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FREE MINDS AND FREE MARKETS

Part I: Barr v. AAPC and Judicial Departmentalism

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Yesterday, the Supreme Court decided *Barr v. American Association of Political Consultants*. (If you would like an edited copy of the case from the Barnett/Blackman supplement, please email me at josh-at-joshblackman-dot-com.) The case considered the constitutionality of a 2015 amendment to the Telephone Consumer Protection Act of 1991. Justice Kavanaugh's plurality offers a pithy summary:

As relevant here, the Telephone Consumer Protection Act of 1991, known as the TCPA, generally prohibits robocalls to cell phones and home phones. But a 2015 amendment to the TCPA allows robocalls that are made to collect debts owed to or guaranteed by the Federal Government, including robocalls made to collect many student loan and mortgage debts. This case concerns robocalls to cell phones. Plaintiffs in this case are political and nonprofit organizations that want to make political robocalls to cell phones. Invoking the First Amendment, they argue that the 2015 government-debt exception unconstitutionally favors debt-collection speech over political and other speech. As relief from that unconstitutional law, they urge us to invalidate the entire 1991 robocall restriction, rather than simply invalidating the 2015 government-debt exception.

The Court sharply divided. Here is the breakdown of the votes:

KAVANAUGH, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and ALITO, J., joined, and in which THOMAS, J., joined as to Parts I and II. SOTOMAYOR, J., filed an opinion concurring in the judgment. BREYER, J., filed an opinion concurring in the judgment with respect to severability and dissenting in part, in which GINSBURG and KAGAN, JJ., joined. GORSUCH, J., filed an opinion concurring in the judgment in part and dissenting in part, in which THOMAS, J., joined as to Part II.

This split among the Court's conservatives reveals several important fissures on the Roberts Court. I plan to write at least four posts about the case. Part I will consider Justice Kavanaugh's partial-embrace of "judicial departmentalism." Part II will look at how the Court sharply divided on the First Amendment–so much so that there is no single majority opinion. Part III will contrast how the two newest members of the Court approach stare decisis. Part IV will turn to an area that is very much in flux: severability. And I will tie in the recent amicus brief I wrote for the Cato Institute in the ACA case. There are a lot of overlaps between brief, Justice Kavanaugh's plurality, and Justice Gorsuch's concurrence.

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It is all too common for lawyers to say that courts "invalidate" a law. Regrettably, courts all-too-often assert a power they lack. Only legislatures can invalidate a statute. Courts lack, in Jonathan

Mitchell's words, a writ of erasure. Justice Thomas stated the issue succinctly in *Seila Law*: "The Federal Judiciary does not have the power to excise, erase, alter, or otherwise strike down a statute." Justice Thomas no longer uses any of these synonyms. Nor does Justice Gorsuch. Nor do I.

Alas, there are countless Supreme Court precedents that invoke these concepts. What to do with these cases? Justice Kavanaugh's plurality offers a compromise. He attempts to redefine the word "invalidate" in Footnote 8. It begins:

FN8: The term "invalidate" is a common judicial shorthand when the Court holds that a particular provision is unlawful and therefore may not be enforced against a plaintiff.

If only that were true. Courts, drunk on judicial supremacy, routinely think that the term "invalidate" means exactly that: to strike a statute off the books. In any event, I hope other judges follow Justice Kavanaugh's lead. Recently, Judge Elrod (CA5) articulated this premise in *Texas v. U.S.* She wrote that if Jonathan Mitchell was correct, "then courts are speaking loosely when they state that they are 'invalidating' or 'striking down' a law." She's right.

If courts do not "strike down" laws, then what does "invalidate" mean? Footnote 8 continues:

To be clear, however, when it "invalidates" a law as unconstitutional, the Court of course does not formally repeal the law from the U. S. Code or the Statutes at Large. Instead, in Chief Justice Marshall's words, the Court recognizes that the Constitution is a "superior, paramount law," and that "a legislative act contrary to the constitution is not law" at all. *Marbury* v. *Madison* (1803). The Court's authority on this front "amounts to little more than the negative power to disregard an unconstitutional enactment." *Massachusetts* v. *Mellon* (1923).

This definition is perfect. Courts have an obligation to follow the higher law. In a conflict between a statute, and the Constitution, the latter prevails. Hamilton explained this judicial "duty" in Federalist No. 78:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose **duty it must be to declare all acts contrary to the manifest tenor of the Constitution void**. Without this, all the reservations of particular rights or privileges would amount to nothing.

Next, Justice Kavanaugh turns to the position stated by Justice Thomas, and now Justice Gorsuch. Here, the Court's newest member is trying to find some middle ground to avoid fissures:

JUSTICE THOMAS's thoughtful approach to severability as outlined in *Murphy* v. *National Collegiate Athletic Assn.* (2018) and *Seila Law LLC* v. *Consumer Financial Protection Bureau*, (joined by JUSTICE GORSUCH in the latter) would simply enjoin enforcement of a law as applied to the particular plaintiffs in a case.

And Kavanaugh explains that the plurality's approach, is similar to Thomas's approach:

Under either the Court's approach or JUSTICE THOMAS's approach, an offending provision formally remains on the statute books (at least unless Congress also formally repeals it).

True enough. Courts cannot strike statutes off the books. Kavanaugh continues:

Under either approach, the formal remedy afforded to the plaintiff is an injunction, declaration, or damages.

I think this statement is accurate only in the most literal sense. Under Thomas's approach, an injunction and declaration takes its usual form: a judgment that binds specific parties. Under Justice Kavanaugh's alternate approach, an injunction and declaration in a case would immediately bind all parties, everywhere. Debates about "nationwide" or "cosmic" injunctions mistake the real grievance: the geographic scope is far less important than the people who are bound by the order.

Justice Kavanaugh acknowledges this disparity. He writes:

One difference between the two approaches is this: Under the Court's approach, a provision is declared invalid and cannot be lawfully enforced against others.

After an admirable effort to redefine the phrase "invalidate," Kavanaugh falls back on the phrase "declared invalid." Old habits die hard. No, courts cannot declare a law "invalid"–that is unenforceable writ large. Courts can only enjoin enforcement of a law in specific cases for specific parties.

Justice Kavanaugh then distills Justice Thomas's approach into four premises (I added numbers in brackets):

Under JUSTICE THOMAS's approach, [**1**] the Court's ruling that a provision cannot be enforced against the plaintiff, **[2]** plus executive respect in its enforcement policies for controlling decisional law, [**3**] plus vertical and horizontal *stare decisis* in the courts, [**4**] will mean that the provision will not and cannot be lawfully enforced against others.

Premise #1 is unobjectionable. Under traditional rules of equity, a judgment is only enforceable against the named Plaintiffs and Defendants. Every 1L learns this rule in CivPro, but promptly forgets it when they study ConLaw. Remember, the Supreme Court is a court like any other. (See my article, *The Irrepressibly Myth of Cooper v. Aaron*).

Premise #2 reflects the distinction between a judgment and a precedent. Even if a case results in a binding *judgment* between specific parties, the government may choose to follow that case as a *precedent* in similar situations. (See my article with Howard Wasserman, *The Process of Marriage Equality*). Indeed, the entire basis of qualified immunity is that government actors will choose to follow clearly-established precedent; the failure to do so can result in monetary damages. But we should not conflate a *voluntary* willingness to follow precedent, with a judgment that binds. The government may believe a non-binding precedent is wrong, and choose to ignore it to tee up a test case.

Premise #3 appears to state an obvious rule: courts will follow precedent. First, under the concept of *vertical stare decisis*, lower courts will follow the decisions of the Supreme Court. I don't think this rule is compelled by Article III–judges take an oath to the Constitution, not the Supreme Court–but that is a debate for another day. And under the concept of *horizontal stare*

decisis, lower courts will follow judgements from sister courts. That latter rule is more contestable. The entire nature of circuit splits refutes the notion that the Ninth Circuit will find itself bound to follow the Ninth Circuit. But I accept the general premise.

So far, Justice Kavanaugh has articulated, with clarity, the doctrine of judicial departmentalism. My colleague Howard states the issue well:

The injunction prohibits enforcement of the law against the plaintiff; the executive voluntarily respects decisional law in future enforcement efforts (but is not required to do so); and stare decisis means any enforcement fails in the courts.

But Premise #4 goes awry. Kavanaugh wrote that because of Premise #1, #2, and #3, "the provision will not and cannot be lawfully enforced against others." Wrong. It likely will not be enforced against others. But enforcing that law "against others" would not be unlawful. Regrettably, Justice Kavanaugh buys into the myth of what I call *judicial universality*–that is,"the Supreme Court's constitutional interpretations obligate not only the parties in a given case, but also other similarly situated parties in later cases." If he believes the first three premises are true, the fourth cannot follow.

Justice Kavanaugh came close to embracing judicial departmentalism, but stopped short.

Footnote 8 concludes:

The Court and JUSTICE THOMAS take different analytical paths, but in many cases, the different paths lead to the same place.

I disagree. *Seila Law* and now *AAPC* illustrate how different the remedies are. I will address severability in the fourth part of this series.

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