Injunctions, Precedent, and Judicial Departmentalism: A Model of Constitutional Litigation

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Introduction

The public, the press, and first-year law students comprehend constitutional adjudication and litigation in two ideas. The first is judicial supremacy, that the Supreme Court holds the final, uncontestable word on what the Constitution says and means and all other actors must yield to that judicial understanding. This derives from *Marbury v. Madison*'s declaration that it is "emphatically the province and duty of the judiciary to say what the law is." The second is the assumption of what Jonathan Mitchell calls the "writ-of-erasure"—a court acts violently against a constitutionally invalid law, "striking down," "setting aside," or "invalidating" that law, rendering it null and void for all purposes, erased from existence, and no longer available as "law."

The reality of constitutional adjudication and litigation is more complicated and more bound-up in judicial procedure and in the political process. Neither of the above ideas is true. *Marbury* declares that the court has a duty to declare the law, which does not support the broader principle that the court's has the final declaration on the law. And invalidation of a law is not a recognized or permissible judicial remedy.[1]

Constitutional adjudication and litigation rests on five controlling principles:

• A violation of constitutional rights arises from executive action in the actual or threatened enforcement of a law or regulation against an individual. The existence of a law, apart from enforcement, does not state an actionable violation.

• Constitutionally defective laws do not disappear or cease to be law. The law remains on the books, until repealed by the relevant legislature. The effect of the court's declaration of constitutional invalidity is that the law cannot be enforced.

• Judicial remedies are particularized to the parties. The judgment that the court enters to resolve a discrete case or controversy between parties controls the conduct of the defendant and those closely connected to the defendant and protects the rights-holders who are party to the specific case. Injunctions should not be "universal," protecting parties and similarly situated non-parties alike.

• There is a distinction between the judgment in which the court resolves a discrete case or controversy and the opinion in which the court explains its decision. That distinction carries to distinctions in how they each is put into practice. The judgment is controlled by the law of judgments and preclusion, allowing the parties to enjoy the benefits and bear the burdens of resolved litigation and to enforce the court's judgment going forward. The opinion operates through the law of precedent, through its binding or persuasive effect on future courts resolving future cases or controversies raising similar issues.

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[1] **Harrison**

• Rather than a system of judicial supremacy and its surrounding rhetoric, the reality of U.S. constitutionalism is what Kevin Walsh labels "judicial departmentalism." Judicial departmentalism has three components: 1) The federal government must enforce judicial judgments and orders; 2) Governments and government officers who are parties to an action are bound to follow a judgment; 3) Judicial precedent controls courts (the extent varies between binding and persuasive authority and depends on the issuing court), but not federal or state legislative and executive actors, who remain free to act on their own understandings, interpretations, and judgments about the Constitution and the constitutional validity of laws and regulations.

These five principles create a constitutional system that is richer and more complicated than the simple narrative of judicial supremacy and disappearing laws. But it allows for a better understanding of the waves of constitutional litigation we have seen in recent years challenging laws and regulations governing and restricting immigration, abortion, same-sex marriage, and other subjects of constitutional litigation.

This paper proceeds in three steps. Part II explores each of the four principles described. Part III provides an overview of constitutional adjudication and litigation in the abstract. Part IV considers six examples of constitutional challenges to laws and regulations in various areas, describing how these disputes proceeded in and out of the courts, and how they could have proceeded in light of the principles described. The six examples are the litigation over marriage equality; the challenges to Department of Justice attempts to withhold federal law-enforcement funds from "sanctuary jurisdictions" that refuse to assist with enforcement of immigration laws; challenges to state and federal laws prohibiting flag desecration; challenges to laws prohibiting wearing certain apparel in polling places; disputes over regulations and restriction on abortion; and the challenge to the pre-clearance requirements of the Voting Rights Act. The six allow for consideration of the actions of courts, executives, and legislatures in enacting, enforcing, and adjudicating the constitutional validity of laws and regulations, illustrating how each acts and the interaction among the branches, officials, and governments.

II. Five principles of constitutional litigation and adjudication

A. Constitutional Violation in the Enforcement

An actionable violation of the Constitution is triggered not by the enactment or existence of a violative law or regulation, but by the actual or attempted enforcement of that law or regulation. That is, a plaintiff cannot sue because the legislature enacted or maintains a law; constitutional litigation comes in response to government efforts to enforce that law.

Descriptively, this is framed in terms of Article III standing. A plaintiff has Article III standing to obtain injunctive or declaratory relief barring enforcement of a law or regulation only by showing that she suffers ongoing, impending, or substantially likely harm, usually from the threatened enforcement of the challenged

law or regulation against her.[2] The existence of a law, without a credible threat of enforcement of that law against her, is insufficient to confer standing.[3] That the existing law might "chill" an individual from exercising her constitutional rights will not confer standing absent that credible threat.[4] Threats of enforcement to persons other than the plaintiff are insufficient to confer standing on that plaintiff.[5] Nor are generalized threats of enforcement as to the public as a whole that are not specific or unique to the plaintiff.[6] Because the claimed injury must be fairly traceable to the defendant's misconduct and judicially remediable, courts frame as constitutional standing the question of whether the plaintiff sued the wrong defendant.[7] If the named defendant is not responsible for enforcing the challenged law, the injury is not fairly traceable to that defendant and a judicial order directed to that defendant will not resolve the injury.

Normatively, William Fletcher argues that standing is better understood as a merits inquiry. Asking whether a plaintiff has suffered an injury-in-fact, the first element of the standing analysis, is really asking whether the plaintiff's legally recognized and legally protected rights, including constitutional rights, have been violated. Under a Fletcherian analysis, it would be a matter of the constitutional merits of a claim or defense whether the actual or threatened enforcement of a constitutionally defective law against that individual.

However conceptualized, the point is that constitutional litigation seeks to stop enforcement of a constitutionally defective law or regulation, because the Article III injury or constitutional violation arises from that enforcement. Constitutional litigation does not seek to stop the law itself. And the constitutional violation is not the existence of the law, but its actual or threatened enforcement.

B. Constitutionally defective laws are not erased

Constitutional defects in laws and regulations may be raised and litigated in two contexts. The government may enforce the law or regulation through criminal, civil, or administrative proceedings against X, a rights-holder; X, as defending party in the enforcement action, raises the constitutional defect in the law or regulation as a defense. Alternatively, X may initiate pre-enforcement litigation against the government or (more commonly) the executive officials responsible for enforcing that law or regulation, seeking a declaration that the law or regulation is constitutionally invalid and/or an injunction prohibiting enforcement. In many cases, the pre-enforcement action produces an anti-suit injunction, with the court

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[2] Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 523–25; *see, e.g.*, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2342 (2014); City of Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983).

[3] *Susan B. Anthony List*, 134 S. Ct. at 2342; Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979).

[4] ***Laird***

[5] *Lyons*, 461 U.S. at 105.

[6] U.S. v. Richardson, 418 U.S. 166, 176 (1974).

[7] **Cases**

issuing a prohibitory (or negative) injunction, prohibiting the defendant official from initiating a judicial proceeding to enforce the law or regulation against the rights-holder. But pre-enforcement litigation is not so limited, as it has extended to allow suits for prospective relief against enforcement of all laws and regulations, regardless of the means of enforcing.[8] In either procedural context, the court presented with the argument that the law or regulation is constitutionally defective must interpret the Constitution and decide whether the underlying law or regulation is consistent with the Constitution or whether it is invalid because it exceeds internal limits on the government's power to enact laws or because it violates individual constitutional rights.

When the court agrees that the law or regulation is constitutionally defective, it often is described as acting upon the law or regulation itself, as if the law were a *res* laid before the court.[9] And the action is described in violent terms. Courts "invalidate" or "strike down" or "set aside" or "nullify" or "block" these laws, acting against the constitutionally defective law itself to eliminate and render it non-existent.[10] Jonathan Mitchell labels this the "writ-of-erasure fallacy," the "assumption that a judicial pronouncement of unconstitutionality has cancelled or blotted out a duly enacted statute, erasing that law from the books, vetoing or suspending it and leaving nothing for the executive to enforce now or in the future." The challenged law or policy is seen as having been suspended or revoked. Judges, politicians, and the public regard "judicially disapproved statutes" as legal nullities.

But this conception is erroneous, as "federal courts have no authority to erase a duly enacted law from the statute books, and they have no power to veto or suspend a statute." A court cannot invalidate a law or regulation, even a constitutionally defective law or regulation, and cause it to disappear.

Rather, this constitutional determination means that the invalid law or regulation cannot be enforced. *Marbury* teaches that the consequence of a law being "repugnant" to the Constitution is that a court must refuse to apply it as a rule of decision in a case or controversy. In an enforcement action, the court will not enforce the law or regulation at issue; with no law or regulation to apply, the court must dismiss the enforcement action or otherwise find in favor of the defendant rights-holder. In a pre-enforcement action, the court will enjoin the defendant officer from enforcing the challenged law or regulation, prohibiting its future use as a rule of decision in a future case or controversy.

Courts lack the authority to order the repeal of state or federal laws. Repeal requires an act of the legislature. But legislators are not parties to litigation challenging the constitutional validity of laws—the government or the executive officials are the named parties and the only ones who can be subject to a judicial remedy. Moreover, federal, state, and local legislators enjoy absolute immunity from

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[8] ***VAPA***

[9] Walsh, *supra* note **Error! Bookmark not defined.**, at 1725.

[10] Bray, *supra* note 21, at 451–52; Bruhl, *supra* note 28, at 552; Fallon, *As-Applied and Facial Challenges, supra* note **Error! Bookmark not defined.**, at 1339; Frost, *supra* note ___, at m.40; **Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, ___ VA. L. REV. ___ (forthcoming 2018) (m. 4-6).**

suit or liability for legislative acts, such as enacting legislation. They therefore are absolutely immune from a court order that would require them to engage in the legislative actions of repealing laws.

C. Particularized Remedies

1. Remedies Particularized to the Parties

Courts enter judgments to resolve the case, to announce who wins and loses, to announce the appropriate remedies, and to establish the obligations and rights of the parties going forward.[11] Will Baude argues that the root of the judicial power under Article III is the authority to "issue binding judgments and to settle legal disputes within the court's jurisdiction. But judgments settle only those legal disputes, not others."[12] **Merrill??**

The judicial remedy portion is particularized to the parties and litigation properly before the court.[13] The judgment and order that the court issues binds the parties to the action as to the law and facts in the case. And the court's power to enforce that order, including by holding disobedient or non-compliant parties in contempt of court, is limited to the parties to the action and to the law and facts in the case.

This is obvious in an enforcement action. If the government initiates a proceeding to enforce a law against X and the court agrees with X that the law is constitutionally invalid and cannot be enforced as the rule of decision in the case, the court dismisses the action and enters judgment in favor of X and against the government that brought the enforcement action. But the judgment goes no further. The judgment does not prevent the government from initiating a new enforcement action against Y. It does not prevent a different government from initiating an action in its courts to enforce its similar law against X,[14] Y, or any other person. It does not prevent the government from initiating a new enforcement action against X for violating a different law or for violating the same law on a different set of facts.

The same should hold for a judgment in a pre-enforcement action for declaratory or injunctive relief. As Samuel Bray argues, a "federal court should give an injunction that protects the plaintiff vis-à-vis the defendant, wherever the plaintiff and the defendant may both happen to be. The injunction should not constrain the defendant's conduct vis-à-vis nonparties."[15] Douglas Laycock similarly argues that "the court in an individual action should not globally prohibit a government agency from enforcing an invalid regulation; the court should order only that the invalid regulation not be enforced against the individual plaintiff."[16] As John Harrison explains, when "a court enjoins an officer from enforcing a

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[11] **(Baude and Merrill)**
[12] **Baude**
[13] Baude
[14] ***But see*** **Separate Sovereigns**
[15] Bray, *supra* note 21, at 469.
[16] *Id.* at 276.

statutory rule, the effect is similar to the repeal of the rule as far as the plaintiff is concerned. When a court declares that a statutory rule is not applicable to a party because the rule is unconstitutional, the declaratory judgment again resembles a judicial act of invalidation with respect to the parties involved."[17] The Supreme Court endorsed this understanding in *Doran v. Salem Inn*,[18] that "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute."[19] The Court could have added that other States and state officers remain free to enforce their similar law against anyone who violates those laws.

This insistence on particularity runs into the recent controversy over universal[20] injunctions, with courts issuing injunctions prohibiting or purporting to prohibit enforcement of the challenged laws and regulations not only against the named plaintiffs, but against all similarly situated persons everywhere who might be subject to enforcement of those challenged laws and regulations.[21] The injunctions attempt to prohibit government officials from enforcing the challenged laws against the universe of all persons and entities, not only the named plaintiffs. Justices Gorsuch and Thomas separately recognized the problem as injunctions that "prohibit the Government from enforcing a policy with respect to anyone, including nonparties,"[22] "not limited to relief for the parties at issue" striking down "a federal statute with regard to anybody anywhere in the world."[23] Universal injunctions have been prominent in constitutional litigation over federal immigration and immigration-adjacent laws, although the problem arises with respect to all federal, state, and local laws.

Mitchell's idea of the writ-of-erasure fallacy shows why injunctions should be particularized rather than universal. The constitutional violation is not the enactment nor existence of an unconstitutional law or regulation, reflected in the fact that the remedy is not the erasure or voiding of the challenged law or regulation. The violation is the actual or threatened enforcement of that law or regulation against particular persons, which can be remedied by a court order prohibiting enforcement.

But that narrower conception of the violation determines the appropriate scope of the injunction. The "scope of injunctive relief is dictated by the extent of the [constitutional] violation established"[24] and the injunctive remedy should be commensurate with and match the constitutional violation.[25] A "remedy must of

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[17] **Harrison**

[18] Doran v. Salem Inn, Inc., 422 U.S. 922, 922 (1975).

[19] *Id.* at 931.

[20] **Terminology**

[21] Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 419 (2017); *see IRAP IV*, 883 F.3d at 272-73; *Batalla Vidal*, 279 F. Supp. 3d at 437; *Chicago*, 264 F. Supp. 3d at 951; *Santa Clara*, 250 F. Supp. 3d at 539.

[22] **Trump v. Hawaii (Thomas, J., concurring).**

[23] **Argument in *Trump v. Hawaii* at 72-73.**

[24] Califano v. Yamasaki, 442 U.S. 682, 702 (1979).

[25] Hills v. Gautreaux, 425 U.S. 284, 293–94 (1976).

course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."[26] Injunctive "relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."[27] If the violation is the actual or threatened enforcement of the constitutionally defective law by the government defendant against the rights-holder, an injunction that prohibits that officer from enforcing that law against that rights-holder matches and remedies, and is commensurate with, the constitutional violation in the case. And an injunction prohibiting enforcement of the challenged law against the plaintiff provides complete relief to the plaintiff, without imposing a greater burden on the government defendant.

2. Article III and Particularized Remedies

The particularity of litigation presents through Article III's justiciability requirements, at the front and back end.

As discussed previously, a plaintiff seeking to bring a pre-enforcement injunctive action must show an ongoing or impending threat that the challenged law or regulation will be enforced against her by the named defendant. She cannot bring the action based on threats of enforcement against other persons or the public as a whole. Whether we describe this as jurisdictional standing or substantive constitutional merits, the point remains that a plaintiff must show her own injury and a constitutional violation affecting her.

Courts undermine the particularity of standing through what Aaron-Andrew Bruhl derides as the "one good plaintiff" rule—courts adjudicate, and provide a broad equitable remedy in, multi-party actions so long as one plaintiff can show standing, without determining standing for every plaintiff.[28] Court assume that an injunction applies to everyone, because a court order that the defendant cease enforcing the challenged law means cease enforcing it against the world. Only one person needs standing to establish the law's constitutional invality, with the injunction applying to other, similarly situated persons.[29] This error contributes to the move from particularized injunctions to overbroad, universal injunctions.[30] Bruhl argues that courts would be more constrained in issuing remedies if they were more constrained in thinking about standing. If judges consider the standing of every plaintiff, they may better consider how to protect the interests of the plaintiffs without going beyond that scope to protect the universe of similarly situated persons.[31]

Particularity is required at the back-end through limitations on Article III mootness. A case is not moot (or mootness will be excepted) when, although the named plaintiff is not presently harmed or threatened with future harm, the injury

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[26] **Lewis v. Casey**

[27] *Califano*, 442 U.S. at 702; *see also* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 778 (1994).

[28] Aaron-Andrew P. Bruhl, *One Good Plaintiff is Not Enough*, 67 DUKE L.J. 481, 500 (2017); *see, e.g.*, Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 586 (4th Cir. 2017); Texas v. United States, 809 F.3d 134, 151 (5th Cir. 2015).

[29] **Bruhl at ___.**

[30] **Bruhl**

[31] Bruhl, *supra* note 28, at 552.

is reasonably likely to reoccur in the future and the claim is so transitory that the injury would cease of its own force before litigation (including all appeals) could be completed.[32] Common applications of capable-of-repetition include in constitutional challenges to holiday-season religious displays (the holiday season lasts approximately one month)[33] and to laws restricting abortion (the pregnancy ends within, at most, nine months).[34] Courts hear these cases despite potential mootness, because they otherwise would never have an opportunity to adjudicate and resolve important constitutional issues arising in these time-sensitive contexts.

For a case to not be moot under this doctrine, the injury must be capable of repetition as to the plaintiff, through a showing that she will be subjected to the challenged unlawful conduct in the future.[35] The plaintiff must show that she will encounter the constitutionally invalid religious display in the future or that she might become pregnant and seek an abortion (and be injured by potential enforcement of the abortion restriction) in the future. That a non-party might be injured through enforcement of the same abortion restriction or the erection of the religious display in the future does not avoid mootness. The court's Article III jurisdiction remains bound to future enforcement or threatened enforcement against this particular plaintiff, not against the universe of non-party individuals who might be subject to future enforcement. If one plaintiff brings an individual action challenging a seasonal religious display then moves out of the state, the court would find the case moot, even though the government may erect the display the following year, causing constitutional injury to non-parties offended by the display. One of those non-parties would have to establish standing and join or file a new lawsuit challenging the future display.

3. Expanding the Scope of the Remedy by Expanding the Scope of Litigation

Constitutional adjudication could have a broader effect. But courts and litigants must rely on ordinary litigation to expand the remedial scope beyond the bilateral one plaintiff/one defendant.

From the defendant side, the key is Federal Rule of Civil Procedure 65(d), which dictates the scope of an injunction. An injunction can run against a party, her agents, and "other persons who are in active concern or participation" with a named defendant. For example, an injunction running against the state attorney general would run against her deputies, as well as against local district attorneys subject to her oversight and control.

From the plaintiff side, the scope of who is protected by the injunction can expand by expanding who we regard as the plaintiff in the case.

a. Injunctive Class Actions

The obvious expansion vehicle is a civil rights injunctive class action under Federal Rule of Civil Procedure 23(b)(2). That rule allows the court to issue class-wide injunctive relief when "the party opposing the class" (has "acted or refused to

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[32] Turner v. Rogers, 564 U.S. 431, 439-40 (2011); Spencer v. Kemna, 523 U.S. 1, 17 (1998).
[33] Chabad Lubavitch of Vermont v. City of Burlington, 936 F.3d 109, 111 (2d Cir. 1991); American Humanist Ass'n v. Baxter Cty., 143 F. Supp. 3d 816, 822 (W.D. Ark. 2015).
[34] Roe v. Wade, 410 U.S. 113, 125 (1973).
[35] *Spencer*, 523 U.S. at 17; City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983). **Sanchez-Gomez**

act on grounds that apply generally to the class," so "that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[36] In pre-enforcement actions, government officials charged with enforcing the challenged law oppose the class, their actions in enforcing or threatening to enforce the challenged law or regulation caused injury in a way applying to the class generally, and an injunction prohibiting enforcement against the class protects the class. A class-wide injunction is not a universal injunction. Rather, the the class is the plaintiff assuming an identity and legal status independent of the representative individual plaintiff.[37] The class-wide injunction remains particularized to this distinct plaintiff.

The Supreme Court enacted the current version of FRCP 23(b)(2) in 1966 to ensure that courts can issue broad indivisible relief where appropriate in civil rights actions. The rule responded to Massive Resistance to *Brown*, in which courts and school districts "remedied" discrimination by ordering the individual African-American plaintiff to be admitted into all-white schools, but without altering the basic structure or operation of the school system and without benefitting non-party African-American students.[38] By certifying a class of prospective African-American students wishing to attend integrated schools, a court could issue an injunction compelling broader structural changes, a remedy benefitting all class members as parties to the case.[39] This injunction is not universal, because it does not protect beyond the plaintiffs to the case. Rather, the rule expands who is a party before the court and therefore who is and may be properly protected by a particularized injunction.[40] The court may narrow the scope and effect of the injunction by narrowing the scope of the class.[41]

b. Associational Standing

A second option arises where the plaintiff in a constitutional case is an entity suing on behalf of its members who are adversely affected by the challenged law or regulation.[42] An injunction issued in an associational standing case does not create or justify a universal injunction. The injunction runs in favor of the association and its members, carrying the same scope as the individuals suing on their own behalf.[43]

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[36] Fed. R. Civ. P. 23(b)(2); Bray, *supra* note 21, at 464 n.278; Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 649–50; Morley, *Nationwide Injunctions*, *supra* note **Error! Bookmark not defined.**, at 624 n.49.

[37] Iowa v. Sosna, 419 U.S. 393, 399 (1975). **Sanchez-Gomez**

[38] Carroll, *supra* note **Error! Bookmark not defined.**, at 858–59; Marcus, *supra* note **Error! Bookmark not defined.**, at 680–81.

[39] Carroll, *supra* note **Error! Bookmark not defined.**, at 859–60; Marcus, *supra* note **Error! Bookmark not defined.**, at 693–95.

[40] *Sosna*, 419 U.S. at 399; Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 541.

[41] Morley, *Nationwide Injunctions*, *supra* note **Error! Bookmark not defined.**, at 650.

[42] Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 542; *see, e.g.*, Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 342–43 (1977); Warth v. Seldin, 422 U.S. 490, 511 (1975).

[43] Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 539, 544–45.

In practice, associational standing creates something akin to a class action of all association members. Having an entity sue on behalf of its members expands the scope of the injunction, where the entity has thousands of members spread across the country or the world, all of whom enjoy the protections of the injunction by virtue of being members of the protected plaintiff-organization. An individual avails herself of the injunction's protections against future enforcement by showing membership in the association.

But the doctrine of associational standing imposes additional requirements, which makes it less an obvious end-run than a purely universal injunction in an individual case. Associational standing requires that members of the association would have had individual standing, that the interests protected in the action are "germane" to the association's purposes, and that the claim and injunctive remedy do not require individual participation.[44]

c. Third-Party Standing

An individual plaintiff, whether a person or organization, may assert third-party standing.[45] The person or entity claims an injury from defendant's conduct and sues to vindicate the constitutional rights of other persons with whom the plaintiff has a business, professional, or other close relationship and where it is not feasible for individual right-holders to sue on their own behalf.[46] Permissible relationships for third-party standing include businesses suing on behalf of potential customers,[47] medical professionals suing on behalf of patients,[48] and lawyers and advocates suing on behalf of clients. [49]

Like associational standing, third-party standing imposes additional requirements that prevent the court from universalizing the injunction. The plaintiff must show that it has standing—that it has suffered an injury in fact that is fairly traceable to the defendants' conduct and is judicially remediable. The plaintiff also must show that her interests are identical to those of the third persons represented or that substantial obstacles prevent rights-holders from asserting their own rights and make them unable or unlikely to sue.

An injunction granted to one plaintiff asserting third-party standing may produce an expansive injunction in several respects. The scope of the injunction varies with the scope of the plaintiff's base of clients or customers. It also may be difficult to determine the plaintiff's clients or customers. This uncertainty affects judicial enforcement of an existing injunction, not its scope when entered. The injunction could be written to protect the plaintiff, then leave to later enforcement efforts whether the person targeted for future enforcement of the challenged law is connected to the named plaintiff and thus protected by the injunction. In other words, if the government attempts to enforce the challenged law against an

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[44] *Hunt,* 432 U.S. at 343.
[45] Kowalski v. Tesmer, 543 U.S. 125, 129–30 (2004).
[46] *Id.* at 130; U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 720 (1990).
[47] Craig v. Boren, 429 U.S. 190, 195 (1976).
[48] Griswold v. Connecticut, 381 U.S. 479, 480–81 (1965).
[49] *Triplett,* 494 U.S. at 720; Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623 n.3 (1989); *but see Kowalski,* 543 U.S. at 131–33.

individual, the plaintiff is a rights-holder protected by the injunction and that enforcement of the law against her is inconsistent with the injunction.

The idea of "bona fide relationship," introduced during the litigation over President Trump's restrictions on travel from certain countries, performs some analytical work here. Where a court enjoins enforcement of the challenged law as to an entity asserting third-party standing, it can demand a "credible claim of a bona fide relationship" between that plaintiff and any rights-holders seeking the protections of the injunction. If the new target can show that relationship, the existing injunction protects here (as someone on whose behalf the plaintiffs had sued) and enforcement of the challenged law is prohibited. If she lacks such a relationship, the injunction does not protect her and the government can enforce the challenged law, subject to a new or expanded injunction protecting her or a plaintiff with which she has that credible claim of a bona fide relationship.

D. Judgments and Opinions, Preclusion and Precedent

A judicial decision contains two pieces—the judgment and the opinion.

As discussed, the binding judgment resolves the instant constitutional litigation of one plaintiff, one defendant, one law or regulation, and one constitutional right. A judgment must be obeyed by the parties and enforced by the executive even if erroneous. While a judgment remains in place and until it is reversed by a higher court in the federal hierarchy, parties are bound to obey, on pain of contempt and the judicial power to protect and enforce its orders. A party cannot avoid its obligation to obey or avoid contempt on the ground that the judgment is wrong. Under the "collateral bar rule," a party cannot disobey an injunction then challenge the contempt finding on the ground that the underlying injunction was erroneous or invalid. An erroneous judgment can be corrected only through established judicial processes, such as appellate review subject to the procedural rules that Congress and the courts put in place. The completion of that appellate produces an Article-III-final judgment, which cannot be questioned or undone by the other branches and is subject to sharply limited judicial reconsideration.

The judgment is accompanied by an opinion, a judicial explanation for how and why the court decided the case and entered judgment as it did.[50] That explanation is a hallmark of judicial decisionmaking,

The party-particularized scope of judgments produces atomized litigation, with courts resolving discrete, party-specific disputes. Arguments in favor of universal, non-particularized injunctions focus on the need for courts to have broader authority and to establish the parameters of constitutional law for other persons. The opinion produces that broader, prospective, beyond-the-parties effect. As Baude argues, "*Judgments* become binding law, not *opinions*. Opinions merely explain the grounds for judgments, helping other people to plan and order their affairs."[51]

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[50] **Baude; Merrill**

[51] **Baude (emphasis in original); Merrill**

The effect of the judgment is controlled by the law of preclusion. The judgment resolves the instant dispute, while preclusion limits the right of parties or those closely connected to the parties to relitigate the legal and factula issues resolved by that judgment. Parties cannot relitigate legal or factual issues actually litigated or claims that were or could have been litigated. But, like the judgment, preclusion is limited to parties to the first action and judgment or to those with a close connection to parties; preclusion does not affect those who were not subject to the original litigation and judgment. Class actions and other procedures for expanding the scope of litigation also expand the scope of preclusion—if the plaintiff is the class, then all members of the class are subject to the judgment's preclusive effect

But the future effect of that judgment remains limited to parties, however defined. In particular, parties cannot assert of non-mutual preclusion against the federal[52] or state[53] governments or government officials. That is, a non-party to the judgment in Court I cannot use so-called "non-mutual" preclusion against the federal or state and local governments to resolve new litigation before Court II. Court I having decided that the law is constitutionally invalid and unenforceable as to X, Court II is bound by that judgment to reach the same conclusion in a second attempt to enforce against X. But if Court II is facing an attempt to enforce against Y, it is not bound by the judgment and need not resolve that case in Y's favor.

The effect of the distinct opinion is controlled by the law of precedent. The decision of Court I, declaring a law constitutionally valid or invalid, serves as precedent for Court II considering the constitutional validity of that law or a similar law. Precedential force varies by court. A district court decision has only persuasive force for the next court as to the validity of the law. A regional court of appeals decision has binding force on other panels of that circuit and district courts within its circuit and persuasive force elsewhere. A Supreme Court decision has binding force on all courts in all circuits and districts and in all state courts.

Every precedent by every court is established in the course of resolving, by the judgment being explained, a concrete controversy between two parties.[54] To be sure, there are debates and confusion about when a judicial decision establishes precedent, what that precedent is, and how courts can tell.[55] While important questions, they are beside the current point that precedent governs the prospective non-party effects of a judicial decision. The effect of binding precedent continues until a decision is overruled by the issuing court, whether by a future Supreme Court or an en banc court of appeals.

Supreme Court affirmance of a non-universal party-particularized injunction by a district court does not render that injunction universal or extend it to prohibit enforcement of the challenged law against non-plaintiffs to that action. The effect is similar, of course. Supreme Court affirmance means all future enforcement

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[52] **Mendoza**
[53] **Morley**
[54] **Baude**
[55] **Kozel; Steinman; Horwitz; Re**

efforts must fail and all pre-enforcement actions to enjoin enforcement must succeed, because all courts are bound by the Court's pronouncement that the challenged law is constitutionally defective and not enforceable.[56] But the affirmance resolves the question as a matter of the law of precedent, the effect of one ruling on a second action involving enforcement against people who were not party to first case. It is not a function of the law of judgments or as an injunction prohibiting enforcement against those non-parties.

Courts will not agree, of course, producing conflicting decisions and precedent. Temporary disuniformity of federal law is inherent in multiple federal courts performing constitutional review in discrete factual situations.[57] It constitutes a feature rather than a bug in a system that relies on "percolation" of issues in lower courts. Multiple district and circuit judges have the opportunity to express their views. And the process achieves a balanced result, either through lower-court consensus that obviates Supreme Court resolution or lower-court disagreement that gives the Supreme Court a fuller legal and factual record with which to work when it ultimately resolves the legal question.[58] Either approach yields ultimate uniformity of federal law, albeit at the cost of temporary disuniformity as multiple cases in multiple courts wend through the judicial process.[59]

But the interim is unattractive, consisting of uncertainty, possible disagreement, and potential disuniformity, however temporary. Preclusion and precedent also place power in the hands of a later court, rather than the first court to decide the issue and issue an injunction. Court II decides whether and how to follow the precedent set by Court I. Determining the preclusive effect of one court's judgment " is usually the bailiwick of the *second* court;"[60] following a judgment from Court I, the parties in Court II raise the preclusive effect of that judgment in Court II and Court II decides whether preclusion applies.

The trend towards universal injunctions reflects judicial impatience with and an attempt to exert greater control over this process. District Court I, having declared the challenge law constitutionally invalid in Case I, does not want to give District Court II the opportunity to adjudicate the same issue against different parties in Case II; that court might reach a different conclusion as to the constitutional question, creating a conflict. And Court I does not want to leave for Court to decide the scope of its judgment and injunction. Court I would prefer to issue the lone controlling judgment and declaration on the law's constitutional validity, subject to reversal by its regional circuit or by the Supreme Court. Moreover, by issuing the lone universally binding judgment, it can enforce it through its contempt

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[56] Blackman & Wasserman, *supra* note **Error! Bookmark not defined.**, at 252–53; Walsh, *supra* note **Error! Bookmark not defined.**, at 1715, 1727–28.

[57] Bray, *supra* note 21, at 461; Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1605–06 (2008).

[58] Bray, *supra* note 21, at 46.

[59] *Id.*

[60] Smith v. Bayer Corp., 564 U.S. 299, ___ (2011) (emphasis in original).

power, cutting off any opportunity for disagreement by the parties or from another court, other than on review of the injunction itself.[61]

Although not a constitutional case, *Nevada v. United States Department of Labor* offers a bizarre example of the problems created by judicial reach. Several states and business organizations brought suit in the Eastern District of Texas[62] challenging the validity under the Fair Labor Standards Act of a Department of Labor regulation increasing the minimum salary for a worker to be exempt from overtime laws (that is, increasing the class of employees entitled to overtime); the district court issued a universal preliminary injunction prohibiting enforcement of the regulation,[63] then granted summary judgment in favor of the plaintiffs.[64] An individual named Carmen Alvarez, represented by counsel, sued Chipotle in the District of New Jersey, alleging that it had violated the DOL overtime regulation. The court found Alvarez's lawyers in contempt, concluding that they were in privity with DOL and that, because the injunction was universal, their attempts to enforce a regulation that the court already had determined they could not enforce violated a court order to which they were subject.[65]

Either preclusion or precedent should have been allowed to do the work here, not judgment. The action against Chipotle should have gone forward, with Chipotle urging the District of New Jersey to agree with the Eastern District of Texas that the overtime regulation was invalid and unenforceable. Alternatively, Chipotle could have asked the District of New Jersey to apply non-mutual defensive preclusion based on the privity between Alvaraez and DOL, leaving to that court the determination of the injunction's preclusive effect. But the Eastern District of Texas did not want to surrender that control. And the overbroad universal injunction allows it to maintain that control over the legal issues in the case, even as to non-parties.

The other important feature of precedent is that it can change, whether by a higher court reversing a lower court decision or by the highest court revisiting and overruling precedent after some time. Mitchell argues that governments and individuals must account for that possibility in organizing their enforcement activities and primary conduct. Laws that government officials believed were unenforceable in light of precedent but that remained on the books become enforceable with the change of precedent; laws they believed were enforceable cease to be so with the change. Conduct that individuals believe they may constitutionally engage in, free from government restriction, may cease to be available, as the conduct loses its constitutional protection and becomes subject to restriction.

E. Judicial Departmentalism

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[61] **Collateral Bar Rule**

[62] **Footnote about forum shopping, citing Bray and yourself**

[63] Nevada v. United States Dep't of Labor, 218 F. Supp. 3d 520 (E.D. Tex. 2016).

[64] Nevada v. United States Dep't of Labor, 275 F. Supp. 3d 795 (E.D. Tex. 2017).

[65] Nevada v. United States Dep't of Labor, 2018 WL 1383236, * (E.D. Tex. 2018)

A longstanding debate in constitutional law is between judicial supremacy, the view that the courts' (especially the Supreme Court's) constitutional interpretation and understanding controls,[66] and departmentalism, the view that the legislative and executive branches possess equal and co-extensive power to interpret the Constitution and owe no deference to judicial understandings.[67] Kevin Walsh urges a middle ground, which is both normatively preferable and descriptively accurate as reflecting what courts and political branches actually do, which he labels "judicial departmentalism.[68]

1. Judicial Departmentalism

The model of judicial departmentalism I urge here contains three components and builds on Walsh's argument. It also rests on Baude's distinction between judgments and opinions and the effect of each.

a. Parties Bound. A government or executive-branch officer who was party to a case is bound by the judgment in that case. She must obey the court's dictates, as with any private party and she is subject to contempt for disregard or disobedience of the injunction and the court's enforcement. She can appeal the judgment to a higher court. But once that judgment becomes Article-III final because the review process has been exhausted and the injunction has not been reversed, the official must comply with the judgment, on pain of contempt or other judicial enforcement of that judgment.

b. Federal executive enforcement. The federal executive must enforce an Article-III-final judgment rendered by a federal court, even if the executive disagrees with the judgment or with the constitutional analysis on which the judgment is based.

Gary Lawson and Christopher Moore offer two reasons for the limited executive power to ignore judgments, which is "so much taken for granted in our legal culture." Beyond the long historical tradition of executive obedience to judgments, they point to the principle of coordinacy between the branches--"The federal judiciary is a coordinate department of the national government. If judgments of the courts are not legally binding on the legislative and executive departments, it is hard to understand in what sense the judiciary could be coordinate. If the President is free to disregard court judgments, then the judiciary is reduced to issuing advisory opinions, which may or may not have the force of law, depending on the determinations of the executive department."

c. Precedent binds courts, not other branches

Walsh's main insight is that precedent—the forward-looking effects of the court's opinion—affects courts, but not legislative or executive officials. Supreme Court precedent binds all federal and state courts, while precedent from other courts has binding or persuasive effect, depending on the courts.

But legislative and executive officials at all levels wield independent authority to interpret the Constitution, consistent with their oaths to support and defend the

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[66] **Sources**
[67] **Sources**
[68] **Walsh**

Constitution. They are never bound by judicial precedent, even from the Supreme Court. Unlike the judgment to which parties are bound, the opinion has no legal force. It reflects the judicial understanding of the Constitution and the validity of the law at issue, but it need not dictate the legislative or executive understanding. Officials retain the power to interpret the Constitution themselves and to act on that distinct constitutional interpretation.

2. Effects of Judicial Departmentalism

Several things follow from this version of judicial departmentalism.

a. Inconsistent Action. Governments and government officials cannot disregard or act consistent with a judgment and injunction arising from a specific dispute to which they are parties, with respect to other parties to that case who are protected by the judgment and injunction (of whatever appropriate breadth). Governments and government officials otherwise may act inconsistent with the judicial precedent established in that case or the constitutional conclusions reflected in that judgment.

This is generally accepted in situations in which the Court has recognized some conduct as constitutionally valid but other branches decline to exercise that power or to engage in that conduct on the independent view that such conduct is not constitutionally valid. The paradigm is President Jackson, who insisted that the Bank of the United States was constitutionally invalid and vetoed the bill establishing the Second Bank based on his constitutional understanding,[69] despite the Court's determination that Congress possessed Article I power to create the Bank.[70]

But the rule of obedience to particularized judgments and independence from opinion and precedent permits the converse. Governments and government officials may exercise powers and engage in conduct they independently conclude to be constitutionally valid in the face of judicial precedent declaring that conduct invalid. Conduct as to other persons does not violate the particularized judgment or injunction or subject officials to contempt. And the precedent does not control other branches.

President Lincoln staked, although did not act on, this view with respect to *Dred Scott* and the Missouri Compromise. In his First Inaugural, Lincoln said:

> I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. * * * At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people

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[69] **Source**

[70] ***McCulloch***

> will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.[71]

Under this view, the executive can continue to enforce a law against non-parties to Case I protected by the judgment, despite a judicial declaration of the invalidity of that law or an identical law in other jurisdiction. A legislature can enact or reenact the same or similar laws, despite a judicial declaration of their invalidity.

Mitchell uses the example of the public-accommodations provisions of the Civil Rights Act of 1875. In *The Civil Rights Cases*, the Court declared that Congress lacked the power under the Thirteenth and Fourteenth Amendments to regulate race discrimination in places of public accommodation. Judicial departmentalism means the President could have continued to attempt to enforce the Act against other individuals. And Congress could have enacted the new public-accommodations provision in the Civil Rights Act of 1964, without looking for a new theory of the Commerce Clause or having to fear or acknowledge the limitations imposed on it by a 90-year-old judicial precedent.

Such inconsistent action by the non-judicial branches may be necessary if the political branches hope to change judicial precedent to bring it more in line with their constitutional vision. Courts can overrule precedent only in deciding a future case; they can decide a future case only if a case is brought because the executive enforces or threatens to enforce the targeted laws or regulations. The executive might limit such action to cases in which it wishes to challenge precedent and has reason to believe the court will overrule that precedent. Judicial departmentalism establishes that the executive is not so limited in choosing this option, but may enforce a law or regulation, contrary to precedent, whenever it believes the law is constitutionally valid. At least so long as the executive is willing to lose in court.

b. Declining to enforce or defend laws

The judicial-departmentalist power to reach constitutional conclusions at odds with judicial precedent and to act on those conclusions supports the arguments of Neil Devins and Sai Prakash that there is no presidential duty to either enforce or defend statutes. Both duties assume judicial supremacy, so they "flatter the courts because they exalt them as the final arbiters of constitutional questions."[72] At most, the executive perhaps bears duty to enforce a statute so as to create a concrete dispute for judicial resolution that allows the court to decide the constitutional issues, again including the possibility of overruling or altering precedent. But the executive need not defend the law once that litigation arises; the enforcement (or threat of enforcement) is sufficient to allow for the judicial proceeding. This is the position that the Obama Administration took with respect to the Defense of

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[72] **Devins & Prakash**

Marriage Act and that the Trump Administration has taken with respect to the Affordable Care Act.

c. Limiting mootness

Judicial departmentalism should make it more difficult for the government to moot a case in light of judicial precedent. If a court in Case I declares a law constitutionally invalid, a challenge to the validity of the same or similar law in Case II does not become moot. Because the executive can reach, and follow, a different constitutional understanding than that of Court I, there remains a credible threat that the law may be enforced against people other than the parties to Case I.

That the executive might or even will follow judicial precedent should not change that. A case should not become moot because of voluntary cessation of the unlawful activity by the defendant in response to a lawsuit. Otherwise, a defendant could engage in unlawful conduct, stop when sued to moot the case, then resume the unlawful conduct.[73] Voluntary cessation moots a case only when the defendant shows it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."[74] A governmental promise not to enforce a law on the books generally does not moot a case because the executive can change her mind at any time, although repeal of the underlying law is sufficient to moot.

Judicial departmentalism vests in the executive broad constitutional discretion and the absolute freedom to disagree with judicial precedent. A promise to adhere to judicial precedent is no different than a promise not to enforce a law or regulation, because the executive can decide at any time to change course and not follow precedent or adopt a new constitutional understanding. Thus, the promise to adhere to precedent should carry no more mooting force than a promise not to enforce the law.

3. Judicial Departmentalism to Judicial Supremacy

Larry Alexander and Larry Solum criticize judicial departmentalism because the judicial constitutional interpretation will prevail over the legislative or executive interpretation, unless the courts change their constitutional interpretation. Walsh labels this the "collapse" argument—because judicial departmentalism collapses into judicial supremacy after time-consuming and expensive litigation, the latter is the normatively better approach.

There are several elements of this collapse (if that is what it is).

Alexander and Solum argue that "it is child's play to get almost all constitutional questions about which there is interbranch disagreement into the form of a lawsuit fit for judicial resolution."[75] This reflects Alexis de Tocqueville's long-ago statement that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." "Armed with the

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[73] ***Already***

[74] ***Id.***

[75] **Alexander & Solum**

power of determining the laws to be unconstitutional, the American magistrate *perpetually* interferes in political affairs," such that "few laws can escape the searching analysis of the judicial power for any length of time." Mark Graber argues that Tocqueville's statement, while part of national lore, was untrue of the Jacksonian Era in which it was made and is not true in its absolute form in modern times. But particularly where individual rights are concerned, disputes over the constitutional validity of laws and regulations can and will make their way into court, where the judicial interpretationof the Constitution (established via precedent) will prevail over the legislative or executive understanding.

Walsh agrees that rhetoric and practice create in a regime of judicial supremacy, because neither the legislature nor executive regularly follows its own constitutional interpretations in the face of competing judicial precedent.[76] But judicial departmentalism remains the formal law underlying this practice.[77] Courts should understand the prevailing practice of the political branches and officials as a matter of voluntary compliance, a choice to accede to the judicial interpretation, rather than a formal system of judicial supremacy.

There may be many reasons for voluntary compliance.

a. Inevitability of defeat

The obvious explanation for voluntary compliance is the inevitability of the judicial loss. There is no reason or incentive for political officials to act contrary to obvious judicial precedent by enacting or enforcing laws that judicial precedent establishes as constitutionally invalid, because officials know they will lose once they enter litigation in a court that must follow precedent. This recalls Olo
This last possibility recalls insistence that law is the prediction by real-world actors, here government officials, of what courts will do. This incentive perhaps changes on some indication that the courts (particularly the Supreme Court) are inclined to reverse or modify existing constitutional law.

b. Consequences of defeat

The risk of defeat may alone stop determined political officials from pursuing a distinct constitutional agenda. Officials do not want to lose in court, which could have political or electoral consequences. But those consequences are minimal and may not deter officials willing to take a chance in court. And because new litigation is necessary for courts to overrule precedent, officials may continue pushing in the face of contrary precedent, hoping to eventually find the case that will change the judicial understanding of the law. That, of course, would be wasteful of government and judicial resources and burdensome on the public, who may be unable to exercise (judicially recognized) constitutional liberty without fear of attempted enforcement of a law that is constitutionally invalid according to the courts.

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[76] **Walsh**
[77] **Walsh**

Real deterrence comes from judicially imposed consequences of bucking precedent and losing in court.

One is qualified immunity. In an action for damages, an executive officer is immune so long as his conduct did not violate a clearly established constitutional right, such that no reasonable officer could have believed his conduct was lawful. The doctrine limits liability to "plainly incompetent" officers and those who knowingly violate constitutional rights. A right is "clearly established" by binding judicial precedent from the Supreme Court, perhaps binding judicial precedent within a regional circuit, or by a strong consensus of lower-court precedent. That precedent need arise from cases involving substantially similar facts, but there must be sufficient factual similarity or connection that the contours of the right were obvious in light of precedent. A right also may be so obvious that it can be clearly established as general principle without factual similar precedent,[78] but the bar for obviousness is high.[79]

This focus on judicial precedent both expands and contracts the interpretive power of non-judicial actors. Because precedent must be factually similar or sufficiently one-sided as to reflect a broad consensus of lower courts, the doctrine leaves room for departmentalist interpretation, as executive officers can proceed on interpretations that depart from precedent so long as that precedent is not overwhelming or factually identical. On the other hand, independent executive constitutional interpretations will not save officials from damages liability when those interpretations conflict with a sufficiently strong consensus of judicial precedent. On a third hand, departmentalism means we must reframe immunity as reaching the plainly incompetent and knowing violators. It must be specifically those who knowingly violate the Constitution as interpreted by the courts, although the official may believe he is acting consistent with the Constitution as he interprets it. Courts also should hesitate to label a departmentalist official as plainly incometent.

A second limit is that state and local officials and governments may be liable to pay reasonable attorney's fees for a prevailing plaintiff in a constitutional action. Enacted in 1986, § 1988(b) vests the court with discretion whether to award fees, but courts have held that a prevailing party should recover fees except in extraordinary circumstances. A party prevails when she obtains a judicial order and remedy that alters the relationship between plaintiff and defendant in an "enduring" way, including awards of compensatory damages, nominal damages, preliminary or permanent injunctive relief, consent decrees, and declaratory judgments. Attorney's fees offer an additional remedy for plaintiffs and an additional deterrent against government misconduct. They also may deter political branches from following their own constitutional interpretations in the face of judicial precedent, knowing that once the case enters litigation, the judicial understanding will prevail, the government will lose, and will be required to pay attorney's fees.

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[78] Hope v. Pelzer, 536 U.S. 730, 741 (2002).

[79] *White*, 137 S. Ct. at 552; Shafer v. Cty. of Santa Barbara, 868 F.3d 1110, 1117-18 & n.3 (9th Cir. 2017).

A third is Federal Rule of Civil Procedure 11, which prohibits parties from pursuing legal claims and defenses that are not "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." The "law" to which Rule 11(b)(2) refers includes the law that the court will apply, including judicial precedent. Regardless of the executive's view of the Constitution and the validity of the law, government attorneys run afoul of Rule 11, subjecting themselves to sanction, if they defend the law purely with regard to the executive interpretation and ignore (and ask the court to ignore) the prevailing judicial understanding as reflected in binding and persuasive precedent. Rule 11 leaves attorneys room to urge courts to reverse existing law, to reject the prevailing judicial understanding in favor of the prevailing executive view. But the argument must be "nonfrivolous;" attorneys must have good reason, beyond the other branches' competing constitutional vision, to argue for new law and for believing the courts are willing to change.

All three impose push towards voluntary compliance and impose a drag on departmentalism and on the willingness of executive officers—and the government attorneys who litigate on their behalf—to follow independent constitutional analysis that differs from controlling judicial interpretation. The certain loss combines with the threat of damages, sanctions, and attorney's fees to push non-judicial actors to adopt or coform to the judicial understanding.

c. Institutional Considerations

Voluntary compliance is the flipside of the executive duty to enforce and defend. The same institutional pressure that prompts executives to enforce (if not also defend) laws and regulations that judicial precedent declares constitutionally valid cause executives to refrain from enforcing laws and regulations that judicial precedent declares constitutionally invalid. Both assume the of ultimate judicial determination of constitutional validity.

With respect the duty to enforce-and-defend, Devins and Prakash deride this as "bureaucratic stratagem masquerading as high-sounding duty." They explain that political appointees and career attorneys in the Department of Justice "enhance their Department's autonomy and their status by embracing the duties to defend and enforce and other widely shared norms and traditions, customs that aid them in turf wars with the White House and other departments. At the same time, the duty is malleable, with vague exceptions that allow Justice Department officials to further both their own legal policy preferences and the desires of the White House and Congress." Congress is similarly willing to leave the Constitution to the courts, pursuing policy preferences without regard to judicial review or the ultimate judicial constitutional determination as to its law. In fact, when a court declares the law invalid, it gives legislators another opportunity to take a position on the issue and to reap the electoral advantages of that position.[80] And legislative and executive officials can campaign against the unaccountable and unelected judges ignoring the

[80] **Whittington; Devins**.

public will and preventing them from enacting their (and the public's) policy preferences.[81]

That institutionalism would affect DOJ lawyers charged with defending a statute that the President or Congress believes constitutional. They can prevail in turf wars with the White House and other departments by pointing to the difficulty of defending a law in court in the face of controlling judicial precedent.

4. Voluntary Compliance and the Rhetoric of Judicial Supremacy

The common reality for executive and legislative officials is voluntary compliance with judicial precedent, subverting independent constitutional views to the judicial views that almost certainly will prevail in litigation. Voluntary compliance is so that the rare example of non-compliance has earned a historic label—"Massive Resistance" to *Brown* and school desegregation by Southern officials.

Massive Resistance produced three seminal moments that illustrate the reality and contours of judicial departmentalism. The first is President Eisenhower sending the 101st Airborne to Little Rock to ensure desegregation. The second is *Cooper v. Aaron*, in which the Court adopted broad rhetoric of judicial supremacy. The third is Alabama Governor George Wallace standing in the schoolhouse doorway attempting to prevent African-American students from registering at the University of Alabama.

But none of these events was about *Brown*, at least not directly. The problem in all three cases was not that state officials ignored or acted contrary to *Brown*, because *Brown* did not affect or control them. University of Alabama and the public schools of Little Rock were not at issue in *Brown* (which came from Kansas) or the cases consolidated with *Brown* (which came from South Carolina, Virginia, and Delaware) and Arkansas or Alabama officials were not parties to those cases. *Brown* was judicial precedent on constitutional meaning that state officials remained free to disagree with and disregard in the exercise of independent constitutional judgment.

A closer look at both Little Rock and Alabama reveals the more complex judicial-departmentalism underpinnings of both events.

The Little Rock School Board attempted to voluntarily comply with *Brown*, developing a desegregation plan; new litigation initiated by African-American students in Little Rock resulted in a district court order adopting the Board's plan as a court order, affirmed by the court of appeals, and not appealed to the Supreme Court. This became an Article-III final judgment with which state officials were obligated to comply. Eisenhower ordered the Army to Arkansas to enforce a new injunction involving schools, students, and public officials of Little Rock. This is the apotheosis of the presidential obligation to enforce judgments and of the reality that judgments, and thus the judicial power, depend on executive power. But *Brown* was irrelevant, except to the extent that the district court judgment relied on *Brown*'s

[81] **Source for this**

constitutional understanding as binding precedent. Had the desegregation plans in Little Rock not produced litigation and that judgment, there would have been no legal obligation for Little Rock officials to allow African-American students to attend desegregated schools, nothing for a court to enforce, and no basis for Eisenhower to deploy the 101st.

The dispute that reached the Supreme Court in *Cooper* arose from the School Board's request to delay compliance with the original injunction and implementation of the desegregation plan, in light of "extreme public hostility" to desegregation rendering it impossible to create a "sound educational program" in a high school with African-American students. The only issue for the Court to resolve was whether conditions warranted that delay in following the injunction. The ode to judicial supremacy and the obligation of non-judicial officials to follow judicial precedent was unnecessary dicta having nothing to do with the dispute before the Court. The problem was not that Arkansas officials such as Governor Orval Faubus ignored *Brown*. The problem was that they attempted to ignore final judgment and injunction that bound them to act in some way; the law of judgments prohibits such disregard for a court order.

Similarly, Wallace stood in the schoolhouse door in violation of two injunctions—one requiring the University to admit the African-American students and one prohibiting Wallace from interfering with enforcement of that prior injunction. As with Little Rock, this was about *Brown* only because the district courts were governed by *Brown* in deciding to issue those injunctions. *Brown* alone did not give African-American students a right to attend the University of Alabama and did not obligate Wallace to allow them to attend. His blockade was unlawful only because those injunctions, not *Brown*, compelled him and other Alabama officials to act in some way.

Cooper is the touchstone for judicial supremacy. It also is the touchstone for critics of judicial supremacy, because the Court's judicial-supremacy rhetoric was misplaced and unnecessary given the case's procedural posture and history.

III. A Model of Constitutional Adjudication

This Part models constitutional litigation and adjudication in the abstract, in light of the principles introduced in Part II. Part IV will apply that model to concrete examples of constitutional litigation.

The starting point is a law or regulation that has been enacted and is on the books at the federal, state, or local level. The responsible executive officer (or officers) believe the law is enforceable and intend to enforce it. The law is subject to some constitutional objection, whether structural or individual-rights based.

Constitutional litigation and its side effects may proceed in several ways.

A. Enforcement Actions

The government initiates a proceeding against X to enforce the law or regulation. The nature of the proceeding depends on the law enforced and the level

of government enforcing it. It could be a criminal prosecution, a civil enforcement action, or an administrative proceeding, and the government initiating the proceeding could be the United States or federal agency, a state or state agency, or a municipality or municipal agency.

Regardless of the proceeding, X defends on the ground that the law or regulation is constitutionally invalid, whether because of a structural defect in the law, because the law exceeds internal limits on the powers of the enacting entity, or because the law violates external limits from protections of individual rights.. The court or agency must interpret the Constitution and declare the validity of the law or regulation enforced. If the adjudicator agrees that the law is constitutionally invalid, that law cannot be enforced in the proceeding and the adjudicator must dismiss the enforcement efforts or otherwise find in favor of X. If the adjudicator declares the law constitutionally valid, the law can be enforced in the proceeding, which then continues to determine whether X is guilty or liable under the law, given the facts of the case. The losing party in the initial proceeding may and will appeal into and through the judicial system, at the top of which stands the Supreme Court of the United States.

If the enforcing authority is a state or municipality, appeals proceed through the state judiciary, with each level given an opportunity to resolve the federal constitutional question. SCOTUS can review the final decision of the highest court of the state to decide the case, because the "validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution" of the United States. If the enforcing authority is the federal government or a federal agency, appeals proceed from the agency or a federal district court to the regional circuit court of appeals and then to the Supreme Court.

If the last court to consider the constitutional question agrees that the law or regulation enforced is constitutionally invalid, the action against X is dismissed or resolved in X's favor, producing a final judgment. X remains free to engage in his constitutionally protected conduct, free of interference from the invalid law. Preclusion doctrine prohibits parties from relitigating the legal or factual issues in the dispute.

B. Pre-Enforcement Actions

Rather than await an enforcement action, X may go on the offensive by initiating a proceeding in federal district court, naming as defendant the executive officer (or multiple executive officers) charged with enforcing the challenged law; the action requests a declaration that the law is constitutionally invalid and/or an injunction prohibiting enforcement of the law as to X. X pursues this strategy to beat the government to the punch and, where the challenge is to state laws, to move the constitutional issues into federal court. This strategy also is essential for challenges to laws or regulations that may not be enforced through judicial or administrative proceedings.

X must clear several preliminary hurdles for this action. He must establish that he has standing to bring the action, because he has suffered an injury in fact

traceable to the executive official sued that is redressable via judicial remedy. For present purposes, X must show that the challenged law or regulation has been enforced against him or that he faces a substantial risk or likelihood that it will be enforced against him by the named defendant official. X also may be unable to pursue the federal action if the government has initiated prior or contemporaneous enforcement proceedings against her.

The federal court can order preliminary or permanent injunctive relief. A permanent injunction is a final judgment on the merits following trial, while a preliminary injunction is interlocutory, designed to preserve the status quo pending completion of litigation. Either injunction requires the same showing by the plaintiff: that he is likely to succeed (or did succeed) on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. The first prong focuses on the constitutional claim—success on the merits means a showing that the challenged law is constitutionally invalid and that enforcement of the law against X would violate her rights.

The grant or denial of a preliminary or permanent injunction is immediately appealable to the court of appeals and then to the Supreme Court. All levels of the judiciary must decide whether to stay the judgment denying or granting the injunction pending review. If the court enjoins enforcement of the law, the stay of the injunction allows the government to continue enforcing until litigation is complete and denial of the stay leaves the injunction in place, prohibiting enforcement. Courts consider four factors in deciding whether to stay a judgment: (1) whether the stay applicant (the loser in the lower court) has made a "strong showing" that he is likely to succeed on the merits of the appeal; (2) whether the applicant will be irreparably injured absent the stay; (3) whether the stay will substantially injure other interested parties; and (4) where the public interest lies. Although stays and preliminary injunctions are distinction mechanisms, they overlap in function and in the factors governing each. A preliminary injunction alters the status quo and the stay suspends that alteration, leaving reviewing courts time and space to "responsibly fulfill their role in the judicial process." But a court must not "reflexively" hold every order in abeyance pending review. The decision to grant a stay involves the exercise of sound discretion and the propriety of a stay depends on the circumstances of each case.

If the district court enjoins enforcement and the injunction is affirmed on appellate review (or the government does not appeal or the higher courts decline to review), the injunction becomes Article-III final. Particularity (or non-universality) now affects the analysis. The injunction may be drafted to prohibit enforcement of the law by the named defendants, along with their officers, agents, servants, employees, and attorneys, and "other persons who are in active concert or participation" with the defendants. This gives the injunction a broad scope as to who it binds—all possible officers who might participate in enforcement of the challenged law are barred from doing so, even if not named defendants. The

injunction also must state the reasons it was issued, its terms, and "describe in reasonable detail . . . the act or acts restrained or required."[82]

The injunction should be narrower as to who it protects, by prohibiting the defendant from enforcing the challenged law only against X, but saying nothing about enforcement against anyone other than X. The protective scope can be expanded if X represents a class or if X sues representing its members or third parties to which it bears a connection.

An injunction is subject to continued and ongoing judicial supervision to ensure compliance by the defendant and continued necessity for the plaintiff. X can move to enforce the injunction if the defendant fails to comply or otherwise acts contrary to the court order. The court may enforce that order, including by holding disobedient officials in contempt and sanctioning them for contempt, including by jail. At the same time, government defendants can move the court to dissolve or modify the injunction when it no longer is necessary or when the constitutional landscape has changed so the law again becomes consistent with the Constitution and thus enforceable.

A court in such cases also may issue a declaratory judgment declaring the law constitutionally invalid and unenforceable as to X, but without enjoining defendants from enforcement. Declaratory judgments are regarded as a milder form of relief, an alternative to the harsh medicine of an injunction barring officials from enforcement on threat of contempt. The declaratory judgment functions by persuading officers that the law is invalid and that they should not enforce it. Should the declaratory judgment fail to persuade, X can ask the court to issue an injunction in furtherance of the declaratory judgment. Importantly, the declaratory judgment should be as party-particularized and non-universal as the injunction—declaring the law unenforceable as against X, but no one else.

C. Where We Are and What Happens Next

The result of the enforcement or pre-enforcement action is a final judgment in which X has prevailed as against the government or government officials. That judgment was accompanied by an opinion that the law or regulation is constitutionally invalid and cannot be enforced against X.

The real action centers on what happens after this initial litigation declaring the law invalid and prohibiting its enforcement by certain government officials against a particular rights-holder (or rights-holders). Accounting for the five principles discussed in Part II, the following are true as to the judgment in the enforcement action and the injunction in the pre-enforcement action.

1. No Enforcement as to X

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[82] **FRCP 65(d)(1).**

If the government attempted to enforce the law against X and X obtained a judgment in that enforcement action, the government cannot attempt to again enforce against X for past conduct. The judgment has preclusive effect on a new enforcement action. And if the law is criminal, the judgment triggers protections of Double Jeopardy.

If the judgment produced an injunction in a pre-enforcement action, government and government officials are precluded from present and future enforcement as to X. Should officials attempt enforcement, X could ask the district court overseeing the injunction to enforce its judgment and to order the officials to comply with the injunction by not attempting future enforcement. Continued disobedience is punishable by civil or criminal contempt and the imposition of sanctions including, theoretically, jailing the officials. X could assert preclusion in the second enforcement action, arguing that Court II is bound by the judgment of Court I and must dismiss the enforcement action. And in an obvious case, a federal court enjoin Court II from proceeding on preclusion grounds.[83]

The power to enforce an injunction is reserved to the parties to the litigation producing that injunction. Enforcing the injunction to halt future enforcement of the challenged law or regulation requires the district court to figure out who is X and who X represents; this defines who can enforce the judgment and when government violates the injunction by threatening enforcement.

If X sued as representative of a certified class, enforcement of the challenged law against any class member is inconsistent with the injunction and can be stopped by the court. If X sued in some representative capacity, enforcement against a represented person would be inconsistent with the injunction. The court resolves these matters at the point of the efforts to enforce the injunction. For example, if X was a doctor asserting third-party standing to enforce the rights of her patients, the enforcement question is whether Y (the target of new enforcement efforts) is one of those patients protected by the injunction protecting X.

The federal executive must enforce that judgment and any subsequent judicial orders in furtherance of the injunction, including contempt. This includes taking officials into custody or ordering the military to ensure compliance. Government defendants can move the court to dissolve or modify the injunction when it no longer is necessary or when the constitutional landscape has changed so the law again becomes consistent with the Constitution and thus enforceable.

2. Enforcement as to Y and Z

The judgment, properly scoped to protect X from enforcement of the challenged law by that government, does constrain any government or officers from doing anything with respect to Y and Z. The executive can enforce the questionable law as to Y and Z, even if they are similarly situated to X. The legislature can enact identical or similar legislation to be applied to Y and Z. Officers of other governments can make and enforce identical or similar laws as to

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[83] § 2283; ***Smith v. Bayer***

Y and Z. So long as all, in their independent judgments, believe the laws they are enacting and enforcing are constitutionally valid, they may proceed.

Nothing about the judgment in *X*, even as affirmed by the Supreme Court, affects their conduct. Because Y and Z were not parties to the prior litigation, they are not protected by the judgment. And executive officers of a different state were not parties to the prior litigation and so are not bound or compelled by that judgment to act or refrain from acting in any way. They do not violate the court's order or the Constitution through this conduct, if supported by their best constitutional understanding.

Nothing about the precedent created in *X*, even as announced by the Supreme Court, affects their behavior. Judicial precedent does not control or dictate the behavior of non-judicial actors. The may follow it because they agree with its substance. They may find it persuasive and allow it to affect their constitutional understanding. But any choice reflects an exercise of independent constitutional judgment and an act of voluntary compliance.

3. Returning to Litigation with Y and Z

Faced with threatened or actual enforcement of the laws or regulations against them, X and Y can proceed to federal court in search of their own injunctions barring enforcement as to them. Depending on the laws and governments involved, X and Y might join as plaintiffs in X's suit, asking the court to extend the existing injunction to protect them against enforcement. Their ability to do this turns somewhat on Federal Rule of Civil Procedure 20(a)(1), which allows multiple plaintiffs to join in a single action when their claims arise from the same transaction or occurrence and when there are common questions of law or fact. A court also certify a Rule 23(b)(2) class post-injunction, extending the injunction to all members of the class.

Y or Z also may initiate new litigation. They may file a new civil action to halt enforcement against them, seeking a new declaration of constitutional invalidity and a new injunction barring enforcement of the challenged law. Or they may await attempted enforcement of the law against them and defend the new enforcement action on the grounds of the law's constitutional invalidity.

Neither the law of preclusion nor the law of judgments plays any role here, because Y and Z were not parties to the original action. They are not protected by the existing judgment and cannot enforce it. And they cannot assert non-mutual preclusion against the federal or state governments.

The result established by Court I in *X* serves as precedent for Court II in the litigation involving Y and Z. If the Supreme Court decided *X* and declared the law constitutionally invalid, that precedent is binding. If a regional court of appeals decided *X* and declared the law constitutionally invalid, the precedent is binding on courts within that circuit, persuasive on all other courts. If a district court had the only word in *X*, the precedent is persuasive. This new litigation gives the plaintiffs and government the opportunity to argue about precedent—what the decision in *X* means, how it applies to a new law or to new parties, and whether there might be

differences between the laws or between the parties that changes the result. The government can argue that non-binding authority (from a different regional circuit, for example) is legally incorrect and that the court should follow a different view of the Constitution.

The result may be inconsistency between the decions from Court I as to X and Court II as to Y or Z, resulting in disuniformity of the law. But that disuniformity is the point of geographically and hierarchically dispersed decisionmaking. And it is temporary, as the Supreme Court stands ready to resolve splits of authority on the meaning of the Constitution and the constitutional validity of laws or regulations.

4. Government hesitancy before forcing future litigation

Governments do not pursue this path very often, particularly in the face of binding Supreme Court precedent declaring that a law or regulation (or category of law or regulation) is constitutionally invalid. There might be several reasons for this.

One is the political pressure of acting contrary to judicial (especially Supreme Court) precedent. Popular and political conversations assume judicial supremacy, that the existing word of the Supreme Court resolved the constitutional question. Efforts to follow departmentalism are framed, however erroneously, not as branch independence but as lawlessness, defiance of the judiciary and the Constitution, the return of the Massive Resistance that required the 101st Airborne in Little Rock. Officials may find it impossible to convince the public otherwise or may find that political capital is better spent elsewhere.

Second is the futility of the adventure. If the outcome of initiating or forcing new litigation is obvious, there is no point in the game.

Third is the disincentives against forcing further litigation--attorney's fees, Rule 11 sanctions, and loss of qualified immunity. State and local officials will be liable for Y or Z's reasonable attorney's fees from having to initiate a new action to halt enforcement of the law, should the second court follows precedent in *X*. If precedent "clearly establishes" the legal principle established in *X*, Y or Z could sue the officials for damages resulting from the actual or threatened enforcement of the law in the face of controlling precedent. Because the right would be clearly established, the officials enforcing the law as to Y or Z would lose on their qualified immunity defense. And government attorneys may be reluctant to pursue or defend Y and Z's litigation, to the extent it requires arguments that are inconsistent with controlling law.

IV. The Model in Action

Part II identified five principles that govern constitutional litigation and Part explained how constitutional litigation and adjudication operates, in the abstract, in light of those principles. This Part examines constitutional litigation over five issues. These examples consider initial judicial decisions, subsequent litigation choices, and conduct by all branches of government at all levels. Together, these

examples demonstrate all the moving pieces in this model of constitutional litigation.

A. *Shelby County* and Continued Enforcement of the Voting Rights Act

Jonathan Mitchell shows how the writ-of-erasure fallacy affected reactions to *Shelby County v. Holder* and the continued enforcement of the Voting Rights Act. *Shelby County* declared that the "coverage" formula in § 4(b) used to determine the states subject to "preclearance" under § 5 of the Act violated the constitutional guarantee of "equal sovereignty" to the States. States subject to preclearance cannot enact and enforce new voting regulations without preapproval by DOJ or a court order.

Mitchell offers *Shelby County* and the VRA as an example of the writ-of-erasure fallacy. Although the Court described itself as "[s]triking down an Act of Congress,"[84] Mitchell argues that the Court did no such thing. Both provisions continue to exist as law and remain part of the United States Code and Statutes at Large. *Shelby County* precedent means the "Supreme Court will protect covered jurisdictions who disregard the statutory preclearance requirement, by denying judicial relief to those who seek to enjoin the enforcement of a non-precleared law."[85] But those covered jurisdictions must remember that *Shelby County* could be overruled in the future, which would render their newly enacted voting provisions unenforceable. Thus, "covered jurisdictions would be well advised to continue submitting their voting-related laws for preclearance."

Particularized injunctions and judicial departmentalism allow a sharper understanding of the practical effects of *Shelby County*. The Court's judgment and injunction protected only Shelby County and prohibited the federal government from enforcing §§ 4(b) and 5 only against Shelby County. It did not prohibit enforcement as to any other covered jurisdiction and the government would not have violated the injunction if it attempted to enforce against another state or local government. Mitchell description of a Supreme Court promise to protect other covered jurisdictions derives from precedent and the binding effect of Supreme Court precedent.

Judicial departmentalism narrows that promise, because it establishes that *Shelby County* does not bind the other branches of the federal government. The Obama Administration, in office for three more years following the Court's decision, could have disregarded that precedent and continued to demand preclearance or sued covered jurisdictions to stop new regulations from taking effect, if it continued to believe the Act was constitutional despite the Court's decision. But such actions would return to Court, whether because the federal government attempted to enforce these preclearance rules or because a target covered jurisdiction sought to enjoin that enforcement. And the constitutional view in *Shelby County*, as precedent binding on courts, would carry the day. The Obama Administration thus ceased

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[84] ***Shelby***
[85] **Mitchell**

enforcement of the preclearance rules not because it was required to do so, but because it was destined to lose if it tried. It again was an example of voluntary compliance with judicial precedent, not a constitutional obligation. On the other hand, the executive must undertake some enforcement efforts to allow the Court to reconsider and overrule precedent.

B. Sanctuary City Regulations

One of the immigration-related controversies involving the Trump Administration and the dispute over universal injunctions involved federal regulations against so-called "sanctuary jurisdictions" that failed or declined to assist the federal government in enforcing immigration laws. DOJ regulations would withhold federal funds to state and local jurisdiction that failed to notify federal agencies of the identity and location of persons within those cities unlawfully present in the United States and declined to continue to hold persons detained on state and local charges for additional periods to allow federal immigration officials to take them into immigration detention.[86]

District courts enjoined the regulations in one action brought by the County of Santa Clara and the City and County of San Francisco and one lawsuit brought by the City of Chicago. Both courts made the injunctions universal, prohibiting DOJ from enforcing the regulations or stripping federal funds as to all state and local governments. The courts offered a number of reasons for making the injunctions universal, including the facial unconstitutionality of regulations, the power of the federal government to enforce the regulations against all state and local jurisdictions nationwide, judicial economy, and the unfairness of allowing federal regulations to be enforceable as to some governments and not others. The court in *Chicago* insisted that there is "no reason to think that the legal issues present in this case are restricted to Chicago or that the statutory authority given to the Attorney General would differ in another jurisdiction."[87]

A unanimous panel of the Seventh Circuit affirmed the injunction declaring the funding regulations constitutionally invalid and barring enforcement as to Chicago. The panel divided on the scope of the injunction. While agreeing that universal injunctions "should be utilized only in rare circumstances"[88] and that they were "a powerful remedy that should be employed with discretion,"[89] the majority justified the universal injunction in this case because it presented "essentially a facial challenge to a policy applied nationwide" and the format of the policy rendered individual relief ineffective in providing full relief.[90] In partial dissent, Judge Manion criticized the universality of the injunction as a "gratuitous application of an

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[86] Chicago v. Sessions, 264 F. Supp. 3d 933, 937–38 (N.D. Ill. 2017); Santa Clara v. Trump, 250 F. Supp. 3d 497, 509–11 (N.D. Cal. 2017).
[87] *Chicago v. Sessions*, 264 F. Supp. 3d at 951.
[88] ***Id.*** **at ___ (slip op. at 26)**
[89] ***Id.*** **at ___ (slip op. at 29).**
[90] ***Id.*** **at ___ (slip op. at 30).**

extreme remedy."[91] But the court later granted rehearing en banc on the scope-of-injunction question.

These cases provide the best illustration of overuse of universal injunction, because none of the justifications that any court offered justified universality.[92] Either scope-of-injunction principle supported particularized injunctions limited to the plaintiffs. Chicago or Santa Clara obtained complete relief from an injunction prohibiting DOJ from enforcing those regulations and from denying funds to those cities; neither loses complete relief and its relief does not become less than complete if DOJ denies funds to a different jurisdiction. Similarly, the constitutional violation is the denial of funds to the plaintiff city pursuant to the regulations, not the regulations themselves; an injunction prohibiting enforcement of the regulations and denial of funds to that city matches and remedies, and is commensurate with, the constitutional violation in the case.

When the dust settled on these cases, DOJ should have been prohibited by court order from enforcing the regulations against Santa Clara, San Francisco, and Chicago, on pain of contempt. It remained free to enforce regulations and seek to strip funds from every other state and local jurisdiction, requiring each of those jurisdictions to join the existing suits or bring their own lawsuits and obtaining their own particularized injunctions. This includes the power to strip funds from sanctuary jurisdictions within the Seventh Circuit, where binding precedent declared the funding regulations invalid.

The strong constitutional opinions from the Seventh Circuit affirming in *Chicago* and the district court in *Santa Clara* serve as persuasive precedent in those future actions, likely leading to new injunctions protecting other states and cities against enforcement. The Seventh Circuit decision provides binding authority, guaranteeing a new injunction should DOJ enforce against a jurisdiction in Illinois, Wisconsin, or Indiana. Aware of this likelihood of defeat, DOJ may stop attempting to enforce the regulations. Alternatively, DOJ may continue enforcing or threatening to enforce the regulations against new jurisdictions, hoping to win some cases in courts that decline to follow existing non-binding authority, creating a division of authority to be resolved by the Supreme Court.

C. Abortion Restrictions

Binding precedent accords some constitutional protection for women to terminate pregnancies. Current law prohibits government from enacting regulations that have the purpose or effect of imposing an "undue burden" on the right of a woman to terminate a pregnancy. But federal and state governments have enacted numerous laws and regulations over the years designed to limit abortion, including prohibitions on certain abortion methods, regulations on medical facilities and abortion providers, regulations of non-surgical medical abortions, prohibitions on

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[91] ***Id.*** **at ___ (slip op. at 42) (Manion, J., concurring in the judgment in part and dissenting in part).**

[92] **Wasserman**

abortions after 20-weeks gestation, and "fetal heartbeat" laws prohibiting abortions after detection of a fetal heartbeat (usually around 12 weeks). Although no states enacted flat bans on all abortion, several states enacted "trigger laws," bans that took effect when the Court rejected constitutional protection for abortion.

Supporters of reproductive freedom criticize these efforts as unconstitutional and in disregard of *Roe*. These restrictions have been challenged in pre-enforcement litigation, with varying degrees of success. Many pre-enforcement challenges to abortion regulations are brought by doctors and service providers, exercising third-party standing on behalf of patients who would seek reproductive services.

This model allows a more nuanced and accurate understanding of the give-and-take among the courts, litigants, and legislators. State legislators who believed that there is no (or a limited) constitutional right to terminate a pregnancy acted consistent with their constitutional oaths in enacting these laws and state executives acted consistent with their oaths in enforcing them and in defending them in court. It is erroneous to describe them as acting unconstitutionally because these laws were inconsistent with *Roe* and *Casey* and the judicial conception of the Fourteenth Amendment.

This offers a different understanding of the trigger laws. State legislative and executive officials could have acted consistent with their oaths in enacting and enforcing outright criminal bans, provided they believe in their constitutional validity. It was unnecessary to place the *Roe* trigger on the effective dates of those laws—inconsistency with *Roe* does not render them invalid. But the enforceability trigger makes sense as a matter of voluntary compliance with judicial precedent. Under current judicial interpretation, a flat ban on abortion imposes an undue burden on women's right to reproductive freedom. The enforcement of such a law is bound to be the subject of litigation and courts bound to follow *Roe/Casey* are certain to declare these bans constitutionally invalid. That successful constitutional challenge to the laws would award prevailing plaintiffs attorneys' fees. And *Roe/Casey* seems an example of clearly established constitutional law, such that officials could lose qualified immunity in attempting to enforce such an inconsistent law.

The retirement of Justice Kennedy in spring 2018 raised this issue in the opposite direction. At the time the Court decided *Roe* in 1973, many states that now favor liberal abortion access maintained restrictive abortion laws. Many such laws remain on the books, although unenforced in the face of certain judicial rejection of any enforcement efforts. The laws were not erased, repealed, or eliminated from existence by Supreme Court decisions dealing with similar or even identical laws from other jurisdictions. They were vestigial, a product of another legal and constitutional error. But they were not erased from the laws of the state.

The nomination (and certain confirmation) of Brett Kavanaugh changed the constitutional calculus. Whereas Kennedy had voted to preserve a vigorous constitutional right to reproductive freedom in two important cases, Kavanaugh was seen by abortion-rights advocates as a fifth vote to eliminate or limit that constitutional right. A change in the judicial constitutional understanding changes the enforceability of these laws; no longer facing certain rejection in court, state

officials may begin enforcing those laws in the new constitutional landscape. Fearing that prospect, officials in states such as Massachusetts and New York took steps to repeal those laws, heading off a risk of renewed enforcement and a new judicial response. This, of course, is the commonly accepted form of departmentalism—judicial precedent renders some laws constitutionally valid, but legislators and executives, adhering to a different view, choose not to enact or enforce such laws.

D. Flag Burning

In 1989, a 5-4 Court in *Texas v. Johnson* declared that a Texas law banning "venerated objects" constitutionally invalid in a criminal prosecution of an individual who burned an American flag during a political protest. Texas identified two interests in support of the law-- preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. The first interest was not implicated, as there was no record of any breaches of the peace and the Court refused to treat flag burning as fighting words. The second interest was implicated, but was related to the suppression of expression, in that the interest was endangered only when burning the flag conveyed a message that the government did not like. But while the second interest was compelling, the law could not survive strict scrutiny. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

The decisions parked a firestorm, as both houses of Congress raced to condemn the decision, and bipartisan majorities of both houses and President George H.W. Bush sought to undo the decision. The point of contention was how to undo the decision.

The President and congressional Republicans urged a constitutional amendment, insisting that it was impossible to enact a statute that would be constitutional valid under *Johnson* and that the statutory road would produce wasteful litigation and return everything to the same place. Moreover, Republicans wanted Congress and the states to have the power to halt flag-related speech in a content- (and even viewpoint-) discriminatory manner, a way that would promote the government's views of the proper meaning and patriotic use of the flag and restrict "undesirable" views or uses of the flag. Congressional Democrats insisted that they could draft a "neutral" flag desecration statute, one that could work within *Johnson*'s judicially established constitutional confines. As Robert Justin Goldstein explains in his history of the flag controversy, the key to the statutory argument was a narrow reading of *Johnson*. While the "overwhelming thrust and stress" of the opinion was that the government could not punish or prohibit flag burning as a means of political protest or to affirm the government's view of the flag, language in the opinion appeared to leave open the option of a la that targeted non-expressive flag burning or that was aimed at "protecting the physical in protecting

the physical integrity of the flag in all circumstances, but is designed to protect it from intentional and knowing abuse that causes serious offense to others."

The statutory approach won out and on overwhelming bipartisan votes, Congress enacted the Flag Protection Act, banned all desecration of the flag (including mutilating, defacing, physically defiling, burning, maintaining on the ground, or trampling), except for disposal of a worn or soiled flag, for any reason and with any motive or purpose. Supporters argued that a blanket ban reflected and served the government interest in protecting the physical integrity of the flag, apart from the message behind its use. The statute took effect in October 1989; the response was more than three dozen incidents of flag burning, most planned and designed to test the validity of the federal law. The United States prosecuted two incidents involving multiple defendants, one in Seattle and one in Washington.

With Brennan writing for the same 5-4 Court, the Court held in *Eichman* that the federal Act violated the First Amendment. Although the law prohibited all flag desecration, regardless of the speaker's motive or message, the government's asserted interest--maintaining respect for the flag as a symbol-- remained related to the suppression of expression because of its content.[3] This could be seen in the statute's text, which prohibited only conduct (mutilating, defacing, defiling) that "unmistakably connotes disrespectful treatment of the flag and suggests a focus on those acts likely to damage the flag's symbolic value," while still permitting respectful disposal by burning. Because the federal law remained content-based, *Johnson* and the First Amendment principles espoused there controlled.

Now the only option was a constitutional amendment, the push for which began when "[t]he ink had hardly dried on the *Eichman* opinion." Within less than a month, a proposed amendment fell thirty-four votes short of the necessary supermajority in the House and nine votes short in the Senate. Flag desecration silently remains the free speech issue that will not die. Proposals for a constitutional amendment have been made in one or both houses in every Congress since the 104th (the first of the Gingrich Revolution) in which Republicans have controlled one or both houses. Several proposals have passed the House; none have passed the Senate, although the closest, in the 109th Congress, fell one vote short. President Trump has railed against flag burning and urged the arrest or rescission of citizenship of anyone who burns a flag, but no serious new efforts at an amendment have been pursued.

This model of constitutional litigation offers a distinct lens through which to view was Goldstein calls the "flag desecration controversy" of 1989-90. The individuals seeking to challenge the federal statute did so by violating the law and burning flags and subjecting themselves to prosecution, rather than by preemptively filing a pre-enforcement action for a declaration of constitutional invalidity and an injunction. Courts are especially receptive to pre-enforcement actions raising First Amendment claims, adopting a "'hold your tongue and challenge now' approach rather than requiring litigants to speak first" (in this case by burning a flag) and subjecting themselves to prosecution and punishment. The increased current use of pre-enforcement challenges suggests that were the events of 1989 to recur, the strategy of opponents of the law would proceed differently.

This posture eliminates the need to debate the appropriateness of a universal injunction had these individuals pursued pre-enforcement actions. An injunction prohibiting enforcement against Flag-Burner X, without halting enforcement against anyone else, accords X complete relief and is commensurate with the violation of the enforcement of the law as to X. Flag-Burner Y can obtain his own relief with a separate action leading to a separate injunction.

This approach limited the effect of the Court's judgment in both *Johnson* and *Eichman*. The judgment *Johnson* reversed the conviction only of Johnson and did not prohibit Texas from prosecuting anyone else under its law. The judgment in *Eichman* required dismissal of prosecutions against ten individuals, but did not prohibit the United States from prosecuting anyone else. Of course, any such prosecutions were doomed to fail when courts applied *Eichman* and *Johnson* as binding precedent. But that failure is governed by precedent, not the judgment.

Finally, judicial departmentalism allows a different take on the congressional debates over statutory or constitutional responses to *Johnson*. As a matter of the First Amendment (as distinct from judicial precedent), a statute was a constitutionally appropriate response to *Johnson* and there was no essential reason that Congress had to make the statute fit within the parameters of the Court's language. So long as the members of Congress voting on the statute believed it constitutionally valid, they acted consistently with the Constitution. The concerns about a likely unconstitutional statute should be seen as a prediction of what the Court would (and ultimately did) do when presented with such a statute. Supporters of a constitutional amendment need not argue that the statute was unconstitutional, only that it would be declared such by the courts, giving controlling judicial constitutional precedent that binds the courts, if not Congress.

E. Marriage Equality (*Windsor*)