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The Least of These: The Case for Nationwide Injunctions in Immigration Cases as a Critical Democratic Institution

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* Clerk-designate to the Honorable Rebecca R. Freyre, Colorado Court of Appeals, J.D., University of Alabama School of Law, May, 2021. The ideas expressed here reflect the views of the authors, and do not necessarily reflect the views of any of the authors' institutional affiliates, their composite organs, or their staffs. I would like to thank Professor Richard Delgado, Professor Joyce White Vance, and Professor Shalini Bhargava Ray for their thoughtful feedback, excellent instruction, and boundless encouragement. Additionally, I would like to thank the hardworking, excellent editors of the U.C. Davis Social Justice Law review.
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Introduction

"Truly I tell you, whatever you did not do for one of the least of these, you did not do for me."

— Matthew 25:45

America is fortunate to have a long running and relatively stable democratic government, due in large part to the robustness of many of its democratic institutions. Analogically, one can describe democratic institutions as some of the individual threads comprising the fabric of a free society. Like the threads making up any fabric, democratic institutions are not all of equal size and strength, nor do they all serve the same function. In most fabrics, one thread will not make or break the whole. Some threads can be strained, worn down, or perhaps even broken, and the fabric will mostly maintain its form; however, we will still notice when it looks worse for the wear. Other threads, however, are so fundamental to the structure that if you remove or break them, the entire cloth will come apart. In a free society, some threads are actions, like voting or holding peaceful protests. Others are concrete institutions made up of groups of people, like the courts or legislatures. Still others are ideals, or cultural commitments — like the belief in due process, the rule of law, and the equal application of the law to all people.

Department of Homeland Security v. New York[1] is a recent immigration case that exposes the function of three important threads. First, it invokes the power of federal district judges; they help shape national policy and protect the substantive and procedural due process rights of people subject to American law. Second, the case highlights a thread interwoven within the structure of the courts; our nation's immigration jurisprudence. Finally, it invokes an ideal: our nation's idea of how we should treat the disenfranchised and disadvantaged — the "least of these." Attached to the latter two is a fourth thread, pernicious and profoundly antidemocratic, yet endemic to America's past and current treatment of noncitizens: racism.

Several areas of law test our commitment to democratic ideals and require us to fight against impulses, like racism, that would erode their foundations. Immigration law is one such area. Like election law, immigration law exposes a "deep interplay between individual and

[1] Dep't of Homeland Security, et al. v. New York, et al., 140 S. Ct. 599 (2020).

collective rights,"[2] that can either allow the best aspects of American democracy to shine through, or enable its worst acts of callous indifference. In shoring up our nation's democratic institutions and foundations, we are called upon to use every ethical tool available to protect against, or to correct, flaws that come to light during a critical evaluation of America's social fabric. One of those tools is the ability of federal district judges to impose nationwide judicial injunctions against controversial government policies, stopping them in their tracks and preventing undue harm to potential victims while the technicalities of the policy are litigated in court.

This Article argues that within immigration law, the power to impose nationwide judicial injunctions is an indispensable tool for the courts to help maintain democratic ideals. This is true for three major reasons:

- Allowing federal district judges to impose nationwide injunctions in immigration cases honors our commitment to ensuring that everyone, including noncitizens, has a legal remedy for harms done to them even if they cannot afford an attorney;
- Nationwide injunctions encourage compromise in creating policy and disincentivize unilateral and extremist policymaking by the executive branch, thus providing a stabilizing force in our democracy; and
- Nationwide injunctions are newsworthy, thus generating the attention necessary for public debate before the enactment of cruel, unpopular policies. Therefore, they act as a last-ditch moral safety valve to save America from being its worst self.

In Part I, we discuss the background facts of *DHS v. New York*, highlighting Justice Gorsuch's concurrence in the Supreme Court's stay of the district court's injunction. Part II discusses nationwide injunctions, their recent uses in immigration cases, and arguments for and against this power. Part III shows that immigration jurisprudence is a flaw in the foundation of American democracy. This section outlines how our immigration law came

[2] Michael T. Morley, *De Facto Class Actions? Plaintiff and Defendant Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J. L. & PUB. POL'Y 487, 493 (2016).

about and still exhibits traces of structurally antidemocratic principles, like racism, and a lack of accountability that has enabled recurring abuses. The use of the term "antidemocratic," rather than "undemocratic," is deliberate. As the reader will see, the practices at stake are not merely distasteful to a democratic polity, they actively erode the norms and expectations on which democratic societies rest. In Part IV, we make the case for keeping the nationwide injunction power in immigration cases by expanding upon the points listed above.

I. The Case

Department of Homeland Security v. New York is, on its surface, a case about the "public charge rule."[3] The rule is an artifact of federal immigration law that has been in force in various forms since the 1880s; essentially, it allows the federal government to exclude a noncitizen from the country if, in the opinion of the government, the noncitizen is "likely at any time to become a public charge."[4] This ground for exclusion is non-waivable; if a noncitizen is too poor, they cannot gain entry to the United States.

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) created a new set of requirements that led to confusion about how the public charge rule would be defined and applied.[5] The original policy guidance, created under the Clinton Administration in 1999, interpreted "public charge" to mean a noncitizen who was at a minimum "primarily dependent on the government for subsistence," based mostly upon their receipt of a limited set of cash benefits.[6] Non-cash programs like healthcare benefits or food programs were exempted from the evaluation.[7]

In 2018, the Trump administration opted to expand the definition and reach of the public charge rule.[8] Under this new interpretation, the

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[3] *See generally* U.S. Citizenship and Immigr. Servs., *Public Charge Provisions of Immigration Law: A Brief Historical Background*, https://www.uscis.gov/history-and-genealogy/our-history/public-charge-provisions-immigration-law-a-brief-historical-background (last updated Aug. 14, 2019).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] U.S. Dep't of Homeland Sec., *Proposed Rules: Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51114, 51277 (Oct. 10, 2018), https://www.govinfo.gov/content/pkg/FR-2018-10-10/pdf/2018-21106.pdf.

criteria expanded to include several previously exempt categories, and further, a noncitizen's receipt of any benefits for more than 12 months in a 36-month period.[9] The practical effects of this expansion made it easier for the federal government to curtail legal immigration, particularly among noncitizens without substantial financial resources. The expansion had a noticeable chilling effect; a significant percentage of noncitizens already in the United States disenrolled from public benefits for fear of its consequences.[10]

Several entities sued the Trump administration over the expansion, including the state of New York.[11] On October 11, 2019, the district court for the Southern District of New York issued an order enjoining the Department of Homeland Security from implementing their changes to the public charge rule, pending the consideration and disposition of the government's appeals on the merits in the Second Circuit Court of Appeals.[12] Practically speaking, the injunction shielded noncitizens from the consequences of the policy change until it made its way through the courts. In 2019, the Trump administration filed an emergency appeal for a stay of the injunction with the U.S. Supreme Court, and in January 2020, a 5-4 majority of the Court granted that request, enabling the policy to continue even as it was being litigated.[13]

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[9] *Id.*

[10] *See* Nicole Narea, *Trump's Rule Creating a Wealth Test for Immigrants is Now in Effect*, VOX, (Feb. 24, 2020, 4:44 PM), https://www.vox.com/policy-and-politics/2019/10/11/20899253/trump-public-charge-rule-immigrants-welfare-benefits; Hamutal Bernstein et al., *With Public Charge Rule Looming, One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018*, URBAN INST., May 21, 2019, https://www.urban.org/urban-wire/public-charge-rule-looming-one-seven-adults-immigrant-families-reported-avoiding-public-benefit-programs-2018; Samantha Artiga et al., *Estimated Impacts of Final Public Charge Inadmissibility Rule on Immigrants and Medicaid Coverage*, KAISER FAM. FOUND., Sept. 18, 2019, https://www.kff.org/report-section/estimated-impacts-of-final-public-charge-inadmissibility-rule-on-immigrants-and-medicaid-coverage-key-findings/; Leila Miller, *Trump Administration's 'Public Charge' Rule Has Chilling Effect on Benefits for Immigrants' Children*, L.A. TIMES, Sept. 3, 2019, https://www.latimes.com/california/story/2019-09-02/trump-children-benefits-public-charge-rule.

[11] New York v. United States Dep't of Homeland Sec., 408 F. Supp. 3d 334 (S.D.N.Y. 2019).

[12] *Id.*

[13] Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020).

Justice Gorsuch's Concurrence

While the public charge rule itself presents an interesting legal topic, the part of the case that implicates democratic institutions appeared in Justice Gorsuch's concurrence — the role of nationwide injunctions at the district court level. Justice Gorsuch emphatically disapproved of them, and urged the court to take up the question of whether district judges should even have such a power.[14] Two of his statements in particular stand out. First, he wrote that '[t]he real problem...is the increasingly common practice of trial courts ordering relief that transcends the cases before them."[15] Secondly, he stated that nationwide injunctions go beyond the scope of the courts' powers:

> When a district court orders the government not to enforce a rule against the plaintiffs in the case before it, the court redresses the injury that gives rise to its jurisdiction in the first place. But when a court goes further than that, ordering the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies. Injunctions like these raise serious questions about the scope of courts' equitable powers under Article III.[16]

These statements make valid formalist arguments, but that same formalism erases the real-world suffering that noncitizens would endure under a policy change that upended nearly two decades of established law. By formalist arguments, we mean arguments based in rigid generalizations, high-sounding platitudes, and hidebound doctrinal boxes[17] that fail to grapple with the real-world impact of the position change in question.

Here, Justice Gorsuch laments that nationwide injunctions are becoming commonly used tools, even as the Supreme Court, with his assent, granted emergency stays to the Trump administration at uncomfortably common rates, as his colleague Justice Sotomayor has noted more than

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[14] *Id.* at 600 (Gorsuch, J., concurring).
[15] *Id.*
[16] *Id.*
[17] Richard Delgado & Jean Stefancic, *Four Ironies of Campus Climate,* 101 MINN. L. REV. 1919, 1926 (2017); *see also* STEVEN W. BENDER, MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY (2015) (discussing how disembodied legal reasoning has led to egregious mistakes at several points in history).

once.[18] Nowhere in his analysis does Justice Gorsuch consider that the very policies passed under the Administration might be necessitating this increase in nationwide injunctions.[19] Moreover, he offers a doctrinal concern about nationwide injunctions affecting strangers outside of a given suit, while neglecting to reckon with the reality that government action, by its very nature, almost inevitably affects people who are not party to a particular lawsuit. In immigration, the inadequacy of formalism became increasingly apparent under a presidential administration that began with,[20]

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[18] Wolf v. Cook Cty., 140 S. Ct. 681, 683-84 (Sotomayor, J., dissenting) ("[T]he Government has come to treat th[e] exceptional mechanism of stay relief as a new normal. Claiming one emergency after another, the Government has recently sought stays in an unprecedented number of cases, demanding immediate attention and consuming limited Court resources in each. And with each successive application, of course, its cries of urgency ring increasingly hollow...Perhaps most troublingly, the Court's recent behavior on stay applications has benefited one litigant over all others.") (internal citation omitted)).

[19] Tessa Berenson, *Inside the Trump Administration's Fight Against Nationwide Injunctions*, TIME, Nov. 4, 2019, https://time.com/5717541/nationwide-injunctions-trump-administration/ (noting that in less than four years, the Trump administration's policies have been blocked by 42 nationwide injunctions, while the Obama administration only received 20 over the course of eight years, and Presidents Reagan, Clinton, and George W. Bush received an average of 1.5 per year during each of their tenures).

[20] Adam Gabbat, *Golden escalator ride: the surreal day Trump kicked off his bid for president*, GUARDIAN, June 14, 2019, https://www.theguardian.com/us-news/2019/jun/13/donald-trump-presidential-campaign-speech-eyewitness-memories (quoting a campaign speech wherein Trump said, in reference to immigrants from Mexico: "... they're bringing drugs, they're bringing crime, they're rapists.").

and continued to use, racist anti-immigrant rhetoric to craft policy and score political points[21] — often with disastrous results.[22]

Alexis de Tocqueville noted America's "singular attachment to the formalities of law'[23] during the genocide of Native Americans in the 1830s, mockingly stating that it would be "impossible to destroy men with more

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[21] *See, e.g.*, Julissa Arce, *Trump's Anti-Immigrant Rhetoric Was Never About Legality — It Was About Our Brown Skin*, TIME, Aug. 6, 2019, https://time.com/5645501/trump-anti-immigration-rhetoric-racism/; Philip Rucker, *'How do you stop these people?': Trump's anti-immigrant rhetoric looms over El Paso massacre*, WASH. POST, Aug. 4, 2019, https://www.washingtonpost.com/politics/how-do-you-stop-these-people-trumps-anti-immigrant-rhetoric-looms-over-el-paso-massacre/2019/08/04/62d0435a-b6ce-11e9-a091-6a96e67d9cce_story.html; John Fritze, *Trump used words like 'invasion' and 'killer' to discuss immigrants at rallies 500 times: USA TODAY analysis*, USA TODAY, Aug. 8, 2019, https://www.usatoday.com/story/news/politics/elections/2019/08/08/trump-immigrants-rhetoric-criticized-el-paso-dayton-shootings/1936742001/; Reuters, *Survey: Trump's immigration rhetoric is negatively impacting Latinos' health,* NBC NEWS (Nov. 4, 2019, 7:47 AM), https://www.nbcnews.com/news/latino/survey-trump-s-immigration-rhetoric-negatively-impacting-latinos-health-n1076011; Jonathan Blitzer, *How Stephen Miller Manipulates Donald Trump to Further His Immigration Obsession*, NEW YORKER, Feb. 21, 2020, https://www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates-donald-trump-to-further-his-immigration-obsession (explaining Stephen Miller's role in both supporting and creating Trump's immigration policies); Amanda Holpuch, *Stephen Miller: the white nationalist at the heart of Trump's White House*, GUARDIAN, Nov. 24, 2019, https://www.theguardian.com/us-news/2019/nov/24/stephen-miller-white-nationalist-trump-immigration-guru; Kim Bellware, *Leaked Stephen Miller emails show Trump's point man on immigration promoted white nationalism, SPLC reports*, WASH. POST, Nov. 13, 2019, https://www.washingtonpost.com/politics/2019/11/12/leaked-stephen-miller-emails-suggest-trumps-point-man-immigration-promoted-white-nationalism/.

[22] *See, e.g.*, Matt Stieb, *Everything We Know About the Inhumane Conditions at Migrant Detention Camps*, N.Y. MAG, Jul. 2, 2019, https://nymag.com/intelligencer/2019/07/the-inhumane-conditions-at-migrant-detention-camps.html; Simon Romero et al., *Hungry, Scared and Sick: Inside the Migrant Detention Center in Clint, Tex.*, N.Y. TIMES, Jul. 9, 2019, https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html; Tal Kopan, *Trump administration admits it lost track of nearly 1,500 immigrant children*, CNN (Sept. 19, 2018, 4:31 PM), https://www.cnn.com/2018/09/19/politics/undocumented-immigrant-children-not-located-detention-released; Robert Moore, Susan Schmidt & Maryam Jameel, *Inside the Cell Where a Sick 16 Year Old Boy Died in Border Patrol Care*, PROPUBLICA (Dec. 5, 2019, 1:30 PM), https://www.propublica.org/article/inside-the-cell-where-a-sick-16-year-old-boy-died-in-border-patrol-care.

[23] Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law,* 31 ARIZ. L. REV. 237, 240 (1989).

respect for the laws of humanity."[24] Nearly 200 years later, it is disappointing to see that same attachment to formalism paving the way for more mistreatment of a marginalized group. This is not to equate genocide with a change in legal interpretation, far from it, we merely wish to point out that the same thinking — so long as we follow the correct set of rules and technicalities, then cruelty is justifiable — is just as profoundly misguided and unconscionable now as it was then. It is also dangerous to our democracy. When we allow these behaviors to proceed unchecked, we risk normalizing them and exposing our society at large to their consequences. Fortunately, we have a tool at our disposal that stops this behavior before normalization and allows our society to ask, "is this the country that we want to be?"

II. Nationwide Injunctions

"Nationwide injunction" refers to a very specific kind of relief that can be granted in federal district court. When a plaintiff successfully challenges a law or regulation as violative of a state or the federal constitution, the court must decide two things: first, whether an injunction is the correct remedy, and second, what the appropriate breadth of the injunction would be.[25] On one hand, the court can decide whether the injunction should only grant relief to the plaintiffs, thus precluding the government defendants from enforcing the successfully challenged statute against the plaintiffs in the case, but leaving the government free to enforce the law against other members of the public.[26] On the other hand, the court can instead choose to enjoin the government from enforcing the policy against anyone in the state or the nation.[27] When discussing nationwide injunctions, we refer to the second, defendant-focused option.

A. Recent Uses of Universal Injunctions in Immigration Cases

Nationwide immigration injunctions have seen increased use in the past several years, and have had consequences on both sides of the political spectrum. For example, in 2014, twenty-six states filed suit in federal court against the Obama administration, challenging a policy known as Deferred Action for Parents of Americans (DAPA).[28] The policy granted the

[24] *Id.*
[25] Morely, *supra* note 2, at 489.
[26] *Id.* at 489-90.
[27] *Id.* at 490.
[28] Texas v. United States, 86 F.Supp. 3d 591 (S.D. Tex. 2015).

undocumented parents of U.S. citizens and lawful permanent residents (LPRs) temporary relief from removal, as well as work authorization.[29] The states sought a nationwide preliminary injunction, arguing that DAPA violated the Administrative Procedure Act, the Immigration and Nationality Act, and the President's constitutional obligation to faithfully execute American laws.[30] The district court found that the plaintiffs were likely to prevail on the merits and would suffer irreparable harm if the policy were allowed to proceed, and issued a nationwide injunction in response.[31] The Fifth Circuit,[32] as well as the Supreme Court in a split 4-4 *per curiam* opinion, affirmed without setting precedent.[33]

Perhaps because of the Trump administration's aggressive anti-immigrant policies,[34] lower courts have handed down several other nationwide injunctions in immigration cases.[35] Perhaps the most high-profile example of these policies is the Trump administration travel ban created by Executive order 13769,[36] also known as the "Muslim Ban."[37]

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[29] Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 140 (2015).

[30] Complaint at 28, Texas v. United States, No. 14-00254 (S.D. Tex. 2015).

[31] Texas, 86 F. Supp. 3d at 671-72, 674, 677 (S.D. Tex. 2015).

[32] Texas v. United States, 809 F.3d 134 (5th Cir. 2015).

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

[34] Christine Chan et al., *The Trump Effect*, REUTERS, https://www.reuters.com/trump-effect/immigration (last visited Mar. 27, 2021).

[35] *See, e.g.*, NAACP v. Trump, 298 F. Supp. 3d 209, 218-19 (D.D.C. 2018) (discussing the recession of DACA); City of Chicago v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017); City of Chicago v. Sessions, 888 F.3d 272, 291 (7th Cir. 2018); City of Providence v. Barr, No. 19-1802 (1st Cir. 2020); City of Los Angeles v. Barr, No. 18-55599 (9th Cir. 2019); City of Philadelphia v. Attorney General, No. 18-2648 (3d Cir. 2019); New York et al. v. United States Dep't of Justice et al., Nos. 19-267(L); 19-275(con) (2d Cir. 2020).

[36] Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017), https://www.govinfo.gov/content/pkg/FR-2017-02-01/pdf/2017-02281.pdf.

[37] *See* Avidan Cover, *Quieting the Court: Lessons from The Muslim-Ban Case*, 23 J. GENDER, RACE & JUS. (2019); Vahid Niayesh, *Trump's travel ban really was a Muslim ban, data suggests*, WASH. POST, Sept. 26, 2019, https://www.washingtonpost.com/politics/2019/09/26/trumps-muslim-ban-really-was-muslim-ban-thats-what-data-suggest/; Ryan Teague Beckwith, *President Trump's Own Words Keep Hurting His Travel Ban*, TIME, Mar. 16, 2017, https://time.com/4703614/travel-ban-judges-donald-trump-words/; Michelle Mark, *Trump's campaign statements about Muslims came under fire during the Supreme Court's travel ban arguments*, BUS. INSIDER, Apr. 25, 2018, https://www.businessinsider.com/trump-muslim-ban-questioned-in-supreme-court-arguments-2018-4; David Bier, *A Dozen Times Trump Equated his Travel Ban with a*

This order banned noncitizens from seven predominantly Muslim countries from entering the United States. It was immediately challenged in court, and was nationally enjoined by a federal district court in Washington state; the injunction was then upheld by the Ninth Circuit.[38] The administration revoked the order and issued a second one, this time temporarily banning all refugees from entry, as well as nationals from six predominantly Muslim countries. [39] Again, the policy was challenged in court, and again was nationally enjoined, preventing it from taking effect.[40] This time, the administration petitioned the Supreme Court for a stay of the injunction, and the Court responded by slightly narrowing the injunction.[41] Eventually, the second case was dismissed for mootness.[42] In September 2017, the Trump administration issued a third order, placing entry restrictions on noncitizens from eight foreign nations that it determined had not adequately shared or managed information about threats coming from their nationals.[43] Ultimately, after further litigation, this third round of revisions resulted in the Supreme Court upholding the policy in *Trump v. Hawaii.*[44] Though the religious animus behind the ban was well documented, the majority dismissed this concern[45] using national security justifications in combination with the plenary power doctrine, discussed below.[46] Instead, the majority discussed whether the ban fell within the President's broad legal authority under the Immigration and Nationality Act (INA), ultimately holding that it did.[47]

Muslim Ban, CATO INST. (Aug. 14, 2017, 12:06 PM), https://www.cato.org/blog/dozen-times-trump-equated-travel-ban-muslim-ban.

[38] Washington v. Trump, 847 F.3d 1511, 1169 (9th Cir. 2017).

[39] Exec. Order No. 13780, 82 Fed. Reg. 13209, 13211-12, 1325 (Mar. 6, 2017).

[40] Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087-88 (2017).

[41] *Id.* at 2089.

[42] Trump v. Hawaii, 138 S. Ct. 377 (2017).

[43] Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public Safety Threats, 82 Fed. Reg. 45161, 45164 (Sept. 24, 2017).

[44] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

[45] Trump v. Hawaii, 132 HARV. L. REV. 327, 330-31 (2018).

[46] *See infra* notes 84-91 and accompanying text.

[47] HARV. L. REV., *supra* note 45.

B. The Debate Surrounding Nationwide Injunctions

Scholars have raised several arguments against nationwide injunctions in a variety of forums.[48] Generally, the arguments against them are rooted in a process-oriented framework; a leading critic of these injunctions, Michael Morely, refers to them as "de facto class action[s].[49]" Morely argues that Defendant-Oriented injunctions run contrary to the policy rationale underlying *Federal Rule of Civil Procedure 23*, the law of judgments, and the courts' limited jurisdiction:

> First, the plaintiffs usually lack standing to protect the rights of third parties, and particularly the rights of the public as a whole. Second, relatedly, Defendant-Oriented Injunctions may violate the due process rights of non-parties to the litigation. By seeking a Defendant-Oriented Injunction, individual plaintiffs leverage the rights of third parties who may not even be subject to the court's personal jurisdiction, without their consent, in order to obtain more sweeping relief. Third, Defendant-Oriented Injunctions have unfairly asymmetric preclusive effects. A successful plaintiff can bind the government defendants regarding people who are not before the court. If the defendants prevail, in contrast, that judgment generally does not preclude subsequent actions, either in the same court or other jurisdictions, by third parties. Fourth, Defendant-Oriented Injunctions run contrary to the general rules governing judgments, and effectively provide class-wide relief despite the plaintiffs' failure to satisfy *Federal Rule of Civil Procedure 23*. Thus, the policy considerations that underlie both the law of judgments and Rule 23 weigh strongly against Defendant-Oriented Injunctions in non-class cases. Finally, by issuing a Defendant-Oriented Injunction, a court applies its interpretation of the law to right-holders and claims outside the scope of its limited territorial jurisdiction, where its opinions lack precedential effect.[50]

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[48] *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 418 (2017); Michael T. Morely, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1 (2019).

[49] Morely, *supra* note 2, at 522.

[50] *Id.* at 522-23.

Additionally, one might argue that the power to issue nationwide injunctions encourages lawyers to forum shop,[51] makes the courts dangerously political,[52] creates a risk of conflicting injunctions,[53] and potentially grants federal district court judges excessive power.[54]

Even so, a few scholars defend federal district judges' power to issue nationwide injunctions.[55] At least one Circuit Court has acknowledged their utility,[56] but scholars offer qualified, rather than broad defenses. They argue, as does this Article, that nationwide injunctions should be applied only in specific circumstances or classes of cases, such as bad faith action by the government.[57] Defenders of nationwide injunctions also argue that these orders are people-, rather than process-oriented, remedying negative consequences affecting the victims of poor or extremist policies. Defenders acknowledge some of the flaws with nationwide injunctions,[58] but argue that these are small compared to the benefits. For example, these injunctions are sometimes necessary to provide complete relief to plaintiffs,[59] and to prevent irreparable harm to nonparties that lack easy access to the courts.[60] Further, Amanda Frost, the earliest defender of nationwide injunctions, argues that "[c]hallenges to policies that cross state lines such as regulations concerning clean air and water, and some immigration policies [...] require broad injunctions."[61] Additionally, she notes that class certification can be difficult or impossible to obtain for certain plaintiffs, and in any case, the government has several strategies available to prevent plaintiffs from achieving certification.[62] Frost also addresses Justice Gorsuch's concerns about Article III,[63] by noting that though "[t]he text of Article III does not

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[51] Bray, *supra* note 48, at 460.

[52] Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1106 (2018).

[53] *Id.*

[54] *Id.* at 1067.

[55] *See, e.g.*, Frost, *supra* note 52; Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 106-07 (2019).

[56] *See* City of Chi. v. Sessions, 888 F.3d 272, 288 (7th Cir. 2018) (noting that although nationwide injunctions should be rare, they "can be beneficial in terms of efficiency and certainty in the law, and more importantly, in the avoidance of irreparable harm and in furtherance of the public interest.").

[57] *E.g.*, Tramell, *supra* note 55, at 104.

[58] *E.g.*, Frost, *supra* note 52, at 1104-15.

[59] *Id.* at 1090-91.

[60] *Id.* at 1094-95.

[61] *Id.* at 1091.

[62] *Id.* at 1089.

[63] *Id.* at 1080-90; *see also supra* note 16 and accompanying text.

spell out the scope of the judiciary's equitable powers, [...] tradition and precedent suggest that broad remedial injunctions are constitutionally permissible, and in some cases essential, as a means of enabling the courts to check the political branches."[64]

In addition to the powerful arguments from defenders of nationwide injunctions, readers should consider a practical analysis that demonstrates that in immigration cases, the asymmetric claim preclusion argument in particular is an argument based in abstraction, rather than the realities of litigation. To reach this conclusion, one needs only look at the massive power disparities between the litigants seeking immigration-focused nationwide injunctions — noncitizens — and the American federal government. The government can indefinitely detain certain classes of noncitizens,[65] and often does so in a way that prevents them from coordinating with an attorney,[66] compounding the difficulties that noncitizens generally face in accessing the American legal system.[67] Moreover, in immigration proceedings noncitizens do not enjoy a constitutional right to counsel, they merely have a statutory right to hire their own attorney.[68] To recognize just how asymmetric immigration cases are, imagine two boxers rather than two legal parties — the government, a professional heavyweight, and noncitizens, amateur flyweights. To begin, the heavyweight has hired the referee and set the rules of the match. Next,

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[64] *Id.* at 1080.

[65] *See infra* notes 116-122, 124-133 and accompanying text.

[66] César Cuauhtémoc Garcia Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel,* 21 BERKELEY LA RAZA L.J. 17 (2011) (finding that immigration detainees have a more difficult time accessing legal aid and representation when they are continually transferred to different detention centers); *see also* Yuki Noguchi, *Unequal Outcomes: Most ICE Detainees Held in Rural Areas Where Deportation Risks Soar*, NPR (Aug. 15, 2019, 7:13 AM), https://www.npr.org/2019/08/15/748764322/unequal-outcomes-most-ice-detainees-held-in-rural-areas-where-deportation-risks; *see also* Kyle Kim, *Immigrants Held in ICE Facilities Struggle to Find Legal Aid Before Being Deported,* L.A. TIMES, Sep. 28, 2017, https://www.latimes.com/projects/la-na-access-to-counsel-deportation/.

[67] *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court,* 164 U. PENN. L. REV. 1 (2015) (finding that only 37% of all immigrants and only 14% of detained immigrants secured legal representation from the years 2007 to 2012); *see also* Samantha Balaban et al., *Without A Lawyer, Asylum Seekers Struggle With Confusing Legal Processes,* NPR (Feb. 25, 2018, 2:10 PM), https://www.npr.org/2018/02/25/588646667/without-a-lawyer-asylum-seekers-struggle-with-confusing-legal-processes.

[68] *Note: The Right to Be Heard from Immigration Prisons: Locating a Right of Access to Counsel for Immigration Detainees in the Right of Access to Courts*, 132 HARV. L. REV. 726 (2018).

the flyweight, who has not been informed of the rules, is blindfolded and hobbled with a hand tied behind their back. Moreover, the flyweight does not have a coach or other helper in their corner. Under these circumstances, Morely's asymmetric claim preclusion critique would argue that, should the flyweight win under these circumstances, somehow the resulting prize is unfair. The government is not a small company or other private party; it is far from helpless. Though the government's resources are not infinite, they are large enough to minimize concerns about the expense and fairness of protracted litigation. Furthermore, if one immigration policy is struck down or stalled, as the Trump administration has shown in cases like the Muslim Ban, the government simply makes another.[69] Noncitizen plaintiffs do not have that luxury.

As mentioned, immigration, like environmental policy and voting, implicates a "deep interplay between individual and collective rights,"[70] one that often cannot be adequately addressed by individual plaintiffs seeking relief from the law solely for themselves. However, in two respects, immigration law differs from other areas. First, it was born in, and remains mired in racism. Second, its current jurisprudence undermines or flouts every democratic principle that we claim to hold dear.

Consider these points, in turn:

III. Tips for Implementing Trauma-Informed Practice in the Law School Classroom.

"Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."

– Dr. Martin Luther King, Jr.

To understand how nationwide injunctions can help the courts strengthen the foundations of American democracy against our immigration jurisprudence, it is important to recognize just how antidemocratic that jurisprudence is. Immigration law and policy have enabled America's worst impulses in the past and continue to do so. Anyone with dreams of enabling an invasive surveillance state that makes a mockery of the Fourth

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[69] *See supra* notes 36-47 and accompanying text.

[70] Morely, *supra* note 2, at 493-94.

Amendment can do so under the banner of immigration.[71] Anyone who wants to act out their worst urges against an outsider can do so to noncitizens, even killing, with impunity.[72] A plethora of atrocities come readily to mind, with the permissive and racialized nature of immigration jurisprudence serving as the thread running through many of them. From its very inception, American immigration jurisprudence has been infected by racism and inhumane treatment of excluded groups. It is one of the most antidemocratic and shameful elements in the American legal system. To correct it, the system needs legal tools that serve as democratic guardrails, ones that loudly call attention to the injustices taking place in this area of the law. Nationwide injunctions are effective for accomplishing both objectives.

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[71] *See* Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1 (2014); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. (2008).

[72] *See* Cleve R. Wootson Jr., *Border agents beat an undocumented immigrant to death. The U.S. is paying his family $1 million.*, WASH. POST, Mar. 28, 2017, https://www.washingtonpost.com/news/post-nation/wp/2017/03/28/border-agents-beat-an-undocumented-immigrant-to-death-the-u-s-is-paying-his-family-1-million/ (stating that though the victim's family is being paid in a settlement, none of the agents involved faced discipline or lost pay, even though they beat an unarmed man so badly that they broke his ribs, damaged his spine, and killed him, then tried to seize video evidence from nearby civilians); Vanessa Romo, *Supreme Court Rules Border Agents Who Shoot Foreign Nationals Can't Be Sued*, NPR (Feb. 25, 2020, 6:21 PM), https://www.npr.org/2020/02/25/809401334/supreme-court-rules-border-patrol-agents-who-shoot-foreign-nationals-cant-be-sue.

A. America's Last Bastion of Legally Sanctioned Racism

"In the first place, we should insist that if the immigrant who comes here in good faith becomes an American and assimilates himself to us, he shall be treated on an exact equality with everyone else, for it is an outrage to discriminate against any such man because of creed, or birthplace, or origin."

– Theodore Roosevelt, 1907

"In the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities... Hereafter no State court or court of the United States shall admit Chinese to citizenship."

– The Chinese Exclusion Act, made permanent by President Theodore Roosevelt in 1904

Immigration law and policy in America are, at their core, about the intersection of racism and government power. The proof lies exposed in our history of hostility directed toward nearly every immigrant group that has landed on American shores.[73] Naturally, that attitude has extended to how the court treats noncitizens. American immigration jurisprudence was born in the Supreme Court under Chief Justice Melville Fuller.[74] This Court, which institutionalized racial segregation and hierarchy in *Plessy v. Ferguson*,[75] also authored *Chae Chan Ping v. United States*,[76] better known as The Chinese Exclusion Case, and *Fong Yue Ting v. United States*,[77] two cornerstones of immigration law. Both cases concerned Chinese laborers who had resided and worked in America and were facing exclusion or

[73] *See, e.g.*, MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE (1999); George J. Sanchez, *Face the Nation: Race, Immigration, and the Rise of Nativism in Late Twentieth Century America*, 31 INT'L MIGRATION REV. 1009 (1997 (same)); Ediberto Román, *The Alien Invasion?*, 45 HOUS. L. REV. 841 (2008); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525 (2000).

[74] Gabriel J. Chin, *Segregation's Last Stronghold*, 46 UCLA L. REV. 1, 5 (1998).

[75] Plessy v. Ferguson, 163 U.S. 537 (1896).

[76] Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[77] Fong Yue Ting v. United States, 149 U.S. 698 (1893).

expulsion under the Chinese Exclusion Act.[78] Passed in 1882, and extending for more than sixty years, the Act was the first piece of legislation in American history to ban noncitizens from entry based on race.[79] In *Chae Chan Ping*, the Court held that even though the Act violated two international treaties, Congress enjoyed an unenumerated power to regulate immigration, which could be exercised to exclude aliens of a particular race.[80] In *Fong Yue Ting*, the Court held that if Congress branded a race as undesirable, then lawful residents of that race, even those who had been living in America for years, could be deported.[81] In the same case, the Court also upheld a rule that explicitly required lawful Chinese residents to have a white witness to vouch for their presence in America.[82] In both cases, the Court wrote that it seemed "impossible" for people of Chinese origin to assimilate into American culture, because of their supposed inborn defects.[83] Neither case has been overturned.

The jurisprudential theory underlying the decisions in these two cases have come to be known as the "plenary power doctrine," which provides that the power of Congress over the admission of aliens to this country is nearly absolute and not subject to judicial review.[84] In many cases, this doctrine makes racial discrimination in the immigration setting legal.[85] Stare decisis has kept the plenary power doctrine alive, despite its origin in the most blatant and outright racism. The Court itself has acknowledged that the doctrine is at odds with other constitutional jurisprudence, but essentially shrugs, on the ground that it is too firmly entrenched to be uprooted.[86]

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[78] Act of May 6, 1882, ch. 126, 22 Stat. 58, *repealed* by Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

[79] Kat Chow, *As Chinese Exclusion Act Turns 135, Experts Point to Parallels Today*, NPR (May 5, 2017, 6:06 PM), https://www.npr.org/sections/codeswitch/2017/05/05/527091890/the-135-year-bridge-between-the-chinese-exclusion-act-and-a-proposed-travel-ban; Irene Hsu, *The Echoes of Chinese Exclusion*, NEW REPUBLIC (Jun. 28, 2018), https://newrepublic.com/article/149437/echoes-chinese-exclusion.

[80] Chin, *supra* note 74, at 11.

[81] *Fong Yue Ting*, 149 U.S. at 707.

[82] *Id.* at 730.

[83] *Id.* at 717; *Chae Chan Ping*, 130 U.S. at 595.

[84] Natsu T. Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 CATH. U. L. REV. 1115, 1119 (2002) (discussing the history of the doctrine and its place in American law).

[85] *Fong Yue Ting*, 149 U.S. at 731.

[86] Chin, *supra* note 74, at 15-16 (citing Justice Frankfurter in Galvan v. Press, 347 U.S. 522, 530-31 (1954) who wrote "In light of the expansion of the concept of substantive due

A judicial norm, immigration exceptionalism, undergirds and works in tandem with the plenary power doctrine.[87] Under immigration exceptionalism, the courts acknowledge that in immigration law, "Congress regularly makes rules that would be unacceptable if applied to Citizens,"[88] but justify this practice because: 1) it concerns noncitizens; not citizens,[89] and 2) because immigration cases supposedly present "policy questions entrusted exclusively to the political branches of our Government, and [courts] have no judicial authority to substitute [their] political judgment for that of the Congress."[90] As a result, "[p]robably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system."[91]

Below, we consider the legal landscape created by these complementary principles. One of the goals of the courts in a democratic society is to uphold the rule of law. When examining immigration law we must be critical; simply "upholding the rule of law" is not a tenable position when the law permits outright inhumanity. For our democracy to remain robust and healthy, courts cannot solely be concerned with upholding the

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process as a limitation upon all powers of Congress, even the war power, see *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146, 155, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. [...] But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349, but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. *The Japanese Immigrant Case*, 189 U.S. 86, 101; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.").

[87] *See generally* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 Nw. U. L. Rev. 583 (2017) (discussing how the two doctrines work together to produce an area of almost unbridled discretion); Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange But Unexceptional Constitutional Immigration Law*, 14 Geo. Immigr. L. J. 257 (2000) (same).

[88] Demore v. Kim, 538 U.S. 510, 521 (2003) (internal citations omitted).

[89] Rubenstein & Gulasekaram, *supra* note 87, at 584.

[90] Kerry v. Din, 135 S. Ct. 2128, 2136 (2015) (quoting Fiallo v. Bell, 430 U.S. 787, 798 (1977) (internal quotation marks omitted)).

[91] Rubenstein & Gulasekaram, *supra* note 87, at 593 (quoting Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 564-65 (1990)).

letter of the law; they must uphold a firm commitment to due process and equal treatment. If a law or policy falls short in these respects, it is incumbent upon the courts to act as a bulwark for those harmed by it using any tools at their disposal, including nationwide injunctions.

B. Immigration Jurisprudence Enables Cruelty and Egregious Legal Arguments

"We have people coming into the country or trying to come in, we're stopping a lot of them, but we're taking people out of the country. You wouldn't believe how bad these people are. These aren't people, they're animals."

– President Donald Trump

Under current immigration jurisprudence, America is not only permitted to be its worst self, it is blessed by the Court to do so. The hands-off approach of the plenary power doctrine, combined with the "anything goes" reasoning behind immigration exceptionalism, has created legal cover to a type of dehumanization known as moral exclusion.[92] Moral exclusion is the process of placing undesirable groups "...outside [of] the [social] boundary in which moral values, rules, and considerations of fairness apply."[93] Since morally excluded groups — noncitizens, in this case — do not count as "one of us," anything done to them under our law is permissible, no matter how unreasonable or cruel.[94] Consider how dehumanization enables well-educated attorneys from the American government to put forward some of the most preposterous arguments that one could make against a fellow human being, indeed, a child. Consider, too, whether those arguments strengthen or undermine a nation that professes to be a healthy democracy.

1. Cruelty Toward Children

In 2019, a Department of Justice attorney made headlines by arguing that noncitizen children detained by the government do not need toothbrushes or soap in order for their conditions to be considered safe and

[92] Philip A. Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 293 (2008) (discussing the social science roots of dehumanization).
[93] Susan Opotow, *Moral Exclusion and Injustice: An Introduction*, 46 J. SOC. ISSUES 1-20 (1990) (discussing the roots of dehumanization); *see also* Bender, *supra* note 17 (same).
[94] Goff et al., *supra* note 92, at 293

sanitary.[95] This case made the news at the same time that the media were exposing brutal conditions for children detained at the border under the Trump administration's mandatory family separation policy.[96] Children as young as seven years old were left to care for toddlers, who, without diapers, were soiling their clothes.[97] Multiple facilities also faced dangerous overcrowding, in one instance with nine hundred noncitizens crammed into a facility designed for one hundred and twenty-five.[98] The litigation filed in response to these conditions arose from the *Flores* Agreement, a 1997 consent decree regulating the conditions for federal government detention of minor noncitizens.[99] Though a Trump administration lawyer made the argument against providing toothbrushes and soap, the conditions at issue are rooted an Obama administration decision to expand the federal government's capacity to detain noncitizen families.[100] In 2015, federal district judge Dolly M. Gee found that the Obama regime had violated the terms of the *Flores* agreement by refusing to release accompanied minor noncitizens from a family detention facility, and detaining the children in "widespread and deplorable conditions".[101] Judge Gee issued a remedial order to the Department of Homeland Security, which appealed, presaging a years long battle in her courtroom to enforce the *Flores* agreement.[102] Part of this ongoing battle culminated a 2017 ruling which found that the government — this time under the Trump administration — had again failed

[95] Ken White, *Why a Government Lawyer Argued against Giving Immigrant Kids Toothbrushes*, ATLANTIC, June 23, 2019, https://www.theatlantic.com/ideas/archive/2019/06/why-sarah-fabian-argued-against-giving-kids-toothbrushes/592366/.

[96] Caitlin Dickerson, *'There is a Stench': Soiled Clothes and No Baths for Migrant Children at a Texas Center*, N.Y. TIMES, June 21, 2019, https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html; *see also* Richard Delgado & Jean Stefancic, *Lessons from Mexican Folklore: An Essay on U.S. Immigration Policy, Child Separation, and La Llorona*, 81 U. PITT. L. REV. 287 (2019).

[97] Dickerson, *supra* note 96.

[98] *Id.*

[99] Stipulated Settlement Agreement at 3, 7-18, 20, Flores v. Reno, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), http://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf.

[100] Dora Schriro, *Weeping in the Playtime of Others: The Obama Administration's Failed Reform of ICE Family Detention Practices*, 5 J. MIGRATION & HUM. SECURITY 452, 458-65 (2017).

[101] Flores v. Johnson, 212 F.Supp. 3d 864, 881 (C.D. Cal. 2015).

[102] *See generally* Flores v. Lynch, 212 F. Supp. 3d 907 (C.D. Cal. 2015); Flores v. Lynch, 828 F. 3d 898, 901 (9th Cir. 2016).

to uphold the *Flores* agreement.[103] Here, the violations consisted of failures to provide noncitizen children with adequate food, access to clean drinking water, or access to hygiene products like toothbrushes and soap.[104] Moreover, the court found that the government was subjecting noncitizen children to extremely cold temperatures (lowering the temperatures further when the children complained),[105] and was depriving them of rest by forcing them to sleep under bright lights on concrete floors without blankets.[106] The government argued that it did not need to provide children with soap, towels, showers, dry clothing, or toothbrushes because the Flores Agreement did not explicitly mention those items.[107] In response, the district court found that those items were encompassed by the Agreement's language requiring that children be kept in "safe and sanitary conditions."[108] In 2018, rather than correcting the faulty conditions, the Trump administration filed an appeal in the Ninth Circuit, which alleged that the district judge had altered the Agreement by mandating soap and toothbrushes. The appeal was denied.[109]

Children also suffer in other ways under the current immigration regime. Since noncitizens have no constitutional right to counsel in removal proceedings, unaccompanied noncitizen children are reduced to representing themselves in hearings about whether or not they should be deported.[110] Scholars have argued for an extension of those rights to noncitizen children,[111] but currently courts recognize no such right; in 2018, a three judge panel on the Ninth Circuit held that neither the Constitution

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[103] Order Re Plaintiff's Motion to Enforce and Appoint a Special Monitor at 1, Flores v. Sessions, No. CV 84-4544 DMG (AGRx) (C.D. Cal. Jun. 27,2017) available at https://www.aila.org/File/Related/14111359v.pdf.

[104] *Id.* at 7-15.

[105] *Id.* at 16.

[106] *Id.* at 15- 18.

[107] *Id.* at 13.

[108] *Id.*

[109] *Flores v. Barr*, 934 F.3d 910 (9th Cir. 2019).

[110] Misrylena Egkolfopoulou, *The Thousands of Children Who Go to Immigration Court Alone*, ATLANTIC, Aug. 21, 2018, https://www.theatlantic.com/politics/archive/2018/08/children-immigration-court/567490/ (discussing procedural injustice toward immigrant children); Vivian Yee & Miriam Jordan, *Migrant Children in Search of Justice: A 2-Year-Old's Day in Immigration Court*, N.Y. TIMES, Oct. 8, 2018, https://www.nytimes.com/2018/10/08/us/migrant-children-family-separation-court.html (same).

[111] *See, e.g.*, Benjamin Good, *Note: A Child's Right to Counsel in Removal Proceedings*, 10 STAN. J. C.R.C.L. 109 (2014) (noting the lack of protections for child claimants).

nor the INA provide noncitizen children with a right to public counsel.[112] In a rehearing en banc in 2019, the Ninth Circuit outright refused to answer the question.[113]

The challenges facing *pro se* litigants are well-documented outside of the immigration setting,[114] prompting a reasonable observer to ask, what healthy democracy would put such a burden on a child that does not speak their language? What healthy democracy would expend resources arguing that children detained in overcrowded facilities do not need soap or toothbrushes, rather than simply providing hygiene items? American immigration law is indicative of a fundamentally unhealthy democracy. It perpetuates a system that wants the poor, the tired, the huddled masses — so that it can leave them as wretched (but profitable) refuse on a detention center's concrete floors.[115]

2. Indefinite Civil Detention

Physical detention is an inextricable component of American immigration enforcement; enforcement agents have raided hospitals and courthouses,[116] and even constructed a fake university to apprehend noncitizens.[117] Once caught, noncitizens have no way of knowing how long their confinement will last. In *ex rel Mezei*, the Supreme Court upheld the

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[112] *See generally* Andrew Leon Hanna, *A Constitutional Right to Appointed Counsel for the Children of America's Refugee Crisis*, 54 HARV. C.R.C.L. L. REV. 257 (2019) (detailing the deficiencies of a system that does not guarantee the right to counsel).

[113] C.J.L.G. v. Barr, No. 16-73801 at 4 (9th Cir. 2019) ("[I]t need not address [the] contention that appointment of counsel for minors in removal proceedings is constitutionally required.").

[114] *See generally* Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenges of Bench and Bar Resistance*, 40 FAM. CT. REV. 36 (2002).

[115] Clyde Haberman, *For Private Prisons, Detaining Immigrants is Big Business*, N.Y. TIMES, Oct. 1, 2018, https://www.nytimes.com/2018/10/01/us/prisons-immigration-detention.html (discussing the deficiencies of the for-profit system).

[116] Peter Hall, *ICE criticized for arrest at Scranton hospital*, MORNING CALL (Mar. 16, 2020, 6:13 PM), https://www.mcall.com/news/pennsylvania/mc-nws-pa-ice-immigrant-arrest-hospital-scranton-coronavirus-20200316-3itqa24pdfau3kjnkm62jcdsai-story.html; Ryan Devereaux, *ICE Courthouse Arrests in New York Increased 1,700 Percent Under Trump*, INTERCEPT (Jan. 28, 2019, 8:32 AM), https://theintercept.com/2019/01/28/ice-courthouse-arrests-in-new-york-increased-1700-percent-under-trump/.

[117] Sarah Mervosh, *ICE Ran a Fake University in Michigan to Catch Immigration Fraud*, N.Y. TIMES, Jan. 31, 2019, https://www.nytimes.com/2019/01/31/us/farmington-university-arrests-ice.html.

indefinite detention of a noncitizen on security grounds based on secret information without judicial or administrative review.[118] Mezei was born in Gibraltar and lived in the United States for approximately 25 years, between 1923 and 1948.[119] He left the U.S. to care for his dying mother in Romania, but was delayed in Hungary for 19 months due to complications with his documentation[120]. When he tried to return to America, he was permanently excluded from the country on national security grounds without a hearing based on secret, undisclosed evidence.[121] Mezei attempted to leave to other countries, but since the United States had declared him a security risk, no one else would admit him.[122] Thus, he was effectively stranded on Ellis Island; he was physically in U.S. territory, but had not been formally admitted to the country.[123] Therefore, Mezei was not *in* America, legally speaking.[124] In immigration, the courts embrace what is referred to as the entry fiction doctrine — unless a noncitizen is formally admitted, they are not technically "in the United States."[125] The courts consider this true even if the noncitizen is forcibly detained by American law enforcement in a detention facility on U.S. soil. In *Mezei*, the Court leaned heavily into the entry fiction doctrine; the justices held that the nearly two-year long detention of a noncitizen without a hearing was not unlawful because as an entrant, he had no rights conferred upon him, and no protections under the Constitution.[126] Additionally, the Court held that neither his physical presence on Ellis Island nor his previous residence in the United States changed his status, so he remained excludable.[127]

Mezei presents a striking demonstration of the plenary power doctrine and immigration exceptionalism at work. Where else in American legal doctrine would the court authorize indefinite detention based on secret evidence, without a hearing? Consider that noncitizens are marched, in handcuffs by armed guards, into facilities remarkably resembling prisons, but are considered detained under civil, rather than criminal law, which

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[118] Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210-11 (1953).
[119] *Id.* at 208.
[120] *Id.*
[121] *Id.*
[122] *Id.* at 209.
[123] *Id.* at 213.
[124] *Id.*
[125] Cesar Cuauhtemoc Garcia Hernandez, *Invisible Spaces and Invisible Lives in Immigration Detention*, 57 HOW. L. J. 869, 876 (2014) (discussing the severe drawbacks of the current system).
[126] *Mezei,* 345 U.S. at 212-216.
[127] *Id.*

means they are deprived of a host of constitutional guarantees.[128] *Mezei* was superseded by statute, but never overturned.[129] In fact, when similar circumstances arose decades later in *Zadvydas v. Davis*, a case about a noncitizen being detained after he was ordered removed from the country, the Court simply leaned harder into the entry fiction doctrine.[130] There, the Court distinguished Zadvydas as being territorially present, and thus subject to some protections and due process rights that Mezei did not receive.[131] *Zadvydas* was an important case because it showed the Court departing slightly from the plenary power doctrine, but the relief was short lived. A later Court, in *Jennings v. Rodriguez*,[132] walked back much of *Zadvydas* without expressly overturning it.[133]

These are only some of the best-known examples of the antidemocratic nature of American immigration law, but there are many others. For example, immigration law has been used to restrict the First Amendment rights of noncitizens,[134] as well as their right to due process.[135] None of these cases has ever been explicitly overturned. Moreover, while we have already discussed the legal arguments behind *Chae Chan Ping*[136] and *Trump v. Hawaii*,[137] the through lines between these two cases are well worth noting; they are over 100 years apart, but both feature a blanket ban based on nationality, with well documented records of animus toward the excluded groups, and both imposed exclusion and hardship on lawful

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[128] Garret Epps, *The Fragility of Immigrants' Constitutional Protections*, ATLANTIC, Nov. 7, 2019, https://www.theatlantic.com/ideas/archive/2019/11/fragility-of-immigrants-constitutional-protections/601486/.

[129] *See Perez v. Decker*, No. 18-CV-5279, 2018 U.S. Dist. LEXIS 141768, at 9 (S.D.N.Y. Aug. 20, 2018) (describing the human costs of a heartless system).

[130] Zadvydas v. Davis, 533 U.S. 678, 693-94 (2001).

[131] *Id.* at 693 ("Once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

[132] *See* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

[133] *See generally* Miriam Peguero Medrano, *Not Yet Gone, and Not Yet Forgotten: The Reasonableness of Continued Mandatory Detention of Noncitizens Without a Bond Hearing*, 108 J. CRIM. L. & CRIMINOL. 597 (2018).

[134] *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 595-96 (1952) (holding that longtime legal residents of the United States could be deported under an *ex post facto* law because of their former Communist Party membership).

[135] *See* United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (holding that a German woman could be excluded from the country based on secret evidence without a hearing, because Congress had not required one, and, "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

[136] *See supra* notes 76-83 and accompanying text.

[137] *See supra* notes 36-47 and accompanying text.

resident noncitizens.[138] The costumes and the characters may have changed, but the plot remains largely the same.

As shocking as the immigration legal landscape looks, one question that many Americans might ask is "Why should we care? We are citizens, not immigrants." The problem with that approach is that the behaviors enabled under the plenary power doctrine do not stop with noncitizens. Instead, the antidemocratic behavior enabled by immigration jurisprudence affects the rights and freedoms of everyone in the country; citizens and noncitizens alike. For example, the plenary power doctrine and immigration exceptionalism have granted federal immigration authorities the power to search citizens without warrants at the border,[139] an authority that has been invoked to suppress free speech by harassing journalists, lawyers, and human rights activists.[140] The Court also allows border agents to require citizens to submit to vehicle checkpoints in any area within 100 miles from the border, and even allows stops based on race.[141] That decision led to situations where border enforcement agents climbed onto private buses demanding proof of citizenship from Black and Brown passengers, many of

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[138] Michael Kagan, *Is the Chinese Exclusion Case Still Good Law? (The President Is Trying to Find Out)*, 1 NEV. L. J. FORUM 80 (2017); Garret Epps, *The Ghost of Chae Chan Ping*, ATLANTIC, Jan. 20, 2018, https://www.theatlantic.com/politics/archive/2018/01/ghost-haunting-immigration/551015/.

[139] United States v. Flores-Montano, 541 U.S. 149, 152-53 (2004) ("The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. Time and again, [the Supreme Court has] stated that 'searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border. Congress, since the beginning of our Government, 'has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.'") (internal citations omitted).

[140] Ryan Devereaux, *Border Official Admits Targeting Journalists and Human Rights Advocates with Smuggling Investigations*, INTERCEPT (May 17, 2019, 11:33 AM), https://theintercept.com/2019/05/17/border-smuggling-journalists-activists/; Seth Harp, *I'm a Journalist But I Didn't Fully Realize the Terrible Power of U.S. Border Officials Until They Violated My Rights and Privacy*, INTERCEPT (June 22, 2019, 5:00 AM), https://theintercept.com/2019/06/22/cbp-border-searches-journalists/ (same).

[141] United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) ("Routine searches of the persons and effects of entrants [into the United States] are not subject to any requirement of reasonable suspicion, probable cause, or warrant. Automotive travelers may be stopped at fixed checkpoints near the border without individualized suspicion even if the stop is based largely on ethnicity, and boats on inland waters with ready access to the sea may be hailed and boarded with no suspicion whatever.") (internal citations omitted)).

whom were citizens.[142] Moreover, the type of indefinite civil detention that the Court normalized in *Mezei* and reaffirmed in subsequent cases[143] was used against an American citizen held in custody for over three years[144]— and he is just one of over 1,000 citizens detained by ICE since 2012.[145]

The abuses by border enforcement authorities under cover of law are too numerous to list here; racism and cruelty have characterized border enforcement since its inception, and their influence remains at present.[146] As this brief review shows, the antidemocratic behavior that we authorize and normalize against noncitizens will inevitably be unleashed upon citizens. What we do to the least of these, we do to ourselves.

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[142] Adiel Kaplan & Vanessa Swales, *Border Patrol searches have increased on Greyhound, other buses far from border*, NBC NEWS (June 5, 2019, 1:30 AM), https://www.nbcnews.com/politics/immigration/border-patrol-searches-have-increased-greyhound-other-buses-far-border-n1012596; Johnny Diaz, *Greyhound to Stop Allowing Border Patrol Agents on Its Buses Without Warrants*, N.Y. TIMES, Feb. 22, 2020, https://www.nytimes.com/2020/02/22/us/greyhound-border-patrol.html.

[143] *See supra* notes 116-133 and accompanying text.

[144] Paige St. John & Joel Rubin, *Must Reads: ICE held an American man in custody for 1,273 days. He's not the only one who had to prove his citizenship*, L.A. TIMES, Apr. 27, 2018, https://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmlstory.html (discussing the practice of lengthy immigrant detention).

[145] For examples of harsh federal practices *see, e.g.*, Steve Coll, *When ICE Tries to Deport Americans, Who Defends Them?*, NEW YORKER, Mar. 21, 2018, https://www.newyorker.com/news/daily-comment/when-ice-tries-to-deport-americans-who-defends-them; Dustin Dwyer, *ICE Tried to Deport This U.S. Citizen and Marine Veteran*, NPR (Jan. 17, 2019, 12:30 PM), https://www.npr.org/2019/01/17/686188335/ice-tried-to-deport-this-u-s-citizen-and-marine-veteran; Meagan Flynn, *U.S. citizen freed after nearly a month in immigration custody, family says*, WASH. POST, July 24, 2019, https://www.washingtonpost.com/nation/2019/07/23/francisco-erwin-galicia-ice-cpb-us-citizen-detained-texas/.

[146] *See* ELIZABETH F. COHEN, ILLEGAL (2020) (describing the gratuitous cruelty in federal immigration practice); Greg Grandin, *The Border Patrol Has Been a Cult of Brutality Since 1924*, INTERCEPT (Jan. 12, 2019, 6:00 AM) https://theintercept.com/2019/01/12/border-patrol-history/; Alex Horton, *A Border Patrol chief in a racist Facebook group says she didn't realize it was racist*, WASH. POST, July 25, 2019, https://www.washingtonpost.com/nation/2019/07/25/border-patrol-chief-was-member-racist-facebook-group-says-she-didnt-notice/.

IV. Why We Should Permit (Or Encourage) Nationwide Injunctions in Immigration Cases

"As citizens, we must prevent wrongdoing because the world in which we all live, wrong-doer, wrong sufferer and spectator, is at stake."

— Hannah Arendt

Nationwide immigration injunctions serve three important functions. First, they protect and reinforce our ideals about legal representation, and give those who are wronged a voice in court. As a democracy, America commits to this principle in several ways: we provide criminal defendants with legal representation, regardless of their ability to pay; we allow *pro se* litigants to be heard at every level of our courts; and the 14th Amendment guarantees the equal protection of the laws to every *person* within American legal jurisdiction, rather than a particular class of people.

Moreover, nationwide injunctions act as a stabilizing force within our democracy, discouraging extremist or unilateral policy making on critical issues. This is particularly relevant in immigration, as the policies can have drastic consequences for the individuals concerned, up to and including death.

Finally, nationwide injunctions allow America the opportunity to reflect, to debate, and publicly decide if we want to be our best or worst selves. By their nature and rarity, nationwide injunctions are newsworthy, thus bringing what may have been an obscure legal dispute into the public forum; this allows citizens to engage with the law, and should they choose, to place political pressure on policymakers to avoid antidemocratic government actions.

Consider each of these contentions in further detail.

A. Nationwide Injunctions Provide Legal Protection to the Disenfranchised

"The bosom of America is open to receive not only the Opulent and respected Stranger, but the oppressed and persecuted of all Nations and Religions; whom we shall welcome to a participation of all our rights and privileges..."

– George Washington

As mentioned, immigration jurisprudence undermines our commitment to due process in many respects. It provides that 'outside of the border' of the United States, the government is not bound to behave constitutionally,[147] and further that noncitizens cannot invoke constitutional rights in the same manner that citizens can.[148] But the Constitution is not merely a set of rights that an individual must invoke, it is a set of structural restrictions on the government, created to provide a sustainable free society. Intrinsic in those structural restrictions is a commitment to every person being entitled to a day in court.

Nationwide injunctions extend that commitment to those normally outside of the Constitution's protection. Noncitizens, even children, have no right to public counsel in many proceedings,[149] thus any argument that assumes that injured noncitizens can simply go to court is unfounded. Moreover, immigration law is highly sensitive to small administrative rule changes that require little oversight, but have a ripple effect that harms thousands. For real-world examples, consider the Trump administration policy that changed the definition of refugee to exclude thousands of previously protected people,[150] or another Trump administration policy that altered the detainment policy surrounding asylum seekers, which resulted in thousands of additional detentions and exacerbated dangerous overcrowding problems.[151] Practically speaking, those policy changes meant that asylum seekers had to, in essence, serve a prison sentence because they requested asylum. The previous administration's policy allowed them to gain release on bail while their asylum claim was heard. The sensitivity to small changes — and the drastic consequences for people convicted of no crime — are why immigration lawsuits need the ability to protect more than one person at a time.

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[147] For a discussion of the outside/inside (and constructive outside) fiction, *see* Zainab A. Cheema, *A Constitutional Case for Extending the Due Process Clause to Asylum Seekers: Revisiting the Entry Fiction After Boumediene*, 87 FORDHAM L. REV. 289 (2018).

[148] *See, e.g.*, Epps, *supra* note 128; Ilya Somin, *Immigration Law Defies the Constitution*, ATLANTIC, Oct. 3, 2019, https://www.theatlantic.com/ideas/archive/2019/10/us-immigration-laws-unconstitutional-double-standards/599140/.

[149] *See supra* notes 110-113 and accompanying text.

[150] Kristie De Pena & Matthew La Corte, *The Devil is in the Details: Digging Deeper into 2020 Refugee Resettlement Changes*, NISKANEN CENT., Nov. 18, 2019, https://www.niskanencenter.org/the-devil-is-in-the-details-digging-deeper-into-2020-refugee-resettlement-changes/.

[151] Vanessa Romo & Joel Rose, *AG Barr Orders Immigration Judges to Stop Releasing Asylum-Seekers on Bail*, NPR (Apr. 17, 2019, 4:35 PM), https://www.npr.org/2019/04/17/714381003/ag-barr-orders-immigration-judges-to-stop-releasing-asylum-seekers-out-on-bail.

The stakes for noncitizens — detention, deportation, and possibly death — are as high as they could be. In a democratic society dedicated to due process, everyone in this position should receive the opportunity to make a case to avoid those consequences. Yet noncitizens' access to the legal system hinges on money, understanding a foreign language, and the cooperation of border enforcement officials; meaning that noncitizens do not have much legal access at all. Barriers to legal access are compounded by a byzantine system that seems designed to make sure that noncitizens cannot be found,[152] and by border enforcement's constant harassment of immigration attorneys that provide pro bono legal services to this group.[153] Given their unique circumstances and disadvantages, noncitizens need the protection of nationwide injunctions —"de facto class actions"[154]— because our country does not provide them with a readily accessible path to an ordinary class action, or even an individual lawsuit. How can noncitizens certify as a class when their own lawyers cannot find them?

A nationwide injunction may not stop an individual abuse, but it can halt systemic changes in policy that harm noncitizens in aggregate numbers. It can stop the next administrative rule change or executive order that undermines noncitizens' due process rights or otherwise harms them. Nationwide injunctions can provide lawyers advocating on behalf of noncitizens with a fighting chance. Rather than scrambling to wage a war on two fronts (having to mitigate real world harms caused to their clients by a policy's implementation, as well as arguing against the policy itself in court) the attorneys can focus on simply arguing against policy. This is good for our democracy in two ways: 1) it allows for the peaceful resolution of seriously harmful policies; and 2) it gives attorneys a chance to push back against the antidemocratic forces at work in immigration law.

The courts are not the answer to every problem in immigration; in many cases, they have created or deepened pre-existing problems. But those mistakes are no excuse to take tools from judges who are trying to uphold our founding ideals of safeguarding life and liberty. By continuing to allow

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[152] Dan Canon, *A System Designed to Make People Disappear*, SLATE (Apr. 2, 2017), http://www.slate.com/articles/news_and_politics/cover_story/2017/04/ice_detainees_enter_an_unbelievably_cruel_system_designed_to_make_them_disappear.html (discussing barriers that the immigration system imposes for attorneys and immigration detainees wishing to find each other).

[153] Lauren Carasik, *The Government is Targeting Immigration Lawyers, Activists, and Reporters*, BOSTON REV. (Apr. 24, 2019), http://bostonreview.net/global-justice/lauren-carasik-government-targeting-immigration-lawyers-activists-journalists.

[154] *See* Morely, *supra* note 2, at 521-22.

district judges to issue nationwide injunctions in immigration cases, we can slow the erosion of democratic norms in this area, and, at least temporarily, make ourselves live up to them.

B. Nationwide Injunctions Act as a Political Stabilizer

"Indeed, it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time."

– Winston Churchill

Nationwide injunctions are not only a tool to serve the disenfranchised, they also serve a critical role in stabilizing, and thus keeping healthy, our democracy. To remain healthy and functional, democracies require two things from political actors: mutual toleration and institutional forbearance.[155] Without them, democracies begin to backslide toward autocracy or other undesirable forms of government.[156]

Mutual toleration is the idea that so long as political rivals play by constitutional rules, they tacitly agree to accept that each has an equal right to exist, compete for power, and govern.[157] Even in disagreement, the opposition is still legitimate.[158] Mutual toleration expresses a collective willingness to agree to disagree. When this norm is weak, a democracy is difficult to sustain.[159] This virtue is critical to a healthy and functioning democracy, and requires the safeguard of universal judicial injunctions.

Institutional forbearance is the issue more directly related to the universal injunctive power. Institutional forbearance describes the behavior of political actors who avoid actions that, "while respecting the letter of the law, obviously violate its spirit."[160] It means that politicians do not use their institutional prerogatives to the hilt, even if it is technically legal to do so, because doing so imperils the existing system.[161] To conceptualize this, it helps to think of democracy as a game that we want to keep playing indefinitely. To ensure that the game continues, players must refrain from injuring their opponents to the point of incapacitation, or antagonizing them

[155] STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 102 (2018) (explaining how elected leaders can gradually subvert the democratic process to increase their control).
[156] *Id.* at 101-102.
[157] *Id.* at 102.
[158] *Id.*
[159] *Id.* at 104.
[160] *Id.* at 106.
[161] *Id.*

so much that they refuse to play again.[162] Any adult who plays a game, such as checkers or chess, with a child, understands this rule. In practice, this usually means that politicians purposely avoid employing dirty tricks or hardball tactics in the spirit of fair play.[163] Institutional forbearance is especially important in presidential democracies — without it, they descend easily into "deadlock, dysfunction, and constitutional crisis."[164] Acting without forbearance is a form of "institutional combat aimed at permanently defeating one's partisan rivals — and not caring whether the democratic game continues."[165]

Nationwide injunctions incentivize institutional forbearance and legislation over extremist or unilateral executive policymaking. Knowing that a president's policy agenda can be stopped in its tracks for being too extreme provides a signal to the executive branch, telling it to avoid policies that would trigger backlash that would put those policies before the courts. To observe this incentivization in action, we need to look no further than the procedural history of *Trump v. Hawaii*.[166] As mentioned above, because of nationwide injunctions, the ban had to be revised three times in order to pass any sort of muster.[167] The final travel ban was still a rabidly anti-immigrant policy, but it was not as overtly racist as it was to begin with. The original ban was the sort of extremist policymaking that sparks backlash,[168] moving the opposing party away from institutional forbearance. The anti-immigrant sentiment[169] that empowered the Trump campaign was very likely itself a result of backlash[170] against liberal immigration policies that were also universally enjoined, like the DAPA

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[162] *Id.* at 107.

[163] *Id.*

[164] *Id.* at 108-09.

[165] *Id.* at 109.

[166] 138 S. Ct. 377.

[167] *See supra* notes 36-47 and accompanying text.

[168] *See, e.g.*, Rachel Levinson-Waldman & Haley Hinkle, *The Abolish ICE Movement Explained*, BRENNAN CENT. (July 30, 2018), https://www.brennancenter.org/our-work/analysis-opinion/abolish-ice-movement-explained; Elaine Godfrey, *What 'Abolish ICE' Actually Means*, THE ATLANTIC, July 11, 2018, https://www.theatlantic.com/politics/archive/2018/07/what-abolish-ice-actually-means/564752/ (discussing recent calls to replace the federal deportation system with a more humane version of border regulation).

[169] *See supra* notes 20-22 and accompanying text.

[170] Editorial Board, Opinion, *A conservative backlash threatens immigration reform*, WASH. POST, Apr. 28, 2013, https://www.washingtonpost.com/opinions/a-conservative-backlash-threatens-immigration-reform/2013/04/28/c0a9fb74-aeb5-11e2-a986-eec837b1888b_story.html.

program.[171] In both cases, nationwide injunctions blunted the policy efforts of the executive branch; presidential policy was either stopped outright, or significantly altered from its original guise.

The specter of a nationwide injunction means that in order to preserve their policy agenda intact and avoid a loss of political capital, a president would best be served by issuing executive orders with caution and moderation, and after consulting with the opposite side. Thus, nationwide injunctions shift policymaking incentives, moving the ideal format away from unilateral executive directives and toward Congressional legislation, where political actors must debate and compromise. Debate and compromise lie at the heart of any democracy, and maintaining them is critical to keeping the political system sustainable. Shifted incentives do not guarantee that policymakers will gravitate toward compromise, but like guardrails, levees, or other mitigative measures, a guarantee is not the point. The point of mitigation is to make a protected area — in this case, our democracy — more resilient.

C. *Nationwide Injunctions Provide America with the Opportunity to Avoid Being Its Worst Self*

"As long as my record stands in federal court, any American citizen can be held in prison or concentration camps without trial or hearing. I would like to see the government admit they were wrong and do something about it, so this will never happen again to any American citizen of any race, creed, or color."

– Fred Korematsu

Nationwide injunctions serve a moral function in addition to their democratic functions. By their very nature, these injunctions are newsworthy and can attract the attention necessary to make American citizens reflect and decide whether we genuinely wish to pursue certain policies. In that way, they provide a safety valve that steers America away from being its worst — its most racist, xenophobic, authoritarian, and cruel — self by providing a public opportunity for discussion on otherwise obscure legal issues. America can be a wonderful place when it wishes to be, but at too many historical moments America brought shame onto itself through its laws.[172] The courts are often the last stop before we do so, and

[171] *See supra* notes 28-33 and accompanying text.

[172] See Bender, *supra* note 17.

nationwide injunctions give the courts one last opportunity to stop us from going over the edge.

When the courts fail, we end up with stains on our national character. One such case, *Korematsu v. United States*, will do so for all time.[173] *Korematsu*, like many immigration cases, affected citizens and noncitizens alike, and in modern immigration cases, its themes are still with us,[174] as Justice Sonia Sotomayor explained in *Trump v. Hawaii*:

> As here, the Government invoked an ill-defined national security threat to justify an exclusionary policy of sweeping proportion... As here, the exclusion order was rooted in dangerous stereotypes about, *inter alia*, a particular group's supposed inability to assimilate and desire to harm the United States... As here, the Government was unwilling to reveal its own intelligence agencies' views of the alleged security concerns to the very citizens it purported to protect... And as here, there was strong evidence that impermissible hostility and animus motivated the Government's policy.[175]

Even though the Muslim Ban was upheld, nationwide injunctions, combined with widespread political protests, stopped its implementation in its most animus-driven form. American history might have been permanently altered for the better if Fred Korematsu's case had received the same rigorous attention. Rather than making us wait decades to admit that we made the wrong choice, nationwide injunctions give citizens the opportunity to organize protests and exert political pressure to protect vulnerable groups. Like all safety valves, this one may not always work, but it is better to have one and not need it, than to need one and not have it.

Our democracy needs judges to maintain this injunctive power in order to help us help ourselves. This power is necessary at the district court level, rather than waiting for years to be enacted at the Circuit or Supreme Court level, because "justice too long delayed is justice denied."[176] Unlike

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[173] Korematsu v. United States, 323 U.S. 214 (1944) (Jackson, J., dissenting).

[174] Philip Bump, *How a 1944 decision on Japanese internment affected the Supreme Court's travel ban decision,* WASH. POST, June 26, 2018, https://www.washingtonpost.com/news/politics/wp/2018/06/26/how-a-1944-decision-on-japanese-internment-affected-the-supreme-courts-travel-ban-decision/.

[175] Trump v. Hawaii, 138 S. Ct. 2392, 2447 (2018) (Sotomayor, J., dissenting).

[176] Martin Luther King Jr., *Letter from Birmingham Jail* (Apr. 16, 1963), *in* WHY WE CAN'T WAIT 77 (1964) (articulating a classic defense of nonviolent resistance).

the government, noncitizens typically lack the resources to go straight to the Supreme Court with their requests for relief.[177]

Might nationwide injunctions backfire and be used by government to deprive states and locales interested in putting in place experimental or new measures to assist and welcome new immigrants? This is possible,[178] but not very likely. As we have seen, ordinarily it is the federal government that backs harshly anti-immigrant policies and procedures, with private citizens, attorneys, or occasionally sympathetic cities or states taking action such as offering sanctuary[179] or permission to practice law[180] or attend a public university.[181] The federal government has many other tools to handle such openly pro-immigrant measures when they arise, including simply ignoring them. Going to court to ask for a nationwide injunction against a small, localized practice that does not threaten a national catastrophe would probably strike most judges as overkill. This is particularly so because such an injunction would not appear necessary to advance any of the policy goals of nationwide injunctions mentioned above, including providing citizens remedies for harm,[182] providing a stable barrier against governmental over-

[177] *See* Garret Epps, *The Supreme Court is Trump's Enforcer*, ATLANTIC, Sept. 15, 2019, https://www.theatlantic.com/ideas/archive/2019/09/the-supreme-court-is-trumps-enforcer/598081/.

[178] *See* Miriam Jordan, *In the first blow to Biden's immigration agenda, a federal judge blocks a 100-day pause on deportations,* N.Y. TIMES, Jan. 26, 2021, https://www.nytimes.com/2021/01/26/us/politics/biden-immigration-deportation.html (noting that a federal judge in the U.S. District Court for the Southern District of Texas had issued a 14-day nationwide restraining order at the request of the state's attorney general. The order enjoined a Biden administration directive suspending deportations for 100 days, on the ground that it was not accompanied by a rational reason and contravened a federal statute requiring that deportations be carried out promptly.)

[179] *See Immigration 101: What is a Sanctuary City?*, AMERICA'S VOICE (Oct. 19, 2019), https://americasvoice.org/blog/what-is-a-sanctuary-city/.

[180] *See* Dan Cadman, *Illegal Aliens Practicing Law,* Ctr. for Immigr. Studies (July 19, 2017), https://cis.org/Cadman/Illegal-Aliens-Practicing-Law (pointing out on behalf of a conservative center that a number of states permit this practice, but describing it is not a matter of great concern).

[181] *See* Elizabeth Redden, *Report Finds Growth in Undocumented Student Population,* INSIDE HIGHER EDUC., (Apr. 17, 2020), https://www.insidehighered.com/news/2020/04/17/report-estimates-more-450000-undocumented-immigrants-are-enrolled-higher-ed (noting that many colleges and universities are willing to enroll students who are undocumented immigrants).

[182] See *supra* notes 2-3 and accompanying text.

reach,[183] and offering citizens an opportunity to discuss unwise and cruel laws before they go into effect.[184]

Conclusion

"With great power, comes great responsibility."

– Stan Lee

Some would assert that our judiciary simply calls "balls and strikes."[185] That is a pleasant fantasy, but little more than that. Judges are policymakers with immense power: they can turn the tide of society against segregation and discrimination,[186] or they can undermine voting rights and give political advantages to the partisans of their choice.[187] They can even decide presidential elections, thus changing the course of history.[188] A tiger's bite does not become any less deadly by claiming that its fangs don't exist; judicial policymaking does not lose its impact simply because judges claim that they lack that power.

The judiciary, as policymakers, and as a co-equal branch of government, is every bit as responsible for strengthening and upholding our democracy as legislators or executives. One of the tools that they can use is the issuance of nationwide injunctions, which enable them to protect vulnerable classes of people from antidemocratic policies--though, to be sure, they should be used sparingly and responsibly. Eliminating this power to protect our democracy and to protect vulnerable groups like noncitizens abdicates the responsibility of the judiciary to act as a shield against injustice. And the resulting errors that such an abdication enables will stain us, just as *Korematsu* does.

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[183] *Id.*

[184] *Id.*

[185] *Roberts: 'My job is to call balls and strikes and not to pitch or bat'*, CNN, (Sept. 12, 2005, 4:58 PM), https://www.cnn.com/2005/POLITICS/09/12/roberts.statement/.

[186] Brown v. Bd. of Educ., 347 U.S. 483 (1954); Obergefell v. Hodges, 576 U.S. 644 (2015).

[187] Shelby County. v. Holder, 570 U.S. 529 (2013); Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

[188] Bush v. Gore, 531 U.S. 98 (2000).