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Presidential Constitutionalism and Civil Rights

Joseph Landau

PRESIDENTIAL CONSTITUTIONALISM AND CIVIL RIGHTS

JOSEPH LANDAU*

ABSTRACT

As the judicial and legislative branches have taken a more passive approach to civil rights enforcement, the President's exercise of independent, extrajudicial constitutional judgment has become increasingly important. Modern U.S. presidents have advanced constitutional interpretations on matters of race, gender, HIV-status, self-incrimination, reproductive liberty, and gun rights, and President Obama has been especially active in promoting the rights of lesbian, gay, bisexual, and transgender (LGBT) persons—most famously by refusing to defend the Defense of Marriage Act (DOMA). Commentators have criticized the President's refusal to defend DOMA from numerous perspectives but have not considered how the President's DOMA policy fits within a principled commitment to LGBT equality that includes supporting and signing legislation, pursuing regulatory initiatives, filing complaints and other court papers, making formal and informal choices in law enforcement, and using the bully pulpit to sway public opinion. The President's nondefense of DOMA not only derives normative force from his larger vision regarding substantive equality and individual rights, but it also demonstrates how certain features of the presidency—including accountability and expertise—can be instrumental in promoting equality-based claims. In this way, presidential constitutionalism

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can engage coordinate institutions—including the Supreme Court—in the development of constitutional law.

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INTRODUCTION

Over the years, the Supreme Court has left undecided large questions at the intersection of individual liberty and governmental power,[1] leaving many constitutional doctrines—in particular those regarding civil rights—to develop outside the context of litigation.[2] As the Court has failed to "pronounce the law of the Constitution" where civil rights are concerned,[3] commentators have focused on ways that Congress can enforce the Constitution through its powers under the Commerce Clause[4] and the Fourteenth Amendment.[5] Lately, however, Congress has been unable to exercise its law-making power over much of anything, much less constitutional implementation or civil rights enforcement.[6] In the absence of a

1. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) [hereinafter SUNSTEIN, JUDICIAL MINIMALISM]; Cass R. Sunstein, *The Supreme Court, 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996); *see also infra* notes 298-301 and accompanying text.

2. *See infra* notes 303-15 and accompanying text.

3. Robert C. Post, *The Supreme Court, 2002 Term: Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 6 (2003); *see id.* at 76 (noting the Supreme Court's "essential mission of protecting individual rights"); *see also* Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1272 (2001) (arguing that the Supreme Court is "the highest and the last source of appellate review, whose chief function [is] correctly to discern and to protect the federal rights of litigants"); *Recent Publications*, 120 HARV. L. REV. 2254, 2256 (2007) (reviewing REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS (2006)) ("The federal courts have acquired the honored distinction—at least among constitutional law students and scholars—of being the primary guarantors of individual rights."); *cf.* Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1127 (2010) ("The courts thus could not rely on the people to protect individual rights because even if the people cared about those rights in a general sense, Chief Justice Gibson doubted whether they would notice the breach of those rights and do anything in response.").

4. U.S. CONST. art. I, § 8, cl. 3; *see, e.g.*, Symposium, *The Commerce Clause: Past, Present, and Future*, 55 ARK. L. REV. 705 (2003).

5. U.S. CONST. amend. XIV; *see, e.g.*, Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000).

6. The 112th Congress, which sat from January 2011 to January 2013, was the least productive on record, enacting a mere 284 laws. *See Bills by Final Status*, GOVTRACK.US, http://www.govtrack.us/congress/bills/statistics (last visited Mar. 16, 2014); Mark Murray, *Unproductive Congress: How Stalemates Became the Norm in Washington DC*, NBC NEWS (June 30, 2013), http://firstread.nbcnews.com/_news/2013/06/30/19206400-unproductive-

strong judicial or legislative role in enforcing civil rights,[7] attention has shifted to ways the executive can place constitutional interpretation in the service of civil rights enforcement.[8]

This Article explores the President's role in employing his own interpretation of the Constitution to promote individual rights, a practice that enjoys a long and storied pedigree dating back to President Jefferson's resistance to the Alien and Sedition Acts.[9] In more modern times, U.S. presidents have advanced civil rights through constitutional interpretations bearing on race,[10] gender,[11] HIV-status,[12] self-incrimination,[13] reproductive liberty,[14] gun rights,[15] and—most recently—sexual orientation.[16] Although there can be profound disagreements about what, precisely, constitutes "civil rights"—and while the differing constitutional arguments across presidential administrations, and the efforts behind them, are not all normatively equivalent—the President's capacity as national representative and barometer on broader legal, social, and

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congress-how-stalemates-became-the-norm-in-washington-dc?lite; *see also* Cliff Sikora & Bonnie Suchman, *What the Energy Industry Can Expect from President Obama's Second Term and a New Congress*, ABA TRENDS (Sec. of Env't, Energy & Resources of the ABA, Chi., Ill.), Mar./Apr. 2013, at 8, 9 ("The general consensus among Beltway insiders is that the 112th Congress, which concluded at the end of 2012, was the least productive Congress in recent history. And the session did not end on a high note. Facing a fiscal cliff that included the expiration of the Bush tax cuts and sequestration (the mandatory cuts in defense and nondefense discretionary programs), as well as the looming debt ceiling and expiration of the continuing resolution, Congress only managed to address the expiring tax cuts."). The current 113th Congress is on track to continue or even surpass its predecessor in terms of unproductiveness. *See id.*

7. In a series of decisions, the Rehnquist Court diluted or voided efforts by Congress to legislate pursuant to its powers under the Fourteenth Amendment. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (imposing limits on congressional power to legislate to protect constitutional rights under the Americans with Disabilities Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (same with respect to the Age Discrimination in Employment Act); City of Boerne v. Flores, 521 U.S. 507 (1997) (same with respect to Religious Freedom Restoration Act).

8. *See, e.g.*, Dawn Johnsen, *Lessons from the Right: Progressive Constitutionalism for the Twenty-first Century*, 1 HARV. L. & POL'Y REV. 239 (2007).

9. *See infra* note 76 and accompanying text.

10. *See infra* Part II.A.

11. *See infra* Part II.B.

12. *See infra* Part II.C.

13. *See infra* Part II.D.

14. *See infra* Part II.E.

15. *See infra* Part II.F.

16. *See infra* Part III.

cultural ideas can make him an ideal figure to place his faculty of interpretation, and his bully pulpit, in the service of civil rights.

While constitutional scholars have posited an important role for the President as an initiator of constitutional change in general,[17] this Article considers how certain features of presidential administrations—including the President's accountability, access to information, and expertise[18]—can be instrumental in promoting liberty- and equality-based claims in particular. Just as electoral accountability supports presidential decisions to advance reasonable interpretations of statutes where Congress leaves a gap in delegating authority to the executive,[19] presidential constitutionalism can articulate and help define the contours of constitutional rights the Court has yet to clarify. This is especially so when a President declares his positions openly and transparently, including campaigning on civil rights issues he plans to help implement upon taking office. Inasmuch as congressional-executive bilateral agreements can bring added legitimacy to various policy initiatives,[20] a joint executive-judicial dialogue on constitutional meaning can provide new opportunities for the political branches—and especially the President, as constitutional actor—to help break stalemates in Supreme Court doctrine.

If "[m]ost Americans expect modern Presidents to provide solutions for every significant political, military, social, and economic problem,"[21] the President—the only democratically elected

17. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1788 (2007) ("The civil rights era is simply one more variation on the great theme of presidential leadership, with movement support, for constitutional change in the name of the American people.").

18. *See, e.g.*, HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 119 (1990) (noting the President's "speed, secrecy, flexibility, and efficiency that no other governmental institution can match"); *see also* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984) (noting the benefits of delegation, including the ability of the executive branch to bring its expertise, access to information, and democratic accountability to bear on questions of policy).

19. *See Chevron*, 467 U.S. at 865-66.

20. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-67 (1952) (Jackson, J., concurring); *see also, e.g.*, Joseph Landau, Chevron *Meets* Youngstown*: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1919-22 (2012) (arguing that recent national security rulings have validated executive branch policies with congressional endorsement and rejected those lacking in legislative validation).

21. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 8 (1993).

official accountable to the entire U.S. populace—can bring a unique authority to the interpretation of laws, including the Constitution, through a variety of different means. On such matters, the President's commitment to deep principles can be said to properly reflect "the contemporary legal culture, which inevitably includes its constitutional law."[22] In some cases, owing to the coordinate branches' built-in limitations, presidential constitutionalism may be the only way to channel widely held beliefs that no court or legislature will vindicate or champion.

United States v. Windsor provides an important case study in presidential constitutionalism.[23] President Obama's refusal to defend the constitutionality of Section 3 of the Defense of Marriage Act (DOMA),[24] coupled with his Administration's broader strategy to keep the case in court,[25] helped produce an important substantive outcome for same-sex couples. The move sparked great controversy: some accused the Administration of abusing its power,[26] while others argued that the Administration shirked its responsibility to stop enforcing a law it believed unconstitutional.[27] Yet the significance of the Obama Administration's legal position regarding DOMA stretches well beyond the pure separation of powers question

22. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 562-63 (1990) (describing federal judges' deference to statutory interpretations that reflect constitutional law principles).

23. 133 S. Ct. 2675 (2013).

24. Section 3 of DOMA defined marriage as "a legal union between one man and one woman," reserving "the word 'spouse' ... only to a person of the opposite sex who is a husband or a wife." Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996). It applied that definition to "the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States." *Id.*

25. *See* Letter from Eric H. Holder Jr., Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

26. Former Solicitor General Charles Fried called the Obama Administration's nondefense policy "an unbecoming, not to mention totally unconvincing, use of excessive ingenuity in squirming out of an unpleasant duty"—namely, the executive's duty to defend congressional acts. *See* Adam Liptak, *The President's Courthouse*, N.Y. TIMES, Feb. 27, 2011, at WK5. Orin Kerr likened the policy to "the Bush Administration's reliance on its Article II theories" during the war on terror. Orin Kerr, *The Executive Power Grab in the Decision Not to Defend DOMA*, VOLOKH CONSPIRACY (Feb. 23, 2011, 3:49 PM), http://www.volokh.com/2011/02/23/the-executive-power-grab-in-the-decision-not-to-defend-doma/.

27. *See infra* notes 260-65 and accompanying text. During oral arguments in *Windsor*, Chief Justice Roberts assailed the President for lacking "the courage of his convictions." Transcript of Oral Argument at 12, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307).

regarding the branch of government best suited to resolve the law's enforceability.[28] The President's nondefense of DOMA was consistent with a broader set of executive branch policies that implemented prior Supreme Court rulings regarding the rights of lesbian, gay, bisexual, and transgender (LGBT) persons. Additionally, the President's *Windsor* strategy championed a new constitutional rule (namely, heightened scrutiny for LGBT-based classifications) that the federal courts had yet to adopt.[29] The Obama Administration's commitment to LGBT equality, which spanned both constitutional implementation and constructions of operative meaning,[30] derived additional normative force from the President's public airing and assertion of those constitutional values during campaigns and after taking office.

This Article proceeds in four parts. Part I explores the concept of presidential constitutionalism by laying out its basic attributes and the surrounding literature. Part II discusses the broader historical practice of presidential constitutionalism and how modern presidential administrations have placed constitutional interpretation in the service of individual rights. Part III situates the Obama Administration's nondefense of DOMA within President Obama's broader constitutional vision for LGBT people and same-sex couples—which spans statutory interpretation, rulemaking, and formal and informal policy decisions in labor and employment, immigration, health care, fair housing, and a host of other matters. Part IV discusses the normative implications of presidential constitutionalism, including

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28. *Windsor*, 133 S. Ct. at 2684-89.

29. The Second Circuit vindicated that rule when, in *Windsor*, it invalidated DOMA Section 3 and became the first federal appellate court to apply heightened judicial scrutiny in the context of LGBT rights. 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

30. *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 15 (2004) (distinguishing "constitutional operative propositions (judicial statements of *what the Constitution means*) from constitutional decision rules (judicial statements of *how courts should decide* whether the operative propositions have been complied with)"); *id.* at 32-33 ("[J]udicial review is essentially a two-step process: First, a court interprets the Constitution; second, it applies that interpretation to the facts of the case to reach a constitutional holding."); *see also* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term: Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997) ("Identifying the 'meaning' of the Constitution is not the Court's only function. A crucial mission of the Court is to *implement* the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution's meaning precisely.").

the President's crucial role in fostering dialogue with the coordinate branches—especially the courts—on matters of individual liberty. The Article concludes with a brief discussion of additional frontiers in presidential constitutionalism, including gender equity and the rights of foreign nationals.

I. WHAT IS PRESIDENTIAL CONSTITUTIONALISM?

A. The Features of Presidential Constitutionalism

Although there is no perfect, singular definition of presidential constitutionalism, it is worth identifying three significant and recurring attributes discussed in this Article. While these attributes do not supply a consistent, three-part test that defines all exercises of presidential constitutionalism, they can help us understand how presidential constitutionalism can advance constitutional interpretations, especially in the context of civil rights and in conversation with the coordinate branches.

First, authority and power are central to presidential constitutionalism. The President is Commander in Chief of the Armed Forces and possesses an important (if indeterminate) "executive Power" as well as certain foreign-affairs powers, including the power to make treaties with the consent of two-thirds of the Senate and to appoint and receive ambassadors and other public ministers.[31] The Constitution also grants the President the power to sign and veto legislation;[32] execute, implement, and interpret laws passed by Congress;[33] exercise prosecutorial discretion[34] bring

31. U.S. CONST. art. II, §§ 1-2; *see* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1281-82 (1996) (discussing an expansive power based on the Vesting Clause of Article II).

32. U.S. CONST. art. I, § 7, cl. 2.

33. *See* Lawson & Moore, *supra* note 31, at 1284-86, 1312-13 (discussing the power to execute the laws pursuant to the Vesting and Take Care Clauses within Article II); *cf.* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

34. *See infra* note 50 and accompanying text.

affirmative litigation or participate as amicus;[35] and, at times, refuse to enforce or defend legislation.[36] Finally, the President, legitimated by the electoral system, serves as a representative of the populace at large.[37] While the scope of executive power in the precincts of both constitutional interpretation and law making are subject to much disagreement, it is axiomatic that both the Constitution and Congress provide the President with powers that, at least in certain instances, necessitate independent interpretation.[38] On some of these occasions, presidential powers provide opportunities for interpretation with a measure of independence and influence on the direction for the development of constitutional law.

A second feature of presidential constitutionalism concerns a President's intent, or motivation, to affect constitutional interpretation.[39] Sometimes it is apparent that a President is engaging in constitutional interpretation; at other times the distinction between a constitutional position and mere policy statement is less clear.[40] Of course, there can be overlaps between the two. Moreover, while a moral or political view about equality is not necessarily the same

35. *See infra* notes 47, 77 and accompanying text.

36. *See infra* notes 87, 99, 110-12, 180 and accompanying text.

37. *See, e.g.*, Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 36, 59 (1995) (discussing that only the President "speaks for the entire American people" and that he possesses a "unique claim to legitimacy" as the only representative "accountable to a national voting electorate and no one else").

38. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

39. Authorship can matter to presidential constitutionalism as well, and thus a distinction should be drawn, in the context of constitutional interpretation, between pronouncements that reflect the President's own judgment and those asserted through proxies. Thus it may be important to consider the extent to which the President personally stands behind various constitutional positions his administration takes, as opposed to taking a more passive approach while cabinet officials advance various constitutional positions. In the latter case, the constitutional positions pursued do not necessarily reflect a President's judgment and are less closely connected to presidential accountability, which can supply an important source of legitimacy for presidential constitutional interpretations.

40. *See* Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1229 (2012) ("[P]residents may be tempted to equate what is misguided or immoral with what is unconstitutional; indeed, Justice Jackson said exactly that about FDR, a leader whom he served and greatly admired."); *cf. id.* at 1229-30 ("[E]ven if the policy issues of greatest concern to the public are rarely constitutional ones, a subset of constitutional issues may be politically salient because of their importance in particular electoral districts or with particular constituencies.").

as a constitutional one, moral and political views can be relevant to presidential constitutionalism. In the sphere of individual rights, judicial rulings have tended to expand according to evolving notions of legal, political, and moral equality, though not always in the clearest manner. Presidential constitutionalism can effectively promote readings of the law that help identify a broader and clearer articulation of prior Court doctrine.

Third, although a President's interventions may not particularly *affect* the law in a tangible way, the impact of presidential constitutionalism can be discerned in legal changes occurring either within the executive branch or in changes in legislatures and courts—either immediately or in the future. When presidential interventions do affect constitutional law, they can have a lasting effect that transcends future party changes;[41] at the same time, regardless of whether presidential interventions affect constitutional law, they can influence conversations around questions of constitutional rights and individual liberty, especially where the current doctrinal formulations and understandings are inchoate, underdeveloped, or even mysterious. Thus, a President who uses the bully pulpit to address gender equality, gay rights, or sentencing disparities undoubtedly shapes the way the public understands and discusses the related substantive policies. Although, as a practical matter, a President may be more likely to employ constitutional interpretation during periods of divided government,[42] a general inquiry regarding presidential constitutionalism and its effect on the coordinate branches can provide insights into how, and why, constitutional innovation takes place outside the courts. Rather than "sanction unjust results and ... submerge critical debate over

41. For a discussion of the lasting impact of executive branch decision making in the civil rights context, see Mathew S. Nosanchuk, *The Endurance Test: Executive Power and the Civil Rights of LGBT Americans*, 5 ALB. GOV'T L. REV. 440, 469 (2012) (discussing the lasting impact of prior executive branch initiatives despite change in party affiliation of subsequent administration).

42. Scholars have noted a consistent pattern of divided government for "thirty of the past forty years." Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 410 (2009); *see also* Peter M. Shane, *When Inter-Branch Norms Break Down: Of Arms-For-Hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial "Coups"*, 12 CORNELL J.L. & PUB. POL'Y 503, 518 (2003) (explaining that divided government has persisted "during most of the post-Vietnam War era").

substantive justice,"[43] the President can enlist the Court's help to promote a more transparent debate over the questions at stake.

B. The Scholarly Debate Regarding Presidential Constitutionalism

The scholarly debate concerning presidential constitutionalism runs a spectrum from Judicial Supremacy on the one hand to Departmentalism on the other. Scholars tend to apply one of three leading theories to a range of presidential authorities that include the power to veto laws,[44] abstain from bringing unconstitutional criminal prosecutions,[45] participate in constitutional litigation,[46] and, more sparingly, refuse to defend (or even more rarely refuse to enforce) congressional acts.[47] As scholars have also noted, executive branch practice has rather consistently followed a middle-ground approach between Departmentalism and Judicial Supremacy.[48]

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43. *See* William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 964 (1989).

44. U.S. CONST. art. I, § 7, cl. 2.

45. *See, e.g.*, Meltzer, *supra* note 40, at 1191.

46. *See, e.g.*, Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1305-06 (2000) (describing steps taken by the Truman Administration to engage the federal government through civil rights litigation).

47. *See, e.g.*, David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61, 76-81 (2000); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 919-20 (1990); Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381, 381-82 (1986); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 8-9 (2000) [hereinafter Johnsen, *Presidential Non-Enforcement*]; Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L. Q. 865, 868 (1994); Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 395 (1987); Burt Neuborne, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 375, 376 (1988); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 261 (1994); Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 108-10 (2000).

48. *See, e.g.*, Marty Lederman, *John Roberts and the SG's Refusal to Defend Federal Statutes in* Metro Broadcasting v. FCC, BALKINIZATION (Sept. 8, 2005, 12:11 AM), http://balkin.blogspot.com/2005/09/john-roberts-and-sgs-refusal-to-defend.html ("As a general matter, the [DOJ] has traditionally adhered to a policy of defending the constitutionality of federal enactments whenever 'reasonable' arguments can be made in support of such statutes."); *see also* Meltzer, *supra* note 40, at 1199-1200 (2012) (describing how Dellinger's position that "the executive's enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the presidency ... has been followed consistently by presidential administrations") (internal quotation marks omitted); *cf.* Johnsen,

On one end of the spectrum, Judicial Supremacy asserts that the judiciary provides a single, authoritative view of the Constitution that the political branches cannot augment through independent interpretation.[49] Anything else would undermine the judiciary and pose a dangerous threat to the separation of powers and a violation of the terms of Article II. While the President has some discretion at the margins (for instance, with respect to prosecutorial discretion),[50] he must in the first instance and as a general matter enforce and defend the law.[51] A more extreme interpretation of judicial supremacy, known as judicial exclusivity, holds that all presidential interpretations must be grounded in constitutional views set forth in prior judicial decisions.[52]

Departmentalism calls for a distinct presidential role in constitutional interpretation on par with that of the coordinate branches.[53]

Presidential Non-Enforcement, *supra* note 47, at 23 ("The best formulations of a context-dependent approach to non-enforcement, and the formulations most consistent with past presidential practice, are found in a 1980 letter from Attorney General Benjamin Civiletti to a U.S. Senator and a 1994 letter from Assistant Attorney General Walter Dellinger to the Counsel to the President.") (citations omitted).

49. Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 784 (2002) ("Judicial supremacy requires deference by other government officials to the constitutional dictates of the Court, even when other government officials think that the Court is substantively wrong about the meaning of the Constitution and in circumstances that are not subject to judicial review.").

50. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996); Heckler v. Chaney, 470 U.S. 821, 832 (1985).

51. May, *supra* note 47, at 873 ("[W]hile there is no explicit rejection of a presidential suspending power, there is convincing evidence in the text of the Constitution and in the debates surrounding its adoption that most of the Founders endorsed the English Bill of Rights' principle that a statute may be suspended only by the lawmaking authority, and not by the Executive acting alone.").

52. This is the position, articulated in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), that because "the federal judiciary is supreme in the exposition of the law of the Constitution," the Supreme Court's interpretation of the Fourteenth Amendment is the "supreme law of the land." *Id.*; *see also* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997) (defending "*Cooper* and its assertion of judicial primacy without qualification").

53. The argument is based on a combination of the Presidential Oath and the Supremacy Clause—in particular, the idea that "faithfully executing the laws" requires the President to execute the Constitution as the "supreme law of the land." *See* Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 523 (2012) ("Article II obliges the President to take an oath to preserve, protect, and defend the Constitution. When he identifies a law as unconstitutional, he should not enforce it, for to execute it would be to erode, rather than preserve, the Constitution. In other words, even as Article II requires faithful execution of constitutional laws, it forbids the executive from executing

On the strongest view of Departmentalism, the President possesses an independent interpretive authority that not only allows but also requires that he refuse to enforce (or defend) statutes he believes to be unconstitutional.[54] Michael Stokes Paulsen, Neal Devins, and Saikrishna Prakash all argue that executive officers should not defer to constitutional interpretations of the Supreme Court with which they disagree. As they see it, the textual obligation that the President "take Care" that the laws—including the Constitution—be faithfully executed implies a role for the President to decide for himself what is constitutional.[55] As Prakash noted recently, "If the President believes a law is unconstitutional, he should not enforce it, much less defend its constitutionality."[56]

Most scholars adopt a view somewhere between the poles of Departmentalism and Judicial Supremacy. On the one hand, they accept the Departmentalist instinct that the President retain some power to interpret the Constitution; on the other hand, they endorse a premise of Judicial Supremacy that presidential constitutionalism should typically give way to the Supreme Court's definitive interpretation of the Constitution. Thus, while they allow that the President may occasionally choose not to enforce or defend a statute he

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unconstitutional ones.") (citations omitted).

54. That includes a presidential power to disregard the Supreme Court's resolution of various constitutional questions. *See, e.g.*, Paulsen, *supra* note 47, at 222 (arguing that the President "may refuse to execute (or, where directed specifically to him, refuse to obey) judicial decrees that he concludes are contrary to law"); *see also* Saikrishna Bangalore Prakash, *Missing Links in the President's Evolution on Same-Sex Marriage*, 81 FORDHAM L. REV. 553, 569-70 (2012) [hereinafter Prakash, *Missing Links*] ("Because the Constitution never demands that he obey anyone else's interpretation of it, the President need not adopt judicial understandings, tests, and formulas. Instead, the President may decide for himself what the Constitution demands or permits, just as the courts may decide for themselves. That is to say, he should act on his own constitutional conclusions as he goes about preserving and protecting the Constitution, including disregarding statutes he believes are unconstitutional.") (footnotes omitted).

55. *See* Prakash, *Missing Links*, *supra* note 54, at 569-70; *see also* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 252-53 (2004); Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*, 52 B.C. L. REV. 1551, 1587 (2011); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2610 (2006) (concluding that "much of the time, it is emphatically the province and duty of the executive branch to say what the law is"); Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2782 (2003); Whittington, *supra* note 49, at 782-83.

56. Prakash, *Missing Links*, *supra* note 54, at 569.

believes to be unconstitutional, they recommend a more sparing use of that power. Unlike most Judicial Supremacists and Departmentalists who look to constitutional text or structure for guidance,[57] middle-ground theorists generally consider institutional, prudential, or other considerations as the basis for legitimate acts of presidential constitutionalism.

Daniel Meltzer provides a leading account of presidential constitutionalism that lies somewhere between Departmentalism and Judicial Supremacy.[58] For Meltzer, the President's obligation to defend congressional acts arises not from "a legal rule derivable from the Constitution itself, but [a]s a matter of judgment, informed by a welter of historical and institutional concerns."[59] Meltzer resolves the question of whether the President should enforce and defend federal statutes based on traditional institutional practices and expectations of the Department of Justice (DOJ). Considering a range of factors,[60] Meltzer argues that the President should strive for institutional continuity and defend congressional acts "even when [he] views them as wrongheaded, discriminatory, and indeed as shameful denials of equal protection,"[61] for anything else could result in an "unraveling of the executive branch's practice of defending federal statutes."[62] However, Meltzer argues that nondefense is acceptable in those rare situations in which a statute is so clearly unconstitutional that no good argument can be made on its behalf[63] or when a statute undermines the separation

57. Judicial Supremacists and Departmentalists tend to look to the Presidential Oath of Office, U.S. CONST. art. II, § 1, cl. 8 ("[The President] will faithfully execute the Office of President of the United States, and will to the best of [his] ability, preserve, protect and defend the Constitution of the United States."), the Supremacy Clause, U.S. CONST. art. VI, § 2 ("[The Constitution is] the supreme Law of the Land."), and the Take Care Clause, U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed."), as well as separation of powers principles.

58. Meltzer, *supra* note 40, at 1208-09.

59. *Id.* at 1184.

60. *Id.* at 1209 (considering "the division of labor between executive and congressional lawyers, the relationship between career and politically appointed lawyers within the executive branch, the preservation of the Justice Department's credibility with the courts, the avoidance of friction with Congress, and the maintenance of the integrity of executive officials subject to Senate confirmation").

61. *Id.* at 1235.

62. *Id.* at 1187.

63. *Id.* at 1198-99.

of powers.[64] Absent these strictly limited circumstances, however, the potential costs of a President's decision to undermine Congress are outweighed by the executive branch's institutional obligation to defend federal statutes.[65]

Another advocate of the middle-ground view between Departmentalism and Judicial Supremacy is Dawn Johnsen,[66] who

64. *Id.* at 1199-1201. In the latter case, Meltzer argues that there is an "equally important interest" for the President to "resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency." *Id.* (quoting Presidential Authority to Decline to Execute Unconstitutional States, 18 Op. O.L.C. 199, 201 (1994)). Meltzer contends that administrations consistently refuse to enforce or defend statutes that encroach on presidential power. For example, President Andrew Johnson refused to comply with the Tenure of Office Act, which required the President to obtain approval from the Senate to discharge heads of Cabinet departments. *Id.* at 1192. Johnson believed the statute was unconstitutional and sought to remove Secretary of War Edwin Stanton without senatorial consent. *Id.* at 1192-93. The President was impeached for failing to execute a law passed by the Congress; eventually, however, the Supreme Court validated Johnson's decision in *Myers v. United States*, 272 U.S. 52, 176 (1926). Meltzer, *supra* note 40, at 1192-93.

65. Meltzer articulates a number of reasons why the executive branch is better able to defend congressional acts than Congress. Meltzer, *supra* note 40, at 1210-12 (noting, inter alia, (1) that it is uncertain whether Congress may intervene as a party at the district court level; (2) that an amicus brief submitted by Congress may not be given as much clout as one from DOJ; (3) that some judges might resist upholding a statute if both the executive branch and the statute's challengers agree that it is unconstitutional, putting Congress at an immediate disadvantage; and (4) that Congress may not intervene or file an amicus brief without authorization from one of the houses of Congress, making Congress's ability to participate a function of the "political vicissitudes of the moment"). He also points out that the executive's refusal to defend federal statutes can cause friction between the Justice Department's leadership and career lawyers. *Id.* at 1213-14, 1217 (arguing that administrations might begin "picking and choosing" whether to defend statutes based on their policy preferences, putting a significant strain on the relationship between DOJ officials and career lawyers). Nondefense can also cause the executive to lose credibility with the courts, lead to internal strife, and possibly spark adverse reactions in Congress. *See id.* at 1217-20.

66. *See* Johnsen, *Presidential Non-Enforcement*, *supra* note 47; *see also* Dawn Johnsen, *The Obama Administration's Decision to Defend Constitutional Equality Rather than the Defense of Marriage Act*, 81 FORDHAM L. REV. 599, 605-06 (2012) [hereinafter Johnsen, *Defend Constitutional Equality*] (rejecting both "a strong departmentalist view" of "[r]outine unilateral presidential nonenforcement" and "the other extreme ... [of] mandatory enforcement and defense of all statutory provisions," and advocating "an intermediate approach ... [of] 'functional departmentalism'" pursuant to which "[p]residents should act upon their independent constitutional views only to the extent consistent with the constitutional functions of Congress and the courts and only to the extent consistent with the discernment and development of constitutional meaning (distinct from simply the advancement of the President's own views)"); Dawn E. Johnsen, *What's a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 396 (2008) [hereinafter Johnsen, *What's a President to Do?*] (arguing that the President has a role in constitutional interpretation).

argues that presidents should be guided by the twin goals to "preserve[] and respect[] the integrity of the lawmaking process" and recognize "the judiciary's special role in that process."[67] The first principle requires judicious use of presidential power out of fealty to the legislature, including Congress's ability to override a veto with a super-majority. The second principle requires the President to respect the "comparative institutional competencies" of the three branches of government and to encourage dialogue on constitutional meaning among the branches.[68] This means that the President should give deference to the constitutional interpretations of Congress (when it makes them) and to the Court in light of the comparative advantages of each respective branch. Based on a number of different considerations,[69] Johnsen argues that there are circumstances in which presidential nondefense or non-enforcement can be legitimate.[70] Ultimately, she argues that the President should strive to engage the judicial branch by ensuring that controversies become justiciable, allowing the judiciary to have the final say on constitutionality.[71]

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67. Johnsen, *Presidential Non-Enforcement*, *supra* note 47, at 29.

68. *Id.* at 36 (citations omitted).

69. Johnsen espouses a series of considerations that, in addition to constitutional structural analyses, are determinants of good decision making regarding presidential constitutionalism in the context of presidential non-enforcement of federal statutes. This list includes: (1) the sharpness of the "constitutional defect;" (2) "the President['s] ... institutional expertise relevant to resolving the constitutional issue;" (3) whether Congress "consider[ed] the constitutional issue in enacting the law;" (4) whether non-enforcement would affect the likelihood of judicial review; (5) the seriousness of the harm from enforcing the law; and (6) whether "repeal ... or nondefense of the statute" are "effective alternatives to non-enforcement." *See id.* at 53.

70. *Id.* at 41-54. Johnsen discusses the clash between the President and Congress in *United States v. Lovett*, 328 U.S. 303 (1946), as an example of a valid exercise of presidential nondefense. *See* Johnsen, *Presidential Non-Enforcement*, *supra* note 47, at 50. In *Lovett*, the Roosevelt Administration refused to defend a statute the President signed into law that prohibited him from paying the salaries of three named federal employees unless they were reappointed with advice and consent of the Senate. *See Lovett*, 328 U.S. at 305. Congress defended the statute and the Court ultimately agreed with the President. Johnsen argues that presidential nondefense led to an outcome in *Lovett* that was more constitutionally sound and faithful to the structure of the Constitution than through unilateral non-enforcement by the President. *See* Johnsen, *Presidential Non-Enforcement*, *supra* note 47, at 48-50. In the non-enforcement context, Johnsen discusses how President Andrew Johnson's non-enforcement of the Tenure of Office Act increased the chances of judicial review and "the possibility of further dialogue among the branches in the context of litigation." *Id.* at 48.

71. *See* Johnsen, *Presidential Non-Enforcement*, *supra* note 47, at 47-50.

While the above positions assess instances of presidential constitutionalism through the lenses of constitutional text, history, or institutional practice, they do not consider how particular acts of nondefense (or non-enforcement) can be grounded within a President's broader commitment to a given constitutional position. Indeed, acts of presidential constitutionalism can derive normative force from the President's larger vision regarding substantive equality and individual rights, especially when a President uses the bully pulpit, during campaigns and upon being elected, to promote constitutional interpretation. In other words, under the right conditions, there can be times when presidential accountability, expertise, and access to information can support the advancement of constitutional claims—especially regarding norms of liberty and equality. "[I]t is certainly reasonable to say that constitutional ambiguities should be resolved by those who are most accountable,"[72] and the President's electoral accountability, coupled with his access to information, can also make him more responsive to broader shifts in constitutional culture.[73] In such instances, presidential constitutional interpretation provides an important "source of interpretation in the absence of judicial resolution and a valuable alternative or supplemental voice when the Court has spoken."[74]

The use of presidential constitutionalism to advance individual rights recognizes the role of the executive branch as an important actor within a broader civil rights struggle while acknowledging the need for a larger number of institutions to shape that debate at both the state and federal levels. When done properly, presidential constitutionalism can engage the policy realm with an interpretive humility that acknowledges some role for executive constitutional interpretation, while promoting additional conversation with the equally expert coordinate branches to catalyze, rather than

72. Sunstein, *supra* note 55, at 2584.

73. As Daniel Meltzer explains, some Departmentalists argue that the executive branch is actually better equipped to interpret the Constitution than the courts because it is "less technical and formulaic" and "better grounded in currents of political justice, popular will, and constitutional culture." Meltzer, *supra* note 40, at 1189.

74. *See* Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 115 (2004) [hereinafter Johnsen, *Functional Departmentalism*].

pretermit, judicial determinations of the constitutional questions at issue. The President can engage the coordinate branches in ways that exploit, in the best possible way, his institutional role in providing leadership, where appropriate, on matters of social disputation.[75] To understand the unique importance of presidential constitutionalism in the civil rights context, it is useful to consider its deployment throughout history.

II. PRESIDENTIAL CONSTITUTIONALISM AS CIVIL RIGHTS ENFORCEMENT

Presidential constitutionalism enjoys a rich historical pedigree that dates as far back as the late eighteenth century, when President Thomas Jefferson refused to enforce the validity of the Alien and Sedition Acts.[76] Modern presidents have refused to enforce or defend congressional acts in a variety of contexts,[77] and those efforts have at times been part of a larger presidential commitment to

75. The breadth of the administrative state is also important. While federal courts are capable of hearing only a limited number of cases affecting individual rights, the administrative agencies can have a major role in interpreting the scope of those rights—not as a substitute for the federal courts but as entities capable of filling in the spaces left open by judicial rulings. *See infra* Part III.A.

76. *See* Devins & Prakash, *supra* note 53, at 514 (noting that Jefferson was "[t]he first President to confront a law he believed unconstitutional" and he "rejected any notion that he had to enforce and defend it"). Jefferson considered the law offensive to constitutional norms, and he pardoned those who had been convicted under the Acts and abated all prosecutions under the Acts, pending or prospective. *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 73 (2004); Meltzer, *supra* note 40, at 1189; Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1664-66 (2008). In 1840, Congress vindicated Jefferson by repaying those who had been fined under the Sedition Act of July 4, 1840, ch. 45, 6 Stat. 802. *See* STONE, *supra*, at 73. A number of Supreme Court Justices subsequently described the Act as unconstitutional. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 288-89 (1952) (Jackson, J., dissenting); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting, joined by Brandeis, J.). The Court later cited those Justices and President Jefferson's pardons approvingly when, in *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964), it explained its agreement with the "broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."

77. *See, e.g.*, Meltzer, *supra* note 40, at 1201 n.94 (noting various administrations' refusals to defend the independent counsel statute and the legislative veto); *see also* Kevin M. Stack, *The Story of* Morrison v. Olson*: The Independent Counsel and Independent Agencies in Watergate's Wake*, *in* PRESIDENTIAL POWER STORIES 401, 422-24 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (discussing President Reagan's undermining of the independent counsel statute by continuing to enforce it while urging its invalidation).

principle. On some occasions, presidents have advocated new constructions of constitutional meaning—as in the Truman Administration's campaign against *Plessy v. Ferguson*[78] during the run-up to *Brown v. Board of Education*.[79] On other occasions, presidential administrations have exercised independent judgment regarding the implementation of Supreme Court rulings—as in a number of executive branch decisions to stop enforcing statutes mandating differential treatment on the basis of gender.[80] While some administrations have sought to expand the reach of constitutional protections, others have campaigned for their retrenchment, as in the Reagan Administration's efforts to restrict abortion rights after *Roe v. Wade*.[81] Although these varying exercises of independent presidential interpretation raise different normative questions, they provide a useful historical baseline for understanding the President's institutional role in promoting constitutional principles on civil rights matters—both in court and within the culture more broadly.

A. Race

During the run-up to *Brown v. Board of Education*, the executive branch contributed to the development of constitutional law by forcefully opposing racial inequality and championing the toppling of *Plessy v. Ferguson*.[82] The Truman Administration's leadership in this particular arena was part of a larger presidential effort that included an executive order ending racial segregation in the U.S. military.[83] Subsequent presidential administrations took positions

78. 163 U.S. 537 (1896).

79. 347 U.S. 483 (1954); *see* Jack M. Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1548 & n.39 (2004); *infra* Part II.A.

80. *See infra* Part II.B.

81. *See infra* Part II.E.

82. 163 U.S. 537; *see* Balkin, *supra* note 79, at 1548 & n.39.

83. President Truman issued Executive Order 9981 on July 26, 1948 to "effectively signal[ ] the racial integration of the United States military." Mario L. Barnes, "*But Some of* [*Them*] *Are Brave": Identity Performance, the Military, and the Dangers of an Integration Success Story*, 14 DUKE J. GENDER L. & POL'Y 693, 694 (2007); *see also* Jennifer Gerarda Brown & Ian Ayres, *The Inclusive Command: Voluntary Integration of Sexual Minorities into the U.S. Military*, 103 MICH. L. REV. 150, 170 (2004) (explaining that President Truman's Executive Order of 1948 "officially outlaw[ed] segregation in the U.S. military"). The effort built on previous efforts by President Roosevelt to integrate the U.S. military. *See* Exec. Order

on race and equal protection by promoting or, in some cases, curbing affirmative action measures.

The Truman Administration's constitutional arguments in *Brown* were part and parcel of a larger policy effort to eliminate racial segregation that included integrating the U.S. military, "a groundbreaking social-justice precedent that helped spur desegregation efforts in other pockets of our civil, social, and political economy."[84] The military order "strongly encouraged popular acceptance of integration prior to the *Brown* decision and was cited by amici in *Brown* who supported desegregation."[85] Indeed, those efforts likely "had a strong impact on the Court's decision to hold separate-but-equal schooling unconstitutional."[86]

In the lead-up to *Brown,* the Truman Administration filed a brief as part of its larger campaign against segregation in *Henderson v. United States*,[87] a suit by an African American train passenger who was denied service on a railroad dining car.[88] The Interstate Commerce Commission (ICC) rejected Henderson's claim, ruling that the railroad's post-litigation decision to accommodate black passengers by reserving a separate table enclosed by a partition was a legitimate implementation of the "separate but equal" doctrine.[89] Henderson appealed the decision in federal court, suing both the United States and the ICC. When Henderson lost before a three-

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No. 9981, 13 Fed. Reg. 4313 (July 26, 1948); *see also* Nosanchuk, *supra* note 41, at 441 ("Both presidents [Roosevelt and Truman] nudged the federal government closer towards the goal of greater racial equality at a time when it was extremely difficult to move affirmative civil rights legislation through the Congress. Only after these executive orders did Congress pass important civil rights legislation—landmark bills to prohibit discrimination on the basis of race, religion, national origin, gender, and disability in employment, public accommodations, housing, and education, ensuring equal opportunities to millions of Americans.").

84. Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023, 1066 (2013); *see also, e.g.*, Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 7-8 (1996).

85. Aaron S.J. Zelinsky, *The Supreme Court (of Baseball),* 121 YALE L.J. ONLINE 143, 161 (2011).

86. *Id.* at 162.

87. Brief for the United States at 9, Henderson v. United States, 339 U.S. 816 (1950) (No. 25), 1949 WL 50329.

88. 339 U.S. at 816, 818-20. Whites occupied the tables conditionally reserved for black customers, and the wait staff refused to serve Henderson even though there were open seats at these tables. *Id.* at 819-20.

89. *See id.* at 821-22; Waxman, *supra* note 46, at 1307.

judge district court, he appealed directly to the Supreme Court.[90] Although DOJ had initially defended the ICC, the Solicitor General changed positions and supported Henderson,[91] filing a brief arguing that segregation on trains violated the Interstate Commerce Act and that the doctrine of "separate but equal" was unconstitutional.[92] The Supreme Court sided with Henderson on narrow grounds, holding that the railroad's policy was in technical violation of the statute.[93]

Henderson is noteworthy for a number of reasons, not least that the Truman Administration decided to confess error in a major civil rights case.[94] Moreover, the Administration sought reversal not on narrow statutory grounds, but on the broader legal question of segregation, asking the Court to overrule one of its precedents, *Plessy v. Ferguson*.[95] Because at the time of *Henderson* federal statutes appeared to require segregated educational facilities, the Truman Administration's litigation position undermined that legislation and the ordinary presidential duty to defend congressional acts.

Although the Supreme Court ultimately sided with Henderson, it sidestepped the Truman Administration's broader constitutional argument regarding *Plessy*, ruling on statutory grounds instead.[96] The same day *Henderson* was announced, the Court also decided two cases that concerned racial segregation in universities: *Sweatt v. Painter*[97] and *McLaurin v. Oklahoma State Regents for Higher Education*.[98] In these cases, the Truman Administration also submitted briefs arguing that state-sponsored racial segregation

90. Waxman, *supra* note 46, at 1307.

91. *See* Brief for the United States, *supra* note 87, at 40 ("[T]he legal and factual assumptions" of *Plessy* "have been undermined and refuted" and the "'separate but equal' doctrine should now be overruled and discarded.").

92. *See id.* at 12-13, 23-66.

93. *See Henderson*, 339 U.S. at 825-26.

94. *See* Waxman, *supra* note 46, at 1306-07.

95. *See id.* at 1307.

96. *See Henderson*, 339 U.S. at 818.

97. 339 U.S. 629 (1950). In *Sweatt*, the Court rejected the University of Texas Law School's justification for refusing admission to a qualified black student on grounds that there was an adequate, separate law school for African-American students.

98. 339 U.S. 637 (1950). In *McLaurin*, the Court rejected the University of Oklahoma's decision to admit a black student into its doctorate of education program but require that he sit apart from his classmates in the classroom, library, and cafeteria.

was unconstitutional and that the Court should overrule *Plessy*.[99] The Court found equal protection violations in both *Sweatt* and *McLaurin*—again on narrower grounds—ruling that the black students in both cases received an inferior education.[100] Four years later, in *Brown*, the Court accepted the broader argument made by government and civil rights lawyers that "separate but equal" was per se unconstitutional.[101]

Subsequent presidential administrations also advanced constitutional interpretations of equal protection in the race context by promoting various affirmative action programs. In 1965, President Johnson signed Executive Order 11,246, which mandated that federal contractors take affirmative action in recruitment and promotion practices.[102] President Nixon enforced this executive order[103] and in 1969 also issued Executive Order 11,478, which required federal agencies to establish affirmative action programs for civilian employees.[104] In addition, that year the Department of Labor set specific numeric targets for federally funded construction projects.[105] While scholars disagree about the root of President Nixon's enthusiasm for affirmative action,[106] the Executive Orders

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99. *See* Memorandum for the United States as Amicus Curiae at 9-14, Sweatt v. Painter, 339 U.S. 629 (1950) (No. 44); McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950) (No. 34).

100. *See McLaurin*, 339 U.S. at 640-41; *Sweatt*, 339 U.S. at 632-33.

101. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

102. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

103. *See* Comment, *Scholars' Reply to Professor Fried*, 99 YALE L.J. 163, 166 (1989); *see also* Michael K. Braswell, Gary A. Moore & Stephen L. Poe, *Affirmative Action: An Assessment of Its Continuing Role in Employment Discrimination Policy*, 57 ALB. L. REV. 365, 369 n.16 (1993) (explaining that Johnson's Executive Order was "later reinforced by Executive Order 11,478, issued by President Nixon in 1969").

104. Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 8, 1969).

105. Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 MICH. J. RACE & L. 51, 69 (1996); *see also* Lundy R. Langston, *Affirmative Action, A Look at South Africa and the United States: A Question of Pigmentation or Leveling the Playing Field?*, 13 AM. U. INT'L L. REV. 333, 348 n.66 (1997).

106. *See, e.g.*, Sameer M. Ashar & Lisa F. Opoku, Recent Developments, *Justice O'Connor's Blind Rationalization of Affirmative Action Jurisprudence*—Adarand Constructors, Inc. v. Pena, *115 S. Ct. 2097 (1995)*, 31 HARV. C.R.-C.L. L. REV. 223, 225 n.11 (1996) (describing various scholarly takes on Nixon's support for affirmative action); J. Clay Smith, Jr., *Open Letter to the President on Race and Affirmative Action*, 42 HOW. L.J. 27, 42-43 & n. 92 (1998) (describing Nixon's support for affirmative action and the limitations of that support).

were major steps that advanced anti-discrimination norms in the wake of the Supreme Court's busing decisions.[107]

After the Johnson and Nixon Administrations expanded affirmative action, subsequent administrations made efforts to curb it. Presidents Reagan and George Herbert Walker Bush both appointed Supreme Court Justices who would support their agendas of curtailing affirmative action. President Reagan appointed Justices O'Connor, Scalia, and Kennedy, all thought to be conservatives in favor of President Reagan's anti-affirmative action views.[108] President Bush appointed Justices Souter and Thomas, believing that both would cast votes against affirmative action.[109] The Reagan and Bush Administrations also made their anti-affirmative action views known through briefs filed in landmark affirmative action cases. For example, as Solicitor General during the Reagan Administration, Charles Fried submitted a brief in *Wygant v. Jackson Board of Education* arguing against a law permitting protection against layoffs for public employees based on race or national origin.[110] During the Bush Administration, DOJ filed an amicus brief authored by Fried in *City of Richmond v. Croson*, which argued that a city ordinance requiring that at least 30 percent of Richmond's city contracts go to minority businesses violated equal protection.[111] The Bush Administration also opposed affirmative action when acting Solicitor General (and current Chief Justice) John Roberts filed a brief in *Metro Broadcasting, Inc. v. FCC* arguing that a longstanding FCC practice granting preferences to

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107. *See* Carl L. Livingston, Jr., *Affirmative Action on Trial: The Retraction of Affirmative Action and the Case for Its Retention*, 40 HOW. L.J. 145, 149 (1996).

108. All three appointees, along with Chief Justice Rehnquist, dissented in *Metro Broadcasting, Inc. v. FCC*, arguing that federal affirmative action programs should be measured by the most exacting form of judicial scrutiny. 497 U.S. 547, 603 (1990) (O'Connor, J., joined by Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting).

109. *See* Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When and How Important?*, 101 NW. U. L. REV. 1483, 1508 (2007); Catharine Pierce Wells, *Clarence Thomas: The Invisible Man*, 67 S. CAL. L. REV. 117, 121-23 (1993).

110. Brief for the United States as Amicus Curiae Supporting Petitioners at 10-11, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (No. 84-1340), 1985 WL 669739, at *8 (characterizing affirmative action laws as "measures discriminating against whites"). Notably, the brief was co-authored by then-Assistant to the Solicitor General, Samuel A. Alito, Jr. *See id.*

111. Brief for the United States as Amicus Curiae Supporting Appellee at 8, City of Richmond v. Croson, 488 U.S. 469 (1989) (No. 87-998), 1988 WL 1025715, at *6.

minority-owned broadcasters violated equal protection.[112] While the Bush Administration refused to defend the policies, it did permit the FCC to defend them.[113]

President Bush also vetoed the Civil Rights Act of 1990,[114] which he labeled a quota bill,[115] and he opposed (but signed) the veto-proof Civil Rights Act of 1991.[116] The day before he was scheduled to sign the bill, he "issued a directive terminating affirmative action in the federal government,"[117] but "congressional and public outcry ... forced [him] to withdraw [the directive]."[118] Bush signed the civil rights bill reluctantly, stressing in his signing statement the limitations he believed the law placed on disparate impact doctrine and affirmative action programs.[119]

B. Gender

During the 1970s, the executive branch determined that a wide swath of federal laws were no longer constitutional in light of Supreme Court decisions prohibiting gender discrimination. Two cases were of particular importance. First, in *Califano v. Westcott*, the Court invalidated a provision of the Aid to Families with Dependent Children program that provided benefits to families whose dependent children lost parental support because of a father's unemployment, but not the mother's.[120] The Court applied intermediate scrutiny to the provision and invalidated it as a vestige of the kind of "sexual stereotypes" that presumed a father's "primary

112. Brief for the United States as Amicus Curiae Supporting Petitioner at 8, Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (No. 89-453), 1989 WL 1126975, *8.

113. *See* Johnsen, *Defend Constitutional Equality*, *supra* note 66, at 607.

114. Stephen Plass, *Exploring the Limits of Executive Civil Rights Policymaking*, 61 OKLA. L. REV. 155, 177 (2008).

115. *See id.*; *see also* President George H.W. Bush, Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 2 PUB. PAPERS 1437, 1438 (Oct. 22, 1990).

116. *See* Plass, *supra* note 114, at 178.

117. *Id.*

118. *Id.*

119. *See id.* at 178-79; *see* President George H.W. Bush, Statement on Signing the Civil Rights Act of 1991, 2 PUB. PAPERS 1504 (Nov. 21, 1991) ("It is extremely important that the statute be properly interpreted—by executive branch officials, by the courts, and by America's employers—so that no incentives [exist] to engage in [] illegal conduct [such as adopting quotas or racial preferences].").

120. 443 U.S. 76, 78, 93 (1979).

responsibility to provide a home and its essentials" and a mother's role in the "center of home and family life."[121] Second, in *Califano v. Goldfarb*, the Court invalidated gender-based distinctions that afforded widows and widowers different relief under Social Security benefit programs as invidious discrimination on the basis of gender.[122] At the time of these opinions, the U.S. Code contained numerous laws discriminating on the basis of sex, making it unlikely, if not impossible, that the federal courts (including the lower courts) would resolve the constitutionality of each and every statute in which a sex-based classification was at issue.[123] In response to the early Supreme Court decisions, DOJ combed through the U.S. Code to identify "similar gender-based rules and instruct[ed] the Executive Branch not to follow them."[124] Ultimately, the Attorney General stopped enforcing such a large number of statutes that "Congress required [DOJ] to notify counsel for [the] House and Senate when the [executive branch] decided not to appeal from a decision holding a statute unconstitutional."[125]

While presidential campaigns to promote racial equality advanced novel constructions of operative constitutional meaning, the gender cases generally reflected implementations of prior Court decisions.[126] In one particular example, however, the Administration's interpretation of prior decisions likely exceeded the scope of those earlier Supreme Court rulings. In *Struck v. Secretary of Defense*,[127] the President decided not to enforce a federal statute that

121. *Id.* at 89 (quoting Orr v. Orr, 440 U.S. 268, 283 (1979); Stanton v. Stanton, 421 U.S. 7, 10 (1975); Taylor v. Louisiana, 419 U.S. 522, 534 n.15 (1975)).

122. 430 U.S. 199, 216-17 (1977). These rulings were part of a larger set of Supreme Court cases striking down various forms of gender discrimination. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 204 (1976) (holding unconstitutional a state law that set a different minimum age for men and women when purchasing certain varieties of beer); Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (holding unconstitutional a practice of determining dependency status in part based on sex).

123. Meltzer, *supra* note 40, at 1194.

124. Easterbrook, *supra* note 47, at 913. In some cases, the executive branch chose not to appeal lower court rulings striking down gender-based provisions, "a step that is functionally a final constitutional decision by the Executive Branch." *Id.*

125. *Id.*

126. *See generally* Berman, *supra* note 30 (analyzing the distinction between interpretations that announce the operative meaning of the Constitution and those that reflect mere implementation of the Constitution).

127. 460 F.2d 1372 (9th Cir. 1972), *vacated*, 409 U.S. 1071 (1972).

required the automatic military discharge of pregnant servicemembers.[128] Captain Struck, a career officer in the Air Force who was facing discharge, challenged the policy and lost in both the district court and the Ninth Circuit.[129] The Supreme Court granted certiorari, and then-Professor Ruth Bader Ginsburg filed a brief on Struck's behalf.[130] However, the case never made it to the Supreme Court because DOJ decided not to enforce the provision after the Court granted certiorari. Solicitor General Erwin Griswold was worried about the government's chances before the Court and recommended that the Air Force "waive Captain Struck's discharge and abandon its policy of automatically discharging women for pregnancy."[131] The Air Force agreed, and the Supreme Court vacated the judgment and remanded the case to the Ninth Circuit "to consider the issue of mootness in light of the position presently asserted by the Government."[132]

Two years later, however, the Court rejected the premise that pregnancy discrimination constituted per se gender discrimination. In *Geduldig v. Aiello*, the Court upheld California's exclusion of medical benefits for pregnant women in its disability insurance program.[133] Applying rational basis review, the Court concluded that California's refusal to cover ordinary pregnancies served a legitimate purpose of keeping the fund solvent, affordable, and functional.[134] Eventually, *Geduldig* was effectively overruled,[135] and

128. Neil S. Siegel & Reva B. Siegel, Struck *by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 777-78 (2010).

129. *Struck*, 460 F.2d at 1373-74.

130. *See* Brief for the Petitioner, Struck v. Sec'y of Def., 409 U.S. 1071 (1972) (No. 72-178), 1972 WL 135840.

131. Siegel & Siegel, *supra* note 128, at 778 (quoting Ruth Bader Ginsburg, Assoc. Justice, Supreme Court of the United States, Advocating the Elimination of Gender-Based Discrimination: The 1970's New Look at the Equality Principle, Address at the University of Cape Town, South Africa (Feb. 10, 2006), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_02-10-06.html).

132. *Struck*, 409 U.S. at 1071.

133. 417 U.S. 484, 494 (1974). The Court reached a similar holding in the context of statutory employment discrimination in *General Electric Co. v. Gilbert*. 429 U.S. 125, 139-40 (1976).

134. *See Geduldig*, 417 U.S. at 494-97.

135. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983), the Supreme Court held that the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, 2076 (1978) (codified at 42 U.S.C. § 2000e(k)), overruled *Gilbert*. Scholars have noted that *Newport News Shipbuilding* significantly limited, if not functionally overturned, *Geduldig*. *See, e.g.*, Kyla Davidoff, Comment, *Time to Close the Gap: Women in the Individual*

although that case is not identical to *Struck*, *Geduldig*'s outcome suggests that the Supreme Court might have upheld Captain Struck's discharge had it considered the merits.

C. HIV

Another notable example at the intersection of presidential constitutionalism and individual liberty arose in 1996 in the context of discrimination based on HIV status. Congress was attempting to pass the National Defense Authorization Act for Fiscal Year 1996, an omnibus defense appropriations bill.[136] Near the end of the legislative process, Representative Robert Dornan added an amendment that would have required the President to discharge all HIV-positive members of the military.[137] President Clinton, along with his team of advisors, was highly opposed to this provision and believed it to be driven solely by malice toward HIV-positive servicemembers.[138] Thus, Clinton vetoed the bill when it first came to his desk for signing.[139] Soon afterward, Congress passed a new version addressing some of Clinton's other concerns with the bill at large while retaining the controversial HIV provision.[140] Clinton now faced a choice: to veto the omnibus bill again, with the result that all of its provisions would be further held up, or to pursue an alternative strategy.[141] Clinton decided to sign the important bill while publicly pressuring Congress to repeal the HIV-discharge provision before it took effect and, if it failed to do so, enforce but not defend

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Health Insurance Market Deserve Access to Maternity Coverage, 25 WIS. J.L. GENDER & SOC'Y 391, 408-409 (2010).

136. Pub. L. No. 104-106, 110 Stat. 186 (1996).

137. *Id.* § 567 (repealed 1996 and codified as amended at 10 U.S.C. § 1177 (2006)); Aziz Z. Huq, *Enforcing (But Not Defending) 'Unconstitutional' Laws*, 98 VA. L. REV. 1001, 1020 (2012); Johnsen, *What's a President to Do?*, *supra* note 66, at 415. Dornan's amendment was based on the misconception that HIV could be contracted only through actions that violated the Uniform Code of Military Justice, such as "illegal drug use, homosexual activity, or sex with prostitutes." *Id.*

138. *See* Johnsen, *Defend Constitutional Equality*, *supra* note 66, at 608.

139. *Id.* at 609; *see also* WILLIAM J. CLINTON, VETO MESSAGE, H.R. DOC. NO. 104-155 (1995), *reprinted in* 142 CONG. REC. H12 (daily ed. Jan. 3, 1996) (noting President Clinton's disapproval for the unwarranted discharge of servicemembers infected with HIV).

140. *See* Johnsen, *Defend Constitutional Equality*, *supra* note 66, at 609.

141. *See id.*

the provision in the courts.[142] Eventually, Congress repealed the provision before it took effect.[143]

Although President Clinton believed that an equal protection violation was clear and that the provision was "blatantly discriminatory and highly punitive,"[144] it is unlikely that the federal courts would have found the law unconstitutional at that time.[145] Thus, President Clinton's reasons for refusing to defend such a law would likely have been based on a novel interpretation of the Constitution's operative meaning—not an implementation of the Court's prior rulings. After all, while such a law might be struck down today,[146] a court examining the HIV-discharge provision in 1996 would likely have upheld it.[147]

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142. *See id.*; *see also* Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 1 PUB. PAPERS 226, 227 (Feb. 10, 1996) [hereinafter Signing Statement], *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=52387 (explaining the President's decision not to veto the bill a second time).

143. Act of Apr. 26, 1996, Pub. L. No. 104-134, tit. II, § 2707(a)(1), 110 Stat. 1321-330 (2006); *see* Johnsen, *Defend Constitutional Equality*, *supra* note 66, at 609.

144. Signing Statement, *supra* note 142, at 226; *see* Johnsen, *Presidential Non-Enforcement*, *supra* note 47, at 56. President Clinton's signing statement argued that the provision "violates equal protection by requiring the discharge of qualified service members living with HIV who are medically able to serve, without furthering any legitimate governmental purpose." Signing Statement, *supra* note 142, at 227.

145. Johnsen, *Defend Constitutional Equality*, *supra* note 66, at 609 (noting that, in 1996, the federal courts evaluating the HIV ban would likely "underenforce the equal protection norms at stake under a deferential rational basis review"); Johnsen, *Presidential Non-Enforcement*, *supra* note 47, at 55-56 & n.190 (citing H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 U. CHI. L. REV. 365, 382-83 (1998)).

146. Although it is difficult to predict how a federal court would interpret such a provision today, there have certainly been notable legislative changes that suggest a potential shift in understanding regarding discrimination based on HIV. For example, in 2008, Congress repealed legislation restricting HIV-positive individuals from entering the country. Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293, § 305, 122 Stat. 2918, 2963. Beginning in 1987, non-citizens with HIV had been made inadmissible to the United States by regulation, *see* Medical Examination of Aliens, 52 Fed. Reg. 32,540 (1987) (amending 42 C.F.R. § 34.2(b)), and in 1993, Congress amended the Immigration and Nationality Act to require the Department of Health and Human Services to designate the HIV infection a "communicable disease of public health significance." 8 U.S.C. § 1182(a)(I)(A)(I) (2006). Congress later repealed those restrictions, and President George W. Bush signed the bill into law. Ryan White HIV/AIDS Treatment Extension Act of 2009, Pub. L. No. 111-87, 123 Stat 2885; *see* Devin Dwyer, *U.S. Bans on HIV-Positive Visitors, Immigrants Expires*, ABC NEWS (Jan. 5, 2010), http://abcnews.go.com/Politics/united-states-ends-22-year-hiv-travel-ban/story?id=9482817&singlePage=true.

147. *See supra* note 145 and accompanying text.

D. Self-Incrimination

The Clinton Administration also championed a criminal defendant's right against self-incrimination in *Dickerson v. United States*[148] by disputing the constitutionality of a federal law that nullified hallowed *Miranda* warnings in criminal interrogations.[149] The law called for a retreat to standards of admissibility comparable to those in place prior to the incorporation of the Fifth Amendment against the states[150] in *Malloy v. Hogan*.[151] After *Malloy*, the Court in *Miranda v. Arizona* established parallel protections from the inherently coercive nature of certain interrogation tactics that federal officers commonly employed.[152] Thus was born the now-famous *Miranda* warnings, requiring that the accused be informed of their rights prior to interrogation and that the state fully honor those rights.[153] Though such warnings are prophylactic in nature,[154]

148. 530 U.S. 428 (2000) (invalidating 18 U.S.C. § 3501(a) (2006)).

149. *Id.* at 431-36.

150. 18 U.S.C. § 3501(a) (2006). For an overview of the standards of admissibility of confessions prior to the Fifth Amendment's incorporation against the states, see Laurence A. Benner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 113-17 (1989).

151. 378 U.S. 1 (1964). Before individuals enjoyed Fifth Amendment protections from the individual states, the Fourteenth Amendment's Due Process Clause provided defendants some protection against self-incrimination. *See* Benner, *supra* note 150, at 113-17 (discussing the development of protections against self-incrimination as applied within the Due Process Clause of the Fourteenth Amendment). The Supreme Court first began to outline those protections in *Brown v. Mississippi*, 297 U.S. 278 (1936), which held that a confession was inadmissible when it was obtained through the use of physical force. *Id.* at 285-86. In the ensuing decades, the Court fleshed out the requirement that confessions were only admissible if they were in fact "voluntary," *see* Benner, *supra* note 150, at 113-17, which required an inquiry into the "totality of all the circumstances" of the interrogation. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 223, 226 (1973) ("In some 30 different cases decided [in the 28 years following *Brown*], the Court was faced with the necessity of determining whether in fact the confessions in issue had been 'voluntarily' given." (citations omitted)).

152. 384 U.S. 436, 458 (1966) ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.").

153. *Id.* at 467.

154. *See* Berman, *supra* note 30, at 18-43 (discussing *Miranda* and the debate over prophylactic rules).

Miranda has been understood to "safeguard[ ] a 'fundamental trial right.'"[155]

Unhappy with the *Miranda* decision, Congress sought to undo it through legislation that made voluntary confessions admissible in prosecutions by the United States or the District of Columbia.[156] The language of the statute closely tracked that of the pre-*Miranda* standards, and did so by design.[157] Consequently, the executive was thus placed between Congress and the Court when the constitutionality of § 3501 was challenged in *Dickerson*. It could either defend a law designed to conflict with the Court's jurisprudence, and thus argue that the Court overrule itself, or it could argue for the Court to affirm *Miranda* and thus strike down the congressional act.[158] While the perspectives of different presidential administrations on that question had varied,[159] the executive chose, at the time of the *Dickerson* challenge, to argue that the Court should affirm *Miranda*.[160]

Seth Waxman, the Solicitor General at the time, subsequently explained that the executive viewed the decision to challenge the

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155. Withrow v. Williams, 507 U.S. 680, 691 (1993) (emphasis omitted) (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990)).

156. 18 U.S.C. § 3501(a) (2006).

157. The senator introducing the bill to the Senate floor described it as an attempt to "rectify" the *Miranda* Court's "mockery of justice." 113 CONG. REC. 1582, 1583 (1967) (statement of Sen. John McClellan). The original bill's Senate Committee Report likewise criticized *Miranda* and described a need to return to the pre-*Miranda* test courts had used to determine voluntariness. S. REP. NO. 90-1097, at 46-50 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2132-38.

158. The executive ultimately rejected a potential middle-ground argument—accepted by the Fourth Circuit, which set the stage for Supreme Court review—that because *Miranda* warnings are prophylactic, they are actually merely rules of procedure. On such a reading, Congress could overrule the Court without requiring the Court to overrule itself, as the decision was not a constitutional one. The Court's own reasoning in *Miranda* and its subsequent applications make clear that the ruling was indeed constitutional and not merely procedural. *See* Brief for the United States at 21-29, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99-5525), 2000 WL 141075, at *12-15.

159. *See* Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 387-90 (2003) [hereinafter Johnsen, *Ronald Reagan and the Rehnquist Court*] (noting practice within the Meese DOJ to advance constitutional interpretations at odds with a range of Supreme Court decisions, including *Miranda*).

160. *See* Brief for the United States at 29-50, *Dickerson*, 530 U.S. 428 (No. 99-5525), 2000 WL 141075, at *15-21.

law as a "solemn act."[161] The President came to the decision after careful deliberation with Waxman and the Attorney General about the policy implications of the impending decision, as well as jurisprudential concerns such as stare decisis.[162] The President's decision was informed by the fact that, because the decision would be a constitutional one, it would necessarily affect fundamental rights.[163]

The Supreme Court ultimately agreed with the executive.[164] Indeed, the Court noted that it is jurisdictionally incapable of applying rules to state courts—as it did in *Miranda* and in subsequent cases[165]—unless it is to apply the Constitution.[166] The Court drew on language from *Miranda* to further establish the constitutional character of the issue, describing the need "to give concrete constitutional guidelines for law enforcement agencies and courts to follow."[167] Accordingly, the Supreme Court, like the executive in its brief, rejected the idea that it could uphold § 3501 without overturning *Miranda*.[168] It declined to do so, and struck down the law.[169]

E. Abortion

Presidential administrations have also been involved in campaigns to shape interpretations of reproductive rights.[170] In the period between the Supreme Court's decisions in *Roe v. Wade*[171] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[172] presidential administrations advanced independent constitutional

161. Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1087-88 (2001).
162. *Id.*
163. *See id.*
164. *See Dickerson*, 530 U.S. at 444.
165. *See, e.g.*, Stansbury v. California, 511 U.S. 318 (1994) (interpreting *Miranda*).
166. *Dickerson*, 530 U.S. at 438-39 ("With respect to proceedings in state courts, our authority is limited to enforcing the commands of the United States Constitution.") (citations and quotations omitted).
167. *Id.* at 439 (emphasis omitted) (quoting Miranda v. Arizona, 384 U.S. 436, 441-42 (1966)).
168. *See id.* at 436-37, 444.
169. *Id.* at 444.
170. *See* NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE 97-120 (1996); Johnsen, *Functional Departmentalism*, *supra* note 74, at 134-47.
171. 410 U.S. 113 (1973).
172. 505 U.S. 833 (1992).

interpretations by raising the issue during campaigns and, once in office, reiterating them through use of the bully pulpit;[173] supporting and signing legislation that comported with the executive's policy preferences, or, alternatively, vetoing legislation that did not;[174] considering views on reproductive liberty when making judicial appointments;[175] nominating to executive posts individuals who shared the President's view;[176] filing amicus briefs in court;[177] and pursuing regulatory initiatives that advanced the executive's agenda on reproductive rights.[178]

President Reagan was especially active in this regard. As early as 1983, his Administration urged the Court to scale back *Roe*. In *Akron v. Akron Center for Reproductive Health, Inc.*,[179] Reagan's Solicitor General, Rex Lee, filed a brief urging the adoption of an "undue burden" standard of review, which would be less stringent than *Roe*'s fundamental right/strict scrutiny standard.[180] Lee's replacement, Charles Fried, filed a brief in 1986 explicitly asking the Court to overturn *Roe*.[181] DOJ likewise filed amicus briefs in

173. For example, Richard Nixon described abortion as "an unacceptable form of population control" during the 1972 election. *See* DEVINS, *supra* note 170, at 98. Ronald Reagan's 1980 campaign included support for "a constitutional amendment to restore protection of the right to life for unborn children." *Id.* at 100. George H.W. Bush expressed a desire to stop "another unborn child" from becoming "the innocent victim of abortion." *Id.* at 101.

174. President George H.W. Bush used his veto power to prevent, inter alia, congressional overrides of Reagan-era regulations restricting funding to international and domestic family-planning centers that provided abortion counseling, as well as a moratorium on fetal tissue research. *See id.* at 102-03. After *Casey*, President Clinton vetoed a ban on "partial birth abortions," whereas President George W. Bush signed a similar ban into law. *See* Johnsen, *Functional Departmentalism*, *supra* note 74, at 141.

175. For example, President Reagan's Administration established a Judicial Selection Committee for screening potential nominees based on their ideological leanings. This appearance of support for reproductive choice was potentially fatal for the candidate's chances. *See* DEVINS, *supra* note 170, at 105.

176. *See id.* at 107-08 (detailing numerous Reagan appointees who "came from the right-to-life movement," and describing how "the [H.W.] Bush and Clinton administrations ... followed the Reagan model").

177. *See id.* at 109-11; Johnsen, *Functional Departmentalism*, *supra* note 74, at 137, 141-42.

178. *See* DEVINS, *supra* note 170, at 113-17 (describing, inter alia, the Reagan Administration's funding restrictions for clinics that provided abortion-counseling and, post-*Casey*, the Clinton Administration's dissolution of those Reagan-era regulations).

179. 462 U.S. 416 (1983).

180. Brief for the United States as Amicus Curiae Supporting Petitioners, Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1982) (No. 81-746); *see* Johnsen, *Functional Departmentalism*, *supra* note 74, at 137.

181. *See* DEVINS, *supra* note 170, at 110-11.

several state-level actions to stimulate discussion on the subject in the hopes of eventually overruling *Roe*.[182] These wide-ranging efforts from Presidents Reagan and George H.W. Bush were reflected in subsequent Supreme Court decisions. In *Casey*,[183] the joint opinion authored by Reagan- and Bush-appointed Justices adopted the "undue burden"[184] standard that Solicitor General Lee had urged a decade earlier.[185] Although *Casey* did not overturn *Roe* entirely, it did scale back the standard of review, diluting protections for reproductive rights.[186]

F. Guns

Since the 1980s, presidential administrations have used constitutional interpretations to lay the groundwork for, and ultimately realize, an interpretation of the Second Amendment providing for an individual right to bear arms. An early example of that effort took place in 1984, when President Ronald Reagan remarked at a campaign rally "that law-abiding people who want to protect their home and family have a constitutional right to own guns."[187] Under the direction of Attorney General Edwin Meese, the Reagan Administration championed the rights of individuals to keep and bear arms under the Second Amendment as well as a number of other traditionally conservative causes.[188] Through DOJ directives,

182. *Id.* at 110.

183. 505 U.S. 833 (1992).

184. *Id.* at 877.

185. *See* Johnsen, *Functional Departmentalism*, *supra* note 74, at 137.

186. Johnsen and Devins disagree on whether *Casey* reduced the salience of abortion as a political issue, leading to more subdued executive action. Devins suggests that the political branches respected the legitimacy of the *Casey* decision, which tempered the salience of abortion as a political issue. *See* DEVINS, *supra* note 170, at 119-20 ("With the Supreme Court carving out a middle-ground position on abortion in *Planned Parenthood v. Casey*, the White House has little to gain by staking out a hard-line position on abortion.") Johnsen, however, draws attention to a number of problems with the restrictions the Court has upheld, indicating that the issue remains live. Johnsen, *Functional Departmentalism*, *supra* note 74, at 135 n.118.

187. Remarks at a Republican Campaign Rally in Mesquite, Texas, 2 PUB. PAPERS 1461, 1463 (Nov. 5, 1988); *see also* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 222 (2008) (discussing the executive's efforts to promote individual constitutional rights under the Second Amendment).

188. *See* Siegel, *supra* note 187, at 221-22; *see also* Johnsen, *Ronald Reagan and the Rehnquist Court*, *supra* note 159, at 387-91.

as well as a strategy to carefully select judicial appointees who were partial to the administration's view of the Second Amendment,[189] President Reagan helped to lay a groundwork that was later advanced through the concerted efforts of President George W. Bush, whose Administration successfully promoted the expansion of an individual right to bear arms[190] that paved the way[191] for the Supreme Court's 2008 decision in *District of Columbia v. Heller*.[192]

While prior administrations took differing approaches to Second Amendment interpretations,[193] the Bush Administration waged a push for an individual rights interpretation of the Second Amendment in May 2001 when then-Attorney General John Ashcroft wrote a letter to the National Rifle Association of America indicating that the Bush Administration might support such an interpretation of the Second Amendment.[194] The move represented a marked shift from that of prior administrations.[195] During the lead up to *Heller*,

189. Siegel, *supra* note 187, at 220.

190. GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW 126-27 (Gregg Lee Carter ed., 2d ed. 2012). Among the more notable efforts to liberalize gun rights by President Bush are (1) his "deflect[ion of] calls to implement a nationwide ballistic fingerprinting system" during the search for the D.C. sniper in 2002; (2) his focus on the passage of a "federal law that would indemnify gun manufacturers and sellers from lawsuits," which was passed in 2005; and (3) his failure to pressure House Republicans to reinstate the expiring Federal Assault Weapons Ban in 2004, despite public support for the ban and campaign promises to renew it. *Id.* However, in 2008 Bush did sign into law the National Instant Criminal Background Check System Improvement Act after public calls and "bipartisan [support for] legislation aimed at preventing the mentally ill from purchasing guns" emerged in the wake of the deadly 2007 shooting at Virginia Polytechnic Institute and State University. *Id.* at 127; *see also* Robert J. Spitzer, *Gun Law, Policy, and Politics*, 84 N.Y. ST. B.J. 35, 36 (2012) ("The second Bush presidency proved itself to be, in policy terms, the most gun-friendly presidency in history.... What is remarkable about Bush and gun control ... is the extent to which the administration put itself out, not only in its political stands on the issue but in the administration's policy toward law-related matters pertaining to the gun issue, where the administration adhered to the NRA line with near-total devotion.").

191. *See* GUNS IN AMERICAN SOCIETY, *supra* note 190, at 126-27.

192. 554 U.S. 570 (2008).

193. *See* Memorandum from the Attorney General to All United States' Attorneys, Regarding *United States v. Emerson* 1, 2, 6 (Nov. 9, 2001), *available at* http://www.justice.gov/olc/secondamendment2.pdf. Prior to the Bush Administration's novel interpretations, DOJ had generally interpreted the amendment narrowly, "opposing efforts to create an individual right to acquire and possess firearms for private use." Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. KY. L. REV. 705, 707 (2002).

194. Nosanchuk, *supra* note 193, at 707-08.

195. *See id.* at 710 (noting that the letter represented a "dramatic departure from past policy" and "flatly contradicted the Department's concurrent position in pending litigation");

lawyers began citing the Bush Administration's stance on the Second Amendment as a basis to dismiss weapons charges against their clients[196] and to "assert[] Second Amendment defenses to gun charges."[197]

Bush's gun rights record proved to be an asset in his 2004 reelection campaign;[198] after winning reelection, he appointed John Roberts and Samuel Alito to the Supreme Court, both of whom proved important in securing the Second Amendment interpretation the Bush Administration favored.[199] In *District of Columbia v. Heller*, the Court adopted the individual rights interpretation and struck down a gun regulation for the first time.[200]

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id. ("This dissonance between the Letter and the Department's longstanding policy and litigation positions, the substantive flaws in the Letter, and the process by which the Letter was produced suggest that Attorney General Ashcroft was acting to legitimize a pro-gun canon when he wrote to the NRA, not institutionalizing the policy agenda of the President through legitimate means.") (citations omitted); *see also* Spitzer, *supra* note 190, at 36-37 ("The letter was remarkable for several reasons: (1) it represented an offhanded, informal, and political means to articulate and inaugurate what proved to be an abrupt and total about-face in decades of Justice Department policy on the meaning of the Second Amendment; (2) the letter's arguments contradicted more than a century of federal court rulings that had uniformly rejected the view embraced by Ashcroft; (3) the evidence and sources cited in the letter to support Ashcroft's claim did no such thing; and (4) the letter failed to cite the most important sources explaining what the right to bear arms does mean. Yet it represented the initial political and legal charge to reinterpret the Second Amendment—an effort that met with success in 2008.") (citations omitted).

196. Margaret E. Sprunger, Comment, *D.C. as a Breeding Ground for the Next Second Amendment Test Case: The Conflict Within the U.S. Attorney's Office*, 53 CATH. U. L. REV. 577, 577 n.2 (2004).

197. Clark Neily, District of Columbia v. Heller*: The Second Amendment Is Back, Baby*, 2008 CATO SUP. CT. REV. 127, 134.

198. *See* David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 130 ("In 2004, John Kerry came closer to defeating an incumbent President in wartime than had any candidate since DeWitt Clinton in 1812. As with Gore, Kerry's Second Amendment record cost him the Presidency."). Shortly before the 2004 Presidential election, DOJ reaffirmed its individual rights interpretation in an opinion from the Office of Legal Counsel. *See* John Zulkey, *The Obsolete Second Amendment: How Advances in Arms Technology Have Made the Prefatory Clause Incompatible with Public Policy*, 2010 U. ILL. J.L. TECH. & POL'Y 213, 219.

199. *See* Kopel, *supra* note 198, at 130; *see also* David B. Kopel, *The Great Gun Control War of the Twentieth Century—and Its Lessons for Gun Laws Today*, 39 FORDHAM URB. L.J. 1527, 1605 (2012) ("That President Bush, rather than President Kerry, appointed the Justices to replace William Rehnquist and Sandra Day O'Connor turned out to make all the difference a few years later in *Heller*.").

200. 554 U.S. 570, 581, 635 (2008); *see* Spitzer, *supra* note 190, at 37.

In *Heller*, Bush's Solicitor General Paul Clement supplied an amicus brief that advocated for a Second Amendment right to bear arms.[201] The Clement brief also put DOJ in the somewhat awkward position of questioning a federal statute in the form of a District of Columbia gun-control measure.[202] In the end, *Heller* represented a huge victory for the Bush Administration that has proved to be quite durable; during the 2008 election, both presidential candidates eagerly declared their support for the *Heller* decision.[203] In 2010, the Supreme Court reaffirmed its interpretation of the individual right to bear arms by applying the rule against the states through the Fourteenth Amendment's Due Process Clause.[204] *Heller* exemplifies how the Bush Administration capitalized on a vibrant social movement and academic writing[205] to mount a successful campaign that implemented a vision of the Second Amendment right that shifted dramatically from prior administrations.

III. PRESIDENTIAL CONSTITUTIONALISM AND GAY RIGHTS

Barack Obama, for his part, has been a staunch supporter of the rights of LGBT individuals and same-sex couples. Among his various efforts to promote LGBT equality, Obama's refusal to defend DOMA represents one of the more controversial policy decisions of his first term. While the Obama Administration originally defended DOMA in the handful of suits it inherited from the second Bush Administration,[206] it changed course shortly after *Windsor* was filed

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201. *See* Neily, *supra* note 197, at 145 (noting, however, that Clement's brief maintained that the individual right to bear arms is still subject to "reasonable regulation," which may have come as a disappointment to those in the Bush Administration who sought even stricter protections of Second Amendment rights).

202. *See* Meltzer, *supra* note 40, at 1206-07 (questioning "the appropriateness of the Department of Justice's taking a position in an amicus brief that would call into question the validity of one or more federal statutes").

203. *See* Kopel, *supra* note 198, at 132.

204. *See* McDonald v. Chicago, 130 S. Ct. 3020, 3050 (2010); *see also* Spitzer, *supra* note 190, at 38.

205. *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 688 (2009) (noting, during the 1980s, "an explosion in the number of academic arguments addressing the Second Amendment generally and advocating the individual rights view specifically").

206. *See, e.g.*, Memorandum of Law in Support of Defendants' Motion to Dismiss at 1, Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 109-CV-10309-JLT).

in district court, announcing on February 23, 2011[207] that it would no longer defend the constitutionality of the statute based on its conclusion that the federal courts should accord heightened scrutiny to all laws facially discriminating on the basis of sexual orientation.[208] The Administration would continue to enforce the statute unless it were legislatively repealed or "the judicial branch render[ed] a definitive verdict against the law's constitutionality," but it would not defend it in court.[209] This enforce-but-not-defend policy was one of the hallmarks of Barack Obama's commitment to the rights of same-sex couples.

President Obama's nondefense of DOMA was part and parcel of a years-long campaign to advance LGBT rights in which he often personally championed equality for same-sex couples. His commitment to this principle included not only refusing to defend DOMA, but also supporting and signing legislation,[210] pursuing regulatory

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207. *See* Holder Letter, *supra* note 25.

208. One reason for the apparent shift was that, although all of the litigation had previously been filed in judicial circuits that had explicitly ruled against applying any form of heightened judicial scrutiny to laws discriminating on the basis of sexual orientation, *Windsor*, and a second case, *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012), were filed in judicial districts within the Second Circuit, which had yet to rule on the question of heightened scrutiny. Those cases therefore provided the Administration with an opportunity to argue the threshold constitutional question as well as the discrete issue regarding DOMA's constitutionality. *See* Holder Letter, *supra* note 25. On October 18, 2012, the Second Circuit ruled that heightened scrutiny applied to all sexual-orientation-based classifications and that DOMA Section 3 did not satisfy that standard of review. Windsor v. United States, 699 F.3d 169, 181-88 (2d Cir. 2012). This was the first time a federal appeals court applied heightened scrutiny to the issue of gay rights.

209. Holder Letter, *supra* note 25.

210. President Obama has signed three major pieces of legislation affecting gay rights: (1) the repeal of the Don't Ask, Don't Tell policy, Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010); (2) the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2835, 2839 (2009) (codified in scattered sections at 18 U.S.C., 28 U.S.C., and 42 U.S.C.), which expanded hate-crimes protections to victims of crimes motivated by gender identity, sexual orientation, or disability; and (3) the Ryan White HIV/AIDS Treatment Extension Act of 2009, Pub. L. No. 111-87, 123 Stat. 2885, 2888 (2009) (codified in scattered sections at 42 U.S.C.), which extended the Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, 104 Stat. 576 (1990), through the 2013 fiscal year and authorized a 5 percent increase in federal funding for the Ryan White programs. In addition to the measures he signed into law, the President pressed Congress for employment non-discrimination legislation, legislation prohibiting LGBT discrimination in public schools, and DOMA repeal. *See* Employment Non-Discrimination Act of 2011, S. 811, 112th Cong.; Student Non-Discrimination Act of 2011, H.R. 998, 112th Cong.; Respect for Marriage Act of 2011, S. 598, 112th Cong.; H.R. 1116, 112th Cong.

initiatives,[211] filing complaints and other court papers,[212] making formal and informal choices in law enforcement,[213] and using the bully pulpit to sway public opinion.[214] These acts, considered as a whole, reflect ways that the executive engaged the judiciary in a dialogue about constitutional interpretation and legal change that neither branch was likely to bring about on its own.

A. Gay Rights and Administrative Law

For years, DOMA prevented the federal government from granting marriage-based benefits to married same-sex couples. However, the Obama Administration—by interpreting laws other than DOMA—expanded relationship benefits to married and unmarried same-sex couples in employment, housing, health care, and immigration.[215] Through a series of presidential memoranda,[216] the federal government extended employment-based benefits to the same-sex domestic partners of federal employees (and in some cases to the children of those partners)[217] and to the same-sex domestic partners of foreign-service employees.[218] The Administration also

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211. *See infra* Part III.A.

212. *See infra* Part III.B.

213. *See infra* Part III.C.

214. *See infra* Part III.D.

215. *See* Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619, 624-27 (2012).

216. *See* Memorandum from President Barack Obama for the Heads of Executive Departments and Agencies on Extension of Benefits to Same-Sex Domestic Partners of Federal Employees, 75 Fed. Reg. 32,247, 32,247-48 (June 2, 2010) [hereinafter Memorandum on Extension of Benefits]; Memorandum from President Barack Obama for the Heads of Executive Departments and Agencies on Federal Benefits and Non-Discrimination, 74 Fed. Reg. 29,393 (June 17, 2009); Memorandum from President Barack Obama for the Secretary of Health and Human Services on Respecting the Rights of Hospital Patients to Receive Visitors and to Designate Surrogate Decision Makers for Medical Emergencies, 75 Fed. Reg. 20,511, 20,511-12 (Apr. 15, 2010) [hereinafter Memorandum on Respecting the Rights].

217. *See* Memorandum on Extension of Benefits, *supra* note 216, at 32,247. The memorandum states that: (1) the children of same-sex partners fall within the definition of "child" for federal child care subsidies; (2) same-sex domestic partners qualify as "family members" under employee assistance programs and other programs; (3) a same-sex partner of a federal retiree can receive annuities upon the death of the federal retiree; (4) employees' same-sex partners and children are dependents for purposes of evacuation payments; and (5) federal employees can receive unpaid leave in order to meet the needs of their same-sex partners or the children of their same-sex partner. *See id.* at 32,247-48.

218. *See* Press Release, Hillary Rodham Clinton, Sec'y of State, Benefits for Same-Sex

enhanced hospital visitation rights for same-sex couples,[219] broadened its interpretation of the Violence Against Women Act to include victims of same-sex gender-motivated violence,[220] expanded Family Medical Leave Act protections to the children of an employee's same-sex partner,[221] and enlarged fair housing protections to prohibit sexual-orientation-based discrimination.[222]

Domestic Partners of Foreign Service Employees (June 18, 2009), *available at* http://www.state.gov/secretary/20092013clinton/rm/2009a/06/125083.htm. The Department of State implemented this policy by changing the Foreign Affairs Manual—followed by U.S. consulates around the world—so that same-sex domestic partners would qualify as "eligible family members" with respect to benefits and allowances. *See* U.S. Dep't of State, 14 Foreign Affairs Manual § 511.3 (2013).

219. *See* Memorandum on Respecting the Rights, *supra* note 216, at 20,511-12; *see also* Medicare and Medicaid Programs: Changes to the Hospital and Critical Access Hospital Conditions of Participation to Ensure Visitation Rights for All Patients, 75 Fed. Reg. 70,831, 70,831-32 (Nov. 19, 2010) (to be codified at 42 C.F.R. pts. 482, 485).

220. *See* Whether the Criminal Provisions of the Violence Against Women Act Apply to Otherwise Covered Conduct When the Offender and the Victim are the Same Sex, 34 Op. O.L.C. 1, 3-7 (2010); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

221. *See* Letter from Nancy J. Leppink, Deputy Adm'r, Dep't of Labor, Administrator's Interpretation No. 2010-3 (June 22, 2010), *available at* http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm; *see also* Press Release, Dep't of Labor, U.S. Department of Labor Clarifies FMLA Definition of 'Son and Daughter' (June 22, 2010), *available at* http://www.dol.gov/opa/media/press/WHD/WHD20100877.htm.

222. *See* Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662, 5663, 5666 (Feb. 3, 2012) (to be codified at 24 C.F.R. pts. 5, 200, 203, 236, 400, 570, 574, 882, 891, 982). The rule requires owners and operators of HUD-assisted facilities to make housing available without regard to sexual orientation or gender identity; prohibits lenders from using sexual orientation or gender identity as a basis to determine a borrower's eligibility for FHA-insured mortgage financing; and clarifies that all otherwise eligible families cannot be excluded from participating in HUD programs. *See* Press Release, U.S. Dep't of Hous. and Urban Dev., HUD Secretary Donovan Announces New Regulations to Ensure Equal Access to Housing for All Americans Regardless of Sexual Orientation or Gender Identity (Jan. 30, 2012), *available at* http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2012/HUDNo.12-014; *see also HUD Announces New LGBT Regulations*, HOUS. AGENT MAG. (Jan. 31, 2012), http://houstonagentmagazine.com/hud-announces-new-lgbt-regulations/. The announced rule followed a January 24, 2011 proposed rule, which cited evidence that LGBT individuals and families were unfairly and arbitrarily excluded from housing opportunities in the private sector. *See* Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity, 76 Fed. Reg. 4194, 4194-97 (proposed Jan. 24, 2011). HUD continues to demonstrate its commitment to equal housing access for same-sex couples: in response to a recent study released by HUD showing that same-sex couples still experience unequal treatment more frequently than heterosexual couples when responding to rental advertisements, HUD Secretary Shaun Donovan remarked, "Following the president's lead, HUD has taken historic steps in the area of fair housing to ensure that we fulfill our nation's commitment to equality.

In the immigration context, the Obama Administration adopted new rules allowing couples returning from overseas travel to file a single customs declaration form[223] and facilitated the process of extending the immigration status of the same-sex partners accompanying nonimmigrants[224] to the United States.[225] The Obama Administration also reversed a previous Bush Administration policy regarding the compilation of Census data that refused to recognize the existence of married same-sex couples. Under the former policy, the Bush Administration would "edit" responses to Census survey questions by changing the designation in which a respondent indicated a same-sex husband or wife living within the same household from "married" to "unmarried partners" instead.[226]

As this study shows, we need to continue our efforts to ensure that everyone is treated the same when it comes to finding a home to call their own, regardless of their sexual orientation." Press Release, U.S. Dep't of Hous. and Urb. Dev., HUD Announces First-Ever Same-Sex Housing Discrimination Study (June 18, 2013), *available at* http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2013/HUDNo.13-096.

223. On March 27, 2012, U.S. Customs and Border Protection, a division of the Department of Homeland Security (DHS), announced that it would broaden the definition of family to include "two adult individuals in a committed relationship wherein the partners share financial assets and obligations, and are not married to, or a partner of, anyone else, including, but not limited to, long-time companions, and couples in civil unions or domestic partnerships." Members of a Family for Purpose of Filing a CBP Family Declaration, 77 Fed. Reg. 18,143, 18,144 (proposed Mar. 27, 2012). The proposed change was intended to "more accurately reflect relationships among members of the public who are traveling together as a family." *Id.*

224. A "nonimmigrant" is a foreign national who comes to the United States for a temporary period and for a specific purpose, such as a foreign government official, student, or temporary worker. *See* 8 U.S.C. § 1101(a)(15) (2012).

225. Although applicants were able to seek extensions in increments of six months from DHS for as long as the principal continued to maintain his or her nonimmigrant status, *see* 8 C.F.R. § 214.2(b)(1) (2011), such extensions were often difficult to obtain. Beginning in 2011, U.S. Citizenship and Immigration Services issued a memorandum advising immigration enforcers to consider a nonimmigrant's cohabitating partnership as a "favorable factor" when granting extensions of the visitor's status. *See* Policy Memorandum, U.S. Citizenship and Immigration Servs., Dep't Homeland Sec., Changes to B-2 Status and Extensions of B-2 Status for Cohabitating Partners and Other Nonimmigrant Household Members (Aug. 7, 2011), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/2011/August/Cohabitating_Partners_PM_081711.pdf ("When evaluating an application for change to or extension of B-2 status based on cohabitation, the cohabitating partner's relationship to the nonimmigrant principal alien in another status will be considered a favorable factor in allowing the household member to obtain or remain eligible for B-2 classification.").

226. Memorandum from Cameron F. Kerry, Gen. Counsel of the United States Dep't of Commerce, to the Sec'y on Collecting and Reporting Census Data Relating to Same-Sex

The Obama Administration initiated a series of additional developments for LGBT individuals including prohibiting job discrimination based on gender identity throughout the federal government;[227] interpreting the gender-based employment discrimination protections of the 1964 Civil Rights Act to apply to transgender individuals;[228] permitting military chaplains to officiate at same-sex weddings in states that recognize the right of same-sex couples to marry;[229] and adding an LGBT representative to the diversity program at each of the 120 prisons the Federal Bureau of Prisons operates.[230]

President Obama also took quick action after *Windsor* by directing his Cabinet "to review all relevant federal statutes" and implement the decision "swiftly and smoothly."[231] Shortly after the ruling, federal agencies announced that same-sex married

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Marriages (July 30, 2009), *available at* http://hunterofjustice.com/files/census-gc-doma-memo.pdf. Under an earlier 1990 policy, the Census Bureau's practice had been to change the designated sex of the individual described as "husband or wife" of a respondent "to reflect the opposite sex from that of the respondent." *See id.* The new policy will not go into effect until the 2020 Census, however. *See, e.g.*, *Census Will Not Count Married Gays Until 2020*, GAY POLITICS (Oct. 23, 2009), http://gaypolitics.com/2009/10/23/census-will-not-count-married-gays-until-2020/ (noting the Census Bureau press release).

227. *See* OFFICE OF PERSONNEL MGMT., GUIDANCE REGARDING THE EMPLOYMENT OF TRANSGENDER INDIVIDUALS IN THE FEDERAL WORKPLACE, *available at* http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/; *see also* Press Release, ACLU, Administration Adds Gender Identity to Equal Employment Opportunity Policies (Jan. 5, 2010), *available at* https://www.aclu.org/lgbt-rights/administration-adds-gender-identity-equal-employment-opportunity-policies. This addition brings the federal government in line with many state and private employer policies banning discrimination based on gender identity or sexual orientation. *See, e.g.*, *Non-Discrimination Laws: State by State Information-Map*, ACLU (Sept. 21, 2011), http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map.

228. *See* Macy v. Holder, No. 0120120821, 2012 WL 1435995, at *1 (E.E.O.C. Apr. 20, 2012) (extending Title VII to cover gender identity, change of sex, and transgender status).

229. *Military Chaplains Now Allowed to Perform Same-Sex Marriages*, NBCNEWS.COM (Sept. 30, 2011, 11:45 AM), http://www.nbcnews.com/id/44730793/ns/politics/t/military-chaplains-now-allowed-perform-same-sex-marriages/#.Uh-Lhz_3Pdc.

230. Trudy Ring, *Federal Prisons to Address LGBT Employees' Concerns*, ADVOCATE.COM (May 3, 2012, 9:36 PM), http://www.advocate.com/society/2012/05/03/lgbt-prison-employees-get-representation. The new addition is meant to ensure that LGBT employees of federal prisons receive adequate support, and each participating prison facility will host one staff event per year that focuses on LGBT issues. *See id.*

231. Press Release, President Barack Obama, Statement by the President on the Supreme Court Ruling on the Defense of Marriage Act (June 26, 2013), *available at* http://www.whitehouse.gov/doma-statement.

couples—irrespective of domicile—would receive the same federal benefits as different-sex couples in the processing of tax, Social Security, military, and other federal benefits.[232] Months after *Windsor*, the Obama Administration issued a broad memorandum extending the ruling to a number of additional contexts including bankruptcy law, prison visitations, and various benefits programs such as the September 11th Victims Compensation Fund.[233] The President also refused to enforce two provisions of federal law after *Windsor* that prevented veterans in same-sex relationships, as well as some similarly situated active-duty servicemembers and reserve members, from receiving certain benefits.[234]

B. Gay Rights Litigation

In the DOMA litigation, the Obama Administration advanced powerful arguments supporting heightened scrutiny that documented a history of governmental discrimination against LGBT persons.[235] Outside the DOMA context, the Obama Administration intervened in a number of anti-bullying lawsuits brought by private individuals against public school districts, including one case against Minnesota's Anoka-Hennepin School District for frequent acts of harassment against gender-non-conforming students.[236] DOJ

232. *See, e.g.*, Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (IRS ruling using the place of celebration rule for income, estate, and gift tax); Press Release, Dep't of Justice, Attorney General Holder Announces Move to Extend Veterans Benefits to Same-Sex Married Couples (Sept. 4, 2013), *available at* http://www.justice.gov/opa/pr/2013/September/13-ag-991.html; Press Release, Dep't of Defense, Further Guidance on Extending Benefits to Same-Sex Spouses of Military Members (Aug. 13, 2013), *available at* http://www.defense.gov/home/features/2013/docs/Further-Guidance-on-Extending-Benefits-to-Same-Sex-Spouses-of-Military-M.pdf; Press Release, Carolyn W. Colvin, Comm'r of Social Security, Statement of Carolyn W. Colvin, Acting Commissioner of Social Security, on Payments to Same-Sex Couples (Aug. 9, 2013), *available at* http://www.ssa.gov/pressoffice/pr/doma-statement-pr.html.

233. *See* Memorandum from Eric H. Holder, Jr., Att'y Gen., to All Dep't Emp., Department Policy on Ensuring Equal Treatment for Same-Sex Married Couples (Feb. 10, 2014), *available at* www.justice.gov/iso/opa/resources/ss-married-couples-ag-memo.pdf.

234. *See* Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Sept. 4, 2013), *available at* http://www.justice.gov/iso/opa/resources/557201394151530910116.pdf.

235. *See* United States v. Windsor, 133 S. Ct. 2675, 2683 (2013).

236. *See* Complaint-in-Intervention at 21-22, Doe v. Anoka-Hennepin Sch. Dist. No. 11, No. 0:11-cv-01999-JNE-SER (D. Minn. Mar. 5, 2012), ECF No. 67, *available at* http://www.justice.gov/crt/about/edu/documents/anokacompint.pdf.

also intervened in a lawsuit against the Mohawk Central School District for failing to prevent in-school incidents of gender-based bullying.[237] In another case, the Obama Administration reached a settlement agreement with the Tehachapi Unified School District in Tehachapi, California, to resolve an investigation into acts of harassment against a gender-non-conforming middle-school student who committed suicide after being subjected to repeated incidents of sex-based harassment.[238]

In the fair housing context,[239] the Obama Administration entered into a settlement agreement with Bank of America to resolve a claim that the bank had denied financing to a Florida couple based on sexual orientation and marital status.[240] The Administration also settled a dispute by agreeing to issue full severance pay to servicemembers discharged under the now-repealed Don't Ask, Don't Tell law.[241]

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237. *See* Memorandum of Law in Support of the United States' Motion to Intervene at 1, 3, J.L v. Mohawk Cent. Sch. Dist., No. 6:09-CV-943 (N.D.N.Y. Jan. 14, 2010), ECF No. 32, *available at* http://www.justice.gov/crt/about/edu/documents/mohawkmotion.pdf. Shortly after DOJ sought to intervene, the federal government, the school district, and the plaintiff reached a settlement agreement requiring the school district to undertake major initiatives to monitor and prevent gender-based harassment. *See* Stipulation and Settlement Agreement at 2-4, J.L. v. Mohawk Cent. Sch. Dist., No. 6:09-CV-943 (N.D.N.Y. Mar. 29, 2010), ECF No. 34, *available at* http://www.justice.gov/crt/about/edu/documents/mohawksettle.pdf.

238. *See* Press Release, Dep't of Justice, Departments of Justice and Education Reach Agreement with Tehachapi, California, Public School to Resolve Harassment Allegations (July 1, 2011), *available at* http://www.justice.gov/opa/pr/2011/July/11-crt-872.html. The terms of the agreement require the Tehachapi school district to take various steps "to prevent sexual and gender-based harassment at all of its schools, to respond appropriately to harassment that occurs and to eliminate the hostile environment resulting from harassment." *Id.*

239. *See also supra* notes 215, 222 and accompanying text.

240. *See* Press Release, U.S. Dep't of Hous. and Urb. Dev., HUD Announces Agreement with Bank of America to Settle LGBT Discrimination Claim (Jan. 2, 2013), *available at* http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2013/HUDNo.13-001. The settlement required Bank of America to pay $7500 to HUD; notify its residential mortgage loan originators, processors, and underwriters of the settlement; remind its employees that they are "prohibited from discriminating against FHA-loan applicants on the basis of sexual orientation, gender identity or marital status;" and "update its fair lending training program to include information on HUD's rule." *Id.*

241. *See* Settlement Agreement at 2, Collins v. United States, No. 10-778C (Fed. Cl. Jan. 7, 2013), ECF No. 75, *available at* https://www.aclu.org/lgbt-rights/collins-v-united-states-settlement-agreement ("Plaintiffs have agreed to settle this case in exchange for payment by the United States of one-hundred percent of the one-half separation pay sought by the class, subject to any offsets and excluding interest.").

C. Law Enforcement Discretion

Both before and after *Windsor*, the Obama Administration exercised its discretion in law enforcement to improve the lives of LGBT individuals and same-sex couples. The Administration used prosecutorial discretion in immigration to protect the foreign-born partners and spouses of U.S. citizens from facing removal from the United States. In one notable case, the Attorney General issued a precedential ruling[242] that had important cascading effects for many other foreign nationals in similar situations, resulting in the postponement (and, eventually, termination) of removal proceedings against many who, prior to *Windsor*, had no opportunity for a family-based immigration benefit and no other way of stopping their deportations.[243] In October 2012, the Obama Administration also issued guidance directing immigration field officers to consider granting favorable exercises of prosecutorial discretion to the foreign-national partners and spouses of U.S. citizens.[244] Shortly after *Windsor*, Secretary Napolitano announced that the immigration agencies would begin to process permanent residency applications without delay.[245] Within two days of the ruling, the press was already reporting that green cards had been granted to foreign national spouses of U.S. citizens, including in states that do not recognize the freedom of those couples to marry.[246] These actions were reflective of the Obama Administration's general commitment to implement *Windsor* swiftly and speedily.

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242. *See* Dorman, 25 I. & N. Dec. 485, 485 (A.G. 2011).

243. *See* Landau, *supra* note 215, at 640.

244. *See* Memorandum from Gary Mead, Exec. Assoc. Dir., U.S. Immigration & Customs Enforcement, Peter S. Vincent, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, and James Dinkins, Exec. Assoc. Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Chief Counsel, and All Special Agents in Charge (Oct. 5, 2012), *available at* http://www.washingtonblade.com/content/files/2012/10/9-Oct-12-PD-and-Family-Reltionships.pdf.

245. Press Release, Janet Napolitano, Former Sec'y of Homeland Sec., Dep't of Homeland Sec., Implementation of the Supreme Court Ruling on the Defense of Marriage Act (July 1, 2013), *available at* http://www.dhs.gov/news/2013/07/01/statement-secretary-homeland-security-janet-napolitano-implementation-supreme-court.

246. *See, e.g.*, Julia Preston, *Gay Married Man in Florida is Approved for Green Card*, N.Y. TIMES, June 30, 2013, at A11.

D. Support for the Freedom to Marry

Barack Obama is the first sitting President to announce support for the right of same-sex couples to marry.[247] The President made the announcement during an interview with ABC News on May 9, 2012.[248] Although some viewed Obama's stance as potentially endangering his 2012 reelection bid, his position appeared to aid his electoral victory while also galvanizing support for same-sex marriage from important constituencies.[249] His announcement further paved the way for successful initiative processes that year in Maine, Maryland, and Washington[250] as well as successful legislative efforts in Delaware, Minnesota, and Rhode Island[251] and, in the wake of *Windsor*, additional legislative and judicial developments in Hawaii, Illinois, New Jersey, and New Mexico.[252] The

247. *See* Jackie Calmes & Peter Baker, *Obama Endorses Same-Sex Marriage, Taking Stand on Charged Social Issue*, N.Y. TIMES, May 10, 2012, at A1.

248. *See id.* at A17. Prior to this announcement, in 2011, President Obama and Secretary of State Hillary Rodham Clinton pledged to "use all the tools of American diplomacy, including the potent enticement of foreign aid," to promote gay rights and "combat efforts by other nations that criminalize homosexual conduct." Steven Lee Myers & Helene Cooper, *U.S. to Aid Gay Rights Abroad, Obama and Clinton Say*, N.Y. TIMES, Dec. 7, 2011, at A4.

249. According to a number of polls conducted in 2012, President Obama's support for the freedom to marry influenced African-American voters' views of that issue. One report in particular found African-American support for same-sex marriage at 59 percent after the President's announcement, compared with 41 percent beforehand. *See* Scott Clement & Sandhya Somashekhar, *Opposition to Gay Marriage Hits a Low*, WASH. POST, May 23, 2012, at A3. A second report conducted in mid-September 2012 found that 44 percent of black voters were in favor of same-sex marriage, up from 33 percent in January 2012. William Selway, *Black Shift on Maryland Gay Marriage Pits Clergy Against NAACP*, BLOOMBERG NEWS (Oct. 19, 2012), http://www.businessweek.com/news/2012-10-19/black-shift-on-maryland-gay-marriage-pits-clergy-against-naacp. A late September 2012 poll for the *Baltimore Sun* showed a larger shift: more than half of black likely voters were in favor of the right of gay couples to marry, up from less than a third in March. *See id.*

250. *See* ME. REV. STAT. tit. 19-A, § 650-A (2011), *available at* http://www.mainelegislature.org/legis/statutes/19-a/title19-A.pdf; MD. CODE ANN., FAM. LAW § 2-201 (West 2013); WASH. REV. CODE § 24.04.010 (2012), *available at* http://apps.leg.wa.gov/rcw/default.aspx?cite=26.04.010#. Voters in a fourth state, Minnesota, rejected a referendum that would have limited marriage to opposite-sex couples. *See Same-Sex Marriage in Minnesota*, MINNESOTA LEGISLATIVE REFERENCE LIBRARY, http://www.leg.state.mn.us/lrl/issues/issues.aspx?issue=gay (last updated June 2013).

251. *See* DEL. CODE ANN. tit. 13, § 101 (West 2013); MINN. STAT. ANN. § 517.01 (West 2013); R.I. GEN. LAWS ANN. § 15-1-1 (West 2013).

252. Hawaii and Illinois both embraced the freedom to marry through legislation. Hawaii Marriage Equality Act of 2013, HAW. REV. STAT. § 572-17 (West 2013); Religious Freedom and Marriage Fairness Act, 750 ILL. COMP. STAT. ANN. 80/10 (West 2014). In New Jersey, after the

President's 2013 inauguration speech, which included allusions to Seneca Falls, Selma, and Stonewall, reaffirmed his commitment to LGBT equality by announcing that "[o]ur journey is not complete until our gay brothers and sisters are treated like anyone else under the law[.]"[253] At numerous turns, the President demonstrated himself to be "a proud partner in the journey toward LGBT equality."[254]

IV. PRESIDENTIAL CONSTITUTIONALISM AND THE ACTIVE VIRTUES

The Obama Administration's commitment to the principle of gay rights—including its nondefense of DOMA—provides a useful case study for thinking about presidential constitutionalism and its core features—authority, intent, and effect—outlined in Part I. Regarding presidential authority, there is little question that the Obama Administration's nondefense of DOMA falls within a long-standing, if sparingly used, presidential power not to defend (or, even more rarely, not to enforce) statutes the President believes are unconstitutional.[255] In terms of intent, the DOMA policy was coupled with a clear effort by the Administration to champion not only an outcome in the *Windsor* case and related litigation, but also a new constitutional rule applying heightened scrutiny to all forms of sexual-orientation-based discrimination.[256] In the end, the

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state supreme court denied the Christie Administration's request for a stay of a lower court decision directing the State of New Jersey to permit same-sex marriages beginning October 21, 2013, Garden State Equality v. Dow, 79 A.3d 1036, 1045 (N.J. 2013), the Administration decided not to appeal the lower court ruling. As a result, gay and lesbian couples are now able to marry in New Jersey. Kate Zernike & Marc Santora, *As Gays Marry in New Jersey, Christie Yields*, N.Y. TIMES, Oct. 22, 2013, at A1. On December 19, 2013, the New Mexico Supreme Court ruled in favor of the freedom to marry for same-sex couples. Griego v. Oliver, 316 P.3d 865, 871-72 (N.M. 2013).

253. *See* President Barack Obama, The White House, Inaugural Address (Jan. 21, 2013) (transcript available at http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama).

254. President Barack Obama, The White House, Presidential Proclamation—Lesbian, Gay, Bisexual, and Transgender Pride Month (May 31, 2013) (transcript available at http://www.whitehouse.gov/the-press-office/2013/06/03/presidential-proclamation-lgbt-pride-month).

255. *See supra* notes 47, 77.

256. Granted, the Obama Administration's interpretation did not come without its share of potential contradictions. While the Administration urged that the legislation be invalidated under a heightened scrutiny regime, it also stated that "[i]f asked ... for the position of the

Administration's constitutional argument did not bring about all of its intended effects: although the Second Circuit did adopt the Administration's position,[257] the Supreme Court paid little attention to the heightened scrutiny point in *Windsor* or in *Hollingsworth v. Perry*,[258] which it handed down on the same day. The *Windsor* Court instead applied ordinary rational basis review to assess DOMA's constitutionality and struck it down under that test.[259]

A. Nondefense of DOMA and the Scholarly Debate

Scholars and judges alike have expressed grave skepticism about the Obama Administration's enforce-but-not-defend policy,[260] with some of the leading criticisms coming from the Departmentalist camp. Although one might imagine *praise* for the Obama Administration's questioning of a law that undermines the President's best interpretation of the Constitution, adherents of Departmentalism contend that President Obama failed to follow through on his principles by, among other things, continuing to enforce DOMA after declaring it unconstitutional; championing heightened judicial scrutiny for laws that discriminate on the basis of sexual orientation; and allowing the Court to have the last word on DOMA's enforceability. Prakash, in an article co-authored with Neal Devins, rejects the Obama Administration's heightened scrutiny argument as "obscuring and, possibly sacrificing, the President's constitutional vision."[261] They argue that the President, rather than taking a position contingent on the heightened scrutiny argument, should

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United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard." Holder Letter, *supra* note 25.

257. Windsor v. United States, 699 F.3d 169 (2d Cir. 2012).

258. Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013). *Perry* was a constitutional challenge to California's Proposition 8, which denied same-sex couples the right to marry. The *Perry* Court ruled that Proposition 8's proponents, who intervened as defendants in the trial court proceedings, lacked standing to appeal the lower court opinion. *Id.* at 2662-68. The Court's standing ruling left intact the trial court decision invalidating Proposition 8.

259. 133 S. Ct. 2675, 2696 (2013) ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

260. *See, e.g.*, *supra* note 26 and accompanying text.

261. *See* Devins & Prakash, *supra* note 53, at 570.

have simply found that DOMA violated any standard of review.[262] Doing so would "have more forcefully articulated the constitutional, animus-based objections to the DOMA."[263] As Prakash writes elsewhere, the Obama Administration's policy amounted to a "sacrifice of constitutional principle at the altar of political expediency."[264] Once the President determined that "DOMA [was] unconstitutional, he should neither [have] enforce[d] nor defend[ed] it."[265]

Interestingly, Meltzer and Johnsen, both of whom typify middle-ground approaches to presidential constitutionalism, reach contrary conclusions where the nondefense of DOMA is concerned. Johnsen sees the policy as "consistent with executive branch precedent in a discrete category of historic cases involving the fundamental meaning of the constitutional guarantee of equal protection."[266] She embraces the President's effort to engage a litigation strategy around DOMA that reinforces his position on the issue of gay rights more broadly:

> I believe that a President may ... choose to tell the public and the courts what he actually believes to be true about the constitutional status of sexual orientation discrimination, one of the great defining civil rights issues of our day. A President may

262. *See id.* at 570-71. The authors critique the Obama Administration's constitutional position as wrongheaded because "the Supreme Court has twice declined to hold that discrimination against gays warrants heightened review and every circuit court that has ruled on the constitutionality of the DOMA has employed rational review." *Id.* at 570. That statement, however factually correct when it was made (but which is no longer true today), *see* Windsor v. United States, 699 F.3d 169 (2d Cir. 2012) (applying heightened scrutiny to invalidate DOMA Section 3), sounds more akin to Judicial Supremacy—namely that presidential constitutional interpretations should hew current precedent—than to Departmentalism.

263. Devins & Prakash, *supra* note 53, at 571. Prakash also argues that the Administration's heightened scrutiny argument conflicts with President Obama's May 2012 declaration that although he supports the freedom of gay couples to marry, he believes that the ultimate decision whether to recognize marriages should be left to the states. Prakash, *Missing Links*, *supra* note 54, at 554-55 ("[I]n reiterating his opposition to a federal constitutional amendment banning same-sex marriage, he insisted that the issue should be decided on a state-by-state basis and not be 'federalized.'") (citation omitted). Prakash argues that the President "cannot simultaneously conclude that DOMA is unconstitutional under existing equal protection doctrine and yet also imagine that the states may constitutionally refuse to permit or recognize same-sex marriage." *Id.* at 555.

264. *See* Prakash, *Missing Links*, *supra* note 54, at 556.

265. *See* Devins & Prakash, *supra* note 53, at 509 (citation omitted).

266. Johnsen, *Defend Constitutional Equality*, *supra* note 66, at 614.

> contribute to what he views as a rare and historic moment of advancement in the Court's understanding of constitutional equality for a disadvantaged group rather than defend a particular instance of discrimination against that group. The President, as the single nationally elected representative, is a particularly valuable participant in this historic constitutional debate about the meaning of equality in the United States—in a sense, about who constitutes "We the People."[267]

Although Meltzer credits the important role of prior administrations in promoting civil rights, he criticizes the Obama Administration's nondefense of DOMA. He argues, for example, that the Truman Administration's argument against all state-sponsored legal segregation in *Sweatt* and *McLaurin*, though in direct conflict with congressional statutes that appeared to mandate segregation in education,[268] was appropriate given the "exceptional case"[269] of race.[270] In the case of gender, Meltzer indicates that executive constitutionalism was appropriate in light of previous Supreme Court rulings that had outlawed gender stereotyping.[271] Once the Court applied heightened scrutiny to gender-based classifications, "defending each provision to the death until the Supreme Court struck it down would have been pointless."[272] But Meltzer understands the gay rights context somewhat differently. Although he finds DOMA "misguided, offensive, and quite possibly unconstitutional,"[273] he argues the statute neither infringed on Article II nor

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267. *Id.* at 615.

268. *See* Meltzer, *supra* note 40, at 1207 ("Various acts of Congress at least presupposed that the schools in the District of Columbia would be segregated, and the District of Columbia's brief in *Bolling v. Sharpe* took the view that these statutes mandated segregation.") (citations omitted); *see also* Johnsen, *Defend Constitutional Equality*, *supra* note 66, at 615 (noting that the Solicitor General's position in *Brown* and the pre-*Brown* cases "jeopardized the chances the Court would uphold a federal law segregating the schools in the District of Columbia").

269. *See* Meltzer, *supra* note 40, at 1230-31.

270. *Id.* (noting that racial discrimination is the "greatest deprivation of constitutional liberty—apart from slavery itself—that the United States has ever seen, one that included a virtually complete exclusion of the victims of discrimination from access to the political processes"). Further, he contends that segregation "critically affected national foreign-policy interests." *See id.* at 1231.

271. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973).

272. Meltzer, *supra* note 40, at 1194 (citing Easterbrook, *supra* note 47, at 914).

273. *See id.* at 1209.

was patently unconstitutional. Thus, DOMA did not satisfy the established DOJ criteria warranting presidential nondefense.[274] The Obama Administration's decision not to defend Section 3 thus undermined "the wisdom of the conventional practice of providing a defense even of statutes that the incumbent administration views as offensive and possibly invalid."[275]

Meltzer argues that the gay rights context implicates different constitutional and institutional concerns than race or gender.[276] In his opinion, neither the Obama Administration's commitment to heightened scrutiny for sexual-orientation-based discrimination, nor its view that the intervening years since passage of DOMA had undermined any "professionally responsible arguments" in its favor,[277] was a sufficient basis to refuse to defend the statute.[278] In short, the Obama Administration lacked a basis in the proper institutional or historically based justifications for presidential nondefense.[279]

On the question of race, Meltzer's argument is that the urgency of the constitutional wrongs prior to *Brown* required a change in the law and those wrongs were of a different magnitude than the urgencies presented by sexual orientation discrimination.[280] On the

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274. *See id.* at 1231-32.

275. *See id.* at 1186-87, 1208-27; *see also* Charles Fried, *The Solicitor General's Office, Tradition, and Conviction*, 81 FORDHAM L. REV. 549, 549 (2012) (lamenting the "quite unjustified decision of the Obama Justice Department and the Solicitor General's Office not further to defend DOMA").

276. *See* Meltzer, *supra* note 40, at 1189, 1230-32.

277. *See* Holder Letter, *supra* note 25.

278. *See* Meltzer, *supra* note 40, at 1213-21.

279. *See id.* at 1231-32 (noting that the decision not to defend DOMA lacked "features that might argue for permitting the executive to refuse to enforce or defend an act of Congress: DOMA was not passed over a presidential veto resting on a constitutional objection; the issue is not one—like military readiness—over which the president might be thought to have a special grant of constitutional authority and claim to expertise; the statute was not a relic from a different era, nor was it a brand new enactment that was quickly deemed to be indefensible; it had been defended by prior administrations, and the precedents regarding its constitutionality were anything but uniformly against the statute's validity; the refusal to defend did not involve a failure, after lower court decisions, to seek Supreme Court review, a situation that requires the solicitor general to consider the Court's limited docket; the constitutional question did not depend upon statutory implementation by an independent agency that the president could not control and that remained free to file its own brief in defense; and Congress did not overlook the constitutional question when passing the bill") (citations omitted).

280. *See id.* at 1231.

question of gender, there were Supreme Court precedents supporting presidential decisions not to enforce or defend statutes mandating discrimination,[281] something lacking in the gay rights context. Of course, it turned out that executive branch interpretations of equal protection in the gender context exceeded the Court's in at least one important case.[282] Moreover, it is not always so easy to distinguish between the implementation of the Court's prior rulings on the one hand, and promoting the President's own view of the Constitution's operative meaning on the other. After all, reasonable minds will disagree whether a prior Supreme Court decision necessarily controls a future case. As Frank Easterbrook has pointed out:

> Assuming the Court's opinions have generality and force beyond the parties, the President must have the ability to declare laws unconstitutional in the course of applying the governing rules. To apply the rules includes the power to interpret them.... If the President may go beyond a decision's four corners to implement "the principle" found there, he must have the ability to implement a principle even when others disagree with his interpretation.[283]

Easterbrook argues that "what counts as a 'similar' decision ... will depend on the level of generality selected, a question to which there is no right answer. To grant the President the power to generalize is to grant him the power to make independent constitutional decisions."[284]

From this perspective, presidential assessments of statutes discriminating on the basis of gender were not necessarily driven by mere implementations of prior rulings; these decisions rested on an exercise of independent executive judgment about constitutional meaning. Seen this way, the differences among the various presidential constitutional interpretations in the race, gender, and sexual orientation contexts may be less evident than otherwise believed.

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281. *See id.* at 1194.
282. *See supra* notes 126-32 and accompanying text.
283. Easterbrook, *supra* note 47, at 914.
284. *Id.*

In any event, comparing the precise doctrinal contexts surrounding race, gender, and sexual orientation may overlook other aspects of, and reasons for, presidential constitutionalism that can supply those acts with normative backing. Certainly, the President has a role in asserting constitutional wrongs he believes to be deep, urgent, and worthy of change. Moreover, considering the difficulty of assessing any given wrong at a given moment in time (for the wrongs of discrimination are often best understood in hindsight), it may be useful to evaluate a particular instance of presidential constitutionalism through the lens of his broader dedication to the particular principle at stake. In other words, rather than compare, for example, the President's nondefense of DOMA to acts of nondefense by prior presidents, it may be equally valuable to consider the policy in light of his commitment to ending discrimination against LGBT people and same-sex couples.[285]

The Obama Administration's nondefense of DOMA is rendered understandable, and more firmly grounded in coherent and transparent constitutional principle, when considered in conjunction with the range of his commitments to LGBT equality spanning marriage, employment, housing, health care, and education. These additional policies bolster the President's belief that the constitutional question regarding gay rights is sufficiently urgent to call into question the validity of a federal law. All of these acts are part of a presidential role in campaigning the coordinate branches—and, in the case of DOMA, the Supreme Court—to reach a similar conclusion. To borrow language from *Windsor*, once the President made a "principled determination" that DOMA was unconstitutional, his decision to undermine Congress, although "a difficult choice,"[286] was not only legitimate—but vital—to bring about a "definitive verdict [regarding] the law's constitutionality."[287]

Grounding individual acts of presidential constitutionalism within a given President's larger vision and commitment to principle helps address a concern about stopping points common to middle-ground theories. For example, Johnsen asks:

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285. *See supra* Part III.

286. United States v. Windsor, 133 S. Ct. 2675, 2689 (2013).

287. Holder Letter, *supra* note 25.

> [A]t what point does the executive branch hold a sufficiently firm view of a law's constitutional infirmity to trigger the duties? Upon an OLC determination reached in reviewing pending legislation that later passes? A Solicitor General determination reached in the course of litigation? Or with constitutional concerns voiced by the President in a signing statement?[288]

An inquiry into a President's broader commitment to principle helps address these questions about the proper limits to presidential constitutionalism. In the case of *Windsor*, the Obama Administration's policy fit squarely within a broader dedication to LGBT equality—which explains and legitimates that particular instance of constitutional interpretation. As a President and candidate, Obama campaigned vigorously on those issues, making his point of view increasingly clear and transparent. By using the bully pulpit to champion the issue of gay rights, his decision not to defend DOMA was bolstered by the comparative institutional advantages of his office—not the least of which were accountability and expertise.

B. The Normative Case for Undermining DOMA

While Departmentalists have charged the Obama Administration with putting expediency ahead of principle,[289] consider what might have occurred had the President decided simply to stop enforcing DOMA. Such a decision would have greatly upset the status quo and required vast regulatory adjustments without the support of a congressional delegation or judicial decree. Administrative agencies would have had to shift policies, create new forms, and educate lower-level bureaucrats on a variety of matters—all of which could be undone should a subsequent administration change course or a court sustain the statute's constitutionality.[290] Some federal officials

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288. Johnsen, *Defend Constitutional Equality*, *supra* note 66, at 604.

289. Prakash, *Missing Links*, *supra* note 54, at 556 (calling President Obama's nondefense of DOMA a "sacrifice of constitutional principle at the altar of political expediency").

290. *But see* Huq, *supra* note 137, at 1025 ("Holder might have argued that sudden nonenforcement of a thousand-plus provisions affected by DOMA Section 3 would have imposed unacceptable transition costs. But the government has dealt successfully with similar transition problems in addressing gender-related equal protection rules that the Court began elaborating in the 1970s. In any case, it is also hard to see why the transition costs would be

would likely have resisted.[291] The Obama Administration's enforce-but-not-defend policy gave the agencies the opportunity to prepare for a potential Supreme Court ruling striking down Section 3. Judging by the speed with which those agencies moved to implement *Windsor*,[292] they appeared to have used that time to prepare. The Obama Administration's decision to interpret *Windsor* broadly (rather than narrowly by confining the holding to the federal income or estate-tax context) highlights yet another way that the Obama Administration placed its constitutional principle behind the interpretation of Supreme Court precedent.

The type of non-enforcement policy Departmentalists envision would have led to a much different set of consequences. First, it would have rendered moot the pending challenges to DOMA's constitutionality, as no plaintiff could demonstrate harm to satisfy basic standing requirements.[293] In that event, *Windsor* noted, the "[r]ights and privileges of hundreds of thousands of persons would be adversely affected."[294] While a non-enforcement policy would likely lead to an immediate disbursement of benefits to married couples, those couples suddenly receiving benefits would be at risk of losing them later if a future administration changed course. Gay rights advocates might win a short-term battle but suffer major setbacks in the long-term war. Moreover, these types of abrupt changes could draw fierce resistance or backlash from the coordinate branches or future courts. Some opposing the President's

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less if the same result were to be imposed by judicial fiat.").

291. One example of such bureaucratic resistance occurred recently in the immigration context. On July 31, 2013, a federal district court threw out a lawsuit brought by five officials within Immigration and Customs Enforcement against President Obama over his Deferred Action for Childhood Arrivals (DACA) policy. Crane v. Napolitano, No. 3:12-cv-03247-O (N.D. Tex. July 31, 2013). Under DACA, immigration officers were instructed to consider favorable exercises of discretion to certain foreign nationals who were brought to the U.S. as children. *See Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process (last visited Mar. 16, 2014).

292. *See supra* notes 231-34, 245-46 and accompanying text.

293. *See* United States v. Windsor, 133 S. Ct. 2675, 2686 (2013) (noting that the Court would lack jurisdiction "if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling").

294. *Id.* at 2688 ("That numerical prediction may not be certain, but it is certain that the cost in judicial resources and expense of litigation for all persons adversely affected would be immense.").

decision to stop enforcing DOMA would likely argue for his impeachment.[295]

Rather than adopt a position anchored squarely within Judicial Supremacy or Departmentalism, the Obama Administration's DOMA policy hewed aspects of both. On the one hand, the President was determined not to upset the status quo unless and until the judiciary issued a definitive verdict on the statute's enforceability; on the other hand, the President refused to defend a congressional act based on a novel interpretation of the Constitution that the Supreme Court had not, and still has not, endorsed. While scholars have criticized this approach as unprincipled, the policy was, in many ways, similar to prior acts of presidential constitutionalism that were intended to promote collective branch consensus around a new and more ideal constitutional position. The Administration's policy reflected interpretive humility by enforcing a law it believed to be unconstitutional while maintaining order, preserving the status quo, and promoting additional conversation over gay rights within other institutions—including courts, state legislatures, and within the culture generally. At the same time, the Administration pursued an aggressive litigation strategy over DOMA's constitutionality that advanced bold arguments about gay and lesbian equality that transcended DOMA. That larger commitment to principle, which resonates with so many of the Obama Administration's positions on gay rights, stretches well beyond the decision not to defend a particular piece of legislation. The President's refusal to defend DOMA in court was part of his larger effort to catalyze, rather than preclude, inter-branch dialogue over difficult interpretive questions.

C. Presidential Constitutionalism and Judicial Doctrine

The Obama Administration's deeper commitment to equal protection spanned numerous policy initiatives and manifested a

295. *See id.* at 2702 (Scalia, J., dissenting) (preferring to leave the question of DOMA's enforceability "to a tug of war between the President and the Congress, which has innumerable means (up to and including impeachment) of compelling the President to enforce the laws it has written"). President Andrew Johnson was impeached (though not convicted) for refusing to enforce the Tenure of Office Act, which the Supreme Court later ruled to be unconstitutional. *See* Johnsen, *Presidential Non-Enforcement*, *supra* note 47, at 8.

clear intention to enlist the courts in bringing about more rights-affirming principles. In that regard, presidential constitutionalism worked in tandem with coordinate institutions—especially the courts—to champion latent Supreme Court interpretations within the "profound fault lines ... at the very foundations of the enterprise" of constitutional law.[296] Rather than reject the Court's prior rulings for their indeterminacy,[297] the President worked within the existing doctrine to assert his own, independent interpretive role.

The Supreme Court routinely leaves undecided many of the larger questions presented in litigation by announcing narrow decisions that avoid more than they decide, especially in the context of civil rights rulings. This tendency—whether revealed through the exercise of the "passive virtues"[298] or the "under-enforcement" of constitutional norms[299]—underlies many of the Court's rulings regarding constitutional law and civil rights. Scholarly dissatisfaction with under-theorized decisions is reflected in Michael Dorf's statement, expressed shortly after *Windsor*, that "there is much to regret about the fact that in *Romer*, *Lawrence*, and now *Windsor*,

296. Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 291, 295 (2005).

297. Eric Berger, Lawrence*'s Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 770 (2013) (discussing the extent to which indeterminacy is an inescapable part of constitutional law).

298. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 65-72, 259-65 (1st ed. 1962); *see* Alexander M. Bickel, *The Supreme Court, 1960 Term: Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 50-51 (1961); *see also* SUNSTEIN, JUDICIAL MINIMALISM, *supra* note 1; Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 73-74 (2000) (tracing the development of judicial minimalism theory from Bickel to Sunstein and suggesting that both favor judicial restraint as a way to increase public discourse and majoritarian decision making); Jan Komarek, *Reasoning with Previous Decisions: Beyond the Doctrine of Precedent*, 61 AM. J. COMP. L. 149, 164 n.96 (2013); *cf.* Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114, 134-35 (2009) (asserting that although Sunstein is the most prominent contemporary defender and refiner of the passive virtues, "he distinguishes his own views from Bickel's by emphasizing that judicial minimalism is meant to maximize and guard the deliberative space of the political branches rather than the legitimacy or power of the judiciary").

299. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1239-42 (1978); *see also* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 43 (2010); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1543-44 (1987); Post & Siegel, *supra* note 5, at 467-70; Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2023-24 (2003); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 17-19 (2003).

the Court has failed to specify the level of scrutiny it is applying as a matter of equal protection doctrine (in *Romer* and *Windsor*) or substantive due process doctrine (in *Lawrence*)."[300] He notes that "it would seem much more straightforward for the Court simply to say that laws drawing distinctions based on sexual orientation are subject to heightened scrutiny."[301] To be sure, a heightened scrutiny ruling from the Court would have tremendous cascading effects in other legal precincts by toppling an entire wave of anti-gay law in education, employment, and family law.[302] But to the extent that courts are unwilling to craft ideal solutions to all constitutional controversies, a judiciary-centric perspective can obscure ways that the coordinate branches can contribute to the development of constitutional law. To the extent that *Windsor*, like earlier pronouncements on gay rights, adopts a narrower approach to constitutional interpretation based on the Court's belief in its "limited fact-finding and policy-making competence,"[303] the President can help shape constitutional interpretations and outcomes through his independent faculty of interpretation.

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300. Michael C. Dorf, *A Publicity Updated and Then Three Thoughts on Justice Scalia's Dissent in* Windsor, DORF ON LAW (June 28, 2013, 10:37 AM), http://www.dorfonlaw.org/2013/06/a-publicity-update-and-then-three.html.

301. *Id.*

302. *See* Joseph Landau, *The DOMA Ripple Effect*, NEW REPUBLIC (Mar. 11, 2011), http://www.newrepublic.com/article/politics/85085/obama-doma-gay-marriage-law (noting that heightened scrutiny would likely lead to the invalidation of virtually every remaining law that mandates discrimination on grounds of sexual orientation in, for example, education, employment, and family law).

303. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2112 n.193 (1990). Although *Windsor* is doctrinally a case about rational basis review, the Court's commitment to lesbian and gay equality stretches beyond the ordinary concept of rational basis analysis to embrace a deeper conception of self-government that has ties to the political process and the belonging of same-sex couples in that polity. For example, *Windsor* contains powerful rhetoric supporting the dignity of LGBT individuals and provides strong language supporting the moral worthiness of same-sex relationships and same-sex families. The Court describes Windsor and her wife, Spyer, as "*long[ing]* to marry" and desiring a relationship that would "occupy the same status and dignity as that of a man and woman in lawful marriage." United States v. Windsor, 133 S. Ct. 2675, 2689 (2013) (emphasis added). The Court writes of a historical change whereby States were beginning to recognize, validate, and respect relationship recognition for "those same-sex couples who wish to define themselves by their commitment to each other" and "affirm their commitment ... before their children, their family, their friends, and their community." *Id.*

In the gay rights context, rulings such as *Romer*,[304] *Lawrence*,[305] and *Windsor* arguably reflect the under-enforcement of the constitutional norms at stake. Although these rulings leave open—and may even anticipate—a ripening principle of heightened scrutiny, judicial minimalism can invite important opportunities for presidential intervention. When the Court avoids addressing the larger, substantive questions, the President can step into the breach by placing his own interpretation of the Constitution in the service of individual rights. Indeed, the Court's tendency to under-enforce norms of equality and non-discrimination creates a vacuum that the political branches, and especially the executive, can fill in advance of—and in anticipation of—future congressional legislation or judicial opinions. Rather than looking to the judiciary as the sole guardian of freedom from executive incursion, the executive can be a helpmate in the struggle for civil rights advancement and innovation.

Scholars have made similar arguments about Congress's role in enforcing the Constitution through its Commerce Clause[306] and Fourteenth Amendment powers.[307] Yet despite Congress's tremendous potential to exert influence over constitutional law, its success rate in passing legislation on anything—let alone civil rights—has been woefully absent of late. When the Court has not been hostile to Congress's efforts to push through civil rights legislation,[308] Congress has been the victim of its own internal mischief-making.[309] Recently, its legislating power has come to a halt, reducing its ability to fill gaps left open by the Court.[310] But a joint executive-

304. 517 U.S. 620 (1996).

305. 539 U.S. 558 (2003).

306. *See supra* note 4.

307. *See supra* note 5.

308. *See supra* note 7.

309. The government shutdown of 2013 was a low point in that regard, with Congress nearly failing to avert default. *See, e.g.*, Jonathan Weisman & Ashley Parker, *Republicans Back Down, Ending Crisis Over Shutdown and Debt Limit*, N.Y. TIMES (Oct. 16, 2013), http://www.nytimes.com/2013/10/17/us/congress-budget-debate.html. After a similar standoff in 2011, federal lawmakers brokered a deal to raise the debt ceiling only two days before a default seemed likely, resulting in, among other things, a downgrade in the U.S. credit rating. *See* Janet Novack, *Federal Government Begins First Shutdown in 17 Years*, FORBES (Oct. 1, 2013), http://www.forbes.com/sites/janetnovack/2013/09/30/clock-ticks-to-first-federal-shutdown-in-17-years/.

310. *See supra* note 6 and accompanying text.

judicial dialogue on constitutional meaning may provide a new way for the political branches—and especially the President as a constitutional actor—to advance the doctrine. In other words, if the Court insists on continuing to play a passive role, and "legislative inertia [has] prevent[ed] judicial silence from having constructive force,"[311] the executive may be an appropriate actor to help fill out the contours of the resulting doctrinal limbo.

In the area of equal protection, where the state of the law often remains unclear, there are good reasons to see the President as a proper actor engaged in a dialogue with the Court. The President already interprets the Constitution when he implements prior Supreme Court decisions in ordinary policy-making contexts. For example, before *Windsor*, the Obama Administration announced numerous policies that expanded statutory and regulatory protections for LGBT individuals and same-sex couples in areas such as labor and employment, immigration, health care, and housing.[312] Those policies, which were made with the explicit intention not to violate DOMA,[313] likely rested on the Supreme Court's prior equal protection rulings. The President's DOMA policy, by contrast, was part of a call for heightened scrutiny and a more direct effort to engage the Court on the proper construction of constitutional meaning. While the Supreme Court did not ultimately accept that principle, there was a certain consistency across all of the President's gay rights policies, regardless of whether they rested on rational basis review or heightened scrutiny—standards that, in any event, potentially converge at the Court's "rational basis plus" jurisprudence.[314] Regardless, the Obama Administration's efforts did not fall flat, coinciding with the first-ever federal appellate ruling applying heightened scrutiny to sexual-orientation-based discrimi-

311. Neal Kumar Katyal, *Judges As Advicegivers*, 50 STAN. L. REV. 1709, 1721 (1998).

312. *See* Landau, *supra* note 215, at 624-27.

313. *See, e.g.*, Memorandum from President Barack Obama for the Heads of Executive Departments and Agencies on Federal Benefits and Non-Discrimination, 74 Fed. Reg. 29,393 (June 17, 2009) (directing the Director of the Office of Personnel Management and the Secretary of State to find ways, "consistent with Federal law," to expand benefits for the same-sex partners of foreign-service and executive branch government employees).

314. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 580-84 (2003) (O'Connor, J., concurring) (describing the Court's equal protection cases as applying a "more searching" form of rational basis scrutiny where animus-based legislation is concerned).

nation.[315] The case study of LGBT rights demonstrates that when the Supreme Court under-enforces the full scope of the norm at issue, the President can be in a particularly opportune position to champion new constitutional meaning by enlisting the Court's prior decisions in the advancement of new constitutional principles.

D. Presidential Constitutionalism and the "Zone of Twilight"

By 2011, when the Obama Administration stopped defending DOMA, the House and Senate majorities were unable to move legislation invalidating DOMA through Congress. This is not because DOMA was hugely popular—on the contrary, many in Congress (including some who voted for DOMA when it was enacted in 1996)[316] opposed the law—but it was equally true that congressional inertia would ensure that DOMA remained on the books for some time. When members of Congress introduced the Respect for Marriage Act[317] to repeal DOMA, it was clear that the bill's backers—more than 150 House cosponsors and more than thirty Senate cosponsors—could not muster the support to move the legislation through Congress.[318] But Congress's impasse did not preclude the President from exercising constitutional interpretation to effectively work with the Court to dismantle a law that was not only in decline, but also inconsistent with the emerging law in many states. Achieving the result through collective branch action, as opposed to a univocal decision by a single branch, was a superior way of resolving a highly contentious substantive constitutional question.[319]

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315. Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012).

316. More than 130 House members—some of whom voted for DOMA—also came forward to sign onto an amicus brief calling upon the federal courts to strike down Section 3. *See, e.g.*, Brief of Members of the U.S. House of Representatives—Including Objecting Members of the Bipartisan Legal Advisory Group, Representatives Nancy Pelosi and Steny H. Hoyer—as Amici Curiae Supporting Plaintiffs-Appellees and Urging Affirmance at 2, Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012) (Nos. 10-2204, 10-2207, 10-2214).

317. H.R. 1116, 112th Cong. (2011); S. 598, 112th Cong. (2011).

318. Max Gouttebroze, *"Respect for Marriage Act" Reintroduced to Ensure Full DOMA Repeal*, GLAAD (June 26, 2013), http://www.glaad.org/blog/respect-marriage-act-re-introduced-ensure-full-doma-repeal.

319. *Cf.* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

While there are a number of important, separation-of-powers-based reasons why a President might seek to engage in certain self-help measures where constitutional interpretation is concerned,[320] one should not underestimate the President's unique ability to work *with* the coordinate branches to invest the law with new meaning. As noted in the Attorney General's letter to Speaker John Boehner, the decision to enforce DOMA while not defending it in court was intended to "respect[ ] the actions of the prior Congress that enacted DOMA, and ... recognize[ ] the judiciary as the final arbiter of the constitutional claims raised."[321] In the case of *Windsor*, that dialogue was about reaching a bilateral endorsement between the Court and the President regarding a complex issue of substantive law in which the proper course of action for the President was not obvious. This course of conduct is reminiscent of the methodology Justice Jackson discussed in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, in which he evaluated presidential action according to the extent of congressional or constitutional authorization.[322] Although Jackson's concurrence articulated a tripartite framework for considering the validity of executive action vis-à-vis Congress,[323] the framework is potentially analogous to the shared interpretative powers between the executive and the Court. Understood this way, the executive might validly exercise some role in constitutional interpretation so long as the Court has authorized room for political branch action by leaving a gap in its constitutional analysis. Assuming as a theoretical matter that the Court under-enforces constitutional norms by broadly charting out areas of constitutional

320. *See* THE FEDERALIST NO. 51, at 268 (James Madison) (George W. Carey & James McClellan eds., Liberty Fund 2001) (discussing the horizontal separation of powers as a means for "ambition ... to counteract ambition").

321. Holder Letter, *supra* note 25.

322. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

323. *Id.* at 635-38 ("(1) When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.... (2) When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.... [and] (3) When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").

protections for individual rights while leaving the precise doctrinal boundaries ill-defined,[324] the Court's restrained behavior arguably constitutes either authorization of some level of constitutional interpretation by the executive, or a "zone of twilight" wherein the executive possesses concurrent interpretative authority with Congress.[325]

In other words, if *Youngstown* held that the executive's powers "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress,"[326] the same might be said with respect to the executive's constitutional interpretations. The Court, by speaking broadly to a particular constitutional issue while leaving the precise boundaries of that question undefined, might "enable, if not invite, measures on independent presidential responsibility."[327] From this perspective, presidential efforts to interpret the Constitution, similar to invocations of presidential authority in the absence of constitutional or congressional authority, "depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[328]

While the overlap between the legislative and executive branches on legislative matters may be more immediately discernible than the overlap between the judicial and executive branches on interpretive matters,[329] courts and legal commentators have consistently found that the executive branch may validly exercise some level of interpretative power.[330] Where those constitutional interpretations

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324. *See supra* notes 298-301 and accompanying text.

325. *Youngstown*, 343 U.S. at 637.

326. *Id.* at 635.

327. *Id.* at 637.

328. *Id.*

329. *Cf.* U.S. CONST. art. I, § 7, cl. 2 (regarding the President's power to veto legislation) and *id.* art. II, § 2, cl. 2 (regarding the President's treaty making powers). While the common law tradition suggests some blurring of the lines between the legislative and judicial functions, at least one scholar has suggested that *Youngstown* "does not provide any judicial tools to assist in determining the balance of power when the struggle is between the executive and the judiciary." *See* Elizabeth Bahr & Josh Blackman, Youngstown*'s Fourth Tier: Is There A Zone of Insight Beyond the Zone of Twilight?*, 40 U. MEM. L. REV. 541, 544 (2010).

330. *See* Trevor W. Morrison, *Suspension and the Extrajudical Constitution*, 107 COLUM. L. REV. 1533, 1580-82 (2007) ("[C]ourts and scholars commonly regard constitutional interpretation as 'a collaborative enterprise in which each branch ... recognize[s] its own limitations and the relative strengths and functions of the other coordinate branches,' but still accord the Supreme Court the final say in the constitutional disputes that come before it.") (quoting Johnsen, *Functional Departmentalism*, *supra* note 74, at 109).

have yet to fully ripen, the President can be uniquely qualified to "construe constitutional ambiguities as [he] sees fit."[331] Presidential constitutionalism, when done properly, can help usher into law emerging ideas about constitutional protection, supplying the Court with an additional tool for striking a balance between principled rulings and expedient ones. In the context of DOMA, the President's nondefense policy, rather than skirting his duties of constitutional interpretation, approached the Court as a helpmate, or interlocutor, to advance a shared understanding of constitutional meaning. His interventions encouraged (or at least allowed for) the participation of other branches of government in that interpretative enterprise.

E. Presidential Constitutionalism and Vertical Separation of Powers

Although presidential constitutionalism is largely a matter of engaging the horizontal federal branches of government, it can implicate the vertical dimension of intra-branch decisions within the executive branch as well as the President's response to, and interaction with, state actors.[332] In the gay rights context, President Obama's constitutionalism has served as a way of enlisting those institutions in outcomes they might have been unable or unwilling to reach on their own. From this perspective, the President's role in constitutional interpretation contributes to a broader legal process that includes both substantive questions of constitutional value as well as institutional arrangements, such as the President's relationship with Congress, the courts, the federal bureaucracy, and the states. There are important ways in which the President's constitutional interpretations, including his refusal to defend unconstitutional acts, intersect with similar decisions by state officials who have increasingly called into question the validity of state legislation.[333]

In 2013, legislatures in Delaware, Hawaii, Illinois, Minnesota, and Rhode Island passed marriage legislation,[334] and in 2012, three

331. Sunstein, *supra* note 55, at 2584.

332. On the topic of vertical constitutionalism more generally, see Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006).

333. On the issue of executive nondefense at the state level, see Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. (forthcoming 2014).

334. *See supra* notes 251-52 and accompanying text.

states passed referenda approving the freedom of same-sex couples to marry.[335] Moreover—and in parallel with the Obama Administration's work advancing LGBT rights—executive branch officers at the state level are playing an active part in developments within their respective states. State executive officials have refused to defend the constitutionality of laws denying marriage rights to same-sex couples in California, Illinois, Nevada, Oregon, Pennsylvania, and Virginia.[336] In New Jersey, executive branch officials defended the state's marriage ban but chose not to appeal a lower-court ruling recognizing the freedom of same-sex couples to marry.[337] In California, when the Governor and the Attorney General refused to defend Proposition 8 in *Hollingsworth v. Perry*, private intervenors became the law's champions in the ensuing litigation[338] but were deemed to lack standing to pursue a federal appeal.[339]

Prior to *Windsor*, state officials also brought a challenge to the constitutionality of DOMA. In 2010, Massachusetts officials successfully sued the federal government over the law's constitutionality, arguing that the statute violated principles of state sovereignty under the Tenth Amendment.[340] Many state attorneys general also issued interpretations (prior to state legislative acts or judicial

335. *See supra* note 250 and accompanying text.

336. Robert Barnes, *Virginia to Fight Same-Sex Marriage Ban*, WASH. POST. (Jan. 23, 2014), http://www.washingtonpost.com/politics/2014/01/22/85a96a10-83ac-11e3-bbe5-6a2a3141e3a9_story.html; Juliet Eilperin, *AG Won't Defend Pennsylvania's Gay Marriage Ban*, WASH. POST (July 11, 2013), http://articles.washingtonpost.com/2013-07-11/politics/40511610_1_gay-marriage-marriage-act-proposition-8; *Gay Marriage Ban Support Slips in Nevada*, N.Y. TIMES (Feb. 10, 2014), http://www.nytimes.com/2014/02/11/us/gay-marriage-ban-support-slips-in-nevada.html?_r=0; Rex Huppke & Stacy St. Clair, *State's Gay Marriage Ban Unlawful, Alvarez Says*, CHI. TRIB. (June 15, 2012), http://articles.chicagotribune.com/2012-06-15/news/ct-met-gay-marriage-lawsuit-20120615a_1_gay-marriage-camilla-taylor-marriage-laws; *Oregon: Attorney General Won't Defend Ban on Gay Marriage*, N.Y. TIMES (Feb. 20, 2014), http://www.nytimes.com/2014/02/21/us/oregon-attorney-general-wont-defend-ban-on-gay-marriage.html?-r=0.

337. *See supra* note 252 and accompanying text.

338. In *Perry v. Brown*, the California Supreme Court held that California law vested the proponents of Proposition 8 standing to represent the state's interest in the litigation. 265 P.3d 1002, 1165 (Cal. 2011). Subsequently, the Ninth Circuit held that the proponents had Article III standing to appeal the adverse decision against them in district court. Perry v. Brown, 671 F.3d 1052, 1070-75 (9th Cir. 2012), *vacated and remanded sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

339. *Hollingsworth*, 133 S. Ct. at 2668.

340. *See* Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 252 (D. Mass. 2010), *aff'd*, 682 F.3d 1 (1st Cir. 2012).

decisions recognizing the freedom to marry) that out-of-state same-sex marriages would receive full recognition as a matter of comity.[341] Outside the marriage context, state officials have refused to enforce or defend other anti-gay legislation. For instance, Florida Governor Charlie Crist refused to appeal an intermediate appellate court ruling that struck down Florida's ban on adoption by gays and lesbians, leaving the appellate decision in place as the final judicial resolution.[342] These decisions by state executive officials to call into question their respective states' anti-gay laws have the cumulative effect of bolstering, in addition to mirroring, the President's refusal to defend DOMA in court.

341. *See, e.g.*, Marriage—Whether Out-of-State Same-Sex Marriage That is Valid in the State of Celebration May Be Recognized in Maryland, 95 Op. Md. Att'y Gen. 3 (2010), *available at* http://www.oag.state.md.us/Opinions/2010/95oag3.pdf; Are Same-Sex Marriages Performed in Other Jurisdictions Valid in New Mexico?, 11 Op. N.M. Att'y Gen. 01 (2011), *available at* http://www.democracyfornewmexico.com/files/4-jan-11-rep.-al-park-opinion-11-01.pdf; Letter from Patrick C. Lynch, R.I. Att'y Gen., to Jack R. Warner, Comm'r, R.I. Bd. of Governors for Higher Educ. (Feb. 20, 2007), *available at* http://www.glad.org/uploads/docs/cases/cote-whitacre-et-al-v-dept-public-health/ri-ag-statement.pdf.

342. *Florida Ends Ban on Gay, Lesbian Adoptions*, CNN.COM (Oct. 22, 2010, 5:21 PM), http://www.cnn.com/2010/US/10/22/florida.gay.adoptions/.

CONCLUSION: PRESIDENTIAL CONSTITUTIONALISM AND THE NEXT FRONTIER

The Obama Administration's championing of civil liberties has not only included gay rights, but also the rights of women,[343] foreign nationals,[344] criminal defendants,[345] and others. While a full assessment of those policies must await further scholarship, the gay rights context supplies an important case study regarding the President's ability to work in tandem with the courts and others to help resolve vexing constitutional issues. The President's multiple efforts and transparent championing of the underlying principle of gay rights, supported by his extrajudicial interpretations, added support and normative force to his decision not to defend DOMA. Obama's DOMA policy reflected a President's deployment of the active virtues in the service of a broader, positive constitutional agenda that advanced his vision consistently with the values of law and democracy.

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343. One important example in the gender context is the recent decision to retire a long-held policy excluding women from ground combat positions in the U.S. military. *See* Press Release, U.S. Dep't of Def., Defense Department Rescinds Direct Combat Exclusion Rule; Services to Expand Integration of Women into Previously Restricted Occupations and Units (Jan. 24, 2013), *available at* http://www.defense.gov/Releases/Release.aspx?ReleaseID=15784. That decision put to rest a recently litigated civil rights issue. *See, e.g.*, Complaint for Declaratory and Injunctive Relief at 1, Hegar v. Panetta, No. 3:12-cv-06005-EMC (N.D. Cal. Nov. 27, 2012); Complaint for Declaratory and Injunctive Relief at 1, Baldwin v. Panetta, No. 1:12-cv-00832-RMC (D.D.C. May 23, 2012).

344. Examples are legion and they include the Obama Administration's strong support for comprehensive immigration reform; its successful legal challenge to Arizona's Support Our Law Enforcement and Safe Neighborhoods Act ("SB 1070"), *see* Arizona v. United States, 132 S. Ct. 2492 (2012); and its 2012 policy to defer action for certain young people who came to the United States as children, Deferred Action for Childhood Arrivals, DEP'T OF HOMELAND SEC., http://www.dhs.gov/deferred-action-childhood-arrivals (last visited Mar. 16, 2014).

345. *See* Eric Holder, U.S. Att'y Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013) (transcript available at http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html); Charlie Savage, *Dept. of Justice Seeks to Curtail Stiff Drug Terms*, N.Y. TIMES, Aug. 12, 2013, at A1.