

THE WRIT-OF-ERASURE FALLACY

*Jonathan F. Mitchell**

The power of judicial review is all too often regarded as something akin to an executive veto. When a court declares a statute unconstitutional or enjoins its enforcement, the disapproved law is described as having been “struck down” or rendered “void”—as if the judiciary holds a veto-like power to cancel or revoke a duly enacted statute. And the political branches carry on as though the court’s decision has erased the statute from the law books.

But the federal judiciary has no authority to alter or annul a statute. The power of judicial review is more limited: It allows a court to decline to enforce a statute, and to enjoin the executive from enforcing that statute. But the judicially disapproved statute continues to exist as a law until it is repealed by the legislature that enacted it, even as it goes unenforced by the judiciary or the executive. And it is always possible that a future court might overrule the decision that declared the statute unconstitutional, thereby liberating the executive to resume enforcing the statute against anyone who has violated it. Judicial review is not a power to suspend or “strike down” legislation; it is a judicially imposed non-enforcement policy that lasts only as long as the courts adhere to the constitutional objections that persuaded them to thwart the statute’s enforcement.

When judges or elected officials mistakenly assume that a court decision has canceled or revoked a duly enacted statute, they commit the “writ-of-erasure fallacy”—the fallacy that equates judicial review with a veto-like power to “strike down” legislation or delay its effective start date. This article identifies the origins of the fallacy, describes the ways in which the writ-of-erasure mindset has improperly curtailed the enforcement of statutes, and explores

* Visiting Professor of Law, Stanford Law School. Thanks to Aditya Bamzai, Charles Barzun, William Baude, Stephanos Bibas, Richard Epstein, John Harrison, Toby Heytens, Aziz Huq, Douglas Laycock, Robert Leider, Michael McConnell, Michael Qian, Nicholas Quinn Rosenkranz, James Sullivan, and workshop participants at the University of Virginia Law School and George Mason University School of Law for comments.

the implications that follow when judicial review is (correctly) understood as a temporary non-enforcement policy that leaves the disapproved statute in effect.

INTRODUCTION.....	934
I. THE ORIGINS OF THE WRIT-OF-ERASURE FALLACY.....	951
A. <i>The Failed Proposals for a Judicial Veto Power at the Constitutional Convention</i>	954
B. <i>The Rhetoric of Marbury v. Madison and Post-Marbury Courts</i>	964
C. <i>The Judiciary’s Stare Decisis Practices</i>	968
II. THE EFFECTS OF THE WRIT-OF-ERASURE FALLACY.....	970
A. <i>The Civil Rights Act of 1875</i>	970
1. <i>The Civil Rights Cases</i>	971
2. <i>Plessy v. Ferguson</i>	977
3. <i>Butts v. Merchants & Miners Transportation Co.</i>	979
B. <i>Preliminary and “Permanent” Injunctions</i>	986
1. <i>Inducing Compliance By Threatening Future Enforcement Against Statutory Violators</i>	987
2. <i>Potential Obstacles To Inducing Compliance With A Judicially Disapproved Statute</i>	993
3. <i>Drafting Legislation To Counteract The Effects Of A Judicial Injunction</i>	1000
III. IMPLICATIONS FOR JUDICIAL DOCTRINE	1003
A. <i>Article III Standing</i>	1003
B. <i>Shelby County v. Holder</i>	1006
C. <i>Criminal Sentencing</i>	1009
D. <i>Judicial Review Under the Administrative Procedure Act</i>	1012
IV. IMPLICATIONS FOR LEGAL AND JUDICIAL RHETORIC	1016
CONCLUSION.....	1019

INTRODUCTION

When a court announces that a statute violates the Constitution, it is common for judges and elected officials to act as though the statute

ceases to exist. They will say that the statute has been “struck down”¹ or rendered “void”² by the court’s decision. And they will act as though the court’s ruling has excised the statute (or its problematic applications) from the Statutes at Large or its state law equivalents.³ The judicial pronouncement of unconstitutionality is regarded as something akin to an executive veto: the disapproved law is “struck down”—either in whole or in part—and the portions or applications of the statute that contradict the judiciary’s interpretation of the Constitution are treated as a legal nullity.

The belief that federal courts “strike down” unconstitutional statutes is widely held throughout our legal and political culture.⁴ But that is an

¹ See, e.g., *Harris v. Ariz. Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1308 (2016) (describing *Shelby County v. Holder*, 570 U.S. 529 (2013), as having “struck down” the coverage formula in section 4(b) of the Voting Rights Act of 1965, codified at 52 U.S.C. § 10303(b) (Supp. II 2015)); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 346 (2010) (describing *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978), as having “struck down” a state-law prohibition on corporate independent expenditures related to referenda issues).

² See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“[A]n act of the legislature, repugnant to the constitution, is void.”); *Ex parte Siebold*, 100 U.S. 371, 376 (1879) (“An unconstitutional law is void, and is as no law.”); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 510 (2010) (pronouncing statutory restrictions on the removal of members of the Public Company Accounting Oversight Board to be “unconstitutional and void”).

³ See, e.g., *Okpalobi v. Foster*, 244 F.3d 405, 429 n.40 (5th Cir. 2001) (en banc) (“Once any private plaintiff seeks to enforce her rights under the statute, Act 825, if indeed unconstitutional, will be stricken forever from the statute books of Louisiana.”).

⁴ See *supra* note 1; see also Adam Liptak, *Supreme Court Strikes Down Texas Abortion Restrictions*, N.Y. Times (June 27, 2016), <https://nyti.ms/298q4o8> [<https://perma.cc/7P45-RR48>] (reporting on the Court’s decision in *Whole Woman’s Health v. Hellerstedt*); Robert Barnes, *Supreme Court Strikes Down Key Part of Defense of Marriage Act*, Wash. Post (June 26, 2013), https://www.washingtonpost.com/politics/supreme-court/2013/06/26/f0039814-d9ab-11e2-a016-92547bf094cc_story.html?utm_term=.53b9ff1d40d7 (reporting on the Court’s decisions in *U.S. v. Windsor* and *Hollingsworth v. Perry*); William Branigin, *Supreme Court Strikes Down Calif. Sentencing Law*, Wash. Post (Jan. 22, 2007), https://www.washingtonpost.com/archive/business/technology/2007/01/22/supreme-court-strikes-down-calif-sentencing-law/ceb7b517-e8b1-4b48-b1b6-ec18395c147f/?utm_term=.a4ac3abfbcd8 (reporting on the Court’s decision in *Cunningham v. California*); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1948–49 (2004) (describing *McLaughlin v. Florida*, 379 U.S. 184 (1964), as having “struck down a state law making open and notorious interracial cohabitation a more

imprecise and misleading description of the power of judicial review. The 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.⁵ The power of judicial review is more limited: It permits a court to decline to enforce a statute in a particular case or controversy,⁶ and it permits a court to enjoin executive officials from taking steps to enforce a statute—though only while the court’s injunction remains in effect.⁷ But the statute continues to exist, even after a court opines that it violates the Constitution, and it remains a law until it is repealed by the legislature that enacted it. And a judicially disapproved statute will often

serious offense than open and notorious cohabitation between unmarried adults of the same race”).

⁵ See *Steffel v. Thompson*, 415 U.S. 452, 469 (1974) (“Of course, a favorable declaratory judgment . . . cannot make even an unconstitutional statute disappear.” (quoting *Perez v. Lesdesma*, 401 U.S. 82, 124 (1971) (Brennan, J., concurring in part and dissenting in part)); *Winsness v. Yocom*, 433 F.3d 727, 728 (10th Cir. 2006) (McConnell, J.) (“There is no procedure in American law for courts or other agencies of government—other than the legislature itself—to purge from the statute books, laws that conflict with the Constitution as interpreted by the courts.”); *Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017) (“[N]either the Supreme Court in *Obergefell* nor the Fifth Circuit in *De Leon* ‘struck down’ any Texas law. When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it . . .”); *Status of District of Columbia Minimum Wage Law*, 39 Op. Att’y Gen. 22, 22–23 (1937) (“The decisions are practically in accord in holding that the courts have no power to repeal or abolish a statute, and that notwithstanding a decision holding it unconstitutional a statute continues to remain on the statute books . . .”); Hart and Wechsler’s *The Federal Courts and The Federal System* 181 (Richard H. Fallon, Jr., et al. eds., 7th ed. 2015) (“[A] federal court has no authority to excise a law from a state’s statute book.”); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 Nw. U. L. Rev. 759, 767 (1979) (“No matter what language is used in a judicial opinion, a federal court cannot repeal a duly enacted statute of any legislative authority.”).

⁶ See *The Federalist* No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961). A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”).

⁷ See *Ex parte Young*, 209 U.S. 123, 155–56 (1908) (“[I]ndividuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.”).

be left with work to do, even if it is believed to have been “nullified”⁸ or “invalidated”⁹ by an adverse court ruling.

When judges or elected officials fail to recognize that a statute continues to exist as law even after a court declares it unconstitutional or enjoins its enforcement, they fall victim to what I call 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.

One example of the writ-of-erasure fallacy occurs when the Supreme Court refuses to enforce an Act of Congress in a particular factual context—but the Court’s ruling is perceived as having “struck down” the statute, rendering it a nullity and preventing anyone from invoking or enforcing the statute in future litigation. The most notorious example of this occurred in the aftermath of the *Civil Rights Cases*,¹⁰ which had declined to enforce provisions in the Civil Rights Act of 1875 that outlawed all acts of racial discrimination in places of public accommodation.¹¹ The *Civil Rights Cases* reached the Supreme Court after the United States had indicted private innkeepers, private theater owners, and a private railroad company for discriminating against racial minorities in violation of the Civil Rights Act of 1875.¹² But the Supreme Court refused to enforce the statute and dismissed the indictments, holding that Congress could not prohibit acts of purely private racial discrimination under section 5 of the Fourteenth Amendment.¹³ The Fourteenth Amendment governs only state action, the Court explained, so Congress’s Fourteenth Amendment enforcement

⁸ See, e.g., *Bernal v. Fainter*, 467 U.S. 216, 220 (1984) (describing *In re Griffiths*, 413 U.S. 717 (1973), as having “nullified a state law excluding aliens from eligibility for membership in the State Bar”).

⁹ *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 331 (2006) (describing *Stenberg v. Carhart*, 530 U.S. 914 (2000), as having “invalidated” Nebraska’s statute banning partial-birth abortion “in its entirety”).

¹⁰ 109 U.S. 3 (1883).

¹¹ See Civil Rights Act of 1875, ch. 114, §§ 1–3, 18 Stat. 335, 336.

¹² See *Civil Rights Cases*, 109 U.S. at 4.

¹³ See *id.* at 11–19. The Court also held that Congress lacked authority to regulate purely private discrimination under section 2 of the Thirteenth Amendment. *Id.* at 20–26.

powers can extend only to “State laws and acts done under State authority.”¹⁴

The *Civil Rights Cases* did not “strike down” the statutory provisions that outlawed racial discrimination in places of public accommodation. Those statutes continued to exist even after the Supreme Court dismissed the indictments in the *Civil Rights Cases*. And those statutory provisions continue to exist to this day; Congress has never repealed the public-accommodations provisions in the Civil Rights Act of 1875. Yet subsequent court decisions acted as if the *Civil Rights Cases* had wiped these statutory protections off the books—and they refused to enforce those statutes in cases involving state-mandated racial discrimination that unquestionably falls within Congress’s Fourteenth Amendment enforcement powers,¹⁵ or in cases involving racial discrimination on the high seas, where Congress holds plenary regulatory authority.¹⁶

The writ-of-erasure fallacy also arises when federal district courts issue preliminary injunctions forbidding officials to enforce a duly enacted statute. When a court issues an injunction of this sort, it is widely assumed that the law has been “blocked” from taking effect,¹⁷ and that citizens are free to flout the law while the injunction remains in place without any fear of subsequent prosecution. Not so. The law remains in effect even after a court enjoins its enforcement; a federal court has no power to suspend a statute or postpone its effective start date. All the injunction does is prevent the named defendants from *enforcing* that law while the court’s injunction remains in place.¹⁸ That does not confer immunity or preemptive pardons on those who violate the statute. And it does not prevent the enjoined officials from enforcing the law against those who violated it if the injunction happens to be dissolved on appeal or after trial.

¹⁴ *Id.* at 13.

¹⁵ See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁶ See *Butts v. Merchants & Miners Transp. Co.*, 230 U.S. 126 (1913).

¹⁷ See, e.g., *Utah Licensed Beverage Ass’n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001) (describing “an injunction that would block an unconstitutional New Mexico regulation of the Internet”); Patrick Marley, *Abortion Law Blocked Until Trial*, *Milwaukee J. Sentinel*, Aug. 4, 2013, at A1 (“A federal judge on Friday blocked until at least November a state law requiring doctors who perform abortions to have hospital admitting privileges.”).

¹⁸ See *Ex parte Young*, 209 U.S. 123 (1908).

The belief that a court's preliminary injunction can immunize those who violate a statute from subsequent prosecution or civil penalties is another manifestation of the writ-of-erasure fallacy: It assumes that a judicial pronouncement of unconstitutionality—even a tentative pronouncement that appears in a preliminary-injunction order—can somehow make a statute disappear until the courts allow it to take effect. But judicial review does not give the federal courts a preclearance power over state or federal laws.¹⁹ It allows courts to enjoin executive officials from taking steps to enforce a statute while the court's injunction remains in effect. Those injunctions do not (and cannot) legalize behavior that the legislature has outlawed, and they do not delay the effective start date of a duly enacted statute.

The same logic carries over to the so-called “permanent injunctions” that courts enter after definitively concluding that a statute conflicts with the Constitution. The use of the “permanent injunction” misnomer has reinforced the myth that federal courts “strike down” or veto unconstitutional legislation, and that judicial disapproval forever precludes the statute's enforcement. But there is always a possibility that a court's “permanent” injunction will be vacated on appeal—and even if the injunction survives appellate review it is always possible that a future Supreme Court will change its interpretation of the Constitution and start enforcing statutes similar or identical to the one that was “permanently” enjoined.²⁰ If this were to happen, the enjoined officials can have the injunction vacated under Rule 60(b),²¹ and once the

¹⁹ Cf. 52 U.S.C. § 10303(b) (Supp. II 2015) (requiring certain state and local jurisdictions to submit their voting-related laws for preclearance from federal officials; declared unconstitutional in *Shelby County v. Holder*, 570 U.S. 529 (2013)).

²⁰ Compare *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (enjoining the enforcement of a federal statute prohibiting the interstate shipment of goods made with child labor) with *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer* and enforcing a federal statute prohibiting the interstate shipment of goods produced under conditions that fail to comport with the Fair Labor Standards Act); compare *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (enjoining the enforcement of a 24-hour waiting period for abortions) with *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (overruling *Akron* and upholding a twenty-four hour waiting period for abortions).

²¹ See Fed. R. Civ. P. 60(b)(5) (allowing relief from a final judgment that is “based on an earlier judgment that has been reversed or vacated”); Fed. R. Civ. P. 60(b)(6) (allowing modification of final orders and judgments for “any other reason that justifies relief”); see

injunction is vacated they can initiate enforcement proceedings against those who violated the statute while the erstwhile injunction was in effect. Of course, some of those lawbreakers might have a statute-of-limitations defense if the court's injunction had been in effect for a long time, and others might try to assert a mistake of law or a constitutional due-process defense if they relied upon a judicial opinion that declared the statute unconstitutional.²² But they have no automatic immunity from prosecution or civil penalties simply because a court once blocked the statute's enforcement.

A court that enjoins the enforcement of a statute that it regards as unconstitutional is no different from a President who instructs his subordinates not to enforce a statute that he regards as unconstitutional.²³ When the President determines that an Act of Congress violates the Constitution and directs the executive branch not to enforce it, he does nothing more than prevent the *enforcement* of the statute while his order remains in effect. The President's order does not "strike down" the statute or render it "void," and the statute remains federal law notwithstanding the President's refusal to enforce it. Those who violate the statute assume the risk that a future President might revoke his predecessor's non-enforcement policy, and they assume the risk that a future President might prosecute or penalize those who violated the statute while his predecessor's non-enforcement policy was in effect. If President Bush declared the anti-torture statute²⁴ unconstitutional and directed the executive branch not to enforce it,²⁵ that would not preclude

also *Agostini v. Felton*, 521 U.S. 203 (1997) (using Rule 60(b) to vacate a twelve-year-old "permanent injunction" that had blocked New York City officials from sending public-school teachers into parochial schools to provide remedial education, and overruling *Aguilar v. Felton*, 473 U.S. 402 (1985), which had interpreted the Establishment Clause to require such an injunction).

²² See *infra* Part II.B.2.

²³ See, e.g., President Clinton's Statement on Signing the Telecommunications Act of 1996, 1 Pub. Papers 188, 190 (Feb. 8, 1996) (directing the Department of Justice not to enforce a provision of the Act that restricted the transmission of abortion-related speech and information over the internet); *id.* (declaring that "this and related abortion provisions in current law are unconstitutional and will not be enforced because they violate the First Amendment").

²⁴ See 18 U.S.C. §§ 2340–2340A (2012).

²⁵ Cf. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, at 31 (Aug. 1, 2002), available at <https://www.justice>

President Obama from prosecuting those who violated this statute in reliance on the Bush Administration's constitutional pronouncements.²⁶ And if President Obama declared the federal partial-birth abortion ban²⁷ unconstitutional and ordered his subordinates not to enforce it, that would not preclude President Trump from prosecuting those who violated this statute during the Obama presidency.

Judicial pronouncements of unconstitutionality are no different. They are temporary, they are *always* subject to reversal on appeal or repudiation by a future Supreme Court, and the temporarily disapproved statute continues to exist as a law until it is repealed by the legislature that enacted it. All that a court can do is announce its opinion that the statute violates the Constitution,²⁸ decline to enforce the statute in cases before the court,²⁹ and instruct executive officers not to initiate enforcement proceedings.³⁰ But the court's instruction to the executive

.gov/olc/file/886061/download [https://perma.cc/BHJ9-TLL4] ("Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants . . . would be unconstitutional."); *id.* at 36 ("[T]he Department of Justice could not . . . enforce Section 2340A against federal officials acting pursuant to the President's constitutional authority to wage a military campaign."); *id.* at 39 ("Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President . . . Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.").

²⁶ See Kenneth Roth, *The CIA Torturers Should Be Prosecuted*, Wash. Post (Dec. 12, 2014), https://www.washingtonpost.com/opinions/the-cia-torturers-should-be-prosecuted/2014/12/12/f034acae-8159-11e4-9f38-95a187e4c1f7_story.html (urging President Obama to prosecute those who violated the anti-torture statute while the Bush Administration's non-enforcement policy was in effect); Eric Posner, *Why Obama Won't Prosecute Torturers*, Slate (Dec. 9, 2014), http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/12/senate_torture_report_why_obama_won_t_prosecute_cia_and_bush_administration.html [https://perma.cc/3C6G-WU3P] (defending President Obama's refusal to prosecute those who violated the anti-torture statute during the Bush Administration, while acknowledging his legal prerogative to do so).

²⁷ 18 U.S.C. § 1531 (2012).

²⁸ See Declaratory Judgment Act, 28 U.S.C. § 2201 (2018) (empowering federal courts, in cases within their jurisdiction, to "declare the rights and other legal relations of any interested party seeking such declaration").

²⁹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–80 (1803).

³⁰ See *Ex parte Young*, 209 U.S. 123 (1908).

lasts only as long as the judiciary adheres to its belief that the statute violates the Constitution—just as a President’s non-enforcement order lasts only as long as the President decides to keep that non-enforcement policy in effect. Those who choose to violate a duly enacted statute in reliance on the judiciary’s present-day constitutional beliefs expose themselves to statutory penalties if a future court decides to repudiate its predecessor’s non-enforcement edict.

All of these misunderstandings about the effect of court rulings arise from the same fiction: that the judiciary “strikes down” statutes (or applications of statutes) when it finds a statute constitutionally defective. But the judiciary has no power to alter, erase, or delay the effective date of a statute, and it has no power to bind future courts to its current interpretations of the Constitution.³¹ A court’s constitutional pronouncements reflect only its *current* views of the Constitution and the judiciary’s role in enforcing it. And a pronouncement of this sort will never foreclose a future court from reviving and enforcing the formerly disapproved statute, or allowing the executive to enforce the statute against those who violated it while the court’s non-enforcement policy was in effect. All too often, judicial rhetoric implies that courts formally suspend or revoke duly enacted statutes, by claiming that laws have been “blocked,”³² “struck down,”³³ “nullified,”³⁴ rendered “void,”³⁵ or “invalidated”³⁶ by an adverse court ruling. This is writ-of-erasure terminology, and it should be discarded from the legal lexicon.

My attack on the writ-of-erasure fallacy may conjure up echoes of longstanding debates over judicial supremacy,³⁷ or debates over whether

³¹ See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“*Stare decisis* is not an inexorable command”); *Smith v. Allwright*, 321 U.S. 649, 665 (1944) (“[W]hen convinced of former error, this Court has never felt constrained to follow precedent.”).

³² See *supra* note 17.

³³ See *supra* notes 1 and 4.

³⁴ See *supra* note 8.

³⁵ See *supra* note 2.

³⁶ See *supra* note 9.

³⁷ There is a vast literature discussing the legitimacy and merits of judicial supremacy. See, e.g., Mark Tushnet, *Taking The Constitution Away From The Courts* 6–32 (1999); Sanford Levinson, *Constitutional Faith* (1988); John Harrison, *Judicial Interpretive Finality and the Constitutional Text*, 23 *Const. Comment.* 33 (2006); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 *Const. Comment.* 455 (2000) [hereinafter *Defending Judicial Supremacy*]; Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *Harv. L. Rev.* 1359 (1997); Gary Lawson &

and when courts should entertain “facial” challenges to statutes when more limited, as-applied relief is available.³⁸ I do not enter into those debates here. My target is a narrow one: the fallacy that equates a court’s non-enforcement of a statute with the suspension or revocation of that law—along with the rhetoric that has reinforced this habit of thinking in the legal profession. One need not reject judicial supremacy to reject the writ-of-erasure fallacy. For those who believe that the political branches must respect the judiciary’s constitutional pronouncements as the final and authoritative exposition of the Constitution, it is *still* a mistake to equate the judicially imposed non-enforcement of a statute with a veto-like power to “strike down” legislation. Even in a world of judicial supremacy, a future court will always hold the prerogative to repudiate the constitutional pronouncements of its predecessors and give retroactive effect to its new interpretation of the Constitution.³⁹ And when this happens, the judiciary’s “supreme” interpretation of the Constitution empowers the political branches to resume enforcing statutes that were previously disapproved. The writ-of-erasure fallacy is not about whether the judiciary or the political

Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 *Iowa L. Rev.* 1267, 1293–94 (1996); Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 *Tul. L. Rev.* 991 (1987); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Geo. L.J.* 217 (1994); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 *Cardozo L. Rev.* 113 (1993).

³⁸ There is also a vast literature on the issue of “facial” and “as-applied” challenges to statutes. See, e.g., Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 *Mich. L. Rev.* 1 (1998); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 *Stan. L. Rev.* 235 (1994); Richard H. Fallon Jr., *As-Applied and Facial Challenges and Third Party Standing*, 113 *Harv. L. Rev.* 1321 (2000); Richard H. Fallon Jr., *Making Sense of Overbreadth*, 100 *Yale L.J.* 853 (1991) [hereinafter *Fallon, Making Sense of Overbreadth*]; Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 *Am. U. L. Rev.* 359 (1998); Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 *Stan. L. Rev.* 1005 (2011); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 *Stan. L. Rev.* 1209 (2010); Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 *Harv. L. Rev.* 76 (1937).

³⁹ See *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 96 (1993) (“[A] rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law.”); Strauss, *supra* note 37, at 135 (“Of course there is a difference between constitutional law and the Constitution, and there are times when the former should be changed to make it more consistent with the latter.”).

branches should enjoy interpretive supremacy over the Constitution; it concerns the allocation of power between present-day courts and their successors.

Rejecting the writ-of-erasure fallacy also does not entail any particular theory of when courts should allow “facial” challenges to legislation. It has become typical for modern courts to disfavor facial challenges by severing and preserving the constitutional applications of an overbroad statute⁴⁰—although courts will still on occasion issue facial remedies that categorically enjoin the enforcement of a law even when the statute appears to have a subset of constitutionally permissible applications.⁴¹ This Article will remain agnostic on whether and when this should be done, although it does criticize some of the arguments that courts have made when opting for facial relief over a narrower, as-applied remedy.⁴² The writ-of-erasure fallacy is concerned with a different question: What is the *legal effect* of a judicial ruling that declines to enforce (or that forbids the executive to enforce) a duly enacted statute? The answer is that the judicially disapproved statute continues to exist as a law, and it remains available for future courts and executives to enforce against present-day conduct if the judiciary changes its interpretation of the Constitution. A statute should never be described or regarded as “blocked,”⁴³ “struck down,”⁴⁴ “nullified,”⁴⁵ rendered “void,”⁴⁶ or “invalidated”⁴⁷ by a judicially imposed non-enforcement policy.

⁴⁰ See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (“Facial challenges are disfavored . . .”); *Ohio v. Akron Ctr for Reprod. Health*, 497 U.S. 502, 514 (1990) (“[B]ecause appellees are making a facial challenge to a statute, they must show that ‘no set of circumstances exists under which the Act would be valid.’”) (quoting *Webster v. Reprod. Health Services*, 492 U.S. 490, 524 (1989) (O’Connor, J., concurring)); Fallon Jr., et al., *supra* note 5, at 170 (“[T]he premise that statutes are typically ‘separable’ or ‘severable’, and that invalid applications can somehow be severed from valid applications without invalidating the statute as a whole . . . is deeply rooted in American constitutional law.”).

⁴¹ See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2318–20 (2016); *United States v. Stevens*, 559 U.S. 460, 473–82 (2010); *Stenberg v. Carhart*, 530 U.S. 914, 937–38 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894–95 (1992).

⁴² See *infra* notes 201–227 and accompanying text.

⁴³ See *supra* note 17.

⁴⁴ See *supra* notes 1 and 4.

⁴⁵ See *supra* note 8.

⁴⁶ See *supra* note 2.

The Article will proceed in four parts. Part I traces the origins and the causes of writ-of-erasure thinking. One principal contributor to the early displays of writ-of-erasure rhetoric was that many influential framers *wanted* the judiciary to have veto-like powers over statutes. At the Constitutional Convention, James Madison and James Wilson pushed hard for a “Council of Revision” composed of federal judges and members of the executive, which would have wielded a formal veto power over federal legislation.⁴⁸ Other delegates, such as Edmund Randolph, offered proposals that would have empowered the judiciary to cancel or revoke *state* laws by pronouncing them “void”—a variation on the “Madisonian negative” in the Virginia Plan that would have allowed Congress to formally and permanently veto state legislation.⁴⁹ None of these proposals were adopted, but many framers wound up describing judicial review as if it *were* a formal and permanent veto power over legislation, rather than a non-enforcement policy that lasts only as long as the judiciary chooses to adhere to it.⁵⁰

This Founding-era writ-of-erasure rhetoric found its way into the earliest court opinions written on judicial review—including *Marbury v. Madison*,⁵¹ which declared that a statute is “entirely void,”⁵² “invalid,”⁵³ and “not law”⁵⁴ if a court finds the statute unconstitutional. *Marbury*’s insistence that a judicially disapproved statute becomes “void” has fueled and perpetuated the myth that the judiciary holds a veto-like power to suspend or revoke legislation, even though it is clear from later rulings that the Supreme Court did not regard section 13 of the 1789 Judiciary Act as “void” and enforced the statute in many other

⁴⁷ See *supra* note 9.

⁴⁸ See *infra* notes 86–105 and accompanying text.

⁴⁹ See *infra* notes 106–108 and accompanying text.

⁵⁰ See *infra* notes 109–117 and accompanying text.

⁵¹ 5 U.S. (1 Cranch) 137 (1803).

⁵² *Id.* at 178; see also *id.* at 177 (“[A]n act of the legislature, repugnant to the constitution, is void.”); *id.* at 180 (“[A] law repugnant to the constitution is void . . .”).

⁵³ *Id.* at 177 (“If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?”).

⁵⁴ *Id.* (“Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law?”).

situations.⁵⁵ Courts in the legal-realism era have aggravated matters by claiming that the judiciary itself “strikes down,”⁵⁶ “nullifies,”⁵⁷ or “invalidates”⁵⁸ statutes, rather than merely discovering that a statute is constitutionally defective and hence unenforceable in the case before the court. The widespread use of this judicial rhetoric leads many to adopt the writ-of-erasure mentality, which in turn leads more people to deploy writ-of-erasure verbiage that further reinforces this way of thinking about judicial review—creating, in effect, a vicious circle. Nowadays statements that courts “strike down” legislation are ubiquitous, and the belief that judicially disapproved statutes have been formally suspended or permanently revoked is equally widespread.

Another contributing factor to the writ-of-erasure mindset has been the judiciary’s *stare decisis* norms, which lead many to assume that the courts’ constitutional pronouncements have the permanence of an executive veto. The Supreme Court often deploys language that makes its precedents seem sacrosanct or irreversible,⁵⁹ and it has even gone so far as to equate its interpretations of the Constitution with the Constitution itself.⁶⁰ But the Court’s rhetoric does not match reality. The Supreme Court regularly overrules, disregards, or narrows and

⁵⁵ See *infra* note 133 and accompanying text.

⁵⁶ See *supra* notes 1 and 4.

⁵⁷ See *supra* note 8.

⁵⁸ See *supra* note 9.

⁵⁹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (“Liberty finds no refuge in a jurisprudence of doubt.”); see also *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (“Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.”); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (“[A]ny departure from the doctrine of *stare decisis* demands special justification.”).

⁶⁰ See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“Article VI of the Constitution makes the Constitution the ‘supreme Law of the Land’ . . . It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’”); see also *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997) (describing a congressional effort to change the Supreme Court’s interpretation of the Free Exercise Clause as an attempt to “change the Constitution”); Charles Evans Hughes, Speech before the Elmira, New York Chamber of Commerce (May 3, 1907) in *Jacob Gould Schurman, Addresses and Papers of Charles Evan Hughes: Governor of New York 1906-1908*, at 139 (1908) (“We are under a Constitution, but the Constitution is what the judges say it is . . .”).

distinguishes precedents that it no longer supports,⁶¹ and the judiciary's interpretation of the Constitution has changed radically over the past 100 years. The courts used to enforce *Lochner*-style "substantive due process" and robust limits on Congress's commerce powers; they no longer do. And no one could have foreseen 100 years ago that the Supreme Court would incorporate the Bill of Rights, outlaw racial segregation in public schools, prohibit malapportioned districting, abolish school prayer, limit capital punishment, expand state sovereign immunity, disapprove anti-miscegenation laws, impose the exclusionary rule on the States and then carve out a "good faith" exception, or create a constitutional right to abortion and then narrow it by upholding regulations identical to those that it had previously disapproved. No one can predict the future direction of the Supreme Court's constitutional jurisprudence, but it is certain that it will continue to evolve—and it is equally certain that the Court will repudiate past decisions that disapproved or enjoined the enforcement of duly enacted statutes. That is the inevitable by-product of a Constitution that provides for the political appointment of Supreme Court justices.⁶²

Part II describes how the writ-of-erasure fallacy has wrongly curtailed the enforcement of duly enacted statutes. The most significant casualty of the writ-of-erasure mindset has been the Civil Rights Act of 1875, which outlawed all acts of racial discrimination in places of public accommodation.⁶³ But when the United States indicted private business owners for discriminating against blacks in violation of the Civil Rights Act, the Supreme Court dismissed the indictments in the *Civil Rights*

⁶¹ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (overruling *Baker v. Nelson*, 409 U.S. 810 (1972)); *Citizens United*, 558 U.S. at 362–63 (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992) (overruling *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, (1983), and *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986)); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (overruling *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976)).

⁶² See U.S. Const. art. II, § 2 ("The President . . . by and with the Advice and Consent of the Senate . . . shall appoint . . . Judges of the supreme Court . . .").

⁶³ See Civil Rights Act of 1875, ch. 114, §§ 1–2, 18 Stat. 335, 336. The statute prohibited racial discrimination in "inns, public conveyances on land or water, theaters, and other places of public amusement."

Cases,⁶⁴ holding that Congress lacked authority to outlaw purely private conduct under section 5 of the Fourteenth Amendment.⁶⁵ The courts responded to this ruling by acting as though the Supreme Court had formally vetoed the statutory prohibitions in the Civil Rights Act of 1875—even though the statutes remained on the books and remained constitutional as applied to state-mandated discrimination and discriminatory acts that Congress might reach under its *other* constitutional powers.

Part II also describes how the writ-of-erasure mentality has led to confusion over the effects of judicial injunctions. A court that enjoins the *enforcement* of a statute has not enjoined or revoked the statute itself, which continues to exist as law. And those who violate the statute while the injunction is in effect can be subject to civil or criminal penalties if the injunction is vacated on appeal or by a future court. This gives the executive branch a powerful tool to use when a court enjoins the enforcement of a statute: It can threaten to pursue statutory penalties against *anyone* who violates a judicially disapproved law—including those who violate the law while a court has enjoined its enforcement—if and when a future court lifts the injunction and permits enforcement to resume. Threats of this sort have the potential to induce de facto compliance even while the statute goes unenforced, as those who violate the statute know neither the day nor the hour when a future court might repudiate an earlier court's non-enforcement policy.

Legislatures can also take measures to induce compliance with judicially disapproved statutes. When drafting or enacting a law that is expected to be challenged in court, the legislature can provide that any statute of limitations will be tolled during a period of judicially imposed non-enforcement. And the legislature can explicitly foreclose a mistake-of-law defense for anyone who violates the statute in reliance on a judicial pronouncement of unconstitutionality.⁶⁶ By eliminating the defenses that might be available to those who violate the statute during a period of judicially imposed non-enforcement, the legislature can make the prospect of future prosecution or enforcement seem more probable and more likely to induce compliance. The legislature can also provide

⁶⁴ 109 U.S. 3 (1883).

⁶⁵ *Id.* at 13, 17.

⁶⁶ See *infra* Part II.B.3.

for private enforcement of the statute by authorizing civil lawsuits and *qui tam* relator actions against statutory violators. Private civil actions of this sort can proceed even after a federal district court issues declaratory and injunctive relief against executive officials, and they can proceed in the state-court system unless and until the Supreme Court declares the statute unconstitutional.⁶⁷ But writ-of-erasure thinking too often leads the political branches to overlook these possibilities and adopt a passive and fatalistic posture when the federal judiciary thwarts the present-day enforcement of their laws.

Part III discusses the writ-of-erasure fallacy's implications for judicial doctrine and decisionmaking. Some of its most significant implications arise in Article III standing doctrine: Because the courts have no power to revoke or "strike down" legislation, a litigant cannot establish Article III standing by asserting that he is "injured" by the mere existence of a statute or by the words that appear in it. Litigants in Establishment Clause cases, for example, will sometimes complain that a statutory provision "endorses" or establishes religion, but the only "injuries" they allege are stigmatic harms caused by the statute's existence or the "message" sent by the law.⁶⁸ Even if one assumes that a harm of this sort qualifies as "injury in fact," the courts are powerless to redress such an injury because the statute (and its state-sponsored "message") will continue to exist even after a court declares the statute unconstitutional or enjoins its enforcement.

The writ-of-erasure fallacy also has implications for successful litigants, who must always bear in mind that judicially disapproved statutes continue to exist and remain capable of enforcement by future courts. *Shelby County v. Holder*,⁶⁹ for example, did not "strike down" the preclearance regime in the Voting Rights Act; it held only that the Supreme Court (at that particular moment in time) will not enforce those statutory provisions against covered jurisdictions. A future Supreme Court might take a different view and overrule *Shelby County*, and if it

⁶⁷ See *infra* notes 270–275 and accompanying text.

⁶⁸ See, e.g., *Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017); *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043, 1047–53 (9th Cir. 2010) (en banc); *Newdow v. Lefevre*, 598 F.3d 638, 643 (9th Cir. 2010).

⁶⁹ 570 U.S. 529, 556–57 (2013).

does then every voting law that failed to secure the statutorily required preclearance would be blocked from enforcement. So covered jurisdictions should continue submitting their voting-related laws to the Department of Justice for preclearance—even after *Shelby County*—because the preclearance regime continues to exist as a statutory requirement and it could be enforced if the Supreme Court returns to Democratic control.

More far-reaching implications arise in the field of criminal sentencing. Numerous Supreme Court decisions, for example, have disallowed the death penalty or life imprisonment without parole for certain categories of offenders. But those rulings do not cancel or repeal the statutes that authorize or require these punishments, and a future Supreme Court might overturn its earlier rulings and allow punishments that it had previously disapproved. So a lower court should not respond to Supreme Court rulings of this sort by formally re-sentencing criminal defendants to a lesser penalty—unless, of course, the legislature has amended or repealed the statutes that had authorized the disputed punishment. Instead, the courts should continue imposing and upholding sentences of death or life imprisonment without parole on defendants that the Supreme Court has exempted from such punishments, but they should *suspend* the execution of those sentences for as long as the Supreme Court adheres to its constitutional objections. This would establish a regime of conditional sentencing: a sentence that imposes a certain and immediate punishment in accordance with the Supreme Court’s current views of the Eighth Amendment, but which reverts to a harsher punishment if and when a future Supreme Court repudiates those Eighth Amendment holdings.

Finally, one must bear in mind that the Administrative Procedure Act establishes a unique form of judicial review that differs from judicial review of statutes. Section 706 of the APA authorizes and requires a court to “set aside” agency rules and orders that it deems unlawful or unconstitutional.⁷⁰ This extends beyond the mere non-enforcement remedies available to courts that review the constitutionality of legislation, as it empowers courts to “set aside”—i.e., formally nullify and revoke—an unlawful agency action. The APA also authorizes the courts to “postpone the effective date of an agency action” when issuing

⁷⁰ 5 U.S.C. § 706 (2012).

preliminary relief.⁷¹ This differs from a preliminary injunction, which merely thwarts the *enforcement* of a statute but does not suspend the statute or delay its effective start date. All of this indicates that judicial review under the APA—unlike judicial review of statutes—is largely consistent with writ-of-erasure understandings of judicial power, and the writ-of-erasure mentality need not be avoided when considering judicial review of agency action.

Part IV concludes by proposing changes to legal and judicial rhetoric that will avoid implying that the judiciary’s non-enforcement of a statute is somehow akin to a veto or suspension of the law itself. It also considers how judges might be motivated to avoid writ-of-erasure nomenclature, especially when the writ-of-erasure fallacy works to enhance the powers of present-day judges and the effects of their rulings.

I. THE ORIGINS OF THE WRIT-OF-ERASURE FALLACY

How did judicial review come to be regarded as a veto-like power over duly enacted statutes? Nothing in the Constitution’s text indicates that judges may “strike down” or permanently inter statutes that legislatures have enacted, even when the courts have constitutional objections to the legislature’s work. Article I, Section 7 says that a bill becomes a “law” once it successfully runs the bicameralism-and-presentment gauntlet; it does not make its status as “law” contingent on whether the statute comports with the judiciary’s interpretation of the Constitution.⁷²

⁷¹ See 5 U.S.C. § 705 (2012).

⁷² Article I, Section 7 establishes three processes by which a bill becomes law. The first is approval by each house of Congress followed by the president’s signature; the Constitution requires presentment to the president “before it become a Law.” U.S. Const. art. I, § 7, cl. 2. The second is a two-thirds vote in each house to override a presidential veto; after this happens, it “shall become a Law.” *Id.* The third involves approval by each house and the president allows it to become law without his signature; when this occurs, it “shall be a Law.” *Id.* This language in Article I, Section 7—which provides that a bill “shall be a Law” when it surmounts the bicameralism-and-presentment hurdles—makes it hard to maintain, as some have argued, that a duly enacted statute that exceeds the enumerated powers of Congress or infringes constitutionally protected rights cannot qualify as a “law.” See Matthew D. Adler and Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 Va. L. Rev. 1105, 1112–13, 1150–71 (2003).

And nothing in the supremacy clause suggests that a statute that the courts find unconstitutional ceases to exist as “law.” Many have noted that Article VI defines the “supreme Law of the Land” to include “[t]his Constitution” and “the Laws of the United States *which shall be made in Pursuance thereof*.”⁷³ But even if one assumes that the “made in pursuance thereof” caveat requires compliance with the Constitution as construed by the federal judiciary,⁷⁴ that means that Article VI merely withholds the status of *supreme* law from statutes that the judiciary finds unconstitutional. It does not indicate or suggest that these federal statutes no longer qualify as “Laws of the United States.”⁷⁵

Another portion of the supremacy clause directs “the Judges in every State” to follow “supreme” federal law over “any Thing in the Constitution or Laws of any State to the Contrary.”⁷⁶ But this is nothing more than a rule of priority for courts when resolving conflicts between

⁷³ U.S. Const. art. VI § 2 (emphasis added); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (“[I]n declaring what shall be the *Supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.”) (emphasis in original); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 903–09 (2003).

⁷⁴ The text of the supremacy clause does not compel this construction, even though Chief Justice Marshall adopted it in *Marbury* with little discussion or analysis. See *Marbury*, 5 U.S. (1 Cranch) at 180. It is possible, for example, to interpret “laws of the United States which shall be made in pursuance” of the Constitution to include any statute that survives the bicameralism-and-presentment hurdles of Article I, § 7. See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 9 (1962); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1, 20–21; Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 Mich. L. Rev. 1, 26–30 (2011). It is also possible to interpret the Constitution as giving federal statutes, rather than Supreme Court opinions, the final and conclusive word on what the Constitution means. See *id.* at 27–28 & n.110.

⁷⁵ Indeed, by conferring supremacy upon the “Laws of the United States which shall be made in pursuance thereof,” the supremacy clause indicates that there are “Laws of the United States” that, while not made “in pursuance” of the Constitution, nevertheless retain their status as “Laws.” It does not imply, as Professors Adler and Dorf have suggested, that “a federal ‘law’ which fails to be made ‘in pursuance’ of the Constitution is no law at all.” See Adler & Dorf, *supra* note 72, at 1113 n.27.

⁷⁶ U.S. Const. art. VI § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

different sources of law.⁷⁷ The state statutes that contradict “supreme” federal law continue to exist as “laws,” even as they go unenforced, and they would become enforceable if federal law were amended or reinterpreted to remove the conflict.

It is instructive to compare the language of the federal Constitution with state constitutions that explicitly empower their judiciaries to pronounce statutes “void.” The Georgia Constitution, for example, provides that “Legislative acts in violation of this Constitution, or the Constitution of the United States, are void, and the Judiciary shall so declare them.”⁷⁸ The Georgia Supreme Court therefore regards judicial pronouncements of unconstitutionality as a formal revocation of the underlying statute—to the point that it refuses to give effect to statutes that purport to amend a law that the state judiciary has pronounced unconstitutional.⁷⁹ A “void” statute cannot be amended because it is a legal nullity, even when the amending statute would have cured the constitutional defects.⁸⁰

The federal Constitution contains no language of this sort. Its provisions (at most) indicate that the judiciary may *decline to enforce* statutes that contradict its interpretation of the Constitution. Yet these statutes continue to exist after the court’s non-enforcement. They remain available for future legislatures to amend; they remain available to future litigants and judges who may have different understandings of what the Constitution requires; and they remain available for the executive to enforce against present-day violators once the judiciary rescinds its non-enforcement policy.

⁷⁷ See *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1383 (2015) (holding that the supremacy clause “instructs courts what to do when state and federal law clash”).

⁷⁸ See Georgia Constitution of 1983, Art. I, § II, ¶ 5; Georgia Constitution of 1877, Art. I, § IV, ¶ 2.

⁷⁹ See, e.g., *City of Atlanta v. Gower*, 116 S.E.2d 738, 742 (Ga. 1960).

⁸⁰ *Id.* (asserting that “[t]his amendment could not add anything of substance” to the previously enacted statute because that statute had been unconstitutional when enacted and was therefore “forever void.” (citation and internal quotation marks omitted)); R. Perry Sentell, Jr., *Unconstitutionality in Georgia: Problems of Nothing*, 8 Ga. L. Rev. 101, 102 n.9 (1973) (noting that the Georgia Supreme Court’s actions in *Gower* “appeared to be treating an unconstitutional statute as it treats repealed statutes.”).

So if the text of the Constitution offers no support for a judicial suspension or veto power over duly enacted statutes, then how did the writ-of-erasure ideology originate and where did it come from?

The roots of the writ-of-erasure fallacy took hold at the Constitutional Convention, where many of the framers *wanted* the judiciary to exercise permanent, veto-like powers over legislative decisions. At the convention, several delegates, including James Madison and James Wilson, pushed for a “Council of Revision,” comprising both the executive and federal judges, which would have been empowered to permanently veto legislation passed by Congress. Unlike judicial review, the Council of Revision’s decisions would be final unless overridden by the legislature, and the disapproved legislation would become “void,” i.e., without *any* legal effect. The Constitutional Convention rejected this proposed entity in favor of a veto power that rests solely in the executive. But many who had favored the Council of Revision, including Madison and Wilson, wound up describing judicial review as a Council-of-Revision-like power to render laws “void,” and early courts followed their example by pronouncing statutes “void” when they found them unconstitutional. Language of this sort has led courts and political actors to regard judicially disapproved statutes as legal nullities, and it eventually led to the modern-day rhetoric that describes statutes as having been “blocked,”⁸¹ “struck down,”⁸² “nullified,”⁸³ or “invalidated”⁸⁴ by adverse court rulings.

A. The Failed Proposals for a Judicial Veto Power at the Constitutional Convention

At the Constitutional Convention, many delegates wanted the judiciary to check and control the decisions of legislative bodies. But they disagreed over the precise powers that the judiciary should have in this regard. Some delegates spoke favorably of judicial review.⁸⁵ But

⁸¹ See *supra* note 17.

⁸² See *supra* notes 1 and 4.

⁸³ See *supra* note 8.

⁸⁴ See *supra* note 9.

⁸⁵ See, e.g., 1 *The Records of the Federal Convention of 1787*, at 109 (Max Farrand, ed., 1911) (Rufus King observing that “Judges will have the expounding of those Laws when they come before them; and they will no doubt stop the operation of such as shall appear

others wanted to give the judiciary an executive-style veto over legislative decisions. The Virginia Plan, for example, called for a “council of revision,” comprising the executive and a “convenient number of the National Judiciary,”⁸⁶ which would hold a formal veto power over all laws enacted by the national legislature.⁸⁷ The Council also would have been empowered to block any of the national legislature’s efforts to “negative” a law enacted by one of the States.⁸⁸ (The Virginia Plan had included a “Madisonian negative,” which would have empowered the national legislature to “negative” any state law that it regarded as unconstitutional.⁸⁹) Any decision by the Council of Revision to veto a proposed law, or to reject the national legislature’s

repugnant to the constitution.”); Prakash & Yoo, *supra* note 73, at 940–54 (collecting statements from delegates to the Constitutional Convention supporting judicial review).

⁸⁶ The Records of the Federal Convention of 1787, *supra* note 85, at 21.

⁸⁷ *Id.* (“Resd. that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by of the members of each branch.”).

The Council of Revision that appeared in the Virginia Plan was based on a similar provision in New York’s Constitution of 1777, which established a council of revision comprising the governor, the “chancellor,” and the “judges of the supreme court, or any two of them.” N.Y. Const. of 1777 art. III. James Madison admired the New York Council of Revision and urged others to include a similar entity in their state constitutions. See Robert A. Rutland, et al., 8 *The Papers of James Madison* 350–51 (1973) (“As a further security against fluctuating & indigested laws the Constitution of New York has provided a Council of Revision. I approve of such an institution & believe it is considered by most intelligent citizens of that state as a valuable safeguard both to public interests & private rights.”); Robert A. Rutland, et al., 11 *The Papers of James Madison* 292–93 (1973). And Alexander Hamilton observed in *The Federalist* No. 73 that New York’s Council of Revision’s “utility has become so apparent” that even those who opposed it “have from experience become its declared admirers.” *The Federalist* No. 73, at 446 (Alexander Hamilton) (Clinton Rossiter, ed. 1961).

⁸⁸ The Records of the Federal Convention of 1787, *supra* note 85, at 21.

⁸⁹ See *id.* (“Resolved that . . . the National Legislature ought to be empowered . . . to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union”); see also Alison L. LaCroix, *The Ideological Origins of American Federalism*, 147–48 (2010).

“negative” of a state law, would have been subject to override by the national legislature.⁹⁰

The powers of a Council of Revision differ from the power of judicial review in two respects. First, a Council of Revision may nix a proposed law simply because the Council thinks it unwise or unjust as a matter of policy. Judges who wield the power of judicial review, by contrast, are not supposed to thwart legislation merely on account of policy disagreements; they must instead point to a conflict between the statute and some higher source of law such as the Constitution. Second, a Council of Revision is empowered to *permanently* block legislation from taking effect, and its disapproval of a proposed law (unless overridden by the legislature) is final and irreversible. But judicial review does not operate this way. It allows a court to decline to enforce a statute and enjoin the executive from enforcing it. But none of that can revoke or veto the statute itself, which remains on the books, and it cannot prevent future courts from enforcing the statute if they have a different view of what the Constitution requires.

Some of the most influential framers supported the Council of Revision and wanted the judiciary to share in the executive’s veto power. James Wilson, for example, opined that judges should have the power to thwart “unwise” and “unjust” laws as well as unconstitutional ones.⁹¹ George Mason expressed similar views, arguing that judges should be “giv[en] aid in preventing *every* improper law.”⁹² And James

⁹⁰ The Records of the Federal Convention of 1787, *supra* note 85, at 21 (“[T]he dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by of the members of each branch.”).

⁹¹ 2 The Records of the Federal Convention of 1787, at 73 (Max Farrand, ed., 1911) (“The Judiciary ought to have an opportunity of remonstrating agst. projected encroachments on the people as well as on themselves. It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.”).

⁹² *Id.* at 78 (emphasis added); see also *id.* (“In this capacity, [judges] could impede in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course.

Madison defended the Council of Revision because it would give the judiciary “an additional opportunity of defending itself [against] legislative encroachments.”⁹³

Madison and Wilson fought especially hard for a formal judicial veto over federal legislation. When the Council of Revision was first debated at the convention on June 4, 1787, both Madison and Wilson spoke in favor of a judicial veto power.⁹⁴ Later that day, Wilson moved to allow the federal judiciary to partake in the executive’s veto power, and Madison seconded the motion.⁹⁵ The motion was defeated by a vote of 8 to 3.⁹⁶

He wished the further use to be made of the Judges, of giving aid in preventing every improper law.”).

⁹³ Id. at 74. Thomas Jefferson, though not a framer, also favored a veto-like power for the judiciary. In a letter to James Madison, Jefferson wrote: “I like the negative given to the Executive with a third of either house, though I should have liked it better had the Judiciary been associated for that purpose, or invested with a similar and separate power.” Letter to James Madison, 12/20/1787, in 12 *The Papers of Thomas Jefferson* 440 (Julian P. Boyd et al., eds, 1955).

⁹⁴ The Records of the Federal Convention of 1787, supra note 85, at 98 (“[Mr. Wilson] was for varying the proposition in such a manner as to give the Executive & Judiciary jointly an absolute negative”); id. at 105 (“Mr. Wilson contends that the executive and judicial ought to have a joint and full negative—they cannot otherwise preserve their importance against the legislature.”); id. at 108 (“Mad[ison]: The Judicial ought to be introduced in the business of Legislation—they will protect their Department, and uniting wh. the Executive render their Check or negative more respectable”); id. at 110 (reporting that Madison defended “the propriety of incorporating the Judicial with the Executive in the revision of the Laws.”).

⁹⁵ See id. at 94–95 (“It was then moved by Mr. Wilson seconded by Mr. Madison that the following amendment be made to the last resolution after the words ‘national Executive’ to add the words ‘a convenient number of the national judiciary.’”); id. at 104 (“It was moved by Mr. Wilson 2ded. by Mr. Madison—that the following amendment be made to the last resolution—after the words ‘National Ex.’ to add ‘& a convenient number of the National Judiciary.’”); id. at 106 (“Mr. Wilson then moved for the *addition of a convenient number of the national judicial* to the executive as a council of revision.”) (emphasis original); id. at 108 (“Wilson moves the addition of the Judiciary—Madison seconds”); see also id. at 139 (quoting lengthy speech by Madison defending the judiciary’s role on the Council of Revision, claiming that “whether the object of the revisionary power was to restrain the Legislature from encroaching on the other co-ordinate Departments, or on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form, the utility of annexing the wisdom and weight of the Judiciary to the Executive seemed incontestable.”).

⁹⁶ Id. at 131 (“On motion of Mr. Wilson seconded by Mr. Madison to amend the resolution, which respects the negative to be vested in the national executive by adding after

Not one to be deterred, Wilson renewed his motion to join the federal judiciary with the executive in all veto decisions on July 21, 1787.⁹⁷ Wilson acknowledged that the convention had already rejected this proposed role for the judiciary, but Wilson “was so confirmed by reflection in the opinion of its utility, that he thought it incumbent on him to make another effort.”⁹⁸ Madison once again seconded the motion⁹⁹ and spoke in favor of it.¹⁰⁰ And Oliver Ellsworth “approved heartily” of the motion, explaining that:

The aid of the Judges will give more wisdom & firmness to the Executive. They will possess a systematic and accurate knowledge of the Laws, which the Executive can not be expected always to possess. The law of Nations also will frequently come into question. Of this the Judges alone will have competent information.¹⁰¹

But Wilson’s motion was defeated again, with four States opposed, three in favor, and two divided.¹⁰²

Finally, on August 15, 1787, Madison made one last effort to revive the judicial veto over federal legislation. He moved to give the Supreme

the words ‘national executive’ the words ‘with a convenient number of the national Judiciary.’ On the question to agree to the addition of these words it passed in the negative. [Ayes—3; noes—8.]”). The Virginia, New York, and Connecticut delegations voted in favor of Wilson’s motion. *Id.*; see also *id.* at 140.

⁹⁷ 2 The Records of the Federal Convention of 1787, *supra* note 91, at 73 (“Mr. Wilson moved as an amendment to Resoln: 10. that the (supreme) Natl Judiciary should be associated with the Executive in the Revisionary power.”).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 74 (“Mr. (Madison)—considered the object of the motion as of great importance to the meditated Constitution. It would be useful to the Judiciary departmt. by giving it an additional opportunity of defending itself agst: Legislative encroachments; It would be useful to the Executive, by inspiring additional confidence & firmness in exerting the revisionary power: It would be useful to the Legislature by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity & technical propriety in the laws, qualities peculiarly necessary; & yet shamefully wanting in our republican Codes. It would moreover be useful to the Community at large as an additional check agst. a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities.”); see also *id.* at 77.

¹⁰¹ *Id.* at 73–74.

¹⁰² *Id.* at 80. Connecticut, Maryland, and Virginia’s delegations supported the motion. *Id.* New York’s delegation had left the convention at this point.

Court a veto power separate and independent from the President's veto, with each veto subject to legislative override.¹⁰³ Wilson seconded Madison's motion, but the convention rejected it by a vote of 8-3.¹⁰⁴ With that, the debate over the judicial veto came to an end, and Madison was left "greatly disappointed" by the Convention's unwillingness to support his idea of a revisionary council composed of federal judges.¹⁰⁵

Other delegates sought to give the federal judiciary a veto-like power over *state* laws. On July 10, 1787, Edmund Randolph offered several proposals that would empower the judiciary to formally pronounce state laws void. One of his proposals would have added the following language to the Constitution:

[A]ny individual conceiving himself injured or oppressed by the partiality or injustice of a law of any particular State may resort to the National Judiciary, *who may adjudge such law to be void*, if found contrary to the principles of equity and justice.¹⁰⁶

Randolph simultaneously proposed allowing the States to appeal any congressional "negative" of a state law to the federal judiciary, which would declare the congressional negative "void" if it exceeded the scope

¹⁰³ Id. at 294–95 ("Every bill which shall have passed the two Houses, shall, before it become a law, be severally presented to the President of the United States and to the Judges of the supreme court, for the revision of each—If, upon such revision, they shall approve of it, they shall respectively signify their approbation by signing it—But, if upon such revision, it shall appear improper to either or both to be passed into a law; it shall be returned, with the objections against it, to that House in which it shall have originated, who shall enter the objections at large on their Journal, and proceed to reconsider the Bill: But, if, after such reconsideration, two thirds of that House, when either the President or a Majority of the Judges shall object, or three fourths, where both shall object, shall agree to pass it, it shall, together with the objections, be sent to the other House, by which it shall likewise be reconsidered and, if approved by two thirds, or three fourths of the other House, as the case may be, it shall become a law."); see also id. at 298 ("[T]hat all acts before they become laws should be submitted both to the Executive and Supreme Judiciary Departments, that if either of these should object 2/3 of each House, if both should object, 3/4 of each House, should be necessary to overrule the objections and give to the acts the force of law.").

¹⁰⁴ Id. at 296, 298. Virginia, Delaware, and Maryland's delegations voted in favor of Madison's motion.

¹⁰⁵ Charles Beard, *The Supreme Court and the Constitution* 56 (1962).

¹⁰⁶ 3 *The Records of the Federal Convention of 1787*, at 56 (Max Farrand ed., 1911) (emphasis added).

of Congress's enumerated powers.¹⁰⁷ In both instances, Randolph proposed a permanent cancellation power akin to an executive veto: The disapproved law (or the disapproved congressional decision to "negative" a state law) would be "void" and permanently interred; no future court would have the ability to bring it back. Randolph also drafted an early version of the supremacy clause that would have empowered the Supreme Court to render state laws "void" when they conflict with the judiciary's interpretation of the Constitution:

All laws of a particular state, repugnant hereto, *shall be void*, and in the decision thereon, which shall be vested in the supreme judiciary, all incidents without which the general principles cannot be satisfied shall be considered, as involved in the general principle.¹⁰⁸

None of these proposals made it into the final Constitution. The judiciary was given only the power to decide "cases" and "controversies"—with no veto power over legislation, and no authority to render statutes "void." The most that one can infer from the enacted language of the Constitution is that a court might decline to enforce a statute that it regards as unconstitutional in the course of resolving a case or controversy. There is no judicial power to formally revoke a statute, and there is no judicial power to bind future courts to the judiciary's past constitutional pronouncements.

Yet many delegates at the convention ended up describing judicial review as if it were a power to permanently veto a duly enacted law. Luther Martin, in opposing Wilson and Madison's support for a judicial veto power, claimed that judicial review already gave the judiciary "a negative on the laws," and he argued that including judges on the Council of Revision would give them an unnecessary "double negative."¹⁰⁹ Elbridge Gerry and Rufus King expressed similar views, arguing that judges should not share in the executive's veto power

¹⁰⁷ Id. ("That altho' every negative given to the law of a particular State shall prevent its operation, any State may appeal to the national Judiciary against a negative; and that such negative if adjudged to be contrary to the power granted by the articles of the Union, shall be void.").

¹⁰⁸ 2 The Records of the Federal Convention of 1787, *supra* note 91, at 144 (emphasis added).

¹⁰⁹ Id. at 76.

because judicial review already enabled the courts to thwart unconstitutional legislation.¹¹⁰ But none of these delegates appeared to notice the subtle but important distinction between judicial review and the formal veto power wielded by a Council of Revision: Judicial review is merely a non-enforcement prerogative that leaves the enacted statute on the books, while a Council of Revision's veto would permanently block a proposed bill and prevent it from ever becoming a law.

Worse, those who *supported* the judicial veto at the Constitutional Convention—including Madison, Wilson, and Ellsworth—wound up asserting that judicial review would empower the courts to declare statutes “void,”¹¹¹ a description that suggests a permanent nullification power over legislation. James Madison, at the Philadelphia convention, claimed that judges would pronounce unconstitutional statutes “null and void”¹¹²—and that such statutes would be “set aside” by the federal judiciary.¹¹³ During the ratification debates, James Wilson repeatedly spoke of a judicial power to declare unconstitutional statutes “null and

¹¹⁰ The Records of the Federal Convention of 1787, *supra* note 85, at 97 (“Mr. Gerry doubts whether the Judiciary ought to form a part of [the Council of Revision], as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality.”); *id.* at 109 (“Mr. King was of opinion that the Judicial ought not to join in the negative of a Law, because the Judges will have the expounding of those Laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the constitution.”).

¹¹¹ See *infra* notes 112, 114, and 115 and accompanying text.

¹¹² 2 The Records of the Federal Convention of 1787, *supra* note 91, at 93 (“A law violating a constitution established by the people themselves, would be considered by the Judges as *null & void*.”) (emphasis added); *id.* at 440 (Madison observing that the *ex post facto* clause “will oblige the Judges to declare” retrospective interferences with the obligations of contracts “*null & void*.”) (emphasis added).

¹¹³ *Id.* at 27 (“Nothing short of a negative, on their laws will controul it. They can pass laws which will accomplish their injurious objects before they can be repealed by the Genl Legislatre. or be *set aside* by the National Tribunals.”) (emphasis added). Other delegates, including Gouverneur Morris and Elbridge Gerry, described judicial review as a power to “set aside” duly enacted laws. *Id.* at 28 (Gouverneur Morris) (“A law that ought to be negatived will be *set aside* in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. law.”) (emphasis added); The Records of the Federal Convention of 1787, *supra* note 85, at 97 (Elbridge Gerry describing judicial review as a power to “*set aside* laws as being agst. the Constitution.”) (emphasis added).

void.”¹¹⁴ And Oliver Ellsworth made similar claims at the Connecticut ratification debates, announcing that federal judges would “declare” unconstitutional statutes “to be void.”¹¹⁵

This early writ-of-erasure rhetoric also appeared in the statements of John Marshall and Alexander Hamilton, who became the most influential early defenders of judicial review. Marshall asserted at the Virginia ratifying convention that the judiciary would declare federal statutes “void” if they exceeded the enumerated powers of Congress.¹¹⁶ And Hamilton, in *The Federalist* No. 78, claimed on numerous occasions that federal judges had the duty to pronounce a statute “void” if they concluded that the statute violated their interpretation of the Constitution.¹¹⁷

¹¹⁴ See McMaster and Stone, *Pennsylvania and the Federal Constitution* 354 (“If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be *null and void*.”) (emphasis added); 2 *The Documentary History of the Ratification of the Constitution* 517 (Merrill Jensen, ed., State Historical Society of Wisconsin 1976) (James Wilson) (“If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be *null and void*. For the power of the Constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto *will not have the force of law*.”) (emphasis added); see also *id.* at 450–51 (James Wilson) (“[I]t is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges—when they consider its principles and find it to be incompatible with the superior power of the Constitution, *it is their duty to pronounce it void*.”) (emphasis added).

¹¹⁵ See 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, As Recommended by the General Convention at Philadelphia in 1787*, at 196 (Jonathan Elliot ed., 1836) [hereinafter *Elliot’s Debates*] (Oliver Ellsworth speech) (“If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, *will declare it to be void*.”) (emphasis added).

¹¹⁶ See 3 *Elliot’s Debates*, at 553 (John Marshall) (“If [Congress] were to make a law not warranted by any of the powers enumerated it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would *declare it void*.”) (emphasis added).

¹¹⁷ See *The Federalist* No. 78 at 466 (Alexander Hamilton) (Clinton Rossiter, ed. 1961) (“By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, *whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void*. Without this, all the reservations of

So writ-of-erasure language and thinking is a phenomenon that predates the Constitution, and it reflects the fact that many of the framers *wanted* the courts to wield a formal veto power over state and federal statutes. Perhaps the unsuccessful efforts to establish a judicial veto in the Council of Revision led the supporters of this idea to describe judicial review as the statutory-cancellation prerogative that they had hoped to vest in the judiciary. Or perhaps the multiple competing proposals regarding the judiciary's role caused wires to get crossed in the way that the Founding-era statesmen thought about and characterized judicial review. The framers certainly understood that the scope of judicial review differed from the Council of Revision's freewheeling veto power, as they recognized that judges could not disapprove laws merely for policy reasons.¹¹⁸ But their language and rhetoric implied that judicial review would produce the same *effects* as a Council of Revision's veto: The disapproved law would be rendered "void" and become a nullity without any legal effect. And this language and rhetoric found its way into the ratification debates,¹¹⁹ The Federalist,¹²⁰ and eventually the *Marbury* opinion.¹²¹

particular rights or privileges would amount to nothing.") (emphasis added); *id.* at 466 ("Some perplexity respecting the rights of the courts to *pronounce legislative acts void*, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.") (emphasis added); *id.* at 466 ("There is no position which depends on clearer principles, than that *every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void*. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.") (emphasis added).

¹¹⁸ See *supra* notes 91–92 and accompanying text.

¹¹⁹ See *supra* notes 112–115 and accompanying text.

¹²⁰ See *supra* note 117 and accompanying text.

¹²¹ See *infra* Part I.B.

B. The Rhetoric of Marbury v. Madison and Post-Marbury Courts

The writ-of-erasure fallacy has also been sustained by the canonical opinion in *Marbury v. Madison*,¹²² in which Chief Justice Marshall famously declared that a statute that the courts find unconstitutional becomes “entirely void,”¹²³ “invalid”¹²⁴ and “not law.”¹²⁵ These statements have reinforced the perception that judicially disapproved statutes are formally erased and no longer exist as law, and they are often cited by judges and advocates who claim that courts “strike down” legislation.¹²⁶ But these statements from *Marbury* were imprecise—and they did not describe the fate of the statutory provision that *Marbury* had found unconstitutional.

Section 13 of the 1789 Judiciary Act provided that “[t]he Supreme Court . . . shall have power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”¹²⁷ *Marbury* pronounced this statutory language unconstitutional after concluding that it authorized litigants to bring *any* mandamus petition described in the statute to the Supreme Court under its original jurisdiction.¹²⁸ In the Court’s view, this contradicted Article III, Section

¹²² 5 U.S. (1 Cranch) 137 (1803).

¹²³ Id. at 178; see also id. at 177 (“[A]n act of the legislature, repugnant to the constitution, is void.”); id. at 180 (“[A] law repugnant to the constitution is void.”).

¹²⁴ Id. at 177 (“If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?”).

¹²⁵ Id. (“Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law?”).

¹²⁶ See, e.g., *Adamson v. California*, 332 U.S. 46, 90 (1947) (Black, J., dissenting) (“Since *Marbury v. Madison*, 1 Cranch 137, was decided, the practice has been firmly established, for better or worse, that courts can strike down legislative enactments which violate the Constitution.”); Brief for the Texas Public Policy Foundation and Cato Institute as Amici Curiae at 5, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (Nos. 11-393 & 11-400) (“In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), this Court struck down a single invalid clause of the lengthy Judiciary Act of 1789, which created the federal judiciary. Id. at 176.”).

¹²⁷ See Judiciary Act of 1789 § 13.

¹²⁸ *Marbury*, 5 U.S. at 173. It is far from clear that section 13 was purporting to expand the Supreme Court’s original jurisdiction in this manner. The more sensible construction is that the statute merely empowered the Supreme Court to issue mandamus as a remedy in cases that already fell within the Court’s original or appellate jurisdiction. See Van Alstyne, *supra* note 74, at 14–16; Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn’t Either*, 38 *Wake Forest L. Rev.* 553, 562–66 (2003).

2 of the Constitution, which extends the Supreme Court's original jurisdiction to "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."¹²⁹ *Marbury* held that Article III prohibits Congress from expanding the Supreme Court's original jurisdiction beyond those cases described in Article III, Section 2, and it declared section 13 "repugnant to the Constitution"¹³⁰ and "void" for that reason.¹³¹

But section 13 continued to exist as a federal statute after *Marbury*. It was not rendered "void" by the Court's non-enforcement in the *Marbury* litigation, and Congress did not repeal section 13 in response to the Supreme Court's decision.¹³² Even after *Marbury*, litigants could continue using section 13 to seek mandamus from the Supreme Court in cases within the Supreme Court's appellate jurisdiction or in the original-jurisdiction cases described in Article III, Section 2.¹³³ And post-*Marbury* litigants remained free to ask the Court to overrule *Marbury* and assert original jurisdiction over *any* mandamus petition described in section 13.¹³⁴ All *Marbury* did was decline to enforce section 13 in *one* original-jurisdiction proceeding, and announce the Marshall Court's

¹²⁹ U.S. Const. art. III, § 2.

¹³⁰ *Marbury*, 5 U.S. at 180.

¹³¹ See *id.* at 173–77.

¹³² See Judicial Code and Judiciary Act of 1948, ch. 646, 62 Stat. 869.

¹³³ See, e.g., *Ex parte Crane*, 30 U.S. 190 (1831); *Ex parte Hoyt*, 38 U.S. 279 (1839); see also James E. Pfander, *Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers, 101 Colum. L. Rev. 1515, 1583 (2001) (noting that the ruling in *Marbury* "left section 13 on the books and available for use another day.").

¹³⁴ Indeed, the Supreme Court repudiated much of *Marbury*'s constitutional analysis in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). *Marbury* had held that the Constitution forbade Congress to give the Supreme Court original jurisdiction over cases within the Court's appellate jurisdiction as defined in Article III, Section 2, and likewise forbade Congress to give the Supreme Court appellate jurisdiction over cases that Article III, Section 2 had placed within the Court's original jurisdiction. See *Marbury*, 5 U.S. at 174 ("If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance."). *Cohens* repudiated the portion of *Marbury* that forbade Congress to give the Supreme Court appellate jurisdiction over the cases that were marked for original jurisdiction under Article III, Section 2. See *Cohens*, 19 U.S. at 394–402.

belief that original-jurisdiction mandamus proceedings are unconstitutional unless they fall within the original-jurisdiction cases specified in Article III, Section 2. *Marbury* did not “strike down,” render “void,” or “invalidate” any statutory provision, and its opinion is not binding in future Supreme Court proceedings.¹³⁵

Yet the *Marbury* opinion repeatedly (and misleadingly) proclaims that a statute becomes “void” when a court pronounces it unconstitutional, implying that the Court’s decision has formally revoked the statute in an act akin to an executive’s veto.¹³⁶ *Marbury* also asserts that “a legislative act contrary to the constitution is not law,”¹³⁷ reinforcing the notion that a judicially disapproved statute loses its status as law. None of these statements are accurate. A statute that the courts have found unconstitutional remains a “law”; it simply won’t be enforced by the judiciary at this moment in time and in this particular case. If the Constitution were amended or if new judges were appointed, the statute could become fully enforceable again.¹³⁸ Even the most extreme legal

¹³⁵ See supra note 134.

¹³⁶ See *Marbury*, 5 U.S. at 177 (“[A]n act of the legislature, repugnant to the constitution, is void.”); id. (“If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?”); id. at 178 (“[A]n [unconstitutional] act . . . according to the principles and theory of our government, is entirely void.”); id. at 180 (“[A] law repugnant to the constitution is void.”).

Pre-*Marbury* court decisions also described judicial review as a veto-like power to render legislation “void.” In *Commonwealth v. Caton*, 8 Va. (4 Call.) 5 (1782), a Virginia court of appeals claimed that “the court had power to declare any resolution or act of the legislature, or of either branch of it, to be unconstitutional and void.” Id. at 20. And in *Van Horne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (1795), a federal circuit court described judicial review in language similar to Chief Justice Marshall’s opinion in *Marbury*:

[E]very act of the Legislature repugnant to the Constitution is absolutely void . . . [I]f a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound that, in such case, it will be the duty of the Court to adhere to the Constitution, and to declare the act null and void.

Id. at 308–09. (The opinion was authored by William Paterson, who had served as a delegate to the Constitutional Convention.) So *Marbury* was hardly the first time that judicial review had been described as a power to pronounce laws “void.” Indeed, *Marbury*’s terminology and characterization of the judiciary’s power appear to have been quite typical for the time. See supra notes 112–117 and accompanying text.

¹³⁷ *Marbury*, 5 U.S. at 177.

¹³⁸ See, e.g., *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870) (overruling *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), and enforcing the Legal Tender Act of 1862, without requiring reenactment of the Act after *Hepburn* had declared it unconstitutional).

realists, who regard “law” as nothing more than a prediction of what the courts will do,¹³⁹ should reject the idea that judicially disapproved statutes cease to exist as “law” because the judiciary’s constitutional pronouncements do not bind successor courts, and those successor courts remain free to enforce the formerly disapproved statute if they have a different view of the Constitution or the judicial role. The situation is no different from a federal statute that the President refuses to enforce for constitutional reasons. The statute does not become “void” on account of the executive’s non-enforcement policy; it continues to exist as a statute and remains available for future Presidents to enforce.¹⁴⁰

These statements from *Marbury* have played a large role in propagating and maintaining the writ-of-erasure fallacy,¹⁴¹ and many courts have emulated *Marbury*’s rhetoric by describing judicially disapproved statutes as “void”¹⁴² and “not law.”¹⁴³ The rise of legal realism—in which judges are perceived as making rather than merely discovering the law—has worsened the situation by inducing post-

¹³⁹ See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 458 (1897) (“[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court.”).

¹⁴⁰ See supra notes 23–27 and accompanying text.

¹⁴¹ See, e.g., *Dascola v. City of Ann Arbor*, 22 F. Supp. 3d 736, 742–46 (E.D. Mich. 2014) (committing the writ-of-erasure fallacy by insisting that a law that was previously found unconstitutional by a federal district court must be reenacted before it can be enforced, even if the law would found constitutional today, because the previous court ruling had rendered the law “unconstitutional and void”).

¹⁴² See supra note 2.

¹⁴³ See, e.g., *Chi., Indianapolis, & Louisville Ry. Co. v. Hackett*, 228 U.S. 559, 566 (1913) (“That act was therefore as inoperative as if it had never been passed, *for an unconstitutional act is not a law*, and can neither confer a right or immunity nor operate to supersede any existing valid law.”) (emphasis added); *Norton v. Shelby County*, 118 U.S. 425, 442 (1886) (“*An unconstitutional act is not a law*; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”) (emphasis added); see also *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 760 (1995) (Scalia, J., concurring) (“[A] law repugnant to the Constitution ‘is void, and is as no law.’” (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1880))); Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 920 (1990) (“The Supreme Court has said more times than one can count that unconstitutional statutes are ‘no law at all.’”).

Marbury courts to claim that the judiciary itself “strikes down”¹⁴⁴ or “invalidates”¹⁴⁵ statutes, rather than simply finding laws to be “void” and announcing that fact. All of this rhetoric bolsters the perception of judicial review as a permanent veto-like power over duly enacted laws, rather than a mere non-enforcement prerogative that leaves the disapproved statute on the books. The widespread use of this writ-of-erasure nomenclature creates a feedback loop: The statements that courts “strike down” and “invalidate” statutes lead others to adopt the writ-of-erasure mentality, which in turn leads those individuals to deploy more of the rhetoric that mischaracterizes judicial review as a statutory revocation power.

C. *The Judiciary’s Stare Decisis Practices*

The writ-of-erasure fallacy has also been reinforced by the judiciary’s tendency to adhere to precedent, and its stated reluctance to overrule past decisions absent a compelling reason to do so.¹⁴⁶ This can lead people to regard the judiciary’s disapproval of a statute as *de facto* permanent, because the possibility of a future court’s overruling that decision may seem speculative, remote, or impossible. Unlike a Presidential non-enforcement edict, which a successor President may repudiate solely for political reasons, a judicial pronouncement of unconstitutionality is supposed to be given weight by successor courts simply on account of its status as precedent, and is not to be cast aside whenever present-day judges disagree with it.¹⁴⁷

But the Supreme Court is continually overruling its constitutional precedents. One need only compare the constitutional jurisprudence of 1918 with the constitutional jurisprudence of 2018 to see how radically the judiciary can change its non-enforcement policies over time. No one in 1918 could have foreseen that the Supreme Court would one day wipe out *Lochner*-style substantive due process and grant Congress near-plenary powers to regulate the economy. But that is no reason for

¹⁴⁴ See *supra* notes 1 & 4.

¹⁴⁵ See *supra* note 9.

¹⁴⁶ See *supra* note 59.

¹⁴⁷ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (“Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.”).

anyone to assume in 1918 that the judiciary's non-enforcement of progressive economic legislation would be permanent, and it should not have led anyone to think that the Supreme Court had "struck down" the statutes that it was refusing to enforce. All of those statutes—including the maximum-hours law in *Lochner v. New York*¹⁴⁸ and the child-labor law in *Hammer v. Dagenhart*¹⁴⁹—continued to exist after the Supreme Court's refusal to enforce them, and they became ripe for enforcement once the Supreme Court abandoned its pre-New Deal constitutional doctrines.¹⁵⁰

It is easy to imagine a future Supreme Court overruling present-day decisions and doctrines that have thwarted the enforcement of federal and state statutes. If liberals were to attain a majority on a future Supreme Court, it is not only possible but likely that they would overrule *Citizens United v. FEC*,¹⁵¹ *Shelby County v. Holder*,¹⁵² and some or all of the Court's Eleventh Amendment decisions.¹⁵³ And if new appointees move the Supreme Court in a more conservative direction, then one can expect the Court's abortion precedents¹⁵⁴ and restrictions on capital punishment¹⁵⁵ to be on the chopping block. No one knows which of these future directions the Supreme Court will take, but it is certain that the Court will overrule *some* decisions that have blocked the enforcement of duly enacted statutes. And when it does, the formerly disapproved statutes become fully enforceable once again—not

¹⁴⁸ 198 U.S. 45 (1905).

¹⁴⁹ 247 U.S. 251 (1918).

¹⁵⁰ See, e.g., *Jawish v. Morlet*, 86 A.2d 96 (D.C. 1952) (holding that a federal statute establishing minimum wages for women and children in the District of Columbia, which the Supreme Court had held unconstitutional in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), became fully enforceable without any need for reenactment once the Supreme Court overruled *Adkins* in *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).

¹⁵¹ 558 U.S. 310 (2010).

¹⁵² 570 U.S. 529 (2013).

¹⁵³ See, e.g., *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30 (2012); *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

¹⁵⁴ See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

¹⁵⁵ See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

only against those who violate them in the future but also against those who have violated them in the past.

II. THE EFFECTS OF THE WRIT-OF-ERASURE FALLACY

The misleading and imprecise rhetoric surrounding judicial review has led many to assume that statutes are permanently “struck down” and rendered “void” by adverse court decisions. As a result, judges and politicians have all too often regarded judicially disapproved statutes as legal nullities—even when those statutes remain on the books and continue to operate as law. This writ-of-erasure mindset has needlessly truncated the scope and effect of many federal and state statutes. A few examples will illustrate.

A. *The Civil Rights Act of 1875*

The Civil Rights Act of 1875 is one of the most important—and one of the most underused—statutes that Congress has ever enacted. Section 1 of the Act prohibits all acts of racial discrimination in places of public accommodation, declaring that:

all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.¹⁵⁶

Section 2 imposes criminal penalties on those who violate section 1.¹⁵⁷ The remaining sections of the Act outlaw racial discrimination in jury selection¹⁵⁸ and give federal courts jurisdiction over claims arising under the Act.¹⁵⁹ But it is sections 1 and 2 of the Act—the provisions that outlaw and punish racial discrimination in places of public accommodation—that have suffered a wrongful death at the hands of the writ-of-erasure fallacy.

¹⁵⁶ See Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335, 336.

¹⁵⁷ See *id.*, § 2, 18 Stat. 335, 336.

¹⁵⁸ See *id.*, § 4, 18 Stat. 335, 336–37.

¹⁵⁹ See *id.*, § 3, § 5, 18 Stat. 335, 336–37.

1. The Civil Rights Cases

Sections 1 and 2 of the Civil Rights Act of 1875 first reached the Supreme Court in the *Civil Rights Cases*, after the United States had indicted private innkeepers, private theater operators, and a private railroad company for discriminating against blacks.¹⁶⁰ The Supreme Court dismissed the indictments, holding that Congress could not prohibit acts of purely private racial discrimination under section 5 of the Fourteenth Amendment. Instead, the Court held that the Fourteenth Amendment authorizes Congress to act only against “State laws and acts done under State authority.”¹⁶¹

But the Court was not content to merely dismiss the indictments and announce that the conduct for which the defendants had been indicted fell outside Congress’s regulatory jurisdiction. Instead, the Court produced an opinion declaring sections 1 and 2 “unconstitutional and void”¹⁶²—and it dismissed the indictments on the ground that they had been brought under this “void” congressional enactment.¹⁶³ The Court spoke as though its principal task was to pronounce the *underlying statutory provisions* valid or invalid, and that resolving the validity of the *indictments* was only ancillary to that task. After reciting the facts, the Court framed its inquiry this way:

It is obvious that the primary and important question in all the cases is the constitutionality of the law: for if the law is unconstitutional none of the prosecutions can stand.¹⁶⁴

This is writ-of-erasure thinking to the core, and it follows directly from the rhetoric and reasoning in *Marbury*. The first hallmark of the

¹⁶⁰ 109 U.S. 3, 4 (1883).

¹⁶¹ *Id.* at 13. See also *id.* at 17 (“[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings.”).

¹⁶² *Id.* at 26.

¹⁶³ *Id.* (“[T]he first and second sections of [the Civil Rights Act of 1875] are unconstitutional and void, and that judgment should be rendered upon the several indictments in those cases accordingly.”).

¹⁶⁴ *Id.* at 8–9.

writ-of-erasure mentality is a judicial opinion asserting the authority to pronounce a statute “void,” and equating that authority with the judiciary’s power to resolve the lawsuits and claims that the parties before it have brought. But a federal court has no authority to render a duly enacted statute invalid or “void”; its powers extend only to resolving the cases and controversies described in Article III. A court might offer its *opinion* on the constitutionality of a statute when resolving those cases or controversies, and it might decline to enforce (or forbid the executive to enforce) a statute that it finds unconstitutional. But the Court’s opinion and its non-enforcement policies do not invalidate the statute or make it “void,” any more than a presidential order directing the executive branch to cease enforcing a statute that the President finds unconstitutional. In either event, the statute remains on the books as law, and it remains available for future courts and future Presidents to use if they have different understandings of what the Constitution requires. When *Marbury* and the *Civil Rights Cases* purport to render statutes “void,” they imply that the judiciary permanently nullifies legislation in a pronouncement that it is as final and binding as its resolution of the parties’ claims.

A second feature of the writ-of-erasure mindset is its tendency to regard the statute’s constitutionality as an all-or-nothing choice. Because jurists who have succumbed to the writ-of-erasure fallacy think of judicial review as a veto-like power to formally revoke legislation, they will often declare a statute “void” without even considering the possibility that the disapproved statute might have both constitutional and unconstitutional applications—or that the statute might remain enforceable in future cases that present different factual circumstances. The opinions in both *Marbury* and the *Civil Rights Cases* exhibit this writ-of-erasure sophistry.

Start with *Marbury*. Section 13 of the Judiciary Act empowered the Supreme Court “to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”¹⁶⁵ This statute (at the very least) authorized the Supreme Court to issue mandamus in cases that already fell within the Court’s original or appellate jurisdiction. And even if one accepts Chief Justice Marshall’s strained

¹⁶⁵ Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81.

construction of the statute, which interpreted section 13 to expand the Supreme Court's original jurisdiction to include *any* mandamus petition brought against a federal court or officer,¹⁶⁶ section 13 remained constitutional to the extent it empowered the Supreme Court to issue mandamus in cases already within the Court's appellate jurisdiction, or within the original-jurisdiction cases described in Article III, Section 2.¹⁶⁷ For Marshall to declare this statute "void"—without even acknowledging that the statute is perfectly constitutional when applied to cases properly within the Supreme Court's appellate or original jurisdiction—is the symptom of a judge afflicted with writ-of-erasure disease: the condition that causes one to equate the judiciary's power with a Council of Revision's authority to formally disapprove legislation, rather than a power to resolve the *claims* that litigants might bring under the disputed statute.

The *Civil Rights Cases* display the same chicanery. Sections 1 and 2 of the Civil Rights Act of 1875 prohibit *all* acts of racial discrimination in places of public accommodation. And some of the prohibited racial discrimination clearly falls within the power of Congress to proscribe—such as racial discrimination committed by state actors, racial discrimination that occurs in interstate or foreign commerce, and racial discrimination that occurs in the territories, on the high seas, or in the District of Columbia, where Congress wields plenary legislative powers.¹⁶⁸ It is a closer question whether Congress may prohibit acts of racial discrimination outside these situations. A divided Supreme Court held in the *Civil Rights Cases* that Congress lacked authority to regulate purely private racial discrimination under its Fourteenth Amendment enforcement powers,¹⁶⁹ and pre-New Deal understandings of the commerce power left Congress powerless to regulate most acts of

¹⁶⁶ See *Marbury*, 5 U.S. at 173.

¹⁶⁷ See *supra* notes 132–135 and accompanying text.

¹⁶⁸ See U.S. Const. art. I, § 8 (empowering Congress “[t]o exercise exclusive Legislation in all Cases whatsoever over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States”).

¹⁶⁹ See *Civil Rights Cases*, 109 U.S. at 13.

intrastate racial discrimination.¹⁷⁰ But even under the stingiest understandings of congressional power, there will be at least *some* acts of racial discrimination in places of public accommodation that indisputably fall within Congress's regulatory jurisdiction—so one would think that the Civil Rights Act of 1875 should remain enforceable at least as applied to those discriminatory acts.¹⁷¹

Indeed, one of the five defendants in the *Civil Rights Cases* had been indicted for discriminating against a black passenger during an *interstate* railroad trip from Grand Junction, Tennessee, to Lynchburg, Virginia.¹⁷² It is hard to understand why the Supreme Court disallowed *this* prosecution when the alleged racial discrimination occurred on an interstate journey that falls squarely within Congress's regulatory jurisdiction.¹⁷³ The Court's opinion did not acknowledge that this journey crossed state lines, nor did it acknowledge that an interstate railroad trip of this sort comes within Congress's regulatory authority. Instead, the Court suggested that Congress would need to enact a new statute limited to interstate transportation before the Court could allow a prosecution to proceed under the commerce power:

¹⁷⁰ See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

¹⁷¹ There is no reason to fear that enforcing the Civil Rights Act of 1875 in these situations will allow prosecutors or plaintiffs to escape their burden of proving facts necessary to establish federal regulatory jurisdiction. The factfinder can return a special-verdict form on the facts necessary to show that the discriminatory conduct falls within Congress's regulatory domain—just as a factfinder can return a special verdict on facts necessary to establish the constitutional definition of treason, see *Kawakita v. United States*, 343 U.S. 717, 737 (1952), or on facts necessary to authorize an enhanced level of punishment, see *United States v. Buishas*, 791 F.2d 1310, 1317 (7th Cir. 1986); see also Kate H. Nepveu, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 *Yale L. & Pol'y Rev.* 263, 263–64 (2003) ("Today, juries commonly return information beyond a simple 'guilty' or 'not guilty' in a wide range of criminal cases. Though these are often called 'special verdicts,' they are not true special verdicts: They provide additional information that accompanies, but does not replace, the general verdict."). And a court should subject prosecutors and plaintiffs to the same burden of proof that would apply had these jurisdictional facts been defined as elements of the statutory crime or cause of action. See *In re Winship*, 397 U.S. 358, 363 (1970) (requiring prosecutors to prove beyond a reasonable doubt "every fact necessary to constitute the crime charged.") (citation omitted).

¹⁷² 109 U.S. at 60–61 (Harlan, J., dissenting).

¹⁷³ *Id.* ("Mrs. Robinson, a citizen of Mississippi, purchased a railroad ticket entitling her to be carried from Grand Junction, Tennessee, to Lynchburg, Virginia. Might not the act of 1875 be maintained in that case, as applicable at least to commerce between the States, notwithstanding it does not, upon its face, profess to have been passed in pursuance of the power of Congress to regulate commerce?").

[W]hether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.¹⁷⁴

The Court's unstated rationale seems to be something like this: Although sections 1 and 2 of the Civil Rights Act of 1875 outlaw *all* acts of racial discrimination in places of public accommodation—including discrimination that occurs on interstate railroad journeys—the Civil Rights Act of 1875 sweeps too far by outlawing conduct that falls outside the boundaries of Congress's regulatory jurisdiction. Therefore, the relevant statutory provisions in the Civil Rights Act are “void,” and an invalid statute cannot sustain a prosecution, even for conduct that undeniably falls within the scope of Congress's regulatory authority.¹⁷⁵

The problem with this line of reasoning is that a statute is not rendered “void” or invalid by a judicial pronouncement of unconstitutionality. The statute remains a law until it is repealed, and it would become fully enforceable if the Constitution were amended or if a later court were to interpret the Constitution differently. The judicial task is not to determine whether a statute is “void,” but whether the court can enforce the statute without violating its higher duty to enforce the Constitution. Yet the *Civil Rights Cases* did not even attempt to explain how the Constitution would preclude the Court from enforcing the Civil Rights Act of 1875 against an *interstate* railroad trip. Instead, the Court simply assumed that its ruling had rendered the statute “void,” so there was no need for the Court to justify its refusal to enforce the statute against conduct that indisputably falls within Congress's regulatory jurisdiction.

In criticizing the writ-of-erasure thinking displayed in the *Civil Rights Cases*, I am in no way suggesting that “facial” challenges to statutes are categorically improper. Nor am I suggesting that courts must reject

¹⁷⁴ See *id.* at 19.

¹⁷⁵ Cf. Henry P. Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1, 8 (1981) (describing the “valid rule requirement,” which allows litigants to “insist that [their] conduct be judged in accordance with a rule that is constitutionally valid”).

facial challenges whenever a statute has at least some constitutionally permissible applications.¹⁷⁶ It is possible to believe that the judiciary's duty to protect constitutional rights or the reserved powers of the states will occasionally require prophylactic remedies that categorically enjoin the enforcement of an overbroad statute,¹⁷⁷ and I express no view on when a remedy of that sort is appropriate. It is also possible to believe that there will be cases in which the courts should refuse to "sever" and preserve the constitutional applications of an overbroad statute, perhaps because the statute contains a non-severability clause, or perhaps for other reasons.¹⁷⁸ I likewise express no view on when courts should sever (or decline to sever) statutes that have both constitutional and unconstitutional applications. The problem with the *Civil Rights Cases* is not that the Court issued a "facial" remedy when more narrow, as-applied relief was available. The problem is that the Court made no effort to justify its refusal to enforce the Civil Rights Act against interstate travel, because it had bought into the writ-of-erasure myth that a statute becomes invalid and "void" when a court declares it unconstitutional.

Finally, the opinion in the *Civil Rights Cases* does avoid the writ-of-erasure fallacy in one respect: It purports to leave open whether the Civil Rights Act of 1875 may be enforced in the territories and the District of Columbia, where Congress holds plenary legislative powers.¹⁷⁹ And

¹⁷⁶ See, e.g., *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) ("[B]ecause appellees are making a facial challenge to a statute, they must show that 'no set of circumstances exists under which the Act would be valid.'") (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring)); *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

¹⁷⁷ See, e.g., Dorf, *supra* note 38, at 261–79; Fallon Jr., *Making Sense of Overbreadth*, *supra* note 38, at 884–903.

¹⁷⁸ See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2318–19 (2016) (refusing to enforce a severability clause in an abortion statute because it would "pave the way for legislatures to immunize their statutes from facial review"); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 691–707 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (arguing that the Affordable Care Act should be deemed non-severable and held "invalid in its entirety" because its provisions are "closely interrelated").

¹⁷⁹ See 109 U.S. 3, 19 (1883) ("We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the

although the Court's opinion repeatedly pronounces sections 1 and 2 "unconstitutional and void,"¹⁸⁰ there are other places where the Court hedges by declaring the statutory sections "void, at least so far as [their] operation in the several States is concerned."¹⁸¹ The Court offered no reason to distinguish its writ-of-erasure approach to the interstate-transportation issue from its enforce-the-statute-where-possible approach to the territories and the District of Columbia. And it is hard to think of a principled distinction between these situations. If the Court is willing to acknowledge that the Civil Rights Act of 1875 might still be enforced in the territories and the District of Columbia because they fall within Congress's regulatory jurisdiction, then how can it simultaneously refuse to enforce the statute against interstate railroad trips, which likewise fall under the regulatory powers of Congress? But at least the Court deserves partial credit for refusing to pronounce the statutes "void" in the territories and the District of Columbia.

2. *Plessy v. Ferguson*

The issue of racial discrimination in places of public accommodation returned to the Supreme Court in *Plessy v. Ferguson*.¹⁸² The petitioner in *Plessy* had been ejected from a railroad car marked for whites and jailed for violating Louisiana's Separate Car Act, which required racial segregation on the State's railroads.¹⁸³ Unlike the *Civil Rights Cases*, which involved private and voluntary racial discrimination unsupported by state action, *Plessy* presented a case of *state-mandated* racial discrimination, which indisputably qualifies as state action under the Fourteenth Amendment. And the Louisiana mandatory-segregation

Territories and the District is not a question for consideration in the cases before us: they all being cases arising within the limits of States.").

¹⁸⁰ *Id.* at 26.

¹⁸¹ *Id.* at 25; see also *supra* note 179.

¹⁸² 163 U.S. 537 (1896).

¹⁸³ *Id.* at 540–42. The Louisiana statute provided that "all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations." No. 111, § 1, 1890 La. Acts 152.

statute contradicted the Civil Rights Act of 1875, which commands that white and minority citizens receive “the full and equal enjoyment of the accommodations” of “public conveyances on land.”¹⁸⁴ Excluding blacks from coaches reserved for white passengers does not provide them with the “full and equal enjoyment” of the railroad’s accommodations.¹⁸⁵

So the Supreme Court should have ruled for Mr. Plessy on the ground that the Civil Rights Act of 1875 preempted the Louisiana Separate Car Act. Yet rather than enforce the Civil Rights Act against this state-mandated racial segregation, the *Plessy* Court hid behind the *Civil Rights Cases*, declaring that the Supreme Court’s previous ruling had rendered these statutory protections “unconstitutional and void,”¹⁸⁶ and there was therefore no need to even consider whether the Civil Rights Act preempted the Louisiana statute.

The *Plessy* opinion is yet another example of the writ-of-erasure fallacy at work. A statute that the Supreme Court has declared unconstitutional is not “void”—even if a prior Supreme Court opinion describes it as “void.” The statute remains a law until it is repealed, and it must be enforced by courts to the extent they can do so consistent with the Constitution. Even if one accepts the *Civil Rights Cases*’s interpretation of the Constitution, that means only that Congress cannot reach purely private discrimination under its section 5 enforcement powers. It does not excuse courts from enforcing the Civil Rights Act of 1875 in cases involving racial discrimination that is “sanctioned in some way by the State” or “done under State authority.”¹⁸⁷ The *Plessy* Court fell victim to the writ-of-erasure fallacy: It assumed that the *Civil Rights Cases* had canceled or “voided” the statutory provisions in the Civil Rights Act of 1875, when the statutes remained on the books and compelled the courts to act against state-mandated racial discrimination in places of public accommodation.

¹⁸⁴ Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335, 336.

¹⁸⁵ *Id.* (emphasis added); Jonathan F. Mitchell, Textualism and the Fourteenth Amendment, 69 *Stan. L. Rev.* 1237, 1297 & n.263 (2017).

¹⁸⁶ *Plessy*, 163 U.S. at 546.

¹⁸⁷ *Civil Rights Cases*, 109 U.S. 3, 17–19 (1883).

3. *Butts v. Merchants & Miners Transportation Co.*

The Civil Rights Act of 1875 returned to the Supreme Court once more in *Butts v. Merchants & Miners Transportation Co.*,¹⁸⁸ this time to answer the question that the *Civil Rights Cases* had left open: Whether sections 1 and 2 of the Civil Rights Act should be enforced in the territories, in the District of Columbia, or on the high seas—where Congress holds plenary regulatory authority.¹⁸⁹ The plaintiff in *Butts* was a black woman who had been denied full and equal accommodations during a series of sea voyages between Boston, Massachusetts, and Norfolk, Virginia.¹⁹⁰ She sued under sections 1 and 2 of the Civil Rights Act of 1875; the defendant responded that these statutory provisions were “unconstitutional and void.”¹⁹¹

The Court began by acknowledging that the *Civil Rights Cases* had held only that sections 1 and 2 were unconstitutional “as applied to the States,” leaving open whether those statutory provisions could be enforced in the territories, in the District of Columbia, or on the high seas.¹⁹² And the Court never denied that Congress held plenary legislative authority in these areas, nor did it deny that the defendant had violated the Civil Rights Act of 1875 by denying the plaintiff full and equal accommodations. Yet the Court refused to enforce sections 1 and 2 of the Civil Rights Act because it declared the statutory sections “invalid in their entirety.”¹⁹³

How could *Butts* declare sections 1 and 2 “invalid in their entirety” when there was no constitutional obstacle to enforcing the statutes on the high seas? The Court offered several arguments for its across-the-

¹⁸⁸ 230 U.S. 126 (1913).

¹⁸⁹ See *Civil Rights Cases*, 109 U.S. at 19 (“We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the Territories and the District is not a question for consideration in the cases before us: they all being cases arising within the limits of States.”).

¹⁹⁰ *Butts*, 230 U.S. at 130.

¹⁹¹ *Id.*

¹⁹² *Id.* at 132.

¹⁹³ See *id.* at 133; see also *id.* at 138 (pronouncing sections 1 and 2 “altogether invalid”).

board non-enforcement policy. First, the Court thought it would be improper to leave sections 1 and 2 enforceable in only *some* of the United States' geographic territory, because it claimed that Congress's "manifest purpose was to enact a law which would have a uniform operation wherever the jurisdiction of the United States extended."¹⁹⁴ Because the *Civil Rights Cases* had rendered uniform enforcement impossible by refusing to apply the statutes in the several states, that left uniform non-enforcement as the only alternative consistent with this supposed congressional "purpose."¹⁹⁵

Second, the Court argued that judicial precedent supported its decision to leave sections 1 and 2 unenforced in their entirety, because two of its prior cases, *United States v. Reese*¹⁹⁶ and the *Trade-Mark Cases*,¹⁹⁷ had pronounced overbroad federal statutes "invalid in their entirety"¹⁹⁸ and made no effort to sever and preserve the constitutional applications of those statutes.¹⁹⁹

There are a number of rather obvious criticisms that can be directed at the *Butts* opinion. It is hard to believe, for example, that Congress's "manifest purpose" in enacting the Civil Rights Act of 1875 was to preserve a uniform nationwide regime at all costs, to the point that the Act's supporters would have preferred a regime of total non-enforcement over a regime of partial enforcement limited to the territories, the high seas, and the District of Columbia. The Court was also selective and opportunistic in its use of precedent; it quoted heavily from *Reese* and the *Trade-Mark Cases* while ignoring other decisions that had severed and preserved the constitutional applications of overbroad statutes rather than declaring them "invalid in their entirety."²⁰⁰ My focus, however, is not on this evident sophistry but on

¹⁹⁴ *Id.* at 133.

¹⁹⁵ *Id.* at 133 ("[H]ow can the manifest purpose to establish a uniform law for the entire jurisdiction of the United States be converted into a purpose to create a law for only a small fraction of that jurisdiction?").

¹⁹⁶ 92 U.S. 214 (1875).

¹⁹⁷ 100 U.S. 82 (1879).

¹⁹⁸ *Butts*, 230 U.S. at 133.

¹⁹⁹ *Id.* at 133–35 (quoting throughout from *Reese*); *id.* at 136 (quoting from the *Trade-Mark Cases*).

²⁰⁰ See, e.g., *Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217, 219–20 (1912) ("As applied to such a case, we think the statute is not repugnant to either the due process of law or the equal protection clause of the Constitution [T]his court must deal

how the writ-of-erasure fallacy tainted the rationale in *Butts* and the precedents on which *Butts* relied.

Butts quoted extensively from *Reese*,²⁰¹ a ruling that (like *Butts*) refused to give *any* effect to an overbroad congressional civil-rights statute—even though some of the conduct prohibited by the statute fell within Congress’s authority to proscribe, and even though the defendants in *Reese* (like the defendants in *Butts*) had engaged in conduct that unquestionably fell within Congress’s regulatory jurisdiction.

Reese refused to enforce section 3 of the Civil Rights Act of 1870, which imposed criminal liability on

any judge, inspector, or other officer of election whose duty it is or shall be to receive, count, certify, register, report, or give effect to the vote of any . . . citizen who shall wrongfully refuse or omit to receive, count, certify, register, report, or give effect to the vote of such citizen.²⁰²

The defendants in *Reese* had violated section 3 (and the Fifteenth Amendment) by denying a black man the right to vote.²⁰³ But the Court held that section 3 reached beyond Congress’s authority to enforce the Fifteenth Amendment, because it was not limited by its terms to those who had denied the right to vote *on account of race*, and it extended to any election official who wrongly denied *any* citizen his right to vote.²⁰⁴

with the case in hand and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid. How the state court may apply it to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail are matters upon which we need not speculate now.”); *Hatch v. Reardon*, 204 U.S. 152, 160–61 (1907) (“If the law is valid when confined to the class of the party before the court, it may be more or less of a speculation to inquire what exceptions the state court may read into general words, or how far it may sustain an act that partially fails.”); see also *Stern*, supra note 38, at 82 (noting that *Reese* “has been followed in a number of cases, but either disregarded or distinguished in many more”).

²⁰¹ 92 U.S. 214 (1875).

²⁰² See Civil Rights Act of 1870, ch. 114, § 3, 16 Stat. 140, 141.

²⁰³ See *Reese*, 92 U.S. at 215.

²⁰⁴ See *id.* at 218 (“It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere, and provide for its punishment. . . . The third section does not in express terms limit the offence of an

The Supreme Court recognized that the defendants in *Reese* had denied the right to vote on account of race—and that this conduct falls squarely within Congress’s Fifteenth Amendment enforcement powers. Yet rather than enforce the statute against these defendants, and withhold enforcement only in cases that do not involve racially discriminatory denials of the right to vote, the Court insisted that it was unable to enforce the statute in *any* situation on account of its overbreadth.²⁰⁵

Why wouldn’t the *Reese* Court at least enforce the statute against racially discriminatory denials of the right to vote, which Congress undoubtedly has the constitutional authority to proscribe? The Court tried to defend its all-or-nothing approach by insisting that the judiciary has no power to “insert[] . . . words of limitation into a penal statute.”²⁰⁶ For the courts to adopt a partial non-enforcement policy along these lines would, in the words of the Court, “substitute the judicial for the legislative department of the government,”²⁰⁷ and “would be to make a new law, not to enforce an old one.”²⁰⁸

The *Butts* Court quoted and relied on this language from *Reese* to justify its refusal to enforce the Civil Rights Act of 1875 on the high seas.²⁰⁹ And modern courts invoke this language from *Reese* when they “facially” enjoin the enforcement of statutes that have undeniably constitutional applications.²¹⁰ The idea is that a court that preserves and

inspector of elections, for which the punishment is provided, to a wrongful discrimination on account of race, &c.”).

²⁰⁵ *Reese* is a precursor to the First Amendment’s “overbreadth” doctrine, which allows litigants who have engaged in statutorily prohibited and constitutionally unprotected conduct to “facially” challenge a speech-restricting statute on the ground that it might violate the Constitution if enforced against others not before the Court. See, e.g., *United States v. Stevens*, 559 U.S. 460, 473–77 (2010); Fallon Jr., *Making Sense of Overbreadth*, *supra* note 38, at 858–59.

²⁰⁶ *Reese*, 92 U.S. at 221.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Butts*, 230 U.S. at 134–35.

²¹⁰ See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016) (refusing to enforce a severability clause on the ground that this “would, to some extent, substitute the judicial for the legislative department of the government” (citation and internal quotation marks omitted)); *id.* (“A severability clause is not grounds for a court to devise a judicial remedy that . . . entail[s] quintessentially legislative work.” (citation and internal quotation marks omitted)); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) (expressing concern that enforcing a severability clause “would, to some extent,

enforces the constitutional applications of an overbroad statute, rather than declaring the statute “void” in its entirety, is somehow invading the legislature’s domain by “re-writing” the statute and enacting a new law that the legislature never voted on.²¹¹

This is nonsense—and it is another example of the fallacy that treats judicial review as a power to cancel, revoke, or alter the scope of duly enacted legislation. Judicial review is a non-enforcement prerogative, not a revisionary power over legislation. So a court is *never* “mak[ing] a new law”²¹² or “inserting . . . words of limitation”²¹³ into a statute when it carves out a subset of unconstitutional statutory applications for non-enforcement. The statute continues to say exactly what it said before the court’s ruling, and everything in the statute remains available for future courts to enforce if they reject or overrule the previous court’s decision. Judicial non-enforcement is no different from Presidential non-enforcement in this regard. When President Clinton signed the Telecommunications Act of 1996, he declared that a provision restricting abortion advertising violated his interpretation of the First Amendment, and he directed his subordinates not to enforce that single provision in a lengthy and omnibus act.²¹⁴ President Clinton did not

substitute the judicial for the legislative department of the government” (quoting *Reese*, 92 U.S. at 221)); *Reno v. ACLU*, 521 U.S. 844, 884–85 & n.49 (1997) (refusing to enforce a severability clause on the ground that it would “involve[] a far more serious invasion of the legislative domain” and because “[t]his Court will not rewrite a . . . law to conform it to constitutional requirements.” (third alteration in original) (citations and internal quotation marks omitted)).

²¹¹ See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888*, at 395, 401–02 n.216 (1985) (noting that *Reese* had concluded that the Court “had no power to rewrite an overbroad statute” and “lacked authority to cut an overbroad statute down to constitutional size”); see also *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 692 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“An automatic or too cursory severance of statutory provisions risks ‘rewrit[ing] a statute. . . .’ The Judiciary, if it orders uncritical severance, then assumes the legislative function; for it imposes on the Nation, by the Court’s decree, its own new statutory regime.” (quoting *R.R. Ret. Bd. v. Alton R. Co.*, 295 U.S. 330, 362 (1935))).

²¹² *Reese*, 92 U.S. at 221.

²¹³ *Id.*

²¹⁴ See President Clinton’s Statement on Signing the Telecommunications Act of 1996, 1 Pub. Papers 188, 190 (Feb. 8, 1996).

“make a new law”²¹⁵ by issuing this non-enforcement edict, and he did not usurp Congress’s prerogatives by altering or rewriting the statute that it had enacted. The disputed statutory provision remained part of the law that he signed—and it remained available for future Presidents and courts to enforce if any of them were to disagree with President Clinton’s interpretation of the Constitution.

Thankfully, modern courts regularly disregard this language from *Reese* when confronting statutes that have both constitutional and unconstitutional applications.²¹⁶ Nowadays the typical judicial response is to sever and preserve the constitutional applications of the statute, rather than “facially invalidating” the statute or pronouncing it “void.”²¹⁷ Courts do this without citing or acknowledging *Reese*—and without expressing any angst that they are somehow “mak[ing] a new law”²¹⁸ or traipsing on the legislature’s terrain by enforcing only a part of a duly enacted statute. The modern-day disregard of *Reese* is hardly surprising, because the argument in *Reese*, if taken to its logical conclusion, would forbid all forms of severance and require total non-enforcement of every statute that has any unconstitutional applications. Yet the language from

²¹⁵ *Reese*, 92 U.S. at 221.

²¹⁶ See Currie, *supra* note 211, at 395 (observing that the *Reese* Court’s assertion that it “had no power to rewrite an overbroad statute” stands “in sharp contrast to modern conceptions of standing or of severability”).

²¹⁷ See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–50 (2008) (“Facial challenges are disfavored”); *Wyoming v. Oklahoma*, 502 U.S. 437, 460–61 (1992) (“Severability clauses may easily be written to provide that if application of a statute to some classes is found unconstitutional, severance of those clauses permits application to the acceptable classes.”); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) (“[B]ecause appellees are making a facial challenge to a statute, they must show that ‘no set of circumstances exists under which the Act would be valid.’”) (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 524 (1989) (O’Connor, J., concurring)); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (“[T]he normal rule is that partial, rather than facial, invalidation is the required course.”); *id.* at 501 (enforcing an application-severability requirement in a state statute that contained an overbroad definition of prurience, holding that “facial invalidation of the statute was . . . improvident”); *Ala. State Fed’n of Labor, Local Union No. 103 v. McAdory*, 325 U.S. 450, 465 (1945) (“When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part.”); Hart and Wechsler’s *The Federal Courts and The Federal System* 170 (Richard H. Fallon, Jr., et al. eds., 7th ed. 2015) (“[T]he premise that statutes are typically ‘separable’ or ‘severable,’ and that invalid applications can somehow be severed from valid applications without invalidating the statute as a whole . . . is deeply rooted in American constitutional law.”).

²¹⁸ *Reese*, 92 U.S. at 221.

Reese continues to make appearances when courts issue rulings that “facially” enjoin the enforcement of an overbroad statute.²¹⁹ And litigants who seek total, across-the-board non-enforcement of a statute will often trot out this language from *Reese* in an effort to justify that remedy.²²⁰

This language from *Reese* should never be invoked to defend a “facial” remedy or a rejection of as-applied relief. The entire argument is based on a misunderstanding of judicial review that stems from the writ-of-erasure fallacy. Courts that refuse to enforce statutes—or that refuse to enforce portions or applications of statutes on constitutional grounds—are *never* “mak[ing] a new law”²²¹ or revising the legislature’s work product. They are simply declining to enforce (or enjoining the executive from enforcing) a statute or a portion of a statute that continues to look exactly as it did when the legislature enacted it, and

²¹⁹ See supra note 210.

²²⁰ See, e.g., Brief for Private Petitioners on Severability at 33, Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (Nos. 11-393 & 11-400); Brief for Respondents at 38, Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) (No. 04-1144); Brief for Petitioners at 49, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618).

Professor Dorf made a similar, *Reese*-inspired argument in his attempt to defend the Supreme Court’s refusal to enforce an explicit severability clause in *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016). See Michael C. Dorf, The Procedural Issues in the Texas Abortion Case, Verdict (June 29, 2016), <https://verdict.justia.com/2016/06/29/procedural-issues-texas-abortion-case> [<https://perma.cc/4F5L-3RPU>] (“[T]he [Supreme] Court has refused to apply a severability clause where doing so would require substantial judicial rewriting of the law. . . . To sever . . . would thus require judicial rewriting or, what amounts to the same thing, a very complex injunction of the law in just those circumstances where the law operates unconstitutionally.”). This argument (like *Reese*) commits the writ-of-erasure fallacy, as it falsely equates a judicially imposed non-enforcement policy with the formal revision of the underlying statute. Yet even if one were to accept Professor Dorf’s efforts to characterize the partial judicial enforcement of a statute as an act of “judicial rewriting,” it is hard to understand why Professor Dorf seems willing to allow for this supposed “judicial rewriting” so long as it is not “substantial.” Id. If a court’s partial enforcement of a statute is truly akin to an act of “judicial rewriting,” then it should follow that *any* form of severance is off-limits to the judiciary. Surely a court that asserts the power to actually rewrite the formally enacted text of a statute could not defend itself by claiming that its judicially imposed line-edits were minor or “non-substantial.” Finally, neither Professor Dorf nor the Supreme Court has given any indication of where the line is to be drawn between “substantial” and “non-substantial” acts of judicial rewriting, which opens the door to arbitrary and results-oriented decision making.

²²¹ *Reese*, 92 U.S. at 221.

that remains available for future courts to enforce according to its terms. The faux judicial modesty that appears in *Reese* is premised on a fallacy that equates the judiciary's non-enforcement of a statute with a Council of Revision's authority to formally alter or "strike down" a law.²²²

This is not to say that a court should never entertain "facial" challenges to statutes that have constitutional applications. There is a rich debate on whether and when courts should issue total, across-the-board relief against overbroad statutes, rather than severing and continuing to enforce the constitutional applications of that law.²²³ And I express no view on the ultimate question of when "facial" or "as-applied" relief is appropriate. My target is not the practice of allowing facial challenges to statutes that have constitutional applications, but the argument from *Reese* that has so often been invoked to defend this practice: the idea that a court is somehow "mak[ing] a new law,"²²⁴ "inserting" or "introduc[ing] words of limitation" into a statute,²²⁵ or "substitut[ing] the judicial for the legislative department of the government"²²⁶ when it limits its non-enforcement remedy to a subset of the statute's provisions or applications. There may be other arguments that can justify facial challenges to statutes that have undeniably constitutional applications.²²⁷ But the arguments from *Reese* commit the writ-of-erasure fallacy and should be banished from constitutional discourse.

B. Preliminary and "Permanent" Injunctions

The writ-of-erasure fallacy has also led courts and elected officials to misunderstand the effect of judicial injunctions. When a court enjoins the executive from enforcing a statute, it is not suspending, revoking, or

²²² Worse, the arguments that appear in *Reese* are regularly disregarded whenever the Supreme Court opts for narrow, as-applied relief against an overbroad statute, as it so often does. See cases cited supra note 217. So on the rare occasions in which the Court chooses to invoke *Reese* as an excuse for rejecting a more narrow judicial remedy, it becomes hard for the Court to dispel the appearance that it is using *Reese* in a selective and opportunistic manner.

²²³ See sources cited supra note 38.

²²⁴ *Reese*, 92 U.S. at 221.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ See sources cited supra note 38.

delaying the effective date of that law. The statute remains in effect; the injunction simply forbids the named defendants to enforce the statute while the court's order remains in place. The injunction is nothing more than a judicially imposed non-enforcement policy, and its effect is no different from a non-enforcement policy that the executive imposes upon itself. It stops the executive from initiating enforcement proceedings while the injunction remains in effect. But it does not suspend the statute, and it does not shield those who violate the statute from future prosecution or civil penalties. If a court were to dissolve the injunction, the executive would be free to enforce the statute again—both against those who will violate it in the future and against those who have violated it in the past. The same is true when the executive repudiates a non-enforcement policy adopted by its predecessors: It is free to seek statutory penalties against past, present, and future violators of the formerly unenforced statute.²²⁸ No one gets an immunity from civil or criminal penalties by violating a statute at a time when the executive or the judiciary has chosen not to enforce it.

The writ-of-erasure mindset regards a judicial injunction as a suspension of the law itself. But neither the courts nor the executive has the power to prevent a duly enacted statute from taking effect. All that a court can do is decline to enforce the statute and enjoin the executive from enforcing it. This leaves the political branches with many tools for inducing compliance with statutes that the judiciary has disapproved.

1. Inducing Compliance By Threatening Future Enforcement Against Statutory Violators

One powerful (and underused) tactic is for the executive to threaten future enforcement of a judicially disapproved statute against present-day violators, in the event that a future court repudiates the rulings that are blocking the statute's enforcement. Consider preliminary-injunction orders. Because of forum-shopping opportunities available to plaintiffs, it is common for litigants who challenge the constitutionality of a statute to obtain a preliminary injunction from a friendly or hand-picked district judge, only to have the injunction dissolved and the law upheld on

²²⁸ See *supra* notes 23–27 and accompanying text.

appeal.²²⁹ But if the statute provides for civil or criminal penalties, the government can announce that it will impose those penalties against anyone who violates the statute while the preliminary injunction is in effect, but that it will refrain from initiating enforcement actions until after the injunction is vacated on appeal. An announcement of this sort can induce immediate compliance with the statute—notwithstanding the district court’s preliminary injunction—because anyone who violates the statute during the injunction will run the risk that a future court might vacate the injunction and allow the government to pursue penalties against those who had previously violated the law.²³⁰

²²⁹ See, e.g., *Voting for America, Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013) (vacating preliminary injunction entered against Texas voter-registration laws); *Planned Parenthood Ass’n of Hidalgo Cty. Tex., Inc. v. Suehs*, 692 F.3d 343 (5th Cir. 2012) (vacating preliminary injunction entered against the enforcement of a law excluding Planned Parenthood from the Texas Women’s Health Program); *Texas Medical Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012) (vacating preliminary injunction entered against Texas informed-consent law).

²³⁰ See Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 Sup. Ct. Rev. 193, 209 (“If the final judgment holds the statute valid, dissolves the interlocutory injunction, and denies permanent relief, state officials would be free to prosecute any violation within the limitations period.”).

A district court might try to strengthen its preliminary injunction by including language that purports to permanently enjoin the executive from penalizing those who violate the disputed statute while the preliminary injunction remains in effect. See, e.g., *ACLU v. Reno*, 31 F. Supp. 2d 473, 499 n.7 (E.D. Pa. 1999) (“Granting injunctive relief to the plaintiffs . . . that only immunizes them for prosecution during the pendency of the injunction, but leaves them open to potential prosecution later if the Order of this Court is reversed, would be hollow relief indeed. . . .”); *id.* at 498–99 (enjoining the Attorney General “from enforcing or prosecuting matters premised upon 47 U.S.C. § 231 of the Child Online Protection Act at any time for any conduct that occurs *while this Order is in effect.*” (emphasis added) (footnotes omitted)). But protections that appear in a preliminary order are useless once the preliminary injunction expires or is vacated on appeal—and that remains true even if the preliminary order claims that its shield of protection will last forever. Once the preliminary order is gone, all the protections conferred by the order go with it. A court that wants to confer permanent immunity on those who violate a statute would need to include those protections in a permanent injunction entered after final judgment—and it is not apparent how the courts would have authority to permanently enjoin the enforcement of a statute that they have found to be valid and constitutional. See *Edgar v. MITE Corp.*, 457 U.S. 624, 653 (1982) (Stevens, J., concurring in part and concurring in the judgment) (“There simply is no constitutional or statutory authority that permits a federal judge to grant dispensation from a valid state law.”); *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999) (limiting the federal courts’ equitable powers to relief that was “traditionally accorded by courts of equity” at the time of the Constitution’s ratification).

The same maneuver can be used in response to the misleadingly named “permanent injunctions” that appear in final judgments. If a district court “permanently” enjoins the enforcement of a statute and the government appeals, the government can announce that it will pursue civil and criminal penalties against *anyone* who violates the statute in the event its appeal succeeds. Indeed, the government can make this threat even if its appeal fails and the injunction and judgment become final for res judicata purposes, because a future court might undermine or repudiate the decisions or doctrines that led the district court to “permanently” enjoin the statute’s enforcement.²³¹ If this were to happen, the government can move to vacate the injunction under Rule 60(b).²³² And once the injunction is gone, the government can resume enforcing the statute, both against those who will violate it in the future and against those who have violated it in the past.²³³

In *Edgar v. MITE Corp.*, Justice Marshall argued that courts should automatically interpret preliminary-injunction orders as conferring “permanent protection from penalties for violations that occurred during the period it was in effect,” “unless the order contains specific language to the contrary.” 457 U.S. 624, 657 (1982) (Marshall, J., dissenting). Justice Marshall did not explain how this interpretive proposal could be squared with Fed. R. Civ. P. 65(d)(1), which requires every injunction to “state its terms specifically” and to “describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.” And even if the courts found a way to interpret preliminary-injunction orders in the manner proposed by Justice Marshall while complying with Rule 65(d)(1), that would do nothing to stop the enforcement of a statute after the preliminary injunction expires or is vacated. Unless and until the Supreme Court holds that a source of law external to the preliminary injunction—such as the Due Process Clause—confers permanent immunity upon those who violate a statute while a preliminary injunction is in effect, the executive can make credible threats to pursue penalties if and when the preliminary injunction is dissolved.

²³¹ See supra note 61 and accompanying text.

²³² See supra note 21 and accompanying text.

²³³ See Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 *Cardozo L. Rev.* 43, 64 (1993) (“[S]tatutory provisions that have been declared unconstitutional remain part of the code unless or until repealed by the legislature. Indeed, if a provision is not repealed by the legislature, and the court later changes its mind about the meaning of the Constitution, the provision in question becomes again as fully effective and enforceable in court as if it had never been questioned.”).

Some commentators have argued that the judiciary should continue to block the enforcement of statutes that were once declared unconstitutional—even after the Supreme Court repudiates the rulings or doctrines that caused the statute to be disapproved—if continued non-enforcement would protect reliance interests or ensure that judicially enforced

The writ-of-erasure mindset appears to have left the political branches unaware that these options are available to them—even when they vehemently and publicly denounce the judiciary’s non-enforcement of their duly enacted laws. Consider the response to *Citizens United v. FEC*,²³⁴ which declared unconstitutional a federal statute that prohibits corporations and labor unions from using their general treasury funds for independent electioneering communications.²³⁵ The ruling has been controversial since the moment it was announced,²³⁶ and calls to overrule the decision have only intensified since that time. The 2016 Democratic Party platform calls for *Citizens United* to be overruled,²³⁷ and each of the Democratic Party’s major presidential candidates promised to impose a *Citizens United* litmus test on their nominees to the Supreme Court.²³⁸ Four members of the Supreme Court have all but

statutes reflect the will of present-day majorities. See William Michael Treanor & Gene B. Sperling, Prospective Overruling and the Revival of “Unconstitutional” Statutes, 93 Colum. L. Rev. 1902 (1993). But the courts have no authority to block the enforcement of a duly enacted statute in the absence of a conflict with the Constitution or some higher source of law—and if the judiciary has disavowed its constitutional objections to the statute it no longer has a legal basis for thwarting the statute’s enforcement. Courts cannot block the enforcement of statutes for naked consequentialist reasons.

²³⁴ 558 U.S. 310 (2010).

²³⁵ See 52 U.S.C. § 30118(a) (2012) (“It is unlawful . . . for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices . . .”).

²³⁶ See Michael W. McConnell, Reconsidering *Citizens United* as a Press Clause Case, 123 Yale L.J. 412, 414 (2013) (“*Citizens United v. FEC* is one of the most reviled decisions of the Supreme Court in recent years.”); *id.* at 414–15 & nn.2–7 (citing political and academic criticism of the decision).

²³⁷ See 2016 Democratic Party Platform 2 (2016), http://www.presidency.ucsb.edu/papers_pdf/117717.pdf [<https://perma.cc/S7AD-5QWY>] (“We will fight to . . . overturn the disastrous *Citizens United* decision”); *id.* at 23 (“We will appoint judges who . . . will . . . curb billionaires’ influence over elections because they understand that *Citizens United* has fundamentally damaged our democracy”).

²³⁸ See Matea Gold and Anne Gearan, Hillary Clinton’s Litmus Test for Supreme Court Nominees: a Pledge to Overturn *Citizens United*, Wash. Post (May 14, 2015) <https://www.washingtonpost.com/news/post-politics/wp/2015/05/14/hillary-clintons-litmus-test-for-supreme-court-nominees-a-pledge-to-overturn-citizens-united/> (“Hillary Clinton told a group of her top fundraisers Thursday that if she is elected president, her nominees to the Supreme Court will have to share her belief that the court’s 2010 *Citizens United* decision must be overturned”); Vote Smart, Transcript: MSNBC Democratic Candidates Debate (Feb. 4,

promised to overrule *Citizens United* as soon as they get a fifth vote to do so.²³⁹

Yet the federal statute that *Citizens United* disapproved continues to exist. It is codified at 52 U.S.C. § 30118, and Congress has shown no interest in repealing the statute in response to the Supreme Court's decision. The statute imposes criminal liability on both corporations and individuals who violate its requirements,²⁴⁰ including:

any candidate . . . or other person [who] knowingly . . . accept[s] or receive[s] any contribution prohibited by [52 U.S.C. § 30118], or any officer or any director of any corporation or any national bank or any officer of any labor organization [who] consent[s] to any contribution or expenditure by the corporation, national bank, or labor organization . . . prohibited by this section.²⁴¹

Today corporations and individuals violate this criminal prohibition with impunity, because they know the courts have their back. Any prosecution brought under this statute will be dismissed, and any prosecutor who threatens to bring charges can be sued and enjoined.²⁴² But it is still a federal crime to violate § 30118, even though the courts, at this moment in time, are unwilling to allow prosecutions to proceed. And this judicial protection will last only for as long as *Citizens United* retains majority support on the Supreme Court.

2016), <https://votesmart.org/public-statement/1036712/transcript-msnbc-democratic-candidates-debate#.WQeUnVLMzUI> [<https://perma.cc/HMS6-5EZ6>] (“SANDERS: . . . No nominee of mine, if I’m elected president, to the United States Supreme Court will get that nomination unless he or she is loud and clear, and says they will vote to overturn *Citizens United*.”).

²³⁹ See *Am. Tradition P’ship, Inc. v. Bullock*, 567 U.S. 516, 517–18 (2012) (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., dissenting).

²⁴⁰ See 52 U.S.C. § 30109(d)(1)(A) (2018) (“Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure—(i) aggregating \$25,000 or more during a calendar year shall be fined under title 18, or imprisoned for not more than 5 years, or both; or (ii) aggregating \$2,000 or more (but less than \$25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both.”).

²⁴¹ See *id.*, § 30118(a).

²⁴² See *Steffel v. Thompson*, 415 U.S. 452, 475 (1974); *Ex parte Young*, 209 U.S. 123, 159–60 (1908).

The politicians who oppose *Citizens United* can do more than simply call for its overruling: They can threaten to prosecute anyone who violates § 30118 if a future Supreme Court removes the judicial obstacles to enforcement. Imagine if just one of the major presidential candidates had made such a promise during the 2016 campaign—while simultaneously promising Supreme Court nominees who will overrule *Citizens United*. That would go a long way toward inducing compliance with § 30118, because few people want to undertake the risk of a future criminal prosecution even if they think they might ultimately prevail in the end.²⁴³ If there is even a possibility that a future court might repudiate the decision enjoining the enforcement of a law, the mere threat of future prosecution by the executive—or even sabre-rattling by a person seeking election to office—may be enough to induce substantial if not total compliance with the statute during a period of judicial non-enforcement.²⁴⁴

²⁴³ See David A. Strauss, *The Independent Counsel Statute: What Went Wrong?*, 51 *Admin. L. Rev.* 651, 651–52 (1999) (describing the many ways in which a criminal prosecution can “ruin a person’s life,” even if the target is never convicted of a crime).

²⁴⁴ This is not to say that the political branches *should* threaten to pursue future penalties whenever someone violates a statute during a period of judicially imposed non-enforcement. Judicial supremacists, for example, believe that the political branches should respect the Supreme Court’s opinions as the final and authoritative interpretation of constitutional meaning, and they will look askance at efforts to deter behaviors that the current Supreme Court has declared constitutionally protected. See, e.g., Alexander & Schauer, *Defending Judicial Supremacy*, *supra* note 37, at 455 (2000) (“[T]he Supreme Court’s interpretations of the Constitution should be taken by all other officials, judicial and non-judicial, as having an authoritative status equivalent to the Constitution itself.”). The constitutional pronouncements of federal district courts, on the other hand, are not regarded by judicial supremacists as tantamount to the Constitution itself, so a belief in judicial supremacy should not preclude the executive from threatening future penalties in response to a district court’s preliminary injunction—especially when the preliminary injunction reflects only the district court’s tentative beliefs regarding the statute’s constitutionality. See *id.*; Neuborne, *supra* note 37, at 993 (1987) (“[O]nce the Supreme Court, or a circuit court for that matter, enunciates a settled rule of law, constitutional or otherwise, in the context of resolving an article III case or controversy, our system of government obliges executive officials to comply with the law as judicially declared.”). Others might embrace a rule-consequentialist disapproval of tactics that are designed to induce compliance with a judicially disapproved statute, especially if they doubt the capacity or the incentives of the political branches to interpret the Constitution properly.

The most compelling situations for threatening future enforcement will arise when a statute prohibits *malum in se* conduct or other behaviors that the government has a crucial interest in suppressing, and when a court enjoins the enforcement of that statute for flimsy or specious constitutional reasons. People may disagree over which statutory policies are sufficiently important—and which court rationales are sufficiently dubious—to warrant a

2. Potential Obstacles To Inducing Compliance With A Judicially Disapproved Statute

Of course, anyone who tries to induce compliance with a judicially disapproved statute by threatening future penalties will encounter some obstacles and limitations. First, a threat of future enforcement will not deter anyone from violating a judicially disapproved statute unless there is a credible possibility that the ruling might be repudiated on appeal or by a future court decision. Deterrence depends on the perceived risk of a future occurrence,²⁴⁵ and no one will be deterred by the prospect of something that is perceived to have a zero percent likelihood of happening. So when a district court's injunction is backed by a solid and stable Supreme Court majority—or involves an issue that the Supreme Court has shown no interest in revisiting—it is unlikely that even the most emphatic promise of future enforcement will do much to encourage present-day compliance. Threats of this sort are more likely to induce compliance when the law is unsettled, the issues are novel, or the case involves doctrines and precedents that members of the Supreme Court have expressed interest in overruling.

Second, many laws have statutes of limitations that shield violators from penalties after a certain window of time. Federal law provides a five-year statute of limitations for most non-capital crimes,²⁴⁶ and most states have statutes of limitations for all but the most serious civil and criminal offenses. This limits the executive's ability to enforce a previously enjoined statute against past violators, and it also limits the

response of this sort, and I take no position on the normative question of whether and when the political branches should attempt to induce compliance with a judicially disapproved statute by threatening future enforcement. My claim is only that this option is available to the political branches when a court enjoins the enforcement of their laws, and that the writ-of-erasure fallacy has caused many to overlook this possibility by assuming that a judicially disapproved statute has been formally suspended or revoked.

²⁴⁵ See Harold J. Brumm & Dale O. Cloninger, *Perceived Risk of Punishment and the Commission of Homicides: A Covariance Structure Analysis*, 31 *J. Econ. Behavior & Org.* 1, 10 (1996); Maynard L. Erickson et al., *The Deterrence Doctrine and the Perceived Certainty of Legal Punishments*, 42 *Am. Soc. Rev.* 305 (1977).

²⁴⁶ 18 U.S.C. § 3282(a) (2012) (“Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed”).

government's ability to induce compliance with a judicially disapproved statute by threatening future prosecution.²⁴⁷ If a ruling that enjoins the enforcement of a federal criminal statute looks safe for at least the next five years, then it becomes harder to make people think that their present-day statutory violations could expose them to prosecution or penalties in the future.

Third, anyone who violates a *criminal* statute in reliance on a judicial pronouncement of unconstitutionality might have a mistake-of-law defense if that judicial ruling is later overturned.²⁴⁸ Whether such a defense would be available depends on the law of the jurisdiction that enacted the challenged statute. Louisiana, for example, provides a mistake-of-law defense if a criminal defendant “reasonably relied on a final judgment of a competent court of last resort that a provision making the conduct in question criminal was unconstitutional.”²⁴⁹ This would shield defendants who relied on constitutional pronouncements from the Supreme Court of the United States or the state supreme court, but not those who relied on preliminary injunctions or rulings from trial or intermediate appellate courts. Other states follow Louisiana by excluding trial-court judgments or orders as the basis for a mistake-of-law defense.²⁵⁰ And most states, as well as the Model Penal Code, limit their mistake-of-law defenses to those who believed that their conduct

²⁴⁷ The statute of limitations also serves to protect the reliance interests of those who acquired property or entered into contracts in violation of a judicially disapproved statute—even if a future court overrules the decisions and doctrines that had blocked the statute's enforcement. Cf. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), which had enjoined the enforcement of minimum-wage legislation); *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934) (reducing judicial scrutiny of laws that impair the obligation of contracts).

²⁴⁸ Mistake-of-law defenses are available only in *criminal* prosecutions; these defenses are inapplicable when the government or private litigants seek civil penalties against someone who relied on a now-repudiated court decision. See Richard S. Murphy & Erin A. O'Hara, *Mistake of Federal Criminal Law: A Study of Coalitions and Costly Information*, 5 *Sup. Ct. Econ. Rev.* 217, 276 (1997) (“Mistake of law plays a limited role in criminal law, but it never excuses civil liability.”).

²⁴⁹ La. Stat. Ann. § 14:17(2) (2016).

²⁵⁰ See, e.g., 720 Ill. Comp. Stat. 5/4-8(b) (2016) (“A person's reasonable belief that his conduct does not constitute an offense is a defense if: . . . (3) he acts in reliance upon an order or opinion of an Illinois Appellate or Supreme Court, or a United States appellate court later overruled or reversed . . .”); Mo. Rev. Stat. § 562.031(2)(b) (2016) (requiring reasonable reliance on “[a]n opinion or order of an appellate court”); Douglas Laycock, *Modern American Remedies* 601–02 (4th ed. 2010).

“does not legally constitute an offense.”²⁵¹ It is not clear whether that language would encompass a defendant who *knew* that he was committing an “offense” as defined in a statute, but believed the statute to be unconstitutional on account of a now-overruled judicial ruling.²⁵²

At the federal level, there is no statute that codifies a mistake-of-law defense for federal crimes. But some federal appellate courts have held or suggested that a defense should be available to those who violated a federal criminal statute in reliance on a judicial ruling that was later vacated or held to be erroneous.²⁵³ The Supreme Court, on the other hand, has sustained criminal convictions for acts that occurred when circuit-court precedent excluded the defendant’s conduct from the scope of the relevant criminal statute,²⁵⁴ which indicates that reliance on a federal judicial pronouncement does not confer automatic protection from subsequent criminal prosecution.

²⁵¹ Model Penal Code § 2.04(3) (“A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when . . . (b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in . . . (ii) a judicial decision, opinion or judgment”); see also Tex. Penal Code Ann. § 8.03(b) (West) (“It is an affirmative defense to prosecution that the actor reasonably believed the conduct charged did not constitute a crime and that he acted in reasonable reliance upon . . . (2) a written interpretation of the law contained in an opinion of a court of record or made by a public official charged by law with responsibility for interpreting the law in question.”).

²⁵² See Vikram David Amar, *How Much Protection Do Injunctions Against Enforcement of Allegedly Unconstitutional Statutes Provide?*, 31 *Fordham Urb. L.J.* 657, 671–72 (2004) (“Someone who acts believing that her behavior is not criminal under a given statute in the first place is arguably more innocent than someone who knowingly violates a statute because she feels it is unconstitutional.”).

²⁵³ See *United States v. Mancuso*, 139 F.2d 90, 92 (3d Cir. 1943) (“While it is true that men are, in general, held responsible for violations of the law, whether they know it or not, we do not think the layman participating in a law suit is required to know more law than the judge. If the litigant does something, or fails to do something, while under the protection of a court order he should not, therefore, be subject to criminal penalties for that act or omission.”) (footnote omitted); see also *Clarke v. United States*, 915 F.2d 699, 702 (D.C. Cir. 1990) (citing *Mancuso* with approval and observing that “the few circuits faced with the question have held that a federal judgment, later reversed or found erroneous, is a defense to a federal prosecution for acts committed while the judgment was in effect”).

²⁵⁴ See *United States v. Shabani*, 513 U.S. 10, 15–17 (1994); *United States v. Rodgers*, 466 U.S. 475, 484 (1984); see also *infra* note 261 and accompanying text.

Finally, a statutory violator might try to assert a constitutional due-process defense if the government (or a private litigant) pursues penalties for conduct that occurred at a time when the courts had blocked the statute's enforcement, by arguing that he lacked fair notice that his conduct could subject him to criminal punishment or civil liability.²⁵⁵ It is unclear whether or to what extent the courts would (or should) accept a lack-of-notice argument in this context. The defendant certainly had fair notice that he was violating the *statute*; his complaint would be that the judiciary's repudiation of an earlier court's non-enforcement policy retroactively changed the expected consequences of his statutory violations. Yet retroactivity is ubiquitous in the law—and that is especially true of judicial decisionmaking, which binds the litigants even when the court overrules its prior decisions and even when the parties lack notice of how the court will rule.²⁵⁶ The Supreme Court gives its rulings retroactive effect beyond the parties to the lawsuit,²⁵⁷ and that remains true when the Court's rulings impose new and unforeseen liabilities,²⁵⁸ or when they overrule or reverse previous

²⁵⁵ See Douglas Laycock, *supra* note 251, at 601; Amar, *supra* note 253, at 671-72 (2004); Patrick T. Gillen, Preliminary Injunctive Relief Against Governmental Defendants: Trustworthy Shield or Sword of Damocles?, 8 *Drexel L. Rev.* 269, 302-06 (2016); see also *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

²⁵⁶ See *Ruppert v. Ruppert*, 134 F.2d 497, 500 (D.C. Cir. 1942) ("[T]he general principle is that a decision of a court of appellate jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law but that it never was the law."); *Legg's Estate v. Commissioner*, 114 F.2d 760, 764 (4th Cir. 1940) ("Decisions are mere evidences of the law, not the law itself; and an overruling decision is not a change of law but a mere correction of an erroneous interpretation."); see also *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency."); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("Judicial decisions have had retrospective operation for near a thousand years.").

²⁵⁷ See *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 96 (1993) ("[A] rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law.").

²⁵⁸ See, e.g., *Harper*, 509 U.S. at 89-102 (retroactively applying a ruling that had forbidden the States to tax retirement benefits paid by the federal government while exempting retirement benefits paid by the State or its subdivisions); *id.* at 113 (O'Connor, J.,

judicial decisions on which others have reasonably relied.²⁵⁹ At the same time, the Court has recognized that the Due Process Clause imposes *some* limits on retroactive judicial decisionmaking—but it has found constitutional violations only when the government seeks criminal sanctions based on a court’s novel and unforeseeable construction of a criminal statute.²⁶⁰ If it was at least “reasonably foreseeable” that the judiciary might interpret a criminal statute in a manner that overrules pre-existing precedent, then the Supreme Court does not hesitate to give retroactive effect to rulings that define the scope of criminal conduct.²⁶¹

dissenting) (protesting that the Court’s retroactivity ruling will “impose crushing and unnecessary liability on the States, precisely at a time when they can least afford it”). The qualified-immunity defense is one notable exception to the practice of giving retroactive effect to judicial decisions that impose new civil liabilities, see *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), but this defense is available only in lawsuits brought under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

²⁵⁹ See, e.g., *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 354–64 (1991) (announcing a new statute-of-limitations period for private securities fraud actions and applying that limitations period retroactively to dismiss the plaintiffs’ case, even though the plaintiffs had reasonably relied on Ninth Circuit precedent that had established a longer statute of limitations); *id.* at 369–70 (O’Connor, J., dissenting) (noting that the plaintiffs had relied upon “a solid wall of binding Ninth Circuit authority dating back more than 30 years,” and criticizing the Court for “shut[ting] the courthouse door on respondents because they were unable to predict the future”); *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (overruling a longstanding Eighth Circuit precedent that had narrowly construed a federal criminal statute and retroactively enforcing the Supreme Court’s newly announced interpretation of the statute against the defendant).

²⁶⁰ See *United States v. Lanier*, 520 U.S. 259, 266 (1997) (“[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope”); *Marks v. United States*, 430 U.S. 188, 195–96 (1977) (holding that the Due Process Clause forbids retroactive application of Supreme Court rulings that broadened the reach of a criminal obscenity statute, because the defendants “had no fair warning that their products might be subjected to the new standards”); *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (holding that the Due Process clause prohibits retroactive application of a “judicial construction of a criminal statute [that] is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue” (internal quotations omitted)).

²⁶¹ *Rodgers*, 466 U.S. at 484 (“[A]ny argument by respondent against retroactive application to him of our present decision, even if he could establish reliance upon the earlier *Friedman* decision, would be unavailing since the existence of conflicting cases from other Courts of Appeals made review of that issue by this Court and decision against the position of the respondent reasonably foreseeable.”); see also *United States v. Qualls*, 172 F.3d 1136, 1138 n.1 (9th Cir. 1999) (“Due process bars retroactive application of a judicial expansion of

The Supreme Court has also been surprisingly acceptive of retroactive legislation. Of course, the Court has long interpreted the Ex Post Facto Clause as forbidding laws that retroactively impose *criminal* sanctions on past conduct.²⁶² But laws that retroactively impose *civil* liability are subject only to rational-basis review—notwithstanding the lack of notice provided to those who acted in accordance with the law existing at the time.²⁶³ This makes it hard to establish a constitutional due-process defense when the government (or a private litigant) pursues only *civil* liability against those who violated a statute at a time when its enforcement had been enjoined. If the Supreme Court would permit the government to enact an entirely new statute that retroactively imposes these civil consequences, or if it would subject a retroactive statute of that sort to mere rational-basis review, then it should *a fortiori* permit civil liability and penalties to be imposed under a pre-existing statute

a law only if the change in the law is unforeseeable.”); Trevor W. Morrison, Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes, 74 S. Cal. L. Rev. 455, 466–67 (2001) (“[T]he Due Process Clause prohibits the retroactive application of *unforeseeable* judicial enlargements of criminal statutes.” (emphasis added)).

²⁶² See *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (“[A]ny statute which punishes as a crime an act previously committed, which was innocent when done . . . is prohibited as *ex post facto*.” (quoting *Beazell v. Ohio*, 269 U.S. 167, 169–70 (1925)); see also *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390–91 (1798).

²⁶³ See *United States v. Carlton*, 512 U.S. 26, 30–32 (1994) (upholding retroactive taxation under rational-basis review); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (upholding retroactive legislation governing workers’ compensation benefits under rational-basis review); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) (“The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process. . . . But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.” (citation and internal quotation marks omitted)); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 5, 14–20 (1976) (upholding retroactive civil liability in the Black Lung Benefits Act of 1972 after applying rational-basis review); *United States v. Monsanto Co.*, 858 F.2d 160, 173–75 (4th Cir. 1988) (upholding retroactive civil liability under CERCLA (Superfund)); *id.* at 174 (noting that other courts “have held uniformly that retroactive operation [of CERCLA] survives the Supreme Court’s tests for due process validity”); see also Noah Feldman, *Cosmopolitan Law?*, 116 Yale L.J. 1022, 1056 n.140 (2007) (“[R]etroactive civil liability has often been found not to violate the Ex Post Facto Clause or constitutional due process.”); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv. L. Rev. 1055, 1074 (1997) (“[T]he Court has not subjected retroactive legislation to close due process scrutiny, requiring only that the legislation have some rational basis.”); David B. Spence, *Imposing Individual Liability as a Legislative Policy Choice: Holmesian “Intuitions” and Superfund Reform*, 93 Nw. U. L. Rev. 389, 403 n.67 (1999) (“[F]ederal courts have upheld the constitutionality of Superfund’s imposition of retroactive liability.”).

that the courts weren't enforcing at the time of the statutory violations.²⁶⁴

The existing cases indicate that the justices will be most receptive to a constitutional lack-of-notice defense when: (1) The government is pursuing criminal rather than civil penalties;²⁶⁵ (2) The defendant could not have reasonably foreseen that the judiciary might repudiate the constitutional objections that led an earlier court to enjoin the statute's enforcement;²⁶⁶ and (3) The prohibited conduct involves speech or expression, where the Court insists on stricter fair-warning requirements.²⁶⁷ Yet even in these situations, the defendant must explain how fair notice is denied when someone knowingly violates a criminal statute, but does so at a time when the statute's *enforcement* has been temporarily thwarted by the judiciary's constitutional objections. No one has a constitutional due-process defense if they violate a statute at a time when the *executive* has chosen not to enforce it,²⁶⁸ and it is not apparent

²⁶⁴ The government could easily assert a rational basis in enforcing a valid and constitutional law that the courts had wrongly attempted to thwart.

²⁶⁵ See *Rose v. Locke*, 423 U.S. 48, 49–50 (1975) (“[T]he fair-warning requirement embodied in the Due Process Clause prohibits the States from holding an individual *criminally* responsible for conduct which he could not reasonably understand to be proscribed.” (emphasis added) (citation omitted)); William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 101, 128 (2018) (“[C]riminal prosecutions have generally been thought to present distinct fair-warning concerns that do not apply to civil statutes.”).

²⁶⁶ Compare *Bouie v. City of Columbia*, 378 U.S. 347, 354 (forbidding retroactive application of a “judicial construction of a criminal statute [that] is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue” (internal quotations omitted)), with *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) (holding that the Due Process clause permits a state court to retroactively abolish the “year and a day” element of common-law murder because such a ruling was not “unexpected and indefensible”), and *Rodgers*, 466 U.S. at 484 (applying the Supreme Court’s newly announced interpretation of a criminal statute retroactively, even though it had overruled circuit precedent on which the defendant had claimed to rely, because the Supreme Court’s repudiation of that circuit precedent was “reasonably foreseeable”).

²⁶⁷ See *Marks v. United States*, 430 U.S. 188, 196 (1977) (“We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values.”).

²⁶⁸ See *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113–14 (1953) (rejecting the defense of desuetude and enforcing the District of Columbia’s anti-discrimination ordinances, even though they had been ignored and unenforced by district authorities); *id.* (“The failure of the executive branch to enforce a law does not result in its modification or repeal.”); see also Zachary S. Price, *Reliance on Nonenforcement*, 58 Wm.

why the due-process analysis should be any different when the non-enforcement policy has been imposed by the judiciary. In both situations, one has notice from the statute that the prohibited conduct is unlawful and subject to penalties, and they know or should know that the present-day non-enforcement policy—whether adopted by the executive or the judiciary—is subject to reversal or repudiation.²⁶⁹ Indeed, the intuition that a defendant *lacks* fair notice when he violates a statute that the courts have refused to enforce may itself be rooted in the writ-of-erasure fallacy: The widespread belief that courts “strike down” or “invalidate” statutes makes the retrospective enforcement of a previously unenforced statute seem tantamount to a retroactive legislative enactment or an unconstitutional *ex post facto* law.

3. Drafting Legislation To Counteract The Effects Of A Judicial Injunction

None of these potential obstacles to inducing compliance with a judicially disapproved statute are insurmountable—and the legislature can obviate many of these barriers to subsequent enforcement in the statutes that it enacts. Suppose that a legislature is about to enact a law that is certain to be challenged in court: it could be a campaign-finance law, a gun-control measure, a civil-rights act, a child-labor law in the 1920s, an abortion regulation, a prohibition on virtual child pornography, or a state-law prohibition on sanctuary cities. If legislators are worried that a court might block the law’s enforcement—and if they want the statute to remain effective despite the judiciary’s opposition—then they can specify in the statute that: (1) There will be no statute of limitations for the civil and criminal penalties provided in the law, or (at the very least) the statute of limitations will be tolled if a court declares the statute unconstitutional or enjoins its enforcement; (2) There will be no mistake-of-law defense for those who violate the statute in reliance

& Mary L. Rev. 937, 945 (2017) (“[I]ndividuals who accept any invitation by the President or executive officials to undertake illegal conduct must do so at their peril. Due process cannot normally shield them from future enforcement.”).

²⁶⁹ See *Edgar v. MITE Corp.*, 457 U.S. 624, 651 (1982) (Stevens, J., concurring in part and concurring in the judgement) (“The fact that a federal judge has entered a declaration that the law is invalid does not provide” an “absolute assurance that he may not be punished for his contemplated activity” because “every litigant is painfully aware of the possibility that a favorable judgment of a trial court may be reversed on appeal.”).

on a judicial pronouncement of unconstitutionality; and (3) Those who violate the statute remain subject to penalties even if they act at a time when the courts have blocked the statute's enforcement. That nullifies defenses based on a mistake of law or the statute of limitations, making the threat of future prosecution more salient and more likely to induce compliance. And it weakens the argument for a constitutional "lack of notice" defense, because the statute itself warns that its penalties remain applicable to those who violate the law during a period of executive or judicial non-enforcement.

The legislature can also induce compliance with its statutes by providing for private enforcement through civil lawsuits and *qui tam* relator actions. These mechanisms are especially powerful because they enable private litigants to enforce a statute even after a federal district court has enjoined the executive from enforcing it.²⁷⁰ When a district

²⁷⁰ When Congress enacted the Partial-Birth Abortion Ban Act of 2003, for example, it not only imposed criminal liability on physicians who violated the statute, it also established a private right of action that allowed the father or maternal grandparents of the fetus to sue for statutory damages. See 18 U.S.C. § 1531(c) (2012). When the federal district courts enjoined the Attorney General from enforcing the statutes, they did not (and could not) enjoin the enforcement of the private right of action, as the potential plaintiffs in these future lawsuits could not be identified and were not parties to the litigation. See, e.g., *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 493 (S.D.N.Y. 2004) (enjoining only "[t]he Attorney General of the United States" and "his officers, agents, servants, employees, successors, and all others acting in concert or participation with them . . . from enforcing the Act"); see *Planned Parenthood Federation of America v. Ashcroft*, 320 F. Supp. 2d 957, 1035 (N.D. Cal. 2004); *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1048 (D. Neb. 2004). It is practically impossible to bring a pre-enforcement challenge to statutes that establish private rights of action, because the litigants who will enforce the statute are hard to identify until they actually bring suit. See *Nova Health Systems v. Gandy*, 416 F.3d 1149, 1157–58 (10th Cir. 2005) ("Article III does not allow a plaintiff who wishes to challenge state legislation to do so simply by naming as a defendant anyone who, under appropriate circumstances, might conceivably have an occasion to file a suit for avid damages under the relevant state law at some future date."); *id.* at 1153 ("A party may not attack a tort statute in federal court simply by naming as a defendant anyone who might someday have a cause of action under the challenged law."); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) ("[P]laintiffs lack standing to contest the statutes authorizing private rights of action, not only because the defendants cannot cause the plaintiffs injury by enforcing the private-action statutes, but also because any potential dispute plaintiffs may have with future private plaintiffs could not be redressed by an injunction running only against public prosecutors An injunction prohibiting *these defendants* from enforcing the private-suit rules would be pointless; an injunction prohibiting *the world* from filing private suits would be a flagrant violation of

court declares a statute unconstitutional or enjoins its enforcement, its decision binds only the named defendants, and it has no precedential value in other court proceedings.²⁷¹ The statute continues to exist (it has not been “struck down”) and private litigants remain free to bring their own enforcement actions in state or federal court. And if the district court’s ruling is affirmed by a federal court of appeals, that holding binds only the federal courts in that circuit and does not control the state judiciary,²⁷² leaving private litigants free to continue enforcing the statute in state-court proceedings. Unless and until the Supreme Court of the United States declares a statute unconstitutional, the States remain free to authorize and entertain private enforcement actions in their own courts—even after a federal district or circuit court has disapproved the statute and enjoined the State’s executive from enforcing it.²⁷³

Of course, the defendants in these private enforcement actions can reassert the constitutional objections to the statute—and perhaps they will persuade the court to follow the reasoning of the courts that have disapproved the statute. But a defendant has no entitlement to attorneys’ fees when he asserts his constitutional rights defensively in a private enforcement action,²⁷⁴ and the need to foot one’s own legal bills may induce statutory compliance even for those who expect to prevail on their constitutional objections. In addition, the plaintiff enforcing the statute will have the prerogative to choose his forum, so he will sue in the court that is most likely to uphold and enforce the statute. When

both Article III and the due process clause (for putative private plaintiffs are entitled to be notified and heard before courts adjudicate their entitlements).”).

²⁷¹ See *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” (quoting 18 J. Moore et al., *Moore’s Federal Practice* § 134.02[1][d], at 134–26 (3d ed. 2011))); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 & n.21 (1997).

²⁷² See *Arizonans for Official English*, 520 U.S. at 58–59.

²⁷³ See *Ex parte Young*, 209 U.S. 123, 163 (1908) (“[T]he right to enjoin an individual, even though a state official, from commencing suits . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature [A]n injunction against a state court would be a violation of the whole scheme of our Government.”). Collateral estoppel will not supply a defense if a private plaintiff brings a civil enforcement action against the litigants who persuaded an earlier court to declare the statute unconstitutional, because the private plaintiff was not a party or privy to that lawsuit. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979).

²⁷⁴ See 42 U.S.C. § 1988(b) (2012) (providing attorneys’ fees only to “prevailing part[ies]” in lawsuits brought under 42 U.S.C. § 1983 and other federal civil-rights statutes).

litigants bring pre-enforcement challenges, by contrast, the statute's opponents get to choose the forum, which almost invariably leads to a favorable district-court ruling that may or may not be affirmed on appeal.²⁷⁵

These sorts of provisions should be standard fare in legislation that is expected to encounter a court challenge—assuming, of course, that the legislature wants to induce compliance with its statute and isn't privately hoping that the courts will block its enforcement.²⁷⁶ But the writ-of-erasure mindset all too often leads the political branches to assume that nothing can be done to overcome federal-court rulings that enjoin the enforcement of their statutes—because they wrongly perceive an injunction or a pronouncement of unconstitutionality as having “blocked” or “struck down” the statute itself. The statute, however, continues to exist as a law, and the political branches have many tools for inducing compliance with that law while a judicial injunction remains in effect.

III. IMPLICATIONS FOR JUDICIAL DOCTRINE

When judicial review is understood as a temporary non-enforcement prerogative, rather than a veto-like power to cancel or suspend legislation, there are many implications that follow for judicial doctrine and decisionmaking.

A. Article III Standing

The Supreme Court requires plaintiffs in federal court to establish standing to sue, and it interprets Article III to impose a constitutional requirement for standing that comprises three distinct elements:²⁷⁷ First, a plaintiff must show injury in fact. Second, the plaintiff must show that

²⁷⁵ See *supra* note 229 and accompanying text.

²⁷⁶ See Frank H. Easterbrook, *Bills of Rights and Regression to the Mean*, 15 *Harv. J. L. & Pub. Pol'y.* 71, 78 (1992) (recounting how the Illinois legislature would enact an anti-abortion law every two years throughout the 1980s, “expecting the courts to hold it unconstitutional,” but that after *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the legislature stopped enacting anti-abortion legislation once it “realized that courts just might *enforce* what they were enacting”) (emphasis original).

²⁷⁷ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

the injury was caused by the conduct of which he complains. Finally, the plaintiff must show that judicial relief will redress the injury that he asserts. The Court's Article III standing doctrine is controversial and has been widely criticized.²⁷⁸ My concern, however, is not with the soundness of this doctrine, but with avoiding the writ-of-erasure fallacy when applying it.

Litigants in establishment-clause cases, for example, will sometimes assert that they are injured by the mere existence of a statute that "endorses" religion or religious belief. In *Newdow v. Lefevre*,²⁷⁹ for example, an atheist challenged the constitutionality of 36 U.S.C. § 302, a statute that simply says, "'In God we trust' is the national motto," and that does not authorize or compel any action by the executive. The plaintiff claimed that this statute injured him by endorsing theism and turning him and his fellow atheists into "political outsiders," and he sought a declaratory judgment that section 302 violates the Establishment Clause.²⁸⁰ The Ninth Circuit held that the plaintiff lacked standing because he had failed to demonstrate injury in fact from a statute that merely declares a national motto.²⁸¹ But the plaintiff faced an additional (and insurmountable) obstacle to standing: Even if he could have shown an injury from a statute's supposed endorsement of theism, the courts have no ability to redress that injury because they cannot revoke or erase a duly enacted statute. The statute and its endorsement of theism will continue to exist—even if a court were to issue a declaratory judgment proclaiming that the statute violates the Establishment Clause.

²⁷⁸ See, e.g., Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163 (1992); William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221 (1988); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 Cornell L. Rev. 663 (1977); Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim to Relief*, 83 Yale L.J. 425 (1974).

²⁷⁹ 598 F.3d 638 (9th Cir. 2010).

²⁸⁰ Original Complaint para. 182, *Newdow v. Congress of the United States*, 435 F. Supp. 2d 1066 (E.D. Cal. 2006) (No. 2:05-cv-02339).

²⁸¹ *Newdow*, 598 F.3d at 643 ("Newdow lacks standing to challenge 36 U.S.C. § 302, which merely recognizes 'In God We Trust' is the national motto . . . Although Newdow alleges the national motto turns Atheists into political outsiders and inflicts a stigmatic injury upon them, an 'abstract stigmatic injury' resulting from such outsider status is insufficient to confer standing. See *Allen v. Wright*, 468 U.S. 737, 755–56 (1984).").

A similar claim was made in *Barber v. Bryant*,²⁸² where a group of plaintiffs challenged a Mississippi conscience-protection law that shielded individuals from penalties if they declined to participate in same-sex marriage ceremonies or other activities that violate their conscientious beliefs. The Mississippi statute singled out three conscientious beliefs that could serve as the basis for invoking the statute's protections: (1) the belief that marriage is between one man and one woman; (2) the belief that sexual relations should be reserved to a man-woman marriage; and (3) the belief that equates an individual's sex with his "biological sex as objectively determined by anatomy and genetics at time of birth."²⁸³ Some of the plaintiffs claimed that this statute injured them by endorsing three specific beliefs that they did not share,²⁸⁴ and they argued that this supposed "endorsement" in the language of the statute violated the Establishment Clause.²⁸⁵

But it is impossible for a court to "redress" an injury that is inflicted entirely by words appearing in a statute. The statute will continue to exist even after a court announces that it violates the Establishment Clause, and the legislature's supposed "endorsement" of religious belief will remain on the books. A court is simply powerless to redress an endorsement of religion that appears solely in the text of enacted legislation; the court can act only against executive action that is implementing a regime of religious endorsement.²⁸⁶

Finally, in *Catholic League for Religious and Civil Rights v. City and County of San Francisco*,²⁸⁷ a Catholic organization challenged a non-binding resolution of the San Francisco Board of Supervisors that

²⁸² 860 F.3d 345 (5th Cir. 2017). In the interest of full disclosure, I represented Governor Bryant in this litigation.

²⁸³ Id. at 351 (quoting 2016 Miss. Laws HB 1523 § 2).

²⁸⁴ Id. at 353 ("The plaintiffs claim they have suffered a stigmatic injury from the statute's endorsement of the Section 2 beliefs.").

²⁸⁵ Id. at 350, 353.

²⁸⁶ The Fifth Circuit held that the plaintiffs in *Barber v. Bryant* had failed to establish injury in fact from the purported "endorsement" in the statute, on the ground that Article III requires a "personal confrontation" with the government's alleged endorsement of religious beliefs, and that it is impossible to "personally confront" statutory text. Id. at 353-54. It therefore did not reach the redressability question.

²⁸⁷ 624 F.3d 1043, 1047-48 (9th Cir. 2010) (en banc).

denounced the Catholic Church for opposing homosexual adoption. The resolution described the Church's stance as "hateful and discriminatory," "insulting and callous," and "insensitiv[e] and ignoran[t]."²⁸⁸ And the Catholic plaintiffs claimed that this resolution injured them by "send[ing] a clear message" that "they are outsiders, not full members of the political community."²⁸⁹

The Ninth Circuit held that the plaintiffs had Article III standing to challenge the resolution. It concluded that the mere existence of the resolution inflicted injury on the plaintiffs, because San Francisco had "directly disparage[d the plaintiffs'] religious beliefs through its resolution . . ."²⁹⁰ But this injury cannot be redressed with judicial relief because the resolution will continue to exist—along with its "direct[] disparage[ment]" of the plaintiffs' religious beliefs—even if a court issues a declaratory judgment pronouncing the resolution unconstitutional. The Ninth Circuit, however, held that the plaintiffs' injury *was* redressable because it thought that "[b]y declaring the resolution unconstitutional, the official act of the government *becomes null and void*."²⁹¹ But that is the writ-of-erasure fallacy in action. A judicial pronouncement of unconstitutionality does *not* render a statute (or a resolution) "null and void." The San Francisco resolution will continue to exist and continue sending an anti-Catholic message no matter how a court rules on the Establishment Clause question.

B. Shelby County v. Holder

The Voting Rights Act of 1965 forbids certain state and local jurisdictions to implement any voting-related law unless they first secure "preclearance" from the Attorney General or a federal court. The preclearance requirement appears in section 5 of the Act, and the "coverage formula" that defines the jurisdictions subject to preclearance appears in section 4(b). Initially these provisions were scheduled to expire in 1970,²⁹² but Congress repeatedly extended them.²⁹³ The most

²⁸⁸ Id. at 1053.

²⁸⁹ Id. at 1048 (quoting the plaintiffs' complaint).

²⁹⁰ Id. at 1053; see also id. at 1052 ("The cause of the plaintiffs' injury here . . . is the resolution itself.").

²⁹¹ Id. at 1053 (emphasis added).

²⁹² See Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438 (amended 1970).

recent extension was enacted in 2006, and under that law the preclearance regime is set to expire in 2031.²⁹⁴ If a covered jurisdiction tries to enforce a voting-related measure that has not been precleared by federal authorities, the Attorney General²⁹⁵ or a private litigant²⁹⁶ may sue to enjoin the enforcement of that law. Lawsuits of this sort are known as section 5 enforcement actions.

But in *Shelby County v. Holder*,²⁹⁷ the Supreme Court held that the coverage formula in section 4(b) was outdated and unconstitutional—and that covered jurisdictions could enact and implement voting-related laws without obtaining federal preclearance. In response to *Shelby County*, covered jurisdictions have (for the most part) stopped seeking preclearance for their voting-related measures. And the Department of Justice does not consider or rule on preclearance submissions from the jurisdictions described in section 4(b), unless those jurisdictions have been “bailed in” to preclearance by a separate court order under section 3(c) of the Voting Rights Act.²⁹⁸

But *Shelby County* did not “strike down” the preclearance regime or the coverage formula. Both section 5 and section 4(b) continue to exist as federal statutes; they remain in the U.S. Code²⁹⁹ and the Statutes at Large³⁰⁰ and they have not been repealed. All that *Shelby County* means is that five members of the Supreme Court—as it existed in 2013—believed the coverage formula to be unconstitutional, and for that reason a covered jurisdiction can flout the congressionally enacted preclearance

²⁹³ See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 3–4, 84 Stat. 314, 315 (amended 1975); Act of Aug. 6, 1975, Pub. L. No. 94-73, §§ 101, 202, 89 Stat. 400, 400-01 (amended 1982); Voting Rights Act Amendments of 1982, §§ 2(b)(7)-(8), 96 Stat. 131, 133 (amended 2006); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 4, 120 Stat. 577, 580.

²⁹⁴ See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 4, 120 Stat. 577.

²⁹⁵ See 52 U.S.C. § 10308(d) (2012).

²⁹⁶ See *Allen v. State Bd. of Elections*, 393 U.S. 544, 554–57 (1969).

²⁹⁷ 570 U.S. 529, 556–57 (2013).

²⁹⁸ 52 U.S.C. § 10302 (2012).

²⁹⁹ See 52 U.S.C. § 10303(b) (2012); 52 U.S.C. § 10304 (2012).

³⁰⁰ See 79 Stat. 437, 438–39; 120 Stat. 577.

regime without fear of being enjoined in a section 5 enforcement action. But *Shelby County* did not erase or revoke section 4(b), so it does not absolve covered jurisdictions of their statutory obligation to seek preclearance. *Shelby County* is nothing more than 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. This promise, however, can last only as long *Shelby County* continues to enjoy majority support on the Supreme Court.

What does all of this mean for covered jurisdictions? To begin, covered jurisdictions should recognize that a future Supreme Court can overrule *Shelby County* at any time—and this could happen before the preclearance requirements expire in 2031. Four justices dissented in *Shelby County* and accused the Court of “err[ing] egregiously.”³⁰¹ So it would hardly be a surprise to see *Shelby County* reconsidered if the Supreme Court returns to Democratic control. And if the Supreme Court were to overrule *Shelby County*, then every voting-related measure that failed to secure the preclearance required by sections 4(b) and 5 will be put back on ice. So covered jurisdictions would be well advised to continue submitting their voting-related laws for preclearance—especially at a time when Republicans control the Department of Justice and can preclear voter-identification laws and redistricting plans that Democrats would be certain to block if the preclearance regime is revived. For covered jurisdictions to pretend that *Shelby County* “struck down” section 4(b)’s coverage formula³⁰² not only commits the writ-of-erasure fallacy, but also runs a risk that the covered jurisdiction might lose its ability to enforce its recently enacted voting laws.

³⁰¹ *Shelby County*, 570 U.S. at 593–94 (Ginsburg, J., dissenting).

³⁰² The majority opinion in *Shelby County* did not help matters when it inaccurately claimed to be “striking down an Act of Congress.” See 570 U.S. at 556 (“Striking down an Act of Congress ‘is the gravest and most delicate duty that this Court is called on to perform.’” (citation omitted)). The dissenting opinion used similar nomenclature in describing what the Court had done. *Id.* at 590 (Ginsburg, J., dissenting) (“[T]he Court strikes §4(b)’s coverage provision.”).

C. Criminal Sentencing

The Supreme Court has interpreted the Eighth Amendment to impose many substantive limits on criminal punishment.³⁰³ The justices tell us that it is “cruel and unusual” to execute juvenile murderers or murderers with intellectual disabilities—no matter how heinous their offenses.³⁰⁴ And it has categorically foreclosed capital punishment for rapists of adult women³⁰⁵ and children.³⁰⁶ Lately the Supreme Court has limited the practice of imposing life imprisonment without the possibility of parole on juvenile offenders.³⁰⁷ But none of the Court’s rulings “strike down” or erase the statutes authorizing these punishments, and the court-imposed restrictions will last only as long as the Supreme Court chooses to adhere to them.

All of this affects the remedies that courts should impose in response to these Supreme Court rulings. When a convicted prisoner shows that he is categorically ineligible for capital punishment under the Supreme Court’s interpretation of the Eighth Amendment, the typical judicial response is to vacate the death sentence and order the State to impose a non-capital penalty.³⁰⁸ But that is an overbroad and inappropriate remedy. When the Supreme Court opines that the Eighth Amendment prohibits the execution of rapists, juvenile offenders, or murderers with intellectual disabilities, that means only that the *current membership* of the Supreme Court regards these executions as constitutionally problematic. A future Supreme Court might take a different view,³⁰⁹ and

³⁰³ The Supreme Court relies on the Fourteenth Amendment when extending its “cruel and unusual punishment” doctrine to the States. See *Robinson v. California*, 370 U.S. 660, 667 (1962). I will use the term “Eighth Amendment” as shorthand to encompass all of the Court’s “cruel and unusual punishment” jurisprudence, including the restrictions it imposes on the States through the Fourteenth Amendment.

³⁰⁴ See *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

³⁰⁵ See *Coker v. Georgia*, 433 U.S. 584 (1977).

³⁰⁶ See *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

³⁰⁷ See *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012).

³⁰⁸ See *Roper*, 543 U.S. at 579 (affirming the state court’s decision “setting aside the sentence of death” imposed on a juvenile murderer).

³⁰⁹ Cf. *Payne v. Tennessee*, 501 U.S. 808, 828–30 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987), which had categorically prohibited the introduction of “victim impact” evidence in a capital-sentencing proceeding).

if this were to happen, the State should retain the prerogative to carry out the sentence that it had originally imposed, so long as the law of the State continues to authorize or require that punishment.

But if the State is ordered to formally resentence the convict to a non-capital punishment, then the State will be unable to resurrect its original capital sentence if the Supreme Court overturns the rulings on which the prisoner relied. The Court's double-jeopardy cases forbid governments to impose a death sentence for a crime after the defendant has been formally sentenced to a non-capital punishment.³¹⁰ So the State will be stuck with a non-capital sentence, and its laws will be thwarted even if the Supreme Court recants whatever constitutional objections it previously had to those laws.

When an appellate or post-conviction court encounters a death sentence imposed on a juvenile murderer, a child rapist, or any other person that the Supreme Court has declared to be categorically immune from capital punishment, the proper remedy is not to vacate the death sentence but to *suspend* the death sentence for as long as the Supreme Court adheres to its decisions that prohibit capital punishment for the relevant category of offenders. This will leave the convicted offender under a sentence that allows the State to execute him, but it ensures that the death sentence will not be carried out unless the Supreme Court changes its jurisprudence and allows the execution to proceed. The same goes for juvenile life-without-parole sentences. When the Supreme Court announced in *Graham v. Florida*³¹¹ that juvenile offenders could not be sentenced to life without parole for non-homicide offenses, a proper re-sentencing should allow the juvenile to seek parole only for as long as *Graham* remains good law, and it should provide that the sentence reverts back to the original life-imprisonment-without-parole if *Graham* is overruled.

Legislatures could also establish a conditional-sentencing regime in response to the Supreme Court's Eighth Amendment rulings—especially when those rulings engender political opposition or threaten to reduce the deterrent effect of criminal sanctions. Many politicians responded angrily to the ruling in *Kennedy v. Louisiana*³¹² and vowed to

³¹⁰ See *Bullington v. Missouri*, 451 U.S. 430, 446 (1981).

³¹¹ 560 U.S. 48, 74 (2010).

³¹² 554 U.S. 407 (2008).

execute child rapists despite the Court's decision.³¹³ But States that support the execution of child rapists can authorize their judges to impose a conditional death penalty—a sentence of death that will not be carried out unless and until the Supreme Court overrules *Kennedy*.³¹⁴ If the membership of the Supreme Court shifts, then any State that has imposed a conditional death sentence of this sort can file a declaratory-judgment action against the convicted child rapist and ask the courts to overrule *Kennedy*. The same maneuver can be applied to other court decisions limiting capital punishment, such as *Roper* and *Atkins*, as well as the recent decisions limiting the availability of life imprisonment without parole. A State could, for example, sentence a juvenile offender to a conditional punishment of life imprisonment without parole that takes effect if and when the Supreme Court overrules *Graham*, but that will otherwise operate as a life sentence that offers the possibility of parole in fifty years.³¹⁵

³¹³ See Associated Press, *Lawmakers Vow to Execute Child Rapists*, CNN (June 26, 2008, 11:18 AM), <http://www.cnn.com/2008/CRIME/06/26/scotus.child.rape.ap/index.html> (“Angry politicians vowed to keep writing laws that condemn child rapists to death, despite a Supreme Court decision saying such punishment is unconstitutional.”); *id.* (quoting Republican presidential candidate John McCain describing the ruling as “an assault on law enforcement’s efforts to punish these heinous felons for the most despicable crime.”); *id.* (reporting that Democratic presidential candidate Barack Obama also opposed the Court’s decision).

³¹⁴ Some members of the Supreme Court have suggested that the Eighth Amendment might prohibit execution after an excessively long wait on death row. See, e.g., *Valle v. Florida*, 564 U.S. 1067, 1067–68 (2011) (Breyer, J., dissenting from the denial of stay of execution); *Johnson v. Bredesen*, 558 U.S. 1067, 1070 (2009) (statement of Stevens, J., respecting the denial of stay of execution and certiorari); *Foster v. Florida*, 537 U.S. 990, 992 (2002) (Breyer, J., dissenting from denial of certiorari). If the Supreme Court were to impose such a rule, then a State could still impose a conditional death sentence on child rapists, but the sentence would have to specify that the child rapist must be executed within the maximum amount of time permitted by the Court’s interpretation of the Eighth Amendment, whatever that may be (20 years, perhaps?). Of course, even that requirement in the sentence should be made conditional on the Supreme Court’s continued adherence to this hypothetical interpretation of the Eighth Amendment.

³¹⁵ Courts must also bear in mind that the Eighth Amendment prohibits cruel and unusual *punishments*, not cruel and unusual *sentences*. See U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). So no violation of the Eighth Amendment can occur until the supposedly unconstitutional *punishment* is inflicted; a sentence that merely purports to authorize such a punishment cannot violate the Eighth Amendment. Cf. Rosenkranz, *The Subjects of the*

D. Judicial Review Under the Administrative Procedure Act

Judicial review of agency action presents a different situation because the Administrative Procedure Act instructs a reviewing court to “hold unlawful and set aside” agency rules and orders that it deems unlawful or unconstitutional.³¹⁶ Some agency organic statutes give reviewing courts additional powers to formally alter an agency’s work product, by allowing courts to “modify” or “suspend”—as well as “set aside”—an agency order.³¹⁷ Unlike judicial review of statutes, in which courts enter judgments and decrees only against litigants,³¹⁸ the APA and these organic statutes go further by empowering the judiciary to act directly against the challenged agency action. This statutory power to “set aside” agency action is more than a mere non-enforcement remedy. It is a veto-like power that enables the judiciary to formally revoke an agency’s rules, orders, findings, or conclusions—in the same way that an appellate court formally revokes an erroneous trial-court judgment.³¹⁹ In

Constitution, *supra* note 38, at 1224–26 (2010) (noting that “every constitutional violation must be located in time” and criticizing the courts for paying insufficient heed to constitutional text while considering “the when question” and related issues of ripeness and mootness) (emphasis omitted). This makes it doubly inappropriate for courts to formally vacate a sentence in response to the Supreme Court’s Eighth Amendment pronouncements, as the sentence is incapable of violating the Eighth Amendment and the Supreme Court might change its interpretation of the Eighth Amendment before the supposedly unconstitutional “punishment” is inflicted.

³¹⁶ 5 U.S.C. § 706 (2012) (providing that “[t]he reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be” unlawful).

³¹⁷ See, e.g., 15 U.S.C. § 45(c) (2012) (“[The courts of appeals] shall have power to make and enter a decree affirming, modifying, or setting aside the order of the [Federal Trade] Commission”); 28 U.S.C. § 2342 (2012) (“The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of [various agency orders].”); 29 U.S.C. § 660(a) (2012) (“[The courts of appeals] shall have power to . . . make . . . a decree affirming, modifying, or setting aside in whole or in part, the order of the [Occupational Safety and Health Administration]”).

³¹⁸ See, e.g., *Okpalobi v. Foster*, 244 F.3d 405, 426 n.34 (5th Cir. 2001) (en banc) (“An injunction enjoins a defendant, not a statute.”).

³¹⁹ See Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 *Colum. L. Rev.* 253, 258 (2017) (“The APA instructs federal courts to ‘hold unlawful and set aside’ arbitrary or unlawful agency action. When the APA was enacted in 1946, that instruction reflected a consensus that judicial review of agency action should be modeled on appellate review of trial court judgments Just as a district court judgment infected with error should be invalidated and returned for reconsideration, so too with agency action.”); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 *Colum. L. Rev.* 939, 940 (2011) (explaining how judicial review of agency action is “built on the appellate review model of the relationship between reviewing

these situations, the courts *do* hold the power to “strike down” an agency’s work, and the disapproved agency action is treated as though it had never happened.³²⁰

It is important not to overstate the significance of a reviewing court’s obligation to “set aside” unlawful agency action under the APA. This power does not, for example, require or authorize courts to “facially” invalidate an entire rule or order when only a subpart or discrete application of the agency’s action is unlawful. It might remain possible for a reviewing court to sever and preserve the subparts and applications of the agency’s action that do not present legal difficulties, simply by characterizing the legal and illegal components as distinct agency “actions.”³²¹ Whether this is possible or appropriate will turn on the law of severability and remedies, and that has nothing to do with whether a reviewing court is formally revoking an agency action or simply enjoining its enforcement.

courts and agencies,” which “was borrowed from the understandings that govern the relationship between appeals courts and trial courts in civil litigation”).

³²⁰ Statutes that authorize reviewing courts to “set aside” unlawful agency actions go as far back as the Hepburn Act of 1906. See Act of Jun. 29, 1906, Pub. L. No 337, ch. 3591, § 4, 34 Stat. 584, 589. Section 4 of the Act provided the orders of the Interstate Commerce Commission would be self-executing “unless the same shall be suspended or modified *or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction.*” *Id.* (emphasis added). This gave reviewing courts the same powers that the Commission enjoyed to formally “suspend[]” or “set aside” its orders. Another provision of the Hepburn Act empowered reviewing courts to “enjoin, set aside, annul, or suspend” an order or requirement of the Commission, which clearly indicates a power to formally revoke the Commission’s work. See *id.* at 592.

The Federal Trade Commission Act of 1914 also empowered reviewing courts to “set aside” an agency order, and it allowed them to “affirm” or “modify” those orders as well. See Act of Sep. 26, 1914, ch. 311, § 5, 38 Stat. 717, 720 (“[T]he court . . . shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission.”). This language mirrors the powers of an appellate court when it reviews a district court’s judgment or factual findings, and it comprises the same power to formally cancel or nullify the underlying decree. See also Fed. R. Civ. P. 52(a)(6) (“Findings of fact, whether based on oral or other evidence, must not be *set aside* unless clearly erroneous” (emphasis added)).

³²¹ See Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses*, 124 *Yale L.J.* 2286 (2015) (discussing severability of agency rules).

The authority to “set aside” an agency’s action also does not resolve whether courts should extend relief beyond the named litigants or issue “nationwide injunctions” that extend beyond the court’s territorial boundaries.³²² The Ninth Circuit, for example, has argued that the APA’s instruction to “set aside” unlawful agency action *compels* the judiciary to issue nationwide relief whenever it finds an agency rule invalid or unconstitutional.³²³ But that conclusion overlooks the possibility of severance. Agency actions, like statutes, may be severable as applied to individuals or as applied to geographic regions.³²⁴ Whether a court *should* sever an agency action in this manner depends, once again, on the law of severability and remedies, and not on the fact that the APA commands reviewing courts to “set aside” the agency’s rule or order.

But the APA does give the judiciary a unique power that it lacks when reviewing the constitutionality of statutes: Reviewing courts may formally vacate an agency’s rule or order, rather than merely enjoin officials from enforcing it. Several implications follow from the APA’s regime of judicial review.

First, *any* court decision that “sets aside” an agency action will bind other courts to the extent it pronounces an agency action invalid. This remains true even when the judgment comes from a court that lacks the authority to bind other tribunals under the rules of *stare decisis*. A decision from a federal district court, for example, will normally have

³²² See, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417 (2017); *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring).

³²³ See *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007) (“The nationwide injunction, as applied to our decision to affirm the district court’s invalidation of 36 C.F.R. §§ 215.12(f) and 215.4(a), is compelled by the text of the Administrative Procedure Act”), *rev’d on other grounds*, *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

³²⁴ A typical severability requirement will instruct courts to sever the statute’s applications as well as its provisions. See, e.g., Tex. Gov’t Code § 311.032(c) (“In a statute that does not contain a provision for severability or nonseverability, if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.”); Michael C. Dorf, *Fallback Law*, 107 Colum. L. Rev. 303, 313 (2007) (“[A]ll the states and the federal government have a general default principle authorizing courts to sever invalid provisions and applications from valid ones.”). And courts will sever a statute’s valid applications from its invalid applications even without an explicit statutory command to do so. See authorities cited in note 217.

no precedential authority in other courts,³²⁵ and rulings from federal courts of appeals are not binding in other circuits or in the state-court system.³²⁶ But a court that has “set aside” an agency action has formally vetoed the agency’s work in the same way that a President vetoes a bill. A court that fails to give effect to this judicial veto is launching a collateral attack on the earlier court’s judgment—and that is impermissible except in extremely rare circumstances.³²⁷

Judicial review of statutes is different in this regard. When a federal district court declares a *statute* unconstitutional, other courts remain free to enforce the statute if they believe it to be constitutional.³²⁸ That is because the statute continues to exist as a law, even after a court renders a final judgment declaring the statute unconstitutional, and any injunction entered by that court merely blocks the statute’s *enforcement* by the named defendants rather than “setting aside” or canceling the statute itself.³²⁹

Second, final judgments that “set aside” agency action will prevent future courts or agency officials from enforcing the disapproved agency action—even if a later-enacted statute or Supreme Court ruling undercuts or repudiates the rationale that the earlier court had relied upon. Because the agency action will have been formally revoked by the earlier court decision, the agency would have to enact a new rule or move under Rule 60(b) to vacate the earlier court decision that had “set aside” the agency’s work. A statute, on the other hand, is never formally canceled by an adverse court ruling; it continues to exist and remains

³²⁵ See *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” (quoting 18 J. Moore et al., *Moore’s Federal Practice* § 134.02[1][d], at 134–36 (3d ed. 2011))).

³²⁶ See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997).

³²⁷ Typically, a collateral attack on a court’s final judgment is permissible only if the court patently lacked jurisdiction, or if the judgment was produced by corruption, duress, fraud, collusion, or mistake. See Restatement (Second) of Judgments §§ 69–72 (Am. Law Inst., 1982). To be clear, other courts won’t be bound to follow the rationale or opinion issued by the court that set aside the agency action (unless the rules of stare decisis establish the court’s opinion as a binding precedent). They need only to regard the agency action as formally “set aside” by the previous court’s decision.

³²⁸ See supra note 325.

³²⁹ See supra note 318.

available for future enforcement if the judiciary withdraws its constitutional objections.³³⁰

Finally, the APA empowers reviewing courts to “postpone the effective date of an agency action” in lieu of a preliminary injunction. Section 705 of the APA provides:

On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process *to postpone the effective date of an agency action* or to preserve status or rights pending conclusion of the review proceedings.³³¹

Preliminary relief under section 705 differs from a preliminary injunction, which blocks the executive from *enforcing* a law but does not postpone the effective date of the law itself.³³² Section 705, by contrast, empowers courts to delay the effective date of the challenged agency action. So preliminary relief under section 705 *will* immunize those who violate the challenged agency action from subsequent penalties—even if the courts wind up approving the agency’s action in the end—because the agency action is formally suspended by the court’s preliminary relief.

IV. IMPLICATIONS FOR LEGAL AND JUDICIAL RHETORIC

As we have seen, the writ-of-erasure mindset has been nourished and sustained by the inaccurate terminology that judges, lawyers, politicians, and journalists have used to describe the effects of court rulings.³³³ Whenever a court declares a statute unconstitutional or enjoins its enforcement, the statute is all too often described as having been “blocked,”³³⁴ “struck down,”³³⁵ “nullified,”³³⁶ rendered “void,”³³⁷ or

³³⁰ See *supra* notes 138 and 150.

³³¹ 5 U.S.C. § 705 (2012) (emphasis added).

³³² See *supra* Part II.B.

³³³ See *supra* Part I.B.

³³⁴ See *supra* note 17.

³³⁵ See *supra* notes 1 and 4.

³³⁶ See *supra* note 8.

“invalidated”³³⁸ by the adverse court decision. This type of rhetoric implies that the statute has been formally suspended or erased, when the statute actually remains on the books as a law and remains available for future officials to enforce. This writ-of-erasure nomenclature should be avoided—except in cases involving judicial review under the APA, where the court is truly functioning as a formal veto-gate for the challenged agency action.³³⁹

And courts should never issue “permanent injunctions” against the enforcement of a statute. It is always possible that the law might change in a way that allows a formerly disapproved statute to be enforced. Any injunction should state that it will expire if the authorities on which it relies to enjoin the statute’s enforcement are repealed or overruled. The “permanent injunction” should be renamed as an “indefinite injunction,” which avoids any suggestion that the court has permanently interred the statute and forever precluded its enforcement.

The challenge comes in finding ways to motivate judges to move away from the writ-of-erasure rhetoric that they have long employed. Judges who vote to enjoin the enforcement of legislation may *want* their rulings to be perceived as permanent, and they may not want to highlight the possibility that their constitutional pronouncements might someday be overruled. It seems too much to expect Justice Kennedy, for example, to emphasize in *Citizens United* that the Court is not actually “striking down” 52 U.S.C. § 30118, but merely preventing the enforcement of that statute until a future court sees fit to overrule his decision.

A dissenting jurist might have more of an incentive to call out the writ-of-erasure fallacy, especially in a dissent that calls for the future overruling of the Court’s decision.³⁴⁰ But even a dissenter may be

³³⁷ See supra note 2.

³³⁸ See supra note 9.

³³⁹ See supra Part III.D.

³⁴⁰ See, e.g., *Am. Tradition P’ship v. Bullock*, 567 U.S. 516, 517–18 (2012) (Breyer, J., dissenting) (calling for *Citizens United* to be reconsidered); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 97 (2000) (Stevens, J., dissenting in part and concurring in part) (“Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent.”); *Planned Parenthood v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in the judgement in part and dissenting in part).

reluctant to expose the fact that the Court's constitutional pronouncements are temporary and that the court has no power to "strike down" legislation. The dissenting justices in *Citizens United* are in the majority when the Court enjoins the enforcement of abortion regulations, and the dissenters in the abortion cases are in the majority in *Citizens United*. So even when a justice finds himself in dissent, he might not want to dilute the force of *other* court rulings that are perceived as having "struck down" statutes that he opposes. The justices might regard the writ-of-erasure fallacy as a noble lie that each member of the Court regards as a net positive, even though the fallacy will overstate the effects of an occasional decision that they dislike. The type of jurist who would be the most eager to expose and repudiate the writ-of-erasure fallacy is one who exhibits a consistent deference to the decisions of legislative bodies—judges in the mold of Oliver Wendell Holmes, Learned Hand, or Felix Frankfurter. But it does not appear that any member of the current Supreme Court subscribes to that judicial philosophy.³⁴¹

Perhaps the best place to start is with lower-court judges who are tasked with implementing Supreme Court rulings that they oppose: judges who oppose *Citizens United* yet are bound by precedent to enjoin the enforcement of campaign-finance laws, or judges who oppose *Roe v. Wade*³⁴² yet feel compelled by precedent to block the enforcement of abortion regulations. These judges will have every incentive to point out the temporary nature of the injunctions that they issue, and to remind everyone that the statutes continue to exist and will become fully enforceable if the Supreme Court ever repudiates the decisions that led to the injunction. And because these judges do not sit on the Supreme Court, they have less to gain from perpetuating the writ-of-erasure fallacy, as neither they nor the court on which they sit purports to have the final say on the constitutionality of statutes.

In the meantime, lawyers and academics can do their part by eschewing writ-of-erasure rhetoric and gently pointing out in briefs and scholarship that courts have no authority to "strike down" or "invalidate" statutes. Writ-of-erasure terminology has survived largely

³⁴¹ See Cass R. Sunstein, *A Constitution of Many Minds* 19 (2009); Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* 12 (2006).

³⁴² 410 U.S. 113 (1973).

out of habit, and breaking a habit of this sort will require regular reminders from many different sources.³⁴³

CONCLUSION

Judicial review of legislation is often misunderstood as a veto-like power to revoke or “strike down” statutes. But the judiciary is powerless to suspend or erase a law; it can only refuse to enforce a statute and prevent the executive from enforcing it. The proper analogy is not to the executive’s veto, but to the executive’s refusal to enforce a previously enacted law. In both situations, the unenforced statutes remain in effect and retain their status as law, and those who violate the statutes assume the risk that a future court (or a future President) might repudiate the non-enforcement policy and allow the executive to seek penalties against those who violated have them.

The writ-of-erasure fallacy arises whenever someone assumes that a judicially disapproved statute has been formally canceled or revoked. And the judiciary has done much to reinforce this misunderstanding of judicial review, as it frequently proclaims that the laws it disapproves have been “struck down” or rendered “void.” But that is an inaccurate and unconstitutional understanding of judicial power. The federal courts were not established as a Council of Revision with a permanent veto power over legislation, and neither the judiciary nor the executive has the power to formally suspend a duly enacted statute. The writ-of-erasure mindset has become ubiquitous among lawyers, judges, politicians, and journalists. But it should be resisted at every turn.

³⁴³ See Adrian Vermeule, *Law and the Limits of Reason* 74–75 (2009) (explaining how informational cascades and herd behavior can be fragile and vulnerable to changes in information, motivation, or incentives).