JUDICIAL SUPREMACY HAS ITS LIMITS

BY JOHN YOO*

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This article began as an opinion piece, John Yoo, Judicial Supremacy Has Its Limits, NAT'L REV. (July 6, 2015, 6:00 PM), http://bit.ly/1OpgDff [perma.cc/WMU7-DHDH], and draws from his previous scholarship on related topics. John Yoo, Andrew Jackson and Presidential Power, 2 CHARLESTON L. REV. 521 (2008); John Yoo, Jefferson and Executive Power, 88 B.U. L. REV. 421 (2008); John Yoo, Lincoln at War, 38 VT. L. REV. 3 (2013).
I. INTRODUCTION

Obergefell v. Hodges\(^\text{1}\) has renewed debate over the proper scope of judicial review. After the steady expansion of gay rights in the 1990s and 2000s in United States v. Windsor,\(^\text{2}\) Lawrence v. Texas,\(^\text{3}\) and Romer v. Evans,\(^\text{4}\) it should have come as no surprise that Justice Anthony Kennedy would join with Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan to strike down state bans on gay marriage. Supporters of gay rights will no doubt claim that Obergefell has finally settled the constitutionality of the question. In this essay, I will set out why Supreme Court decisions may settle questions of constitutional interpretation for the judiciary, but not for the other branches of government.

Many leading scholars have recently questioned the very existence of judicial review.\(^\text{5}\) A broader group has debated the supremacy of judicial interpretation of the Constitution over the other branches.\(^\text{6}\) Much of this discussion was precipitated by the Rehnquist Court’s declaration in City of Boerne v. Flores\(^\text{7}\) that its interpretation of the Fourteenth Amendment binds Congress’s interpretation.\(^\text{8}\) Academics may not have displayed the same level of concern over the Supreme Court’s unprecedented declaration of authority to review the legal status of enemy prisoners of war,\(^\text{9}\) or the Obergefell decision, but the question remains the same. These scholars draw on a deeper trend of skepticism toward judicial review inspired by Cooper v. Aaron,\(^\text{10}\) the decisions of the Warren

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2. 133 S. Ct. 2675 (2013).
8. Id. at 536.
10. 358 U.S. 1, 18 (1958) (*[Marbury v. Madison] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and
Court in the 1960s, and the decisions of the Four Horsemen in the New Deal period. In this respect, these authors are tackling the same problems as did Jesse Choper, John Hart Ely, Learned Hand, and Herbert Wechsler.

Our starting point should be common ground for these scholars: the Constitution requires each branch of government to interpret the Constitution for itself. Early critics of judicial review argued that the Constitution did not expressly authorize judicial review. But from the beginning, judicial review has been on firm ground, and it is has been frequently (but incorrectly) claimed that the other branches have no place in interpreting the Constitution. As Sai Prakash and I have argued, the judicial power to hear cases arising under the Constitution was understood to include the authority to decide the meaning of the Constitution. When faced with a case where one party claims a right under an Act of Congress and another relies upon the Constitution, the federal courts must choose between the sources of law. Judicial review flows from the federal courts' duty to choose the higher law of the Constitution over the statute as a rule of decision-making. If Congress, for

indispensable feature of our constitutional system.

11. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-62 (1964) (upholding the constitutionality of Title II of the Civil Rights Act of 1964, which prohibits racial discrimination in places of public accommodation); Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (upholding the constitutionality of the Civil Rights Act of 1964 as applied against a racially-discriminatory restaurant, citing Congress's finding that such discrimination was a "national commercial problem of the first magnitude" and therefore within the scope of its Commerce Clause powers).


17. See U.S. CONST. art. I, § 8, cl. 18 (empowering Congress to execute the powers given to it by the Constitution); U.S. Const. art. II, § 3, cl. 1 (implied in the Executive’s duty to "take Care that the Laws be faithfully executed" is the need to interpret the Constitution); U.S. Const. art. III, § 2, cl. 1 (judicial powers extend to all cases arising under the Constitution).


19. Id.

20. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803) ("So if a law be in opposition to the constitution . . . the court must determine which of these conflicting rules governs the case.").

21. Id. at 180 ("[A] law repugnant to the constitution is void").
example, defined treason as a crime provable with the testimony of only one witness, a federal court would have to refuse to convict because the Constitution requires two witnesses. Judicial review is the manner in which federal judges implement their obligation to obey the written limits on the delegation of power to the government while performing their unique function of deciding Article III cases or controversies.

Other provisions confirm this reading. Article VI requires that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States, shall be made the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." 22 In order to decide whether a state law conflicts with a constitutional provision, federal courts must interpret the Federal Constitution first. 23 The Supremacy Clause also makes clear that the Constitution itself is law to be enforced in court, rather than a set of mere unenforceable political goals. 24 Both Article III 25 and Article VI 26 include the Constitution as a source of law for the courts. If the Constitution can supply rules of decision for cases or controversies, judicial review becomes inevitable.

If the courts draw their authority of judicial review from the higher status of the Constitution, a similar obligation must apply to the executive and legislative branches. Members of each branch take an oath to the Constitution just as judges do. 27 To fulfill their oath, federal officials must discern the meaning of the Constitution first. 28 The President, for example, bears the responsibility to

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22. U.S. CONST. art. VI, cl. 2.
23. See Prakash & Yoo, supra note 18, at 905 ("To vindicate the Constitution against the states, the courts must be able to interpret the entire Constitution.").
24. U.S. CONST. art. VI, cl. 2.
25. Id. art. III, § 2, cl. 1.
26. Id. art. VI, cl. 2.
27. Id. art. II, § 1, cl. 8 (executive oath); id. art. VI, cl. 3 (requiring all senators, representatives, state legislators, and executive and judicial officers to be bound by oath to support the Constitution, the phrasing of which is codified in 5 U.S.C. § 3331 (2012), and supplemented by 28 U.S.C. § 453 (2012) for federal judges only).
28. I understand that a constitution might enshrine one institution as the final arbiter of a constitution's meaning, in which case all others must adhere to that institution's readings of the constitution. But even if a constitution contained such a provision, one would still have to interpret the constitution to see if it contained the interpretational supremacy provision described above. Some level of independent interpretation is simply unavoidable. I, of course, do not believe that the Federal Constitution contains any provision relating to interpretational supremacy.
preserve, protect, and defend the Constitution. To defend the Constitution, the President must decide what offends it. As a participant in the legislative process, the President at a minimum should veto laws that he or she believes violates the Constitution. This is not judicial review because it does not arise in the course of deciding a case or controversy. It is instead presidential review because the President interprets the Constitution in the performance of his or her unique constitutional responsibilities.

A similar analysis applies to Congress. Congressmen, like the President and judges, take an oath to uphold the Constitution. Congress cannot enact laws that it believes to be unconstitutional, as it is the Constitution that creates the Congress and defines its powers. Individual members of Congress, therefore, have the independent duty to review the constitutionality of proposed legislation before them and to refuse to enact unconstitutional laws. As President Andrew Jackson observed when vetoing legislation re-chartering the Bank of the United States:

> It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.

This departmentalist approach to constitutional review by the three branches rejects judicial supremacy. No branch is supreme in interpreting the Constitution. The constitutional text and structure create the duty of judicial review in the courts in the same way that it places the duty on the other branches to interpret the Constitution while performing their roles. If anything, the authority of the federal courts is weaker than that of the other branches. While the judiciary enjoys the independence to oppose the other branches without fear of retaliation, it has no mechanisms to execute its constitutional views. Enforcement of the Supreme Court’s decisions, as many have noted, ultimately depends on the

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30. Id. art. VI, cl. 3; 5 U.S.C. § 3331 (2012).
32. Id. art. I, § 8.
33. Andrew Jackson, Veto Message (July 10, 1832), in 2 A Compilation of the Messages and Papers of the Presidents, 1789–1897, 576, 582 (James D. Richardson, ed., D.C., Gov’t Printing Off. 1897).
34. The judiciary, as Alexander Hamilton explained, has “no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor
agreement of the other branches and the support of the public.

On the other hand, it is fair to say that the majority of scholars support judicial supremacy. That is, the Court is the final interpreter of the Constitution, and its decisions bind the other branches not just in the case before it but in all other similar cases. Professor Laurence Tribe speaks for most when he says that "the Executive Branch must enforce the law according to the Executive's view of what the Constitution requires ... so long as the Executive does not thereby usurp the role of the Article III Judiciary as the ultimate expositor of the Constitution in actual cases and controversies."

Nonetheless, each branch need not adopt the views of the others in interpreting the Constitution. The Constitution makes each branch supreme in performing its respective functions. The courts, for example, are supreme in resolving cases. We can criticize these judgments, but they are final and to be enforced because the Constitution commits the resolution of certain disputes to the courts.

But there is a difference between a judgment and an opinion. The judgment is the necessary and legally operative action of the federal courts, and as such, it is the only part of a decision that has constitutional force. It is the result of the judiciary's power to decide cases or controversies. In contrast, the opinion is merely the court's explanation of its judgment. While the opinion may in some ways bind lower courts, the Supreme Court's explanation does not bind the other branches. Only the judgment binds them. Suppose federal courts only issued judgments and not opinions. The other branches would still have a constitutional duty to implement those judgments as the final exercise of a coordinate branch's constitutional authority.

Other branches also enjoy supremacy within their own sphere. The President, for example, may pardon someone on a wholly idiosyncratic and misguided understanding of the Constitution.

WILL, but merely judgment . . . . " THE FEDERALIST No. 78 (Alexander Hamilton). Even to enforce its judgments, he observed, the judiciary "must ultimately depend upon the aid of the executive arm . . . ." Id.

35. Larry D. Kramer, Judicial Supremacy and the End of Judicial Restraint, 100 CAL. L. REV. 621, 630 (2012) ("In the years after Brown [v. Board of Education], the idea of judicial supremacy seemed, at long last, gradually to find wide public acceptance.").


37. U.S. CONST. art. III.

38. See U.S. CONST. art. II, § 2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of
Nonetheless, the pardon is final, and the judiciary cannot ignore it on the grounds that the President read the Constitution incorrectly. Suppose that the President issued the pardon because he interprets the Constitution to bar prosecution. Suppose further that a future prosecutor under a subsequent President believes prosecution is warranted. Neither the prosecutor nor the judiciary can ignore the pardon on the ground that the previous President misunderstood the Constitution. When the judiciary permits the defendant to raise the pardon as a defense, the judiciary need not accept the President's reading of the Constitution. Instead the judiciary accords to the pardon the legal effect that the Constitution assigns to it: immunity from prosecution and punishment.

Judgments have the same feature. When the judiciary issues a judgment, the other branches must regard it as the final disposition of a dispute. When the President enforces a judgment, he performs one of the time-honored functions of the executive branch. But he need not acquiesce in the constitutional logic behind the Court’s decision.

Judicial supremacy, however, may be only a short practical step removed from coordinate branch construction. Presidents and Congress would find little incentive to pursue their own independent interpretations if they continue to lose in court. They can cede the Constitution to the courts to focus on the political issues that will lead to their re-election.

This raises the question in Obergefell: how should the other branches respond to judgments beyond what they consider constitutional? One is tempted to say that the Constitution permits the President to ignore judgments that fall outside the bounds of reasonable interpretation. But the Framers do not appear to have contemplated a response to completely unfounded judgments. They did not grant the President the right to review judgments. Instead, the President has the duty to enforce the law, which presumably includes judgments. Presidential refusal to implement judgments is an extra-constitutional measure that ought to be reserved for only the gravest circumstances. While we might

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39. See Saikrishna Prakash & John Yoo, Against Interpretive Supremacy, 103 Mich. L. Rev. 1539, 1541 (2005) (“Because the courts have the judicial power and jurisdiction over cases arising under the Constitution, when they issue final judgments in cases that involve constitutional interpretation, other branches must obey and enforce such judgments.”).
applaud such presidential defiance, it would rely on one constitutional violation to counter-balance an earlier violation by the judiciary.

II. DEPARTMENTALISM IN PRACTICE

This Part describes the views of significant Presidents and their arguments against judicial supremacy. Presidents have long interpreted the Constitution, beginning with President Washington's decisions to sign the law creating the First Bank of the United States 40 and to proclaim neutrality in the wars surrounding the French Revolution. 41 Thomas Jefferson recognized that the power of judicial review did not curtail the President's right to interpret the Constitution. 42 Over time, Presidents developed the theory that while Supreme Court opinions might bind the courts, they did not control the views of the other branches in the performance of their own constitutional responsibilities. These examples lend support to the argument that the Supreme Court cannot settle as final the constitutional question raised in Obergefell.

A. Thomas Jefferson

Jefferson's views on executive enforcement of the law laid a strong claim to presidential equality with the other branches. One of the most hated pieces of Federalist legislation was the Alien and Sedition Acts of 1798, which made it a crime to defame or libel the government. 43 Even though Jefferson and Madison had secretly drafted the Kentucky and Virginia Resolutions, which suggested that the states could resist unconstitutional federal laws, the Supreme Court issued no decisions striking down the law as a violation of the First Amendment, and the lower federal courts allowed prosecutions to move forward. While parts of the Act expired at the end of the Adams administration, Jefferson proceeded to pardon ten individuals convicted under the law and ordered all prosecutions dropped. "A legislature had passed a sedition law. The federal courts had

subjected certain individuals to its penalties of fine and imprisonment,” Jefferson explained in 1819. 44 “On coming into office, I released these individuals by the power of pardon committed to executive discretion, which could never be more properly exercised than where citizens were suffering without the authority of law, or, which was equivalent, under a law unauthorized by the constitution, and therefore null.” 45 Even though the courts and Congress had found the Alien and Sedition Acts to be constitutional, Jefferson used his power as President to prevent execution of the law.

Jefferson’s decision was rooted in a strict view of the separation of powers and the right of each branch to interpret the Constitution for itself. He utterly rejected the notion that the courts have the last word on the meaning of the founding document. In a letter to Abigail Adams explaining his actions, Jefferson asserted that the executive and judiciary are “equally independent” in reviewing the constitutionality of the laws:

You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the executive, more than to the executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. 46

While the courts can view a law as constitutional and allow cases to move forward, the President can hold a different view and refuse to bring prosecutions against those who violate the law and pardon those already convicted. In an 1819 letter, Jefferson cited his reversal of the Sedition Act convictions to show that “each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the constitution in the cases submitted to its action; and especially, where it is to act ultimately and without appeal.” 47 While Jefferson did not challenge the Court’s right to interpret the Constitution or review the constitutionality of statutes, he denied that the judiciary’s thinking bound him in the exercise of his own responsibilities.

Jefferson’s vision went further. He believed that Presidents ought

45. Id.
47. Jefferson, supra note 44, at 137.
to use the veto only when they were fairly certain that Congress had passed an unconstitutional law.\textsuperscript{48} It does not appear Jefferson thought he should veto laws simply because he disagreed with Congress's policy choices.\textsuperscript{49} On the other hand, Jefferson viewed his right to interpret the Constitution as extending beyond the President's role in the legislative process. As the Alien and Sedition Acts episode shows, he believed a President could decline to prosecute laws that in his opinion violated the Constitution.\textsuperscript{50} Similarly, Jefferson would not have expected the courts to feel bound by the views of the President and Congress on the constitutionality of the laws that they enact.

\textbf{B. Andrew Jackson}

Andrew Jackson placed the constitutional powers of the executive—removal, the veto, and the power to execute and interpret the law—in the service of a new constitutional theory of the office. For Jackson, the Presidency did not just rest on the same plateau with the other branches. Rather, Jackson conceptualized the Presidency as the direct representative of the American people, the only official in the federal government elected by the majority.\textsuperscript{51} He proceeded to exercise a broad interpretation of his constitutional powers, sometimes in conflict with Congress and the Court, because he believed he was promoting the wishes of the people.\textsuperscript{52} Jackson's vision came through in the symbolic—as in his First Inaugural, when he opened the White House to the public, which then proceeded to storm through the building destroying

\textsuperscript{48} See Thomas Jefferson, Opinion on the Constitutionality of a National Bank (Feb. 15, 1791), in 6 THE WORKS OF THOMAS JEFFERSON 197, 204 (Paul L. Ford ed., 1904) ("It must be added, however, that unless the President's mind on a view of everything which is urged for and against this bill, is tolerably clear that it is unauthorised [sic] by the Constitution; if the pro and the con hang so even as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion.").

\textsuperscript{49} See \textit{id}.

\textsuperscript{50} See id.\textsuperscript{44}, at 138.

\textsuperscript{51} Andrew Jackson, First Annual Message to Congress (Dec. 8, 1829), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, 442, 448 (James D. Richardson, ed., D.C., Gov't Printing Off. 1897) (declaring that "the first principle of our system" is "\textit{that the majority is to govern}"); Andrew Jackson, Protest to the Senate (Apr. 15, 1834), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, 69, 90 (James D. Richardson, ed., D.C., Gov't Printing Off. 1897) ("The President is the direct representative of the American people" and he is "elected by the people and responsible to them.").

furniture, carpets, and fine china—and the real, as when he took his re-election as a mandate to destroy the Bank of the United States.

Jackson made a point of mentioning the Bank at the end of his First Annual Message to Congress. He observed that "[b]oth the constitutionality and the expediency of the law creating this bank are well questioned by a large portion of our fellow-citizens" and declared that "it has failed in the great end of establishing a uniform and sound currency." Jackson recommended that if Congress were to keep the bank, significant changes in its charter were necessary. At the time, many Americans shared Jackson's hostility toward the Bank.

The Bank was a wholly different creature from today's Federal Reserve. The legislation establishing the First Bank of the United States, the one signed by George Washington and over which Hamilton and Jefferson had fought, expired just before the War of 1812. Part of the responsibility for the Madison administration's setbacks fell on its difficulties in financing the war. Congress established the Second Bank of the United States in 1816, and Madison, who had argued against the constitutionality of the First Bank while a Congressman, signed the legislation. In a veto of an earlier version of the bill, Madison had "[w]aiv[ed] the question of the constitutional authority of the Legislature" because of "repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches . . . ." Madison conceded that the Bank's legality had been established by additional "indications, in different modes, of a concurrence of the general will of the nation . . . ." In 1819, Chief Justice Marshall had upheld the Bank's constitutionality along lines similar to those of Alexander Hamilton's: although unmentioned

55. Id.
56. Id.
58. COLE, supra note 53, at 57.
59. Id.
60. Id.
62. Id.
in the constitutional text, a national bank fell within Congress's Necessary and Proper Clause power because it allowed the government to exercise its tax, spending, commerce, and war powers.63

Jackson did not feel bound by the views of Madison or the Supreme Court. Jackson's objections to the Bank were not just constitutional; he believed that its concentration of power threatened individual liberties.64 The Second Bank had come to dominate the American economy in a way unmatched by any other company or institution.65 Jackson viewed it as an institution that benefited only a small financial elite.66 Its first president, a former Navy and Treasury Secretary appointed by Madison, speculated in the Bank's stock, benefited from corrupt branch operations, and almost drove it into bankruptcy.67 During the Monroe administration, the Bank was widely blamed for the Panic of 1819, which closed many state banks, bankrupted many farmers and businesses, and sparked a sharp increase in unemployment.68 The years after the War of 1812 witnessed a dramatic increase in land speculation fueled by bank notes.69 During the Panic, the Second Bank demanded that state banks redeem their notes in hard currency, which caused a sharp contraction of credit, a run of bankruptcies, and a rapid increase in unemployment.70 Political movements rose to oppose the Bank, with states enacting laws heavily taxing the Bank or trying to drive branches out of their territory.71

Ironically, by the time Jackson became President, the Bank had changed its ways and become a powerful aid to the economic expansion of the 1820s and 1830s.72 Through its special relationship with the federal government and its holdings of specie and state bank notes, it effectively controlled the national money supply and had a profound effect on the amount of credit and

65. Id. at 577.
66. Id. at 577.
67. REMINI, supra note 57, at 27.
68. Id. at 27–28.
69. See id. at 19–20.
70. See generally MURRAY N. ROTHBARD, PANIC OF 1819: REACTIONS AND POLICIES (1962) (detailing the 1819–1921 depression following the postwar economic boom).
72. Id. at 37–39.
growth in the economy. Under President Nicholas Biddle, the Second Bank cleaned up its finances, ended internal corruption, and kept a reserve of hard currency to reduce speculation in government notes. Biddle believed that government oversight and public involvement in the Bank’s operations were unwelcome and unnecessary, and made sure his influence was felt by paying newspaper editors and legislators to defend the Bank.

The approach of the 1832 presidential election prompted the first round in the fight between Jackson and the Bank. In his Second Annual Message to Congress, Jackson proposed folding the Bank into the Treasury Department, even though the legislation establishing the Bank itself was not up for re-authorization until 1836. However Jackson later agreed not to seek any changes in the Bank’s charter until after the 1832 election. A convention of National Republicans—the group that split off from the Democratic Party to oppose Jackson—nominated Henry Clay as their presidential candidate. Sensing a political opportunity, Clay convinced Biddle to seek renewal of the Bank’s charter four years early. Both the House Ways and Means Committee and the Senate Finance Committee had issued reports the previous year finding the Bank constitutional and praising its operations. Clay’s supporters passed the bill in the summer of 1832 by a vote of 28-20 in the Senate and 107-85 in the House. To throw salt on President Jackson’s wounds, the Senate, with Vice President Calhoun casting the tie-breaking vote, at the same time rejected Martin Van Buren’s nomination as Minister to Great Britain.

Jackson issued a thundering veto on July 10, 1832. For the first time in presidential history, a veto message extensively discussed political, social, economic, and constitutional objections to legislation. Jackson portrayed the bill as a “gratuity” and a

73. Id. at 32–33, 39.
74. Id. at 34–35.
75. See id. at 70–71.
76. Id. at 70–71.
78. REMINI, supra note 57, at 74.
79. Id. at 92.
80. Id. at 75–76.
81. Id. at 67.
82. Id. at 80.
83. Id. at 93–94.
84. Jackson, supra note 64, at 576–91.
“present” transferred from the American people to the Bank’s shareholders.85 The Bank occupied the position of a monopoly that benefited “a privileged order, clothed both with great political power and enjoying immense pecuniary advantages from their connection with the Government” at the expense of “merchant, mechanic, or other private citizen[s]” who are not allowed to pay their debts with notes, rather than with hard currency.86 Such wealth, Jackson argued, ought to give “cause to tremble for the purity of our elections in peace and for the independence of our country in war” because the wealthy would “influence elections or control the affairs of the nation.”87 Foreign shareholders, Jackson feared, might cause the financial system to collapse during a war—“[c]ontrolling our currency, receiving our public moneys, and holding thousands of our citizens in dependence” would pose a greater threat to national security than an enemy army or navy.88

Jackson’s message broke from practice by introducing his policy views. But its lasting impact remains in its claim of independent authority to interpret and enforce the Constitution. Jackson conceded that the Supreme Court and previous Congresses had upheld the constitutionality of the Bank.89 Jackson, however, declared that the Constitution established the Executive as an independent and coordinate branch whose decisions could not be dictated by the Court: “The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution.”90 In fulfilling its constitutional functions, each branch has an equal and independent duty to decide upon the constitutionality of legislation, whether in passing, enforcing, or adjudicating it: “The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges . . . .”91 And, he emphasized, “on that point the President is independent of both.”92 He concluded that “[t]he authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities . . . .”93 Jackson would only grant the courts “such

85. Id. at 576–77.
86. Id. at 578.
87. Id. at 581.
88. Id.
89. Id. at 582.
90. Id.
91. Id.
92. Id.
93. Id.
influence as the force of their reasoning may deserve." 94

Jackson remained convinced that Jefferson had been right in 1791: a national bank was neither necessary nor proper to execute the government's constitutional powers, because it was not truly indispensable. 95 Congress, for example, has the power to coin money, 96 and it had already established a mint. Therefore, a national bank could not truly be necessary and proper to execute that power. Jackson's veto of the Bank presented a striking declaration of independence from the other branches of government. He gave no deference to the views of Congress, the Supreme Court, or even past Presidents. Jackson believed that he had a duty to decide for himself what the Constitution meant and to use his powers to advance that vision. Of course, the other branches were also free to use their authority to advance their constitutional views, and they were in no way bound by the President.

Jackson's veto was greeted with howls of protest. Biddle wrote to Clay that Jackson was a demagogue calling for anarchy. 97 Daniel Webster told the Senate the President was grabbing for "despotic power." 98 "[A]lthough Congress may have passed a law, and although the Supreme Court may have pronounced it constitutional, yet it is, nevertheless, no law at all, if he, in his good pleasure, sees fit to deny it effect; in other words, to repeal and annul it." 99 Webster foresaw that Jackson's example would lead to today's presidential influence over legislation. Jackson's veto message "claim[s] for the President, not the power of approval, but the primary power, the power of originating laws." 100 Clay followed with the claim that the veto was reserved for extraordinary moments when Congress had acted rashly. 101 Now, Clay observed, the President's veto had become a threat used to influence legislation, which was "hardly reconcilable with the genius of representative government." 102

94. *Id.*
95. *Id.* at 586.
96. U.S. CONST. art. I, § 8, cl. 5.
97. REMINI, *supra* note 57, at 84.
98. *Id.* at 85; *see also* 8 REG. DEB. 1232 (1832), 22d Congress, 1st Session.
99. REMINI, *supra* note 57, at 84; *see also* 8 REG. DEB. 1292 (1832).
100. REMINI, *supra* note 57, at 85; *see also* 8 REG. DEB. 1240 (1832).
101. REMINI, *supra* note 57, at 85; *see also* 8 REG. DEB. 1265 (1832).
102. REMINI, *supra* note 57, at 85; *see also* 8 REG. DEB. 1265 (1832).
C. Abraham Lincoln

Perhaps the President whose example bears the most relevance to disagreement with the Supreme Court is Abraham Lincoln. Lincoln's rise to political prominence centered on his opposition to the Supreme Court case *Dred Scott v. Sandford*, which recognized the ownership of slaves as a property right that Congress could not regulate in the territories. 103 In his losing 1858 campaign against Stephen Douglas for the Illinois Senate seat, Lincoln argued that *Dred Scott* applied only to the parties in the case. 104 Supreme Court decisions, in Lincoln's view, could not bind the President or Congress, both of which also had the right to interpret the Constitution. In his first Inaugural Address, Lincoln "[did not] deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit . . . ." 105 Judicial opinions should receive "very high respect and consideration, in all parallel [sic] cases, by all other departments of the government." 106 But "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 people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal." 107 No other President has challenged the binding scope of Supreme Court decisions as did Lincoln.

Lincoln's view of coordinate branch construction of the Constitution was put to the test soon after he took office. Upon the fall of Fort Sumter, Lincoln sprung to action. He called forth 75,000 state troops, issued a call for volunteers, increased the size of the regular Army, and ordered the Navy to enlist more sailors and purchase additional warships. 108 He also removed millions of

104. See Abraham Lincoln, First Debate with Stephen A. Douglas at Ottawa, Ill. (Aug. 21, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1858–1860, 1, 16 (Roy P. Basler ed., 1953) (asserting that his rejection of *Dred Scott* jurisprudence does not imply a desire to see social equality between blacks and whites, or to "directly or indirectly . . . interfere with the institution of slavery in the States where it exists"); see also Abraham Lincoln, "A House Divided" Speech at Springfield, Ill. (June 16, 1858), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1848–1858, 461, 466 (Roy P. Basler ed., 1953) (noting that the *Dred Scott* decision did not hold that a state, for example, may not forbid slavery).
106. Id.
107. Id.
dollars from the Treasury for military recruitment and pay.\textsuperscript{109} He ordered a blockade of Southern ports and dispatched troops against rebel-held territory.\textsuperscript{110} He called Congress into special session, but significantly, not until July 4.\textsuperscript{111} While of obvious symbolic importance, the July 4 date ensured that the executive branch, not Congress, would set the initial outlines of national policy. Lincoln had three months to establish a status quo that would be difficult for Congress to change.

Rapid events forced Lincoln to defy the courts. Maryland was a slave-holding state, and the state legislature and the mayor of Baltimore were pro-Confederacy.\textsuperscript{112} If Maryland seceded, the nation's capital would be utterly isolated.\textsuperscript{113} Mobs in Baltimore attacked the first military units from Massachusetts and Pennsylvania traveling to reinforce the Capital, and rebel sympathizers cut the telegraph and railroad lines to Washington.\textsuperscript{114} On April 27, 1861, Lincoln unilaterally suspended the writ of habeas corpus on the route from Philadelphia to Washington and replaced civilian law enforcement with military detention.\textsuperscript{115} Suspension prevented rebel spies and operatives detained by the military from petitioning the civilian courts for release.\textsuperscript{116} The Constitution describes this power in the passive tense: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."\textsuperscript{117} But it is located in Article I, which enumerates Congress's powers and their limits.

Union officers arrested John Merryman, an officer in a secessionist Maryland militia, for participating in the destruction of the railroads near Baltimore.\textsuperscript{118} Upon the petition of Merryman's lawyer, Chief Justice Roger Taney issued a writ of habeas corpus ordering the commander of Union forces in Maryland to produce

\textsuperscript{109} Farber, supra note 108, at 118.
\textsuperscript{110} Id. at 117.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 16.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 16, 117.
\textsuperscript{117} U.S. Const. art. I, § 9, cl. 2.
\textsuperscript{118} Farber, supra note 108, at 17.
Merryman in court.119 The General refused to appear and instead sent an aide to notify Taney that Merryman had been detained under the President’s suspension of habeas.120 Taney held the General in contempt, but the Marshal serving the order could not gain entry to Fort McHenry.121 Taney was left to issue an opinion, which sought to pull the heart out of Lincoln’s energetic response to the attack on Fort Sumter.122 Taney held that the Suspension Clause’s placement in Article I, and judicial commentary since ratification, recognized that only Congress could suspend the writ.123 If military detention without trial were permitted to continue, Taney wrote, “the people of the United States are no longer living under a government of laws.”124 Under presidential suspension, “every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.”125 Taney’s opinion clearly questioned the legal bases for Lincoln’s other responses to secession. Beyond suspending habeas corpus, he wrote, the Lincoln administration “has, by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers.”126

*Merryman* was not just an attack on Lincoln’s suspension of the writ, but upon the President’s right to interpret the Constitution. Taney declared that it was the responsibility of “that high officer, in fulfillment of his constitutional obligation” under the Take Care Clause to enforce the Court’s orders.127 It was another declaration of judicial supremacy in interpreting the Constitution—to be expected of the Justice who wrote *Dred Scott*, though perhaps not from Jackson’s Attorney General. Taney wanted to dramatize the conflict between the President and the judiciary. He appeared before a crowd of 2,000 on the Baltimore courthouse steps to

121. *Id.* at 265, 268.
123. *Ex Parte Merryman*, 17 F. Cas. at 148.
124. *Id.* at 152.
125. *Id.*
126. *Id.*
127. *Id.*
receive the Commanding General’s response, and declared that the officer was defying the law and that the Chief Justice might be under military arrest soon.128

Lincoln answered Taney and the widespread claims of executive dictatorship in his message to the July 4, 1861, session of Congress. Lincoln stressed that the Confederacy had fired the first shot before the national government had taken any action that might threaten slavery.129 Secession did not answer any unconstitutional action of the government, but sought to overturn the constitutional process of “time, discussion, and the ballot-box.”130 In response, “no choice was left but to call out the war power of the Government; and so to resist force, employed for its destruction, by force, for its preservation.”131 He recited the litany of actions that followed: calling out the militia, the blockade, the call for volunteers, and the expansion of military spending. Lincoln claimed that he had moved forcefully with the support of public opinion. “These measures, whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them.”132 Lincoln avoided the question whether he had acted unconstitutionally. He sought justification from Congress’s political support, after the fact. “It is believed that nothing has been done beyond the constitutional competency of Congress.”133 Congress enacted a statute that did not explicitly authorize war against the South, but declared that:

[Lincoln’s actions] respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States.134

Congress gave approval through its explicit control over the size and funding of the military, but did not seek to direct Lincoln’s war aims or the conduct of hostilities. It would be a year and a half

128. PALUDAN, supra note 116, at 76.
130. Id. at 423.
131. Id. at 426.
132. Id. at 429.
133. Id.
before the Supreme Court considered the constitutionality of Lincoln’s immediate actions in *The Prize Cases*. The *Prize Cases* presented a demand for damages by the owners of several vessels seized by blockading Union warships in the summer of 1861. They argued that international law limited blockades only to wars between nations, which conflicted directly with Lincoln’s theory that the Confederacy was only a conspiracy of law-breakers. If the Civil War were a war, the plaintiffs continued, Lincoln could not act without a declaration of war from Congress first.

A 5-4 majority of the Court upheld Lincoln’s actions, with or without congressional authorization. It began by endorsing Lincoln’s initial judgment that secession had begun an insurrection, not a war with a separate nation. They also agreed that the scope of the insurrection nevertheless granted the United States the rights and powers of war against a belligerent nation: “[I]t is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other.” Even though the Confederacy would never be recognized as a nation by the United States, the very nature of the conflict required that it be recognized as war, rather than as a matter for the criminal justice system. “When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war.” Lincoln’s imposition of a blockade on Southern ports, though legal under international law only against another nation, was a legitimate exercise of war power under the Constitution.

The Court found that Lincoln did not need a declaration of war to respond to the attack on Fort Sumter: “If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but

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136. *Id.* at 636–38.
137. *Id.* at 641–43.
138. *Id.* at 688–90.
139. *Id.* at 668.
140. *Id.* at 641–42.
141. *Id.* at 666.
142. *Id.* at 692.
143. *Id.* at 666–67.
is bound to accept the challenge without waiting for any special legislative authority."¹⁴⁴ It did not matter whether the attacker was a foreign nation or a seceding state. The firing on Fort Sumter constituted an act of war against which the President automatically had authority to use force: "And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be ‘unilateral.’"¹⁴⁵ The Court expressly declared that the scope and nature of the military response rested within the hands of the executive: "Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him . . . ."¹⁴⁶ Judicial review would not extend to the President’s decisions on whether to consider the Civil War an actual war, and what type of military response to undertake. Justice Grier, writing for the majority, said that "this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted."¹⁴⁷ The Justices only entertained the need for legislative approval as a hypothetical to buttress its conclusion, and never held that Congress’s approval was necessary as a constitutional matter:

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency.¹⁴⁸

Both the courts and Congress vindicated Lincoln’s constitutional position from the early days of the war.

The normal process of law could not handle the unique nature of the rebellion. Confederate leaders, for example, were not being detained because they were guilty of a crime, but because their release would pose a future threat to the safety of the country. What if federal authorities, Lincoln wrote in a letter published in June of 1863, could have arrested the military leaders of the

¹⁴⁴. *Id.* at 668.
¹⁴⁵. *Id.*
¹⁴⁶. *Id.* at 670.
¹⁴⁷. *Id.*
¹⁴⁸. *Id.*
Confederacy, such as Generals Breckinridge, Lee, and Johnston, at the start of the war. He continued, "Unquestionably if we had seized and held them, the insurgent cause would be much weaker. But no one of them had then committed any crime defined in the law. Every one of them, if arrested, would have been discharged on Habeas Corpus, were the writ allowed to operate." Suspension of the writ made clear that captured Confederates could not seek the benefits of the very civilian legal system that they sought to overthrow.

Lincoln's July 4, 1861, message to the special session of Congress mounted a powerful defense of his suspension of the writ. He argued that his presidential duty called upon him to protect the Constitution over and above the decisions of the Supreme Court: "The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States." Saving the Union from a mortal threat, Lincoln suggested, could justify a violation of the Constitution and the laws, and certainly a single provision of them:

Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated?

Lincoln then famously asked the question "more directly": "[A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?" He suggested that painstaking attention to the habeas corpus provision would come at the expense of his ultimate constitutional duty: saving the Union. "Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?"

Lincoln performed some acrobatics to pull back from a direct

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150. Id.
152. Id. at 430.
153. Id.
154. Id.
155. Id.
constitutional conflict. It was obvious that the nation indeed was confronted with "rebellion or invasion." 156 Written in the passive tense, the Constitution’s habeas corpus provision did not specify which branch had the right to suspend it. 157 Lincoln quickly returned to the need for prompt executive action to address the crisis: "[A]s the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together . . . ." 158 A rebellion might even prevent Congress from meeting.

In an opinion issued the next day, Attorney General Bates agreed that the President’s duty to execute the laws and uphold the Constitution required him to suppress the rebellion using the most effective means available. 159 If the rebels sent an army, the President had the discretion to respond with an army. 160 Bates also said that "if they employ spies and emissaries, to gather information, to forward rebellion, he may find it both prudent and humane to arrest and imprison them." 161 A President must have the ability to suspend habeas in case of an emergency that required him to call out the military, the vagueness of the Suspension Clause notwithstanding. 162 In times of emergency, "the President must, of necessity, be the sole judge, both of the exigency which requires him to act, and of the manner in which it is most prudent for him to employ the powers entrusted to him . . . ." 163

Bates’s legal opinion launched a frontal assault on Taney’s claim to judicial supremacy in Merryman. "To say that the departments of our government are co-ordinate, is to say that the judgment of one of them is not binding upon the other two, as to the arguments and principles involved in the judgment." 164 Independence required that no branch could compel another. No court could issue a writ requiring compliance by the President, just as no President could order a court how to decide a case. Bates’s opinion ventured even

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156. See U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion . . . .").
157. Id.
160. Id. at 83.
161. Id.
162. Id. at 87, 90–92.
163. Id. at 84.
164. Id. at 77.
further than Lincoln's view on *Dred Scott*, in which Lincoln at least agreed to enforce against the parties in the case. Bates's claim of the independent status of each branch implied that the President had no obligation to obey a court judgment even in that narrow case—a position that the administration had to adopt because Lincoln had already ignored Taney's order releasing Merryman. Bates questioned whether the courts had any competence to decide questions relating to the war:

> [T]he whole subject-matter is political and not judicial. The insurrection itself is purely political. Its object is to destroy the political government of this nation and to establish another political government upon its ruins. And the President, as the chief civil magistrate of the nation, and the most active department of the Government, is eminently and exclusively political, in all his principal functions.

A court, Bates concluded, had no authority to review these political decisions of the President. The Attorney General suggested that something like the modern Political Question Doctrine be applied to judicial review of the President's wartime decisions. Almost as an aside, Bates addressed the merits of the constitutional question. He observed that the Suspension Clause was vague and did not specify whether Congress alone, or the President too, could suspend habeas corpus. He argued that it was absurd to allow habeas corpus to benefit enemies in wartime, as it would imply that the enemy could sue for damages when the Union destroyed their arms and munitions.

Lincoln represents the high point of presidential opposition to judicial supremacy in interpreting the Constitution. With *Dred Scott*, he argued that the President had a constitutional duty to enforce a judgment against the parties of the case itself. The opinion of the Court was just that: an opinion. The President could hold his own interpretation of the Constitution even while enforcing a judgment.

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166. Suspension of the Privilege of the Writ of Habeas Corpus, *supra* note 159, at 78 (arguing that the judicial branch has powers that are "ample and efficient" for resolving conflicts between individual parties, but that it is "powerless to impose rules of action and of judgment upon other departments.").
169. *Id.*
170. See *id.*
171. *Id.* at 88–89.
172. *Id.* at 91.
with which he disagreed. During the Civil War, Lincoln went even further. In *Merryman*, Lincoln eventually refused even to carry out a judgment—a writ of habeas corpus—that he believed intruded upon his constitutional authority as Commander-in-Chief during wartime.

III. MODERN RESPONSE TO OBERGEFELL

Part II describes the rejection of judicial supremacy by some of America's greatest Presidents. Chief executives have reached their own interpretation of the Constitution in the course of performing their unique responsibilities. Jefferson used his plenary power over prosecution and the granting of pardons to advance his vision of free speech. Jackson wielded the veto to carry out his understanding of the limits on federal power vis-à-vis the states. Lincoln exercised his functions as Commander-in-Chief according to a more robust theory of the government's war powers. In each of these cases, presidential views deviated sharply from those of the Supreme Court.

These examples show the way forward for critics of *Obergefell*. Presidents can use their own powers to advance a reading of the Constitution's protection for gay rights at odds with judicial doctrine. Most prominent among these powers is the power of judicial appointment, which the President of course shares with the Senate's right of advice and consent. While Jefferson never changed the arc of the Court's nationalist decisions, Lincoln and Franklin Roosevelt had more success in appointing Justices that turned the Court in a more congenial direction. Opponents of *Obergefell* could begin most immediately by seeking to appoint one Justice to the Court who might reverse *Obergefell*'s 5-4 vote.

Prominent defenders of traditional marriage, however, have gone beyond the usual criticism of a mistaken judicial decision to attack the Supreme Court as an institution. "I will not acquiesce to an imperial court any more than our Founders acquiesced to an imperial British monarch," said Mike Huckabee, former governor of Arkansas and GOP presidential candidate. "We must resist and reject judicial tyranny, not retreat." Fellow candidate and

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175. *Id.*
Republican Senator Ted Cruz proposed constitutional amendments not only to overturn *Obergefell*, which other candidates support, but to subject Supreme Court justices to periodic elections. Others have proposed a constitutional amendment that would subject Supreme Court decisions to override by a supermajority of Congress, an idea proposed by Judge Robert Bork in the 1990s.

Such efforts forget the coordinate nature of the separation of powers in the area of constitutional interpretation. While the Constitution does not grant federal courts the final word, it implicitly gives the courts a right to interpret the Constitution. As Chief Justice John Marshall famously observed in *Marbury v. Madison*, which established the power of judicial review, "It is emphatically the province and duty of the judicial department to say what the law is." When judges confront a case where one side relies on a federal statute and the other on the Constitution, they must choose the Constitution as the higher law and put aside the act of Congress. The judiciary’s power to interpret the Constitution derives from its responsibility to decide cases and controversies under federal law.

Opponents of gay marriage are summoning this deeper understanding of the separation of powers to resist *Obergefell*. But the Constitution itself provides less drastic means than attacking the Court’s independence. Rather than subject Justices to term limits or elections, critics must persuade the American people that the courts have overstepped their proper role by reading their personal preferences into the Constitution. They can change *Obergefell’s* result by seeking judicial nominees who will restore primary control over family law and marriage to the states. Like the opponents of *Roe v. Wade*, they can seek to create a political and cultural environment that makes a return to the Court’s proper role possible. While such a campaign could take decades, as has the movement to restore control over abortion to the states, critics of *Obergefell* should work within the bounds of tradition, even when

the Court does not.