Presidential Constitutionalism and Civil Rights

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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.
# Table of Contents

**INTRODUCTION** ........................................................................ 1722

I. WHAT IS PRESIDENTIAL CONSTITUTIONALISM? .............. 1727
   A. The Features of Presidential Constitutionalism .......... 1727
   B. The Scholarly Debate Regarding Presidential
      Constitutionalism ........................................... 1730

II. PRESIDENTIAL CONSTITUTIONALISM AS CIVIL RIGHTS  1737
    A. Race ..................................................... 1738
    B. Gender ............................................... 1743
    C. HIV ..................................................... 1746
    D. Self-Incrimination .................................. 1748
    E. Abortion ............................................. 1750
    F. Guns .................................................... 1752

III. PRESIDENTIAL CONSTITUTIONALISM AND GAY RIGHTS 1755
    A. Gay Rights and Administrative Law ................... 1757
    B. Gay Rights Litigation .................................. 1761
    C. Law Enforcement Discretion ............................ 1763
    D. Support for the Freedom to Marry .................... 1764

IV. PRESIDENTIAL CONSTITUTIONALISM AND THE
    ACTIVE VIRTUES ............................................ 1765
    A. Nondefense of DOMA and the Scholarly Debate ....... 1766
    B. The Normative Case for Undermining DOMA .......... 1772
    C. Presidential Constitutionalism and Judicial Doctrine. 1774
    D. Presidential Constitutionalism and the “Zone of
       Twilight” ...................................................... 1779
    E. Presidential Constitutionalism and Vertical
       Separation of Powers .................................. 1782

CONCLUSION: PRESIDENTIAL CONSTITUTIONALISM AND THE
NEXT FRONTIER .......................................................... 1785
INTRODUCTION

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

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.").
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, attention has shifted to ways the executive can place constitutional interpretation in the service of civil rights enforcement.

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. In more modern times, U.S. presidents have advanced civil rights through constitutional interpretations bearing on race, gender, HIV-status, self-incrimination, reproductive liberty, gun rights, and—most recently—sexual orientation. 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
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,\textsuperscript{17} this Article considers how certain features of presidential administrations—including the President’s accountability, access to information, and expertise\textsuperscript{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,\textsuperscript{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,\textsuperscript{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,”\textsuperscript{21} the President—the only democratically elected

\textsuperscript{17.} Bruce Ackerman, \textit{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.”).

\textsuperscript{18.} See, e.g., Harold Hongju Koh, \textit{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”); \textit{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).

\textsuperscript{19.} See \textit{Chevron}, 467 U.S. at 865-66.


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.”

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


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.”


regarding the branch of government best suited to resolve the law’s enforceability. 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. The Obama Administration’s commitment to LGBT equality, which spanned both constitutional implementation and constructions of operative meaning, 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...

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. The Constitution also grants the President the power to sign and veto legislation; execute, implement, and interpret laws passed by Congress; exercise prosecutorial discretion; bring

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;\textsuperscript{35} and, at times, refuse to enforce or defend legislation.\textsuperscript{36} Finally, the President, legitimated by the electoral system, serves as a representative of the populace at large.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{40} Of course, there can be overlaps between the two. Moreover, while a moral or political view about equality is not necessarily the same

\textsuperscript{35}. See infra notes 47, 77 and accompanying text.
\textsuperscript{36}. See infra notes 87, 99, 110-12, 180 and accompanying text.
\textsuperscript{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”).
\textsuperscript{38}. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).
\textsuperscript{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.
\textsuperscript{40}. See Daniel J. Meltzer, Executive Defense of Congressional Acts, 61 Duke L.J. 1183, 1229 (2012) (“[P]resident 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.”); \textit{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; at the same time,
regardless of whether presidential interventions affect constitu-
tional 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, 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
despite change in party affiliation of subsequent

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-
CORNELL J. L. & PUB. POL’Y 503, 518 (2003) (explaining that divided government has persisted
“during most of the post-Vietnam War era”).

2014] PRESIDENTIAL CONSTITUTIONALISM 1729
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, abstain from bringing unconstitutional criminal prosecutions, participate in constitutional litigation, and, more sparingly, refuse to defend (or even more rarely refuse to enforce) congressional acts. As scholars have also noted, executive branch practice has rather consistently followed a middle-ground approach between Departmentalism and Judicial Supremacy.

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).
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, 1730
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. 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), he must in the first instance and as a general matter enforce and defend the law.

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.

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

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*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.”).


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. 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. As Prakash noted recently, “If the President believes a law is unconstitutional, he should not enforce it, much less defend its constitutionality.”

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 unconstitutional ones.” (footnotes 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).


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, 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. For Meltzer, the President’s obligation to defend congressional acts arises not from “a legal rule derivable from the Constitution itself, but [as] a matter of judgment, informed by a welter of historical and institutional concerns.” 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, 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,” for anything else could result in an “unraveling of the executive branch’s practice of defending federal statutes.” 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 or when a statute undermines the separation of powers.

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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.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.

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

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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. 198, 201 (1984)). 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. 385, 386 (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.” 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. 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, Johnsen argues that there are circumstances in which presidential nondefense or non-enforcement can be legitimate. 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.

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.
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. 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. Modern presidents have refused to enforce or defend congressional acts in a variety of contexts, 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* during the run-up to *Brown v. Board of Education*. 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. 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*. 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*. 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. Subsequent presidential administrations took positions

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78. 163 U.S. 537 (1896).
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.
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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86. Id. at 162.
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. Although DOJ had initially defended the ICC, the Solicitor General changed positions and supported Henderson, filing a brief arguing that segregation on trains violated the Interstate Commerce Act and that the doctrine of “separate but equal” was unconstitutional. The Supreme Court sided with Henderson on narrow grounds, holding that the railroad’s policy was in technical violation of the statute.

Henderson is noteworthy for a number of reasons, not least that the Truman Administration decided to confess error in a major civil rights case. 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*. 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. The same day Henderson was announced, the Court also decided two cases that concerned racial segregation in universities: *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents for Higher Education*. In these cases, the Truman Administration also submitted briefs arguing that state-sponsored racial segregation

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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.”).
94. *See Waxman, supra* note 46, at 1306-07.
95. *See id.* at 1307.
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.*

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. 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.

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. President Nixon enforced this executive order and in 1969 also issued Executive Order 11,478, which required federal agencies to establish affirmative action programs for civilian employees. In addition, that year the Department of Labor set specific numeric targets for federally funded construction projects. While scholars disagree about the root of President Nixon’s enthusiasm for affirmative action, the Executive Orders

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


were major steps that advanced anti-discrimination norms in the wake of the Supreme Court’s busing decisions.  

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. President Bush appointed Justices Souter and Thomas, believing that both would cast votes against affirmative action. 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. 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. 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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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).


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

President Bush also vetoed the Civil Rights Act of 1990, which he labeled a quota bill, and he opposed (but signed) the veto-proof Civil Rights Act of 1991. The day before he was scheduled to sign the bill, he “issued a directive terminating affirmative action in the federal government,” but “congressional and public outcry ... forced [him] to withdraw [the directive].” 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.

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. 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

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

While presidential campaigns to promote racial equality advanced novel constructions of operative constitutional meaning, the gender cases generally reflected implementations of prior Court decisions. 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, 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.\textsuperscript{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.\textsuperscript{129} The Supreme Court granted certiorari, and then-Professor Ruth Bader Ginsburg filed a brief on Struck’s behalf.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{132}

Two years later, however, the Court rejected the premise that pregnancy discrimination constituted per se gender discrimination. In \textit{Geduldig v. Aiello}, the Court upheld California’s exclusion of medical benefits for pregnant women in its disability insurance program.\textsuperscript{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.\textsuperscript{134} Eventually, \textit{Geduldig} was effectively overruled,\textsuperscript{135} and

\textsuperscript{129} \textit{Struck}, 460 F.2d at 1373-74.
\textsuperscript{132} \textit{Struck}, 409 U.S. at 1071.
\textsuperscript{134} See \textit{Geduldig}, 417 U.S. at 494-97.
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.\(^\text{136}\) 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.\(^\text{137}\) 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.\(^\text{138}\) Thus, Clinton vetoed the bill when it first came to his desk for signing.\(^\text{139}\) 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.\(^\text{140}\) 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.\(^\text{141}\) 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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\(^{137}\) *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.


\(^{140}\) See Johnsen, *Defend Constitutional Equality*, *supra* note 66, at 609.

\(^{141}\) See id.
the provision in the courts. Eventually, Congress repealed the provision before it took effect.

Although President Clinton believed that an equal protection violation was clear and that the provision was “blatantly discriminatory and highly punitive,” it is unlikely that the federal courts would have found the law unconstitutional at that time. 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, a court examining the HIV-discharge provision in 1996 would likely have upheld it.


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)).


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

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149. Id. at 431-36.
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.
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

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.
law as a “solemn act.” 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. The President’s decision was informed by the fact that, because the decision would be a constitutional one, it would necessarily affect fundamental rights.

The Supreme Court ultimately agreed with the executive. Indeed, the Court noted that it is jurisdictionally incapable of applying rules to state courts—as it did in Miranda and in subsequent cases—unless it is to apply the Constitution. 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.” Accordingly, the Supreme Court, like the executive in its brief, rejected the idea that it could uphold § 3501 without overturning Miranda. It declined to do so, and struck down the law.

E. Abortion

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

162. Id.
163. See id.
164. See Dickerson, 530 U.S. at 444.
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.
interpretations by raising the issue during campaigns and, once in office, reiterating them through use of the bully pulpit;\textsuperscript{173} supporting and signing legislation that comported with the executive’s policy preferences, or, alternatively, vetoing legislation that did not;\textsuperscript{174} considering views on reproductive liberty when making judicial appointments;\textsuperscript{175} nominating to executive posts individuals who shared the President’s view;\textsuperscript{176} filing amicus briefs in court;\textsuperscript{177} and pursuing regulatory initiatives that advanced the executive’s agenda on reproductive rights.\textsuperscript{178}

President Reagan was especially active in this regard. As early as 1983, his Administration urged the Court to scale back \textit{Roe}. In \textit{Akron v. Akron Center for Reproductive Health, Inc.},\textsuperscript{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 \textit{Roe}’s fundamental right/strict scrutiny standard.\textsuperscript{180} Lee’s replacement, Charles Fried, filed a brief in 1986 explicitly asking the Court to overturn \textit{Roe}.\textsuperscript{181} DOJ likewise filed amicus briefs in

\textsuperscript{173}. For example, Richard Nixon described abortion as “an unacceptable form of population control” during the 1972 election. See \textit{Devins}, \textit{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.” \textit{Id.} at 100. George H.W. Bush expressed a desire to stop “another unborn child” from becoming “the innocent victim of abortion.” \textit{Id.} at 101.

\textsuperscript{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 \textit{id.} at 102-03. After \textit{Casey}, President Clinton vetoed a ban on “partial birth abortions,” whereas President George W. Bush signed a similar ban into law. See \textit{Johnsen, Functional Departmentalism, supra} note 74, at 141.

\textsuperscript{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 \textit{Devins, supra} note 170, at 105.

\textsuperscript{176}. See \textit{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”).

\textsuperscript{177}. See \textit{id.} at 109-11; \textit{Johnsen, Functional Departmentalism, supra} note 74, at 137, 141-42.

\textsuperscript{178}. See \textit{Devins, supra} note 170, at 113-17 (describing, inter alia, the Reagan Administration’s funding restrictions for clinics that provided abortion-counseling and, post-\textit{Casey}, the Clinton Administration’s dissolution of those Reagan-era regulations).

\textsuperscript{179}. 462 U.S. 416 (1983).


\textsuperscript{181}. See \textit{Devins, supra} note 170, at 110-11.
several state-level actions to stimulate discussion on the subject in
the hopes of eventually overruling Roe. These wide-ranging efforts
from Presidents Reagan and George H.W. Bush were reflected in
subsequent Supreme Court decisions. In Casey, the joint opinion
authored by Reagan- and Bush-appointed Justices adopted the
“undue burden” standard that Solicitor General Lee had urged a
decade earlier. Although Casey did not overturn Roe entirely, it
did scale back the standard of review, diluting protections for
reproductive rights.

F. Guns

Since the 1980s, presidential administrations have used constitu-
tional 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.” 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. Through DOJ directives,
as well as a strategy to carefully select judicial appointees who were partial to the administration’s view of the Second Amendment, 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 that paved the way for the Supreme Court’s 2008 decision in *District of Columbia v. Heller.*

While prior administrations took differing approaches to Second Amendment interpretations, 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. The move represented a marked shift from that of prior administrations. 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.
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 and to “assert[] Second Amendment defenses to gun charges.”

Bush’s gun rights record proved to be an asset in his 2004 reelection campaign; 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. In District of Columbia v. Heller, the Court adopted the individual rights interpretation and struck down a gun regulation for the first time.

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).


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.
in district court, announcing on February 23, 2011 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.

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. 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, pursuing regulatory

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.


initiatives, filing complaints and other court papers, making formal and informal choices in law enforcement, and using the bully pulpit to sway public opinion. 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. Through a series of presidential memoranda, 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) and to the same-sex domestic partners of foreign-service employees. The Administration also

211. See infra Part III.A.
212. See infra Part III.B.
213. See infra Part III.C.
214. See infra Part III.D.
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,\textsuperscript{219} broadened its interpretation of the Violence Against Women Act to include victims of same-sex gender-motivated violence,\textsuperscript{220} expanded Family Medical Leave Act protections to the children of an employee’s same-sex partner,\textsuperscript{221} and enlarged fair housing protections to prohibit sexual-orientation-based discrimination.\textsuperscript{222}

\textsuperscript{219} 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).

\textsuperscript{220} 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).

\textsuperscript{221} 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).


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://houstonagent magazine.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\textsuperscript{223} and facilitated the process of extending the immigration status of the same-sex partners accompanying nonimmigrants\textsuperscript{224} to the United States.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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. \textsuperscript{226} See 8 U.S.C. § 1101(a)(15) (2012).

\textsuperscript{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 cohabiting partnership as a “favorable factor” when granting extensions of the visitor’s status. \textsuperscript{226} 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/Cohabiting_Partners_PM_081711.pdf (“When evaluating an application for change to or extension of B-2 status based on cohabitation, the cohabiting 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.”).

\textsuperscript{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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\(^{230}\) 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.

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. 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. 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.

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. 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. DOJ


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.\(^{241}\)


\(^{238}\) 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.


\(^{241}\) 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.”).
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 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. 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. Shortly after Windsor, Secretary Napolitano announced that the immigration agencies would begin to process permanent residency applications without delay. 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. These actions were reflective of the Obama Administration’s general commitment to implement Windsor swiftly and speedily.

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. The President made the announcement during an interview with ABC News on May 9, 2012. 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. His announcement further paved the way for successful initiative processes that year in Maine, Maryland, and Washington as well as successful legislative efforts in Delaware, Minnesota, and Rhode Island and, in the wake of Windsor, additional legislative and judicial developments in Hawaii, Illinois, New Jersey, and New Mexico. The


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.


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.” At numerous turns, the President demonstrated himself to be “a proud partner in the journey toward LGBT equality.”

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. 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. In the end, the 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).


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,\textsuperscript{257} the Supreme Court paid little attention to the heightened scrutiny point in \textit{Windsor} or in \textit{Hollingsworth v. Perry},\textsuperscript{258} which it handed down on the same day. The \textit{Windsor} Court instead applied ordinary rational basis review to assess DOMA’s constitutionality and struck it down under that test.\textsuperscript{259}

\textbf{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,\textsuperscript{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.”\textsuperscript{261} They argue that the President, rather than taking a position contingent on the heightened scrutiny argument, should

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

\textsuperscript{258} Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013). \textit{Perry} was a constitutional challenge to California’s Proposition 8, which denied same-sex couples the right to marry. The \textit{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. \textit{Id.} at 2662-68. The Court’s standing ruling left intact the trial court decision invalidating Proposition 8.

\textsuperscript{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.”).

\textsuperscript{260} See, e.g., supra note 26 and accompanying text.

\textsuperscript{261} See Devins & Prakash, supra note 53, at 570.
have simply found that DOMA violated any standard of review. Doing so would “have more forcefully articulated the constitutional, animus-based objections to the DOMA.” As Prakash writes elsewhere, the Obama Administration’s policy amounted to a “sacrifice of constitutional principle at the altar of political expediency.” Once the President determined that “DOMA [was] unconstitutional, he should neither [have] enforce[d] nor defend[ed] it.”

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.” 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.
WILLIAM & MARY LAW REVIEW

[Vol. 55:1719

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

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.
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.\textsuperscript{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.”\textsuperscript{275}

Meltzer argues that the gay rights context implicates different constitutional and institutional concerns than race or gender.\textsuperscript{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,\textsuperscript{277} was a sufficient basis to refuse to defend the statute.\textsuperscript{278} In short, the Obama Administration lacked a basis in the proper institutional or historically based justifications for presidential nondefense.\textsuperscript{279}

On the question of race, Meltzer’s argument is that the urgency of the constitutional wrongs prior to \textit{Brown} required a change in the law and those wrongs were of a different magnitude than the urgencies presented by sexual orientation discrimination.\textsuperscript{280} On the

\begin{itemize}
\item \textsuperscript{274} See id. at 1231-32.
\item \textsuperscript{275} See id. at 1186-87, 1208-27; see also Charles Fried, \textit{The Solicitor General’s Office, Tradition, and Conviction}, 81 \textit{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”).
\item \textsuperscript{276} See Meltzer, \textit{supra} note 40, at 1189, 1230-32.
\item \textsuperscript{277} See Holder Letter, \textit{supra} note 25.
\item \textsuperscript{278} See Meltzer, \textit{supra} note 40, at 1213-21.
\item \textsuperscript{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).
\item \textsuperscript{280} See id. at 1231.
\end{itemize}
question of gender, there were Supreme Court precedents supporting presidential decisions not to enforce or defend statutes mandating discrimination, 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. 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.

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.”

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.

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 non-defense 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.

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,” was not only legitimate—but vital—to bring about a “definitive verdict [regarding] the law’s constitutionality.”

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:

285. See supra Part III.
At 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?^238

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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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. 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, 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. In that event, Windsor noted, the “[r]ights and privileges of hundreds of thousands of persons would be adversely affected.” 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


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. Rather than reject the Court’s prior rulings for their indeterminacy, 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” or the “under-enforcement” of constitutional norms—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,

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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”).
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*). 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.” 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. 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,” the President can help shape constitutional interpretations and outcomes through his independent faculty of interpretation.

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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. 2575, 2589 (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*, *Lawrence*, 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 and Fourteenth Amendment powers. 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, Congress has been the victim of its own internal mischief-making. Recently, its legislating power has come to a halt, reducing its ability to fill gaps left open by the Court. But a joint executive-
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,” 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-


\(^{313}\) 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).
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) 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 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. 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.

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).
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, 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.”

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. Although Jackson’s concurrence articulated a tripartite framework for considering the validity of executive action vis-à-vis Congress, 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”).
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, 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.

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,” 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.” 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.”

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, courts and legal commentators have consistently found that the executive branch may validly exercise some level of interpretative power. Where those constitutional interpretations

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 Extrajudicial 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.” 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. 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.

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

331. Sunstein, supra note 55, at 2584.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{337} In California, when the Governor and the Attorney General refused to defend Proposition 8 in \textit{Hollingsworth v. Perry}, private intervenors became the law’s champions in the ensuing litigation\textsuperscript{338} but were deemed to lack standing to pursue a federal appeal.\textsuperscript{339}

Prior to \textit{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.\textsuperscript{340} Many state attorneys general also issued interpretations (prior to state legislative acts or judicial

\textsuperscript{335} See supra note 250 and accompanying text.


\textsuperscript{337} See supra note 252 and accompanying text.

\textsuperscript{338} In \textit{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. \textit{Perry v. Brown}, 671 F.3d 1052, 1070-75 (9th Cir. 2012), \textit{vacated and remanded sub nom. Hollingsworth v. Perry}, 133 S. Ct. 2652 (2013).

\textsuperscript{339} \textit{Hollingsworth}, 133 S. Ct. at 2668.

decisions recognizing the freedom to marry) that out-of-state same-sex marriages would receive full recognition as a matter of comity.\textsuperscript{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.\textsuperscript{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.


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, foreign nationals, criminal defendants, 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.


