DECONSTRUCTING INVISIBLE WALLS: SOTOMAYOR'S DISSENTS IN AN ERA OF IMMIGRATION EXCEPTIONALISM

KARLA MCKANDERS*

> *Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. Because the Court's decision today has failed in that respect, with profound regret, I dissent.*
>
> —Justice Sonia Sotomayor[1]

Since 2017, the U.S. Supreme Court has granted certiorari and considered twenty immigration cases.[2] In 2019, the Supreme Court

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* Clinical Professor of Law, Vanderbilt University Law School. Thanks to Vanderbilt University, School of Law students Cloe Anderson and Joshua Minton for excellent research assistance. Thanks also to Professors Ragini Shah and Yolanda Vazquez for their insightful feedback.

1. Trump v. Hawaii, 138 S. Ct. 2392, 2448 (2018).

2. *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020); Nasrallah v. Barr, 140 S. Ct. 1683 (2020); United States v. Sineneng-Smith, 140 S. Ct. 1575 (2020); Barton v. Barr, 140 S. Ct. 1442 (2020); Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062 (2020); Kansas v. Garcia, 140 S. Ct. 791 (2020); Hernandez v. Mesa, 140 S. Ct. 735 (2020); Wolf v. Cook Cnty., 140 S. Ct. 681 (2020); Barr v. East Bay Sanctuary Covenant, 140 S. Ct. 3 (2019); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 139 S. Ct. 2779 (2019) (mem.); Dep't of Com. v. New York, 139 S. Ct. 2551 (2019); Nielsen v. Preap, 139 S. Ct. 954 (2019); Pereira v. Sessions, 138 S. Ct. 2105 (2018); Sessions v. Dimaya, 138 S. Ct. 1204 (2018); Jennings v. Rodriguez, 138 S. Ct. 830 (2018); *In re* United States, 138 S. Ct. 443 (2017); Trump v. Hawaii, 138 S. Ct. 377 (2017) (mem.); Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 353 (2017) (mem.); Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017); Lee v. United States, 137 S. Ct. 1958 (2017); Maslenjak v. United States, 137 S.

issued eight decisions focusing on immigration.[3] There are many different theories accounting for the proliferation of immigration cases on the Supreme Court's docket. Some immigration scholars attribute the proliferation to the decline of the plenary powers doctrine,[4] while others attribute the increase in the executive branch's unilateral actions restricting immigration in the United States.[5]

With the proliferation of immigration cases before the Supreme Court, Justice Sonia Sotomayor has emerged as a strong voice of dissent.[6] Over the past few terms, Sotomayor has written more dissents than any other Justice.[7] The Article examines the impact her

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Ct. 1918 (2017); Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017); Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

3. *See Thuraissigiam*, 140 S. Ct. at 1961 (discussing the constitutionality of expedited removal of noncitizens); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. at 1891 (holding that the Department of Homeland Security's decision to rescind the DACA policy was arbitrary and capricious, in violation of the Administrative Procedure Act); *Nasrallah*, 140 S. Ct. at 1683 (citing 8 U.S.C. § 1252(a)(2)(C)–(D) do not preclude judicial review of a noncitizen's factual challenges to an order denying relief under the Convention Against Torture); *Sineneng-Smith*, 140 S. Ct. at 1575 (holding principle of party presentation violated when the Ninth Circuit found First Amendment overbreadth for statute prohibiting the inducement of immigration law violations); *Barton*, 140 S. Ct. at 1442 (determining eligibility for cancellation of removal of a lawful permanent resident who commits a crime, an offense listed in 8 U.S.C. § 1182(a)(2) committed during the initial seven years of residence need not be one of the offenses of removal); *Guerrero-Lasprilla*, 140 S. Ct. at 1062 (finding that "questions of law" in the Immigration and Nationality Act's 8 U.S.C. § 1252(a)(2)(D), include the application of a legal standard to undisputed or established facts); *Garcia*, 140 S. Ct. at 791 (holding federal immigration law did not preempt the Kansas identity fraud statutes); *Hernandez*, 140 S. Ct. at 735 (holding there is no private right of action for the family of a young Mexican national who was killed by a United States border officer).

4. Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 59 (2015).

5. Michele Waslin, *The Use of Executive Orders and Proclamations to Create Immigration Policy: Trump in Historical Perspective*, 8 J. ON MIGRATION & HUM. SEC. 54, 54 (2020) ("Donald Trump's overall volume of EOs has been remarkably similar to that of other presidents, while his number of proclamations has been relatively high. His immigration-related EOs and proclamations, however, diverge from those of his predecessors in several ways. Of the 56 immigration-related EOs and 64 proclamations issued since 1945, Trump has issued [ten] and nine, respectively. Overall, about [one] percent of all EOs and proclamations during this period have been immigration related, compared to [eight] percent of Trump's EOs and 2.4 percent of Trump's proclamations.").

6. Kevin R. Johnson, *Immigration Decisions in the 2019 Supreme Court Term, Upcoming Cases in the 2020 Term*, UC DAVIS SCH. OF L. FAC. BLOG (June 25, 2020), https://facultyblog.law.ucdavis.edu/post/immigration-decisions-in-the-supreme-court-2019-term-upcoming-cases-in-the-2020-term.aspx [http://perma.cc/SL6Q-ZLG3]; *see also* Ali Shan Ali Bhai, *A Border Deferred: Structural Safeguards against Judicial Deference in Immigration National Security Cases,* 69 DUKE L.J. 1149, 1166–67 (2020).

7. Adam Feldman, *Empirical SCOTUS: Amid Record-Breaking Consensus, the Justices' Divisions Still Run Deep*, SCOTUS BLOG (Feb. 25, 2019, 1:28 PM), https://www.scotusblog.com/2019/02/empirical-scotus-amid-record-breaking-consensus-the-justices-divisions-still-run-deep [http://perma.cc/XPC3-PU3C] (noting that during the 2019 term, Justice Sotomayor was the Supreme Court's most frequent dissenter in opinions and in the Supreme Court's shadow docket).

dissents have on the theme of this symposium, *Justice Along Borders*. This Article focuses on how Justice Sotomayor's recent immigration dissents force us to grapple with how the long-standing plenary powers doctrine has privileged borders over *our most sacred legal commitments*—fundamental rights under the constitution and adherence to rule of law. This Article argues that Justice Sotomayor's immigration decisions provide a significant break in historical deference to executive actions and are forcing us to reconceptualize the ways in which the immigration system historically has abrogated the rights of immigrants of color.

In 2017, President Trump began an unprecedented upheaval of the U.S. immigration system through executive orders, proclamations, proposed regulations,[8] and the referral of immigration cases to the Attorney General.[9] In many instances, the Administration has outrightly stated that it would not follow existing immigration, constitutional, or other laws to reach its goal of overhauling the immigration system.[10] This significant policy shift has resulted in multiple lawsuits and injunctions halting executive actions.[11] It has resulted in the U.S. Solicitor General's multiple unprecedented petitions to the Supreme Court to intervene and bypass existing court rules and procedures.[12] In many of the immigration cases, the Supreme Court is balancing whether to defer to executive actions when immigration, national security, and sovereignty are implicated against the xenophobic and racist statements that implicate constitutional rights.[13]

During Justice Sotomayor's eleven-year tenure on the bench, she has become known as the Justice who consistently challenges decisions that impact "minorities, immigrants, criminal defendants and death row inmates."[14] Given her recent dissents, it is important

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8. Waslin, *supra* note 5, at 54–64.

9. *See, e.g.*, Castillo-Perez, 27 I&N Dec. 664 (A.G. 2019); Thomas and Thompson, 27 I&N Dec. 674 (A.G. 2019); Castro-Tum, 27 I&N Dec. 271 (A.G. 2018), *overruled by* Guillen -Acosta v. Barr, 799 Fed. Appx. 212, 2020 U.S. App. LEXIS 10445, *and* Romero v. Barr, 937 F.3d 282, 2019 U.S. App. LEXIS 26241, 2019 WL 4065596; A-B-, 27 I&N Dec. 316 (A.G. 2018).

10. Allan Smith, *'Unforgivable': Trump's Days of Immigration Statements Come Under Fire*, NBC NEWS (Apr. 14, 2019), https://www.nbcnews.com/politics/immigration/unforgivable-trump-s-days-immigration-statements-come-under-fire-n994281 [http://perma.cc/C43R-R75Y].

11. *See* Madison J. Scaggs, Comment, *How Nationwide Injunctions Have Thwarted Recent Immigration Policy*, 105 IOWA L. REV. 1447, 1448 (2020).

12. *See* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 124 (2019).

13. Neil S. Siegel, *The Supreme Court Is Avoiding Talking About Race*, THE ATLANTIC (Aug. 7, 2020), https://www.theatlantic.com/ideas/archive/2020/08/supreme-court-doesn't-like-talk-about-race/614944 [http://perma.cc/3SUV-P6HZ].

14. Richard Wolf, *"The People's Justice": After Decade on Supreme Court, Sonia Sotomayor Is Most Outspoken on Bench and off*, USA TODAY (Aug. 8, 2019, 3:01 AM),

to examine their impact on the United States immigration system and how they challenge existing norms that permeate the history of immigration laws in the United States.[15] Her dissents have also challenged the Court's shadow docket in issuing orders that do not make it to the oral argument calendar by issuing written dissenting opinions.[16] In addition, Justice Sotomayor's recent dissents must be placed in context of the overall trajectory of her jurisprudence on immigration cases. In 2014, immigration law scholar Cristina Rodríguez, in *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, focused on the theorical value of Justice Sotomayor's immigration opinions within the "messier reality" of the immigration system.[17]

Through her decisions, Sotomayor has established a record of forcing the country to examine discriminatory immigration norms. In her first 2009 opinion as a Justice, *Mohawk Industries, Inc. v. Carpenter*, she challenged the use of the term illegal in reference to people.[18] At a Yale Symposium, Justice Sotomayor explained the need for the Court to weigh in on public discourse on the term illegal. She stated:

> To dub every immigrant a criminal because they're undocumented, to call them "illegal aliens," seemed, and has seemed, insulting to me. Many of these people are people I know, and they're no different than the people I grew up with or who share my life. And they're human beings with a serious legal problem, but the word "illegal" alien made them sound like those other kinds of criminals. And I think people then paint those individuals as something less than worthy human beings. And it changes the conversation when you recognize that this is a different—it's a regulatory problem. We've criminalized a lot of it, but it started as, and fundamentally remains, a regulatory problem, not a criminal one. And so that's why I chose my words.[19]

Justice Sotomayor's dissents challenge existing norms within the United States immigration system, which has deference baked into its structure.[20] Her dissents demonstrate a pattern of requiring adherence

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https://www.usatoday.com/story/news/politics/2019/08/08/justice-sonia-sotomayor-supreme-court-liberal-hispanic-decade-bench/1882245001 [http://perma.cc/FBG8-9SBJ].

15. *See* Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 YALE L.J. F. 499, 500, 506, 510 (2014).

16. Wolf v. Cook Cnty., 140 S. Ct. 681 (2020); Barr v. East Bay Sanctuary Covenant, 140 S. Ct. 3 (2019).

17. Rodríguez, *supra* note 15, at 500.

18. *See* Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100, 103–04 (2009).

19. Justice Sonia Sotomayor & Linda Greenhouse, *A Conversation with Justice Sotomayor*, 123 YALE L.J. F. 375, 387 (2014).

20. Johnson, *supra* note 4, at 64.

to process and demanding that the Court examine the Administration's policies in context of their xenophobic and discriminatory rhetoric.[21] The dissents recognize that, where the structure of the immigration system requires deference, there is a corresponding need to adhere to procedure where decisions disproportionately impact immigrant communities based upon their race, gender, and class.[22]

Since 2017, Justice Sotomayor's dissenting opinions have focused on strict adherence to process and procedure, while pushing the Supreme Court to not ignore the discriminatory and xenophobic context and motivation of the President's immigration executive actions.[23] In conceptualizing how her opinions impact race, gender, and social justice, this Article highlights two important functions of her dissents for justice at the borders: (1) forcing future courts to balance the longstanding plenary powers doctrine when executive actions are rife with discriminatory animus; and (2) the need to strictly adhere to process[24] when the Court is upholding doctrines that privilege executive actions that disproportionately impact immigrants of color. The last Part of the Article considers the impact of her decisions at the intersection of race, gender, and immigration status by evaluating how her decisions might "appeal . . . to the intelligence of a future day";[25] propel legislative action;[26] and serve the public role of signaling to marginalized communities that someone is listening.[27]

I. SUBJECTING THE PLENARY POWERS DOCTRINE TO STRINGENT STANDARD OF REVIEW

This Section discusses Justice Sotomayor's dissent in *Trump v. Hawaii*.[28] This dissent must be placed in the context of the plenary powers doctrine. Historically, through the plenary powers doctrine,

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21. Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J. F. 525, 527 (2014).

22. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1917–18 (2020) (Sotomayor, J., dissenting).

23. Meares & Tyler, *supra* note 21, at 526.

24. *Id.* (defining Justice Sotomayor's jurisprudence as one focused on process that emphasizes making decisions fairly).

25. *See* Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 4 (2010) ("A dissent in a Court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.").

26. *See id.* at 7 (citing as example Justice Ginsburg's own dissent in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)).

27. Meares & Tyler, *supra* note 21, at 539 (stating that Justice Sotomayor "has her finger on the pulse of the American public and hence has a good sense of how to create and maintain legitimacy for the Court and its decisions").

28. Trump v. Hawaii, 138 S. Ct. 2392, 2433 (2018).

courts have deferred to the political branches' authority to regulate immigration.[29] Immigration scholar Kevin Johnson posits that the increase in this Administration's executive orders might expand the constitutional rights of immigrants where traditionally the executive branch's decisions have been subjected to limited review.[30] This Section discusses how Sotomayor's dissent in *Trump v. Hawaii* challenges the longstanding precedent of immigration exceptionalism in subjecting executive actions to a stringent standard of review where the constitutional rights of immigrants of color and religious minorities are implicated.[31]

A. Travel Ban Case: Trump v. Hawaii

On September 24, 2017, the President issued a Proclamation entitled *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States.*[32] In *Trump v. Hawaii* (also known as the *Travel Ban Case*), the plaintiffs challenged the President's 2017 Proclamations and Orders restricting the entry of foreign nationals from Muslim majority countries.[33] The President issued the Orders asserting:

> [C]ertain entry restrictions were necessary to "prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information"; "elicit improved identity management and information sharing protocols and practices from foreign governments"; and otherwise "advance [the] foreign policy, national security, and counterterrorism objectives of the United States. Proclamation § 1(h)."[34]

The plaintiffs argued that the President's Orders and Proclamation violated the Immigration and Nationality Act and the Establishment Clause of the First Amendment to the U.S. Constitution where the orders were "motivated not by concerns pertaining to national security but by [a discriminatory] animus toward Islam."[35]

The procedural history of this case and the enactment of the executive orders are very important to understand the context in which Sotomayor wrote her dissent. In January 2017, President

29. Kevin R. Johnson, *Immigration and Civil Rights in the Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611, 659 (2017).
30. *Id.* at 615–16.
31. *Trump*, 138 S. Ct. at 2441.
32. *Id.* at 2404.
33. *Id.* at 2406.
34. *Id.* at 2405.
35. *Id.* at 2406.

Trump signed Executive Order 13769—Protecting the Nation from Foreign Terrorist Entry Into the United States.[36] The Order banned the entry of immigrants from seven Muslim majority countries.[37] Multiple civil rights organizations and individuals filed lawsuits in Hawaii, Washington, and the District of Columbia.[38] After the lawsuits were filed, the Ninth Circuit[39] and the United States District Court for District of Columbia[40] issued nationwide injunctions halting the enforcement of the travel ban. After the injunction, the President revoked the Order and replaced it with Executive Order 13780.[41] This Order removed Iraq from the list of travel banned countries.[42] Thereafter, the President issued many revisions to the orders, in some instances removing countries that he deemed complied with the orders' requirements.[43]

The Supreme Court upheld the travel ban in a 5–4 decision.[44] Four of the Supreme Court Justices believed that an anti-Muslim animus motivated the Administration's travel ban.[45] Justice Sotomayor authored a dissenting opinion, which Justice Ginsburg joined.[46] Justice Sotomayor's dissent extensively documented Trump's words during and after the 2016 campaign and asked the question whether a reasonable observer would conclude that the proclamation was motivated by anti-Muslim animus.[47] In the dissent, she stated:

> The Court's decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and

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36. Davide De Lungo, *Protecting the Nation From Foreign Terrorist Entry Into the United States: A Constitutional Analysis of President Trump's Executive Orders*, 9 ITALIAN J. PUB. L. 189, 190 (2017).

37. *See Trump*, 138 S. Ct. at 2403.

38. *See, e.g.*, Complaint, Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (No. 2:17-cv-00141-JLR); Complaint, Ali v. Trump, No. C17-0135JLR (W.D. Wash. Jan. 30, 2017); Complaint, Arab Am. Civil Rights League v. Trump, 399 F. Supp. 3d 717 (E.D. Mich. 2017) (No. 2:17-cv-10310-VAR-SDD); Complaint, Hawaii v. Trump, 233 F. Supp. 3d 850 (D. Haw. 2017) (No. 17-00050 DKW-KJM); Complaint, Pars Equal. Ctr. v. Trump, No. 1:17-cv-00255 (TSC) (D.D.C. Feb. 8, 2017); Complaint, Int'l Refugee Assistance Project v. Trump, 404 F. Supp. 3d 946 (D. Md. 2017) (No. 8:17-cv-00361-TDC); Complaint, Universal Muslim Ass'n of Am., Inc. v. Trump, No. 1:17-cv-00537-TSC (D.D.C. Mar. 27, 2017); Complaint, Iranian Alliances Across Borders v. Trump, No. 8:17-cv-02921-GJH (D. Md. Oct. 2, 2017); Complaint, Zakzok v. Trump, No. 1:17-cv-02969-GLR (D. Md. Oct. 6, 2017).

39. Washington v. Trump, 847 F.3d 1151, 1169 (9th Cir. 2017).

40. Pars Equal. Ctr. v. Trump, No. 17-cv-0255 (TSC), 2018 U.S. Dist. LEXIS 70512, at *13 (D.D.C. March 2, 2018).

41. De Lungo, *supra* note 36, at 191.

42. *See Trump*, 138 S. Ct. at 2404.

43. *See id.* at 2403–06 (Breyer, J., dissenting) (Sotomayor, J., dissenting).

44. *Id.* at 2402; *see also* Kevin R. Johnson, *Keynote to Immigration in the Trump Era Symposium: Judicial Review and the Immigration Laws*, 48 SW. L. REV. 463, 465 (2019).

45. *See Trump*, 138 S. Ct. at 2433 (Breyer, J., dissenting) (Sotomayor, J., dissenting).

46. *Id.* at 2433.

47. *Id.* at 2434–36.

> unequivocally as a "total and complete shutdown of Muslims entering the United States" because the policy now masquerades behind a façade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President's words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus.[48]

Further, the dissent firmly asserted: "[w]hatever the merits of plaintiffs' complex statutory claims, the Proclamation must be enjoined for a more fundamental reason: It runs afoul of the Establishment Clause's guarantee of religious neutrality."[49] The dissent asserts that the Court should subject an administration's immigration decisions to strict review when there is strong evidence of the presence of discriminatory animus.[50] Her dissent began by evaluating the constitutionality of the Presidential Proclamation under the First Amendment's Establishment Clause.[51]

Her dissent provided a historical overview of the President's anti-Muslim comments through the issuance of the Executive Orders and Presidential Proclamations.[52] She provided the historical background of the Executive Orders as the basis of her dissent and posited that the Executive Orders could not be separated from their origins.[53] Given the President's statements, Sotomayor concluded:

> Ultimately, what began as a policy explicitly "calling for a total and complete shutdown of Muslims entering the United States" has since morphed into a "Proclamation" putatively based on national-security concerns. But this new window dressing cannot conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers.[54]

The dissent prioritized an individual's constitutional rights over immigration and national security priorities.[55] While the majority set aside the President's statements and encouraged deference to

48. *Id.* at 2433.
49. *Id.* at 2433–34.
50. *See id.* at 2440–41.
51. *Trump*, 138 S. Ct. at 2434–35.
52. *Id.* at 2435–38.
53. *See id.* at 2438.
54. *Id.* at 2440.
55. *See id.*

immigration and national security matters,[56] the dissent posited that the majority "incorrectly applie[d] a watered-down legal standard in an effort to short circuit plaintiffs' Establishment Clause claim."[57]

Justice Sotomayor distinguished the cases on which the majority relied, *Kerry v. Din*[58] and *Kleindienst v. Mandel*,[59] asserting that they were not applicable. For Sotomayor, the distinguishing factors in *Din* and *Mandel* were that the cases "involved . . . [the] Executive Branch['s] decision to exclude a single foreign national under a specific . . . ground of inadmissibility."[60] Whereas, in *Trump v. Hawaii*, the travel ban impacted millions of people on a single categorical basis—their religion.[61] She further posited that *Mandel* and *Din* did not attempt to create a "framework for adjudicating cases (like this one) involving claims that the executive branch violated the Establishment Clause by acting pursuant to an unconstitutional purpose."[62] For Sotomayor, these two factors were dispositive.

Certainly, Justice Sotomayor's analysis extends beyond the traditional deference courts have given to immigration executive actions. In the dissent, she clearly signaled to future courts how to balance the longstanding plenary powers doctrine when executive actions contain a discriminatory animus.[63] She asserted:

> [E]ven assuming that *Mandel* and *Din* apply here, they would not preclude us from looking behind the face of the Proclamation because plaintiffs have made "an affirmative showing of bad faith," by the President who, among other things, instructed his subordinates to find a "lega[l]" way to enact a Muslim ban . . . .[64]

She highlighted the fact that the Court has not ruled on a similar case where a President issued a Proclamation excluding a large segment of one particular religion.[65]

B. Ending Immigration Exceptionalism Through Exhaustive Review of Executive Actions

This dissent is significant for two reasons. First, the dissent highlighted the ways in which the majority opinion is similar to the case

56. *Id.* at 2440.
57. *Trump*, 138 S. Ct. at 2440.
58. Kerry v. Din, 576 U.S. 86, 88–89 (2015).
59. Kleindienst v. Mandel, 408 U.S. 753, 767–68 (1972).
60. *Trump*, 138 S. Ct. 2440 n.5.
61. *Id.*
62. *Id.*
63. *See id.* at 2441 n.6.
64. *Id.* at 2440 n.5.
65. *See id.* at 2441 n.6.

in which overturned *Korematsu v. United States*.[66] The *Korematsu* decision similarly deferred to a racist and xenophobic presidential policy that interred Japanese Americans.[67] Second, the dissent challenged the plenary powers doctrine when constitutional rights are implicated under the Establishment Clause.[68] Similar to the Administration's Muslim Ban, the Supreme Court in *Korematsu* "gave 'a pass [to] an odious, gravely injurious racial classification' authorized by an executive order."[69]

Sotomayor emphasized the parallel nature of both cases where the government "invoked an ill-defined national security threat to justify an exclusionary policy of sweeping proportion."[70] The dissent drew parallels between the travel ban and the government in *Korematsu*'s policies that were similarly based in discriminatory stereotypes to justify exclusionary immigration policies.[71] Both the *Hawaii* and *Korematsu* decisions were based in xenophobic and discriminatory notions that a particular group could not assimilate and thus was a national security risk to the United States.[72] Justice Sotomayor quotes, in full, Justice Murphy's dissent in *Korematsu*: "'[I]t is essential that there be definite limits to [the government's] discretion,' as '[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support.'"[73] Justice Murphy's language could be easily supplanted into Sotomayor's dissent in *Trump v. Hawaii.* Like the dissenting Justices in *Korematsu*, Sotomayor's dissent presages how the majority's opinion may similarly harm the "constitutional fabric."[74] She powerfully stated:

> This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority's decision here acceptable or right. By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the

66. *See Trump*, 138 S. Ct. at 2447–48 (citing Korematsu v. United States, 323 U.S. 214, 215 (1944)).

67. *See Korematsu*, 323 U.S. at 217, 219.

68. *See Trump*, 138 S. Ct. at 2440–41.

69. *Id.* at 2447.

70. *Id.* (citing Brief for Japanese American Citizens League as Amicus Curiae Supporting Petitioner, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22), 1944 WL 42852, at *12–14).

71. *Id.*

72. *Id.* at 2447–48 (citing *Korematsu*, 323 U.S. at 236–40 (Murphy, J., dissenting)).

73. *Id.* at 2448 (citing *Korematsu*, 323 U.S. at 234 (Murphy, J., dissenting)).

74. *Trump*, 138 S. Ct. at 2447–48.

> same dangerous logic underlying Korematsu and merely replaces one "gravely wrong" decision with another.[75]

In addition to drawing parallels between *Korematsu* and the instant case, Sotomayor called for a thorough examination of the intent behind the facially neutral Presidential Proclamation and, unlike the majority, she would have applied "a more stringent standard of review."[76] Justice Sotomayor asserted, however, that under any form of review—heightened or rational basis—the administrative actions were unconstitutional.[77]

Justice Sotomayor enumerated the President's multiple statements to demonstrate the President's discriminatory animus. For example:

- Campaign trail statement from President—"Statement on Preventing Muslim Immigration" that called for a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[78]
- Candidate Trump also stated, "Islam hates us" and asserted that the United States was "having problems with Muslims coming into the country."[79]
- Shortly after being elected, when asked whether violence in Europe had affected his plans to "ban Muslim immigration," the President replied, "You know my plans. All along, I've been proven to be right."[80]

Sotomayor asserted that the Presidential Proclamations could not be separated from their "express hostility toward Muslims."[81] She intentionally cited to the voluminous record evidence of anti-Muslim animus to support the conclusion that the Proclamation did not have a legitimate basis.[82] The dissent cited to the Constitutional Law Scholars Amicus Brief, which argued that when there is a discriminatory animus, presidential deference to executive actions should not be upheld.[83] The amicus asserted, "no matter how many

75. *Id.* at 2448.
76. *See id.* at 2441.
77. *Id.*
78. *Id.* at 2417.
79. *Id.*
80. *Trump*, 138 S. Ct. at 2417.
81. *Id.* at 2441–42.
82. *Id.* at 2442.
83. *See id.* at 2443.

officials affix their names to it, the Proclamation rests on a rotten foundation."[84]

A hallmark of many of Justice Sotomayor's opinions is her focus on procedural fairness.[85] Her immigration dissents similarly focus on whether the Administration's executive actions adhere to the proper procedure; and the Court's adherence to proper procedural rules.[86] She highlighted the fact that in issuing the Executive Orders, the President engaged in an administrative review process that was not disclosed to the public.[87] She stated, "[i]gnoring all this, the majority empowers the President to hide behind an administrative review process that the Government refuses to disclose to the public."[88] Pointing back to the structure of the Immigration and Nationality Act, she stated that the remedy for which the President allegedly sought to address in his orders would be to simply rely upon the structure of the Immigration and Nationality Act (INA), which already accounted for the concerns the President seeks to address.[89] The statutory scheme of the INA "already . . . fulfills the putative national-security interests the Government now puts forth to justify the Proclamation. Tellingly, the Government remains wholly unable to articulate any credible national-security interest that would go unaddressed by the current statutory scheme absent the Proclamation."[90]

The standard that emerges from the dissent is one that diminishes the plenary powers doctrine and immigration exceptionalism.[91] The standard would eliminate automatic deference and subject the executive branch's immigration decisions to constitutional norms.[92] The dissent is suggesting that the political branches' immigration actions should be subjected to constitutional review.[93]

Justice Sotomayor's dissent must be placed within the wider context of Supreme Court immigration jurisprudence and the plenary powers doctrine. Historically, the Supreme Court has been extremely deferential to the political branches' authority over immigration.[94] This deference has been upheld even when violations of

84. *Id.* (quoting Brief for Constitutional Law Scholars as Amici Curiae).
85. *Id.* at 2442–43.
86. *Trump*, 138 S. Ct. at 2442–44.
87. *See Trump*, 138 S. Ct. at 2443.
88. *Id.*
89. *Id.* at 2443–44.
90. *Id.* at 2444.
91. *See id.*
92. *See id.*
93. *See Trump*, 138 S. Ct. at 2441 n.6.
94. *See* Karla Mari McKanders, *Federal Preemption and Immigrants' Rights*, 3 WAKE FOREST J.L. & POL'Y 333, 340 (2013).

individual constitutional rights are alleged.[95] "[T]he history of America's immigration laws gives us insight into categories of people who were undesirable during a particular moment in our nation's history and justification for closely monitoring the constitutionality of laws that target immigrant populations."[96] The Chinese Exclusion Act cases demonstrate the depth of the plenary powers doctrine.[97] These cases provide the foundation for excluding immigration laws from judicial review when a discriminatory animus is present.[98] Since the Chinese Exclusion Act cases, the plenary powers doctrine has limited how far individual constitutional rights extend to immigrants.[99] This doctrine is based upon the idea that a country, as a sovereign, has the ability to create laws that are in their own interest.[100] "Traditionally immigration laws are considered a nation's prerogative[,] as a nation-state has the ability to discriminate against who is permitted to enter."[101]

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95. *See id.* ("[T]he Plenary Powers Doctrine has shielded congressional immigration determinations from substantive constitutional review."); *see also* Johnson, *supra* note 44, at 465 ("One of the foundations of immigration law has been something called the 'plenary power doctrine,' which is akin to a constitution-free zone for the immigration laws and, at times, Executive actions.").

96. McKanders, *supra* note 94, at 341.

97. *See id.*

98. *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909))); Chae Chan Ping v. United States, 130 U.S. 581, 603–04 (1889) (laying out the plenary powers doctrine which attributed the power as inherent to a sovereign nation); *see also* Chris Nwachukwu Okeke & James A.R. Nafziger, *United States Migration Law: Essentials for Comparison*, 54 AM. J. COMP. L. 531, 544 (2006) (stating "a cardinal doctrine of United States constitutional law is that Congress has an inherent, plenary power in matters of immigration"); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1630 (1997) ("[T]he federal government has enjoyed a virtual carte blanche on immigration matters.").

99. *See* Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 601 (2013); *see also* Johnson, *supra* note 44, at 465 (defining characteristic of plenary powers doctrine as "immigration exceptionalism").

100. *See* Plyler v. Doe, 457 U.S. 202, 225 (1982) ("Drawing upon [its Article I, section 8] power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders."); *see also Fiallo*, 430 U.S. at 787 ("Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments . . . .'"); League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 768 (C.D. Cal. 1995) (citing Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (recognizing the inherent power of a sovereign nation to control its borders)); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) (pointing out that the Constitution vests the national government with absolute control over international relations); *Chae Chan Ping*, 130 U.S. at 603 (stating that the government's power to exclude aliens from the United States is not open to controversy).

101. McKanders, *supra* note 94, at 340 (citing *Chae Chan Ping*, 130 U.S. at 603–04).

Immigration systems and borders are predicated on membership and belonging. Membership and belonging are narrowly construed and available to a limited few. The plenary powers doctrine affirms that sovereign nations inherently have the power to exclude or include noncitizens from its borders based upon criteria on which its citizenry decides through elected officials.[102]

Historically, the immigration system's structure has given the political branches unfettered discretion over who enters and exits the country.[103] The Supreme Court has limited powers to review the congressional actions and the President's discretion.[104] The political branches' authority to regulate immigration is an inherent power—as a sovereign the President can conduct foreign affairs and make decisions to protect the country's national security and implicate foreign affairs.[105] This is a political question. There has been a historical progression of federal regulation of immigration that has led to judicial deference to congressional and executive actions.[106]

Historically, the criteria upon which immigration laws are based have been discriminatory.[107] Immigration laws have been based on societal bias and prejudices, reinforced existing class and wealth structures, or included arbitrary reasons for exclusion and inclusion.[108] In the United States, immigration laws have operated to maintain homogeneity to the exclusion of immigrants of color.[109] Immigration laws have traditionally utilized fear and exclusion to define what America should look like, privileging the entry of immigrants of European descent.[110]

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102. *See id.* at 340–42; *see also* Abrams, *supra* note 99, at 611–18.

103. Anne Y. Lee, *The Unfettered Executive: Is There an Inherent Presidential Power to Exclude Aliens?*, 39 COLUM. J.L. & SOC. PROBS. 223, 228, 240 (2005).

104. *See id.* at 228.

105. *Id.* at 238–41.

106. *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 258–60 (1984). From this historical progression, immigration laws and executive actions have been subjected to limited review creating a form of immigration exceptionalism—especially when citizens' and noncitizens' fundamental constitutional rights are implicated.

107. *See* McKanders, *supra* note 94, at 334–35.

108. *See id.* at 343–44.

109. *See id.*; *see also* Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1059, 1066–68 (1994).

110. *See* McKanders, *supra* note 94, at 341–44; *see also* Emergency Immigration Act of 1921, the Immigration Restriction Act of 1921, the Per Centum Law, and the Johnson Quota Act, ch. 8, 42 Stat. 5 (the Quota law placed numerical restrictions on certain nationalities limiting migration from southern and eastern Europe. The restrictions greatly impacted the demographics of the United States until the 1964 Immigration Act removed numerical restrictions forever altering the demographics of noncitizens immigrating to the United States).

The Court's 5–4 *Hawaii v. Trump* decision is a step towards subjecting executive actions to a "stringent standard of review,"[111] when, as here, the First Amendment Establishment Clause and freedom of religion are implicated. When this occurs, the dissent would have courts examine facially neutral statutes to "discern" whether the executive policy bears "a relationship to legitimate state interests."[112] The analysis would involve a rigorous examination into the history that leads up to the promulgation of the executive actions and a rigorous analysis of executive action in relation to the statutory framework of the Immigration and Nationality Act. If this standard were applied, this would reorient the immigration system which has historically been highly deferential to executive and congressional authority and, in very limited circumstances has prioritized constitutional rights.[113]

II. EXECUTIVE ACTIONS RECONSTRUCTING OUR BORDERS MUST ADHERE TO THE RULE OF LAW

A theme throughout Sotomayor's dissents is that the executive branch should not be exempt from complying with the rule of law.[114] In multiple speeches, she has focused on how strict adherence to process and procedure provides a necessary legitimating function to the courts.[115] Sotomayor asserts, "And I can live with that if I perceive the process to be fair."[116] Justice Sotomayor has been called the People's Justice for her constant desire to create and maintain the Supreme Court's legitimacy with the public.[117] Accordingly, her recent immigration dissents focus on curtailing administrative actions that attempt to reconstruct borders without adhering to the rule of law.[118]

The following section discusses two different categories of dissents that serve the same function—eliminating immigration exceptionalism through adherence to the rule of law. First, in *Department of Homeland Security v. Regents of the University of California*, Sotomayor's dissent asserts that the majority erred in not permitting the case to proceed beyond the summary judgment stage for the

111. Four justices reviewed the executive actions under a heightened standard of review. Trump v. Hawaii, 138 S. Ct. 2392, 2441 (2018).

112. *Id.* at 2441–42.

113. *See* Plyler v. Doe, 457 U.S. 202, 225 (1982).

114. *See* Meares & Tyler, *supra* note 21, at 529.

115. *See id.* at 526, 528–29.

116. *Id.* at 527.

117. *Id.* at 539 ("[T]he Justice has her finger on the pulse of the American public and hence has a good sense of how to create and maintain legitimacy for the Court and its decisions.").

118. *See* Waslin, *supra* note 5, at 54–65.

examination and development of the plaintiffs' discrimination claims.[119] Second, in *Wolf v. Cook County* and *Barr v. East Bay Sanctuary Covenant,* her dissent highlights the extraordinary measures the Court took in considering lifting lower courts' injunctions at a procedurally premature stage in the case.[120]

A. Department of Homeland Security v. Board of Regents of the University of California

The Supreme Court's decision in *Department of Homeland Security v. Regents of the University of California*[121] considered the narrow issue of whether the Department of Homeland Security's (DHS) rescission of the Deferred Action for Childhood Arrivals (DACA) program complied with the Administrative Procedures Act (APA).[122] Justice Roberts wrote the majority opinion.[123] Justice Sotomayor concurred in part and dissented in part from the majority decision.[124]

The majority decision did not rule on the legality of DACA and the Administration's rescission of DACA.[125] Correspondingly, as addressed in Justice Sotomayor's dissent, the decision did not hold that the Administration's actions in rescinding DACA were undergirded by a discriminatory animus towards the Latinx community.[126] The Court's decision was limited to the legal issue of whether the Department of Homeland Security properly followed the APA when it rescinded DACA.[127] The Court held DHS did not.[128]

The majority held that the Department of Homeland Security failed to fully consider both: (1) the forbearance that DACA extends to its recipients; and (2) that DACA recipients have a "reliance interest" in the benefits it confers—work authorization, social security, and Medicare.[129] While the Court's opinion affirmed core principles of agency accountability and public confidence not convenience, the majority's opinion is very narrow.[130] The decision left open the

119. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1917 (2020).

120. *See* Wolf v. Cook Cnty., 140 S. Ct. 681, 681–83 (2020).

121. *See* Trump v. NAACP, 139 S. Ct. 2779 (2019) (consolidating Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260 (E.D.N.Y. 2018) and Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476 (9th Cir. 2018)).

122. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1905.

123. *Id.* at 1901.

124. *Id.* at 1916 (Sotomayor, J., dissenting in part and concurring in part).

125. *Id.* at 1905.

126. *Id.* at 1915–16.

127. *Id.* at 1916.

128. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1910, 1916–17.

129. *Id.* at 1906, 1914, 1929–30.

130. *See id.* at 1916.

possibility that the Administration could comply with the APA and rescind DACA.[131]

Justice Sotomayor concurred with the majority's holding that the rescission of DACA violated the APA, yet she dissented with the majority's decision to foreclose review of the plaintiff's equal protection claims, given the procedural posture of the case.[132] She asserted that the procedural posture of the case—at the motion to dismiss stage—precluded respondents from being able to fully develop the record on their equal protection claims.[133] Unlike the majority, the dissent suggests that the disparate impact of the rescission on the Latinx community could not be considered in isolation of the President's policy agenda.[134]

Justice Sotomayor cited some of the Administration's statements asserted in the complaints as evidence that the record needed further development.[135] She cited: "The *Batalla Vidal* complaints catalog then-candidate Trump's declarations that Mexican immigrants are 'people that have lots of problems,' 'the bad ones,' and 'criminals, drug dealers, [and] rapists.'"[136] The *Regents* complaints additionally quote President Trump's 2017 statement comparing undocumented immigrants to 'animals' responsible for 'the drugs, the gangs, the cartels, the crisis of smuggling and trafficking, [and] MS13.'"[137] The majority of the complaints in the litigation contained voluminous discriminatory statements by President Trump.[138]

In addition, the underlying complaints contained more evidence of a possible discriminatory animus, including:

> President Trump's statements and actions reflect a pattern of bias against Mexicans and Latinos. For example, on February 24, 2015, President Trump demanded that Mexico "stop sending

131. *Id.* at 1897.

132. *Id.* at 1917–18.

133. *Id.*

134. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1917–18.

135. *Id.*

136. *Id.* at 1917 (citing Complaint at ¶ 91, Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260 (E.D.N.Y. 2018) (No. 1:16-cv-04756) ("In his presidential announcement speech, then-candidate Trump stated: 'When Mexico sends its people, they're not sending their best . . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists.'")).

137. *Id.* (citing Complaint at ¶¶ 101–13, 124, Garcia v. United States, No. 3:17-cv-05 380-JCS (N.D. Cal. filed Sept. 18, 2017)).

138. *See* Complaint at ¶¶ 91–100, Batalla Vidal v. Nielsen, No. 1:16-cv-04756(NGG) (JO) (291 F. Supp. 3d 260) (containing Trump's discriminatory statements); Complaint, Santa Clara Cty. v. Trump, No. 5:17-cv-05813 (N.D. Cal. filed Oct. 10, 2017); Complaint at ¶¶ 101–13, 124, Garcia v. United States, No. 3:17-cv-05380 (N.D. Cal. filed Sep. 18, 2017); Complaint at ¶¶ 1, 32–35, Cty. of San Jose v. Trump, No. 3:17-cv-05329-WHA (N.D. Cal. filed Sept. 14, 2017); Complaint at 239–49, New York v. Trump, No. 1:17-cv-05228 (E.D.N.Y. filed Sept. 6, 2017).

> criminals over our border." On March 5, 2015, President Trump tweeted that he "want[ed] nothing to do with Mexico other than to build an impenetrable WALL . . . ."[139]
>
> Since his inauguration, Defendant Trump has continued to express animus toward Mexicans and Latinos through both his words and actions. In August 2017, in a speech in Arizona, Defendant Trump described some undocumented immigrants as "animals."[140]
>
> On August 25, 2017, President Trump pardoned former Maricopa County Sheriff Joe Arpaio, who was to be sentenced for criminal contempt for failing to comply with a federal judge's order to stop racially profiling Latinos.[141]

The dissent focused on how the President's racist statements provided the main reason for which DACA was rescinded.[142] She highlighted how, if the facts asserted in each consolidated case complaints were developed, it might lead to a demonstration of a violation of the Equal Protection Clause.[143] "Taken together, 'the words of the President' help to 'create the strong perception' that the rescission decision was 'contaminated by impermissible discriminatory animus.' This perception provides respondents with grounds to litigate their equal protection claims further."[144]

Second, the dissent challenged the majority's minimization of the disproportionate impact of the recission on the Latinx community.[145] The majority asserted that the equal protection claim fails where any immigration policy will *per se* have a disproportionate impact on the Latinx community.[146] In response, the dissent asserted that the impact of the rescission could not be viewed in isolation from, but within, "the context of the President's public statements on and off the campaign trail."[147]

Referencing back to the procedural posture of the case, Justice Sotomayor asserted that because the case was only at the motion-to-dismiss stage, the case needed to be remanded for further exploration of whether the executive action "disproportionately harms the

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139. Complaint at 101, *Garcia*, No. 3:17-cv-05380.
140. Complaint at 97, *Batalla Vidal*, 291 F. Supp. 3d 260.
141. Complaint at 249, *Trump*, No. 1:17-cv-05228.
142. *See Regents of the Univ. of Cal.*, 140 S. Ct. at 1917.
143. *Id.*
144. *Id.* (quoting Trump v. Hawaii, 138 S. Ct. 2391, 2440 (2018) (Sotomayor, J., dissenting)).
145. *Id.* at 1917–18.
146. *Id.* at 1915.
147. *Id.* at 1918.

same racial group that the President branded as less desirable mere months earlier."[148] To Sotomayor, the timing of the change in policy demonstrated that legality of DACA was pretextual.[149] She suggested that the abruptness of the change demonstrated an incongruence between the decision and the rationale.[150]

Ultimately, her dissent stressed the importance of adherence to procedure, which reinforces the legitimacy of the Supreme Court.[151] Here, the failure to permit the full development of the discrimination claims, in light of the President's statements, undermines the legitimacy of the court system.[152] The legitimacy of court procedures and allowing the respondent's claims to be fully developed is significant, given the manner in which court systems in the United States have served as an instrument of discrimination against marginalized communities. Justice Sotomayor's adherence to procedure is grounded in ensuring public confidence in the system, rather than ensuring a particular outcome. When the rules have not been followed and the outcome is against the litigant, it does not inspire public trust and confidence that the court has reached the right result.[153]

B. Wolf v. Cook County

In *Wolf v. Cook County*, the Administration petitioned the Supreme Court to overturn a preliminary injunction to enforce its regulation changing the parameters of when a noncitizen under 8 U.S.C. § 1182(a)(4)(A) would be inadmissible based upon their likelihood of becoming dependent on the state—becoming a public charge.[154] "This new regulation . . . defines a 'public charge' as 'an alien who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months).'"[155]

The majority decision lifted the district court's granting of a preliminary injunction, allowing enforcement pending the disposition of the Government's appeal in the Seventh Circuit.[156] It is not typical for the Supreme Court to issue an opinion on an order granting a preliminary injunction.[157] Justice Sotomayor wrote a dissenting

148. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1918.
149. *See id.*
150. *Id.* (citing Dep't of Com. v. New York, 139 S. Ct. 2551, 2575 (2019)).
151. *See id.* at 1926–29.
152. *See id.* at 1918–19.
153. *See* Sotomayor & Greenhouse, *supra* note 19, at 376.
154. *See* Wolf v. Cook Cnty., 140 S. Ct. 681, 681 (2020).
155. *Id.* at 681–82 (quoting 8 U.S.C. § 1182(a)(4)(A)).
156. *See id.* at 681.
157. *See id.*

opinion highlighting the procedural irregularity and the Administration's reflexive use of petitioning the Court before cases are ripe for judicial review.[158]

Again, Justice Sotomayor's dissent focused on strict adherence to procedure.[159] She admonished the Court's affirming the Administration's request for it to overturn two lower courts' grant of a stay.[160] She cited this as "a now-familiar pattern"[161] and "'th[e] exceptional mechanism' of stay relief 'as a new normal.'"[162] In her dissent, speaking to her colleagues, she encouraged the Supreme Court to remember the standard the government must meet in order to obtain a stay and reminded the government that it cannot simply presume that it will obtain the assent of five Justices on the legal issues.[163] The standard is a higher standard when the government—or a party—seeks to depart from the standard rules of appellate procedure.[164]

In other cases, the Administration argued that Supreme Court intervention was necessary where the district court issued nationwide injunctions.[165] This case can be distinguished because both the district court and the Seventh Circuit issued injunctions that were only applicable to the state of Illinois, not the entire country.[166] Justice Sotomayor called out the Administration in what is becoming a familiar pattern of petitioning the Supreme Court before a case is ripe for review:

> 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. Indeed, its behavior relating to the public-charge rule in particular shows how much its own definition of irreparable harm has shifted. Having first sought a stay in the New York cases based, in large part, on the purported harm created by a nationwide injunction, it now disclaims that rationale and insists that the harm is its temporary inability to enforce its goals in one State.[167]

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158. *See id.* at 682.
159. *See id.* at 682–83.
160. *Wolf*, 140 S. Ct. at 681–82.
161. *Id.* at 681.
162. *Id.* at 683 (citing Barr v. East Bay Sanctuary Covenant, 140 S. Ct. 3, 6 (2019) (Sotomayor, J., dissenting from grant of stay)).
163. *See id.* at 683–84.
164. *See id.* at 683 (citing Packwood v. Senate Select Comm. on Ethics, 510 U.S. 1319, 1320 (1994)).
165. *Id.*
166. *See Wolf*, 140 S. Ct. at 682–83.
167. *Id.* at 683.

Her dissent focused on how the failure to adhere to basic rules of appellate procedure creates a "disparity in treatment [that] erodes the fair and balanced decision-making process that this Court must strive to protect."[168]

C. Barr v. East Bay Sanctuary Covenant

In July 2019, the Administration promulgated an interim rule, 8 C.F.R. § 208, restricting asylum applicants on the southern border.[169] The joint interim rule, 8 C.F.R. § 208, banned all asylum seekers who enter or attempt to enter the United States across the southern land border who transit through a safe third country in to the United States.[170] The rule provided that a person in transit must apply in the countries through which they transited.[171] Simultaneously, the Administration entered into Asylum Cooperation Agreements with El Salvador (September 20, 2019),[172] Honduras (September 21, 2019),[173] and Guatemala (July 26, 2019).[174]

In *Barr v. East Bay Sanctuary Covenant*, legal and social service organizations challenged the validity of the joint interim rule.[175] Before the Ninth Circuit heard arguments on the merits of the case, the Administration petitioned the Supreme Court to issue a stay pending appeal allowing the interim rule to go into effect.[176] The Administration's petition and the Court's response were a departure from normal procedure.[177]

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168. *Id.* at 684.

169. 8 C.F.R. § 208.13 (c)(4) (2019).

170. *Id.*

171. *See id.*

172. *See* Press Release, *Joint Statement Between the U.S. Government and the Government of El Salvador*, DEP'T OF HOMELAND SEC. (Sept. 20, 2019), https://www.dhs.gov/news/2019/09/20/joint-statement-between-us-government-and-government-el-salvador [https://perma.cc/7G68-7TQ6].

173. *See* Agreement Between the Government of the United States of America and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims, U.S.-Hond., Sept. 25, 2019, T.I.A.S. No. 20-325; *see also* Press Release, *Joint Statement Between the U.S. Government and the Government of Honduras*, DEP'T OF HOMELAND SEC. (Sept. 21, 2019), https://www.dhs.gov/news/2019/09/21/joint-statement-between-us-government-and-government-honduras [https://perma.cc/G2S7-N3N2].

174. *See* Agreement between the United States of America and Guatemala, U.S.-Guat., July 26, 2019, T.I.A.S. No. 04-1229; *see also* Press Release, Joint Statement between the U.S. Government and the Government of Guatemala, DEP'T OF HOMELAND SEC. (July 22, 2019), https://www.dhs.gov/news/2019/07/22/joint-statement-between-us-government-and-government-guatemala [https://perma.cc/Q32G-B486].

175. *See* 8 C.F.R. § 208.30 (2019); Barr v. East Bay Sanctuary Covenant, 140 S. Ct. 3, 3 (2019). On June 30, in *Capital Area Immigrants' Rights Coal. v. Trump*, the district court held that the third country agreements were invalid. *See* No. 1:19-cv-02117-TJK, 2019 WL 3436501 (D.D.C. filed June 30, 2020).

176. *See* Vladeck, *supra* note 12, at 143.

177. *Id.* at 130–31.

On September 11, 2019, the Supreme Court issued a stay lifting the Ninth Circuit's injunction halting the interim rule's implementation.[178] The Supreme Court's order allowed the executive branch's proposed rule to go into effect pending litigation.[179]

Justice Sotomayor's dissent, joined by Justice Ginsburg, was highly unusual, as the Supreme Court typically does not issue opinions when lifting a stay.[180] Her dissent followed a similar pattern, given her repeated focus on procedural fairness.[181] The dissent made two major points. First, the dissent highlighted the Administration's promulgation of a rule without following the standard rulemaking procedures under the Administrative Procedures Act.[182] The dissent cited to the district court's opinion, where the court issued an injunction halting the enforcement of the government's rule finding that the government was unlikely to succeed in the merits of their case.[183] Specifically, the district court found that the government did not follow the two requisite steps for promulgating the transit ban regulations under the Administrative Procedures Act (APA).[184]

Agencies must first publish notice of the proposed rule in the Federal Register and, second, there must be a public commenting period.[185] During the public commenting period, people may submit data, opinions or arguments, either written or orally.[186] The Administration did not follow these two steps.[187]

Sotomayor admonished the Court for lifting the injunction.[188] In allowing the regulation to go into effect, the Court dismantled decades of asylum procedures.[189] She noted that the implementation of this policy had a disparate impact on "some of the most vulnerable people in the Western Hemisphere—without affording the public a chance to weigh in."[190]

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178. *See East Bay Sanctuary Covenant*, 140 S. Ct. at 3.

179. *See id.*

180. Ian Millhiser, *The Supreme Court's Enigmatic "Shadow Docket," Explained*, VOX (Aug. 11, 2020), https://www.vox.com/2020/8/11/21356913/supreme-court-shadow-docket-jail-asylum-covid-immigrants-sonia-sotomayor-barnes-ahlman.

181. *See East Bay Sanctuary Covenant*, 140 S. Ct. at 4.

182. *Id.* at 4–5.

183. *Id.* at 5.

184. *See id.* at 4–5 (citing East Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922, 947 (C.D. Cal. 2019)).

185. *See id.* at 4 (citing *East Bay Sanctuary Covenant*, 385 F. Supp. 3d at 947–51).

186. *See id.* at 4–5 (citing *East Bay Sanctuary Covenant*, 385 F. Supp. 3d at 947–51).

187. *See Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. at 5–6 (citing *East Bay Sanctuary Covenant*, 385 F. Supp. 3d at 947).

188. *Id.* at 4–6.

189. *Id.* at 5.

190. *Id.*

Second, the dissent highlighted the Supreme Court's acquiescence to the Administration's petitioning the Court before it properly proceeded through the court system.[191]

> By granting a stay, the Court simultaneously lags behind and jumps ahead of the courts below. And in doing so, the Court sidesteps the ordinary judicial process to allow the Government to implement a rule that bypassed the ordinary rulemaking process. I fear that the Court's precipitous action today risks undermining the interbranch governmental processes that encourage deliberation, public participation, and transparency.[192]

Here, Justice Sotomayor asserted the need to strictly adhere to procedure.[193] In lifting the injunction, the Court—without issuing an opinion—was essentially confirming strict deference to the executive branch's plenary power over immigration.[194] Since 2017, the Administration has increasingly petitioned the Supreme Court to bypass district and circuit court nationwide injunctions prior to the case proceeding through the lower courts.[195] The dissent forced the Court to reconcile its decision with the longstanding practice of failing to rule on a case prior to it properly proceeding through the lower courts.[196] She stated, "[u]nfortunately, it appears the Government has treated this exceptional mechanism as a new normal. Historically, the Government has made this kind of request rarely; now it does so reflexively."[197] The core principle that emerged from this dissent is that the Administration is not above the APA and that the Administration's use of the Supreme Court to resolve cases before they go through the proper appellate procedures to the Supreme Court is unacceptable.[198]

CONCLUSION

Justice Sotomayor's immigration dissents in cases challenging executive actions serve three important functions: (1) signal the ways in which immigration exceptionalism has permitted the abandonment

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191. *Id.*
192. *Id.*
193. *See East Bay Sanctuary Covenant*, 140 S. Ct. at 4–5.
194. *Id.*
195. *See* Vladeck, *supra* note 12, at 124, 134.
196. *See East Bay Sanctuary Covenant*, 140 S. Ct. at 5 ("By granting a stay, the Court simultaneously lags behind and jumps ahead of the courts below. And in doing so, the Court sidesteps the ordinary judicial process to allow the Government to implement a rule that bypassed the ordinary rulemaking process. I fear that the Court's precipitous action today risks undermining the interbranch governmental processes that encourage deliberation, public participation, and transparency.").
197. *Id.* at 6.
198. *See id.* at 4–5.

of adherence to the rule of law;[199] (2) reinforce the need for congressional reform;[200] and (3) signal to marginalized communities that the pretext of regulating immigration and national security do not provide cover for the Administration's racist and xenophobic immigration policies.[201]

Historically, Supreme Court dissents in civil rights cases have served the important function of holding government institutions accountable for blatant discrimination and legalized segregation.[202] Public commentators have likened Justice Sotomayor's dissents to the dissents in 1960s civil rights cases.[203] Noting that her dissent in *Trump v. Hawaii*

> would be like recounting George Wallace's comments in 1963 about segregation but finding his refusal to allow African Americans into an all-white school was based on some legitimate educational rationale. If Trump shouted from the rooftops, "*Of course I did it to get Muslims*!" the majority would no doubt find reason to disregard the confession. (And isn't that what he did over and over again—confess to anti-Muslim bigotry?)[204]

In the Supreme Court's history, the most memorable dissents were written when Justices highlighted the incongruence between systems of legalized segregation and constitutional norms.[205] The dissents later would become the prevailing norms for affirming the

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199. *See* Ginsburg, *supra* note 25, at 4 ("A dissent in a Court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.").

200. *See id.* at 6–7 (citing as example Justice Ginsburg's own dissent in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)).

201. *See id.* at 4–5. Justice Ginsburg, in a lecture, creates two main typologies for dissenting opinions: (1) intelligence of a future day—"A dissent in a Court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed"; and (2) aims to attract immediate public attention and, thereby, to propel legislative change. *Id.* at 4, 6. I add a third function to her typologies—the public function—to those whose rights are taken away by the majority, and the Justice signals there is someone listening. *See also* Meares & Tyler, *supra* note 21, at 539 ("Justice [Sotomayor] has her finger on the pulse of the American public and hence has a good sense of how to create and maintain legitimacy for the Court and its decisions.").

202. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393, 564 (1857) (Curtis, J., dissenting), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting); Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Curtis, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

203. *See* Jennifer Rubin, *Sotomayor's Searing Dissent is Worth Savoring*, WASH. POST (June 27, 2018, 9:15 AM), https://www.washingtonpost.com/blogs/right-turn/wp/2018/06/27/sotomayors-searing-dissent-is-worth-savoring [http://perma.cc/4X6B-RDY6].

204. *Id.*

205. *See* Damon Keith, *One Hundred Years after* Plessy v. Ferguson, 65 U. CIN. L. REV. 853, 855–56 (1997).

right of African Americans to equal protection under the law.[206] Historic Supreme Court dissents were written in *Dred Scott v. Sandford* (1857),[207] *Civil Rights Cases* (1883),[208] and *Plessy v. Ferguson* (1896).[209] In these cases, the majority refused to acknowledge the humanity of African Americans, which was an official legal endorsement of racial segregation and discrimination against African Americans.[210]

Like the infamous civil rights dissents, Justice Sotomayor calls attention to the ways in which immigration laws have operated in a vacuum of exceptionalism that has resulted in the abrogation of immigrant's fundamental constitutional rights.[211] She highlights with clarity how the adherence to rule of law and upholding immigrant's fundamental rights within the Constitution do not permit this Administration—in the name of sovereignty and national security—to act with impunity when racist and xenophobic statements provide the context for their policies.[212] Recognizing the power of dissenting opinions herself, Justice Sotomayor highlighted the similarity between her dissent in *Trump v. Hawaii* and Justice Murphy's dissent in *Korematsu*.[213] Both dissents called attention to national security justifying immigration policies that are cover for discriminatory animus.[214]

Justice Sotomayor's dissents are written in a context where the President has sought to enforce executive actions that are connected to discriminatory and xenophobic statements during his campaign and while in office.[215] Her dissents demand strict adherence to procedure, while forcing the Court to recognize the discriminatory and xenophobic rhetoric that has driven its immigration policy agenda. Accordingly, her dissents provide wisdom to a future day where immigration authority does not reign supreme in the face of blatant discriminatory and xenophobic immigration laws and policies.

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206. *See* Brook Thomas, Plessy v. Ferguson *and the Literary Imagination*, 9 CARDOZO STUD. L. & LITERATURE 45, 60–62 (1997).

207. Dred Scott v. Sandford, 60 U.S. 393, 564 (1857), (Curtis, J., dissenting), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

208. The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

209. Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Curtis, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

210. *Id.* at 543, 548, 551; *Civil Rights Cases*, 109 U.S. at 24–25; *Dred Scott*, 60 U.S. at 395–96, 404–05.

211. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2433 (2018).

212. *Id.* at 2440–41.

213. *Id.* at 2392, 2447–48.

214. *Id.*

215. *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1917 (2020) (Sotomayor, J., dissenting).