

U.S. v. Windsor and the Judicial Politics of the Roberts Court

Tara Helfman¹

Introduction

When Chief Justice Marshall struck down an Act of Congress as unconstitutional for the first time in American history, he offered a vigorous defense of judicial review. “It is emphatically the duty of the Judicial Department to say what the law is,” he wrote. “Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each.”² It took Marshall many decades to carve out the federal judiciary’s role as the ultimate arbiter of constitutional questions. Yet to this day, the precise role of the executive and legislative branches in interpreting the Constitution remains unsettled. It is the duty of each department to interpret the Constitution and comply with its requirements.⁴ But what happens when there is disagreement among the political branches as to the proper interpretation of the Constitution? In particular, what happens when the President believes that a duly enacted law is unconstitutional? This

¹ Assistant Professor, Syracuse University College of Law. The author wishes to thank Logan Beirne (Yale Law School), Gregory Dolin (University of Baltimore School of Law), and Edgar McManus (City University of New York) for their valuable comments on versions of this article. She is also grateful for the valuable research assistance of Sophia Colas and Ethan Zhong, both J.D. candidates at the Syracuse University College of Law.

² 5 U.S. (1 Cranch) 137, 177 (1803).

⁴ *United States v. Nixon*, 418 U.S. 683, 703 (1974) (“In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.”). For discussion of the power of the executive to interpret the Constitution, see Gary Lawson and Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 378-79 (1994); Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 267-72 (1994); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1991).

article explores this question in the context of *United States v. Windsor*,⁵ in which the Executive declined to defend Section 3 of the Defense of Marriage Act⁶ on the ground that the President believed it violated the equal protection guarantee of the Fifth Amendment.

This article examines the political implications of the Executive's nondefense of the Defense of Marriage Act (DOMA), along with the long-term constitutional implications of the Supreme Court's ruling in *Windsor*. Part I offers a critical assessment of the *Windsor* case, arguing that the majority overreached with respect to jurisdiction and underperformed with respect to the protection of gay rights. Part II considers the propriety of the Executive's non-defense of DOMA, arguing that the Executive's defend-but-do-not-enforce posture was deeply problematic. Part III considers *Windsor* in the context of Chief Justice Roberts's leadership of the Court, exploring the implications of the case for the future role of the Supreme Court in the national debate on gay rights. These are deeply controversial issues – perhaps even unorthodox ones for a law journal – but they are fitting questions to explore in the inaugural issue of the *Syracuse Journal of Law and Civic Engagement*, a publication dedicated to the rigorous exploration of the intersection of politics and the law.

I. The Trouble with *Windsor*

The story behind the *Windsor* litigation has all the makings of a Hollywood movie. Two young people meet and fall madly in love, defying social conventions about the propriety of their match. The couple patiently abides four decades before being allowed to marry. Only this is a love story with a twist: both protagonists of this romance are women. Edith Windsor and Thea Spyer married in Canada in 2007 after a forty-year engagement. In 2009, Spyer succumbed to

⁵ 570 U.S. ___ (2013).

⁶ 110 Stat. 2419.

the ravages of muscular sclerosis, leaving her estate to her spouse.⁷ Notwithstanding the fact that the couple's domicile (New York State) recognized the marriage,⁸ the federal Defense of Marriage Act barred Windsor from enjoying the marital exemption from the estate tax. And for the purposes of this article, that is where the story really begins.

On November 9, 2010, Windsor challenged the constitutionality of Section 3 in the District Court for the Southern District of New York. She argued that the law violated the equal protection guarantee of the Fifth Amendment by denying homosexual married couples the same tax exemptions enjoyed by their heterosexual counterparts.⁹ Three months after Windsor filed her complaint, Attorney General Eric Holder announced that the Department of Justice would continue enforcing DOMA but would not defend the constitutionality of Section 3 in the suit.

He explained:

the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has

⁷ Peter Applebome, *Reveling in Her Supreme Court Moment*, N.Y.T. (Dec. 10, 2012), available at <http://www.nytimes.com/2012/12/11/nyregion/edith-windsor-gay-widow-revels-in-supreme-court-fight.html?pagewanted=all>.

⁸ In re Estate of Ranftle, 81 A.D.3d 566, 917 N.Y.S.2d 195 (1st Dep't 2011) (recognizing a 2008 Canadian marriage because "In the absence of an express statutory prohibition legislative action or inaction does not qualify as an exception to the marriage recognition rule"); *Lewis v. N.Y. State Dep't. of Civil Serv.*, 60 A.D.3d 216, 872 N.Y.S.2d 578 (3rd Dep't 2009) (recognizing out-of-state same-sex marriages on the ground that "regardless of how we define marriage in New York, we must apply the marriage recognition rule to determine whether we will recognize same-sex out-of-state marriages for the purpose of according their parties spousal benefits"); *Martinez v. Cnty. of Monroe*, 50 A.D.3d 189, 850 N.Y.S.2d 740 (4th Dep't 2008) (ruling that in the absence of a New York State statute prohibiting the recognition of gay marriage, same-sex marriages consecrated outside the state of New York are to be legally recognized).

⁹ *Windsor v. United States*, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012). Section 3 of the Defense of Marriage Act defines marriage for the purpose of eligibility for federal benefits, providing:

In determining 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, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7.

instructed the Department not to defend the statute in such cases. I fully concur with the President's determination. . .¹⁰

The Attorney General further expressed the Justice Department's "interest in providing Congress a full and fair opportunity to participate in the litigation."¹¹

On March 9, 2011, Speaker of the House John Boehner announced that the Bipartisan Legal Advisory Group of the House of Representatives¹² planned to avail itself of that opportunity. "The House General Counsel has been directed to initiate a legal defense of this law[,] he stated. "This action by the House will ensure that this law's constitutionality is decided by the courts, rather than by the President unilaterally."¹³ The Southern District of New York denied BLAG's motion to intervene as of right, but allowed BLAG to intervene as an interested party pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure on the ground

¹⁰ Press Release, Department of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>. The Attorney General also sent a letter to Speaker of the House John Boehner advising him of the decision pursuant to 28 U.S.C. 530D ("The Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice. . . establishes or implements a formal or informal policy to refrain. . . from enforcing, applying, or administering any provision of any Federal statute, rule, regulation, program, policy, or other law whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional"). Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

¹¹ Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

¹² The Speaker called upon the Bipartisan Legal Advisory Group to consider intervening in the case pursuant to House Rules II.8. Rules of the House of Representatives, One Hundred Thirteenth Congress at p. 3 ("There is established an Office of General Counsel for the purpose of providing legal assistance and representation to the House. Legal assistance and representation shall be provided without regard to political affiliation. The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisor Group, which shall include the majority and minority leaderships.").

¹³ Press Release, Speaker of the House John Boehner, House Will Ensure DOMA Constitutionality Is Determined by Courts (Mar. 9, 2011), *available at* <http://www.speaker.gov/News/DocumentSingle.aspx?DocumentID=228539> (last visited March 19, 2014).

that “BLAG has a cognizable interest in defending the enforceability of statutes the House has passed when the President declines to enforce them.”¹⁴

The trouble, though, is that such intervention is unprecedented. When Congress has intervened in lawsuits to defend its legislative enactments, it has done so pursuant to a joint resolution of both houses.¹⁵ There was no such joint resolution in *Windsor*. As *Amica Curiae* Vicki Jackson explained, “if there were any legislative injury arising from the Executive Branch’s refusal to defend the constitutionality of this statute, that injury would afflict the Congress as a whole. A single house (or part thereof) does not have standing to assert that interest, and the Senate has not intervened.”¹⁶ BLAG decided to intervene through a party-line vote of three of its five members,¹⁷ hardly a meaningful representation of the House of Representatives, much less of Congress as a whole.¹⁸

Yet in *Windsor*, the Supreme Court all but washed its hands of the question of BLAG’s standing, holding, “the Court need not decide whether BLAG would have standing to challenge

¹⁴ Memorandum and Order of James C. Francis IV in *Windsor v. United States* (Jun. 2, 2011), Case 1:10-cv-08435-BSJ-JCF, available at <http://www.scribd.com/doc/61610238/1-10-cv-08435-26>.

¹⁵ See *I.N.S. v. Chadha*, 462 U.S. 919, 939-40 (1983) (noting “We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional” but doing so in a case in which both the houses of Congress authorized intervention (*Chadha*, 462 U.S. at n.5; S. Res. 40 and H. R. Res. 49, 97th Cong., 1st Sess. (1981)); *United States v. Lovett*, 328 U.S. 303, 306 (1946) (“The Solicitor General, appearing for the Government, joined in the first two of respondents’ contentions but took no position on the third. House Resolution 386, 89 Cong. Rec. 10882, and Joint Resolution No. 230, 78th Congress, 58 Stat. 113, authorized a special counsel to appear on behalf of the Congress.”).

¹⁶ Brief for Court-Appointed *Amica Curiae* Addressing Jurisdiction, *United States v. Windsor*, No. 12-307 (2012) at 7-8.

¹⁷ The House Speaker, Majority Leader and Majority Whip supported intervention in the case. The Minority Leader and Whip voted against it.

¹⁸ Indeed, the Supreme Court has denied members of Congress standing to challenge the constitutionality of a statute where they have alleged no injury to themselves personally and where they allege only a “wholly abstract and widely dispersed” injury to Congress as an institution. *Raines v. Byrd*, 521 U.S. 811, 829 (1997). Suzanne B. Goldberg characterized one of the perverse implications of allowing BLAG standing in this case “Article III Double-Dipping.” In *Windsor*, two parties purported to represent the government’s interest in the case: the Executive, in its decision not to defend DOMA, and BLAG, in its decision to defend it. *Article III Double-Dipping: Proposition 8’s Sponsors, BLAG, and the Government’s Interest*, 161 U. Pa. L. Rev 164 (2013).

the District Court’s ruling and its affirmance in the Court of Appeals on BLAG’s own authority.”¹⁹ Rather, “[r]ules of prudential standing”²⁰ were sufficient to establish jurisdiction over the case. Those prudential concerns included the prospect that “district courts in 94 districts throughout the Nation would be without precedential guidance . . . in tax refund suits” unless the Supreme Court weighed in on the issue.²¹ The majority was also concerned that “the Executive’s agreement with the plaintiff that a law is unconstitutional . . . [would] preclude judicial review,” thus compromising the Court’s role as the ultimate arbiter of a law’s constitutionality.²² The majority’s concern about a lack of uniformity among federal districts is unusual to say the least. District courts employ different legal approaches in any number of fields without intervention by the Supreme Court. As discussed in Part II below, the more interesting question goes to the separation of powers issues to which the President’s non-defense of DOMA gave rise.

After effectively winning its case in the district court, the Department of Justice could simply have stopped litigating the matter; but it did not. Instead, having received a favorable decision from the Southern District, the Department of Justice petitioned the Supreme Court for certiorari.²⁴ *Why?* The Executive claimed that it was trying to preserve the separation of powers by enforcing – but not defending – DOMA. As the Attorney General himself said, “enforcing the statute would “respect[] the actions of the prior Congress that enacted DOMA, and . . .

¹⁹ *Windsor*, 570 U.S. at 12.

²⁰ *Id.* at 7.

²¹ *Id.* at 11.

²² *Id.* at 12.

²⁴ The DOJ filed its cert petition on September 11, 2012 (212 U.S. S. Ct. Briefs LEXIS 3743). Oral arguments in the Second Circuit did not even take place until September 27th and the decision was not handed down until October 18th. *Windsor v. United States*, Docket No. 12-2335-cv(L); 12-2435(Con).

recognize[] the judiciary as the final arbiter of the constitutional claims raised.”²⁵ At the same time, the President could be faithful to his own interpretation of the Fifth Amendment by declining to defend the statute.²⁶

However, in the context of *Windsor*, this approach creates more constitutional problems than it solves. For the judiciary to be “the final arbiter of the constitutional claims raised,”²⁷ there must be something to arbitrate. In other words, the parties must actually make competing constitutional claims that render the litigants adverse to one another. This requirement limits the power of the judiciary over the formulation of public policy, a matter vested by the Constitution in the elected branches of government, by restricting its jurisdiction to cases or controversies.²⁸ But here, both the United States and *Windsor* were making the same claim: that Section 3 of DOMA violated the Fifth Amendment equal protection guarantee. What is more, two federal courts vindicated that claim. So when the majority nevertheless found that the parties had Article III standing, the only explanation was, in Justice Scalia’s words, that the majority was so “eager—hungry—to tell everyone its view of the legal question at the heart of this case”²⁹ that it was willing to dispense with the standing requirement.³⁰

²⁵ Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

²⁶ Marty Lederman, **Understanding standing: The Court’s Article III questions in the same-sex marriage cases (I) (Jan. 17, 2013)**, <http://www.scotusblog.com/2013/01/understanding-standing-the-courts-article-iii-questions-in-the-same-sex-marriage-cases-i/>.

²⁷ Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

²⁸ U.S. Const., Art. III, §2.

²⁹ Scalia Dissent, *Windsor*, 570 U. S. at 1. “That is jaw-dropping,” he continued, “It is an assertion of judicial supremacy over the people’s Representatives in Congress and the Executive. It envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere “primary” in its role.”

³⁰ The role of the standing requirement in guarding the separation of powers hardly needs to be restated here. See e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992); *Allen v. Wright*, 468 U.S. 737, 759-61 (1984);

Because Justices Roberts, Scalia, Thomas, and Alito refused to decide the case on the merits, *Windsor* was effectively decided by a Court of five justices. One can only speculate what the *Windsor* decision might have looked like had more members of the court participated in the ruling on the merits, but the majority opinion is itself a confounding one. The standard of scrutiny to be applied to classifications based on sexual orientation is no clearer today than it was before the case was decided. This was no *Loving v. Virginia*, in which a unanimous court resolutely held, “[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies [state antimiscegenation laws]”.³¹ While the *Windsor* majority concluded that DOMA was animated by anti-gay sentiment,³² the ruling provided no guidance on whether a federal statute establishing a separate classification for same-sex married partners might be constitutional if it were animated by something other than homophobic intent. Nor was this a *Lawrence v. Texas*, in which a majority of the Court struck down state anti-sodomy statutes on the ground that they “further[ed] no legitimate state interest which c[ould] justify [the state’s] intrusion into the personal and private life of the individual[.]”³³ *Windsor* left open the question whether states might define marriage to exclude same-sex couples.

Instead, the opinion in *Windsor* discussed everything and nothing at once. It discussed federalism without addressing whether the federal government has the authority to define

Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 37 (1976) (“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.”).

³¹ 388 U.S. 1, 11 (1967). The *Windsor* Court placed heavy emphasis on the notion that “[t]he avowed purpose and practical effect of the law here in question [were] to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.” *Windsor*, 570 U.S. at 21. The Court provided no guidance on whether a federal statute establishing a separate classification for same-sex married partners might be constitutional if it were animated by something other than homophobic intent.

³² 570 U.S. at 25 (“the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage”). See discussion at **n. [redacted]** below.

³³ 539 U.S. 558, 578 (2003).

marriage in the first place. It celebrated states' rights without considering whether states might prohibit gay marriage. And it held that Section 3 of DOMA violated the Fifth Amendment without establishing the standard of scrutiny to which the law was subjected.³⁴ The decision is susceptible to scores of qualifications and exceptions, all of which should be cause for concern to proponents and opponents of marriage equality alike.

II. Is it Emphatically the Province of the Executive to Say What the Law Is?

By enforcing but not defending DOMA, the President tried to have his wedding cake and eat it, too. The Executive took what seemed to be a bold and principled stand in deciding that it would not defend a constitutionally objectionable law.³⁵ But the Executive continued to enforce a statute that it viewed as indefensible.³⁶ The reason for this approach is unclear.³⁷ One possible interpretation is that the President wished to discharge his constitutional obligations to “take Care that the Laws be faithfully executed”³⁸ and to “preserve, protect and defend the Constitution of the United States”.³⁹ Yet it seems a contradiction in terms to refuse to defend a

³⁴ Whereas the District Court for the Southern District of New York subjected DOMA to strict scrutiny, and the Second Circuit subjected it to heightened (or, intermediate) scrutiny, the Supreme Court alluded to a standard of “careful scrutiny” and nothing more. *Windsor*, 570 U.S. at 20 (“In determining whether a law is motivated by an improper animus or purpose, discriminations of an unusual character especially require careful consideration.” (Internal citation omitted.)). In this respect, the ruling fell short of Windsor’s expectations, as her cert petition argued that the case presented a vehicle for the court to determine the appropriate level of scrutiny for discrimination based on sexual orientation. *United States v. Edith Schlain Windsor*, in her capacity as Ex’r of the estate of Thea Clara Spyer, (2012 U.S. S. Ct. Brief LEXIS 4357) at 14.

³⁵ Here I use a phrase coined by former Acting Assistant Attorney General Dawn E. Johnsen in her important article, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*. 63 L. & CONTEMP. PROBS. 7 (2000).

³⁶ See text at n. 24, *supra*. (Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>).

³⁷ For discussion, see Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COL. L. REV. 507, 519-21 (2012).

³⁸ U.S. Const., Art. II, § 3.

law because it is unconstitutional while simultaneously enforcing it on the ground that the Constitution requires that even unconstitutional laws be enforced.⁴⁰

Two constitutional principles lie at the heart of contemporary arguments in support of executive non-enforcement: the separation of powers doctrine and the supremacy of the Constitution over all other forms of law. As one memorandum from the Office of Legal Counsel explained, “the Take Care Clause does not compel the President to execute unconstitutional statutes. An unconstitutional statute, as Chief Justice Marshall explained in his archetypal decision, is simply not a law at all[.]”⁴¹ In short, the President is not obligated to enforce what he considers a legislative nullity. This view was in circulation at the time of the framing. James Wilson, one of the framers of the Constitution (and subsequently Associate Justice of the Supreme Court) explained,

I had occasion, on a former day, to state that the power of the Constitution was paramount to the power of the legislature acting under that Constitution; for it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before *the judges*,--when they consider its principles, and find it to be incompatible with the superior power of the Constitution,--it is their duty to pronounce it *void*; and judges independent, and not obliged to look to every session for a continuance of their salaries, will behave with intrepidity, and refuse to the act the sanction of judicial authority. In the same

³⁹ U. S. Const., Art. II, § 1, cl. 8.

⁴⁰ President Clinton did something similar when he declined to defend yet continued enforcing a provision of the National Defense Authorization Act for Fiscal Year 1996. The provision required that the military discharge all personnel infected with HIV. Pub. L. No. 104-106, § 567, 110 Stat. 186 (1996), *repealed by* Act of Apr. 26, 1996, Pub. L. No. 104-134, tit. II, § 2707(a)(1), 110 Stat. 1321, 1321-30 (codified as amended at 10 U.S.C. § 1177 (Supp. IV 1998)). The administration defended its position on the ground that deference to the will of Congress was appropriate in light of the President’s desire to engage congressional leadership directly on the possibility of repeal of the provision. Indeed, Congress did repeal the provision shortly after it was enacted. For discussion, see Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 L. & CONTEMP. PROBS. 7, 54-8 (2000).

⁴¹ Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. Off. Legal Counsel 18, 31-36 (1992) (memorandum from Acting Assistant Attorney General Timothy E. Flanigan), *available at* http://www.justice.gov/olc/gray.11.htm#N_19_ (last visited, March 19, 2014).

manner, the President of the United States could shield himself, and refuse to carry into effect an act that *violates* the Constitution.⁴²

Although this theory of executive non-enforcement has gained ground in recent decades, it does not appear to have been the norm in the early Republic.⁴³ While many framers wrote about the power of each of the branches to interpret the Constitution,⁴⁴ few went so far as to claim that the Executive's power to interpret also entailed a power of selective enforcement. In fact, federal courts rejected this proposition in two notable cases. In the 1806 case of *United States v. Smith*,⁴⁵ the defendant argued that his alleged violations of the Neutrality Act of 1794⁴⁶ were undertaken with the authorization of the Executive, a notion that Associate Justice William Paterson, then riding circuit, considered a preposterous excuse:

⁴² II DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 450-51 (Merrill Jensen ed., 1976) (statement of Dec. 1, 1787). It is a view consistent with the Federalist position on the supremacy of the Constitution. As Chief Justice Marshall wrote in *Marbury*, "If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply." 5 U.S. (1 Cranch) 137, 178 (1803). James Wilson's view found a modern iteration in Judge Frank Easterbrook's approach to "presidential review." Easterbrook has described executive non-enforcement as a salutary balance against judicial review, explaining:

Presidential review is . . . a counterweight to judicial review. Life tenure has conflicting effects on the judicial system. It is designed to (and does) liberate judges from current politics. This could lead them to carry out their personal agendas. It is supposed to have the former effect; an unpleasant byproduct is that for some portion of judges it has the latter. Separated and overlapping powers of review can help control the phenomenon. . . . We live in a constitutional republic in which many actors hold overlapping powers. Powers are not so much separated as duplicated and distributed, so that concurrent approval is necessary to action. This is not an efficient system; it is designed to frustrate all claims of power. Presidential review fits neatly in such a framework. We live in a constitutional republic. Contemporary officeholders are but squatters in that mansion. All owe their duties to the real owners.

Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 929 (1990).

⁴³ For discussion, see CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE 18-41 (1998).

⁴⁴ See e.g., James Madison to [Unknown] (Dec. 1834) ("As the Legislative, Executive & Judicial Departments of the U.S. are co-ordinate, and each equally bound to support the Constitution, it follows that each must in the exercise of its functions, be guided by the text of the Constitution according to its own interpretation of it; and consequently, that in the event of irreconcilable interpretations, the prevalence of the one or the other Department. must depend on the nature of the case, as receiving its final decision from the one or the other, and passing from that decision into effect, without involving the functions of any other. "), available at <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-02-02-02-3067>.

⁴⁵ 27 F. Cas. 1192 (Cir. Court, D.N.Y. 1806).

⁴⁶ 18 U.S.C. § 962.

Supposing then that every syllable of the [defendant's] affidavit is true, of what avail can it be on the present occasion? Of what use or benefit can it be to the defendant in a court of law? Does it speak by way of justification? The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government. In this particular, the law is paramount. Who has dominion over it? None but the legislature; and even they are not without their limitation in our republic.⁴⁷

Thirty years later, the Supreme Court expressly rejected any constitutional basis for executive non-enforcement in the Take Care Clause, noting in dicta:

To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible. But although the argument necessarily leads to such a result, we do not perceive from the case that any such power has been claimed by the President. But, on the contrary, it is fairly to be inferred that such power was disclaimed.⁴⁸

Nevertheless, it is hard to believe that the framers intended for the Take Care Clause to codify rigid formalism into the Constitution such that the President would be obligated to enforce bills of attainder,⁴⁹ ex post facto laws,⁵⁰ or laws creating titles of nobility.⁵¹ In Federalist 44, Madison offered the following response to concerns that the congress might pass a law “not warranted by [the] true meaning” of the Constitution: “the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts[.]”⁵² While hardly a straightforward assertion of the power of executive non-

⁴⁷ United States v. Smith, 27 F. Cas. 1192, 1230 (Cir. Court, D.N.Y. 1806).

⁴⁸ Kendall v. United States ex rel Stokes, 37 U.S. 524, 613 (1838).

⁴⁹ U.S. Const. Art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”).

⁵⁰ *Ibid.*

⁵¹ U.S. Const. Art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States.”).

⁵² THE FEDERALIST No. 44, at 221 (James Madison) (Terence Ball ed, 2003).

enforcement, Madison’s reassurance does suggest that the framers considered the executive – and the judiciary – well suited to review the constitutionality of acts of congress.

The most spectacular example of executive non-enforcement was, of course, that of President Andrew Johnson, whose refusal to comply with the Tenure of Office Act⁵³ on the ground that it encroached upon the removal powers of the president provided Congress with a pretext for his impeachment.⁵⁴ Approximately fifty years later, President Wilson likewise refused to comply with the Tenure of Office Act and was vindicated by the Supreme Court in *Myers v. United States*.⁵⁵ The Court held the statute unconstitutional in workmanlike fashion without pausing to reflect on whether the President had the authority not to enforce a constitutionally objectionable statute.⁵⁶

However, the power not to enforce constitutionally objectionable statutes was vigorously invoked in the second half of the twentieth century. In successive administrations, the White House Office of Legal Counsel has justified executive non-enforcement under the Take Care Clause and the President’s oath of office, holding that the Executive may employ non-enforcement only in limited circumstances.⁵⁷ Indeed, most cases of executive non-defense and

⁵³ 14 Stat. 430 (Mar. 2, 1867).

⁵⁴ HANS L. TREFOUSSE, *IMPEACHMENT OF A PRESIDENT* (1975).
DAVID M. DEWITT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON, SEVENTEENTH PRESIDENT OF THE UNITED STATES* (1967).

⁵⁵ 272 U.S. 52 (1926). Doing so would have been unnecessary in this case: here, non-enforcement simply meant noncompliance by the President himself.

⁵⁶ For an authoritative discussion of the Tenure of Office Act, *See* JOHN HART, *TENURE OF OFFICE ACT UNDER THE CONSTITUTION* (1930).

⁵⁷ The President’s Constitutional Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200 (1994) (memorandum from Assistant Attorney General Walter Dellinger) (“While the general proposition that in some situations the President may decline to enforce unconstitutional statutes is unassailable, it does not offer sufficient guidance as to the appropriate course in specific circumstances.”); Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18 (1992) (memorandum from Acting Assistant Attorney General Timothy E. Flanigan) (“The Department of Justice has consistently advised that the Constitution provides the President with the authority to refuse to enforce unconstitutional provisions. Both the President’s

non-enforcement have involved attempts by the Executive to resist encroachments upon its powers by the legislative branch, most notably the foreign relations power,⁵⁸ the appointments power,⁵⁹ and the commander in chief power.⁶⁰

A notable exception was the decision by successive administrations not to enforce Section 3501 of the Omnibus Crime Act of 1968,⁶¹ which allowed for the admission of voluntary confessions in federal criminal proceedings. The provision attempted to roll back some of the

obligation to “take Care that the Laws be faithfully executed,” U.S. Const. Art. II, § 3, and the President’s oath to “preserve, protect and defend the Constitution of the United States,” *Id.* § 1, vest the President with the responsibility to decline to enforce laws that conflict with the highest law, the Constitution. We recognize, however, that the judicial authority addressing this issue is sparse and that our position may be controversial.”); Memorandum Opinion for the Counsel to the President, 14 Op. O.L.C. 37, 46 (1990) (memorandum from Assistant Attorney General William P. Barr) (“The Department of Justice has consistently advised that the Constitution provides the President with such authority. Both the President’s obligation to “take Care that the Laws be faithfully executed” and the President’s oath to “preserve, protect and defend the Constitution of the United States” vest that conflict with the highest law, the Constitution. We emphasize, however, that there is little judicial authority concerning this question, and the position remains controversial.”); Memorandum Opinion for the Attorney General, 8 Op. O.L.C. 183, 193-4 (1984) (memorandum from Assistant Attorney General Theodore B. Olson) (“The Executive’s duty faithfully to execute the law and recognition of the presumption of constitutionality generally accorded duly enacted statutes result in all but the rarest of situations in the Executive’s enforcing and defending laws enacted by Congress. . . . Exceptions to this general rule, however rare, do and must exist.”). *See also*, The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4 Op. O.L.C. 5543 (1980) (letter from Attorney General Benjamin R. Civiletti).

⁵⁸ *See e.g.*, Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18 (1992) (memorandum from Acting Assistant Attorney General Timothy E. Flanigan). The Memorandum addressed whether the President was obligated to comply with an act of congress prohibiting the Secretary of State from issuing more than one official passport to government personnel for the purpose of complying with Arab League nations’ policy of denying entry to people whose passports reflect a visit to Israel. The Memorandum concluded that the statute encroached upon the foreign relations powers of the President and was therefore unconstitutional. *See also*, Issues Raised by Foreign Relations Authorization Bill (memorandum from Assistant Attorney General William P. Barr) 14 Op. O.L.C. 37 (1990). The Memorandum considered the constitutionality of a provision in a bill conditioning authorization for appropriations on a requirement that an entity controlled by Congress be included in the U.S. delegation to meetings of the Conference on Security and Cooperation in Europe. The Memorandum concluded that the provision violated the foreign relations power of the president and advised him not to enforce it.

⁵⁹ *Recommendation that the Department of Justice not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 8 Op. O.L.C. 183, 195 (1984) (“the President need not blindly execute or defend laws enacted by Congress if such laws trench on his constitutional power and responsibility”). **Double Check.**

⁶⁰ **CLINTON NON-ENFORCEMENT HIV PERSONNEL** at n. ___ *supra*.

⁶¹ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 701(a), 82 Stat. 197, 210-11 (codified as amended at 18 U.S.C. § 3501-3502 (1994)). Amended at 18 U.S.C. § 3501-3502 (1994)).

protections afforded by the Supreme Court's ruling in *Miranda v. Arizona*,⁶² which held that testimony provided by a defendant prior to being advised of his right to counsel is inadmissible in a court of law. Almost every administration since the enactment of Section 3501 declined to invoke the provision on the ground that it was unconstitutional. With the Department of Justice unwilling to enforce the provision and criminal defendants unlikely ever to invoke it, Section 3501 seemed to be forever beyond the reach of judicial review.

The constitutionality of the provision came before the Supreme Court through an otherwise unremarkable case involving the federal prosecution of a bank robber. The Fourth Circuit⁶³ took the rare and controversial step of considering the section's constitutionality *sua sponte*, stating, "We are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it."⁶⁴ The Fourth Circuit thus injected the constitutionality of Section 3501 into the proceedings, forcing the issue before the Supreme Court when the circuit ruling was appealed. The Supreme Court decided by a 7-2 margin that the provision was an unconstitutional abridgment of the Fifth Amendment right against self-incrimination.⁶⁵

⁶² 384 U.S. 436 (1966).

⁶³ *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000).

⁶⁴ *Id.* The Executive's position on the Dickerson litigation was so controversial as to prompt the Senate to hold hearings on the Department of Justice's non-enforcement of the statute. *Hearing before the Subcommittee on Criminal Justice Oversight of the Committee on the Judiciary on Examining the Department of Justice's Decision Regarding the Enforcement of Federal Statute 18 U.S.C. 3501, Which Governs the Admissibility of Voluntary Confessions in Federal Court, and the Impact of the Miranda Rights*, 106th Cong. 1 (1999). But the Fourth Circuit's decision to raise §3501 was not without controversy, either. Erwin Chemerinsky accused the court of violating the separation of powers doctrine by raising an issue not argued by the adverse parties. Erwin Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding Dickerson v. United States*, 1 U. PENN. L. REV. 287 (2000).

⁶⁵ *Dickerson v. United States*, 530 U.S. 428 (2000).

Seth Waxman, the Solicitor General who advised President Clinton not to defend the statute, described the Executive's position not as one of executive defiance, but of executive *deference*, deference to the judicial branch rather than the legislative. He explained:

[T]he decision not to defend a statute, and indeed to advocate against it, should be a rare and solemn act. But as we saw it, the Supreme Court's repeated, consistent application of *Miranda* to the States could only mean that the doctrine is a constitutional one; and because the statute in question could not be reconciled with *Miranda*, it could constitutionally be applied only if the Court were to overrule *Miranda* and the dozens of cases that have followed, applied, and extended the landmark decision.⁶⁶

In effect, both *Dickerson*'s position and the position of the United States were vindicated, but they were vindicated through the adversarial process⁶⁷ and only after the Supreme Court had settled the matter.

But the Executive's posture with respect to DOMA presented the worst of all possible worlds: an enforce-but-do-not-defend position under conditions that made genuine adversity of interests all but impossible. What is more, this position was not rooted in any clear precedent. In *Dickerson*, the Executive's decision not to enforce or defend the *Miranda* rollback legislation was entirely consistent with existing judicial precedent. There, executive non-enforcement of the

⁶⁶ Seth P. Waxman, *Defending Congress*, 79 N.C.L. REV. 1073, 1087-8 (2001).

⁶⁷ Contrast this with the position taken by the Clinton administration with respect to the Communications Decency Act of 1996. Pub. L. No. 104-104, 110 Stat. 133 (codified at 47 U.S.C. 223(a) and (d) to (h) (1994 and Supp. IV 1998)). The law prohibited the dissemination of "indecent" or "patently offensive" materials to minors on the internet. Even though the Department of Justice believed the statute to be unconstitutional, it persisted in defending the act of congress. This was a conscious decision on the DOJ's part, rooted in the belief that the adversarial judicial process was the appropriate means of settling the matter. As the then Solicitor General wrote:

Having argued the case, I can confirm that there is nothing quite like standing in front of the Supreme Court to defend the constitutionality of a law that not a single judge has ever found to be constitutional in any respect. The United States did lose . . . But our adversarial system of constitutional adjudication was served. The United States' briefs served the valuable purpose of articulating for the Supreme Court the strongest possible rationale in support of constitutionality - a much stronger case than anything that had been articulated by or to Congress. Those arguments in turn prompted the parties challenging the statute to hone and improve their own positions. And when the Court concluded that the statute should be invalidated, it did so with assurance that it had considered the very best arguments that could be made in its defense.

Seth P. Waxman, *Defending Congress*, 79 N.C.L. REV. 1073, 1079 (2001).

law amounted to executive enforcement of the judiciary's ultimate judgment on the matter.⁶⁸

But in *Windsor*, the Obama administration decided not to defend an act of Congress for the very purpose of securing a judicial ruling *overturning* a precedent.⁶⁹

Two possible interpretations may account for the Obama administration's approach. On one hand, it viewed DOMA as so patently unconstitutional that it neither could nor should be defended pursuant to the President's duties to uphold and defend the Constitution. But this brings us back to the question posed at the start of this section: if DOMA was so constitutionally objectionable, why bother enforcing it? A more plausible interpretation is that the executive intended, by enforcement and non-defense, to force the issue out of the legislative and executive branches and into the judicial branch. And this is where Presidents must tread carefully when it comes to responding to constitutionally objectionable laws.

In a memorandum advising the Attorney General not to defend a constitutionally objectionable statute, then Assistant Attorney General Ted Olson cautioned:

Our constitutional system is delicately balanced by the division of power among the three Branches of the Government. Although each Branch is not hermetically sealed from the others and certain areas of overlapping responsibility may be identified, the quintessential functions of each Branch may be easily stated. It is axiomatic that the Legislature passes the laws, the Executive executes the laws, and the Judiciary interprets the laws. Any decision by the Executive that a law is not constitutional and that it will not be enforced or defended tends on the one hand to undermine the function of the Legislature and, on the other, to usurp the function of the Judiciary. It is generally inconsistent with the Executive's duty, and contrary to the allocation of legislative power to Congress, for the Executive to take actions that have the practical effect of nullifying an Act of Congress. It

⁶⁸ For discussion of judicial supremacy, see William Baude, *The Judgment Power*, 96 GEO. L.J. 1987 (2008).

⁶⁹ *Baker v. Nelson*, 409 U.S. 819 (1972). In *Baker*, the Supreme Court dismissed an appeal from the Supreme Court of Minnesota (191 N.W.2d 185 (Minn. 1971)) for want of a substantial federal question, a decision tantamount to a ruling on the merits from the high court. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). The Supreme Court of Minnesota rejected a petition for a writ of mandamus requiring the issuance of a marriage license to the same-sex claimants on the ground that marriage is not a fundamental right. ("[Petitioners'] constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory. We are not independently persuaded by these contentions and do not find support for them in any decisions of the United States Supreme Court." *Id.* at 312.).

is also generally for the courts, and not the Executive, finally to decide whether a law is constitutional. Any action of the President that precludes, or substitutes for, a judicial test and determination would at the very least appear to be inconsistent with the allocation of judicial power by the Constitution to the courts. Exceptions to this general rule, however rare, do and must exist. (Internal citations omitted.)⁷⁰

We have explored a number of those exceptions here. They included: (1) instances in which the President declined to enforce an act of congress because he believed it encroached upon powers allocated by the Constitution to the Executive (i.e., cases in which the President was the aggrieved party,) and; (2) an instance in which the Executive declined to enforce or defend an act of congress because it attempted to contravene a settled principle of constitutional law. These cases have not jeopardized the delicate constitutional balance for two reasons. First, the adversarial system ensured that the constitutionally objectionable law received a full-throated defense. For example, when the President refused to comply with the Tenure of Office Act, the Postmaster General sued; and when the President challenged the constitutionality of the statute in court, the claimant defended it. The judiciary thus became the arbiter of whether Congress had encroached upon the powers of the president. Similarly, when the President declined to enforce or defend an act of congress allowing for the admission of voluntary confessions in violation of the *Miranda* ruling, he did so not in defiance of Congress but out of deference to the judiciary.

By declining to defend DOMA – yet persistently appealing favorable decisions – the Executive made clear its desire that the underlying constitutional issues be resolved not in the political branches but by the judiciary. Yet the tortured procedural history of the case, complete with the puzzling recognition of BLAG’s standing, lays bare the perils of relying on the federal judiciary to the exclusion of the political process when the President considers an act of congress

⁷⁰ Memorandum Opinion for the Attorney General, 8 Op. O.L.C. 183, 193-4 (1984) (memorandum from Assistant Attorney General Theodore B. Olson).

unconstitutional. A careful read of the Chief Justice’s opinion in *Windsor* suggests that he was well aware of these political and constitutional perils.

III. Will the Real John Roberts Please Stand Up?

In announcing his decision to nominate John Roberts to the Supreme Court, President George W. Bush observed, “One of the most consequential decisions a president makes is his appointment of a justice to the Supreme Court. When a president chooses a justice, he’s placing in human hands the authority and majesty of the law.”⁷¹ Critics have described the Chief Justice as a traitor to conservatism,⁷² a pawn of big business,⁷³ and even “[t]he shrewdest, most manipulative and radical politician in [D.C.]”⁷⁴ From his controversial decision on campaign finance in *Citizens United*⁷⁵ to his startling ruling on the Affordable Care Act,⁷⁶ the Chief Justices has drawn fire from all quarters. Even President Obama, in an historic breach of presidential decorum, publicly rebuked the Roberts Court during his 2010 State of the Union address.⁷⁷ This section explores the Chief Justice’s role as something more than a judge – as a

⁷¹ President George W. Bush, Sup. Ct. Nomination Announcement, Press Conference (July 19, 2005), *available at* <http://www.nytimes.com/2005/07/19/politics/politicsspecial1/19TEXT-SCOTUS.html> (last visited Mar. 2, 2014).

⁷² Matt Lewis, *Brent Bozell slams Chief Justice John Roberts as ‘traitor to his philosophy,’* THE DAILY CALLER (June 28, 2012), <http://dailycaller.com/2012/06/28/brent-bozell-slams-justice-jon-roberts-as-a-traitor-to-his-philosophy/> (last visited Mar. 8, 2014).

⁷³ Megan Hatcher-Mays, *Right-Wing Media Continue to Deny Pro-Business Agenda of Roberts Court*, MEDIA MATTERS FOR AMERICA (Sept. 17, 2013), <http://mediamatters.org/blog/2013/09/17/right-wing-media-continue-to-deny-pro-business/195930> (last visited Mar. 8, 2014).

⁷⁴ Howard Fineman, *John Roberts Shows Cold-Blooded Calculation in his Supreme Court Rulings*, HUFFINGTON POST (June 26, 2013), *available at* http://www.huffingtonpost.com/2013/06/26/supreme-court-doma_n_3434870.html (last visited Mar. 8, 2014).

⁷⁵ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

⁷⁶ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566 (2012).

⁷⁷ Robert Barnes, *Alito v. Obama: Reactions split on Obama’s remark, Alito’s response at State of the Union*, WASH. POST (Jan. 29, 2010), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012802893.html> (last visited Mar. 2, 2014) (“legal experts said they had

judicial statesman – responsible for leading the Court through the controversial social issues at the heart of the DOMA litigation.

As Chief Justice of the United States, John Roberts is responsible for the most fragile branch of the federal government: the judiciary. The authority of the judiciary of the United States depends almost entirely upon its perceived institutional integrity. This integrity does not spring from the Constitution itself, which actually gives the Court a very limited role in the life of the nation.⁷⁸ Nor is it the result of a political vacuum created by failures of the political branches and deferential politicians. Rather, the Court’s integrity is built upon the legacy of generations of strong judicial leadership by Chief Justices mindful of the role of the Court in our constitutional system.

Every astute Chief Justice knows that the Court is only as strong as the political branches enable it to be. The binding force of its decisions depends entirely on the recognition by federal and state governments of the Court’s institutional legitimacy. Historically, that has not always been a given. When the Court defied the Executive’s policy of Indian removal in the 1832 case of *Worcester v. Georgia*,⁷⁹ President Andrew Jackson reportedly remarked, “John Marshall has made his decision . . . now let him enforce it!”⁸⁰ Although probably apocryphal, the remark

never seen anything quite like [the rebuke], a rare and unvarnished showdown between two political branches during what is usually the careful choreography of the State of the Union address.”).

⁷⁸ In Federalist No. 78, Alexander Hamilton reassured the voters of New York that the federal judiciary proposed in the new Constitution was “beyond comparison the weakest of the three departments of power” because it “has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may be truly said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” THE FEDERALIST No. 78, at 378 (Alexander Hamilton) (Terence Ball ed., 2003).

⁷⁹ 31 U.S. (6 Pet.) 515 (1832).

⁸⁰ Edwin A. Miles, *After John Marshall’s Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J.S. HIST. 519, 519 (1973). See also, Andrew Jackson, *Veto Message Regarding the Bank of the United States* (Jul. 10, 1832), http://avalon.law.yale.edu/19th_century/ajveto01.asp (“The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.”)..

accurately sums up the limitations of judicial power in the 1830s. But a century later when Arkansas Governor Orval Faubus barred African-American children from a Little Rock public school to “preserve the peace” in defiance of a Court order, President Eisenhower nationalized the Arkansas National Guard and ordered it to escort the students safely to school.⁸¹

Any astute Chief Justice also knows that the decisions of the Court are only as authoritative as the citizenry believe them to be. Never has the Court fallen into such disrepute as in the wake of *Dred Scott v. Sandford*,⁸³ when Chief Justice Taney, seemingly blind to the intensity of sectional divisions on slavery, handed down an expansive and morally obtuse decision going well beyond the narrow issues actually raised by the case. It took the nation – and the Court itself – decades to recover from the national convulsions the decision wrought.⁸⁴ And seldom has judicial activism unleashed more lasting controversy or more deeply divided popular opinion as *Roe v. Wade*,⁸⁶ regarded by some commentators as the 20th-century equivalent of the *Scott* case.⁸⁷ In both cases, the Court arguably overreached in tackling essentially moral issues better left to the political branches for resolution and closure.⁸⁸

⁸¹ Exec. Order No. 10,730, 3 C.F.R. 389 (1954-1958 comp.) (Little Rock, Arkansas).

⁸³ 60 U.S. (19 How.) 393 (1857). For discussion, see DON R. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* at 573-595 (1978).

⁸⁴ That recovery was facilitated, at least in part, by congressional legislation expanding federal judicial power. William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1836-1875*, 13 AM. J. L. HIST. 333 (1969) (Source on role of Salmon Chase).

⁸⁶ 410 U.S. 113 (1973).

⁸⁷ See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., dissenting) (“I cannot agree with, indeed I am appalled by, the Court’s suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced—*against* overruling, no less—by the substantial and continuing public opposition the decision has generated. The Court’s judgment that any other course would “subvert the Court’s legitimacy” must be another consequence of reading the error-filled history book that described the deeply divided country brought together by *Roe*. In my history book, the Court was covered with dishonor and deprived of legitimacy by *Dred Scott v. Sandford*, 19 How. 393 (1857), an erroneous (and widely opposed) opinion that it did not abandon, rather than by *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937), which produced the famous “switch in time” from the Court’s erroneous (and widely opposed) constitutional opposition to the social

These lessons of history have apparently not been lost on John Roberts. During his confirmation hearings, he commented to Senator Orrin Hatch, “All judges are acutely aware of the fact that millions and millions of people have voted for you and not one has voted for any of us.”⁸⁹ So where then does judicial legitimacy come from? According to Roberts, it comes from the faithful discharge of the narrow task assigned to judges under our constitutional system the task of resolving disputes between adverse parties in accordance with the law. Anything beyond this amounts to political encroachment. “[J]udges should be careful in making sure that they have a real case in front of them,”⁹⁰ he told the Senate:

A real live dispute between parties who have actual injury involved, actual interests at *stake* because that is the basis for their legitimacy. And then they’re to decide that case as a judge would, not as a legislator would based on any view of what’s the best policy but as a judge would based on the law.⁹¹

Roberts reiterated this conception of the federal judiciary in his opinions in the two same-sex marriage cases before the Court last year. Both *Windsor* and *Hollingsworth*⁹² turned on the constitutionality of statutes forsaken by the political branches of government responsible for defending their constitutionality. In *Windsor*, the Obama administration refused to defend the definition of marriage under DOMA as a union between one man and one woman. In *Hollingsworth*, the State of California refused to defend Proposition 8, which amended the state

measures of the New Deal.”) For a critique of the analogy, see Jamin B. Raskin, *Roe v. Wade and the Dred Scott Decision: Justice Scalia’s Peculiar Analogy in Planned Parenthood v. Casey* at I J. GENDER & L. 61 (1993).

⁸⁸ Debra Cassens Weiss, *Justice Ginsburg: Roe v. Wade Decision Came Too Soon* ABA JOURNAL (Feb. 13, 2012), http://www.abajournal.com/news/article/justice_ginsburg_roe_v_wade_decision_came_too_soon/ (last visited March 2, 2014).

⁸⁹ *Transcript: Second Day of Hearings on the Nomination of Judge John Roberts*, N.Y. TIMES (Sept. 13, 2005), available at <http://www.nytimes.com/2005/09/13/politics/politicsspecial1/13text-roberts.html?pagewanted=17> (last visited March 2, 2014).

⁹⁰ *Id.*

⁹¹ *Id.*. See also John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L. J. 1219 (1993).

⁹² *Hollingsworth v. Perry*, 570 U.S. ____ (2013).

constitution to prohibit the recognition of same-sex marriage.⁹³ In both cases third-party appellants stepped in to defend the laws that the state and federal officials responsible would not defend.

The threshold question before the court in both cases was whether the proxy appellants had Article III standing to bring appeals. Under Article III, the parties must have a real adversary interest in the outcome of the case for the Court to take jurisdiction over the issues raised. It is not enough for a litigant to want clarity on a constitutional question or vindication of a general principle of law. In both cases, Roberts held that the appellants lacked adversary standing and that the appeal therefore was not a matter over which the Court had jurisdiction. Speaking for the 5-4 majority in *Hollingsworth*, the Chief Justice noted that the very purpose of the standing requirement is to prevent the judiciary from usurping the function of the political branches in setting public policy. Acknowledging the active public debate on same-sex marriage,⁹⁴ Roberts declined to inject the court into an issue better left to the political process. For the Court to rule on the issues raised outside the context of a real case or controversy involving actual adversary interests would be an act of judicial usurpation.⁹⁵

But the Chief Justice found himself on the losing side of the jurisdictional issue in *Windsor*. There, he disagreed with the majority's decision to decide the case on the merits, arguing instead that the *Windsor* appellants lacked standing for the same reason as the

⁹³ Cal. Const., Art. I, § 7.5.

⁹⁴ The decision opens with these words: "The public is currently engaged in an active political debate over whether same-sex couples should be allowed to marry. That question has also given rise to litigation. In this case, petitioners, who oppose same-sex marriage, ask us to decide whether the Equal Protection Clause prohibits the State of California from defining marriage as the union of a man and a woman." (Internal quotations omitted.) *Windsor*, 570 U.S. at 1.

⁹⁵ *Id.* at 17 ("The Article III requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in our system of separated powers.").

Hollingsworth appellants.⁹⁶ He also disagreed with the majority on the merits of the appeal, challenging the holding that the Defense of Marriage Act was motivated by homophobic animus.

The evidence adduced, he wrote, was

hardly enough to support a conclusion that the ‘principal purpose’ of the 342 Representatives and the 85 Senators who voted for [DOMA], and the President who signed it, was a bare desire to harm. . . . At least, without some more convincing evidence that the Act’s principal purpose was to codify malice, and that it furthered *no* legitimate government interests, I would not tar the political branches with the brush of bigotry.⁹⁷

The Chief Justice’s dissent served to remind his colleagues of the need for judicial civility toward lawmakers with whom there might be honest disagreement on deeply divisive social issues.⁹⁸

Contrast these restrained and consistent holdings with Roberts’s puzzling approach to *National Federation of Independent Business v. Sebelius*⁹⁹ and the constitutionality of the Affordable Care Act.¹⁰⁰ The Act’s individual mandate requires certain Americans to purchase health insurance or pay a penalty (the “shared responsibility payment”) to the Internal Revenue Service.¹⁰¹ Another provision of the act requires states to expand the scope of Medicaid coverage or face the loss of federal funding for the program. As in *Hollingsworth* and *Windsor*, there was a threshold issue of standing: whether the Anti-Injunction Act, which bars suits to

⁹⁶ Roberts Dissent, *Windsor*, 570 U.S. at 3-4.

⁹⁷ *Id.* at 1-2.

⁹⁸ It is worth noting that Roberts joined in the first part of Justice Scalia’s dissent, which dealt with the lack of standing in the case, but he did not join in the second part, which dealt harshly with the majority’s characterization of DOMA. “It is one thing for a society to elect change,” Scalia wrote, “it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.” Scalia Dissent, *Windsor*, 570 U.S. at 21.

⁹⁹ 567 U.S. ____ (2012).

¹⁰⁰ 26 U.S.C. § 5000A.

¹⁰¹ 26 U.S.C. §§ 5000A(c), (g)(1).

enjoin the federal government from collecting taxes,¹⁰² required that the case be dismissed. In a startling display of semantic gymnastics, Roberts held that the shared responsibility payment was a penalty with respect to the Anti-Injunction Act but a valid exercise of Congress's tax power with respect to its constitutionality.

This sort of casuistry from a jurist whose brilliance is conceded by admirers and critics alike almost beggars belief. Republican Senator Mike Lee was not alone in wondering, "What happened to Chief Justice Roberts?"¹⁰³ Even liberal commentators posed the question in the wake of the ACA ruling. Linda Greenhouse of the *New York Times* suggested, "In saving the mandate's penalty provision as a tax, [Roberts] followed his head. In denouncing the very notion that Congress might require people to buy health insurance, he followed his heart. . . . [For Roberts,] head and heart were no longer at war."¹⁰⁴ But such platitudes do little to explain the Chief Justice's ruling, heartfelt or not.

Chief Justice Roberts is a pragmatist. When asked during his confirmation hearings whether he subscribed to a particular school of constitutional interpretation, he responded,

I don't have an overarching view. As a matter of fact, I don't think very many judges do. I think a lot of academics do. But the demands of deciding cases and the demands of deciding cases by committee -- either a group of three or a group of nine -- I find with those demands the nuances of academic theory are dispensed with fairly quickly and judges take a more practical and pragmatic approach to trying to reach the best decision consistent with the rule of law.¹⁰⁵

¹⁰² 26 U.S.C. § 7421(a) ("no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person").

¹⁰³ MIKE LEE, *WHY JOHN ROBERTS WAS WRONG ABOUT HEALTHCARE: A CONSERVATIVE CRITIQUE OF THE SUPREME COURT'S RULING* (2013) (title of Chapter IV).

¹⁰⁴ Linda Greenhouse, *The Real John Roberts Emerges*, N.Y.T. (June 29, 2013), available at <http://opinionator.blogs.nytimes.com/2013/06/29/the-real-john-roberts-emerges/> (last visited, March 8, 2014).

¹⁰⁵ *Transcript: Second Day of Hearings on the Nomination of Judge Roberts*, N.Y.T. (Sept. 13, 2005), available at <http://www.nytimes.com/2005/09/13/politics/politicsspecial1/13text-roberts.html?pagewanted=33> (last visited, March 8, 2014).

With a fragile majority of five conservative justices and a long future ahead of him on the Court, Chief Justice Roberts may well have opted for a pragmatic, though decidedly non-magisterial, outcome in *National Federation of Independent Business v. Sebelius*. From 2010, when the law was passed, to 2012, when the Court upheld its constitutionality, public opinion polls showed that the nation was narrowly divided on the desirability of the ACA, the signature legislative achievement of the Obama administration.¹⁰⁶ Had Roberts sided with the Conservative justices in the case, he would likely have reinforced public perception of the court as an irretrievably partisan institution. But instead, Roberts' surprising decision garnered political support for his leadership from Democrats in the short term¹⁰⁷ while simultaneously weakening the ACA in the long term.¹⁰⁸

As divided as the Supreme Court is today, John Roberts has proven an exceptionally effective consensus-builder. Indeed, he indicated from the outset that this is one of his chief priorities as Chief Justice. “[W]e’re not benefited by having six different opinions in a case,” he once remarked.¹⁰⁹ Like John Marshall, Earl Warren, Charles Evans Hughes and other judicial statesmen before him, Roberts recognizes that the Court never speaks so authoritatively as when

¹⁰⁶ Frank Newport, Jeffrey M. Jones, Lydia Saad, *Gallup Editors: Americans' Views on the Healthcare Law* (June 22, 2012), <http://www.gallup.com/poll/155300/gallup-editors-americans-views-healthcare-law.aspx> (last visited March 8, 2014).

¹⁰⁷ If anything, his ruling appears to have inspired greater confidence in the Court among Democrats. Jeffrey M. Jones, *Party Divide Still Evident in Supreme Court Job Approval* (Sept. 28, 2012), <http://www.gallup.com/poll/157754/party-divide-evident-supreme-court-job-approval.aspx> (showing a precipitous increase in Supreme Court approval ratings among Democrats in the wake of the ACA decision, and a corresponding decrease among Republicans) (last visited, March 8, 2014).

¹⁰⁸ The decision limits Congress's exercise of the once-inexorable commerce power to the regulation of commercial activity. In addition, the opinion struck down key provisions of the ACA. The ruling on Medicaid expansion has left states with the option of not participating in the new system, a prospect which might leave more than 17 million of the poorest Americans without any insurance coverage at all. Thus the statute that was supposed to make federally subsidized health care available to all could instead place it beyond the reach of those who need it most.

¹⁰⁹ *Transcript: Third Day of Hearings on the Nomination of Judge Roberts*, N.Y.T. (Sept. 14, 2005), available at <http://www.nytimes.com/2005/09/14/politics/politicsspecial1/14text-roberts.html?pagewanted=76> (last visited, March 8, 2014).

it speaks unanimously. In *Rumsfeld v. Forum for Academic and Institutional Rights*,¹¹⁰ he secured a unanimous ruling that upheld a federal statute requiring colleges and universities receiving federal funds to allow military recruiters on campus despite their objections to the don't-ask-don't-tell policy then in effect in the armed forces. And in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,¹¹¹ a unanimous court ruled against the federal government's seizure of sacramental tea containing a substance banned by the Controlled Substances Act.

But even the most able judicial negotiator cannot build consensus on issues that deeply polarize the nation. Where the Roberts Court has encountered such issues, particularly with respect to same-sex marriage and the ACA, the Chief Justice effectively temporized so that the political branches could work out a solution without assertive judicial intervention. Perhaps nowhere has this been more evident than in the same-sex marriage cases. The *Hollingsworth* decision made no great strides for gay rights in the states, and *Windsor* guarantees homosexuals no more and no less than they are entitled to under the laws of their respective domiciles. Yet both supporters and opponents of same-sex marriage walked away from the Court on June 26th, 2013, feeling to some degree vindicated by the Court's decisions. It was a remarkable outcome for cases that turned on so wrenching a social issue.

Temporizing may buy the political process time to resolve issues that are not yet ripe or expedient for the Supreme Court to decide, however, deferring decisions for another day begs the question of who, exactly, will be deciding the cases. There are few guarantees that two years hence the Court's make-up will be the same as it is today. So when gay rights return to the Court, it is unclear what the outcome will be. The next president will likely have the power to

¹¹⁰ 547 U.S. ____ (2006).

¹¹¹ 546 U.S. 418 (2006).

tip the ideological balance of the court for decades to come, but our protean Chief Justice is not going anywhere soon. As his record to date makes abundantly clear, this Chief Justice plays a long game in which the stakes are history. And as a relatively young man with many years ahead of him on the Court, history is on John Roberts's side.

Conclusion

The Supreme Court is a curious institution in this democratic republic. It is not a representative body whose members are elected or subject to electoral recall, which is precisely why Jefferson regarded it as an anomaly in the Early Republic.¹¹² The Court is composed of lifetime appointees with the power to overturn legislation passed by the elected representatives of the people. Its justices can declare acts of the Executive unconstitutional in time of war and peace;¹¹³ they can invalidate the duly enacted laws of the several states;¹¹⁴ and they can issue decisions that bear upon the most public human endeavors and the most private individual activities.¹¹⁵ And yet the judicial power is carefully bounded by doctrines of standing and justiciability, both of help preserve the separation of powers among the three branches.

This article has been a study in judicial politics: the judicial politics of executive review, judicial review, and judicial statesmanship. It explored the perils of executive and judicial

¹¹² Jefferson explained his distrust of the judiciary as follows:

The constitution . . . is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent, is absolute also; in theory only, at first, while the spirit of the people is up, but in practice, as fast as that relaxes. Independence can be trusted nowhere but with the people in mass.

Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *in* THOMAS JEFFERSON: WRITINGS, at 1426 (Merrill D. Peterson ed., 2011).

¹¹³ *See e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (“The President's power, if any, to issue the [expropriation] order must stem either from an act of Congress or from the Constitution itself.”).

¹¹⁴ *See e.g.*, *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236 (1796) (“A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a state legislature can stand in its way.”).

¹¹⁵ *See e.g.*, *Griswold v. Conn.*, 381 U.S. 479, 484-6 (1965) (finding that the First, Third, Fourth and Fifth Amendment protect “zones of privacy” into which state regulation cannot intrude).

overreach in the context of *United States v. Windsor*. Part I explored the jurisdictional problems that bedeviled the case, suggesting that the majority overstepped the proper boundaries of judicial power, intruding upon the political process in the absence of a case or controversy. Part II explored the executive's strategy of non-defense (but continuing enforcement) of DOMA, arguing that the manner in which the Executive asserted its interpretation of the Constitution was deeply problematic, encroaching upon the power of the legislature to set public policy. Finally, Part III examined John Roberts' leadership of the Court through this (and other) politically charged cases. It now concludes with a call for caution and for reform.

There are some cases in which presidential non-defense and non-enforcement of a statute may effectively nullify a law. For example, if a president were to decide not to enforce the federal death penalty, one would be hard-pressed to find a death-row inmate willing to challenge the constitutionality of the president's stance.¹¹⁶ Under such circumstances, presidential non-defense or non-enforcement would, in effect, constitute a form of *de facto* repeal, and that should be deeply troubling to Congress. Just as there may be instances in which the president, not the judiciary, would become the ultimate arbiter of a law's constitutionality, so too would there be instances in which the president, not the legislative process, would become the ultimate author of the public policy of the nation. And this is an extraordinary threat to the separation of powers.

Yet the politics of the moment often stand in the way of more enduring constitutional principles, making it difficult for congress to pass a joint resolution to intercede in judicial proceedings. A Republican congress would probably be unwilling to challenge non-enforcement by a Republican president, just as a Democratic congress would probably be unwilling to challenge a Democratic president. Nevertheless, it is in the interest of lawmakers of *both* parties

¹¹⁶ Absent a court like the Fourth Circuit in *Dickerson* that is willing to raise the issue *sua sponte*, the un-enforced statute might remain forever beyond judicial review.

to see to it that the constitutionality of their laws is determined by the judiciary and not by the president in genuine cases or controversies. The solution to establishing congressional standing therefore lies in Congress rather than in the courts. Revising the Manual and Rules of the House of Representatives to empower the BLAG to speak for the whole of Congress absent a joint resolution of Congress might be all that is necessary to give the Group standing in federal courts in cases such as *Windsor*.