

# William & Mary Bill of Rights Journal

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Volume 29 (2020-2021)  
Issue 3 *The Presidency and Individual Rights*

Article 7

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March 2021

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Mark Tushnet

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### Repository Citation

Mark Tushnet, *The President and Individual Rights*, 29 Wm. & Mary Bill Rts. J. 809 (2021), <https://scholarship.law.wm.edu/wmborj/vol29/iss3/7>

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## THE PRESIDENT AND INDIVIDUAL RIGHTS

Mark Tushnet\*

### INTRODUCTION: SOME GROUNDWORK

Departmentalist constitutional theory asserts that members of each branch have the authority to use their own understandings of the Constitution when they act within their prescribed domain.<sup>1</sup> Specifically, departmentalists claim that neither the President nor members of Congress are required to accept the interpretations of the Constitution offered by the courts, either in evaluating possible courses of action beforehand or bowing to a judicial decision after the event *as a matter of principle*.<sup>2</sup> Sometimes

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\* William Nelson Cromwell Professor of Law Emeritus, Harvard Law School. I thank Martin Lederman, Louis M. Seidman, and Eric Segall for extremely valuable comments on a draft of this Article.

<sup>1</sup> See Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 489 (2018).

<sup>2</sup> Many departmentalists believe that in the vast majority of circumstances there will be good *prudential* reasons to accede to a judicial interpretation after the event, although the conditions for acceding can be quite narrow. See *id.* at 507. The classic statement is Abraham Lincoln's—that he would defer to a judicial interpretation with respect to the very case in which it was rendered but need not take that interpretation as a rule to guide future action in developing policy:

I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.

Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) (transcript available at [https://avalon.law.yale.edu/19th\\_century/lincoln1.asp](https://avalon.law.yale.edu/19th_century/lincoln1.asp) [<https://perma.cc/C4H5-LBJ8>]).

departmentalists confine their claims to constitutional interpretation of provisions about each department's scope of authority.<sup>3</sup> So, for example, a departmentalist president might claim that Article II gives her the power to remove at will any principal officer of the government from office even though Congress has purported to limit the removal power in ways that seem consistent with Supreme Court precedent.<sup>4</sup>

Individual rights cut across all three branches.<sup>5</sup> Assume that Congress is exercising one of its enumerated powers. All agree that Congress can provide legal rights associated with, for example, freedom of expression or racial equality that are more extensive than the rights the Supreme Court would hold—or indeed has held—the Constitution itself generates.<sup>6</sup> Note the formulation here: “*legal rights*” and “*associated with*” constitutional rights—provisions. For present purposes, I mean by “legal” rights those that can be enforced in court.<sup>7</sup> That a right is associated with a constitutional provision means (a) that it is not something the courts would find *required* by the Constitution itself,<sup>8</sup> (b) that it advances the values underlying the judicially enforced right, and (c) that the associated right falls within a range of reasonable interpretation of some constitutional provision even though the courts have adopted a different interpretation.<sup>9</sup>

With the notions of “legal rights” “associated with” constitutional rights in hand, what can be said about the President and individual rights? This Article divides the

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<sup>3</sup> See Matthew Steilen, *Collaborative Departmentalism*, 61 BUFF. L. REV. 345, 355 (2013).

<sup>4</sup> See *id.* at 346–47.

<sup>5</sup> See Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 380, 384–86 (2016) (discussing separation of powers among the three branches).

<sup>6</sup> See, e.g., Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa–2000aa-12 (with respect to freedom of expression); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of the U.S. Code) (with respect to racial equality).

<sup>7</sup> See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (outlining a distinction between enforced and unenforced constitutional norms).

<sup>8</sup> For purposes of this Article I put to one side two situations: (1) The possibility that people can have legal rights even when no institutional actors do anything to respect those rights (such as protecting or acknowledging them) is largely irrelevant to the kinds of institutional issues of interest to departmentalists and judicial supremacists; and (2) this Article does not discuss cases where Congress has adopted a remedy for constitutional violations by *state* actors that the courts would themselves recognize but that goes somewhat beyond what the courts would do because the courts lack the institutional capacity to develop fully adequate remedies. See *id.* at 1217–18. A nationally applicable rule that certain changes in voting procedures must be pre-approved by a national body is an example (not foreclosed by *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013)). Cf. Voting Rights Act of 1965, 52 U.S.C. §§ 10101–702. Similarly, this Article does not discuss cases where Congress has adopted a modestly prophylactic interpretation of the (judicially defined) constitutional right because the prophylactic rule is congruent with and proportional to the degree of judicially recognizable constitutional violations. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 529–30 (1997). This doctrine means that *some* actions by states and their officials would be such that (a) the courts would not hold them unconstitutional, but that (b) the courts would hold them to be violations of a constitutionally permissible statute.

<sup>9</sup> See Sager, *supra* note 7, at 1243–45.

discussion into two parts. Part I deals with a president's exercise of discretionary powers, such as the power to pardon, the power to veto bills that reach her desk, and the power to recommend legislation.<sup>10</sup> It argues that, though the president of course can take into account the values associated with individual-rights-oriented constitutional provisions in exercising these discretionary powers, the very fact that they are discretionary means that they do not involve the president in protecting individual *rights*.

Part II turns to the President's power to take care that the laws be faithfully executed by supervising the actions of her appointees to Cabinet and other administrative positions.<sup>11</sup> Section A lays out standard departmentalist arguments that the take-care obligation does not require that the President's supervision be determined in principle by judicial interpretations of the Constitution's individual rights provisions.<sup>12</sup> It examines what has come to be called administrative constitutionalism to show that presidents can exercise their take-care obligation by providing either "more" or "less" protection for individual rights than the courts have or would (the scare quotes indicating that the characterization of something as more protective or less so itself rests upon prior agreement about the right's scope).

Section B then turns to the case where the President and her appointees agree with the courts about the content of an individual right.<sup>13</sup> Administrative constitutionalism in this mode means that executive officials act within their jurisdiction to protect the legal rights the courts would recognize.<sup>14</sup> It retrieves an argument made decades ago by Bernard Meltzer, that a world with more remedies for the same rights violations might not be better—from a rights-protective point of view—than a world with fewer such remedies.<sup>15</sup>

A brief Conclusion summarizes the argument.<sup>16</sup>

## I. THE PRESIDENT'S DISCRETIONARY POWERS

One standard example offered in defense of departmentalism is President Thomas Jefferson's decision to pardon those who had been convicted of violating the Federalist-inspired Sedition Act of 1798.<sup>17</sup> Jefferson did so because he believed that the Sedition Act was unconstitutional on federalism and freedom-of-expression grounds.<sup>18</sup>

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<sup>10</sup> See *infra* Part I.

<sup>11</sup> See *infra* Part II.

<sup>12</sup> See *infra* Section II.A.

<sup>13</sup> See *infra* Section II.B.

<sup>14</sup> See *infra* notes 68–77 and accompanying text.

<sup>15</sup> See Bernard D. Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies, the Better?*, 42 U. CHI. L. REV. 1, 3 (1974).

<sup>16</sup> See *infra* Conclusion.

<sup>17</sup> See JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* 231 (1951) (“[Jefferson] pardoned all still serving terms for violating the Sedition Act, declaring that he considered that law ‘to be nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.’”).

<sup>18</sup> Jefferson prepared but did not send a message to the Senate explaining his position, which

And he did so in the face of lower court decisions upholding the statute against constitutional challenges.<sup>19</sup> Another standard example is President Andrew Jackson's veto of a bill rechartering the Bank of the United States.<sup>20</sup> Jackson's veto invoked policy and constitutional (federalism) objections to the rechartering.<sup>21</sup> Notably, the Supreme Court here *had* rejected the constitutional challenges.<sup>22</sup> Finally, presidents can recommend that Congress enact a statute providing more protection to individual privacy from government surveillance than the Supreme Court has or would hold constitutionally guaranteed.<sup>23</sup>

These three examples involve exercises of *discretionary* presidential powers.<sup>24</sup> The key point about discretionary decisions is that before, and sometimes even after, they are made they necessarily create no legal rights.<sup>25</sup> No one convicted of violating

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referred to the "protection" the Constitution "secure[d] to the press . . . in which it remained under the authority of the states, with whom alone the power is left of abridging that freedom." JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 305 (1956).

<sup>19</sup> The Supreme Court had not resolved the question largely because it had limited jurisdiction in criminal cases. See Charles E. Rice, *Congress and the Supreme Court's Jurisdiction*, 27 VILL. L. REV. 959, 964 (1982). For a discussion of the possibility that a President would grant a pardon to someone convicted of violating court-determined constitutional rights of *other* people because the President believed that the person receiving the pardon had not violated such rights before they were exercised, see *infra* notes 25–26 and accompanying text.

<sup>20</sup> Veto Message from Andrew Jackson, President of the U.S., to the U.S. Senate (July 10, 1832) [hereinafter Veto Message], [https://avalon.law.yale.edu/19th\\_century/ajveto01.asp](https://avalon.law.yale.edu/19th_century/ajveto01.asp) [<https://perma.cc/FG2W-W7NX>]. I note that the veto message can be read as Jackson's interpretation of *McCulloch* rather than as his disagreement with it. See David S. Schwartz, *Defying McCulloch? Jackson's Bank Veto Reconsidered*, 72 ARK. L. REV. 129, 132 (2019). In this understanding, Jackson read *McCulloch* as holding that the degree of necessity was for elected officials to decide. Those officials decided in 1816 that the bank was necessary in the constitutional sense, and Jackson was deciding in 1832 that it was not necessary in that sense. See Mark A. Graber, *Overruling McCulloch?*, 72 ARK. L. REV. 79, 82 (2019). I thank Mark Graber for pointing out this reading of Jackson's message.

<sup>21</sup> See Veto Message, *supra* note 20.

<sup>22</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 326–27 (1819).

<sup>23</sup> See, e.g., WHITE HOUSE, *CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL DIGITAL ECONOMY* 35–40 (2012).

<sup>24</sup> See Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*, 52 B.C. L. REV. 1551, 1595–96 (2011).

<sup>25</sup> Legal rights might arise after a discretionary decision is made. See Comment, *Presidential Clemency and the Restoration of Civil Rights: Appraising the Consequences of a Full Article II Pardon*, 61 IOWA L. REV. 1427, 1430–31 (1976). For example, a person who had received a pardon would not be reimprisoned for the underlying offense if a successor President believed the pardon to rest on a mistaken understanding of the Constitution. *Id.* at 1427–28. Not all such discretionary decisions have this character, though: a discretionary decision to recommend legislation creates no legal rights even after it is made. See J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2127–28 (1989).

the Sedition Act had a right to a pardon—even in the form of a right to have a President who believes the Act unconstitutional issue a pardon.<sup>26</sup> Or consider *United States v. Lovett*.<sup>27</sup> There Congress had directed the President to withhold pay from three named government officials.<sup>28</sup> President Franklin Roosevelt signed the bill, stating, “I have been forced to yield, to avoid delaying our conduct of the war. But I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional.”<sup>29</sup> The Supreme Court did hold the statute unconstitutional as a bill of attainder.<sup>30</sup> Even so, *Lovett* clearly had no legal right to a veto from a President who believed the statute unconstitutional.<sup>31</sup>

All this is so elementary as perhaps not worth stating in detail. A President’s discretionary powers in themselves cannot generate rights because, in Hohfeldian terms, the putative rights-holder cannot assert that the President has a duty to use those powers one way or another.<sup>32</sup>

Still, as the examples show, a President can exercise her discretionary powers in ways that take into account values associated with individual rights.<sup>33</sup> In doing so she protects those values. There is one complication, though. Constitutional rights either trump other non-rights social values, in Dworkin’s terms, or compete against those other values.<sup>34</sup> In the first case the contours of the constitutional right are defined with reference to those other values.<sup>35</sup> So, for example, the right to free expression trumps the values of social stability, but the right does not encompass (in the United States) utterances that (to oversimplify) are intended to and are likely to incite imminent lawless action.<sup>36</sup> In the second case, the values associated with the right are balanced against other social values such as stability or, in the usual example, the ability of people to use streets and parks for their ordinary purposes.<sup>37</sup>

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<sup>26</sup> Suppose, contrary to the fact, that the Sedition Act remained on the books after Jefferson left the presidency and was replaced by a President who believed the Act constitutional. Had Jefferson overlooked someone convicted of violating the Act, that person would have no claim to a pardon from Jefferson’s successor. *See* Sedition Act of 1798, ch. 73, 1 Stat. 596 (1798).

<sup>27</sup> 328 U.S. 303 (1946).

<sup>28</sup> *Id.* at 304–05.

<sup>29</sup> *Id.* at 313.

<sup>30</sup> *Id.* at 316–18.

<sup>31</sup> A strong adherent to judicial supremacy could challenge this entire line of argument by denying that *any* decisions are discretionary—or, put another way, that all presidential decisions (whether to issue or refrain from issuing a pardon, whether to veto or sign legislation) are subject to evaluation *by the courts*. *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1313–14 (1996).

<sup>32</sup> Though, again, once exercised some of the powers can generate legal rights.

<sup>33</sup> *See supra* notes 17–24 and accompanying text.

<sup>34</sup> *See* François du Bois, *Rights Trampled? Balancing in Constitutional Adjudication*, 2004 ACTA JURIDICA 155, 162–63.

<sup>35</sup> *See, e.g.,* *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

<sup>36</sup> *Id.*

<sup>37</sup> *See* du Bois, *supra* note 34, at 157.

In either version, a President's discretionary action that takes into account the values associated with a constitutional right might bump up against other social values.<sup>38</sup> In the usual case this simply produces an ordinary policy judgment that, in the policymaker's view (here, the President's), public policy is better advanced by the decisionmaker's preferred course of action.<sup>39</sup> Sometimes, though, the other social values are also associated with individual rights. In those cases the President's discretionary decisions might violate one person's constitutional rights while seeming to protect another. This problem is pervasive in connection with the take-care obligation, as we will see in Part II, but almost non-existent with respect to the President's other discretionary powers.<sup>40</sup> One can dream up extreme hypotheticals in which a pardon based on a President's view of the Constitution or even a constitutionally based recommendation to Congress might violate someone's constitutional rights.<sup>41</sup> That the hypotheticals are extreme indicates that we should not build anything of theoretical significance around them.

As noted, the problem that actions taken to advance values associated with individual rights can bump up against other social values is pervasive in connection with the take-care obligation, to which this Article now turns.

## II. THE TAKE-CARE OBLIGATION, DEPARTMENTALISM, AND ADMINISTRATIVE CONSTITUTIONALISM

### A. Departmentalism

One might initially think that a presidential decision to provide "more" protection than the Constitution requires could not violate the take-care obligation. After

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<sup>38</sup> See *id.* at 162–63.

<sup>39</sup> See *supra* notes 17–24 and accompanying text.

<sup>40</sup> See *infra* Part II.

<sup>41</sup> For example, a President might pardon all those convicted of the crime of possessing a gun after having been convicted of a crime of domestic violence, taking the view that the Second Amendment protects gun possession under all such circumstances. Doing so might diminish the personal security of potential victims of domestic violence to the point that the *President's* action deprives them of life or liberty without due process of law. (This hypothetical tracks the analysis one should offer on the question of whether President Trump's pardon of Joseph Arpaio might violate the constitutional rights of those whose rights Arpaio was found by the courts to have violated. See, e.g., *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB, 2017 WL 4839072, at \*1–2 (D. Ariz. Oct. 19, 2017), *aff'd*, 951 F.3d 1001 (9th Cir. 2020).) Or a recommendation that race-based affirmative action be outlawed, based upon a President's view of what the idea of equal protection requires, might unconstitutionally encourage discrimination against racial minorities. It is worth noting that both substantive claims here are nonstandard, but are available within current constitutional discourse, and that the non-standard nature of the constitutional analysis is what makes the hypotheticals extreme, not the possibility that the hypotheticals might actually occur.

all, if Congress can enact statutes that provide free expression rights broader than the Supreme Court says the First Amendment requires, why cannot the President do the same?<sup>42</sup>

Consider the following problems. During the Presidency of President A, Congress enacts, and the President signs, a statute authorizing criminal prosecutions of those who publish sensitive but non-classified material that deals with national security matters. The President directs that the Department of Justice institute prosecutions under the statute. One defendant challenges the statute as a First Amendment violation because it is unconstitutionally overbroad. The Supreme Court rejects the challenge and holds the statute to be constitutionally permissible. Then President B takes office. Believing that the statute is indeed unconstitutional, the President directs that all pending prosecutions be dropped and that none be brought thereafter. With the statute still on the books, and held to be constitutional by the Supreme Court, has President B failed to take care that the laws be faithfully executed?<sup>43</sup>

Or consider a President who directs federal prosecutors not to use in any way whatever information derived from questioning after imperfect or no *Miranda*<sup>44</sup> warnings were given, even when precedent holds that the use of the information in the circumstances would be constitutionally permissible. Of course, such a direction ensures that the Fifth Amendment is faithfully executed. Perhaps, though, it violates the Take Care Clause with respect to federal criminal laws, the enforcement of which might be less effective than otherwise.<sup>45</sup>

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<sup>42</sup> I put to one side a case where the President waives a legal right available to her personally. I see no difficulty with a presidential decision to refrain from suing for libel even when she believes—and believes she can establish—that someone has published a false statement about her with malice in the *New York Times Co. v. Sullivan* sense. See generally 376 U.S. 254 (1964). The reason, though, is that she has no constitutional duty to take care that libel law—state law, after all—be faithfully enforced.

<sup>43</sup> A somewhat more complicated case would arise were Congress to make it clear, either with respect to a particular statute or with respect to criminal statutes generally, that it authorized the President to make case-specific decisions about whether to prosecute but did not authorize her to make categorical judgments like the one described in the text. The President would certainly contend that this directive itself violated her Article II inherent executive power. See U.S. CONST. art. II. Suppose the courts rejected that contention. Then the President would rely on the narrow departmentalist view that she has the power to determine the scope of the Constitution as it applies to her office. See *infra* text accompanying notes 46–53.

<sup>44</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>45</sup> I am inclined to think that it does not, even when the directive leads a prosecutor to conclude that prosecution without the evidence would be futile. In my view, this would be akin to situations in which policy considerations (the defendant's age or ill health, for example) lead prosecutors to decline to prosecute, *see, e.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”), and such declinations pretty clearly do not violate the take-care duty. See *id.* Note, though, that the practice



The departmentalist says that the President has not violated the take-care obligation in either case. The reasons are simple.<sup>46</sup> Most constitutional provisions identifying individual rights do so at relatively high levels of abstraction: “[T]he freedom of speech,” “unreasonable searches and seizures,” and the like.<sup>47</sup> To become administrable law they have to be transformed into doctrines.<sup>48</sup> I call these doctrines “specifications” of the terms’ meaning. Specifications are not, in general, merely the results reached in specific cases or even the aggregate of such results.<sup>49</sup> Rather, they are doctrinal formulations at a mid-level of abstraction. Examples from the First Amendment are “clear and present danger,”<sup>50</sup> “the gravity of the ‘evil,’ discounted by its improbability,”<sup>51</sup> “incitement to imminent lawless action.”<sup>52</sup> Each specification might be said to transform the abstract constitutional provisions into tools for effective governance, including effective rights-protection. Each rests upon a judgment about how the values underlying the constitutional provision can best be implemented in a complex government system.<sup>53</sup>

I pass over a large number of details about what goes into that judgment.<sup>54</sup> The central argument departmentalists make is that there are many reasonable specifications of individual provisions available in complex systems. Different decision-makers can place different weights on the various considerations and arrive at different bottom-line judgments, all of which are reasonable.<sup>55</sup> They can agree that

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of case-specific declinations might be different from a categorical decision to decline to prosecute, as discussed *supra* note 43 and accompanying text.

<sup>46</sup> I confine this discussion to the Constitution’s individual rights provisions, though in my view the same arguments are available with respect to all the Constitution’s provisions.

<sup>47</sup> See U.S. CONST. amends. I, IV.

<sup>48</sup> Cf. James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 *FORDHAM L. REV.* 1377, 1381 (2005).

<sup>49</sup> Sometimes they are, when the abstract constitutional term is specified by a doctrine directing decisionmakers to take all relevant matters into account and from them determine whether, all things considered, the constitutional right was violated. See, e.g., Kari M. Knudson, Comment, *Searches and Seizures—Automobile Exception: The Fourth Amendment Does Not Prevent a Search of Passengers’ Containers in an Automobile: Wyoming v. Houghton*, 526 *U.S.* 295 (1999), 76 *N.D. L. REV.* 943, 945–46 (2000) (discussing hierarchy of factors in considering Fourth Amendment violations).

<sup>50</sup> See *Schenck v. United States*, 249 *U.S.* 47, 52 (1919).

<sup>51</sup> See *Dennis v. United States*, 341 *U.S.* 494, 510 (1951).

<sup>52</sup> See *Brandenburg v. Ohio*, 395 *U.S.* 444, 449 (1969).

<sup>53</sup> See Fleming, *supra* note 48, at 1381.

<sup>54</sup> Among the considerations are: the number of officials charged with implementing the doctrine as specified, federalism, the capacity of courts to supervise implementing officials, and the capacity of higher courts to supervise lower courts. See, e.g., Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 *LAW & CONTEMP. PROBS.*, Summer 2004, at 105, 109–10 (2004). There are, however, many more considerations. See, e.g., *id.*

<sup>55</sup> See Fallon, *supra* note 1, at 489–90.

the Supreme Court's specification of the First Amendment's applicability to modes of expression that take the form of nonverbal communication is reasonable,<sup>56</sup> for example, but also believe (reasonably) that the Court's criteria for determining when nonverbal communication is covered by the First Amendment—its specification of the doctrine—include too many (or too few) forms of nonverbal communication.<sup>57</sup> For the departmentalist, a court's specification of constitutional doctrine is a datum a President should take into account, but in the end, the departmentalist believes, the President can make her own judgment about how the balance of considerations comes out, within the broad constraints of reasonableness.<sup>58</sup>

To my mind, the only substantial objection to departmentalism defended in this way is that it introduces an undesirable instability into the law.<sup>59</sup> Perhaps some instability can be productive, for example by allowing different actors to search for specifications better than the ones the courts come up with. Even if that is not so, though, the constraint that a President's (or Congress's) specification must be reasonable limits the instability. And, for the departmentalist, the instability is limited enough to be tolerable.<sup>60</sup>

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<sup>56</sup> See, e.g., *Texas v. Johnson*, 491 U.S. 397, 404, 406 (1989).

<sup>57</sup> As did Judge Bork. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26–27 (1971).

<sup>58</sup> Some departmentalists supplement this (in my opinion) modest argument with the argument that a presidential or congressional reasonable specification should prevail over a court's because the President and Congress have a democratic warrant for their judgments that the courts lack (or have more indirectly). Fallon, *supra* note 1, at 488–89, 491–92 (presenting departmentalist arguments about a President's ability to usurp judicial supremacy). That supplement is, in my view, defensible, but it is not relevant to the argument of this Article.

<sup>59</sup> See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359–60 (1997) (providing examples where independent actors' decisions to bypass judicial supremacy could cause instability). Schauer and Alexander make a broader jurisprudential argument, which is (as I understand it) that for an action to count as *law*, it must displace the possibility that other actors would evaluate on their own the considerations underlying the action. See *id.* at 1361, 1371–72. On this view, departmentalism is inconsistent with the idea that Supreme Court decisions are *law*. I am not competent to take on that jurisprudential argument, though it seems to me to rest upon an overly strong account of the degree to which actions must displace others' judgment to count as law. See, e.g., *id.* at 1373–74 (using precedent as an example of when judges must determine whether to displace a prior judge's judgment in order to craft new law).

For the departmentalist, the fact that the President's interpretation is a reasonable one (though different from the judiciary's also reasonable one) defeats the general objection from judicial expertise. There is a residual problem of motivation: suppose the President really does not care about the Constitution but has her lawyers gin up a reasonable constitutional interpretation that purports to justify an otherwise badly motivated action. My view is that, if clearly established, such motivation would override the departmentalist defense of the President's action. For a discussion that underlies that view, see Mark Tushnet, *Trump v. Hawaii: "This President" and the National Security Constitution*, 2018 SUP. CT. REV. 1, 1–2.

<sup>60</sup> The preceding example suggests some difficulties associated with the language of

Now consider a more realistic example.<sup>61</sup> The President believes that Congress and the courts have misinterpreted the Free Exercise Clause<sup>62</sup>—the courts by failing to recognize a constitutionally rooted obligation to accommodate neutral laws of general applicability to take account of their adverse impact on free exercise, and Congress by purporting to require such accommodations under criteria that are less robust than the President believes the Constitution requires (for example, by purporting to require that the accommodation be unavailable if there is merely a strong government interest supporting the underlying statute rather than, as the President believes, a compelling interest).<sup>63</sup> The President therefore directs that relevant agencies refrain from enforcing neutral nondiscrimination laws against participants in federal programs who have religiously based objections to the duties imposed by those laws because, in the President's view, the underlying government interests are perhaps strong but certainly not compelling.<sup>64</sup>

Here the problem is not one of “over”-protection of the free exercise right. It is also one of “under”-protection of *other* constitutional rights, either the Nonestablishment Clause or the Equal Protection Clause<sup>65</sup>—what I earlier referred to as the problem arising when one constitutional right bumps up against another.<sup>66</sup> The President must make departmentalist arguments with respect to two (or three) constitutional provisions:

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“under”- and “over”-enforcement. The President is under-enforcing a statute that, in the view of Congress and the courts, fully protects individual rights, and in doing so over-enforces the First Amendment, again in the view of the other branches.

<sup>61</sup> The example is developed from Trump Administration policies with respect to the enforcement of nondiscrimination obligations in many federal statutes. *See, e.g.*, Exec. Order No. 13,831, 83 Fed. Reg. 20,715 (May 3, 2018).

<sup>62</sup> *See* U.S. CONST. amend. I.

<sup>63</sup> I am not here attempting to describe the existing statutory regime under the Religious Freedom Restoration Act. *See generally* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4.

<sup>64</sup> I have designed the hypothetical in a way that makes a *statutory* challenge to the President's directive available as based upon an interpretation contrary to law, because in doing so the President is requiring agencies to construe the congressional statute more expansively than its terms require or allow. The hypothetical makes it possible for the President to claim that her interpretation of the statute is permissible in light of the canon of constitutional avoidance (where what is to be avoided is a constitutional problem arising from the President's views about the Constitution). *See, e.g.*, Aneil Kovvali, *Constitutional Avoidance and Presidential Power*, 35 YALE J. ON REGUL. BULL. 10, 12 (2017).

<sup>65</sup> Technically, the equal protection component of the Fifth Amendment's Due Process Clause. *See* U.S. CONST. amend. V.

<sup>66</sup> The Trump Administration's expansive interpretation of the exemption provided in the Affordable Care Act for those who object to providing certain “essential” services might be said to “over”-protect religious liberty but at the cost of underserving the Act's goals and of arguably “under”-protecting equality rights (though the latter claim is complicated by the fact that the recipients of the services probably do not have a constitutional right, whether grounded in equality or due process, to receive the services). I thank Tara Leigh Grove for pressing me to use this example.

The President's interpretation of the Free Exercise Clause must be within the range of reasonable interpretations of that clause, and her interpretation of the Nonestablishment and Equal Protection Clauses must be within the range of reasonable interpretations of those clauses.<sup>67</sup>

### B. *Administrative Constitutionalism*

Over the past decade scholars, mostly of legal history and administrative law, have produced an interesting body of work on what they call "administrative constitutionalism."<sup>68</sup> Professor Karen Tani defines the term: "[T]he role of administrative agencies in constructing and elaborating constitutional meaning."<sup>69</sup> According to Professor Tani, the historically oriented scholars engaged in this project tend to focus on "people whose low status or limited access to formal power may have prevented them from 'making history' in the traditional sense."<sup>70</sup> Administrative constitutionalism results from the interaction between agency employees, typically civil service bureaucrats today, and those low-status people—or, more generally, those who higher-level officials see as the objects of regulation but who see themselves as active subjects.<sup>71</sup>

Professor Tani suggests that constitutional meanings constructed within administrative agencies have "two lines of influence," one "[running] through Congress and the other [running] through the judiciary."<sup>72</sup> The first line is one in which executive departmentalism contributes to legislative departmentalism, the second is one in which it informs constitutional interpretation in the courts. Note the temporal dimension here.<sup>73</sup> In this version, administrative constitutionalism operates on a nearly blank slate.<sup>74</sup> One of Professor Tani's case studies, for example, involves the construction of the idea of freedom or non-slavery under the Thirteenth Amendment prior to any judicial definitions.<sup>75</sup> Professor Sophia Lee's study of administrative constitutionalism in the Federal Communications Commission, the Federal Power Commission, and the National Labor Relations Board deals (in rough summary) with the application of equality norms in new regulatory domains.<sup>76</sup> From the point of view of constitutional

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<sup>67</sup> I take no position on the merits of these specific departmentalist arguments.

<sup>68</sup> See, e.g., Karen M. Tani, *Administrative Constitutionalism at the "Borders of Belonging": Drawing on History to Expand the Archive and Change the Lens*, 167 U. PA. L. REV. 1603, 1604–05 (2019).

<sup>69</sup> *Id.* at 1604.

<sup>70</sup> *Id.* at 1607–08.

<sup>71</sup> *Id.* at 1607–08, 1628–30.

<sup>72</sup> *Id.* at 1617.

<sup>73</sup> See *id.* at 1617–18.

<sup>74</sup> See *id.* at 1613, 1617–18.

<sup>75</sup> See *id.* at 1611, 1619.

<sup>76</sup> See Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 800–02 (2010). Qua legal norm, the norm of sex equality was itself relatively novel when the agencies began to deal with it. See *id.* at 838–39, 844.

structure (as distinct from a point of view focusing on the substantive norm), administrative constitutionalism as a form of executive departmentalism raises no normative questions because it does not place the executive branch at odds with either Congress or the courts.<sup>77</sup>

For present purposes, cases where administrative constitutionalism deals with constitutional norms on which the courts in particular have already weighed in is more interesting. This Article focuses specifically on cases where the agency *accepts* the norms as defined by the courts and tries to implement them.<sup>78</sup> Sometimes this creates problems of “over”-enforcement, as described above.<sup>79</sup> Sometimes, though, it creates a distinctive problem identified in 1974 by Professor Bernard Meltzer.<sup>80</sup>

Taking his cue from two then-recent court decisions requiring the National Labor Relations Board to take racial discrimination by labor unions into account in implementing its statutory obligations—and in particular in determining whether to recognize a discriminatory union as a bargaining agent—Professor Meltzer questioned whether more remedies for acknowledged statutory and constitutional violations are always better.<sup>81</sup> As he wrote in his concluding sentence: “There is little reason to believe that [additional remedies] will make an effective contribution to eliminating racial discrimination; but there are good reasons for believing that they

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<sup>77</sup> See *id.* at 801–02.

<sup>78</sup> Professor Lee provides a useful summary of late twentieth-century developments:

[W]hereas before they might have had no choice but to reason from custom and constitutional first principles, the Court’s growing constitutional rights jurisprudence ensured that they had ample judicial sources to which to turn. . . . The Court’s rights activism and assertions of judicial supremacy gave administrators incentives to punt difficult constitutional questions to courts. In constitutional disputes within agencies, administrators strategically invoked judicial supremacy and precedent to advance their arguments.

Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1743–44 (2019) (footnote omitted).

<sup>79</sup> Professor Walker observes that “federal agencies regulate us in many meaningful, and sometimes frightening, ways that either evade judicial review entirely or are at least substantially insulated from such review.” Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1624 (2018). These methods include agency guidance and enforcement discretion, informal and formal adjudication, rulemaking under *Chevron*, legislative drafting assistance, and agency budgeting. *Id.* at 1625. Characterizing some of these as ways of regulating seems to me questionable (budgeting) or encapsulated by departmentalism as already discussed (enforcement discretion and drafting assistance). In my view, to the extent that the current absence or difficulty of judicial review is a problem, it is one that can be remedied through adjustments in nonconstitutional law (modifying *Chevron* and treating the more stringent forms of guidance as having force of law, for example). For that reason, the problem of judicial review, if there is one, does not raise the kinds of questions about constitutional fundamentals with which this Article is concerned.

<sup>80</sup> See Meltzer, *supra* note 15, at 3, 44–45.

<sup>81</sup> *Id.* at 2–3.

will compromise the purposes of the NLRA, which are valued by the historic victims of racial discrimination . . . .<sup>82</sup> This concern arises not only when courts direct that the NLRB take race discrimination into account in a specific way, but also when the agency on its own initiative does so.<sup>83</sup> That is, it is a concern associated with administrative constitutionalism.<sup>84</sup>

Professor Meltzer's analysis was NLRA-specific, but that specificity rested upon more general concerns.<sup>85</sup> Professor Meltzer observed that the NLRA was only one of several statutes that addressed, or could be interpreted to address, racial discrimination in employment.<sup>86</sup> Each statute provided different remedies for such discrimination.<sup>87</sup> Professor Meltzer argued that we should see the statutes and their remedies as part of an integrated system of governance, and our concern should be with ensuring that that system, taken as a whole, provided effective remedies for racial discrimination.<sup>88</sup> Examining the statutes applicable to racial discrimination in employment, Professor Meltzer concluded that the remedies under the NLRA were likely to be less effective than remedies available under Title VII of the 1964 Civil Rights Act and might even undermine those remedies.<sup>89</sup> This concern will arise throughout the domain of administrative constitutionalism whenever—as will almost always be the case—constitutional concerns can be raised in multiple institutional locations.<sup>90</sup>

The problem described earlier of administrative constitutionalism bumping up against other values also concerned Professor Meltzer, again for reasons arising from institutional arrangements.<sup>91</sup> Earlier I discussed the way in which agency implementation of values associated with constitutional rights might bump up against other values.<sup>92</sup> Here we are concerned with the constitutional rights themselves; that is, the substantive rights are precisely those that courts would enforce.<sup>93</sup> Professor Meltzer argued that NLRB enforcement of antidiscrimination norms through its remedial system would weaken the Board's ability to achieve its statutory goal of promoting industrial peace.<sup>94</sup> Here administrative constitutionalism interferes with the (merely?)

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<sup>82</sup> *Id.* at 46.

<sup>83</sup> *See id.* at 45.

<sup>84</sup> *See id.* at 19–21.

<sup>85</sup> *See id.* at 45–46.

<sup>86</sup> *Id.* at 1.

<sup>87</sup> *See id.*

<sup>88</sup> *See, e.g., id.* at 45 (referring to “the different parts of the administrative-judicial system” with “distinctive responsibilities” (emphasis added)).

<sup>89</sup> *See id.* at 17 (referring to the problem of “determining the effect that NLRB decisions should have in actions filed under Title VII”).

<sup>90</sup> *See id.* at 45–46.

<sup>91</sup> *See id.* at 15.

<sup>92</sup> *See supra* Part II.

<sup>93</sup> *See Meltzer, supra* note 15, at 32.

<sup>94</sup> *Id.* at 14–15.

statutory charge the agency has received from Congress.<sup>95</sup> And, for Professor Meltzer, such interference was unnecessary because other statutes provided remedies that could be implemented without weakening the NLRA's power to achieve industrial peace.<sup>96</sup>

Again, the point can be generalized. Sometimes the way in which an agency enforces constitutional rights will inhibit its ability to achieve the goals set out in its organic statute.<sup>97</sup> That reduction in effectiveness might also be unnecessary where other institutions can provide effective remedies for the constitutional violation.<sup>98</sup> Administrative constitutionalism might be problematic when agency constitutional interpretations (a) unnecessarily (b) weaken the effectiveness of the statutes the agency administers.

More remedies for judicially defined constitutional violations might not always be better. Further, though Professor Meltzer did not make this point, remedial over-enforcement might lead to the other forms of "over"-enforcement already discussed.<sup>99</sup> Agencies that build attention to constitutional rights into their missions might experience "mission creep," an expansion of the mission beyond its initial scope.<sup>100</sup> Beginning with the view that the agency should use the tools at hand to address violations of constitutional rights as the court define such violations, the agency comes to take its own view of what the Constitution requires. Sometimes, as the literature on administrative constitutionalism argues, doing so can contribute to changes in judicial doctrine.<sup>101</sup> This would occur, for example, if the agency extended judicial doctrine to deal with problems that the courts had not yet considered. Where the agency's interpretation is ruled out by clear judicial precedent, we once again have the standard version of "over"-enforcement.<sup>102</sup>

Professor Meltzer's argument rested upon a close analysis of the precise statutory context in which the NLRB operated.<sup>103</sup> Its conclusion was that administrative constitutionalism in that setting was problematic.<sup>104</sup> The generalization of that argument here devotes no attention to statutory specifics. For that reason, the general conclusion should be that sometimes—but only sometimes—administrative constitutionalism can be problematic because better ways of operating a complex system for protecting constitutional rights are available.

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<sup>95</sup> *See id.* at 45–46.

<sup>96</sup> *Id.* at 25.

<sup>97</sup> *See, e.g., id.* at 32.

<sup>98</sup> *See, e.g., id.* at 25.

<sup>99</sup> I drop the scare quotes in the first use of *over-enforcement* in this sentence to indicate that the agency is not disagreeing with judicial definitions of the applicable constitutional provision.

<sup>100</sup> *See* Dov Fox, *Interest Creep*, 82 GEO. WASH. L. REV. 273, 276 (2014) (explaining the origin and meaning of the phrase "mission creep").

<sup>101</sup> *See supra* notes 72–76 and accompanying text.

<sup>102</sup> *See supra* notes 61–67 and accompanying text.

<sup>103</sup> *See* Meltzer, *supra* note 15, at 1–6.

<sup>104</sup> *See id.* at 45–46.

## CONCLUSION

That Presidents can “over”- and “under”-enforce individual rights is obvious.<sup>105</sup> The problems with “under”-enforcement seem equally obvious, but, as I have argued, much depends upon one’s views about the value of taking judicial specifications of those rights as the normative baseline.<sup>106</sup> If one is agnostic on that question, sometimes presidential “under”-enforcement will be desirable.

One problem with presidential “over”-enforcement is also reasonably obvious. This problem arises when the President’s approach to one individual right raises questions about incursions on other individual rights. Another problem is subtler. It arises not only when Presidents “over”-enforce relative to a judicial baseline but also when the President follows that baseline to the letter.<sup>107</sup> Sometimes, as Professor Meltzer argued, doing so can reduce the President’s ability to implement nonconstitutional statutory goals without improving the actual protection of individual rights.<sup>108</sup> Sometimes, that is, less presidential enforcement of individual rights actually protects those rights more effectively than does more enforcement.

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<sup>105</sup> See *supra* notes 61–66 and accompanying text.

<sup>106</sup> See Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473, 1477 (2008).

<sup>107</sup> See *supra* notes 61–67 and accompanying text.

<sup>108</sup> See Meltzer, *supra* note 15, at 45–46.