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ARTICLES

PRECEDENT, NON-UNIVERSAL INJUNCTIONS, AND JUDICIAL DEPARTMENTALISM: A MODEL OF CONSTITUTIONAL ADJUDICATION

by
Howard M. Wasserman[*]

This Article proposes a model of constitutional adjudication that offers a deeper, richer, and more accurate vision than the simple "courts strike down unconstitutional laws" narrative that pervades legal, popular, and political discourse around constitutional litigation. The model rests on five principles: 1) an actionable constitutional violation arises from the actual or threatened enforcement of an invalid law, not the existence of the law itself; 2) the remedy when a law is constitutionally invalid is for the court to halt enforcement; 3) remedies must be particularized to the parties to a case and courts should not issue "universal" or "nationwide" injunctions; 4) a judgment controls the parties to the case, while the court's opinion creates precedent to resolve future cases; and 5) rather than judicial supremacy, federal courts operate on a model of "judicial departmentalism," in which executive and legislative officials must abide by judgments in particular cases, but exercise independent interpretive authority as to constitutional meaning, even where those interpretations conflict with judicial understanding. The synthesis of these five principles produces a constitutional system defined by the following features: 1) the judgment in one case declaring a law invalid prohibits enforcement of the law as to the parties to the case; 2) the challenged law remains on the books; and 3) the challenged law may be enforced against non-parties to the original case, but

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[*] Professor of Law, FIU College of Law. Thanks to Thomas Baker, Samuel Bray, Andrew-Aaron Bruhl, Scott Dodson, Michael Froomkin, Michael Morley, James Pfander, Andrew Wright, and participants in programs at University of Colorado Law School, University of Miami School of Law, and the Southeastern Association of Law Schools.

systemic and institutional incentives weigh against such enforcement efforts and push towards compliance with judicial understandings.

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INTRODUCTION

The public, the media, political officials, and first-year law students understand and describe constitutional adjudication along three ideas.

The first is judicial supremacy.[1] 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; once the Court speaks on a constitutional issue, the only way to change is a constitutional amendment. This derives from *Marbury v. Madison*'s declaration that it is "emphatically the province and duty of the judicial department to say what the law is"[2] as well as language in *Cooper v. Aaron* seeking to enforce school desegregation.[3] The second is what Jonathan Mitchell calls the "writ-of-erasure fallacy"—the erroneous understanding that a court acts against a constitutionally invalid law, "striking down," "blocking," "setting aside," "halting,"

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[1] Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 456 (2000) [hereinafter Alexander & Schauer, *Defending*]; Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359 (1997) [hereinafter Alexander & Schauer, *Extrajudicial*]; Josh Blackman, *The Irrepressible Myth of* Cooper v. Aaron, 107 GEO. L.J. 1135, 1137 (2019); Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1715 (2017).

[2] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[3] Cooper v. Aaron, 358 U.S. 1, 18 (1958); Alexander & Schauer, *Defending*, *supra* note 1, at 456; Alexander & Schauer, *Extrajudicial*, *supra* note 1, at 1359; Blackman, *supra* note 1, at 1137.

or "voiding" that law, rendering it null and void for all purposes, erased from existence, and no longer effective as "law."[4] These combine into a third idea: An unconstitutional law disappears and the political branches are disabled from acting in some area absent a constitutional amendment or the Court overruling its precedent.

The reality of constitutional adjudication is more complicated and more bound-up in sub-constitutional features of judicial and political procedure and in inter-branch norms. *Marbury* establishes that the Court has a duty and power to declare the law in the course of deciding cases, which does not support the broader principle that the Court has the final power to declare the law.[5] And invalidating or striking down a law is not a recognized or permissible judicial remedy.[6]

Properly conceptualized, constitutional adjudication rests on five controlling principles, which I summarize here and describe in detail throughout the Article:

- A judicially remediable violation of constitutional rights arises from executive action in the actual or threatened enforcement of a law[7] against an individual. The enactment or existence of a law, apart from enforcement, does not state an actionable violation.

- Constitutionally defective laws do not disappear or cease to be law following a judicial ruling. Courts cannot repeal or eliminate a law, and a law remains on the books until repealed by the relevant legislature. The Court's declaration of constitutional invalidity means the law cannot be enforced by the relevant executive-branch officials; it does not mean the law ceases to take effect or ceases to to exist once it has taken effect.

- Judicial remedies are particularized to the parties. A judgment resolving a discrete case or controversy between parties controls the conduct of the defendant and those closely connected to the defendant. That judgment protects the rights-holders who are party to the specific case but extends no further. Injunctions prohibiting enforcement of a law should not be "universal" or "non-particularized"[8] to protect parties and similarly situated non-parties alike; orders must be particularized to the parties to the

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[4] Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 934–37 (2018); Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 358–59 (2018).

[5] Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1273–74 (1996).

[6] John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 88 (2014); Mitchell, *supra* note 4, at 942; Wasserman, *supra* note 4, at 356–57.

[7] In using "law" throughout the Article, I mean all enforceable legal rules regardless of source—statutes, administrative regulations and policies, executive policies, and judge-made common law.

[8] Throughout the Article, I describe injunctions in pairs: universal/non-particularized and

case. The scope of the remedy has been a point of significant recent academic[9] and judicial[10] dispute.

• The judgment resolving a discrete case or controversy is distinct from the opinion in which the court explains and justifies that judgment. That distinction establishes downstream distinctions in how each is put into practice and effect. A 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 and through its binding or persuasive effect on future courts resolving future cases or controversies raising similar legal issues among different parties.[11]

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non-universal/particularized. I previously adopted "universal" as the preferred and more accurate term, Wasserman, *supra* note 4, at 349–53, as did Justice Thomas in his concurring opinion in *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 n.1 (2018) (Thomas, J., concurring); *see also* Rodgers v. Bryant 942 F.3d 451, 460 & n.5 (8th Cir. 2019) (Stras, J., concurring in part and dissenting in part); Howard M. Wasserman, *Nomenclature Matters: Universal Injunctions, Declaratory Judgments, Opinions, and Precedent*, 91 U. COLO. L. REV. (forthcoming 2020) (manuscript at 6–7). Most courts continue to use "nationwide." *E.g.*, California v. Azar, 911 F.3d 558, 583–84 (9th Cir. 2018). My new preference distinguishes injunctions that are "particularized" to the parties from "non-particularized" orders protecting non-parties; this reaches orders that are not universal (because they do not protect everyone in the universe of enforcement targets) but do impermissibly protect beyond the parties to the case. Wasserman, *supra* (manuscript at 6–7).

[9] For scholars arguing that injunctions cannot protect beyond the parties to the case, see DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 276 (4th ed. 2010); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 418, 469 (2017); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. (forthcoming 2020) (manuscript at 4–5) (on file with author); Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 7–8 (2019) [hereinafter Morley, *Disaggregating*]; Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 620–21 (2017) [hereinafter Morley, *Nationwide Injunctions*]; Wasserman, *supra* note 4, at 353; Wasserman, *supra* note 8 (manuscript at 1–2). For scholars arguing that universal or non-particularized injunctions can protect beyond the parties, at least in some cases, see Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 5–7 (2019); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 56 (2017); James E. Pfander & Jacob Wentzel, *The Common Law Origins of* Ex Parte Young, STAN. L. REV. (forthcoming 2020) (manuscript at 56–57); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 72–73 (2019).

[10] *Compare Trump*, 138 S. Ct. at 2424–25 (Thomas, J., concurring), *with id.* at 2446 n.13 (Sotomayor, J., dissenting); *compare* California v. Health & Human Servs., 351 F. Supp. 3d 1267, 1300 (N.D. Cal. 2019), *aff'd* 941 F.3d 410 (9th Cir. 2019), *with* Pennsylvania v. President United States, 930 F.3d 543, 575–76 (3d Cir. 2019).

[11] Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915,

• Constitutional adjudication operates on what Kevin Walsh labels "judicial departmentalism."[12] Under judicial departmentalism: (1) the federal executive must enforce judicial judgments and orders;[13] (2) governments and government officers (federal, state, or local) who are parties to an action are bound to obey a judgment entered against them;[14] and (3) judicial precedent controls courts (the extent of control depends on the issuing court and varies between binding and persuasive authority) but not 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.[15]

The synthesis of these five principles produces a system of constitutional adjudication that can be framed as follows:

• A court, having declared a law constitutionally invalid, enters a judgment binding on the parties to the action, stopping, enjoining, or prohibiting enforcement of that law by the defendant government as to the rights-holders who are party to the case. The government is barred, on pain of contempt,[16] from further enforcement of the law as to the opposing parties. And the judgment has some preclusive effect on future enforcement efforts.

• The challenged law remains on the books. The executive may enforce that law against others not protected by the judgment if the executive continues to believe the law is constitutionally valid, even in the face of contrary judicial precedent. The legislature may keep the law on the books regardless of what judicial precedent says about its validity. Any legislature can enact or reenact an identical law contrary to judicial precedent.

• New legislative or enforcement efforts will land in court. When they do, courts are bound or persuaded by precedent to reach the same conclusion about the constitutional validity of the law and to enjoin or prohibit en-

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923 n.31 (2011) [hereinafter Fallon, *Fact*]; Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339 (2000) [hereinafter Fallon, *As-Applied*]; Adam N. Steinman, *Case Law*, 97 B.U. L. REV. 1947, 1957 (2017); Walsh, *supra* note 1, at 1727–28.

[12] Walsh, *supra* note 1, at 1715.

[13] Lawson & Moore, *supra* note 5, at 1321.

[14] William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1809–10 (2008); Walsh, *supra* note 1, at 1726.

[15] Baude, *supra* note 14, at 1809–10; Lawson & Moore, *supra* note 5, at 1328; Walsh, *supra* note 1, at 1726.

[16] Cass, *supra* note 9 (manuscript at 10–11).

forcement of the law as to new parties. Alternatively, the court may overrule precedent, declaring the law valid and permitting its enforcement.

This model provides a more accurate understanding of the waves of constitutional litigation we have seen in recent years challenging laws governing and restricting immigration,[17] same-sex marriage,[18] and abortion.[19] It offers a better way of thinking and talking about constitutional adjudication and about enforcing and vindicating constitutional rights. It understands that all branches of government have extensive and co-equal powers of constitutional interpretation. And it provides a richer, more complicated, and more complete narrative than the simple story of judicial supremacy and the Supreme Court "striking down" a law that disappears for all purposes and as to all actors. Constitutional and legal dialogue is richer for the more accurate description of the process.

This Article proceeds as follows. Parts I through V describe and elaborate on the five principles identified above. Part VI then describes how this process works in a generic case.

I. PRINCIPLE ONE: CONSTITUTIONAL VIOLATION IN THE ENFORCEMENT

An actionable violation of the Constitution is triggered not by the enactment or existence of a violative law, but by the actual, attempted, or threatened enforcement of that law. That is, a plaintiff cannot sue because the legislature enacts or retains a law; constitutional litigation comes in response to government efforts to enforce that law. In *Massachusetts v. Mellon*, the Court stated that it could not act in response to the "naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute," where "nothing has been

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[17] Trump v. Hawaii, 138 S. Ct. 2392, 2403 (2018); City of San Francisco v. Trump, 897 F. 3d 1225, 1231 (9th Cir. 2018); State of New York v. U.S. Dep't of Justice, 343 F. Supp. 3d 213, 220–21 (S.D.N.Y. 2018); City of Chicago v. Sessions, 264 F. Supp. 3d 933, 936 (N.D. Ill. 2017); Ms. L. v. U.S. Immigration & Customs Enf't, 310 F. Supp. 3d 1133, 1136 (S.D. Cal. 2018). *See generally* Wasserman, *supra* note 4.

[18] *See* Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 243 (2016); Howard M. Wasserman, *Crazy in Alabama: Judicial Process and the Last Stand Against Marriage Equality in the Land of George Wallace*, 110 NW. U. L. REV. ONLINE 1, 1 (2015); *see also, e.g.*, Miller v. Caudill, 936 F.3d 442, 446 (6th Cir. 2019).

[19] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016); E.M.W. Women's Surgical Center v. Beshear, 920 F.3d 421, 423 (6th Cir. 2019); Jackson Women's Health Org. v. Dobbs, 379 F. Supp. 3d 549, 551 (S.D. Miss. 2019). *See generally* Sabrina Tavernise, *'The Time Is Now': States Are Rushing to Restrict Abortion, Or to Protect It*, N.Y. TIMES (May 15, 2019), https://www.nytimes.com/2019/05/15/us/abortion-laws-2019.html.

done and nothing is to be done" to enforce that statute against someone.[20]

Descriptively, this is framed as Article III standing. A plaintiff has Article III standing to obtain injunctive or declaratory relief barring enforcement of a law only by showing that she suffers ongoing, impending, or substantially likely harm or injury from the actual or threatened enforcement of the challenged law against her.[21] The existence of the law, without a credible threat of enforcement of that law against her, is insufficient to confer standing.[22] That the existing law might "chill" an individual from exercising her constitutional rights will not confer standing absent that credible threat of enforcement.[23] That the existing law sends a negative "message" does not confer standing absent real or potential enforcement.[24] Threats of enforcement against persons other than the plaintiff are insufficient to confer standing on that plaintiff[25] as are generalized threats of enforcement against the public as a whole that are not specific or unique to the plaintiff.[26]

In addition, whether the plaintiff sues the wrong defendant is framed as constitutional standing. If the named defendant is not the government official responsible for enforcing the challenged law, the injury is not fairly traceable to that defendant, thus a judicial order directed to that defendant will not resolve or redress the injury caused by enforcement of that law.[27]

In deciding whether the plaintiff faces an imminent threat of enforcement, courts consider whether the federal pre-enforcement plaintiff could be prosecuted

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[20] Massachusetts v. Mellon, 262 U.S. 447, 483 (1923).

[21] Michael T. Morley, *DeFacto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J. L. & PUB. POL'Y 487, 523–35 (2016) [hereinafter Morley, *DeFacto Class Actions*]; *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).

[22] *Driehaus*, 134 S. Ct. at 2342; Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979).

[23] Laird v. Tatum, 408 U.S. 1, 10 (1972).

[24] Plaintiffs can claim an injury to challenge government practices, such as school prayers or religious displays, that violate the Establishment Clause by sending a "message" to non-believers that they are less-than-full members of the community. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309 (2000); Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). But those cases involve challenges to government execution of a prayer or religious display, not an unenforced policy permitting such prayers or displays. And two Justices have questioned "offended observer" standing, even in Establishment Clause cases. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2098 (2019) (Gorsuch, J., joined by Thomas, J., concurring in the judgment).

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

[26] United States v. Richardson, 418 U.S. 166, 176–77 (1974).

[27] *Cf.* Common Cause v. Biden, 748 F.3d 1280, 1284–85 (D.C. Cir. 2014); Brenner v. Scott, 999 F. Supp. 2d 1278, 1286 (N.D. Fla. 2014).

or subject to enforcement of the challenged statute in light of the facts of the plaintiff's intended conduct. The standing analysis in the pre-enforcement action predicts the executive enforcement decisions by mirroring the analysis that would apply in the enforcement action—whether the law applies to this individual and her conduct and whether the government might seek to enforce the law against such conduct by this individual.

Normatively, Judge William Fletcher argues that standing is better understood as an inquiry about the substantive merits. Asking whether a plaintiff has suffered an injury-in-fact—the first element of the standing analysis—really asks whether the plaintiff's legally recognized and legally protected rights have been violated.[28] The lynchpin of Fletcher's argument is his insistence that there is no such thing as an objective, neutral injury-in-fact divorced from some external, normative source of law establishing rights and duties that define when someone has been injured.[29] The relevant question is not whether an actual injury occurred in the abstract, but whether it is an injury that the courts should recognize because the substantive statutory or constitutional law recognizes it as one that can be vindicated and enforced in a particular case.[30]

Fletcherian analysis leads to the same conclusion as standing analysis. The constitutional merits stand or fall on the actual or threatened enforcement of a constitutionally defective law against that individual. Constitutional litigation seeks to stop enforcement of that constitutionally defective law against an individual because the Article III injury or substantive constitutional violation arises from that enforcement. Constitutional litigation does not and cannot stop the law itself because the law itself neither inflicts the injury needed for standing nor imposes the substantive constitutional violation. Absent some actual or threatened enforcement, there can be no injury and no constitutional claim.

II. PRINCIPLE TWO: COURTS HALT ENFORCEMENT OF THE LAW, NOT THE LAW ITSELF

A. The Process of Constitutional Litigation

Because the constitutional injury and violation arise from enforcement of the

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[28] William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty?*, 65 ALA. L. REV. 277, 282 (2013) [hereinafter Fletcher, *Standing*]; William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223, 232–33 (1988) [hereinafter Fletcher, *Structure*]; Howard M. Wasserman, *Fletcherian Standing, Merits, and* Spokeo, Inc. v. Robins, 68 VAND. L. REV. EN BANC 257, 258–59 (2015).

[29] Fletcher, *Structure*, *supra* note 28, at 231.

[30] *Id.* at 231–32, 234; Fletcher, *Standing*, *supra* note 28, at 281.

challenged law, it follows that the remedy must stop enforcement of a constitutionally defective law rather than erase the law itself.

Constitutional defects in laws may be raised and litigated in four contexts.

1. Defensive

Government initiates proceedings to enforce a law against *X*, a rights-holder, who raises the constitutional defect in the law as a defense to enforcement. Enforcement proceedings may be criminal,[31] civil,[32] or administrative.[33] A rights-holder defendant also may raise constitutional defenses to laws enforced through private civil litigation.[34]

2. Offensive, Prospective

Prior to initiation of an enforcement action against X, X sues the government or (more commonly) the executive officials responsible for enforcing the law in federal court, seeking a declaratory judgment[35] that the law is constitutionally invalid and cannot be enforced against X and/or an injunction prohibiting enforcement of that law against X.[36]

This is often labeled an *Ex Parte Young* action.[37] In many cases, the action produces an anti-suit injunction, with the court issuing a prohibitory (or negative) injunction prohibiting the defendant official from initiating a judicial proceeding to enforce the law against the rights-holder.[38] But *Ex Parte Young* pre-enforcement litigation extends to enforcement of all laws, regardless of how the defendant executive would enforce that law.[39] In either procedural context, the federal court, presented

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[31] Bond v. United States, 564 U.S. 211, 214 (2011); United States v. Stevens, 559 U.S. 460, 466–67 (2010); United States v. Morrison, 529 U.S. 598, 601–02, 608 (2000); United States v. Lopez, 514 U.S. 549, 552 (1995); Texas v. Johnson, 491 U.S. 397, 399 (1989).

[32] United States v. Windsor, 570 U.S. 744, 749–52 (2013); *cf.* Huffman v. Pursue, Ltd., 420 U.S. 592, 604–05 (1975).

[33] Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982).

[34] Snyder v. Phelps, 562 U.S. 443, 450 (2011); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 243 (1974); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964); Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1243 (10th Cir. 2010).

[35] 28 U.S.C. §§ 2201–2202 (2012).

[36] Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 861–62 (1997); Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975); Steffel v. Thompson, 415 U.S. 452, 454 (1974).

[37] *Ex Parte* Young, 209 U.S. 123, 167–68 (1908).

[38] Va. Office for Protection & Advocacy v. Stewart, 563 U.S. 247, 262 (2011) (Kennedy, J., concurring); Bray, *supra* note 9, at 449–50; John Harrison, Ex Parte Young, 60 STAN. L. REV. 989, 990, 1014–15 (2008).

[39] *Stewart*, 563 U.S. at 256–57; *see, e.g.*, United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1536 (2018); City of Chicago v. Sessions, 264 F. Supp. 3d 933, 936 (N.D. Ill. 2017); Miller v. Davis, 123 F. Supp. 3d 924, 933–34 (E.D. Ky. 2015); Pfander & Wentzel, *supra* note 9

with the argument that the law is constitutionally defective, interprets the Constitution and decides whether the underlying law exceeds internal limits on the government's power to enact laws (such as the Commerce Clause or federalism limits)[40] or external limits on the government's power arising from individual-rights provisions (such as the First or Fourteenth Amendments).[41]

A court may grant a declaratory judgment alone or alongside an injunction, whether or not further relief is or could be sought.[42] Or the declaratory judgment can form the basis for a later injunction against the party whose rights had been declared.[43] Congress enacted the Declaratory Judgment Act in 1934.[44] In *Steffel v. Thompson*, the Supreme Court explained the remedy as a delayed reaction to the "storm of controversy" that followed *Ex Parte Young*, reflecting congressional hostility to federal district courts preventing state and federal governments from enforcing their laws.[45] A declaratory judgment offered a "milder alternative" to the "strong medicine" of an injunction.[46] It was less intrusive on states and political branches because the court did not prohibit enforcement of the law. It was less coercive because it was not immediately enforceable through contempt if the government defendant disregarded the order.[47] Declaratory judgments operate through persuasion, convincing government defendants to follow a course of action by the force of the court's reasoning.

If persuasion does not work and coercion becomes necessary, the declaratory judgment can form the basis for a subsequent injunction, although the injunction at least requires an additional step and additional time. In fact, many plaintiffs seek pre-enforcement injunctions where the primary motive is to obtain the declaration of rights that a declaratory judgment provides.[48]

Samuel Bray rejects the thesis that "mildness" represents the distinction between injunctions and declaratory judgments. A declaratory judgment is a court

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(manuscript at 49).

[40] Bond v. United States, 564 U.S. 211, 214 (2011); United States v. Morrison, 529 U.S. 598, 601–02 (2000).

[41] *Obergefell*, 135 S. Ct. at 2608; United States v. Stevens, 559 U.S. 460, 481–82 (2010); *Reno*, 521 U.S. at 849; Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

[42] 28 U.S.C. § 2201 (2012).

[43] *Id.* § 2202; Samuels v. Mackell, 401 U.S. 66, 72–73 (1971).

[44] Steffel v. Thompson, 415 U.S. 452, 466–67 (1974).

[45] *Id.* at 465–67.

[46] *Id.*

[47] Perez v. Ledesma, 401 U.S. 82, 111–12 (1971) (Brennan, J., concurring in part and dissenting in part); Cass, *supra* note 9 (manuscript at 49).

[48] EMILY SHERWIN & SAMUEL L. BRAY, AMES, CHAFEE, AND RE ON REMEDIES, CASES AND MATERIALS (forthcoming 2020) (manuscript at 17–18).

order. The judicial declaration that a law should not be enforced against an individual frees the individual to engage in constitutionally protected conduct without fear of enforcement; it is of no matter that the judgment does not command non-enforcement of the law on threat of contempt.[49] The real distinction between the remedies is the greater detail the court must include in an injunction, allowing it to manage the parties and their conduct going forward. Declaratory judgments require less detail and less party management, allowing the court to pronounce rights without more.[50]

Choosing between an injunction and a declaratory judgment thus depends on the scope and needs of the case—whether ongoing court supervision and management is necessary. An injunction is essential in a structural-reform case, where the purpose of litigation is judicially managed, detailed, and specific reform of government institutions such as schools or prisons.[51] A declaratory judgment may be sufficient in the one-off case in which an individual seeks to stop enforcement of a constitutionally invalid law but does not require broader judicial oversight[52]—or can wait to obtain judicial oversight when it becomes clear the declaratory remedy is insufficient. Courts may regard the declaration of rights as sufficient because the government "will do their duty when disputed questions have been finally adjudicated and the rights and liabilities of the parties have been finally determined."[53]

3. Offensive, Retroactive

A rights-holder can bring an action for damages under 42 U.S.C. § 1983[54] for past constitutional injuries caused by state or local officials[55] or municipalities[56] or under *Bivens v. Six Unknown Named Agents* for past constitutional injuries caused by federal officials. [57] Rather than stopping enforcement, these lawsuits seek retroactive remedies, primarily damages, after government officials have taken or attempted constitutionally defective enforcement efforts, including enforcing a constitutionally defective law against a rights-holder. The damages remedy compensates the plaintiffs for the past injury, deters continued or future enforcement efforts, and

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[49] Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1120–21 (2014).

[50] *Id.* at 1124–25.

[51] *Id.* at 1128; *see, e.g.*, Brown v. Plata, 563 U.S. 493, 545 (2011).

[52] Bray, *supra* note 49, at 1124–25.

[53] Martin v. Gross, 380 F. Supp. 3d 169, 172 (D. Mass. 2019).

[54] 42 U.S.C. § 1983 (2012); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 663, 701 (1978); Monroe v. Pape, 365 U.S. 167, 173–74 (1961).

[55] *Monroe*, 365 U.S. at 171–72.

[56] *Monell*, 436 U.S. at 690.

[57] Ziglar v. Abbasi, 137 S. Ct. 1843, 1854 (2017); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

holds government officials accountable for past misconduct.[58] Defendants in such damages actions may include police officers who arrested the plaintiff for violating the constitutionally defective law[59] or other executive officials charged with enforcing the law outside of the courts.[60]

4. Federal Government

Although less-frequently wielded, the federal government can initiate criminal[61] or civil[62] proceedings against state and local governments and government officials to protect individuals' federal constitutional and statutory rights against misconduct by state and local governments and officials. These efforts allow vindication of individual rights where defendants may be immune from private suit.[63]

B. The Results of Constitutional Litigation

Each procedure described in Part II.A produces the same result if the court agrees that the law is constitutionally defective—a judgment declaring the law constitutionally invalid and a remedy prohibiting or deterring continued and future enforcement of that law as to the parties to the action (or redressing injury from past enforcement). Regardless of remedy, the results of the cases should have the same scope.

Court are often described as acting upon the law itself. And the court's action against the law is described in violent terms. Courts "invalidate" or "strike down" or "set aside" or "nullify" or "block" or "void" or "halt" or "stop" these laws, preventing them from taking effect or eliminating and rendering them non-existent.[64] Jonathan Mitchell labels this the "writ-of-erasure fallacy," the "assumption that a judicial pronouncement of unconstitutionality has canceled or blotted out a duly enacted statute, when the court's ruling is in fact more limited in scope and leaves room for the statute to continue to operate."[65] The challenged law or policy is understood as suspended or revoked or vetoed or blocked, with judges, politicians, and

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[58] City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267–68 (1981); Owen v. City of Independence, 445 U.S. 622, 651 (1980).

[59] Snider v. City of Cape Girardeau, 752 F.3d 1149, 1156 (8th Cir. 2014).

[60] Ermold v. Davis, 936 F.3d 429, 432–33 (6th Cir. 2019)

[61] 18 U.S.C. § 242 (2012); *id.* § 241; United States v. Lanier, 520 U.S. 259, 271–72 (1997).

[62] 34 U.S.C. § 12601 (2012).

[63] Alden v. Maine, 527 U.S. 706, 755 (1999).

[64] Bray, *supra* note 9, at 451–52; Aaron-Andrew P. Bruhl, *One Good Plaintiff is Not Enough*, 67 DUKE L.J. 481, 552 (2017); Fallon, *As-Applied*, *supra* note 11, at 1339; Frost, *supra* note 9, at 1100; Mitchell, *supra* note 4, at 934–35.

[65] Mitchell, *supra* note 4, at 937.

the public regarding "judicially disapproved statute[s]" as legal nullities.[66] This position finds support in the loose language of *Marbury* that a law "repugnant to the Constitution" becomes "entirely void."[67]

But this conception is erroneous. As the Court explained in *Massachusetts v. Mellon*:

> We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right.[68]

A court cannot apply a constitutionally defective law as a rule of decision in the instant case or controversy, as the *Marbury* Court refused to enforce Section 25 of the Judiciary Act of 1789 and exercise jurisdiction over Marbury's action.[69] In an enforcement action, the court cannot enforce the law at issue; with no law to apply, the court must dismiss the enforcement action or otherwise find in favor of the defendant rights-holder.[70] In a pre-enforcement *Ex Parte Young* action, the court enjoins the defendant officer from enforcing the challenged law, prohibiting its future use as a rule of decision in a future case or controversy.

But federal courts cannot act on the law itself. As Mitchell argues, "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."[71] Invalidation is not a recognized judicial remedy: "Courts do not invalidate statutory rules in a literal sense, and therefore do not, strictly speaking, grant a remedy that makes a statutory provision ineffective."[72] The target of the lawsuit is the person of the enforcing-official defendant, not the law as a *res*.[73]

Courts also cannot stop a law from taking effect, repeal a law, or order the

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[66] *Id.* at 944.

[67] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

[68] Massachusetts v. Mellon, 262 U.S. 447, 488 (1923).

[69] *Marbury*, 5 U.S. at 176–80.

[70] United States v. Stevens, 559 U.S. 460, 481–82 (2010); Texas v. Johnson, 491 U.S. 397, 420 (1989); Mitchell, *supra* note 4, at 936.

[71] Mitchell, *supra* note 4, at 936.

[72] Harrison, *supra* note 6, at 88.

[73] Walsh, *supra* note 1, at 1725.

legislature to repeal the law; all require an independent legislative act.[74] But legislators are not parties to litigation challenging the constitutional validity of laws—the government or the responsible executive officials are the named parties and the only ones subject to a judicial remedy. Nor can litigants sue to force repeal. Federal, state, and local legislators enjoy absolute immunity from suit or liability for legislative acts, including enacting or repealing legislation.[75] A court cannot order legislators to engage in the legislative actions of repealing or refraining from enacting laws.

That a law has been declared constitutionally invalid and its enforcement prohibited does not absolve rights-holders of their legal obligations under that statute so long as the statute remains on the books in effect.[76] Rather, a rights-holder has (or can gain, through future litigation and future remedies) judicial protection (or promise of judicial protection) against enforcement of that law and that legal obligation. For example, having convinced a court that the state prohibition on flag desecration violates the First Amendment, X is protected from conviction for his act of flag desecration,[77] as will be Y who, subsequent to that judicial determination, desecrates a flag.[78]

III. PRINCIPLE THREE: PARTICULARIZED REMEDIES

A. Remedies Particularized to the Parties

A court enters a judgment[79] to resolve the case or controversy before it—to announce who wins and who loses, to announce the appropriate remedies, and to establish the rights, duties, and obligations of the parties going forward. William 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."[80]

This judicial remedy is particularized to the litigation at issue and therefore to the parties to that litigation.[81] The judgment and order that the court issues binds the parties to the action as to the law and facts in the case, resolving their dispute. And the court's power to enforce that order, including by holding disobedient or

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[74] Brookins v. O'Bannon, 699 F.2d 648, 655 n.16 (3d Cir. 1983).

[75] U.S. CONST. art. I, § 1, cl. 1; Bogan v. Scott-Harris, 523 U.S. 44, 46 (1998); Gravel v. United States, 408 U.S. 606, 616 (1972).

[76] Mitchell, *supra* note 4, at 1008; Walsh, *supra* note 1, at 1726.

[77] Texas v. Johnson, 491 U.S. 397, 420 (1989).

[78] Snider v. City of Cape Girardeau, 752 F.3d 1149, 1156 (8th Cir. 2014).

[79] FED. R. CIV. P. 58.

[80] Baude, *supra* note 14, at 1811; *accord* Robert. J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 860 (2001).

[81] Baude, *supra* note 14, at 1811; Pushaw, *supra* note 80, at 860.

non-compliant parties in contempt of court,[82] is limited to the parties to the action and to the law and facts in the case.

This is obvious in an enforcement action. Imagine the government initiates proceedings to enforce a law against X, X defends on the ground that the law is inconsistent with the Constitution, 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 and enters judgment in favor of X and against the government that brought the enforcement action. But this judgment goes no further, speaking to no person other than X. And no one believes or argues otherwise. The judgment does not prohibit the government from initiating a new enforcement action against Y. It does not prohibit a different government from initiating an action in its courts to enforce a similar law against X, Y, or any other person. It may not prohibit the same 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 arising from a different transaction or occurrence.

It also is obvious in a retroactive action for damages. The plaintiff receives the monetary award, no one else. Non-parties benefit indirectly from the deterrent effect of the judgment and damages award for the plaintiff—wanting to avoid future damages judgments, governments and government officials will not engage in that constitutionally violative behavior.[83]

It follows that a judgment in a pre-enforcement action for declaratory or injunctive relief to halt future enforcement of the challenged law should be similarly particularized, protecting the plaintiff but not non-parties. A pre-enforcement action anticipates government enforcement, and the pre-enforcement remedy prevents that attempt. The rights-holder's defensive effort to stop enforcement before it begins is symmetrical to her defensive effort to defeat an ongoing enforcement action. If the judgment in the enforcement action would be limited to the rights-holder, the judgment in the pre-enforcement action should go no further. The goal of both actions is to halt enforcement of the challenged law—if one is particularized to one rights-holder, so should the other.

Thus, Bray argues that 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."[84] 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

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[82] Juidice v. Vail, 430 U.S. 327, 335–36 (1977); Reynolds v. Roberts, 207 F.3d 1288, 1297 (11th Cir. 2000).

[83] *See* Owen v. City of Independence, 445 U.S. 622, 651 (1980).

[84] Bray, *supra* note 9, at 469.

enforced against the individual plaintiff."[85] John Harrison agrees:

> When a court enjoins an officer from enforcing a 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.[86]

The Supreme Court endorsed this position in *Doran v. Salem Inn*, stating, "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."[87] The Court could have added that other states and officers of other states remain free to enforce their similar laws against anyone who violates those laws.

This insistence on particularity abuts the recent controversy over universal or non-particularized injunctions,[88] with courts issuing injunctions in pre-enforcement actions that prohibit or purport to prohibit enforcement of the challenged laws not only against the named plaintiffs, but also against all or some similarly situated non-parties who might be subject to enforcement of those challenged laws.[89] These injunctions attempt to prohibit government officials from enforcing the challenged laws against the universe of all persons and entities rather than 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"[90] and are "not limited to relief for the parties at issue" by striking down "a federal statute with regard to anybody anywhere in the world."[91] Legal scholars are divided between those who argue that Article III and equity require injunctions to be particularized to the parties and those who argue that courts have broader equitable remedial powers.[92]

Mitchell's writ-of-erasure fallacy[93] illustrates why remedies should be particularized rather than universal/non-particularized. The constitutional violation is neither the enactment nor existence of the unconstitutional law, thus the remedy is not

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[85] LAYCOCK, *supra* note 9, at 276.

[86] Harrison, *supra* note 6, at 87.

[87] Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975).

[88] *See supra* note 8.

[89] Bray, *supra* note 9, at 419. *Compare* California v. Health & Human Servs., 351 F. Supp. 3d 1267, 1300 (N.D. Cal. 2019), *aff'd* 941 F.3d 410 (9th Cir. 2019), *with* Pennsylvania v. President United States, 930 F.3d 543, 575–76 (3d Cir. 2019).

[90] Trump v. Hawaii, 138 S. Ct. 2392, 2424 n.1 (2018) (Thomas, J., concurring).

[91] Transcript of Oral Argument at 73, *Trump*, 138 S. Ct. 2392 (No. 17-965).

[92] *See* sources cited *supra* note 9.

[93] Mitchell, *supra* note 4, at 937.

the erasure or voiding of the challenged law. The violation is the actual or threatened enforcement of that law against particular persons, which can be remedied by a court order stopping or preemptively prohibiting enforcement particularized to those persons.

That narrower conception of the constitutional violation dictates the appropriate scope of the pre-enforcement injunctive or declaratory remedy. The "scope of injunctive relief is dictated by the extent of the [constitutional] violation established"[94] and should be commensurate with and match the constitutional violation.[95] A "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."[96] Injunctive "relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."[97] And the judicial remedy must benefit the plaintiff "in particular."[98]

If the violation is the actual, attempted, or threatened enforcement of the constitutionally defective law by an executive official against a particular rights-holder, an injunction prohibiting that official from enforcing that law against that particular rights-holder matches and remedies, and is commensurate with, the constitutional violation in the case. An injunction prohibiting enforcement of the challenged law against the plaintiff, X, provides complete relief to X without imposing a greater burden on the government defendant. That relief is not rendered less than complete if the injunction does not prohibit the government from enforcing the law against Y and if the government attempts to enforce that law against Y. Nor does X benefit from an order protecting non-parties from enforcement, as that non-party enforcement does not harm or affect X.

The requirement of particularity applies where the plaintiff seeks declaratory relief only, without a corresponding injunction.[99] Either remedy resolves a discrete dispute between discrete parties to a discrete action and not beyond.[100] A declaratory judgment should be as particularized as an injunction, limited to declaring the rights of the plaintiff as against the government defendant, but not extending to declaring

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

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

[96] Lewis v. Casey, 518 U.S. 343, 357 (1996).

[97] *Califano*, 442 U.S. at 702; *see also* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 778 (1994) (Stevens, J., concurring in part and dissenting in part).

[98] Kanuszewski v. Mich. Dep't of Health & Human Servs., 927 F.3d 396, 426 (6th Cir. 2019) (Rogers, J., concurring).

[99] *Supra* notes 42–52 and accompanying text.

[100] Bray, *supra* note 9, at 469; Cass, *supra* note 9 (manuscript at 5); Morley, *Nationwide Injunctions*, *supra* note 9, at 616; Morley, *Disaggregating*, *supra* note 9, at 7–8; Wasserman, *supra* note 4, at 353; Wasserman, *supra* note 8 (manuscript at 12–14).

the rights of non-plaintiffs or to binding non-defendants. The declaration establishes that a constitutionally invalid law cannot be enforced against the plaintiff by the defendant, providing what Harrison calls a "judicial act of invalidation with respect to the parties involved,"[101] but says nothing about the enforceability of that law against non-parties.

This understanding is consistent with the text of the Declaratory Judgment Act. Section 2201 empowers the court to declare the rights or legal relations "of any interested party,"[102] meaning the determination of rights is specific to the parties, but cannot speak to the law, or its enforceability, in the abstract.[103] Kevin Walsh's argument about the nature of constitutional actions holds for declaratory relief—it is an *in personam* claim to stop government officials from enforcing the law against the plaintiff, not an *in rem* claim to stop the law itself.[104]

"Further necessary or proper relief," namely an injunction against the adverse party, can follow if the declaration proves insufficient to protect the rights declared against enforcement of the challenged law.[105] But only the plaintiff can seek that further relief to protect her declared rights. X having obtained a declaratory judgment, it would be incoherent to allow Y to use X's declaratory judgment to obtain an injunction protecting Y; if X must pursue the less-coercive remedy against enforcement in a separate step, so must Y. It also would be incoherent to allow X to convert her declaratory judgment into an injunction if the government obeyed the judgment as to X but attempted to enforce the challenged law against Y; non-enforcement as to X has given X what he wants, so an injunction prohibiting enforcement as to Y is not "necessary or proper" to protect X. If X cannot protect Y's constitutional rights by bringing a lawsuit to enforce those rights,[106] X cannot protect Y's constitutional rights by converting her declaratory judgment into an injunction protecting everyone.

In endorsing particularity of federal remedies in *Doran*, the Supreme Court treated declaratory and injunctive relief as having the same scope and purpose—either remedy halts enforcement of the challenged law against the federal plaintiffs, but leaves the government free to enforce that law against others who violate it.[107] Moreover, the milder, less-intrusive, less-strong declaratory-judgment medicine should not have broader non-party effects than the stronger, more coercive injunctive medicine. If the injunction only prohibits government officials from enforcing

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[101] Harrison, *supra* note 6, at 87.

[102] 28 U.S.C. § 2201 (2012).

[103] Harrison, *supra* note 6, at 82–83 & n.130.

[104] Walsh, *supra* note 1, at 1725.

[105] 28 U.S.C. § 2202; Samuels v. Mackell, 401 U.S. 66, 72 (1971).

[106] City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983).

[107] Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975).

the challenged law against the parties, the less-coercive declaratory judgment should only declare that government officials cannot constitutionally enforce the challenged law against the parties.

In *Martin v. Gross*, in two consolidated individual actions, the district court declared invalid a Massachusetts law prohibiting secret recording of government officials but declined to enjoin enforcement.[108] According to the court, the declaratory judgment meant government officials could not enforce the law against the plaintiffs. Enforcement would constitute failure to "do their duty" and would provide a basis for the court to convert the declaratory judgment into an injunction, the earlier remedy having failed to persuade the government to change its conduct.[109] But the declaratory judgment properly did not speak to the validity of officials enforcing that law against non-plaintiffs, and such enforcement would not represent failure to comply with the judgment or with their official duties. Had Massachusetts officials continued to enforce those laws against persons who were not party to *Martin*, those non-parties would have to join or initiate their own actions and obtain their own judgments—declaratory, injunctive, or both—protecting them against enforcement of the recording laws.

B. Article III and Particularized Remedies

Article III's justiciability requirements demand particularity at the front and back ends of litigation.

1. Standing at the Front End

A plaintiff seeking to bring a pre-enforcement injunctive action must show an ongoing or impending threat that the challenged law will be enforced against her by the named defendant. She cannot bring the action based on threats of enforcement against other persons or against 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 resulting from enforcement of the law against her.[110]

Courts undermine this particularity command through what Aaron-Andrew Bruhl derides as the "one good plaintiff" rule, under which courts adjudicate and provide broad equitable remedies in multi-party actions so long as one plaintiff can show standing, without determining standing for every plaintiff.[111] In doing so, courts assume that the injunction applies to everyone because a court order stating

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[108] Martin v. Gross, 380 F. Supp. 3d 169, 172 (D. Mass. 2019).

[109] *Id.*

[110] *See supra* notes 28–30 and accompanying text.

[111] Bruhl, *supra* note 64, at 500; *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).

that the defendant cease enforcing the challenged law means it must cease enforcing it against the universe of potential enforcement targets. Only one person needs standing to establish the law's constitutional invalidity, with the injunction applying to all similarly situated persons.[112] This error contributes to the move from particularized injunctions to overbroad, universal, non-particularized injunctions.[113] Bruhl argues that courts would be more constrained in issuing non-particularized remedies if they were more constrained about standing. If judges must consider standing (or substantive constitutional violation) for every plaintiff, they may better consider how to protect the interests of one plaintiff without going beyond that scope to protect the universe of similarly situated persons whose rights do not affect the plaintiff's rights.[114]

2. Mootness at the Back End

Particularity is enforced 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 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.[115] Common applications of the capable-of-repetition-yet-evading-review doctrine include constitutional challenges to holiday-season religious displays (the holiday season lasts approximately one month)[116] and to laws restricting abortion (pregnancy ends within nine months at most).[117] Courts adjudicate these cases despite potential mootness because they otherwise would never have an opportunity to resolve important constitutional issues arising in these time-sensitive contexts.

For a case to not be moot, 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.[118] For example, 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.

On the other hand, that a non-party might be injured through enforcement of

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[112] Bruhl, *supra* note 64, at 487.

[113] *Id.* at 511.

[114] *Id.* at 541.

[115] United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1540 (2018); Turner v. Rogers, 564 U.S. 431, 439–40 (2011); Spencer v. Kemna, 523 U.S. 1, 17 (1998).

[116] *E.g.*, Chabad-Lubavitch of Vt. v. City of Burlington, 936 F.2d 109, 111 (2d Cir. 1991); Am. Humanist Ass'n v. Baxter Cty., 143 F. Supp. 3d 816, 822 (W.D. Ark. 2015).

[117] *E.g.*, Roe v. Wade, 410 U.S. 113, 125 (1973).

[118] *Sanchez-Gomez*, 138 S. Ct. at 1540–41; *Spencer*, 523 U.S. at 17; City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983).

that abortion restriction or the erection of that religious display does not avoid mootness. The court's Article III jurisdiction remains bound to actual or threatened future enforcement against the particular plaintiff, not against the universe of non-parties who might be subject to future enforcement of the same law raising the same constitutional issue.[119] For example, imagine X brings an individual action challenging a seasonal religious display, obtains an injunction prohibiting its erection, and then moves out of the state. A court would find the case moot once X moves nd no longer will encounter the display. The government may erect the display the following year, even if it causes constitutional injury to Y, a non-party offended by the display. Y must establish her standing,[120] join or file a new lawsuit challenging the future display, and obtain a new or extended injunction protecting her from the constitutionally violative religious display.

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Standing and mootness demonstrate the party-particularized nature of pre-enforcement injunctive litigation. The plaintiff must show that she is subject to enforcement of the challenged law to go into court and she must show that she is subject to continued enforcement of the challenged law to continue litigating despite later changes (such as the end of Christmas season). It follows that the remedy she obtains from the litigation should protect her constitutional rights against enforcement, without protecting the constitutional rights of others.

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

Constitutional adjudication could have a broader effect, and there are strong arguments that it should.[121] But to expand the remedial scope beyond the bilateral one plaintiff/one defendant, courts and litigants must use accepted litigation processes, rules, and mechanisms.

From the defendant side, the touchstone is Federal Rule of Civil Procedure 65(d), which dictates that an injunction can run against a party, her agents, and "other persons who are in active concert or participation" with a named defendant.[122] For example, an injunction running against the state attorney general would

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[119] *Sanchez-Gomez*, 138 S. Ct. at 1540–41; Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1734 & n.503 (2000).

[120] *But cf.* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2098 (2019) (Gorsuch, J., joined by Thomas, J., concurring in the judgment) (arguing that offense from a religious display cannot provide standing).

[121] Clopton, *supra* note 9, at 43–45; Frost, *supra* note 9, at 1090–101; Malveaux, *supra* note 9, at 62; Trammell, *supra* note 9, at 106.

[122] FED. R. CIV. P. 65(d)(2)(C).

run against her deputies as well as against local district attorneys subject to her oversight and control.

Plaintiffs can extend the injunction's reach and protection through different procedural and constitutional rules.

1. Injunctive Class Actions

The obvious expansion vehicle is the civil rights injunctive class action under Federal Rule of Civil Procedure 23(b)(2). That rule empowers courts to issue class-wide injunctive relief when "the party opposing the class has acted or refused to 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."[123] 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 cause injury in a way that applies generally to the class of targets of the challenged law, and an injunction prohibiting enforcement against the class protects the class. A class-wide injunction is not a universal/non-particularized injunction. Rather, the class becomes the plaintiff, assuming an identity and legal status independent of the representative individual plaintiff.[124] The class-wide injunction protects and benefits the plaintiff, but the plaintiff is the entire class. The rule expands who is a party before the court and therefore who is and may be properly protected by a particularized/non-universal injunction.[125]

The Supreme Court enacted the basic framework of Rule 23(b)(2) in 1966 to empower courts in civil rights actions to issue broad indivisible relief.[126] The rule responded to Massive Resistance to *Brown* in which courts and school districts "remedied" discrimination by ordering an individual African American plaintiff to be admitted into an all-white school, but without altering the basic segregated structure or operation of the school system and without benefitting non-party African American students.[127] By certifying a class of prospective African American students wishing to attend integrated schools, a court could issue an injunction compelling broader structural changes benefitting all class members as parties to the case.[128]

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[123] FED. R. CIV. P. 23(b)(2); Bray, *supra* note 9, at 464 n.278; Morley, *DeFacto Class Actions*, *supra* note 21, at 540; Morley, *Nationwide Injunctions*, *supra* note 9, at 624 n.49.

[124] *Sanchez-Gomez*, 138 S. Ct. at 1538; Sosna v. Iowa, 419 U.S. 393, 399 (1975).

[125] *Sosna*, 419 U.S. at 399; Rodgers v. Bryant, 942 F.3d 451, 464 (8th Cir. 2019) (Stras, J., concurring in part and dissenting in part); Morley, *DeFacto Class Actions*, *supra* note 21, at 541; Morley, *Disaggregating*, *supra* note 9, at 17–19.

[126] Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 857–58 (2016).

[127] *Id.* at 858–59; *see also* David Marcus, *Flawed But Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 680–81 (2011).

[128] Carroll, *supra* note 126, at 859–60; Marcus, *supra* note 127, at 693–95.

Allowing non-particularized/universal injunctions in individual cases undermines the Court's adopted mechanism for broadening injunctions. If a court can issue an injunction in an individual action that prohibits enforcement of the challenged law against all similarly situated persons (e.g., all African American students desiring to attend the integrated school), Rule 23(b)(2) becomes superfluous. No plaintiff would bother seeking class certification; her individual lawsuit would be sufficient to obtain the broader remedy.

Two high-profile examples illustrate the use of the class device.

In *J.D. v. Azar*,[129] plaintiffs were detained pregnant unaccompanied immigrant minors subject to regulations of the Office of Refugee Resettlement that effectively barred them from obtaining abortions.[130] Courts have been tempted to issue universal injunctions in cases such as this—a challenge to a broad, federal policy violating the constitutional rights of many people, plaintiffs and similarly situated persons affected in the same way. But allowing continued enforcement against non-parties would not affect individual plaintiffs or limit the "completeness" of their injunctive relief in an individual action—the ability of X to obtain her desired abortion is not affected if the regulations prevent Y from obtaining her desired abortion. The district court thus followed the procedurally proper path to a broad remedy—it certified a class of "all pregnant, unaccompanied immigrant minor children (UCs) who are or will be in the legal custody of the federal government," then issued a particularized injunction prohibiting enforcement of the ORR policy as to the class, which the court of appeals affirmed as proper.[131]

In *Ms. L v. U.S. Immigration and Customs Enforcement*,[132] plaintiffs challenged a federal policy and practice of separating minor children from their asylum-seeking parents and not taking steps to reunite them, alleging that the practice "shocked the conscience" in violation of substantive due process.[133] The district court certified an injunctive class of:

> [a]ll adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the [DHS], and (2) have a minor child who is or will be separated from them by DHS and detained in [Office of Refugee Resettlement ("ORR")] custody, ORR foster care, or DHS custody absent a determination that the parent is unfit or presents a danger to the child.[134]

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[129] J.D. v. Azar, 925 F.3d 1291, 1312 (D.C. Cir. 2019) (per curiam).

[130] *Id.* at 1299–300.

[131] *Id.* at 1305–06, 1312.

[132] Ms. L. v. U.S. Immigration & Customs Enf't, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

[133] *Id.* at 1142–43.

[134] *Id.* at 1139 n.5. The court modified the injunction to reach families whose children had been released from custody before the injunction was entered. Ms. L v. U.S. Immigration &

The court then issued a class-wide preliminary injunction, prohibiting federal agencies from detaining parents "without and apart" from their minor children and ordering agencies to release any minor children in detention and to reunite children with their parents.[135]

While agreeing that Rule 23(b)(2) renders non-particularized injunctions inappropriate, Michael Morley identifies a tension between broad classes and limits on broad injunctions. The real goal of the class may be to bind the government against the world at large rather than to adjudicate the rights of discrete parties within the class.[136] Morley argues that district courts should never certify nationwide classes, only district-wide or circuit-wide classes, thereby limiting protection to similarly situated persons within a given region.[137] This allows for class actions—and injunctions particularized to those classes—while allowing multiple courts to address the constitutional issues.

2. Associational Standing

A second option arises where the constitutional plaintiff is an entity suing on behalf of its members adversely affected by the challenged law.[138]

In practice, associational standing creates something akin to a class action with a "prefabricated" or "premade" class of the members of the plaintiff association.[139] The injunction protecting the association protects the association's members spread across the country or the world, by virtue of their membership in the protected plaintiff-organization. An individual member avails herself of the injunction's protections against future enforcement by showing membership in the protected association. Again, however, this does not create or justify universality. The injunction remains particularized to the association and its members, carrying the same scope as the individuals suing on their own behalf.[140]

Associational standing imposes additional requirements, which makes it less of an obvious end-run around particularity than a non-particularized/universal injunction in an individual action. Association members must be able to establish individual standing; the individual interests protected in the action must be "germane" to the association's purposes; and the claim and injunctive remedy must not require

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Customs Enf't, 330 F.R.D. 284, 287 (S.D. Cal. 2019).

[135] *Ms. L.*, 310 F. Supp. 3d at 1149–50.

[136] Morley, *Disaggregating*, *supra* note 9, at 25–26.

[137] *Id.*

[138] *Id.* at 27–29; Morley, *DeFacto Class Actions*, *supra* note 21, at 539; *see, e.g.*, Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 342–43 (1977); Warth v. Seldin, 422 U.S. 490, 511 (1975).

[139] Morley, *Disaggregating*, *supra* note 9, at 27.

[140] *Id.* at 27–9; Morley, *DeFacto Class Actions*, *supra* note 21, at 539, 544–45.

individual-member participation or individualized facts.[141] Morley insists that any remedy must be tailored to specific parties represented by the plaintiff association,[142] such as formal members of the organization.

3. Third-Party Standing

An individual plaintiff, whether a person or organization, may assert third-party standing in limited circumstances.[143] The person or organization claims an injury from defendant's conduct and sues to vindicate the constitutional rights of rights-holders with whom the plaintiff has a business, professional, or other close relationship and where it is not feasible for the right-holders to sue on their own behalf.[144] Permissible relationships for third-party standing include businesses suing on behalf of potential customers,[145] medical professionals suing on behalf of patients or potential patients,[146] and lawyers and advocates suing on behalf of clients.[147]

Like associational standing, third-party standing imposes additional requirements that prevent the court from universalizing an injunction in an otherwise individual case. 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 and connected to those of the third-party rights-holders represented or that substantial obstacles prevent rights-holders from asserting their own rights or leave them unable or unlikely to sue.[148] And as with associational standing, the injunction should be particularized to the plaintiff and the specific rights-holders with the necessary close relationship to the plaintiff.[149]

4. Incidental Benefits and Spillover Effects

An injunction's "who" expands in practice when relief accorded to the named plaintiff in an individual action incidentally benefits non-parties similarly situated, where the effects of the injunction spill over to protect non-parties.

Maureen Carroll describes this as a "system-wide" remedy that provides relief as broad as the challenged government policy or practice, meaning as broad as the

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[141] *Hunt*, 432 U.S. at 343.

[142] Morley, *Disaggregating*, *supra* note 9, at 27.

[143] Kowalski v. Tesmer, 543 U.S. 125, 129–30 (2004).

[144] *Id.* at 130; U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 720 (1990).

[145] Craig v. Boren, 429 U.S. 190, 195 (1976).

[146] Griswold v. Connecticut, 381 U.S. 479, 480–81 (1965).

[147] *Triplett*, 494 U.S. at 720; Caplin & Drysdale v. United States, 491 U.S. 617, 623 n.3 (1989). *But see Kowalski*, 543 U.S. at 131–33.

[148] Singleton v. Wulff, 428 U.S. 106, 115–16 (1976).

[149] Wasserman, *supra* note 4, at 370–71.

people subject to that policy or practice.[150] Morley argues that such relief turns on a distinction between divisible and indivisible rights and remedies.[151] Divisible rights belong to the plaintiff alone and can be remedied by a particularized injunction protecting the plaintiff alone.[152] Indivisible rights of one person cannot be separated from the rights of others and a remedy benefitting one person necessarily benefits other people similarly situated.[153] Because the remedy cannot distinguish parties from non-parties, a class is unnecessary to produce an injunction protecting or benefitting beyond the individual plaintiff.

Consider several examples. In an action challenging prison conditions, protecting one plaintiff prisoner by ordering government officials to remove raw sewage from the prison floors benefits all prisoners, since the prison cannot clean sewage as to one prisoner and not others.[154] In a challenge to legislative districting, the remedy for a constitutionally invalid district is an injunction compelling the government to redraw the district, a remedy benefitting all voters whose rights were infringed by the previous, constitutionally infirm district.[155] The government cannot redraw the district to benefit the plaintiff without benefitting similarly situated voters in the district. In a challenge to a Christmas tree or Ten Commandments erected in a public space, the injunction protects the plaintiff from the offense of having to encounter the display; the remedy of ordering the government to remove the display benefits non-parties who also might be offended. The government cannot remove or cover the display for one person and not for others. Finally, in challenges to President Trump's plans to "reprogram" funds to build a wall on the Mexico border, an injunction prohibiting impermissible use of those funds protects everyone;[156] a court cannot stop some wall spending for the benefit of the plaintiff without stopping all wall spending for the benefit of all.

These cases do not produce non-particularized/universal injunctions protecting non-parties. They produce particularized injunctions protecting and benefitting

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[150] Carroll, *supra* note 126, at 860.

[151] Morley, *Disaggregating*, *supra* note 9, at 38; Morley, *DeFacto Class Actions*, *supra* note 21, at 492.

[152] Morley, *Disaggregating*, *supra* note 9, at 47; Morley, *DeFacto Class Actions*, *supra* note 21, at 524–25.

[153] Carroll, *supra* note 126, at 846; Marcus, *supra* note 127, at 667; Morley, *Disaggregating*, *supra* note 9, at 47; Morley, *Nationwide Injunctions*, *supra* note 9, at 616–17; Morley, *DeFacto Class Actions*, *supra* note 21, at 524; Pfander & Wentzel, *supra* note 9, at 55–56.

[154] Morley, *Disaggregating*, *supra* note 9, at 38.

[155] *Id.*; Morley, *Nationwide Injunctions*, *supra* note 9, at 616.

[156] Sierra Club v. Trump, No. 19-cv-00892-HSG, 2019 WL 2715422 (N.D. Cal. 2019), *stay denied* 929 F.3d 670 (9th Cir. 2019), *stay granted* 140 S. Ct. 1 (2019); El Paso Cty. v. Trump, 408 F. Supp. 3d 840 (W.D. Tex. 2019).

only the plaintiffs, enforceable only by the plaintiff, and violated only if the defendant fails to perform as to the plaintiff (that is, by attempting to take the enjoined conduct against the plaintiff). But the benefits of the injunction inure to non-parties because the remedy for the plaintiff necessarily and unavoidably gives something to non-parties.[157] The difference may appear semantic, but it is procedurally significant. A party protected by an injunction can enforce the injunction through a motion to enforce and by seeking to hold the government officer in contempt.[158] That right to enforce the judgment remains limited to the parties who control the litigation and does not extend to non-parties enjoying incidental spillover benefits.

Return to the religious-display example. If the government fails to remove the religious display, only the plaintiff can return to court to enforce the injunction; a non-party who does not want to encounter that display could not.[159] That non-party must take some steps to become a party, whether by joining as an individual plaintiff and asking for the injunction to be extended[160] or by filing a new civil action and obtaining her own injunction or declaratory judgment. She then gains her own court order and the right to enforce it, greater protection than incidental spillover benefits from another person's court order.

IV. PRINCIPLE FOUR: JUDGMENTS AND OPINIONS, PRECLUSION AND PRECEDENT

A court issues two papers when it decides a case—a judgment and an opinion. Failure to distinguish these papers, their meaning, and their effects explains some of the confusion over the scope of remedies. Maintaining the distinction is essential to understanding constitutional litigation.

A. Judgments

The binding judgment resolves constitutional litigation involving one plaintiff, one defendant, one law, and one constitutional right.[161] 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."[162]

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[157] Pfander & Wentzel, *supra* note 9, at 55–56.

[158] FED. R. CIV. P. 70; 28 U.S.C. §§ 401–402 (2012).

[159] *See supra* notes 113–17 and accompanying text.

[160] FED. R. CIV. P. 20.

[161] Baude, *supra* note 14, at 1811; Lawson & Moore, *supra* note 5, at 1327; Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 44–45 (1993); Pushaw, *supra* note 80, at 860; *see supra* Part III.

[162] Baude, *supra* note 14, at 1811.

A judgment must be obeyed by the parties and enforced by the executive, even if erroneous.[163] A party cannot avoid its obligation to obey a judgment and cannot avoid contempt on the ground that the judgment is wrong. Under the "collateral bar rule," a party cannot disobey an injunction and challenge the subsequent contempt finding on the ground that the underlying injunction was erroneous or invalid.[164] An erroneous judgment can be challenged and corrected through established judicial processes, such as appellate review of the judgment, subject to the procedural rules and limits that Congress and the courts put in place.[165] But the enjoined party must obey that judgment while appellate review proceeds, unless the injunction is stayed pending review.[166] The completion of appellate review produces an Article-III-final judgment, which cannot be questioned or undone by the other branches[167] and is subject to limited judicial reconsideration.[168] A court may enforce that order on its own or on request of a party, including by holding non-compliant parties in contempt of court and ordering them jailed.[169]

For the reasons discussed in Part III, any judgment remains particularized to the litigation at issue and to the parties to that litigation.[170] Only parties are bound to abide by the judgment or subject to the court's enforcement powers, such as contempt. And this is true whether the constitutional judgment arises from an enforcement action, a pre-enforcement *Ex Parte Young* action, or a retroactive damages action.[171]

The effect of any judgment is controlled by the law of judgments and the law of preclusion.[172] The final judgment resolves the dispute between parties and can be enforced to ensure that those parties comply. Preclusion then limits the right to

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[163] *Id.* at 1826; Harrison, *supra* note 6, at 87; Pushaw, *supra* note 80, at 860; Wasserman, *Departmentalism*, *supra* note 8 (manuscript at 30–31). *But see* Lawson & Moore, *supra* note 5, at 1325.

[164] Walker v. City of Birmingham, 388 U.S. 307, 314, 316 (1967).

[165] *Id.* at 314.

[166] Nken v. Holder, 556 U.S. 418, 434 (2009); Blackman & Wasserman, *supra* note 18, at 283.

[167] Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 218–19 (195); Lawson & Moore, *supra* note 5, at 1319.

[168] *See* FED. R. CIV. P. 60(b); Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 379–80 (1992).

[169] FED. R. CIV. P. 70; 28 U.S.C. §§ 401–402; *see* Juidice v. Vail, 430 U.S. 327, 335–36 (1977); Miller v. Caudill, 936 F.3d 442, 446 (6th Cir. 2019); Reynolds v. Roberts, 207 F.3d 1288, 1297 (11th Cir. 2000).

[170] Baude, *supra* note 14, at 1826; Pushaw, *supra* note 80, at 860; *supra* Part III.

[171] *Supra* notes 89–93 and accompanying text.

[172] Fallon, *Fact*, *supra* note 11, at 923 n.31; Fallon, *As Applied*, *supra* note 11, at 1339; Harrison, *supra* note 6, at 88; Steinman, *supra* note 11, at 1957.

relitigate, in a new action, the legal and factual issues considered and resolved by that judgment.[173] But like the judgment, preclusion is limited to the parties to the first action or to those with a close or privity connection with them; preclusion does not affect those unconnected to the original litigation and the judgment resolving that litigation.[174]

Courts have relaxed this rule somewhat, allowing non-mutual preclusion—a non-party to Case I avails herself of the preclusive effect of the judgment against a party to Case I, who should not be allowed another bite at the apple in Case II.[175] But under *United States v. Mendoza*,[176] non-parties cannot use preclusion against the federal government or federal officials,[177] a principle that some courts have extended to state governments and officials.[178] That is, a non-party to the judgment in Court I cannot use non-mutual preclusion against the federal or state governments (or officials) to resolve new litigation in Court II. If Court II is considering actual or threatened enforcement against Y, a non-party in Court I, Y cannot argue that the constitutional question has been resolved against the government by Court I's judgment as to X and that preclusion binds Court II to reach the same conclusions on the constitutional question.

This point has been the target of recent scholarly criticism. Zachary Clopton and Alan Trammell independently argue that *Mendoza* was wrongly decided and that Congress or courts should overrule or narrow it.[179] This would allow non-parties in Court I to obtain the preclusive benefits of the constitutional ruling to bar or halt the government from future enforcement against them in Court II. Y could argue that Court I's judgment in *X* resolved the question of the law's constitutional validity against the government after the government had a full and fair opportunity to litigate the constitutional issue. That judgment binds Court II, requiring it to find the law constitutionally invalid and unenforceable in an action involving Y, without requiring Y to litigate the constitutional issue and without permitting the government to relitigate an issue on which it previously lost.

Clopton and Trammell link *Mendoza* to the scope-of-injunction debate. Both authors argue that if—in a non-*Mendoza* world—a non-party can benefit from

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[173] Clopton, *supra* note 9, at 10–13; Trammell, *supra* note 9, at 71–72; *see* United States v. Mendoza, 464 U.S. 154, 158 (1984).

[174] *Mendoza*, 464 U.S. at 159–60; Clopton, *supra* note 9, at 10–13; Harrison, *supra* note 6, at 88.

[175] Clopton, *supra* note 9, at 12–13; Trammell, *supra* note 9, at 94–95.

[176] *Mendoza*, 464 U.S. 154.

[177] *Id.* at 162.

[178] Idaho Potato Comm'n v. G & T Terminal Packaging, Inc., 425 F.3d 708, 713–14 (9th Cir. 2005); Morley, *Nationwide*, *supra* note 9, at 623–24.

[179] Clopton, *supra* note 9, at 37; Trammell, *supra* note 9, at 97–101.

Court I's judgment via non-mutual preclusion, then Court I should—in an appropriate case—be able to skip the middle step and directly protect non-parties via a universal/non-particularized injunction.[180] Either approach gives non-parties the benefits of Court I's injunction; allowing Court I to make the injunction universal/non-particularized protects the non-party without the need for additional litigation in Court II.

The problem with the argument is that the scope of a judgment and the scope of preclusion need not be coextensive. Expanding the preclusive effect of a judgment does not require expanding the permissible scope of that judgment. The symmetry between a judgment in an enforcement action and a judgment in the corresponding pre-enforcement action demonstrates why.

Suppose *Mendoza* were overruled. The government initiates an enforcement action against X, who defends on the ground that the law being enforced is constitutionally invalid; Court I agrees and dismisses the action against X. Without *Mendoza* and with non-mutual preclusion available against the government, Y could assert preclusion based on that judgment in a subsequent enforcement action—Y could argue that Court II is bound by the judgment of Court I on the constitutional issue without Y having to litigate the constitutional question and without the government having an opportunity to relitigate the constitutional question on which it lost before Court I. But the judgment of Court I would not protect anyone other than X, regardless of how anyone might wield its preclusive effect in subsequent litigation. Regardless of preclusion rules, the government would violate that judgment, and be subject to contempt, only by attempting to enforce against X, not against Y or another non-party.

The same should hold if the judgment from Court I came in a pre-enforcement *Ex Parte Young* action by X. Broadening the preclusive effect of that judgment need not broaden the judgment and injunction itself. Regardless of the posture of the litigation that produced Court I's judgment, the preclusive effect of that judgment matters for subsequent litigation in which Court II determines the effect to accord Court I's prior judgment.[181] It should not matter for the scope of the prior judgment itself and Court I's authority, including the power of contempt, to enforce it.

B. Opinions

The opinion, the second paper the court issues, is a reasoned explanation justifying the judgment. Opinions are "essays written by judges explaining why they

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[180] Clopton, *supra* note 9, at 6, 19, 36–38; Trammell, *supra* note 9, at 101.

[181] Smith v. Bayer Corp., 564 U.S. 299, 307 (2011).

rendered the judgment they did. The primary significance of these essays for non-judicial actors is the guidance they provide in predicting future judicial behavior."[182] They "explain the grounds for judgments, helping other people to plan and order their affairs."[183] This giving of reasons for an outcome represents a hallmark of judicial decision-making.[184]

Court I's opinion—its essay—explaining why a law is constitutionally valid or invalid and justifying the judgment serves as precedent for Court II in considering the constitutional validity of that law or a similar law in a separate action involving a different rights-holder. Precedential force varies by court.[185] A district court opinion as to the validity of a law has persuasive force for the next court, including for judges within that district, but no binding force.[186] A regional court of appeals opinion has binding force on other panels of that circuit (and can be reversed only by that circuit sitting *en banc*)[187] and on district courts within its circuit, but persuasive force on courts of appeals and trial courts elsewhere. A Supreme Court decision has binding force on all courts in all circuits and districts and in all state courts.[188]

There are debates and confusion about when a judicial decision establishes precedent, what that precedent is, and how courts can tell.[189] While important questions, they are beyond the current point that precedent governs a judicial decision's prospective non-party effects—on government officials and rights-holders forming

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[182] Merrill, *supra* note 161, at 62; *cf.* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897) ("The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.").

[183] Baude, *supra* note 14, at 1844; Lawson & Moore, *supra* note 5, at 1327; Merrill, *supra* note 161, at 44–45, 62.

[184] Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 387–88 (1978).

[185] Randy Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 185–86 (2014).

[186] Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011); ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989); Fallon, *As Applied*, *supra* note 11, at 1340; Fallon, *Fact*, *supra* note 11, at 924 n.31. *But see* Morley, *Disaggregating*, *supra* note 9, at 53–54 (proposing that district court opinions be given intra-district or intra-circuit binding, or *stare decisis*, effect).

[187] Mitchell, *supra* note 4, at 946–47, 1017.

[188] Cass, *supra* note 9 (manuscript at 44–45); Fallon, *Fact*, *supra* note 11, at 923 n.31; Fallon, *As Applied*, *supra* note 11, at 1339; Harrison, *supra* note 6, at 88; Steinman, *supra* note 11, at 1957.

[189] RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT (2017); Richard Re, *Narrowing Supreme Court Precedent From Below*, 104 GEO. L.J. 921 (2016); Richard Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1863 (2014); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987); Steinman, *supra* note 11, at 1950.

their primary conduct in the real world and on courts and parties to future litigation.[190] The effect of binding precedent (whatever its scope) continues until a decision is overruled, while persuasive precedent allows different courts to decide issues in their own ways, depending on how convincing they find prior opinions.

The other significant feature of precedent is that it can change, whether by a higher court reversing a lower court judgment or by any court revisiting and overruling precedent after some time.[191] While government officials and individuals arrange their primary conduct around existing precedent,[192] all must account for that possibility in organizing their enforcement activities.[193]

This leaves individuals and government with freedom and with uncertainty. Laws that government officials believe are unenforceable under current precedent remain on the books and may become enforceable with a change in precedent; laws they believe are enforceable cease to be so with a change in precedent.[194] Conduct that individuals believe they may constitutionally engage in, free from government restriction, may lose its constitutional protection and become subject to restriction with a change in precedent.[195] Conduct that individuals believe prohibited may become permissible with a change in precedent and recognition of constitutional protection for their conduct.

C. *Judgments, Opinions, and Non-Particularity*

Arguments in favor of non-particularized/universal injunctions grant courts broader authority to establish the parameters of constitutional law for other persons, beyond resolving the case at hand.[196] But the judgment and injunction need not perform that function, either directly via an injunction protecting the universe of the law's targets or indirectly via non-mutual preclusion. Instead, the opinion performs that function. The opinion provides the wider prospective non-party authority of the decision through the law of precedent and stare decisis. And the opinion protects other rights-holders by establishing the parameters of constitutional law and constitutional rights for future litigation.[197]

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[190] Baude, *supra* note 14, at 1844; Lawson & Moore, *supra* note 5, at 1327; Merrill, *supra* note 161, at 44–45, 62.

[191] Walsh, *supra* note 1, at 1715.

[192] Baude, *supra* note 14, at 1844; Lawson & Moore, *supra* note 5, at 1327; Merrill, *supra* note 161, at 44–45, 62.

[193] Mitchell, *supra* note 4, at 1008.

[194] *Id.* at 987.

[195] *Id.* at 948, 987–88.

[196] Frost, *supra* note 9, at 1087–89, 1092–95; Malveaux, *supra* note 9, at 62–63.

[197] Baude, *supra* note 14, at 1844; Fallon, *Fact*, *supra* note 11, at 923 n.31; Fallon, *As Applied*, *supra* note 11, at 1339; Merrill, *supra* note 161, at 44–45; Morley, *Disaggregating*, *supra* note 9,

Judgment and precedent operate differently within the judicial hierarchy. A district court opinion is not binding precedent, even on other judges within the district.[198] But a district court judgment, unstayed,[199] is and remains binding on the parties, carrying the same force and effect on those parties as an injunction that has been reviewed and affirmed by a higher court. While in effect, the district court injunction places enjoined government officials in the same position as where the injunction was affirmed on review or where officials declined to seek review. That force remains unless and until the judgment is reversed by a higher court. Allowing non-particularized/universal injunctions thus expands the power and force of one district judge's decision, giving its judgment force that its opinion lacks as precedent.

Similarly, Supreme Court affirmance of the district court's judgment does not expand the injunction. If the district court entered a non-universal/party-particularized injunction, the Supreme Court affirms a non-universal/party-particularized injunction; the injunction does not gain broader scope or force to protect beyond the parties.

Supreme Court affirmance does mean all future enforcement efforts necessarily fail and all pre-enforcement actions to enjoin enforcement necessarily succeed, because all courts are bound by the Supreme Court's pronouncement that the challenged law is constitutionally defective and not enforceable.[200] But the affirmance resolves the question as a matter of the law of precedent—the binding precedential effect of the Supreme Court's opinion on any subsequent court deciding a legal issue arising from a new government threat or attempt to enforce the law against non-parties to the first case (who are not protected by the judgment). The affirmance is not a function of the law of judgments or of a non-particularized judgment prohibiting enforcement against those non-parties.

Preclusion and precedent both empower the later court. Court II decides the scope and meaning of the precedent set by Court I's opinion and whether and how to apply it in resolving the new action before it. Similarly, the preclusive effect of Court I's judgment "is usually the bailiwick" of Court II.[201] Following a judgment from Court I, the parties in Court II raise the preclusive effect of that judgment before Court II; Court II decides whether preclusion applies and the scope of that preclusion.

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at 24–25, 39–40.

[198] *See supra* note 188 and accompanying text.

[199] Nken v. Holder, 556 U.S. 418, 434 (2009); Blackman & Wasserman, *supra* note 18, at 283.

[200] Blackman & Wasserman, *supra* note 18, at 252–53; Steinman, *supra* note 11, at 1957; Walsh, *supra* note 1, at 1715, 1727–28.

[201] Smith v. Bayer Corp., 564 U.S. 299, 307 (2011).

The trend towards universal/non-particularized injunctions reflects judicial impatience with this adjudicative process. Universality/non-particularity seeks to empower Court I to seize control of the adjudicative process at the expense of Court II. And it extends the judgment and the law of judgments to swallow the opinion and the law of precedent.

Court I, having declared the challenged law constitutionally invalid in Case I and having extended its judgment beyond the parties, strips Court II of the opportunity (or at least the need[202]) to adjudicate the same issue involving different parties. Court I can prevent Court II from deciding either the scope of Court I's judgment and injunction or the meaning of its opinion as precedent. Court I would issue the lone controlling judgment and opinion on the law's constitutional validity and prohibit all enforcement of that law against anyone, subject only to reversal by its regional circuit or by the Supreme Court. Court I can guard both through its enforcement and contempt powers, cutting off any opportunity for disagreement by the parties or by another court.

Supporters of universal/non-particularized injunctions reject individual, atomized litigation of constitutional rights, fearing a flood of duplicative litigation in which each affected individual or entity must file its own action and obtain its own injunction.[203] For example, in imposing a universal/non-particularized injunction in an action challenging regulations stripping federal funds from "sanctuary cities," the Northern District of Illinois emphasized that 37 counties and cities had filed an amicus brief in that action.[204] Because all had been heard in this case, judicial economy counseled against compelling each to file a separate lawsuit to have a separate court resolve legal issues already addressed.[205]

But multiple or successive litigation is not duplicative litigation. Rather, multiple or successive litigation is necessary to create precedent—persuasive and binding—that later courts can use to guide resolution of later cases. Multiple precedents from multiple cases in multiple courts allow "percolation of legal questions" through different district courts and courts of appeals, allowing each court to reach its own conclusion, pending final resolution by the Supreme Court.[206] Allowing universal/non-particularized injunctions to preempt further litigation preempts the creation of new precedent.

Although not a constitutional case, *Nevada v. United States Department of Labor* offers a bizarre example of the problems created by this sort of judicial reach.

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[202] *See* Wasserman, *supra* note 8 (manuscript 24–26).

[203] Chicago v. Sessions, No. 17 C 5720, 2017 WL 4572208, at *3 (N.D. Ill. Oct. 13, 2017); Frost, *supra* note 9, at 1101; Malveaux, *supra* note 9, at 61–62; Trammell, *supra* note 9, at 82.

[204] *Chicago*, 2017 WL 4572208, at *3.

[205] *Id.*

[206] Bray, *supra* note 9, at 420; Wasserman, *supra* note 4, at 383.

Several states and business organizations sued in the Eastern District of Texas, challenging the validity under the Fair Labor Standards Act ("FLSA") of Department of Labor ("DOL") regulations raising the salary line at which employees become exempt from overtime requirements (that is, broadening the class of employees entitled to overtime pay). The district court issued a universal/non-particularized preliminary injunction prohibiting enforcement of the regulations,[207] then granted summary judgment for the plaintiffs.[208]

A Chipotle employee named Carmen Alvarez, represented by counsel, filed a separate action in the District of New Jersey, alleging that the company had denied her overtime compensation in violation of DOL regulations.[209] The Eastern District of Texas found Alvarez and her lawyers in contempt of its original injunction; all were in privity with DOL and, because the injunction was universal/non-particularized, their attempts to enforce a regulation that the court had determined was unenforceable violated a court order to which they were subject.[210]

More than a year later, the Fifth Circuit reversed the contempt finding, rejecting the argument that Alvarez or her attorneys were in privity with DOL, given the absence of evidence of an express or implied legal relationship under which DOL could be said to represent Alvarez's interests.[211] The court added, "[m]ore generally, Chipotle's theory that the DOL represents every worker's legal interests through its enforcement of the FLSA so as to bind every worker in the United States to an injunction where the DOL is the only bound party lacks authoritative support."[212] Federal labor law gave individuals unique legal rights and the opportunity to enforce those rights in private litigation when violated by a particular actor, distinct from the power of the federal government to enforce federal labor laws.[213]

Had the district court's original injunction been properly particularized, precedent could have done the work here, rather than judgment and contempt. Alvarez's action against Chipotle should have gone forward, with Chipotle urging the District of New Jersey to agree with the Eastern District of Texas's opinion that the overtime regulations were invalid and unenforceable as to Alvarez, requiring the former court to resolve the lawsuit against her and in favor of Chipotle.[214] Alternatively, because

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[207] Nevada v. U.S. Dep't of Labor, 218 F. Supp. 3d 520 (E.D. Tex. 2016).

[208] Nevada v. U.S. Dep't of Labor, 275 F. Supp. 3d 795 (E.D. Tex. 2017).

[209] Nevada v. U.S. Dep't of Labor, 321 F. Supp. 3d 709, 720 (E.D. Tex. 2018).

[210] *Id.* at 720, 726.

[211] Texas v. Dep't of Labor, 929 F.3d 205, 208 (5th Cir. 2019).

[212] *Id.* at 213.

[213] *Id.*

[214] To the extent there was privity among DOL and Alvarez and her attorneys, that should have been left for a preclusion analysis, not judgment and contempt, in the second court. Chipotle could have urged the District of New Jersey to apply non-mutual defensive preclusion based on

the Eastern District of Texas would not have been binding authority on the District of New Jersey, the latter court could have reached a different legal conclusion about the regulations' validity and ruled in favor of Alvarez.[215] This also would have created a division of authority on the legal question, potentially requiring Supreme Court resolution. Either way, this shows the law of precedent and percolation in action.

Arguments in favor of universal injunctions—and the broader scope of law that universal injunctions provide—really amount to arguments about precedent and its role in future litigation.

Mila Sohoni shows that the Supreme Court has long affirmed injunctions that, by their terms, prohibit government conduct as a universal and categorical matter, not limited to the plaintiffs.[216] This includes some of the Court's most significant constitutional cases[217] in which the Court intended and the public understood the Court to have stopped all enforcement of the constitutionally infirm laws, not only enforcement against the plaintiffs.

Sohoni offers as one example *West Virginia Board of Education v. Barnette*[218] in which the Court held that the First Amendment prohibited states from compelling public-school children to stand and recite the Pledge of Allegiance.[219] She offers a hypothetical: The day after *Barnette*, the federal government compelled students in D.C. schools to salute the flag, producing a new constitutional challenge to the new law; she argues that "there is no basis in Article III for thinking that such a hypothetical case would have or should have come out any differently than *Barnette* did."[220]

Sohoni is correct that the subsequent court in this hypothetical would have reached the same result as *Barnette*. But the reason would have been precedent and the binding nature of Supreme Court opinions, not the scope of the *Barnette* injunction. The Court having declared in *Barnette* that compulsory flag salutes violate the First Amendment, all lower courts must follow that opinion as precedent and

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that privity, but leaving to that court to determine the first injunction's preclusive effect. But the Eastern District of Texas did not want to surrender authority. And the overbroad universal/non-particularized injunction it issued in Nevada's lawsuit allowed it to control the legal issues in a subsequent case, even as to non-parties.

[215] That would have remained true had the Fifth Circuit affirmed on appeal in *Nevada*. A court of appeals decision is persuasive, but not binding, on a district court in a different circuit; the District of New Jersey is not located in the Fifth Circuit.

[216] Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 926–28 (2020).

[217] *Id.* (manuscript at 5, 70–71); *see, e.g.*, W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939).

[218] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[219] *Id.* at 642.

[220] Sohoni, *supra* note 216, at 991.

declare that all similar government attempts to compel the salute violate the First Amendment. The new dispute would have been litigated in the District of the District of Columbia, with that court resolving new litigation involving new parties based on binding precedent. In fact, the hypothetical D.C. case would have reached the same result had the *Barnette* injunction been expressly particularized/non-universal. The District of the District of Columbia would have performed the same analysis—apply the binding precedent of the *Barnette* opinion and conclude that D.C.'s attempted compulsion violated the First Amendment.

But this would have had nothing to do with the injunction and judgment in *Barnette* itself. The district court in West Virginia, which issued and must oversee and manage the injunction affirmed in *Barnette*, would play no role in the new dispute as part of managing its injunction. The judgment and injunction from *Barnette* would be irrelevant to any subsequent litigation. The opinion and precedent do the work.

V. PRINCIPLE FIVE: JUDICIAL DEPARTMENTALISM

American constitutional law features a longstanding debate between judicial supremacy and departmentalism. The former holds that the judicial (especially the Supreme Court) constitutional interpretation and understanding controls for all branches and actors.[221] The latter holds that the legislative and executive branches (of all governments) possess equal and co-extensive power to interpret the Constitution and owe no deference to judicial understandings.[222] This debate has undergone an ideological evolution. While conservative constitutionalists[223] and Republican Attorney General Edwin Meese[224] initially promoted departmentalism, liberal scholars have recently taken up the move to "take the Constitution away from the courts."[225]

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[221] MARTIN H. REDISH, JUDICIAL INDEPENDENCE AND THE AMERICAN CONSTITUTION: A DEMOCRATIC PARADOX 40 (2017); Alexander & Schauer, *Defending*, *supra* note 1, at 482; Alexander & Schauer, *Extrajudicial*, *supra* note 1, at 1369–70.

[222] LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 252 (2004); REDISH, *supra* note 221, at 38; Mark A. Graber, *Judicial Supremacy Revisited: Independent Constitutional Authority in American Constitutional Law and Practice*, 58 WM. & MARY L. REV. 1549, 1554 (2017); Lawson & Moore, *supra* note 5, at 1326; Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 220 (1994).

[223] *See* Lawson & Moore, *supra* note 5, at 1328; Paulsen, *supra* note 222, at 225–26 & n.19.

[224] Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983 (1987).

[225] MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); *e.g.*, KRAMER, *supra* note 222, at 5–6.

Kevin Walsh proposes a middle ground that is normatively preferable and descriptively reflective of actual judicial and political practice; he labels this middle ground "judicial departmentalism."[226] I have hinted at the same understanding in past work.[227] This Part builds on Walsh's argument, situating it within this model of constitutional adjudication.

A. Judicial Departmentalism

The model of judicial departmentalism I urge here contains three components and rests on two distinctions—between judgments and opinions, as discussed in Part IV,[228] and between courts and other branches of the federal, state, and local governments.

1. Parties Bound and Must Comply

A government officer who is a party to a case is bound by the judgment in that case. She must obey the court's dictates, as any private party, and is subject to the court's enforcement power. She can appeal the judgment to a higher court. But once that judgment becomes Article-III final when the review process has been exhausted and the judgment remains in place, the official must comply.[229]

Tara Leigh Grove argues that this obligation of compliance is more convention than obligation, a recent development traceable to the Civil Rights era and its discontents.[230] In modern times, it is uncommon for federal, state, or local officials to disobey federal judicial decrees and doing so often triggers criticism from the recalcitrant official's co-partisans as well as political opponents. As Grove explains, the "norm likely emerged in large part *because* of the civil rights movement; subsequent political actors did not want to be equated with the segregationists who led the massive resistance to *Brown*."[231]

2. Federal Executive Enforcement of Federal Judgments

The federal executive is charged with enforcing judgments of federal courts—both judgments to which it is a party (challenges to enforcement of federal laws) and federal court judgments to which state or local officials are parties (challenges to enforcement of state or local law). The federal executive must enforce an Article-

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[226] Walsh, *supra* note 1, at 1715.

[227] Blackman & Wasserman, *supra* note 18, at 253–54.

[228] *Supra* Part IV.

[229] REDISH, *supra* note 221, at 45–46; Lawson & Moore, *supra* note 5, at 1319.

[230] Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 468 (2018) [hereinafter Grove, *Origins*]; Tara Leigh Grove, *The Power of "So-Called Judges,"* 93 N.Y.U. L. REV. ONLINE 14, 15–16 (2018) [hereinafter Grove, *Power*]. *But see* Lawson & Moore, *supra* note 5, at 1319.

[231] Grove, *Origins*, *supra* note 230, at 499.

III-final judgment rendered by a federal court, even if the executive disagrees with the judgment or with the constitutional analysis underlying the judgment.[232] In practice, this means President Eisenhower was constitutionally obligated to send the 101st Airborne to Little Rock in 1957 to ensure that the state complied with a desegregation order.[233]

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."[234] Beyond what they call 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.[235]

Hamilton glanced at this problem in Federalist No. 78, calling the judiciary the "least dangerous" branch possessing neither force nor will and neither sword nor purse, relying on the executive to enforce its judgments.[236] For Lawson and Moore, the judiciary's ineffectiveness obligates executive enforcement, lest one branch be allowed to render another impotent.[237]

3. Precedent Binds Courts, Not Other Branches

Walsh's essential insight is that precedent—the forward-looking, prospective effects of the court's opinion—controls courts, but not legislative or executive officials.[238] Supreme Court precedent binds all federal and state courts while precedent from other courts has binding or persuasive effect, depending on the court that issued the precedent and the court considering the precedent.[239] Legislative and executive officials at all levels wield independent authority to interpret the Constitution,

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[232] Lawson & Moore, *supra* note 5, at 1319; Walsh, *supra* note 1, at 1721.

[233] MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 329, 332–34, 419 (2004); Grove, *Origins*, *supra* note 230, at 498; Walsh, *supra* note 1, at 1744.

[234] Lawson & Moore, *supra* note 5, at 1319. *But see* Grove, *Origins*, *supra* note 230, at 470; Grove, *Power*, *supra* note 230, at 18.

[235] Lawson & Moore, *supra* note 5, at 1320.

[236] The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[237] Lawson & Moore, *supra* note 5, at 1320–21.

[238] Walsh, *supra* note 1, at 1728.

[239] *See supra* notes 168–70 and accompanying text.

consistent with their oaths to support and defend the Constitution.[240] They are never bound by judicial precedent, even precedent from the Supreme Court.[241]

The judgment/opinion distinction is essential to this element. Unlike the judgment to which parties are bound, the opinion has no independent legal force.[242] The opinion is an essay, describing the judicial understanding of the Constitution and of the validity of the law at issue so as to justify the judgment, while providing a prediction of what the court might do in a future case.[243] But it is not law, so it need not dictate the legislative or executive understanding of the Constitution.

B. Effects of Judicial Departmentalism

Judicial departmentalism and its three principles carry several implications.

1. Inconsistent Action

Governments and government officials cannot disregard or take action inconsistent with a judgment and injunction arising from a specific dispute to which they are parties, but only with respect to other parties to that case who are protected by the judgment and injunction (of whatever appropriate breadth). But governments and government officials may act inconsistent with the judicial precedent established by the explanatory essay in that case (i.e., the opinion) or with the constitutional conclusions reflected in that judgment. The precedential effect of the judicial opinion, separate from the effect of the judgment, is never more than persuasive on non-judicial actors.[244] Non-judicial officials retain the power to interpret the Constitution themselves and to act on that distinct constitutional interpretation by enforcing the law against those who they believe to have violated it,[245] so long as those targets are not protected by a prior judgment and injunction.

This is the accepted understanding when the Court has recognized that some government action is constitutionally valid but other branches decline to engage in that conduct based on an independent view that such conduct is not constitutionally valid. The paradigm is President Jackson and the Second Bank of the United States. Despite the Court's determination that Congress possessed Article I power to create the Bank,[246] Jackson continued to believe it constitutionally invalid and vetoed the

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[240] Lawson & Moore, *supra* note 5, at 1328; Merrill, *supra* note 161, at 48; Walsh, *supra* note 1, at 1721.

[241] Baude, *supra* note 14, at 1841, 1845; Merrill, *supra* note 161, at 48; Walsh, *supra* note 1, at 1728.

[242] Baude, *supra* note 14, at 1844–45; Lawson & Moore, *supra* note 5, at 1328.

[243] Merrill, *supra* note 161, at 62; Mitchell, *supra* note 4, at 967.

[244] Merrill, *supra* note 161, at 62; Walsh, *supra* note 1, at 1728, 1737.

[245] Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975).

[246] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

bill based on his constitutional understanding.[247]

But the distinction between executive obedience to particularized judgments and executive independence from judicial opinion and precedent allows the converse. Executive officials may exercise powers and engage in conduct that they independently conclude to be constitutionally valid in the face of judicial precedent declaring the conduct invalid. Conduct as to non-parties does not violate the particularized judgment or injunction, and precedent does not control other branches. The combination leaves officials free to act on an independent constitutional understanding as to anyone other than those protected by a judgment.

President Lincoln advocated this position 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 will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.[248]

Under Lincoln's view, he could continue to enforce the Missouri Compromise (which prohibited slavery in states and territories north of 36'30 north latitude) even if he must enforce the judgment declaring that Dred Scott was not free.[249] More generally, judicial departmentalism establishes that political-branch officials can enact and enforce a law whenever they believe the law is constitutionally valid, regardless of judicial precedent and what a court might have said previously. The executive can continue to enforce a law with respect to non-parties to Case I (who are not

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[247] Andrew Jackson, Veto Message (July 10, 1832), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 582 (James D. Richardson ed. 1897); ERIC LOMAZOFF, RECONSTRUCTING THE NATIONAL BANK CONTROVERSY: POLITICS AND LAW IN THE EARLY AMERICAN REPUBLIC 140 (2018); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 9, 27–28 (2019); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 20 (2000); Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1117 (2000); Paulsen, *supra* note 222, at 258–59; David S. Schwartz, *Defying* McCulloch*? Jackson's Bank Veto Reconsidered*, 71 ARK. L. REV. 129, 136–38 (2019).

[248] *First Inaugural Address of Abraham Lincoln*, YALE L. SCH.: AVALON PROJECT (Mar. 4, 1861), https://avalon.law.yale.edu/19th_century/lincoln1.asp.

[249] *See* Schwartz, *supra* note 247, at 139 (describing Lincoln's framing as "defiant departmentalism").

protected by a judgment) despite a judicial opinion in Case I declaring law or action constitutionally invalid. A legislature can enact or reenact the same or similar laws, despite a judicial opinion declaring their constitutional invalidity.

The prospect of inconsistent executive or legislative action enables the changeability of precedent. A court can overrule precedent only in deciding a future case; a court can decide a future case only if that future case can be brought. A legislature must be willing to enact laws and an executive must be willing to enforce or threaten to enforce those laws. They might not survive judicial constitutional scrutiny under existing precedent, but new litigation is necessary to give the courts an opportunity to change precedent.

The political branches do not do this as a matter of course, tending to accept the judicial settlement of constitutional questions. But this is not a matter of constitutional obligation. It is a matter of "constitutional norms—of normative constraints on elected officials over and above strictly legal limits that oblige them to participate in the political process with some self-restraint, and so to refrain from pushing their legal powers to their respective maxima."[250] Political actors do not want to be equated with the segregationists who attempted to disregard school-desegregation precedents.[251] The norm also furthers the settlement function of law; by allowing a single judicial determination to control, all actors can organize their primary conduct going forward.[252]

The norm should not be confused with a constitutional duty of executive or legislative compliance with precedent.[253] It imposes a degree of prudence. Perhaps political officials will limit themselves to cases in which they have good reason to believe the court is ready and willing to overrule the challenged precedent.[254] But officials violate no constitutional rule by moving forward on the argument that present judicial doctrine is dead or vulnerable.[255] This explains, and justifies, states enacting broad restrictions on abortion in 2019. These laws would not be enforceable under existing Supreme Court precedent, but the enacting legislatures believed they would survive constitutional scrutiny before a Supreme Court with a new majority ready to overrule its foundational abortion precedents.[256]

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[250] Neil S. Siegel, *Law Is Not Enough*, 45 OHIO N.U. L. REV. 197, 204 (2019); *accord* Merrill, *supra* note 161, at 44; Walsh, *supra* note 1, at 1719–20.

[251] Grove, *Origins*, *supra* note 230, at 498–99.

[252] Alexander & Schauer, *Extrajudicial*, *supra* note 1, at 1371–72; Alexander & Schauer, *Defending*, *supra* note 1, at 457; Walsh, *supra* note 1, at 1719–20.

[253] Baude, *supra* note 14, at 1845; Merrill, *supra* note 161, at 44.

[254] Trammell, *supra* note 9, at 105.

[255] Walsh, *supra* note 1, at 1728.

[256] Tavernise, *supra* note 19; *see, e.g.*, Robinson v. Marshall, No. 2:19cv365-MHT, 2019 WL 5556198 (M.D. Ala. Oct. 29, 2019) (declaring invalid Alabama law imposing criminal

Importantly, there is no obvious political valence to this independent interpretive authority. The public fears state officials denying marriage licenses to same-sex couples[257] and state legislatures banning all abortions.[258] But Mitchell offers as a competing ideological example the preclearance provisions of the Voting Rights Act.[259] The Act required certain "covered" jurisdictions (largely in the South) to preclear changes to their voting laws with the Department of Justice and allowed the federal government to obtain an injunction prohibiting a non-precleared change in state law from taking effect.[260] In *Shelby County*, in an action brought by one covered county, the Court declared invalid the formula for deciding which jurisdictions are subject to preclearance as violating a principle of equal state sovereignty.[261] Nevertheless, a willing federal executive could have continued to attempt to enforce preclearance by seeking to enjoin other covered jurisdictions—any jurisdiction other than Shelby County—from enforcing uncleared new voting laws in the hope that the Court might overrule *Shelby County*.[262]

Allowing the executive to ignore precedent that otherwise binds courts recalls 1980s debates over administrative nonacquiescence in which administrative agencies claimed that they were not bound by an appellate court's understanding of a statute in a case involving different parties, either in a different circuit or, more controversially, within the same circuit.[263] Although that debate focused on administrative agencies and administrative review of alleged statutory violation, the logic of nonacquiescence applies to governmental litigation choices in all types of cases.[264] Some deride executive disregard for judicially binding precedent as "lawlessness."[265] Others argue that the executive can do this only where it has a "justifiable basis" for believing that its position, although contrary to current judicial precedent, may be adopted, and only so long as the executive advocates that position by pursuing litigation and allowing courts to adhere to their existing precedential position.[266]

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penalties on abortion providers).

[257] *See* Miller v. Davis, 267 F. Supp. 3d 961, 972–76 (E.D. Ky. 2017); Trammell, *supra* note 9, at 111–12.

[258] *Supra* notes 204–08 and accompanying text.

[259] Voting Rights Act, 52 U.S.C. § 10101 (2012); Mitchell, *supra* note 4, at 1006–07.

[260] Shelby County v. Holder, 570 U.S. 529, 537 (2013); Mitchell, *supra* note 4, at 1006–07.

[261] *Shelby County*, 570 U.S. at 556–57.

[262] Mitchell, *supra* note 4, at 1007–08.

[263] Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 687 (1989); Merrill, *supra* note 161, at 48–50; Trammell, *supra* note 9, at 101–04.

[264] Trammell, *supra* note 9, at 105–06.

[265] *Id.* at 103.

[266] Estreicher & Revesz, *supra* note 263, at 745–55; Trammell, *supra* note 9, at 105–06.

Judicial departmentalism and the judgment/opinion distinction imposes an outer limit on the executive's power to act inconsistent with the judicial understanding. The result is a give-and-take between the judiciary and the other branches across multiple cases. The judiciary decides Case I, rendering a judgment binding on the executive as to the parties and an opinion setting judicial constitutional precedent for future cases. The defendants must comply with that judgment and the federal executive must enforce it.[267] As to the opinion, relevant executive and legislative officials have three options: they may agree with that precedent and follow it in the future; they may disagree with that precedent and act on their independent constitutional understanding and retain, reenact, and enforce the questioned law as to others; or they may disagree with precedent but decide to follow it for other reasons (primarily a belief that the court will not overrule precedent).

The second option triggers new litigation in Case II in which the original precedent performs its role in the courts. Case II produces a new judgment and new precedent—whether overruling or reaffirming the opinion and judicial understanding established in Case I. The executive is bound by the new judgment as to the parties to Case II and the President must enforce that judgment. As for the precedential effect of the opinion on those who were not party to Case II, the cycle begins anew.

2. Departmentalism and Particularized Injunctions

Under this model, injunctions must be particularized and non-universal. Only non-particularized judgments leave the political branches free to engage judicial departmentalism and enforce a law against non-parties to the injunction.[268]

Universal/non-particularized injunctions conflate judgment and precedent, converting the subsequent effects of precedent into the primary effects of a judgment. Rather than the judgment controlling present parties and precedent (and independent executive judgment) controlling future non-parties, a non-particularized injunction purports to control future behavior of non-parties through the judgment. But that injunction leaves the executive no room for independent constitutional judgment in conflict with the underlying opinion. A court through a universal injunction can short-circuit the executive's power to reach and act on a different constitutional understanding by converting the forward-looking opinion that does not bind non-judicial actors into an all-encompassing judgment that does. That, in turn, short-circuits the executive opportunity to challenge and change precedent.[269]

This inter-branch give-and-take is analogous to the process of percolation in

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[267] REDISH, *supra* note 221, at 45; Baude, *supra* note 14, at 1809–10.

[268] Trump v. Hawaii, 138 S. Ct. 2392, 2424–25 (2018) (Thomas, J., concurring); LAYCOCK, *supra* note 9, at 226.

[269] Merrill, *supra* note 161, at 76.

which multiple lower courts consider and decide constitutional issues in separate litigation, which leads to a conversation among those courts. Universal/non-particularized injunctions allow one court to issue (or affirm) a universal injunction, obviating the force of competing (and possibly contradictory) judgments of coordinate courts at the same level of the judicial hierarchy.[270] Rather than allowing multiple judges to consider issues independently and reach their best judgments, universality allows the first court to rule to control the question. The second court has two options: issue a conflicting injunction that imposes conflicting obligations on the government[271] or issue an unnecessary judgment, because the rights of the plaintiff in Case II are protected by the universal/non-particularized judgment in Case I.[272]

A universal/non-particularized injunction seizes constitutional interpretive power from non-judicial actors. The broad injunction compels the executive and legislature to adhere to the judicial understanding instantiated in a judgment protecting all potential enforcement targets. It leaves the other branches no room to act on a competing constitutional understanding, because acting on that contrary interpretation as to non-parties violates not precedent that the executive may disregard, but an injunction and judgment that it may not disregard. It also limits the executive's opportunity to challenge precedent and to seek to have it overruled by triggering new litigation, because that new litigation itself would violate the existing non-particularized injunction.[273]

3. Limiting Mootness

Judicial departmentalism makes it more difficult for the government to moot a case in light of judicial precedent. If Court I declares a law constitutionally invalid, a challenge to the validity of the same or similar law before Court II should not become moot. Because the executive can reach and follow a different constitutional understanding than that of Court I (even if Court I is the Supreme Court), a credible threat remains that the executive may enforce the law against people who were not parties to (and not protected by the judgment in) the action before Court I.

That the executive might follow judicial precedent should not change that threat. A case does not become moot because of voluntary cessation of the unlawful activity by the government defendant.[274] Otherwise, a government official could

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[270] Bray, *supra* note 9, at 461–62; Wasserman, *supra* note 4, at 378; *supra* Part IV.C.

[271] Bray, *supra* note 9, at 462–64; Wasserman, *supra* note 4, at 383–84.

[272] California v. U.S. Dep't of Health & Human Servs., 941 F.3d 410, 432 (9th Cir. 2019) (Kleinfeld, J., dissenting); Wasserman, *supra* note 8 (manuscript 24–27).

[273] Cass, *supra* note 9 (manuscript at 51). The alternative is to move to modify or dissolve the injunction and use that motion as the vehicle for changing precedent, an unusual and arguably improper procedure. Agostini v. Felton, 521 U.S. 203, 217–18 (1997). *But see id.* at 257 (Souter, J., dissenting).

[274] Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013).

engage in unlawful conduct, stop when sued in order to moot the case, then resume the unlawful conduct.[275] 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."[276] An executive 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, while repeal of the underlying law will moot the case by rendering enforcement impossible.[277]

Judicial departmentalism offers a different justification for this distinction. Departmentalism vests the executive with broad constitutional freedom to disagree with judicial precedent and discretion to make enforcement decisions based on that disagreement. A promise to adhere to judicial precedent is as unreliable as a promise not to enforce an existing law and thus should carry no more mooting force; as to both, the executive can decide at any time to change course and not follow precedent or adopt a new constitutional understanding. Only legislative repeal of the law to be enforced—its removal from the books—guarantees that the executive cannot and will not enforce it.

The marriage-equality litigation campaign provides an example. *Obergefell v. Hodges* declared same-sex-marriage bans invalid, establishing binding judicial precedent on the Fourteenth Amendment question in a case arising from bans in Michigan, Ohio, Kentucky, and Tennessee.[278] At the time of the *Obergefell* decision, challenges to bans in other states were pending, including Eighth Circuit appeals of preliminary injunctions prohibiting enforcement of bans in South Dakota and Nebraska.[279] Both states moved to dismiss the appeals as moot, based on a promise to adhere to *Obergefell* and to not enforce their state marriage bans. The Eighth Circuit declined to find the cases moot, emphasizing that the challenged laws remained on the books and that the state's enforcement decision could change.[280] That judicial precedent is no more than persuasive on non-judicial actors (such as those who issue marriage licenses) reinforces the Eighth Circuit's conclusion, by reinforcing the discretionary nature of executive adherence to precedent.

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[275] *Id.*

[276] *Id.* (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000)).

[277] *See, e.g.*, Freedom from Religion Found., Inc. v. Concord Cmty. Sch., 885 F.3d 1038, 1051 (7th Cir. 2018).

[278] Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015); Blackman & Wasserman, *supra* note 18, at 254–55.

[279] Rosenbrahn v. Daugaard, 799 F.3d 918, 921–22 (8th Cir. 2015); Waters v. Ricketts, 798 F.3d 682, 685 (8th Cir. 2015).

[280] *Rosenbrahn*, 799 F.3d at 921–22; *Waters*, 798 F.3d at 685–86.

C. *Judicial Departmentalism to Judicial Supremacy*

Larry Alexander and Larry Solum criticize judicial departmentalism because judicial constitutional interpretation prevails over the legislative or executive interpretation when the dispute reaches the courts; the courts must apply binding precedent, meaning they will decide the case against the government.[281] If the judicial view inevitably prevails to produce what looks like judicial supremacy, then judicial supremacy must be a normatively better and more efficient approach. Walsh labels this the "collapse" thesis—judicial departmentalism collapses into judicial supremacy after time-consuming and expensive litigation.[282]

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."[283] This reflects Alexis de Tocqueville's long-ago assertion that there "is hardly a political question in the United States which does not sooner or later turn into a judicial one."[284] Tocqueville laments that "[a]n American judge, armed with the right to declare laws unconstitutional, is constantly intervening in political affairs,"[285] such that "few laws can long escape the searching analysis of the judges, for there are very few that do not injure some private interest and which advocates cannot or should not question before the courts."[286] Where individual rights are concerned, most disputes over the constitutional validity of a law can and will make their way into court, where the judicial interpretation of the Constitution (established via precedent) will prevail over the legislative or executive interpretation unless and until the Supreme Court (or any highest court) changes precedent to align with the executive's understanding.

Walsh agrees that rhetoric and practice create a regime of effective judicial supremacy because neither the legislature nor executive regularly follows its own constitutional interpretations in the face of competing judicial precedent.[287] Collapse is especially acute when the Supreme Court affirms a particularized injunction, giving it the same practical effect as a universal/non-particularized injunction. Again, however, the judgment does not do the work here; precedent and the executive's constitutional judgment as to how to engage and agree with that precedent do the work.

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[281] Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1614–15 (2005).

[282] Walsh, *supra* note 1, at 1721–22.

[283] Alexander & Solum, *supra* note 281, at 1614.

[284] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (J.P. Mayer ed., George Lawrence trans., 1969) (1835). *But see* Mark A. Graber, *Resolving Political Questions; Tocqueville's Thesis Revisited*, 21 CONST. COMMENT. 485, 486 (2004).

[285] TOCQUEVILLE, *supra* note 284, at 269.

[286] *Id.* at 102.

[287] Walsh, *supra* note 1, at 1739–40.

Regardless of practice, the formal legal rules reflect judicial departmentalism.[288] Courts must 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.

Several considerations make voluntary compliance with judicial precedent more likely.

1. Inevitability of Defeat

The obvious explanation for executive voluntary compliance is the inevitability of judicial loss in any new enforcement effort. Binding precedent, especially from the Supreme Court, leaves no room for successful future litigation against non-parties, as courts must adhere to that precedent and rule against the government and in favor of the rights-holder. And the executive knows that he cannot successfully enforce the targeted law because precedent will go against him in court. The executive's only move is not to buck the judicial understanding and thus not to attempt or threaten new enforcement.

Political officials lack incentive to act contrary to obvious judicial precedent by enacting or enforcing laws that judicial precedent establishes as constitutionally invalid, knowing they will lose once they enter litigation in a court that must follow precedent. The inevitability of defeat enables the settlement function of law; the executive accepts that the law is settled by the judicial understanding and follows that understanding, enabling other actors to plan their primary conduct.[289]

This recalls Oliver Wendell Holmes's insistence that law is the prediction by real-world actors, here government officials, of what courts will do.[290] Mitchell describes precedent as a judicial "promise" to protect a rights-holder from a legal obligation imposed by a law (that remains in place because the challenged law remains on the books) by denying judicial relief to the government that seeks to enforce that law.[291] To use Mitchell's example of *Shelby County* and the Voting Rights Act: *Shelby County* is a "promise that 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."[292] Or to use the example of marriage equality: *Obergefell* is a promise that the Court will protect same-sex couples who are denied marriage licenses by providing a remedy

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[288] *Id.* at 1730.

[289] Alexander & Schauer, *Extrajudicial*, *supra* note 1, at 1377; Alexander & Schauer, *Defending*, *supra* note 1, at 455.

[290] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897); Merrill, *supra* note 161, at 44, 62; Mitchell, *supra* note 4, at 967.

[291] Merrill, *supra* note 161, at 44, 69; Mitchell, *supra* note 4, at 1008.

[292] Mitchell, *supra* note 4, at 1008.

(primarily an injunction) against government officials who deny them those licenses.[293]

Alexander and Solum advocate for judicial supremacy because it leaves law and practice in the same place—the judicial view prevails. But defeat is inevitable only so long as judicial precedent remains stable. Rhetoric aside, the "Supreme Court regularly overrules, disregards, or narrows and distinguishes precedents that it no longer supports, and the judiciary's interpretation of the Constitution has changed radically over the past 100 years."[294] The political branches may continue to enact and enforce or threaten to enforce laws, hoping to persuade the court to overrule precedent and allow enforcement.

2. Consequences of Defeat

The risk of defeat in court may not deter determined political officials from pursuing a distinct constitutional agenda that diverges from judicial precedent. Political officials do not want to lose in court and do not want to be seen as recalcitrant actors reminiscent of Southern segregationists, which could have political or electoral consequences. On the other hand, the need for new litigation to convince courts to overrule precedent requires executive and legislative officials to push in the face of contrary precedent, hoping to find the case that will convince the judiciary to change its prevailing understanding of the law. Political officials may be willing to take repeated chances in court, especially if it allows them to score political points by criticizing unaccountable runaway "activist judges"[295] who thwart the public will by enjoining executive enforcement efforts.

Rather than relying on inevitable defeat, judicial doctrine imposes consequences on executive officials for ignoring precedent, pursuing litigation, and losing in court. They then take their chances. If right about the readiness of the Court to overrule precedent, they win in court and get the desired legal change. If wrong, they face genuine litigation consequences. This is how the system, and the interplay among co-equal branches with co-equal interpretive authority, should function.

a. Qualified Immunity

The target of a law that precedent had established constitutionally invalid may pursue two forms of judicial recourse. She could bring an *Ex Parte Young* action to enjoin threatened or attempted enforcement, or she could bring an action for damages for the injury caused by past enforcement against state and local officials under Section 1983 or a *Bivens* claim against federal officials.[296] For example, when the clerk of Rowan County, Kentucky refused to issue marriage licenses to same-sex

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293 *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

294 Mitchell, *supra* note 4, at 946–47 (citation omitted).

295 Grove, *Power*, *supra* note 230, at 19.

296 *Supra* notes 35–41, 56–62 and accompanying text.

couples despite Supreme Court precedent in *Obergefell*, couples denied licenses sued both for an injunction compelling issuance of the licenses and to recover damages (likely nominal) for the injuries suffered from the delay or denial of their licenses.[297]

The hurdle to the latter strategy is the executive's defense of qualified immunity. An executive officer is immune from suit for damages 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. Qualified immunity limits damages liability to "plainly incompetent" officers and those who knowingly violate constitutional rights.[298] A right is "clearly established" when binding judicial precedent from the Supreme Court, perhaps binding judicial precedent within a regional circuit, or a strong consensus of lower-court precedent affirm that right.[299] Precedent need not arise from cases involving substantially similar facts, but there must be sufficient factual similarity or connection such that the contours of the right were obvious in light of precedent.[300] A right also may be so obvious that it can be clearly established on general principle without factually similar precedent,[301] but the bar for obviousness is high.[302]

This focus on judicial precedent as the fulcrum for qualified immunity 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 departing from precedent so long as that precedent is not overwhelming or factually identical. It leaves room for executive discretion, including discretion as to constitutional meaning. On the other hand, independent executive constitutional interpretations will not save officials from damages liability when those interpretations conflict with a sufficiently binding or strong consensus of judicial precedent, especially from the Supreme Court. Officers lose immunity when they knowingly violate the Constitution as interpreted by the courts, even though the official acts consistent with his independent interpretation of the Constitution.

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[297] Ermold v. Davis, 936 F.3d 429, 432–33, 437 (6th Cir. 2019); Blackman & Wasserman, *supra* note 18, at 272.

[298] White v. Pauly, 137 S. Ct. 548, 551 (2017); Mullenix v. Luna, 136 S. Ct. 305, 308 (2015).

[299] Plumhoff v. Rickard, 572 U.S. 765, 779–80 (2014); Ashcroft v. al-Kidd, 563 U.S. 731, 741–42 (2011).

[300] *Al-Kidd*, 563 U.S. at 741.

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

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

b. Attorneys' fees

A second consequence of defeat is the availability of attorneys' fees for prevailing plaintiffs in constitutional actions. If the targets of later enforcement succeed in their subsequent injunctive or damages litigation, executive officials may be liable not only for the primary remedy but also for the rights-holder's attorneys' fees.

Prevailing § 1983 plaintiffs are entitled to fees from state and local officials and governments under 42 U.S.C. § 1988(b). Enacted in 1986, it vests the court with discretion whether to award, but allows denial of fees only in extraordinary circumstances.[303] Plaintiffs who prevail in enjoining enforcement of federal law may recover fees through the Equal Access to Justice Act, which provides for an award of fees and costs, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[304] Prevailing *Bivens* plaintiffs cannot recover fees from individual federal officials.[305] A party prevails when she obtains a judicial order and remedy that materially 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.[306]

Attorneys' fees incentivize individuals to pursue litigation to vindicate their rights and to hold government officials accountable for misconduct by incentivizing competent counsel to pursue these claims, regardless of the client's resources or the monetary value of the legal claim. Fees also offer an additional remedy for plaintiffs and an additional deterrent against government misconduct, where the attorneys' fees may represent the only money government officials will pay.

For our purposes, attorneys' fees also deter departmentalism and executive noncompliance with precedent. The executive who acts contrary to precedent knows that once the case enters litigation, the judicial understanding will prevail and the government will lose, unless the executive succeeds in convincing the court to overrule precedent. Losing now costs the government not only the primary remedy, but also attorneys' fees. And those fees may prove substantial—Rowan County, Kentucky paid more than $220,000 for County Clerk Kim Davis's refusal to follow *Obergefell* and issue marriage licenses to same-sex couples and the litigation that followed.[307] Faced with the prospect of new litigation producing a judicial loss and

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[303] Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968).

[304] 28 U.S.C. § 2412(d)(1)(A) (2012).

[305] Kreines v. United States, 33 F.3d 1105, 1109 (9th Cir. 1994); Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 494 (2011).

[306] Sole v. Wyner, 551 U.S. 74, 82–83, 86 (2007); Rhodes v. Stewart, 488 U.S. 1, 3–4 (1988) (per curiam).

[307] Miller v. Caudill, 936 F.3d 442, 452–53 (6th Cir. 2019). States collectively paid more than $13.5 million in fees in defending same-sex marriage bans in the lead-up to *Obergefell*. *See*

a steep fees bill if she continues on her departmentalist path, the executive may elect to follow precedent rather than incur the cost and political fallout of these efforts.[308]

c. Attorney Obligations

When a dispute over continued enforcement reaches litigation, executive-branch attorneys must defend the challenged law and the executive's decision to continue enforcing. Although not binding on the executive, judicial precedent limits the arguments that attorneys can pursue before a court that is bound by judicial precedent.

One limitation is Federal Rule of Civil Procedure 11. That rule 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."[309] The applicable "law" to which Rule 11(b)(2) refers includes judicial precedent, such that an argument is frivolous if it has "absolutely no chance of success under the existing precedent."[310] Regardless of the executive's view of the Constitution and of the validity of the challenged law, government attorneys run afoul of Rule 11, subjecting themselves to sanctions, if they defend the law purely with regard to the executive interpretation and ignore (and ask the court to ignore) prevailing judicial understanding as reflected in binding and persuasive precedent. Rule 11 leaves attorneys some room to urge courts to reverse or modify existing law and to reject the prevailing judicial understanding in favor of the prevailing executive view. But the argument must be "nonfrivolous"; government attorneys must have good reason and support, beyond another branch's competing constitutional vision, to argue for new law and for believing the courts are willing to adopt a new legal theory.[311]

This limitation is echoed in Rule 3.1 of the Model Rules of Professional Conduct: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[312] This seems to prohibit government attorneys from defending the validity of enforcing a law in the face of unfavorable precedent unless they argue for reversing that law. Commentary establishes that defense of a law or its enforcement

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Anthony Michael Kreis, *Stages of Constitutional Grief: Democratic Constitutionalism and the Marriage Revolution*, 20 U. PA. J. CONST. L. 871, 895 (2018).

[308] Blackman & Wasserman, *supra* note 18, at 261.

[309] FED. R. CIV. P. 11(b)(2).

[310] *In re* Sargent, 136 F.3d 349, 352 (4th Cir. 1998) (quoting Brubaker v. City of Richmond, 943 F.2d 1363, 1373 (4th Cir. 1991)).

[311] FED. R. CIV. P. 11 advisory committee's note to 1993 amendment; Estreicher & Revesz, *supra* note 263, at 755.

[312] MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2019).

is not frivolous because the attorney believes it will fail so long as there is a good-faith argument.[313] ModelRule 3.3(a)(2) requires that lawyers "disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client,"[314] meaning government counsel must disclose to the court that the executive's enforcement efforts run contrary to controlling precedent.

A third limitation is institutional. The Department of Justice ("DOJ") represents the executive in court, and DOJ attorneys may be reluctant to vigorously defend an executive constitutional position that contradicts judicial precedent. One reason is self-preservation; as Thomas Merrill argues, government "lawyers, berated at oral argument and chastised in strident opinions for the [government's] behavior, will quickly lose the stomach to persist in enforcing the [executive] interpretation. Eventually, the [executive] will cave in and accept the judicial understanding."[315] Lawyers must exercise "independent professional judgment,"[316] not merely parrot the elected officials' contrary legal views that are unlikely to prevail in court. And they want to avoid the appearance that the executive is not merely permissibly asserting departmental power contrary to judicial precedent, but impermissibly defying or circumventing a court order in the current case, and doing so with the attorney's assistance.

The power balance within the executive branch provides another institutional limit. Executive-branch attorneys view judicial precedent as stating rules of law.[317] And there is a benefit to that respect for precedent. Neil Devins and Saikrishna Prakash argue that political appointees and career attorneys in the DOJ:

> 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.[318]

The DOJ can prevail in turf wars with the White House and other executive departments by pointing to the difficulty of defending prospective enforcement of a law in the face of controlling judicial precedent. DOJ may urge the executive to

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[313] *Id.* r. 3.1 cmt. 2.

[314] *Id.* r. 3.3(a)(2).

[315] Merrill, *supra* note 161, at 73.

[316] MODEL RULES OF PROF'L CONDUCT r. 2.1.

[317] Merrill, *supra* note 161, at 69.

[318] Neil Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 538 (2012).

push the non-judicial position only in cases in which it believes the court might overrule precedent and adopt the executive position. And it can ensure that the executive pursues litigation, appeals adverse decisions, and follows other efforts to instantiate that position.[319]

The Office of Legal Counsel ("OLC") further instantiates DOJ respect for judicial precedent and thus judicial supremacy. OLC opinions on constitutional questions bind the executive branch, subject to overruling by the President or the Attorney General.[320] OLC is unlikely to adopt or recommend constitutional positions that run contrary to the weight of judicial precedent or that are likely to be rejected in litigation. By emphasizing and acquiescing to the power and force of judicial precedent, DOJ and OLC attorneys curry favor with the courts.[321]

Congress is another institution 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. A judicial declaration that a law is constitutionally invalid offers legislators a new opportunity to take a position on the issue and to reap the electoral advantages of that position.[322] The House and Senate Judiciary Committees, charged with overseeing DOJ, are similarly inclined to defer to judicial interpretation and to court-centric constitutional interpretation.

d. Good Faith Exception to Younger *Abstention*

Under the abstention doctrine of *Younger v. Harris*,[323] a federal court cannot grant an injunction or declaratory judgment that interferes with an ongoing criminal, civil, or administrative enforcement proceeding.[324] Once the government initiates formal enforcement efforts, the rights-holder loses the option of a federal pre-enforcement action[325] or an action for damages;[326] she is consigned to asserting constitutional rights defensively in the enforcement proceeding on threat of conviction and criminal punishment. *Younger* also limits rights-holders' protections against executive non-compliance with precedent. If the executive initiates enforcement in the face of unfavorable precedent, the rights-holder loses the strategic option of preemptive federal litigation and with it the drags on non-compliance, such as damages,

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[319] Estreicher & Revesz, *supra* note 263, at 755–56; Trammell, *supra* note 9, at 105–06.

[320] 28 C.F.R. § 0.25(a) (2019); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1305 (2000).

[321] Devins & Prakash, *supra* note 318, at 510–11.

[322] Neil Devins, *Why Congress Does Not Challenge Judicial Supremacy*, 58 WM. & MARY L. REV. 1495, 1536–37 (2017).

[323] Younger v. Harris, 401 U.S. 37, 53–54 (1971).

[324] Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982); Huffman v. Pursue, Ltd., 420 U.S. 592, 594 (1975); *Younger*, 401 U.S. at 54.

[325] *Younger*, 401 U.S. at 40–44.

[326] Doe v. Univ. of Ky., 860 F.3d 365, 372 (6th Cir. 2017).

injunctions, and attorneys' fees.

But *Younger* recognizes an exception—the federal court can enjoin or interfere with the ongoing enforcement proceeding when that proceeding is brought in bad faith, without "any expectation of securing valid convictions."[327] The bad-faith exception might limit the executive's departmentalist power to act on an independent constitutional understanding contrary to controlling judicial precedent. If binding precedent, controlling on all courts, establishes that a law is constitutionally invalid, the executive brings the enforcement action without expectation of securing a valid conviction or judgment. Regardless of the executive's continued good-faith independent belief in the law's constitutional validity, the contrary judicial view prevails in court, which the executive must know. Any conviction that might be secured is not valid and will not survive review under controlling precedent.

A rights-holder thus can go to federal court to stop a departmentalist executive from pursuing an enforcement action, unencumbered by the *Younger* bar. The rights-holder can obtain an injunction prohibiting the executive from continuing with the enforcement action if the federal court applies precedent declaring the law in question constitutionally invalid. The rights-holder may also obtain the added remedy of attorneys' fees if successful in those constitutional arguments.

D. Voluntary Compliance (or Acquiescence) and the Rhetoric of Judicial Supremacy

The common strategy for executive and legislative officials is voluntary compliance or acquiescence with judicial precedent, subverting independent constitutional views to the judicial views that almost certainly will prevail in litigation.

Voluntary compliance is so common that the rare example of non-compliance earned a historic label—"Massive Resistance" to *Brown* and school desegregation by southern officials in the 1950s and '60s.[328] Three moments from this era illustrate the reality and contours of judicial departmentalism. The first is President Eisenhower sending the 101st Airborne to Little Rock to ensure enforcement of a desegregation order for the Little Rock schools.[329] The second is *Cooper v. Aaron*, a case arising from the desegregation crisis in Little Rock, in which the Court adopted broad rhetoric of judicial supremacy, insisting:

> Compliance with decisions of this Court, as the constitutional organ of the supreme Law of the Land, has often, throughout our history, depended on active support by state and local authorities. It presupposes such support. To withhold it, and indeed to use political power to try to paralyze the supreme

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[327] *Younger*, 401 U.S. at 48 (quoting Dombrowski v. Pfister, 380 U.S. 479, 482 (1965)).

[328] KLARMAN, *supra* note 233, at 326, 368–69, 408–09; Grove, *Origins*, *supra* note 230, at 497.

[329] KLARMAN, *supra* note 233, 329, 332–34; *supra* note 232 and accompanying text.

> Law, precludes the maintenance of our federal system as we have known and cherished it for one hundred and seventy years.[330]

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.[331]

Properly understood, these events illustrate the fundamental distinctions between judgments and opinions/precedent and the imperative of particularized injunctions.

Despite the common perception, Alabama and Arkansas officials did not ignore or act contrary to *Brown* as a judgment because the judgment in *Brown* did not affect or control them. Neither the University of Alabama nor the public schools of Little Rock were at issue in *Brown* (which arose from a challenge to public-school segregation in Kansas) or the cases consolidated with *Brown* (from South Carolina, Virginia, and Delaware).[332] Officials of Alabama and Arkansas were not parties to those cases. *Brown* operated only as an opinion and as judicial precedent on the meaning of the Equal Protection Clause.

Little Rock and *Cooper* are more complicated under judicial departmentalism. The Little Rock School Board attempted to voluntarily comply with *Brown*'s precedent by 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 Eighth Circuit, and not appealed to the Supreme Court.[333] This became an Article-III final judgment with which Arkansas officials were obligated to comply. When Eisenhower ordered the 101st Airborne to Little Rock, he was enforcing not *Brown*, but a new injunction involving schools, students, and public officials of Little Rock. This is the apotheosis of the presidential obligation to enforce federal-court judgments and of the reality that judgments and the judicial power depend on executive enforcement and executive power.

Brown affected Little Rock as the precedent establishing the controlling judicial understanding of the Fourteenth Amendment that compelled the court's new judgment. Had the desegregation plans in Little Rock not produced new litigation and a new judgment, however, 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 military.

The dispute that reached the Supreme Court in *Cooper* arose from the Little

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[330] Cooper v. Aaron, 358 U.S. 1, 26 (1958); KLARMAN, *supra* note 233, at 328–29; Blackman, *supra* note 1, at 1153.

[331] KLARMAN, *supra* note 233, at 407.

[332] Brown v. Bd. of Educ., 347 U.S. 483, 486 & n.1 (1954).

[333] *Cooper*, 358 U.S. at 8; Blackman, *supra* note 1, at 1145.

Rock School Board's request to delay compliance with the injunction and implementation of the desegregation plan, in light of "extreme public hostility" to desegregation that rendered it impossible for the Board to create a "sound educational program" in a high school with African American students.[334] The issue before the Court was whether conditions warranted that delay in compliance, which the Court easily answered in the negative.[335] The ode to judicial supremacy and to the obligation of non-judicial officials to obey judicial precedent was unnecessary dicta that had nothing to do with the issue before the Court.[336] The problem was not that Arkansas officials such as Governor Orval Faubus ignored *Brown*. The problem was that they attempted to ignore a final judgment and injunction that bound them to act in some way with respect to Little Rock schools; the law of judgments prohibited such disregard for a court order.[337]

Judicial departmentalism offers a clearer picture of Wallace standing in the schoolhouse door. Wallace violated two injunctions—one requiring the University of Alabama to register the African American students[338] and one prohibiting Wallace from interfering with that prior injunction.[339] As with Little Rock, this was about *Brown* only because *Brown* bound the lower courts 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 because those injunctions prohibited him and other Alabama officials from acting in some way as to the individuals seeking to attend the university.

Cooper is the touchstone for judicial supremacy.[340] It also is the touchstone for critics of judicial supremacy, precisely because the Court's judicial-supremacy rhetoric was misplaced and unnecessary.[341] The modern norm of executive compliance with court orders dates to *Cooper* and to the negative public reaction to Massive Resistance.[342] A more focused *Cooper* opinion might have formalized that norm without the confounding, questionable, and debatable resort to the rhetoric of judicial supremacy.

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[334] *Cooper*, 358 U.S. at 12; Blackman, *supra* note 1, at 1147–50.

[335] *Cooper*, 358 U.S. at 15.

[336] Blackman, *supra* note 1, at 1154–55.

[337] Merrill, *supra* note 161, at 52–53.

[338] Lucy v. Adams, 134 F. Supp. 235, 239 (N.D. Ala. 1955).

[339] United States v. Wallace, 218 F. Supp. 290, 292 (N.D. Ala. 1963).

[340] Alexander & Schauer, *Extrajudicial*, *supra* note 1, at 1362; Blackman, *supra* note 1, at 1154; Lawson & Moore, *supra* note 5, at 1293 & n.124; Merrill, *supra* note 161, at 52–53; Walsh, *supra* note 1, at 1717, 1743.

[341] Blackman, *supra* note 1, at 1191–92; Merrill, *supra* note 161, at 79; Walsh, *supra* note 1, at 1743.

[342] Grove, *Origins*, *supra* note 230, at 498–99, 531.

The rhetorical embrace of judicial supremacy enhances the norm of executive voluntary compliance with judicial precedent, keeping the system flowing and limiting inter-branch conflict.[343] One thus might object that embracing judicial departmentalism will prompt less voluntary compliance and produce more inter-branch conflict. Freed of the public presumption of judicial supremacy and the negative public connotations of departmentalism, executive officials (at all levels) become less inclined towards voluntary compliance with judicial precedent. It may render Massive Resistance less derogatory, less publicly unacceptable, and less to be avoided, making executive officials more willing to act on independent judgment. This has the potential to upset all judicial settlement, creating confusion as to what government officials and rights-holders are empowered or prohibited from doing.

Departmentalists argue the converse to resist *Cooper*'s rhetorical limits. If executive officials need not follow judicial precedent, courts may be less anxious to flex their constitutional muscle and may attend to the views of the more politically accountable branches, limiting themselves to rulings likely to secure voluntary acceptance by these coordinate branches.[344]

The answer is not to turn a blind eye to the practical realities of litigation and adjudication, but to recognize and embrace those realities. Conflict can be minimized through the incentives towards executive compliance—judicial defeat, attorneys' fees, damages, sanctions, institutionalism, and executive prudence. Even if the public accepts the possibility of executive non-compliance, it may be less willing to accept repeated litigation failures, and the attendant costs, by public officials who refuse to accept where precedent inevitably leads the courts.

E. The Role of the Legislature

Judicial departmentalism recognizes the legislature's independent power of constitutional interpretation. The judicial decision declaring a statute constitutionally invalid in *X* prohibits enforcement of the statute only against the plaintiff in *X* and lasts as precedent only until the Supreme Court overrules it.[345] This preserves a role for the legislature, which may act on its independent constitutional judgment in choosing the laws to enact, repeal, or leave in place, regardless of contrary judicial precedent. Although precedent means any efforts to enforce these laws will fail in court, the legislature remains unencumbered to make or not make laws as it sees fit.

This puts a different face on past exchanges between legislatures and the judiciary in two directions.

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[343] Merrill, *supra* note 161, at 69, 73.

[344] *Id.* at 76–79.

[345] Mitchell, *supra* note 4, at 946–47.

1. Legislating Contrary to Precedent

In 1989, a 5-4 Court in *Texas v. Johnson* declared that a Texas law banning "venerated objects" was constitutionally invalid in a criminal prosecution of an individual who burned an American flag during a political protest.[346] Under this model of constitutional adjudication, the Court produced a judgment prohibiting Texas from enforcing its flag-burning statute against Johnson arising from his actions during the 1984 Republican National Convention. It also produced binding judicial precedent interpreting the First Amendment as protecting flag desecration as expressive activity and declaring that prohibitions on flag desecration were inconsistent with the First Amendment and should not be enforced. But no judgment prohibited Texas from enforcing its law against another person. Nor did any judgment prohibit another government from enforcing its similar law against anyone.

Congress debated a response to *Johnson*. Some argued for a constitutional amendment that would overrule the Court's decision and establish that the First Amendment does not protect flag desecration.[347] Others pushed for legislation, which carried the day with passage of the Flag Protection Act, which took effect later in 1989.[348] The law 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.[349] In *United States v. Eichman*, the same 5-4 majority declared that the federal statute violated the First Amendment.[350] Congress then turned to a constitutional amendment before "[t]he ink had hardly dried on the *Eichman* opinion,"[351] although a proposed amendment fell 34 votes short of the necessary supermajority in the House and nine votes short in the Senate.[352]

As with *Johnson*, *Eichman* produced a judgment and precedent. The judgment dismissed the federal prosecution of Eichman under the federal law. The opinion established further binding precedent interpreting the First Amendment as protecting flag desecration as expressive activity and declaring that prohibitions on flag desecration are inconsistent with the First Amendment and cannot be enforced.

Judicial departmentalism offers a different lens on the congressional choice between statutory or constitutional responses to *Johnson*, avoiding the simplistic "the

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346 Texas v. Johnson, 491 U.S. 397, 420 (1989).

347 ROBERT JUSTIN GOLDSTEIN, FLAG BURNING AND FREE SPEECH: THE CASE OF *TEXAS V. JOHNSON* 135–42 (2000).

348 Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (1989) (codified at 18 U.S.C. § 700 (2012)); GOLDSTEIN, *supra* note 347, at 128–29, 142–43.

349 United States v. Eichman, 496 U.S. 310, 312–13 (1990).

350 *Id.* at 312, 318–19.

351 Howard M. Wasserman, *Holmes and Brennan*, 67 ALA. L. REV. 797, 844 (2016).

352 GOLDSTEIN, *supra* note 347, at 211.

only alternative is a constitutional amendment" narrative.[353] As a matter of the First Amendment (as distinct from *Johnson* as judicial precedent interpreting the First Amendment), a statute was a constitutionally appropriate response, and Congress had no constitutional obligation to fit the statute within the parameters of *Johnson*'s language and reasoning. *Johnson* was judicial precedent—judicial promises[354] that flag-burning statutes would not be applied in court against individuals who invoked that manner of expression and a prediction of what would happen if the United States enacted and attempted to enforce a statutory ban.

But *Johnson* did not compel congressional or executive obeisance. So long as members of Congress believed the statute was constitutionally valid, they acted consistently with the First Amendment and their constitutional oaths, regardless of contrary Supreme Court precedent. And so long as the President and Attorney General believed the statute valid, they acted consistently with the First Amendment, their constitutional oaths, and the President's constitutional "Take Care" obligations in enforcing it.

Devins argues that Congress is more likely than the executive to acquiesce to judicial supremacy and punt issues to the courts as the arbiter of the Constitution. After all, "judicial invalidations can prove beneficial, for they create new opportunities for lawmakers to return to the issue and consider alternative measures."[355] The flag-burning controversy presented that opportunity to Congress, although public demand for congressional action, intense following *Johnson*, fizzled following *Eichman*.[356] Devins offers an additional example of the Gun Free School Zones Act, which the Supreme Court declared invalid in 1995 in *United States v. Lopez*.[357] The *Lopez* decision provided lawmakers an opportunity to return to the issue and pursue new legislation, taking a popular public position against crime and in favor of protecting children.[358]

The responses to *Johnson* and to *Eichman* turn on a rhetorical point. It is not that any statute is unconstitutional; it is that everyone in Congress knows the statute will be declared so by courts applying controlling judicial precedent. That is why Congress necessarily turned to an amendment after *Eichman*—members predicted that a new statute would suffer the same fate as the 1989 statute once the dispute reached the judiciary. But recognizing that judicial departmentalism best describes the reality of constitutional litigation frees Congress to score those political points in the face of contrary judicial precedent—enact the new statute and leave it to the

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353 *Id.* at 128–29.

354 Mitchell, *supra* note 4, at 1008.

355 Devins, *supra* note 322, at 1522.

356 GOLDSTEIN, *supra* note 347, at 211–15.

357 United States v. Lopez, 514 U.S. 549, 567–68 (1995); Devins, *supra* note 322, at 28–29.

358 Devins, *supra* note 322, at 28–29.

courts to stop enforcement. Legislators can frame the defeat as competing constitutional interpretations without the rhetorical blowback accusing them of engaging in Massive Resistance, disobeying the Supreme Court, or acting in an unconstitutional manner by ignoring the courts. Legislators can score further political points against activist judges thwarting the public will through an erroneous constitutional understanding.

Congress then must grapple with several issues. One is how much it wants to engage in a back-and-forth with the courts—Congress enacts a statute, the courts declare it invalid and refuse or enjoin its enforcement, and Congress responds with the same (or a similar) law that the courts will declare invalid. Another issue is at what point the DOJ—concerned for its own institutional interests bending towards judicial supremacy—ceases to enforce or defend a congressional enactment that is doomed to fail in court under controlling judicial precedent.[359] Executive acquiescence with judicial precedent may prompt congressional acquiescence with judicial precedent. A third issue is how much Congress wants to deal with political or financial (damages, attorneys' fees, attorney sanctions) consequences of appearing to waste everyone's time.

Judicial departmentalism adds a new gloss to the 2019 efforts in several states to enact sharp restrictions on abortion.[360] These laws were unquestionably invalid under controlling Supreme Court precedent as of 2019 and state officials voting for and attempting to enforce them knew that. The point was to create the litigation necessary to give the Court the opportunity to overrule precedent by enacting and threatening to enforce these laws, then appealing their inevitable defeats in the lower courts.[361] Again, this litigation model means these states were not disobeying the Supreme Court. The starting point was that state officials believed the laws were constitutionally valid on their best constitutional understanding and interpretation and they took steps to urge that interpretation on the judiciary. This is how the system, and the interplay among co-equal branches with shared interpretive authority, operates.

2. Cleaning the Statute Books

Following a judgment, the government may not enforce the challenged law against X, but may attempt to enforce it against Y or Z, if it is willing to litigate and lose in court (if it cannot convince the court to abandon precedent) and to shoulder the attendant consequences. This means Y, Z, and others are not "absolved" of their

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[359] Devins & Prakash, *supra* note 318, at 510–11; Merrill, *supra* note 161, at 73.

[360] Tavernise, *supra* note 19.

[361] *Governor Ivey Issues Statement After Signing the Alabama Human Life Protection Act*, OFF. GOVERNOR ST. ALA. (May 15, 2019), https://governor.alabama.gov/statements/governor-ivey-issues-statement-after-signing-the-alabama-human-life-protection-act; *see, e.g.*, Robinson v. Marshall, No. 2:19cv365-MHT, 2019 WL 5556198 (M.D. Ala. Oct. 29, 2019).

obligations to follow that statute.[362] The law could be enforced against them, even if enforcement likely will fail. Eliminating all possible future enforcement requires legislative action over the content of statute books. The only way to stop the executive from enforcing or threatening to enforce a constitutionally dubious law, even one declared invalid by the Supreme Court, is to repeal that law. If a court declares a law constitutionally invalid and the legislature repeals that law, an executive disagreeing with the judicial precedent cannot enforce the law against Y or Z because there is no law to enforce.

This explains efforts to repeal anti-miscegenation laws and same-sex marriage bans in states in which such laws remain on the books. As of 2018, three years after *Obergefell*, bans on same-sex marriage remained in 30 state constitutions.[363] Alabama became the final state to repeal its anti-miscegenation law in 2000, two years after South Carolina, although the Court declared that the Fourteenth Amendment prohibits such laws in 1967.[364]

This also explains recent efforts in pro-choice states such as New York to clean their abortion laws following the 2018 appointment of Justice Brett Kavanaugh. Many states had sharp restrictions on abortion in the 1960s and '70s; although those laws could not be successfully enforced following *Roe v. Wade*, they remained on the books even in states that protected reproductive rights. Facing the prospect of a five-Justice majority willing to overrule precedent establishing constitutional protection for abortion, reproductive-freedom advocates have sought to repeal abortion restrictions to ensure a favorable statutory landscape, even if the constitutional terrain should change.[365]

Virginia took a more comprehensive approach. It convened a Commission to Examine Racial Equity in Virginia, which released an interim report in November 2019 identifying and calling for the repeal of dozens of outdated, no-longer-judi-

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[362] Mitchell, *supra* note 4, at 1008.

[363] Josh Barro, *Some Practical Thoughts on Gay Marriage After Anthony Kennedy's Retirement*, BUS. INSIDER (June 29, 2018), https://www.businessinsider.com/what-does-anthony-kennedy-retirement-mean-for-gay-marriage-2018-6. *But see, e.g.*, Toghill v. Commonwealth, 768 S.E.2d 674, 675 n.1 (Va. 2015) ("The General Assembly amended Code § 182–361(A) in 2014 to remove the general provisions forbidding sodomy.").

[364] Philip Bump, *What Overturning Interracial Marriage Bans Might Tell Us About What Happens Next with Gay Marriage*, WASH. POST (Oct. 6, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/10/06/what-overturning-interracial-marriage-bans-might-tell-us-about-what-happens-next-with-gay-marriage/.

[365] Blackman, *supra* note 1, at 1200 & n.518; Joseph Spector & Jon Campbell, *Abortion Laws in New York: How They Changed with the Reproductive Health Act*, DEMOCRAT & CHRON. (Jan. 22, 2019), https://www.democratandchronicle.com/story/news/politics/albany/2019/01/22/abortion-laws-new-york-how-they-change-immediately/2643065002/.

cially enforceable state laws; these included the anti-miscegenation law declared invalid and unenforceable in *Loving v. Virginia*, education laws enacted during Massive Resistance to *Brown*, and laws targeting the "feeble-minded."[366]

These efforts serve three functions. They are symbolic, removing from the positive law provisions that the Court has declared are inconsistent with the Constitution, actual or attempted enforcement of which would fail in court and subject state officials to suit and a range of judicial remedies. They are expressive—Virginia described its efforts to combat its history of racism and racial exclusion by removing from the positive law provisions that, although not judicially enforceable, send an historical and continued message of exclusion and the denial of full rights of citizenship and civil participation.[367] And these efforts have substantive effect. Executive officials could attempt to enforce those laws if they remain in place and they believe them constitutionally valid, even in the face of contrary judicial precedent. Although enforcement efforts would fail in court and are unlikely, they remain within executive discretion. And the executive remains aware that the Court might overrule precedent, enabling future enforcement. The only way to ensure no enforcement, now or in the future, is to eliminate the laws.

Repeal efforts must be directed to the legislature. Unfortunately, the presumption and habit of judicial supremacy prompts some advocates to direct these efforts to the judiciary on the belief that it alone is charged with constitutional enforcement. The Sixth Circuit confronted a skewed version of this in *Mason v. Adams County Recorder*.[368] The Section 1983 plaintiff sought an injunction ordering the county recorder of deeds to stop maintaining property deeds containing racially restrictive covenants, although such covenants were not enforceable under binding constitutional precedent[369] and no attempt had been made to enforce them.[370]

In concluding that the plaintiff lacked standing,[371] the majority described the claim as one seeking to eliminate legal memory:

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[366] INTERIM REPORT FROM THE COMMISSION TO EXAMINE RACIAL INEQUITY IN VIRGINIA LAW 12 (2019), https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Interim-Report-From-the-Commission-to-Examine-Racial-Inequity-in-Virginia-Law.pdf

[367] *Id.* at 1.

[368] Mason v. Adams Cty. Recorder, 901 F.3d. 753, 755 (6th Cir. 2018).

[369] Shelley v. Kraemer, 334 U.S. 1, 23 (1948). The racially restrictive covenants also are unenforceable under the Federal Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619 (2012), and a provision of the Civil Rights Act of 1866 prohibiting discrimination because of race with respect to property. *Id.* § 1982.

[370] *Mason*, 901 F.3d at 756 (footnote omitted).

[371] In part because the plaintiff had not suffered a remediable violation of his constitutional rights. *Mason*, 901 F.3d at 757.

> In ancient Rome, the practice of *damnatio memoriae*, or the condemnation of memory, could be imposed on felons whose very existence, including destruction of their human remains, would literally be erased from history for the crimes they had committed. Land title documents with racially restrictive covenants that we now find offensive, morally reprehensible, and repugnant cannot be subject to *damnatio memoriae*, as those documents are part of our living history and witness to the evolution of our cultural norms. Mason's feeling of being unwelcomed may be real. A feeling cannot be unfelt. But Mason's discomfort at the expression of historical language does not create particularized injury. The language in question is purely historical and is unenforceable and irrelevant in present-day land transactions.[372]

It might be within the legislative power to enact a law creating new or updated deeds without the unenforceable restrictive covenants. But the court cannot order that remedy.

VI. CONSTITUTIONAL ADJUDICATION IN ACTION

This Part models constitutional litigation and adjudication in light of the principles introduced in Parts I through V.

The starting point is a law (federal, state, or local) that has been enacted and is on the books; for present purposes, form and substance do not matter. The responsible executive officer (or officers) believe the law is enforceable and intend to enforce it. The law is subject to some constitutional objection by a rights-holder against whom the law may be enforced.

This framing is generic and abstract, without reference to particular cases, parties, or laws. But it offers a big picture of how this model of constitutional litigation operates.

A. Initial Constitutional Litigation

Constitutional adjudication against this law may proceed in two ways: 1) defensively, through government-initiated efforts to enforce the challenged law against the rights-holder's constitutional defense or 2) offensively, in rights-holder-initiated efforts to stop enforcement of the challenged law. This sub-Part considers both proceedings, the arguments made, and the results.

1. Enforcement Actions

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

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[372] *Mason*, 901 F.3d at 757.

ing 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 nature of the enforcement proceeding, X defends on the ground that the law 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 individual-rights provisions. The body adjudicating the enforcement action must interpret the Constitution and declare the validity of the law enforced. If the adjudicator agrees that the law is constitutionally invalid, that law cannot be enforced as the rule of decision; the adjudicator must dismiss the enforcement efforts or otherwise enter judgment in favor of X. If the adjudicator declares the law constitutionally valid, the law can be enforced as the rule of decision in the action, which then continues to determine whether X is guilty or liable under the law, given the facts of the case.

If the law is state or municipal and 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. The Supreme Court 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.[373] If the law is federal and 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[374] and then to the Supreme Court.[375]

If the last federal court to consider the constitutional question agrees that the law enforced is constitutionally invalid, the result is an Article III-final judgment resolving the enforcement action in X's favor. Judgment in hand, X remains free to engage in his constitutionally protected conduct, free of interference from the invalid law.

2. Pre-Enforcement Actions

Rather than await an action to enforce that law, X goes 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 declaratory judgment that the law is constitutionally invalid, an injunction prohibiting enforcement of the law as to X, or both. X pursues this strategy to beat the government to the punch and, where the challenge is to state

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373 28 U.S.C. § 1257(a) (2012).

374 *Id.* § 1291.

375 *Id.* § 1254(2).

laws, to move the federal constitutional issues into federal court. This strategic option is essential to halt enforcement of laws or regulations that are not enforced through judicial or administrative proceedings (e.g., laws requiring racially segregated schools, prohibiting same-sex marriage, or establishing invalid legislative districts).

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 defendant official that is redressable via judicial remedy. For present purposes, X must show that he faces a substantial risk or likelihood that the law will be enforced against him by the named defendant official. X also may be unable to pursue his anticipatory federal civil action if the government has initiated prior to or contemporaneous with enforcement proceedings against him.

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 and leave the parties in their current positions 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 has no adequate alternative remedy, 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 (or likely success) on the merits means showing that the challenged law is constitutionally invalid and that enforcement of the law against X would violate his rights.

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 enters 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."[376] 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."[377]

The injunction should be particularized to the plaintiff, prohibiting the defendant from enforcing the challenged law only against X. The protective scope can be expanded if X represents a civil rights injunctive class or if X sues on behalf of its members or third parties to which it bears a connection. Its scope also can be expanded if the remedial benefits to the plaintiff are indivisible from the benefits to

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[376] FED. R. CIV. P. 65(d)(2)C).

[377] FED. R. CIV. P. 65(d)(1).

non-parties, who enjoy incidental spillover effects of X's relief. An injunction is subject to continued and ongoing judicial supervision to ensure compliance by the defendant and continued protection for the plaintiff.

The federal court may instead issue a declaratory judgment declaring the law constitutionally invalid and unenforceable as to X but without enjoining defendants from enforcing it. Should the declaratory judgment fail to persuade the officers, X can ask the court to issue an injunction in furtherance of the declaratory judgment. A declaratory judgment should be as particularized as an injunction, limited to declaring X's rights and the unenforceability of the law against X.

Having obtained an injunction or declaratory judgment, X is a prevailing party and is entitled to attorney's fees incurred in pursuing her constitutional challenge. The federal executive must enforde that federal judgment.

B. Where We Are and What Happens Next

Either the enforcement action or the pre-enforcement action described in Part VI.A leaves us in the same place—X has prevailed against the government or government officials, obtaining a judgment in his favor. That judgment was accompanied by an opinion explaining that the law is constitutionally invalid and why.

The action shifts to what happens after this initial litigation involving X. Accounting for the five principles discussed, the following must be true.

1. No New Enforcement as to X

If the first proceeding was an enforcement action and X obtained a judgment in her favor, the government cannot attempt to again enforce the law against X for the same conduct, as the judgment has preclusive effect. And if the law is criminal, the judgment triggers protections of Fifth Amendment Double Jeopardy.

If the first proceeding was a pre-enforcement action, government and government officials are precluded from present and future enforcement as to X. Should officials attempt enforcement, X could move the district court overseeing the injunction to enforce its judgment and to order the officials to comply by not undertaking prohibited future enforcement. Continued disobedience is punishable by contempt and sanctions, including fines and jail for the officials. X could assert preclusion in any second enforcement action, arguing that Court II is bound by the judgment of Court I and must dismiss the enforcement action. At the same time, government defendants can move to dissolve or modify the injunction when it no longer is necessary or when the constitutional landscape has changed so the challenged law again becomes consistent with the Constitution and thus enforceable.

The power to enforce that injunction and to seek sanctions for its disregard is reserved to X, the party to the litigation that produced the injunction. Enforcing the injunction to halt future enforcement of the challenged law may require the district court to determine the scope of the injunction—who is X and who X represents. That Y incidentally benefits from the injunction (for example, as another voter

in an unconstitutionally gerrymandered district) does not allow Y to move the court to enforce; that power remains with X.

The federal executive branch must enforce that federal court judgment and any subsequent judicial orders in furtherance of the injunction, including contempt. This includes taking recalcitrant officials into custody and involving the U.S. Marshals or even the military to ensure compliance with the court order.

2. Enforcement as to Y

The judgment, properly scoped to protect X from enforcement of the challenged law by that government, does not constrain government officials from doing anything with respect to Y. The executive can enforce the questionable law against her, even if she is similarly situated to X. The legislature can enact identical or similar legislation to be applied to Y. Officials of other governments can make and enforce identical or similar laws as to Y. Nothing about the judgment in X, even as affirmed by the Supreme Court, affects the government's conduct towards Y. Because she was not party to the prior litigation, she is not protected by the judgment. Nor are executive officers of a different government who 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. These officials do not violate the court's order or the Constitution through these enforcement efforts if supported by their best constitutional understanding. The only requirement is that these officials, in their independent judgments, believe the laws they enact and enforce are constitutionally valid.

The analysis changes if X sued and obtained a judgment in more than an individual capacity. If X sued as representative of a certified Rule 23(b)(2) class and Y is a member of the class, enforcement of the challenged law against them is inconsistent with the injunction. If X sued in some third-party or associational capacity that represented Y, enforcement against Y would be inconsistent with the injunction. Any question of whether Y is protected by the judgment—and thus whether enforcement against them violates the injunction—is for the issuing court to resolve in enforcing its injunction. For example, if X was a doctor asserting third-party standing to enforce the rights of her patients as against a restriction on abortion, the enforcement question is whether Y (the target of new enforcement efforts) is one of those patients protected by the injunction protecting X.

3. Returning to Litigation with Y

Faced with threatened or actual enforcement of the laws or regulations against her and unprotected by the existing judgment, Y has several options. She may join as a new plaintiff in Case I and ask the court to extend the injunction to her. She may ask Court I to certify a class and to extend the injunction to a class of which Y is a part. Alternatively, Y may initiate her own pre-enforcement litigation, seeking a new declaration of constitutional invalidity and a new injunction barring enforcement of the challenged law as to her. Or Y may await attempted enforcement of the law against her and defend the new enforcement action on the grounds of the law's

constitutional invalidity. Or Y may sue for damages for past injuries arising from that enforcement; the damages claim must overcome qualified immunity, which would turn on whether Court I's opinion "clearly established" the constitutional invalidity of the law.[378]

The law of judgments plays no role in any litigation involving Y, who was not party to the original action (presuming no class action or other representative litigation). She is not protected by the existing judgment and cannot enforce it. And, under current doctrine, she cannot assert non-mutual preclusion against the federal or state governments. This might change if Clopton and Trammell get their way in overruling *Mendoza* and allowing non-mutual offensive preclusion against the government.[379] In any event, preclusion requires new litigation involving Y; that litigation requires the executive to make a valid choice to continue enforcing a law he believes constitutionally valid, even in the face of contrary precedent—Y cannot gain preclusion from Court I.

Assuming the initial action was an individual action and injunction, the decision serves as precedent for Court II in Y's new litigation—a judicial promise of some nature (whether binding or persuasive) that Y is protected against enforcement of the law and the duties or restrictions it imposes. How Court II resolves Case II depends on which courts renders the judgment and opinion in Case I and whether it produced binding or persuasive authority. If binding, Court II must resolve the new case in favor of Y; if persuasive, Court II is free to reach its best constitutional judgment. New litigation offers Y and the government the opportunity to argue about precedent—what Court I's opinion means, how it applies to a new law or to new parties, whether there might be differences between the laws or between the parties that changes the result. The government also can convince Court II (whatever level of court) that non-binding authority is legally incorrect or that existing precedent should be overruled; either results in a judgment from Court II that the law is constitutionally valid and enforceable against Y.

If Court II concludes that the law is constitutionally invalid (consistent with precedent from Court I), Y enjoys the same protections and benefits that X enjoyed following the judgment in his favor.[380]

4. Enforcement and Litigation Against Z

Where does this leave everyone? The cycle begins anew. Binding judgments prohibit the executive from enforcing the law against X or against Y. But the executive remains free to enforce the law against Z, triggering everything described above as to Y. Should Z sue for damages, her claim may be stronger than Y's, because Z has the benefit of two precedential opinions (from Court I and Court II) to clearly

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[378] *Supra* Part V.C.2.a.

[379] *See supra* notes 182–83 and accompanying text.

[380] *Supra* Parts VI.A, VI.B.1.

establish her constitutional right and thus overcome qualified immunity.

The executive having lost twice, judicial drags on independent executive action may play a larger role. An official who continues to pursue "lawless" enforcement in the face of contrary judicial precedent may face political backlash. Government attorneys may resist representing the executive and subjecting themselves to judicial ire at their resistance to judicial precedent. The executive may decide that the point has come to acquiesce in the judicial understanding and to begin acting accordingly in its enforcement actions. But this remains a prudential choice, an exercise of the executive's independent constitutional judgment.

Legislatures engage in their own prudential processes. The laws declared invalid in Case I (as to X) and Case II (as to Y) remain on the books unless and until the legislature repeals them. A different legislature can repeal its equivalent law in deference to the prior opinions. But a different legislature also can enact its own law identical to the one declared invalid and trigger its own enforcement activities, subject to judicial review and the effect of judicial precedent established in Case I and Case II. Or the legislature may recognize that the executive will not enforce a law so contrary to judicial precedent and will refrain from pursuing new legislation. This, too, remains a prudential choice, an exercise of the legislature's independent constitutional judgment.

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The process described is neither efficient nor certain nor attractive to watch. And the practical reality is that the process rarely, if ever, proceeds beyond the initial litigation with X, because the executive and legislative branches rarely, if ever, assert their independent constitutional judgment. Or X follows appropriate procedural mechanisms to properly expand the scope of her injunction and judgment.

Nevertheless, the system benefits from a clearer and more accurate understanding of the judicial, political, and constitutional processes underlying and driving constitutional litigation and adjudication.