AMERICAN CONSTITUTIONALISM

VOLUME I: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Judicial Power and Constitutional Authority/Constitutional Litigation

**Department of Homeland Security v. New York, 140 S. Ct. 599** (2020).

*The Department of Homeland Security in 2019 changed the definition of “public charge” in federal immigration laws. The new rule prohibited the admission of any noncitizen who received financial or non-financial benefits (i.e., food stamps) from a government agency. New York immediately filed a lawsuit, claiming the new rule violated constitutional rights and the Administrative Procedure Act, and immigration law. The local federal court issued a preliminary injunction forbidding the United States from implementing that rule anywhere in the country. While an appeal of that injunction was pending in the Court of Appeals for the Second Circuit, the Department of Homeland Security asked the Supreme Court of the United States to vacate the lower court’s order.*

 *The Supreme Court by a 5-4 vote stayed the preliminary injunction. Justice Neil Gorsuch’s concurring opinion condemned the increased tendency of lower federal courts to issue nationwide injunctions. The court in this case, he notes, did not simply enjoin implementation of new federal rules in New York or in the states covered by the Second Circuit, but throughout the United States. Why might lower federal courts think they have the power to issue national injunctions? Why does Justice Gorsuch object to this power? Who has the better of the argument? The vast majority of nationwide injunctions were issued during the Trump presidency. What about the Trump presidency inspired this judicial practice? Are nationwide injunctions likely to survive the Trump presidency?*

The application for stay presented to Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=If4ae13793c5f11eaadfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If4ae13793c5f11eaadfea82903531a62) and by her referred to the Court is granted.

Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=If4ae13793c5f11eaadfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If4ae13793c5f11eaadfea82903531a62), Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=If4ae13793c5f11eaadfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If4ae13793c5f11eaadfea82903531a62), Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=If4ae13793c5f11eaadfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If4ae13793c5f11eaadfea82903531a62), and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=If4ae13793c5f11eaadfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If4ae13793c5f11eaadfea82903531a62) would deny the application.[[1]](#footnote-1)

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=If4ae13793c5f11eaadfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If4ae13793c5f11eaadfea82903531a62), with whom Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=If4ae13793c5f11eaadfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If4ae13793c5f11eaadfea82903531a62) joins, concurring in the grant of stay.

. . . .

. . . . The real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them. Whether framed as injunctions of “nationwide,” “universal,” or “cosmic” scope, these orders share the same basic flaw—they direct how the defendant must act toward persons who are not parties to the case.

Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit. 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 thus raise serious questions about the scope of courts’ equitable powers under Article III.

It has become increasingly apparent that this Court must, at some point, confront these important objections to this increasingly widespread practice. As the brief and furious history of the regulation before us illustrates, the routine issuance of universal injunctions is patently unworkable, sowing chaos for litigants, the government, courts, and all those affected by these conflicting decisions. . . .

This is not normal. Universal injunctions have little basis in traditional equitable practice.. . . By their nature, universal injunctions tend to force judges into making rushed, high-stakes, low-information decisions. The traditional system of lower courts issuing interlocutory relief limited to the parties at hand may require litigants and courts to tolerate interim uncertainty about a rule's final fate and proceed more slowly until this Court speaks in a case of its own. But that system encourages multiple judges and multiple circuits to weigh in only after careful deliberation, a process that permits the airing of competing views that aids this Court's own decisionmaking process. The rise of nationwide injunctions may just be a sign of our impatient times. But good judicial decisions are usually tempered by older virtues.

Nor do the costs of nationwide injunctions end there. There are currently more than 1,000 active and senior district court judges, sitting across 94 judicial districts, and subject to review in 12 regional courts of appeal. Because plaintiffs generally are not bound by adverse decisions in cases to which they were not a party, there is a nearly boundless opportunity to shop for a friendly forum to secure a win nationwide.  The risk of winning conflicting nationwide injunctions is real too.  And the stakes are asymmetric. If a single successful challenge is enough to stay the challenged rule across the country, the government's hope of implementing any new policy could face the long odds of a straight sweep, parlaying a 94-to-0 win in the district courts into a 12-to-0 victory in the courts of appeal. A single loss and the policy goes on ice—possibly for good, or just as possibly for some indeterminate period of time until another court jumps in to grant a stay. And all that can repeat, *ad infinitum*, until either one side gives up or this Court grants certiorari. What in this gamesmanship and chaos can we be proud of?

1. Justice Sotomayor’s dissent in *Wolf v. Cook County, Illinois* (2020) explains why she would have denied the petition in *Department of Homeland Security*. [↑](#footnote-ref-1)