# SECOND-BITE LAWMAKING*

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*Lawmakers can be quite persistent as they battle to advance their favored agendas, even after unsuccessfully defending against constitutional challenge. When a law is struck down because it is constitutionally defective, the architects of the defeated law frequently go back to the drawing board and try again, making modifications they hope will allow the new version to survive another round of litigation. Sometimes this second bite at the lawmaking apple looks like the very embodiment of good faith interbranch dialogue. But sometimes these repeated efforts reflect the deliberate evasion of constitutional duty across multiple cycles of lawmaking and litigation—or as Justice Kagan recently put it, the "pouring of old poison into new bottles." To distinguish between these two different types of official persistence, we must first understand second-bite lawmaking as a pervasive and trans-substantive phenomenon—one that calls for an adjudicative framework well suited to its unique features.*

*This Article is the first to serve that purpose, offering three case studies in the areas of voting rights, free speech, and religious liberty. The case studies demonstrate that as government defendants repeatedly try to produce a law that will withstand judicial review, they learn how to conceal the defects that were fatal to prior versions. Courts will thus eventually be presented with laws that have been scrubbed clean of their predecessors' most obvious flaws. When examining these sanitized versions, how should courts weigh the failed attempts at constitutionally legitimate lawmaking that preceded them? This Article considers what guidance the Supreme Court has offered on this question. Carefully examining cases in which the Court has expressly considered the appropriate implications to draw from prior iterations of a challenged law, this Article reveals that over time, the Supreme Court has abandoned what was once a tolerably sensible approach to second-bite lawmaking. The Court's latest pronouncement threatens to eviscerate the substantive constitutional principles at stake in these multiphasal disputes.*



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## INTRODUCTION

"Here we go again," lamented a district court judge in the opening words of an order enjoining Mississippi's latest attempt to ban abortion prior to fetal viability.[1] As the judge explained, the previability ban clearly violated the constitutional principles governing abortion regulation, as did Mississippi's previous ban.[2] With obvious frustration, the judge noted that "[t]he parties have been here before,"[3] and that it had been merely a year since the plaintiffs had successfully challenged Mississippi's prior attempt at a ban.[4] Another district court judge, patience wearing thin upon becoming the *fifth* federal court to rule against the same set of asylum restrictions from the Trump administration,

1. Jackson Women's Health Org. v. Dobbs, 379 F. Supp. 3d 549, 551 (S.D. Miss. 2019), *aff'd*, 951 F.3d 246 (5th Cir. 2020).

2. *Id.* at 552–53, 552 n.13 ("[W]e now use 'viability' as the relevant point at which a State may begin limiting women's access to abortion for reasons unrelated to maternal health." (quoting Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320 (2016))).

3. *See id.* at 551.

4. *See id.* at 552 ("This Court previously found the 15-week ban to be an unconstitutional violation of substantive due process because the Supreme Court has repeatedly held that women have the right to choose an abortion prior to viability, and a fetus is not viable at 15 weeks . . . .").

observed in exasperation that "the government keeps crashing the same car into a gate, hoping that someday it might break through."[5]

As these and other examples illustrate, government defendants can be quite persistent in pursuing their favored agendas, even after unsuccessfully defending against a constitutional challenge. When a court strikes down a law because it is constitutionally defective, the government officials backing the defeated law frequently try again with a new version, enacting modified legislation or issuing a revised executive order with the goal of preventing or surviving another round of litigation. This pattern of persistence raises important questions for subsequent assessments of a revised law's constitutionality. How many unfettered chances should lawmakers get to pass a law after the first effort was deemed unconstitutional? Should the slate wipe clean every time? These questions are worth sustained scholarly attention—and not only because federal judges are growing weary.[6] As this Article shows, a convincing and consistent approach to this phenomenon—a pattern that I label second-bite lawmaking—is essential to the operation of tiered scrutiny, intent inquiries, and other doctrines that form the functional machinery of constitutional adjudication.

To be sure, subsequent lawmaking can sometimes look like the very embodiment of good faith interbranch constitutional dialogue—the system working exactly as it should. After the Washington D.C. handgun ordinance was struck down in *District of Columbia v. Heller* (*Heller I*),[7] for example, the city went back to the drawing board and tried again, enacting a new scheme which was again subjected to Second Amendment challenge.[8] While some portions of the new scheme were also struck down, much of it was upheld,[9] reflecting the city's partial success in recalibrating its regulations to comply with the demands of the Second Amendment. That the resulting regulatory landscape is disappointing to those on both sides of the gun control divide underscores the

5. Suman Naishadham, *US Judge Blocks Trump Administration's Sweeping Asylum Rules*, AP NEWS (Jan. 8, 2021), https://apnews.com/article/donald-trump-immigration-courts-local-governments-3d6ab9e79153e67d974cee1bf592862f [https://perma.cc/MSQ7-CCUF (staff-uploaded archive)]; *see also* Maria Dinzeo, *Judge Slams Feds over Insistence Wolf Is Lawful Homeland Security Chief*, COURTHOUSE NEWS SERV. (Jan. 7, 2021), https://www.courthousenews.com/judge-slams-feds-over-insistence-wolf-is-lawful-homeland-security-chief/ [https://perma.cc/NJU4-HEJE] (reporting that the judge also opined that "[t]he government keeps running the same 8-track tape and the sound is not getting better").

6. *See* Carter Sherman, *"Here We Go Again:" This Judge Blocked Another Mississippi Abortion Ban and He's Tired*, VICE NEWS (May 24, 2019, 6:06 PM), https://www.vice.com/en/article/vb9zna/here-we-go-again-this-judge-blocked-another-mississippi-abortion-ban-and-hes-tired [https://perma.cc/C2W8-V4MP].

7. 554 U.S. 570 (2008).

8. Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1248 (D.C. Cir. 2011).

9. Heller v. District of Columbia (*Heller III*), 801 F.3d 264, 290 (D.C. Cir. 2015) (Henderson, J., dissenting).

sense of disputation, dialogue, and accommodation that should characterize the resolution of intensely contested issues in a constitutional system.[10]

Sometimes, however, a lawmaker's return to the drawing board looks like recalcitrance or outright resistance—like the persistent evasion of constitutional duty across multiple cycles of lawmaking and litigation. The paradigm example of iterative lawmaking that cannot be characterized as simply the boisterous back-and-forth of interbranch constitutional dialogue is one with deep historical roots: the unyielding but ever adaptive efforts of state officials to prevent Black communities from voting, switching from one stratagem to another as each was successfully challenged in court.[11] While the cycle was arrested with the passage of the Voting Rights Act of 1965, described by scholars as the most successful civil rights statute in American history,[12] race-based voter suppression is hardly a thing of the past.[13]

North Carolina's recent voting laws are but one prominent example. Since the passage of the Voting Rights Act in 1965 up to the very present moment, there has been only a seven-week period, in the summer of 2013, during which North Carolina was neither required to obtain federal preclearance for changes to its voting laws nor defending its voting enactments against charges of racial discrimination.[14] It was hard at work during those seven weeks, however. The

10. *See* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right To Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1438 (2018) ("Second Amendment scholarship and commentary are particularly riven with fundamental disagreements, some of which are insoluble.").

11. For expanded discussion of this chronology in the caselaw, see, for example, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2351 (2021) (Kagan, J., dissenting) (describing how states and localities were constantly contriving new rules to keep minority voters from the polls, thereby "pour[ing] old poison into new bottles"); South Carolina v. Katzenbach, 383 U.S. 301, 309–11 (1966) (describing "the variety and persistence" of such laws). For scholarly discussion, see, for example, Katie R. Eyer, *The New Jim Crow Is the Old Jim Crow*, 128 YALE L.J. 1002, 1033 (2019) [hereinafter Eyer, *The New Jim Crow*] ("[I]n the voting domain, most of the infamous efforts to disenfranchise African Americans—such as the grandfather clause, the poll tax, literacy tests, and felon disenfranchisement laws—were 'race neutral' in design, precisely in order to evade prohibitions on facially race-based voting restrictions."); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 177 (2007) ("[C]ase-by-case adjudication of voting rights lawsuits proved incapable of reining in crafty Dixiecrat legislatures determined to deprive African Americans of their right to vote, regardless of what a federal court might order.").

12. On the extraordinary success of the Voting Rights Act in combating race-based voter suppression, see, for example, Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2144 (2015) ("Widely lauded as one of the most effective statutes ever enacted, the Voting Rights Act . . . finally made good on the promise of the Fifteenth Amendment.").

13. *See* Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 214 ("[S]tates across the country [have recently] adopt[ed] a wide range of measures making it harder to vote.").

14. "Covered jurisdictions" included states and localities with a history of race-based voter suppression as defined by a formula set forth in the Voting Rights Act. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438 (codified as amended at 52 U.S.C. §§ 10301–10313). Such jurisdictions were required to receive preclearance from either the Attorney General or the U.S.

North Carolina General Assembly, upon being released from its preclearance obligations in June 2013 by the Supreme Court's decision in *Shelby County v. Holder*,[15] enacted an omnibus bill with a range of voting restrictions that "target[ed] African Americans with almost surgical precision."[16] Immediately after the law was struck down, North Carolina officials started "calling for a new law that would incorporate some of the same ideas in a manner that they thought could withstand judicial review."[17] The second effort, enacted in 2018, reflected enough of those "same ideas" to suffer the same fate as the first: it was promptly challenged in federal court and enjoined for its ongoing discriminatory intent and disparate impact.[18] Undaunted, North Carolina legislators passed a *third* version in June 2020, this time bundling it with COVID-inspired provisions, such as expanded voting by mail.[19]

When do these subsequent bites at the lawmaking apple seem legitimate, and when do they seem suspect? Once our suspicions are aroused, how should the resulting analysis proceed? Should we be content to stay within the "four corners" of the latest iteration, ignoring the failed attempts at constitutionally legitimate lawmaking that preceded it?[20] As this Article shows, such questions are ubiquitous, arising across multiple areas of law and implicating legislative

District Court for the District of Columbia prior to making any changes in voting procedure. § 5, 79 Stat. at 439. Forty North Carolina counties were covered jurisdictions, Billy Ball, *In N.C., 40 Counties Are No Longer Governed by Section 5 of the Voting Rights Act*, INDY WK. (July 3, 2013, 4:00 AM), https://indyweek.com/news/northcarolina/n.c.-40-counties-longer-governed-section-5-voting-rights-act/ [https://perma.cc/5ZL6-RA9B], until, in *Shelby County v. Holder*, 570 U.S. 529 (2013), the Supreme Court invalidated the coverage formula on the grounds that it had become outdated "in light of current conditions." *Id.* at 550–51. The Supreme Court handed down its *Shelby County* decision on June 25, 2013. Exactly seven weeks later, two lawsuits were filed to challenge the General Assembly's recently enacted voter identification bill. *See* Ethan Rosenberg, *Two Lawsuits Challenge NC Voter ID Law*, U.S. NEWS & WORLD REP. (Aug. 13, 2013, 4:49 PM), https://www.usnews.com/news/newsgram/articles/2013/08/13/two-lawsuits-challenge-nc-voter-id-law [https://perma.cc/2CMU-PDY4 (staff-uploaded archive)].

15. 570 U.S. 529 (2013).

16. N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016). For further detail, see *infra* Section I.A.1, which relays how Republican leaders requested and received racial data for a variety of voting practices and drafted the restrictions only after learning that African Americans would be the voters most significantly affected.

17. N.C. State Conf. of the NAACP v. Cooper, 430 F. Supp. 3d 15, 26 (M.D.N.C. 2019), *rev'd sub nom.* N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295 (4th Cir. 2020).

18. *Id.* at 47 (explaining that the chronology leading up to the 2018 law "reflects an effort by the majority party to do as little as possible and still withstand judicial review"). As explored in more detail later in this Article, the preliminary injunction was reversed by the Fourth Circuit in December 2020. *See infra* notes 100–02 and accompanying text.

19. *See* David Hawkings, *N.C. Legislators Clear Bill Combining Easier Mail Balloting with Voter ID*, FULCRUM (June 12, 2020), https://thefulcrum.us/north-carolina-voter-id-law [https://perma.cc/WK9X-S4AB].

20. *See, e.g.*, Emma Kaufman, *The New Legal Liberalism*, 86 U. CHI. L. REV. 187, 209–10 (2019) (describing the majority in *Trump v. Hawaii* as having "reasoned that courts ought not peer beyond the four corners of executive orders on immigration, no matter how compelling the evidence of discriminatory intent").

and executive actors at both the state and federal level. As one appellate court put it, "The outcome hinges on the answer to a simple question: How much does the past matter?"[21] But we might rephrase the question to inquire instead: How do we know when the past is really past?[22] Once attuned to this question, we see it emerge across multiple areas of concern, including voting rights, immigration, abortion, criminal procedure, and a host of other salient and politically charged realms.[23] What is needed, and what is provided here for the first time in the scholarly literature, is a trans-substantive account of the phenomenon and a systematic examination of the Supreme Court's practices regarding successive lawmaking.[24]

Part I introduces second-bite lawmaking, using detailed examples drawn from different types of government action to illustrate the benefit of thinking about this as a trans-substantive phenomenon. This part offers three case studies in the areas of voting rights, free speech, and religious liberty, all of which concern successive lawmaking and the appropriate inferences to be drawn from prior iterations of a challenged law. The first case study offers a closer look at North Carolina's indefatigable attempts to make it harder to vote—especially for Black communities.[25] The second case study examines a similarly persistent, multiphased effort by Iowa lawmakers to insulate the state's agricultural industry from critical coverage in the media. After each of these "ag-gag" laws were invalidated for the impermissible burdens they placed on protected speech, lawmakers returned to the drawing board, producing a more tailored version that appeared responsive to the prior rulings.[26] The third case study considers President Trump's infamous "Muslim ban," which was challenged, rescinded, redrafted, and then challenged and rescinded again, all

21. *Raymond*, 981 F.3d at 298. This seemingly straightforward formulation in fact begs the question: Is the discrimination with which we have been concerned past or present—ongoing or completed?

22. Acknowledgement is due here, of course, to William Faulkner, who famously observed, "The past is never dead. It's not even past." WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951).

23. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020) (tracing Oregon's rule permitting nonunanimous verdicts to the rise of the Ku Klux Klan and other efforts to dilute the influence of minorities in Oregon juries).

24. As Professor W. Kerrel Murray observes, scholars have grappled in various ways with "the broad idea that problematic history could affect present-day analysis." W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1195, 1227 (2022) (collecting sources and developing a "temporally maximalist, institutionally realist" model for detecting when a policy bears a tainted relationship to a discriminatory predecessor). This Article contributes to that literature by focusing on the distinctive questions that arise when lawmakers return to the drawing board after suffering defeat in litigation and repeatedly try either to fix or conceal the defects that were fatal to prior versions. To that end, this Article offers three case studies in which it is possible to discern a singular trajectory of lawmaking effort across multiple rounds of invalidation and revision. Doing so allows us to trace the information-forcing effect of each round of judicial review and see how it redounds to the benefit of government defendants determined to hew as closely as possible to their original course.

25. *See infra* Section I.A.1.

26. *See infra* Section I.A.2.

before arriving at a final version that purported to emphasize the targeted countries' inadequate security protocols rather than religion.[27]

The substantive doctrinal principles at stake in each context differ considerably, as does the relationship between the lawmaker in question and the federal court—judicial review of presidential power in "sensitive" national security matters is exceedingly deferential, as we are continually reminded.[28] But in each of these contexts, the underlying question is, "How much does the past matter?" Or more aptly, "How do we know the past is really past?" As this Article shows, the answer will eventually become outcome determinative as government defendants learn to conceal the defects that were fatal to prior versions.

The case studies in Part I illustrate that constitutional litigation is information forcing in a way that works to the benefit of government officials determined to stay the course. Courts will eventually be presented with laws that have been scrubbed clean of their most obvious flaws—sanitized versions that might very well have passed muster had they been the lawmaker's first attempt at the issues in question.[29] But shouldn't the analysis of the latest version take into account the entire sequence that preceded it? After all, in equal protection, free speech, and religious liberty adjudication, the presence of invidious intent is a determining factor in assessing the constitutionality of government action.[30] Are we to imagine that an impermissible purpose simply vanishes after lawmakers learn the hard way that their work product will not survive constitutional scrutiny?[31]

27. Trump v. Hawaii, 138 S. Ct. 2392, 2403–05 (2018).

28. *Id.* at 2422.

29. Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 65 (2020) (describing "animus laundering" as "the ability of a government actor to change the rationale for a government action from a discriminatory one to something more palatable to satisfy further judicial review"); *see also* Joshua Matz, *Thoughts on the Chief's Strategy in the Census Case*, TAKE CARE (July 1, 2019), https://takecareblog.com/blog/thoughts-on-the-chief-s-strategy-in-the-census-case [https://perma.cc/DZH3-JH2B] (explaining that, in some cases, courts themselves "order[] a round of revision," giving legislators opportunities "in which the most blatant lies will be washed away and replaced with subtler lies").

30. Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1212 (2018) ("'Discriminatory intent' is a central term in the judicial interpretation of constitutional clauses requiring the equal treatment of persons without regard to their race, ethnicity, or religion.").

31. Any work that involves discussion of legislative intent, purpose, or motive must contend with a formidable set of caveats and complications. As Professor Richard Fallon, Jr., has queried, "When the Supreme Court invokes the concepts of legislative intent or purpose, and occasionally of legislative motivation, does it refer—possibly confusedly or even incoherently—to an imagined collective mental state, to some aggregation of the mental states of individual legislators, or to something else?" Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 527 (2016). A rich scholarly literature explores these and other intent-related questions in detail. For a nonexhaustive list, see, for example, John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1207 (1970) ("The Supreme Court's traditional confusion about the relevance of legislative and administrative motivation in determining the constitutionality of governmental actions has, over

Part II considers what guidance the Supreme Court has offered on this question. At a high enough level of abstraction, there is no doubt that a challenged law's full trajectory can be considered—after all, the Court said as much in *Village of Arlington Heights v. Metropolitan Development Corp.*,[32] setting forth what is now a well-established framework for plaintiffs challenging unconstitutional conduct. But as usual, the devil is in the details. As we start to probe more deeply into the methodological questions surrounding successive lawmaking, we find a considerable lack of clarity.

By carefully examining the cases in which the Court has expressly considered the appropriate implications to draw from prior iterations of a challenged law, Part II reveals that over time the Court has taken profoundly divergent approaches. The Court at one point was highly sensitive to the idea that a contemporary, facially unproblematic law might nonetheless contain "unconstitutional remnants" if it was "traceable" to prior unconstitutional conduct.[33] The Court went so far as to place the burden on the state—having enacted an "initially tainted policy"—to show that the link between the new law and the prior version had been severed.[34] In a subsequent case, while not applying an explicit burden-shifting framework, the Court expressly took into account the evolution of a challenged policy, not merely its latest iteration.[35] As the Court observed, "[T]he world is not made brand new every morning . . . . [R]easonable observers have reasonable memories . . . ."[36] More recently, however, the Court cautioned against treating "past discrimination" as a sort of "original sin" that continues to taint subsequent lawmaking, reversing the lower

the past few terms, achieved disaster proportions." (footnote omitted)); Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1, 3 (2016) [hereinafter Eyer, *Ideological Drift*] (considering whether intent inquiries have a progressive or conservative valence); Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1790–91 (2008) (answering the question, "What role are courts supposed to play in enforcing purpose-based restrictions on legislative power?"); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992) ("[T]here is not a single legislative intent, but rather many *legislators*' intents."); Timothy W. Grinswell, *The Best of All Possible Congresses*, NEW RAMBLER, https://newramblerreview.com/book-reviews/law/the-best-of-all-possible-congresses [http://perma.cc/5A4D-G68N] (reviewing *The Nature of Legislative Intent* by Richard Ekins and determining that Ekins "provides a serious defense of legislative intent as integral to the lawmaking process"); *see also* McGowan v. Maryland, 366 U.S. 420, 466 (1961) (Frankfurter, J., concurring) ("To ask what interest, what objective, legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted."). For an argument that the inquiry should be described instead as one that focuses on "legislative context," see VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 135–37 (2016).

32. 429 U.S. 252, 268 (1977) (identifying, "without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed").

33. United States v. Fordice, 505 U.S. 717, 733–34 (1992).

34. *Id.* at 746–47 (Thomas, J., concurring).

35. McCreary County v. ACLU of Ky., 545 U.S. 844, 866 (2005).

36. *Id.*

court for disregarding "the presumption of legislative good faith."[37] Part II explains why this latest pronouncement has destabilized what had been a sensible approach to successive lawmaking. An infinitely renewable presumption of good faith that refreshes in full, no matter how many times lawmakers have returned to the drawing board, will eviscerate the substantive principles at stake in these multiphasal disputes.

Part III tackles additional questions that emerge as we develop and refine a theory of second-bite lawmaking. Would reenactment by a newly constituted legislature be sufficient to cut the thread between a new attempt and prior invalidated versions? Could the mere passage of time, at least when combined with extensive social transformation, be enough to cleanse a law of a prior improper purpose? Under what conditions might we conclude that lawmakers going back to the drawing board are sincerely engaged in good faith interbranch dialogue, recalibrating their policy preferences to accommodate constitutional principles? Following an exploration of these questions and synthesizing the key lessons of second-bite lawmaking, this Article concludes that an adequate framework for evaluating patterns of official persistence requires procedural mechanisms tailored to this unique context.

## I. BACK TO THE DRAWING BOARD: SECOND-BITE LAWMAKING AS A TRANS-SUBSTANTIVE PHENOMENON

This part explores three different case studies in successive lawmaking, beginning with one that is regrettably familiar: race-based voter suppression. It then considers the phenomenon in a newer area of constitutional struggle, the battles over speech-suppressing "ag-gag" laws, before turning to the high-profile controversy over President Trump's multiple efforts to impose a Muslim ban. As we see in each of these contexts, every subsequent law was inextricably linked to its predecessor, revealing a singular trajectory of lawmaking effort.

### A. *Case Studies in Successive Lawmaking*

#### 1. Voting Rights as the Paradigm Example

History shows that we may fail to understand the full import of official action if we simply look at each challenged law as a discrete and independent constitutional battle. Nearly one hundred years after the ratification of the Fifteenth Amendment, the Supreme Court characterized the efforts of state officials to prevent Black voters from exercising the franchise as nothing other than "unremitting and ingenious defiance of the Constitution."[38] Against the

37. Abbott v. Perez, 138 S. Ct. 2305, 2324 (2018) ("[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." (quoting City of Mobile v. Bolden, 446 U.S. 55, 74 (1980))).

38. South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

"clear commands" of the Fifteenth Amendment, states like Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia repeatedly created new voter suppression mechanisms in order to evade court orders striking down their earlier efforts.[39] They enacted literacy tests, for example, which were "specifically designed" to prevent Black citizens from voting.[40] A typical test required registrants to read and write, while exempting from the literacy requirement the "lineal descendants" of those who had been eligible to vote in 1866—a category comprised entirely of white people.[41]

When Oklahoma's version of this "grandfather clause" was struck down by the Court in 1915, the state responded with a law providing that (1) all those who had been eligible to vote in 1914 remained eligible to vote; and (2) everyone else would need to register between April 30, 1916, and May 11, 1916, or else *permanently* lose the right to register and vote.[42] This obvious attempt to achieve the same exclusionary effect as the invalidated grandfather clause was also struck down,[43] as were all-white primaries,[44] racial gerrymandering efforts,[45] and the discriminatory application of voting tests.[46]

Notwithstanding this impressive record of federal court victories, it became clear that repeatedly bringing suit under the Fifteenth Amendment was ultimately ineffective against "the variety and persistence" of mechanisms designed to deprive Black voters of their rights.[47] Decades of successful litigation were insufficient to correct this intransigence, in spite of the clear constitutional command, because voting suits were onerous to prepare, litigation was slow, and even when victory was finally achieved, states "merely switched to discriminatory devices not covered by the federal decrees or . . . enacted difficult new tests designed to prolong the existing disparity."[48] This was the phenomenon that Congress sought to arrest with the preclearance mechanism of the Voting Rights Act, requiring states with a history of racially

39. *Id.* at 309–10.

40. *Id.* at 310.

41. *Id.* at 310–11. These so-called "grandfather clauses" were struck down by the Supreme Court in *Guinn v. United States*, 238 U.S. 347, 347, 364–65 (1915), and *Myers v. Anderson*, 238 U.S. 368, 369, 379–80 (1915). For additional discussion of voter suppression tactics during this period, see Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Slouching Toward Universality: A Brief History of Race, Voting, and Political Participation*, 62 HOW. L.J. 809, 832 (2019).

42. Lane v. Wilson, 307 U.S. 268, 270–71 (1939).

43. *Id.* at 277.

44. *See* Terry v. Adams, 345 U.S. 461, 470 (1953); Smith v. Allwright, 321 U.S. 649, 664–66 (1944).

45. *See* Gomillion v. Lightfoot, 364 U.S. 339, 347–48 (1960).

46. Louisiana v. United States, 380 U.S. 145, 154–55 (1965); Alabama v. United States, 371 U.S. 37, 37 (1962) (per curiam); Schnell v. Davis, 336 U.S. 933, 933 (1949) (per curiam).

47. South Carolina v. Katzenbach, 383 U.S. 301, 311–12, 334–35 (1966) (describing the "extraordinary stratagem[s] of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees").

48. *Id.* at 314.

discriminatory voting practices to demonstrate that any proposed change to voting procedure would not diminish the ability of any citizen to vote on account of race or color. Indeed, "Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down."[49]

The particular legal question at issue in *South Carolina v. Katzenbach*[50] was whether this pronounced pattern of persistence provided a sufficient foundation for Congress to enact the Voting Rights Act,[51] but the lesson we can draw is much broader. As egregious as they are in isolation, neither the twelve-day registration period,[52] the twenty-eight-sided voting district,[53] nor any of the other voter suppression stratagems invalidated by the Court can convey how "unremitting and ingenious" was the determination to prevent Black citizens from voting.[54] Only by viewing all of these efforts as iterations in the same ongoing struggle can we truly understand the significance of each of these laws and the "insidious and pervasive evil" that animated their enactment.[55] This lesson has been clearly understood for quite some time with regards to the conditions that led to the enactment of the Voting Rights Act, forming a settled narrative in the case law and the scholarly literature devoted to this pivotal era. We must now consider the potential for its continued application.

When we heed the call to evaluate official action across time, and perhaps across jurisdictions, where else do we see "unremitting and ingenious defiance"[56] or such "variety and persistence"?[57] Notably, we still see it with racially discriminatory burdens on voting, and a careful examination of current voter suppression efforts will illuminate some of the key issues in second-bite lawmaking.

North Carolina, for example, suffers from a "long and shameful history of race-based voter suppression," and is in the midst of a profoundly contentious dispute about whether such discrimination is better described as past or present.[58] From 1965 until the summer of 2013, forty North Carolina counties were covered jurisdictions under the Voting Rights Act, which required them to obtain preclearance from the federal government before enacting any laws

49. Beer v. United States, 425 U.S. 130, 140 (1976).
50. 383 U.S. 301 (1966).
51. *Id.* at 308.
52. Lane v. Wilson, 307 U.S. 268, 271 (1939).
53. Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960).
54. *Katzenbach*, 383 U.S. at 309.
55. *Id.*
56. *Id.*
57. *Id.* at 311.
58. *See* N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295, 311 (4th Cir. 2020).

pertaining to voting.[59] In 2013, within seven weeks of being freed from the preclearance obligation by the Supreme Court's holding in *Shelby County v. Holder*,[60] North Carolina enacted an omnibus law with multiple types of "punishing" restrictions on voting.[61] Challengers filed suit hours after the bill was signed into law,[62] initiating a string of legal battles that are still pending in some form as of spring 2022.[63]

While *Shelby County* was a pivotal moment in this chronology, North Carolina's General Assembly had been working to enact a voter identification bill even before being freed of the Voting Rights Act's preclearance regime.[64] Its first effort passed both chambers[65] but was vetoed by Governor Beverly Perdue in 2011, who explained that the bill would "unnecessarily and unfairly disenfranchise many eligible and legitimate voters."[66] Perhaps inattentive to the risk of confirming and indeed strengthening this assessment,[67] the General Assembly returned to the drawing board and at multiple points in 2012 and

59. *Id.* at 298. For a complete list of North Carolina's covered counties, see *Jurisdictions Previously Covered by Section 5*, U.S. DEP'T JUST., **Error! Hyperlink reference not valid.**https://www.justice.gov/crt/jurisdictions-previously-covered-section-5 [https://perma.cc/PVJ9-57N5] (Nov. 29, 2021).

60. *See supra* notes 14–16 and accompanying text.

61. Voter Information Verification Act, ch. 381, 2013 N.C. Sess. Laws 1505 (codified as amended in scattered sections of N.C. GEN. STAT.); *see also* Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147, 2162–63 (2019); Eyer, *The New Jim Crow*, *supra* note 11, at 1040–41 (describing the law as a "new 'colorblind' form[] of racial subordination" that continues to exclude African Americans from political participation rights).

62. *See* Rosenberg, *supra* note 14.

63. N.C. State Conf. of the NAACP v. Berger, 999 F.3d 915, 923 (4th Cir.) (en banc), *cert. granted*, 142 S. Ct. 577 (2021) (mem.) (explaining that the district court trial on the merits was postponed pending the resolution of a separate appeal regarding intervention). In November 2021, the U.S. Supreme Court granted certiorari on the intervention question. *See Berger*, 142 S. Ct. at 577. The district court stayed the entire case, including the trial that had been scheduled to begin January 24, 2022, pending the resolution of the certiorari grant. *See* N.C. State Conf. of the NAACP v. Cooper, No. 18CV01034, 2021 WL 3639493, at *1 (M.D.N.C. Aug. 17, 2021); *see also* Will Doran, *Voter ID Is Blocked for Now in NC. Your Guide to All the Court Fights and What's Next*, NEWS & OBSERVER (Sept. 19, 2021, 11:17 AM), https://www.newsobserver.com/article254326153.html [https://perma.cc/8DCS-X67Y (staff-uploaded, dark archive)].

64. N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295, 298 (4th Cir. 2020).

65. H.B. 351, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011).

66. Ned Barnett, *North Carolina Governor Vetoes Voter Photo ID Bill*, REUTERS (June 23, 2011, 4:10 PM), https://www.reuters.com/article/us-voterid-northcarolina/north-carolina-governor-vetoes-voter-photo-id-bill-idUSTRE75M7LM20110623 [https://perma.cc/9N2U-JUDG]. Governor Perdue alluded to North Carolina's Jim Crow past, stating, "There was a time in North Carolina history when the right to vote was enjoyed only by some citizens rather than by all. That time is past, and we should not revisit it." Eric Kleefeld, *North Carolina Dem Governor Vetoes GOP Voter-ID Bill*, TALKING POINTS MEMO (June 23, 2011, 1:48 PM), https://talkingpointsmemo.com/muckraker/north-carolina-dem-governor-vetoes-gop-voter-id-bill [https://perma.cc/F979-DMY7 (dark archive)].

67. State Republicans driving these efforts were no doubt emboldened by having won the governorship and supermajorities in both state chambers in 2012. *See* Mary C. Curtis, *A Voter ID Battle in North Carolina*, WASH. POST (Mar. 13, 2013), https://www.washingtonpost.com/blogs/she-the-people/wp/2013/03/13/a-voter-id-battle-in-north-carolina/ [https://perma.cc/Z5SV-TDZE (dark archive)].

2013 requested and received information on the racial demographics of voter identification, as well as practices such as early and provisional voting.[68] The record makes clear that the legislators wanted to know which racial groups used which types of identification and voting practices, and that they were successful in obtaining this information. Representative Harry Warren, a sponsor of the pending voter ID bill, requested that the State Board of Elections provide "a cross-matching of registered voters who have 'neither a NC Driver's License nor a NC Identification Card' and the 'number of one-stop voters and provisional voters.'"[69] He further requested that both inquiries be "broken down by all possible demographics" collected by the State Board of Elections, including "party affiliation, ethnicity, age, gender, etc."[70] The director of the State Board of Elections provided Representative Warren with a link where the requested data could be found, including "summary counts based on different demographics."[71] Representative David Lewis, another sponsor, received "a spreadsheet that contained race data for individual same-day registrants and whether those registrants were verified."[72] A legislative research staffer sought and obtained "a breakdown of the 2008 voter turnout, by race (white and black) and type of vote (early and election day)."[73]

As the General Assembly was gathering and contemplating this and other related data, the Supreme Court issued its opinion in *Shelby County*, releasing North Carolina from the obligation to obtain federal preclearance of changes to its voting laws.[74] The very next day, the Republican chairman of the Senate Rules Committee announced that in lieu of the single-issue voter identification bill that had been winding its way through the legislative process, the Assembly would soon "have an omnibus bill coming out."[75]

The bill was then revised and expanded in a number of ways. With regards to the original issue of voter identification, "[t]he pre-*Shelby County* version of [the bill] provided that all government-issued IDs, even many that had been expired, would satisfy the requirement."[76] The post-*Shelby County* version was amended to exclude many of the alternative types of identification typically used by Black voters, retaining as acceptable only the types of ID that "white

68. *See* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 216–17 (4th Cir. 2016).

69. N.C. State Conf. of the NAACP v. McCrory, 182 F. Supp. 3d 320, 489–90 (M.D.N.C.), *rev'd and remanded*, 831 F.3d 204 (4th Cir. 2016). "One-stop voters" refer to those availing themselves of a "procedure allowing voters to request and cast an absentee ballot at the same time." *Id.* at 332 n.4.

70. *Id.* at 490.

71. *Id.*

72. *Id.*

73. *Id.* at 489.

74. *Id.* at 498; *see also* Shelby County v. Holder, 570 U.S. 529, 557 (2013).

75. *McCrory*, 182 F. Supp. 3d at 498.

76. N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 216 (4th Cir. 2016); H.B. 351, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011).

North Carolinians were more likely to possess."[77] The bill was also expanded to include a reduction of the early voting period; the elimination of same-day registration; restrictions on provisional voting, including the use of out-of-precinct ballots; and the elimination of "pre-registration" of sixteen- and seventeen-year-olds who would not be eighteen by the next general election.[78] The racial data requested and received by the General Assembly showed that each of the eliminated or restricted practices were disproportionately used by Black voters.[79] This omnibus bill passed both houses, was signed into law by the governor, and was challenged immediately in federal court as a violation of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.[80]

The district court entered judgment against the plaintiffs,[81] and the Fourth Circuit reversed, holding that the challenged provisions were enacted with racially discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act.[82] In May 2017, the Supreme Court denied the State's petition for certiorari, leaving in place the appellate court's ruling against the discriminatory provisions.[83] Within hours of that denial, legislators began "calling for a new law that would incorporate some of the same ideas in a manner that they thought could withstand judicial review."[84] By the end of 2018, the General Assembly had enacted another voter identification law over Governor Roy Cooper's veto.[85]

77. *McCrory*, 831 F.3d at 216; H.B. 589, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013).

78. *McCrory*, 182 F. Supp. 3d at 340. Additional measures included:

> (4) the allowance for up to ten at-large poll observers within each county; (5) the ability of any registered voter in the county, as opposed to precinct, to challenge a ballot; (6) the elimination of the discretion of [county boards of elections] to keep the polls open an additional hour on Election Day in "extraordinary circumstances."

*Id.*

79. *McCrory*, 831 F.3d at 216–17.

80. *Id.* at 218. Another group of plaintiffs challenged the age restrictions as violations of the Twenty-Sixth Amendment. *Id.*

81. *McCrory*, 182 F. Supp. 3d at 530.

82. *McCrory*, 831 F.3d at 219, 242.

83. North Carolina v. N.C. State Conf. of the NAACP, 137 S. Ct. 1399, 1399 (2017) (mem.).

84. N.C. State Conf. of the NAACP v. Cooper, 430 F. Supp. 3d 15, 26 (M.D.N.C. 2019), *rev'd sub nom.* N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295 (4th Cir. 2020).

85. *Id.* at 27. Republicans were able to use their supermajorities in the state legislature to place a constitutional amendment on the 2018 ballot that would require photo ID for voting. *Id.* (citing Act of June 29, 2018, ch. 128, 2018 N.C. Sess. Laws 824). The amendment, which was adopted by popular vote in November 2018, instructed the legislature to enact laws setting forth the specific requirements. *Id.* The legislature did so in December 2018, producing the modified voter ID law that was again subject to challenge. *Id.* Governor Cooper's veto message expressed his view that the measure "was designed to suppress the rights of minority, poor and elderly voters" and would "trap honest voters in confusion and discourage them with new rules." *Id.* (quoting Governor Roy Cooper, Objections and Veto Message on S.B. 824 (Dec. 14, 2018), https://webservices.ncleg.gov/ViewBillDocument/2017/7703/0/S824-BD-NBC-2666 [https://perma.cc/D64A-HKZK]). The 2018 bill included a wider array of acceptable forms of ID, but set forth a list that "continues to primarily include IDs which minority

The following day, plaintiffs filed suit challenging the 2018 law and requesting a preliminary injunction, which the district court granted in part.[86] The preceding history concerning the 2013 omnibus law figured prominently in the district court's opinion—not because there was any lingering controversy regarding the now-defunct provisions of the 2013 law, but because the court found the chronology to be relevant in assessing the intent motivating the 2018 law.[87] The state defendants appealed the preliminary injunction,[88] and while the appeal was pending, the General Assembly passed yet another voting bill in June 2020.[89]

The June 2020 bill was originally presented and debated as a suite of measures to address the challenges of administering an election safely during the COVID-19 pandemic.[90] To that end, the bill provided funding for election officials to sanitize polling stations and purchase protective equipment for poll workers, allowed greater flexibility in the staffing of polling stations, reduced the number of witnesses needed for absentee ballots from two to one, and offered an online mechanism for requesting an absentee ballot.[91] But while the bill was pending, Republican legislators[92] added language that would allow voters to present public assistance documents as proof of identification *if* the

voters disproportionately lack, and leaves out those which minority voters are more likely to have." *Id.* at 38. It added an expanded procedure for claiming reasonable impediment to the presentation of photo ID, and it included absentee voting, which is disproportionately used by white voters and had been exempted from the 2013 ID requirement. *See id.* at 34–36.

86. *See id.* at 24, 54. Methodically working through the factors set out in *Arlington Heights* for the assessment of facially neutral laws that are alleged to be motivated by discriminatory intent—including the historical background and legislative history of the challenged law—the district court found that the plaintiffs were likely to prevail on their claim that the 2018 law was motivated by racially discriminatory intent. *See id.* at 43.

87. *See id.* at 25 ("[T]o fully understand and contextualize S.B. 824, its mechanics, its proposed implementation, and the motivations of those who enacted it, a brief review of that history is necessary here.").

88. *Raymond*, 981 F.3d at 301.

89. *See* Hawkings, *supra* note 19; *see also* Bipartisan Elections Act of 2020, ch. 17, 2020 N.C. Sess. Laws 104 (codified as amended in scattered sections of N.C. GEN. STAT. ch. 163).

90. Melissa Boughton, *With State Elections Bill Sleight of Hand, GOP Seeks To Revive Enjoined Voter ID Law*, NC POL'Y WATCH (June 11, 2020), http://www.ncpolicywatch.com/2020/06/11/with-state-elections-bill-sleight-of-hand-gop-seeks-to-revive-enjoined-voter-id-law/ [https://perma.cc/K9GL-WEZF].

91. WILLIAM JANOVER, KYRA JASPER, CAMPBELL JENKINS, CHRISTOPHER MIDDLETON, MEGHA PARWANI, SANDY PECHT, GEORGIA ROSENBERG & INDY SOBOL, STANFORD-MIT HEALTHY ELECTIONS PROJECT, NORTH CAROLINA'S 2020 ELECTION PREPARATIONS 5–6 (2020), https://healthyelections.org/sites/default/files/2020-10/NC_preparations.pdf [https://perma.cc/T2AS-QHJJ].

92. For a discussion of the difficulty in "distinguishing government actions motivated by race from those motivated by partisanship," see Joshua S. Sellers, *Politics as Pretext*, 62 HOW. L.J. 687, 688 (2019). Professor Richard Hasen has explored in depth "the legal problems caused by 'conjoined polarization': the overlap of race and party preferences, particularly in the American South, with white voters overwhelmingly preferring Republican candidates and African-Americans (and to a lesser extent Latino voters) preferring Democratic candidates." *See* Hasen, *supra* note 29, at 71.

enjoined voter identification requirements from the 2018 law were allowed to go into effect.[93] This immensely clever strategy presented the Democratic legislators with a multilayered dilemma. Most immediately, if they were to vote against the bill in objection to the newly added voter identification provisions, they risked imperiling the incontrovertibly necessary pandemic measures.[94] But they were also faced with a strategic choice about the pending litigation over the 2018 law and how best to understand the status quo in which they found themselves. As they debated, North Carolina Democrats and voting rights advocates had no way to know whether, at any moment, the appellate court might reverse the preliminary injunction against the 2018 law and resurrect the voter identification requirement—potentially in time for the all-important November 2020 election.[95] If that were to happen, it would unquestionably be better for Black voters to be allowed to satisfy the ID requirement with public assistance documents.[96] On the other hand, North Carolina Democrats had no wish to sanitize and potentially rehabilitate the latest iteration of a voter identification project with discriminatory origins.[97] Legislators concerned with voter disenfranchisement faced the prospect that in the eyes of the courts, the addition of public assistance documents might be just enough to salvage a voter

93. *See* Boughton, *supra* note 90; *see also* Bryan Warner, *Common Cause NC Statement on Enactment of Bipartisan Bill To Prepare State for Elections amid COVID-19*, COMMON CAUSE N.C. (June 12, 2010, 6:37 PM), https://www.commoncause.org/north-carolina/press-release/common-cause-nc-statement-on-enactment-of-bipartisan-bill-to-prepare-state-for-elections-amid-covid-19/ [https://perma.cc/GD7J-VLZX] ("A controversial provision in the bill that is unrelated to COVID-19 relief—and that was opposed by Common Cause NC and other pro-democracy groups—deals with voter ID. It is important to note that a court injunction has blocked the implementation of voter ID requirements in North Carolina. This bill's provision does not supersede the court order that remains in place blocking voter ID.").

94. *See* Boughton, *supra* note 90. Representative Raymond Smith, Jr., one of three Black Democrats to vote against the measure, decried as "one of the oldest tricks in the book" the Republican effort to include a voter ID provision in a bill that has "absolutely everything to do with the health of our people, the health of our state." *Id.*

95. *See* Will Doran, *Why a Law Responding to Coronavirus Could Also Help Republicans in a Voter ID Lawsuit*, NEWS & OBSERVER, https://www.newsobserver.com/article244122227.html [https://perma.cc/6XT3-52TB (staff-uploaded, dark archive)] (July 10, 2020, 9:39 AM) ("Republican lawmakers are currently appealing their losses in three different lawsuits related to voter ID.").

96. *See* Michael Wines, *North Carolina Court Strikes Down a Voter ID Law, Citing Racial Discrimination*, N.Y. TIMES (Sept. 17, 2021), https://www.nytimes.com/2021/09/17/us/politics/north-carolina-voter-id-law.html [https://perma.cc/2NRW-24GQ (dark archive)] ("[E]ven if the photo identification law improved on its predecessor, it still had a lopsided impact on Black voters. Republicans rejected Democratic proposals to add public assistance and high-school ID cards to the list of accepted identification, . . . and an expert testified that Black voters were about 39 percent more likely to lack an accepted ID than were white voters.").

97. Representative Smith, Jr., for example, explained his vote against the bill: "My feeling was that by voting in favor of this bill, we were in essence introducing a new voter ID law. We just created another window of opportunity." Boughton, *supra* note 90.

identification scheme that would otherwise suffer the same fate as its unconstitutional predecessor.[98]

Ultimately, the June 2020 bill passed with bipartisan support and was signed into law by the governor.[99] The preliminary injunction against the 2018 voter ID bill stayed in place through the November 2020 election but was reversed soon thereafter.[100] Reviewing the lower court's ruling against the 2018 voter ID law, the Fourth Circuit was troubled by the degree to which the district court emphasized the discriminatory intent behind the invalidated 2013 law, critiquing the district court for having treated it as "effectively dispositive of its intent in passing the 2018 Voter-ID Law."[101] The Fourth Circuit reversed the preliminary injunction of the 2018 law, holding that the district court had "improperly flipped the burden of proof" regarding the legislative purpose.[102]

We will return to this opinion in more detail, but we must first understand the extent to which the dynamics revealed in this chronology appear in other contexts. As becomes evident in the next sections, North Carolina legislators are not alone in their commitment to stay the chosen course, responding to unfavorable rulings by finding new vehicles for the "same ideas" that animated their previous unsuccessful efforts.[103] In the voting rights context and others, attending carefully to these patterns of legislative persistence is essential to a full understanding of the subsequent enactments.

In drawing this parallel between the ongoing battles over voting rights in North Carolina and official persistence in other areas of constitutional struggle, I do not intend to diminish the primacy of race-based voter suppression in this country's past, present, or future. With the nation still reeling from the January 6, 2021, terrorist attack on the Capitol—one that historians have identified as merely the latest in a chronology of violent white political backlash stretching back throughout the nation's history[104]—it is safe to say that the appropriate rules of electoral engagement for a multiracial democracy is the central overriding concern of our time. But it would be a mistake to conclude that the pattern of official persistence exemplified by North Carolina's determination to

98. *See id.* (gathering statements from legislators who voted against the bill because of the newly added voter ID provision). Tomas Lopez, the executive director of Democracy NC, referenced the pending litigation in his critique and described the Republican addition of public assistance documents to the 2020 bill "as an attempt by leadership at a 'quick fix' to North Carolina's voter ID problem as raised by those courts." *Id.*

99. Warner, *supra* note 93.

100. *See* N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295, 310–11 (4th Cir. 2020).

101. *Id.* at 303.

102. *Id.*

103. *See infra* Sections I.A.2–3.

104. Rick Perlstein, acclaimed historian of the American reactionary right, explained this phenomenon in a video released on social media shortly after the January 6 attack. *See* Rick Perlstein (@attn), TWITTER (Jan. 15, 2021, 11:00 AM), https://twitter.com/attn/status/1350140696141783040 [https://perma.cc/L2E7-J949].

pass a voter identification bill is limited to voting rights, as the next sections illustrate. While race-based voter suppression may be sui generis in many respects, it offers lessons about official persistence in unconstitutional conduct that translate to many other contexts.

### 2. Ag-Gag Laws in Iowa

In the same month that North Carolina officials produced their third attempt at a voter identification law, lawmakers in Iowa were showing similar levels of determination to pass the kind of measure that has come to be known as an "ag-gag" law. Named to convey the underlying motive to muzzle criticism of the agricultural industry,[105] ag-gag laws criminalize whistleblowing and undercover investigations in agricultural facilities.[106] Urged upon state legislatures by the agricultural industry as a mechanism to prevent the damaging public relations fallout from undercover investigations conducted by journalists and activists,[107] ag-gag laws have been repeatedly found unconstitutional for the burdens they place on protected speech.[108] As with the voter suppression efforts explored above, ag-gag laws are not confined to a single state,[109] and there is much to learn by considering the controversy across state lines. Homing in on a single state, however, helps us understand the phenomenon of second-bite lawmaking that is the focus of this Article.

105. The term "ag-gag" was coined by *New York Times* food writer Mark Bittman. Mark Bittman, Opinion, *Who Protects the Animals?*, N.Y. TIMES (Apr. 26, 2011, 9:29 PM), https://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/ [https://perma.cc/P5PL-2S8T (dark archive)].

106. *See An Overview of "Ag-Gag" Laws*, REPS. COMM. FOR FREEDOM PRESS, https://www.rcfp.org/journals/overview-ag-gag-laws/ [https://perma.cc/9KMJ-PCPG].

107. *See* Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317, 1317–18 (2015).

108. *See, e.g.*, Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017); *see also* Caitlin A. Ceryes & Christopher D. Heaney, *"Ag-Gag" Laws: Evolution, Resurgence, and Public Health Implications*, 28 NEW SOLS. 664, 666 (2019) (providing a brief history of similar proposed and enacted legislation across the country).

109. Alleen Brown, *Iowa Quietly Passes Its Third Ag-Gag Bill After Constitutional Challenges*, INTERCEPT (June 10, 2020, 4:55 PM), https://theintercept.com/2020/06/10/iowa-animal-rights-crime-ag-gag-law/ [https://perma.cc/RQM8-XZPQ] ("Iowa isn't alone in using legislation to criminalize animal rights activism and whistleblowing. For more than a decade, the American Legislative Exchange Council, an organization that links industry lobbyists with state lawmakers, has promoted a model ag-gag bill. More than two dozen states have introduced versions of the bill, and in half a dozen states, they remain law. In Idaho, Utah, Kansas, and Wyoming, ag-gag laws have been overturned as unconstitutional.").

Iowa, the nation's largest producer of pork[110] and eggs,[111] offers a useful case study to illuminate official persistence in the realm of ag-gag laws.[112] Iowa's first ag-gag law[113] was struck down in January 2019 after a federal district court judge ruled that the law was a content-based restriction on speech that could not withstand strict scrutiny.[114] Two months later, Iowa enacted a second version,[115] making modifications that turned out to be too minor to save the new law from being enjoined as well; the judge remarked that the state defendants had still "not made any persuasive record regarding the interests the statute is said to serve."[116] Remaining undeterred, Iowa lawmakers tried yet again, enacting a third ag-gag law in June 2020.[117] As is usually the case with iterative lawmaking, an accurate understanding of the third version requires that Iowa's ag-gag chronology be examined in further detail.

When lawmakers convened in 2012 to debate and enact Iowa's first ag-gag law, the state's agricultural interests were experiencing an onslaught of negative publicity on a national scale.[118] Undercover investigations had exposed horrific abuse and unsanitary conditions at several of Iowa's industrial farms, prompting the U.S. Food and Drug Administration to initiate regulatory actions[119] and national grocery chains to suspend purchasing from the facilities shown in the

110. *Iowa Pork Facts*, IOWA PORK PRODUCERS ASS'N, https://www.iowapork.org/news-from-the-iowa-pork-producers-association/iowa-pork-facts/ [https://perma.cc/3DCX-GPK7].

111. *Did You Know that Iowa Is Number One in Egg Production in the United States?*, IOWA EGG COUNCIL, https://www.iowaegg.org/egg-industry/iowa-egg-farmers [http://perma.cc/8RFG-6QEA].

112. *See* Tyler Lobdell, *Iowa's Waged a War To Silence Big Ag Critics. We're Trying To Stop Them in Court.*, FOOD & WATER WATCH (Sept. 2, 2021), https://www.foodandwaterwatch.org/2021/09/02/iowas-waged-a-war-to-silence-big-ag-critics-were-trying-to-stop-them-in-court/ [https://perma.cc/C27V-SYK9] ("Iowa enacted its first Ag-Gag law in 2012, and has since passed three more in response to court decisions striking down these laws for violating the First Amendment. . . . Ag-Gag 4.0 takes a slightly different approach than previous attempts . . . .").

113. Act of Mar. 2, 2012, 2012 Iowa Acts 5 (codified at IOWA CODE § 717A.3A (2013)).

114. Animal Legal Def. Fund v. Reynolds (*Reynolds II*), 353 F. Supp. 3d 812, 824–26 (S.D. Iowa 2019), *aff'd in part, rev'd in part*, 8 F.4th 781 (8th Cir. 2021).

115. Act of Mar. 14, 2019, 2019 Iowa Acts 4 (codified at IOWA CODE § 717A.3B (2020)).

116. Animal Legal Def. Fund. v. Reynolds, No. 19-cv-00124, 2019 WL 8301668, at *20 (S.D. Iowa Dec. 2, 2019); *see also* Donnelle Eller, *Judge Issues Order Preventing Enforcement of Iowa's New 'Ag-Gag' Law*, DES MOINES REG., https://www.desmoinesregister.com/story/money/agriculture/2019/12/02/federal-judge-stops-enforcement-iowas-new-ag-gag-law/2591453001/ [http://perma.cc/VGN5-U9GA] (Dec. 3, 2019, 4:55 PM) [hereinafter Eller, *Judge Issues Order*].

117. Act of June 10, 2020, 2020 Iowa Acts 62 (codified at IOWA CODE § 716.7A (2020)); *see also* Ava Auen-Ryan & Emma Schmit, *Iowa Leaders Use Pandemic To Restrict Free Speech on Ag Concerns*, IOWA STARTING LINE (June 22, 2020, 3:18 PM), https://iowastartingline.com/2020/06/22/iowa-leaders-use-pandemic-to-restrict-free-speech-on-ag-concerns/ [https://perma.cc/M4G3-BV2V]. As with their colleagues in North Carolina, Iowa lawmakers used pandemic-related legislation as a vehicle to revive their ag-gag agenda while the enjoined second iteration was pending in federal court. *Id.*

118. *See Reynolds II*, 353 F. Supp. 3d at 816–17.

119. Dan Flynn, *Egg Rule Violations Cost Sparboe Its McDonald's Account*, FOOD SAFETY NEWS (Nov. 11, 2019), https://www.foodsafetynews.com/2011/11/egg-rule-violations-cost-sparboe-mcdonalds-account/ [https://perma.cc/5YK5-H2VV].**Error! Hyperlink reference not valid.**

video recordings.[120] For the most part, the whistleblowers were animal rights activists who had obtained employment at the facilities they were hoping to investigate.[121] They then used their access as employees to record workers engaged in abusive conduct, such as hurling piglets at a concrete floor, beating pigs with metal rods, and sticking clothespins into the pigs' eyes and faces.[122] Investigators at one Iowa farm "documented hens with gaping, untreated wounds laying eggs in cramped conditions among decaying corpses."[123]

As the results of these investigations were circulated in the national media, Iowa's lawmakers introduced a bill to create the crime of "agricultural production facility fraud."[124] The new offense would occur when a person willfully

> a. Obtains access to an agricultural production facility by false pretenses [, or]
>
> b. Makes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized.[125]

Lawmakers described the bill as both promoting the security of agricultural facilities and protecting the industry from reputational harm. One state senator, commenting on a draft version of the bill, said, "What we're aiming at is stopping these groups that go out and gin up campaigns that they use to raise money by trying to give the agriculture industry a bad name."[126] Another legislator explained that the goal was to "protect agriculture . . . [and] not have any subversive acts . . . bring down an industry," and that the law was "passed mainly for protection of an industry that is dedicated to actually feeding the world in the next 25 years."[127] The bill was signed into law by the Governor,

120. Anne-Marie Dorning, *Iowa Pig Farm Filmed, Accused of Animal Abuse*, ABC NEWS (June 29, 2011, 9:29 AM), https://abcnews.go.com/Business/iowa-pig-farm-filmed-accused-animal-abuse/story?id=13956009 [https://perma.cc/R7SH-4TDP].

121. *Id.*

122. *Reynolds II*, 353 F. Supp. 3d at 816–17.

123. Clark Kauffman, *Iowa's 'Ag Gag' Has Stifled Investigations, Despite Pending Court Challenges*, IOWA CAP. DISPATCH (Nov. 27, 2020, 12:00 PM), https://iowacapitaldispatch.com/2020/11/27/iowas-ag-gag-has-stifled-investigations-despite-pending-court-challenges/ [https://perma.cc/8GYJ-KZ89].

124. *Reynolds II*, 353 F. Supp. 3d at 816; *see also* H. File 589, 84th Gen. Assemb. (Iowa 2011).

125. *Reynolds II*, 353 F. Supp. 3d at 818; *see also* H. File 589, 84th Gen. Assemb. (Iowa 2011). Iowa law already criminalized trespass and other offenses more squarely tailored to the concerns about biosecurity, such as the "willful possession, transportation, or transfer" of pathogens. *Reynolds II*, 353 F. Supp. 3d at 826; *see also* IOWA CODE § 717A.4(1) (Westlaw through legislation from the 2021 2d Extraordinary Sess.).

126. *Reynolds II*, 353 F. Supp. 3d at 817.

127. Brief in Support of Plaintiff's Motion for Summary Judgment at 5, *Reynolds II*, 353 F. Supp. 3d 812 (No. 17-cv-00362).

whose spokesperson previously told a newspaper that the Governor "believes undercover filming is a problem that should be addressed."[128]

A coalition of journalists and advocacy groups dedicated to animal welfare, food safety, and worker protection filed suit, asserting that the law was a viewpoint-based, content-based, and overbroad restriction on protected speech.[129] The district court agreed that the law was a content-based restriction and that the prohibited speech, while false, was nonetheless within the domain of First Amendment protection.[130] Essential to this aspect of the ruling was that the speech prohibited by the law required "no likelihood of actual, tangible injury on the part of the recipient of false speech."[131] Having determined that the law was indeed a content-based restriction on protected speech, the district court therefore applied strict scrutiny, rebuffing the defendants' insistence on a more deferential standard of review.[132] The district court, observing that at least some lawmakers were motivated by the speech-suppressing desire to protect "Iowa's agricultural industry from perceived harms flowing from undercover investigations of its facilities," nonetheless considered whether the law could be said to advance the state's interests in protecting private property and biosecurity.[133] The district court concluded that the defendants had failed to produce any evidence that the challenged provisions "are actually necessary to protect perceived harms to property and biosecurity."[134]

With the first law enjoined and an appeal pending,[135] Iowa legislators went back to the drawing board and produced a second version in just two months,

128. *Id.*

129. Animal Legal Def. Fund v. Reynolds (*Reynolds I*), 297 F. Supp. 3d 901, 909–11 (S.D. Iowa 2018).

130. *See id.* at 919, 924.

131. *Id.* at 924. The false statements made by investigators attempting to obtain employment fell short of causing tangible injury because, while they concealed ideological commitments and journalistic affiliation, they did not relate to the applicant's qualifications or relevant work experience (for example, ability to drive a forklift). *See id.*

132. *See id.* at 919–20. *United States v. Alvarez*, 567 U.S. 709 (2012)—the Supreme Court's controlling precedent on the constitutional protection for false statements—has left lower courts in a state of some uncertainty as to the appropriate standard of review. *See* Alan K. Chen & Justin Marceau, *Developing a Taxonomy of Lies Under the First Amendment*, 89 U. COLO. L. REV. 655, 673–74 (2018).

133. *Reynolds II*, 353 F. Supp. 3d at 824.

134. *Id.* at 825. The court noted that these interests were already served by several content neutral restrictions in Iowa law, including existing trespass provisions and a law prohibiting "the willful possession, transportation, or transfer of a 'pathogen with an intent to threaten the health of an animal or crop.'" *Id.* at 825–26 (quoting IOWA CODE § 717A.4(1) (Westlaw through legislation from the 2021 2d Extraordinary Sess.)).

135. Animal Legal Def. Fund v. Reynolds, 8 F.4th 781, 783 (8th Cir. 2021). On appeal, the Eighth Circuit affirmed in part and reversed in part, agreeing with the district court that the employment provision could not survive strict scrutiny but holding that the access provision was "consistent with the First Amendment because it prohibits exclusively lies associated with a legally cognizable harm—namely, trespass to private property." *Id.* at 783, 785–87. The appellate court did not consider the speech-suppressing motives revealed in the legislative history. *See id.* at 783–87.

showing remarkable consistency in their concern about the reputational harms suffered by the agricultural industry when exposed to negative publicity.[136] One state legislator advocated for the second bill's passage by saying he would "not stand by and allow [Iowa farmers] to be disparaged in the way they have been."[137] Iowa State Senator Ken Rozenboom, whose own farm had been revealed as a site of animal abuse in an undercover investigation,[138] said the bill would protect agriculture from "those who would intentionally use deceptive practices to distort public perception of best practices to safely and responsibly produce food."[139]

Iowa's second ag-gag law was signed into law by the Governor and again challenged in federal court as an unconstitutional burden on speech.[140] In comparison to its predecessor, the second ag-gag law included a "revised intent element," limiting the scope of prohibited conduct to false statements made with the "intent to cause physical or economic harm or other injury."[141] With this revision, the defendants argued, the law became a permissible restriction targeting only the kinds of speech lying outside the domain of First Amendment protection.[142] The defendants had clearly taken heed of the district court's concern about the prior version's breadth and seemingly tried to bring the second version into alignment with the principle that only speech causing "legally cognizable harm or material gain to the speaker" lies outside of First Amendment protection.[143]

The problem, as the district court noted in its review of the second version, was that the new provision

> appears to place no meaningful limit on the harm that would satisfy its intent element—that is, it does not require the harm to be legally cognizable, specific, tangible, actual, or material. On its face, an intent to

136. Animal Legal Def. Fund v. Reynolds, No. 19-cv-00124, 2019 WL 8301668, at *2 (S.D. Iowa Dec. 2, 2019) (noting that lawmakers described the purpose of the second ag-gag bill in terms similar to those of the first bill).

137. *Id.*

138. *See* Donnelle Eller, *Animal Rights Group Claims Animal Neglect at Farm of Iowa Senator Who Backed Ag-Gag Law*, DES MOINES REG., https://www.desmoinesregister.com/story/money/agriculture/2020/01/24/animal-rights-group-claims-neglect-pigs-iowa-farm-ag-gag-supporter/4545787002 [https://perma.cc/L9YH-85K9] (Jan. 24, 2020, 9:46 AM). However, a subsequent investigation by the county sheriff's office and the Iowa Department of Agriculture found no evidence of animal abuse. *See* Donnelle Eller, *Animal Abuse Claims Against Iowa Senator Are 'Unfounded,' Say State, Local Investigators*, DES MOINES REG., https://www.desmoinesregister.com/story/money/agriculture/2020/02/14/animal-abuse-claims-iowa-senator-unfounded-say-state-local-investigators/4761422002/ [https://perma.cc/3HC4-J4SD] (Feb. 15, 2020, 6:00 AM).

139. *Reynolds*, 2019 WL 8301668, at *2.

140. Eller, *Judge Issues Order*, *supra* note 116.

141. *Reynolds*, 2019 WL 8301668, at *5.

142. *Id.* at *3.

143. *Id.* at *5.

> cause *any* injury, no matter how trivial or subjective, would suffice to establish the harm element of the statute.[144]

Most importantly, the district court noted, the harm element was broad enough to include the reputational injury arising from "legitimate First Amendment activity, such as truthful reporting on animal abuse or unsanitary conditions."[145]

The defendants' purported fix was thus merely a cosmetic one. Their second bite at the law appeared responsive to the concern that the regulation of speech must be targeted at the prevention of some injury, but the new version endeavored to satisfy this doctrinal principle by including the consequences that flow from critical coverage of the agricultural industry: the lost profits and stature that an entity might suffer when the public learns what truly happens behind its closed doors.[146] By making this kind of harm a predicate for criminal liability, the second version revealed itself to be just another vehicle for the suppression of industry-critical speech. The second version did not actually tailor its reach to the types of harms that a state is entitled to prevent when deception is used to obtain access to an agricultural facility, such as an arsonist lying about his intent to commit arson at the slaughterhouse where he is attempting to obtain employment, or a competitor's agent who lies about her intent to steal trade secrets.[147] Instead, the district court concluded that the "scant record" supporting the state's proffered interests, the "ready availability of alternatives that burden substantially less speech," and the "disconnect" between the law's means and the state's asserted ends "suggest that the law's true purpose is to prohibit undercover investigations."[148] As with its predecessor, the new law was motivated by the continuing desire "to prevent critical coverage of the agricultural industry" and could not withstand the heightened scrutiny required by the First Amendment.[149]

144. *Id.* at *6.

145. *Id.*

146. *Id.* Notably, the Iowa Attorney General could have disavowed this reading of the statute, offering an authoritative narrowing construction and potentially mooting the case, but chose not to do so. *See id.* at *7 (explaining that, instead, the State defendants had simply taken the "unsupported position" that the challenged statute would not apply to whistle-blowing, labor organizing, and other activities that might "cause an 'economic harm or other injury' to an agricultural production facility's 'business interest'").

147. *Id.* at *6.

148. *Id.* at *18.

149. *Id.* Pursuant to an agreement between the parties, the case was continued pending the Eighth Circuit's ruling on Iowa's first ag-gag law. *See* Animal Legal Def. Fund v. Reynolds, No. 19-cv-00124, 2022 WL 777231, at *2 (S.D. Iowa Mar. 14, 2022). With the Eighth Circuit having issued its opinion in August 2021, *see supra* note 135, the district court resumed its assessment of Iowa's second ag-gag law, and found once again that it violated the First Amendment. *See id.* at *12–13 (ruling that the provision "discriminates based on viewpoint" and "fails strict scrutiny" and thus "transgress[es] important First Amendment values").

Within six months of that ruling, Iowa lawmakers enacted a third version.[150] The third version is substantially improved in the sense that it does not specifically regulate speech or expression; rather than prohibit deception, false statements, or misrepresentation, the new law criminalizes "food operation trespass" committed by a person "entering or remaining on the property of a food operation without the consent of a person who has real or apparent authority to allow the person to enter or remain on the property."[151] The legislative history, however, again reveals a clear motive to suppress the circulation of disturbing and politically charged images that "don't always look good" by "organizations out there that simply don't want people to eat meat."[152]

In debating the third version, Iowa lawmakers still could not resist the temptation to describe the bill as one necessary to prevent animal rights activists from recording slaughterhouse operations and bringing negative scrutiny to the industry through the release of those recordings. One state legislator, after emphasizing the importance of the jobs provided by Iowa's agricultural industry and recalling his own family's history of employment in Iowa slaughterhouses, explained that when someone trespasses onto a slaughterhouse floor, they can "take a video of what are actually very humane practices and make them appear sociopathic," and bring "dishonor to very honorable work that is done by thousands of Iowans day in and day out."[153] Another legislator specified that the goal of such investigations "is to eliminate production agriculture when it comes to animals. The harm that is done by taking a video of something that has been done by the book every single step of the way can be immense."[154]

In this third iteration, then, we have a statute that on its face appears to be a permissible trespass provision, regulating unauthorized presence in a certain type of facility rather than expression of a certain disfavored kind. But the floor debate suggests otherwise, revealing an unmistakable continuity in legislative purpose stretching back through prior versions of the bill—laws that have already been deemed unconstitutional for their speech-suppressing qualities. If the third version's "true purpose is to prohibit undercover investigations," as the district court determined with regards to the first and second versions, then how much should it matter that the Iowa legislature has

150. *See* Lauren Belin, *Iowa's Ag Gag 3.0 May Get Past Courts*, BLEEDING HEARTLAND (June 28, 2020), https://www.bleedingheartland.com/2020/06/28/iowas-ag-gag-3-0-may-get-past-courts/ [https://perma.cc/9JR8-CENG].

151. IOWA CODE § 716.7A(2)(e)(2) (Westlaw through legislation from the 2021 2d Extraordinary Sess.).

152. Belin, *supra* note 150.

153. *Id.*

154. *Id.*

managed to find a superficially neutral vehicle with which to advance that goal?[155]

Animal rights activists are something of an emerging movement, and Iowa legislators have not yet realized that when they openly proclaim their antipathy toward that particular viewpoint, they imperil the laws with which they hope to burden the movement.[156] But we can expect that the legislators will get there eventually—they are, after all, receiving an intensive tutorial from the federal courts reviewing their work product. Assuming that they are, at some point, finally able to enact a bill that is both facially neutral and unblemished by expressions of animus toward particular kinds of expression, should the sanitized version be scrutinized without reference to the entire history that preceded it?

The chronology of Iowa's efforts to enact an ag-gag law that can withstand judicial review illustrates two dynamics that may at first appear in tension with one another. By attempting to add a harm element in the second version, and then eliminating altogether the regulation of speech in the third, Iowa lawmakers showed an apparent responsiveness to judicial explication of what the First Amendment requires.[157] But these efforts were accompanied and undermined by the somewhat surprising candor with which lawmakers continued to express their antipathy toward the animal rights movement they desired to hamstring. As other scholars have observed, legislators generally have the wit "to avoid words like 'race' or the name of a particular racial group" in the text of their legislation or during floor debates.[158] But when we look at lawmaking that targets a newer, less deeply rooted social movement—before the development of social and constitutional norms that disfavor expressions of hostility toward that group—we have moments of transparency that afford a

155. *Id.* As expressed by one of the challengers, the executive director of the ACLU of Iowa: "While the text of the bill doesn't seem like an attack on free speech, if in practice the goal is to stop speech then we believe that continues to be unconstitutional." Donnelle Eller, *Iowa's New Ag Trespass Law Seeks To 'Intimidate and Silence' Animal Rights Activists*, USA TODAY, https://www.usatoday.com/story/money/2020/06/12/iowa-legislature-ag-gag-law-critics-silence-whistleblowers/5346773002/ [https://perma.cc/3W52-WAWC] (June 13, 2020, 3:36 PM).

156. In contrast, contemporary legislators are unlikely to proclaim openly, as they did in the past, that they have gathered to pass laws to establish white supremacy. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 229 (1985) (explaining that, in 1901, "delegates to the all-white convention were not secretive about their purpose" and "zeal for white supremacy"). *But see* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 506 (2018) ("White supremacy and misogyny have once again revealed themselves as potent forces in American social life." (footnotes omitted)). Nevertheless, the Supreme Court has noted that "floor statements by individual legislators rank among the least illuminating forms of legislative history." NLRB v. SW Gen., Inc., 137 S. Ct. 929, 943 (2017).

157. *See supra* note 146 and accompanying text.

158. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 764 (2011) ("If legislators have the wit—which they generally do—to avoid words like 'race' or the name of a particular racial group in the text of their legislation, the courts will generally apply ordinary rational basis review. This tendency is true even if the state action has an egregiously negative impact on a protected group.").

measure of insight into legislative purpose. These glimpses will inevitably be short-lived, however, as lawmakers experience the consequences of that candor.

The coalition of plaintiffs that successfully challenged Iowa's first two ag-gag laws has not yet filed suit to enjoin the third version.[159] If they do, the newest law's primary weakness will be statements made on the floor by legislators revealing the persistence of a speech-suppressing motive. If the law is enjoined on that basis, the message to Iowa lawmakers will be clear: the path forward for ag-gag laws must not include sentiments of animus against animal rights activists or exhortations against the circulation of images "that don't always look good."[160]

Ultimately, both the textual revisions that brought the third version of the law into closer compliance with the First Amendment and the expressions of hostility against animal rights activists—which will likely be driven underground at some point as the ag-gag struggle matures—illustrate a central point about second-bite lawmaking. Litigation is information forcing in a way that works to the benefit of lawmakers determined to stay the chosen course as much as courts will permit. Each round comes with an updated set of instructions for how to pass constitutional muster, even as lawmakers persist with the suspect project. By following these instructions, savvy legislators should eventually be able to launder the appearance of impermissible intent out of their work product.[161] We should, in fact, *expect* that subsequent iterations

159. They have, however, challenged another statute enacted by the Iowa legislature in April 2021, Act of Apr. 30, 2021, 2021 Iowa Acts 224 (codified at IOWA CODE § 727.8A (2022)), that creates a new crime applying to someone who commits a trespass and "knowingly places or uses a camera or electronic surveillance device that transmits or records images or data while the device is on the trespassed property." *See* Civil Rights Complaint for Declaratory and Injunctive Relief ¶¶ 1, 9, Animal Legal Def. Fund v. Reynolds, No. 21-cv-00231, 2021 WL 3522352, at *1–2 (S.D. Iowa Aug. 10, 2021) (quoting IOWA CODE § 727.8A (Westlaw through legislation from the 2021 2d Extraordinary Sess.)). Whether this latest effort should be described as Iowa's fourth ag-gag law is profoundly interesting for our purposes. On the one hand, the newest law does not so much as mention food, animals, or agriculture and is not limited in any way to trespasses that occur in slaughterhouses or other agricultural facilities. On the other, the plaintiffs allege in their complaint that this expanded breadth is an evasive strategy designed to escape the constraints of the previous ag-gag rulings, asserting that the newest law "seeks to create the gloss of legitimacy by applying to industries beyond agriculture, so that the State can claim its aim is not just to prevent pro-animal speech. And it targets speech alongside other activities, so that the State can claim its real aim is to prohibit conduct, not speech." *Id.* ¶ 14. The plaintiffs included in their complaint numerous statements by legislators revealing that the "true purpose" of the newest effort is "to deter and punish the same investigations Iowa previously sought to repress with its other Ag-Gag laws." *Id.* ¶ 22. For a brief summary of Iowa's entire ag-gag trajectory, including this latest effort, see Elizabeth Rumley, *"Ag-Gag" Laws: An Update of Recent Legal Developments*, NAT'L AGRIC. L. CTR. (Aug. 26, 2021), https://nationalaglawcenter.org/ag-gag-laws-an-update-of-recent-legal-developments/ [https://perma.cc/PQK3-F5RH].

160. *See* Belin, *supra* note 150.

161. As Professor Brandon Garrett observes, the damage to government legitimacy remains, especially given the many doctrinal hurdles that courts have placed in front of plaintiffs challenging state action. *See* Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 104 VA. L. REV. 1471, 1474–77 (2018).

will be sanitized of the offending elements and superficially compliant with constitutional principles.[162]

For courts reviewing these subsequent iterations, this presents a conundrum: Do these changes reflect an authentic recalibration, a reshaping of policy preferences to accommodate the constitutional principles expressed in the prior ruling? Or does the appearance of neutralizing elements in later stages of constitutional struggle indicate merely a strategic adaptation meant to conceal an ongoing illicit purpose? As readers are likely to recognize, this question took center stage in the nationwide litigation over the multiple iterations of the Trump administration's Muslim ban. As detailed in the next section, much of the controversy turned on the appropriate inferences to draw from a government defendant's strategic adaptations—especially when those adjustments contrast sharply with continued expressions of illicit motive made in extrinsic statements.

### 3. President Trump's "Muslim Ban"

On January 27, 2017, within a week of taking office, President Trump issued an executive order "designed to make his most incendiary campaign rhetoric a reality."[163] On the campaign trail, Trump promised "a total and complete shutdown of Muslims entering the United States"[164] and justified the proposal by asserting that President Franklin D. Roosevelt "did the same thing"

162. For scholarship exploring various facets of this phenomenon, see, for example, Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119–20 (1996) (explaining "preservation through transformation" as the process by which reform movements pressure lawmakers "to rationalize status-enforcing state action in new and less socially controversial terms"); Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773, 1776 ("[Anti-evasion doctrines] seek to prevent officials from complying with the form of the previously announced rule, while subverting the substance of the constitutional principle the rule sought to implement. Put differently, they attempt to optimize constitutional enforcement by curbing circumvention of constitutional principles."); Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 943 (2014) (describing "backup" laws which are "designed to preserve as much as possible of a legal model that either has recently been invalidated or seems certain to be invalidated in the near future" in order to "attempt to extend the life of a model that has been marked for extinction"); Jacob Hutt, Note, *Compliant Subversion*, 92 N.Y.U. L. REV. 1609, 1612 (2017) (describing a theory of legal gamesmanship termed "compliant subversion," which "obstruct[s a] law[] by mapping out its various manifestations, tracking how courts respond to them, and considering when such responses are inappropriate"); David King, *Responding to Unconstitutional State Opportunism*, 87 MISS. L.J. 79, 81 (2018) (describing constitutional struggle, such as the white primary battles, as presenting a story about "opportunism—the problem of sophisticated parties evading the purposes of legal norms").

163. Cristina M. Rodríguez, *Trump v. Hawaii and the Future of Presidential Power over Immigration*, AM. CONST. SOC'Y, https://www.acslaw.org/analysis/acs-supreme-court-review/trump-v-hawaii-and-the-future-of-presidential-power-over-immigration/#_ftnref2 [https://perma.cc/S629-ZEK3]; *see also* Josh Blackman, *The Travel Bans*, 2017 CATO SUP. CT. REV. 29, 30 (explaining that the travel bans "traced their roots to overtly anti-Muslim statements made by then-candidate Trump" and that "the government could only offer the faintest patina of a rational basis to defend the policies").

164. Trump v. Hawaii, 138 S. Ct. 2392, 2435 (2018) (Sotomayor, J., dissenting). The full statement "remained on his campaign website until May 2017," several months into his presidency. *Id.*

with the internment of Japanese Americans.[165] In the executive order, he prohibited the entry of nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen,[166] all of which have majority Muslim populations.[167] The order included a waiver provision allowing individual refugee admissions on a case-by-case basis, contingent on the determination "that the admission of such individuals as refugees is in the national interest—including when the person is a religious minority in his country of nationality facing religious persecution."[168] The day he signed the order, President Trump explained to the media that the order would give priority to Christian refugee applicants and was designed "'to help' the Christians in Syria."[169]

For individuals outside of the waiver provision, the ban's breadth was immense—covering entrants of every status, including lawful permanent residents and existing visa holders who were, quite literally, in the air en route to the United States.[170] Its immediate implementation, conducted without interagency review or coordination, "unleashed chaos within the government and across the country."[171] Lawsuits were filed in federal courts throughout the nation, asserting that the order exceeded the President's statutory authority and violated the Establishment Clause, the Due Process Clause, and the Equal Protection Clause.[172] The order was temporarily enjoined within a week of its issuance, and the temporary restraining order was upheld by the Ninth Circuit Court of Appeals less than a week after that.[173]

165. *Id.*

166. *Id.* at 2403 (majority opinion); Exec. Order No. 13769, 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017).

167. *Muslim Travel Ban*, IMMIGR. HIST., https://immigrationhistory.org/item/muslim-travel-ban/ [https://perma.cc/QD6S-RCYQ].

168. Exec. Order No. 13769, 82 Fed. Reg. 8977, 8979 (Jan. 27, 2017).

169. *Trump*, 138 S. Ct. at 2436 (Sotomayor, J., dissenting).

170. *See Trump's Executive Order: Who Does Travel Ban Affect?*, BBC NEWS (Feb. 10, 2017), https://www.bbc.com/news/world-us-canada-38781302 [https://perma.cc/WL5U-F5EZ].

171. W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J.F. 825, 830 (2018) (describing how the State Department immediately stopped conducting visa interviews and processing visa applications for citizens of the seven banned countries, revoked between 60,000 and 100,000 visas, and detained nationals arriving from those countries at airports for hours while awaiting assistance).

172. *Trump*, 138 S. Ct. at 2406; *see also* Kerry Abrams & Brandon L. Garrett, *Clear Violation*, SLATE (Jan. 30, 2017, 4:55 PM), https://slate.com/news-and-politics/2017/01/here-are-all-the-parts-of-the-constitution-trumps-muslim-ban-violates.html [https://perma.cc/8K74-CBQA].

173. Washington v. Trump, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) (concluding preliminarily that "significant and ongoing" harm was being inflicted by the executive order, which plaintiffs were likely going to be able to prove was unlawful), *motion for stay pending appeal denied*, 847 F.3d 1151, 1168–69 (9th Cir. 2017) (rejecting government's request for emergency stay of temporary restraining order).

Rather than continue to defend the order, the administration withdrew it and issued a second one in its place.[174] The second order was narrower in scope: it omitted Iraq from the list of barred countries,[175] exempted lawful permanent residents and holders of diplomatic visas,[176] and applied only to new visa applicants rather than current visa holders.[177] It no longer included the language in the waiver provision, applicable to members of "a religious minority" in their "country of nationality,"[178] that had been touted by the President as a means to give Christian applicants priority over Muslims.[179] But the second version was characterized by President Trump himself as just "'a watered down, politically correct version' of the [first order]."[180] He expressed rather candidly that he would have preferred to follow through more explicitly on a "total and complete shutdown of Muslims entering the United States," but "stupidly, that would not be politically correct."[181] Even as President Trump issued his third attempt,[182] the second order having also been enjoined by federal courts,[183] the White House Deputy Press Secretary drew the connection between the latest effort and the President's past remarks. He noted "that 'the President has been

174. Exec. Order No. 13780, 82 Fed. Reg. 13209, 13212 (Mar. 6, 2017); *see also* Washington v. Trump, No. 17-35105, 2017 WL 3774041, at *1 (9th Cir. Mar. 8, 2017) (granting government's motion to dismiss appeal of Executive Order 13769); Washington v. Trump, No. C17-0141JLR, 2017 WL 2172020, at *1 (W.D. Wash. May 17, 2017) ("On March 6, 2017, President Trump issued EO2, which expressly revokes EO1.").

175. Exec. Order No. 13780, 82 Fed. Reg. 13209, 13210–12 (Mar. 6, 2017). According to the *New York Times*, this revision was requested by Secretary of Defense Mattis, who expressed concern that barring Iraqi nationals "would hamper coordination to defeat the Islamic State." Glenn Thrush, *Trump's New Travel Ban Blocks Migrants from Six Nations, Sparing Iraq*, N.Y. TIMES (Mar. 6, 2017), https://www.nytimes.com/2017/03/06/us/politics/travel-ban-muslim-trump.html [https://perma.cc/RTF6-JUYS (dark archive)].

176. Exec. Order No. 13780, 82 Fed. Reg. 13209, 13213–14 (Mar. 6, 2017).

177. *Id.* at 13213. As explained by David Cole, national legal director of the ACLU, "The decision to exempt current visa-holders also means that the order does not strip individuals in the US of rights previously granted to them, as the first order did." David Cole, *It's Still a Muslim Ban*, N.Y. REV. (Mar. 11, 2017), https://www.nybooks.com/daily/2017/03/11/its-still-a-muslim-ban-trump-executive-order/ [https://perma.cc/8W2T-LVWV (dark archive)].

178. Exec. Order No. 13769, 82 Fed. Reg. 8977, 8979 (Jan. 27, 2017).

179. *See* Exec. Order No. 13780, 82 Fed. Reg. 13209, 13214–15 (Mar. 6, 2017). It did, however, continue to allow case-by-case exemptions for individual refugees. *Id.* at 13214.

180. Trump v. Hawaii, 138 S. Ct. 2392, 2437 (2018) (Sotomayor, J., dissenting).

181. *Id.* at 2438.

182. Both the first and second orders instructed the Secretary of Homeland Security to conduct a review of the adequacy of information provided by foreign governments about their nationals seeking to enter the United States. *Id.* at 2403–04 (majority opinion); Exec. Order No. 13769, 82 Fed. Reg. 8977, 8977–78 (Jan. 27, 2017); Exec. Order No. 13780, 82 Fed. Reg. 13209, 13212 (Mar. 6, 2017). The review was completed in September 2017, and the third order followed shortly thereafter. *Trump*, 138 S. Ct. at 2404.

183. Hawai'i v. Trump, 241 F. Supp. 3d 1119, 1122–23 (D. Haw. 2017) ("Plaintiffs have met their burden of establishing a strong likelihood of success on the merits of their Establishment Clause claim, that irreparable injury is likely if the requested relief is not issued, and that the balance of the equities and public interest counsel in favor of granting the requested relief.").

talking about these security issues for years now, from the campaign trail to the White House' and 'has addressed these issues with the travel order that he issued earlier this year and the companion proclamation.'"[184]

The third effort, styled as a "proclamation," purported to announce the results of a worldwide assessment of security protocols that President Trump requested in the first and second orders.[185] To conduct the assessment, government agencies prepared a baseline of "information required from foreign governments to confirm the identity of individuals seeking entry into the United States . . . to determine whether those individuals pose a security threat."[186] After an initial evaluation, the Department of Homeland Security pursued diplomatic efforts with sixteen countries, identified in the worldwide review as having inadequate protocols, to improve their practices.[187] At the end of the fifty-day period allocated for these efforts,[188] seven countries were deemed to remain deficient in their risk profiles and information-sharing practices, and nationals from these countries were subject to the entry restrictions outlined in the third order.[189]

Unlike the first and second versions of the orders, the third at least nominally included two countries that are not majority-Muslim: Venezuela and North Korea.[190] For the government defending the proclamation, which was again subjected to immediate challenge and enjoined in the lower federal courts,[191] this was an important display of the proclamation's religious

184. *Trump*, 138 S. Ct. at 2417 (quoting Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 267 (4th Cir.), *judgment vacated*, 138 S. Ct. 2710 (2018) (mem.)).

185. Proclamation No. 9645, 82 Fed. Reg. 45161, 45161 (Sept. 24, 2017). Skepticism immediately arose as to "whether the world-wide review and its results were genuine national security exercises or after-the-fact veneers to make raw discrimination fit within the confines of accepted presidential behavior." Rodríguez, *supra* note 163.

186. *Trump*, 138 S. Ct. at 2404; *see also* Proclamation No. 9645, 82 Fed. Reg. 45161, 45162 (Sept. 24, 2017).

187. *Trump*, 138 S. Ct. at 2405.

188. *Fact Sheet: The President's Proclamation on Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats*, DEP'T HOMELAND SEC., https://www.dhs.gov/news/2017/09/24/fact-sheet-president-s-proclamation-enhancing-vetting-capabilities-and-processes [https://perma.cc/7VTQ-3UV7] (Apr. 10, 2018).

189. The countries covered in the third order were: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. Proclamation No. 9645, 82 Fed. Reg. 45161, 45163 (Sept. 24, 2017). Iraq also failed to meet the baseline, but the Secretary of Homeland Security determined that entry restrictions were "not warranted" in light of Iraq's particular circumstances, including "the close cooperative relationship between the United States and the democratically elected government of Iraq." *Id.*

190. *Id.*

191. State v. Trump, 265 F. Supp. 3d 1140, 1145 (D. Haw.), *aff'd in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *rev'd and remanded*, 138 S. Ct. 2392 (2018).

neutrality.[192] In *Trump v. Hawaii*,[193] a majority of the Supreme Court agreed that the third order, "say[ing] nothing about religion," could be sustained as a measure advancing the "legitimate national security interest" of "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices."[194] But as Justice Sotomayor explained in her dissent, the introduction of a superficially neutralizing element, like the inclusion of North Korea and Venezuela, may be evidence of exactly the impermissible intent the defendant is trying to conceal—an effort to avoid "criticism or legal consequences"[195] for what continues to function as a "religious gerrymander."[196] The inclusion of superficially neutralizing elements looked very different on the third try, after multiple rounds of litigation, than it would have as part of the first attempt—especially when accompanied by a long and continuing history of anti-Muslim remarks. Chief Justice Roberts's majority opinion, however, refused "to invalidate a national security directive regulating the entry of aliens abroad"[197] that "is facially neutral toward religion" on the basis of "extrinsic statements."[198]

### B. *Lessons and Implications*

Observers were quick to critique the *Trump v. Hawaii* opinion, echoing Justice Sotomayor's frustration with the majority's refusal to credit the President's own characterizations of the motive animating the three orders.[199]

192. Brief for the Petitioners at 65, *Trump*, 138 S. Ct. 2392 (No. 17-965) (emphasizing the "inclusion of two new non-Muslim-majority countries" to argue that "the Proclamation does not target aliens based on their religion").

193. 138 S. Ct. 2392.

194. *Id.* at 2421–22.

195. *Id.* at 2442 (Sotomayor, J., dissenting) ("The Proclamation's effect on North Korea and Venezuela, for example, is insubstantial, if not entirely symbolic. A prior sanctions order already restricts entry of North Korean nationals, and the Proclamation targets only a handful of Venezuelan government officials and their immediate family members. As such, the President's inclusion of North Korea and Venezuela does little to mitigate the anti-Muslim animus that permeates the Proclamation." (citations omitted)).

196. *Id.* (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535–36 (1993)) (explaining that the term "religious gerrymander" was used to describe and invalidate a prohibition on animal sacrifice that had been carefully drawn to burden only the practices of the Santeria religion, while leaving undisturbed every other form of animal killing).

197. *Id.* at 2418 (majority opinion). The majority emphasized that this made the case different "from the conventional Establishment Clause claim . . . involving religious displays or school prayer." *Id.*

198. *Id.*

199. *See, e.g.*, Michael J. Klarman, *The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 222 (2020). Professor Klarman compares the Muslim ban to the internment of Japanese Americans, concluding that

> [t]he Muslim travel ban was not so very different. President Trump's animus towards Muslims was open and notorious, and it was shared by a majority of Republicans, who view Muslims as a national security threat per se, which is how many Americans saw people of Japanese

Others, however, cautioned that this approach was confined to the unique context of presidential power over immigration.[200] The opinion, repeatedly emphasizing the unique concerns of national security and executive immigration enforcement, substantiates this reading.[201] As explored later in this Article, the Supreme Court's resolution of the Muslim ban controversy leaves open long-standing questions about the appropriate way to scrutinize iterative lawmaking outside this specialized context. Where the Supreme Court is not driven by deference to the executive on matters concerning national security, what is the appropriate way to evaluate the strategic addition of superficially neutralizing elements by a defendant lawmaker with a long and consistent history of illicit motive? Do these changes cure the discriminatory intent or offer proof of it?

In short, across the three contexts explored above as well as many others, constitutional struggle is an iterative rather than a single-stage process, offering a rich and potentially cumulative picture of the government officials involved in the origination and implementation of the challenged law and its predecessors. At first blush, this may seem like a trivial descriptive point that has little relevance beyond the "procedural history" section of an opinion. But as these examples demonstrate, the presiding court's willingness to consider and draw inferences from previous iterations of a challenged law will eventually

> descent in 1942. Many experts ridiculed the Muslim travel ban as irrelevant to national security . . . [contending that] creative government lawyers laundered the ban to make it facially neutral and created exceptions and waiver provisions as "window dressing" . . . .

*Id.* (footnotes omitted). As Justice Sotomayor had done in *Masterpiece Cake Shop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), scholars also noted the contrast between the lack of significance accorded to Trump's statements of anti-Muslim animus and the seriousness with which the majority had taken the "less pervasive official expressions of hostility and the failure to disavow them." *Trump*, 138 S. Ct. at 2439 (Sotomayor, J., dissenting); *see also, e.g.*, Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 135 (2018) ("[I]t is impossible to ignore the obvious inconsistency between the Court's demand for tolerance and respect in *Masterpiece* and its abdication of that demand in *Trump v. Hawaii* . . . .").

200. *See, e.g.*, Rodríguez, *supra* note 163 ("[L]ower courts and commentators can and should actively read *Trump v. Hawaii* as limited to its very particular context—to an intent-based anti-discrimination claim against the decision to exclude non-citizens, for national security reasons, on the precipice of entry and outside the custody and control of the United States."); Aziz Z. Huq, *Article II and Antidiscrimination Norms*, 118 MICH. L. REV. 47, 50 (2019) ("[I]t is Article II and Article II alone that now comes packaged with open-textured discretion to discriminate on the basis of suspect classification, and to do so relatively candidly.").

201. The majority opinion states that "the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Trump*, 138 S. Ct. at 2418 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)). It further insists that "'[a]ny rule of constitutional law that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution,' and our inquiry into matters of entry and national security is highly constrained." *Id.* at 2419–20 (quoting Mathews v. Diaz, 426 U.S. 67, 81 (1976)).

become outcome determinative as government defendants learn to conceal the defects that were fatal to prior versions.

As illustrated by all three of the foregoing examples, a central piece of the puzzle concerns the intent underlying the challenged law and its successors.[202] When intent is constitutionally significant,[203] how keen should we be to trace its presence across multiple iterations of lawmaking? When a court finds a law to be constitutionally invalid and the lawmaker goes back to the drawing board, how should we assess whether the impermissible intent lingers covertly—as pernicious as before but in less visible form? While the lawmakers in question may have heeded the admonishment from the court and avoided an open restatement of the invalid intent, is it not an obvious fiction that the impermissible intent has now been scrubbed clean from the new version of the law? On the other hand, if it strikes us as troubling to treat the new law as if it were written on a blank slate, then at what point, if ever, can a subsequent iteration of a law that was previously invalidated outrun the stain of its predecessor? How long does impermissible intent linger—and whose burden should it be to establish its presence or absence? As detailed in the next part, the Supreme Court's guidance on these questions has been profoundly inconsistent.

## II. COMPETING APPROACHES TO SECOND-BITE LAWMAKING

This part provides a detailed look at the Supreme Court's forays into successive lawmaking, revealing a sequence of cases that together offer a set of principles tailored to this context. The Supreme Court has understood that there is something significant about evaluating the progeny of an invalidated law, but it has changed direction rather dramatically. Where the Supreme Court was once willing to acknowledge that later versions of a law can be traceable to prior unconstitutional conduct, it has more recently announced a "presumption of legislative good faith" that threatens to be perplexingly resistant to evidence of the contrary.

As is shown in this part, *Arlington Heights* explicitly set forth a methodology in which courts were encouraged to scrutinize and draw inferences from prior iterations of a challenged law. Building on this understanding, the Supreme Court offered a robust "traceability" analysis in *United States v. Fordice*,[204] and subsequently used a scaled-back but still distinctive version of it in *McCreary County v. ACLU of Kentucky*.[205] However, with its 2018 decision in

202. *See* Garrett, *supra* note 161, at 1474.

203. *See* Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337, 1340, 1350 (2019) (noting that "intent requirements are a familiar feature of the constitutional landscape").

204. 505 U.S. 717 (1992).

205. 545 U.S. 844 (2005).

*Abbott v. Perez*,[206] the Supreme Court conveyed overt hostility to the idea that a successor law might remain infected with the discriminatory purpose of prior versions.

### A. Arlington Heights *as Origin Point*

To understand the doctrinal landscape for iterative lawmaking, particularly in contexts where the defendant's intent is constitutionally relevant, the place to begin is *Arlington Heights*, in which the Supreme Court provided guidance to plaintiffs newly tasked with the burden to show that a facially neutral law or policy was motived by discriminatory intent.[207] Recognizing that direct evidence of improper purpose may often be unavailable, the Supreme Court explicitly endorsed a "sensitive inquiry" that would attend to whatever forms of circumstantial evidence might shed light on the decisionmaker's purpose: (1) historical background; (2) the specific sequence of events leading to the law's enactment, including any departures from the normal legislative process; (3) the law's legislative history; and (4) whether the law "bears more heavily on one race than another."[208]

The Court explained that "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes."[209] Among the cases cited as illustrative were *Lane v. Wilson*[210] and *Griffin v. County School Board of Prince Edward County*,[211] both presenting chronologies of successive lawmaking in which government officials sought to evade the consequences of prior rulings against discriminatory policies.[212] Close scrutiny of iterative lawmaking also fits seamlessly with the

206. 138 S. Ct. 2305.

207. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) (citing Washington v. Davis, 426 U.S. 229, 242 (1976)). The Supreme Court had just the previous term announced in *Washington v. Davis*, 426 U.S. 229 (1976), that racially disproportionate impact alone was insufficient to demonstrate a violation of the Equal Protection Clause. *Id.* at 242.

208. *Arlington Heights*, 429 U.S. at 266–68.

209. *Id.* at 267.

210. 307 U.S. 268 (1939).

211. 377 U.S. 218 (1964).

212. *Griffin* concerned the thirteen-year saga to desegregate the public schools in Prince Edward County, Virginia. *Id.* at 220–21. Rather than comply with the desegregation order in *Brown v. Board of Education*, 347 U.S. 483 (1954), the school board of Prince Edward County closed its public schools and contributed funds to a tuition grant program that helped defray the costs of attending a private school that was only available to white students. *Griffin*, 377 U.S. at 220–24. Virginia not only acquiesced in the closure but contributed state funds to the tuition grant program. *Id.* at 221. The Supreme Court—while reiterating the "wide discretion" that states typically have in their treatment of county policies—agreed with the district court that, "under the circumstances here," the school closure violated the Equal Protection Clause. *Id.* at 225, 231. In *Lane v. Wilson*, 307 U.S. 268 (1939), the Supreme Court invalidated Oklahoma's effort to impose a twelve-day voter registration period, after which anyone who failed to register would be permanently disenfranchised. *Id.* at 275–76. Exempted from this punishingly short deadline was anyone who had been qualified to vote in 1914, when voting eligibility in Oklahoma was limited to those who either passed a literacy test or were the lineal

Supreme Court's acknowledgement that "[t]he specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes."[213] Here, the Supreme Court offered as illustrative *Reitman v. Mulkey*,[214] in which it upheld the California Supreme Court's determination that a ballot proposition repealing the state's antidiscrimination laws, properly viewed in its full context, would involve the state in, rather than remove the state from, private racial discrimination in housing.[215] A lower court's authority to scrutinize and draw inferences from previous iterations of a challenged law also squares with the Supreme Court's instruction that "[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."[216] In sum, paying careful attention to, and drawing inferences from, prior iterations of a challenged law is incontrovertibly encompassed within the four factors offered in *Arlington Heights* as a method to examine facially neutral laws.

As is now well established, the method outlined in *Arlington Heights* applies not only in equal protection cases, but also in religious liberty cases[217] and other contexts that call for inquiry into official purpose.[218] And so, at a sufficiently

descendant of a white voter. *Id.* at 269–71. The twelve-day registration period was enacted after the grandfather clause was invalidated, and as the Supreme Court recognized, "was obviously directed towards the consequences" of the prior ruling. *Id.* As such, it was similarly invalid. *Id.* at 275–77.

213. *Arlington Heights*, 429 U.S. at 267.

214. 387 U.S. 369 (1967).

215. *Id.* at 370–75; *see also id.* at 383 (Douglas, J., concurring) ("Proposition 14 is a form of sophisticated discrimination whereby the people of California harness the energies of private groups to do indirectly what they cannot under our decisions allow their government to do." (footnotes omitted)). The Supreme Court of California rejected the contention that the state was merely adopting a stance of neutrality, explaining that the proposition, taken in its full context, could not be viewed as such:

> [T]he state, recognizing that it could not perform a direct act of discrimination, nevertheless has taken affirmative action of a legislative nature designed to make possible private discriminatory practices which previously were legally restricted. . . . Here the state has affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is encouraged . . . .

Mulkey v. Reitman, 413 P.2d 825, 834 (Cal. 1966), *aff'd*, 387 U.S. 369 (1967).

216. *Arlington Heights*, 429 U.S. at 268.

217. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993) (applying *Arlington Heights* in a Free Exercise Clause case); Edwards v. Aguillard, 482 U.S. 578, 594–95 (1987) (noting that Establishment Clause inquiry looks to "[t]he plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, . . . the historical context of the statute, . . . and the specific sequence of events leading to [its] passage").

218. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015) (noting that facially content-neutral laws will be considered content-based regulations of speech if they were adopted by the government "because of disagreement with the message" conveyed by the speech); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 276, 287 n.2 (1977) (considering a First Amendment dispute over whether a public school teacher had been fired for engaging in protected speech, citing *Arlington Heights* for the proposition that plaintiff had shown that his speech was a "motivating factor"

high level of generality, the key principles are clear: historical background and legislative context, including contemporary statements of decisionmakers, are relevant and should be considered whenever a court is asked to adjudicate questions of improper purpose. An assessment of repeated cycles of lawmaking and litigation leading up to the consideration of the defendants' latest effort fits comfortably within this paradigm.

We thus see widespread recognition across a range of contexts that previous iterations of a challenged law may be considered as part of an *Arlington Heights*-endorsed inquiry into discriminatory purpose, but from there, the clarity diminishes.[219] The Supreme Court's subsequent forays into this area have produced wildly different approaches.

### B. United States v. Fordice*: Current Practices Are Traceable*

As the Supreme Court clearly anticipated in *Arlington Heights*, the framework it provided for determining when facially neutral laws disguise improper purpose would, regrettably, continue to have wide application. When it comes to persistence in unconstitutional conduct, efforts to maintain educational segregation certainly compete for primacy with the kinds of voter suppression efforts we considered in the previous part. In 1992, nearly forty years after *Brown v. Board of Education*,[220] the Supreme Court examined Mississippi's ongoing failure to integrate its public system of higher education.[221] Mississippi maintained a de jure policy of segregation in its university system until 1962, when the first Black student was admitted to the University of Mississippi by court order.[222] In addition to the University of Mississippi, the state maintained four other universities serving only white students, as well as three universities whose student populations were entirely Black.[223] The court order did little to produce any additional progress toward

in his termination). For a prominent scholarly treatment of the improper motive component of free speech doctrine, see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) ("First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives. The doctrine comprises a series of tools to flush out illicit motives and to invalidate actions infected with them. Or, to put the point another way, the application of First Amendment law is best understood and most readily explained as a kind of motive-hunting."); *see also* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1198 (9th Cir. 2018) (evaluating Idaho's ag-gag law and observing that its reach "is so broad that it gives rise to suspicion that it may have been enacted with an impermissible purpose" and that "a vocal number of supporters were less concerned with the protection of property than they were about protecting a target group from critical speech").

219. *See infra* Sections III.B–E.

220. 347 U.S. 483 (1954).

221. United States v. Fordice, 505 U.S. 717, 723–24 (1992).

222. *Id.* at 722.

223. *Id.*

racial integration, and enforcement efforts by federal agencies were similarly unavailing.[224]

In 1975, a group of private plaintiffs filed suit against the state, asserting that Mississippi maintained the racially segregative effects of its prior system of dual education in violation of the Constitution and the Civil Rights Act.[225] The parties then attempted for twelve years "to achieve a consensual resolution of their differences through voluntary dismantlement by the State of its prior separated system."[226] But, in 1987, the system remained highly segregated, and the parties proceeded to trial because "they could not agree on whether the State had taken the requisite affirmative steps to dismantle its prior *de jure* segregated system."[227]

There was no dispute that "[w]here a state has previously maintained a racially dual system of public education established by law, it assumes an 'affirmative duty' to reform those policies and practices which required or contributed to the separation of races."[228] Applying that principle after a trial consisting of seventy-one witnesses and over 56,000 pages of exhibits, the district court found that Mississippi fulfilled its duty.[229] The court of appeals affirmed, observing that "the record makes clear that Mississippi has adopted and implemented race neutral policies for operating its colleges and universities and that all students have real freedom of choice to attend the college or university they wish."[230]

The Supreme Court reversed, emphasizing that "a State does not discharge its constitutional obligations until it eradicates policies and practices *traceable* to its prior *de jure* dual system that continue to foster segregation."[231] If the state perpetuates policies and practices traceable to its prior system that continue to have segregative effects, it has not sufficiently dismantled its prior dual system—it is not enough to simply abolish the legal requirements that white and Black students be educated separately and adopt racially neutral policies "not animated by a discriminatory purpose."[232] The Supreme Court then proceeded to identify several "unconstitutional remnants" of Mississippi's

224. The U.S. Department of Health, Education, and Welfare ("HEW") initiated enforcement efforts in 1969. *Id.* The Mississippi Board of Trustees of State Institutions of Higher Learning ("Board") responded with a meager set of proposals that HEW rejected as insufficient. *Id.* at 722–23. The Board nonetheless proceeded with that plan, only to have the state legislature withhold its funding until 1978, and then fund it at "well under half" of what the Board had requested. *Id.* at 723.

225. *Id.*

226. *Id.* at 724.

227. *Id.* at 725.

228. *Id.* at 726.

229. Ayers v. Allain, 674 F. Supp. 1523, 1526, 1564 (N.D. Miss. 1987), *vacated sub nom.* Ayers v. Fordice, 970 F.2d 1378 (5th Cir. 1992).

230. Ayers v. Allain, 914 F.2d 676, 678 (5th Cir. 1990), *vacated sub nom. Fordice*, 505 U.S. 717.

231. *Fordice*, 505 U.S. at 728, 743 (emphasis added).

232. *Id.* at 731–32.

prior system—policies that, while race neutral on their face, "substantially restrict a person's choice of which institution to enter, and they contribute to the racial identifiability of the eight public universities."[233]

Most importantly for our purposes, the Supreme Court explicitly criticized the district court for having "improperly shifted the burden away from the State" and onto the plaintiffs.[234] Concurring Justices wrote separately "to emphasize that it is Mississippi's burden to prove that it has undone its prior segregation."[235] Even Justice Thomas, often characterized as the Supreme Court's most conservative member,[236] acknowledged the force of this procedural principle in his separate concurrence, written to emphasize that the affirmative duty required of postsecondary institutions was different than what was previously announced for grade school systems.[237] Clarifying that the *Fordice* opinion therefore did not portend "the destruction of historically black colleges," Justice Thomas explained:

> It is safe to assume that a policy adopted during the *de jure* era, if it produces segregative effects, reflects a discriminatory intent. As long as that intent remains, of course, such a policy cannot continue. And given an initially tainted policy, it is eminently reasonable to make the State bear the risk of nonpersuasion with respect to intent at some future time, both because the State has created the dispute through its own prior unlawful conduct, and because discriminatory intent does tend to persist through time.[238]

*Fordice* is important for two distinct reasons. First, it is grounded upon the recognition that current practices are *traceable* to prior practices even where they

233. *Id.* at 732–34 (noting that the policies with lingering "discriminatory taint" included the role of ACT scores in university admissions policies, the unnecessary duplication of programs, and the designation of institutional mission at the eight universities in Mississippi's postsecondary system).

234. *Id.* at 739.

235. *Id.* at 744 (O'Connor, J., concurring).

236. *See, e.g.*, Corey Robin, *Clarence Thomas's Radical Vision of Race*, NEW YORKER (Sept. 10, 2019), https://www.newyorker.com/culture/essay/clarence-thomass-radical-vision-of-race [https://perma.cc/6YZ2-P4GU (dark archive)] ("By consensus, Thomas is the most conservative member of the Court."); Michael O'Donnell, *Deconstructing Clarence Thomas*, ATLANTIC (Sept. 15, 2019), https://www.theatlantic.com/magazine/archive/2019/09/deconstructing-clarence-thomas/594775/ [https://perma.cc/93SG-2D7S (dark archive)] ("Thomas is by far the most conservative justice on a very conservative Court."). For empirical scholarship comparing Justice Thomas's conservatism with that of other Justices, see Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideology and the Study of Judicial Behavior*, *in* IDEOLOGY, PSYCHOLOGY, AND LAW 705, 713 (Jon Hanson ed., 2012) (observing that Justice Thomas has been generally considered to be one of "the most reliably conservative members of the Rehnquist Court (and now the Roberts Court)"). This status may be changing with Justice Barrett's confirmation. Greg Stohr, David Yaffe-Bellany & Lydia Wheeler, *Barrett Could Be Most Conservative Justice Since Clarence Thomas*, BLOOMBERG L. (Sept. 26, 2020), https://www.bloomberg.com/news/articles/2020-09-26/barrett-could-be-most-conservative-justice-since-clarence-thomas [https://perma.cc/534A-E5SR (dark archive)].

237. *Fordice*, 505 U.S. at 746 (Thomas, J., concurring).

238. *Id.* at 745–47 (citations omitted).

have significantly changed form, assuming a less obviously offensive demeanor. Second, *Fordice* clearly announced that the appropriate way to adjudicate whether current practices are traceable to prior unconstitutional conduct is to place the burden on the state to demonstrate that the link has been severed.[239] The traceability insight, combined with the explicit burden-shifting requirement, would have had a profoundly forceful effect on second-bite lawmaking were this approach applied as widely as it might have been. But as we see when we turn to subsequent cases in this trajectory, it becomes clear that the Supreme Court has stopped short of wielding *Fordice*'s full potential.

In reflecting on why this is so, one might wonder whether any principles deriving from the precise context addressed in *Fordice* can shed light on more recent forms of unconstitutional conduct. A clear, de jure violation—like the one invalidated in one of the Supreme Court's most canonical cases and manifested by Mississippi's system of postsecondary education for years thereafter—may seem like a category of wrongdoing that is now more or less defunct. But the generative insight at the heart of the *Fordice* opinion is the traceability of current practices to their predecessors—the link between contemporary, superficially neutral policies and previous iterations in which the discriminatory intent was apparent on the surface.[240] This principle may not function in the same way in other contexts, depending on the nature of the original misconduct. But there is no logical reason that the historically contextualized approach manifested in *Fordice* is limited to school desegregation. We should not confuse the limited attention it has been given with the analytical breadth of its potential. Its burden-shifting approach, had it

239. In this regard, *Fordice* built on previous case law imposing an "affirmative duty" on states to desegregate. Green v. Cnty. Sch. Bd. of New Kent Cnty., 391 U.S. 430, 437–38 (1968).

240. While it might seem to require categorically different treatment, the role of de jure segregation in the *Fordice* opinion has an analogue in other, more contemporary areas of constitutional struggle, which we can better understand by breaking the analysis into composite steps. Public education in Mississippi was at one time segregated not merely by custom but by force of law. Those laws were facially discriminatory, in a way that is admittedly different from most of what we see now, but that does not limit the analytical reach. As has been established repeatedly, in cases like *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), *Lane v. Wilson*, 307 U.S. 268 (1939), *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and others, a facially neutral law with both discriminatory intent and impact likewise violates the Equal Protection Clause—those policies are also de jure because they use the force of law to discriminate. Facially neutral laws that are motivated by invidious intent "are just as abhorrent, and just as unconstitutional, as laws that expressly discriminate on the basis of race." N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 220 (4th Cir. 2016) (citing Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–66 (1976)). The difference is that facially neutral laws, because of the lawmakers' effort to bury any illicit intent, are susceptible to more dispute about their validity than laws that openly discriminate on the basis of race or other proscribed category. But in our specific context, that difference matters far less because we are concerned with previous laws that have been *already determined* to be unconstitutional. North Carolina's 2013 omnibus voting law, for example, was conclusively invalidated on the basis of its discriminatory intent and disparate impact—it can be considered functionally analogous to the kind of equal protection violation that is easy to identify in de jure segregation policies. *See id.* at 219.

been more widely adopted, might have transformed the litigation of iterative lawmaking.

Few courts or commentators have understood *Fordice* to reach beyond the particular context of race-based policies in public education.[241] But echoes of its traceability insight appear in more recent opinions and in contexts beyond school desegregation. Considering an Establishment Clause challenge to a series of Ten Commandments displays in *McCreary*, the Supreme Court acknowledged that "reasonable observers have reasonable memories," refusing "to turn a blind eye to the context in which [a] policy arose."[242]

### C. McCreary County v. ACLU of Kentucky*: Reasonable Observers Have Reasonable Memories*

A detailed account of *McCreary*'s procedural history illustrates how decisively the Supreme Court embraced an intent analysis that was sensitive to

241. It has only been cited eight times in Supreme Court opinions, two of those by Justice Sotomayor—in *Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring), and in *Trump v. Hawaii*, 138 S. Ct. 2392, 2439 (2018) (Sotomayor, J., dissenting). The appellate courts have mostly refused to apply *Fordice* outside the context of education—an analysis of every *Fordice* citation in the federal courts of appeals reveals not only that the application of its burden-shifting framework is limited primarily to school desegregation matters, but that courts have explicitly rejected its application to other matters. *See, e.g.*, Knight v. Alabama, 476 F.3d 1219, 1226 (11th Cir. 2007) (holding that a challenge to a tax scheme and school finance policy was not subject to *Fordice* framework); Burton v. City of Belle Glade, 178 F.3d 1175, 1190 (11th Cir. 1999) (holding that a challenge to an annexation decision affecting voting rights was not subject to *Fordice*); I.L. v. Alabama, 739 F.3d 1273, 1286 n.7 (11th Cir. 2014) (holding that a challenge to a tax scheme and school finance policy was not subject to *Fordice* framework); Johnson v. DeSoto Cnty. Bd. of Comm'rs, 204 F.3d 1335, 1344 n.18 (11th Cir. 2000) (holding that a challenge to at-large elections was not subject to *Fordice* framework). Excluding the cases in which *Fordice* was cited for unrelated propositions—such as the retroactivity of a statute or the existence of a private right of action—the research revealed twenty-seven cases in which the traceability principle was considered potentially applicable, and only five of them were in contexts outside of school desegregation. *See* Walker v. City of Mesquite, 402 F.3d 532, 536 (5th Cir. 2005) (challenging racial segregation in housing); Rutherford v. City of Cleveland, 179 F. App'x 366, 367–68 (6th Cir. 2006) (challenging a police department's affirmative action program); Johnson v. Governor of Fla., 405 F.3d 1214, 1225–27 (11th Cir. 2005) (en banc) (considering and rejecting traceability in a challenge to felon disenfranchisement, while expressing reluctance to apply *Fordice* outside of the education context); Hall v. Ala. Ass'n of Sch. Bds., 326 F.3d 1157, 1171–73 (11th Cir. 2003) (per curiam) (challenging the appointment of a superintendent); Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1575–77 (11th Cir. 1994) (challenging a fire and police department's affirmative action program). In none of these five cases were the challengers successful in persuading the court to shift the burden. Notably, the *Fordice* framework was also applied outside the school desegregation context in two additional panel opinions that were vacated en banc. Harness v. Hosemann, 988 F.3d 818, 820, 821 n.3 (5th Cir.) (challenging felon disenfranchisement), *rev'd en banc*, 2 F.4th 501 (5th Cir. 2021) (per curiam); Johnson v. Governor of Fla., 353 F.3d 1287, 1291, 1298–300 (11th Cir. 2003) (challenging felon disenfranchisement), *rev'd en banc*, 377 F.3d 1163 (11th Cir. 2004) (mem.). In one additional case, an appeals court reversed a district court ruling that had relied on *Fordice* in a voting rights case—the Fourth Circuit opinion considered extensively in Section II.E.

242. McCreary County v. ACLU of Ky., 545 U.S. 844, 866 (2005) (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000)).

history and context, firmly rejecting the idea that only the last in a series of government actions should be considered. At issue in *McCreary* was the display of the Ten Commandments in two Kentucky county courthouses.[243] The displays changed form three times within a year as they were repeatedly challenged in federal court for violating the Establishment Clause.[244] By the time the case reached the Supreme Court, the question was not only whether the counties' purpose was a proper basis upon which to evaluate the legitimacy of the display, but also "whether evaluation of the counties' claim of secular purpose for the ultimate displays *may take their evolution into account*."[245] The Supreme Court answered in the affirmative, holding that "the development of the presentation should be considered when determining its purpose."[246]

The controversy began in the summer of 1999, when officials in McCreary and Pulaski Counties displayed in their respective courthouses large, gold-framed excerpts of the King James version of the Ten Commandments.[247] The ACLU sued the counties, asserting that the displays violated the Establishment Clause and seeking a preliminary injunction against their maintenance.[248] Within a month, and before the district court ruled on the preliminary injunction, the legislative bodies of both counties enacted resolutions authorizing expanded displays and explaining that the Ten Commandments constitute "the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded."[249] The resolutions offered a variety of observations in support of the displays, including that in 1993 the Kentucky House of Representatives voted unanimously to adjourn "in remembrance and honor of Jesus Christ, the Prince of Ethics" and that the "Founding Father[s had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America's strength and direction."[250] In the second version of the display, copies of this resolution were posted alongside the framed Ten Commandments.[251] Unlike the first version, the new display also included eight smaller documents containing religious themes or excerpts to emphasize religious elements.[252]

243. *Id.* at 850.
244. *Id.*
245. *Id.* (emphasis added).
246. *Id.* at 850–51.
247. *Id.* at 851.
248. *Id.* at 852.
249. *Id.* at 852–53.
250. *Id.* at 853.
251. *Id.*
252. *Id.* at 853–54. The documents included, among others, the "endowed by their Creator" passage from the Declaration of Independence and the national motto, "In God We Trust." *Id.* at 854.

Applying the *Lemon v. Kurtzman*[253] test for evaluating Establishment Clause claims, the district court found that both the first and second versions of the display lacked any secular purpose.[254] Rejecting the counties' argument that the displays were meant to be educational, the district court noted that the "narrow scope" of the first display—"a single religious text unaccompanied by any interpretation explaining its role as a foundational document—can hardly be said to present meaningfully the story of this country's religious traditions."[255] As for the second version, the district court observed that the counties had "narrowly tailored" the "selection of foundational documents to incorporate only those with specific references to Christianity."[256] The district court entered a preliminary injunction, ordering that the displays be removed immediately and that no county official "erect or cause to be erected similar displays."[257]

The counties appealed from the preliminary injunction but then voluntarily dismissed the appeal after hiring new lawyers.[258] Without repealing the resolutions that authorized the previous display, the counties installed yet a third version of the display.[259] The third version consisted of nine documents of equal size, one of them explicitly identified as the King James version of the Ten Commandments, now quoted at greater length than before.[260] Accompanying the Commandments were framed copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the "Star-Spangled Banner," the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice.[261] Each document came with a statement about its historical and legal significance, and the collection was titled "The Foundations of American Law and Government Display."[262]

At the plaintiffs' request, the district court supplemented the preliminary injunction to include the third display, reiterating the religious nature of the first and second versions and finding that the counties' purpose continued to be

253. 403 U.S. 602 (1971).

254. *McCreary*, 545 U.S. at 854–55. The test is: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612–13 (citation omitted) (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970)).

255. *McCreary*, 545 U.S. at 854.

256. *Id.* at 854–55.

257. *Id.* at 854.

258. *Id.* at 855.

259. *Id.*

260. *Id.*

261. *Id.* at 856.

262. *Id.* Included in the statement explaining the significance of the Ten Commandments was the proposition that they "provide the moral background of the Declaration of Independence and the foundation of our legal tradition." *Id.*

religious rather than secular.[263] The Sixth Circuit affirmed[264] over a dissenting opinion that disputed the relevance of the prior displays and asserted "that a history of unconstitutional displays can[not] be used as a sword to strike down an otherwise constitutional display."[265]

The Supreme Court affirmed, expressly endorsing the consideration of the entire sequence of the counties' actions and reactions.[266] Writing for the majority, Justice Souter declined the counties' exhortations to apply "a standard oblivious to the history of religious government action like the progression of exhibits in this case."[267] The majority reiterated that judicial inquiry into whether a challenged government action had a secular legislative purpose remained an important part of Establishment Clause analysis because the Clause's core principle of official religious neutrality is violated when government acts with the purpose of advancing religion.[268] This assessment of purpose is undertaken not by the folly of attempting "judicial psychoanalysis of a drafter's heart of hearts," but by adopting the stance of an "objective observer" who takes into account "traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act."[269]

On that foundation, the Supreme Court considered the counties' argument "that purpose in a case like this one should be inferred, if at all, only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject."[270] The Supreme Court firmly rejected this approach, observing that "the world is not made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show."[271] The Supreme Court concluded that the counties' proposed method "just bucks common sense: reasonable observers have reasonable memories, and our precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'"[272] Examining all three

263. *Id.* at 856–57.

264. *Id.* at 857.

265. ACLU of Ky. v. McCreary County, 354 F.3d 438, 478 (6th Cir. 2003) (Ryan, J., dissenting), *aff'd*, 545 U.S. 844.

266. *McCreary*, 545 U.S. at 850–51.

267. *Id.* at 859.

268. *Id.*

269. *Id.* at 862 (quoting Wallace v. Jaffree, 472 U.S. 38, 74, 76 (1985) (O'Connor, J., concurring in the judgment)).

270. *Id.* at 866.

271. *Id.*

272. *Id.*

installations and the surrounding circumstances in its assessment of religious purpose, the Court upheld the preliminary injunction.[273]

While *Fordice* spoke in the proceduralist register of burden-shifting, *McCreary* speaks in the intuitive language of common sense—a beloved but less reliable instrument than burden-shifting, at least insofar as constitutional litigation is concerned. But both of these opinions confirm that a government defendant's latest effort cannot be examined in isolation, and that the constitutionality of the most recent version depends on a holistic assessment of the entire chronology that preceded it. Although *McCreary* does not follow *Fordice* in explicitly imposing a burden on government defendants, it nonetheless subtly expresses the idea that government defendants must account for the link between the latest iteration and previous conduct, rather than expecting the slate to be wiped clean between each cycle. The idea that "reasonable observers have reasonable memories"[274] continues to express, in its own powerful way, the traceability concept set out in *Fordice*. The lesson is clear, and *McCreary*'s influence has been notable—at least in the Establishment Clause context, lower courts have acknowledged that "as we have learned from *McCreary County*, history and context matter in these cases."[275]

The insight is uncontroversial at that level of generality, and the Supreme Court has certainly never disavowed it. But in *Abbott v. Perez*, a 2018 case arising out of an intricate and prolonged series of challenges to redistricting plans in Texas, the Court admonished the lower court for placing excessive emphasis on the history of discriminatory intent leading up to the plan most recently at issue.[276] It was "fundamental legal error," the Court chastised, for the lower court to require the state to provide evidence that it cured the discriminatory

273. *Id.* at 881. As noteworthy as the *McCreary* opinion is standing alone, its importance for our purposes is further underscored by the fact that the Supreme Court decided another Ten Commandments case the very same day, in which it *upheld* the display as constitutionally permissible. Van Orden v. Perry, 545 U.S. 677, 691–92 (2005). The main difference between the cases was the sequence of events leading up to the litigation—the display in *Van Orden* had been standing for forty years without legal dispute. *Id.* at 746 (Souter, J., dissenting). Justice Breyer voted to uphold the display in *Van Orden* and strike down the display in *McCreary*, making him the only Justice to vote differently on the two cases. He explained that the years of tranquility in *Van Orden* showed that "few individuals, whatever their system of beliefs, [we]re likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion." *Id.* at 702 (Breyer, J., concurring in the judgment). According to Justice Breyer, this differed in a "determinative" way from *McCreary*, "where the short (and stormy) history of the courthouse Commandments' displays demonstrates the substantially religious objectives of those who mounted them." *Id.* at 702–03.

274. *See supra* note 242 and accompanying text.

275. ACLU of Ky. v. Garrard County, 517 F. Supp. 2d 925, 928, 941 (E.D. Ky. 2007) (identifying the central question: "If a county gets it wrong in displaying the Ten Commandments, what does it then take to get it 'right' such that it passes constitutional muster?"); *see also* Felix v. City of Bloomfield, 841 F.3d 848, 862 (10th Cir. 2016) (relying on *McCreary* to assess whether a reasonable observer would discern religious purpose).

276. 138 S. Ct. 2305, 2313.

taint of a prior redistricting plan.[277] The legislature was entitled to a presumption of good faith, the Court instructed, and it was the challengers' burden to show the existence of discriminatory intent specific to the latest challenge.[278]

### D. Abbott v. Perez*: The Presumption of Legislative Good Faith Is Renewable*

For all its procedural complexity, at the center of *Abbott* was this core question: Once a voting district is drawn with discriminatory intent and therefore invalidated, under what circumstances can a district with those same lines reappear in later redistricting plans? Texas, its population having grown by more than twenty percent, was apportioned four new congressional seats after the 2010 census.[279] The redistricting plans drawn in 2011 to reflect these changes were immediately challenged in federal court on the grounds that the new districts were racial gerrymanders, produced intentional vote dilution, and had the effect of depriving minority voters an equal opportunity to elect the candidates of their choice.[280] In a parallel proceeding initiated by the State to fulfill its preclearance obligations under Section 5 of the Voting Rights Act, still in force at the time, the 2011 plans were denied preclearance because the map had "retrogressive effect" and "was enacted with discriminatory intent."[281] The 2011 plan was then repealed by the Texas legislature in 2013.[282]

In its place, the legislature enacted a new redistricting plan that was very closely modeled on an interim plan drawn by the three-judge district court to which the 2011 challenge had been assigned.[283] That court faced the "unwelcome obligation" of drawing an interim plan for Texas to use in the 2012 primaries because the legislature's 2011 plan did not receive preclearance and election deadlines were fast approaching.[284] The lower court's first interim plan was vacated by the Supreme Court for failing to reflect sufficient deference to the state legislature.[285] The Supreme Court instructed the district court to start with the 2011 plan adopted by the legislature and then adjust it as necessary to avoid legal defects.[286] On remand, the lower court drew a revised, "more deferential interim plan[], but noted that its analysis had been expedited and curtailed, and

277. *Id.*

278. *Id.* at 2324.

279. *Id.* at 2314.

280. *Id.* at 2315.

281. *Id.* at 2345 (Sotomayor, J., dissenting). Texas obtained a vacatur of this decision after being released from its preclearance obligations in *Shelby County v. Holder*. *Id.* at 2317 (majority opinion).

282. *Id.*

283. *See* 28 U.S.C. § 2284(a) ("A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.").

284. *Abbott*, 138 S. Ct. at 2345 (Sotomayor, J., dissenting).

285. Perry v. Perez, 565 U.S. 388, 397–99 (2012) (per curiam).

286. *Abbott*, 138 S. Ct. at 2313.

that it had only made preliminary conclusions that might be revised on full consideration."[287] It was this revised interim plan, designed for use in the exigent circumstances presented by an election rapidly approaching without a usable map, that was used as the model for the redistricting plan enacted by the 2013 legislature.[288]

By spring 2017, the lower court held multiple trials on both the 2011 and 2013 plans.[289] The district court found that the 2011 plan was unlawful because it created districts that were impermissible racial gerrymanders that would intentionally dilute minority voting strength.[290] Turning its attention to the 2013 redistricting plan, which unlike the 2011 plan had actually gone into effect and was used in two intervening elections, the district court invalidated those districts in the 2013 plan that corresponded to the 2011 plan.[291] The court noted that the 2011 plan in which those districts were first drawn was infected by discriminatory intent, and the legislature failed to "engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans."[292]

The Supreme Court reversed this ruling, treating it as an inversion of the burden of proof and a failure to comply with a "presumption of legislative good faith."[293] The majority reiterated that "[w]henever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State."[294] Essential for our purposes, the Court cautioned that a finding of past discrimination is not sufficient to change "[t]he allocation of the burden of proof and the presumption of legislative good faith . . . . '[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.'"[295] The Court acknowledged that "[t]he 'historical background' of a legislative enactment is 'one evidentiary source' relevant to the question of intent," citing *Arlington Heights*.[296] But it cautioned that "we have never suggested that past discrimination flips the evidentiary burden on its head."[297]

287. *Id.* at 2345 (Sotomayor, J., dissenting).

288. *Id.* at 2317 (majority opinion) (noting that the legislature "enacted the Texas court's interim plans with just a few minor changes").

289. *Id.*

290. *Id.*

291. *Id.* at 2313. Unlike the 2011 plan, the 2013 plan had in fact been used in both the 2014 and 2016 elections. *Id.* at 2317.

292. *Id.* at 2318.

293. *Id.* at 2326–27.

294. *Id.* at 2324.

295. *Id.* It took the "original sin" language from a plurality opinion in *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980), a decision that Congress repudiated by amending the Voting Rights Act to specify that violations could be proven by discriminatory impact alone. Thornburg v. Gingles, 478 U.S. 30, 35 (1986).

296. *Abbott*, 138 S. Ct. at 2325 (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977)).

297. *Id.*

Leaving aside for the moment whether the Court had suggested just that in *Fordice*, we must first take note of the dissent's strong objection to this characterization of the lower court's analysis.[298] The dissenting Justices insisted that the district court, rather than relying on a mechanistic transfer of intent from the 2011 legislature to the 2013 legislature, "followed the guidance in *Arlington Heights* virtually to a tee."[299] The dissent painstakingly worked through each of the factors shaping the district court's conclusion, noting the ways in which it was supported by demonstrated discriminatory impact as well as oddities in the deliberative process.[300]

What emerges from the dissent is something that is difficult to discern in the majority opinion and particularly relevant for our purposes: the strength of the connective tissue making the 2013 plan inseverable from the 2011 plan. To see this, it helps to recap the entire history in highly simplified form: First, the 2011 plan was challenged by plaintiffs as tainted by discriminatory intent and concurrently denied preclearance.[301] To provide a usable map for the 2012 election, the lower court then produced an interim plan only to have it rejected by the Supreme Court, which told the lower court to start with the 2011 plan and make any adjustments necessary to eliminate legal defects.[302] Next, the lower court followed this instruction but cautioned that its analysis was provisional.[303] Lastly, the legislature adopted the revised interim 2012 plan as the 2013 plan.[304] The dissent succinctly articulated that ultimately, in adopting the 2013 plan, "[t]he Legislature made no substantive changes to the challenged districts that were the subject of the 2011 complaints."[305] Moreover, the dissent observed, there was "substantial evidence" that the 2013 Legislature's approval of the interim plans was part of a strategy "to insulate (and thus continue to benefit from) the discriminatory taint of its 2011 maps."[306]

The majority opinion emphasized the amount of judicial review to which the plan was subjected over the course of this history, scoffing at the idea that

298. "The Court today goes out of its way to permit the State of Texas to use maps that the three-judge District Court unanimously found were adopted for the purpose of preserving the racial discrimination that tainted its previous maps." *Id.* at 2335 (Sotomayor, J., dissenting).

299. *Id.* at 2346.

300. *Id.* at 2335–49.

301. *Id.* at 2315–16 (majority opinion).

302. *Id.*

303. *See id.* at 2316.

304. *Id.* at 2317.

305. *Id.* at 2347–48 (Sotomayor, J., dissenting).

306. *Id.* at 2348. Explaining this in further detail, the dissent noted that the Texas Attorney General had predrafted the legislative findings asserting that the 2012 plan complied with all applicable law, before any actual fact-finding had been done, and "advised the Legislature that adopting the interim plans was the 'best way to avoid further intervention from federal judges' and to '*insulate* [Texas'] redistricting plans from further legal challenge.'" *Id.* at 2348–49.

the plan could nonetheless continue to have unconstitutional remnants.[307] This may be an appealing proposition at first blush because the "rather convoluted" procedural history of this case did provide considerably more judicial input than is often the case for challenged lawmaking.[308] By the time the state legislature was preparing to adopt the 2013 map, the plan under consideration was the product of two rounds of review at the district court level and one round at the Supreme Court.[309] But the weight the majority placed on this becomes less convincing once we consider the district court's factfinding regarding the effect of all this input. In 2012, issuing the interim map that derived from the 2011 plan and would eventually become the 2013 plan, the district court warned that the conclusions were "preliminary," had been subject to "severe time constraints," and "were not based on a full examination of the record or the governing law."[310] The district court also explained that the "claims presented . . . involve difficult and unsettled legal issues as well as numerous factual disputes," and that its conclusions were therefore subject to further revision before any determinations became final.[311] In 2017, when it finally undertook the full trial on the 2011 and 2013 plans, the district court determined that its own involvement in creating the 2012 interim plan was insufficient to break the link between the 2013 plan and the discriminatory intent of the 2011 map.[312]

The dissent lamented the majority's refusal to credit the district court's finding that the "Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans."[313] But the *Abbott* dissenters also drew attention to the fact "that the majority does not question the relevance of historical discrimination in assessing present discriminatory intent."[314] As the dissent noted,

> [T]he majority leaves undisturbed the longstanding principle recognized in *Arlington Heights* that the "'historical background' of a legislative enactment is 'one evidentiary source' relevant to the question of intent." With respect to these cases, the majority explicitly acknowledges that, in evaluating whether the 2013 Legislature acted with discriminatory purpose, "the intent of the 2011 Legislature . . . [is] relevant" and "must

307. The majority constantly referred to the disputed map as "court-ordered," "court-issued," or "court-approved." *See id.* at 2316, 2327–29 (majority opinion).

308. *Id.* at 2345 (Sotomayor, J., dissenting).

309. *Id.* at 2328 (majority opinion).

310. *Id.* at 2348 (Sotomayor, J., dissenting).

311. *Id.*

312. *Id.* at 2318 (majority opinion).

313. *Id.* at 2349 (Sotomayor, J., dissenting).

314. *Id.* at 2351.

be weighed together with any other direct and circumstantial evidence" bearing on intent.[315]

One could thus potentially read *Abbott* as both the majority and dissent urge us to do: a dispute over the proper application of long-standing principles from *Arlington Heights* that are uncontroversial in the abstract. But to do so is to elide the lessons that can be drawn by viewing *Abbott* as part of a trajectory that includes not only *Arlington Heights*, but also *Fordice* and *McCreary*. Analyzing these precedents interdoctrinally, we see what is effectively a complete reversal in the Supreme Court's approach to iterative lawmaking. In *Abbott*, the dissenting Justices did not openly defend a burden-shifting approach as an appropriate method of resolving a challenge to successive lawmaking; instead, they endeavored to repudiate the majority's charge that the district court shifted the burden of proof.[316] But looking back to *Fordice*, it is clear that the Supreme Court was at one time expressly willing to shift the burden to the state to prove that a challenged policy was not a remnant of prior unconstitutional conduct.[317] And even *McCreary*'s softer and more colloquial expression that "the world is not made brand new every morning"[318] exists in some tension with the notion of an infinitely renewable presumption of good faith that the district court is required to apply in full on each successive round of revisions.

One might query whether the error is in trying to find connection across these three cases—should we not simply view *Fordice* as applicable to school desegregation, while *McCreary* governs Establishment Clause litigation and *Abbott* controls voting rights? Although it may be tempting to leave *Fordice*, *McCreary*, and *Abbott* each in their own substantive silos, the methodological tensions between them cannot be fully resolved by reference to the doctrinal differences that distinguish each of these cases. Although the rights at stake in each context differ considerably, in order to apply the requisite substantive principles, the Court must consider essentially the same question: How much does the past matter? How do we know that the past is really past? The inescapably interdoctrinal nature of this inquiry is revealed in the fact that both the *Abbott* majority and dissent cite to *Arlington Heights*, which is now well established as an authority that transcends substantive doctrinal areas.[319]

315. *Id.* at 2351–52 (citation omitted).

316. *See id.* at 2335–36.

317. *See supra* notes 231–34 and accompanying text.

318. McCreary County v. ACLU of Ky., 545 U.S. 844, 866 (2005).

319. *Arlington Heights* was a case alleging racial discrimination in housing. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 254 (1977). It cited a case about an alleged retaliatory discharge of a public employee for engaging in protected speech. *Id.* at 270–71 n.21 (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 276 (1977)). It was then prominently adopted in a case concerning religious liberty. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993) (adopting *Mt. Healthy*). This area of inquiry has been interdoctrinal since its inception. In accounting for the unexplained obsolescence of *Fordice*, there may be a temptation

The more convincing explanation is simply that the Court is growing impatient with the historically sensitive approach on display in *Fordice* and is ready to imagine that the world, if not made brand new every morning, is best captured by a presumption of good faith that refreshes continuously no matter how many rounds have transpired. The possibility that *Abbott* reflects an unspoken departure from *Fordice* and *McCreary* is troubling for reasons apparent in the ongoing dispute over voter ID requirements in North Carolina. As we see in the next section, recent developments in that controversy afford a glimpse into a future in which sensitivity to historical context is viewed with skepticism and derided as a judicial variant on the concept of original sin.

### E. Abbott *Applied and Gone Astray*

As 2020 sputtered to its long-awaited finish, the Fourth Circuit relied heavily on *Abbott* in reversing the preliminary injunction that was issued against North Carolina's 2018 voter ID law, concluding that the district court accorded too much weight to the discriminatory intent that invalidated the prior version of the law.[320] Recall that the 2013 version was found to target Black voters with "surgical precision" and that the 2018 law was enacted as its successor.[321] As the Fourth Circuit put it, in analyzing the 2018 law, "The outcome hinges on the answer to a simple question: How much does the past matter?"[322] Its answer: not as much as the district court thought. The appellate court criticized the district court for treating "the North Carolina General Assembly's recent discriminatory past" as "effectively dispositive" of the validity of the 2018 law.[323] "[T]he Supreme Court directs differently," instructed the Fourth Circuit, citing *Abbott v. Perez*.[324]

In the context of North Carolina's history of voter suppression, "recent discriminatory past" is a hardworking phrase.[325] Applied to the relevant

to note that case's origin in manifest de jure racial segregation, and to note that *Fordice* is progeny of *Brown v. Board of Education*, a pedigree lacking in other contexts. But the *Arlington Heights* inquiry was never offered as a framework meant to apply to "lesser" forms of unconstitutional conduct as compared to the de jure segregation at issue in *Fordice*. The *Arlington Heights* framework was designed to ferret out when other forms of state action are equivalently unconstitutional in substance despite their superficially neutral form. *Arlington Heights* itself cited to cases that were part of the *Brown* progeny, such as school districts in Virginia shutting down rather than integrating, and then providing for white students to attend private schools. *See supra* notes 209–12 and accompanying text. The idea that *Fordice* is part of a separate genealogy breaks down on inspection.

320. N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295, 311 (4th Cir. 2020).

321. *See supra* notes 16–18 and accompanying text.

322. *Raymond*, 981 F.3d at 298.

323. *Id.*

324. *Id.*

325. *See, e.g.*, Cooper v. Harris, 137 S. Ct. 1455, 1468–69 (2017) (affirming the lower court's invalidation of a racial gerrymander because "uncontested evidence" showed that the state's mapmakers "purposefully established a racial target: African-Americans should make up no less than a majority of the voting-age population" and exhibited "a 'textbook example' of race-based redistricting").

chronology, it seems we are to accept that the discriminatory motive infecting the 2013 law became "past" in May 2017, when the Supreme Court declined the State's petition for certiorari, leaving in place the appellate court's judgment that the law was unconstitutional.[326] A few hours later, when North Carolina lawmakers began "calling for a new law that would incorporate some of the same ideas," ushering in the process that culminated in the 2018 law, the "present" had already begun.[327] Having thus established that whatever led to the discriminatory 2013 law was "past," the Fourth Circuit drew the following lesson from *Abbott*:

> A legislature's past acts do not condemn the acts of a later legislature, which we must presume acts in good faith. So because we find that the district court improperly disregarded this principle by reversing the burden of proof and failing to apply the presumption of legislative good faith, we reverse.[328]

Throughout its opinion, the Fourth Circuit relied heavily on *Abbott* without ever accounting for its key distinguishing feature: the extensive judicial involvement in the Texas redistricting plans that were ultimately at issue.[329] This is profoundly misguided. *Abbott*'s repeated insistence on a fully renewed presumption of legislative good faith must be viewed in light of the unusual fact that the lower court participated, albeit in an admittedly constrained way, in drawing the map that it later invalidated.[330] But notwithstanding its misuse, *Abbott*'s impact is nonetheless unmistakable. It offers the readily available frame of impermissible burden-shifting whenever a lower court seeks to trace invidious intent through multiple rounds of lawmaking. Any effort to see whether lawmakers have "purged the 'taint'" of a demonstrated prior purpose is now at risk of being reversed as an improper flip of the burden.[331]

This is troubling for many reasons. First, undertaking a traceability analysis to uncover lingering invidious purpose is distinct from the question of which party bears the burden. Identifying a discriminatory taint, and then seeking to assess whether it was purged at a later point, is not itself tantamount to burden-shifting: either party can bear the burden in a traceability analysis. In keeping with the ordinary approach in constitutional litigation,[332] it may well

326. *Raymond*, 981 F.3d at 299.

327. N.C. State Conf. of the NAACP v. Cooper, 430 F. Supp. 3d 15, 26–27 (M.D.N.C. 2019), *rev'd sub nom*. *Raymond*, 981 F.3d 295.

328. *Raymond*, 981 F.3d at 298 (citation omitted).

329. *Id.* at 303–05.

330. *See supra* Section II.D.

331. Abbott v. Perez, 138 S. Ct. 2305, 2324–25 (2018); *Raymond*, 981 F.3d at 304.

332. Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the state. *See, e.g.*, Reno v. Bossier Par. Sch. Bd., 520 U.S. 471, 481 (1997). For a discussion of cases in which the Supreme Court has appeared skeptical of "whether the state's record can be believed as a complete and unbiased presentation of evidence," see

be the challenger who has the burden to show that the state's latest effort is traceable to the earlier one. If the challengers meet their burden to show traceability, then the district court could conclude, without ever "flipping the burden," that lawmakers did not purge the taint.

In the alternative, we can imagine a revival of the *Fordice* approach: that "given an initially tainted policy," the state will subsequently have the burden to show that the taint was purged, and that its latest product is not traceable to its earlier invalid efforts.[333] This approach is clearly at odds with the current Supreme Court's inclination,[334] but as we have seen, the Court did at one point explicitly conduct such analysis.[335] *Abbott* and its progeny are thus troubling for another reason: what appears to be the functional repudiation of *Fordice* warrants more than just sub silentio treatment. Ruling against North Carolina's 2018 voter identification law, the district court relied on *Fordice* for the proposition that "[i]t therefore seems 'eminently reasonable to make the State bear the risk of nonpersuasion with respect to intent' when the very same people who passed the old, unconstitutional law passed the new."[336] The Fourth Circuit does not address why this reliance on *Fordice* was improper, other than to continually invoke *Abbott* as if it were self-evidently superseding.[337] The *Abbott* majority, for its part, does not mention *Fordice* at all, much less explain how its core insight became so disfavored.[338] In sum, the Court has offered no explanation for how burden-shifting went from an accepted method for adjudicating the longevity of impermissible intent to a shorthand for reversible error in the context of iterative lawmaking.

Bertrall L. Ross II, *The State as Witness:* Windsor*,* Shelby County*, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027, 2031–32 (2014).

333. United States v. Fordice, 505 U.S. 717, 746–47 (1992) (Thomas, J., concurring). Professor Murray proposes a decision rule under which "[a] tainted relationship is prima facie evidence that justifies shifting a burden of production to the government of demonstrating the taint's extirpation." Murray, *supra* note 24, at 1237; *see also* Gabriel J. Chin, *Rehabilitating Unconstitutional Statutes: An Analysis of* Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998)*, 71 U. CIN. L. REV. 421, 435 (2002) (scrutinizing the argument that an initially unconstitutional statute can be legitimated by the action of a subsequent legislature and offering various criteria to analyze "what circumstances should be sufficient to warrant a finding that the taint has been purged").

334. Eyer, *The New Jim Crow*, *supra* note 11, at 1072 (observing in passing that *Abbott* appears to reject a burden-shifting approach but explaining that "[w]here a law initially was enacted for the purposes of racial subordination, in most circumstances the race of those initially burdened by the law is still a cause (and typically a 'but for' cause) of the contemporary statute's existence").

335. *See supra* Section II.B.

336. N.C. State Conf. of the NAACP v. Cooper, 430 F. Supp. 3d 15, 32 (M.D.N.C. 2019), *rev'd sub nom*. *Raymond*, 981 F.3d 295.

337. *Raymond*, 981 F.3d *passim*.

338. Justice Alito, the author of *Abbott*, might have heeded his own prior exhortation that "[a] precedent of this Court should not be treated like a disposable household item—say, a paper plate or napkin—to be used once and then tossed in the trash." Cooper v. Harris, 137 S. Ct. 1455, 1486 (2017) (Alito, J., concurring in the judgment in part and dissenting in part).

Nor is there a sufficient explanation in *Abbott*'s constant reminder that courts must apply a presumption of legislative good faith.[339] As a starting point, there was some artful maneuvering in the majority's treatment of this supposedly established principle. In the case that *Abbott* cites as authority for the presumption of legislative good faith, the full proposition is this: "Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed."[340]

This additional context illustrates Professor Richard Hasen's point that the presumption embraced in *Abbott* was not only "new" but "appears to have been created via distortion of an earlier racial gerrymandering case."[341] Putting this doubtful pedigree aside, however, the fact remains that invoking a presumption of legislative good faith does little to answer the key questions that arise in successive lawmaking. The presumption of legislative good faith that the *Abbott* majority appears to contemplate is not a conclusive one,[342] at least not transparently so.[343] The central remaining question is whether any such presumption is *rebuttable* by previous displays of invidious intent.[344]

339. *See, e.g.*, Abbott v. Perez, 138 S. Ct. 2305, 2324–26 (2018).

340. Miller v. Johnson, 515 U.S. 900, 915 (1995) (citations omitted).

341. Hasen, *supra* note 29, at 64.

342. *See, e.g.*, Francis H. Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof*, 68 U. PA. L. REV. 307, 307–08 (1920) ("[T]here is no class of case more confused or confusing, more difficult to analyze or rationalise, than those which deal with the effect of presumptions on the burden of proof."); James Fleming, Jr., *Burdens of Proof*, 47 VA. L. REV. 51, 51 (1961) ("The term 'burden of proof' is used in our law to refer to two separate and quite different concepts."); Edmund M. Morgan, *Presumptions*, 12 WASH. L. REV. & ST. BAR J. 255, 255 (1937) ("Every writer of sufficient intelligence to appreciate the difficulties of the subject-matter has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of despair.").

343. Scholars have started to express skepticism about the Supreme Court's own good faith on matters at the intersection of race and political power. As Professor Hasen has argued, the Court's clear pro-partisan turn is making it more difficult to avoid the conclusion that it is complicit in allowing "political actors freer range to pass laws and enact policies that can help entrench politicians—particularly Republicans—in power and insulate them from political competition." Hasen, *supra* note 29, at 50. Professor Hasen suggests that the Supreme Court consider "what an intelligent person is going to conclude about the Supreme Court if the five Republican-appointed Justices continue to side with Republicans in redistricting and voting rights disputes by using new tools that load the dice in favor of partisan political actions." *Id.* at 79; *see also* Klarman, *supra* note 199, at 224, 231 (describing how the Supreme Court has repeatedly "defended the interests of the Republican Party" rather than protecting democracy); Manheim & Porter, *supra* note 13, at 230; Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565, 1570 (2013) (arguing that the Rehnquist and Roberts Courts reflected "a cynical conception of politics" in which "the discrete and insular minorities that were once entitled to protection under the defective pluralism conception of politics became the object of suspicion").

344. There appears to be an analogue in the review of executive decision-making. "The presumption of regularity is a deference doctrine: it credits to the executive branch certain facts about what happened and why and, in doing so, narrows judicial scrutiny and widens executive discretion over decisionmaking processes and outcomes." Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431, 2432 (2018).

It requires little effort to frame the lower court opinions in *Abbott* and the North Carolina voter ID case as concluding that the presumption of legislative good faith was in fact rebutted. To add a bit more texture, we could characterize those rulings as having applied a presumption that does not refresh in full every time the Texas Legislature and the North Carolina General Assembly go back to the drawing board to regulate elections following defeat in federal court. If this refusal to refresh the presumption in full is what the Supreme Court finds to be "fundamental legal error," then the Court is headed into some truly indefensible territory.[345]

To invoke the presumption as if it makes no difference whether it is being applied on the first, second, or third round of lawmaking starts to look like something rather different than a presumption, suggesting instead a naiveté that is neither compelled nor permitted by the constitutional doctrines that form the substantive frameworks for these disputes.[346] Renewing the presumption of legislative good faith in full on each round amounts to an accretion of deference that threatens to hollow out from within the substantive principles the plaintiffs seek to vindicate.[347]

It has never been easy for plaintiffs to vindicate claims that their constitutional rights have been violated, and the Supreme Court has rightfully been criticized at length for closing the door on all but the most obvious forms of state-sponsored discrimination.[348] But cases like *Fordice* and *McCreary* reveal that the Court was, for a time, at least reluctant to close its eyes to the obvious. It has been eighty years since the Court announced that the Equal Protection Clause is offended by "sophisticated as well as simple-minded modes of discrimination."[349] Free speech doctrine likewise "comprises a series of tools to flush out illicit motives," such as government hostility to a speaker's message, from superficially neutral regulation.[350] The religion clauses similarly insist that "[l]egislators may not devise mechanisms, *overt or disguised*, designed to

345. *See, e.g.*, Elise C. Boddie, *The Contested Role of Time in Equal Protection*, 117 COLUM. L. REV. 1825, 1826 (2017) (critiquing the Supreme Court's "assumptions that the effects of prior discrimination expire, such that current inequality bears no cognizable relationship to discrimination from years past").

346. Klarman, *supra* note 199, at 223 ("Judge Friendly . . . once famously said that '[j]udges are not required to exhibit a naiveté from which ordinary citizens are free.' . . . Constitutional law does not require the Court to show such naiveté either. Indeed, well-established principles of equal protection and free exercise do not permit such naiveté.").

347. David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 903 (2016) ("Concerns about the bad faith of public policymakers, then, undergird the elaboration and enforcement of numerous antidiscrimination norms.").

348. *See, e.g.*, Rebecca Aviel, *Rights as a Zero-Sum Game*, 61 ARIZ. L. REV. 351, 356–57 (2019) (describing the Supreme Court's highly constrained view of unconstitutional discrimination and gathering sources critiquing those limitations).

349. Lane v. Wilson, 307 U.S. 268, 275 (1939); Yuvraj Joshi, *Racial Indirection*, 52 U.C. DAVIS L. REV. 2495, 2501 (2019) ("[R]acial indirection describes practices with a covert *racial form* that have a disproportionate *racial impact*.").

350. Kagan, *supra* note 218, at 414; *see also, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015).

persecute or oppress a religion or its practices."[351] These propositions, so well settled that they hardly need reminder, are threatened by a presumption of good faith that is infinitely renewable cycle after cycle. Given the persistence and strategic adaptions of government defendants of the sort revealed in this Article, courts cannot fairly examine sophisticated or disguised modes of unconstitutional conduct if they are forbidden to draw inferences from prior iterations of a challenged law.

A full course correction would return us to the insight highlighted in *Fordice*: the latest iteration of a challenged policy may well be traceable to its unconstitutional predecessors, and "given an initially tainted policy," it should be the state's burden to show that the link has been severed.[352] But at the very least, the Court should retain the commonsense principles espoused in *McCreary*, allowing "reasonable observers" to exercise their "reasonable memories."[353] A tolerable universal principle of successive lawmaking simply will not treat the second, third, or fourth attempt to withstand judicial review as indistinguishable from the first. The next part considers several questions and complexities we encounter as we build out from that foundational premise.

## III. REFINING THE THEORY OF SUCCESSIVE LAWMAKING

We have now closely studied the multiphasal quality of constitutional disputes across several different substantive areas. We have seen the extent to which judicial treatment of the "recent discriminatory past" becomes outcome determinative as lawmakers learn to conceal the defects that were fatal to prior versions, and we have followed the troubling deterioration in the Supreme Court's willingness to trace the connection between subsequent iterations and the original invalidated law. Applying an infinitely renewable presumption of legislative good faith to second-bite lawmaking threatens to eviscerate substantive principles that are fundamental to equal protection, free speech, and religious liberty.

But additional questions emerge as we develop and refine a theory of second-bite lawmaking and consider the appropriate mechanisms with which it should be reviewed. What, if anything, might cut the thread between older, invalidated policies and their newer iterations: Reenactment by a newly constituted legislature, perhaps? Or merely the passage of time, at least when combined with sufficient social transformation? Is there *good* iterative lawmaking for which we might not condemn lawmakers who are trying to get close to the constitutional line? Or, put differently, what does it look like when

351. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523, 547 (1993) (emphasis added) ("The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions.").

352. United States v. Fordice, 505 U.S. 717, 746–47 (1992) (Thomas, J., concurring).

353. McCreary County v. ACLU of Ky., 545 U.S. 844, 866 (2005).

lawmakers are sincerely engaged in good faith interbranch dialogue about the meaning and mechanics of constitutional law? Is there any way to develop a typology that transcends political ideology? This part explores these questions and offers some responses.

### A. *What Cuts the Thread Between Old and New?*

#### 1. New Legislature, Clean Slate?

It is often the case that a subsequent iteration of an invalidated law is enacted by a legislature that has undergone some change in membership. One might be tempted to describe the second or third effort as having been enacted by a "new" or "different" legislature, but to describe it as such obscures the extent to which there may be substantial overlap in membership between the legislative body that enacted the first version and the one responsible for subsequent efforts.[354] Our North Carolina case study illustrates this perfectly. As the district court observed in its 2019 decision, "the same key legislators who championed" the 2013 omnibus voting law "were the driving force behind" the modified voting law enacted "just a few years later."[355] While it is crucial to recognize this kind of continuity where it exists, the potential for significant change in legislative membership from one session to another does raise an important question for iterative lawmaking: How does it affect the connection between the invalidated law and its successors, especially where intent is the central inquiry? Is it not hard enough to discern legislative intent at a single point in time, with a static group of legislators? How might we convincingly say that the subsequent work product is traceable to its invalidated predecessor when the personnel of the decision-making body has changed?

These questions are challenging, but also illustrate why it is important to develop a sensible approach to successive lawmaking. We could get it wrong in either direction—it is too extreme to say that a legislature never outruns the taint of its differently constituted predecessor, but it is also problematic to conclude that any new membership in the chamber itself wipes the slate clean.[356] This is especially true for endeavors like restrictive voting measures, for which

354. In North Carolina, for example, "[l]egislative voting records reveal that, while the composition of the General Assembly had changed somewhat in the time between 2013 and 2018, a majority of the Republican legislators who voted for S.B. 824 had previously voted for H.B. 589." N.C. State Conf. of the NAACP v. Cooper, 430 F. Supp. 3d 15, 31 (M.D.N.C. 2019), *rev'd sub nom.* N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295 (4th Cir. 2020). "This fact is particularly striking in light of Defendants' admission that there were no 'changes in legislative policy preferences leading to the enactment of SB824.'" *Id.* at 32.

355. *Id.* at 35.

356. For a persuasive explanation of why turnover in multimember bodies is not sufficient in itself to break the link between an earlier policy and a newer one, see Murray, *supra* note 24, at 1221 ("The problems of evasion and the lingering effects of past wrongdoing do not disappear simply because multimember bodies have inconstant personnel.").

support correlates so strongly with party affiliation that a new member of the same party might well pick up the mantle of a prior impermissible effort with little disruption or transformation in purpose.

To illustrate, we return once again to our case study of North Carolina voting laws. Recall that the 2013 omnibus law targeting African Americans with "surgical precision" passed along strict party lines, with all Republicans in favor and all Democrats opposed.[357] Now let's consider a change in legislative membership that takes place before the next round of voting legislation is enacted. Depending on the type of change, there might be little reason to conclude that the link to the prior invalid law has been severed. We can readily envision a solidly Republican district where the Republican incumbent retired, or was primaried, and a new Republican is elected to represent the district. The prior member voted for the prior bill and the new member votes for the new bill with the changes forced by the state's loss in the previous litigation. Because party affiliation in North Carolina is so predictive of support for the kind of voting restrictions that disproportionately harm Black voters, the fact that there is a new Republican in the seat should not itself be sufficient to discharge the prior invidious purpose.[358]

But there might be a different dynamic in other scenarios. Ag-gag laws in Iowa are supported by both Republicans and Democrats, either of whom might have sufficiently close ties to the agricultural industry to be sympathetic to legislation that seeks to protect the industry from criticism.[359] The 2012 ag-gag bill enacted in Iowa was voted up by all twenty-four Iowa Senate Republicans as well as sixteen Iowa Senate Democrats, with ten Democrats voting against.[360] Drawing from the context of this case study, we could imagine a district represented by a Democrat who voted for the 2012 ag-gag law. If that Democrat retires and is replaced by another Democrat whose ties to the agricultural industry are of a different nature, we might have cause to wonder whether the new Democrat shares the speech-suppressing motives of her predecessor. This consideration would then be combined with an assessment of whether the margin was such that this legislator's support had any impact on the outcome of the subsequent bill.

357. *Cooper*, 430 F. Supp. 3d at 26, 35.

358. *See, e.g.*, Hasen, *supra* note 29, at 55–56.

359. Will Potter, *"Ag Gag" Bills and Supporters Have Close Ties to ALEC*, GREEN IS NEW RED (Apr. 26, 2012), http://www.greenisthenewred.com/blog/ag-gag-american-legislative-exchange-council/5947/ [https://perma.cc/7DNU-PLLD] (reporting that the Iowa Poultry Association helped draft Iowa's first ag-gag bill, that the bill's "most vocal sponsor" was the former executive director of the Iowa Angus Association, and that ag-gag "[s]upporters are quite proud of their ties to the agriculture industry").

360. *Iowa Senate Passes Two Bills Favored by Big Ag (Updated)*, BLEEDING HEARTLAND (Feb. 28, 2012), https://www.bleedingheartland.com/2012/02/28/iowa-senate-passes-two-bills-favored-by-big-ag-updated/ [https://perma.cc/J5K3-2M98].

In sum, an intervening election and a resulting change in legislative membership may do little to disrupt the link between a newly challenged law and its predecessor, or conversely, it may do quite a bit. A sensible approach to second-bite lawmaking would certainly seek to distinguish reliably between these possibilities, while accounting for the inferences that reasonably emerge from the central fact that the subsequent effort shows sufficient resemblance to a prior invalidated act to be considered a lineal descendant.[361] The procedural principle announced in *Fordice*—placing the burden on the state to show that the link to a prior invalid policy has been severed—is well suited to accommodate these diverse scenarios. In every instance of second-bite lawmaking, the state is welcome to introduce evidence of changes in legislative membership to show that the new effort is free of the impermissible intent that infected the prior version. As the examples above illustrate, this may be plausible in some scenarios and implausible in others; either way, it makes sense to have this burden borne by the state, which has taken a second bite of the lawmaking apple after suffering a defeat in constitutional litigation.

### 2. Passage of Time

While the seating of a newly constituted legislature may not itself be sufficient to cut the thread, neither can we simply assume that invidious purpose lingers indefinitely despite whatever transformations may have taken place in the relevant social context. Take, for example, Sunday closing laws, which "generally proscribe all labor, business and other commercial activities on Sunday," the "Sabbath day of the predominant Christian sects."[362] These laws were undeniably of a "strongly religious origin," enacted "in aid of the established church."[363] The Supreme Court nonetheless upheld such laws against Establishment Clause challenge in *McGowan v. Maryland*,[364] explaining that

> [i]n light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to

361. *Cf.* Garrett, *supra* note 161, at 1479 ("[After lawmakers revise and reenact legislation,] courts may be loath to trust their motives if they quickly claim to have re-done the policy, claiming newly clean hands. The taint of constitutionally illegitimate intent may persist so long as the relevant action is taken.").

362. McGowan v. Maryland, 366 U.S. 420, 422, 431 (1961).

363. *Id.* at 433. The "obvious precursor" of the statute under review in *McGowan* was titled "An Act for the Service of Almighty God and the Establishment of the Protestant Religion within this Province." *Id.* at 446.

364. 366 U.S. 420 (1961).

> establishment of religion as those words are used in the Constitution of the United States.[365]

The Court's discussion of the history of Sunday closing laws began with King Henry III in the thirteenth century and did not shy away from the explicitly and incontrovertibly religious motives animating the original laws; but the Court then painstakingly proceeded to trace how "the statutes began to lose some of their totally religious flavor."[366] The need for a uniform day of rest that laborers could share with their families and communities, and longstanding social expectations that Sunday would be that day, provided sufficient secular justification to support the law as a legitimate public policy independent of religious purpose.[367]

*McGowan* provides an illustration of how a law can outlast its original improper purpose, but we might wonder how instructive the lesson really is for the sort of second-bite lawmaking with which we are primarily concerned. The Sunday closing laws considered in *McGowan* were not actually successors to laws that were struck down; they were not enacted in response to unfavorable rulings and in order to withstand a subsequent round of judicial scrutiny. The trajectory of Sunday closing laws thus does not include the information-forcing mechanism of litigation and the strategic adaptions that government defendants then undertake in response.[368] But while this scenario presents a less compelling need for a review framework tailored to the unique dynamics of second-bite lawmaking, it nonetheless showcases the kind of factual inquiry that can yield a persuasive conclusion that the link between a challenged law and an improper purpose has been severed.

Whether we are considering formal developments, like the seating of a new legislature, or gradual change, like the evolution of social meaning over time, the important lesson is that a convincing approach to second-bite lawmaking does not require us to set forth an all-purpose, preset typology characterizing developments as either sufficient or insufficient to sever the link

365. *Id.* at 444.

366. *Id.* at 431–34.

367. *Id.* at 434–37.

368. For the same reason, the assessment of whether state provisions prohibiting government aid to sectarian schools were motivated by anti-Catholic animus, at issue in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), is also somewhat orthogonal. *Id.* at 2251, 2273. It belongs in the large general category of cases in which intent is constitutionally relevant and arguably discernable from historical background, but does not present the issue of reenactment after invalidation. The role of white supremacy in prompting states like Louisiana and Oregon to allow convictions by nonunanimous juries is in a somewhat different posture. As explained in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), at the time of those enactments, states had already begun to seek superficially race-neutral means of maintaining white supremacy as a way to avoid equal protection constraints articulated by the Supreme Court. *Id.* at 1394. Nonetheless, the context surrounding nonunanimous jury provisions is also somewhat distinctive from the phenomenon we consider most closely here, where we can trace a single trajectory of lawmaking effort connecting multiple iterations of a challenged law.

between a newly enacted law and a prior improper purpose. It requires only that we have a sensible process for analyzing these developments. As argued throughout this Article, it is reasonable to place the burden on the state, appearing back in court to defend a subsequent version of a law that was previously invalidated, to explain how any potentially relevant developments cleanse the taint.

The more difficult question is whether this is an appropriate burden for the state to bear in all cases of second-bite lawmaking. If state actors are engaged in good-faith interbranch dialogue, pursuing legitimate or even laudable goals in an area where constitutional meaning is highly contested, why can they not get close to the line? In other words, is all iterative lawmaking inherently bad? If not, how do we distinguish between authentic recalibration and persistent evasion? We explore these questions in the next section.

### B. *Is Second-Bite Lawmaking Inherently Bad?*

In trying to determine whether second-bite lawmaking is inherently suspect, it is helpful to return to the series of ordinances passed by the District of Columbia in an effort to regulate firearms within the city bounds. After its initial effort was struck down by the Supreme Court in *Heller I*,[369] the city tried again. Its new effort to regulate firearms was again subjected to Second Amendment challenge.[370] While some portions of the new scheme were also struck down, much of it was upheld, reflecting the city's efforts to recalibrate its regulations to comply with the demands of the Second Amendment.[371] As another example, consider the federal statute that at one time prohibited "the depiction of animal cruelty."[372] After the Supreme Court struck down the statute on overbreadth grounds in *United States v. Stevens*,[373] Congress then

369. *Heller I*, 554 U.S. 570, 635 (2008) (invalidating the district's ban on handgun possession in the home).

370. *Heller II*, 670 F.3d 1244, 1247 (D.C. Cir. 2011).

371. *See id.* at 1259–60, 1264 (upholding basic registration requirements and prohibitions on assault weapons and high-capacity magazines and remanding with instructions for the district to provide "meaningful evidence" in support of novel registration requirements and long gun registration requirements). The district enacted a revised firearms act, repealing some of the challenged registration provisions and retaining others. *See* Firearms Amendment Act of 2012, 59 D.C. Reg. 5691 (May 15, 2021) (codified as amended at D.C. CODE § 7-2502 (2013)). On review of the revised act, the appellate court upheld basic registration for long guns, requirements that applicants appear in person to register and provide fingerprints and a photograph, pay reasonable fees, and attend safety training. *Heller III*, 801 F.3d 264, 280–81 (D.C. Cir. 2015). However, it struck down triennial re-registration, physically bringing the firearm, test of legal knowledge, and the prohibition on registration of "more than one pistol per registrant during any 30–day period." *Id.* at 281.

372. Depiction of Animal Cruelty, Pub. L. No. 106-152, 113 Stat. 1732 (1999) (codified as amended at 18 U.S.C. § 48).

373. 559 U.S. 460, 482 (2010) (finding that the statute as written was "substantially overbroad, and therefore invalid under the First Amendment").

"promptly revised and narrowed the statute."[374] The revised statute was upheld against First Amendment challenges, and (for better or worse) is currently enforced as part of the federal criminal code.[375]

For some readers, these examples of subsequent lawmaking are likely to seem less problematic than the three case studies examined in detail above—maybe even salutary. What should we make of this different reaction? How does it impact the framework advanced here? There are several possible answers. With regards to the statute struck down in *Stevens*, we could posit that revision and reenactment is particularly sensible as a response to an overbreadth ruling.[376] As to the District of Columbia's effort to regulate firearms, we might observe that Second Amendment doctrine is new and its contours are still being worked out, such that we might be less inclined to condemn lawmakers who overstep its boundaries as having acted in some sort of deliberate defiance of constitutional duty.[377] We could also note that the legal analysis supplied by Second Amendment doctrine does not invite consideration of improper purpose, such that it is constitutionally irrelevant whether lawmakers retained the same motive throughout multiple rounds of lawmaking and litigation.[378] There is no taint to cleanse, so lawmakers can revise and redraft without arousing suspicion of villainy.[379]

The important point is that iterative lawmaking itself is not necessarily intrinsically good or bad, right or wrong. Lawmakers can go back to the drawing

374. United States v. Richards, 755 F.3d 269, 272 (5th Cir. 2014).

375. *Id.* at 279 ("[18 U.S.C.] § 48 is limited to unprotected obscenity and therefore is facially constitutional."). *See generally* Justin Marceau, *Palliative Animal Law: The War on Animal Cruelty*, 134 HARV. L. REV. 250 (2021) (critiquing carceral animal law from an animal rights perspective). The Preventing Animal Cruelty and Torture ("PACT") Act, Pub. L. No. 116-72, 133 Stat. 1151 (2019) (codified as amended at 18 U.S.C. § 48)—which provided an additional update to the statute—was passed with "overwhelming support" in both chambers. Matthew Daly, *Congress Approves Bill Expanding Animal Cruelty Law*, AP NEWS (Nov. 6, 2019), https://apnews.com/article/donald-trump-animal-cruelty-ted-deutch-vern-buchanan-crime-d6dab49a15af4f67875c17faddaccbbf [https://perma.cc/T8QR-EZFT].

376. *See Richards*, 755 F.3d at 279 (explaining how Congress narrowed the second version of the statute to exclude the provisions that had raised overbreadth concerns).

377. *See* Joseph Blocher, *Response: Rights as Trumps of What?*, 132 HARV. L. REV. F. 120, 128–32 (2019).

378. Courts have so far developed and applied a doctrinal test that does not include an assessment of motive, as this articulation demonstrates: "In determining whether some form of heightened scrutiny applies, we consider two factors: '(1) "how close the law comes to the core of the Second Amendment right" and (2) "the severity of the law's burden on the right." Laws that neither implicate the core protections of the Second Amendment nor substantially burden their exercise do not receive heightened scrutiny.'" N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45, 56 (2d Cir. 2018) (quoting N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 258 (2d Cir. 2015)), *vacated and remanded*, 140 S. Ct. 1525 (2020).

379. *Cf.* William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 210–11 (2019) ("The heroic story America tells itself about the Constitution . . . necessarily casts as villains the characters who have ended up on the short side of the Supreme Court vote . . . .").

board in a posture that is reparative, defiant, evasive, or some combination. And simply getting close to the line—seeking to exercise the maximum degree of lawmaking power allowed by the relevant constitutional principles—is different than evading constitutional principles by obscuring an ongoing improper purpose.

Clarifying this core focus on the durability of improper purpose also helps explain what appears to be a consistent ideological valence to all of the case studies. Lawmaking efforts that burden Black voters, animal rights activists, and migrants from predominantly Muslim countries all seem to pit progressive interests against conservative lawmaking, which requires us to ask whether the framework being developed here will have traction only for those whose substantive ideological commitments align with the plaintiffs in these cases. The answer is no, but a bit more explanation illuminates why this is so.

Over the course of our constitutional history, intent-based inquiries have typically been used to curb majoritarian discrimination against "out" groups, whose vigorous protection has been more strongly associated with progressive ideology.[380] These case studies exemplify that strand of rights litigation—indeed, one of the important lessons of the North Carolina case study is the way it fits into a longer trajectory of voter suppression efforts stretching back to the ratification of the Fifteenth Amendment. A framework for tracing improper purpose through multiple rounds of lawmaking and litigation may well have greater application to areas of contestation in which minoritized out-groups wield constitutional principles as a bulwark against majoritarian processes. It would be mistaken, however, to conclude that this will necessarily have a liberal or progressive bent—it turns out that this itself is a principle with cross-ideological appeal if taken at a sufficient level of abstraction. Conservatives and progressives do not disagree that there are embattled minorities who need judicial protection from hostile majorities, they simply differ in their identification of who counts as a minoritized out-group needing such solicitude.[381] The traceability paradigm has a cross-ideological reach because it

380. John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 486–87 (1978); Eyer, *Ideological Drift*, *supra* note 31, at 66 (describing a period in the Supreme Court's history when intent doctrine was "used in the service of progressive racial justice aims"). *But see* Professor Nikolas Bowie, Assistant Professor of L., Harvard L. Sch., Written Statement to the Presidential Commission on the Supreme Court of the United States: The Contemporary Debate over Supreme Court Reform: Origins and Perspectives (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf [https://perma.cc/UWF2-XSE4] ("[A]s a matter of historical practice, the Court has wielded an antidemocratic influence on American law, one that has undermined federal attempts to eliminate hierarchies of race, wealth, and status.").

381. Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 941–43 (2004) (identifying various difficulties in discerning which religious groups are minorities).

inherits the same ideological valence as the intent-based inquiries underlying it, and the ideological valence of intent inquiries is constantly changing.[382]

This phenomenon has already been well documented with regards to adjudication of race and gender discrimination under equal protection,[383] but it goes well beyond this realm into newer areas of contestation governed by newer constitutional principles. Take the ag-gag cases, for example. To begin, we might observe that support for these measures has been consistently bipartisan, complicating the impulse to portray all of the lawmaking challenged in our case studies as simply the product of Republican-controlled bodies. But more importantly, the principles established in the ag-gag cases will protect undercover investigators working in conservative social movements, like the effort to recriminalize abortion. This ideological drift is already underway, as exemplified by a recent suit brought by Planned Parenthood against the anti-abortion activists who infiltrated the organization's conferences and facilities and recorded embarrassing statements made by the organization's officials.[384] Ruling on summary judgment motions, the district court was somewhat parsimonious in crediting the defendants' First Amendment defenses to the imposition of damages arising from the publication of the videos.[385] A group of free speech scholars and animal advocacy groups that were instrumental in the ag-gag litigation filed an amicus brief criticizing the district court for applying common law trespass principles without adequate consideration of the free speech interests at stake.[386] Just as they had done in the ag-gag litigation, these advocates urged the appellate court to recognize that "investigative deception

382. *See, e.g.*, J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 870 (1993) (explaining the concept of "ideological drift" by positing that "[s]tyles of legal argument, theories of jurisprudence, and theories of constitutional interpretation do not have a fixed normative or political valence" and that "[t]heir valence varies over time as they are applied and understood repeatedly in new contexts and situations"); Eyer, *Ideological Drift*, *supra* note 31, at 7 (situating intent doctrine in the phenomenon of ideological drift by which "doctrine may become unmoored from its original normative underpinnings and may even come to serve opposing aims").

383. Aviel, *supra* note 348, at 377 ("The kind of discrimination for which white claimants might seek relief has been made highly salient and constitutionally significant. The kinds of injustice about which claimants of color might complain are largely outside of Equal Protection's reach.").

384. *See* Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, 402 F. Supp. 3d 615, 632–33 (N.D. Cal. 2019). For other cases in which free speech principles have been wielded in service of anti-abortion movements, see, for example, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2378 (2018) (invalidating required disclosures for crisis pregnancy centers whose aim is to dissuade women from having abortions); McCullen v. Coakley, 573 U.S. 464, 473, 496–97 (2014) (invalidating buffer zones around abortion clinics enacted in response to anti-abortion protestors).

385. *Ctr. for Med. Progress*, 402 F. Supp. 3d at 644–45.

386. Brief of Amici Curiae for Free Speech Scholars and Animal-Advocacy Organizations in Support of Neither Party at 16, Planned Parenthood Fed'n of Am. v. Ctr. for Med. Progress, No. 16-cv-236-WHO (9th Cir. Mar. 5, 2021) (Nos. 20-16068, 20-16070, 20-16773 & 20-16820), 2021 WL 964262, at *16.

is protected speech" that cannot be categorically punished without careful attention to whether the harms alleged are legally cognizable.[387]

It is worth noting that this example of cross-ideological reach arises in a damages suit brought against private parties rather than a challenge to lawmaking of any kind, much less the successive variety. But the speech-chilling potential of private tort lawsuits has been clear since at least *New York Times Co. v. Sullivan*,[388] and the example helps illustrate that if the California state legislature attempted repeatedly to prohibit whistleblowing and undercover investigations in certain medical facilities in an effort to protect abortion providers from negative publicity, the persistence of a speech-suppressing intent would be as central to the question of constitutional validity as it has been in the ag-gag cases. The ag-gag case study is thus only superficially a story about progressive interest groups using constitutional principles to impede a conservative legislative agenda.

It should be even easier to see the cross-ideological effects of a robust traceability scheme in religious liberty litigation.[389] Intent inquiries can be pivotal to religious liberty litigation,[390] and indeed, the presence of "religious animus" was central to the ruling in favor of the Christian baker who refused to

387. *Id.* at *2, *17.

388. 376 U.S. 254 (1964).

389. There has been a pronounced effort on the part of both scholars and advocacy groups to demonstrate that the doctrine protects marginalized religious minorities and thereby continues to serve an important check on majoritarian power. The Becket Fund for Religious Liberty brings cases on behalf of Sikhs, Muslims, Native Americans, Jews, Catholics, and Protestant Christians from various denominations and prominently displays this diversity on its website. *See Becket Case Database*, BECKET, https://www.becketlaw.org/cases/ [https://perma.cc/QFP3-36KT]. Scholars have attempted to show empirically that "[r]eligious minorities remain significantly overrepresented in religious freedom cases; Christians remain significantly underrepresented." Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 353, 353 (2018). It is not clear how the study might control for the fact that religious practices associated with majoritarian Christian denominations are less likely to be burdened by neutral, generally applicable laws, and other scholars are much less sanguine about the extent to which religious minorities continue to find robust protection in current religious liberty jurisprudence. *See* Cathleen Kaveny, *The Ironies of the New Religious Liberty Litigation*, DAEDALUS, Summer 2020, at 72, 72; *see also* Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1402–04 (2020) (expressing concern about "rising Christian favoritism" in religious liberty jurisprudence).

390. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523, 540 (1993) (explaining that "[t]he principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions" and striking down animal cruelty ordinances that "had as their object the suppression of religion"); *see also* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 8 (2016) (asserting that "[a]nti-religious motive is *sufficient* to trigger strict scrutiny, but it is not *necessary*," and explaining that only two Justices joined the section of the opinion resting on antireligious motive); Kendrick & Schwartzman, *supra* note 199, at 135 ("[U]nder the Free Exercise Clause, acts motivated by religious animus are, at least as a prima facie matter, impermissible."); Schragger & Schwartzman, *supra* note 389, at 1397–405.

make a wedding cake for a same-sex couple.[391] To be sure, the cross-ideological potential of a vigorous scheme for tracing religious hostility has been obscured by the lack of vocal support expressed by religious conservatives for the plaintiffs in the travel ban cases.[392] Problems of selective application aside, however, religious discrimination is ostensibly a phenomenon of deep concern to both conservatives and progressives.[393] Whether an observer is more inclined to see religious animus in the statements of the Colorado Civil Rights Commission or President Trump, in either case, she should be invested in a regime that keeps track of it across multiple iterations.[394]

The idea of improper purpose as an invalidating force is so popular that it is spreading to the Second Amendment context, where there is a movement afoot to introduce motive scrutiny into the assessment of firearm regulation.[395] In challenging these regulations as violative of the Second Amendment, gun rights advocates assert "that support for gun regulation is motivated by anti-gun bias."[396] Professor Joseph Blocher explains how Second Amendment litigants attempt to cast their claims as targeting "the kind of government bigotry, intolerance, or corruption" that other constitutional doctrines treat as suspect.[397]

In sum, anyone who believes that an improper purpose can render a law or official decision constitutionally invalid—and these days that seems to be pretty much everyone—ought to embrace a framework that is capable of

391. *See* Thomas C. Berg, *Religious Freedom and Nondiscrimination*, 50 LOY. U. CHI. L.J. 181, 199 (2018) [hereinafter Berg, *Religious Freedom*] (discussing "evidence of anti-religious hostility in *Masterpiece*"); *see also* Thomas C. Berg, Masterpiece Cakeshop*: A* Romer *for Religious Objectors?*, 2017 CATO SUP. CT. REV. 139, 139–40. For critique of the animus holding in *Masterpiece Cakeshop*, especially when viewed in light of the contrary ruling in *Trump v. Hawaii*, see, for example, Schragger & Schwartzman, *supra* note 389, at 1399–405 (arguing that animus has lost meaning due to selective application); Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257, 281 (asserting that *Masterpiece Cakeshop*'s ruling shows "that the concept of animus may be applied flexibly—and indeed, inverted").

392. *See* Berg, *Religious Freedom*, *supra* note 391, at 184 (identifying and critiquing the failure of religious conservatives to defend Muslim religious freedom as "a serious error—of pragmatics and of principle").

393. *See* Schragger & Schwartzman, *supra* note 389, at 1404 ("[A]nimus seems to be in the eye of the beholder. It is notable that a doctrine that has generally applied to ethnic, racial, sexual, and religious minorities—African-Americans and Muslims and other traditionally despised religious groups—is deployed by the Court to protect religious conservatives against a state enforcing a liberal norm of equal treatment.").

394. Conversely, the traceability paradigm cannot and does not purport to solve the problem of selective application.

395. *See* Blocher, *supra* note 377, at 126–27.

396. *Id.* at 129; *see also* Darrel A.H. Miller, *The Second Amendment and Second-Class Rights*, HARV. L. REV. BLOG (Mar. 5, 2018), https://blog.harvardlawreview.org/the-second-amendment-and-second-class-rights/ [https://perma.cc/B7J6-BW5L].

397. Blocher, *supra* note 377, at 131 (noting that the briefing for the challengers in one prominent case attacking New York City's regulatory scheme insists that "[t]he City betrays [in this law and in the litigation] its hostility to Second Amendment rights").

tracking any such lingering purpose through multiple rounds of lawmaking and litigation. For all its challenges and shortcomings, motive scrutiny is a basic feature of constitutional law, and it can serve to advance interests that align with either conservative or progressive ideals.[398] This project takes that landscape as a given and builds upon it a framework tailored to the specific context of successive lawmaking. The framework gives effect to the insights gleaned through careful analysis of our illustrative case studies: that "discriminatory intent tends to linger"; that after multiple rounds of lawmaking and litigation it is likely to be driven underground rather than forthrightly expressed; and that this phenomenon requires procedural mechanisms tailored to this particular context.

## CONCLUSION

The case studies explored in this Article are important in their own right, each portraying a vivid site of contemporary constitutional struggle, but together, they serve to illustrate a much broader and trans-substantive phenomenon. These case studies show that it is often possible to trace a singular trajectory of lawmaking effort across multiple cycles of invalidation, revision, and subsequent litigation. This Article shows not only that it is possible to understand second-bite lawmaking in this holistic, continuous, and historically grounded way, but that doing so is essential. As the case studies reveal, constitutional litigation is information forcing in a way that works to the benefit of government defendants determined to stay the course. Because these officials benefit from the lessons learned in their previous efforts, a court's willingness to see the connection between an earlier effort and a subsequent iteration eventually becomes outcome determinative as government defendants learn to conceal the defects that were fatal to prior versions.

Tracing impermissible intent through multiple rounds of lawmaking and litigation is consistent with longstanding elements of the Supreme Court's methodology in such matters, and its availability as a procedural principle should be strengthened rather than undermined. A full course correction would revitalize the earlier principle that government defendants returning to court to defend second-bite lawmaking bear the burden to prove that the impermissible intent has indeed vanished, especially given the significant obstacles that plaintiffs face in making the initial demonstration of impermissible intent. As scholars have long recognized, the Supreme Court's intent doctrine "permits policymakers to conceal invidious purposes behind facially neutral language."[399]

398. Kendrick & Schwartzman, *supra* note 199, at 134 (describing animus as "a basic principle of constitutional law, namely, that officials act illegitimately when their conduct is based on wrongful intentions").

399. Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147, 2149 (2019).

But at the very least, the Court should adhere to its previous insight that "the world is not made brand new every morning,"[400] and recognize that it is in tension with the idea of a presumption that refreshes in full no matter how many times the state may attempt to refashion its prior work product into something more likely to withstand scrutiny. To treat the presumption of legislative good faith as an infinitely renewable resource is to undermine the substantive constitutional principles underlying these multiphased disputes.

400. McCreary County v. ACLU of Ky., 545 U.S. 844, 866 (2005).