dec. 7, 2015), <https://www.nbcnews.com/video/trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-u-s-581768771855> [<https://perma.cc/VND2-EH2L>].

ration, he issues an executive order imposing a ninety-day ban on entry into the United States by individuals from seven Muslim-majority countries.⁹ The order is challenged immediately in a number of venues, and courts quickly face questions regarding the order's scope, operation, and constitutionality.¹⁰

- Both during the presidential campaign and in the early days of the new administration, the President repeatedly criticizes what he describes as “sanctuary cities.”¹¹ Within days of taking office, the President issues an Executive Order that purports to “[e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds. . . .”¹² At a press conference announcing the new order, the White House Press Secretary explains it this way: “We are going to strip federal grant money from the sanctuary states and cities that harbor illegal immigrants. The American people are no longer going to have to be forced to subsidize this disregard for our laws.”¹³ Several cities challenge the order, and courts must both construe the order and determine whether it is constitutional.¹⁴
- Six months into the new administration, the President announces in a series of tweets that transgender individu-

⁹ E.O. 13,769, *supra* note 1. For later iterations of this order, see *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats*, Proclamation No. 9645, *supra* note 1; *Protecting the Nation from Foreign Terrorist Entry into the United States*, E.O. 13,780, *supra* note 1.

¹⁰ See, e.g., *Washington v. Trump*, 847 F. 3d 1151 (9th Cir. 2017), *cert. denied sub nom. Golden v. Washington*, 138 S. Ct. 448 (2017).

¹¹ See Matthew Boyle, *Donald J. Trump to San Francisco: Sanctuary Cities 'Unacceptable,' a 'Disaster' Creating 'Safe-Haven for Criminals.'* BREITBART (May 16, 2016), <http://www.breitbart.com/2016-presidential-race/2016/05/16/exclusive-donald-j-trump-to-san-francisco-sanctuary-cities-unacceptable-a-disaster-creating-safe-haven-for-criminals/> [<https://perma.cc/WF8E-LJDP>] (“Sanctuary cities are a disaster We’ll be looking at sanctuary cities very hard.”); Interview by Bill O’Reilly with Donald J. Trump, President of the United States, AM. PRESIDENCY PROJECT (Feb. 3, 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=123062> [<https://perma.cc/Y5TH-DLWD>] (“I’m very much opposed to sanctuary cities. They breed crime, there’s a lot of problems. If we have to, we’ll defund. We give tremendous amounts of money to California—California in many ways is out of control”).

¹² *Enhancing Public Safety in the Interior of the United States*, E.O. 13,768, *supra* note 2.

¹³ The White House, *1/25/17: White House Press Briefing*, YOUTUBE (Jan. 25, 2017), <https://www.youtube.com/watch?v=OaPriMVvtZA> [<https://perma.cc/2JBP-8U83>].

¹⁴ See, e.g., *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017) (upholding a preliminary injunction against the sanctuary city executive order).

als will no longer be allowed to serve in the U.S. military.¹⁵ He follows that announcement with a Presidential Memorandum that directs the Secretaries of Defense and Homeland Security to create a process for ending the accession of transgender individuals into the military.¹⁶ A number of individuals challenge both the order and its implementation, and the courts must both interpret the order and decide whether it complies with the Constitution.¹⁷

Each of these cases presents both (1) interpretive questions regarding the meaning or effect of a presidential directive, and (2) constitutional questions regarding the substantive permissibility of that same directive. And, in each case, statements by the President and other executive-branch officials might bear on intent in both of those endeavors.

This Article begins with a (necessarily abbreviated) tour through some key debates in statutory interpretation, in particular regarding legislative purpose, legislative intent, and reliance on extrinsic evidence like legislative history. It then turns to the parallel and largely separate body of law that grapples with these concepts in the context of constitutional claims.

The Article then turns to the executive, asking how courts apply intent-based tests in constitutional cases involving the executive, and arguing that for the most part courts make no distinction between legislative and executive-branch officials in such cases. It then explores the function of intent in administrative law, with reference to several lines of important administrative-law cases that highlight the significance of official intent (in contrast to much of administrative law's decentering of intent).

Turning more fully to the normative, the Article unfolds an argument that, taken together, these materials suggest that judicial reliance on the intent of executive-branch officials in constitutional and "constitutionally inflected" cases, even if underdeveloped, is actually routine, appropriate, and well-grounded in a familiar conceptual apparatus. Beyond consti-

¹⁵ Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), <https://twitter.com/realDonaldTrump/status/890193981585444864> [<https://perma.cc/R7DP-DXVN>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472> [<https://perma.cc/HB8H-XDZ6>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:08 AM) <https://twitter.com/realDonaldTrump/status/890197095151546369> [<https://perma.cc/52YQ-DDN5>].

¹⁶ Memorandum on Military Service by Transgender Individuals, 82 Fed. Reg. 41,319 (Aug. 25, 2017).

¹⁷ See, e.g., *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 211 (D.D.C. 2017) (finding that transgender individuals were likely to prevail on an equal protection claim).

tutional doctrine, there is significant authority from federal administrative law that both supports the propriety of such inquiries and provides guidelines for conducting them. In light of this background, I argue, it is appropriate and often necessary for courts to consider presidential intent in cases involving constitutional challenges to presidential action. But I also argue that for a number of institutional reasons, courts should proceed with caution before employing a concept of “presidential intent” that tracks the idea of “legislative intent” when it comes to the task of ordinary interpretation of presidential directives. The concepts of legislative intent and legislative history, developed and debated in the context of statutes, are a poor fit in the context of executive action. The Article thus provides a set of guidelines, with specific reference to the examples above as well as a handful of others, for distinguishing between proper and improper judicial invocation of presidential intent.¹⁸

Several caveats are in order before proceeding further. First, this Article focuses on judicial approaches to both the speech and the intent of the President. It does not examine the treatment of presidential statements, or the role of presidential intent more broadly, inside the executive branch, as agencies endeavor to carry out presidential directives and policy goals. That is a worthy subject and one I hope to pursue in future work, but it is not this project. Similarly, intriguing authority from some state courts grapples with the intent and speech of state executive-branch officials, primarily governors and attorneys general. Many of the same questions pursued in this Article arise in analogous ways in the context of the states,¹⁹ but I do not attempt to address those questions here.

The scenarios described above raise questions regarding the relevance of speech by the President not only while in office but also in the context of political campaigns. Once again, this is an important question, and one scholarship is beginning to

¹⁸ Although all of these examples involve legal challenges to policy initiatives of the Trump administration, it is my hope that the analysis and proposals I offer here are durable enough to transcend this particular administration. For an argument that the presidency of Donald Trump requires jettisoning “rules of constitutional practice and constitutional interpretation rooted in assumptions that constitutional institutions are functioning normally,” see Sanford Levinson & Mark A. Graber, *The Constitutional Powers of Anti-Publican Presidents: Constitutional Interpretation in a Broken Constitutional Order*, 21 *CHAPMAN L. REV.* 133, 164 (2018).

¹⁹ See Katherine Shaw, *The State Bully Pulpit* (working draft).

take up,²⁰ but I do not directly tackle the question here, focusing instead on what I believe are important antecedent questions.

Similarly, presidential statements could prove relevant to investigations involving the President, whether by executive-branch²¹ or congressional actors; but the relevance of statements in any such proceedings is similarly distinct from my focus here.²²

One final introductory note. As the foregoing makes clear, courts and commentators use the term “intent” in a number of distinct ways. The term is used, first, to describe a state of mind, in particular in the context of *impermissible* motives like bias or animus.²³ It is also used in the more value-neutral sense of attempted communicative content or meaning,²⁴ as well as to describe the expected or predicted results of a particular course of action (put differently, a tort-like concept of “the natural and foreseeable consequences of [an] act.”²⁵). Identifying these tensions and sensitive to these distinctions, this piece attempts to offer a descriptive account and a set of recommendations for distinguishing proper from improper judicial use of presidential intent, with particular reference to the role of extrinsic materials in cases involving intent. But the topic is vast,

²⁰ See, e.g., Michael Coenen, *Campaign Communications and the Problem of Government Motive*, 21 U. PA. J. CONST. L. 333 (2018); Shawn E. Fields, *Is It Bad Law to Believe a Politician? Campaign Speech and Discriminatory Intent*, 52 U. RICH. L. REV. 273 (2018) (discussing whether courts should consider campaign statements as evidence of discriminatory motive).

²¹ U.S. DEPT OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1, <https://www.justice.gov/storage/report.pdf> [<https://perma.cc/8CY8-PJWG>].

²² Cf. Kate Shaw, *Impeachment and Presidential Rhetoric*, TAKE CARE BLOG (June 14, 2018), <https://takecareblog.com/blog/impeachment-and-presidential-rhetoric> [<https://perma.cc/LUD4-ZGY7>] (discussing role of presidential rhetoric in previous impeachment efforts).

²³ See WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 5 (2017).

²⁴ See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013).

²⁵ WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATIONS: STATUTES AND THE CREATION OF PUBLIC POLICY 131 (4th ed., 2011); see also Micah Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban*, in NOMOS LXI: POLITICAL LEGITIMACY 205 (Jack Knight & Melissa Schwartzberg eds., 2019), <https://ssrn.com/abstract=3159393> [<https://perma.cc/CJF4-KYWS>] (defining “intention” as “the reasons for which agents understand themselves to be acting,” and declining to distinguish between intentions and motivations) Aziz Z. Huq, *What is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1215 (2018) (“[T]he federal judiciary has not homed in upon a single definition of discriminatory intent.”).

and this piece offers more the beginning of a dialogue than a comprehensive set of answers.²⁶

I

LEGISLATIVE INTENT: DOCTRINE AND DEBATES

While questions of presidential intent have remained remarkably underexplored, a rich body of both doctrine and scholarship grapples with the role of intent in the interpretation of statutes, focusing in particular on whether and how courts should consider extrinsic sources of evidence as part of the interpretive endeavor. Accordingly, before turning directly to presidential speech and presidential intent, I take a brief tour through some key debates in statutory interpretation.

A. Legislative Intent in Ordinary Interpretation

Henry Hart and Albert Sacks once famously observed that “[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”²⁷ That observation remains largely true today: judges and scholars remain sharply divided on the proper approach to statutory interpretation, on grounds both theoretical and methodological.²⁸

Still, commentators of all stripes tend to agree that “general statutory language inescapably includes open spaces and unresolved questions of meaning.”²⁹ The key question in statutory interpretation, then, is how to fill those spaces and answer those questions. Contemporary approaches can be roughly divided into two general camps, at least for purposes of this project: variants of purposivism or intentionalism, on the one hand, and textualism, on the other.³⁰

²⁶ The philosophical literature on the nature of intention is, of course, extensive, but mostly beyond the scope of this piece. Important works include T.M. Scanlon, *Intention and Permissibility*, 74 *ARISTOTELIAN SOC'Y* 301 (2000); MICHAEL E. BRATMAN, *FACES OF INTENTION* (1999); G.E.M. ANSCOMBE, *INTENTION* (1957).

²⁷ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

²⁸ See ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 9 (2012) (“Is it an exaggeration to say that the field of interpretation is rife with confusion? No.”).

²⁹ See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 *COLUM. L. REV.* 673, 695 (1997); see also Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 *HARV. J.L. & PUB. POL'Y* 61, 67 (1994) (“‘Plain meaning’ as a way to understand language is silly. In interesting cases, meaning is not ‘plain.’”).

³⁰ In identifying these as the most important approaches to statutory interpretation, I largely omit consideration of positive political theory, contract theo-

As a general matter, purposivists tend to construe statutes “in relation to broad purposes that they derive not only from the text simpliciter, but also from an understanding [of] what social problems the legislature was addressing and what general ends it was seeking.”³¹ As Hart and Sacks explained, a court should interpret a statute “to carry out the purpose as best it can”³²; operationally, this means that courts should “[d]ecide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved[,] and then [i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can.”³³ Purposivists’ close cousins, intentionalists, “concern themselves more directly [than purposivists] with actual, historical understandings of statutes that can be ascribed to the members of the legislature.”³⁴ Discussions of legislative intent often encompass at least two distinct concepts: first, *what did the drafters of a piece of legislation mean to accomplish through a particular enactment?* Second, *why did the drafters act as they did?*³⁵ Under the rubrics of both purposivism and intentionalism, courts regularly consult materials outside of the statutory text. These include the social and historical context and, most controversially, legislative history—principally committee reports and statements by key players involved in the passage of a particular piece of legislation.

By contrast, textualists hold that “statutory meaning is to be found in the words the legislature has used.”³⁶ As leading

ries, pragmatism, and self-consciously “dynamic” theories of statutory interpretation. All of those approaches are clearly important; but they are less fixated on extrinsic materials than are purposivism, intentionalism, and textualism. Because the proper role of extrinsic materials is a key focus of my project, my discussion is limited to the schools of thought that similarly engage with these sources.

³¹ Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 227 (1999); see Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1764 (2010) (“Purposivists’ salient difference from textualists is their focus on ‘interpret[ing] the words of the statute . . . so as to carry out the purpose as best [they] can’ and their willingness to consider an array of extrinsic interpretive aids, including legislative history, to do so.” (footnote omitted)); see also ROBERT A. KATZMANN, *JUDGING STATUTES* 31 (2014) (“Statutes . . . have purposes or objectives that are discernible. The task of the judge is to make sense of legislation in a way that is faithful to Congress’s purposes.”).

³² HART, JR. & SACKS, *supra* note 27, at 1374.

³³ *Id.*

³⁴ Strauss, *supra* note 31, at 227.

³⁵ Cf. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1090 (2017) (distinguishing between “author’s intent and reader’s understanding” as theories of meaning).

³⁶ Strauss, *supra*, note 31, at 227.

textualists Justice Scalia and Bryan Garner summarized their basic view in 2012: “Textualism . . . begins and ends with what the text says and fairly implies.”³⁷ In the words of Dean John Manning, “textualists choose the letter of the statutory text over its spirit[.]”³⁸ and in Professor Bill Eskridge’s gloss, for textualists, “a statutory text’s apparent plain meaning must be the alpha and the omega in a judge’s interpretation of the statute.”³⁹ When it comes to translating these commitments to praxis, Scalia and Garner suggest that judges should “look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters’ extratextually derived purposes and the desirability of the fair reading’s anticipated consequences.”⁴⁰ If the text alone fails to resolve questions of meaning, most textualists allow the use of a number of canons of interpretation, both textual and substantive.

So while both purposivists and intentionalists believe that the interpretive endeavor often requires looking beyond or behind statutory language, including considering the articulated goals of drafters and other participants in the legislative process, most textualists disavow the relevance, or even any stable concept, of intent in statutory interpretation. Justice Scalia and Bryan Garner suggest that “it is high time that further uses of *intent* in questions of legal interpretation be abandoned.”⁴¹

The textualist critique of the quest for intent or purpose tends to come in several different forms.⁴² First, textualists challenge the idea that intent can be discerned at all in the context of a multimember body like a legislature, where com-

³⁷ SCALIA & GARNER, *supra* note 28, at 16; see also William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1511 (1998) (describing Justice Scalia’s textualism).

³⁸ John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

³⁹ Eskridge, *supra* note 37.

⁴⁰ SCALIA & GARNER, *supra* note 28, at xxvii.

⁴¹ *Id.* at 396; see also Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ., 550 U.S. 81, 119 (2007) (Scalia, J., dissenting) (“To be governed by legislated text rather than legislators’ intentions is what it means to be ‘a Government of laws, not of men.’”); Easterbrook, *supra* note 29, at 68 (“Intent is empty. Peer inside the heads of legislators and you find a hodgepodge. Some strive to serve the public interest Some strive for re-election Most do a little of each. . . . Intent is elusive for a natural person, fictive for a collective body.”).

⁴² As in the case of the constitutional questions discussed in the next sub-Part, questions of legislative purpose or intent involve two distinct (though related) lines of inquiry—the relevance *vel non* of “legislative intent” and the means by which it is established.

promise is required and intentions may be inconsistent or conflicting.⁴³ This argument is by no means a new one. Max Radin wrote in 1930 that “[t]he chances that of several hundred men each will have exactly the same determinate situations in mind . . . are infinitesimally small,”⁴⁴ and many esteemed thinkers since—both inside and outside of the legal academy—have echoed or offered variations on this critique.⁴⁵

Purposivists and intentionalists do not accept these criticisms, of course. Judge Robert Katzmann, for example, a leading proponent of purposivism, writes:

That legislation is the institutional product of a collection of individuals with a variety of motives and perspectives should not foreclose the effort to discern purposes. Just as intentions are attributed to other large entities—such as local governments, trade associations, and businesses—so too do linguistic protocols, everyday mores, and context facilitate an inquiry into what Congress intended to do when statutory text is vague or ambiguous.⁴⁶

Professor Victoria Nourse echoes this response, invoking mathematician Alan Turing: “[T]he question is not whether computers or groups have minds but how groups and computers act.”⁴⁷

Textualists also argue that the key materials from which intent would even be divined—primarily legislative history—are categorically improper interpretive tools,⁴⁸ both unreliable

⁴³ Gluck, *supra* note 31, at 1762; Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 239 (1992); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 372 (2005); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 7 (2001); William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2043 (2006) (reviewing ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006)).

⁴⁴ Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930).

⁴⁵ See RONALD DWORKIN, *LAW’S EMPIRE* 335–36 (1986); JEREMY WALDRON, *LAW AND DISAGREEMENT* 128 (1999); Shepsle, *supra* note 43, at 249–50; VICTORIA NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* 138–44 (2016) (describing the critique).

⁴⁶ KATZMANN, *supra* note 31, at 34–35; see also MICHAEL E. BRATMAN, *FACES OF INTENTION* 143 (1999) (“Shared intentions are intentions of the group. . . . [W]hat they consist in is a public, interlocking web of the intentions of the individuals.”).

⁴⁷ NOURSE, *supra* note 45, at 146 (emphasis added).

⁴⁸ See Eskridge, Jr., *supra* note 37, at 1512 (“[T]he new textualism’s most distinctive feature is its insistence that judges should almost never consult, and never rely on, the legislative history of a statute.”); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 377 (“It is well known that technocrats, lobbyists and attorneys have created a virtual cottage industry in fashioning legislative history so that the Congress will appear to embrace their particular view in a given statute.”). *But see In re Sinclair*, 870 F.2d 1340, 1341–44 (7th Cir. 1989) (discussing distinctions between different uses of legislative history).

and susceptible to manipulation.⁴⁹ Beyond these pragmatic objections to the use of legislative history, many textualists argue that reliance on legislative history is inconsistent with or undermines the constitutionally prescribed process for passing legislation—bicameralism and presentment.⁵⁰ What results from that process is law, the argument runs; for courts to place decisive (or perhaps even significant) weight on anything else is in tension with that process, if not flagrantly unconstitutional.⁵¹ Some textualists also contend that the use of legislative history represents an unconstitutional delegation—that is, that such reliance runs afoul of “the prohibition against legislative self-delegation,”⁵² because it is tantamount to a delegation of “legislative power” to either committees or individual members. Purposivists and intentionalists respond that their use of legislative history merely facilitates the proper understanding of, rather than displaces, statutory text, so that none of these constitutional arguments has any genuine force.

Finally, textualists often argue that limiting judges to statutory text, together with a specified group of extrinsic sources that does not include legislative history,⁵³ will better cabin judicial discretion than approaches like intentionalism and purposivism. Opponents counter that textualists have it precisely backward: by seeking evidence of legislative purpose, judges faithfully interpret the handiwork of the legislature rather than imposing their own preferences, and that it is tex-

⁴⁹ See *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring) (“It is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind.”).

⁵⁰ U.S. CONST. art. I, § 7, cl. 2, 3.

⁵¹ See *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279–80 (1996) (Scalia, J., concurring); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 64 (1988) (“If we took an opinion poll of Congress today on a raft of issues and found out its views, would those views become the law? Certainly not. They must run the gamut of the process—and process is the essence of legislation.” (footnote omitted)); Manning, *supra* note 29, at 697 (“Neither committee reports nor sponsors’ statements comply with the ‘fairly precise’ requirements set by the Constitution for the enactment of legislation. And so a court cannot treat those materials as authoritative sources of statutory meaning without offending the bicameralism and presentment requirements . . .”).

⁵² Manning, *supra* note 29, at 675.

⁵³ See Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 836–39 (2017); *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566–70 (2012) (relying heavily on a number of dictionaries).

tualism that does not deliver on its promise to meaningfully constrain judicial discretion.⁵⁴

Critics of the quest for intent in the interpretation of statutes have a recent and unexpected ally of sorts in Professor Victoria Nourse. Professor Nourse, though herself no textualist, has recently advocated a conceptual and rhetorical shift from the concept of legislative intent—which she describes as “the most confusing idea in all statutory interpretation theory”⁵⁵—and toward the less freighted and more descriptively accurate idea of *legislative context*. As she explains, reliance on outside materials in the attempt to divine the meaning of a legislative enactment is not the pursuit of “some ghostly spirit”; rather, it is a search for context as a guide to meaning, something *legislative evidence* (she prefers the term to legislative history) is uniquely able to supply.⁵⁶ She argues that much reliance on legislative history fails to understand it in its full context—she analogizes reliance on the “wrong” types of legislative evidence to a legal brief’s reliance on a dissenting rather than majority opinion—and contends that greater attention to legislative rules and processes will equip courts to infer group intent from group action. And, she argues, a move away from mental states toward a focus on action will allow us to transcend spurious “group intent” objections and to actually grasp “the meaning of public acts done according to the rules”⁵⁷—a pragmatic conception of intent that focuses on action.⁵⁸

⁵⁴ See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 855–56 (1992); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 7 (2005) (challenging “formalist claims that the canons can promote either impartiality or consistency in judicial reasoning”); Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia’s Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129, 143 (2008).

⁵⁵ NOURSE, *supra* note 45, at 135.

⁵⁶ *Id.* at 135–37 (“My argument does not reject the notion of intent. Instead, I redefine it as a search for public legislative context.”).

⁵⁷ *Id.* at 150.

⁵⁸ *Id.* at 142–43 (“Philosophical pragmatism takes the view that one cannot know one’s ends without acting to achieve those ends. . . . Because pragmatic intent focuses on action, it does not require a mental state or a communication; for that reason it emphasizes and *requires* an understanding of context from which to infer meaning.” (emphasis omitted)). *But see* Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1044 (2017) (questioning the value of “[a]ttention to the nuances of the legislative process” in statutory interpretation).

B. Constitutionally Suspect Legislative Intent

The debates above primarily concern ordinary interpretation—that is, how courts should determine what a statute means or does. But a parallel and largely separate body of law, typically under the rubric of constitutional law rather than statutory interpretation, asks whether legislation is tainted by some form of constitutionally impermissible intent.⁵⁹ Of course, this is a somewhat artificial separation: courts often inquire into legislative purpose or intent precisely in order to determine whether illegitimate purpose renders a particular enactment unconstitutional. But the constitutional doctrine has developed on a largely separate path, giving rise to a number of distinct doctrinal tests across a range of silos of constitutional law; what unites these tests is that all direct courts to probe the intent or purpose of legislators when evaluating the constitutionality of a particular legislative enactment.

First, and perhaps most familiar, is equal protection, where the Court has rejected effects tests in favor of a requirement of discriminatory intent.⁶⁰ In the context of race⁶¹ and sex⁶²—and to varying degrees alienage, national origin, and parentage—the Court has looked to purpose in adjudicating equal protection claims challenging conduct ranging from discrimination in employment⁶³ to felon disenfranchisement,⁶⁴ re-

⁵⁹ See Richard H. Fallon, Jr., *Implementing the Constitution* 81 (2001) (“[C]ontemporary constitutional doctrine reflects a larger concern with the legitimacy of governmental purposes than is often appreciated.”).

⁶⁰ See *id.* at 90 (noting that the Court has “expressly rejected arguments in favor of effects and balancing tests and made discriminatory purpose the touchstone of equal protection inquiries”).

⁶¹ See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional . . .”).

⁶² See *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (in the context of sex discrimination claims under the Constitution, “purposeful discrimination is ‘the condition that offends the Constitution’” (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971))).

⁶³ See *Guardians Ass’n of N.Y.C. Police Dep’t, Inc. v. Civil Serv. Comm’n of City of New York*, 633 F.2d 232, 245 (2d Cir. 1980), *aff’d*, 463 U.S. 582 (1983) (“[T]he constitutional standard is concerned only with action reflecting a racially discriminatory purpose . . .”); *Scott v. City of Anniston*, 597 F.2d 897, 899 (5th Cir. 1979) (“Discriminatory intent must be shown in fourteenth-amendment actions against government agencies.”).

⁶⁴ See *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (striking down Alabama’s felon disenfranchisement constitutional provision on the grounds that “its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect”).

districting,⁶⁵ and jury selection.⁶⁶ The Court has also inquired into purpose in cases involving claims of discrimination that targets groups not specifically designated as “suspect classes,” including individuals with intellectual disabilities;⁶⁷ gays and lesbians;⁶⁸ even particular individuals singled out by government bodies for adverse treatment⁶⁹ (so-called equal protection “class of one” claims).

Equally common are discussions of purpose in cases involving religious discrimination under the First Amendment. When it comes to the Establishment Clause, the Court has underscored “the intuitive importance of official purpose to the realization of Establishment Clause values,”⁷⁰ and has de-

⁶⁵ See *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (sustaining challenge to “re-districting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting”) (emphasis added); cf. Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993, 1998–2002 (2018) (explaining the way courts have considered intent in challenges to partisan gerrymanders under the Equal Protection Clause).

⁶⁶ See *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (“[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.”) (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)).

⁶⁷ See, e.g., *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 450 (1985) (finding that the application of a zoning ordinance was based on “irrational prejudice” against individuals with disabilities).

⁶⁸ See, e.g., *United States v. Windsor*, 570 U.S. 744, 774, (2013) (“[T]he principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage.”); *Romer v. Evans*, 517 U.S. 620, 634 (1996) (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”); see also Steve Sanders, *Making It Up: Lessons for Equal Protection Doctrine from the Use and Abuse of Hypothesized Purposes in the Marriage Equality Litigation*, 68 HASTINGS L.J. 657, 684–90 (2017); COREY BRETTSCHEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY? 33 (2012) (“What is significant about the doctrine of animus as a whole is that it suggests that, in order to determine whether a law violates a right, we need to examine the available reasons and motivations for that law.”).

⁶⁹ See, e.g., *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (holding that a class of one may assert an equal protection claim where treatment was alleged to be “irrational and wholly arbitrary”); cf. *Engquist v. Oregon Dep’t of Agri.*, 553 U.S. 591, 605 (2008) (holding that a class-of-one equal protection theory is “simply a poor fit in the public employment context”); see also William D. Araiza, *Flunking the Class-of-One/Failing Equal Protection*, 55 WM. & MARY L. REV. 435, 443–50 (2013) (discussing the current state of the class-of-one doctrine).

⁷⁰ *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 861 (2005); see also *Town of Greece v. Galloway*, 572 U.S. 565, 597 (2014) (Alito, J., concurring) (noting the absence of evidence of “discriminatory intent” and explaining that “I would view this case very differently if the omission of these synagogues were intentional”); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540–42 (1993) (Kennedy, J.) (plurality opinion) (“Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous state-

clined multiple invitations to overrule its decision in *Lemon v. Kurtzman*, which looks first to government purpose as a component of its three-part test.⁷¹ Purpose also looms large in the context of the Free Exercise Clause, in which one important component of a court's analysis is whether the "object or purpose of a law is the suppression of religion or religious conduct."⁷² And not just religion but the speech protections of the First Amendment have given rise to judicial tests involving purpose or intent; to take one example, the Court has explained that "even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys."⁷³

Substantive due process cases represent another example. Although the most famous phrase from *Planned Parenthood v. Casey* is "undue burden"—the test it announced for evaluating the constitutionality of abortion restrictions—the Court also explained that a regulation imposes an "undue burden" when it has a "*purpose* or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."⁷⁴ The post-*Casey* decision *Mazurek v. Armstrong*⁷⁵ has been

ments made by members of the decisionmaking body," and citing numerous statements by "residents, members of the city council, and other city officials" demonstrating "significant hostility . . . toward the Santeria religion and its practice of animal sacrifice"; *Larson v. Valente*, 456 U.S. 228, 254 (1982) (finding in legislative history evidence that a selective registration and reporting requirement "was drafted with the explicit intention of including particular religious denominations and excluding others").

⁷¹ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) ("[T]he statute must have a secular legislative purpose . . ."); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) ("Under the *Lemon* standard, a court must invalidate a statute if it lacks 'a secular legislative purpose.'").

⁷² *Church of the Lukumi Babalu Aye*, 508 U.S. at 533.

⁷³ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645 (1994); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) ("[T]he application of First Amendment law is best understood and most readily explained as a kind of motive-hunting."); Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 285 (2012) (comparing the First Amendment prohibition on content discrimination to equal protection jurisprudence). When it comes to the First Amendment, still other bodies of doctrine could be implicated—in particular the law that surrounds government speech—but I have not engaged with such materials here. See generally Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2246 (2015) (holding that specialty license plates were government speech; thus the state could reject a confederate flag design without violating the First Amendment); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 989 (2005) (considering government participation in public debate).

⁷⁴ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877 (1992) (emphasis added).

⁷⁵ 520 U.S. 968, 973 (1997).

widely read in the lower courts as limiting the force of *Casey's* “purpose” language,⁷⁶ and the Court’s most recent encounter with a restrictive abortion regulation, *Whole Woman’s Health v. Hellerstedt*, focused overwhelmingly on the effects of the challenged law.⁷⁷ But the purpose prong remains very much a part of the constitutional law of abortion.⁷⁸

When it comes to the Eighth Amendment’s prohibition of “cruel and unusual punishments,” the Court has focused since the 1970s on the intent of government actors. The Court held in *Estelle v. Gamble* that the denial of adequate medical care to prisoners would violate the Eighth Amendment only if it involved the “unnecessary and wanton infliction of pain”⁷⁹; the Court explained that unintentional conduct, “although it may produce . . . anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain,”⁸⁰ but that deliberate misconduct, such as the intentional denial or delay of access to medical care, *would* constitute a constitutional violation.⁸¹ Eighth Amendment proportionality analysis similarly asks about penological purpose.⁸² And at least some justices

⁷⁶ See, e.g., *Karlin v. Foust*, 188 F.3d 446, 493 (7th Cir. 1999) (“While a plaintiff can challenge an abortion regulation on the ground that the regulation was enacted with an impermissible purpose, the joint opinion in *Casey* and the Court’s later decision in *Mazurek* suggest that such a challenge will rarely be successful, absent some sort of explicit indication from the state that it was acting in furtherance of an improper purpose.” (citation omitted)).

⁷⁷ See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2304 (2016) (finding that the plaintiffs failed “to proffer competent evidence contradicting the legislature’s statement of a legitimate purpose”). See generally Reva B. Siegel & Linda Greenhouse, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman’s Health*, 126 YALE L.J.F. 149 (2016).

⁷⁸ Indeed, the lower-court opinion in *Whole Woman’s Health* struck down a portion of the law in part based on the impermissible purpose it found to have animated the legislature. See *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 685–86 (W.D. Tex. 2014) (“[T]he court concludes . . . that the ambulatory-surgical-center requirement was *intended to close* existing licensed abortion clinics.”) (emphasis added). Other lower-court decisions focused on the intent of government actors include *Whole Woman’s Health v. Hellerstedt*, 231 F. Supp. 3d 218, 229 (W.D. Tex. 2017) (enjoining Texas’s fetal tissue disposal requirements based in part on “evidence [the Department of State Health Services] stated interest is a pretext for its true purpose, restricting abortions”); *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042, 1049 (8th Cir. 1997) (“[T]he record, the stipulated facts, and the additional findings of the court suggest that subjecting the plaintiff to review [prior to the approval of clinic construction] had the *intended effect* of impeding or preventing access to abortions.” (emphasis added)).

⁷⁹ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

⁸⁰ *Id.* at 105.

⁸¹ *Id.* at 104–05; see also Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1401–04 (2008) (assessing the role of official intent in the law of punishment).

⁸² See *Ewing v. California*, 538 U.S. 11, 25 (2003); Ristroph, *supra* note 81, at 1375–79.

take the position that when it comes to methods of execution, punishments can only be “cruel and unusual” if they are “*purposely* designed to inflict pain and suffering beyond that necessary to cause death.”⁸³

Even cases arising under the Dormant or Negative Commerce Clause typically involve an inquiry into government purpose. The Court has explained that the doctrine prohibits “regulatory measures *designed to* benefit in-state economic interests by burdening out-of-state competitors.”⁸⁴

Turning now to the types of evidence on which courts rely in identifying impermissible intent or purpose, *Village of Arlington Heights* supplies the most frequently cited guidance. The Court in that case advised that in seeking evidence of the sort of discriminatory intent that would constitute a violation of equal protection, “[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body.”⁸⁵ The Court noted that in some circumstances, “members [of such bodies] might be called to the stand at trial to testify concerning the purpose of the official action,” though it also acknowledged

⁸³ *Baze v. Rees*, 553 U.S. 35, 96 (2008) (Thomas, J., concurring) (emphasis added); see *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (rejecting a challenge to a second attempt at electrocution, after a first attempt failed, on the grounds that, “[t]he fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain”). But see John F. Stinneford, *The Original Meaning of “Cruel,”* 105 GEO. L.J. 441, 464 (2017) (arguing that “[t]he linguistic and historical evidence demonstrates that a punishment is cruel and unusual within the original meaning of the Cruel and Unusual Punishments Clause if its effects are unjustly harsh in light of longstanding prior punishment practice,” without regard to the intent of the punisher).

⁸⁴ *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) (“This ‘negative’ aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”) (emphasis added); see *Trinova Corp. v. Mich. Dep’t of Treasury*, 498 U.S. 358, 386 (1991) (rejecting dormant commerce clause challenge to state tax, and explaining that, “Although [plaintiff] repeats the Governor’s statement [that the SBT was enacted ‘to promote the development and investment of business within Michigan’] in an attempt to demonstrate an impermissible motive on the part of the State, all the contemporaneous evidence concerning passage of the SBT suggests a benign motivation, combined with a practical need to increase revenues” (quoting *id.* at 386); see also Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986) (“In the central area of dormant commerce clause jurisprudence . . . the Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism.”).

⁸⁵ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977).

that “such testimony frequently will be barred by privilege.”⁸⁶ In addition, the Court pointed to the “specific sequence of events leading up the challenged decision” as also potentially “shed[ding] some light on the decisionmaker’s purposes.”⁸⁷

The Court has supplied similar guidance in cases arising under the Establishment Clause, where it has closely scrutinized sequences of events, advising (in a case involving the installation of a display of the Ten Commandments) that “an understanding of official objective emerges from readily discoverable fact.”⁸⁸ And the Court’s approach to Free Exercise cases has been similar: in the *Church of the Lukumi Babalu Aye* case, Justice Kennedy explained that “[i]n determining if the object of a law is a neutral one,” a court should look to evidence that includes “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.”⁸⁹ In reaching its conclusion, the Court cited numerous statements by “residents, members of the city council, and other city officials.”⁹⁰

I should pause here to note that the Court’s focus on purpose and intent in constitutional adjudication is a fairly recent development⁹¹—for much of our history, the Supreme Court expressly disclaimed the propriety of any inquiry into govern-

⁸⁶ *Id.* As I elaborate on in Part III, both “speech or debate” and other privileges that apply in the context of legislative officials are generally inapplicable to executive-branch officials. See *infra* Part III.

⁸⁷ *Vill. of Arlington Heights*, 429 U.S. at 267.

⁸⁸ *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005).

⁸⁹ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993). This portion of Justice Kennedy’s opinion was joined only by Justice Stevens, but only Justice Scalia and Chief Justice Rehnquist took explicit issue with the opinion’s examination of decision-maker statements and intent. See *id.* at 558 (Scalia, J., dissenting) (“I do not join that section because it departs from the opinion’s general focus on the object of the laws at issue to consider the subjective motivation of the lawmakers.”).

⁹⁰ *Id.* at 541–42.

⁹¹ The Court in the constitutional law staple *Fletcher v. Peck*, for example, famously cautioned that a court “cannot sustain a suit . . . founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.” 10 U.S. 87, 131 (1810). In the famous jurisdiction-stripping case *Ex parte McCardle*, the Court explained that “[w]e are not at liberty to inquire into the motives of the legislature.” 74 U.S. 506, 514 (1869). And cases through the 1960s and early 1970s continued to echo this sentiment: in *Palmer v. Thompson*, the Court rejected a challenge to a city’s decision to close, rather than desegregate, its public pools; although the plaintiffs argued that the decision “violates the Equal Protection Clause because the decision to close the pools was motivated by a desire to avoid integration of the races,” the Court explained that “no case in this Court has held that a legislative

ment purpose in constitutional cases, although its disavowals were arguably stronger than its actual practice⁹²—and also subject to significant criticism.⁹³ An important recent article, by Professor Richard Fallon, offers a sweeping critique of the Court’s approach to intent and purpose in constitutional law, including in many of the cases surveyed above. Arguing that many of the Court’s cases demonstrate confusion or even incoherence when it comes to their identification of constitutionally-forbidden intent—including in their frequent failure to distinguish between subjective and objective conceptions of intent—Fallon argues for an approach in which “courts should never invalidate legislation *solely* because of the subjective intentions of those who enacted it. Instead, in all cases, final determinations of statutes’ validity should depend on their language and effects.”⁹⁴

Critically, however, Professor Fallon also explains that his analysis focuses on the “peculiar problems posed by judicial inquiries into the intentions of multimember legislative bodies for the purpose of determining the validity of statutes or other policies.”⁹⁵ He explains that questions regarding the intent of other players, like executive-branch officials, “do not present the main conceptual problem with which I am concerned, involving the aggregation of the mental states of multiple officials

act may violate equal protection *solely because of the motivations of the men who voted for it.*” 403 U.S. 217, 224 (1971) (emphasis added).

⁹² Caleb Nelson provides the most detailed account of the history to date. Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1812–42 (2008); see also Coenen, *supra* note 20, at 356 (describing “various rationales for motives-based analysis in constitutional law”).

⁹³ Commentators have been especially critical of the Court’s fixation on government purpose or intent in the equal protection context. See, e.g., David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 904 (2016) (“Race discrimination doctrine under the Equal Protection Clause, for example, turns on government intent; yet the Court has made this intent standard ‘extraordinarily difficult’ for plaintiffs to satisfy” (citation omitted)); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3181–83 (2015) (critiquing the Court’s focus on intent in equal protection doctrine); Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 20–23 (2013) (describing the shift from impact to purpose in equal protection analysis).

⁹⁴ Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 529 (2016). Professor Fallon does, however, agree that evidence of intent may be considered—his main objection is to according intent dispositive weight. He also proposes one significant exception: “if it is well known that some members of the legislature (but less than a majority) voted for a statute with the aim of harming a racial or religious minority, their intentions might contribute to the statute’s overall expressive impact in marginalizing or stigmatizing that minority,” which should at least give rise to heightened scrutiny. *Id.* at 530.

⁹⁵ *Id.* at 530.

into a collective intent of a decisionmaking body.”⁹⁶ Professor Fallon’s insightful critique of intent doctrines in the case of statutes, then, seems to lack any real force in the context of executive-branch players who are the focus of the next Part.

II

EXECUTIVE INTENT: DOCTRINE AND DEBATES

This Part turns to the executive. It first argues that in cases featuring “constitutionally suspect intent,” courts ordinarily make no distinction between legislative and executive officials; it also discusses the role of intent in “qualified immunity” doctrine, where cases typically involve constitutional claims against executive-branch officials. It then identifies several pockets of constitutionally-inflected administrative law that also assign significance to decision-maker intent, including considering outside statements as evidence of that intent, and contrasts those lines of cases to ordinary administrative law’s aversion to intent inquiries. Finally, it briefly considers the nascent academic literature on the interpretation of executive-branch regulations. This Part remains focused on executive-branch officials other than the President, before turning squarely to the President in Part III.

A. Constitutionally Suspect Intent Beyond the Legislature

Although some of the language in the cases discussed above presumes the existence of decision-making *bodies*⁹⁷ rather than individual decision makers, the government officials in the cases themselves are in fact a mix of legislators and executive-branch officials. Where constitutional claims involve aspects of the democratic process, like redistricting and disenfranchisement, challenges are typically to statutes or constitutional amendments.⁹⁸ But in cases involving matters like jury

⁹⁶ *Id.* at 531. *But see* Michael C. Dorf, *Even a Dog: A Response to Professor Fallon*, 130 HARV. L. REV. F. 86, 88 (2016) (arguing that despite this caveat, “Fallon does not really think that aggregating individual intent presents insuperable difficulties,” and that in any event Fallon’s main argument applies with equal force to non-legislative actors—which, on Professor Dorf’s view, supplies one reason for overall caution regarding Fallon’s normative recommendations).

⁹⁷ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977); *see also* *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (“[T]he statute must have a secular legislative purpose . . .”).

⁹⁸ *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 642 (1993); *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

selection,⁹⁹ discrimination in employment¹⁰⁰ or education,¹⁰¹ the treatment of prisoners,¹⁰² and religious discrimination under either the Free Exercise or Establishment Clause, it is frequently actors within the executive branch whose conduct is in question. To be sure, many of the cases involve ground-level actors within the executive branch, rather than the President or other senior officials (either state or federal). But courts' application of intent tests in these cases is a strong indication that intent and purpose are just as relevant in constitutional cases involving executive action as they are when legislation is at issue. And, despite the occasional reference to "decision-making bodies," nothing in the logic of those cases seems limited to legislative, rather than executive, officials—and indeed, at the state and local level, where many of these cases arise, there is often less rigid separation between legislative and executive officials and functions than is true in the federal system.¹⁰³

Consider the Court's most recent encounter with this issue in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Justice Kennedy's controlling opinion rested largely on what the Court perceived as antireligious animus on the part of the Colorado commission that ruled in favor of a same-sex couple denied service at Masterpiece Cakeshop. As evidence of that animus, Justice Kennedy highlighted statements by several individual commissioners; taken together, the Court found that these statements reflected "clear and impermissible hostility toward . . . sincere religious beliefs."¹⁰⁴ Although acknowledg-

⁹⁹ See, e.g., *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016); *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).

¹⁰⁰ See, e.g., *Scott v. City of Anniston*, 597 F.2d 897, 899 (5th Cir. 1979) ("Discriminatory intent must be shown in fourteenth-amendment actions against government agencies.").

¹⁰¹ See, e.g., *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 234 (1964) (invalidating school board decision to close all public schools rather than desegregate them); *id.* at 222 n.6 (citing the Board's public explanation of its refusal to appropriate money or levy taxes to carry on the county's public school system: "Knowing the people of this county as we do, we know that it is not possible to operate the schools of this county within the terms of that principle [of admission without regard to race] and, at the same time, maintain an atmosphere conducive to the educational benefit of our people").

¹⁰² See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

¹⁰³ For example, in *McCreary v. ACLU*, one of the Ten Commandments displays at issue was erected by an official the opinion describes as a "Judge-Executive." See *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 851 (2005). See generally, Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537 (2019).

¹⁰⁴ *Masterpiece Bakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018).

ing different views on the relevance of decision maker statements in the context of legislation, the opinion suggested that here the commissioners' statements were clearly relevant, as they were made "by an adjudicatory body deciding a particular case."¹⁰⁵ So the statements of these administrative actors, sitting in an adjudicatory capacity, were deemed relevant, perhaps in part *because of* the speakers' identity. And this seemed to be the view not only of Justice Kennedy, but of the entire Supreme Court, since none of the three separate writings seemed to depart from this aspect of the majority opinion (though Justices Ginsburg and Sotomayor suggested that these comments, though unfortunate, were trivial¹⁰⁶).

Masterpiece is unusual in even acknowledging the status of the government actor whose intent is deemed relevant, but earlier case law confirms the relevance of both the intentions and the statements of executive-branch officials. The government actors in *McCreary v. ACLU*, a frequently-cited Establishment Clause case involving a Ten Commandments display, are alternately referred to as "Executives" and "Judge-Executives."¹⁰⁷ And the school officials responsible for "direct[ing] the performance of a formal religious exercise at promotional and graduation ceremonies," struck down by the Court in *Lee v. Weisman*, are best thought of as executive-branch officials.¹⁰⁸

Also relevant to these debates is the doctrine of qualified immunity, which involves judicial inquiries into the intent or knowledge of actors within the executive branch, both federal officials under *Bivens*¹⁰⁹ and state officials under § 1983.¹¹⁰ As the Court has explained, qualified immunity confers on public officials protection from damages liability under some circumstances. While the language of subjective intent once appeared in the Court's qualified immunity cases,¹¹¹ the Court in *Harlow*

¹⁰⁵ *Id.* at 1730.

¹⁰⁶ *Id.* at 1749 (Ginsburg, J., dissenting). See generally Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 133 (2018) (arguing that in cases such as *Masterpiece*, the Court scrutinizes state officials' adjudicative etiquette more than the Constitutional principles at stake).

¹⁰⁷ *McCreary*, 545 U.S. at 850.

¹⁰⁸ 505 U.S. 577, 586–87 (1992).

¹⁰⁹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

¹¹⁰ 28 U.S.C. § 1983.

¹¹¹ See *Wood v. Strickland*, 420 U.S. 308, 322 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974); see also Pozen, *supra* note 93, at 898–99 ("Where [qualified immunity] does apply, the Court has narrowed its focus to objective reasonableness and 'purged' any consideration of motive from the qualified immunity analysis . . .").

v. Fitzgerald broke with such tests, setting forth a rule that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”¹¹²—what is now known as an “objective” standard. In rejecting the subjective test, the Court referenced the “substantial costs attend[ing] the litigation of the subjective good faith of government officials,”¹¹³ and explained that “[j]udicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons, including an official’s professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.”¹¹⁴

Under this test, then, intent or knowledge is typically imputed based on surrounding circumstances, rather than derived from evidence of conduct or speech outside of the particular sequence of events in question. But the Court has also made clear that in qualified immunity cases, “[w]hen intent is an element of a constitutional violation”—for example, in the equal protection context—*Harlow*’s objective test does *not* preclude an inquiry into the intent of the official in question.¹¹⁵ Even in the qualified immunity context, then, where the Court has for decades rejected subjective notions of intent, there is room for inquiry—in particular in cases where a particular doctrinal test so provides—into the intent of government officials.¹¹⁶ So the doctrine of qualified immunity further supports the relevance of intent of executive-branch officials (though in application it often shields such officials from liability).¹¹⁷

¹¹² *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also* *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (“Government officials are entitled to qualified immunity with respect to ‘discretionary functions’ performed in their official capacities.”).

¹¹³ *Harlow*, 457 U.S. at 816.

¹¹⁴ *Id.* at 817 (footnote omitted).

¹¹⁵ *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998); *see also* Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent That Haunts Objective Legal Reasonableness*, 50 BAYLOR L. REV. 869, 871 (1998) (explaining that in *Crawford-El*, the Supreme Court held that *Harlow*’s objective legal reasonableness standard “does not preclude inquiry into a defendant’s subjective intent when intent is an element of the plaintiff’s claim”).

¹¹⁶ *See* Eskow & Cole, *supra* note 115, at 871.

¹¹⁷ *See, e.g.,* *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1865–69 (2017). *But see* Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 813 (2010) (“*Bivens* cases are much more successful than has been assumed by the legal community . . .”);

B. Constitutionally Inflected Administrative Law

In addition to these constitutional cases, pockets of administrative law feature judicial inquiries into the intent of executive-branch actors. All of these cases involve executive-branch actors other than the President.¹¹⁸ But, like the cases discussed above, they may shed light on questions of intent and the President. Accordingly, the first sub-Part below surveys a line of administrative-law cases which appear under the rubric of the “unalterably closed mind” doctrine. The next sub-Part discusses the Court’s well-known case *Accardi v. Shaughnessy*.

Discussions of intent or purpose in the context of legislation are comparatively straightforward, in that the government action in question always takes the same form—a bill, passed by both houses of Congress, and signed by the President or with supermajorities over his veto. Executive action, by contrast, comes in many (almost limitless) forms. Within the administrative state, agencies issue regulations and adjudicate disputes; they also issue interpretive rules, generate statements of policy, and produce other kinds of informal guidance materials.¹¹⁹ Most such agency instruments are subject to judicial review, and in several discrete areas of administrative law doctrine, courts focus on the intent of administrative actors in ruling on such challenges.

1. *Administrative Law’s “Unalterably Closed Mind” Doctrine*

A number of administrative-law cases entertain questions regarding the intent or state of mind of administrative decision makers, including examining extrinsic statements as relevant evidence, under the rubric of the “unalterably closed mind” doctrine. This doctrine, which arises in the context of both rulemaking and adjudication, is an important one from the perspective of this piece: it is concerned with intent, and it

see also William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 60–61 (2018) (describing and criticizing qualified immunity doctrine).

¹¹⁸ Indeed, the President scarcely appears in these cases, but that is hardly unique; as a general matter, “courts tend to ignore presidential involvement when reviewing agency actions.” Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1857 (2015).

¹¹⁹ See Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 219 (1993) (arguing that the literature on presidential control has not been sufficiently attentive to “different types of agency decisionmaking,” and proposing as a “rough cut” the categories of “adjudication, selection of regulatory strategies, value selection, and statutory interpretation”).

explicitly grapples with the problem of government actors who speak in several registers—as political figures with policy views, on the one hand, and also as public officials wielding particular legal authorities, on the other. Indeed, some of the cases explicitly discuss the question of how statements made by agency actors operating in the former role may impact action taken in the latter. In brief, these cases endorse the view that intent may be relevant in assessing and on occasion invalidating agency action; and, although they articulate a standard that is difficult to satisfy on the basis of extrinsic evidence, they do not erect an insuperable obstacle to the use of such statements.

As the D.C. Circuit has explained on a number of occasions, “agencies proceeding by informal rulemaking should maintain minds open to whatever insights the comments produced by notice under [the APA’s notice-and-comment rulemaking process] may generate.”¹²⁰ But the standard for successfully challenging a rulemaking or disqualifying a decision maker on the grounds that a decision-making process or particular decision maker has failed to maintain an open mind, or prejudged an outcome, is a very high one: “a Commissioner should be disqualified only when there has been a *clear and convincing showing* that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding.”¹²¹

So in *Association of National Advertisers, Inc. v. FTC*, several associations of advertisers and toy manufacturers sought to prevent Michael Pertschuk, Chairman of the Federal Trade Commission, from participating in a rulemaking regarding advertising that targeted children.¹²² They prevailed in the trial court, relying on Pertschuk’s public remarks in various venues.¹²³ The most important of these was a speech before a research conference, in which Pertschuk argued that “children have only a minimal understanding of the nature of television commercials and are unable to distinguish between advertising and other forms of information,” and quoted a finding that “many children do not have the sophistication or experience needed to understand that advertising is not just another form of informational programming.”¹²⁴ But the D.C. Circuit re-

¹²⁰ NRDC v. EPA, 859 F.2d 156, 194 (D.C. Cir. 1988).

¹²¹ Ass’n of Nat’l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1170 (D.C. Cir. 1979) (emphasis added).

¹²² *Id.* at 1155.

¹²³ *Id.* at 1156.

¹²⁴ *Id.* at 1171.

versed the trial court, explaining that “[t]he mere discussion of policy or advocacy on a legal question . . . is not sufficient to disqualify an administrator.”¹²⁵ The court explained that “[a]n agency member may be disqualified . . . only when there is a clear and convincing showing that he has an unalterably closed mind.”¹²⁶ The opinion concluded by noting that

The appellees have a right to a fair and open proceeding; that right includes access to an impartial decisionmaker. Impartial, however, does not mean uninformed, unthinking, or inarticulate. . . . We would eviscerate the proper evolution of policymaking were we to disqualify every administrator who has opinions on the correct course of his agency’s future action.¹²⁷

Another case involving an FTC rule, *Consumers Union v. FTC*, featured a consumer challenge to an FTC decision to omit from a final “Used Car Rule” a provision that would have required used-car dealers to affix to windshields stickers notifying prospective buyers of any known defects.¹²⁸ The plaintiffs raised an objection to the impartiality of the chairman, on the grounds that during the comment period he apparently informed a reporter “that the Revised Rule would not contain a known-defects provision,” and at a press conference commented that an earlier iteration of the rule without a known-defects provision “is the rule that I think best.”¹²⁹ Explaining that such evidence “gives no indication of a mind that has been closed to the evidence in the past or that would disregard any significant new material subsequently introduced,”¹³⁰ the court found that neither statement “approaches the ‘clear and convincing evidence’ that must be produced to prove that [the chairman] had ‘an unalterably closed mind on matters critical to the disposition of the proceeding.’”¹³¹

125 *Id.*

126 *Id.* at 1154.

127 *Id.* at 1174.

128 *Consumers Union v. FTC*, 801 F.2d 417, 418 (D.C. Cir. 1986).

129 *Id.* at 426.

130 *Id.* at 427.

131 *Id.* (quoting *Ass’n of Nat’l Advertisers*, 627 F.2d at 1170); see also *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 625 (D.C. Cir. 1987) (“Although the Secretary might prefer that state governments regulate ‘public health issues’ because they have ‘traditionally been a primary concern of state and local officials,’ Congress . . . decided that the federal government would take the lead [T]he Secretary may not withhold or delay issuance of a standard within his jurisdiction because he holds a different vision of the federal government’s role in this field than the role envisioned by Congress and enacted into law”).

These and other cases set a high bar for challenges to rulemaking based on an official's outside statements. But where the agency conduct in question is an adjudication rather than a rulemaking, courts *have* at times set aside agency action or disqualified particular actors based on outside statements. The leading case here is *Cinderella Career and Finishing Schools, Inc. v. FTC*, in which the FTC ordered a group of "finishing schools" to cease and desist from certain practices and representations the Commission concluded were "unfair and deceptive"¹³² regarding the value of a Cinderella education and the career prospects of program graduates. Cinderella challenged the order against it, pointing to a speech by FTC Commissioner Dixon, which it argued undermined the integrity of the FTC proceeding.¹³³ The speech included this language:

What kind of vigor can a reputable newspaper exhibit? . . . What would be the attitude toward accepting good money for . . . ads that offer college educations in five weeks, . . . or becoming an airline's hostess by attending a charm school? . . . Granted that newspapers are not in the advertising policing business, their advertising managers are savvy enough to smell deception when the odor is strong enough.¹³⁴

Quoting this speech and concluding that a decision maker must be disqualified from participating in an adjudication if "a disinterested observer may conclude that [he] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it,"¹³⁵ the court vacated the order and remanded to the FTC with directions to reconsider the

¹³² The complaint alleged that Cinderella made the following claims:

1. Petitioners make educational loans to students who register for courses at the Cinderella Career and Finishing School.
2. School Services, Inc. is a government or public nonprofit organization that has officially approved the Cinderella School or its courses.
3. Dianna Batts, 'Miss U.S.A. 1965,' and Carol Ness, 'Miss Cinderella 1965,' were graduates of the Cinderella School and owe their success to the courses they took there.
4. and 5. Petitioners offer courses of instruction which qualify students to become airline stewardesses and buyers for retail stores.
6. Petitioners find jobs for their students in almost all cases through their job placement service.
7. Graduates of petitioners' courses are qualified to assume executive positions.
8. Cinderella Career and Finishing School is the official Washington, D.C., headquarters for the Miss Universe Beauty Pageant.
9. Cinderella Career College and Finishing School is a college.

Cinderella Career & Finishing Sch., Inc. v. FTC, 425 F.2d 583, 584 n.1 (D.C. Cir. 1970).

¹³³ *Id.* at 584.

¹³⁴ *Id.* at 589–90 (emphasis added).

¹³⁵ *Id.* at 591 (quoting Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir. 1959)).

evidence against Cinderella, *without* the participation of Commissioner Dixon.¹³⁶

Although it has not addressed the issue in much detail, the Supreme Court has on occasion opined on the question of when the expressed views of administrative actors might taint the output of administrative processes, in particular adjudicatory processes. Most notably, an aspect of *United States v. Morgan*, one of several Supreme Court encounters with the protracted litigation surrounding rate-setting at the Kansas City Stockyards under the Packers and Stockyards Act, involved the impact of the Agriculture Secretary's public statements on his rate determination. In the case's last trip to the Supreme Court,¹³⁷ the party challenging the rate determination attempted to disqualify the Secretary because of a critical letter he had written to the New York Times regarding the outcome of one of the earlier cases.¹³⁸ The Court responded to this attempted disqualification:

That [the Secretary] not merely held but expressed strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court. . . . In publicly criticizing this Court's opinion the Secretary merely indulged in a practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press. Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.¹³⁹

Morgan is often read as establishing a high bar to the disqualification of an administrative official, and also as setting forth something of a presumption of good faith on the part of such officials. And indeed, the language excerpted above supports that reading. But it is also significant that the Court did not dismiss entirely the possibility that the Secretary's views on an

¹³⁶ *Id.*

¹³⁷ *United States v. Morgan*, 313 U.S. 409, 421 (1941); *United States v. Morgan*, 307 U.S. 183 (1939); *United States v. Morgan*, 304 U.S. 1 (1938); *Morgan v. United States*, 298 U.S. 468 (1936).

¹³⁸ Henry A. Wallagh, Letter to the Editor, *Secretary Wallace Explains Kansas City Rate Decision; Head of Department of Agriculture Sees No Rebuke in the Hughes Pronouncement, but Believes Livestock Men Have Suffered Injustice*, N.Y. TIMES, May 8, 1938, at 72.

¹³⁹ *Morgan*, 313 U.S. at 421.

op-ed page might be relevant; rather, it seemed only to find that the particular views articulated in the letter at issue had no bearing on the Secretary's ability to participate in subsequent agency proceedings.

Another Supreme Court case, *FTC v. Cement Institute*,¹⁴⁰ featured a price-fixing charge against cement manufacturers. One of the respondents, Marquette, argued that "the Commission had previously prejudged the issues, was 'prejudiced and biased against the Portland cement industry generally,' and that the industry and Marquette in particular could not receive a fair hearing from the Commission."¹⁴¹ As evidence, Marquette pointed to Commission reports and testimony by individual commissioners, which made clear that some or all members of the Commission believed that the sort of point system utilized by the cement manufacturers *did* constitute a restraint of trade in violation of the Sherman Act. But the Court held that even assuming that "such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations. . . . [T]his belief did not disqualify the Commission."¹⁴² Those opinions had been formed prior to the adversarial process in which the respondents had a right to participate, and they did not establish "that the minds of its members were irrevocably closed on the subject of the respondents' . . . practices."¹⁴³

To be sure, these cases erect a high hurdle to actually invalidating agency action or disqualifying an official because of outside statements, especially in the context of rulemaking. But it seems quite significant that all *consider* the words of the executive-branch actors in question. And, although not all identify the source of the requirement that agency decision makers remain open-minded and unbiased, the Due Process Clause seems the most natural source of the obligation—the right to a fair hearing is broadly understood as foundational to due process.¹⁴⁴ These cases, then, in their focus on intent and state of mind, seem in many ways extensions of the constitutional cases surveyed in the preceding sub-Part.¹⁴⁵

¹⁴⁰ 333 U.S. 683 (1948).

¹⁴¹ *Id.* at 700.

¹⁴² *Id.*

¹⁴³ *Id.* at 701.

¹⁴⁴ *Cf.* *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" (quoting *In re Murchison*, 349 U.S. 133, 136 (1955))).

¹⁴⁵ A handful of similar cases involve formal adjudications under section 554 of the APA. What courts call the "will to win" doctrine excludes from decision-

2. *Accardi v. Shaughnessy*

Although it is not typically considered an “unalterably closed mind” case, the important administrative-law case *Accardi v. Shaughnessy*¹⁴⁶ closely resembles the cases above—featuring similar facts and the articulation of similar principles. *Accardi* involved a challenge to a deportation order.¹⁴⁷ The primary grounds for the challenge were the Attorney General’s statements at a press conference that he “planned to deport certain ‘unsavory characters,’” together with his preparation of a list of individuals, including the petitioner, to be targeted for deportation.¹⁴⁸ The petitioner argued that this amounted to “public prejudgment by the Attorney General,” rendering “fair consideration of petitioner’s case by the Board of Immigration Appeals . . . impossible.”¹⁴⁹

In a short and somewhat opaque opinion, the Court held that the Attorney General, by circumscribing the discretion of the Board of Immigration Appeals, had violated a regulation that conferred on the Board the power to exercise discretion when it came to deportation determinations.¹⁵⁰

The case is primarily known as the source of “the *Accardi* principle,” a requirement that agencies follow their own regulations.¹⁵¹ This principle, as a number of commentators have noted, is undertheorized: the Court has not, in *Accardi* or any other case, explained the source of the rule.¹⁵² But it is argua-

making processes individuals who previously held prosecutorial or investigative roles—or any related role that has engendered a “will to win”—in the same matter or a related one. See Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 773 (1981) (“The primary purpose of separating functions is to screen from decision-making those who have a will to win, a psychological commitment to achieving a particular result because of involvement on the agency’s team.”); see also *Grolier Inc. v. FTC*, 615 F.2d 1215, 1219–20 (9th Cir. 1980) (analyzing the APA’s legislative history and finding that Congress drafted section 554(d) in part to address its concern over the “man who has buried himself in one side of an issue” and thus disabled himself “from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions”).

¹⁴⁶ 347 U.S. 260, 264–65 (1954).

¹⁴⁷ *Id.* at 263–64.

¹⁴⁸ *Id.* at 264.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 267 (“[T]he petition for habeas corpus charges the Attorney General with precisely what the regulations forbid him to do: dictating the Board’s decision.”).

¹⁵¹ Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 569 (2006) (describing the *Accardi* principle as a rule that “[a]gencies must comply with their own regulations”).

¹⁵² See *id.* (“The Supreme Court has never settled on an explanation for the source of this duty. The Court has variously suggested that it is inherent in the nature of delegated ‘legislative power’; that it is required by due process; and that

bly a due process interest in unbiased and fair decision making, of the same sort at issue in the cases discussed above, that underlies the rule. The petitioner challenged the Attorney General's bias; the manifestation of that bias or prejudice appeared in the circulated list and the Attorney General's press conference remarks. One reading of *Accardi*, then, is that when impermissible intent, here in the form of bias, infects agency decision making, the resulting decision contravenes the Constitution and must be set aside. And, crucially, the *Accardi* Court did not hesitate to consider the content of the Attorney General's public remarks in reaching its decision.

C. Intent in Ordinary Administrative Law

In contrast to the cases above, in the mine run of administrative-law cases—in which courts seek to answer questions about things like the consistency of agency action with the requirements of various provisions of the APA, or some other statute—administrative-law doctrine actually discourages inquiries into matters like intent. The *Morgan* cases, discussed above, are often cited as establishing the principle that courts should hesitate before inquiring into the motives of agency officials. And the Supreme Court in the famous case *Overton Park* elaborated on *Morgan*, suggesting that a court may only probe the “mental processes of administrative decisionmakers”¹⁵³ where there has been some threshold showing of bad faith or improper motive (though it has allowed for the propriety of such inquiries where officials have given no explanation for their decisions). And, as a corollary, it is black letter law that when reviewing administrative action, courts' review is limited both to the record before the agency and to the justifications offered by the agency at the time of the action under review.¹⁵⁴

In one significant case involving these principles, the *en banc* D.C. Circuit declined to review the transcripts of the closed proceedings of the Nuclear Regulatory Commission, which the plaintiffs had obtained and wished to use in their challenge to a licensing decision. The court refused the review on the grounds that no threshold showing of bad faith or improper motive had been made without reference to the tran-

it is a principle of administrative common law. The sparse commentary is not very helpful in sorting out the underpinnings of the *Accardi* principle either.”)

¹⁵³ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); see also *United States v. Morgan*, 313 U.S. 409, 422 (1941).

¹⁵⁴ See *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 158 (1962).

scripts themselves¹⁵⁵ (though four members of the current Supreme Court appear to view this case as an unwarranted extension of *Overton Park* and *Morgan*¹⁵⁶).

These cases suggest that where courts evaluate agency action, most of the time there is no space to consider the intent of agency decision makers. But even these cases allow for the possibility that with a sufficiently strong threshold showing, both intent and the materials that might establish it may be permissible subjects of judicial inquiry.

D. Intent in Regulatory Interpretation

One additional aspect of administrative law may be relevant to the evaluation of executive action: regulatory interpretation. When it comes to agency regulations issued pursuant to the APA's notice-and-comment procedures, an emerging literature has begun to grapple with the same sorts of interpretive questions that have long preoccupied commentators in the context of statutory interpretation.

Professor Kevin Stack is largely responsible for sparking this debate. In his article *Interpreting Regulations*, Stack observes that despite the centrality of regulations as sources of law, "courts have not developed a consistent approach to regulatory interpretation."¹⁵⁷ Attempting to offer such an approach, Stack advocates a method of interpretation he calls "regulatory purposivism"—essentially an application of Hart and Sacks' purposivist method of statutory interpretation to the interpretation of regulations.¹⁵⁸ Stack argues that the premise that "every statute and every doctrine of unwritten law . . . has some kind of purpose or objective"¹⁵⁹ has special force in

¹⁵⁵ There may be cases where a court is warranted in examining the deliberative proceedings of the agency. But such cases must be the rare exception if agencies are to engage in uninhibited and frank discussions during their deliberations. Were courts regularly to review the transcripts of agency deliberative proceedings, the discussions would be conducted with judicial scrutiny in mind. Such agency proceedings would then be useless both to the agency and to the courts. We think the analogy to the deliberative processes of a court is an apt one. Without the assurance of secrecy, the court could not fully perform its functions.

San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n, 789 F.2d 26, 45 (D.C. Cir. 1986).

¹⁵⁶ See *In re United States*, 138 S. Ct. 371, 373 (2017) (Breyer, J., dissenting from the denial of certiorari).

¹⁵⁷ Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 359 (2012).

¹⁵⁸ *Id.* at 363.

¹⁵⁹ *Id.* at 388.

the context of regulations; this is largely because the presumption that laws are enacted by “reasonable persons pursuing reasonable purposes reasonably”¹⁶⁰ is especially well-grounded in the context of agency actors, who are constrained by a number of doctrines that require reasoned deliberation, reason-giving, and a fit between offered reasons and actual conduct.¹⁶¹

Much of Stack’s discussion defends reliance on the “statements of basis and purpose” that accompany every regulation, and he expressly declines to address the potential relevance of other sources in cases in which reading statements of basis and purpose together with a rule’s substantive provisions fails to answer the interpretive question.¹⁶² But his argument certainly leaves open the possibility of relying on at least certain sorts of extrinsic agency materials, beyond the statements of basis and purpose that are his focus.

Jennifer Nou has argued that a textualist approach is more appropriate in the context of the interpretation of regulations, largely on the grounds, based in textualist critiques of intent in statutory interpretation, that it is highly unlikely that “multi-member institutions like administrative agencies possess a singular, identifiable intent or purpose.”¹⁶³ She argues that this criticism has the most force in the context of independent agencies headed by multimember boards and commissions, but applies as well, for a number of institutional reasons involving the President and OIRA, in the context of ordinary executive agencies.¹⁶⁴

Neither approach has yet won the day, and judicial approaches to interpreting regulations remain somewhat ad hoc, with some decisions hewing closely to regulatory text and others consulting a range of sources in interpreting regulations, including not just statements of basis and purpose, but the legislative history of the underlying statute,¹⁶⁵ informal

¹⁶⁰ *Id.* at 384–86 (citing HART, JR. & SACKS, *supra* note 27, at 1378).

¹⁶¹ Stack, *supra* note 157, at 359.

¹⁶² *Id.* at 407 (“[I]n cases in which the text and the statement of basis and purpose offer no assistance, the account of purposive regulatory interpretation would need to be specified further and could take more textualist or purposive variants.”).

¹⁶³ Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81, 94–95 (2015).

¹⁶⁴ *See id.* at 94–96.

¹⁶⁵ *See, e.g.*, *Fernandez v. Zoni Language Ctrs., Inc.*, 858 F.3d 45, 51 (2d Cir. 2017) (“The purpose of the regulation warrants no different conclusion. What scant legislative history there is . . . suggests that it was premised on the intention to exempt workers who ‘typically earned salaries well above the minimum wage, and . . . were presumed to enjoy other compensatory privileges . . . setting them

agency guidance documents,¹⁶⁶ and records of internal administrative processes.¹⁶⁷ This is an important and still young interpretive debate, and it highlights the need to engage with questions of interpretation when it comes to the range of modes of executive action.

The cases in this Part reflect regular invocation of the intent of executive-branch actors. The “unalterably closed mind” cases, and arguably *Accardi*, focus on constitutionally-grounded notions of intent as state of mind, in particular bias or closed-mindedness. These cases provide a powerful counter-point to the claim that administrative law does not engage with intent. And extrinsic evidence is central to these cases: all ask whether statements made outside of administrative-law processes indicate that decisions rendered inside of those processes were infected by impermissible intent. In addition, the regulatory interpretation debates show scholars grappling with the question of whether and how to consider the intent of agency actors in construing regulations. This discussion, then, establishes that there is much in administrative law to support the claim that, in some instances, inquiry into the intent of executive-branch actors is a familiar feature of our law.

III

DEVELOPING A FRAMEWORK FOR PRESIDENTIAL INTENT

We come, finally, to the questions that began this piece: When, if ever, should courts evaluating presidential action inquire into presidential intent? If such inquiries are ever appropriate, on what sources should courts rely in conducting the

apart from the nonexempt workers entitled to overtime pay.” (quoting *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,124 (Apr. 23, 2004) (codified at 29 C.F.R. pt. 541).

¹⁶⁶ See, e.g., *Abington Memorial Hosp. v. Burwell*, 216 F. Supp. 3d 110, 127 (D.D.C. 2016).

¹⁶⁷ See, e.g., *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 521 (1994) (Thomas, J., dissenting) (describing agency officials’ reimbursement practices under contested regulatory provision); see also Lars Noah, *Divining Regulatory Intent: The Place for a “Legislative History” of Agency Rules*, 51 HASTINGS L.J. 255, 260 (2000) (arguing that “courts should pay more attention to original agency intent and consult pre-promulgation materials”); cf. Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1797 (2015) (“[I]n the contexts of both statutory interpretation and administrative law” the unorthodoxies of modern lawmaking “have been largely invisible”).

intent inquiry? And what principles might guide courts as they approach these questions? As the preceding Parts have elaborated, when it comes to the ordinary interpretation of statutes, the quest for intent and the role of outside materials are both hotly debated and controversial. At the same time, when it comes to both statutes and executive action, there is substantial constitutional doctrine that places official intent (and statements as evidence of intent) at the center of the inquiry into constitutionality. So too does a constitutionally-inflected slice of administrative law, which deals explicitly with the intent and motives of executive-branch actors. This intent-focused administrative law stands in contrast to much of administrative-law doctrine, with its focus on facial review and its disinclination to consider intent or evidence outside of the administrative record.

Synthesizing all of this material in the context of the President, this Part argues that for a variety of structural and institutional reasons, it is ordinarily improper for courts to rely on presidential statements to illuminate presidential intent when it comes to the ordinary interpretation of presidential instruments. But there is strong support in both constitutional and constitutionally-inflected case law for looking to intent when a constitutional claim is raised in the context of presidential action. Accordingly, this Part argues that when it comes to the scope or meaning of a presidential directive, intent inquiries are typically misplaced,¹⁶⁸ but that it is appropriate and often necessary for courts to probe presidential intent in the context of assessing the constitutionality of presidential action.¹⁶⁹

This Part begins by surveying the limited existing authority, both from case law and scholarship, involving presidential intent in the context of executive orders and similar directives. It then asks directly about applicability of the ideas of legisla-

¹⁶⁸ For a recent argument in favor of textualism in the interpretation of presidential directives, see Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3338466 [<https://perma.cc/EY74-RCQG>].

¹⁶⁹ Direct presidential action—that is, action without Congress—can take the form of executive orders and presidential memoranda, see KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 4–5 (2001); proclamations, see HAROLD C. RELYEA, CONG. RES. SERV., PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW 14 (2008), <http://fas.org/sgp/crs/misc/98-611.pdf> [<https://perma.cc/PFP9-743N>]; and executive agreements, see Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007). Although “[t]he U.S. Constitution does not explicitly recognize any of these policy vehicles,” they are now well-established (though not uncontroversial) tools every President has utilized. WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 7 (2003).

tive purpose, legislative intent, and legislative history to presidential intent, and to speech as evidence of that intent. It then connects presidential directives to the administrative-law literature, and to constitutional law proper. Building on those discussions, it more fully develops the distinction described here—between scope and meaning, on the one hand, and constitutionality, on the other—and moves on to apply that framework to the examples set forth in the Introduction. Finally, it identifies and answers some key objections to the framework I propose.

A. The Existing Authority

1. *Case Law*

A handful of cases not discussed above engage explicitly (if in passing) with the question of presidential intent, so they warrant brief discussion here, as we turn more fully to the normative.

The first group of cases—which involve the President's power to create private rights of action, cognizable in the federal courts, through executive orders—discuss presidential intent in a way that largely mirrors discussions of legislative intent. Several lower-court cases from the 1960s and '70s address this question in the context of executive orders mandating nondiscrimination by government contractors. For instance, in *Farmer v. Philadelphia Electric Company*,¹⁷⁰ a federal appeals court focused on administrative history in determining that the executive order in question should not be read to create a private right of action. But a district court discussing a similar executive order a few years later invoked presidential intent (in addition to pragmatic considerations): “The existence of a private cause of action under the executive order would vastly complicate the administrative process contemplated by the order . . . a much more compelling demonstration of Presidential intent to allow a private right of action would be

¹⁷⁰ 329 F.2d 3, 9 (3d Cir. 1964) (“The history of the orders, the rules and regulations made pursuant to them, and the actual practice in the enforcement of the nondiscrimination provisions are all strong persuasive evidence, it seems to us, that court action as a remedy was to be used only as a last resort, and that the threat of a private civil action to deter contractors from failing to comply with the provisions was not contemplated by the orders.”); see also *Farkas v. Texas Instrument*, 375 F.2d 629, 633 (5th Cir. 1967) (“We agree with the conclusion there [in *Farmer*] reached that . . . the threat of a private civil action was not contemplated by the orders.”).

necessary in order for plaintiffs to prevail.”¹⁷¹ The court offered no real specifics on what a sufficiently compelling showing might consist of; and in neither of the cases did any extrinsic evidence of intent surface. Moreover, this specific right-of-action debate is largely academic today, since the majority of executive orders now expressly disclaim any intent to create a private right of action.¹⁷²

The Fourth Circuit, in a case interpreting an executive order banning the export of certain goods to Iran, first cited the language of the order, explaining that “[c]onsistent with the plain meaning of the term ‘export,’ the Executive Order intended to cut off the shipment of goods intended for Iran.”¹⁷³ But the court also cited extrinsic evidence of the President’s assessment of the situation, pointing to a presidential message to Congress: “This broad export ban reflected the President’s appraisal of the nation’s interest in sanctioning Iran’s sponsorship of international terrorism, its frustration of the Middle East peace process, and its pursuit of weapons of mass destruction.”¹⁷⁴ In another case, the Tenth Circuit considered whether two early nineteenth-century Executive Orders terminated reservations of land to the Navajo Tribe, concluding that they did; the court cited “the circumstances surrounding [a related statute] and EOs 1000/1284,” which it concluded “reveal[ed] unequivocal evidence of a widely held contemporaneous understanding,” including by Presidents, other executive-branch officials, and legislators, that the lands in question would return to the public domain.¹⁷⁵

In a handful of cases, the Supreme Court has itself made some reference to presidential intent in the context of executive orders or other presidential directives. In *Old Dominion v. Austin*,¹⁷⁶ for example, the Supreme Court held, referencing state-

¹⁷¹ *Traylor v. Safeway Stores, Inc.*, 402 F. Supp. 871, 876 (N.D. Cal. 1975); see also John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 867–70 (1981) (arguing, as relevant here, that where Congress delegates to the President the authority to create a private right of action, courts appropriately inquire into presidential intent, though such inquiry should be secondary to considerations of congressional intent).

¹⁷² See, e.g., E.O. 13,768, *supra* note 2, at 8658 (“This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.”).

¹⁷³ *United States v. Ehsan*, 163 F.3d 855, 859 (4th Cir. 1998).

¹⁷⁴ *Id.* (citing Message to the Congress on Iran, 31 WEEKLY COMP. PRES. DOC. 1584 (Sept. 18, 1995)).

¹⁷⁵ *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1419 (10th Cir. 1990).

¹⁷⁶ 418 U.S. 264, 274–75 (1974).

ments made by the President and other executive-branch officials, that “one of the primary purposes of the Executive Order was to ‘substantially strengthen the Federal labor relations system by bringing it more into line with practices in the private sector of the economy,’” and that “[i]n light of this basic purpose, we see nothing in the Executive Order which indicates that it intended to restrict . . . the robust debate which has been protected under the NLRA.”¹⁷⁷ In *Cappaert v. United States*, the Court explained that “[i]n determining whether there is a federally reserved water right . . . the issue is whether the Government intended to reserve unappropriated and thus available water,”¹⁷⁸ and found that “the 1952 [Presidential] Proclamation expressed an intention to reserve unappropriated water.”¹⁷⁹ It then explained that “[i]ntent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created,”¹⁸⁰ suggesting a purposivist approach akin to that used by courts in many statutory-interpretation cases. And in *Minnesota v. Mille Lacs Band of Chippewa Indians*,¹⁸¹ the Court applied its statutory severability standards to an Executive Order, asking “whether the President would not have revoked the 1837 Treaty privileges if he could not issue the removal order.” The Court was quite explicit, however, that it was merely assuming arguendo that “the severability standard for statutes also applies to Executive Orders”¹⁸²—and the statutory standard turns on congressional intent.¹⁸³

Beyond these scattered examples, and several others,¹⁸⁴ federal courts have typically *not* grappled with presidential in-

¹⁷⁷ *Id.* (quoting Announcement of the Signing of Executive Order 11,491, 5 WEEKLY COMP. PRES. DOC. 1508 (Oct. 29, 1969)).

¹⁷⁸ 426 U.S. 128, 139 (1976).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ 526 U.S. 172, 191 (1999).

¹⁸² *Id.*

¹⁸³ See *In re* Petition of Reyes, 910 F.2d 611, 613 (9th Cir. 1990) (“This suggestion coupled with the language of the Order renders it apparent that the President would not have signed this Order had he known it would encompass those aliens serving in the military in other geographical locations unrelated to the Grenada invasion,” and therefore the entire Order should be deemed invalid based on an invalid provision); see also Erica Newland, Note, *Executive Orders in Court*, 124 YALE L.J. 2026, 2069–71 (2015) (“[W]hile courts often seek to effectuate (some version of) congressional intent when interpreting statutes, their guiding principle when interpreting executive orders . . . has generally been to give effect to presidential intent.” (emphasis omitted) (footnote omitted)).

¹⁸⁴ See, e.g., *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 235–36 (8th Cir. 1975) (“[I]n our view, Executive Order No. 11821 was intended primarily as a managerial tool for implementing the President’s personal economic policies and

tent in the context of construing executive orders—and this fact alone is striking. Courts consider challenges to executive orders with some frequency¹⁸⁵—including in canonical cases like *Youngstown*¹⁸⁶—and yet they typically do not explicitly engage with the President’s intent in resolving challenges to those orders.

2. Commentary

The administrative-law literature, while focusing on both structural and functional dimensions of the relationship between the President and administrative agencies, has paid scant attention to questions of presidential intent. The canonical *Presidential Administration*, by then-Professor Elena Kagan, both identifies and celebrates a shift toward presidential control over, and rhetorical appropriation of, the output of regulatory processes.¹⁸⁷ The piece engages with the President’s exercise of authority over the administrative state; but throughout, it steers clear of probing the intent or mental processes of President Clinton or any other President. Consider the paper’s lengthy discussion of President Clinton’s executive order regarding OMB regulatory review.¹⁸⁸ The article offers a close reading of a number of provisions of the executive order’s text; describes the interactions between the order’s provisions; and identifies areas of continuity with, and breaks from, the regulatory review paradigms that preceded it.¹⁸⁹ But there is not so much as a whisper regarding the President’s *intent*. Kathryn Watts, in a recent piece that continues charting the trajectory identified in *Presidential Administration*, focuses on the mechanisms by which outright direction or softer types of presidential influence may be brought to bear on agencies, but similarly focuses on text and conduct, not intent.¹⁹⁰

not as a legal framework enforceable by private civil action. . . . [W]e conclude that the President did not undertake or intend to create any role for the judiciary in the implementation of Executive Order No. 11821.”); *Mobley v. C.I.A.*, 924 F. Supp. 2d 24, 58 (D.D.C. 2013), *aff’d*, 806 F.3d 568 (D.C. Cir. 2015) (“Absent any affirmative evidence that the Executive Order intended to prohibit delegation of the authority to perform this document-by-document classification, the delegation is presumptively permissible.”); Grove, *supra* note 168 (collecting cases).

¹⁸⁵ Newland, *supra* note 183, at 2047.

¹⁸⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952).

¹⁸⁷ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247–50 (2001).

¹⁸⁸ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

¹⁸⁹ Kagan, *supra* note 187, at 2285–90.

¹⁹⁰ See Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 700–04 (2016).

There is much more literature in this vein.¹⁹¹ But the basic point is that all of this work focuses very closely on the relationship of the President to the administrative state, but never engages in the sort of inquiry into intent that we have encountered in both the constitutional law domain, and in some of the administrative-law cases involving intent and subordinate federal officials. As I argue in the next section, this de-emphasis of intent is perfectly appropriate in the context of construction of presidential instruments, at least where no constitutional violation is alleged.

B. Analogies

1. *Legislative History and Legislative Intent*

Part I surveyed the key debates surrounding both legislative intent and legislative history. In the context of the President, there are two distinct ways that intent, and statements as evidence of that intent, might be relevant in legal contests that do *not* involve constitutional claims: first, in the context of the interpretation of legislation; and second, in the context of the interpretation of presidential directives, like executive orders. Before turning to presidential directives, I briefly consider presidential speech and presidential intent in the context of legislation.

Presidential statements have not always received adequate scholarly attention in legislative-history debates.¹⁹² But the President's role in the legislative process goes well beyond sign-

¹⁹¹ See, e.g., Peter L. Strauss, *Overseer, or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704–05 (2007) (arguing that the President's role in relation to administrative agencies created by Congress "is that of overseer and not decider"); Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2583 (2006) (arguing that "the executive's law-interpreting authority is a natural and proper outgrowth of . . . the shift from regulation through common law courts to regulation through administrative agencies").

¹⁹² See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2125 (2016) (reviewing KATZMANN, *supra* note 31) ("Lawyers, academics, and judges too often treat legislation as a one-body process ('the Congress') or a two-body process ('the House and Senate'). But formally and functionally, it is actually a three-body process: the House, the Senate, and the President. Any theory of statutory interpretation that seeks to account for the realities of the legislative process . . . must likewise take full account of the realities of the President's role in the legislative process."); see also Christopher S. Yoo, *Presidential Signing Statements: A New Perspective*, 164 U. PA. L. REV. 1801, 1804 (2016) (proposing an "equal dignity principle" counseling "that both presidential and congressional legislative history be treated the same"); Daniel B. Rodriguez, Edward H. Stiglitz & Barry R. Weingast, *Executive Opportunism, Presidential Signing Statements, and the Separation of Powers*, 8 J. LEGAL ANALYSIS 95, 97 (2016) (suggesting that presidential signing statements "change the meaning of an act").

ing or vetoing legislation. The Constitution's Recommendation Clause imposes on the President the obligation to recommend legislation to Congress;¹⁹³ so, where bills are drafted in the executive branch or with significant involvement by executive-branch officials, there is an argument that statements by the President should be deemed especially relevant strains of legislative history. Indeed, the Supreme Court has recognized that the President "may initiate and influence legislative proposals,"¹⁹⁴ and the Court has cited presidential statements in canonical statutory interpretation cases.¹⁹⁵ As a general matter, textualist critiques of legislative history would seem to have less force in the context of presidential statements about legislation, where no multimember body problems are present, and where the Recommendation Clause may provide a constitutional basis for some consideration of presidential statements, since the constitutional language "recommend to their *Consid-*

¹⁹³ U.S. CONST. art. II, § 3 ("[The President] shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient . . ."); see also J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2081 (1989) (arguing that "the Framers explicitly elevated the President's recommendation of measures from a political prerogative to a constitutional duty").

¹⁹⁴ *Clinton v. New York*, 524 U.S. 417, 438 (1998); see also Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1818–19 (1996) ("[T]he President has aptly been termed the 'legislator-in-chief.'"); Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 103–04 (2015) ("Despite the conventional understanding of Congress as the primary source of legislation, often, the executive branch will draft entire pieces of legislation and transmit that legislation to Congress."); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1044–45 (2015) (finding that agency rule drafters rated presidential signing statements as being on par with both floor statements by sponsors and hearing transcripts in terms of reliability).

¹⁹⁵ See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 203 (1979) (citing remarks of Senator Humphrey, and noting that they echoed "President Kennedy's original message to Congress upon the introduction of the Civil Rights Act in 1963[:] 'There is little value in a Negro's obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job'" (quoting 109 CONG. REC. 11,074, 11,159 (1963))); cf. *State v. Santiago*, 122 A.3d 1, 47–48, (Conn. 2015) ("Turning our attention to the other elected branch of government, we also recognize that the meaning of a statute is revealed not only in the intent of the legislators who draft and enact it, but also in the aspirations of the governor who signs it."); *Burgos v. State*, 118 A.3d 270, 283 (N.J. 2015) (finding that "the Legislature and Governor clearly expressed an intent that Chapter 78 create a 'contract right'" but lacked the authority to do so); *Treasurer & Receiver Gen. v. John Hancock Mut. Life Ins. Co.*, 446 N.E.2d 1376, 1383–84 (Mass. 1983) ("The Governor's remarks clearly indicate that nonfiduciaries, such as insurers, were to be included within the scope of the act. . . . We cannot assume the Legislature ignored the Governor's request for broad legislation or limited the Governor's request in a statute passed shortly after his message, without expressing any limitations it imposed.").

eration”¹⁹⁶ seems to contemplate at least some sort of interbranch dialogue, in addition to whatever legislation might result from the presidential proposal.¹⁹⁷ But there is something of a paradox here; while the President in many ways “speak[s] for the only branch that can be said to have a single will,”¹⁹⁸ he often does so in exceedingly informal contexts and platforms—Twitter of course prominent among them in 2019—that may prove unreliable interpretive aids, especially in contrast to their more formal legislative-branch analogues. All of this suggests that courts may find presidential statements useful in construing statutes, but that they should remain sensitive to the format and subject matter of particular presidential statements, as well as to the context and process of passage of particular pieces of legislation.

The idea of presidential intent—and the use of presidential statements—in the context of judicial review of direct presidential action, rather than legislation, is both more uncharted and more complex.

Of the leading textualist critiques of the use of legislative history in statutory interpretation, some do and some do not appear to apply to presidential intent, and the use of presidential statements as evidence of that intent, when it comes to presidential directives. As discussed above, the multimember body objection is largely inapplicable in the context of executive-branch materials. Of course, Presidents act with the assistance of staff members within agencies and the White House.¹⁹⁹ But as a matter of constitutional structure—in par-

¹⁹⁶ U.S. CONST. art. II, § 3 (emphasis added).

¹⁹⁷ See also Vasana Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 10 (2002) (“Early commentators on the Constitution agreed that the State of the Union and Recommendation Clauses are mandatory.”); Kathryn Marie Dessayer, Note, *The First Word: The President’s Place in “Legislative History,”* 89 MICH. L. REV. 399, 404 (1990) (“The compulsory language in [the Recommendation Clause] makes presidential proposals of legislation a duty.”); Sidak, *supra* note 193, at 2081 (arguing that “the Framers explicitly elevated the President’s recommendation of measures from a political prerogative to a constitutional duty”). See generally Jeffrey K. Tulis, *Deliberation Between Institutions*, in DEBATING DELIBERATIVE DEMOCRACY 200, 200–10 (2003) (arguing that interbranch deliberation is an essential feature of the theory of separation of powers).

¹⁹⁸ JOSH CHAFETZ, CONGRESS’S CONSTITUTION 38 (2017).

¹⁹⁹ See, e.g., Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 822–25 (2017) (discussing the rise and role of the Office of Legal Counsel in White House decision making); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 234–41 (2016) (explaining that agency decisions are shaped by a group of government officials including agency leaders and civil servants).

ticular both the Vesting Clause²⁰⁰ and the Take Care Clause²⁰¹—only the intent of the President would seem potentially relevant when direct presidential action is at issue (though the picture is more complicated when action by a subordinate federal executive-branch official is in question). Similarly, presidential utterances in various fora, though their *relevance* may be debated, are not ordinarily subject to manipulation of the sort that may be present in the case of legislative history, where the paradigmatic example is of a staffer smuggling language into a committee report at the behest of a lobbyist²⁰²—and where members may never even read reports before they are finalized.²⁰³

The constitutional objections to the use of legislative history—that it undermines constitutional processes of bicameralism and presentment, as well as representing a questionable delegation²⁰⁴—seem to lack any real force in the context of direct presidential action. This is because in contrast to the legislative process, there is ordinarily no constitutionally prescribed process at all when it comes to executive action—executive orders, for example, do not so much as appear in the Constitution. Accordingly, there is no constitutional process that would be undermined or threatened by looking to intent, or using extrinsic sources to divine it, in the context of these modes of executive action. So none of the constitutional objections to the use of legislative history seem to apply to the use of presidential statements to interpret direct presidential action.

Arguments against the use of legislative history that are grounded in concerns regarding the judicial role may have some force in the context of the executive, especially because the universe of potentially relevant statements in the case of a figure like the President is virtually boundless. Contemporary Presidents are widely understood to “have a duty constantly to

²⁰⁰ U.S. CONST. art II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

²⁰¹ U.S. CONST. art II, § 3 (“[H]e shall take Care that the Laws be faithfully executed . . .”).

²⁰² See *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring) (“What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land . . .”).

²⁰³ *But see* Stipulation at 3, *Knight First Amendment Institute v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2017) (No. 17-cv-5205), <https://knightcolumbia.org/sites/default/files/content/Cases/Twitter/2017.09.25%20Stipulation.pdf> [<https://perma.cc/33B9-SK24>] (stipulating that White House Social Media Director Daniel Scavino sometimes posts messages on behalf of President Donald Trump).

²⁰⁴ See *supra* Part II.

defend themselves publicly, to promote policy initiatives nationwide, and to inspire the population.”²⁰⁵ To allow courts to selectively utilize casual presidential utterances as interpretive guides when it comes to presidential orders would render such use susceptible to just the sort of cherry-picking critique that opponents of legislative history have been able to marshal with considerable force in the statutory-interpretation context. Indeed, this was one of Judge Kozinski’s key objections to both a district court order and Ninth Circuit panel opinion invalidating President Trump’s first travel ban executive order. As he wrote, “[c]andidates say many things on the campaign trail; they are often contradictory or inflammatory. No shortage of dark purpose can be found sifting through the daily promises of a drowning candidate, when in truth the poor schlub’s only intention is to get elected.”²⁰⁶ Although Kozinski’s focus here was on campaign statements, the argument readily translates to Presidents today, with the high volume of speeches and other statements they customarily give²⁰⁷—particularly in a world in which, as President Donald Trump told reporters one month into his administration, “Life is a campaign. . . . Making our country great again is a campaign. For me, it’s a campaign.”²⁰⁸

So parts of the textualist case against legislative history seem to hold up in the context of the President, and some do not. But beyond these comparisons to legislative history debates, a number of additional considerations counsel against the use of presidential statements when it comes to the ordinary interpretation of presidential instruments. First, the Constitution itself supplies some support for distinguishing between the use of such materials in the context of the legislature, on the one hand, and the executive, on the other. Article I, Section 5, provides that each House of Congress will “determine the rules of its proceedings,” and additionally that “each House shall keep a Journal of its proceedings, and from time to

²⁰⁵ JEFFERY K. TULIS, *THE RHETORICAL PRESIDENCY* 4 (1987) (emphasis omitted).

²⁰⁶ *Washington v. Trump*, 858 F.3d 1168, 1173 (9th Cir. 2017) (Kozinski, J., dissenting from the denial of rehearing en banc) (footnote omitted).

²⁰⁷ *But see* Adam M. Samaha, *Looking Over a Crowd—Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554, 558 (2017) (challenging “the notion that discretion increases as sources increase”).

²⁰⁸ Lindsey Bever, ‘*Demonic Activity was Palpable*’ at Trump’s Rally, *Pastor Says*, WASH. POST (Feb. 22, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/02/22/demonic-activity-palpable-at-president-trumps-rally-pastor-says/?tid=sm_fb&utm_term=.e09de89c9308 [<https://perma.cc/2CUF-5HLT>].

time publish the same[.]”²⁰⁹ This language, as both Victoria Nourse and Jim Brudney have argued, is tantamount to a constitutional mandate to consider—or at least constitutional grounding for considering—“legislative evidence,” or what we more commonly refer to as legislative history.²¹⁰ In addition to this constitutional grounding, long-standing norms and practices have resulted in a degree of openness and public debate when it comes to congressional processes.²¹¹ While no one is naïve enough to think that everything of relevance to a bill’s passage appears in the Congressional Record, or in front of the cameras, these transparency requirements and practices nevertheless ensure that a degree of transparency attaches to the legislative process.

By contrast, nothing in the Constitution specifically requires any degree of public access to White House materials or decision-making processes. Of course, nothing in the document expressly protects White House secrecy either²¹²; but other founding-era documents contemplate some executive-branch secrecy,²¹³ and consistent practice since the founding has created a strong norm in favor of at least a degree of executive-branch secrecy.²¹⁴

²⁰⁹ U.S. CONST. art. I, § 5.

²¹⁰ See NOURSE, *supra* note 45, at 163 (“[T]he Proceedings Clause gives explicit authority to the ‘proceedings’ of each house, the proceedings documented in a constitutionally prescribed legislative journal. Because of that specific constitutional authority, legislative evidence should be given more, not less, constitutional weight than other materials.” (emphasis omitted) (footnote omitted)); James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1201 (2010) (describing Article I as having created “two notable innovations in legislative design that are relevant to how courts should approach statutory interpretation[:] . . . the determination to favor detailed public reporting of floor debates and the decision to create permanent standing committees that produced oral and then written committee reports”).

²¹¹ See, e.g., STEPHEN FRANTZICH & JOHN SULLIVAN, *THE C-SPAN REVOLUTION* 55–60 (1996) (describing debates on utilizing television to increase public access to political decision making).

²¹² See generally Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 520–21 (2007); DANIEL N. HOFFMAN, *GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS* (1981).

²¹³ See THE FEDERALIST NO. 70 (Alexander Hamilton) (Presidential “unity is conducive to energy” because “[d]ecision, activity, secrecy, and d[i]spatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number”).

²¹⁴ See David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 267 (2010); see also *United States v. Nixon*, 418 U.S. 683, 711 (1974) (“Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.”).

Presidential statements, especially those made using platforms like Twitter or during informal speeches and interviews, also fall short of the degree of preparation and care that often attend committee reports, widely viewed as the most reliable form of legislative history. In addition, as I have argued elsewhere, courts faced with presidential statements as potential interpretive guides are likely simultaneously to encounter executive-branch positions offered in other, more authoritative documents—typically briefs filed by the Department of Justice.²¹⁵ In such instances, the values of process and rigor suggest that *those* documents, rather than presidential statements, should be treated as containing the authoritative statements of the position of the executive branch on a legal question—in particular if there is tension between the two on matters of interpretation.²¹⁶

Even if courts thought presidential statements might illuminate the meaning of a presidential enactment, the relative ease of correction of presidential directives would seem to supply an additional reason for courts to refrain from probing presidential intent, in light of the arguments counseling against their use. In contrast to the complex and difficult process of passage of legislation to correct judicial interpretations, modifying an executive order is quite literally achieved with the stroke of a pen.²¹⁷

In addition, there is arguably an important distinction between presidential statements made via Twitter and in speeches and other fora, and presidential instruments like executive orders: the statements made by a particular President are irreducibly tied to that particular President. By contrast, presidential instruments like executive orders, which remain in

²¹⁵ See Shaw, *supra* note 3, at 123; Tulis, *supra* note 197, at 200–01 (“In the construction and exchange of texts institutions address the merits of public policy and the best of these exchanges manifest the most important attribute of deliberation: reciprocal respect for, and responsiveness to, opposing arguments regarding the issue addressed.”).

²¹⁶ See Shaw, *supra* note 3, at 131.

²¹⁷ See MAYER, *supra* note 169, at 4–5; Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 994 (2003) (“Executive orders are . . . freely revocable and revisable . . .”). For literature on congressional overrides of judicial decisions, see Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1317 (2014); Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 511 (2009).

effect unless and until a later President undoes them, can be viewed as products of the *institution* of the presidency.²¹⁸

The discussion in this subpart suggests that although presidential intent, and extrinsic materials as evidence of that intent, may be an appropriate component of an inquiry into the meaning of a statute, in particular a statute whose drafting process involved significant White House involvement, there is reason for caution about inquiries into intent, and reliance on certain sorts of extrinsic materials that might go to intent, in the context of executive action—at least where the judicial inquiry in question is not one in which any constitutionally impermissible intent is alleged.

2. Ordinary Administrative Law

Foundational principles of administrative law similarly counsel against relying on presidential statements to illuminate the meaning of presidential action; in fact, there may be more reason for caution in the context of interpretation of presidential actions than agency actions.

As discussed above, much of administrative law attends to the explanations given, and materials relied upon, by agency actors engaged in policymaking, discouraging courts from looking outside agency processes to assess agency action. *Chenery v. SEC* most famously holds that agency action can only be upheld on the basis of reasons that were given by the agency at the time it took the action under review.²¹⁹ This stands in contrast to lower court judgments, which can be affirmed on any basis (assuming arguments have been preserved).²²⁰ In addition, the Court in cases like *Morgan* and *Overton Park* has erected a high (though not insurmountable) hurdle to inquiring into the intentions of agency actors, at least where some sort of contemporaneous explanation for agency action was provided.²²¹

²¹⁸ See Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2221–22 (2018). Indeed, the publication norms around presidential directives like memoranda in the Federal Register, and the norm against publication even of presidential speeches of comparative formality, like State of the Union addresses, reflects our understanding of the enduring force of directives like memoranda. See also Shaw, *supra* note 3, at 77 n.15 (discussing publication practices around the presidency).

²¹⁹ *SEC v. Chenery Corp.*, 332 U.S. 194, 194 (1947).

²²⁰ *Id.*; *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 156 (1962).

²²¹ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

These principles may not apply directly to the President, since the Court has suggested that presidential action is not subject to review under the Administrative Procedure Act²²² (though some of these principles predate and perhaps transcend the APA). And it is not clear how the political accountability concerns that may explain *Chenery* translate to the context of the President, who of course is politically accountable in a way agencies are not.²²³

But there may be related but independent reasons to hesitate before probing intent in the mine-run of cases involving the President. Presidential action occurs free from the access and transparency requirements that attach to agency action. *Franklin v. Massachusetts* exempts presidential action from the requirements of the Administrative Procedure Act,²²⁴ with its robust public participation provisions, and courts have held that the Freedom of Information Act is not applicable to the White House.²²⁵ All of this means that courts encountering presidential directives do so without access to much in the way of decisional history,²²⁶ in ways that differ both practically and constitutionally from not only congressional but also agency products. So the invocation of isolated presidential statements seems unlikely to give the full picture of any decisional process in the case of presidential action. Selective citation, then, is unlikely to provide reliable insight into the proper interpretation of a presidential directive.

C. Scope, Meaning, and Constitutionality

The analogies to both legislation and agency action, then, counsel against inquiring into presidential intent in the course of construing presidential directives. But when it comes to *constitutional* claims, there are strong arguments, both practi-

²²² *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); *Dalton v. Specter*, 511 U.S. 462, 469 (1994) (“[T]he President’s actions [a]re not reviewable under the APA, because the President is not an ‘agency’ within the meaning of the APA.”).

²²³ See Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 1016 (2007). Note, however, that Stack actually argues that *Chenery*’s reason-giving requirement does apply to the President.

²²⁴ *Franklin*, 505 U.S. at 801 (“As the APA does not expressly allow review of the President’s actions, we must presume that his actions are not subject to its requirements.”).

²²⁵ See *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (records made by the National Security Advisor not subject to FOIA).

²²⁶ Where agencies have been intimately involved with the drafting of a presidential directive, as is often the case with either the Office of Legal Counsel or the Office of Management and Budget, FOIA is theoretically available, but a number of bases for withholding relevant documents means that release is unlikely.

cal and conceptual, for inquiring into presidential intent and for using presidential statements as evidence of that intent.

As shown in Parts I and II, courts have long inquired into the intentions of government actors in constitutional cases; and, absent some principled, Article II-grounded reason for distinguishing the President from other government actors when it comes to the relevance of intent, it may simply follow that presidential intent is no *less* relevant than the intent of any other actor. Of course, the deference courts extend to the President in the context of foreign affairs and national security matters may mean that such cases should be treated somewhat differently.²²⁷ Still, as Professor Micah Schwartzman recently explained, various conceptions of political legitimacy render official intentions relevant, both directly (“intentions might be relevant because the moral principles and ideals that are acceptable to reasonable citizens, and which are used to structure constitutional essentials, may include limits on how public officials can be motivated”) and indirectly (in the case of the travel ban, “because, when publicly conveyed, they demean or denigrate religious minorities in ways that are impermissible”).²²⁸ On the logic of both direct and indirect relevance, the intentions of the President, who is selected, if indirectly, by the polity as a whole, seem if anything *more* potentially relevant than the intentions of any other government official.

As Professor Schwartzman also suggests, as an epistemic matter there is nothing particularly distinctive or difficult about ascertaining presidential intent. Courts can simply apply familiar constitutional tests, inquiring into the history and public discourse surrounding the decision under review, including statements made around the decision, as well as the “specific sequence of events leading up the challenged decision.”²²⁹ Indeed, the constitutionally-inflected administrative

²²⁷ How much deference courts actually give the President in matters of foreign relations and national security is the subject of active debate. See Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 785 (2011) (challenging the prevailing account that “the Court will defer to executive views in core matters of foreign relations”).

²²⁸ Schwartzman, *supra* note 25, at 210–12.

²²⁹ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977); see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (plurality opinion) (“In determining if the object of a law is a neutral one,” a court should look to evidence that includes “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body”).

law cases discussed above demonstrate courts doing just that in the context of evaluating the motives of executive-branch actors other than the President.

At this point, it is worth revisiting a significant aside from the *Arlington Heights* opinion. The *Arlington Heights* Court provided critical guidance regarding how courts were to approach the intent inquiry in constitutional cases. But the Court also suggested that privilege might circumscribe courts' ability to conduct such inquiries, or at least limit their ability to elicit testimony from government officials that might go to intent.²³⁰

Presumably, the Court had in mind some version of legislative immunity, of which there are a number of forms. In the Constitution, the Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."²³¹ The provision has been understood to grant legislative-branch officials immunity from criminal and civil prosecution for actions within the sphere of legislative activity.²³² Although the protection is not unlimited—some judicial opinions actually take a narrow view of the scope of privileged activity²³³—the clause itself remains an illustration of the inviolability of at least some of the rhetorical activities of members of Congress.²³⁴

²³⁰ *Vill. of Arlington Heights*, 429 U.S. at 268 ("[M]embers [of such bodies] might be called to the stand at trial to testify concerning the purpose of the official action," though "such testimony frequently will be barred by privilege").

²³¹ U.S. CONST. art. I, § 6, cl. 1.

²³² *See, e.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975); *Doe v. McMillan*, 412 U.S. 306, 312–13 (1973); *United States v. Brewster*, 408 U.S. 501, 516 (1972); *Powell v. McCormack*, 395 U.S. 486, 502–03 (1969); *see also* Michael L. Shenkman, *Talking About Speech or Debate: Revisiting Legislative Immunity*, 32 *YALE L. & POL'Y REV.* 351, 371–84 (2014) (explaining the immunity the provision is understood to provide).

²³³ *See Hutchinson v. Proxmire*, 443 U.S. 111, 130–32 (1979) (permitting lawsuit against Senator based on materials he distributed outside of the legislature, on the grounds that "neither the newsletters nor the press release was 'essential to the deliberations of the Senate' and neither was part of the deliberative process"); *Gravel v. United States*, 408 U.S. 606, 625–26 (1972) (concluding that Senator Gravel's activities surrounding publication of the Pentagon Papers were "not part and parcel of the legislative process" and thus not covered by the Speech or Debate Clause); CHAFETZ, *supra* note 198, at 229 (critiquing the Court's unduly narrow vision of the clause, and arguing: "real legislative authority is, in fact, largely constructed through the processes of public engagement, and the Speech or Debate Clause ought to be understood to facilitate those processes"); *see also* JOSH CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 95 (2007).

²³⁴ Most state constitutions have provisions similar to the federal Constitution's Speech or Debate Clause. *See, e.g.*, N.Y. CONST. art. III, § 11 ("For any speech or debate in either house of the legislature, the members shall not be questioned in any other place."); *see also* Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 *WM. & MARY L. REV.* 221, 224

In light of this context, it is striking that no analogous privilege extends—or has ever been understood to extend—to the executive, in particular the President. Neither common law tradition nor constitutional provision shields *speech* by the Executive from potential later use in courts and other fora, as is the case with at least some legislative speech (although non-public debate and deliberation involving the President may certainly be subject to claims of executive privilege²³⁵). This distinction may shore up the case for the propriety of considering presidential intent, particularly where public statements appear to go to intent. Indeed, the divergent language in Article II compared to Article I may provide an affirmative constitutional warrant for considering presidential statements and presidential intent in constitutional cases.²³⁶

Of course, whatever the identity of the government official, not *all* utterances will necessarily be relevant in constitutional cases, even where the speech touches subject matter that could implicate constitutional protections. Indeed, as Justice Stevens has noted in the context of the Establishment Clause, there will be some instances in which government officials' statements are not even properly attributable to government as such. Writing of the practice of offering a short prayer or blessing in the context of a public address, he explained that "when public officials deliver public speeches, we recognize that their words are not exclusively a transmission from *the* government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity."²³⁷ In the cases that are my focus here, however, official speech touches on the subject of official action in ways

(2003) (identifying forty-three state constitutions containing similar provisions). And common law protections may exist even in states that have not constitutionalized the protection. State speech-or-debate protections are generally understood to sweep less broadly than the federal version, but like the federal clause, they provide robust—even absolute—protections to speech made in conjunction with core legislative activities. *Id.* ("In a number of recent cases, state courts have construed the absolute privilege that attaches to a legislator's work more narrowly than federal courts have interpreted the corresponding privilege found in the U.S. Constitution's Speech or Debate Clause." (footnote omitted)).

²³⁵ See *United States v. Nixon*, 418 U.S. 683, 686 (1974).

²³⁶ I should note that I do not explore presidential immunity from suit generally—merely the absence of a sort of presidential immunity akin to legislative immunity. For a recent discussion of presidential immunity more broadly, see Steve Vladeck & Benjamin Wittes, *Can A President's Absolute Immunity Be Trumped?*, *LAWFARE* (May 9, 2017, 5:17 PM), <https://www.lawfareblog.com/can-presidents-absolute-immunity-be-trumped> [<https://perma.cc/QY8J-MV9P>].

²³⁷ *Van Orden v. Perry*, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting); see also Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 *TEX. L. REV.* 583, 588 (2011).

that render reliance far more appropriate than in Justice Stevens' hypothetical.

One case in which the absence of any discussion of presidential (or other officials') intent is especially conspicuous is *Korematsu v. United States*.²³⁸ In that case, the Court failed to inquire into intent—either of President Roosevelt, whose executive order authorized the military to exclude groups or persons from designated areas,²³⁹ or of General DeWitt, who issued the exclusion order pursuant to which Fred Korematsu was arrested.²⁴⁰ Instead, the Court credited the government's proffered military necessity rationale—that “exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group . . . the military authorities considered that the need for action was great, and time was short”²⁴¹—and looked no further into official purpose.

The Court was presented with arguments that it should look behind the government's representations of necessity. *Korematsu's* brief contended that the order was animated by racial prejudice,²⁴² and it quoted at length from the report of General DeWitt on which the government largely relied:

What one day will be celebrated as a masterpiece of illogic but which is corroborative evidence this frenzied banishment was based upon prejudice appears in General DeWitt's letter of February 14, 1942, to the Secretary of War, one month and a half before the evacuation commenced. He characterizes all our Japanese as subversive in this letter by referring to the subject of “Evacuation of Japanese and other Subversive Persons from the Pacific Coast.” He states in the context thereof that “the Japanese race is an enemy race” and the native-born are citizens and “Americanized”, their “racial strains are

²³⁸ *Korematsu v. United States*, 323 U.S. 214 (1944); see also *Hirabayashi v. United States*, 320 U.S. 81 (1943).

²³⁹ Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

²⁴⁰ Civilian Exclusion Order No. 43, 7 Fed. Reg. 3967 (May 3, 1942).

²⁴¹ *Korematsu*, 323 U.S. at 218–24.

²⁴² In the words of the brief:

These quiet citizens, thousands of whose sons were in uniform, suffered the agonies of war and, along with their families, these insults and humiliations and, finally, the embarrassment of banishment and imprisonment, all because of the color of their skin, the slant of their eyes, the religions they professed and the old nationality of a few of their forebears.

Brief for Appellant at 10–12, *Korematsu*, 323 U.S. 214 (1944) (No. 22), 1944 WL 42849.

undiluted” and being “barred from assimilation by convention” may “turn against this nation.”²⁴³

The *Korematsu* majority made no mention of this report, but several of the dissenting opinions did. The dissent of Justice Murphy in particular argued that the exclusion order “goes over the very brink of constitutional power and falls into the ugly abyss of racism,”²⁴⁴ pointing to General DeWitt’s report as evidence that “this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity.”²⁴⁵

Of course, *Korematsu* is subject to nearly universal condemnation today.²⁴⁶ Some of the criticism focuses on the failure of the executive branch to provide truthful information to

²⁴³ *Id.* at 63 (citation omitted). Indeed, evidence that came to light much later revealed that this report was a revised version of an earlier report that reflected even more extensive bias and animus on the part of General DeWitt. See Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 977 (2004).

²⁴⁴ The dissent continues:

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General’s Final Report on the evacuation from the Pacific Coast area. In it he refers to all individuals of Japanese descent as “subversive,” as belonging to “an enemy race” whose “racial strains are undiluted,” and as constituting “over 112,000 potential enemies . . . at large today” along the Pacific Coast.

Korematsu, 323 U.S. at 233 (Murphy, J., dissenting) (citation omitted); *Id.* at 235–36 (footnote omitted).

²⁴⁵ *Id.* Noah Feldman suggests that “at the time [*Hirabayashi*] was decided, Murphy had already been concerned about the racial motivation of the detention, but allowed his dissent to become a concurrence. Now he decided the time was right to make a stand.” NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES* 249 (2010).

²⁴⁶ Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 396 (2011) (including *Korematsu* in the “anticanon,” that is, a “decision [that] has been rejected by our legal culture”); see also Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (“*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.” (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting))); *Korematsu v. United States*, 584 F. Supp. 1406, 1419–20 (N.D. Cal. 1984) (granting writ of coram nobis); NEAL KATYAL, ACTING SOLIC. GEN., DEP’T OF JUST., *Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases* (May 20, 2011), <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> [https://perma.cc/PG9D-4KGL]; *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 241 (2005) (agreeing with characterization of *Korematsu* as ranking among “some of the worst decisions in the history of the Supreme Court”).

the Court.²⁴⁷ And the case is somewhat distinct from my main focus here, in that the most potentially relevant statements came not from the President but a subordinate executive-branch official. But the Court's total failure to inquire into intent, in the context of accepting the government's attestation of military necessity, is a deep current within the case.²⁴⁸ And it supplies support for the position that, at least under some circumstances, judicial failure to probe official intent can result in profoundly misguided results.

D. Application

The foregoing discussion, I hope, establishes that there are good reasons for inquiring into the intentions or motives of the President in the context of constitutional claims. The justifications for doing so are straightforward: we have placed substantive limits on the permissible intentions or motivations of government officials, and those limits reflect certain constitutional principles and ideals: equality; freedom of religion; the impermissibility of government action designed to target individuals based on their membership in particular groups, or to punish speech for its content or views. Nothing in either the text or contemporary understandings of Article II grants the President an exemption from these generally applicable principles.

Against this backdrop, let us return to the examples described in the Introduction.

1. *Travel Ban*

Consider, first, the twin questions of the relevance of presidential intent to the constitutionality of the President's "travel ban" executive orders, and the significance of the President's statements (as both chief executive and earlier as presidential candidate) for courts confronting challenges to the successive directives. The legal questions surrounding the first iteration of the travel ban—issued one week into the new administration, enjoined by multiple courts, and eventually withdrawn and replaced by a second and then third version of the ban—

²⁴⁷ See Kang, *supra* note 242, at 977; Dean Masaru Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 4 ASIAN PAC. AM. L.J. 72, 74 (1996).

²⁴⁸ See Leah Litman & Ian Samuel, *No Peeking? Korematsu and Judicial Credulity*, TAKE CARE (Mar. 22, 2017), <https://takecareblog.com/blog/no-peeking-korematsu-and-judicial-credulity> [<https://perma.cc/YH7C-3JY7>].

provide the clearest illustration of the distinctions offered above.

The first ban was challenged on several constitutional grounds, including the Establishment Clause (on the basis that it disfavored Muslims) and the Due Process Clause (on the grounds that it operated to deprive some individuals of protected interests without notice or a hearing).²⁴⁹ The Court also faced questions regarding the scope and operation of the order in several respects, including whether it extended to lawful permanent residents, or green card holders. The White House had purported to resolve questions about the applicability of the order to green card holders through a memo from the White House Counsel.²⁵⁰ But suppose instead that the President himself had either tweeted or explained in an interview that green card holders were not subject to the ban—an important antecedent question to the challengers' constitutional due process claims.

The arguments offered above suggest that such presidential statements should not have been considered in construing the scope and reach of the order. By contrast, the presidential statements that a number of lower courts read as evincing an intent to discriminate against Muslims on the basis of religion *did* warrant consideration by courts deciding whether the orders were infected by constitutionally impermissible intent. The Establishment Clause, as the cases discussed in Part I make clear, is quite concerned with the intent of government actors, and the most relevant actor here is the President. Accordingly, it was appropriate for courts to consider statements made by the President, where those statements went to intent.

Indeed, the Fourth Circuit opinion invalidating the third iteration of the travel ban focused on both the President's purpose and his statements. In upholding a preliminary injunction that court explained:

Plaintiffs offer undisputed evidence that the President of the United States has openly and often expressed his desire to ban those of Islamic faith from entering the United States. The Proclamation is thus not only a likely Establishment Clause violation, but also strikes at the basic notion that the government may not act based on "religious animosity."²⁵¹

²⁴⁹ *Washington v. Trump*, 847 F.3d 1151, 1164–67 (9th Cir. 2017).

²⁵⁰ COUNSEL TO THE PRESIDENT, AUTHORITY GUIDANCE ON EXECUTIVE ORDER ENTITLED "PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES" (Jan. 27, 2017).

²⁵¹ *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 269 (4th Cir. 2018), as amended (Feb. 28, 2018), *cert. granted, judgment vacated*, 138 S. Ct.

The Supreme Court ultimately rejected this Establishment Clause argument—as well as several statutory challenges to the Proclamation—largely setting aside the presidential statements relied upon by the Fourth Circuit. The Court did not, however, fully close the door to such statements, relying in part on a concession by the Solicitor General that under some circumstances, when there is compelling enough evidence of animus, the Court need not limit its inquiry to the facial validity of a presidential directive.²⁵²

A moment at oral argument before the Supreme Court in *Trump v. Hawaii* precisely illustrates the distinction between meaning and constitutionality set forth above. In his rebuttal, Solicitor General Noel Francisco explained that “the [presidential] statements that [the plaintiffs] principally rely on don’t actually address the meaning of the proclamation itself. This is not a so-called Muslim ban. If it were, it would be the most ineffective Muslim ban that one could possibly imagine.”²⁵³

But that response suggested that the President’s words did not establish what the Proclamation *meant* or *did*—they did not convert a country-specific set of travel restrictions into an *actual* ban on Muslims entering the United States. And, as I have argued here, Solicitor General Francisco’s argument against relying upon the President’s words to assess the scope or meaning of the Proclamation was well-grounded. But Francisco did not squarely confront the potential use of the President’s words as evidence of presidential intent. Indeed, nothing in Francisco’s rebuttal provided any convincing reasons not to consider the statements for that very different purpose. So the travel ban case illustrates precisely the distinction I propose here.²⁵⁴

This argument also suggests that the Court erred in not taking more seriously the President’s statements; under ordinary Establishment Clause doctrine, the statements should have been deemed highly relevant. Still, it was quite significant that the Court did not entirely close the door to the legal rele-

2710 (2018) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 535 (1993)); see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2433, 2439 (2018) (Sotomayor, J., dissenting) (“Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus . . .”).

²⁵² See *Trump*, 138 S. Ct. at 2418.

²⁵³ Transcript of Oral Argument at 29, *Trump*, 138 S. Ct. at 2392 (No. 17-965).

²⁵⁴ Kate Shaw, *The Travel Ban Arguments and the President’s Words*, HARV. L. REV. BLOG (April 27, 2018), <https://blog.harvardlawreview.org/the-travel-ban-arguments-and-the-presidents-words/> [<https://perma.cc/LGK7-MQBJ>].

vance of presidential statements and presidential intent, even in cases involving matters like immigration or national security. The decision to leave that door open sends an important message to the lower courts—that they need not reject entirely the potential constitutional relevance of the words and intent of the President.

2. “Sanctuary” Cities

A second example involves the litigation over President Trump’s “sanctuary cities” executive order, an order framed as a response to municipalities that “willfully violate Federal law in an attempt to shield aliens from removal from the United States.”²⁵⁵ After its issuance, the order, and subsequent implementation by the Attorney General, were swiftly challenged by several municipalities on various constitutional and statutory grounds, and some of those cases remain ongoing.²⁵⁶ In these cases, too, a major question is what the order *does*—here, whether it imposes new conditions on municipalities that receive federal funds, or merely requires localities to comply with existing federal law. As one of the district courts considering such a challenge explained, “[t]he Government’s primary defense is that the Order does not change the law, but merely directs the Attorney General and Secretary [of Homeland Security] to enforce existing law.”²⁵⁷ But the court chose not to accept that characterization. It concluded, rather, based on both the text of the order and a number of statements by the President (as well as other executive-branch officials), that the order *did* impose new conditions, and accordingly that the localities were likely to succeed in their constitutional challenge. The statements on which the court relied included an interview with Bill O’Reilly in which the President explained that he was “very much opposed” to sanctuary cities and promised that “[i]f we have to, we’ll defund.”²⁵⁸ The court also cited a press conference in which Attorney General Sessions indicated that municipalities could be subject to “withholding grants, termination of grants, and disbarment or ineligibility for future

²⁵⁵ E.O. 13,768, *supra* note 2.

²⁵⁶ See Christina Goldbaum, *State Courts Become Battleground Over Trump’s Sanctuary Cities Policy*, N.Y. TIMES (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/nyregion/sanctuary-cities-state-courts.html> [<https://perma.cc/3K22-M5L8>].

²⁵⁷ *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 514 (N.D. Cal. 2017).

²⁵⁸ *Interview by Bill O’Reilly with Donald J. Trump, President of the United States*, AM. PRESIDENCY PROJECT (Feb. 3, 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=123062> [<https://perma.cc/SAP5-A6TV>].

grants,” as well as statements by the White House Press Secretary to the same effect.²⁵⁹ As the court explained, “[t]he statements of the President, his press secretary and the Attorney General belie the Government’s argument in the briefing that the Order does not change the law.”²⁶⁰

On the logic advanced here, it was arguably improper for the court to rely on the words of the President and subordinate officials in ruling on the operation of the executive order. As the Parts above contend, although analogous statements by legislators could prove useful in the construction of a piece of legislation, and although it was surely correct to focus on the order’s text, as the court did, considerations both constitutional and institutional counseled against the consideration of presidential statements merely in order to construe the executive order under review.

3. *Military Service by Transgender Individuals*

Finally, the litigation surrounding the Administration’s ban on military service by transgender individuals provides an additional illustration of the distinction I am drawing here.²⁶¹ The ban was initially announced via Twitter and followed by a Presidential Memorandum to the Secretaries of Defense and Homeland Security, directing them, among other things, to create a process for ending the accession of transgender individuals into the military.²⁶² A number of individuals challenged both the order and its implementation, and the courts have been required (the litigation is ongoing) to both interpret the order and decide whether it complies with the requirements of the Constitution.²⁶³

Once again, the arguments outlined above suggest that presidential statements, made via Twitter or elsewhere, should not be used to interpret the scope or operation of the order. By contrast, these statements—and potentially others that might

²⁵⁹ *Cty. of Santa Clara*, 250 F. Supp. 3d at 520, 522.

²⁶⁰ *Id.* at 523.

²⁶¹ Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), <https://twitter.com/realDonaldTrump/status/890193981585444864> [<https://perma.cc/R7DP-DXVN>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472> [<https://perma.cc/HB8H-XDZ6>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:08 AM), <https://twitter.com/realDonaldTrump/status/890197095151546369> [<https://perma.cc/52YQ-DDN5>].

²⁶² Memorandum on Military Service by Transgender Individuals, 82 Fed. Reg. 41,319 (Aug. 25, 2017).

²⁶³ See *In Tweets, President Purports to Ban Transgender Servicemembers*, 131 HARV. L. REV. 934, 936–39 (2018).

evinced animus toward transgender individuals as a group—could properly be considered in the context of equal protection challenges alleging that the order impermissibly discriminates on the basis of sex or gender identity.

E. Objections and Responses

Adopting the framework set forth above means accepting that in some instances, presidential utterances will remain off-limits to courts evaluating presidential action. So it is necessary to answer objections that courts ought to consider a wider swath of presidential utterances.

One argument in favor of considering all presidential statements is purely pragmatic—that judicial consideration of presidential statements will have a salutary effect on both the processes that produce presidential statements and the output of those processes. On this logic, Presidents might be incentivized to take more care with what they say if courts refuse to give a pass to presidential speech. A related objection is that for courts to place some presidential statements off-limits is essentially to countenance official mendacity,²⁶⁴ permitting Presidents to make one set of representations to the public and another to courts without any consequences.²⁶⁵

But one fairly straightforward response is that the consequences of government mendacity must in most instances be political, rather than judicial. The vast majority of governmental lies and misstatements will arise in matters that never make it before the courts to begin with. Even if courts were to bind political actors to their representations (and misrepresentations) in a narrow swath of cases in which such representations were relevant to the resolution of a justiciable dispute, such consequences would seem less likely to punish or deter misrepresentations writ large than would attempts by the press, civil society, and voters to hold Presidents and other government actors accountable.

²⁶⁴ See Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. 73, 110 (2015); Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 167.

²⁶⁵ This is a genuine concern in the case of a President who routinely lies or misleads. See Glenn Kessler et al., *President Trump Has Made 3,001 False or Misleading Claims So Far*, WASH. POST, https://www.washingtonpost.com/news/fact-checker/wp/2018/05/01/president-trump-has-made-3001-false-or-misleading-claims-so-far/?noredirect=on&utm_term=.9ccd6cecf751 [http://perma.cc/Z5QV-73A9] (an ongoing database of the “false or misleading claims” made by President Trump since assuming office).

Another potential objection to this proposal is that to credit representations made in litigation by subordinate officials, while disregarding statements by the President, is essentially to flip the constitutional hierarchy on its head, in tension with both the Vesting Clause and the basic structure of the Constitution.

But, as I have argued elsewhere, to disregard presidential statements in lieu of the briefs and arguments of lawyers in the Justice Department is not to elevate the statements of subordinate officials above those of the President: if the President wishes to direct his subordinates to present particular arguments to the courts, he retains the power to do so. But the long-standing allocation to the Justice Department of the power to present the position of the United States to the courts—a function of both tradition and statute—means that courts should not permit the President to bypass these processes completely.²⁶⁶

Finally, it is possible to argue that courts should consider presidential statements in an asymmetrical fashion—that is, that courts should consider such statements only when the President's statements run contrary to the President's preferred reading of the directive in question. Professor Glen Staszewski makes a related version of this argument in an article considering the relevance of the statements of ballot-initiative proponents in the interpretation of ballot initiatives.²⁶⁷ Professor Staszewski focuses on Michigan's Proposal 2, a ballot initiative that, like many other so-called "baby DOMA" laws, was approved by Michigan voters in November 2004.²⁶⁸ During the campaign, the initiative proponents' rhetoric had suggested that the proposal was narrow and would only impact marriage itself. But soon after it was approved, some proponents began arguing that the proposal swept more broadly, including to invalidate domestic partner benefits. Staszewski's article proposes a new canon of interpretation, under which courts are to "interpret successful ballot measures in a manner that binds the initiative proponents to their positions during the election campaign."²⁶⁹ Applying this scheme to the President would be challenging, but it is an intriguing possibility.

²⁶⁶ See Shaw, *supra* note 3, at 123–29.

²⁶⁷ Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17, 45 (2006).

²⁶⁸ *Id.* at 45.

²⁶⁹ *Id.*; see also Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 253 (2014) (pointing out that a number of courts, prior to

An additional response to several of the objections above is that in many or most instances, existing administrative-law doctrines already equip courts to invalidate government action when officials provide manufactured or *ex post* justifications, and where considering presidential speech might reveal a policy's true motivations.²⁷⁰ Consider, as a hypothetical, an executive action that singles out a particular country, or company, for adverse treatment—sanctions, tariffs, or entry restrictions in the case of a country; heightened antitrust scrutiny, or adverse tax treatment, in the case of a private company. In this hypothetical, presidential statements suggest that personal animosity between the President and the head of the targeted entity is in fact responsible for the government action; but when a legal challenge is brought, the official justifications offered by government litigators point to some neutral purpose, rather than personality clashes with the President. If, in fact, the justifications are essentially a cover used to conceal the policy's true justifications, then it is likely that arbitrary and capricious review, available to assess the agency action through which the President's directives are typically carried out, would likely suffice to invalidate the conduct in question. Arbitrary and capricious review demands a fit between government action and proffered rationale,²⁷¹ and manufactured justifications along these lines likely would and should fail such review.

CONCLUSION

The discussion here makes several things clear. First, existing constitutional tests for establishing impermissible intent are entirely applicable to executive-branch actors and should be applicable to the President; those tests make plain the permissibility of reliance on extrinsic materials in establishing intent. But a wholesale transplant of notions of "legislative intent" to the context of the Executive is not warranted, for reasons that in some ways overlap with, and in some ways diverge from, critiques of legislative intent and legislative history in the context of statutory interpretation. Finally, case law and scholarship on the question of presidential intent is ex-

2013, had "permitted ballot initiative proponents to defend laws the executive had chosen not to defend").

²⁷⁰ See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–21 (1971) (finding the Secretary of Transportation's post hoc rationalizations for his decision to build a highway insufficient).

²⁷¹ *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 54–56 (1983).

ceedingly limited, and what case law does exist fails to provide much guidance—but the conspicuous failure of courts in cases like *Korematsu* to probe presidential intent actually provides further support for the view that future courts ought to be more willing to inquire into presidential intent, at least in constitutional cases. And the examples provided above illustrate in practice the line I propose here—careful consideration of the words of the President in constitutional adjudication, but a demerphasis of their significance in the context of ordinary interpretation.

In the words of Jeffrey Tulis's masterful *The Rhetorical Presidency*: "Rhetorical power is a very special case of executive power." This is because "simultaneously it is the means by which an executive can defend the use of . . . executive powers and . . . a power itself. Rhetorical power is thus not only a form of 'communication,' it is also a way of constituting the people to whom it is addressed."²⁷²

Tulis wrote these words long before President Trump arrived on the scene, but it seems beyond dispute that President Trump has broken with many rhetorical norms (as well as other norms) that have long held sway. We do not yet know how this use of rhetoric may impact presidential power—if power can be understood, as Daryl Levinson recently defined it, as "the ability of political actors to control the outcomes of contested decisionmaking processes and secure their preferred policies."²⁷³ But courts, unlike historians, do not have the advantage of waiting to make these sorts of assessments. They face questions now regarding how much to look to intent, and whether to rely on statements made via Twitter, or at rallies or in interviews, in doing so. Although many of the specific questions this new era raises are unprecedented, this Article identifies a number of bodies of law, together with some guiding principles, to assist the courts tasked with answering them.

²⁷² JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 203 (1987).

²⁷³ Daryl J. Levinson, Foreword, *Looking for Power in Public Law*, 130 HARV. L. REV. 31, 39 (2016).