2016

Presidential Legitimacy through the Anti-Discrimination Lens

Catherine Y. Kim
University of North Carolina School of Law, cykim@email.unc.edu

Publication: *Chicago-Kent Law Review*

PRESIDENTIAL LEGITIMACY THROUGH THE ANTI-DISCRIMINATION LENS

CATHERINE Y. KIM*

INTRODUCTION

The Obama administration's deferred action programs granting temporary relief from deportation to undocumented immigrants have focused attention to questions regarding the legitimacy of presidential lawmaking.[1] Days after the administration first announced it would grant work authorization and renewable two-year reprieves from removal to noncitizens who were brought to the United States in childhood,[2] Republicans attacked the program as an "affront to our system of representative government and the legislative process."[3] When the president subsequently expanded the program to benefit additional childhood arrivals as well as the parents of U.S. citizens and legal permanent residents,[4] reactions were even more critical. Members of Congress accused the administration of "sus-

* Assistant Professor of Law, University of North Carolina School of Law. I wish to thank Max Eichner, Victor Flatt, Don Hornstein, Holning Lau, Rob Smith, Erika Wilson, and the organizers and participants of the American Association of Law Schools symposium on "Congressional Dysfunction and Executive Lawmaking During the Obama Administration." Tyson Leonhardt and Preetha Suresh provided invaluable research assistance. All errors are my own.

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

2. President Barack Obama, Remarks by the President on Immigration (June 15, 2012) (transcript at https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration); Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to David Aguilar et al., Acting Comm'r, U.S. Customs and Border Prot., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) (on file at http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorialdiscretion-individuals-who-came-to-us-as-children.pdf).

3. Letter from 20 U.S. Senators to President Barack Obama (June 19, 2012) (on file at http://www.grassley.senate.gov/news/news-releases/senators-question-president%E2%80%99s-authority-issue-immigration-directive).

4. President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014) (transcript at https://www.whitehouse.gov/thepressoffice/2014/11/20/remarkspresidentaddressnationimmigration); Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014) (on file at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

pend[ing] the law at its whim" in "astonishing disregard for the Constitution [and] the rule of law."[5] These attacks were not confined to partisan opponents. Legal scholars of varying political stripes asserted a violation of separation-of-powers requirements,[6] while the editorial boards of the Wall Street Journal, the Washington Post, and USA Today condemned what they viewed as executive overreach.[7] Both the initial deferred action program and its subsequent expansion have been subjected to constitutional challenge in the federal courts as well.[8]

Immigration, though, is not the only context in which the president has exercised policymaking authority, and this Essay examines presidential lawmaking in the anti-discrimination context. Executive policymaking in this area presents an important point of comparison for deferred action because like immigration, it necessarily impli-

5. Letter from 22 U.S. Senators to President Barack Obama (Apr. 24, 2014) (on file at http://www.grassley.senate.gov/news/news-releases/senators-press-administration-enforcing-immigration-laws-new-%E2%80%9Cenforcement-review%E2%80%9D).

6. *See* Josh Blackman, *The Constitutionality of DAPA Part II- Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 199, 255 (2015); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014); *Obama Immigration Policy: Hearing Before the S. Judiciary Comm.*, 113th Cong. (2014) (testimony of John C. Eastman); *The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the Comm. on the Judiciary H. R.*, 113th Cong. (2013) (testimony of Nicholas Quinn Rosenkrantz); *The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the Comm. on the Judiciary H. R.*, 113th Cong. (2013) (testimony of Jonathan Turley).

7. Editorial, *On Immigration, the GOP Should Make the Next Move*, WASH. POST (Nov. 20, 2014), https://www.washingtonpost.com/opinions/on-immigration-the-gop-should-make-the-next-move/2014/11/20/99c10984-70e8-11e4-8808-afaa1e3a33ef_story.html; Editorial, *I Barack*, WALL ST. J., Nov. 21, 2014, at A12; Editorial, *Obama's Immigration Order: Right Thing in The Wrong Way,* USA TODAY, Nov. 21, 2014, at A8; *see also* Ross Douthat, *The Great Betrayal: Commentary*, N.Y. TIMES, Nov. 16, 2014, at SR9.

8. In October of 2012, a union representing federal immigration officials filed suit alleging that the initial deferred action program "unconstitutionally usurps and encroaches upon the legislative powers of Congress" and violates the president's constitutional duty to "faithfully execute the laws." Crane v. Napolitano, No. 3:12-cv-3247, 2012 WL 5199509 (N.D. Tex. Oct. 10, 2012). Although the district court found that the plaintiffs were likely to succeed on the merits of their statutory claim, it found that the Civil Service Reform Act precluded review and dismissed for lack of subject matter jurisdiction. Crane v. Napolitano, No. 3:12-cv-3247, 2013 WL 8211660 (N.D. Tex. July 31, 2013).

More recently, twenty-six states filed suit seeking to enjoin the expanded deferred action program. The Fifth Circuit affirmed the district court's grant of a preliminary injunction, concluding that the plaintiffs were likely to succeed on the merits of their claim that the program violates the Administrative Procedure Act's procedural and substantive requirements. Texas v. United States, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015). The administration has announced it will petition the Supreme Court to review the decision. Michael D. Shear, *Fate of 5 Million at Stake, Obama to Ask Justices to Rule on Immigration Overhaul*, N.Y. TIMES, Nov. 11, 2015, at A15.

cates the rights of traditionally disenfranchised populations. Deferred action benefits undocumented aliens, who by definition lack direct political representation; anti-discrimination laws benefit other "discrete and insular groups" such as racial and ethnic minorities or members of the lesbian, gay, bisexual and transgender (LGBT) communities.[9] Presidential policies relating to workplace discrimination, environmental justice, and affirmative action exhibit some of the key features animating the separation-of-powers debate over deferred action yet have been spared from serious constitutional challenge.

A comparison of executive policies in the immigration and anti-discrimination contexts identifies unique challenges to assessing the validity of presidential attempts to protect minority populations. In prior generations, when federal courts were the institutions most frequently relied upon to protect these groups, scholars recognized the need to develop an account of judicial legitimacy capable of explaining and evaluating such judicial interventions.[10] As doctrinal and political developments have diminished the role of federal courts in this area,[11] however, civil rights scholars have begun examining the growing importance of the executive branch in this role.[12] Yet, they

9. For discussions of the intersection between immigration and racial status, see Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 U.C.L.A. L. REV. 1 (1998); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); Rose Cruz Villazor, *Rediscovering* Oyama v. California*: At the Intersection of Property, Race and Citizenship*, 87 WASH. U. L. REV. 979 (2010).

10. *See* United States v. Carolene Prods. Co., 304 U.S. 144 n.4 (1938) (suggesting need for heightened judicial scrutiny to review legislation targeting "discrete and insular minorities" such as particular religious, national, or racial groups); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135-79 (1980); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

11. *See e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. (2011) (involving requirements for class certification in civil rights case); Ashcroft v. Iqbal, 556 U.S. 662 (2009) (determining pleading standards in civil rights case); Alexander v. Sandoval, 532 U.S. 275 (2001) (setting forth standards for inferring private rights of action in civil rights case); City of Los Angeles v. Lyons*,* 461 U.S. 95 (1983) (establishing standing requirements for injunctive relief in civil rights cases); *see also* Myriam Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1386 (2000); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2003); Catherine Y. Kim, *Changed Circumstances: The Federal Rules of Civil Procedure and the Future of Institutional Reform Litigation After* Horne v. Flores, 46 U.C. DAVIS L. REV. 1435, 1455-68 (2013).

12. *See* Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence*, 10 BERKELEY J.

have not fully grappled with the unique legitimacy concerns implicated by such presidential actions. This Essay begins to fill that gap.

Part I analyzes the separation-of-powers concerns raised by the deferred action programs and identifies parallel examples from the anti-discrimination context. Part II contextualizes attacks on deferred action within the broader debate over the legitimacy of presidential lawmaking.[13] As a formal matter, the validity of an executive policy depends on its adherence to congressional intent.[14] The delegation of exceedingly broad swaths of discretion to the executive, however, frequently renders congressional intent difficult to discern. In light of this ambiguity, administrative law scholars have proposed functionalist approaches to assessing the legitimacy of presidential exercises of power, collectively focusing on four general metrics: (1) public visibility, (2) adherence to majoritarian preferences, (3) avoidance of factionalism, and (4) reasoned deliberation. Part III assesses the deferred action and anti-discrimination policies along these dimensions. It concludes that proposed metrics for evaluating presidential

AFR.-AM. L. & POL'Y 146 (2008); Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339 (2012); Joseph Landau, *Presidential Constitutionalism and Civil Rights*, 55 WM. & MARY L. REV. 1719 (2014); Chinh W. Le, *Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725, 726 (2010); Margaret H. Lemos, *Consequences of Congress' Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363 (2010); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413 (2011); Stephen Plass, *Exploring the Limits of Executive Civil Rights Policymaking*, 61 OKLA. L. REV. 155 (2008); Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace*, 91 WASH. U. L. REV. 1519 (2014).

13. *See, e.g.,* Kate Andrias, *The President's Enforcement Power,* 88 N.Y.U. L. REV. 1031 (2013); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 506 (2003); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 448 (2010); Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: *From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2007); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741 (2009); Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making,* 108 MICH. L. REV. 1127 (2010); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014); Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1387 (2013); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws,* 106 COLUM. L. REV. 263 (2006); Kathryn A. Watts, *Controlling Presidential Control,* 119 MICH. L. REV. (forthcoming 2016).

14. This Essay proceeds on the assumption that presidential power over immigration is coextensive with such power over purely domestic matters. The Constitution, however, arguably vests the executive branch with greater authority to regulate immigration than matters that do not implicate the nation's foreign relations. *See* Adam B. Cox & Cristina Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009) (discussing presidential authority to act unilaterally in immigration context); Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*, 90 NOTRE DAME L. REV. 691 (2014).

lawmaking prove indeterminate in all but the one easy case, demonstrating the need for a distinct theory of legitimacy when the president acts to protect vulnerable populations.

I. PRESIDENTIAL LAWMAKING IN THE ANTI-DISCRIMINATION CONTEXT

This section analyzes the two features of the deferred action policy that have drawn the most criticism. It then identifies parallel examples from the anti-discrimination context in which the president unilaterally imposed a policy shaping the rights of a traditionally disenfranchised group. While executive policies relating to workplace discrimination, environmental justice, and affirmative action raise some of the same separation-of-powers concerns implicated by deferred action, they have been spared from serious constitutional challenge.

A. Deferred Action

Constitutional challenges to the deferred action policies focus on two key aspects of the programs: their similarities to failed legislation and their categorical nature. First, critics of deferred action contend that the imposition of the programs as a direct response to Congress' failure to enact bills proposing similar goals makes evident the programs' unconstitutionally legislative nature. In the years preceding the announcement of the initial deferred action program in 2012, Congress repeatedly considered DREAM Act legislation that would have normalized the immigration status of undocumented youth who came to the United States in childhood.[15] When the bill failed to reach a floor vote, President Obama announced the "Deferred Action for Childhood Arrivals" program, expressly justifying it as a response to legislative failure.[16]

The subsequent expansion of the deferred action policy in 2014 similarly responded to Congress' refusal to act. After the Senate passed a comprehensive immigration reform bill to grant relief to millions of undocumented immigrants in June of 2013,[17] the president

15. *See, e.g.*, S. 952, 112th Cong. (2011); H.R. 6487, 111th Cong. (2010); S. 3992, 111th Cong. (2010).

16. Remarks by the President on Immigration (June 15, 2012), *supra* note 2.

17. S. 744, 113th Cong. (1st Sess. 2013); *Roll No. 168*, U.S. SENATE (June 27, 2013), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?&congress=113&session=1&vote=00168.

repeatedly pressed the House to act as well.[18] But when the Speaker of the House indicated that he would not bring the legislation to a floor vote in his chamber that year,[19] the president responded swiftly by announcing the expansion of the deferred action policy, again citing the need to cure Congress' failure to act.[20] Opponents have cited this sequence of events as demonstrative of the president's unconstitutional encroachment of Congress' exclusive lawmaking authority.[21]

Critics have also focused on a second feature of deferred action: the categorical nature of the programs. While the executive branch may validly exercise prosecutorial discretion to decline to enforce a statute in a particular case,[22] opponents maintain that deferred action exceeds the bounds of such authority because it "requires no searching, individualized evaluation of the merits of particular applicants. All who possess the designated characteristics will qualify."[23] Pursuant to this view, the failure to enforce statutory re-

18. President Barack Obama, Statement on Senate Passage of Immigration Reform Legislation (June 27, 2013) (transcript at http://www.readperiodicals.com/201306/3039409011.html); President Barack Obama, Remarks on Immigration Reform (Oct. 24, 2013) (transcript at https://www.washingtonpost.com/politics/transcript-president-obamas-oct-24-remarks-on-immigration-reform/2013/10/24/7e322db4-3cba-11e3-a94f-b58017bfee6c_story.html); President Barack Obama, Remarks Prior to a Meeting with Business Leaders to Discuss Immigration Reform (Nov. 5, 2013); President Barack Obama, Statement on House of Representatives Action on Immigration Reform Legislation (Mar. 26, 2014); President Barack Obama, Statement on Immigration Reform Legislation (Apr. 16, 2014).

19. Steven Dennis, *Immigration Bill Officially Dead: Boehner Tells Obama No Vote This Year, President Says*, ROLL CALL (June 30, 2014), http://blogs.rollcall.com/white-house/immigration-bill-officially-dead-boehner-tells-obama-no-vote-this-year/.

20. President Barack Obama, Remarks by the President on Border Security and Immigration Reform, (June 30, 2014) (transcript at https://www.whitehouse.gov/the-press-office/2014/06/30/remarks-president-border-security-and-immigration-reform); Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), *supra* note 4.

21. *See, e.g.*, Blackman, *supra* note 6, at 254 (arguing that presidential policy imposed "after Congress voted down their antecedent bills" exceeds executive authority); Testimony of Nicholas Quinn Rosenkrantz, *supra* note 6, at 4 (arguing that deferred action policy, "which exactly mirrors a statute that Congress declined to pass," demonstrates its "distinctly legislative character").

22. *See* McCleskey v. Kemp, 481 U.S. 279, 311–12 (1987) (discussing importance of prosecutorial discretion in American law). The executive branch has granted deferred action to undocumented aliens on a case-by-case basis for decades without constitutional challenge. *See* Classes of Aliens Authorized to Accept Employment, 8 C.F.R. 274a.12(c)(14) (2015) (defining "deferred action" as "an act of administrative convenience to the government which gives some cases lower priority"); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 248–52 (2010) (discussing historical evolution of deferred action).

23. Delahunty & Yoo, *supra* note 6, at 845; *see also* Price, *supra note* 13, at 760 (concluding that non-enforcement decisions pursuant to the program are invalid because they are

quirements in a predetermined category of cases, rather than on an individualized case-by-case basis, undermines its claim as a valid exercise of executive branch prosecutorial discretion.

B. Parallels from the Anti-Discrimination Context

Presidential lawmaking in the anti-discrimination context shares much in common with deferred action. First, both contexts necessarily implicate the rights of traditionally disenfranchised groups. Second, a number of presidential anti-discrimination policies exhibit the features animating the constitutional debate over deferred action. Executive actions relating to workplace discrimination and environmental justice, like deferred action, responded to Congress' refusal to legislate the policy. Presidential actions relating to affirmative action, like deferred action, categorically refused to enforce statutory requirements in a predetermined set of cases. Unlike deferred action, however, these examples were spared from serious constitutional attack.

1. Workplace Discrimination

Both the Clinton and Obama administrations engaged in presidential lawmaking to protect members of the lesbian, gay, bisexual and transgender (LGBT) communities from workplace discrimination. As with deferred action, the administration in both cases repeatedly urged Congress to legislate protections for a minority group and, after Congress refused to do so, acted to impose such protections unilaterally.

After the Stonewall Rebellion in 1969, the gathering momentum of the LGBT rights movement coalesced with the introduction of the Equality Act in the House of Representatives in 1974.[24] Modeled on the Civil Rights Act of 1964,[25] the bill proposed to broadly prohibit discrimination on the basis of sexual orientation across employment, housing, and public accommodations.[26] The bill stalled, however, and although Congress considered similar bills in subsequent years,

not "based on compelling individual circumstances" or "exceptional, unforeseen events justify[ing] relief from the full rigor of immigration law").

24. H.R. 14752, 93d Cong. (1974).

25. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended across scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

26. H.R. 14752, *supra* note 24.

a comprehensive anti-discrimination statute continued to elude LGBT advocates.[27]

By the early 1990s, LGBT groups hoped to broaden public support by narrowing their focus to workplace discrimination, resulting in the introduction of the Employment Non-Discrimination Act (ENDA) in 1994.[28] The bill died in committee but was reintroduced the following year.[29] This time, it reached the Senate floor but ultimately failed by one vote.[30] Meanwhile, debate over President Clinton's "Don't Ask, Don't Tell" policy and the enactment of the Defense of Marriage Act ensured a prominent place for LGBT issues in the 1996 elections.[31] After Bill Clinton won reelection, he continued to press Congress to enact ENDA legislation.[32] The bill was introduced again in 1997, but neither the House nor the Senate, both of which were controlled by Republicans, reached a vote on the measure.[33]

With months remaining before the 1998 mid-term elections, President Clinton took matters into his own hands. In May of that year, he issued Executive Order 13,087 prohibiting discrimination on the basis of sexual orientation in the federal workplace.[34] The president's statement accompanying the order expressly cited Congress' failure to enact ENDA and once again urged it to do so.[35]

President Obama's order on workplace discrimination followed a similar course. After 1998, legislation to prohibit sexual-orientation discrimination across all workplaces, not just federal employers,

27. *See, e.g.*, H.R. 447, 94th Cong. (1975).

28. H.R. 4636, 103d Cong. (1994); S. 2238, 103d Cong. (1994).

29. S. 2056, 104th Cong. (1995).

30. S.2056, 104th Cong. (2d Sess. 1996); *Roll No. 281*, U.S. SENATE (Sept. 10, 1996), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00281.

31. *See, e.g.*, Presidential Debate Between Republican Nominee Senator Bob Dole and President Bill Clinton, San Diego, Cal. (Oct. 16, 1996) (transcript at http://www.presidency.ucsb.edu/ws/index.php?pid=52115&st=gay&st1=).

32. Letter from President William J. Clinton, to Edward Kennedy, Senator, Mass. (Oct. 19, 1995); President William J. Clinton, Statement on Proposed Employment Non-Discrimination Legislation (Apr. 24, 1997) (transcript at http://www.presidency.ucsb.edu/ws/?pid=54041).

33. Employment Non-Discrimination Act of 1997, S. 869, 105th Cong. (1997); H.R. 1858, 105th Cong. (1997); *see also* Joyce Price, *Activists Shun Hearings on Hill: But Fight 'Gay Bill' Behind the Scenes*, WASH. TIMES, Oct. 25, 1997.

34. Exec. Order No. 13087—Further Amendment to Executive Order 11478, Equal Employment Opportunity in the Federal Government, 3 C.F.R. § 13087 (1998).

35. President William J. Clinton, Statement on Signing an Executive Order on Equal Employment Opportunity in the Federal Government (May 28, 1998) (transcript at http://www.presidency.ucsb.edu/ws/?pid=56040).

continued to be introduced in Congress but was defeated each time.[36] In 2007, the House passed a version of ENDA,[37] but the bill did not reach the Senate. Once President Obama came into office, he repeatedly pressed Congress to enact legislation on the issue.[38] In 2013, the Senate passed a broader version of ENDA protecting gender identity as well sexual orientation,[39] but the bill did not reach a House vote.[40]

Again, just months before the mid-term elections, President Obama acted unilaterally. On July 21, 2014, he issued Executive Order 13,672[41] which expanded the Clinton order in two ways. First, it added gender identity to the list of protected categories.[42] Second, it applied to federal contractors as well as federal employers, extending protections to roughly a fifth of the national workforce.[43] And again, the president's statement accompanying the order expressly justified it as a cure to legislative inaction: "Now, Congress has spent 40 years—four decades—considering legislation that would

36. Every Congress after 1998 except the 109th (2005-2006) has considered a version of ENDA legislation. *See, e.g.,* H.R. 2355, 106th Cong. (1999); S.1276, 106th Cong. (1999); H.R. 2692, 107th Cong. (2001); S. 1284, 107th Cong. (2001); H.R. 3285, 108th Cong. (2003); S. 1705, 108th Cong. (2003); H.R. 2015, 110th Cong. (2007); H.R. 2981, 111th Cong. (2009); S. 1584, 111th Cong. (2009); H.R. 1397, 112th Cong. (2011); S.811, 112th Cong. (2011); H.R. 1755, 113th Cong. (2013); S. 815, 113th Cong. (2013).

37. H.R. 3685, 110th Cong. (2007); *Roll No. 1057*, U.S. HOUSE OF REPRESENTATIVES (Nov. 7, 2007), http://clerk.house.gov/evs/2007/roll1057.xml.

38. *See* President Barack Obama, Presidential Proclamation—Lesbian, Gay, Bisexual, and Transgender Pride Month (May 28, 2010) (transcript at https://www.whitehouse.gov/the-press-office/presidential-proclamation-lesbian-gay-bisexual-and-transgender-pride-month); President Barack Obama, Remarks at the Human Rights Campaign's Annual National Dinner (Oct. 1, 2011) (transcript at https://www.whitehouse.gov/the-press-office/2011/10/01/remarks-president-human-rights-campaigns-annual-national-dinner); President Barack Obama, Statement on Senate Passage of Legislation To Prevent Employment Discrimination Against Lesbian, Gay, Bisexual, and Transgender Persons (Nov. 7, 2013) (transcript at http://www.gpo.gov/fdsys/pkg/DCPD-201300762/pdf/DCPD-201300762.pdf).

39. S. 815, 113th Cong. (1st Sess. 2013); *Roll No. 232*, U.S. SENATE (Nov. 7, 2013), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?&congress=113&session=1&vote=00232.

40. H.R. Res. 678, 113th Cong. (2013).

41. Exec. Order No. 13672—Further Amendments to Execute Order 11478, Equal Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity, 79 Fed. Reg. 42971 (July 23, 2014). For a broader discussion of President Obama's policies to enhance equality for LGBT individuals, see Landau, *supra* note 12, at 1755–65.

42. Exec. Order No. 13672, *supra* note 41.

43. *Id.*; President Barack Obama, Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination (July 21, 2014) (transcript at https://www.whitehouse.gov/the-press-office/2014/07/21/remarks-president-signing-executive-order-lgbt-workplace-discrimination); Jennifer Bendery, *Obama Signs Executive Order on LGBT Job Discrimination*, HUFFINGTON POST (July 21, 2014, 3:59 PM), http://www.huffingtonpost.com/2014/07/21/obama-gay-rights_n_5605482.html.

help solve the problem. That's a long time. And yet they still haven't gotten it down . . . I'm going to do what I can, with the authority I have, to act."[44] In both situations, Presidents Clinton and Obama urged Congress to enact a particular legislative policy, and when Congress failed to do so, unilaterally imposed a program to achieve their goals.

2. Environmental Justice

The Clinton administration also engaged in presidential lawmaking in environmental justice, mandating the mitigation of racial disparities in the distribution of environmental harms. In the early 1990s, activists began drawing attention to the disproportionate environmental hazards imposed on communities of color, launching the environmental justice movement. Then-Senator Al Gore introduced the Environmental Justice Act of 1992 to curtail adverse environmental impacts on minority groups, among other goals.[45] That bill was ultimately defeated, and after a similar bill failed the following year,[46] President Clinton issued Executive Order 12,898 in February of 1994.[47] Like the bills considered and rejected by Congress, the order, titled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," required agencies to "identify[] and address[] . . . disproportionately high and adverse human health or environmental effects of [federal] programs, policies, and activities on minority populations and low-income populations in the United States."[48] Once again, members of the administration championed a bill before Congress; Congress defeated the bill; and then the president unilaterally imposed a program to achieve the goals of the failed bill.

3. Affirmative Action

The last example of presidential lawmaking involves affirmative action. Like deferred action, this policy constituted a categorical refusal to enforce statutory provisions in a predetermined set of cases.

44. Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination (July 21, 2014), *supra* note 43.

45. S. 2806, 102d Cong. (1992); *see also* H.R. 5326, 102d Cong. (1992).

46. S. 1161, 103d Cong. (1993); H.R. 2105, 103d Cong. (1993).

47. Exec. Order No. 12898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 3 C.F.R. § 859 (1995).

48. *Id.*

During the 2000 presidential race, George W. Bush actively campaigned on an anti-affirmative action platform.[49] Once in office, his administration remained faithful to this stance, arguing before the Supreme Court in the *Grutter* and *Gratz* cases that university race-conscious admissions policies violated constitutional equal protection guarantees.[50] Less apparent at least initially, the Bush administration also pursued its policy against affirmative action through the use of signing statements.

The president's statement upon signing the Export-Import Bank Reauthorization Act of 2002[51] is illustrative, providing that "The executive branch shall carry out section 7(b) of the bill, which relates to certain small businesses, in a manner consistent with the requirements of equal protection under the Due Process Clause of the Fifth Amendment to the Constitution."[52] While this statement omits express mention of affirmative action, section 7(b) in fact requires "special emphasis on conducting outreach and increasing loans" for small businesses owned by "socially and economically disadvantaged" groups, defined to include "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities."[53] A careful parsing of the statutory text thus reveals a refusal to enforce the statute's affirmative action requirements to the extent they conflict with the White House's interpretation of constitutional guarantees. According to political scientist Philip Cooper,

49. The Republican Party Platform for the 2000 election stated "We believe rights inhere in individuals, not in groups. We will attain our nation's goal of equal opportunity without quotas or other forms of preferential treatment." *Republican Party Platform of 2000*, AM. PRESIDENCY PROJECT (July 31, 2000), http://www.presidency.ucsb.edu/ws/?pid=25849. In an interview with Time Magazine, Bush famously stated: "The best thing to do is to educate every child and to challenge the soft bigotry of low expectations. We can have affirmative programs that enhance people's chance to access the middle class without quotas and without pitting race against race…. I call it affirmative access…. And yes, racism exists. I'm not going to be making policy based on guilt." Interview by Walter Isaacson, Time Magazine, with President George W. Bush (Aug. 1, 2000).

50. Brief for the United States as Amicus Curiae Supporting Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241); Brief for the United States as Amicus Curiae Supporting Petitioner, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516).

51. Export-Import Bank Reauthorization Act of 2002, Pub. L. 107-189, 116 Stat. 701 (2002) (codified as amended at 12 U.S.C. § 635 (2012)).

52. President George W. Bush, Statement on Signing the Export-Import Reauthorization Act of 2002 (June 14, 2002) (transcript at http://www.presidency.ucsb.edu/ws/?pid=62993).

53. Export-Import Bank Reauthorization Act of 2002 § 7(b) (codified at 12 U.S.C. § 635(b)(1)(E)(iii)(II) (defining "socially and economically disadvantaged small business concerns" by reference to 15 U.S.C. §637(a)(4), which refers to businesses owned by "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities," 5 U.S.C. § 637(d)(3)(C)).

President Bush utilized signing statements with similar language to oppose affirmative action provisions no fewer than fifteen times during his first term in office.[54]

The affirmative action policy exhibits the second feature troubling critics of deferred action: a categorical refusal to enforce statutory provisions in a predetermined set of cases. It is true that executive nonenforcement of affirmative action was based on constitutional objections, while the refusal to deport certain classes of undocumented immigrants was based solely on notions of fairness or good policy.[55] It is not at all clear, though, that a president's conclusion that a statute is inconsistent with the Constitution justifies his or her refusal to enforce it.[56] Moreover, even those who endorse such presidential authority might be wary of sanctioning its exercise where the constitutional objections to the statute are not identified and articulated.

The affirmative action example diverges from the pattern identified in the preceding situations in one important respect. In the other cases, the executive responded to Congress' refusal to enact a bill, suggesting a violation of congressional intent to the extent a failure

54. Phillip J. Cooper, *George W. Bush, Edgar Allen Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 525 (2005). George W. Bush's relatively covert use of signing statements to oppose affirmative action requirements contrasts starkly with his father's. President George H.W. Bush signed the veto-proof Civil Rights Act of 1991, which made clear that employment policies having a disparate impact on minority groups violated the Act. In doing so, he issued a signing statement setting forth his administration's legal view of the constitutional restrictions on disparate impact and stating that the administration would interpret the statute to adhere to its interpretation. President George H.W. Bush, Statement on Signing the Civil Rights Act of 1991, 2 PUB. PAPERS 1504 (Nov. 21, 1991). For a discussion of the anti-affirmative action policies promulgated under the Reagan and H.W. Bush administrations, see Landau, *supra* note 12, at 1742–43.

55. *See* Delahunty & Yoo, *supra* note 6, at 836–41; Testimony of Jonathan Turley, *supra* note 6, at 18–19.

56. *Compare* Memorandum from Walter Dellinger, Assistant Att'y Gen., to The Honorable Abner J. Mikva, Counsel to the President, Presidential Authority to Decline to Execute Unconstitutional Statutes 200-03 (Nov. 2, 1994) (on file at http://fas.org/irp/agency/doj/olc110294.html) *and* Memorandum from Walter Dellinger, Assistant Att'y Gen., for the Counsel to the President, The Legal Significance of Presidential Signing Statements 131 (Nov. 3, 1993) (on file at http://www.justice.gov/sites/default/files/olc/opinions/1993/11/31/op-olc-v017-p0131.pdf) *and* Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMM. 307 (2006) *with* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006) (arguing that presidential refusal to enforce statute on constitutional grounds should be limited to issues involving statutory ambiguity) *and* Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81 (2007).

to legislate reflects opposition to a policy choice.[57] In the affirmative action example, by contrast, the executive policy responded to a positive legislative enactment, seeking to nullify the clear intent of Congress. In this way, the affirmative action policy signifies a more intrusive encroachment on legislative authority.

***

Presidential lawmaking in anti-discrimination raises some of the same constitutional concerns associated with deferred action. Executive branch policies prohibiting workplace discrimination on the basis of LGBT status and requiring the mitigation of racial disparities in environmental harms share much in common with deferred action. In each of these cases, members of the administration urged Congress to legislate a particular policy goal; Congress refused to do so; and, in response, the president imposed the policy unilaterally. The affirmative action policy does not follow this pattern, but shares another feature with deferred action: both constitute a categorical refusal to enforce statutory provisions. The purpose here is not to argue that these examples are identical in every respect. Nonetheless, they share one crucial feature—they each involve the interests of vulnerable groups and thus present particular legitimacy challenges.

II. METRICS FOR ASSESSING THE LEGITIMACY OF PRESIDENTIAL LAWMAKING

In important ways, the constitutional debate over deferred action replicates the debate over the legitimacy of "presidential administration" more generally. The first feature troubling critics of deferred action—the president's attempt to cure legislative inaction—expresses a concern of presidential intrusion on Congress' exclusive lawmaking authority. By contrast, the second feature—the categorical nature of a policy—invokes concerns of presidential interference in technocratic decisionmaking made by bureaucratic expertise.[58]

57. *But see* United States v. Craft, 535 U.S. 274, 287 (2002) (quoting Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 187 (1994) ("'[C]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction.'")); Zuber v. Allen, 396 U.S. 168, 185 n.21 (1969) (quoting Girouard v. United States, 328 U.S. 61, 69 (1946) ("Congressional inaction frequently betokens unawareness, preoccupation, or paralysis. 'It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law.'")).

58. *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1929 (2015) ("Precluding prospective and categorical articulation of immigration enforcement

Administrative law scholars have addressed these concerns directly, proposing two approaches to distinguish between permissible and impermissible exercises of presidential authority: the political accountability model and the good governance model. Taken together, these models suggest four general metrics for assessing the legitimacy of presidential action: political visibility; adherence to majoritarian preferences; avoidance of factionalism; and reasoned deliberation.

A. Political Accountability

The dominant approach to assessing the legitimacy of presidential lawmaking focuses on the extent to which it is politically accountable. The president arguably enjoys more democratic legitimacy than civil servants or even Congress because only the president answers to the national electorate.[59] The degree to which a given presidential policy can be said to be politically accountable, however, varies along two discrete but related measures.

The first dimension of political accountability involves visibility.[60] The public cannot hold the president accountable for a decision unless it is made aware of the decision. In the words of one commentator, this factor "allows concerned parties—both public and political—to understand governmental decisions, to detect improper motives, and to assign blame."[61] Although scholars frequently refer to "transparency" norms, the term "visibility" better captures the concept. Transparency in the sense of public disclosure does not, standing alone, ensure public understanding of a policy or a mechanism to express disapproval; a degree of public salience is also necessary. As many have noted, the intense media scrutiny of the Oval Office renders presidential decisions more visible than individual enforcement decisions made by street-level agency officials or legislative decisions made by Congress.[62] Nonetheless, the presi-

policy and priorities is tantamount to insisting that nonenforcement decisions be made by lower-level officials…."); *see also* Freeman & Vermeule, *supra* note 13; Watts, *supra* note 13.

59. Kagan, *supra* note 13, at 2333–37.

60. *Id.* at 2337 ("It is when presidential control of administrative action is most visible that it most will reflect presidential reliance on and responsiveness to broad public sentiment").

61. Bressman, *supra* note 13, at 506.

62. Kagan, *supra* note 13, at 2310.

dent sometimes employs more covert methods to achieve policy goals, and, in doing so, compromises democratic legitimacy.[63]

A second and related dimension of political accountability is consistency with majoritarian preferences. A unilateral action opposed by the general public has little claim to democratic legitimacy. Again, presidential policies generally fare better along this measure than decisions made by civil servants or Congress because the president, unlike those other institutions, answers directly to the national electorate.[64] Yet it is easy to imagine a president bowing to the preferences of campaign donors rather than those of the public at large, particularly where he or she can evade public scrutiny in doing so. In this way, adherence to public preferences often corresponds closely with visibility.

B. Good Governance

An alternative "good governance" approach focuses on a broader constellation of norms beyond political accountability to assess the legitimacy of presidential lawmaking.[65] One of the leading proponents of this approach defines legitimacy in terms of an avoidance of arbitrariness, which in turn is described as follows:

> At a basic level, arbitrary administrative decisionmaking is not rational, predictable, or fair. More helpfully, it generates conclusions that do not follow logically from the evidence, rules that give no notice of their application, or distinctions that violate basic principles of equal treatment. Importantly, it also may affect individual rights in the absence of an adequate justification – that is, in the absence of reasons reflecting some sufficiently public purpose.[66]

Another commentator defines executive legitimacy in terms of "six core principles: purposefulness, integrity, solicitude, fairness, reasonableness, and transparency."[67] For present purposes, these various factors may be grouped into two general categories: the avoidance of factionalism and the requirement for reasoned deliberation.

One of the central measures of legitimacy pursuant to the good governance approach is the avoidance of factionalism that would

63. Kitrosser, *supra* note 13, at 1744; Mendelson, *supra* note 13, at 1130; Watts, *supra* note 13, at 6.

64. Kagan, *supra* note 13, at 2335.

65. *See* Bressman, *supra* note 13, at 497.

66. *Id.* at 496.

67. Criddle, *supra* note 13, at 448.

compromise the public interest. This factor addresses "the potential for narrowly focused groups to influence governmental decisionmaking at public expense."[68] The avoidance of factionalism often overlaps with democratic accountability goals, to the extent that both reject political domination by a small, concentrated, and well-organized group at the expense of the general public. Importantly, however, the avoidance of factionalism sometimes departs from majoritarian preferences.[69] A majority of the public may, for example, favor oppressing a politically powerless group to advance their own interests.[70] Good governance norms deem such discrimination as inconsistent with the common good regardless of its responsiveness to majoritarian preferences.

The good governance approach identifies a second factor necessary to legitimate government decisionmaking: a deliberative process culminating in a reasoned explanation for a policy choice.[71] This norm requires the decisionmaker to employ logic to rationalize and defend his or her decision. Deliberation ensures knowledgeable and reasoned decisions, thereby promoting technocratic goals of efficient and effective governance.[72]

***

Collectively, scholarship debating the legitimacy of presidential policies directs attention to (1) the visibility of the decision, (2) the extent to which it reflects majoritarian preferences, (3) its avoidance of factionalism, and (4) reasoned deliberation. The next section applies these metrics to assess the presidential policies described in Part I, exploring the unique challenges to evaluating policies impacting historically disenfranchised groups.

III. ASSESSING LEGITIMACY IN THE ANTI-DISCRIMINATION CONTEXT

This section evaluates presidential lawmaking in the immigration and anti-discrimination contexts along the following four measures of legitimacy: visibility, adherence to majoritarian prefer-

68. Bressman, *supra* note 13, at 498.

69. *See* Criddle, *supra* note 13, at 471.

70. *See* Sunstein, *supra* note 10, at 57 (arguing that "the distribution of resources or opportunities to one group rather than another solely because those benefited have exercised the raw power to obtain government assistance" enjoys no claim to legitimacy); Bressman, *supra* note 13, at 504.

71. Bressman, *supra* note 13, at 500–01; Criddle, *supra* note 13, at 448; Sunstein, *supra* note 10, at 57.

72. *See* Seidenfeld, *supra* note 13, at 1426.

ences, avoidance of factionalism, and reasoned deliberation. The indeterminacy of these metrics in all but the one easy case exposes the need for greater attention to the unique legitimacy concerns implicated by presidential actions seeking to protect vulnerable populations.

A. VISIBILITY

Any claim that a presidential policy is democratically legitimate depends on public awareness of the policy, or visibility. By this metric, President Bush's affirmative action policy is the hardest to justify among the examples discussed here. Concededly, the policy of not enforcing preferential treatment requirements was visible in that it was publicly disclosed through a signing statement, and the president was clearly identified as the decisionmaker responsible for the policy. As such, it is more politically accountable than policies over which the president can disclaim ownership. Nonetheless, the signing statements were transparent only in a superficial sense. Although the administration announced its policy of nonenforcement in over a dozen statements from 2001 to 2005, the policy escaped public notice until 2006, when the Boston Globe published an extensive review of the practice.[73] It was only then that the policy became subject to public scrutiny and criticism.[74] In the interim, the lack of public awareness precluded the exercise of any meaningful electoral check.

The other examples present a more complicated picture, suggesting an inverse relationship between visibility and political consensus. The public awareness necessary to trigger meaningful electoral checks depends largely on media coverage, and media coverage depends largely on the existence of debate and dissent. The media extensively covered political opposition to both the de-

73. Charlie Savage, *Bush Challenges Hundreds of Laws*, BOS. GLOBE (Apr. 30, 2006), http://www.boston.com/news/nation/washington/articles/2006/04/30/bush_challenges_hundreds_of_laws/.

74. After publication of the Boston Globe article, public criticism was immediate and pronounced. The American Bar Association convened a task force on the use of signing statements, which concluded, "[t]o sign a bill and refuse to enforce some of its provisions because of constitutional qualms is tantamount to exercising the line-item veto power held unconstitutional by the Supreme Court in *Clinton v. New York*." NEAL R. SONNETT, AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, RECOMMENDATION AND REPORT 22 (Aug. 2006), http://www.americanbar.org/content/dam/aba/migrated/leadership/2006/annual/dailyjournal/20060823144113.authcheckdam.pdf.

ferred action policy[75] as well as the Clinton workplace discrimination order,[76] ultimately triggering direct electoral checks in the form of congressional votes on whether to repeal the policy in each instance.[77] The notable absence of political opposition to the Clinton environmental justice order[78] and the Obama workplace discrimination order,[79] by contrast, resulted in far less media attention to these

75. *See supra* note 7 and accompanying text.

76. Joyce Howard Price, *Clinton Order Hit as Awarding Gays 'Special Privileges*, WASH. TIMES, May 30, 1998 (discussing political criticism of order); Jim Kirskey, *Hefley Upset by Order; Job Bias Protection at Heart of Problem*, DENVER POST, June 25, 1998, at B-04 (same).

77. The House of Representatives ultimately voted 176-252 against denying federal funds for the enforcement of the Clinton workplace discrimination order. H.R. 4276, 105th Cong. (2d Sess. 1998) *amended by* H. Amend. 855, Hefley Amend. (1998) [hereinafter Hefley Amendment]; *Roll No. 398*, J. HOUSE OF REPRESENTATIVES ¶ 82.28 (Aug. 5, 1998), http://www.gpo.gov/fdsys/pkg/HJOURNAL-1998/pdf/HJOURNAL-1998-08-05-para82-28.pdf.

The House voted in favor of denying funds for the initial deferred action program for childhood arrivals. To Prohibit Certain Actions with Respect to Deferred Action for Aliens Not Lawfully Present in the United States, and for Other Purposes, H.R. 5272, 113th Cong. (2d Sess. 2014); *Roll Call No. 479*, U.S. HOUSE OF REPRESENTATIVES (Aug. 1, 2014), http://clerk.house.gov/evs/2014/roll479.xml. The following year, it voted in favor of denying federal funding to the expanded deferred action program in two separate measures. Department of Homeland Security Appropriations Act, H.R. 240, 114th Cong. (2015), *amended by* H. Amends. 6 & 7, Aderholt Amend. & Blackburn Amend. (2015) [hereinafter Aderholt & Blackburn Amendments]; *Roll No. 29*, U.S. HOUSE OF REPRESENTATIVES (Jan. 14, 2015), http://clerk.house.gov/evs/2015/roll029.xml; *Roll No. 30*, U.S. HOUSE OF REPRESENTATIVES (Jan. 14, 2015), http://clerk.house.gov/evs/2015/roll030.xml. The Senate version of the bill was defeated by filibuster. Immigration Rule of Law Act of 2015, S. 534, 114th Cong. (1st Sess. 2015); *Roll No. 63*, U.S. SENATE (Feb. 27, 2015), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=1&vote=00063.

78. Journalistic coverage of the Clinton environmental justice order mentioned virtually no political opposition to the policy. *See, e.g.*, John Cushman, Jr., *Clinton to Order Pollution Policy Cleared of Bias*, N.Y. TIMES (Feb. 10, 1994), http://www.nytimes.com/1994/02/10/us/clinton-to-order-pollution-policy-cleared-of-bias.html; Gary Lee, *Clinton Executive Order Gives Boost to Mission*, WASH. POST (Feb. 17, 1994), https://www.washingtonpost.com/archive/politics/1994/02/17/clinton-executive-order-gives-boost-to-mission/7a00e599-8db2-4ad4-8245-8eee3ba4e06a/; Timothy Noah, *Order to be Issued on Agencies' Effect on Pollution in Minority Communities*, WALL ST. J., Feb. 11, 1994. The Wall Street Journal published a single guest editorial criticizing the order by law professor David Schoenbroad, who argued that racial disparities in exposure to environmental hazards might be the result of market forces rather than intentional discrimination. David Schoenbrod, *Rule of Law: Environmental "Injustice" is About Politics, Not Racism*, WALL ST. J., Feb. 23, 1994.

79. Media coverage of the Obama workplace discrimination order similarly mentioned little political criticism. *See, e.g.,* Jonathan Capehart, *Obama Moves to Protect LGBT Federal Contractors and Employees*, WASH. POST (July 21, 2014), https://www.washingtonpost.com/blogs/post-partisan/wp/2014/07/21/obama-moves-to-protect-lgbt-federal-contractors-and-employees/; Laura Meckler, *Contractors Face Obama Ban Against LGBT Bias*, WALL ST. J., July 19, 2014, at A4; Beth Reinhard, *A Move to Unite Tea Party, Social Conservatives*, WALL ST. J., June 20, 2014, at A6 ("This week, Republican officials were quiet when President Barack Obama issued an executive order barring federal contractors from antigay discrimination.").

issues, thereby weakening the electorate's ability to express approval or disapproval over the president's policies.

B. Majoritarian Preferences

A second important measure of democratic legitimacy is the extent to which a policy reflects majoritarian preferences. The affirmative action policy may be the hardest to justify on this measure as well. According to a Gallup poll conducted during President Bush's first term in office, nearly two-thirds of Americans preferred to see an increase in affirmative action policies or have them remain the same, while a little over a quarter wanted to see a reduction in such programs, suggesting that a majority of the electorate did not support the president's policy.[80]

The remaining examples expose more fundamental tensions within this measure. In its simplest form, this factor could be read to validate any presidential policy that is supported by more than half of the electorate. Yet the existence of significant opposition, even if not representative of a majority of the electorate, compromises a policy's claim to democratic legitimacy. Although polls indicated a wide majority of Americans supported President Clinton's workplace discrimination policy, with eighty-three percent of Americans favoring legal protections for lesbians and gays in the workplace,[81] one hundred and seventy-six members of the House voted to deny federal funding for the policy.[82] Similarly, while sixty-three percent of Americans supported the initial deferred action program in 2012[83] and sixty-two percent supported the goals of its subsequent expan-

80. Jack Ludwig, *Public Warming to Affirmative Action as Supreme Court Hears Michigan Case*, GALLUP (Apr. 1, 2003), http://www.gallup.com/poll/8092/public-warming-affirmative-action-supreme-court-hears-michigan-case.aspx. Forty-nine percent of Americans, however, felt that the federal government should not make any special efforts to help minorities, while forty percent felt it should make every effort to do so. *Public Split on Federal Role in Affirmative Action*, GALLUP (May 6, 2003), http://www.gallup.com/poll/8347/Public-Split-Federal-Role-Affirmative-Action.aspx?g_source=affirmative%20action&g_medium=search&g_campaign=tiles.

81. *Gay and Lesbian Rights*, GALLUP, http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx (last visited Oct. 22, 2015).

82. Hefley Amendment, *supra* note 77.

83. *July 2012 Religion & Politics Survey*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (July 9, 2012), http://www.people-press.org/files/legacy-questionnaires/7-12-12%20Political%20topline%20for%20release.pdf.

sion,[84] a full majority of the House voted to deny funding for both deferred action programs.[85] Indeed, Congress came perilously close to shutting down the Department of Homeland Security altogether as a result of opposition to deferred action.[86] The vigor of this opposition weakens these policies' claim to democratic legitimacy.

The Clinton environmental justice order suggests a final difficulty in relying on majoritarian preferences to validate presidential policies. There was no public opinion data indicating either support or opposition to the goal of mitigating racial disparities in the distribution of environmental harms. On the one hand, this evidence might be viewed as demonstrating an absence of public opposition to the policy, bolstering its claim to legitimacy. On the other hand, it suggests public disinterest, in which case the president's devotion of resources to the issue could be viewed as departing from majoritarian priorities.

C. Factionalism

To the extent that catering to factional interests compromises legitimacy, each of the policies described here might be viewed with suspicion. Immigration and anti-discrimination policies by their nature serve identifiable factions, whether defined by immigration status; race or ethnicity; sexual orientation or gender identity; handicap status; gender; etc. Indeed, critics characterized President Clinton's workplace discrimination policy as little more than rank factionalism. Describing the executive order protecting gays and lesbians, House Majority Leader Dick Armey stated, "Once again, this administration pushes extreme policies on behalf of a narrow special interest group."[87] Similarly, opponents of deferred action accused President Obama of pandering to the Latino vote, making special note that the announcement of the initial program was timed only months before the presidential elections.[88]

84. Sarah Dutton et al., *Americans' View of the Economy Most Positive in Eight Years*, CBS NEWS (Jan. 14, 2015), http://www.cbsnews.com/news/americans-view-of-the-economy-most-positive-in-eight-years/.

85. Aderholt & Blackburn Amendments, *supra* note 77.

86. *See* Sean Sullivan, *House Passes Bill Fully Funding Department of Homeland Security*, WASH. POST (Mar. 3, 2015), https://www.washingtonpost.com/politics/house-passes-bill-fully-funding-the-department-of-homeland-security/2015/03/03/9d62484a-c1c5-11e4-9ec2-b418f57a4a99_story.html.

87. Price, *supra* note 76, at 2.

88. *See, e.g.,* Joel Rose, *For Undocumented Youth, New Policy Carries Risks*, NPR (Aug. 15, 2012), http://www.npr.org/2012/08/15/158872445/for-undocumented-youth-new-

D. Deliberation

Careful deliberation culminating in a reasoned explanation for a policy choice presents a final factor to consider. By this measure, the affirmative action policy again falls short. The signing statements raise vague constitutional objections to provisions requiring preferential treatment for minorities, but omit any explanation of their reasoning.

Yet it is not clear that the remaining examples of presidential lawmaking fare much better. President Obama explained his justification for the initial deferred action program as follows: "not only because it's the right thing to do for our economy—and CEOs agree with me—not just because it's the right thing to do for our security, but because it's the right thing to do, period."[89] President Clinton's explanation of the need for the environmental justice order was even vaguer, simply stating that "All Americans have a right to be protected from pollution—not just those who can afford to live in the cleanest, safest communities."[90]

***

The factors associated with presidential legitimacy—visibility, adherence to majoritarian preferences, avoidance of factionalism, and reasoned deliberation—consistently identify the Bush affirmative action policy as suspect. This policy of nonenforcement went unnoticed by the public for years, was supported by less than half of the electorate, and was accompanied by no reasoning or explanation. Additionally, to the extent opponents of affirmative action fall into a

policy-carries-risks (stating that opponents criticized deferred action as "pandering to Latino voters in an election year"); Television Interview by Greta Van Susteran, Fox News, with Ron Fournier, Nat'l Journal Reporter (Nov. 19, 2014) (video at http://dailycaller.com/2014/11/19/ron-fournier-on-executive-amnesty-a-lot-of-hispanics-see-this-as-pandering-video/) (suggesting that Latino voters would see through the immigration policy as mere pandering and realize they were being used politically); Jessica Chasmar, *Chris Matthews to Obama: Stop Pandering to Ethnic Groups*, WASH. TIMES (Oct. 9, 2014), http://www.washingtontimes.com/news/2014/oct/9/chris-matthews-to-obama-stop-pandering-to-ethnic-g/; Ian Reifowitz, *GOP Says Obama Pushes Popular Immigration Policies to Win Votes. Er, That's Called Democracy*, DAILY KOS (Nov. 23, 2014), http://www.dailykos.com/story/2014/11/23/1346270/-GOP-says-Obama-pushes-popular-immigration-policies-to-win-votes-Er-that-s-called-democracy# (citing elected officials who characterized deferred action "pandering" for votes).

89. Remarks by the President on Immigration (June 15, 2012), *supra* note 2.

90. *See* President William J. Clinton, Statement on Signing an Executive Order on Equal Employment Opportunity in the Federal Government (May 28, 1998) (transcript at http://www.presidency.ucsb.edu/ws/?pid=56040).

discrete and identifiable group, the policy may be viewed as catering to factional interests, albeit a faction that may include a majority of the populace.

Apart from such easy cases, however, the legitimating factors prove indeterminate in assessing protections for minority groups. In terms of accountability, the existence of strong political opposition to a policy compromises democratic legitimacy. Yet the absence of such opposition minimizes media attention, thereby shielding the policy from public scrutiny and debate and denying the public a meaningful opportunity to exercise electoral checks. In both the Clinton workplace discrimination and deferred action examples, it was the strong political opposition to these policies that ultimately generated a direct congressional vote. The apparent political consensus around the Clinton environmental justice order and the Obama workplace discrimination order, by contrast, ensured the absence of these issues on the legislative agenda and weakened the electorate's ability to express approval or disapproval of them through voting mechanisms.

The factors associated with good governance are comparably ambiguous. As noted above, immigration and anti-discrimination policies inherently implicate factional interests. The deliberation requirement often ameliorates this difficulty because the provision of a reasoned explanation reduces the likelihood that the policy mechanically responds to factional interests rather than engaging in a considered assessment of the common good. Reason-giving may be helpful in technical areas where the common good is defined by objective measures of effectiveness or efficiency, but it provides little protection in the context of immigration and anti-discrimination policies, which are expressly normative and ultimately can only be justified by disputed norms of fairness or morality. Absent any extrinsic measure of the "common good" in these contexts, we lack a theoretical foundation to determine when a presidential policy protecting minority groups simply elevates the factional interests of one group over another's.

CONCLUSION

Concerns regarding the steady accretion of presidential power have generated various models for assessing the legitimacy of executive policymaking. These models prove inconclusive, however, in evaluating presidential policies impacting vulnerable populations.

Just as prior generations grappled with the unique legitimacy concerns raised by *judicial* interventions designed to protect minority interests, the current era of presidential lawmaking suggests the need for a distinct theory of legitimacy when the president acts to protect these groups.