COURT-STRIPPING AND CLASS-WIDE RELIEF: A RESPONSE TO JUDICIAL REVIEW IN IMMIGRATION CASES AFTER AADC

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It is an honor to comment on Judicial Review in Immigration Cases After AADC, written by Professor Hiroshi Motomura—he is a scholar who has had a tremendous impact on our understanding of immigration law. In his article, Professor Motomura has attempted and accomplished an admirable feat on two separate fronts. The first is a descriptive project that maps out the inner workings of a statutory beast, Immigration and Nationality Act ("INA") § 242, the main provision governing judicial review following the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Within this meaty topic, Professor Motomura’s focus is to chart the manner in which consolidation of claims as to both timing and multi-party joinder will be interpreted under § 242, and to parse out the uncertainties that Reno v.

* © Leti Volpp 2000. Assistant Professor, Washington College of Law, American University. In the interest of full disclosure, I worked for the ACLU Immigrants’ Rights Project on cases challenging the stripping of judicial review over removal orders. These remarks were initially prepared for the “Workshop on the Supreme Court and Immigration and Refugee Law” at Georgetown University Law Center, October 9-10, 1999. I am very grateful to Alex Aleinikoff for inviting me to take part. Special thanks to Lucas Guttentag, who provides perennial inspiration. Many thanks to Kevin Johnson, Lewis Grossman, and Joan Shaughnessy for helpful suggestions. My research assistants Rose Cuison and Leah Werchick provided much appreciated assistance.

I dedicate this comment to my dear friend and colleague, Peter Cicchino.


In addition, Professor Motomura is a scholar of civil procedure, which is evident in his article for this Symposium. See Hiroshi Motomura, Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices, 63 Tul. L. Rev. 298 (1988); Hiroshi Motomura, Using Judgments as Evidence, 70 Minn. L. Rev. 979 (1986).

American-Arab Anti-Discrimination Committee ("AADC") left for these issues. As Professor Motomura demonstrates, three provisions of § 242 of the INA are especially relevant to questions of consolidation: subsection (b)(9), consolidating timing of claims;\(^5\) subsection (f), limiting injunctive relief;\(^6\) and subsection (g), foreclosing jurisdiction.\(^7\)

While subsection (g) became the interpretative focus of AADC, Professor Motomura rightly points out that, following Justice Scalia’s limited reading of the reach of (g) in AADC, the provision that may create the most cause for concern for those seeking judicial review is subsection (b)(9). Herein lies Professor Motomura’s second important effort. This is a normative project, to save non-final-order judicial review of certain claims under (b)(9). Subsection (b)(9) was described by Justice Scalia as a “channeling” provision,\(^8\) that would bar interlocutory appeals. Professor Motomura challenges this assumption by importing from civil procedure the concept of collateral orders. Applying the doctrine of collateral orders to the context of the removal process would permit immediate judicial review of significant and independent matters—for example, a constitutional challenge to unlawful detention—even if related to a pending removal proceeding.

The amount of work and thought that both aspects of this article reflect is laudable. I do not have substantive differences with Professor Motomura’s description and analysis of the future of judicial review under § 242. What I will do here is quibble with one claim made by Professor Motomura, and then devote the remainder of this comment to examining the meaning of

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(9) Consolidation of questions for judicial review
Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section.


(f) Limit on injunctive relief
(1) In general
Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of title II [INA §§ 231-244], as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

7. INA § 242(g), 8 U.S.C. § 1252(g) (Supp. III 1998) provides:

(g) Exclusive jurisdiction
Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

8. AADC, 119 S. Ct. at 941, 949.
§ 242(f), one of the three statutory provisions of § 242 that Professor Motomura calls especially relevant, but that is not a focus of his paper.

I. DILATORY TACTICS

My disagreement lies in Professor Motomura furthering a particular perspective as to why noncitizens might engage in litigation. Lest our aversion to an inability to bring interlocutory or multi-party claims, and the ensuing results (a camouflaged problem; an unlawful imprisonment) eclipse all else, Professor Motomura balances these concerns with the government's perspective. In particular, he points out that allowing interlocutory appeals, or permitting multi-party joinder, introduces inefficiencies into an already overburdened system. Professor Motomura notes that this problem is "a real one," exacerbated by the fact that some noncitizens rush into federal court so as to engage in dilatory litigation.

Here is my concern. Professor Motomura describes his target audience as courts, and secondarily, Congress, suggesting the desire for a reasoned and objective tone. I assume that this is why he insists on looking at these issues from the point of view of the government, and why he neither criticizes Congress' enactment of legislation that deprives immigrants of judicial review, nor describes the context in which this occurred. To elect this as an approach does not, to me, damage the very real strength and importance of the paper. But I must voice here my discomfort with one specific claim made by Professor Motomura, that, "[u]nfortunately, the ability to run into federal court at every turn is also, for some, an irresistible temptation for dilatory litigation meant to string out the procedures as long as possible."

This is precisely the claim used by Justice Scalia and others as a basis on which to call for streamlining the process of judicial review. Justice Scalia in AADC, in holding that plaintiffs had no constitutional right to assert selective prosecution as a defense against deportation, specifically invoked the specter of dilatory litigation. He wrote:

[The concerns that inhibit the courts from examining selective prosecution claims] are greatly magnified in the deportation context. Regarding, for example, the potential for delay: Whereas in criminal proceedings the consequence of delay is merely to postpone the criminal's receipt of his just deserts, in deportation proceedings the consequence is to permit and prolong a continuing violation of United States law.

9. I note, however, that what the prescribed legislative fix would be is not clear in the article.
10. At the Workshop, the panel's moderator, Frank Wu, appeared to disagree with this.
Postponing justifiable deportation (in the hope that the alien's status will change—by, for example, marriage to an American citizen—or simply with the object of extending the alien’s unlawful stay) is often the principal object of resistance to a deportation proceeding, and the additional obstacle of selective-enforcement suits could leave the [Immigration and Naturalization Service] hard pressed to enforce routine status requirements.\(^4\)

Putting aside the fact that Justice Scalia appears to overestimate the ease with which noncitizens can escape deportation through marriage,\(^5\) it is important to recognize the impact of the popular presumption that the challenges to removal proceedings brought by noncitizens are frivolous, and often engaged in solely for the purpose of prolonging unlawful residence in the United States. The idea that “illegal aliens” engage in abusive delays is a narrative that has enabled Congress to limit judicial review.\(^6\) In particular, Congress in 1996 explicitly stripped courts of statutory authority to review the following: final orders of removal for most so-called “criminal aliens”; detention pending removal; denials of discretionary relief from removal, including cancellation of removal, voluntary departure, adjustment of status and certain waivers of inadmissibility; and most determinations relating to “expedited removal.”\(^7\)

14. AADC, 119 S. Ct. at 946-47. Justice Scalia also claimed in the opinion that it made sense for (g) to bar judicial review over even pending cases challenging the decision or action of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders, because Congress was concerned about the “deconstruction, fragmentation, and hence prolongation of removal proceedings.” Id. at 945.

15. A noncitizen in removal proceedings cannot adjust status through a marriage entered into for purposes of changing immigration status. INA § 245(e), 8 U.S.C. § 1255(e) (Supp. III 1998) provides:

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(e) \text{ Restrictions on adjustment of status based on marriages entered while in exclusion or}
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\[
\text{deportation proceedings; bona fide marriage exception}
\]
\[
(1) \text{ Except as provided in paragraph (3), an alien who is seeking to receive an immigrant visa on}
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\[
\text{the basis of a marriage which was entered into during the period described in paragraph (2) may}
\]
\[
\text{not have the alien's status adjusted under subsection (2).}
\]
\[
(2) \text{ The period described in this paragraph is the period during which administrative or judicial}
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\[
\text{proceedings are pending regarding the alien's right to be admitted or remain in the United States.}
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(3) \text{ Paragraph (1) ... shall not apply with respect to a marriage if the alien establishes by clear}
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\[
\text{and convincing evidence to the satisfaction of the Attorney General that the marriage was entered}
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\[
\text{into in good faith and in accordance with the laws of the place where the marriage took place and}
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\[
\text{the marriage was not entered into for the purpose of procuring the alien's admission as an}
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\[
\text{immigrant and no fee or other consideration was given.}
\]

16. At the Workshop, Professor Nancy Morawetz made the point that we must pay attention to the emerging narrative, which describes the lawyer who represents immigrants challenging removal proceedings as solely engaged in dilatory litigation. She analogized this narrative to one that has crystallized in death penalty cases. See generally Anthony G. Amsterdam, Selling a Quick Fix for Boot Hill: The Myth of Justice Delayed in Death Cases, in The Killing State: Capital Punishment in Law, Politics, and Culture 148 (Austin Sarat ed., 1999). Professor Anthony Amsterdam describes the rhetorical use of the term “abuse of the writ” in constructing the prisoner as an abuser of legal process, and the development of a “conspiracy myth” in which those condemned to death and their lawyers manipulate the process and take advantage of conscientious judges. See id. at 158-65.

The idea that noncitizens might run to federal court for dilatory purposes is especially misplaced in the context where attorneys seek to challenge the failure of the agency to follow statutory or constitutional mandates. In this context, what concerns us is not purported immigrant abuse of the agency, but agency abuse of the immigrant. When the agency engages in systemic misconduct, the vehicle through which this failure is meant to be challenged is class action litigation. This is why the provision, § 242(f), seeking to limit class-wide injunctive relief, is of the utmost importance.

II. CLASS ACTIONS

Class action litigation has played a unique role in immigration law through reforming misconduct by identifying a pattern and practice of illegal behavior. We could think about the many class action cases where courts have found systemic misconduct, and enjoined the Immigration and Naturalization Service (“INS”) from engaging in unlawful acts affecting thousands of noncitizens.
What might subsection (f) have to do with this history? Remember, (f) bars class-wide injunctive relief from being granted, by any court other than the Supreme Court, to enjoin or restrain the operation of the provisions of chapter IV of title II of the INA. The sections that chapter IV covers are §§ 231 through 244, which address inspection, apprehension, examination, exclusion, cancellation of removal, voluntary departure, temporary protected status, detention, removal, and judicial review of orders of removal.\(^{21}\)

Why would Congress enact (f)? Because Congress sought—in the words of the Congressional Record—to “no longer allow single district courts or courts of appeal to have the authority to enjoin procedures established by Congress to reform the process of removing illegal aliens from the U.S.”\(^{22}\) In other words, Congress wanted to stop the few people who bring class action litigation on behalf of immigrants from interfering with the agency.\(^{23}\) We can see (f) as part and parcel of a general trend—to prohibit and make more difficult bringing class action litigation in areas where Congress wants to bar public interest litigation on behalf of the poor, the disenfranchised, and those Congress finds repugnant: women seeking abortions, people on welfare, prisoners, and immigrants.\(^{24}\) In 1996 Congress barred legal services from

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affected class of more than 4,000 Haitians violated due process rights); American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) (approving class-wide settlement agreement for class of Salvadorans and Guatemalans which afforded de novo asylum adjudication).


22. The legislative history of (f) states the following:

Section 306 also limits the authority of Federal courts other than the Supreme Court to enjoin the operation of the new removal procedures established in this legislation. These limitations do not preclude challenges to the new procedures, but the procedures will remain in force while such lawsuits are pending. In addition, courts may issue injunctive relief pertaining to the case of an individual alien, and thus protect against any immediate violation of rights. However, single district courts or courts of appeal do not have authority to enjoin procedures established by Congress to reform the process of removing illegal aliens from the U.S.


23. As Professor Lenni Benson writes, “Congress probably intended [(f)] to prevent class-wide injunctions such as those which have prevented the INS from removing large numbers of people or from implementing changes in the past.” Lenni Benson, Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings, 29 CONN. L. REV. 1411, 1454 (1997). See also Tanya Kateri Hernandez, The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws, 76 OR. L. REV. 731, 761-62 (1997) (suggesting that the limitation on class action litigation seeks to avoid the kind of lawsuit which disempowered immigrants have successfully used to attack discriminatory immigration policies in the past, for example, litigation by Haitians).


The first Legal Services Corporation (LSC) statute prohibited recipients from engaging in litigation relating to abortion, desegregation, selective service and military desertion cases, and criminal proceedings. Participation in class actions was only permitted if the individual attorneys received approval from their program superiors. See 42 U.S.C. §§ 2996(f)(b)(7)-(10) (1994).

In the 1970s and 1980s, Congress repeatedly entertained proposals to restrict the jurisdiction of the courts over controversial issues such as school busing, abortion, and prayer in schools, but none of these
litigating class action cases and from participation in any abortion, prison and welfare litigation, as well as from representing noncitizens in immigration matters.\textsuperscript{25} That same year, the Antiterrorism and Effective Death Penalty Act ("AEDPA") limited habeas corpus review of death penalty cases, and stripped the statutory right of many "criminal aliens" to judicial review.\textsuperscript{26} The 1995 Prison Litigation Reform Act limits circumstances under which courts may enter injunctions against unconstitutional prison conditions, and made it much more difficult for prisoners to file \textit{in forma pauperis} lawsuits.\textsuperscript{27}

A great deal of concern, as evidenced by both scholarly interest and litigation, has so far focused on the effects of AEDPA and IIRIRA on individual removal cases.\textsuperscript{28} Although this issue is indeed urgent, the impact of (f) also deserves our attention, because class actions are so critical to large systemic reform.\textsuperscript{29}

Class action litigation is especially important to uniquely vulnerable people. Immigrants are uniquely vulnerable people. For one, noncitizens

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proposals passed. See Max Baucus & Kenneth R. Kay, The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress, 27 VILL. L. REV. 988 (1982). Professor David Cole argues that these issues inspired strong constituencies on both sides of the debate, making it difficult for Congress to transgress the jurisdiction-stripping taboo. In contrast, noncitizens and prisoners both cannot vote and are historically unpopular, and thus became the target of the most extreme restrictions of the 1996 Congress. David Cole, Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress' Control of Federal Jurisdiction, 86 GEO. L.J. 2481, 2482 (1998).

25. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996); Velazquez v. Legal Servs. Corp., 164 F.3d 757 (2d Cir. 1999); J. Dwight Yoder, Justice or Injustice for the Poor? A Look at the Constitutionality of Congressional Restrictions on Legal Services, 6 WM. & MARY BILL RTS. J. 827 (1998). As to the restrictions on representation of immigrants, legal services providers are currently allowed to provide legal assistance to only the following groups of people: U.S. citizens, permanent residents, immigrants admitted as refugees or asylees, and immigrants who are present because of the Attorney General's withholding of deportation pursuant to § 243(h) of the INA. See Restrictions on Legal Assistance to Aliens, 45 C.F.R. § 1626 (1999). Legal assistance, however, does not include normal intake and referral services. See 45 C.F.R. § 1626.3 (1999) (discussing prohibited activities). In addition, there are some exceptions to the restrictions on the representation of aliens. See, e.g., 45 C.F.R. § 1626.10 (1999) (exempting legal services providers in the Commonwealth of the Northern Mariana Islands, Republic of Palau, Federated States of Micronesia, and the Marshall Islands).


29. See Deborah L. Rhode, Class Conflicts in Class Actions, 34 STAN. L. REV. 1183 (1982). Professor Rhode writes:

On the whole, institutional reform class actions have made and continue to make an enormous contribution to the realization of fundamental constitutional values—a contribution that no other governmental construct has proven able to duplicate.

Id. at 1184.
cannot vote. 30 As the Supreme Court pointed out in NAACP v. Button, 31 groups that find themselves unable to achieve objectives through the ballot, must turn to the courts. In the words of the Court, “[l]itigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.” 32 For another, the class action litigation Congress sought to make more difficult in subsection (f) was litigation challenging removal and relief from removal. Once removed from the United States, immigrants are effectively foreclosed from litigating their rights. 33 We could assert that without a class remedy, there will be large numbers of immigrants who will have no remedy at all.

To preclude class-wide injunctive relief helps to insulate an executive agency that has been called a “rogue agency” 34 from the purview of the courts. Class actions are especially necessary in this context. 35 As Professor Motomura indicates, the government does not like multi-party joinder. From the government’s point of view, class actions are disproportionately expen-

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30. There are small exceptions to this in local contexts such as school board elections, thanks to the efforts of my colleague Professor Jamin Raskin, and others. See Jamin Raskin, Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of the Alien Suffrage, 141 U. Pa. L. Rev. 1391 (1993); see also Kevin R. Johnson, Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement, 1993 BYU L. Rev. 1139 (1993). Professor Johnson notes, “[b]ecause noncitizens cannot vote, politicians and administrators have limited incentive to respond to noncitizen demands . . . .” Id. at 1153.


32. Id. at 430. The Court noted that “litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state, and local, for the members of the Negro community in this country.” Id. at 429.

33. We know that the consequences of removal are severe. Deportation can deprive a person of “all that makes life worth living.” Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). In the words of Robert Pauw, the decisions made by the Immigration Service can mean “the difference between living with loved ones and living in exile; between economic well-being and total impoverishment; between refuge [or] torture [and] execution.” Robert Pauw, Judicial Review of “Pattern and Practice” Cases: What to Do When the INS Acts Unlawfully, 70 Wash. L. Rev. 779 (1995).

34. That the INS might act unlawfully is exacerbated by the fact that the Board of Immigration Appeals (BIA)—which would be the last stop if, in reality, no federal court can or will grant injunctive relief on behalf of a class—is known for a history of erroneous decisions. In the words of Judge Richard Posner, “the proceedings of the Immigration and Naturalization Service are notorious for delay, and the opinions rendered by its judicial officers, including the members of the Board of Immigration Appeals, often flunk minimum standards of adjudicative rationality.” Salameda v. INS, 70 F.3d 447, 449 (7th Cir. 1995).

In explaining the risks of executive adjudication, Professor Gerry Neuman notes: “One does not need to impugn the good faith of these decisionmakers to recognize the pressures under which they work and the incentives they may face to cut corners.” Neuman, supra note 28, at 1024.

35. In the context of representing the poor, Marie Failinger and Larry May write:

[T]he fact is that group representation devices such as class actions are often the most effective way of representing an individual poor person . . . . [T]he individual lawsuit, which may restore some of the economic benefits lost by the poor person, cannot remedy past and future harassment or restore the political balance of power between the institution and the individual. By contrast, the class suit can secure relief for the client that is not only longer-lasting but also broader-based. Additionally, the publicity accompanying the class suit places more of a burden on the welfare official to explain his or her conduct to supervisors and members of the public . . . .

Marie A. Failinger & Larry May, Litigating Against Poverty: Legal Services and Group Representation, 45 Ohio St. L. J. 1, 17 (1984).
sive to defend. As Professor Motomura writes, class actions in the immigration context tend to be brought by particularly skilled advocates, often with more financial resources than the average solo immigration practitioner, which tends to eliminate the government's frequent advantage as to financial resources and expertise.\textsuperscript{36}

Without class action remedies, correcting egregious and widespread unlawful agency action will be made much more difficult.\textsuperscript{37} As Peter Schuck and Ted Wang documented in their survey of immigration litigation between 1979 and 1990, noncitizens often prevailed over the INS in impact litigation—and won, at one period, in seventy-two percent of impact cases reviewed in Ninth Circuit courts.\textsuperscript{38} As Schuck and Wang describe:

[A]liens and advocacy groups were also highly successful in impact lawsuits, most of which challenged the INS' failure to implement new immigration policies in the manner prescribed by Congress. The nature and quantity of these lawsuits ... provide a clear signal that some important aspects of the INS' administrative performance are deeply and systematically flawed ... [O]ur impact litigation data furnish much unmistakable evidence that the INS' enforcement orientation has often hindered its ability to provide effective services and fair adjudication.\textsuperscript{39}

III. INTERPRETING (f)

Is there reason to fear that courts will interpret (f) to bar class-wide injunctive relief? Justice Scalia has begun to pave the way, stating in dicta in \textit{AADC} that (f) is "nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of part IV of section II of the \textit{INA}."\textsuperscript{40}

Even as we fear the interpretation of (f) to bar class-wide injunctive relief, it is important to note that some may argue that Congress may have intended (f) to bar class \textit{joinder}, as well as relief. However, that is not the plain meaning of the provision: (f) nowhere addresses joinder, and only addresses relief. If Congress had sought to bar class joinder, it could explicitly have provided for this, as indeed was done in a neighboring subsection of § 242.

\textsuperscript{36} Motomura Draft, supra note 1, at 4-5.

\textsuperscript{37} For a discussion of why pattern and practice cases have been needed to correct unlawful policies and practices adopted by the INS, adversely affecting thousands of individuals, in the context of legalization, see Pauw, \textit{supra} note 33, at 779.


\textsuperscript{39} \textit{Id.} at 177.

\textsuperscript{40} 119 S. Ct. at 942. The context for this description of (f) as "nothing more or less than a limit on injunctive relief" was responding to the Ninth Circuit's reading of (f) as an affirmative grant of jurisdiction. \textit{See id.}
This is § 242(e)(1)(B), which specifically states that no court may "certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action" to challenge "expedited removal" under § 235(b)(1).\(^4\) This fact appears especially significant, in that while § 242(e)(1) is titled "Limits on relief," paralleling—in a broader fashion—the title of (f), "Limits on injunctive relief," (e) goes on to add a subsection forbidding class certification, in stark contrast to (f). Thus, there is no direct expression of congressional intent contrary to maintaining a class action under Rule 23 as regards the sections of the INA for which class-wide injunctive relief is barred under (f). This would be relevant to §§ 231 through 244, with the exception of § 235(b)(1), which is modified by (e).\(^4\)

Further bolstering the argument that (f) was not intended to bar class action joinder is Justice Scalia’s description of (f) in AADC, which did not suggest any application to joinder. Rather, Scalia called it "nothing more or less than a limit on injunctive relief."\(^4\) In his article, Professor Motomura states that (f) "might only limit relief, and not joinder itself,"\(^4\) and I would urge a reading of (f) that emphatically does not bar class-wide joinder.

How have lower courts interpreted (f)? In Catholic Social Services v. INS ("CSS"),\(^4\) the only post-AADC lower court to address (f), the Ninth Circuit held that (f) barred a class-wide preliminary injunction issued on behalf of some 45,000 undocumented persons challenging INS legalization policies and the constitutionality of the statute precluding judicial review over their inability to apply for legalization.\(^6\) While CSS tried to argue that (f) did not

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(c) Judicial review of orders under section 235(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

... (B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

INA § 235(b)(1), in part, requires an immigration officer who determines that an alien is inadmissible due to misrepresentation or the lack of valid documents to order the alien removed without further hearing or review unless the alien indicates an intent to apply for asylum or a fear of persecution. INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (Supp. III 1998). If an alien indicates such an intent, an asylum officer is to conduct an interview, and if the officer determines no credible fear of persecution, the officer shall order the alien removed without further hearing or review, unless the alien requests review. INA § 235(b)(1)(B), 8 U.S.C. § 1225(b)(1)(B) (Supp. III 1998).


43. 119 S. Ct. at 942 (emphasis added).

44. Motomura Draft, supra note 1, at 56.

45. 182 F.3d 1053 (1999).

46. The plaintiffs sought to challenge the INS practice known as "front-desking," whereby INS employees were instructed to review applications in the applicants' presence and to reject the applications of any aliens who were statutorily ineligible for legalization, in combination with the "advance parole" policy, where aliens who disclosed even the briefest of trips outside the United States in violation of the advance parole policy, where aliens who disclosed even the briefest of trips outside the United States in violation of the advance parole policy.
bar class-wide injunctive relief because the injunction was a remedy for claims brought under the legalization provisions of part V of the INA, rather than for claims brought under the deportation and detention provisions of part IV, the Ninth Circuit held that the injunctive relief clearly interfered with the operation of part IV because the injunction barred deportation and detention.47

_Tefel v. Reno_, a class action on behalf of 40,000 noncitizens challenging the constitutionality of the stop-time rule for determining eligibility for suspension of deportation, suggested a more favorable interpretation of this strategy under (f).49 Judge Lawrence King of the District Court for the Southern District of Florida stated, in a pre-AADC order, that even if (f)'s date of enforcement were effective for these plaintiffs, (f) would not apply because plaintiffs did "not seek to enjoin the statute, but sought to enjoin constitutional violations and policies and practices of the Defendants that result in pretermission and deportation. Rather than seeking to enjoin the statute, they are seeking its implementation under the appropriate standard."50 In vacating and remanding the district court's decision, while discussing the class action status of the plaintiffs, the Eleventh Circuit did not address whether this was a correct interpretation of (f).51

In _Barahona-Gomez v. INS_, the Ninth Circuit held that the district court had jurisdiction to hear a class action brought to enjoin the deportation of plaintiffs pending resolution of their claim that new provisions of the INA affecting the number of suspensions of deportation and the stop-time provision violated their due process rights.53 _Barahona-Gomez_ was issued shortly before AADC; (f) was not addressed, and in fact judge Cynthia Hall dissented, saying that the case should have been deferred until the AADC decision.54

These cases suggest that the time is ripe to clarify the limits of (f)'s reach. In addition to understanding (f) not to preclude class action joinder, there is parole policy had their applications rejected before the applications could be filed. 182 F.3d at 1055-57. They also sought to challenge the jurisdictional bar to review over the claims of aliens denied legalization under these policies, arguing that it violated the Constitutional guarantee of equal protection. _Id._ at 1058-59.

47. _Id._ at 1061-62.
48. 972 F. Supp. 608 (S.D. Fla. 1997), _rev'd on other grounds_, 180 F.3d 1286 (11th Cir. 1999). Under the stop-time provision, an alien's period of residence of continuous physical presence in the United States for purposes of cancellation of removal is "deemed to end once the alien has been served with a 'notice to appear' for removal proceedings or commits a criminal offense" rendering the alien excludable or deportable. 180 F.3d at 1289; _see also_ INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (Supp. III 1998).
49. Professor Lenni Benson points to _Tefel_, and notes that litigants can argue that they seek to enjoin the implementation of the law or the regulations and not the particular statutory provision included in the subchapter addressed in (f). _See_ Benson, _supra_ note 23, at 1454.
50. _Tefel_, 972 F. Supp. at 618.
51. _See_ _Tefel_ v. Reno, 180 F.3d 1286 (11th Cir. 1999).
52. 167 F.3d 1228 (9th Cir. 1999).
53. Plaintiffs challenged the 4000 person annual limit on the number of suspensions of deportation and adjustments of status that the Attorney General may grant in each fiscal year, as well as the "stop-time" provision. _See id._ at 1231.
54. _Id._ at 1240. Judge Hall did not address (f); rather she sought clarification from the Supreme Court as to the question of jurisdiction under (g).
no reason to think that (f) was intended to bar any form of class-wide relief other than injunctive relief. The title of (f) reads "Limit on injunctive relief." Civil procedure separates injunctive relief and declaratory relief as two distinct forms of equitable relief. Although they may lead to a similar result, declaratory relief involves a lesser showing than injunctive relief, and can be issued when injunctions are inappropriate.56 That these are two distinct legal remedies is reflected within the very language of § 242, indicating the full awareness of Congress that injunctive relief and declaratory relief are two different animals. The neighboring § 242(e)(1), titled more broadly, "Limitations on relief," forbids any court from entering injunctive relief with regards to a challenge to an order for expedited removal in § 242(e)(1)(A). But subsection (e)(1)(A) also explicitly forbids any court from entering declaratory relief, or other equitable relief.57 Thus, if Congress had sought (f) to bar class-wide declaratory relief—or other forms of equitable relief—we can assume it would have proceeded to enumerate "declaratory relief," and "other equitable relief" under (f), as well.

Subsection (f) should thus be interpreted to permit the entering of class-wide declaratory relief. In challenging agency wide misconduct, entering such along with an injunction to an individual might be especially effective.58 This understanding of (f) is especially plausible given that courts may prefer not to issue injunctive relief against agencies on the assumption that they will obey the declaratory instruction of the court. In addition, (f) would permit a writ of mandamus that could correct agency-wide misconduct.59 While mandamus is an extraordinary remedy, available only in situations where

55. MOORE'S FEDERAL PRACTICE, supra note 42, ¶ 57.07.
56. See Steffel v. Thompson, 415 U.S. 452, 466-67, 471-72 (1974) (declaratory judgment is less intrusive remedy than injunction, requiring a lesser showing; declaratory judgment provides relief when legal or equitable remedies are too intrusive or otherwise inappropriate).

(e) Judicial review of orders under section 235(b)(1)
(1) Limitations on relief
Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—
(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 235(b)(1) except as specifically authorized in a subsequent paragraph of this subsection.

58. For another example of how to file a policy and practice case without structuring it as a class action, see The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions—Implementation Panel, 25 FORDHAM URB. L.J. 321 (1998). Valerie Bogart, class counsel in Varshavsky v. Perales, 202 A.D. 2d 155 (N.Y. Sup. Ct. 1994) described filing a case in state court which seeks declaratory and injunctive relief to challenge policies and practices, but is not filed on behalf of anyone but the named plaintiff. She notes that discovery will be limited, and that when the City attempts to moot out the client, they will have difficulty keeping the case alive. Id. at 327.
59. Professor Motomura makes this suggestion, in Motomura Draft, supra note 1, at 56, as did Nadine Wettstein in comments at the Workshop. This approach might mean filing a class action, and then granting mandamus as to misconduct affecting the entire class. The federal district courts have original jurisdiction of any action in the nature of mandamus to compel an officer, employee, or agency of the United States to perform a duty owed. 28 U.S.C. § 1361 (1994). An action in mandamus lies only if the defendant owes a clear, ministerial, and nondiscretionary duty. See MOORE'S FEDERAL PRACTICE, supra note 42, ¶ 105.42(1).
government officials have clearly failed to perform nondiscretionary duties, mandamus is available when—as might be alleged here—no adequate alternative remedy exists. Lastly, when litigants seek to challenge illegal conduct by the INS, they can make clear that they are attempting to enforce the operation of the INA sections covered by (f)—and not to “enjoin or restrain” the operation of these provisions. While (f) bars any court, other than the Supreme Court, from having jurisdiction or authority to enjoin or restrain the provisions of chapter 4 of title II of the INA, (f) should not bar class-wide injunctive relief when a court is enforcing the appropriate operation of these provisions.

IV. CHALLENGES TO (f)

The time may also be ripe to present challenges to (f). We could isolate arguments which attack (f) as unconstitutional: that (f) violates Article III of the Constitution, as well as the Due Process Clause, through barring judicial review of constitutional claims; and that (f) violates the Equal Protection Clause through invidiously motivated classification of a disenfranchised group. While a First Amendment challenge would be precluded because of the state action doctrine, it bears mention. Each of these arguments merits article-length treatment on its own. All I am doing here is to raise these arguments as ideas.

The first possible argument is that (f) is unconstitutional because it will serve to bar the judicial review of constitutional claims. Access to the courts has been acknowledged to be a right preservative of all other rights. Congress may not deny immigrants a federal forum to address constitutional challenges to immigration action because of the magnitude of constitutional problems that would arise. Specifically, a bar on judicial review of a constitutional challenge to removal would violate Article III of the Constitution, as well as the due process rights of the noncitizen. What poses great difficulty for applying this argument to (f) is that the government would argue that the construct of the class action is a statutory creation and that there is no federal right to bring one’s claim as part of a class. Nonetheless, one could argue that it appears overwhelmingly likely that without a class action

60. See Carter v. Seams, 411 F.2d 767, 773 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970); Ex parte Republic of Peru, 318 U.S. 578, 584 (1943). I recognize that a writ of mandamus is rarely granted.
61. I am indebted to Lucas Gutten tag and Linton Joaquin for this point.
63. See, e.g., Goncalves v. Reno, 144 F.3d 110 (1st Cir. 1998); Henderson v. INS, 157 F.3d 106 (2d Cir. 1998); Sandoval v. Reno, 166 F.3d 225 (3rd Cir. 1999); Nguyen v. INS, 117 F.3d 206 (5th Cir. 1997); Mansour v. INS, 123 F.3d 423 (6th Cir. 1997); Chow v. INS, 113 F.3d 659 (7th Cir. 1997); Mendez-Morales v. INS, 119 F.3d 738 (8th Cir. 1997); Duldalao v. INS, 90 F.3d 396 (9th Cir. 1996); Mayers v. INS, 175 F.3d 1289 (11th Cir. 1999); Ramallo v. Reno, 114 F.3d 1210 (D.C. Cir. 1997) (recognizing constitutionally mandated nature of judicial review of challenges to removal orders).
remedy, some constitutional violations will not be remedied, because some individuals will have no remedy at all.

A possible equal protection challenge would be the argument that at operation here is the kind of invidious bias motivating the prohibition of governmental action designed to protect a disenfranchised minority, that was struck down in *Romer v. Evans*. In *Romer*, the Court applied rational basis review to Colorado’s Amendment 2, prohibiting all legislative, executive, or judicial action designed to protect gays and lesbians from discrimination. According to Justice Kennedy, the referendum was “inexplicable by anything but animus toward the class it affects,” and therefore lacked “a rational relationship to legitimate state interests.” Because of this animus, the rational basis standard emerging from *Romer* differs from the standard applied in “the ordinary case” where a law will be sustained if it is considered to advance a legitimate government interest, “even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.” Instead, if the Court suspects that a classification is “drawn for the purpose of disadvantaging the group burdened by the law,” the law will not be sustained. Thus, one would argue that the restriction on class-wide injunctive relief for noncitizens facing removal in (f) was crafted because of animus and sheer dislike for the population.

While this argument would be a difficult one to make, I will note here that a study documented that Americans feel more negatively towards gay people than any other group—with the exception of “illegal immigrants.”

The lack of governmental funding for legal representation or other basis for state action makes a First Amendment challenge to (f) in all likelihood a

69. *Id.* at 632.
70. Jessica Roth makes the argument that the Legal Services restrictions imposed by Congress were an attempt to cut off unpopular viewpoints and to silence the trouble-making poor, and that this should support a challenge under *Romer v. Evans*. See Jessica A. Roth, *It is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 HARV. C.R.-C.L. L. REV. 107, 147-50 (1998).
71. Martha Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, But Not Hell Either*, 73 DENV. U. L. REV. 1107, 1149, 1168 n.178 (1996). Professor Ertman describes a National Election Study which created a zero score for most extreme cold feelings, 50 for neither cold nor warm., and 100 for extremely warm feelings. The data indicate that in 1994, 28.2 percent of Americans felt absolutely cold toward gay people, with a mean “temperature” of 35.7. Twenty four percent of those surveyed felt absolutely cold toward “illegal immigrants,” with a mean temperature of 32.3. In contrast, only 6.2 percent gave a zero score to Christian fundamentalists.

The level of distaste for immigrants, and how this might support a challenge under *Romer v. Evans*, has been noted by Professor Katherine Franke. She writes, “Hopefully, in this post identity era, other victims of state sanctioned bigotry, such as immigrants and single mothers, will one day rejoice: ‘This is our Romer!’ ” Katherine M. Franke, *Homosexuals, Torts, and Dangerous Things*, 106 YALE L.J. 2661, 2682 (1997) (book review) (describing *Romer* as redirecting the equality inquiry toward practices endorsed or enforced by the state that vilify their objects as legal strangers).

72. *See Aguilara-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975) (indigent noncitizens have no constitutional right to appointed counsel unless there is a violation of “fundamental fairness”); *INA
claim no court would entertain, given our contemporary understanding of state action. Nonetheless, courts have found First Amendment violations to exist when lawyers are not allowed to represent clients who seek to challenge underlying law. One state court held that the restriction on recipients of Legal Services Corporation ("LSC") funds from participating in class actions was unconstitutional under the First Amendment. This indicates the seriousness with which courts have viewed the imposition of restrictions on the challenging of government policies. As the Second Circuit stated in Velazquez v. Legal Services Corporation:

Criticism of official policy is the kind of speech that an oppressive government would be most keen to suppress. It is also speech for which liberty must be preserved to guarantee freedom of political choice to the people . . . . In our view, a lawyer's argument to a court that a statute, rule, or governmental practice standing in the way of a client's claim is unconstitutional or otherwise illegal falls far closer to the First Amendment's most protected categories of speech than abortion counseling or indecent art.

At issue in Velazquez was a provision in the LSC restrictions regarding welfare benefits which only allowed an LSC grantee to represent "an eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." The Second Circuit struck this provision down as violating the First Amendment, noting that among the only directly effective ways to oppose a statute, regulation or policy is to argue to a court having jurisdiction in the matter that the rule is

§ 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (Supp. III 1998) ("the alien shall have the privilege of being represented, at no expense to the Government").

73. This assumes that no court will adopt more expansive notions of state action, for example, that espoused by Kendall Thomas in his argument that recent scholarship on the theory of power should shift our traditional understandings of state action. Our traditional conception of state action reflects the public/private dichotomy of modern liberal theory. Professor Thomas looks to the work of Michel Foucault, who argues that we rely too much on conceptions of power which are concentrated in the state and the state apparatus. Rather, attention should be paid to the manner in which power transpires in relational networks, and how such power is supported, transmitted, and given its maximum effectiveness by the state. Such a perspective on power, suggests Thomas, should lead to a revisioning of state action that would indicate that the state's failure to control homophobic violence by private individuals constitutes state action supporting a claim under the Eighth Amendment's prohibition against cruel and unusual punishment. See Kendall Thomas, Beyond the Privacy Principle, 92 COLUM. L. REV. 1431, 1478-87 (1992). Following a more expansive theory of state action, one could construct an argument that the attempt of Congress to immunize government policy from criticism in the courts through (f) violates the First Amendment.


75. Varshavsky, No. 40767/91.


77. This was called the "suit-for-benefits exception." Id. at 769.
either unconstitutional or unauthorized by law. While these LSC decisions—which involve targeted restrictions on funding—will not provide pre-~ential value to a challenge to (f) given contemporary limitations of state action jurisprudence, they do indicate the recognition of courts that the attempts of Congress to restrict legal remedies that would challenge official misconduct are to be viewed with great skepticism.

V. NECESSARY REMEDIES

During the Workshop, it was suggested that a pilot project to provide individuals in removal proceedings with attorneys might go some way towards rectifying the problems caused by lack of class-wide injunctive relief. I am skeptical that this would suffice. A glance at the facts of any of a number of cases where courts have granted class-wide relief on behalf of noncitizens illustrates the impossibility that individual removal proceedings can cure systemic unlawful behavior. Would lawyers representing individuals fleeing El Salvador, who were coerced and threatened by INS agents into taking voluntary departure instead of applying for asylum in Orantes-Hernandez v. Thornburgh have been able to stop the misconduct on behalf of all without a class-wide injunction?

It is important to note that evisceration of class-wide relief reflects a general trend of increasing antipathy towards group-based remedies. In the past several years, we have seen the courts, Congress, and the public turn away from understanding inequalities and harms as systemic problems that require systemic remedies. Instead, bad outcomes are believed to reflect individual failings.

78. Id. at 771.
79. Professor David Martin has apparently been consulting with Senator Daniel Patrick Moynihan on such a project. Noncitizens in removal proceedings have no right to government appointed counsel. See supra note 72 and accompanying text.
80. See Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal. 1988), aff'd, 919 F.2d 549 (9th Cir. 1990). The court found that INS agents directed, intimidated, or otherwise coerced Salvadorans in their custody, who had not expressed a desire to return to El Salvador, to sign for voluntary departure. INS agents used a variety of techniques, ranging from subtle persuasion to outright threats and misrepresentations. INS officers told the class members that they would not be given asylum and that they would be deported, regardless of an asylum application. They stated that the information on the form would be sent to El Salvador, and that asylum applicants would never be able to return to El Salvador.
81. See, e.g., T. Alexander Aleinikoff, Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno, 92 Mich. L. Rev. 588, 600 (1993) (describing in voting rights cases shift to "norm of equal treatment of individuals" rather than "raising up of disadvantaged groups"—described as a "model that is dedicated to the pursuit of social peace rather than social justice"); Fran Ansley, Classifying Race, Racializing Class, 68 U. Colo. L. Rev. 1001, 1015 (1997) (describing manner in which affirmative action doctrine has "for the most part been unable to overcome the strong individualist bent of our legal culture" and therefore been unable to provide "support for group remedies to compensate for the infliction of group wrongs"); John O. Calmore, Spatial Equality and the Kerner Commission Report: A Back-to-the Future Essay, 71 N.C. L. Rev. 1487, 1495 (1993) (noting in housing context that spatial equality is a group based remedy without which blacks will be left with the "inadequate 'remedy' of individuals choosing, or being forced, to move to 'better' space somewhere else.")
rights, and the exaltation of the individual as an economic and political agent.\textsuperscript{82} Such a shift deserves our attention here, as we examine the attempted stripping of judicial review in immigration cases, as well as elsewhere.

\textsuperscript{82} See Peter M. Cicchino, \textit{The Problem Child: An Empirical Survey and Rhetorical Analysis of Child Poverty in the United States}, 5 J.L. & Pol'y 5, 9 (1996). Professor Peter Cicchino identifies this delegitimation of group rights and exaltation of the individual as part of the conservative commitment to capitalism underlying the perspective of the Republican majority in Congress.