

CASA, Procedure (Code?), and Fraenkel’s *Dual State*



“The Elephant in the Lecture Hall,” courtesy of Lucian.

Read this handout on *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025) and be prepared to discuss the questions that follow.¹

Majority opinion.

Justice Barrett, in her opinion for the Court, stated the basic facts:

The United States has filed three emergency applications challenging the scope of a federal court's authority to enjoin Government officials from enforcing an executive order. Traditionally, courts issued injunctions prohibiting executive officials from enforcing a challenged law or policy only against the plaintiffs in the lawsuit. The injunctions before us today reflect a more recent development: district courts asserting the power to prohibit enforcement of a law or policy against *anyone*. These injunctions—known as “universal injunctions”—likely exceed the equitable authority that Congress has granted to federal courts.

In footnote 1, she defined “universal injunctions” as follows:

[“Universal”] injunctions are sometimes called “nationwide injunctions,” reflecting their use by a single district court to bar the enforcement of a law anywhere in the Nation. But the term “universal” better captures how these injunctions work. Even a traditional, parties-only injunction can apply beyond the jurisdiction of the issuing court. . . . The difference between a traditional injunction and a universal injunction is not so much *where* it applies, but *whom* it protects: A universal injunction

¹ Edits are noted, except for some in-text citations and references to footnotes, which are removed for readability.

prohibits the Government from enforcing the law against *anyone*, anywhere. H. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 Lewis & Clark L. Rev. 335, 338 (2018).²

The District Courts in three separate cases (consolidated before the Supreme Court) had issued injunctions preventing the federal government from enforcing an Executive Order narrowing the scope of Birthright Citizenship under the Fourteenth Amendment. “In each case, the District Court concluded that the Executive Order is likely unlawful and entered a universal preliminary injunction barring various executive officials from applying the policy to *anyone* in the country (emphasis added).” The government sought *partial* stays of the injunctions; in other words, the government did not seek to stay the injunctions insofar as they applied to the parties, but instead as they applied to anyone else.

As the majority framed the issue, the question presented was not whether the Executive Order unconstitutionally violated long-standing law on Birthright Citizenship, but whether the District Courts had the power to issue universal injunctions that would extend beyond the named parties. Writing for the majority, Justice Barrett held:

The Government is likely to succeed on the merits of its argument regarding the scope of relief. . . . A universal injunction can be justified only as an exercise of equitable authority, yet Congress has granted federal courts no such power.

Noting the proper scope of an injunction, Justice Barrett stated:

“Complete relief” is not synonymous with “universal relief.” It is a narrower concept: The equitable tradition has long embraced the rule that courts generally “may administer complete relief between the parties.” . . . While party-specific injunctions sometimes “advantag[e] nonparties,” Trump, . . . they do so only incidentally.

Thus, the question was not whether the Executive Order was unconstitutional, but “whether the Government is likely to suffer irreparable harm from the District Courts’ entry of injunctions that likely exceed the authority conferred by the Judiciary Act.

Complete relief is not a guarantee—it is the maximum a court can provide. And in equity, “the broader and deeper the remedy the plaintiff wants, the stronger the plaintiff’s story needs to be.”

Several other Justices wrote to concur.³

² Professor Howard Wasserman is a civil procedure professor at FIU and blogs frequently at PrawfsBlawg.

³ Justices Thomas concurred, noting that “serious constitutional questions would arise even if Congress purported to one day allow universal injunctions.” Justice Alito wrote to criticize the use of Class Actions and third-party standing as a way to get around the prohibition on universal injunctions. As noted, Justice Kavanaugh wrote separately to state that “plaintiffs who challenge the legality of a new federal statute or executive action and request preliminary injunctive relief may sometimes seek to proceed by class action under Federal Rule of Civil Procedure 23(b)(2) and ask a court to award preliminary classwide relief that may, for example, be statewide, regionwide, or even nationwide.”

Dissents.

Justice Sotomayor wrote in dissent, noting that “[n]owhere did the Government contest the District Courts’ uniform holdings that the Citizenship Order likely violated the Constitution. Instead, it challenged only the scope of the ordered relief, arguing that the injunctions should be narrowed to block the Order’s enforcement against only the individual persons named in the complaints.” Yet, she also noted that “[c]hildren born in the United States and subject to its laws are United States citizens. That has been the legal rule since the founding, and it was the English rule well before then.”⁴ Thus, “[e]very court to evaluate the Order has deemed it patently unconstitutional and, for that reason, has enjoined the Federal Government from enforcing it.” Decrying what she termed “gamesmanship,” she said:

The Government does not ask for complete stays of the injunctions, as it ordinarily does before this Court. Why? The answer is obvious: To get such relief, the Government would have to show that the Order is likely constitutional, an impossible task in light of the Constitution’s text, history, this Court’s precedents, federal law, and Executive Branch practice. So the Government instead tries its hand at a different game. It asks this Court to hold that, no matter how illegal a law or policy, courts can never simply tell the Executive to stop enforcing it against anyone. Instead, the Government says, it should be able to apply the Citizenship Order (whose legality it does not defend) to everyone except the plaintiffs who filed this lawsuit.

No right is safe in the new legal regime the Court creates. Today, the threat is to birthright citizenship. Tomorrow, a different administration may try to seize firearms from law-abiding citizens or prevent people of certain faiths from gathering to worship. The majority holds that, absent cumbersome class-action litigation, courts cannot completely enjoin even such plainly unlawful policies unless doing so is necessary to afford the formal parties complete relief. That holding renders constitutional guarantees meaningful in name only for any individuals who are not parties to a lawsuit. Because I will not be complicit in so grave an attack on our system of law, I dissent.

....

The Government also falls well short of satisfying its burden to show that it will likely suffer irreparable harm absent a stay and that it will likely succeed on the merits of its challenge to the scope of the injunctions. The Executive Branch has respected birthright citizenship for well over a century, and it advances no plausible reason why maintaining the status quo while the litigation proceeds would cause it irrevocable harm. Nor could it, for the Constitution and federal law prohibit the enforcement of the Citizenship Order.

⁴ She also stated:

This Court once attempted to repudiate it, holding in *Dred Scott v. Sandford*, 19 How. 393, 15 L.Ed. 691 (1857), that the children of enslaved black Americans were not citizens. To remedy that grievous error, Congress passed in 1866 and the States ratified in 1868 the Fourteenth Amendment’s Citizenship Clause, which enshrined birthright citizenship in the Constitution. There it has remained, accepted and respected by Congress, by the Executive, and by this Court. Until today.

Justice Jackson also dissented, stating that “permit[ting] the Executive to violate the Constitution with respect to anyone who has not yet sued is an existential threat to the rule of law.”

Stated simply, what it means to have a system of government that is bounded by law is that everyone is constrained by the law, no exceptions. And for that to actually happen, courts must have the power to order everyone (including the Executive) to follow the law—full stop. To conclude otherwise is to endorse the creation of a zone of lawlessness within which the Executive has the prerogative to take or leave the law as it wishes, and where individuals who would otherwise be entitled to the law's protection become subject to the Executive's whims instead.

Continuing, she argued:

I am not the first to observe that a legal system that operates on two different tracks (one of which grants to the Executive the prerogative to disregard the law) is anathema to the rule of law.⁵ Thus, the law-free zone that results from this Court's near elimination of universal injunctions is not an unfamiliar archetype. Also eerily echoing history's horrors is the fact that today's prerogative zone is unlikely to impact the public in a randomly distributed manner. Those in the good graces of the Executive have nothing to fear; the new prerogative that the Executive has to act unlawfully will not be exercised with respect to *them*. Those who accede to the Executive's demands, too, will be in the clear. The wealthy and the well connected will have little difficulty securing legal representation, going to court, and obtaining injunctive relief in their own name if the Executive violates their rights.

Consequently, the zone of lawlessness the majority has now authorized will disproportionately impact the poor, the uneducated, and the unpopular—*i.e.*, those who may not have the wherewithal to lawyer up, and will all too often find themselves beholden to the Executive's whims. This is yet another crack in the foundation of the rule of law, which requires “equality and justice in its application.” *Papachristou v. Jacksonville*, 405 U. S. 156, 171 (1972). In the end, though, everyone will be affected, because it is law's evenhanded application—“to minorities as well as majorities, to the poor as well as the rich”—that “holds society together.” *Ibid*.

Note that the first sentence ends with a drop to footnote 5, reproduced below. What is Justice Jackson saying?

⁵ See E. Fraenkel, *The Dual State*, pp. xiii, 3, 71 (1941) (describing the way in which the creation of a “Prerogative State” where the Executive “exercises unlimited arbitrariness . . . unchecked by any legal guarantees” is incompatible with the rule of law); see also J. Locke, *Second Treatise of Civil Government* 13 (J. Gough ed. 1948) (“[F]reedom of men under government is to have a standing rule to live by, common to every one of that society . . . and not to be subject to the . . . arbitrary will of another man”); *The Federalist* No. 26, p. 169 (C. Rossiter ed. 1961) (A. Hamilton) (contrasting the monarch's “prerogative” with the emergence of “liberty”); *Myers v. United States*, 272 U. S. 52, 295 (1926) (Brandeis, J., dissenting) (“[P]rotection of the individual . . . from the arbitrary or capricious exercise of power [is] an essential of free government”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 641 (1952) (R. Jackson, J., concurring) (observing that our Constitution—which embodies the rule of law—does not grant to the Executive the “prerogative exercised by George III”).

Thought and discussion questions:

1. Is a “stay” of an injunction essentially an injunction against an injunction?
2. Justice Barrett and Sotomayor both address the “merits” of the government’s applications for stays. Do they view the “merits” in the same way?
3. The late Rep. John Dingell, a long-serving Congressperson, wryly observed, “If you write the substance and you let me write the procedure, I’ll screw you every time.” What might he have to say about the *CASA* opinion?
4. Justice *Robert Jackson*, who had earlier worked for the Allies in the Nuremberg War Crimes Trials, famously said the Supreme Court is “not final because we are infallible, but we are infallible only because we are final.” Thus, accepting Justice Barrett’s opinion as the law, can Congress permit universal injunctions, thus statutorily overruling the holding of *CASA*? Is it likely to? What other paths might exist to revising federal procedure to allow universal the kind of universal injunctions that were more common prior to 2025?
5. In her dissent above, Justice Ketanji Brown Jackson repeatedly uses the words “prerogative” and “constraint” as competing models of law. In discussing the “prerogative” version of law, she cites in FN 5 to Ernst Fraenkel’s 1941 book *The Dual State*.⁵ Who was Fraenkel? What do you think Justice Jackson means by “prerogative” and “constraint”? Based on the majority’s rule, who may have broader prerogative or be subject to greater constraint? How might this affect the Rule of Law?
6. Professor Lawrence Lessig famously said “Code is Law.” If he is right, what would Ernst Fraenkel have to say about whether today’s “code” is normative or prerogative?
7. Could we argue today that Law is Code? Was it always? If not, what has changed?

⁵ With great pleasure I tip the hat to Professor Zachary Catanzaro, who brought this book to my attention.