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ABSTRACT

Institutionalist scholars argue that international rights norms, judicial autonomy, and discourses of immigrant nationhood constrain shifts to harsher immigration policies in liberal democracies, particularly settler societies. The Trump presidency and Liberal-National Coalition government in Australia during the same period are occasions to test whether those norms functioned as expected in two paradigmatic country cases. Both governments attempted to undermine judicial autonomy, the illegitimacy of ethnic and religious selection of immigrants, the rights of detained children and families, and the principle of *non-refoulement*. A new institutionalist analysis of attempted norm-busting in each country specifies which norms were effective constraints. International legal and political constraints were weak. Domestically, norms obliging the protection of children were more effective than norms related to adults. Discourses favoring immigrant nationhood and opposing discrimination resonated, but were confronted by equally powerful discourses of insular nationalism and security that promoted restriction. While the judiciary moderately constrained new policies, particularly in the U.S., in neither country did the judiciary fully act in line with dominant theoretical expectations, because of both structural and normative weaknesses.

Norm-busting: rightist challenges in US and Australian immigration and refugee policies

Scholars dispute whether, why, and under what conditions norms shape migration and refugee policies (Betts and Orchard 2014). Norms are constituted by widely shared, longstanding principles that guide policy (Peters 2019: 23). Discursive norms include taken-for-granted formulations such as "we are a nation of immigrants" (Schmidt 2011). Legal norms are principles about what makes just law and the appropriate role of the judiciary vis-à-vis other branches. Norms' duration, legitimacy, and degree of institutionalization lie on continua, though to be more than simply ideologies or procedures, their duration and legitimacy must be substantial (Olsen 2009).

Institutionalists argue that specific norms constrain new attempts by executive and legislative bodies to restrict immigration. Hollifield (1992), Joppke (1998), Boswell and Geddes (2011), and Hamlin (2014) argue that rights norms protected by autonomous judiciaries curb restrictions. However, Soennecken (2008) observes that courts in liberal-democratic states vary in their enforcement of those norms. Whether the judiciary constrains new policies is not simply determined by the structure shown on an organizational chart, but also by different ideas about the proper role of the judiciary vis-à-vis other branches (Blyth 2003).

Authors disagree about which norms are strongly constraining and their degree of path dependency (Pierson 2011). Hollifield (1992) and Brubaker (1992) argue that citizenship policies can be locked in by discourses about nationhood created during nation-state formation. Freeman (1995: 881) contends that in liberal-democratic states, especially English-speaking settler-colonial societies, "institutionalized politics favor expansionary policies and is relatively immune to sharp swings in direction." However, Brubaker (1995: 904-905) argues the "constrained discourse over immigration in liberal democracies" identified by Freeman (1995) was "a historically specific and contingent feature of public discussion at certain times and places, not a feature of liberal democratic politics as such." Dauvergne (2016: 2) declares "the era of settler societies has ended" as they converge with European policies based on temporary workers.

The U.S. presidency of Donald Trump (2016-2020) and Australia's Liberal-National Coalition government (2013-present) are occasions to test whether discursive norms about nationhood and a set of legal norms constrain major immigration restrictions in quintessential settler-colonial liberal-democracies. Both governments pushed hard against four norms: judicial autonomy, illegitimacy of ethnic and religious selection to reduce immigration from the Global South, rights of detained children and families, and the principle of *non-refoulement* that refugees will not be returned to face persecution.

We draw on historical, empirical, normative, and discursive theories of institutionalism to answer our central research question: did an enumerated set of norms effectively constrain the strong challenges against them from the Trump and Coalition governments? Our theoretical goal is to refine an institutionalist understanding of immigration politics that has too often ignored attempts at deinstitutionalization. In doing so, we follow this special issue's mandate to "uncover both the resilience of institutions and practices, as well as their volatility according to personalities in place and circumstances" (Thiollet and Natter, this issue). We first summarize how different versions of institutionalist theory expect norms to constrain immigration policy. We then detail our rationale for selecting the U.S. and Australia as paradigmatic cases of settler-colonial liberal democracies, while highlighting variations in their constitutions and the extent of rightist challenges to core tenets of liberal democracy. Including this variance avoids the

immigration literature's tendency to dichotomize timeless democracies and autocracies, which impedes understanding of illiberal policies in consolidated democracies and artificially separates the Global North and South (Thiollet and Natter, this issue). We outline our qualitative methods of analyzing laws and regulations of immigration, landmark court decisions, public statements by incumbents and advocates, and public opinion surveys regarding the four types of norm-busting restriction in each of the two countries. These sources provide evidence to assess pushback against norm-busting policies, and whether it was effective, from international law, international politics, civil society, and the judiciary.

We find that against the expectations of institutionalist accounts, norms entrepreneurs *can* create harsh new immigration policies even in paradigmatic liberal-democratic settler societies. These restrictions are possible for three reasons: 1) Political actors unbound by a domestic or international logic of appropriateness *tout court* have much greater room to innovate than mainstream politicians. 2) International norms are not effective constraints when the judiciary's legal nationalism rejects reliance on international legal instruments, the executive rejects multilateralism, and international norms have been weakened by the diffusion of previous challenges. 3) Discourses of nationhood that favor immigrants are contested by other resonant norms, around security and insular nationalism, that favor restriction.

However, political entrepreneurs face two more effective constraints: 1) Norms protecting children are stronger than norms protecting adults. 2) The judiciary can modestly constrain immigration policies, but to an extent that is weaker than dominant accounts have claimed. Full judicial constraint requires a combination of autonomy from other branches, a constitution that protects civil rights, and judicial review based on administrative law principles.

INSTITUTIONAL CONSTRAINTS

Realist scholars are skeptical that norms constrain states. Posner (2014) argues international human rights law is inconsequential. Sikkink (2017) rebuts many of his points. There is no consensus on whether, how, which, when, or why norms matter. The "realist" hypothesis (H1) is that international norms will not significantly constrain harsh new immigration policies.

Hollifield (1992), Joppke (1998), Boswell and Geddes (2011), and Hamlin (2014) maintain the "embedded liberalism" of rights norms protected by courts limits the ability of executive and parliamentary bodies to enact much more restrictive immigration policies. In this empirical institutionalist argument, the design of the institutions sharply limits policy options regardless of public opinion, party ideologies, or political entrepreneurship (Peters 2019). For example, in Australia, judicial review in which federal courts adjudicate whether a policy is consistent with foundational legal norms can constrain parliament's restrictive asylum policies (Foster and Pobjoy 2011). In the U.S., federal circuit courts of appeal tend to be more receptive to immigrant litigants than the policy-driven Supreme Court, and given the large volume of appeals, this structure favors immigrants (Law 2010). The "liberal judiciary" hypothesis (H2) is that courts will constrain harsh new immigration restrictions of other branches.

However, judiciaries in liberal-democratic states do not universally or consistently constrain other branches. Courts sometimes behave *more restrictively* than the law allows. In South Korea, judges in asylum cases import stricter evidentiary standards from criminal law (McLean 2021). While U.S. and Canadian courts have long shaped asylum policy, German courts have been more deferential to the executive. Pro-refugee NGOs have pushed German courts to exercise greater oversight (Soennecken 2008: 14). In these normative institutionalist arguments (see March and Olsen 2006), judges are deciding what is an appropriate role for the

court as they face new legal issues. Arguments about the strong constraints of the courts developed in the unique context of the EU, with its two supranational courts, do not always apply to other liberal democracies or even all EU member states. The "contingent courts" hypothesis (H3) is that the degree to which the judiciary constrains other branches will vary.

Combining historical and discursive institutionalist perspectives, Brubaker (1992) and Hollifield (1992) argue that antiquarian ideas about nationhood can have long-lasting impacts on citizenship policies through a process of path dependency (Pierson 2011). Freeman (1995) and Joppke (1998) emphasize the constrained discourse in liberal democracies that forecloses many harsh immigration policy options, but in a stance disputed by Brubaker (1995), Freeman and Joppke identify the source of these constraints in the inherent nature of liberalism rather than contingent cultural formations. Yet until global decolonization during the Cold War increased the reputational harms of racist immigration laws, liberalism and populism were associated with *greater* racist restrictions (FitzGerald and Cook-Martín 2014). A further complication is that liberalism, with its emphasis on individual rights, and democracy, with its emphasis on majoritarian rule, can diverge such that populist majorities support illiberal immigration policies (Mudde and Rovira 2017). While these accounts dispute whether idioms of immigrant nationhood or liberalism are the decisive institutions, and they vary in their degree of determinism, the "discursive" hypothesis (H4) is that the boundaries of legitimate discourse define the limits of policy.

Institutionalist theories struggle to explain major change. Brubaker (1992: 115) wrote of Germany that "there is no chance that the French system of *jus soli* will be adopted; the automatic transformation of immigrants into citizens remains unthinkable." By the end of the decade, Germany had adopted *jus soli* provisions that made it more like France. A focus on continuity fails to account for periods of intense political conflict and how institutions enable change as well as stasis. Normative institutionalism's reliance on actors, often bureaucrats, to determine the logic of appropriateness when faced with a decision (March and Olsen 2006) does not explain the power of politicians to innovate (Peters et al. 2005; Bell 2011: 895). Yet if individual agents can freely create great changes, institutionalism's contribution to the study of politics disappears (Olsen 2009: 9). For historical institutionalists, major change comes at "critical junctures" when actors have greater agency, contingency supersedes structural factors, and divergent paths are established. Capoccia and Kelemen (2007: 352, 355) convincingly argue that critical junctures include brief periods when fundamental change was "plausible, considered, and ultimately rejected in a situation of high uncertainty." To understand the extent to which norms limit transformations, analysts must avoid sampling on the dependent variable of enacted, sustained policies and also examine "the near misses of history" when the deinstitutionalization of norms became possible (Olsen 2009: 10). The "entrepreneurial agent" hypothesis (H5) is that individuals taking advantage of critical junctures and/or enabling features of political institutions can create profound change.

CASE SELECTION AND METHODS

Immigration studies take the U.S. and Australia as paradigmatic liberal-democratic settler societies (Freeman and Birrell 2001, Joppke 2005). The two countries share many characteristics. Both are products of British settler colonialism, long histories of mass immigration, and immigration policies that shifted from preferences for whites and explicit discrimination against Asians to a greater openness toward diverse origins. Along with Canada, they have accepted most of the world's resettled refugees since 1980. The immigrant share of the

population is 30% in Australia and 14% in the U.S. Immigrant nationhood is rooted in their political culture (Freeman 1995), though Dauvergne (2016) claims this consensus has eroded. In 2018, 75% of U.S. adults, including 71% of Republicans, agreed when asked, "Do you believe the US is a nation of immigrants?"[1] Of Australians, 54% agreed "Australia's openness to people from all over the world is essential to who we are as a nation."[2] Both countries are long-standing liberal democracies with common law, traditions of scepticism toward international law, and are party to the 1967 Protocol to the Refugee Convention.

Of course, the countries have legal, political, and geographic differences. The U.S. has only signed five international human rights treaties to Australia's fourteen. Yet domestically, "Rights-based liberalism is more fully embedded in the U.S. than in Australia, with the result that U.S. policymakers were less able to limit the spread or reverse the recognition of immigrant rights" (Freeman and Birrell 2001: 543-544). The U.S. has constitutionally protected civil rights, stronger judicial review, and a civil rights movement and litigious culture that spawned robust legal advocacy organizations. As an island, Australia can more easily achieve control over immigration than the U.S. Despite these and other differences, Australia and the U.S. are "typical cases" of longstanding liberal-democratic settler societies of mass immigration (see Seawright and Gerring 2008).

We analyze two periods: the U.S. under the Republican administration of President Donald Trump (2016-2020), and Australia under the Liberal-National Coalition dominated by the Liberal Party (2013-present) which includes the tenures of prime ministers Tony Abbott (2013-2015), Malcom Turnbull (2015-2018), and Scott Morrison (2018-present). Table 1 summarizes the three parties' characteristics in Norris's (2020) global party survey.

[INSERT TABLE 1 ABOUT HERE]

Both the U.S. Republicans and Australian Liberal-National Coalition are economically rightist and socially conservative. All three parties support strong immigration restrictions, though the U.S. Republicans score 8.9 on a 10-point scale, 1.7 points higher than the Australian Liberals. The U.S. Republicans are much more opposed to multilateralism than the two Australian parties. The U.S. Republicans, followed closely by the Australian National Party, are more extreme in undermining liberal democratic norms and practices than the Australian Liberals. The U.S. Republicans are even more extreme in their opposition to checks and balances on executive power, scoring 8.5, compared to 3.6 for the Australian Liberals. The U.S. became much less democratic during the Trump administration, falling in the Economist Democracy Index from "full democracy" in 2016 to "flawed democracy" in 2020.[3] Analyzing this period thus allows us to assess whether norms constrain harsh immigration policies when the party in power undermines core principles of liberal democracy.

For each of the two countries during this period, we examine four areas of immigration law where both governments strongly challenged the following norms: independent courts, non-discrimination, the rights of detained children and families, and the rights of asylum seekers. Norms and their influence, particularly when they are not formalized, are difficult to measure (Jasso and Opp 1997). Our qualitative strategy draws on new institutionalist approaches in

[1] *The Economist*/ YouGov Poll, Oct. 28-30, 2018, p. 78, https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/p8wvf16d2j/econTabReport.pdf.
[2] Lowy Institute Poll 2018, Fig. 17, https://www.lowyinstitute.org/publications/2018-lowy-institute-poll.
[3] https://www.eiu.com/n/campaigns/democracy-index-2020/

political science and sociology that show how cultural logics and path dependency, rather than rational choices about expected consequences alone, drive political processes as they interact with structural factors (Powell and DiMaggio 1991). Discursive institutionalism emphasizes how framing issues and public communication affects political processes (Schmidt 2011). Our analysis draws on laws and regulations of immigration (including asylum), landmark court decisions, public statements by incumbents and advocates, and public opinion polls. In each of the eight cases of a policy shift challenging a norm (four policies in each of the two countries), we identify the norm; pushback from legal advocacy, public protest, and international legal and political sources; and whether the norms held back new policies or were breached.

FINDINGS AND DISCUSSION

The Trump administration and Coalition each challenged four norms around immigrants and asylum seekers. Limited precedents can be found in earlier administrations, but their policies nevertheless represent major breaches with dominant norms.

Independent courts

An independent judiciary is a constitutive feature of democracy (Linz and Stepan 1996). Despite differences between judicial review in the U.S. and Australia, the separation of powers has historically been strong in both countries (Sackville 2000).

United States

Compliance with core democratic norms cannot be assumed even in an apparently consolidated democracy. In many areas of policy, the Trump administration consistently challenged the separation of powers by rhetorically attacking judges, using inflammatory language to describe unfavorable decisions, and describing court appointments in transactional terms (Nelson and Gibson 2018). In the immigration sphere, Trump attempted to further undermine the autonomy of immigration courts, which was already structurally weak (Hamlin 2014). Immigration Courts and the Board of Immigration Appeals (BIA) are part of the Executive Office for Immigration Review (EOIR) within the Department of Justice (DOJ). Their judges are employees of the executive, rather than Article III judges in federal district and circuit courts and Supreme Court justices, all of whom have lifetime tenure. The Attorney General who leads the DOJ hires immigration judges and can remove them from cases after they render decisions unfavorable to the government. The Attorney General has the "certification" authority to overturn cases decided by the BIA and render a decision that sets precedent (Law 2010).[4]

Institutions hamper some innovations while enabling others (Bell 2011: 895). The Trump administration exploited the structural weakness of immigration courts by trying to create new rules and deploying new rhetoric to further weaken their independence. His attorneys general issued a record eleven certifications through early 2020 that including reducing access to asylum based on domestic or gang violence and restricting the definition of "particular social group" in family-related cases.[5] In January 2018, Attorney General Jeff Sessions ordered "performance measures" in EOIR cases.[6] The DOJ imposed quotas on judges to speed up decisions and

[4] "Judges' Union Files Grievance Over DOJ's Interference with Judicial Independence and Violation of the Due Process Rights of Those Appearing before the Immigration Courts," American Immigration Lawyers Association, Aug. 8, 2018.

[5] Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018); Matter of L-E-A-, 27 I&N Dec. 581 (A.G. 2019).

[6] EOIR Memorandum on "Case Priorities and Immigration Court Performance Measures," Jan. 17, 2018.

deportations. In August 2019, the DOJ petitioned the Federal Labor Relations Authority to decertify the National Association of Immigration Judges in a move to weaken their ability to act collectively. Finally, the EOIR on 17 January 2020 banned immigration judges from speaking publicly about immigration law in their personal capacities and required permission from the EOIR before any public speaking.

Well-organized immigration judges and advocates effectively pushed back to protect judicial autonomy. The National Association of Immigration Judges resisted numerical quotas, filed a suit to block the EOIR gag rule, and successfully fought decertification.[7] During hearings convened by the Democratic-controlled House of Representatives, the American Immigration Lawyers Association and American Bar Association called for legislation that would create fully independent immigration courts.[8] Trump's attempt to radically change the rules of the game for immigration courts was unsuccessful, as would be predicted by the liberal judiciary hypothesis.

However, the composition of the Supreme Court was the object of a successful norm violation. The Republican-controlled Senate broke with precedent to block consideration of the March 2016 nomination of President Obama's court pick, Merrick Garland, until Trump took office and they could install his nominee, Neil Gorsuch, in April 2017 (Eckerstrom 2018). This move enabled a conservative court majority that later upheld the administration's "Travel Ban" by a 5-4 vote (discussed below). Senate Republicans aggressively weakened the norm guiding court confirmation in a way that opened the door to more restrictive immigration policies, including those motivated by religious animus. The weak institutionalization of confirmation norms, which left key rules outside the constitution or statutes, enabled innovation, in keeping with the entrepreneurial agent hypothesis.

Australia

Unlike the U.S., Australia does not have a bill of rights which courts can rely on to review the constitutionality of laws and regulations. The right to due process in Australia is upheld through the common law principle of procedural fairness, though that right can be abrogated through legislation. Asylum cases make up a significant percentage of Australian procedural fairness jurisprudence (McDonald and O'Sullivan 2018).

The structural weakness of judicial review was exacerbated by the Coalition government's challenge to the norm of apolitical appointments of legally qualified jurists. By 2019, the Coalition government had replaced 70% of the members of the Administrative Appeals Tribunal (AAT), which conducts independent merits review of administrative decisions, with political appointees, more than a third of whom did not have legal qualifications (Hardaker and Landis-Hanley 2019). The Law Council of Australia argued the lack of transparency and political nature of the appointments "compromises community confidence in the independence of the tribunal and the quality of its decision making."[9] Between 2015 and 2018, the odds of a Labour-appointed member deciding in favor of an asylum-seeker were 1.46 times higher than those of a Coalition-appointed member (Simpson 2020). Political bias is also a concern for asylum appeals in the Federal Circuit Court, which hears appeals from the AAT. A review of Federal Circuit Court decisions in refugee cases

[7] "NAIJ Has Grave Concerns Regarding Implementation of Quotas on Immigration Judge Performance Reviews," National Association of Immigration Judges, Oct. 18, 2017; "Civil Action No. 20-cv-731," US District Court Eastern District of Virginia, Alexandria Division; "Decision and Order WA-RP-19-0067," July 31, 2020.

[8] "Courts in Crisis," Hearings of the Subcommittee on Immigration and Citizenship, Jan. 29, 2020.

[9] "AAT appointments must be transparent and merit-based," Law Council of Australia, Feb. 22, 2019.

found a "258% difference between the judge with the lowest success rate to the judge with the highest success rate" (Dorostkar 2020). Autonomy is also limited in the Immigration Assessment Authority (IAA), which hears appeals from asylum seekers who arrived by boat. The Immigration Minister appoints IAA Reviewers.[10] As such, IAA Reviewers are not independent statutory officers.

Only a few national media outlets have reported on this erosion of independent decision making, and public concern has been muted.[11] Legal bodies have criticized these developments.[12] In 2019, a former High Court Judge concluded an independent review of the AAT,[13] recommending that "all further appointments, re-appointments or renewals of appointment" should be of lawyers and "on the basis of merit" (Callinan 2019: 9). However, no reforms have occurred to date. Even more than in the U.S., the structural weakness in the separation of powers has enabled the Coalition government to discard norms that protect the judiciary's autonomy. The courts play a weaker role in constraining the executive and parliament than would be expected according to the liberal judiciary hypothesis, thus lending support to the contingent courts hypothesis.

Ethnic and religious discrimination

Freeman (1995: 884) argues that in liberal democracies, "the boundaries of legitimate discussion of immigration policy are narrow, precluding, for example, argument over the ethnic composition of migrant streams." The overt use of ethnic (including racial) categories to select permanent immigrants has sharply declined in most countries, though such selection continues discreetly (FitzGerald et al. 2018).

United States

The 1st Amendment to the U.S. Constitution in 1791 established the principle of non-discrimination on religious grounds. While ethnic discrimination was an explicit, core feature of U.S. immigration and nationality law from the early republic to 1952-1965, a norm of nondiscrimination for permanent immigrants has prevailed since (FitzGerald and Cook-Martín 2014). The 1965 *Immigration and Nationality Act* ended the national-origins quota system and banned discrimination, with narrow exceptions, "in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."[14]

The Trump administration challenged the post-1965 norm of non-discrimination by aggressively targeting Latinos, Muslims, and Blacks. Trump aimed to reduce immigration from what he called "shithole countries," whose composition can be inferred to include countries in the Global South. Trump's own stated ideal immigrant is Norwegian (Kendi 2019). As a presidential candidate, he repeatedly called for a "Muslim ban" (Bier 2017). Just a week after taking office in January 2017, he issued Executive Order 13769 (Ban 1.0), which banned visitors, immigrants, and refugees from seven countries whose populations are majority

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[10] *Migration Act s* 473BA.

[11] https://www.crikey.com.au/2020/12/21/aat-christmas-appointments/, https://www.crikey.com.au/2020/09/18/christian-porter-aat-tip/, https://www.theguardian.com/australia-news/2020/nov/09/labor-accuses-coalition-of-stacking-tribunal-as-member-revealed-to-be-working-as-lobbyist, https://www.crikey.com.au/2021/02/16/christian-porter-aat-robodebt/.

[12] https://www.lawyersweekly.com.au/politics/25094-lack-of-transparency-in-aat-appointments-slammed, https://www.abc.net.au/news/2019-02-22/government-slammed-for-appeals-tribunal-appointees/10835856

[13] http://www.aial.org.au/news-events/app-news/calliunan-review-of-aat

[14] 2 INA §202(a)(1)(A), 8 USC §1152(a)(1)(A).

Muslim. The order suspended the refugee resettlement program for 120 days, indefinitely suspended Syrian refugee admissions, and privileged religious minorities for resettlement—a move widely interpreted as favoring Christians over Muslims.

Civil society erupted in backlash. At least 323 protests, with a median size of 200 participants and total attendance of 235,000, were held in the U.S., with many more around the world (Andrews et al. 2018). Newspaper coverage increased references to American identity, such as the claim that the ban was "un-American." Between 12 January and 7 February 2017, public opposition to a Muslim travel ban increased from 42% to 50%. Collingwood et al. (2018: 1037) argue "this change was partly driven by an influx of information portraying the ban as being at odds with egalitarian principles of American identity and notions of religious liberty." Legal advocates sued to end the ban, which was enjoined by two district courts and upheld on appeal in the Fourth and Ninth circuits for violating the 1st Amendment's "establishment clause."[15] A new executive order, 13780 (Ban 2.0), removed Iraq from the list of banned countries and made exceptions for lawful permanent immigrants and visa holders. Two district courts enjoined Ban 2.0. The injunctions were upheld on appeal by the Fourth Circuit and partly upheld by the Ninth Circuit. The Supreme Court then allowed the administration to continue the ban on nationals of the six countries and refugees, unless they had a "bona fide relationship" with a person or entity in the U.S.[16]

The administration responded with Proclamation 9645 (Ban 3.0), an indefinite travel ban that removed Sudan from the list of banned nationals, added North Koreans, and imposed restrictions on certain Venezuelan officials and their families. Two district courts blocked the provisions that affected nationals of the five majority-Muslim countries. On appeal, the Ninth Circuit partly stayed a district court decision. The Fourth Circuit affirmed the preliminary injunction issued by a district court, but stayed its ruling as the Supreme Court had announced it would hear the case. On 26 June 2018, the Supreme Court upheld Ban 3.0 in a 5-4 decision in which Justice Gorsuch added the decisive fifth vote.[17] When on 31 January 2020 the administration's Proclamation 9983 adding to the banned list six more countries, all of which have large Muslim populations, there was barely any public protest.

Several theoretical lessons emerge from the travel ban cases. First, as FitzGerald and Cook-Martín (2014: 341-344) predicted, "There is little reason to believe that the U.S. courts would prevent ethnic selection of immigrants," and as the realist hypothesis would also predict, "international law is a weak constraint on governments practicing ethnic selection of immigrants." Second, and against their prediction that international political constraints made such policies unlikely because negative discrimination would incur high diplomatic costs, opprobrium from abroad was irrelevant to an administration singularly hostile to international cooperation. Third, thinly disguising the anti-Muslim animus behind the ban by including nationals from North Korea and Venezuela effectively evaded the 1st Amendment's establishment clause. Religious discrimination can be diluted to pass the scrutiny of a conservative-majority court. Fourth, most of the targeted nationalities were from collapsing states like Yemen, Iraq, Syria, Libya, and Somalia that cannot generate an effective international backlash to protect their nationals. Against the expectations of the liberal judiciary and discursive hypotheses, and in keeping with the entrepreneurial agent hypothesis, Trump and his advisors

[15] *State of Hawaii v. Trump* 1:17-cv-00050 (D. Haw.); *International Refugee Assistance Project v. Trump*, 8:17-cv-00361-TDC (D. Md.).
[16] *Trump. v. International Refugee Assistance Project*, 582 U.S. ___ (2017).
[17] *Trump v. Hawaii*, 585 U.S. ___ (2018).

were able to breach a deeply institutionalized anti-discrimination norm by framing the move as a response to a critical security threat from terrorists.

Australia

Like the U.S., Australia has shifted from policies of only accepting white immigrants to an institutionalized norm against ethnic discrimination. The 'White Australia Policy' lasted from federation in 1901 until it was dismantled by the *Race Discrimination Act 1975*. The Department of Home Affairs claims that since the 1970s, "Australia's Immigration and Citizenship Program has been based around a universal, non-discriminatory visa system, which focuses on the contribution a person can make to Australia rather than their ethnicity, gender or religious beliefs."[18]

However, racial and religious selection continue to play a quiet role in Australia's refugee policies in a way that challenges the discursive hypothesis (H4). During Prime Minister Turnbull's leaked call to President Trump on 28 January 2017, Turnbull asserted the two governments similarly preferred Christian refugees. "We are very much of the same mind," Turnbull said to Trump. "It is very interesting to know how you prioritise the minorities in your executive order. This is exactly what we have done with the program to bring in 12,000 Syrian refugees, 90 per cent of which will be Christians."[19] Indeed, almost 80% of Syrian and Iraqi refugees arriving in Australia indicated they were Christian, even though Christians only constituted an estimated 15% of all refugees from Iraq and less than 1% of all refugees from Syria (Doherty 2018).

Other statements from the Coalition Government indicated that white South African farmers would receive "special attention" for refugee status (Karp 2018). The Coalition Government thus undermined by subterfuge the norm against religious and racial selection. The policy received little public criticism, with the most notable critique coming from the *New York Times* rather than Australian media.[20] Neither did the government pay a diplomatic price. A cautious public discourse hiding the content of the animus, and framing selection in terms of positive preferences for one group rather than negative discrimination against another, rendered counter-mobilizing impotent. The norm of non-discrimination is still resonant, in keeping with H4, but the amendment is that the norm can be evaded by attacking its principles quietly while paying lip service to the language of non-discrimination, or by disguising the ethnic/religious target with other categorical exclusions.

Family separation and detention of children

An international norm insists that immigration and deportation policies consider the best interest of the child and family unity. Article 9 of the 1990 UN Convention on the Rights of the Child provides, "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child." The UN's Special Rapporteur on Torture and Other Cruel, Inhuman or

[18] "The Administration of the Immigration and Citizenship Program, 4th Ed, Feb. 2020," p.3.
[19] "Donald Trump and Malcom Turnbull's phone call: The full transcript," ABC News, Aug. 3. 2017.
[20] https://www.nytimes.com/2017/05/03/opinion/australias-immoral-preference-for-christian-refugees.html

Degrading Treatment or Punishment states that separation of migrant families may violate the 1984 Convention against Torture (CAT).[21]

United States

The U.S. is the only country that has not ratified the Convention on the Rights of the Child, but it is party to the CAT. Domestically, one of the core norms of U.S. child welfare law is that decisions should be guided by the best interests of the child (Kohm 2007). More broadly, the celebration of "family values" is a strong cultural trope, particularly among conservatives.

On 6 April 2018, Attorney General Jeff Sessions ordered a "zero-tolerance policy" that separated migrant families apprehended at the southwestern border. While parents were referred for prosecution in federal criminal court, their minor children – who could not be criminally prosecuted and were not allowed to be kept in federal criminal detention facilities for extended periods – were transferred to the custody of the Office of Refugee Resettlement after being reclassified as "unaccompanied alien children." The administration acknowledged separating 4368 children between 2017 and 26 June 2018 (Davis 2020). Lawsuits filed by the ACLU revealed hundreds of separations predated the "zero tolerance" announcement.

A strong backlash erupted from the administration's opponents and even many allies. Two-thirds of American adults opposed family separation.[22] The UN High Commissioner for Human Rights office condemned the policy as "arbitrary and unlawful interference in family life" and "a serious violation of the rights of the child."[23] The Inter-American Commission on Human Rights issued a resolution warning of multiple risks to serious violations of children's rights.[24] Under pressure, Trump signed an executive order to stop separating families at the U.S.-Mexico border.[25] The next day, the DOJ filed an application seeking to modify the *Flores* settlement regulating the detention of children in immigration cases so that children could be detained with their parents indefinitely. A U.S. district judge denied the request.[26] Meanwhile, another U.S. district court issued a preliminary injunction against the family separation policy on June 26 and ordered the reunification of separated children with narrow exceptions. The order supported the plaintiffs' claims that the policy violated rights of due process, particularly in failing to keep records that would facilitate family reunification and communication, the "right to family integrity," and the "constitutional liberty interest" of parents "in the care, custody, and control of their children."[27]

The cumulative effect of the rulings was to prevent the administration from detaining children for long periods or separate families absent a determination that the parent was unfit, or otherwise a danger to the child. However, an ombudsman later found the government continued to separate families in often secretive ways, such as cases in which parents had previous, non-

[21] "Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Mendez," UN Human Rights Council, March 5, 2015.

[22] "Separating Families At The Border Is Really Unpopular," FiveThirtyEight, June 19, 2018.

[23] "Children 'as young as one' involved in US separation of migrant families – UN rights office," UN News, June 5, 2018.

[24] "Inter-American Commission on Human Rights Resolution 64/2018," Aug. 16, 2018.

[25] "Affording Congress an Opportunity to Address Family Separation," June 20, 2018.

[26] *Jenny L. Flores v. Jefferson B. Sessions, III* CV 85-4544-DMG (C.D. Cal. July 9, 2018).

[27] *Ms. L. v. U.S. Immigration and Customs Enforcement*, "Order Granting Plaintiffs' Motion for "Classwide Preliminary Injunction," U.S. District Court, Southern District of California, No. 18-00428.

violent immigration violations.[28] The frontal assault on the norms of family unity and the best interests of the child failed because of the federal courts' oversight and civil society mobilization, in keeping with the liberal judiciary and discursive institutionalist hypotheses, but the principle was quietly undermined in practice as the issue faded from public attention.

Australia

Australia has ratified the Convention on the Rights of the Child but has not codified its provisions within domestic law. It is the only country to mandate indefinite closed detention of undocumented children. While amendments to the *Migration Act* in 2005 provided that children only be detained as a last resort,[29] the Australian Human Rights Commission (2014) found 1000 children in detention centers who had been held eight months on average.[30] The Commission argued the policy violated several international conventions. However, the Coalition Government rejected the findings and tried to remove the Commission's head, Gillian Triggs. A poll found 34% of Australians supported Triggs, while 22% disapproved.[31] By 2016, most children were released from closed immigration detention and placed in alternative open facilities (Doherty 2016).

The detention of children in Australia's offshore processing center on Nauru was the focus of 2015 High Court litigation and a civil society campaign. The Human Rights Law Centre challenged the constitutionality of the Government's financing of the Nauru processing center in *M68 v Minister for Immigration and Border Protection.* However, the majority found the centers were constitutionally lawful. Following the failed legal challenge, civil society organizations led a public campaign to allow the 267 litigants, many of whom were children, to remain in Australia (Dastyari 2018). Many of the children had been brought to Australia for urgent medical treatment, while others were born in Australia. The campaign focused on sharing images and stories of the children on the front pages of major newspapers. Public opinion split, as 40% of Australians said the babies born in Australia should remain, and 39% said they should be sent to Nauru.[32] The campaign was successful in temporarily halting deportations to Nauru, but the Government continued to insist those in Australia would be returned to offshore detention. In 2018, a similar coordination of strategic litigation and public campaigning by a coalition of civil society organizations focused on sharing individual stories to demand the release of all children detained on Nauru.[33] The #KidsOffNauru campaign achieved the removal of all children held on the island.

Children continue to be a politically contentious issue within Australia's asylum debate. Policies are not guided by the best interest of the child. Thus far the Coalition government has not been punished diplomatically or by voters for their strict stance. Any constraints are the result of civil society advocacy and injunctions. As in the U.S., normative constraints on harsh policies are stronger for children than adults.

Non-refoulement of asylum seekers

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[28] "CBP Separated More Asylum-Seeking Families at Ports of Entry Than Reported…" DHS Office of Inspector General, May 29, 2020.

[29] *Migration Act 1958* s 4AA.

[30] "An overview of the children in detention," Australian Human Rights Commission.

[31] "Human Rights Commission," Essential Report, March 3, 2015.

[32] "Asylum seeker babies," Essential Report, Feb. 6, 2016.

[33] https://www.kidsoffnauru.com/.

The core norm of the international refugee regime is *non-refoulement*. The principle is included in the 1951 Refugee Convention and its 1967 Protocol. The CAT contains a *non-refoulement* provision for those facing torture. Both the U.S. and Australia are party to the 1967 Protocol and the CAT. *Non-refoulement* is part of international customary law and arguably *jus cogens*, meaning it has universal applicability and cannot be derogated (Costello and Foster 2016).

United States

The U.S. incorporated the 1967 Protocol's refugee definition into the 1980 Refugee Act, which included the right to apply for asylum at U.S. borders or within its territory.[34] Granting asylum to persecuted people is a robust legal norm at the international and domestic level and resonant in the deep political culture, though there are increasingly partisan debates about restricting asylum. In a 2019 survey, 77% of Republicans said it should be more difficult to gain asylum, while 79% of Democrats said it should be easier.[35]

The Trump administration attacked refugee resettlement and asylum. In addition to the temporary restrictions on the refugee resettlement program that were part of Travel Bans 1.0 and 2.0, the administration slashed annual resettlement slots, ending a small in-country processing program, increased security vetting, and granted subnational authorities the power to block resettlements in their jurisdictions (Pierce and Bolter 2020). Proclamation 9822 of 9 November 2018 suspended the right to seek asylum for "aliens who enter the U.S. unlawfully through the southern border." On 25 January 2019, the Department of Homeland Security issued the so-called "Migrant Protection Protocols" (MPP) requiring most asylum seekers at the southern border to remain in Mexico while awaiting the outcome of their cases filed in the U.S.[36] On 16 July 2019, the administration issued a rule barring asylum applications, with limited exceptions, for those who transited another country to reach the U.S.-Mexico border.[37] During the Covid-19 pandemic in March 2020, the Centers for Disease Control and Prevention suspended certain kinds of entry on the land border.[38] A letter from public health experts observed that in practice, the order would "enable the mass expulsion of asylum seekers and unaccompanied children."[39]

Pushback on asylum restrictions from legal advocates was strong, with mixed results in court. Where successful, advocates showed the administration's violation of the 1946 *Administrative Procedure Act*. A district judge granted a temporary restraining order against the ban on unauthorized asylum seekers who crossed the southern border. A preliminary injunction a month later was affirmed on appeal by the Ninth Circuit.[40] A preliminary injunction against MPP by the Ninth Circuit was stayed by the Supreme Court in March 2020, thus allowing the policy to continue during its litigation.[41] The July 2019 transit rule was enjoined by a district court, but the Supreme Court stayed the order.[42] Based on a suit filed against the administration's policy of restricting asylum applications at the southern border, a district court issued a preliminary injunction, but the Ninth Circuit lifted the injunction on appeal on 5 March 2020.[43] In June 2020

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[34] 94 Stat. 105, Sec. 208 (a)
[35] "Public's Priorities for U.S. Asylum Policy," Pew Research Center, Aug. 12, 2019.
[36] "Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration," DHS, Dec. 20, 2018.
[37] 84 FR 33829
[38] 85 FR 16559.
[39] "Public Health Experts Urge U.S. Officials to Withdraw Order…," Columbia University, May 18, 2020.
[40] *East Bay Sanctuary Covenant et al. v. Trump et al.*, D.C. No. 4:18-cv-06810- JST.
[41] *Wolf v. Innovation Law Lab*, Supreme Court Order of March 11, 2020.
[42] *East Bay Sanctuary Covenant v. Barr*. 588 U. S. ____ (2019).
[43] *Al Otro Lado et al. v. Wolf et al.*, D.C. No. 3:17-cv-02366-BAS-KSC.

the Supreme Court allowed new limitations on a habeas review for foreigners in "expedited removal" proceedings.[44]

Numerous regulations pay lip service to *non-refoulement* while effectively squeezing the channels to asylum nearly shut. Advocate wins based on administrative law arguments at the district and circuit level have sometimes been blocked by the Supreme Court. On the other hand, asylum rights would have been undermined even more without lawsuits or judicial review. The courts were a partial constraint, weakly in line with the liberal judiciary hypothesis.

Australia

Australia has ratified the Refugee Convention and its Protocol. However, it has not fully implemented their provisions in domestic law, meaning many policies are inconsistent with international law. Since 1992, successive Australian governments have maintained a hardline policy against people seeking asylum, especially by boat. Many of these policies, including mandatory detention, offshore processing, and interceptions in third countries, have received bi-partisan and majority public support.[45] However, 'turn-backs' first introduced under the Coalition Government in 2001 have been contentious. While the Labor Government ended the policy in 2007, the Coalition re-instated the policy as part of "Operation Sovereign Borders" immediately after coming to power in 2013 (Hirsch 2017), while also reducing the humanitarian resettlement program from 20,000 places annually to 13,750. Since 2013, 33 boats, carrying 810 passengers, have been returned to their country of departure. No refugee status determination is carried out for those returned to Indonesia, while a rudimentary screening is conducted for returns to Sri Lanka and Vietnam (Dastyari and Ghezelbash 2020).

Turn-backs have received mixed public reception. A 2014 poll found 46% of Australians "think that asylum seekers arriving by boat should be allowed to stay in Australia if they are found to be genuine refugees" while "26% think all asylum seekers arriving in Australia by boat should be sent back to the country they came from even if they are genuine refugees."[46] The Human Rights Law Centre sued the Government over the issue of turn-backs in *CPCF v Minister for Immigration and Border Protection.* The High Court held that the detention of 157 Tamil asylum seekers at sea and the Government's attempt to return them to India (where they departed) was legal under the *Maritime Powers Act 2013*.

Public concern for the turn-back policy has faded, as the policy has evidently stopped unauthorized boat arrivals. The policy is perceived to be so successful that the center-left Labor Party has also adopted it (Norman 2018). The right to ask for asylum in Australia has been under sustained assault to the extent that domestically, it is no longer a widely held norm to allow application by those who arrive by sea. Other norms around asylum are upheld by advocates with mixed success. The biggest regular public protest, held yearly on Palm Sunday, is attended by approximately one thousand people in each major city (SBS News 2019), but still fails to generate strong political pressure on the Coalition Government. The weak effects of international norms and binding treaties in this domain is in keeping with the realist position of Posner (2014). Against the liberal judiciary hypothesis, the structural lack of a bill of rights and normative weaknesses in judicial review prevent the courts from constraining government policy.

CONCLUSION

[44] *DHS v. Thuraissigiam*. 591 U. S. ____ (2020).
[45] "Policy of indefinite offshore detention of asylum seekers and refugees," Essential Report, Sep. 17, 2019.
[46] "Treatment of Asylum Seekers," Essential Report, Jan. 21, 2014.

Republican (2016-2020) and Liberal-National Coalition policies (2013-present) raise serious doubts about how far discursive and legal institutions at the domestic and international level can constrain attempts at much harsher restrictions on immigration and asylum, even in the quintessential liberal-democratic settler societies of the U.S. and Australia. Against the "liberal judiciary" and "discursive institutionalist" hypotheses, rightist governments in both cases sustained a weakening of norms around the autonomy of the judiciary, non-discrimination on ethnic and religious grounds, and non-refoulement. Political entrepreneurs who reject mainstream logics of appropriateness have extensive room to innovate and harshly restrict immigration. Trump and Stephen Miller, the architect of his immigration policies, flouted all manner of norms around political communication, the legitimacy of the free press, constitutional rights, and the separation of powers (Lieberman et al. 2019). When core features of democratic institutions are under assault, including the transfer of power following the 2020 election, it is little wonder that subsidiary norms became weaker and less consequential (Grier 2021). The "near miss" of restriction in both country cases was the attempt but ultimate failure to directly undermine norms around the rights of child migrants and family separation.

In keeping with the realist hypothesis, norm-busting was enabled by the weakness of international legal and political constraints in both cases. International law tends to defer to state sovereignty in immigration matters, with narrow exception in some aspects of asylum policy (FitzGerald and Cook-Martín 2014). International laws are not effective constraints where national judiciaries have long subscribed to a legal nationalist position that it is generally inappropriate to rely on international law. International political norms that usually constrain immigration policies were not a serious constraint in either case. Singularly unilateralist among post-World War II U.S. presidents, Trump flaunted diplomatic norms and weakened core multilateral engagements. While the Coalition Government is more multilateralist than the Republicans (see Figure 1), the spectre of reputational harms abroad has not deterred harsher Australian policies in this domain. After the UN's special rapporteur on torture found Australia was violating the rights of asylum seekers, Prime Minister Tony Abbott declared Australians are "sick of being lectured to by the United Nations" (Cox 2015). Despite some negative international public attention around maritime interception and offshore processing of asylum seekers, many European leaders seek to copy rather than condemn the Australian model, which earlier borrowed from U.S. policy (Ghezelbash 2018). An international race to keep out unwanted asylum seekers from the Global South means that norms violations by one state have become diffused across the Global North and do not trigger serious negative consequences from other states. As norms erode around the world, they become less constraining for a given state.

The judiciary has a mixed record of limiting the executive, but has generally been stronger in the U.S. than in Australia. The major constraints on Trump were the federal district courts and circuit courts of appeal, which ignore international norms and draw instead on interpretations of the U.S. constitution and increasingly, administrative law. These constraints themselves are contingent as judicial confirmations become less autonomous from winner-take-all partisan politics. While venue shopping by impact litigators makes the district and circuit appeals courts useful for limiting executive action, the conservative majority in the Supreme Court as of October 2018 and its 5-4 upholding of a travel ban motivated by religious animus suggest that the Supreme Court will not be an effective constraint on hardline policies unless they are very clearly outside the black letter of the law. Immigration judges, who are employees of the Department of Justice, are even less likely to constrain executive action.

Courts have posed limited constraints on Australia's immigration and asylum policies.

The emphasis on parliamentary sovereignty has enabled the Coalition to circumvent legal challenges by passing retrospective legislation. For example, in the *M68* case, Parliament passed legislation to retrospectively ensure offshore processing remains legal.[47] In *CPCF*, the Coalition introduced amendments to the *Maritime Powers Act 2013* to ensure that turn-backs were not declared unlawful.[48] An institutional design in which Parliament can pass such amendments has constrained the judiciary's ability to consider international legal obligations or common law rights. This has left the courts relatively weak in their ability to uphold norms. In both countries, judicial review of immigration policies has increasingly relied on the doctrine that the executive violated administrative law principles of fairness and reasonable grounds for state action (Wadhia 2019; Dunlop et al. 2019). We amend the liberal judiciary hypothesis by showing that three separate elements are necessary for a judiciary to fully uphold liberal-democratic norms: autonomy of the courts (Hamlin 2014), judicial review based on constitutional principles (Elliott 2001), and judicial review based on administrative law principles (Halliday 2004). Weakness in any of these elements degrades the courts' ability to constrain major new immigration restrictions.

Domestically, norm-busting restrictions are the subject of public debate. Street protests and advocacy campaigns in both countries have powerfully deployed discourses and symbols of immigrant nationhood and the obligation to protect children. Public concern for refugees' treatment has increased when children are concerned, as evident with the #KidsOffNauru campaign in Australia and widespread outrage in the U.S. about "children in cages." However, favorable discourses about nations of immigrants do not exist in a norms vacuum, and even in longstanding settler societies, they can be challenged by more insular forms of nationalism and securitization. Norms around children and families are more robust, but their principles are quietly undermined behind the scenes. Against the view of Freeman (1995), rightist media and parties have blown open the boundaries of legitimate discourse about immigration.

Just because norms have weaker constraints on rightist governments' policies than predicted by institutionalist scholars of immigration politics does not mean the norms never mattered, or that they do not matter now. Rather, these attempts at restriction highlight how norms are sticky, but never engraved in stone.

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[47] *Migration Amendment (Regional Processing Arrangements) Act 2015*

[48] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014.*

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Table 1. U.S. and Australian rightist party characteristics, 2019

Party	**Economic/ Cultural Values**	**Restrictive immigration policy**	**Multilateralist**	**Undermines liberal democracy**	**Opposes checks & balances on executive**
U.S. Republican	Right/Conservative	8.9	1.9	8.3	8.5
Australian Liberal	Right/Conservative	7.2	5.3	5.2	3.6
Australian National	Right/Conservative	7.7	4.7	7.0	4.3

Note: All scales are 0-10.
Source: Norris 2020.