A Step Toward a Proper Understanding of Constitutional Litigation

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Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. __ (forthcoming 2018), available at SSRN.

Everyone—public, media, government officials, courts, and first-year law students—understands constitutional litigation in light of two ideas. From Marbury v. Madison's declaration that it is "emphatically the province and duty of the Judicial Department to say what the law is," everyone believes that the Supreme Court gets the final, uncontestable word on what the Constitution says and means. And a court exercising judicial review "strikes down" or "sets aside" or "invalidates" unconstitutional laws, rendering them null and void for all purposes, erased from existence, as if never enacted and no longer available as "law."

In a new article, Jonathan Mitchell labels this the "writ-of-erasure fallacy," the erroneous "assumption that a judicial pronouncement of unconstitutionality has cancelled or blotted out a duly enacted statute, erasing that law from the books, vetoing or suspending it and leaving nothing for the executive to enforce now or in the future." In fact, judicial review is more limited. Having identified a law as constitutionally invalid, a court may decline to enforce that law in a particular case or it may enjoin executive officers from enforcing the law while the injunction remains in effect. But the statute continues to exist as law unless and until repealed by the enacting legislature. It is a fiction that courts "strike down" or "block" or "invalidate" statutes. That fiction creates misunderstandings about constitutional litigation and the effect of judicial rulings in constitutional cases. And that fiction unnecessarily limits the power of the executive to enforce still-existing law and of the legislature to enact new or amended laws.

Mitchell first traces the fallacy to the early days of the Constitution. One source is Convention debates over a proposed Council of Revision that would have given federal courts a genuine power to veto legislation as unconstitutional, preventing a proposed law from taking effect. Of course, the Council idea failed—and with it the power of the federal judiciary to strike laws from the books. Another source is the rhetoric of *Marbury* and its progeny, in which courts describe judicially disapproved statutes as "void" or "not law." A third is the courts' tendency to adhere to precedent; because courts are unlikely to overrule constitutional precedent, judicial disapproval of a statute in one case is regarded as permanent. Courts therefore refuse to enforce the statute (previously declared constitutionally infirm) in future litigation and enjoin threats or attempts at future enforcement. History shows, however, that the Court does overrule precedent at times, putting lie to the assumption that any judicial declaration of constitutional invalidity is permanent.

Mitchell then illustrates the nefarious effects of the writ-of-erasure fallacy in two doctrines. The first involves the Civil Rights Act of 1875, a late-Reconstruction statute that prohibited race discrimination in places of public accommodation. In The Civil Rights Cases, the Court held that Congress lacked the authority under § 5 of the Fourteenth Amendment to prohibit private racial discrimination, while treating the statute as void for all purposes. By purporting to "erase" the Act, however, the Court disabled its future uses, such as against discrimination on a train traveling in interstate commerce or against state-compelled racial segregation in Plessy v. Ferguson. As to the latter, Mitchell argues that the Court

should have held that the 1875 Act, still extant as federal law, preempted the discriminatory state law.

The second nefarious effect is to overstate the effect of judicial injunctions. An injunction "simply forbids the named defendants to enforce the statute while the court's order remains in place." The injunction does not suspend or revoke the statute. And it does not shield those who violate the statute from future prosecutions or penalties should the injunction be dissolved or should the court overrule the underlying pronouncement of unconstitutionality. Mitchell analogizes an injunction to a President ordering his subordinates not to enforce a statute he believes is constitutionally invalid. Neither voids or strikes down the law, which remains on the books, presently unenforced but potentially enforceable.

Finally, Mitchell considers four doctrinal areas that would be altered by rejecting the writ-of-erasure fallacy; two are of present interest. One is the doctrine of standing in Establishment Clause cases in which plaintiffs claim injury from laws or regulations that by their words endorse religious beliefs or project a message of exclusion of those who do not adhere to those beliefs. The source of the constitutional injury in such cases purports to be the statute itself. But if the statute (as opposed to its actual or threatened enforcement) causes the injury, the only remedy is repeal or elimination of the statute. But a court cannot repeal a statute nor order a legislature to repeal a statute. That means no judicial order can redress the plaintiff's injury, depriving her of standing in such cases. This doctrinal change would affect current debates over President Trump's travel ban, as several plaintiffs are claiming injury from the existence of the executive order and its message of exclusion; standing becomes a problem in that litigation if a court cannot order the repeal of the executive order, the only remedy that would resolve the claimed injury.

A second doctrinal area involves the pre-clearance provisions of the Voting Rights Act of 1965 (VRA), which require certain "covered" (mostly Southern) jurisdictions to clear voting-related laws with the Department of Justice (DOJ) or a federal court. In *Shelby County v. Holder*, the Court held that the formula for defining covered jurisdictions was constitutionally invalid, such that covered jurisdictions could enact and implement voting-related laws without pre-clearance, something many jurisdictions have done since. But the pre-clearance provisions continue to exist as federal statutes and have not been repealed, erased, revoked, or amended. *Shelby County* means a covered jurisdiction can disregard the statutory pre-clearance regime without fear of a court enjoining their actions should DOJ attempt to stop it from implementing a non-precleared law. But, Mitchell argues, covered jurisdictions must recognize that the pre-clearance provisions remain as federal law, that a future Supreme Court could overrule *Shelby County*, and that any new, non-precleared voting-related measure could be challenged and found to violate a now-constitutionally valid VRA. Mitchell suggests that covered jurisdictions should continue submitting laws for pre-clearance, consistent with the VRA, unless and until the pre-clearance provisions are repealed—something that *Shelby County* did not achieve and that only Congress can do.

This article that I like lots furthers scholarly debates (to which I offer my contributions) about the proper scope and operation of constitutional litigation and constitutional remedies. There are many dimensions to this issue, and Mitchell does not address all of them. He does not specify whether the anti-suit injunctions courts are authorized to issue can prohibit enforcement of the challenged law as to the named plaintiffs (he acknowledges the injunction prohibits enforcement only by the named officials) or whether courts can issue universal/nationwide/"cosmic" injunctions prohibiting enforcement against all persons who might be subject to the law. Mitchell also identifies, but avoids, the debate between departmentalism and judicial supremacy. He need not resolve the debate, because even in a world of judicial supremacy, courts can repudiate prior constitutional pronouncements, empowering the political branches to resume enforcement of these statutes, including retroactively.

If we do resolve those debates in favor of departmentalism and particularized/non-universal injunctions, however, the political branches gain even more power than Mitchell suggests. Consider *Shelby County*

and the VRA's pre-clearance requirements. Mitchell allows that covered jurisdictions may encounter pre-clearance problems with new laws if a future Supreme Court overrules *Shelby County* and a future DOJ resumes enforcement. But if the point of *Shelby County* is that five members of the Supreme Court as it existed in 2013 believed the VRA's coverage formula unconstitutional and the resulting injunction only prohibited DOJ from requiring *Shelby County* to obtain pre-clearance for changes to particular voting laws, then DOJ need not wait that long. It could continue demanding pre-clearance from other jurisdictions as to other voting laws, without violating the injunction. Of course, DOJ's efforts in that direction will fail as soon as they reach court (whether through its action to enforce pre-clearance or a covered jurisdiction's action to enjoin DOJ from enforcing pre-clearance); courts must follow *Shelby County* as precedent and find that pre-clearance is constitutionally defective and unenforceable as to the new laws enacted by the new covered jurisdiction.

But Mitchell's insights into the operation of constitutional litigation and the nature of constitutional remedies maps how this process will play out and the additional steps required. He shows that it is richer and more complicated than the simplistic "the court struck the law down and it is gone forever" narrative in which we operate.

Mitchell's paper is long and detailed, but wonderfully written and highly readable. It is a significant scholarly work that should change how we think and talk about judicial review and constitutional adjudication.

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