

Conventions in the Trenches

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INTRODUCTION

A short passage from the Supreme Court’s opinion in *Trump v. Hawaii*¹ offers a succinct summation of the dilemma facing courts in the age of Trump. A central issue in the case, which featured a challenge to the third iteration of the President’s “travel ban,” was the impact of the President’s anti-Muslim statements on the ban’s constitutionality. In addressing that question, the Chief Justice explained for the Court that in evaluating the significance of the President’s rhetoric, the Court was required to consider “not only the statements of a particular President, but also the authority of the Presidency itself.”² For the Chief Justice, the “Presidency itself” prevailed—although the opinion also suggested that the extensive involvement of executive-branch players *other than* the President was largely responsible for the ban’s survival.³

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1. 138 S. Ct. 2392 (2018).

2. *Id.* at 2418.

3. The Court reasoned that the Proclamation, 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), was the result of a “worldwide review process undertaken by multiple Cabinet officials and their agencies”; that it was subject to revision pursuant to a biannual review process involving the Secretaries of Homeland Security and State, as well as the Attorney General and the Office of the Director of National Intelligence; and that it contained a waiver program administered by consular officers under guidance issued by the Department of Homeland Security (DHS) and the State Department. *Trump v. Hawaii*, 138 S. Ct. at 2421. *See also*

In their Jorde Symposium lecture, Professor Samuel Issacharoff and Dean Trevor Morrison offer an insightful distillation of the question at the core of *Trump v. Hawaii*, and indeed most high-stakes challenges to Trump administration policies:

How should courts adjudicate claims that particular exercises of government power, though facially within the bounds of long-settled authority, should nonetheless be invalidated on grounds that the bias, abusiveness, dishonesty, or sheer self-dealing of the current leadership has effectively forfeited any claim to the benefits of the institutional bargains struck by their predecessors?⁴

What do the authors mean by “institutional bargains”? Both have written previously about the importance of history and practice in resolving contested constitutional questions, particularly those implicating the separation of powers.⁵ But here they connect this sort of “historical gloss”⁶ analysis to the ideas of “institutional settlement,” and “constitution by convention.” They write, “[B]eneath the [American] Constitution’s text there lies a world of institutional settlement—or constitution by convention. On this understanding, all constitutional actors allow time-tested institutional resolutions of a range of questions to play a significant, sometimes dispositive, role in determining the content of the law.”⁷ While previous accounts of conventions and settlements have mostly either failed to engage with courts, or treated conventions as unenforceable by the courts,⁸ Issacharoff and Morrison envision a role for courts in “integrating . . . experiential wisdom into formal, judicially elaborated

Daphna Renan, “*Institutional Settlement*” in a *Provisional Constitutional Order*, 108 CALIF. L. REV. 1995 (2020) (analyzing differing approaches to the president/presidency distinction evident in the dissenting opinions of Justices Breyer and Sotomayor); Daphna Renan, *The President’s Two Bodies*, 120 COLUM. L. REV. 1119 (2020).

4. Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 102, 1913, 1941 (2020).

5. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 413 (2012); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013); Samuel Issacharoff, *Meriwether Lewis, the Air Force, and the Surge: The Problem of Constitutional Settlement*, 12 LEWIS & CLARK L. REV. 649 (2008); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004).

6. Although the concept is far older than *Youngstown*, the term “gloss” traces to Justice Frankfurter’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”).

7. Issacharoff & Morrison, *supra* note 4, at 1916 (emphasis added).

8. See, e.g., Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283, 284 (2015) (“[W]hile courts may and should recognize conventions, they may not and should not enforce them.”). For a contrary view drawing on case law from a number of jurisdictions, see Farrah Ahmed et al., *Enforcing Constitutional Conventions*, 17 INT’L J. CONST. L. 1146 (2019).

constitutional doctrine.”⁹ If *desuetude* signifies a lapse into unenforceability from disuse, this account envisions something like its opposite: “Historical practice begins as custom but may be incorporated into doctrine.”¹⁰

But how these practices come to shape doctrine is a difficult matter to pin down. Here Issacharoff and Morrison join Daphna Renan in proposing “a presumption of a constitutional safe harbor when government actors perform within established frameworks,” and “a shifting of the presumption toward judicial skepticism when government officials move outside such frameworks.”¹¹ The examples the authors explore—in particular the recess appointments case *NLRB v. Noel Canning*¹²—develop their account of conventions or frameworks as settled institutional practices. But how courts are to identify performance outside of established frameworks, and the operation of “judicial skepticism” when frameworks are exceeded or transgressed, remains underspecified.

In this Essay, I identify several shifts in focus that might further illuminate the intersection of constitutional conventions and judicial review: first, attending to the role of *internal* executive-branch conventions, which are distinct in important ways from settlements *between* the political branches that are Issacharoff and Morrison’s primary focus; second, widening the lens to include the role of the lower courts, in particular district courts, in identifying conventions and incorporating both adherence and violation into their decisional processes; and third, recognizing that judicial treatment of constitutional conventions has both a substantive and a procedural dimension. This means that any serious discussion of the role of courts in policing conventions must grapple with important antecedent questions about courts’ ability to inquire into political-branch processes at all.

As it turns out, the recent litigation over the Trump administration’s attempts to add a citizenship question to the 2020 Census implicates all of these themes.¹³ So I will focus on that case, but along the way I will touch on *Trump v. Hawaii*, in which both internal executive-branch processes and the lower courts played critical roles.

9. Issacharoff & Morrison *supra* note 4, at 1918; *see also id.* at 145–56 (“[W]ithin American constitutional law, conventions established through settlement and repeated practice are not just a matter of institutional convenience standing apart from judicially elaborated doctrine, but can come to shape important domains of the doctrine itself.”).

10. *Id.* at 1929.

11. *Id.* at 1928; *see also* Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2268 (2018) (suggesting that certain forms of “institutional collapse” might appropriately “cause a court to adjust its own structural norms of deference”); *id.* at 2266 (elaborating that “a court reviewing presidential behavior should ratchet down deference (i) when the source of legal wrong is not the norm itself but an independent constitutional or statutory right, and (ii) when the court concludes that the situational context is sufficiently grave or the presidential norm sufficiently core to a minimal understanding of *legal legitimacy*”).

12. 573 U.S. 513 (2014).

13. *See Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019).

I.

CITIZENSHIP ON THE CENSUS

New York v. Commerce, which involved the Commerce Department's efforts to add a citizenship question to the 2020 Census, was primarily an Administrative Procedure Act (APA) case, not a constitutional case. But the APA is no ordinary statute; rather, its provisions are widely understood to have acquired a type of "quasi-constitutional status."¹⁴ In addition, the case involved many of the same dynamics at play in *Trump v. Hawaii*—an arena of broad but not unbounded executive authority, an anomalous policy development process, and a disconnect between government action and official explanations.

From the perspective of the public, the relevant events began in March 2018, when Commerce Secretary Wilbur Ross issued a memorandum directing the addition of a question about citizenship to the 2020 Census.¹⁵ The memorandum explained that Secretary Ross was acting pursuant to a request from the Department of Justice (DOJ) that he include such a question to aid in the DOJ's enforcement of the Voting Rights Act (VRA).¹⁶ Soon after issuing the memorandum, Secretary Ross testified before Congress, reiterating that account.¹⁷ A number of states, localities, and nonprofits quickly challenged the decision under both the APA and the Constitution, and their cases were consolidated before District Judge Jesse Furman in the Southern District of New York.¹⁸

In light of the fast-approaching deadlines to finalize and begin printing the Census, Judge Furman moved the litigation along quickly. Initial disclosures revealed that contra the government's public representations, Secretary Ross had in fact begun considering the citizenship question in 2017, and had actually solicited the formal request to include the question from the DOJ. Judge Furman then authorized discovery beyond the administrative record, which led to the production of over 12,000 pages of Commerce Department documents.¹⁹ Judge

14. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1077 (2004) ("Although it is packaged as a statute, the APA is the product of constitutional thought, and the courts have given quasi-constitutional status to its provisions."); see also Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351, 1358 (describing the APA as "widely regarded as a quasi-constitutional framework statute"); cf. Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337, 1387–88 (2019) (describing a "constitutionally-inflected" category of administrative law cases).

15. Memorandum from Sec'y Wilbur Ross, Dep't of Commerce, to Karen Dunn Kelley, Under Secretary for Econ. Affairs, Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire (Mar. 26, 2018), https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf [<https://perma.cc/T9ET-HR7N>].

16. *Id.*

17. Joint Appendix Volume III at 956, *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019) (No. 18-966) (containing the testimony of Secretary Ross before the House Committee on Ways and Means on Mar. 22, 2018).

18. *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019), *aff'd in part, rev'd in part and remanded sub nom.* *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019).

19. *Id.*

Furman also concluded that the plaintiffs had made a “strong showing in support of a claim of bad faith or improper behavior on the part of agency decision-makers,”²⁰ and accordingly authorized depositions of various Commerce Department and DOJ officials, as well as allowing additional extra-record discovery.²¹

At the request of the government, the Supreme Court stayed the order permitting the plaintiffs to depose Secretary Ross, but allowed the remaining additional discovery to proceed.²² Following that discovery and a three-week bench trial, Judge Furman issued a lengthy opinion finding that the decision to add the citizenship question was “arbitrary and capricious”²³ under the APA in several distinct respects: the explanations ran counter to the evidence before the agency; the Secretary failed to consider important aspects of the problem; the decision “represented a dramatic departure from the standards and practices that have long governed administration of the census, and [the Secretary] failed to justify those departures,”²⁴ and the Secretary’s stated rationale, that the citizenship question was necessary to enforce the VRA, was plainly pretextual.²⁵

The Supreme Court granted certiorari before judgment and affirmed the district court in an opinion by Chief Justice John Roberts. In one portion of the opinion, the Chief Justice, joined by Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh, first explained that the Secretary *did* have the constitutional power to add a citizenship question to the Census.²⁶ That discussion made extensive reference to practice and history, citing *Noel Canning* and other cases to essentially conclude, in the words of Issacharoff and Morrison, that “the executive action in question fit[] within the bounds of established historical practice.”²⁷ The same majority proceeded to find that the Secretary’s

20. This finding initially came in an oral ruling on July 3, 2018. *See* Transcript of July 3 Oral Argument at 82, *New York v. Dep’t of Commerce*, No. 18-CV-2921 (JMF), 2018 WL 6060304 (S.D.N.Y. Nov. 20, 2018) (quoting *Nat’l Audubon Soc’y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997)).

21. *Id.* at 85–87. At this point Judge Furman did not authorize the deposition of Secretary Ross himself. *Id.* at 86–87. In a subsequent order, Judge Furman authorized the plaintiffs to depose Secretary Ross. Opinion and Order, *New York v. Dep’t of Commerce*, 333 F. Supp. 3d 282 (S.D.N.Y. 2018).

22. *See In re Dep’t of Commerce*, 139 S. Ct. 16 (2018) (mem.); *see also id.* at 17 (Gorsuch, J., joined by Thomas, J., concurring in part and dissenting in part) (describing the district court as having made the “extraordinary” decision to permit “an inquisition into a cabinet secretary’s motives”).

23. *See* 5 U.S.C. § 706(2)(a) (2018) (authorizing courts to “hold unlawful and set aside” agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

24. *New York v. Dep’t of Commerce*, 351 F. Supp. 3d 502, 654 (S.D.N.Y. 2019), *aff’d in part, rev’d in part and remanded sub nom.* *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019).

25. The court also found that the addition of the question violated certain provisions of the Census Act but concluded that the plaintiffs had not carried their burden in showing that the decision to reinstate the citizenship question was tainted by discriminatory intent. *Id.* at 670.

26. *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2567 (2019).

27. Issacharoff & Morrison, *supra* note 4, at 1918; *Commerce*, 139 S. Ct. at 2567 (“In light of the early understanding of and long practice under the Enumeration Clause, we conclude that it permits Congress, and by extension the Secretary, to inquire about citizenship. . . . Here, as in other areas, our interpretation of the Constitution is guided by a Government practice that ‘has been open, widespread,

decision to add a citizenship question did not represent an abuse of discretion in violation of the APA's prohibition of agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁸

But in the final portion of the opinion, a different majority—with the Chief Justice now joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan—concluded both that the district court had been justified in ordering extra-record discovery, and that the district court had been correct to set aside the agency action in light of the new material, which revealed a fatal mismatch between the action taken and the justification offered.²⁹ This second majority agreed that the agency decision could not be "adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA,"³⁰ and that the district court had therefore been correct to conclude that the justification was pretextual. Although the Court avoided speculating about the Commerce Department's real reason for seeking to include the question,³¹ the Court explained that:

The reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. . . . If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.³²

Whether that holding is understood as grounded in long-standing requirements of reasoned decision-making in administrative law,³³ or as the articulation of a

and unchallenged since the early days of the Republic.") (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 572 (Scalia, J., concurring in the judgment)).

28. 5 U.S.C. § 706(2)(a); *Commerce*, 139 S. Ct. at 2567.

29. See *Commerce*, 139 S. Ct. at 2573–76. This dual aspect of the opinion bore some resemblance to Roberts's twin holdings in *N.F.I.B. v. Sebelius*: that the Affordable Care Act exceeded Congress's authority under the Commerce Clause, but could nevertheless be justified as a permissible exercise of Congress's power to tax. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558, 574 (2012). And, like *N.F.I.B.*, commentary on the *Commerce* case has included speculation that the decisional history involved an eleventh-hour change in positions by the Chief Justice. See Joan Biskupic, *How John Roberts Killed the Census Citizenship Question*, CNN (Sept. 12, 2019), <https://www.cnn.com/2019/09/12/politics/john-roberts-census-citizenship-supreme-court/index.html> [<https://perma.cc/KB6B-Y5CU>].

30. *Commerce*, 139 S. Ct. at 2575.

31. Cf. Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. 1355, 1387–97 (2019) (identifying several potential "real" rationales for the move to add the citizenship question).

32. *Commerce*, 139 S. Ct. at 2575–76.

33. See *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (holding that agencies must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'") (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (holding that courts must consider whether "the decision was based on a consideration of the relevant factors"); *Burlington Truck Lines*, 371 U.S. at 168 (setting aside agency action based on agency's failure to "articulate any rational connection between the facts found and the choice made"); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth*

new or newly defined prohibition on pretextual justifications,³⁴ the case invites exploration of conventions inside the executive branch and the particular interaction of lower courts with those conventions.

II.

CONVENTIONS INSIDE THE EXECUTIVE BRANCH

Issacharoff and Morrison focus on settlements between the political branches; their key case study, *NLRB v. Noel Canning*,³⁵ represents as clean an inter-branch dispute as any game theorist could construct. But much of the work of governance—of “making things work under conditions of uncertainty”³⁶—transpires *within* the executive branch. And conventions are also a significant feature of internal executive-branch ordering. Of course, very little in the executive branch is truly internal, since most key matters of agency structure, function, and operation reflect congressional judgments.³⁷ But Congress for the most part draws the broad outlines; the details of life inside the executive branch are supplied by the executive branch, which makes things work through both hard and soft ordering mechanisms.

Indeed, as Adrian Vermeule has written, many internal executive-branch conventions are “central to the operation of the administrative state.”³⁸ Vermeule’s analysis focuses on “independent agencies,” whose insulation from presidential control is largely a function of conventions, not written law. The Securities and Exchange Commission, for example, is viewed as an “independent” agency whose commissioners may only be removed by the president for good cause.³⁹ Yet that understanding is the result of conventions;

Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions, 1987 DUKE L.J. 387, 425.

34. Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 5 (“[T]he Court ultimately reaffirmed and arguably expanded administrative law’s core requirement of reasoned decision making to include a prohibition on pretextual explanations of agency decisions.”).

35. 573 U.S. 513 (2014).

36. Issacharoff & Morrison, *supra* note 4, at 1917. See STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 101 (2018) (“[Norms] are shared codes of conduct” that “become common knowledge within a particular community . . . accepted, respected, and enforced by its members.”); Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 182 (2018).

37. See David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 86 (2014) (noting “the porousness of the inter- and intrabranch categories”).

38. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165 (2013); *id.* at 1166 (explaining that “conventions may be generated by a variety of mechanisms, yet they have in common that unwritten political norms within relevant legal and political communities impose sanctions for perceived violations of agency independence or create internalized values or beliefs protecting that independence”).

39. Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 600 (2010) (“The President cannot fire the members of [independent agencies including the Securities Exchange Commission] for political reasons, including failure to follow administration policy, but only for ‘good cause,’ such as neglect of duty or malfeasance in office.”).

nothing in the relevant statutes actually provides for such protection.⁴⁰ In a related vein, despite many years of vigorous academic debate about the wisdom and necessity of “for-cause” removal protections for heads of independent agencies,⁴¹ presidents themselves have shied away from testing the meaning of such provisions, and have not sought to remove officers who are protected by these provisions.⁴²

Conventions, both operational and structural, define and constrain conduct across the executive branch. A non-exhaustive list of internal executive-branch conventions includes circulation and clearance processes for documents; allocations of decisional authority within and between agencies, within and between agency subcomponents, and between career and political officials; processes of policy development and policy change; and practices of evidence-based decision-making.⁴³ Some of this is rooted in positive law,⁴⁴ and some is

40. The Supreme Court essentially ratified that understanding in 2010. *See* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 487 (2010) (“The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey’s Executor* standard of ‘inefficiency, neglect of duty, or malfeasance in office,’ . . . and we decide the case with that understanding.”) (quoting *Humphrey’s Executor v. United States*, 295 U.S. 602, 620 (1935)); *see also* Richard H. Pildes, *Free Enterprise Fund, Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration*, 6 DUKE J. CONST. L. & PUB. POL’Y (SPECIAL ISSUE) 1, 2 (2010).

41. The literature is vast, but for versions of the argument that the President’s power to remove officers of the United States, including the heads of independent agencies, cannot constitutionally be constrained, *see* Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 598 (1994) (“If the President is to have effective control of his constitutionally granted powers, he must be able to remove those who he believes will not follow his administrative agenda and philosophy.”); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1227 (2014) (“[The President] must have the ability to remove all executive branch officers at will.”). For the position that for-cause removal protections are both constitutionally permissible and normatively desirable, *see, e.g.*, Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1173 (2019); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 30 (2010).

42. *See* Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=%203520377 [<https://perma.cc/E8ZQ-E9AC>]; Aditya Bamzai, *Taft, Frankfurter, and the First Presidential for-Cause Removal*, 52 U. RICH. L. REV. 691, 691–92 (2018) (exploring two presidential for-cause removals).

43. *See* Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 157 (2018) (describing various axes, though not “crisp dichotomies,” within executive-branch agencies, which include “politically appointed and civil service; the partisan and the impartial; . . . the high-level officials and the low”); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1253–54 (2017).

44. 5 U.S.C. § 553(b)(3)(A) (2018) (exempting from APA’s notice-and-comment requirements “rules of agency organization, procedure, or practice”); JEFFREY S. LUBBERS & NANCY G. MILLER, ADMIN. CONF. U.S., THE PROCEDURAL AND PRACTICE RULE EXEMPTION FROM THE APA’S NOTICE-AND-COMMENT RULEMAKING PROCEDURES (1991), <https://www.acus.gov/sites/default/files/documents/1992-01%20The%20Procedural%20and%20Practice%20Rule%20Exemption%20from%20the%20APA%20Notice-and-Comment%20Rulemaking%20Requirements.pdf> [<https://perma.cc/8HE2-VMEE>].

the result of norms and practices that have emerged and evolved over time.⁴⁵ And it is surely the case that for courts to rigidly bind agencies to the particulars of these practices, which may be the result of inertia or path-dependence, would stymie innovation and result in a dangerous degree of ossification.⁴⁶ But these settled practices are also not irrelevant when evaluating the lawfulness or constitutionality of government action.

Indeed, some administrative law doctrine actually incorporates this principle, although not in precisely these terms. The administrative law classic *Accardi v. Shaughnessy* is broadly understood to stand for the principle that agencies must follow their own rules.⁴⁷ And among the reasons courts will deem agency action arbitrary and capricious in violation of the APA is the failure to offer sufficient justification for departing from prior positions.⁴⁸ The fact that no decennial census since 1950 had asked about citizenship did not take that option off the table for the Commerce Secretary; but it did demand a reason for changing course. The district court—and after a fashion, the Supreme Court—found that no sufficient reason was provided.

Beyond this question at the heart of the case, the Census litigation featured a host of deviations from typical executive-branch procedures—both within the Commerce Department and to a degree within DOJ. And, particularly in the district court, those breaks from settled conventions appeared to influence the case in ways both subtle and direct.

First, as to the Commerce Department, an important motif in the district court opinion was the flouting of the ordinary processes and operations of the Census Bureau, which sits within the Commerce Department. As the district court found, “the failure to conduct any pretesting of the proposed citizenship question on the decennial census questionnaire was a ‘significant deviation’ from the Census Bureau’s historical practices, its own mandatory Statistical Quality

45. See, e.g., Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 505 (2017) (noting that many agency heads have subdelegated authority “through highly informal means”); Metzger & Stack, *supra* note 43, at 1253–54 (“Agencies generate a vast amount of rules, procedures, and specifications geared at agency personnel to govern how they undertake their jobs and to supervise their actions. Some are officially promulgated and clearly identified as internally binding requirements; others emerge over time and take the form of unwritten norms and practices”) (citation omitted).

46. Issacharoff & Morrison, *supra* note 4, at 1920 (“[S]ettled past practice cannot and should not serve as a straightjacket compelling narrow adherence to what has come before.”); Cf. Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1488–91 (2017).

47. See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267–68 (1954); Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569 (2006).

48. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) (holding that although agency changes in position are *not* subject to an especially searching form of review, “an agency must ordinarily display awareness that it *is* changing position, [] and may sometimes need to account for prior factfinding or certain reliance interests created by a prior policy”) (citation omitted); Nestor M. Davidson & Ethan J. Leib, *Regleprudence—at OIRA and Beyond*, 103 GEO. L.J. 259, 272 n.56 (2015) (“[A]gencies are under an obligation to provide a reasoned explanation for a change in position that acknowledges the fact of departure from prior agency pronouncements.”).

Standards, and its previously announced plans for the 2020 census.”⁴⁹ This failure, together with Secretary Ross’s efforts to “downplay, if not conceal, the degree of that deviation,”⁵⁰ was one reason the district court concluded that the Secretary’s decision was arbitrary and capricious under the APA.

The district court detailed four separate examples of Secretary Ross’s efforts to conceal significant breaks with past practices. One episode in particular provides an illustration of both the importance of past practice inside agencies like the Commerce Department and the significance of the deviation in this instance.

As detailed in the district court opinion, DOJ’s request for the addition of a citizenship question—a request solicited by Secretary Ross and his staff, who initially and unsuccessfully targeted other government entities for the purpose of eliciting such a request⁵¹—met a skeptical reception by Census Bureau officials.⁵² Following receipt of DOJ’s request, two of Secretary Ross’s senior aides assembled a list of questions for the Census Bureau to answer for the Secretary. One of the questions asked about the ordinary process for adding new questions to the Census. The Census Bureau’s Chief Scientist, Dr. John Abowd, later a critical witness at trial, tasked a senior Census Bureau official with drafting the answer to this particular question.⁵³ As originally drafted, the response read:

The Census Bureau follows a well-established process when adding or changing content on the census or ACS to ensure the data fulfill legal and regulatory requirements established by Congress. Adding a question or making a change . . . involves extensive testing, review, and evaluation. This process ensures the change is necessary and will produce quality, useful information for the nation.⁵⁴

But over several rounds of revision inside the Commerce Department, political appointees changed the answer, so that the final text read: “Because no new questions have been added to the Decennial Census (for nearly 20 years), the Census Bureau did not fee[l] bound by past precedent when considering the Department of Justice’s request.”⁵⁵ The Census Bureau did not give Dr. Abowd an opportunity to review these revisions to the initial response, and the Bureau

49. *New York v. Dep’t of Commerce*, 351 F. Supp. 3d 502, 560 (S.D.N.Y. 2019) (citation omitted). This was in addition to the Secretary’s rejection of the unanimous recommendation of Census officials—who consistently maintained that adding a citizenship question would be “very costly, harm[] the quality of the census count, and would use substantially less accurate citizenship status data than are available from administrative sources.” *Id.* at 565 (alteration in original).

50. *Id.* at 560.

51. *Id.* at 550–55 (describing lengthy attempts, beginning in May and continuing until September 2017, to elicit such a request from various DOJ and DHS components).

52. *Id.* at 562 (describing “the Census Bureau’s initial, critical assessments of DOJ’s request to add the question”).

53. *Id.*

54. *Id.*

55. *Id.* at 563.

initially only submitted the edited version of the answer to the court as part of the administrative record.⁵⁶

This episode represented a strikingly atypical process. Political appointees worked in secret to revise the work product of career officials, in order to create a narrative that ran directly contrary to the understanding and experience of career officials—all in the context of a written document whose very subject was ordinary processes.⁵⁷

Along with the Commerce Department's other breaks with practice, DOJ's conduct appeared to raise red flags for the district court. The court noted that "DOJ officials' refusal to meet with the Census Bureau to discuss their request for data was highly 'unusual.'"⁵⁸ As the court explained, it was "standard operating procedure" for the Census Bureau, upon receiving an agency request for particular sorts of data, to meet with the requesting agency "to discuss the best way to deliver usable data for a particular use."⁵⁹ Evidence also established that Census officials believed such meetings were essential to ensuring that they understood how requested data would be used so they could word questions accordingly.⁶⁰ Here, by contrast, after submitting its letter requesting the addition of a citizenship question, DOJ repeatedly refused to meet with Census officials, evidently based on the specific instructions of the Attorney General.⁶¹ This obvious break with convention seemed significant to the district court's assessment of Commerce's proffered justification for the addition of the question: that is, to assist DOJ in enforcing the Voting Rights Act.

Although the district court's merits opinion neglected to discuss it, some of the court's earlier (and subsequent) rulings made note of another dynamic in the case—the conduct of DOJ *in the litigation itself*. Litigation norms of DOJ before the federal courts are arguably another type of convention⁶²—although as much inter-branch as intra-branch—and the repeated breaks with those conventions

56. *Id.*

57. The district court enumerated a number of additional breaks from normal practice, all paired with some sort of concealment. *See, e.g., id.* at 567 ("Secretary Ross and his aides were not *required* to inform Dr. Abowd or others at the Census Bureau that they were considering whether to add a citizenship question to the census . . . however, the degree to which the origins of the decision were kept from those who worked hard to promptly evaluate DOJ's request was unusual and noteworthy.").

58. *Id.* at 558.

59. *Id.*

60. *Id.*

61. *Id.* According to Dr. Abowd's testimony, this was the first time a "Cabinet Secretary personally directed agency staff not to meet with the Census Bureau . . . [and] was thus 'unusual.'" *Id.* at 659–60.

62. Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1217–18 (2012) (discussing "the considerable credibility that the Department has with the courts, because of the consistency with which it fulfills its responsibilities," and suggesting that courts' perception of undue politicization might undermine that credibility); Rebecca Mae Salokar, *Politics, Law, and the Office of the Solicitor General*, in GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS 59 (Cornell W. Clayton ed., 1995).

were a noteworthy feature of the litigation, even if their precise impact on the outcome of the case is difficult to assess.

The first such break occurred early in the litigation, when government attorneys from the Southern District of New York withdrew from the case, leaving a team from DOJ, in Washington, D.C., to defend the Commerce Department.⁶³ There is no legal requirement that lawyers from a local U.S. Attorney's Office mount a defense of the government, but that is the usual practice inside DOJ⁶⁴—and the deviation from that practice was noteworthy.

Judge Furman reminded the government of this unusual fact when he denied a motion to delay the trial, writing:

There are dozens of highly qualified lawyers and professional staff in the Civil Division of the United States Attorney's Office for the Southern District of New York—the office that normally represents the Government in this District. The Court can only speculate why the lawyers from that Office withdrew from their representation of Defendants in these cases.⁶⁵

He continued: “Whatever the reasons for that withdrawal, however, a party should not be heard to complain about harms of its own creation.”⁶⁶

The final days of the dispute featured yet another attempt by DOJ lawyers to withdraw from the case en masse. This attempt came in the wake of the Supreme Court decision, when despite the loss, the administration signaled that it might make one more attempt to include the citizenship question.⁶⁷ Judge Furman denied the litigation team's withdrawal motion, finding it “patently deficient” in light of a local rule requiring a party to show satisfactory reasons before being permitted to withdraw.⁶⁸ In a footnote, the court observed that “[n]otably, this is not the first time that lawyers from the Department of Justice

63. Motion for Dominika Tarczynska to Withdraw as Attorney, *New York v. Dep't of Commerce*, No. 1:18-CV-2921 (JMF), 2018 WL 6060304 (S.D.N.Y. Nov. 20, 2018), ECF No. 227; Order granting ECF No. 227 Motion to Withdraw as Attorney, *New York v. Dep't. of Commerce*, (S.D.N.Y. Aug. 7, 2018) No. 1:18-CV-2921 (JMF), ECF No. 233.

64. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL Tit. 4-1.210 (2018) (“The majority of civil litigation in certain categories is handled in the field by United States Attorneys . . .”).

65. *New York v. Dep't of Commerce*, 345 F. Supp. 3d 444, 448 n.2 (S.D.N.Y. 2018).

66. *Id.*

67. Hansi Lo Wang & Amita Kelly, *DOJ Still Looking to Add Citizenship Question, Official Tells Court*, NPR (July 3, 2019), <https://www.npr.org/2019/07/03/738139549/trump-digs-in-on-census-citizenship-question-sparking-confusion-and-court-activi> [<https://perma.cc/KC2C-29PL>].

68. Memorandum Opinion and Order, *New York v. Dep't. of Commerce*, No. 1:18-CV-2921 (JMF), 2018 WL 6060304 (S.D.N.Y. Nov. 20, 2019) No. 1:18-CV-2921 (JMF), ECF No. 177; see Michael Wines & Katie Benner, *Judge Rejects Justice Dept. Request to Change Lawyers on Census Case*, N.Y. TIMES (July 9, 2019), <https://www.nytimes.com/2019/07/09/us/census-citizenship-question.html> [<https://perma.cc/HT4Q-ZVYH>]. At the same time, the DOJ team defending against a similar challenge in a Maryland district court also sought to withdraw, and was also denied leave to do so. See Kathryn Watson, *Second Federal Judge Denies DOJ Request to Change Lawyers in Census Case*, CBS NEWS (July 10, 2019), <https://www.cbsnews.com/news/census-citizenship-question-second-federal-judge-denies-doj-request-to-change-lawyers-in-maryland-case/> [<https://perma.cc/7WHD-T478>].

have sought to withdraw from this litigation.”⁶⁹ The district court’s denial of leave to withdraw became the last word in the case; shortly thereafter, the President announced that the administration would abandon the effort and pursue other avenues to acquire citizenship information.⁷⁰

III.

POLICING CONVENTIONS IN THE LOWER COURTS

Like most works of constitutional theory, Issacharoff and Morrison’s focus is on the Supreme Court.⁷¹ But lower federal courts, district courts in particular, have a unique perspective on the workings of political-branch institutions, and they have played a critical and underappreciated role in policing constitutional conventions in the age of Trump.

President Trump has made no secret of his contempt for the lower courts, where his initiatives have fared remarkably poorly.⁷² Similarly, since 2017, DOJ has made clear its desire to have legal challenges resolved by the Supreme Court as quickly as possible.⁷³ Steve Vladeck recently showed how stark the numbers are: as of 2019, the Trump administration Solicitor General’s office had sought stays in the Supreme Court twenty-one times, compared to five such requests in

69. Memorandum Opinion and Order, *New York v. Dep’t. of Commerce*, No. 1:18-CV-2921 (JMF), 2018 WL 6060304 (S.D.N.Y. Nov. 20, 2019) No. 1:18-CV-2921 (JMF), ECF No. 177.

70. THE WHITE HOUSE, *Remarks by President Trump on Citizenship and the Census* (July 11, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/> [<https://perma.cc/ZY3X-JCSH>].

71. Cf. Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3554027 [<https://perma.cc/5X3H-SDRX>] (arguing that “the narrow emphasis on the Supreme Court overlooks the broader reality of the federal judiciary”).

72. See Fred Barbash et al., *Federal Courts Have Ruled Against Trump Administration Policies at Least 70 Times*, WASH. POST (Apr. 26, 2019), <https://www.washingtonpost.com/graphics/2019/politics/trump-overruled/> [<https://perma.cc/6LQF-ZFHR>]; Adam Liptak, *Trump Takes Aim at Appeals Court, Calling it a ‘Disgrace,’* N.Y. TIMES (Nov. 20, 2018), <https://www.nytimes.com/2018/11/20/us/politics/trump-appeals-court-ninth-circuit.html> [<https://perma.cc/4PYB-M4WC>]; Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks ‘Obama Judge,’* N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html> [<https://perma.cc/3QQ6-XAQR>]; Joe Sexton, *Trump, All About Winning, Sees Losses in Court Pile Up*, PROPUBLICA (April 2, 2019), <https://www.propublica.org/article/president-donald-trump-losses-fred-barbash-washington-post-q-and-a> [<https://perma.cc/WYW6-U3HL>].

73. Robert Barnes & Josh Dawsey, *Trump Views the Supreme Court as an Ally, Sowing Doubt About its Independence Among his Critics*, WASH. POST (Apr. 27, 2019), https://www.washingtonpost.com/politics/courts_law/trump-views-the-supreme-court-as-an-ally-sowing-doubt-about-its-independence-among-his-critics/2019/04/27/837c3822-682f-11e9-82ba-fcfeff232e8f_story.html [<https://perma.cc/3YK8-QYWX>] (“We will then be sued . . . and we’ll possibly get a bad ruling, and then we’ll get another bad ruling and then we’ll end up in the Supreme Court, and hopefully we’ll get a fair shake, and we’ll win at the Supreme Court.”).

the eight years of the George W. Bush administration, and three requests over the eight years of the Barack Obama administration.⁷⁴

The Trump administration's steady string of lower court losses has led to charges of "judicial resistance,"⁷⁵ on the one hand, and the embrace of courts' continued role as checks on a lawless president, on the other.⁷⁶ But neither of these responses fully captures important dynamics at play in the lower courts.

The last three years have laid bare the importance of lower courts in evaluating internal executive-branch decisions and decisional processes. District courts in particular, with their ability to engage in fact-finding and repeat encounters with executive-branch lawyers and other officials, have a relatively unique vantage point when it comes to identifying and evaluating conventions and counter-conventional behavior. In a number of cases, including those involving the Census and travel ban, lower courts have struck the sort of institutional realist note that Richard Pildes has written about when he advocates for the development of "constitutional and public-law doctrines that penetrate the institutional black box and adapt legal doctrine to take account of how these institutions actually function in, and over, time."⁷⁷

So how do—and how should—courts penetrate that black box to identify executive-branch conventions and assign significance to their breach? The final aspect of my discussion begins to identify relevant considerations by disaggregating the procedural and substantive dimensions of judicial inquiries into executive-branch practices and conventions.

IV.

PROCESS AND SUBSTANCE

In a critical passage, Issacharoff and Morrison write:

The more the institutional practice is established and public, the longer it has been in existence, the more repeated actors have accepted its legitimacy, and the more its implementation has been successful, the greater the safe harbor presumption. By contrast, if the conduct is in direct repudiation of similarly well-settled and publicly understood norms or practices, its propriety must be assessed on its own terms without the benefit of any historically based safe harbor—and perhaps

74. Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 133–34 (2019).

75. See Ilya Shapiro, *Courts Shouldn't Join the #Resistance*, CATO INST. (May 17, 2017, 9:10 PM), <https://www.cato.org/blog/courts-shouldnt-join-resistance> [<https://perma.cc/6MY2-35JA>]; Dahlia Lithwick & Steven I. Vladeck, *The Dangerous Myth of the Judicial 'Resistance'*, N.Y. TIMES (Oct. 31, 2017), <https://www.nytimes.com/2017/10/31/opinion/myth-judicial-resistance-integrity.html> [<https://perma.cc/2AVA-3DQ5>].

76. David Cole, *How the Courts Have Stymied Trump*, NATION (Jan. 30, 2018), <https://www.thenation.com/article/archive/how-the-courts-have-stymied-trump/> [<https://perma.cc/HC3P-RCU5>].

77. Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 2.

with a measure of explicit judicial skepticism.⁷⁸

In broad terms, this seems uncontroversial and plainly correct. But how are courts to know how much deviation from settled and understood norms has occurred, in order to calibrate their responses? Some norm flouting is public and flagrant, and the reference to “publicly understood norms or practices” will accurately capture the sorts of disputes between Congress and the executive branch that play out in plain view. But when may a court facing such a challenge peek inside the “institutional black box” of executive-branch decision-making?⁷⁹

Much depends on context: the specific decision or government action at issue, the conventions that typically surround such decisions and actions, and the circumstances in which the convention has operated, or failed to operate.⁸⁰ But both the district court and Supreme Court opinions in the Census case offer some guiding principles.

In the district court, both the initial, facially incomplete administrative record and the later, expanded record and extra-record material revealed a serious mismatch between the Commerce Department’s story—that it sought to add the citizenship question for the purpose of “enhancement of DOJ’s VRA enforcement efforts”⁸¹—and both Commerce Department and DOJ officials’ actions.⁸²

Much of the briefing in the Supreme Court focused on the propriety of the district court’s authorization of discovery beyond the administrative record. On that point, the Chief Justice explained that Judge Furman’s authorization of additional discovery, though “premature,” was “ultimately justified” under the Court’s decision in *Overton Park*.⁸³

The *Overton Park*⁸⁴ principle traces back to the pre-APA *Morgan* cases from the late 1930s and early 1940s.⁸⁵ In the case’s last trip to the Supreme Court, one party sought to disqualify the Secretary of Agriculture because of the Secretary’s public comments regarding the outcome of one of the earlier cases. The Secretary had been deposed and called to testify at trial below, and the Court,

78. Issacharoff & Morrison, *supra* note 4, at 1928.

79. Pildes, *supra* note 77. See also Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1435–36 (2018) (distinguishing between public norm violations and more subtle forms of norm decomposition or modification).

80. See generally Chafetz & Pozen, *supra* note 79 (identifying the importance of context in evaluating various forms of constitutional norm breakdown).

81. *New York v. Dep’t of Commerce*, 351 F. Supp. 3d 502, 660 (S.D.N.Y. 2019).

82. See Transcript of July 3 Oral Argument at 82, *New York v. Dep’t of Commerce*, No. 18-CV-2921 (JMF), 2018 WL 6060304 (S.D.N.Y. Nov. 20, 2018), ECF No. 205.

83. *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2574 (2019).

84. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

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

reviewing the proceedings, found that “the Secretary should never have been subjected to this examination.”⁸⁶

In 1971, the *Overton Park* Court cited *Morgan* for the principle that “inquiry into the mental processes of administrative decisionmakers is usually to be avoided.”⁸⁷ But, importantly, *Overton Park* also explained that courts could inquire into *decision-making processes* and the reasons for particular choices—including by allowing for direct questioning of officials based on a “strong showing of bad faith or improper behavior.”⁸⁸ Noting that the Transportation Secretary had prepared no contemporaneous findings that explained the highway-approval decision under review, the Court explained that on remand “it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary’s action was justifiable under the applicable standard.”⁸⁹ *Overton Park*, then, pointed to process shortcomings—specifically, the Secretary’s failure to prepare any contemporaneous findings—and authorized courts confronting such process failures to conduct additional inquiry into the substantive basis for decisions.

The *Commerce* Court, like the *Overton Park* Court, found that the obvious incompleteness of the administrative record, together with the facial contradictions between that record and the administration’s voting-rights-enforcement rationale, justified further inquiry. In doing so, it breathed new life into a principle that had gone largely underenforced in the years since *Overton Park*.⁹⁰ In concluding that additional discovery had been justified, the *Commerce* Court confirmed that *Overton Park* arms lower courts with a powerful tool for inquiring into agency decisional processes under appropriate circumstances, and that those circumstances include sufficiently serious breaks with ordinary agency conventions.

86. *Morgan*, 313 U.S. at 422. As the Court explained, “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 Cabinet officers . . . are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.” *Id.* at 421.

87. *Volpe*, 401 U.S. at 420.

88. *Id.*

89. *Id.*

90. In a sense, an informal judicial convention against allowing depositions of high-level government officials had developed in the post-*Overton Park* years; Judge Furman’s ruling represented a break with that convention, although it was also arguably a return to a better reading of *Overton Park* itself. See *In re McCarthy*, 636 Fed. Appx. 142, 143 (4th Cir. 2015) (granting writ of mandamus sought by EPA administrator, and explaining that “it is well established that high-ranking government officials may not be deposed or called to testify about their reasons for taking official actions absent ‘extraordinary circumstances,’” and those circumstances did not exist here); *Lederman v. N.Y.C. Dep’t of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013) (holding that “to depose a high-ranking government official, a party must demonstrate exceptional circumstances justifying the deposition—for example, that the official has unique first-hand knowledge related to the litigated claims or that the necessary information cannot be obtained through other, less burdensome or intrusive means”).

In some ways, this was a dual holding on process: The district court was ultimately justified in its procedural rulings authorizing additional inquiry into agency process. And that inquiry unearthed additional evidence that fatally undercut the Commerce Department's explanation for its action.⁹¹ Although the district court explained all of this at length, the Supreme Court's discussion was brief and terse. The Court noted that the Commerce Department's explanation was "incongruent with what the record reveals about the agency's priorities and decisionmaking process;"⁹² referenced the fact that Commerce Department consideration of the citizenship question long predated the DOJ request it claimed it was responding to; and noted that the Commerce Department had gone to great lengths to solicit the request from DOJ, and that DOJ's conduct was inconsistent with the VRA rationale. Based on all of this, the Court found that the VRA rationale could not adequately explain the agency's decision.

Although the discussion was framed in terms of the insufficiency of the justification, the Court's reasoning invoked both the agency's decisional process and, indirectly, the convention-flouting that characterized the internal processes in this case.⁹³ By insisting on a degree of match between process and explanation, the Court arguably affirmed the importance of internal executive-branch practice, while remaining careful not to bind the agency to any particular practice or convention—save the one that requires "genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public."⁹⁴ In doing so, it signaled to lower courts that sufficiently serious breaks with executive-branch conventions may justify additional judicial scrutiny; that such scrutiny may support or reveal fatal flaws in justifications offered to courts; and that such inquiries are perfectly consistent with the so-called "presumption of regularity," which is best understood as a rebuttable presumption.⁹⁵

Of course, cases that do not arise under the APA—like the travel ban litigation, which was in the main a constitutional case—will not begin with the

91. See *supra* notes 49–60 and accompanying text.

92. Dep't of Commerce v. New York, 139 S. Ct. 2551, 2576 (2019).

93. *Id.* at 2575 ("Commerce went to great lengths to elicit the request from DOJ (or any other willing agency).").

94. *Id.* at 2575–76. The Court assiduously avoided speculating about what hidden and presumably improper motivation actually underlay the decision. In May 2019, over a month after oral arguments, respondents filed a letter brief in the Supreme Court calling the Court's attention to files in the possession of deceased Republican operative Thomas Hofeller that suggested the addition of the citizenship question was driven by a desire to create an electoral advantage for, in Hofeller's words, "Republicans and Non-Hispanic Whites." See NYIC Plaintiffs' Motion for an Order to Show Cause at 1, New York v. Dep't. of Commerce, No. 1:18-CV-2921 (JMF), 2020 WL 2564933 (S.D.N.Y. May 21, 2020), Doc. No. 587. See also New York v. Dep't of Commerce, No. 18-CV-2921 (JMF), 2020 WL 2564933, at *2 (S.D.N.Y. May 21, 2020) (discussing Hofeller files in order granting in part and denying in part motion for sanctions).

95. Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431, 2452 (2018); Withrow v. Larkin, 421 U.S. 35, 47 (1975) (describing "a presumption of honesty and integrity in those serving as adjudicators"). Cf. David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 920 (2016).

production of an “administrative record” that courts can evaluate for obvious incompleteness or indications of the need for additional information. But some of the general principles animating the *Overton Park* and *Commerce* Courts seem applicable. In the context of certain kinds of constitutional claims, well-settled doctrine already provides that decisional processes may be relevant to the lawfulness of government action, particularly where there are allegations of constitutionally impermissible purpose.⁹⁶

As with the Census litigation, deviations from executive-branch conventions were significant at various stages of the travel ban litigation in the lower courts, and arguably led to more searching judicial inquiries. Take, for example, the early uncertainty over whether green card holders were subject to the first travel ban if they were temporarily out of the country when it was issued. The White House initially indicated that green card holders would need to seek a waiver to gain reentry.⁹⁷ Days after the order was issued, however, the White House reversed course, and the White House Counsel issued a memorandum purporting to clarify that green card holders were *not* subject to the entry ban.⁹⁸ This question was central to the due process claim in the case. The Ninth Circuit highlighted the procedural oddity of a memo purporting to offer a definitive interpretation of an Executive Order, explaining that:

[T]he Government has offered no authority establishing that the White House counsel is empowered to issue an amended order superseding the Executive Order signed by the President and now challenged by the States, and that proposition seems unlikely . . . The White House Counsel is not the President, and he is not known to be in the chain of command for any of the Executive Departments.⁹⁹

The Ninth Circuit seemed to suggest that in the absence of an established practice of similar White House Counsel memos, it would not simply accept this instrument as resolving the meaning of the Executive Order.¹⁰⁰

96. See Shaw, *supra* note 14, at 1355–56.

97. Interview by Chuck Todd with Reince Priebus, White House Chief of Staff, *Meet the Press* NBC (Jan. 29, 2017), <https://www.nbcnews.com/meet-the-press/meet-press-01-29-17-n713751> [<https://perma.cc/QY9X-VMHY>] (questioning Priebus regarding whether the order would affect green card holders, to which Priebus responded, “Well, of course it does.”).

98. Memorandum from Donald F. McGahn II, Counsel to the President, to The Acting Sec’y of State et al., *Authoritative Guidance on Executive Order Entitled “Protecting the Nation from Foreign Terrorist Entry into the United States”* (Jan. 27, 2017) (Feb. 1, 2017), <https://pennstatelaw.psu.edu/sites/default/files/WH%20Counsel%20-%202017-02-01%20-%20Authoritative%20Guidance%20re%20EO%20on%20Refugees-Visas.pdf> [<https://perma.cc/YL46-6XJ4>].

99. *Washington v. Trump*, 847 F.3d 1151, 1165–66 (9th Cir. 2017), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017) (mem.), and *reconsideration en banc denied*, 858 F.3d 1168 (9th Cir. 2017) (mem.), and *cert. denied sub nom.* *Golden v. Washington*, 138 S. Ct. 448 (2017) (mem.).

100. Of course, giving legal effect to this sort of White House memo could potentially raise separation-of-powers concerns: government-wide directives typically come from the Office of Management and Budget or DOJ, whose heads are answerable to Congress in a way the White House Counsel is not. But what the court seemed to focus on was the inconsistency of this device with settled

Similar themes arose in later stages of the litigation; as to the second Executive Order, the Fourth Circuit identified “the exclusion of national security agencies from the decisionmaking process” as one of several reasons that justified looking behind the face of the order.¹⁰¹

In cases like the travel ban litigation, where the claim is that government conduct is tainted by constitutionally impermissible purpose, the public record itself may supply sufficient evidence. Courts evaluating challenges brought under the Equal Protection Clause and the Establishment Clause have explained that “[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body”¹⁰² The Court has also noted that in such cases, the “specific sequence of events leading up the challenged decision” may potentially “shed some light on the decisionmaker’s purposes.”¹⁰³ As I have argued elsewhere, although the case law primarily involves state and local officials, there is no reason that this test of government purpose should be inapplicable to the President.¹⁰⁴ Indeed, lower courts considered both the sequence of events and the President’s public statements in concluding that successive iterations of the travel ban were tainted by impermissible religious animus. And it is striking that despite its apparent confidence in the Supreme Court, the Trump administration twice allowed lower courts to have the last word on the lawfulness of the ban, opting each time to essentially acquiesce and draft a new order. These lower court orders, though enjoining particular presidential action, did not broadly disable the executive branch, let alone, as Issacharoff and Morrison worry, “destabilize the modern administrative state.”¹⁰⁵

To return to the Census citizenship case, one way to understand the Court’s Janus-faced opinion may be to see the Court’s affirmation of the *power* to take the action under review as embodying a kind of aspirational formalism; at the same time, the Court’s rejection of the agency’s pretextual explanation

internal executive-branch practice. *See also* Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017) (discussing green card episode).

101. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 591–92 (4th Cir. 2017), as amended (May 31, 2017), as amended (June 15, 2017), vacated and remanded *sub nom.* *Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 353 (2017) (mem.).

102. *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, 540–42 (1993) (plurality opinion); *McCreary Cty. v. ACLU*, 545 U.S. 844, 861 (2005).

103. *Arlington Heights*, 429 U.S. at 267; *see also* *Lukumi Babalu Aye*, 508 U.S. at 540–42; *McCreary Cty.*, 545 U.S. at 861.

104. Shaw, *supra* note 14, at 1355–56; *see also* Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147, 2150 (2019) (“A number of commonly used procedures—such as the quality or duration of deliberation, the involvement of experts, the facilitation of regular public hearings and open debate, and the documentation of studies and reasoning behind various policies—provide useful indicators in discovering political branch motivation.”).

105. Issacharoff & Morrison, *supra* note 4, at 1949.

represents an acknowledgment that this kind of formalism must yield to a more realist mode of analysis in cases like this.¹⁰⁶

CONCLUSION

An entire stratum of conventions exists inside the executive branch, perched atop the formal authority that structures, empowers, and constrains executive action. Both the travel ban litigation and the Census citizenship litigation featured district court inquiries into executive-branch decisions and conventions. In both cases, such inquiries generated valuable forms of public knowledge, created important pressure on executive-branch actors, and led to meaningful policy change. Both cases therefore underscore the importance of expanding our thinking about conventions beyond the Supreme Court's encounters with inter-branch disputes; they also provide guiding principles for lower courts evaluating future challenges to executive action.

106. Michigan law professor Leah Litman has parodied the weakness of the connection between the Voting Rights Act and the citizenship question across different platforms and formats. *See, e.g.*, @LeahLitman, TWITTER (Oct. 1, 2019, 7:44 PM), <https://twitter.com/LeahLitman/status/1179180379590275075> [<https://perma.cc/88HK-GG5N>] (“[O]bviously a border wall with a water filled trench full of snakes or alligators is necessary to enforce the voting rights act.”).