Fifth Amendment — Due Process Clause — Equal Protection — Department of Homeland Security v. Regents of the University of California

The Trump Administration's hostility to immigration has raised new questions about whether and how far courts should look past government actors' stated intentions.[1] In particular, advocates have pointed to the President's statements on the campaign trail and on Twitter when challenging the Administration's stated rationales as pretextual[2] and its actions as unconstitutional in court.[3] Last Term, in *Department of Homeland Security v. Regents of the University of California*,[4] the Supreme Court invalidated the rescission of the Department of Homeland Security's (DHS) policy of Deferred Action for Childhood Arrivals (DACA).[5] After careful review of the agency record, the Court ultimately found that the agency failed to adequately explain the basis for its decision and to consider reliance interests.[6] In contrast, the Court dismissed the argument that the decision to rescind DACA was motivated by a desire to discriminate against Latinos.[7] The Court's brief analysis of the equal protection claims both construes precedent narrowly and reveals underlying tensions latent in the Court's conception of the President's role in agency decisionmaking.

In June 2012, DHS announced DACA: a plan to suspend enforcement of "immigration laws against certain young people who were brought to this country as children and know only this country as home."[8] The memorandum introducing the DACA program also provided that the people shielded from deportation would qualify for work authorization and benefits like Social Security and Medicare, per existing DHS regulations.[9] Two years later, DHS announced Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA, which extended deferred action and benefits to the parents of both U.S.

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[1] *See* Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337, 1338–39 (2019).

[2] *See* Complaint ¶¶ 1, 106, 109, 183, New York v. U.S. Dep't of Com., 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 18-cv-05025).

[3] *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020) (plurality opinion); Trump v. Hawaii, 138 S. Ct. 2392, 2416–17 (2018).

[4] 140 S. Ct. 1891.

[5] *Id.* at 1901.

[6] *Id.* at 1915.

[7] *Id.* at 1915–16 (plurality opinion).

[8] Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. 1 (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/5L5T-Z3PT].

[9] *See id.* at 3; *Regents*, 140 S. Ct. at 1901–02.

citizens and lawful permanent residents.[10] The memo creating DAPA also expanded the scope of DACA.[11]

Twenty-six states brought suit to enjoin DAPA and the expansion of DACA.[12] The District Court for the Southern District of Texas imposed a nationwide preliminary injunction barring implementation of the program.[13] A panel of the Fifth Circuit affirmed over a dissent.[14] The Fifth Circuit rejected the argument that DAPA was "exempt" from the Administrative Procedure Act's[15] (APA) notice-and-comment requirements.[16] Because there was a substantial likelihood that DAPA was effectively binding on DHS officials, and because DAPA conferred substantive rights on its beneficiaries, the Fifth Circuit reasoned, DAPA was not a "general statement[] of policy," and notice and comment were required under the APA.[17] The Fifth Circuit further held that DAPA was unreasonable under the Immigration and Nationality Act[18] (INA).[19] The Supreme Court "affirmed by an equally divided Court."[20]

Following the 2016 presidential election, the Trump Administration rescinded DAPA.[21] Attorney General Sessions then advised DHS to rescind DACA as well, invoking the Fifth Circuit's decision as confirmation that DACA was also illegal.[22] In a memorandum citing the Attorney General's letter and the Fifth Circuit's decision, Acting Secretary of Homeland Security Elaine Duke "terminated" DACA.[23]

Three groups of plaintiffs challenged her decision under the APA and the Due Process Clause of the Fifth Amendment in courts across the country.[24] The District Court for the Eastern District of New York

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[10] *See Regents*, 140 S. Ct. at 1902.

[11] *See* Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigr. Servs., et al. 3–4 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_2.pdf [https://perma.cc/PJ7S-8U3X].

[12] *See Regents*, 140 S. Ct. at 1902.

[13] Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271, 2272 (2016) (mem.) (per curiam).

[14] *See Texas*, 809 F.3d at 135, 146.

[15] 5 U.S.C. §§ 551, 553–559, 701–706.

[16] *Texas*, 809 F.3d at 171; *see id.* at 171–78.

[17] *Id.* at 171 (quoting 5 U.S.C. § 553(b)(A)); *see id.* at 171–78.

[18] Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.).

[19] *See Texas*, 809 F.3d at 182. The court declined to reach the states' constitutional claim. *Id.* at 154.

[20] United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (mem.) (per curiam).

[21] *Regents*, 140 S. Ct. at 1903.

[22] Letter from Jefferson B. Sessions III, Att'y Gen., U.S. Dep't of Just., to Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec. (Sept. 4, 2017), https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf [https://perma.cc/9KBF-SMCK].

[23] *See* Memorandum from Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs., et al. (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca [https://perma.cc/8ST5-7GBN]; *Regents*, 140 S. Ct. at 1903.

[24] *Regents*, 140 S. Ct. at 1903.

sustained the claims that the rescission was arbitrary and capricious under the APA and that it was "substantially motivated by discriminatory animus" in violation of the equal protection component of the Due Process Clause, but dismissed the claim that notice and comment were required.[25] Similarly, the District Court for the Northern District of California sustained the majority of the APA and constitutional claims.[26] The District Court for the District of Columbia vacated the rescission on the grounds that it was arbitrary and capricious[27] but "defer[red] ruling" on the constitutional claims.[28] In response to the D.C. District Court's invitation for further clarification, Secretary Kirstjen Nielsen (Acting Secretary Duke's successor) wrote an additional memorandum offering "several separate and independently sufficient reasons" for rescission.[29] The D.C. District Court rejected the government's motion for reconsideration, explaining that "[a] conclusory assertion that a prior policy is illegal, accompanied by a hodgepodge of illogical or post hoc policy assertions, simply will not do."[30]

The Ninth Circuit affirmed the California district court's decision.[31] The court explained that deferred action "arises . . . from the Executive's inherent authority to allocate resources and prioritize cases."[32] After declining to consider any rationales that differed from the sole reason Acting Secretary Duke provided, the Ninth Circuit found that DACA was a "general statement[] of policy" that did not require notice-and-comment procedures and a lawful exercise of the agency's discretion.[33] As the Secretary acted "on an erroneous view of what the law required," the decision to terminate DACA was arbitrary and capricious.[34] Before the Second Circuit and the D.C. Circuit could decide, the Supreme Court granted certiorari and consolidated the three cases.[35]

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[25] Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260, 269 (E.D.N.Y. 2018); *see also* Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 409 (E.D.N.Y. 2018) (granting plaintiffs a preliminary injunction after concluding that they were likely to succeed on the merits).

[26] *See* Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., 298 F. Supp. 3d 1304, 1316 (N.D. Cal. 2018).

[27] *See* NAACP v. Trump, 298 F. Supp. 3d 209, 243 (D.D.C. 2018).

[28] *See id.* at 246. The court explained that it was not necessary to address the constitutional claims, and the court was "especially reluctant unnecessarily to address constitutional issues that ha[d] already been thoroughly considered by other courts." *Id.*

[29] Memorandum from Kirstjen M. Nielsen, Sec'y, Dep't of Homeland Sec. 1 (June 22, 2018), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf [https://perma.cc/J7MQ-7LLG].

[30] NAACP v. Trump, 315 F. Supp. 3d 457, 473–74 (D.D.C. 2018) (emphasis omitted).

[31] *See* Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 510 (9th Cir. 2018).

[32] *See id.* at 487.

[33] *See id.* at 502–03, 507–08, 510. The Ninth Circuit explained that "DACA is being implemented in a manner that reflects discretionary, case-by-case review . . . . With respect for our sister circuit, we find the analysis that seemingly compelled the result in *Texas* entirely inapposite." *Id.* at 510.

[34] *Id.* at 510.

[35] *Regents*, 140 S. Ct. at 1905.

Writing for the Court, Chief Justice Roberts[36] first rejected the government's claim that the agency action was unreviewable under either the APA or the INA. The rescission of DACA was not "committed to agency discretion by law" under § 701(a)(2) of the APA[37] because "DACA is not simply a non-enforcement policy."[38] Rather than refusing to act, DHS "created a program for conferring affirmative immigration relief."[39] And the elements of the policy that went beyond nonenforcement — work authorization and government benefits — are the kind of "benefits . . . 'courts often are called upon to protect.'"[40] As DACA "is more than a non-enforcement policy, its rescission is subject to review under the APA."[41] Additionally, Chief Justice Roberts concluded that because INA provisions barring judicial review apply only to specific deportation proceedings and decisions to commence those proceedings, they did not apply to general policy decisions like the DACA rescission.[42]

The Court then considered whether the agency satisfied the procedural requirement of reasoned decisionmaking. First, Chief Justice Roberts rejected the government's attempt to include in the record the second memorandum written by Secretary Nielsen.[43] He stated that when an agency chooses to elaborate on its initial explanation rather than issue a new rule supported by new reasons, courts must view these explanations "critically" and reject any "post hoc rationalization[s]."[44] While Secretary Nielsen offered three independent reasons for the rescission, she offered these reasons only after the fact.[45] Meanwhile, "Acting Secretary Duke rested the rescission [solely] on the conclusion that DACA is unlawful."[46]

Considering only the rationale provided by Acting Secretary Duke, the Court held that the rescission of DACA was arbitrary and capricious.[47] As the Acting Secretary relied on *Texas v. United States*[48] to support her decision, the Court looked to the "legal . . . defects" the Fifth Circuit found in that case, and concluded that these defects were relevant only

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[36] Chief Justice Roberts was joined by Justices Ginsburg, Breyer, and Kagan. Justice Sotomayor joined except as to Part IV.

[37] *Regents*, 140 S. Ct. at 1905.

[38] *Id.* at 1906.

[39] *Id.*

[40] *Id.* (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985)).

[41] *Id.* at 1907.

[42] *Id.*

[43] *Id.* at 1907–10. The Court stated that agencies cannot provide additional reasons for their decisions after the fact. *Id.* at 1908.

[44] *Id.* at 1908 (emphasis omitted) (quoting Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)).

[45] *See id.*

[46] *Id.*

[47] *Id.* at 1915.

[48] 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271, 2272 (2016) (mem.) (per curiam).

to DHS's decision to grant eligibility for benefits.[49] The agency had therefore ignored the legally distinct policy of deferring deportations.[50] While noting that this failure was enough to violate the APA, Chief Justice Roberts nevertheless went on to conclude that the agency had also failed to consider substantial reliance interests.[51] The Supreme Court did not address substantive arguments about DACA's legality, noting that the parties had overlooked the fact that Acting Secretary Duke "was bound by the Attorney General's legal determination."[52]

Finally, in a portion of the opinion joined by three Justices, Chief Justice Roberts found insufficient evidence that the rescission of DACA was motivated by animus against Latinos to support an equal protection claim.[53] Chief Justice Roberts concluded that DHS's decision to reevaluate DACA was not "irregular," and dismissed the President's "critical" language about Latinos and Mexicans as "remote in time and made in unrelated contexts."[54] He further noted that the respondents had not identified statements evincing animus from either Acting Secretary Duke or Attorney General Sessions, who were the most relevant actors.[55] Justices Thomas, Alito, Gorsuch, and Kavanaugh concurred in the dismissal of the equal protection claims.[56]

Justice Sotomayor dissented from the dismissal of the constitutional claims. She argued that by minimizing President Trump's statements and "the disproportionate impact of the rescission decision on Latinos," the majority ignored context.[57] Finding sufficient evidence of animus, she would have allowed the equal protection claims to stand.[58]

Justice Thomas, joined by Justices Alito and Gorsuch, dissented in part. Justice Thomas argued that DACA was illegal from the start because it was created "without any statutory authorization and without going through the requisite rulemaking process."[59] As such, DHS was not required to provide any additional reasons for its rescission.[60]

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[49] *See Regents*, 140 S. Ct. at 1911 (omission in original) (quoting Letter from Jefferson B. Sessions III, *supra* note 22).

[50] *Id.* at 1911–12. The Court compared the agency's justification to the justification rejected as insufficient in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). *Regents*, 140 S. Ct. at 1912.

[51] *Regents*, 140 S. Ct. at 1913.

[52] *Id.* at 1910 (emphasis omitted).

[53] *Id.* at 1915–16 (plurality opinion). Chief Justice Roberts was joined by Justices Ginsburg, Breyer, and Kagan.

[54] *Id.* at 1916.

[55] *Id.*

[56] *Id.* at 1919 n.1 (Thomas, J., concurring in the judgment in part and dissenting in part); *id.* at 1936 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

[57] *Id.* at 1917 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part); *see id.* at 1917–18.

[58] *Id.* at 1917.

[59] *Id.* at 1918–19 (Thomas, J., concurring in the judgment in part and dissenting in part).

[60] *Id.* at 1922.

Justice Alito also dissented in part. He argued that "even if DACA were lawful," the Court "would still have no basis for overturning its rescission" for two reasons.[61] First, if DACA were a "lawful exercise of prosecutorial discretion," the rescission of DACA must be unreviewable for arbitrariness.[62] Second, if the rescission were reviewable, it was not arbitrary and capricious for the reasons provided in Justice Kavanaugh's dissent.[63]

Lastly, Justice Kavanaugh dissented in part. In his view, precedent directed the Court to disregard only "after-the-fact explanations advanced by agency lawyers during litigation."[64] He argued that Secretary Nielsen's memorandum was not a post hoc justification, but a new "rule" under 5 U.S.C. § 551(4).[65] The Court should therefore have considered her memorandum as a legitimate explanation from an authorized agency decisionmaker.[66] As the second memorandum clarified the agency's rationale, explained that the agency would have rescinded DACA even if it were lawful, and addressed reliance interests, it would have passed arbitrary-and-capricious review.[67]

The *Regents* Court declined to give the President's statements any doctrinal weight. This is nothing new: from the start of the Trump Administration, a majority of the Court has proven hesitant to entertain claims that the executive branch acted with discriminatory intent, even while holding it accountable for procedural defects. But the Court's narrow reading of the biased-decisionmaker element of discriminatory intent is new. Moreover, the Court's insistence that the President's statements were barely relevant[68] is in tension with its recent decision that executive branch agencies cannot be completely insulated from the President's control.[69] If read broadly, *Regents* will likely make claims of discrimination harder to prove.

The Supreme Court has all but foreclosed equal protection claims based solely on evidence of disparate impact on a protected class.[70] As a result, claims of unconstitutional discrimination often must include evidence that a government actor was motivated by a discriminatory

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[61] *Id.* at 1932 (Alito, J., concurring in the judgment in part and dissenting in part).

[62] *Id.*

[63] *Id.*

[64] *Id.* at 1934 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (emphases omitted).

[65] *Id.* at 1933.

[66] *See id.* at 1933–34.

[67] *Id.* at 1933.

[68] *Id.* at 1916 (plurality opinion).

[69] *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020).

[70] *See* Washington v. Davis, 426 U.S. 229, 242 (1976); Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1082–83 (2011) (explaining that the Supreme Court has made the requirement of discriminatory purpose "very difficult to prove" by requiring evidence that "the government desired to discriminate," *id.* at 1082).

purpose.[71] Knowledge "of [a] disparate impact on a protected group" is generally insufficient; instead, "[t]he disparate impact ha[s] to operate as at least a partial incentive for the state action."[72] Though the contours of these kinds of inquiries are not always clear,[73] disparaging statements have been considered "highly relevant" evidence of such an incentive.[74] To give one example, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[75] the Supreme Court found that several statements by commissioners were sufficient evidence of impermissible hostility toward religion.[76]

But when faced with claims of discrimination brought against the executive branch, the Supreme Court has not found the President's statements to be evidence of impermissible animus. In addressing anti-Muslim statements in *Trump v. Hawaii*,[77] for example, the Court emphasized that its inquiry into the President's statements about national security in particular was "highly constrained."[78] And in *Department of Commerce v. New York*,[79] though the Court was willing to find that the agency's stated reason for its decision to include a citizenship question in the 2020 Census was pretextual, it did not speculate as to the real reason behind the pretextual one.[80] In keeping with this trend, the *Regents* Court dismissed the argument that the rescission of DACA was motivated by animus.

In contrast to in its recent cases, however, the *Regents* Court implied — almost in passing — that the President was not a directly

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[71] Shaw, *supra* note 1, at 1351–52; *see, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (free exercise); Pers. Adm'r v. Feeney, 442 U.S. 256, 274 (1979) (sex discrimination).

[72] Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 764 (2011); *see Feeney*, 442 U.S. at 272; *Davis*, 426 U.S. at 242.

[73] *See* Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 553–54 (2016) (explaining that the Supreme Court's "methods for gauging [impermissible] intent are . . . variables, not constants, in constitutional analysis," *id.* at 553).

[74] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977).

[75] 138 S. Ct. 1719 (2018).

[76] *See id.* at 1732. The statement that the Court found most damning was the following: "[W]e can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to — to use their religion to hurt others." *Id.* at 1729 (quoting Petition for a Writ of Certiorari at 29, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111)).

[77] 138 S. Ct. 2392 (2018).

[78] *Id.* at 2420; *see id.* at 2417–18.

[79] 139 S. Ct. 2551 (2019).

[80] *Id.* at 2575–76. The district court in that case addressed this question head-on, ultimately concluding that, though the plaintiffs proved that the Secretary of Commerce's stated rationale was pretextual, the plaintiffs failed to prove "what the rationale was a pretext for — and, more to the point, that it was a pretext for *discrimination* prohibited by the Due Process Clause." New York v. U.S. Dep't of Com., 351 F. Supp. 3d 502, 670 (S.D.N.Y 2019), *aff'd in part, rev'd in part, and remanded*, 139 S. Ct. 2551. The district court explained that though it had found sufficient evidence of discriminatory animus at the motion-to-dismiss stage, the plaintiffs had offered no evidence of a nexus between the President's disparaging statements and the agency's decision at trial. *Id.* at 669–70.

relevant decisionmaker. Though the dismissal of the religious discrimination claim in *Hawaii* was heavily criticized,[81] some noted that the analysis at least seemed limited to the facts given the Court's emphasis on the "authority of the Presidency itself."[82] The *Regents* Court's analysis was not so limited. In a portion of the opinion spanning just over a page, and relying exclusively on its 1977 decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[83] the Court explained that the President's statements were "unilluminating" because the decision's "relevant actors" did not "directly" include the President, whose statements were "remote in time and made in unrelated contexts."[84]

This narrow view of whose animus is relevant represents a shift from the Court's precedent on discriminatory intent. At a high level, *Arlington Heights* was not as close a fit for this case as the Court's opinion might suggest: The *Arlington Heights* Court dismissed equal protection claims as lacking sufficient evidence of discriminatory intent, but it did so only after a full bench trial.[85] And even after trial, the plaintiffs offered no evidence of statements revealing animus.[86] By contrast, as Justice Sotomayor stressed in her dissent, the equal protection claims before the Court in *Regents* were in a "preliminary posture."[87]

In other cases as well, though it has limited the kinds of evidence it views as relevant to a claim of discrimination, the Supreme Court has not defined "decisionmaker" as excluding everyone other than the "directly" relevant actors.[88] On the contrary, in *Personnel Administrator v. Feeney*,[89] the Court considered "the totality of legislative actions

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[81] *See* Trump v. Hawaii, 138 S. Ct. at 2447 (Sotomayor, J., dissenting) (describing parallels between the majority opinion and the Court's decision in *Korematsu v. United States*, 323 U.S. 214 (1944)); *see also, e.g.*, Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1273–75 (2018); Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119, 1210 (2020).

[82] Trump v. Hawaii, 138 S. Ct. at 2418; *see* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 530 (2018) ("Whatever the lessons of *Trump v. Hawaii* might be, they are limited to challenges to immigration policies involving the entry of noncitizens, and likely only those policies implicating national security.").

[83] 429 U.S. 252 (1977).

[84] *Regents*, 140 S. Ct. at 1916 (plurality opinion); *see id.* at 1915–16.

[85] *See Arlington Heights*, 429 U.S. at 254, 270.

[86] *Id.* at 269–71.

[87] *Regents*, 140 S. Ct. at 1917 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part). Even in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the case that imposed a heightened pleading standard for claims of discriminatory intent, the Court dismissed a claim offering *only* evidence of disparate impact to support a claim of discriminatory purpose, without any additional evidence of discriminatory intent, *id.* at 681–82.

[88] *Regents*, 140 S. Ct. at 1916 (plurality opinion); *see* Jessica Clarke, *The DACA Decision Is Trouble for Discrimination Law*, TAKE CARE (June 24, 2020), https://takecareblog.com/blog/the-daca-decision-is-trouble-for-discrimination-law [https://perma.cc/V7U7-JL72]. Though it has most often considered discriminatory intent in the legislative — rather than executive — context, those cases are instructive. *See* Shaw, *supra* note 1, at 1345, 1386–87.

[89] 442 U.S. 256 (1979).

establishing" the law at issue to discern discriminatory purpose.[90] When faced with a claim of discrimination against religious minorities in another case, the Court considered "significant hostility exhibited by residents, members of the city council, and other city officials" as evidence that a city ordinance was passed to suppress "the Santeria religion."[91]

Finally, in hastily dismissing the equal protection claims, the Court also disregarded a "cat's paw" theory of liability, which it has embraced in claims of employment discrimination. This theory stands for the principle that an employer may be liable for discrimination if a supervisor acts with animus, even where that supervisor is not a final decisionmaker, as long as the act is the "proximate cause" of an adverse employment action.[92] The District Court for the Eastern District of New York rejected the argument that the President's motives were irrelevant in part on these grounds, noting: "As courts have recognized in far more mundane contexts, liability for discrimination will lie when a biased individual manipulates a non-biased decision-maker into taking discriminatory action."[93]

As disparaging statements are one of only a few kinds of evidence courts still find probative of discriminatory intent, the President's statements should have carried more weight — especially given the principle, most recently articulated by the Chief Justice in *Seila Law LLC v. Consumer Financial Protection Bureau*,[94] that the President is responsible for the decisions of the executive branch.[95] Writing for the majority in *Seila*, the Chief Justice explained that "[u]nder our Constitution, the 'executive Power' — all of it — is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'"[96] The majority held that Congress may not constitutionally vest decisionmaking power in a single agency director who is "insulated from Presidential control."[97] Following this logic, the District Court for the Eastern District of New York emphasized that the "Constitution vests 'executive Power' in the

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[90] *Id.* at 280.

[91] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 541 (1993); *see id.* at 540–41 (applying the *Feeney* standard for discriminatory purpose).

[92] Staub v. Proctor Hosp., 562 U.S. 411, 415, 422 (2011); *see also* Zamora v. City of Houston, 798 F.3d 326, 331–33 (5th Cir. 2015) (joining the Sixth, Tenth, Eighth, and Eleventh Circuits in embracing a "cat's paw" theory of causation in Title VII discrimination cases).

[93] Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260, 279 (E.D.N.Y. 2018).

[94] 140 S. Ct. 2183 (2020).

[95] *See id.* at 2191–92, 2203.

[96] *Id.* at 2191 (first quoting U.S. CONST. art. II, § 1, cl. 1; then quoting *id.*; and then quoting *id.* § 3); *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 490 (2003) ("The presidential control model seeks to ensure that administrative policy decisions reflect the preferences of the one person who speaks for the entire nation. In this way, it attempts to legitimate administrative policy decisions, through presidential politics, on the ground that they are responsive to public preferences.").

[97] *Seila*, 140 S. Ct. at 2192.

President, not in the Secretary of DHS, who reports to the President and is removable by him at will."[98]

As compared with its careful review of the agency's decisionmaking process for procedural errors — and its insistence that the government "turn square corners in dealing with the people"[99] — the Court's one-page dismissal of the equal protection claims in this case indicates that it is unwilling to consider the possibility that the Executive intends to discriminate. But, especially given its decision in *Seila*, if the Court wanted to exempt the President from such inquiries into motive, it should have provided an explicit reason for doing so. As Professor Katherine Shaw has argued, "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."[100] Otherwise, it is not clear why the President should be considered in "control" in one context and not in another.

To be sure, the Court's careful parsing of the agency's stated rationale and refusal to consider post hoc explanations forced the administration to accept the political repercussions of a decision that stood to cause significant harm.[101] For Dreamers and their families, this was a good outcome. But as the Court dismissed the equal protection claims without any discussion of the President's unique role in agency decisionmaking, the Court's latest effort to avoid acknowledging the administration's real reasons may create unnecessary obstacles for future claims of discriminatory intent. Lower courts rely on statements evincing animus — often from higher-ups — to invalidate stop-and-frisk policies,[102] voting laws disadvantaging Black and Latino voters,[103] and discriminatory employment decisions.[104] These statements are often revealed only after discovery.[105] The *Regents* Court's hasty dismissal of the equal protection claims at the pleading stage may therefore make claims of discrimination by the government even harder to prove.

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[98] *Batalla Vidal*, 291 F. Supp. 3d at 279 (quoting U.S. CONST. art. II, § 1, cl. 1). Professor Daphna Renan has noted a similar tension between *Trump v. Hawaii* and *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), explaining that "[i]f public law requires the president to be personally responsible for the decisions of the presidency, then the animus of the incumbent is salient, even central to the constitutional analysis of impermissible discriminatory intent." Renan, *supra* note 81, at 1210.

[99] *Regents*, 140 S. Ct. at 1909 (quoting St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting)).

[100] Shaw, *supra* note 1, at 1387.

[101] *See* Benjamin Eidelson, *Unbundling DACA and Unpacking Regents: What Chief Justice Roberts Got Right*, BALKINIZATION (June 25, 2020), https://balkin.blogspot.com/2020/06/unbundling-daca-and-unpacking-regents.html [https://perma.cc/SQE7-U5G2].

[102] *See* Clarke, *supra* note 88 (citing Floyd v. City of New York, 770 F.3d 1051 (2d Cir. 2014)).

[103] Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 1041 (9th Cir. 2020) (en banc).

[104] *See* Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260, 279 (E.D.N.Y. 2018) (collecting cases).

[105] *See* Huq, *supra* note 81, at 1277 ("[M]undane mechanisms of civil discovery . . . may be especially important in substantiating the presence of discriminatory intent that takes the form of animus . . . .").