ARTICLES

ZOMBIE LAWS

by
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A judicial declaration of constitutional invalidity does not erase a challenged law. Such a law is "dead" in that enforcement efforts will not succeed in court, where judicial precedent binds and dictates the outcome in future litigation. But such a law is "alive" in that it remains on the books and may be enforced by a departmentalist executive acting on an independent constitutional judgment. Judge Gregg Costa has labeled these statutory remainders "zombie laws."

This Article describes several principles that define constitutional litigation, how those principles produce zombie laws, and the scope and nature of zombie laws. It then describes how Congress or state legislatures can eliminate or enable future enforcement of zombie laws by repealing or retaining them, depending on their views of judicial precedent and what they want to see happen with their laws in the future.

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INTRODUCTION

Constitutional litigation, adjudication, and decision-making emerges from a complex system with multiple parts across multiple branches of government.

First, a judicial declaration of constitutional invalidity cannot "erase" a challenged law or remove it from the books.[1] Courts speak of "invalidating," "voiding" or "striking down" laws,[2] but those are figures of speech. A court cannot eliminate or suspend a law.[3] While it "may seem odd that unconstitutional laws remain on the books,"[4] that is the case for even the most "plainly unconstitutional" laws.[5] A court order stops the defendant executive official's conduct in enforcing that law against some target,[6] but the law does not disappear or cease to exist as a positive statute. Judicial remedies operate on parties, not on the challenged law in the abstract.[7]

Second, the judgment or injunction declaring a law invalid as violative of the Constitution and prohibiting its enforcement should be non-universal or particularized to the parties.[8] The court prohibits enforcement of the challenged law by the

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[1] Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339 (2000); Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936 (2018); *see also* Pool v. City of Houston, 978 F.3d 307, 309 (5th Cir. 2020); John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, YALE J. REGUL. BULL., Apr. 12, 2020, at 37, 43 [hereinafter Harrison, *Section 706*]; Howard M. Wasserman, *Precedent, Non-Universal Injunctions, and Judicial Departmentalism: A Model of Constitutional Adjudication*, 23 LEWIS & CLARK L. REV. 1077, 1085–86 (2020) [hereinafter Wasserman, *Departmentalism*].

[2] Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 451–52 (2017); Mitchell, *supra* note 1, at 934–35; Wasserman, *Departmentalism*, *supra* note 1, at 1089–90.

[3] John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 87–88 (2014) [hereinafter Harrison, *Adjudication*]; Mitchell, *supra* note 1, at 936; Wasserman, *Departmentalism*, *supra* note 1, at 1090–91.

[4] Hartnett v. Pa. State Educ. Ass'n, 963 F.3d 301, 309 (3d Cir. 2020).

[5] *Pool*, 978 F.3d at 309; *accord* Mitchell, *supra* note 1, at 936–37; *see also* Harrison, *Section 706*, *supra* note 1, at 43; Wasserman, *Departmentalism*, *supra* note 1, at 1082, 1085–86.

[6] Massachusetts v. Mellon, 262 U.S. 447, 488 (1923); Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1485–86 (2018) (Thomas, J., concurring); Harrison, *Section 706*, *supra* note 1, at 44; Harrison, *Adjudication*, *supra* note 3, at 82, 87; Mitchell, *supra* note 1, at 934–36; Wasserman, *Departmentalism*, *supra* note 1, at 1089–90.

[7] Whole Woman's Health v. Jackson, No. 21-463, 2021 WL 5855551, at *8 (Dec. 10, 2021); California v. Texas, 141 S. Ct. 2104, 2115 (2021).

[8] While courts continue to use the term "nationwide," Louisiana v. Becerra, No. 21-30734, 2021 WL 5913302, at *2 (5th Cir. Dec. 15, 2021) (per curiam); Texas v. United States, 515 F. Supp. 3d 627, 637 n.5 (S.D. Tex. 2021), that mischaracterizes what these injunctions do. "Universal" better captures an injunction that purports to protect the universe of potential targets of enforcement of the challenged law, whether parties to the litigation or not. Howard M.

defendant officials against the parties to the case, but does not stop enforcement of that law or a similar law against non-parties.[9]

Third, constitutional litigation operates under Kevin Walsh's "judicial departmentalism," in which executive and legislative actors are bound by the particularized judgment as to the parties to the case, but not by the forward-looking precedent the court's opinion establishes. Executive and legislative actors remain free to act on their independent constitutional understandings, interpretations, and judgments about the Constitution and the constitutional validity of laws and actions, in deciding what laws to enact or repeal and which laws to enforce and how.[10]

This complex scheme leaves a statutory remainder. A law remains on the books, even if a court has declared that the law is inconsistent with the Constitution. The law remains available for actual or threatened enforcement by a departmentalist executive convinced of its validity and willing to follow an independent constitutional understanding unbound by judicial precedent. Such enforcement fails once the constitutional issues reach a court, where judicial precedent (especially Supreme Court

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Wasserman, *Concepts, Not Nomenclature: Universal Injunctions, Declaratory Judgments, Opinions, and Precedent*, 91 U. COLO. L. REV. 999, 1006 (2020) [hereinafter Wasserman, *Concepts*]; Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 350 (2018) [hereinafter Wasserman, "*Nationwide*"]; *see also* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., joined by Thomas, J., concurring in the grant of stay); Trump v. Hawaii, 138 S. Ct. 2392, 2424–25 n.1 (2018) (Thomas, J., concurring); City of Chicago v. Barr, 961 F.3d 882, 912 n.7 (7th Cir. 2020). A related term is "non-particularized," which captures all injunctions extending and protecting beyond the parties—injunctions not "particularized" to the parties—whether they cover the universe of enforcement targets or a smaller, non-universal set of enforcement targets. Wasserman, *Concepts*, *supra* note 8, at 1007.

[9] DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 276 (4th ed. 2010); Bray, *supra* note 2, at 469; Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29–30 (2019); Harrison, *Section 706*, *supra* note 1; Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 7–8, 65 (2019); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 620 (2017); Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 NOTRE DAME L. REV. 1985, 2012 (2019); Wasserman, *Departmentalism*, *supra* note 1, at 1080–81, 1093–94; Wasserman, *Concepts*, *supra* note 8, at 1000; Wasserman, "*Nationwide*," *supra* note 8, at 353; *see also New York*, 140 S. Ct. at 600 (Gorsuch, J., joined by Thomas, J., concurring in the grant of stay); *Hawaii*, 138 S. Ct. at 2424–25 (Thomas, J., concurring); *City of Chicago*, 961 F.3d at 936–38 (Manion, J., concurring in the judgment); Rodgers v. Bryant, 942 F.3d 451, 460 (8th Cir. 2019) (Stras, J., concurring in part and dissenting in part).

[10] Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1715, 1725–26 (2017); *see* William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1809–10 (2008); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1328 (1996); Wasserman, *Departmentalism*, *supra* note 1, at 1082, 1115–17.

precedent) declaring that law constitutionally invalid binds courts and dictates the outcome in new cases.[11]

Fifth Circuit Judge Gregg Costa labels these statutory remainders "zombie laws."[12] This is an apt label because these laws are "undead." They are alive in that they remain on the statute books. They are alive in that they are enforceable by that departmentalist executive acting on an independent constitutional judgment.[13] But they are dead in that enforcement efforts are dead-on-arrival in court, where courts follow precedent to declare that the law is constitutionally invalid and that enforcement against this new rights-holder cannot proceed or succeed.

Courts can do nothing about zombie laws, as a rights-holder cannot obtain judicial relief against "the mere enactment of the statute" absent some effort to enforce it against that rights-holder.[14] The fate of zombie laws—and their actual or attempted future enforcement—rests with the exclusive,[15] departmentalist, and discretionary control that a legislature (federal, state, or local) exercises over its substantive law and the laws that remain on its statute books, whether as living laws or as zombie laws. No judicial remedy can target the legislature or compel the legislature to act or refrain from acting.[16]

A legislature has options in handling zombie laws. It might agree with existing judicial precedent and seek to prevent future enforcement by repealing the zombie law; removal from the books kills the law, leaving no positive provision to enforce against anyone. It might disagree with judicial precedent and believe the zombie law valid, leaving it in place for future enforcement and the possibility that judicial precedent might change and restore the zombie to life. Or it might enact a new zombie law, not judicially enforceable under current judicial precedent, but anticipating or seeking to create changes in judicially established constitutional law that would render the presently zombified law valid and enforceable.

Part I describes several principles that define constitutional litigation, how those principles produce zombie laws, and the scope and nature of zombie laws. Part II describes how Congress or state legislatures can eliminate or enable future enforcement by repealing or retaining zombie laws, depending on their views of judicial precedent and what they want to see happen with their laws in the future.

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[11] Wasserman, *Departmentalism*, *supra* note 1, at 1124–26; Walsh, *supra* note 10, at 1721–22.

[12] Pool v. City of Houston, 978 F.3d 307, 309 (5th Cir. 2020).

[13] *See id.* at 312–13.

[14] Massachusetts v. Mellon, 262 U.S. 447, 483 (1923); *see also* Whole Woman's Health v. Jackson, No. 21-463, 2021 WL 5855551, at *8 (Dec. 10, 2021); California v. Texas, 141 S. Ct. 2104, 2121 (2021) (Thomas, J., concurring).

[15] Wasserman, *Departmentalism*, *supra* note 1, at 1140, 1147.

[16] *California*, 141 S. Ct. at 2115–16.

I. CONSTITUTIONAL LITIGATION AND THE CREATION OF ZOMBIE LAWS

A. Principles of Constitutional Litigation

A judicial decision declaring a law constitutionally invalid and unenforceable creates a zombie law, an undead remainder on the statute books. The appropriate scope and nature of the legislative response to a zombie law depends on the scope and nature of that zombie law. That, in turn, depends on the scope and nature of prior constitutional litigation and adjudication and of the judicial remedy that litigation produced. The principles described in the Introduction define the scope of constitutional litigation, the resulting judgment, and the zombie law that remains.[17]

1. Identifying the Constitutional Violation

An actionable constitutional violation arises not from the enactment or existence of a constitutionally violative law, but from the actual, attempted, or threatened enforcement of that violative law against a rights-holder and imposition of liability and sanction under that law. That is, a plaintiff cannot sue or obtain relief because the legislature enacts or retains a law on the books; the plaintiff obtains relief against actual or threatened efforts to enforce that law and to impose liability under that law against constitutionally protected conduct.[18] A plaintiff cannot prevail in court on the "naked contention" of a violation of constitutional rights from the "mere enactment" or existence of a statute, "though nothing has been done and nothing is to be done" to enforce that law.[19]

Courts frame this as standing—a plaintiff has standing to sue only for a sufficiently credible threat of imminent future enforcement of the law against her, not for the existence of a legal provision.[20] It makes more sense to say that enforcing and imposing liability under the law violates the rights-holder's substantive constitutional rights, whereas the law's mere existence, apart from enforcement, does not.[21] Regardless of framing, the point stands that plaintiffs cannot pursue or succeed in constitutional litigation absent actual or threatened enforcement of the defective law.

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[17] *See generally* Wasserman, *Departmentalism*, *supra* note 1, at 1080–83.

[18] *Id.* at 1083–85; *see, e.g.*, *Whole Woman's Health*, 2021 WL 5855551, at *8; *California*, 141 S. Ct. at 2115–16; *id.* at 2121 (Thomas, J., concurring).

[19] *Mellon*, 262 U.S. at 483; *see* Poe v. Ullman, 367 U.S. 497, 507 (1961); Support Working Animals, Inc. v. Governor of Fla., 8 F.4th 1198, 1203 (11th Cir. 2021).

[20] *California*, 141 S. Ct. at 2115–16; Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014); Steffel v. Thompson, 415 U.S. 452, 459 (1974).

[21] Wasserman, *Departmentalism*, *supra* note 1, at 1084–85; *see* William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty?*, 65 ALA. L. REV. 277, 282 (2013); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223, 232–33 (1988).

2. Two Postures for Litigating Constitutional Defects in Laws

Constitutional defects in laws are asserted and litigated in two primary postures.[22]

The first is defensive. X, a rights-holder, violates the law; someone with authority to enforce that law initiates an enforcement proceeding against X; X raises the constitutional defect in the law as a defense to enforcement, arguing for dismissal or a favorable judgment in that proceeding because the law being enforced is constitutionally invalid and she cannot be liable under it. The government enforces laws through criminal,[23] civil,[24] or administrative[25] proceedings. Other laws are enforced through private civil litigation—a private individual sues for a civil remedy vindicating a statutory or common law right and the rights-holder defends by challenging the constitutional validity of holding him liable under that law. Rights-holders assert constitutional defenses in private claims for defamation,[26] intentional infliction of emotional distress,[27] other torts,[28] breach of contract,[29] privacy rights,[30] property rights,[31] and employment discrimination.[32]

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[22] Two additional contexts are available, but beyond the current argument. Wasserman, *Departmentalism*, *supra* note 1, at 1086–87.

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

[24] *E.g.*, Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171 (2012); Huffman v. Pursue, Ltd., 420 U.S. 592, 604–05 (1975).

[25] *E.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018); Ohio Civ. Rts. Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 621 (1986); Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982).

[26] Milkovich v. Lorain J. Co., 497 U.S. 1 (1990); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); N.Y. Times Co. v. Sullivan, 376 U.S 254 (1964).

[27] Snyder v. Phelps, 562 U.S. 443, 450 (2011); Hustler Mag., Inc. v. Falwell, 485 U.S. 46 (1988); Gerber v. Herskovitz, 14 F.4th 500 (6th Cir. 2021).

[28] Thunder Studios, Inc. v. Kazal, 13 F.4th 736 (9th Cir. 2021).

[29] Cohen v. Cowles Media Co., 501 U.S. 663 (1991); Barrows v. Jackson, 346 U.S. 249 (1953).

[30] Fla. Star v. B.J.F., 491 U.S. 524 (1989); Cox Broad. Corp. v. Cohn, 420 U.S 469 (1975).

[31] Shelley v. Kraemer, 334 U.S. 1 (1948); Animal Legal Def. Fund v. Vaught, 8 F.4th 714, 717 (8th Cir. 2021).

[32] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020); Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1243 (10th Cir. 2010); DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591 (5th Cir. 1995); Jew v. Univ. of Iowa, 749 F. Supp. 946 (S.D. Iowa 1990).

The second posture is offensive. X, a rights-holder, brings an action under § 1983[33] and the *Ex parte Young* equitable cause of action,[34] typically in federal court, against the government or (more commonly) executive officers responsible for enforcing the challenged law. X seeks a declaratory judgment[35] that the law is constitutionally invalid and/or an injunction prohibiting ongoing and future enforcement of that law by the defendant against her.[36] Alternatively, X brings an offensive § 1983 action following completion of state enforcement, seeking a retrospective remedy such as damages for the injuries suffered from past enforcement.[37]

3. Stopping Enforcement, Not Existence

While courts speak of "invalidating" or "voiding" laws, those are figures of speech, not reflecting what happens in litigation or its result. A court halts the executive action of enforcing and imposing liability under the law; it does not halt the legislative action of determining the content of the statute books and of passing, repealing, eliminating, or retaining laws.[38] A court cannot prevent a law from taking effect or stop its continued existence. A court cannot erase or suspend the challenged law,[39] despite common, inaccurate rhetoric about "striking down" unconstitutional laws.[40]

A court's order prohibits the executive official from enforcing that law; that law does not disappear or cease to exist as a positive provision. As the Court explained in *Mellon*:

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[33] 42 U.S.C. § 1983.

[34] Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015); *Ex parte* Young, 209 U.S. 123, 155–56 (1908).

[35] 28 U.S.C. §§ 2201–2202.

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

[37] Wasserman, *Departmentalism*, *supra* note 1, at 1088–89; *see* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267–68 (1981); Owen v. City of Independence, 445 U.S. 622, 651 (1980).

[38] Whole Woman's Health v. Jackson, No. 21-463, 2021 WL 5855551, at *8 (Dec. 10, 2021); Massachusetts v. Mellon, 262 U.S. 447, 488 (1923); Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1485–86 (2018) (Thomas, J., concurring); Harrison, *Section 706*, *supra* note 1; Harrison, *Adjudication*, *supra* note 3, at 82; Mitchell, *supra* note 1, at 934–36; Wasserman, *Departmentalism*, *supra* note 1, at 1089–91.

[39] Pool v. City of Houston, 978 F.3d 307, 309 (5th Cir. 2020); Hartnett v. Pa. State Educ. Ass'n, 963 F.3d 301, 308–09 (3d Cir. 2020); Harrison *Section 706*, *supra* note 1; Harrison, *Adjudication*, *supra* note 3, at 88; Mitchell, *supra* note 1, at 936; Wasserman, *Departmentalism*, *supra* note 1, at 1090–91.

[40] Bray, *supra* note 2, at 451–52; Fallon, *supra* note 1, at 1339; Mitchell, *supra* note 1, at 934–36; Wasserman, *Departmentalism*, *supra* note 1, at 1089–90.

> We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right.[41]

Judicial review consists of declaring the validity of the applicable law in deciding a judicial controversy[42] and the "negative power to disregard an unconstitutional enactment" in adjudicating that controversy by not allowing that invalid rule to serve as a rule of decision.[43]

4. Particularized/Non-Universal Remedies

The remedies from constitutional litigation are particularized to the parties. A judgment prohibits or stops enforcement by the enforcing party against the rights-holder party in the case; it does not control the conduct of any non-party nor protect any non-party rights-holder from enforcement. The judgment does not prohibit another official from enforcing or threatening to enforce that law or a similar law against another rights-holder; the judgment does not protect another rights-holder against separate enforcement of the law.

This is obvious in a defense posture. Imagine the government initiates proceedings to enforce a law against X; X defends on the ground that the law is inconsistent with the Constitution; and the court agrees with X that the law is constitutionally invalid and cannot be enforced as the rule of decision in the case. The court dismisses the action or otherwise enters judgment in favor of X and against the government. But this judgment goes no further. It does not purport to prohibit these government officials from enforcing this now-zombified law against Y, nor does it purport to prohibit officials from a different government from enforcing an identical law against X or Y.

It follows that a judgment in an offensive action by X enjoining future enforcement of the challenged law should be similarly particularized; it protects X but not Y, who remains subject to future enforcement of that now-zombified law. Y must pursue litigation and a new or expanded judgment and injunction to be protected from future enforcement.

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[41] *Mellon*, 262 U.S. at 488; *accord* Mitchell, *supra* note 1, at 936; Wasserman, *Departmentalism*, *supra* note 1, at 1083–84, 1090.

[42] *See* California v. Texas, 141 S. Ct. 2104, 2115–16 (2021); Mitchell, *supra* note 1, at 936; Wasserman, *Departmentalism*, *supra* note 1, at 1083–84; Lawson & Moore, *supra* note 10, at 1273–74.

[43] *Mellon*, 262 U.S. at 488.

Note that this is the best conclusion[44] and the position I have urged in prior work.[45] It remains a topic of scholarly[46] and judicial debate,[47] with lower courts unsurprisingly embracing broader remedial power.[48]

5. Judgments and Opinions

In deciding a constitutional case in either posture, courts issue two papers—a judgment and an opinion.

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[44] *Supra* note 9.

[45] Howard M. Wasserman, *Congress and Universal Injunctions*, 2021 CARDOZO L. REV. DE NOVO 187, 188–89 (2021); Wasserman, *Departmentalism*, *supra* note 1, at 1080–81, 1093–94; Wasserman, *Concepts*, *supra* note 8, at 1000; Wasserman, "*Nationwide*," *supra* note 8, at 353.

[46] *Compare* sources cited *supra* note 9, *with* Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1285–88, 1331 (2021); Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 5–7 (2019); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56 (2017); Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955, 1973 (2019); Portia Pedro, *Toward Establishing a Pre-Extinction Definition of "Nationwide Injunctions"*, 91 U. COLO. L. REV. 847, 854–58 (2020); James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 STAN. L. REV. 1269, 1353–54 (2020); Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1124–25 (2020) [hereinafter Sohoni, *Vacate*]; Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 924 (2020); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 73–74 (2019).

[47] *Compare* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., joined by Thomas, J., concurring in the grant of stay), *and* Trump v. Hawaii, 138 S. Ct. 2392, 2425 n.1 (2018) (Thomas, J., concurring), *with* Little Sisters of the Poor Saint Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2412 n.28 (2020) (Ginsburg, J., dissenting), *and Hawaii*, 138 S. Ct. at 2446 (Sotomayor, J., dissenting).

[48] *See, e.g.*, HIAS, Inc. v. Trump, 985 F.3d 309, 318 (4th Cir. 2021); New York v. U.S. Dep't of Homeland Sec., 969 F.3d 42, 87–88 (2d Cir. 2020); City of Chicago v. Barr, 961 F.3d 882, 911–31 (7th Cir. 2020); E. Bay Sanctuary Covenant v. Trump, 950 F.3d 1242, 1260 (9th Cir. 2020); Rodgers v. Bryant, 942 F.3d 451, 457–59 (8th Cir. 2019); E. Bay Sanctuary Covenant v. Barr, 934 F.3d 1026, 1028–30 (9th Cir. 2019); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 511–12 (9th Cir. 2018); Texas v. United States, 809 F.3d 134, 187–88 (5th Cir. 2015), *aff'd mem. by evenly divided court*, 136 S. Ct. 2271 (2016); Wynn v. Vilsack, No. 3:21-cv-514-MMH-JRK, 2021 WL 2580678, at *17 (M.D. Fla. June 23, 2021); Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., No. 20-cv-3377 (DLF), 2021 WL 1779282, at *9–10 (D.D.C. May 5, 2021); Texas v. United States, 515 F. Supp. 3d 627, 639 (S.D. Tex. 2021); Danville Christian Acad., Inc. v. Beshear, 503 F. Supp. 3d 516, 531 (E.D. Ky. 2020), *stay granted on other grounds*, 981 F.3d 505 (6th Cir. 2020); California v. Health & Hum. Servs., 351 F. Supp. 3d 1267, 1300 (N.D. Cal. 2019); Pennsylvania v. Trump, 351 F. Supp. 3d 791, 830–35 (E.D. Pa. 2019); Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 437–38 (E.D.N.Y. 2018); Cnty. of Santa Clara v. Trump, 250 F. Supp. 3d 497, 539–40 (N.D. Cal. 2017).

A judgment resolves litigation involving one plaintiff, one defendant, one law, and one constitutional right, binding those persons on those issues.[49] The root of the judicial power under Article III is the authority to "issue binding judgments and to settle legal disputes within the court's jurisdiction. But judgments settle only those legal disputes, not others."[50] The judgment prohibits current and future enforcement of the invalid law by the parties, their officers and agents, and "other persons who are in active concern or participation."[51] That injunction should be no more burdensome than necessary to accord "complete relief" to the plaintiff and should be commensurate with and match the constitutional violation.[52] It therefore protects the party rights-holders from ongoing or future enforcement, but should not extend beyond that to protect the universe of non-parties who share similar rights or interests and who may be subject to future enforcement.[53]

An opinion is a reasoned explanation justifying the judgment. Opinions are "essays written by judges explaining why they rendered the judgment they did. The primary significance of these essays for non-judicial actors is the guidance they provide in predicting future judicial behavior."[54] They "explain the grounds for judgments, helping other people to plan and order their affairs" going forward.[55]

The judgment resolves a discrete dispute between discrete parties but applies no further; this explains why the injunction is particularized to protect the party rights-holder but no one else. The opinion provides the broader prospective effect. Through the law of precedent and stare decisis, the opinion protects other rights-holders in future judicial proceedings, compelling or persuading (depending on the level of court) the court in future proceedings to reach the same conclusion about the law's constitutional invalidity and to reject enforcement of that law against a

[49] Wasserman, *Concepts*, *supra* note 8, at 1017–18; Wasserman, *Departmentalism*, *supra* note 1, at 1104–05.

[50] Baude, *supra* note 10, at 1811.

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

[52] Lewis v. Casey, 518 U.S. 343, 357 (1996); Califano v. Yamasaki, 442 U.S. 682, 702 (1979); Hills v. Gautreaux, 425 U.S. 284, 293–94 (1976); Wasserman, *Departmentalism*, *supra* note 1, at 1094.

[53] Wasserman, *Departmentalism*, *supra* note 1, at 1089–91, 1091–92.

[54] Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 44–45, 62 (1993); *see* my previous discussions in Wasserman, *Concepts*, *supra* note 8, at 1021–23; Wasserman, *Departmentalism*, *supra* note 1, at 1107–09.

[55] Baude, *supra* note 10, at 1844; Lawson & Moore, *supra* note 10, at 1327–28; Merrill, *supra* note 54, at 62.

new set of rights-holders.[56] Precedent arises from either litigation posture—the Supreme Court has established major constitutional principles and precedents in opinions from offensive[57] and defensive[58] actions.

6. Judicial Departmentalism

Constitutional adjudication rests on a practical system of judicial departmentalism,[59] which internalizes that distinction between judgment and opinion. Judicial departmentalism rests on three principles. First, a judgment in one case, particularized as it must be, binds the parties to the case and must be obeyed. Second, the federal executive must enforce judgments from federal courts. Third, judicial precedent established by an opinion controls courts in future litigation but no non-judicial branches or actors; other branches and actors can adopt and act on independent constitutional understandings of the law's validity and enforceability, even if at odds with judicial precedent.[60] In practice the judicial position prevails in most cases—disputes reach the judiciary and courts must apply judicial precedent to declare the new round of enforcement constitutionally invalid and to prohibit enforcement and liability as to the new rights-holders.[61] But other actors retain broader constitutional leeway outside of court.

B. Creating Zombie Laws

Zombie laws emerge from the interaction of these principles—of the Constitution prohibiting enforcement but not existence, required non-universality/particularity of judgments, distinctions between opinions and judgments, and judicial departmentalism. Following judicial review and a court decision declaring a law constitutionally invalid, the executive is prohibited from enforcing the law against the rights-holders who were party to the action.

But the challenged law remains on the books and retains practical force. It remains available for actual or threatened enforcement against non-parties to the prior

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[56] Baude, *supra* note 10, at 1844; Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 923 n.31 (2011); Fallon, *supra* note 1, at 133; Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 185–87 (2014); Lawson & Moore, *supra* note 10, at 1327; Merrill, *supra* note 54, at 44–45, 62 (1993); Wasserman, *Departmentalism*, *supra* note 1, at 1108–09.

[57] Cases cited *supra* notes 34–37.

[58] Cases cited *supra* notes 23–32.

[59] Walsh, *supra* note 10, at 1715.

[60] MARTIN H. REDISH, JUDICIAL INDEPENDENCE AND THE AMERICAN CONSTITUTION: A DEMOCRATIC PARADOX 45–46 (2017); Lawson & Moore, *supra* note 10, at 1318–19, 1328; Wasserman, *Departmentalism*, *supra* note 1, at 1115–17.

[61] Wasserman, *Departmentalism*, *supra* note 1, at 1124–26; Walsh, *supra* note 10, at 1721–22.

litigation by a departmentalist executive convinced of its validity and willing to follow an independent understanding of the Constitution contrary to that of the judiciary.[62] Such enforcement fails once the constitutional issues reach court—judicial precedent controls the court in an enforcement action or in a rights-holder-initiated offensive action to enjoin threatened enforcement. Bound by judicial precedent (especially binding Supreme Court precedent) declaring that law constitutionally invalid, the court will stop this new enforcement effort because enforcement of and imposition of liability under that law violate the (judicially determined) constitutional rights of the targeted rights-holder.[63]

"Zombie laws" provides an apt label for these "undead" laws. They are alive in that they remain on the statute books. They are alive in that they are enforceable by a departmentalist executive acting on an independent constitutional judgment.[64] They are dead in that enforcement efforts are dead-on-arrival in court.[65]

Three classes of zombie laws arise in three ways.

1. Similar Laws, Different Jurisdictions

Jurisdiction B's law becomes a zombie when a court declares an identical (or substantially similar) law from Jurisdiction A constitutionally invalid. Because the prior judgment spoke to the enforcement of Jurisdiction A law by Jurisdiction A enforcers against individuals subject to Jurisdiction A law, it says nothing about Jurisdiction B's law or enforcement of Jurisdiction B's law against individuals within Jurisdiction B. Consider three examples.

a. Pool v. City of Houston

Judge Costa coined "zombie law" in *Pool v. City of Houston*.[66] Plaintiffs challenged a Houston ordinance requiring initiative and petition circulators to be registered voters.[67] The Supreme Court in *Buckley v. American Constitutional Law Foundation*[68] had declared that an identical Colorado law violated the First Amendment. But *Buckley* said nothing about Houston officials' continued enforcement of Houston's ordinance as to Houston petition circulators; further litigation was necessary to establish the constitutional invalidity and non-enforceability of Houston's ordinance. *Buckley* served as controlling judicial precedent making the answer obvious—

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[62] Walsh, *supra* note 10, at 1715, 1728; Wasserman, *Departmentalism*, *supra* note 1, at 1115–17.

[63] *See supra* Section I.A.

[64] *See* Pool v. City of Houston, 978 F.3d 307, 312–13 (5th Cir. 2020).

[65] *Id.*; Walsh, *supra* note 10, at 1721–22.

[66] *Pool*, 978 F.3d at 309.

[67] *Id.*

[68] Buckley v. Am. Const. Law. Found., 525 U.S. 182, 186–87 (1999).

Houston's identical ordinance was invalid and unenforceable for the reasons Colorado's law was invalid and unenforceable. But that determination required a new round of litigation and a new judgment limited to this law and these parties.[69]

b. June Medical Services, L.L.C. v. Russo

In *Whole Woman's Health v. Hellerstedt*, the Supreme Court declared invalid a Texas law requiring that physicians at reproductive-health clinics have admitting privileges at nearby hospitals.[70] The Court's decision made a zombie of Louisiana's "almost word-for-word identical"[71] admitting-privileges law. When Louisiana officials evinced intent to enforce its zombie law despite the binding precedent of *Whole Woman's Health*, the Court in *June Medical Services* declared that law invalid and prohibited its enforcement against Louisiana-based clinics and physicians.[72]

c. Marriage Equality

Obergefell v. Hodges[73] declared constitutionally invalid, and enjoined enforcement of, same-sex-marriage bans in four states (Michigan, Ohio, Kentucky, and Tennessee). The decision made zombies of similar bans in other states. But the next steps rested with the executive branches of those states to cease enforcing their bans and to begin issuing marriage licenses and with the legislative branches of those states to repeal the bans. Executive officials in Mississippi and Texas dragged their feet in issuing licenses to same-sex couples, insisting on awaiting judgments prohibiting their enforcement of their zombie laws as to their citizens, necessitating further litigation.[74] Same-sex marriage bans in states such as South Dakota and Nebraska remained on the books following *Obergefell*; pre-enforcement offensive litigation challenging those laws remained alive, requiring judicial declaration of their invalidity in light of the *Obergefell* precedent.[75]

Attorneys for the City of Houston in *Pool* offered same-sex marriage bans as the paradigm of a zombie law that "everyone knows . . . can no longer be enforced."[76] But the government cannot say a zombie law "can no longer be enforced"

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[69] *See Pool*, 978 F.3d at 312–13.

[70] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2301 (2016).

[71] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112 (2020).

[72] *Id.* at 2113; *see also id.* at 2141–42 (Roberts, C.J., concurring in the judgment) ("The result in this case is controlled by our decision four years ago invalidating a nearly identical Texas law.").

[73] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[74] Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 266–71 (2015).

[75] *Id.* at 256; Wasserman, *Departmentalism*, *supra* note 1, at 1123. *See, e.g.*, Rosenbrahn v. Daugaard, 799 F.3d 918, 921–22 (8th Cir. 2015); Waters v. Ricketts, 798 F.3d 682, 685 (8th Cir. 2015).

[76] Pool v. City of Houston, 978 F.3d 307, 313 (5th Cir. 2020).

if it remains on the books and a departmentalist executive is willing to pursue enforcement at the risk of inevitable judicial defeat. That current Houston officials choose not to enforce in the face of contrary binding precedent does not render the law unenforceable.

2. Jurisdiction's Own Law

Jurisdiction B's law becomes a zombie when a court declares it invalid and enjoins its enforcement by B's enforcer as to rights-holder parties to that case. But one judicial ruling does not eliminate any effect from Jurisdiction B's new zombie. The combination of particularized injunctions and judicial departmentalism empowers Jurisdiction B's executive to attempt or threaten to enforce this zombie law against new, non-party rights-holders despite the prior judgment and opinion. Those efforts fail when the new enforcement effort reaches a court bound by precedent declaring Jurisdiction B's law constitutionally invalid and the second court, following that precedent, prohibits enforcement against this new target.

Certain defeat makes such enforcement efforts less likely. The constitutional question is so obvious, judicial precedent having been established in a case involving this law, as to preordain the result of future litigation involving that law and make further enforcement not worth the effort. Political considerations deter executives from flexing their departmentalist muscle for fear of being perceived as disobeying the first court.[77] That concern increases when B's official continues enforcing the very law the court had declared invalid, even if against different, non-party rights-holders; that distinction is lost on the general public and the mainstream press.[78] The point is that compliance with precedent—and thus non-enforcement of this zombie law—is not a matter of obligation but of convention and self-preservation, by officials recognizing the likelihood of litigation defeat and wary of being equated with the segregationists who led Massive Resistance to *Brown*.[79]

Many state officials pursued this decision-making process during pre-*Obergefell* challenges to same-sex marriage prohibitions. Following lower-court injunctions compelling state or local officials to grant marriage licenses to plaintiff same-sex couples, officials issued licenses to all couples in the state in voluntary compliance with the precedent of the prior cases, although not compelled by any injunction.[80] Counter-examples—executives continuing to enforce zombie marriage bans by denying licenses to non-party couples—were notable for their rarity. Alabama was the most visibly non-compliant state pre-*Obergefell*, with state executive and judicial

[77] Wasserman, *Departmentalism*, *supra* note 1, at 1119; Blackman & Wasserman, *supra* note 74, at 267.

[78] Wasserman, *Departmentalism*, *supra* note 1, at 1119.

[79] Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 499 (2018).

[80] Blackman & Wasserman, *supra* note 74, at 262–65, 272–73.

officials taking a firm stand against non-binding federal district-court precedent and in favor of its power to enforce its zombie laws.[81]

The most celebrated post-*Obergefell* example involved Kim Davis, the county clerk for Rowan County, Kentucky. *Obergefell* enjoined enforcement of Kentucky's law refusing recognition of same-sex marriages as to a widower wanting his name listed as spouse on his husband's death certificate.[82] *But Obergefell* did not speak to Davis or to couples seeking marriage licenses in Rowan County. When Davis continued to enforce Kentucky's zombie law and refused to issue licenses to requesting same-sex couples, the appropriate process followed—the new requesting couples sued Davis; the court enjoined her from enforcing the law and compelled her to issue the licenses to those couples; the court held her in contempt and jailed her for disobeying the court order to issue licenses; and the court deemed her not immune from damages for her past refusal to issue licenses.[83]

The enforcement calculus changes when the enforcement mechanism changes. Texas' Fetal Heartbeat Act, enacted in 2021, prohibits abortions after detection of fetal heart activity (around five to six weeks of pregnancy).[84] The law also precludes enforcement by any public official.[85] It relies on exclusive private civil enforcement, through a cause of action for "any person" (regardless of personal injury or connection to any abortion) to sue a reproductive-health provider and to recover damages, attorney's fees, and other civil remedies.[86]

The distinction between the particularized judgment and the prospective opinion applies to this different enforcement scheme. A judgment dismissing X's SB8 lawsuit against Planned Parenthood over one prohibited post-heartbeat abortion does not affect Y's subsequent or simultaneous lawsuit against Planned Parenthood

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[81] Howard M. Wasserman, *Crazy in Alabama: Judicial Process and the Last Stand Against Marriage Equality in the Land of George Wallace*, 110 NW. U. L. REV. ONLINE 1, 1–2 (2015).

[82] Obergefell v. Hodges, 135 S. Ct. 2584, 2594–95 (2015).

[83] Blackman & Wasserman, *supra* note 74, at 269–70; *see* Miller v. Caudill, 936 F.3d 442 (6th Cir. 2019); Ermold v. Davis, 936 F.3d 429, 437 (6th Cir. 2019); Miller v. Davis, 123 F. Supp. 3d 924 (E.D. Ky. 2015).

[84] Texas Heartbeat Act, S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021); Whole Woman's Health v. Jackson, No. 21-463, 2021 WL 5855551, at *4 (Dec. 10, 2021). The Supreme Court allowed reproductive-health providers to pursue pre-enforcement litigation against state licensing officials but no other officials. *Id.* at *8, *11. *See generally* Howard M. Wasserman & Charles W. "Rocky" Rhodes, *Solving the Procedural Puzzles of Texas' Fetal-Heartbeat Law and Its Imitators: The Limits and Opportunities for Offensive Litigation*, 71 AM. U. L. REV. (forthcoming 2022); Charles W. "Rocky" Rhodes & Howard M. Wasserman, *Solving the Procedural Puzzles of Texas' Fetal-Heartbeat Law and Its Imitators: The Potential for Defensive Litigation*, SMU L. REV. (forthcoming 2022).

[85] TEX. HEALTH & SAFETY CODE ANN. § 171.207(a) (West 2021); *Whole Woman's Health*, 2021 WL 5855551, at *4.

[86] *Id.* § 171.208(a)–(b); Wasserman & Rhodes, *supra* note 84 (manuscript at 4).

for the same[87] or a different abortion. Precedent established in X's suit (depending on how far that case went) guarantees that Y's suit fails.

The ordinary checks on futile enforcement of the zombified law are absent. Private litigants pursuing ideological or personal agendas may feel less constrained than elected public officials by popular opprobrium or criticism for actions that appear to disregard courts and judicial precedent; they need not worry that public disagreement will cost them a future election. The ordinary deterrent for frivolous private civil litigation comes from attorney's fees and other sanctions.[88] But SB8 eliminates that check, prohibiting state courts from awarding attorney's fees against private plaintiffs or in favor of provider defendants, regardless of how weak or frivolous the case.[89] As a result, nothing, beyond litigation defeat, deters Y from ignoring precedent established in X's failed lawsuit and continuing to pursue damages under the SB8 zombie, with the attendant costs, burdens, and chill on reproductive-health providers and their pregnant clients.[90]

3. Different Laws, Similar Constitutional Defects

Jurisdiction B's law becomes a zombie because the current state of judicial constitutional doctrine renders the law unenforceable in court. The parameters of constitutional jurisprudence show that, absent substantial change, a court applying existing judicial doctrine will declare the law constitutionally invalid and prohibit enforcement. But those parameters derive from cases involving different laws (whether from Jurisdiction A or Jurisdiction B) raising similar constitutional problems and defects.

This category of zombie law is broader and more difficult to define. At its broadest, one constitutional decision renders a zombie every law that has not been subject to constitutional testing (or whose materially similar twin from another jurisdiction has not been subject to constitutional testing) but that might raise similar constitutional concerns under precedent involving laws touching similar issues. The concept should not extend so far. It should be limited to cases in which the constitutional deficiency of the law is patent under general constitutional principles, such that the law will not survive judicial review absent doctrinal revision.

The doctrine of executive qualified immunity provides rough guidance. A constitutional right is clearly established (and an official can be liable for damages) when

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[87] Only one plaintiff can recover for one abortion; "a court may not award" further relief for one abortion when the defendant has paid the full statutory damages for that abortion. TEX. HEALTH & SAFETY CODE ANN. § 171.208(c).

[88] FED. R. CIV. P. 11(b)(2); 28 U.S.C. § 1927; Wasserman, *Departmentalism*, *supra* note 1, at 1128–30.

[89] TEX. HEALTH & SAFETY CODE ANN. § 171.207(i); *see* Rhodes & Wasserman, *supra* note 84 (manuscript at 46).

[90] Wasserman & Rhodes, *supra* note 84 (manuscript at 25); Rhodes & Wasserman, *supra* note 84 (manuscript at 21).

the "contours of the right [are] sufficiently clear" such that every reasonable officer would know his conduct violated the Constitution, even if the right was not established in factually identical precedent.[91] Precedent must place the constitutional question "beyond debate,"[92] such that all but the "plainly incompetent" would know enforcement would fail before a court adhering to judicial precedent.[93] Applying that line, a provision qualifies as a zombie law if the "contours" of constitutional jurisprudence place "beyond debate" the conclusion that the law is invalid and cannot be enforced, even when that judicial determination did not arise from an identical or materially similar law.

It is not essential to define this line, as nothing practical turns on whether a given law qualifies as a zombie. Zombie or not, the law remains on the books and the executive can threaten or attempt enforcement until the court issues a new judgment prohibiting him from enforcing the law against a new target rights-holder. Defining the line makes a conceptual difference, signaling to the executive the state of constitutional doctrine, the likelihood of successful enforcement, and how far on a political or popular limb he is going with efforts to enforce a given law.

Consider several examples.

a. Abortion Restrictions

States have raced to enact laws prohibiting pre-viability abortions, from after 20 weeks or fewer of pregnancy down to after detection of fetal heart activity at 5–6 weeks.[94] Under controlling doctrine, states may not prohibit pre-viability abortions.[95] But states envisioned a newly aligned Supreme Court ready to limit (if not overrule) controlling abortion precedent and to increase state power to limit reproductive freedom; states sought to create the litigation through which the Court

[91] Anderson v. Creighton, 483 U.S. 635, 640 (1987); *accord* Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (quoting *Anderson*, 483 U.S. at 640); Saucier v. Katz, 533 U.S. 194, 202 (2001) (quoting *Anderson*, 483 U.S. at 640).

[92] *al-Kidd*, 563 U.S. at 741.

[93] *Id.* at 743 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

[94] *See, e.g.*, Whole Woman's Health v. Jackson, No. 21-463, 2021 WL 5855551, at *4 (Dec. 10, 2021); Bryant v. Woodall, 1 F.4th 280, 283 (4th Cir. 2021); Little Rock Fam. Plan. Servs., Inc. v. Rutledge, 984 F.3d 682, 686 (8th Cir. 2021); Jackson Women's Health Org. v. Dobbs, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam); United States v. Texas, No. 1:21-CV-796-RP, 2021 WL 4593319, at *35 (W.D. Tex. Oct. 6, 2021); Planned Parenthood S. Atl. v. Wilson, No: 3:21-00508-MGL, 2021 WL 1060123, at *1 (D.S.C. Mar. 19, 2021); Sistersong Women of Color Reprod. Just. Collective v. Kemp, 472 F. Supp. 3d 1297, 1314 (N.D. Ga. 2020); Robinson v. Marshall, 415 F. Supp. 3d. 1053, 1055, 1057–58 (M.D. Ala. 2019); MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT 205–06 (2020).

[95] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992); Roe v. Wade, 410 U.S. 113, 163 (1973).

could eliminate or narrow constitutional protection for abortion.[96] The Court will consider the constitutional validity of Mississippi's 15-week ban during October Term 2021.[97]

The Court has never considered or passed on the validity of a 15-week ban or a fetal-heartbeat ban. *Roe* involved a law prohibiting abortions at any stage of pregnancy except to save the pregnant woman's life,[98] while *Casey* involved a host of laws governing consent, permission, information, notice, and reporting.[99] Nevertheless, the contours of *Roe* and *Casey* as precedent place beyond debate that a law banning some pre-viability abortions (those between detection of a fetal heartbeat and viability) is invalid and unenforceable in court.[100] These bans should be understood as zombie laws, because their constitutional invalidity is plain to all but the plainly incompetent.

b. Regulating Social Media Companies

Texas and Florida enacted laws prohibiting social media companies from "deplatforming" or banning certain speakers and from otherwise "censoring" speech by moderating content on their sites.[101] Neither the Supreme Court nor a court of appeals has considered the constitutional validity of laws requiring social media sites to provide forums for unwanted speakers nor established binding precedent in a case evaluating such laws.[102] Nevertheless, controlling precedent applies ordinary First Amendment principles to the internet,[103] and protects private operators of expressive outlets from being compelled to host third-party speakers or speech they do not wish to host.[104] The First Amendment's contours should be beyond debate—a law

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[96] Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 268–69 (5th Cir. 2019), *cert. granted in part*, 141 S. Ct. 2619 (2021); Arkansas Unborn Child Protection Act, S.B. 6, 93d Gen. Assemb., Reg. Sess. (Ark. 2021); *see also* Howard M. Wasserman, *A Court With No Names: Anonymity and Celebrity on the "Kardashian Court"*, 106 IOWA L. REV. ONLINE 47, 59 (2021).

[97] *Dobbs*, 141 S. Ct. at 2619 (granting certiorari).

[98] *Roe*, 410 U.S. at 117–18.

[99] *Planned Parenthood*, 505 U.S. at 844–45.

[100] Jackson Women's Health Org. v. Dobbs, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam); United States v. Texas, No. 1:21-CV-796-RP, 2021 WL 4593319, at *35 (W.D. Tex. Oct. 6, 2021); Planned Parenthood S. Atl. v. Wilson, No: 3:21-00508-MGL, 2021 WL 1060123, *1 (D.S.C. Mar. 19, 2021).

[101] FLA. STAT. § 106.072 (2021); TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002 (West 2021).

[102] *But see* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring in order granting certiorari, vacating, and remanding to dismiss as moot).

[103] Reno v. ACLU, 521 U.S. 844, 870 (1997).

[104] Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., 515 U.S. 557, 570 (1995); Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257–58 (1974); *see also* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019); *id.* at 1944 (Sotomayor, J., dissenting).

dictating to private sites the speakers and speech they must host is constitutionally invalid, absent drastic revisions to free-speech doctrine and principles.[105] These social-media "anti-censorship" laws are zombies, triggering new litigation in which courts apply existing First Amendment principles to declare them constitutionally invalid and enjoin enforcement.[106]

c. Amending Defamation Law

First Amendment advocates regard *New York Times v. Sullivan*[107] as the Court's most important free-speech case and the genesis of the modern speech-protective First Amendment.[108] The Court recognized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[109]

But scholars, litigants, and judges have criticized the decision and suggested the need to reconsider and perhaps overrule it in a changing media, political, and expressive environment.[110] Imagine a state, observing and agreeing with these criticisms, calls for a new First Amendment regime; it amends its defamation law to

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[105] *See Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. at 1221 (Thomas, J., concurring); Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2368 (2021).

[106] *See* NetChoice L.L.C. v. Paxton, No. 1:21-CV-840-RP, 2021 WL 5755120 (W.D. Tex. Dec. 1, 2021); NetChoice L.L.C. v. Moody, No. 4:21cv220-RH-MAF, 2021 WL 2690876, at *8–9, *12 (N.D. Fla. June 30, 2021).

[107] N.Y. Times Co. v. Sullivan, 376 U.S. 264 (1964).

[108] LEE LEVINE & STEPHEN WERMIEL, THE PROGENY: JUSTICE WILLIAM J. BRENNAN'S FIGHT TO PRESERVE THE LEGACY OF *NEW YORK TIMES V. SULLIVAN* 31 (2014); ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 5–8 (1991); Harry Kalven, Jr., *The* New York Times *Case: A Note on "the Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 221 n.125; Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 79; Mary-Rose Papandrea, *The Story of* New York Times Co. v. Sullivan, *in* FIRST AMENDMENT STORIES 229, 230 (Richard W. Garnett & Andrew Koppelman eds., 2012); Howard M. Wasserman, *Holmes and Brennan*, 67 ALA. L. REV. 797, 810, 832 (2016).

[109] *N.Y. Times*, 376 U.S. at 270; LEVINE & WERMIEL, *supra* note 108, at 28; Papandrea, *supra* note 108, at 248.

[110] *See, e.g.*, Berisha v. Lawson, 141 S. Ct. 2424, 2424–25 (2021) (Thomas, J., dissenting from denial of certiorari); *id.* at 2430 (Gorsuch, J., dissenting from denial of certiorari); McKee v. Cosby, 139 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari); Nunes v. Lizza, 14 F. 4th 890, 899 (8th Cir. 2021); Tah v. Glob. Witness Publ'g, Inc., 991 F.3d 231, 251–56 (D.C. Cir. 2021) (Silberman, J., dissenting in part); Palin v. N.Y. Times Co., 482 F. Supp. 3d 208, 214–15 (S.D.N.Y. 2020); David A. Logan, *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 OHIO ST. L.J. 759, 761–62 (2020); David McGowan, *A Bipartisan Case Against* New York Times v. Sullivan, 1 J. FREE SPEECH L. 509, 509–10 (forthcoming 2021); Papandrea, *supra* note 108, at 258–59.

align with its preferred tort policies and to create the litigation necessary to reconsider *New York Times* and its progeny. That is, imagine a state creates a regime of zombie defamation law through a series of zombie enactments.

It might begin small, enacting a statute requiring the defendant to prove truth by a preponderance of evidence, rather than the plaintiff prove falsity by clear-and-convincing evidence.[111] Or a state might confront the central holding of *New York Times* and make defamation a strict-liability tort by imposing liability, even in cases brought by public officials, without regard to state of mind.[112] Or a state might go big, redefining defamation to make privately actionable the expression of insulting, demeaning, or negative statements about public officials, regardless of truth or accuracy, contrary to vital First Amendment protection for utterances that do not state actual facts[113] and the rule that government cannot proscribe publication of truthful, lawfully obtained information.[114]

Each qualifies for this class of zombie law. Each contradicts existing constitutional principles and judicial precedent, established in different cases involving different laws enforced by different plaintiffs in different jurisdictions. Under controlling constitutional jurisprudence, enforcement of each fails.

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Again, labeling laws as zombies does not end the inquiry. An executive or private plaintiff can attempt or threaten to enforce these laws, whether they qualify as zombies. New litigation must determine their validity and halt their enforcement against new target rights-holders. The point is that the way out of that litigation is more obvious and more over-determined for zombie laws than for other laws.

C. Limiting and Expanding the Zombie's Power

Zombie laws are inevitable. In declaring a law constitutionally invalid, a court cannot erase that law, an identical law in another jurisdiction, or a different law raising similar constitutional concerns; something remains on the statute books. The court also cannot enjoin the legislature to repeal the law declared invalid[115] and it certainly cannot enjoin another legislature to repeal an identical or similar law.

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[111] *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 773–74 (1986).

[112] *N.Y. Times*, 376 U.S. at 279–80; *see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347–48 (1974); Logan, *supra* note 110, at 785–86, 788; McGowan, *supra* note 110, at 529–30.

[113] Milkovich v. Lorain J. Co., 497 U.S. 1, 20–21 (1990); Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 51–52 (1988).

[114] Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989).

[115] California v. Texas, 141 S. Ct. 2104, 2115–16 (2021).

A separate question is the zombie law's force—how undead it is. That depends on two issues: the scope of the judgment in the case declaring the law invalid and the executive's prospective departmentalist choices.

1. Scope of the Judgment

The scope of the prior judgment, distinct from the precedent-setting opinion, dictates what the executive can do with the zombie remainder. A broad court order in prior litigation narrows the future enforceability of the zombie law against future non-party rights-holders, narrowing the potential constitutional and political mischief that a zombie can create. A narrower court order yields the opposite—a more effective, powerful, and mischievous zombie.

This adds practical consequence to the academic debate over the scope of judgments and the permissibility of universal/non-particularized injunctions.[116] If a court can issue a universal injunction prohibiting enforcement of the challenged law against all rights-holders, it strips that zombie law of any practical force. Although the law remains on the statute books, the universal injunction prohibits the most-departmentalist executive from enforcing it against any rights-holders and makes any effort to do so a violation of a court's judgment and injunction. If the judgment and injunction must remain particularized to protecting the parties, the zombie remainder retains greater force; the judgment is silent as to enforcement of that zombie law against any other person, allowing the executive to wield the zombie toward some end.

But universal injunctions can limit only the second type of zombie law—a judgment declaring Jurisdiction B's law invalid as to all future enforcement of Jurisdiction B's law. A universal/non-particularized injunction prohibits Jurisdiction B's executive from enforcing Jurisdiction B's law against any rights-holder, party or otherwise. Any attempt to enforce the zombie against anyone violates the judgment and subjects the executive to further remedies and sanctions for violating an injunction.

Universality cannot limit the first class of zombie law (a prior judgment declaring Jurisdiction A's law invalid affecting enforcement of Jurisdiction B's similar or identical law) or the third class (a law rendered patently inconsistent with precedent established in cases involving different laws but placing the constitutional question beyond debate).[117] The broadest universal/non-particularized injunction or declaratory judgment prohibiting enforcement of Jurisdiction A's law by all officials against all rights-holders does nothing to prohibit enforcement of Jurisdiction B's law by Jurisdiction B's enforcers against rights-holders subject to Jurisdiction B's law. And it certainly does nothing to prohibit enforcement of a different law that happens to raise similar constitutional difficulties.

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[116] *Supra* Section I.A.4.

[117] *Supra* Section I.B.

This is a common misconception about the history of school-desegregation litigation following *Brown v. Board of Education*.[118] *Brown* enjoined enforcement of Kansas's segregated-school laws; at its most non-particularized it required Kansas schools to admit all students into historically white secondary schools in Kansas. That broadest understanding of the *Brown* injunction did nothing to prohibit enforcement of similar, zombified (first category) public-school segregation laws in Arkansas.[119] Nor did it prohibit enforcement of (third category) zombie laws mandating segregation in other contexts.

The opinion declaring Jurisdiction A's law constitutionally invalid has precedential effect on courts considering the constitutional validity of Jurisdiction B's identical zombie law. The degree of precedential effect depends on the level of court that decided the question; the similarities and differences between Jurisdiction A's law at issue in the prior litigation and Jurisdiction B's zombie law; and the parties and context involved in later litigation. In the meantime, Jurisdiction B's executive can attempt or threaten to enforce its zombie law and burden new rights-holders subject to that law. The threat and burden on new rights-holders ends when the dispute reaches court, the court applies binding precedent (from litigation over Jurisdiction A's law), and the court passes judgment and issues a remedy against Jurisdiction B's executive as to the enforcement of Jurisdiction B's law.

Return to *Brown*. The Court's opinion zombified laws (first category) requiring racial segregation in secondary education in Arkansas. *Brown*'s declaration that separate-but-equal secondary schools violate the Fourteenth Amendment established binding judicial precedent dictating the conclusion in future litigation over Arkansas' zombie segregation laws—those laws must be declared constitutionally invalid and Arkansas officials must be enjoined from enforcing them.[120] Federal courts appropriately relied on *Brown*, as precedent, to enjoin Arkansas officials from enforcing their segregation laws, with disregard for that new injunction punishable by contempt.[121] *Brown* also established general principles from which a court might conclude that laws mandating segregation in other contexts, such as higher education[122] or use of public spaces,[123] are (third category) zombie laws violating the Fourteenth Amendment whose enforcement should be enjoined.

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[118] *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[119] Wasserman, *Departmentalism*, *supra* note 1, at 1132–33; *supra* Section I.B.1.

[120] *Id.* at 1133.

[121] *Id.*; *see* Cooper v. Aaron, 358 U.S. 1, 15 (1958); Josh Blackman, *The Irrepressible Myth of* Cooper v. Aaron, 107 GEO. L.J. 1137, 1147–50 (2019).

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

[123] Dawson v. Mayor & City Council of Balt. City, 220 F.2d 386, 387 (4th Cir.), *aff'd per curiam*, 350 U.S. 877 (1955); Dorsey v. State Athletic Comm'n, 168 F. Supp. 149, 151–52 (E.D. La. 1958).

2. Executive Departmentalism

A departmentalist executive or private individual committed to enforcing or threatening to enforce a zombie law in the face of contrary judicial precedent and certain judicial defeat gives that zombie law power. The shadow of executive departmentalism also allows rights-holders to pursue preemptive offensive litigation to prevent that enforcement. Because the zombie law exists and judicial precedent (without a judgment) does not preclude attempted enforcement, the rights-holder can show a sufficiently credible threat of future enforcement by the departmentalist executive to justify federal litigation,[124] rather than awaiting actual enforcement efforts.

In *Pool v. City of Houston*,[125] the Fifth Circuit considered a zombie ordinance requiring initiative and petition circulators to be registered voters; it found a sufficient threat of enforcement where the city (through the municipal executive) had failed to inform the public that it would not require petition organizers to satisfy the requirements of the zombie law and had inquired into circulators' registrations in previous investigations of ballot-initiative signatures.[126] In *Bryant v. Woodall*,[127] the Fourth Circuit held that abortion providers could challenge North Carolina's ban on pre-viability abortions, emphasizing recent amendments to the state's statutory scheme and recent efforts throughout the United States to prohibit pre-viability abortions; renewed state interest in regulating abortion made the threat of prosecution under the law credible.[128] Through history and the signals of departmentalist executives and legislatures, both "zombie[s] show[ed] signs of life."[129]

II. RESPONDING TO ZOMBIE LAWS

If litigation inevitably leaves zombie laws on the books, the power to do something about them rests with the legislative (federal, state, or local) power over the statute books. Legislatures wield exclusive power and discretion to repeal, retain, amend, or enact laws following judicial declarations of constitutional invalidity and establishment of constitutional principles.

The zombie law remains unless the legislature acts, in its sole discretion as to when, whether, and how. A court cannot compel legislative action to enact or repeal any law, including a zombie law.[130] Legislators enjoy absolute immunity from suit

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[124] Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014); Steffel v. Thompson, 415 U.S. 452, 459 (1974); *see supra* notes 20–21 and accompanying text.

[125] Pool v. City of Houston, 978 F.3d 307 (5th Cir. 2020); *supra* notes 66–69 and accompanying text.

[126] *Pool*, 978 F.3d at 312–13.

[127] Bryant v. Woodall, 1 F.4th 280 (4th Cir. 2021).

[128] *Id.* at 287–89.

[129] *Pool*, 978 F.3d at 313.

[130] *See* California v. Texas, 141 S. Ct. 2104, 2115–16 (2021).

or judicial remedy for core legislative functions, including enacting or repealing laws,[131] even where that law or a similar law has been declared constitutionally invalid. Moreover, the Constitution does not obligate the legislature to repeal. The existence of the zombie law does not violate any rights-holders' constitutional rights.[132] The law cannot be successfully enforced because enforcement fails in court; that protects rights-holders and their constitutional liberties.

More importantly, the legislature controls and can address all three classes of zombie laws. A court could stop the second category of zombie—Jurisdiction B's law following judicial determination of its invalidity—by allowing universal/non-particularized judgments to protect non-parties.[133] But that broad order cannot reach enforcement of similar laws in other jurisdictions or different laws raising similar constitutional concerns. [134] Only legislative repeal eliminates all zombie laws from the books.

A departmentalist legislature might wield this power in two directions. If it agrees with judicial precedent, it can repeal a zombie law, guaranteeing universal non-enforcement; removing a law from the books leaves no positive provision to enforce against any rights-holder. This also preempts a future executive with different constitutional views and commitments. Alternatively, a departmentalist legislature might disagree with judicial precedent, believe the zombie law valid, and wish to enable future enforcement and future challenges to judicial precedent. It might leave a zombie law in place, supporting a future executive or private enforcer with shared constitutional commitments and allowing for future enforcement should changed judicial precedent revive the zombie. Or it might enact new zombie laws, anticipating and enabling litigation to change judicially determined constitutional law.

A. Agreement and Repeal

The only way to eliminate a zombie law and stop any future enforcement—the only bullet or ax to the head—is repeal, removing the law from the books.

1. Repealing Zombie Laws

Legislatures often do not bother repealing zombie laws, leaving statutes in place even if the judicially determined status quo renders enforcement futile and unlikely.

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[131] U.S. CONST. art. I, § 6, cl. 1; Bogan v. Scott-Harris, 523 U.S. 44, 46 (1998); Gravel v. United States, 408 U.S. 606, 616 (1972).

[132] Whole Woman's Health v. Jackson, No. 21-463, 2021 WL 5855551, at *8 (Dec. 10, 2021); Poe v. Ullman, 367 U.S. 497, 507 (1961); Massachusetts v. Mellon, 262 U.S. 447, 483 (1923); Support Working Animals, Inc. v. Governor of Fla., 8 F.4th 1198, 1203 (11th Cir. 2021); Wasserman, *Departmentalism*, *supra* note 1, at 1083–85; *supra* Section I.A.1, I.A.3.

[133] *Supra* Section I.B.2.

[134] *Supra* Sections I.B.1, I.B.3.

The Supreme Court declared that the Fourteenth Amendment prohibits enforcement of anti-miscegenation laws in 1967,[135] but it took more than 30 years for South Carolina (1998) and Alabama (2000) to repeal their zombie laws.[136] Six years after *Obergefell v. Hodges*,[137] prohibitions on same-sex marriage remain in 30 state constitutions.[138] The same-sex sodomy prohibition declared invalid in *Lawrence v. Texas* remained on the Texas statute books as of 2019.[139] A 2006 study showed that many Jim Crow laws remained on the books in multiple states half a century after *Brown*.[140]

Other states pursue a comprehensive approach. The Commission to Examine Racial Inequity in Virginia Law issued a November 2019 interim report identifying and calling for repeal of dozens of zombie laws. These include the anti-miscegenation statute declared invalid and unenforceable in *Loving*, racially discriminatory education laws enacted during Massive Resistance to *Brown*, and laws targeting the "feeble-minded."[141] Virginia also repealed two same-sex marriage prohibitions.[142]

Repeal serves a symbolic purpose.[143] It expresses the legislative sense that these zombie laws are "offensive, morally reprehensible, and repugnant"[144] and should form no part of the state's positive law. It expresses the legislature's desire to combat a history of racial or other exclusion by eliminating positive legal provisions that convey an historical and contemporary message of the denial of full rights of citizenship and civic participation. Repeal expresses meaning, although those laws could never be successfully enforced under existing judicial precedent and although the most departmentalist executives never undertake or consider enforcement.

But repeal serves a substantive function in a judicial-departmentalist world, stripping the executive or private enforcers of the option to pursue constitutional

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[135] Loving v. Virginia, 388 U.S. 1 (1967).

[136] Wasserman, *Departmentalism*, *supra* note 1, at 1139.

[137] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[138] Julie Moreau, *States Across U.S. Still Cling to Outdated Gay Marriage Bans*, NBC News (Feb. 18, 2020, 7:44 AM), https://www.nbcnews.com/feature/nbc-out/states-across-u-s-still-cling-outdated-gay-marriage-bans-n1137936.

[139] Blackman, *supra* note 121, at 1199.

[140] Gabriel J. Chin, Roger Hartley, Kevin Bates, Rona Nichols, Ira Shiflett & Salmon Shomade, *Still on the Books: Jim Crow and Segregation Laws Fifty Years After* Brown v. Board of Education, 2006 MICH. ST. L. REV. 457, 457–58.

[141] COMM'N TO EXAMINE RACIAL INEQUITY IN VA. LAW, INTERIM REPORT 12–13 (2019), https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Interim-Report-From-the-Commission-to-Examine-Racial-Inequity-in-Virginia-Law.pdf.

[142] Va. Code Ann. § 20-45.2 (1997) & Va. Code Ann. § 20-45.3 (1997), *repealed by* Act of March 2, 2020, ch. 75, 1 Va. Acts 104 & ch. 195, 1 Va. Acts 283.

[143] *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022–23 (1996).

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

commitments. A central principle of judicial departmentalism is that judicial precedent can change,[145] de-zombifying laws and returning them to life. Judicial precedent changes through new litigation (enforcement or pre-enforcement) allowing the court to announce new precedent. A departmentalist executive, committed to the constitutional validity of a zombie law, might renew enforcement efforts to create the new litigation that changes constitutional precedent and revives the law. Legislative repeal ensures that no positive law remains, preempting changes to precedent and leaving nothing for any executive to enforce. Only repeal allows us to say the zombie law "can no longer be enforced."[146]

New York confronted this problem when it repealed restrictive abortion laws following the 2018 Supreme Court appointment of Justice Kavanaugh. Those were zombie laws, not successfully enforceable under *Roe v. Wade* and its progeny; they were vestiges of the abortion-restrictive 1960s and 1970s, when state policy disfavored abortion rights. Fearing a five-Justice majority[147] would overrule precedent establishing constitutional protection for abortion and with state policy having turned in favor of reproductive freedom, advocates and lawmakers sought to remove those restrictions from the statute books; the effort guaranteed a favorable statutory landscape in the state should the constitutional landscape change.[148] Absent statutory abortion restrictions, a future executive opposed to reproductive freedom has no law to enforce, even if changed precedent narrowing (or eliminating) the Fourteenth Amendment right to reproductive freedom permits successful judicial enforcement of a statute banning abortions.

2. Legislatures Only

The legislature exercises sole power to repeal zombie laws in deference to existing precedent. Courts play no role in this effort to clear the statute books. Courts can neither erase the law[149] nor order the legislature to erase the law.[150]

This contrasts with the greater role courts play with respect to invalid administrative regulations under the Administrative Procedure Act (APA). Section 706

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[145] Mitchell, *supra* note 1, at 946–47, 1008; Walsh, *supra* note 10, at 1715; Wasserman *Departmentalism*, *supra* note 1, at 1109, 1119–20.

[146] Pool v. City of Houston, 978 F.3d 307, 313 (5th Cir. 2020).

[147] Expanded to six-Justice with the September 2020 death of Justice Ginsburg and the October 2020 appointment of Justice Barrett. *See* Wasserman, *supra* note 96, at 59.

[148] Blackman, *supra* note 121, at 1200 n.518; Wasserman, *Departmentalism*, *supra* note 1, at 1139.

[149] Fallon, *supra* note 1, at 1339; Mitchell, *supra* note 1, at 936; Whole Woman's Health v. Jackson, No. 21-463, 2021 WL 5855551, at *8 (Dec. 10, 2021); sources cited *supra* note 39.

[150] California v. Texas, 141 S. Ct. 2104, 2115–16 (2021); *supra* note 131 and accompanying text.

authorizes federal courts to "hold unlawful and set aside agency action."[151] Promulgating regulations qualifies as agency action and to "set aside" such regulations is to vacate them, rendering them as if they did not exist—to erase them from the regulatory books. The APA thus empowers (without requiring) courts to act in unique ways against administrative regulations by erasing them as positive law,[152] not merely zombie remainders whose future enforcement fails.

Section 706 creates a unique scheme authorizing a unique judicial role as to the continued existence of regulations.[153] Mila Sohoni paraphrases Justice Scalia's description of administrative agencies promulgating regulations as acting "as a kind of 'junior-varsity Congress,'" obligated to comply with procedural requirements that the "varsity" Congress can skip.[154] Judicial power to vacate—to erase—regulations represents another limitation on junior-varsity enactments in the administrative-law system.[155]

But courts lack similar power with respect to invalid legislation.[156] Whatever courts can do in "setting aside" or erasing "junior-varsity" administrative regulations, they lack that power as to laws from the "varsity" legislature,[157] federal or state. Because only the legislature can repeal a duly enacted law,[158] only the legislature can provide the remedy of killing zombies by "scrubbing invalid laws from the statute books."[159]

3. Micro Repeal or Macro Repeal

By repealing a zombie law, the legislature ensures universal non-enforcement by leaving no positive law to be enforced. But the goal of killing the zombie collides with "legislative inertia"—the difficulty of initiating and sustaining the legislative machinery to enact new laws (including a law repealing an existing law), even absent opposition or resistance to the proposed legal change.[160] Zombie laws remain not because the legislature or the executive wants them on the books or wishes them

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[151] 5 U.S.C. § 706(2).

[152] Sohoni, *Vacate*, *supra* note 46, at 1131–33; *see* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2412 n.28 (Ginsburg, J., dissenting).

[153] Sohoni, *Vacate*, *supra* note 46, at 1133–35.

[154] *Id.* at 1135–36 (quoting Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting)).

[155] Harrison, *Section 706*, *supra* note 1; *see also* Sohoni, *Vacate*, *supra* note 46, at 1180.

[156] Sohoni, *Vacate*, *supra* note 46, at 1133–34; *see* Massachusetts v. Mellon, 262 U.S. 447, 488 (1923).

[157] Sohoni, *Vacate*, *supra* note 46, at 1135–36.

[158] Mitchell, *supra* note 1, at 936; Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2351 n.8 (2020); Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1485–86 (2018) (Thomas, J., concurring).

[159] Hartnett v. Pa. State Educ. Ass'n, 963 F.3d 301, 308–09 (3d Cir. 2020); Harrison, *Adjudication*, *supra* note 3; Wasserman, *Departmentalism*, *supra* note 1, at 1091.

[160] Mirit Eyal-Cohen, *Unintended Legislative Inertia*, 55 GA. L. REV. 1193, 1208 (2021).

enforced, but because the burdens of pursuing the lawmaking process outweigh the benefits. Jim Crow zombie laws remain because of inertia, rather than opposition to judicial precedent declaring those zombie laws invalid or support for the policy reflected in those zombie laws.

A legislature committed to eliminating zombie laws might overcome legislative inertia by changing the default for repeal. Rather than a zombie law remaining on the books until the legislature acts to repeal it, the zombie law could be repealed unless the legislature acts to retain it. This allows the statute books to be cleared of zombies without waiting 50 years or expending legislative time, resources, and capital on the expressive act of repeal.

a. Zombie Statute Avoidance Act

Congress might do this through a precommitment statute cutting across current and future federal law,[161] constraining future legislative behavior and entrenching current policy preferences in responding to judicial decisions.[162] Imagine the "Zombie Statute Avoidance Act":

> If the Supreme Court of the United States, in an opinion from the majority of the Court producing binding judicial precedent, declares any Act of Congress invalid and unenforceable as repugnant to the Constitution of the United States, or issues an interlocutory or permanent injunction restraining or prohibiting enforcement by any officer of the United States a law, regulation, executive order, or other policy of the United States on the ground of its being invalid and unenforceable as repugnant to the Constitution of the United States, such Act of Congress, regulation, executive order, or other policy shall be deemed repealed at the close of the Congress following the issuance of such opinion, injunction, or judgment, unless otherwise provided by law.

This law precommits Congress to scrub challenged (and judicially declared invalid) laws, eliminating the zombie and the possibility or option of future enforcement of that zombie. It relieves repeal proponents of the burden of overcoming legislative inertia in the future. It places the onus for new legislation on departmentalists who disagree with judicial precedent as to constitutional invalidity and who wish to retain the zombie law for potential future enforcement. Precommitment to repeal is not inexorable.[163] Congress retains discretion and power to decline to repeal and to retain the zombie. But opponents of judicial precedent—those who want to retain the zombie law for possible future enforcement—must overcome legislative

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[161] Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253 (1995).

[162] Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1918–19 (2001).

[163] *Id.* at 1920.

inertia, either by declining to repeal now or by reenacting the automatically repealed law in the future.

A federal zombie-repeal law cannot eliminate zombie state or local laws, as Congress cannot control the content of state law or dictate what a state legislature does with state law.[164] But state and local legislatures can enact similar super-statutes repealing their zombie laws in response to Supreme Court precedent.

Legislative response to judicial decisions is common. Congress monitors courts for statutory decisions to consider whether and when to override with new enactments or with corrective amendments to existing laws.[165] Judicial departmentalism recognizes that courts cannot erase or repeal laws and that other branches can continue to treat zombie laws as valid and enforceable on an independent constitutional understanding. This compels legislatures to extend monitoring of courts to constitutional decisions and to consider whether and when to follow judicial precedent by repealing the law declared invalid or to hold the line on the issue in the hope that precedent changes. A precommitment statute streamlines that process by responding to the judicial decision with repeal unless the legislature decides otherwise.

b. Objections to Precommitment

This precommitment proposal triggers several objections.

i. Codifying Judicial Supremacy

The law codifies judicial supremacy, by allowing the judicial declaration of invalidity to control the content of the statute books. The default is that the Court was correct and the statute disappears, unless Congress acts.

In fact, however, this proposal recognizes judicial departmentalism—the independent legislative interpretive authority—as the default. A feature of judicial departmentalism is that judicial precedent declaring a law constitutionally invalid does not prohibit the executive from attempting or threatening to enforce the law against new individuals.[166] To eliminate future enforcement, however futile or unlikely to succeed, the legislature must repeal the law. At the same time, a future legislature may decline to repeal, exercising its departmentalist authority to ignore judicial prec-

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[164] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1476–77 (2018).

[165] Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1319–20 (2014); Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398, 405 (2021); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 387–90 (1991); Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 208–09 (2013); Deborah A. Widiss, Response, *Identifying Congressional Overrides Should Not Be This Hard*, 92 TEX. L. REV. 145, 147 (2013).

[166] Wasserman, *Departmentalism*, *supra* note 1, at 1135, 1139; *supra* notes 59–61 and accompanying text.

edent and legislate (or decline to legislate) on its independent constitutional understanding. Default repeal accepts and promotes that independent authority to reject the court's constitutional interpretation by retaining the law.

Making repeal the default perhaps places a thumb on the scales in favor of the judicial view—automatic repeal means positive law reflects judicial precedent unless the legislature acts. But that reflects not the scope of legislative power to disagree with judicial precedent, but the likely outcome of future attempted enforcement and litigation—the judicial understanding (the law is constitutionally invalid and unenforceable) prevails in court. Defaulting to repeal makes sense if future enforcement is futile. But that does not mean the judicial view prevails within the legislature or the legislature is bound by the judicial view.

ii. Insufficient Time

The proposal leaves Congress insufficient time to review the issue and to decide whether and how to respond to the constitutional decision. Congress needs time to review an opinion and decide whether to follow the Court and allow the law to disappear; whether to reenact the same law; or whether to amend the law in some way that retains some legal rule while adhering to judicial precedent.

My original draft gave Congress seven months,[167] which seemed too short. Time pressure in this version depends on when the Court decides the case declaring the law invalid—a decision earlier in a congressional session leaves more time than one later in the session. The timing of legislative action is not significant. If a law is repealed by dint of the super-statute and Congress fails to act before the end of that session, a future Congress, given more time to study and consider the matter, can enact a new version of the challenged-and-now-repealed zombie law or take other steps to counter judicial precedent. The onus remains on those who want the zombie law on the books to work the legislative process to enact legislation retaining that zombie.

iii. Legislative Undermining

Congress could undermine its precommitment by exempting legislation from default repeal. That is, including in new legislation a provision declaring that the Zombie Statute Avoidance Act and default repeal does not apply should the Court declare invalid or enjoin enforcement of any piece of this new legislation.

But such action furthers, rather than defeats, the purpose of default repeal. By exempting new legislation, Congress considers and addresses, in a judicial-departmentalist way, the problematic zombie law. The prospect of automatic repeal incentivizes legislators to exercise their departmentalist power to respond to judicial decisions—to decide whether a law should remain undead in the event of adverse

[167] I modeled this time proposal on the period for Congress to disapprove proposed rules under the Rules Enabling Act, which gives Congress from May 1 to November 30 to enact a law to stop a rule from taking effect on December 1. 28 U.S.C. § 2074(a).

precedent. Default repeal guides that exercise *ex post*, by compelling opponents of a judicial decision to respond with new legislation. Exempting a new law from default repeal in the event of anticipated judicial decisions guides that exercise *ex ante*. Either engages the legislature in the same inquiry.

iv. Ineffective

Precommitment functions in the simplest second class of zombie law—a single provision in Jurisdiction B's law declared "invalid and unenforceable as repugnant to the Constitution" produces automatic repeal of that single provision of Jurisdiction B's law.

It becomes less efficient beyond that simple case. If Jurisdiction B's law contained multiple provisions, it may be difficult to determine how much and which parts of the law were declared invalid, will be automatically repealed, and must be unrepealed through legislative action. The short time built into the statute exacerbates this problem, as automatic repeal may take effect without sufficient time for legislators to consider and understand the moving parts.

It also might depend on whether the Court declares the law facially invalid or invalid as applied.[168] A Supreme Court declaration of facial invalidity establishes as a matter of binding precedent that the law is constitutionally invalid and that any future enforcement against new persons or in new contexts will fail.[169] That may nudge Congress towards allowing repeal. As-applied invalidity leaves the possibility that the law can be validly and successfully enforced against new persons or in new contexts, prompting Congress to act to leave the law in place and leave the executive future enforcement opportunities in new applications.

The statute works less well with the first and third class of zombie law.[170]

As the statute is drafted, Jurisdiction B's law would not be repealed by a judicial decision declaring invalid Jurisdiction A's similar or identical law. Jurisdiction B would not want its law repealed because an identical law from Jurisdiction A has been declared invalid; it may await the certainty that comes from its law being declared invalid in a judgment specific to enforcement of its law. Congress in particular does not want federal law automatically repealed because an identical or similar state law has been declared invalid. Legislative practice runs the opposite direction—

[168] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2390–91 (2021) (Thomas, J., concurring in part and concurring in the judgment); Fallon, *supra* note 1, at 1339–40; Fallon, *supra* note 56, at 923 n.31.

[169] *Ams. for Prosperity Found.*, 141 S. Ct. at 2390–91 (Thomas, J., concurring in part and concurring in the judgment); Fallon, *supra* note 1, at 1339–40; Wasserman, "*Nationwide,*" *supra* note 8, at 384; Wasserman, *Departmentalism*, *supra* note 1, at 1108.

[170] *Supra* Section I.B.1, 3.

Congress responds to judicial decisions declaring state laws invalid by enacting identical federal laws, hoping that a similar-but-better-drafted federal law will withstand judicial constitutional scrutiny.[171]

The same is true of the third class of zombie law—one whose validity is placed beyond debate by judicial precedent established in a case involving a different law from any jurisdiction. Mississippi enacted a ban on abortion after 15 weeks of pregnancy and a separate ban on abortions after detection of a fetal heartbeat (around six weeks).[172] These zombie laws suffer from the same constitutional defect—they ban pre-viability abortions, contrary to controlling judicial precedent.[173] But no legislature would want the decision declaring invalid the former[174] to trigger default repeal of the latter. It might repeal the latter in light of judicial precedent. Or it might retain the latter pending adjudication of its validity, even if the invalidity of a fifteen-week ban *a fortiori* means the invalidity of a six-week ban. The point is that the legislature retains its lawmaking options.

If default repeal covers one of three classes of zombie laws, it will not apply to most zombie laws resulting from most judicial decisions. Most zombie laws will remain on the books in most jurisdictions, eliminated only if those who support judicial precedent overcome inertia and take affirmative steps to repeal the declared-invalid law. That is, it leaves the law where it is without precommitment.

These objections perhaps make precommitment unwise. The best course is keeping zombie laws and allowing each legislature to handle them as it wishes on an individual basis and in response to judicial precedent. The point is that the "unconstitutional" zombie law remains on the books and subject to attempted future enforcement against non-party rights-holders unless the legislature does something, in whatever time and order it exercises that power.

c. Zombie Law Review Act

If precommitment to repeal zombie laws is not workable, an alternative is to "fast track" congressional reconsideration of zombie laws following Supreme Court decisions declaring them invalid. The zombie remains on the books absent affirmative legislative action and the burden to work the lawmaking machinery remains on those who want to repeal the law. But expedited procedures enable repeal advocates to overcome ordinary legislative inertia.

Ganesh Sitaraman and Daniel Epps propose something similar for Congress in responding to statutory decisions. Following a decision interpreting a federal statute,

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[171] *Infra* notes 192–96 and accompanying text.

[172] Jackson Women's Health Org. v. Dobbs, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam).

[173] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973); *supra* Section I.B.3.a.

[174] Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 265 (5th Cir. 2019), *cert. granted in part*, 141 S. Ct. 2619 (2021).

Congress votes within 30 days to begin a reconsideration process. Special committees in each house draft a bill fixing the statute, to be voted on in both houses within 40 days; the process bypasses ordinary standing committees, filibusters, and other legislative veto gates, and takes priority over other matters in each house.[175] Sitaraman and Epps predict that Congress could, if it wishes, overrule a statutory decision within two months.[176]

Congress (and state legislatures) might adopt something similar following a declaration of a law's constitutional invalidity. Within 30 days of the decision declaring the law constitutionally invalid, each house votes on whether to repeal this zombie law. If both houses agree to do so, a special committee drafts legislation repealing the law or the provision declared invalid, with consideration on the same expedited and priority basis and not subject to ordinary veto gates.

This process may not succeed in repealing the zombie law. Congressional majorities may disagree with the Court, believe the law valid, and wish to retain it. Or the committee may find it too difficult to draft around the Court's decision or to identify which pieces of the law are zombies to be killed and which remain alive and should be retained. Or the President might veto the repealing law because he disagrees with the Court and wishes to retain the zombie law and thus the opportunity to enforce (however certain to fail). The point is to force Congress to consider and engage with the zombie remainder of the Court's constitutional decisions and to affirmatively choose what laws should remain on the statute books.

B. Disagreement and Continued Enforcement

Where the legislature agrees with (or at least accepts and acquiesces in) the Court's constitutional judgment, its sole option is repealing the zombie law. But a legislature, in its departmentalist discretion, may disagree with and reject judicial precedent. It may want a zombie law to remain on the books and available for future enforcement, litigation, and changes in judicial constitutional precedent.

1. Compelling New Precedent and De-Zombifying Laws

The Congressional Accountability for Judicial Activism Act of 2005,[177] a bill introduced but never enacted or seriously considered, allowed two-thirds of both houses to "reverse" a Supreme Court judgment concerning the constitutionality of an Act of Congress. This bill attempted an additional step of undoing judicial precedent and converting the law into an enforceable non-zombie.

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[175] Epps & Sitaraman, *supra* note 165, at 405; Ganesh Sitaraman, *How to Rein in an All-Too-Powerful Supreme Court*, THE ATLANTIC (Nov. 16, 2019), https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924/.

[176] Sitaraman, *supra* note 175.

[177] Congressional Accountability for Judicial Activism Act of 2005, H.R. 3073, 109th Cong. (2005).

A system of judicial departmentalism makes this bill unnecessary. Judicial departmentalism accepts Congress's independent legislative power to interpret the Constitution and to act on its constitutional understanding regardless of judicial precedent. No statute and no distinct act of "legislative reversal" is necessary to establish or exercise that power. The Supreme Court's judgment and opinion do nothing to Congress or to the existence of the zombie law; they do not remove the law from the books or bar future attempted enforcement against non-parties. Congress need take no special steps—certainly not by super-majority—to retain the law or to enable continued enforcement by a simpatico departmentalist executive. Simple legislative inaction leaves the zombie law in place and available for future enforcement.

On the other hand, a system of judicial departmentalism makes congressional "reversal" of the Court's judgment ineffectual. Whatever Congress may believe about the constitutional validity of that law or the correctness of the Court's decision declaring it constitutionally invalid, Congress cannot change judicial precedent. Congress cannot compel courts to accept or follow a different constitutional understanding or interpretation and cannot declare enforcement permissible in the face of contrary judicial precedent declaring the law unenforceable.[178] Nor can Congress deny force and effect to the Article-III final judgment[179] prohibiting new or continued enforcement against the parties protected by the final judgment. Whatever law Congress enacts by whatever super-majority cannot change the judgment prohibiting enforcement as to the parties or the judicial precedent declaring the law constitutionally invalid.

Put differently, courts and legislatures play distinct, mirroring roles in the zombie-law process. Courts create zombie laws through their judgments and opinions but cannot order their repeal; legislatures eliminate zombie laws through repeal. Courts de-zombify laws, rendering them alive rather than undead, by changing constitutional precedent; legislatures retain zombie laws but cannot de-zombify them or alter judicial precedent to make them enforceable non-zombies.

2. Awaiting New Precedent

For a legislature that disagrees with and rejects judicial precedent, the hope and goal is that precedent changes through future litigation producing future decisions adopting a different constitutional view. A legislature may follow several paths while awaiting that judicial change.

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[178] United States v. Klein, 80 U.S. (13 Wall.) 128 (1871); Lawrence G. Sager, Klein*'s First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2529 (1998); Howard M. Wasserman, *The Irrepressible Myth of* Klein, 79 U. CIN. L. REV. 53, 76–77 (2010).

[179] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995).

a. Retention

A legislature can retain its zombie law and push the constitutional issue by enabling continued enforcement. Consider state laws requiring doctors at reproductive-health clinics to have admitting privileges at nearby hospitals. After the Court declared invalid a Texas law requiring doctors to have admitting privileges,[180] Louisiana continued seeking to enforce its "almost word-for-word identical" zombie law.[181] Louisiana providers brought new pre-enforcement litigation challenging Louisiana's law, and the Court applied controlling precedent to prohibit enforcement of the identical law from a different state (the first class of zombie law).[182]

Some zombie retention is for show. The Flag Protection Act of 1989, declared invalid in *United States v. Eichman*,[183] remains in the U.S. Code,[184] perhaps reflecting congressional hope that it will become enforceable in the future. Meanwhile, its continued presence as positive law expresses to the (likely supportive) public a congressional commitment to protecting the sanctity of the flag, hampered only by existing (and erroneous) judicial interpretation of the First Amendment.

Both sides of any debate over repealing zombie laws highlight the expressive component of retaining them. Advocates for repeal of same-sex-marriage bans zombified by *Obergefell* emphasize the imperative to eliminate a vestigial law containing cruel or exclusionary language;[185] repeal opponents appreciate the positive legal commitment to traditional marriage, even if judicial enforcement remains impossible.

b. New Legislation

A legislature can respond to judicial precedent by enacting new zombie laws, whether identical to those declared invalid (the first or second classes) or different-but-clearly-invalid under controlling precedent (the third class). Lawmakers pursue distinct goals in enacting new zombie laws.

i. New Zombie Laws for the Sake of Enacting New Laws

New zombie laws allow lawmakers to score political points by "taking action" to stop what constituents believe to be a problem, without seeking to change judicial precedent or expecting that courts will not declare the laws invalid.

Consider state laws seeking to prohibit "censorship" and "de-platfoming" on social media.[186] Florida Governor Ron DeSantis signed the state's law by denouncing "big tech" attacks on conservative speech and proclaiming that "in Florida, we

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[180] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

[181] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112 (2020).

[182] *Id.* at 2112–13; *supra* Section I.B.1.b.

[183] United States v. Eichman, 496 U.S. 310 (1990).

[184] 18 U.S.C. § 700 (1990).

[185] Moreau, *supra* note 138.

[186] *Supra* Section I.B.3.b.

said this egregious example of biased silencing will not be tolerated."[187] Texas Governor Gregg Abbott tweeted in support of its law that "[s]ilencing conservative views is un-American, it's un-Texan[,] and it's about to be illegal in Texas."[188]

That neither law can withstand judicial constitutional scrutiny—and lawmakers realized this—does not alter the political goal. Both governors and their legislatures retain the departmentalist discretion and authority to enact laws that they believe constitutionally valid and worthy of enactment. And they can obtain the political benefits of "fighting" for the public against a perceived enemy and its wrongdoing.[189] District courts considered the governors' statements—reflecting a desire to appeal to their constituents by protecting certain speech and speakers against a common enemy—in finding constitutional defects in the laws.[190] Of course, officials can use that inevitable judicial defeat to demonize the courts for interfering with their fight against the evils of censorship.

ii. New Zombie Laws in Search of New Precedent

New zombie laws enable executive or private enforcers to test the scope of judicial precedent and trigger new constitutional litigation to convince the Court to overrule or change that precedent.[191] These legislative efforts and statements boost the likelihood of executive enforcement and thus the prospect of successful pre-enforcement litigation.[192]

A state may be explicit about this goal. Arkansas in March 2021 enacted a law prohibiting abortion except to "save the life of a pregnant woman in a medical emergency," supporting the ban with legislative findings about the imperative for the Court to overrule *Roe* and *Casey* and "urgently plead[ing]" with the Court to "do the right thing," as it did in overruling *Plessy* in *Brown*.[193] An extended multi-state campaign of new zombie laws triggers new pre-enforcement litigation producing many judicial defeats.[194] But a state committed to changing precedent needs only

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[187] NetChoice L.L.C. v. Moody, No. 4:21cv220-RH-MAF, 2021 WL 2690876, at *10 (N.D. Fla. June 30, 2021).

[188] NetChoice L.L.C. v. Paxton, No. 1:21-CV-840-RP, 2021 WL 5755120, at *1 (W.D. Tex. Dec. 1, 2021) (quoting Greg Abbott (@GregAbbott_TX), TWITTER (Mar. 5, 2021, 8:35 PM), https://twitter.com/GregAbbott_TX/status/1368027384776101890).

[189] *NetChoice L.L.C.*, 2021 WL 2690876, at *10.

[190] *NetChoice L.L.C.*, 2021 WL 5755120, at *8–10; *NetChoice L.L.C.*, 2021 WL 2690876, at *10.

[191] Wasserman, *Departmentalism*, *supra* note 1, at 1138.

[192] Bryant v. Woodall, 1 F.4th 280, 286–88 (4th Cir. 2021).

[193] Arkansas Unborn Child Protection Act, S.B. 6, 93d Gen. Assemb., Reg. Sess. § 1 (Ark. 2021).

[194] *See, e.g.*, *Bryant,* 1 F.4th at 286–88; Little Rock Fam. Plan. Servs. v. Rutledge, 984 F.3d 682, 686–88 (8th Cir. 2021); Jackson Women's Health Org. v. Dobbs, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam); Planned Parenthood S. Atl. v. Wilson, No: 3:21-00508-MGL, 2021 WL 1060123, at *5 (D.S.C. Mar. 19, 2021); Sistersong Women of Color Reprod. Just. Collective v.

one victory.[195]

The choice between leaving zombie laws untouched and enacting new zombie laws reflects a dance between the executive and legislature, even where they share constitutional commitments and the desire to challenge adverse judicial precedent. If a legislature never repealed its zombie law in conformance with judicial precedent, a new zombie law is unnecessary. The executive can pursue constitutional change by attempting to enforce the existing zombie law where not limited by a particularized injunction prohibiting enforcement of that law against those rights-holder targets.

We thus might question why legislatures seeking judicial change enact new zombie laws rather than leaving a committed executive to enforce existing zombie laws. Michael Dorf suggests that the answer is legislators' desire to appeal to the public on hot-button political issues.[196] Legislators want to demonstrate their commitment to the cause (such as opposition to abortion) by taking visible and affirmative, if unnecessary, steps to address a problem some members of the public liken to slavery. The sole legislative path to public attention, acclaim, and credit requires enacting a new, if zombified, law. Waiting for the executive to enforce an existing zombie law does not achieve that political goal, because the public focuses on the executive's actions and the executive reaps the political benefits and rewards.

iii. New Federal Zombie Laws Following Old State Laws

Congress often enacts federal zombie laws in response to a judicial declaration that a similar state law is constitutionally invalid, hoping for a different, more solicitous constitutional determination. Examples run in both directions.

Congress succeeded in banning "partial-birth abortion." After the Court declared invalid Nebraska's ban on certain procedures in 2000,[197] Congress enacted a federal ban that the Court declared valid and enforceable in 2007.[198] The different result has been attributed to changes in Court personnel—in 2005, Justice O'Connor, who joined the 5–4 *Stenberg* majority, was replaced by Justice Alito, who joined the 5–4 *Gonzalez* majority.[199] Congress failed in attempting to ban flag desecration.

Kemp, 472 F. Supp. 3d 1297, 1314 (N.D. Ga. 2020); Robinson v. Marshall, 415 F. Supp. 3d. 1053, 1055, 1057–58 (M.D. Ala. 2019).

[195] *Cf.* Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021) (granting certiorari); Wasserman, *supra* note 96, at 59–60.

[196] Michael C. Dorf, *The "Revival" Alternative to Test Legislation Like the New Arkansas Abortion Ban*, DORF ON L. (Mar. 11, 2021, 12:08 PM), http://www.dorfonlaw.org/2021/03/the-revival-alternative-to-test.html#more.

[197] Stenberg v. Carhart, 530 U.S. 914 (2000).

[198] Gonzales v. Carhart, 550 U.S. 124 (2007).

[199] David J. Garrow, *Significant Risks:* Gonzales v. Carhart *and the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 1; Eric J. Segall, *Is the Roberts Court Really a Court?*, 40 STET. L. REV. 701, 704 (2011).

After the Court declared invalid Texas's ban on flag desecration,[200] Congress enacted a federal ban that the same 5–4 Supreme Court declared invalid one year later.[201]

iv. Trigger Laws

A legislature may enact a "trigger law" as a middle ground between doing nothing and enacting new laws contrary to and challenging of judicial precedent. This new zombie law (a new enactment that cannot survive constitutional scrutiny under current judicial precedent) includes a "trigger"—it does not take effect or become enforceable unless and until the Court de-zombifies it by overruling or changing constitutional doctrine, reanimating the law into an enforceable non-zombie.[202]

Judicial departmentalism renders the "trigger" mechanism superfluous. Judicial precedent does not bind legislators in deciding what laws to enact or repeal. The legislature can enact a new and immediately effective zombie law, while recognizing that the law is undead and that courts will reject any attempted or threatened enforcement. It need not dilute new legislation in deference to the judiciary with a limiting trigger. Rather than a substantive mechanism, the trigger is symbolic. It hedges against popular backlash to the perception, grounded in the presumption of judicial supremacy, that the legislature is disobeying or ignoring the Constitution (as determined by the Court).[203] But a legislature committed to its departmentalist authority should highlight and display its power to enact zombie laws rather than hiding behind the trigger.

C. Zombie Documents

Statutes are not the only source of legal obligation that can be zombified. The Court's jurisprudence can do the same to legal documents, such as contracts, land and property deeds, and titles.

In *Shelley v. Kraemer*, the Court held that the Fourteenth Amendment prohibits its courts from allowing property owners to enforce racially restrictive covenants.[204]

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

[201] United States v. Eichman, 496 U.S. 310 (1990). *See generally* ROBERT JUSTIN GOLDSTEIN, FLAG BURNING AND FREE SPEECH: THE CASE OF *TEXAS V. JOHNSON* 214–15, 218–19 (2000); SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 527 (2010); Wasserman, *supra* note 108, at 843–44.

[202] ZIEGLER, *supra* note 94, at 210; Mary Ziegler, *The Price of Privacy, 1973 to the Present*, 37 HARV. J.L. & GENDER 285, 322 (2014).

[203] Walsh, *supra* note 10, at 1739–40; *supra* notes 77–90 and accompanying text.

[204] Shelley v. Kraemer, 334 U.S. 1, 4, 23 (1948).

The Fair Housing Act[205] and a provision of the Civil Rights Act of 1866[206] prohibit the use or enforcement of such provisions. [207]

Unenforceable though they might be, restrictive covenants remain as vestiges in old and long-standing documents dating to another era of law. The continued existence of such provisions drew public attention during William Rehnquist's 1986 confirmation hearings as Chief Justice, when it was revealed that he owned homes whose deeds contained covenants prohibiting the sale or lease of the property to "any person not of the white or Caucasian race" or to "any member of the Hebrew race."[208] Rehnquist reminded the Judiciary Committee that such covenants remain in many deeds and are not enforceable.[209]

In *Mason v. Adams County Recorder*,[210] plaintiff asked the court to order the county recorder of deeds to stop maintaining property deeds containing racially restrictive covenants, while acknowledging that such covenants were not enforceable and no attempt had been made to enforce them against him.[211] The court concluded that the plaintiff lacked standing[212] (although it would be better described as not having had his constitutional rights violated from the mere existence of a provision[213] in a document) because he was not denied (or uniquely deterred) in the opportunity to purchase any property by the existence of an unenforceable covenant in the document.[214] The majority described the claim as one seeking to eliminate legal memory divorced from any risk of constitutionally violative enforcement, a power beyond the judicial ken:

> In ancient Rome, the practice of *damnatio memoriae*, or the condemnation of memory, could be imposed on felons whose very existence, including destruction of their human remains, would literally be erased from history for the crimes they had committed. Land title documents with racially restrictive cov-

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[205] 42 U.S.C. §§ 3601–3619.

[206] 42 U.S.C. § 1982; Hurd v. Hodge, 334 U.S. 24, 34 (1948).

[207] *Shelley*, 334 U.S. at 10–11, 18, 20.

[208] *Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States*: *Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 180–87, 228–30 (1986) [hereinafter *Hearings*]; Paul Butler, *Rehnquist, Racism, and Race Jurisprudence*, 74 GEO. WASH. L. REV. 1019, 1020 n.4 (2006); *Justice Knew of Deed in '74*, N.Y. TIMES, Aug. 6, 1986, at A13; Alan S. Oser, *Unenforceable Covenants Are in Many Deeds*, N.Y. TIMES, Aug. 1, 1986, at A9.

[209] *Hearings*, *supra* note 208, at 181, 230.

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

[211] *Id.* at 755–56.

[212] *Id.* at 757.

[213] Massachusetts v. Mellon, 262 U.S. 447, 483 (1923); *see* Poe v. Ullman, 367 U.S. 497, 507 (1961); Support Working Animals, Inc. v. Governor of Fla., 8 F.4th 1198, 1203 (11th Cir. 2021); *supra* notes 20–21 and accompanying text.

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

> enants that we now find offensive, morally reprehensible, and repugnant cannot be subject to *damnatio memoriae*, as those documents are part of our living history and witness to the evolution of our cultural norms. Mason's feeling of being unwelcomed may be real. A feeling cannot be unfelt. But Mason's discomfort at the expression of historical language does not create particularized injury. The language in question is purely historical and is unenforceable and irrelevant in present-day land transactions.[215]

Restrictive covenants are zombies—alive in that they remain part of valid legal documents, dead in that enforcement of the provisions fails in court. As with zombie laws, there is an expressive value to eliminating any source of law that is "offensive, morally reprehensible, and repugnant"[216] or that sends a message of exclusion. In fact, eliminating zombie legal documents may be more urgent than eliminating zombie laws, as more people encounter and are affected by discriminatory zombie title, deed, or contract provisions. But as with zombie statutes, power to cleanse sources of law does not rest with the federal judiciary. The political branches must balance the expressive benefits of eliminating zombies and their symbolic harms against the costs and burdens of wholesale replacement or revision of thousands of deeds and other legal documents.

Rather than wholesale changes, states have created mechanisms for individuals to control the details of their documents. Indiana allows owners to "renounce" restrictive covenants by attaching a new statement to the deed or by filing a cross-referencing notice declaring the discriminatory covenant "invalid, unenforceable, and antithetical to American values of equal justice and equality under the law."[217] Washington established a judicial mechanism through which property owners or other interested parties petition state courts to strike discriminatory language from real-property contracts.[218] While not providing the broadest relief—wholesale protection from exclusionary messages and wholesale pronouncement of the broadest message of inclusion—these mechanisms eliminate zombies on an incremental basis. It may be the best the legislature can do, given the number and variety of documents containing outdated and unenforceable zombie language.

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[215] *Id.* at 757.

[216] *Id.*

[217] H.B. 1314, 122d Gen. Assemb., 1st Reg. Sess. (Ind. 2021) (codified at Ind. Code § 32-21-15-3 (2021)).

[218] May v. Spokane Cnty., 481 P.3d 1098, 1101 (Wash. Ct. App. 2021). That court divided over whether striking discriminatory language meant physically removing the language from the document or merely instituting an order deeming it stricken; the majority adopted the latter view. *Id.* at 1103–04.

CONCLUSION

Judge Costa captured a real but unrealized constitutional phenomenon in describing "zombie laws." The most unconstitutional law remains on the books and can be enforced by a departmentalist executive undaunted by the prospect of judicial defeat.

The legislature controls zombie laws and other zombie legal sources, a power to be wielded in whichever constitutional direction the legislature chooses. It can kill zombie laws through repeal, halting future enforcement. It can retain existing zombie laws. Or it can enact new zombie laws, reinforcing and bolstering the executive power to threaten present and future enforcement, however futile. The legislature can develop a unique and independent constitutional vision and can exercise exclusive power to act on that vision in handling undead sources of law.