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Standing Athwart History: Anti-Obergefell Popular Constitutionalism and Judicial Supremacy's Long-Term Triumph

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ARTICLE

**STANDING ATHWART HISTORY:
ANTI-*OBERGEFELL* POPULAR
CONSTITUTIONALISM AND JUDICIAL
SUPREMACY'S LONG-TERM
TRIUMPH**

JOSH HAMMER*

INTRODUCTION	179
I. JUDICIAL SUPREMACY, DEPARTMENTALISM, AND POPULAR CONSTITUTIONALISM: AN ANALYSIS OF THE APP STATEMENT	182
II. THE APP STATEMENT AND THE SOUTHERN MANIFESTO	190
III. THE TRIUMPH OF JUDICIAL SUPREMACY	196
A. Judicial Supremacy's Emerging Consensus Predates <i>Cooper v. Aaron</i> and the Southern Manifesto	197
B. Largely Left-Leaning Legal and Political Elites Have Supported Judicial Supremacy as a Counter-Majoritarian Protector of Individual Rights	201
C. For Many, It is Difficult to Separate the Judicial Supremacy Debate from the Twentieth Century Desegregation Fights	203
D. There are Compelling Pragmatic and Functionalist Reasons to Contemporarily Support Judicial Supremacy	204
E. Due to Justices' Life Tenure, the Supreme Court Enjoys Peculiar Institutional Capital	206
IV. CONCLUSION	207

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INTRODUCTION

“It is emphatically the province and duty of the judicial department to say what the law is,”¹ Chief Justice John Marshall opined in the famous nineteenth century judicial review-affirming case, *Marbury v. Madison*. Yet often forgotten and seldom mentioned is Marshall’s immediately succeeding sentence: “Those who apply the rule to *particular cases*, must of necessity expound and interpret that rule.”²

What thus emerged as a fairly uncontroversial assertion of historically grounded judicial power³—the ability of the judiciary to voluntarily choose not to give effect to a duly enacted congressional statute, in a particular Article III case or controversy, if the statute is deemed by the bench to run afoul of the US Constitution—somehow transmogrified into something much more insidious. In the 1958 case of *Cooper v. Aaron*,⁴ the court, for the first time, latched onto *Marbury* to unequivocally pronounce the doctrine that we today recognize as judicial supremacy: “[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been by this court and the Country as a permanent and indispensable feature of our constitutional system.”⁵ The *Cooper* court thus directly conflated its own interpretation of the Fourteenth Amendment, made four years earlier in the landmark school desegregation case, *Brown v. Board of Education*,⁶ with the requirements of the Constitution’s supremacy clause⁷ itself. Today, few seriously contest that such judicial supremacist views dominate in both the legal academy and the political arena.⁸

1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

2. *Id.* (emphasis added).

3. See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 247 (2007) (“John Marshall’s 1803 defense of the power of judicial review drew little negative comment . . .”); THE FEDERALIST NO. 78 (Alexander Hamilton) (“If there should happen to be an irreconcilable variance between [a constitution and any particular act proceeding from the legislative body], that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”); accord Robert M. Casale, *Revisiting One of the Law’s Great Fallacies: Marbury v. Madison*, 89 CONN. B.J. 62, 64 (2015) (arguing that *Marbury* “articulated a persuasive justification for an existing judicial practice that was anticipated by the framers of the Constitution, previously acknowledged by justices of the Supreme Court, and regularly exercised by state courts.”).

4. *Cooper v. Aaron*, 358 U.S. 1 (1958).

5. *Id.* at 18.

6. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

7. U.S. CONST. art. VI, cl. 2.

8. See, e.g., Ronald J. Pestritto, *MODERN AMERICA AND THE LEGACY OF THE FOUNDING* 67 (2007) (“[S]ince the late 1970s, most liberal judges and constitutional scholars have assumed that federal courts ought to be supreme interpreters of the Constitution . . .”); see also WHITTINGTON, *supra* note 3, at 280–81 (explaining how even the conservative Rehnquist Court, in the context of its federalism and Commerce Clause jurisprudence, emphasized judicial supremacist norms).

And yet, rather than simply having one interpretive method intrinsically required by either constitutional structure or the Article III text as the *Cooper* court claimed, “the construction of th[e] authority to interpret the Constitution does not stand outside of politics . . . but rather occurs within American political development.”⁹ In June 2015, the Supreme Court constitutionalized same-sex nuptials in *Obergefell v. Hodges*.¹⁰ A bitterly split five-to-four decision that mostly rested not on slightly more plausible equal protection grounds but rather on less defensible substantive due process grounds, *Obergefell* left most originalists, and certainly all social conservatives, somewhere between jurisprudentially frustrated and positively aghast.¹¹ In dissent, Chief Justice Roberts bluntly said that “[the Constitution] had nothing to do with [the ruling]”;¹² Justice Scalia called it “a naked judicial claim to legislative . . . power; a claim fundamentally at odds with our system of government”;¹³ and Justice Thomas said the opinion “exalts judges at the expense of the People from whom they derive their authority.”¹⁴

Rather than merely accede to the court’s latest diktat, some conservative legal scholars saw fit to push back against the judicial supremacist tide. On October 8, 2015, the American Principles Project, a conservative think tank co-founded by Princeton University McCormick Professor of Jurisprudence Robert P. George¹⁵ and former presidential speechwriter and Republican US Senate candidate Jeffrey Bell, released a powerful “Statement Calling for Constitutional Resistance to *Obergefell v. Hodges*” (hereinafter referred to as the “APP Statement,” or sometimes merely as the “Statement”).¹⁶ The APP Statement brutalizes the *Obergefell* majority opinion¹⁷ and is unabashed in its assault on judicial supremacy and on the claimed authority of the Supreme Court to definitively settle the marriage question for the entire nation.¹⁸ The Statement then cites canonical passages by

9. WHITTINGTON, *supra* note 3, at 292.

10. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

11. See, e.g., Caitlin La Ruffa, *After Obergefell: A First Things Symposium*, FIRST THINGS (June 27, 2015), <http://www.firstthings.com/web-exclusives/2015/06/after-obergefell-a-first-things-symposium> (“Well, we got the *Roe v. Wade* of marriage. As much as we’d been expecting it, it’s still surprisingly hard to swallow.”).

12. *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting).

13. *Id.* at 2629 (Scalia, J., dissenting).

14. *Id.* at 2631 (Thomas, J., dissenting).

15. See *People*, PRINCETON U., <http://web.princeton.edu/sites/jmadison/people/george.html>.

16. Bradley C.S. Watson et al., *Statement Calling for Constitutional Resistance to Obergefell v. Hodges*, AQUILA REP. (Oct. 8, 2015), <https://www.theaquilareport.com/statement-calling-for-constitutional-resistance-to-obergefell-v-hodges%E2%80%AF>.

17. *Id.* (“The opinion for the Court substituted for traditional—and sound—methods of constitutional interpretation a new and ill-defined jurisprudence of identity—one that abused the moral concept of human dignity. . . . The four dissenting justices are right to reject the majority opinion in unsparing terms.”).

18. *Id.* (“Any decision . . . lacking anything remotely resembling a warrant in the text, logic, structure, or original understanding of the Constitution must be judged anti-constitutional and

James Madison¹⁹ and Abraham Lincoln²⁰ in order to argue that (1) the Constitution is not what a majority of sitting Supreme Court justices says it is; (2) all US officeholders hold an oath to uphold the US Constitution, not the will of five members of the Supreme Court; and (3) all federal and state officeholders should (a) refuse to accept and apply *Obergefell* for any parties except those party to the litigation, (b) recognize the authority of states to define marriage, (c) pledge full and mutual legal and political assistance to anyone who refuses to follow *Obergefell* for constitutionally protected reasons, and (d) open a conversation on the means by which Americans may “constitutionally resist and overturn the judicial usurpations evident in *Obergefell*.”²¹ The Statement ends with a solemn warning against treating the same-sex marriage issue as “settled” and “the law of the land.”²²

This paper does not directly address Fourteenth Amendment doctrine. As such, I will discuss at length the underlying merits of neither *Brown* nor *Obergefell*. What I will discuss, however, is whether the phenomenon of judicial supremacy is principled or justifiable, and how the phenomenon has evolved in constitutional history so as to make statements like the APP’s so contemporarily very rare.

Part I of the paper will technically analyze the APP Statement. The analysis will address all of the Statement’s most controversial elements: its rejection of “horizontal” judicial supremacy over Congress and the executive branch, its rejection of “vertical” judicial supremacy over state and local officeholders, and its argument to only maintain the *Obergefell* ruling as an ad hoc judgment, rather than as a broader political rule to be accepted and applied by all federal and state courts. Part I is intended as more of a proffered justification than a full-on apologia.

illegitimate. *Obergefell* should be declared to be such, and treated as such, by the other branches of government and by citizens of the United States.”).

19. THE FEDERALIST NO. 49 (James Madison) (“The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers . . .”).

20. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) (“I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.”).

21. Watson et al., *supra* note 16.

22. *Id.* For a broad overview of many of the possible federal and state mechanisms by which to resist or refute *Obergefell*, see generally Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J. L. & LIBERTY 18 (2016).

Part II of the paper will compare the APP Statement with a superficially logical predecessor, the 1956 Declaration of Constitutional Principles (hereinafter, the “Southern Manifesto”), which was co-written by segregationist US Senators Strom Thurmond of South Carolina and Richard Russell, Jr. of Georgia in response to *Brown*. While the APP Statement unambiguously goes further than the Manifesto does in its assault on judicial supremacy, I will offer two key reasons why the APP Statement is more normatively defensible from the perspective of political constitutionalism: the sharply divided nature of the court’s ruling in *Obergefell* and crucial historical differences between the development of antimiscegenation laws in the US and the political rise of same-sex marriage.

Finally, in Part III, I will explore reasons why statements such as the APP’s have been so rare. I will offer five reasons, which range from the more speculative to the more empirically grounded. First, judicial supremacy was already accepted by many political actors throughout American history pre-Manifesto and had become widely accepted by the time of the Manifesto and *Cooper*. Second, the post-*Carolene Products*²³ footnote four/post-Warren court legal professoriate and political elite have sufficiently promoted an idealistic vision of the countermajoritarian, rights-protecting judiciary so as to largely cabin strongly antijudicial supremacy sentiment to ardent social conservatives. Third, in the eyes of many, the procedural judicial supremacy debate today is unfortunately largely inextricable from the substantive segregationist debate of the 1950s. Fourth, in a constitutional landscape increasingly driven by functionalist concerns, there are worthy pragmatic reasons to support judicial supremacy. Fifth, the life tenure of the justices may promote the court’s institutional interests in such a way so as to better enable the aggrandizement of power relative to Congress and the executive branch.

I. JUDICIAL SUPREMACY, DEPARTMENTALISM, AND POPULAR CONSTITUTIONALISM: AN ANALYSIS OF THE APP STATEMENT

Marbury’s assertion of the judicial power to not lend authority to unconstitutional statutes amounted to a sizable victory for “the least dangerous branch,”²⁴ but it is an implausible stretch to claim *Marbury* supports—let alone requires, as the *Cooper* court did—the far broader claim of judicial supremacy.²⁵ Chief Justice Marshall grounds his holding in *Marbury*, which

23. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

24. Hamilton, *supra* note 3.

25. See Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2708–09, 15 (2003) (“[T]he Framers understood to be the power of judicial review: a coordinate, coequal power of courts to judge for themselves the conformity of acts of the other two branches with the fundamental law of the Constitution, and to refuse to give acts contradicting the Constitution any force or effect insofar as application of the judicial power is concerned. . . . Nothing in *Marbury* supports the modern myth of judicial supremacy in interpretation of the Constitution. Quite the contrary . . . it is a huge and illogical stretch, one certainly not warranted

famously established for the first time the principle of judicial review, in three core arguments: (1) there is constitutional supremacy, (2) constitutional supremacy cannot be reconciled with the ability of one branch to definitively bind another to its possibly erroneous constitutional interpretations, and (3) a public official's oath to support the Constitution necessitates direct recourse to the document itself.²⁶ The superiority of the written Constitution over inconsistent subsequent actions of government requires unquestioned fidelity to the former at the expense of the latter—a notion intrinsic in the very nature of the founding generation's decision to physically write a durable governing charter. Far from *requiring* judicial supremacy, a proper understanding of Marshall's holding, therefore, actually necessitates *rejecting* it; just as the judiciary must not feel bound by Congress's idiosyncratically incorrect constitutional prognostications, so Congress must not feel strictly bound by the judiciary's idiosyncratically incorrect interpretations.²⁷ The same, of course, is true for the presidency;²⁸ quite simply put, presidents interpret the Constitution all the time in the course of their quotidian work.²⁹

Indeed, given the very nature of the Madisonian separation of powers and the elaborate system of checks and balances, it was likely understood that “the justices should allocate interpretive authority over the Constitution in a manner that respects the stature of the other branches as coordinate and independent branches.”³⁰ The entire edifice of the federal government was designed so that “ambition [would] be made to counteract ambition”;³¹ the very notion of one branch blindly succumbing to the will of a different

by the ‘emphatically the province’ sentence [in *Marbury*] and indeed quite inconsistent with the rest of Marshall's argument, to move from the proposition that the courts are *competent to determine* constitutional cases to the proposition that the courts' views *bind everybody else*.”)

26. *Id.* at 2711–12.

27. See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 911–12 (1989) (“Legislators may vote for a bill that the Court has held unconstitutional, in order to prompt change . . . [and] legislation that bumps against accepted [judicial] bounds is a force for change as legitimate as the arguments of lawyers who try to curtail governmental powers by asking for the invalidation of laws previously sustained.”).

28. See Paulsen, *supra* note 25, at 2718 (“[T]here is no more reason in principle—and none remotely suggested in the pages of *Marbury*—for Branch X to be bound by Branch Y's errors than for Branch Z to be bound by Branch X's.”); accord Paulsen, *supra* note 25, at 2726 (“[T]he President may, indeed must, refuse to execute or carry out a decision of the judiciary that exceeds the limits the Constitution has imposed on that branch.”).

29. For one particularly noteworthy recent example, consider President Barack Obama's decision to implicitly conclude that § 1035 of the 2014 National Defense Authorization Act, § 8111 of the Fiscal Year 2014 Consolidated Appropriations Act, and the Anti-Deficiency Act were all unconstitutional infringements on his Article II Commander in Chief prerogative—and thus unenforceable—in the context of his controversial May 2014 prisoner swap involving Sergeant Bowe Bergdahl. See, e.g., Jack Goldsmith, *Was the Bergdahl Swap Lawful?*, LAWFARE (Mar. 25, 2015, 9:19 PM), <https://www.lawfareblog.com/was-bergdahl-swap-lawful>.

30. Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 29 (2011).

31. THE FEDERALIST NO. 51 (James Madison).

branch was anathema. Thomas Jefferson, perhaps the earliest clarion exponent of departmentalism, asserted that “[to] give[] to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch.”³² And the founding generation, which fought a bloody revolution precisely to break away from a power-hungry and rights-undermining monarch, had no interest in returning to despotism of any kind.

If the “least dangerous branch”—that which has “neither FORCE nor WILL, but merely judgment,” in the Hamiltonian formulation—does not bind the other branches so as to undermine the political branches’ discrete spheres of autonomy, then the judiciary must necessarily “depend upon the aid of the executive arm even for the efficacy of its judgments.”³³ The take care clause³⁴ and the presidential oath³⁵ impress upon the president serious custodial duties with respect to the Constitution,³⁶ but, importantly, there is nothing in “the laws” to which the take care clause refers that includes the judiciary’s sweeping constitutional prognostications. The APP Statement writers concede that *Obergefell* should be enforced insofar as parties to the suit are involved, thus rendering superfluous Lincoln’s famous defiance of Supreme Court Chief Justice Roger Taney’s specific circuit court judgment in *Ex parte Merryman*.³⁷ But what is structurally inconceivable is that the framers might have imposed such solemn obligations of constitutional faithfulness upon the president whilst simultaneously requiring that he not interpret the Constitution for himself but instead merely accept the judiciary’s word for it.

Far from being required by constitutional text, structure, or even from Marshall’s ruling in *Marbury*, the scope over who gets to properly interpret the Constitution has been an ongoing political tug-of-war throughout American history.³⁸ Just as Presidents Thomas Jefferson and Andrew Jackson³⁹ espoused departmentalist views that ultimately culminated in Lincoln’s di-

32. Mark C. Rahdert & Robert J. Reinstein, *Reconstructing Marbury*, 57 ARK. L. REV. 729, 755–56 n.135 (2005) (quoting Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON 51 (Albert Ellery Bergh, ed., 1905)).

33. Hamilton, *supra* note 3.

34. U.S. CONST. art. II, § 3, cl. 5.

35. U.S. CONST. art. II, § 1, cl. 8.

36. Indeed, one might easily read the text of the presidential oath and think that the executive branch is the singular branch most firmly entrusted to defend the Constitution.

37. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

38. See generally WHITTINGTON, *supra* note 3.

39. See Tim Alan Garrison, *Worcester v. Georgia* (1832), NEW GA. ENCYCLOPEDIA (Feb. 20, 2018), <http://www.georgiaencyclopedia.org/articles/government-politics/worcester-v-georgia-1832> (“Although Jackson is widely quoted as saying, ‘John Marshall has made his decision; now let him enforce it,’ his actual words to Brigadier General John Coffee were: ‘The decision of the supreme court has fell still born, and they find that it cannot coerce Georgia to yield to its mandate.’”).

rect defiance of *Dred Scott*⁴⁰ and hitherto unprecedented assault on judicial power⁴¹ in *Ex parte Merryman*, so have many other national politicians advanced judicial supremacist sentiments when it was seen as beneficial for either their political careers or for the country.⁴² For example, President Dwight D. Eisenhower's sending federal troops into Little Rock in 1957 and his ultimate decision to support the *Cooper* court's claimed judicial supremacy in 1958 can be seen as a distinctly political solution to a notable episode in the long-running interpretive tug of war. It is noteworthy that the circular reasoning of the *Cooper* court necessarily required Eisenhower's independent enforcement decision in order to have any teeth.⁴³ The feared "despotism of an oligarchy,"⁴⁴ against which Lincoln warned in his debates with Stephen Douglas, thus actually requires⁴⁵ the coordinated enforcement mechanism of the executive branch in order to render a judicial ruling more than a de facto advisory opinion.

The APP Statement, of course, goes beyond merely rejecting judicial supremacy and calling for departmentalism among the three branches of the federal government. Specifically, the Statement explicitly exhorts upon "all

40. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

41. See Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1285–95 (2008); but see Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421 (1999) (disagreeing with Paulsen—and thus Lincoln—on the scope of the president's ability to refuse to enforce specific judgments in cases or controversies that he deems unconstitutional).

42. See, e.g., WHITTINGTON, *supra* note 3, at 255–56 (arguing that amidst the post-Civil War economic strife and political partisanship, judicial authority was welcomed as a harmonizing force); accord WHITTINGTON, *supra* note 3, at 274 ("Turning to the judiciary as an alternative forum for advancing constitutional goals is frequently a necessity if political coalitions from their origins are fragmented or insecure or if coalition partners disagree not just about one (perhaps big) issue such as slavery but myriad issues.").

43. Importantly, Eisenhower's decision to send federal troops into Little Rock predated *Cooper* by one year; this might have bolstered the *Cooper* Court's faith in executive enforcement of its claimed interpretive supremacy. Though some see Eisenhower's decision to send in federal troops to Little Rock in 1957 as "the extent of his support of *Brown*," he did follow *Brown* by immediately exercising his direct authority over the District of Columbia to order desegregation of the public schools there. Judith A. Hagley, *Massive Resistance—The Rhetoric and the Reality*, 27 N.M. L. REV. 167, 187–88 (1997). Moreover, Eisenhower's decision to enforce *Brown* via sending in federal troops was unenthusiastic about . . . *Brown*"; instead, Eisenhower felt (perhaps erroneously: see *supra* note 28–29) that "[his] personal opinions about the [*Brown*] decision have no bearing on the matter of enforcement." Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1175 (2011).

44. Paulsen, *supra* note 41, at 1250.

45. To be clear, most judicial judgments will be readily accepted, and such deference is probably appropriate. See, e.g., WHITTINGTON, *supra* note 3, at 3–4 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 535–36 (1997) ("Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches.")). But if a judgment is resisted, then the simple truth remains that the judiciary has no enforcement mechanism of its own. Even the U.S. Marshals Service, borne out of the incipient Judiciary Act of 1789, is hierarchically housed within the Executive Branch's U.S. Department of Justice.

federal and state officeholders” to refuse to accept *Obergefell* as binding beyond the specific named parties to the suit.⁴⁶ With “officeholder” being most naturally read to mean “public official,” it must be conceded that the APP Statement thus includes under its aegis not only state legislators, governors, and other government functionaries, but also other federal and state judges.

US Supreme Court justices can, of course, overturn their own decisions. But for the judges of the lower federal courts, are they strictly bound by Supreme Court rulings under either a structurally required Article III hierarchy or by *stare decisis*? Recall that *Marbury*’s ultimate holding is one of constitutional (i.e. not judicial) supremacy: the Constitution must reign supreme over conflicting interpretations. There is no compelling textual or structural reason for distinguishing between statutes and judicial interpretations: a mistaken interpretation is a mistaken interpretation. If one takes *Marbury* and the logic of the oath to uphold the Constitution seriously, then it is very difficult to escape the conclusion that *stare decisis* in constitutional interpretation—“the idea that courts should (as they sometimes say they do, and as they sometimes, in fact, do) adhere to the principles of prior cases even when persuaded that those principles are wrong as a matter of the correct interpretation of the Constitution or other controlling federal law”⁴⁷—is not only unjustified but is anticonstitutional. To find otherwise is to subordinate the requirements of a judge’s oath⁴⁸ for a conclusion⁴⁹ allegedly inherent from the federal judiciary’s very structure.⁵⁰ As Michael Stokes Paulsen argues, “[lower court judges] can, and should, make the Supreme Court do its own dirty work.”⁵¹

46. Watson et al., *supra* note 16.

47. Paulsen, *supra* note 25, at 2733.

48. The Founding generation took its oaths quite seriously. See, e.g., FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 2* (Princeton University Press 2003) (directly linking the Puritans’ governing oaths, which meant to ensure that “only godly Christians [would] rule,” to George Washington’s oath a century and a half later to “faithfully execute the office of the President of the United States” and to “preserve, protect, and defend the Constitution of the United States.”).

49. Namely, that lower court federal judges are necessarily always bound by the constitutional interpretations of the U.S. Supreme Court.

50. See Paulsen, *supra* note 25, at 2734 (positing that the words “supreme” and “inferior” in Article III do not necessarily imply anything more than a hierarchy by which a higher court can review and possibly reverse a lower court’s judgment); accord Paulsen, *supra* note 22, at 25 (“[L]ower federal court judges are [not] mere subordinate functionaries of the Supreme Court. Rather, they are constitutionally independent judicial officers responsible for their own decisions. Their decisions can be reversed—if the chain of appellate hierarchy controlled by Congress so provides. But even where that is the case, it does not transform lower court judges into flunkies of the Supreme Court; their duty, too, is the faithful interpretation and application of the Constitution—no matter what the Supreme Court may have said to the contrary.”); accord Paulsen, *supra* note 22, at 29 (arguing that lower federal court judges should not be thought of as “subordinates” of Supreme Court justices).

51. Paulsen, *supra* note 25, at 2734.

The power of state officeholders to meaningfully challenge or flout the federal judiciary's constitutional prognostications is perhaps a historically and politically fraught topic in which to delve. Many will instinctively think of Jefferson and Madison's famous Kentucky and Virginia Resolutions of 1798–99, which arguably established the intellectual foundation for South Carolina's nullification crisis during the presidency of Andrew Jackson and perhaps for John C. Calhoun-style nullification theory more broadly. But intellectual honesty demands that, for purposes of the Constitution's supremacy clause, we distinguish between congressional legislation and judicial prognostications; while the supremacy of the former over the states' contrary legislation was assuredly one of the underlying motivations of the supremacy clause,⁵² the latter does not neatly fit within the clause's ambit unless one casually conflates a judicial decree with being an unambiguous "law of the land."⁵³ Simply put, the textualist argument that an Article III judicial decree amounts to a "Law[] of the United States which shall be made in Pursuance [of the Constitution]"⁵⁴ is tenuous at best.⁵⁵ By contrast, judicial review in the early years of the republic was "aimed primarily at [the disparate] state legislatures."⁵⁶

State constitutional defiance of the federal government may understandably raise some eyebrows due to the historical invocations of "states' rights" to push for more historically troubling theories such as "nullification" of federal statutes, "[b]ut the correctness of a constitutional theory cannot be judged by its misappropriation and misapplication by constitutional hijackers."⁵⁷ Two already discussed themes do indeed support such an independent prerogative amongst state and local government officials, including judges, to interpret the Constitution for themselves: *Marbury's* emphasis on constitutional (i.e., not judicial) supremacy, and the solemnity of the oath of public office.⁵⁸ Skeptics will complain of the pragmatic and "rule of law" shortcomings of such a theory of decentralized constitutional interpretation (more on that in Part III, *infra*), but "[t]he true question is whether the Constitution provides for a multiplicity of interpreters, each

52. The clause's text unambiguously demands the "suprem[acy]" of "Laws . . . made in Pursuance" of the Constitution over the "laws of any State to the Contrary . . ." U.S. CONST. art. VI, cl. 2.

53. Professor Paulsen persuasively argues that this is simply anathematic to Chief Justice Marshall's very narrow holding in *Marbury*—which, contrary to so much popular opinion, goes to lengths to reject the notion that an act of judicial review establishes a binding principle as "law of the land." See Paulsen, *supra* note 25.

54. U.S. CONST. art. VI, cl. 2.

55. This logic applies just as easily for the U.S. Supreme Court as it does for Article III lower courts.

56. R. Kent Newmyer, *Chief Justice Marshall in the Context of His Times*, 56 WASH. & LEE L. REV. 841, 846 (1999).

57. Paulsen, *supra* note 25, at 2734.

58. See *id.* at 2736 ("*Marbury* makes as much of the idea of constitutional supremacy, and of the obligation of the oath, as it does the coordinacy of the branches of the federal government.").

independent of the others and armed with only a portion of the constitutional power to make their interpretations stick, or instead provides for a single authoritative interpreter whose decisions are conclusive and binding on all other actors, even where they are wrong—contrary to the written Constitution that is our paramount law—and even where they are wicked.”⁵⁹ While many today might intuitively harbor a greater fear for the former, Lincoln⁶⁰ and, indeed, Chief Justice Marshall in *Marbury*,⁶¹ were more concerned with the latter. And to clarify, from the perspective of state constitutional actors, the obedience requirements of the supremacy clause are much more clearly not invoked when considering federal judicial decrees than when considering congressional legislation; in other words, one can accept an independent prerogative of state legislative and judicial actors to refuse to blindly accept as a binding political principle a misguided federal judicial ruling without fully summoning the ghost of John C. Calhoun and disinterring the antebellum “nullification” debate.

Since judicial supremacy—defined as rote obedience to the US Supreme Court as the singular and unequivocal expositor of constitutional interpretation by means of a willful conflation between “the Constitution” and “what a majority of the court says about the Constitution”—is not textually required and is actually anathematic to *Marbury*’s common-sense affirmation of *The Federalist No. 78*,⁶² the historical ebbing and flowing of judicial supremacist and popular constitutionalist⁶³ sentiment has largely been driven not by black-letter legalism but by what University of Virginia political scientist James Ceasar calls “political constitutionalism.”⁶⁴ In this framework, no less an event than the US Civil War can actually be understood as (amongst many other things) an instance of constitutional interpretation: General Robert E. Lee’s April 1865 surrender to General Ulysses S. Grant at Appomattox Court House “resolved the most important issue of

59. *Id.* at 2737; accord Paulsen, *supra* note 22, at 28–29 (positing that lower federal court and state court judges do indeed “possess *independent* constitutional authority and the independent duty to decide matters of federal law faithfully to the U.S. Constitution.”).

60. Paulsen, *supra* note 40, at 1243–67 (detailing at length Lincoln’s staunch opposition to judicial supremacy, in the context of his famous 1858 debates with Stephen Douglas).

61. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (stating that opposition to constitutional supremacy, and concomitant acceptance of legislative (or any other form of) supremacy, “would subvert the very foundation of all written constitutions”).

62. *See Hamilton, supra* note 3.

63. I am defining “popular constitutionalism” here as simply meaning large-scale constitutional interpretation outside the courts. *See, e.g.*, Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483 (2012).

64. *See* Yuval Levin, *How Our Democracy Works*, NAT’L REV. (Nov. 21, 2014), <http://www.nationalreview.com/corner/393244/how-our-democracy-works-yuval-levin> (quoting Ceasar for the proposition that the Constitution must be understood in terms of both “legal constitutionalism” and “political constitutionalism,” where the latter “. . . understands the Constitution as a document that fixes certain ends of government activity, delineates a structure and arrangement of powers, . . . encourages a certain tone to the operation of the institutions . . . [and under which] it falls mostly to political actors making political decisions to protect and promote constitutional goals”).

antebellum constitutional dispute—the nature of the Union—in favor of the nationalist view of sovereignty and against the South’s state-sovereignty view.”⁶⁵ Similarly, just as Lincoln’s rejection of *Dred Scott* as binding principle and utter defiance of Chief Justice Taney’s specific judgment in *Ex parte Merryman* may be seen as long-term “political constitutionalism” victories for departmentalism, so may Eisenhower’s perception of feeling bound by the *Brown* court and concomitant decision to send in federal troops to Little Rock⁶⁶ be seen as a “political constitutionalism” victory for judicial supremacy.

In the aftermath of *Obergefell* and the APP Statement, at least one state court has grappled with all of these raised issues. In November 2015, the Mississippi Supreme Court considered a routine motion for an entry of judgment that was filed by a same-sex couple seeking to have the state’s highest court instruct a chancery court to exercise subject-matter jurisdiction over its divorce proceeding.⁶⁷ Though the motion was successful, the court order was notable for its three acerbic dissents.

Dissenting, Presiding Justice Jess Dickinson positively quoted the *Obergefell* dissenters and the APP Statement itself⁶⁸ to argue that “it indeed is possible for the United States Supreme Court to render an opinion so devoid of constitutional analysis or reason, that it exceeds not only the authority granted itself in *Marbury*, but also the court’s authority under Article III of the United States Constitution.”⁶⁹ Dickinson also explicitly grounded his own oath of office as being to the Constitution itself; he foreswore that he had any “oath to follow decisions that have ‘no basis in the Constitution.’”⁷⁰ Justice Leslie King, also dissenting to the order, saw fit to point out that the US Supreme Court only directly held unconstitutional the state laws of the states before it in the *Obergefell* litigation: Mich-

65. Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 691 (2004) (reviewing DANIEL FABER, *LINCOLN’S CONSTITUTION* (2003)); accord Paulsen, *supra* note 25, at 2736 n.85 (arguing in favor of an independent state ability to interpret the Constitution but also noting that “the existence of such state interpretive power surely does not bind the organs of federal government, which may properly resist state misinterpretations or abuses of the Constitution with all the power at their disposal, in order to correct such state departures from the Constitution. See, e.g., *Grant v. Lee* (Appomattox Court House, Apr. 1865).”).

66. See *supra* note 42. Eisenhower’s enforcement of *Brown*, as well as his response to the Southern Manifesto by “offer[ing a] hearty endorsement[] of judicial supremacy,” perhaps motivated the Court’s ultimate unabashed claim of judicial supremacy in *Cooper*—which Eisenhower also then supported. See Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1102 (2014).

67. Order Granting Motion for an Entry of Judgment, *Czekala-Chatham v. Mississippi ex rel. Hood*, 195 So. 3d 187 (Miss. 2015) (No. 2014-CA-00008-SCT).

68. Justice Dickinson actually saw fit to list by name thirty-one of the Statement’s signees.

69. *Czekala-Chatham*, 195 So. 3d at 189–93 (Dickinson, J., objecting).

70. *Id.* para. 14, at 190 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting)).

igan, Ohio, Kentucky, and Tennessee.⁷¹ Finally, Justice Josiah Coleman quoted *The Federalist No. 78*, Justice Benjamin Curtis's famous *Dred Scott* dissent, and (at length) *Cooper* in order to argue both against the notion that *Marbury* established judicial supremacy⁷² and in favor of the notion that blind obedience to the US Supreme Court's *Obergefell* diktat cannot be reconciled with the Mississippi judicial oath to "faithfully and impartially discharge and perform all the duties incumbent upon [them] . . . agreeably to the Constitution of the United States."⁷³

The Mississippi Supreme Court's decision to order the chancery court to exercise subject-matter jurisdiction over the same-sex couple's post-*Obergefell* divorce necessarily obviated the need for President Obama to emulate Eisenhower's strong-handedness by sending federal troops into Mississippi. Thus a minor victory was achieved for judicial supremacists in their ongoing political tug of war with departmentalists and popular constitutionalists.

II. THE APP STATEMENT AND THE SOUTHERN MANIFESTO

The APP Statement is notable, in part, for being one of the most powerful and nationally prominent⁷⁴ antijudicial authority proclamations since the 1956 Southern Manifesto.⁷⁵ Before considering possible explanations for the long-term triumph of judicial supremacy within both the legal academy and the political arena, then, it is worth considering how the APP Statement and the Manifesto are similar and how they are different.

Like the APP Statement, and despite its unfortunate historical stature as having stood athwart a Supreme Court decision now all but universally viewed as a landmark civil rights achievement, the Manifesto "offers an

71. *Id.* para. 18, at 198 (King, J., objecting) (stating opposition to viewing specific judgments as binding national political rules that is similar to the stance Lincoln took in his first inaugural address in arguing that the judgment in *Dred Scott* should only be applied to Dred Scott himself; it is also similar to the stance of the APP Statement signees in arguing that *Obergefell* should only apply to the specific plaintiffs in the litigation).

72. *Id.* para. 10, at 202–03 (Coleman, J., objecting) (quoting Robert Lowry Clinton, *How the Court Became Supreme*, FIRST THINGS (Jan. 1, 1999), <http://www.firstthings.com/article/1999/01/001-how-the-court-became-supreme>).

73. *Id.* para. 7, at 201 (quoting MISS. CONST. art. VI, § 155).

74. The Manifesto was indubitably more attention grabbing, but the APP Statement signees include many nationally prominent legal scholars. Robert P. George, for instance, who is widely viewed as the lead drafter of the Statement, was once described by *The New York Times Magazine* as "this country's most influential conservative Christian thinker." David D. Kirkpatrick, *The Conservative-Christian Big Thinker*, N.Y. TIMES (Dec. 16, 2009), <http://www.nytimes.com/2009/12/20/magazine/20george-t.html>.

75. The full text of the Manifesto, which was first introduced in a speech on the House floor on March 12, 1956 by Rep. Howard Smith (D-Va.) before Sen. Walter George (D-Ga.) introduced an identical version in the Senate (see Andrew Glass, *Southern Manifesto Introduced, March 12, 1956*, POLITICO (Mar. 12, 2009), <http://www.politico.com/story/2009/03/southern-manifesto-introduced-march-12-1956-019897>). For a record of the Manifesto's recitation in Congress, see *The Southern Manifesto*, 102 CONG. REC. 3948 (1956), reprinted in 1 RACE REL. L. REP. 435–37 (1956).

unusually articulate example of constitutional interpretation outside of the courts.”⁷⁶ Indeed, rather than being filled with racist vitriol, the Manifesto “chiefly consisted of lawyerly arguments about constitutional meaning.”⁷⁷ The Manifesto argued that *Brown* was wrongly decided on the Fourteenth Amendment merits, that the question of segregation was properly a state issue pursuant to the Tenth Amendment, and that “all lawful means” should be used to “bring about a reversal of [*Brown*,] which is contrary to the Constitution.”⁷⁸ Perhaps anticipating Eisenhower’s decision to send in federal troops to Little Rock, the Manifesto also sought to “prevent the use of force in [*Brown*’s] implementation.”⁷⁹

The Manifesto’s language was certainly strong in its opposition to the unanimous *Brown* court—though perhaps no stronger than the vociferous words of the four dissenting justices in *Obergefell*. The Manifesto’s seventy-seven House members and nineteen senators condemned the *Brown* court’s “clear abuse of judicial power” and decried the “climax[ed] . . . trend in the Federal Judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people.”⁸⁰ Former South Carolina Representative L. Mendel Rivers went so far as to call the US Supreme Court a “greater threat to this Union than the entire confines of Soviet Russia.”⁸¹ Indeed, the great twentieth century constitutional law scholar Alexander Bickel referred to the Manifesto as a “calculated declaration of political war against the court’s decision.”⁸² Yet all the while, most Manifesto signatories were circumspect not to purposefully foment violence or unrest across the South.⁸³

The most salient technical difference between the APP Statement and the Manifesto is that, while the APP Statement overtly calls for complete rejection of judicial supremacy, the Manifesto’s urging of Southerners to

76. Driver, *supra* note 66, at 1057.

77. *Id.* at 1063 (“[M]any contemporary observers instead praised the document for demonstrating moderation, restraint, and also for avoiding inflammatory and emotional rhetoric.”); *see also id.* at 1067 (mentioning that *The Wall Street Journal* even noted that “the Manifesto was ‘not the voice of any calloused demagog’ [sic]”); Bert Brandenburg, *Brown v. Board of Education and Attacks on the Courts Fifty Years Ago, Fifty Years Later*, JUSTICE AT STAKE, 66, 72 (2008).

78. Driver, *supra* note 66, at 1066.

79. *Id.* at 1066–67. *But see* Hagley, *supra* note 43, at 190 (arguing that this portion of the Manifesto arguably “made resistance to the federal courts respectable across the South and signaled that there would be no federal retribution for defiance of *Brown*”).

80. Robert Justin Lipkin, *Which Constitution? Who Decides? The Problem of Judicial Supremacy and the Interbranch Solution*, 28 CARDOZO L. REV. 1055, 1115–16 (2006).

81. Brandenburg, *supra* note 77, at 70.

82. Hagley, *supra* note 43, at 189 n.162 (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 256 (1962)).

83. *See, e.g.*, Driver, *supra* note 66, at 1066–67; *see, e.g.*, Driver, *supra* note 66, at 1088 (quoting *Ellender Warns South Not to Use Violence in Resisting Integration*, N.Y. TIMES, Mar. 18, 1956, at 87) (Louisiana Senator Allen Ellender’s “sober warning” that “[w]hat the South must avoid at all costs is violence, lawlessness, hatred and bloodshed”).

“resist forced integration by any lawful means”⁸⁴ is largely viewed, perhaps counterintuitively, as actually having inherently *endorsed* the doctrine of judicial supremacy.⁸⁵ Indeed, “the Manifesto’s eschewal of language claiming that the *Brown* decisions were without effect bolsters the notion that the document did not expressly disavow judicial authority and implore defiance.”⁸⁶ In a Senate floor colloquy with New York Senator Herbert Lehman, South Carolina Senator Strom Thurmond noted that the Manifesto’s phrase “any lawful means” was employed “cautiously,” so as “not to imply defiance.”⁸⁷ When the Manifesto was read and discussed on the Senate floor, no other senator made any statement “from the floor directly rejecting [Oregon] Senator [Wayne] Morse’s [previous] articulation of judicial supremacy,” and it is not a stretch to posit that actual respect for judicial supremacy “even shaped the Manifesto itself.”⁸⁸ Senator J. William Fulbright of Arkansas took a very strongly prejudicial supremacy stance that would have been excoriated by the APP Statement signees, even as he signed the Manifesto and saw no internal contradiction whatsoever therein.⁸⁹ Many other Manifesto signees publicly expressed similar sentiments.⁹⁰

With such differing views about judicial authority, it is not surprising that the purposes and intents of the APP Statement and Manifesto’s drafters differ greatly. The APP Statement cites colorful portions of the *Obergefell* dissenting opinions and some of the greatest expositions of departmentalism in American history in order to argue that “all federal and state officeholders” should, *inter alia*, “refuse to accept *Obergefell* as binding precedent for all but the specific plaintiffs in that case.”⁹¹ This is, of course, a call to directly defy the will of a majority of the US Supreme Court as to the propriety of a constitutional dispute,⁹² but it is a clear-cut course of action

84. Driver, *supra* note 66, at 1089 (quoting 102 CONG. REC. 4460 (1956)).

85. See, e.g., *id.* at 1091 (noting that Mississippi Senator James Eastland’s strong stance of recalcitrant defiance, “[t]he South will not abide by nor obey this legislative decision by a political court,” was “not representative of the attitude of most southern members of Congress during the mid-1950s”).

86. *Id.* at 1093.

87. *Id.* at 1109 (quoting 102 CONG. REC. 5445 (1956)).

88. *Id.* at 1109–10; accord Friedman & Delaney, *supra* note 43, at 1190 (noting that despite the Manifesto’s strong criticisms of the Supreme Court’s ruling in *Brown*, it “did not question the Court’s power to decide the matter—only its abandonment of *Plessy* without ‘legal basis’”).

89. See Driver, *supra* note 66, at 1111 (“Under our system of government the Supreme Court is specifically given the authority to interpret the Constitution, and no matter how wrong we think they are, there is no appeal from their decision unless you rebel as the South tried to do in 1860.”).

90. See *id.* at 1112 (“[The Manifesto] does [not] repudiate the Supreme Court as the proper body to interpret [the Constitution];” but only that they erred in *Brown*.).

91. Watson et al., *supra* note 16.

92. It is worth noting that at least one of the four *Obergefell* dissenters would likely have viewed such repudiation of *Obergefell* as wholly justified. According to APP Statement signee Robert P. George, Antonin Scalia was a departmentalist:

Antonin Scalia not only questioned but rejected [judicial supremacy]. And he rejected it for the best possible reasons—Lincoln’s reasons—because it is incompatible with the

that some APP Statement signees even long publicly stood for well before the *Obergefell* ruling was promulgated.⁹³ By contrast, the Manifesto's signees only "sought to influence what they acknowledged were the judiciary's controlling constitutional interpretations" and did not "attempt to issue authoritative constitutional interpretations in their own right."⁹⁴ Suffice it to say that these suggested responses to the perceived judicial activism of both the *Brown* and *Obergefell* courts are miles apart. Before the APP Statement, then, the Manifesto's longest-lasting implication was perhaps, ironically, that it helped "solidify[] the belief that acquiescence to judicial authority forms a fundamental tenet of American civil religion."⁹⁵

Of course, the contexts for the resistances to *Brown* and to *Obergefell* are crucial—and, specifically, are crucial in two distinct ways that help render the APP Statement more normatively defensible as a vehicle for endorsing and espousing popular constitutionalism. First, there is the important distinction that *Brown* was a unanimous decision, whereas *Obergefell* was a sharply divided five-to-four split. This distinction was an important feature of the *Cooper* court's claim of judicial supremacy; *Cooper* claimed that the consequentialist and moral importance of yielding to the "tribunal specially charged with the duty of ascertaining and declaring what is 'the Supreme Law of the Land'" is particularly strong when the declaration "is not the dubious pronouncement of a gravely divided Court[,] but is the unanimous conclusion of a long-matured deliberative process."⁹⁶ Justice Coleman, one of the Mississippi Supreme Court dissenters in the aforementioned *Czekala-Chatham*⁹⁷ decision to order entry of judgment in a same-sex divorce last November, also was careful to note the distinction: "Unlike *Brown*, which was a unanimous decision, in *Obergefell*, four of the nine justices—including the Chief Justice—disagreed and much more. All four

republican principles of the Constitution itself. For Scalia, as for Lincoln, the rule of law was not the rule of judges; and a decision of the Supreme Court was the law of the case (binding on the parties) but not necessarily the law of the land (binding on the other branches of government).

Robert P. George, *Antonin Scalia: An American Originalist*, PUB. DISCOURSE (Feb. 16, 2016), <http://www.thepublicdiscourse.com/2016/02/16478/>.

93. See, e.g., Robert P. George, *How Republicans Should Respond to a Supreme Court Marriage Ruling*, FIRST THINGS (Mar. 7, 2015), <http://www.firstthings.com/blogs/firstthoughts/2015/03/how-republicans-should-respond-to-a-supreme-court-marriage-ruling> ("[T]he Republican Party, the Republican Congress, and a future Republican President should regard and treat the decision just as the Republican Party, the Republican Congress, and the Republican President—Abraham Lincoln—regarded and treated the *Dred Scott* decision. They should, in other words, treat it as an anti-constitutional and illegitimate ruling in which the judiciary has attempted to usurp the authority of the people and their elected representatives. They should refuse to treat and regard it as a binding and settled matter.").

94. Driver, *supra* note 66, at 1113.

95. *Id.* at 1130.

96. *Cooper v. Aaron*, 358 U.S. 1, 24 (1958) (quoting President Andrew Jackson's Message to Congress of Jan. 16, 1833, reprinted in III JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 610, 623 (1896)).

97. *Czekala-Chatham v. Mississippi ex rel. Hood*, 195 So. 3d 187 (Miss. 2015).

dissenters, in so many words, called the *Obergefell* majority an exercise of judicial power that lacked constitutional backing.”⁹⁸

To the extent that judicial supremacy and popular constitutionalism compete in a recurring tug-of-war amongst sundry public actors and institutions,⁹⁹ political and institutional capital are indispensable in helping to determine when and where battles are best fought. By dint of the four passionate dissents in *Obergefell*, the same-sex marriage decision presents a far more logical juncture at which to expend institutional capital standing strongly athwart judicial authority than *Brown* did. *Obergefell* featured four distinct passionate dissenting opinions—including a vintage vituperative assault by Justice Scalia on the majority’s claimed legal authority, a rarely heated Justice Alito, an exquisitely erudite Justice Thomas, and the first time that Chief Justice Roberts ever felt so aggrieved as to necessitate reading excerpts of his dissent from the bench itself. Without delving into the Fourteenth Amendment merits, suffice it to say that there is plenty of intellectual heft—onto which it would be fully appropriate for judicial supremacy opponents to latch—to the constitutional position of the *Obergefell* dissenters.

Secondly, there is the reality that strong policy arguments against same-sex marriage today are far more historically plausible and morally defensible than were policy arguments against desegregation in the 1950s. In the United States, antimiscegenation laws and Jim Crow laws, more generally, were inconsistent with the common law inherited from England and spawned in the “modern period” as part of an “insidious movement that denied the fundamental equality and dignity of all human beings and forcibly segregated citizens.”¹⁰⁰ Indeed, Professor Francis Beckwith of Baylor University notes that “the overwhelming consensus among scholars is that the reason for these laws was to enforce racial purity, an idea that begins its cultural ascendancy with the commencement of race-based slavery of Africans in early 17th century America and eventually receives the imprimatur of ‘science’ when the eugenics movement comes of age in the late nineteenth and early twentieth centuries.”¹⁰¹

In contrast, civil marriage was almost perennially and universally understood throughout human history as the union of one man and one woman until the Netherlands became the first country to legalize same-sex nuptials in 2000.¹⁰² Laws affirming the traditional, conjugal definition of marriage

98. *Id.* at 204 (Coleman, J., objecting).

99. *See generally* WHITTINGTON, *supra* note 3.

100. Ryan T. Anderson, *Marriage, Reason, and Religious Liberty: Much Ado About Sex, Nothing to Do with Race*, THE HERITAGE FOUND. (Apr. 4, 2014), <http://www.heritage.org/research/reports/2014/04/marriage-reason-and-religious-liberty-much-ado-about-sex-nothing-to-do-with-race>.

101. *Id.* (quoting Francis Beckwith, *Interracial Marriage and Same-Sex Marriage*, PUB. DISCOURSE (May 21, 2010), <http://www.thepublicdiscourse.com/2010/05/1324>).

102. *See, e.g.*, *United States v. Windsor*, 570 U.S. 744, 808 (2013) (Alito, J., dissenting).

thus did not arise out of spite or animus, but out of the overwhelming millennia-old consensus amongst thinkers as disparate as Jewish, Christian, Muslim, ancient Greek, ancient Roman, and Enlightenment era alike that marriage was intrinsically defined as the union of one man and one woman.¹⁰³ These disparate cultures often held wildly divergent views on the morality of homosexual activity itself, yet all independently arrived at the conclusion that marriage is an inherently child-oriented—and not adult romance-oriented—union whose only natural legal definition is to comprise one man and one woman.¹⁰⁴ Thus, while 1950s segregationists defended an institutionally racist de facto caste system that was anathema to the common law, conjugal marriage proponents today merely espouse the view unanimously accepted by canon, common, civil, ancient Greek, and ancient Roman law.¹⁰⁵ That viewpoint, furthermore, was also adopted by popular initiative by the nation's largest blue state¹⁰⁶ and was ostensibly publicly defended by liberal President Barack Obama as recently as his 2008 presidential campaign.

* * * * *

The embedded assumption in Part II of this paper has been that the APP Statement and Southern Manifesto make for an important comparison in part due to the paucity of such similar comprehensive antijudicial authority statements issued between March 1956 and November 2015.¹⁰⁷ Such an assumption is indeed borne out by history, but it is important to try to understand why judicial supremacy has so largely prevailed in its recurring methodological tug of war with departmentalism and popular constitutionalism.

103. See Anderson, *supra* note 100.

104. See Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 247 (2011) (“[M]arriage is the type of social practice whose basic contours can be discerned by our common human nature, whatever our religious backgrounds.”).

105. See Anderson, *supra* note 100.

106. In 2008, California's Proposition Eight popular ballot initiative, which affirmed the traditional definition of civil marriage, passed 52.24% to 47.76%.

107. There have certainly been instances of notable singular political actors urging judicial defiance or constitutional resistance, however. For example, in the aftermath of *Engel v. Vitale*, 370 U.S. 421 (1962), which held that government-directed public school prayer runs afoul of the First Amendment's establishment clause, South Carolina Senator Olin Johnston encouraged South Carolinians to openly defy the Court: “Despite the Supreme Court ruling, I am urging school teachers and schools to continue the reading of the Bible and to continue praying in the classrooms.” J. K. Sweeney, *Public Education In A 'Religious State': South Carolina Responds to Engel v. Vitale (1962), Abington v. Schempp (1963), and Murray v. Curle (1963)*, SCHOLAR COMMONS (Jan. 1, 2013), <http://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=2237&context=etd>.

III. THE TRIUMPH OF JUDICIAL SUPREMACY

The seeming predominance of judicial supremacist sentiment amongst both the legal academy and political arena today¹⁰⁸ has made the APP Statement all the more worthwhile. Certainly, *Carolene Products'* famous footnote four¹⁰⁹ and the Earl Warren court's famously progressive jurisprudence have, in the minds of many, solidified the idea of the judiciary as a countermajoritarian guardian of the natural liberties secured by the Bill of Rights.¹¹⁰ And it is easy to see how calls for judicial restraint, which have deeply shaped post-Warren Court conservative jurisprudence and has been an embedded part of the Federalist Society's very mission,¹¹¹ can lead to antijudicial supremacist sentiment sometimes pigeonholed as a nostalgic notion of a purportedly reactionary social conservative right.¹¹² Regardless of the cause, as one scholar has opined, it seems like "[s]ometime in the past generation or so . . . Americans came to believe that the meaning of their Constitution is something beyond their compass, something that should be left to others."¹¹³

I have identified what I believe are five main reasons why judicial supremacy has become such a nearly universally accepted norm in the academy and political arena, and why explicitly antijudicial supremacy pleas

108. See Tom Donnelly, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948, 960 (2009) (quoting LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 232 (2004)) (proposing that there have been "two generations of near consensus about judicial supremacy among intellectuals and opinion-makers on both the left and the right (not to mention among high school civics teachers)").

109. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

110. See, e.g., Timothy E. Gammon, *Equal Protection of the Laws and San Antonio Indep. Sch. Dist. v. Rodriguez*, 11 VAL. U. L. REV. 435, 471 n.102 (1977) (quoting David A.J. Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32 (1973)) (proposing that, where a "trained" and "independent" judiciary is available and possesses a "special technique by which to interpret and enforce the fundamental civil rights," then a "certain amount of judicial supremacy in interpreting and enforcing the fundamental civil rights is also justifiable.").

111. For example, my current Federalist Society membership card has printed on its back the famous excerpt from Alexander Hamilton's *THE FEDERALIST* NO. 78 in which he describes the judiciary's relative institutional impotence. See Hamilton, *supra* note 3.

112. As but two examples, Michael Stokes Paulsen and Robert P. George, both of whom have been cited in this paper numerous times and are adamantly opposed to judicial supremacy, are strongly pro-life Christians (Paulsen is an evangelical Protestant, and George is a Catholic). Furthermore, Chief Justice Roy Moore of the Alabama Supreme Court, perhaps the most iconic antijudicial supremacy jurist currently in any state court, is a devout Southern Baptist whose wife Kayla serves as president of the Alabama-based socially conservative group, "Foundation for Moral Law." See *Our Staff*, FOUND. FOR MORAL LAW <http://morallaw.org/our-staff/>. But see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000), for a prominent counterexample of a left-leaning legal scholar—and, specifically, one identified with the socialistic/Marxist-leaning "critical legal studies" movement—strongly opposing judicial supremacy and concomitantly endorsing popular constitutionalism.

113. Donnelly, *supra* note 108, at 960 (quoting LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 229 (2004)).

such as the APP Statement are so contemporarily rare. These five reasons range from being more empirically grounded to being more speculative, but all are worthy of careful consideration.

A. *Judicial Supremacy's Emerging Consensus Predates Cooper v. Aaron and the Southern Manifesto*

Though Alexander Hamilton, James Madison, and Chief Justice John Marshall in *Marbury* alike all arguably considered judicial supremacy anathema, there is actually substantial historical support for the notion that judicial supremacist sentiment was widely pervasive well before the Supreme Court first explicitly pronounced it in *Cooper*.¹¹⁴ Indeed, US history “is littered with debates over judicial authority and constitutional meaning,” with “judicial authority. . . contested by important segments of the populace, from abolitionists to labor unions to segregationists to pro-life advocates.”¹¹⁵ But the key word in the preceding sentence is “contested”: judicial supremacy, after all, has always been a closely held belief by a nonnegligible segment of the American populace. It was hotly contested from the time of the Founding generation through the antebellum period, emerged as powerfully pervasive by the turn of the twentieth century and was already widely accepted by the legal and political elite by the time of the Manifesto and *Cooper*.

Even before *Marbury*, Federalist Party criticisms of Jefferson and Madison’s Kentucky and Virginia Resolutions of 1798–99 “overwhelmingly . . . resorted to the assertion of judicial supremacy.”¹¹⁶ Indeed, “Federalist doctrine” viewed it as “self-evident” that the Constitution clearly “removed questions of its own interpretation from the states and vested them in the federal courts.”¹¹⁷ Since Alexander Hamilton himself was still a prominent Federalist Party leader at the time, it is difficult to conclude that his seminal antijudicial power writing in *The Federalist No. 78* was ultimately irreconcilable with such a unanimous party-line belief. This prejudicial power Federalist Party dogma was at loggerheads with the Jeffersonian and Madisonian opposition to judicial supremacy evinced in the Kentucky and Virginia Resolutions; as the Democratic-Republican Party of Jefferson and Madison broke off into various factions in the 1820s, its anti-judicial supremacy intellectual progeny followed Andrew Jackson and became a prominent trait of Jackson’s new Democratic Party.

More broadly, while Presidents Jefferson and Jackson staunchly adhered to departmentalism both in theory and in practice, some antebellum presidents subscribed to judicial supremacy for largely political calcula-

114. *Cooper v. Aaron*, 358 U.S. 1 (1958).

115. WHITTINGTON, *supra* note 3, at 4.

116. *Id.* at 245.

117. *Id.* at 245–46.

tions. Populist to its movement's core, Jacksonian democracy was ardently opposed to judicial supremacy. To the contrary, President James Buchanan "was only too happy to oblige" to include language in his first inaugural address to the effect that the slavery issue "must ultimately be decided by the Supreme Court."¹¹⁸ Buchanan's avowed judicial supremacy was only abetted by the Taney-led Court, whose unanimous ruling in 1859's *Ableman v. Booth*¹¹⁹ dealt narrowly with a habeas corpus dispute, but more broadly asserted in dicta that the Constitution gives the judiciary the final say in constitutional interpretation.¹²⁰ In many ways, then, *Ableman* can be seen as a direct precursor to the *Cooper Court*'s more explicit assertion of judicial supremacy ninety-nine years later.

President Buchanan is not a historical outlier, even by antebellum standards. Indeed, American history has numerous examples of presidents all too eager to defer to judicial authority because "for most national leaders most of the time," "judicial supremacy . . . [is] at worst an annoyance and at best a godsend."¹²¹ Judicial supremacy has more often been opposed by more populist (e.g., Jackson) and transformative Article II-centric (e.g., Lincoln) presidents, but for many others, accepting judicial supremacy often makes for good politics. Most presidents who are not true visionaries likely only have a certain spectrum of core issues on which they are deeply passionate and willing to exercise significant political capital;¹²² thus, "limitations of vision or imagination on the part of certain presidents may [also] account for their diffidence toward the Court."¹²³ Not every president, in

118. *Id.* at 253.

119. *Ableman v. Booth*, 62 U.S. 506 (1859).

120. *Id.* at 517–18 ("But the supremacy thus conferred on this Government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken. And the Constitution and laws and treaties of the United States, and the powers granted to the Federal Government, would soon receive different interpretations in different States, and the Government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a Government, that it should have the power of establishing courts of justice, altogether independent of State power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a State court or a court of the United States, should be finally and conclusively decided. Without such a tribunal, it is obvious that there would be no uniformity of judicial decision; and that the supremacy, (which is but another name for independence,) so carefully provided in the clause of the Constitution above referred to, could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority.")

121. WHITTINGTON, *supra* note 3, at 287.

122. *See, e.g., id.* at 282 (noting that even while signing into law the Bipartisan Campaign Reform Act, President George W. Bush "used the occasion to invite the Supreme Court to strike down key provisions as unconstitutional" by writing in his signing statement that, "I expect that the courts will resolve these legitimate legal questions as appropriate under the law.")

123. Thomas W. Merrill, *Book Reviews: The Political Foundation of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*, 9 *ENGAGE* 1, 148 (2008) (reviewing KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY*:

other words, can be Andrew Jackson—let alone Abraham Lincoln. Not every president necessarily cares about judicial power as much as Jackson did, and certainly very few can so much as aspire to be as transformative as was Lincoln.

One result of Lee's surrender to Grant at Appomattox Court House was the large-scale repudiation of nullification-based John C. Calhoun interpretive theory,¹²⁴ and many viewed "the defeat of the South in 1865 [as] extinguish[ing] [the theory's] vitality."¹²⁵ In Reconstruction and the late nineteenth century, the politically dominant Republican Party largely adhered to judicial supremacist sentiment: judicial authority was seen as institutionally harmonizing amidst such post-war internal strife.¹²⁶ The rapidly increasing industrialization of the United States only accelerated judicial supremacy's rise, as big business viewed as necessary "an integrated national market free from the interference of states and localities"; furthermore, the Supreme Court was "only too happy to fill" the "vacuum" left by a Congress that had grave qualms about its Article I, Section 8 authority to nationally regulate private enterprise.¹²⁷ The Court's "*Lochner* Era"¹²⁸ saw the Republican Party and economic conservatives only clamor harder for judicial authority, while it was left to populist Democrats like William Jennings Bryan to push back against perceived "judicial oligarchy."¹²⁹ The emergence of a late-nineteenth century partisan mirror image of the 1858 debates between the fiercely antijudicial supremacy Republican, Lincoln, and the pro-judicial supremacy Democrat, Douglas, demonstrates, moreover, that this particular debate has not been aired throughout our history along strictly partisan lines.¹³⁰

The early twentieth century saw a continuation of much of the same. President William McKinley's sweeping victory in the 1900 election was largely understood as a popular vote in favor of judicial authority.¹³¹ With President Theodore Roosevelt's emerging Progressive Era domestic

THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007)).

124. See generally Paulsen, *supra* note 65.

125. Hagley, *supra* note 43, at 193. But see WHITTINGTON, *supra* note 3, at 181 (noting that Democratic President Andrew Johnson, in the aftermath of the Civil War, still encouraged popular constitutionalism: "the Constitution 'is again unfolded, and the people are invited to read and understand it, and to maintain its provisions' against transient factions.").

126. See, e.g., WHITTINGTON, *supra* note 3, at 183, 255 (noting that Republican President Ulysses Grant viewed a "judicial remedy" as one means of resolving an Article I versus Article II separation of powers dispute).

127. Friedman & Delaney, *supra* note 43, at 1159.

128. See *Lochner v. New York*, 198 U.S. 45 (1905).

129. See WHITTINGTON, *supra* note 3, at 258.

130. To further indicate the lack of partisan lines of this particular debate in the late-nineteenth century, consider that Democratic President Grover Cleveland had "small-government inclinations" that "complemented and enriched" the emergence of the *Lochner* era's distinctly laissez-faire jurisprudence. *Id.* at 229.

131. *Id.* at 259.

agenda, judicial supremacy “acquired new dimensions” when it emerged as a natural response to the “perceived need to rein in the increasingly active political branches of government.”¹³² Americans came to see the new political landscape’s muddled and “unruly” electoral coalitions as necessarily ill-suited to settle constitutional disputes.¹³³ Frustrated by the *Lochner* era courts impeding his imposed progressivism, Roosevelt eventually went “haywire” and espoused “unconstrained majoritarianism” in his fiercely antijudicial power 1912 third-party presidential run;¹³⁴ his defeat at the polls was thus yet another victory for judicial authority.¹³⁵

President Calvin Coolidge, as a leading *laissez-faire* Republican of the *Lochner* Era, was very much a proponent of judicial supremacy.¹³⁶ Even President Franklin Delano Roosevelt’s decision to try to “pack” the Supreme Court in 1937 can be understood as a tacit capitulation to judicial supremacy; though Roosevelt was an unambiguous proponent of a powerful executive branch, such a court-packing scheme is likely not the course he would have steered if he believed a president would be duly justified in flatly refusing to either ad hoc enforce or accept as binding political principle a judicial diktat with which he disagreed. As the nation entered World War II against European and Japanese fascism, subsequently, judicial authority came to be seen domestically “as the authoritative guardian [] of liberty that distinguished American democracy from European dictatorships.”¹³⁷ And finally, President Harry Truman’s decision to meekly abide the court’s anti-Article II power ruling in *The Steel Seizure Case*¹³⁸ cemented judicial supremacy as mainstream presidential sentiment.

All in all, then, judicial supremacist sentiment has always been a subject of debate throughout the republic. It was closely contested in the early years, and indeed was bitterly contested in the antebellum period between the era of Jacksonian democracy and Lincoln’s ultimate presidential ascension. Judicial supremacy became quite pervasive in the *laissez-faire* period of the late nineteenth century, and, notwithstanding President Theodore

132. *Id.* at 284.

133. *Id.*

134. George F. Will, Opinion, *George Will: Texas’s Ted Cruz Gives Tea Party a Madisonian Flair*, WASH. POST (Aug. 1, 2012), http://www.washingtonpost.com/opinions/george-will-texas-ted-cruz-gives-tea-party-a-madisonian-flair/2012/08/01/gJQApiwePX_story.html.

135. Democrat Woodrow Wilson, the iconic Progressive and presidential victor in 1912 over both Roosevelt and the incumbent William Taft, was also a judicial supremacist. See Robert Lowry Clinton, *Elitism and Judicial Supremacy*, PUB. DISCOURSE (Oct. 8, 2010), <http://www.thepublicdiscourse.com/2010/10/1742> (noting that Wilson embraced judicial supremacy, describing the courts as “instruments of the nation’s growth,” that by determining “what powers are to be exercised under the Constitution . . . determine also the adequacy of the Constitution in respect of the needs and interests of the nation”).

136. See Whittington, *supra* note 3, at 265.

137. *Id.* at 271 (quoting RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 177–224 (1999)).

138. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

Roosevelt's prominent antijudicial power third-party presidential run in 1912, had indeed become "widespread"¹³⁹ accepted sentiment in the lead-up to the Southern Manifesto¹⁴⁰ and the *Cooper Court's* 1958 unapologetic aggrandizement. It is, thus, little surprise that powerful doctrinal opposition to judicial supremacy, such as that found in the APP Statement, is so rarely given voice today.

B. Largely Left-Leaning Legal and Political Elites Have Supported Judicial Supremacy as a Counter-Majoritarian Protector of Individual Rights

Many of the Constitution's framers foresaw the judiciary, with its lack of democratic accountability and life-tenured judges, as a uniquely counter-majoritarian institution to help temper the excesses of plebiscitary democracy.¹⁴¹ The rise of political parties shortly after the American founding only further emphasized the need for such a countermajoritarian guardian, as "the President and Congress [were] beholden to the coalitions of interest groups that put them in power and sustain[ed] them thereafter."¹⁴²

In the twentieth century, as the *Lochner* Era faded, *Carolene Products'* famous footnote four¹⁴³ provided progressives and those on the political left with a new twist on this founding-era thought. For many on the legal left today, including the American Constitution Society,¹⁴⁴ *Carolene Products'* footnote four still serves as something closely approximating a doctrinal guidepost for the judiciary's highest and noblest function: to preclude "prejudice against discrete and insular minorities."¹⁴⁵ The *Lochner* era had soured progressives on judicial authority, but the famous footnote four helped ensure that "many of the Left [came to] prefer[] unreliable judicial protection of constitutional rights to no judicial protection at all."¹⁴⁶ Minor-

139. Driver, *supra* note 66, at 1058.

140. The Southern Manifesto was itself largely premised (however counter-intuitively) on judicial supremacy. See generally Driver, *supra* note 66.

141. See, e.g., THE FEDERALIST NO. 10 (James Madison) (discussing the problem of "factions").

142. Merrill, *supra* note 123, at 149.

143. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

144. As a personal aside, when I attended the American Constitution Society's introductory talk my 1L year at the University of Chicago Law School, Professor Geoffrey Stone went out of his way to emphasize the importance of this footnote to the society's very mission.

145. *Carolene Products*, 304 U.S. at 152 n.4.

146. WHITTINGTON, *supra* note 3, at 270. The contemporary left's affinity for such judicial authority in the realm of majority-minority relations is, of course, undermined by the historical reality that very similar arguments were employed at the time of the Civil War by southern secessionists. See Paulsen, *supra* note 41, at 1276 (quoting Professor Harry Jaffa) ("The Constitution had established the Supreme Court as the arbiter between the [majority and the minority]," and

ity free speech and religion were seen as too important not to judicially protect.¹⁴⁷

The Warren Court's famous minority rights-protecting progressive decisions, including those dealing with desegregation, were seen by many as juridical culminations from footnote four's provenance. Overall, "the Justices were seen by some as the final bulwark of constitutional liberty," and liberal fear of European-style fascism coming to America likely made "the middle classes more ready to accept the Court's guardianship of civil liberties."¹⁴⁸ To this day, the Left's near universal acceptance of judicial supremacy is still largely tied to this normative belief in the judiciary's purpose and function.¹⁴⁹

The left-leaning legal academy's near consensus¹⁵⁰ on judicial supremacy has even substantially affected the discussion on the legal right. The broader intellectual community of the Federalist Society, a group largely founded in explicit opposition to the perceived juridical excesses of the progressive Warren court, is itself now largely split amongst more "conservative" projudicial restraint originalists¹⁵¹ and more "libertarian" pro-"judicial engagement" originalists.¹⁵² Many notable libertarian originalists, such as Ilya Somin, defend judicial supremacy in explicit terms;¹⁵³ others, such as the Institute for Justice's Evan Bernick, choose to recouch judicial supremacy as a more anodyne "judicial co-equality."¹⁵⁴ These libertarians doctrinally depart rather dramatically from the projudicial restraint jurisprudence and rhetoric of the conservative Judge Robert Bork and the departmentalism of Justice Antonin Scalia.¹⁵⁵ It is wrong to equate the judicial restraint/"judicial engagement" debate as having entirely equivalent boundaries with the judicial supremacy/departmentalism debate,¹⁵⁶ but there is

["i]f the antislavery majority refused to accept that arbitration, then it refused to accept the Constitution.").

147. See WHITTINGTON, *supra* note 3, at 269.

148. Friedman & Delaney, *supra* note 43, at 1172–73.

149. See, e.g., Pestritto, *supra* note 8, at 67; accord Gammon, *supra* note 110, at 471 n.102.

150. See, e.g., Donnelly, *supra* note 108, at 960.

151. See, e.g., Matthew J. Franck, *Judicial Restraint, (At Least) As Old as Judicial Review Itself*, NAT'L REV. (Jan. 16, 2015, 7:50 PM), <http://www.nationalreview.com/bench-memos/396553/judicial-restraint-least-old-judicial-review-itself-matthew-j-franck>.

152. See, e.g., Evan Bernick, *Rand Paul Is Right: Judicial Restraint Is Wrong*, NAT'L REV. (Jan. 15, 2015, 11:00 AM), <http://www.nationalreview.com/article/396416/rand-paul-right-judicial-restraint-wrong-evan-bernick>.

153. See Ilya Somin, *Defending Judicial Supremacy*, WASH. POST (June 1, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/01/defending-judicial-supremacy/> ("[S]uch exceptional cases [as those Lincoln faced] should not lead us to reject the importance of adhering to the Constitution as a general rule—or to reject judicial supremacy.").

154. Evan Bernick, *Judicial Co-Equality Is Not Judicial Supremacy: Why the Judiciary Has the Final Say in Constitutional Disputes*, HUFFINGTON POST (June 1, 2015, 5:31 PM), http://www.huffingtonpost.com/evan-bernick/judicial-co-equality-is-n_b_7488136.html.

155. See George, *supra* note 92.

156. For example, the well-known constitutional theorist Hadley Arkes of Amherst College is a proponent of both "judicial engagement" and departmentalism.

usually strong overlap. One prominent result of this bifurcation in right-of-center jurisprudence has been to largely cabin antijudicial supremacy sentiment to social conservative circles.¹⁵⁷

Whether it is traditionally at home on the post-*Carolene Products*/Warren court legal left or more recently at home on the rational basis test-opposing libertarian right, then, judicial authority is seen by many as a necessary means to protect certain rights normatively deemed especially worthy of the utmost protection. Furthermore, there is increasingly less of an ideological/partisan split on the issue, compared to earlier times in American history such as the turn of the twentieth century;¹⁵⁸ prejudicial sentiment couched in the language of countermajoritarianism is not cabined to just the political left.¹⁵⁹

C. *For Many, It is Difficult to Separate the Judicial Supremacy Debate from the Twentieth Century Desegregation Fights*

When many contemporarily think of defiance of judicial authority, the images that come to mind are less frequently Lincoln ignoring *Dred Scott* to issue passports to blacks in western US territories, and more frequently federal troops escorting black schoolchildren in the South over the screams of white racists.¹⁶⁰ While the worth of a constitutional doctrine, including the

157. See, e.g., Gammon, *supra* note 110, at 440. Robert P. George is fond of comparing *Roe v. Wade* to *Dred Scott*, both on the merits of the abortion/slavery comparison and for the fact that substantive due process was both times the purported Fourteenth Amendment constitutional rationale. See Robert P. George, “A Republic. . . If You Can Keep It,” *FIRST THINGS* (Jan. 22, 2016), <http://www.firstthings.com/blogs/firstthoughts/2016/01/a-republic-if-you-can-keep-it>; see also Robert P. George & William L. Saunders, *Republicans and the Relics of Barbarism*, *NAT’L REV.* (Aug. 30, 2004, 6:23 PM), <https://www.nationalreview.com/2004/08/republicans-and-relics-barbarism-robert-p-george-william-l-saunders/>. For judicial supremacy as a political cudgel, see Josh Hammer, *Ted Cruz is Right About Marco Rubio on Same-Sex Marriage*, *REDSTATE* (Feb. 15, 2016, 7:00 AM), http://www.redstate.com/diary/josh_hammer/2016/02/15/ted-cruz-right-marco-rubio-sex-marriage/ (arguing that Senator Marco Rubio’s public comments following *Obergefell*—“[w]hile I disagree with this decision, we live in a republic and must abide by the law”—evinced an insufficiently strong opposition to the Supreme Court’s decision).

158. Recall that, around that time, Republicans and economic conservatives were overwhelmingly supportive of stauncher judicial authority, while populists and progressives, such as William Jennings Bryan and Theodore Roosevelt, were not.

159. See, e.g., Evan Bernick, Cooper v. Aaron and Judicial Authority: Lessons From Little Rock, *HUFFINGTON POST* (Oct. 2, 2015, 11:46 AM), http://www.huffingtonpost.com/evan-bernick/cooper-v-aaron-and-judici_b_8233796.html (“The judiciary, owing to its comparative insulation from majoritarian pressures, is less likely than other organs of government to take the majority’s view of the minority’s rights or cave in the face of majoritarian tyranny.”).

160. On a personal note, I recall being very moved in sixth grade when I first saw Norman Rockwell’s 1964 painting, *The Problem We All Live With*, which depicts six-year-old black girl Ruby Bridges being escorted to school in New Orleans by four deputy U.S. marshals. I wrote a poem about the painting, at the time, entitled *Southern Inhospitality*, which I still have saved on my computer. At the risk of embarrassment, here is what I wrote: “A frightened black child on her way to school, Knowing that her destiny is where white people rule. Guarded by strangers every step of the way, To protect her from a world unfortunately cruel./ Her intelligence has given her entry today, Which is kind of ironic, if I do say, For what is supposed to be a happy event Has

distinctly interpretive question of judicial supremacy, should not be adjudicated based on how sundry political actors use or misuse it, there is little doubt that it has often been hard to extricate the esoteric judicial supremacy debate from such viscerally searing images.¹⁶¹ Legal scholars have actually sometimes even been loath to analyze judicial supremacy precisely due to this deeply unfortunate connection,¹⁶² which is certainly intellectually disappointing and does an academic disservice to the legacy of morally heroic opponents of judicial supremacy—such as Lincoln himself. Nonetheless, Justin Driver opines that these terrible images form such a “synecdoche” for segregationist obstinacy that “[t]o the extent that citizens today are inclined to express vehement disagreement with judicial decisions after they are initially issued, it would not be surprising if they often muted their reactions in order to avoid resembling the widely reviled opponents of racial integration during the post-*Brown* era.”¹⁶³ As judicial supremacy and “aversion to white supremacy” have “become fused in the minds of many Americans,”¹⁶⁴ there is little doubt that such a fusion has been to the long-term detriment of both judicial supremacy’s theoretical potency and its popular appeal.

D. There are Compelling Pragmatic and Functionalist Reasons to Contemporarily Support Judicial Supremacy

While theorists such as Michael Stokes Paulsen see little harm in letting various constitutional actors interpret the Constitution for themselves within their own semisovereign spheres of influence, pragmatists, functionalists, and even many formalists concerned with general rule of law

turned into a miserable day./ Oh, I’m sure in this girl’s mind there was left a very sizable dent; Unfortunately, that was not what was supposed to be meant. School should be a place where you can learn and expand your mind; Not where you feel other children’s resent./ The world should be a place where people love, forgive, and be kind. This little girl should leave this dreadful memory behind. People’s ignorance is regrettably easy to find, Yet trying to find a cure for this ignorance is hard on the mind.” Poem by Josh Hammer, (on file with author).

161. See, e.g., Judge Wiley Branton, Jr., *Reflections on the Commemoration of the 50th Anniversary of the Crisis at Little Rock Central High School*, 30 U. ARK. LITTLE ROCK L. REV. 313, 318 (2008) (“A particularly troubling and unforgettable image, and one that I submit should live in infamy forever, is that of Elizabeth Eckford—a young black teenager dressed in a clean and fresh pressed dress, ready for her first day at a new school—facing the angry white mob all by herself. Eventually, a white lady of courage came to her assistance. That incident was utterly shameful and unforgivable.”); see also David A. Strauss, *Little Rock and the Legacy of Brown*, 52 ST. LOUIS U. L.J. 1065, 1082 (2008) (“The televised images of frenzied crowds of white adults abusing black schoolchildren were very dramatic.”).

162. See, e.g., Driver, *supra* note 66, at 1056 (“Law professors have, with a negligible number of exceptions, approached the legal materials advocating white resistance to *Brown* as though they contained some sort of racial contagion and that the best way to avoid contracting racial prejudice is to keep materials exhibiting such prejudice at bay.”).

163. *Id.* at 1131–32.

164. *Id.* at 1132.

norms¹⁶⁵ have reason to be skeptical of a possible “every man a law unto himself” result.¹⁶⁶ Constitutional authority Daniel Webster was very nervous about this result: he opined that the Constitution “in the hands of multiple ‘popular bodies, each at liberty to decide for itself, and none bound to respect the decisions of others’” would not be “fit to be called a government.”¹⁶⁷ Instead, Webster contended the Constitution would then be “a collection of topics, for everlasting controversy.”¹⁶⁸ Stephen Douglas raised its specter during his debates with Lincoln,¹⁶⁹ and Senator Lehman of New York did the same during the Senate floor colloquy on the Southern Manifesto.¹⁷⁰ Moreover, President Eisenhower’s decision to send federal troops into Little Rock was largely based on his own belief that “the rejection of judicial supremacy [w]as an invitation to anarchy.”¹⁷¹ Most recently, libertarian originalist Evan Bernick has analogized the rejection of judicial supremacy as “get[ting] a glimpse of the dangers that [John] Locke perceived in the state of nature,” and thus “risk[ing the] creat[ion of] an uncertain and dangerous state of affairs.”¹⁷²

In the aftermath of *Obergefell*, the judicial supremacy debate memorably took the partial shape of the controversy surrounding Kim Davis, a county clerk for Rowan County, Kentucky. In August 2015, Davis cited her Christian faith as precluding her from issuing same-sex marriage licenses and was then subjected to a district court order directing her to do so. She was subsequently jailed for contempt of court before being ultimately released. Davis has been partially vindicated by the Kentucky state legislature

165. See Bernick, *supra* note 159 (arguing that rejecting *Cooper* would mean “the rule of law could not be preserved.”).

166. While perhaps not directly on point, even Madison warned in THE FEDERALIST NO. 10 that “[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.” THE FEDERALIST NO. 10, *supra* note 141 (Madison).

167. WHITTINGTON, *supra* note 3, at 1 (quoting 6 REG. DEB. 78 (1830) (statement of Sen. Daniel Webster)).

168. *Id.*

169. See Paulsen, *supra* note 41, at 1258–59 (quoting Stephen Douglas, Third Lincoln-Douglas Debate, Jonesboro, Illinois (Sept. 15, 1858), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858, at 633–34 (Don E. Fehrenbacher ed., 1989)). Stephen Douglas asked Lincoln, “Is every man in this land allowed to resist decisions he does not like, and only support those that meet his approval?” Paulsen’s own response to Douglas is that “the idea that judicial decisions might legitimately be resisted by the political branches is not an invitation to ‘chaos,’” but “can be seen as a logical, even desirable, consequence of the separation of powers and attendant checks and balances, applied to the shared incidental power of constitutional interpretation.”

170. See Driver, *supra* note 66, at 1106–07 (quoting 102 CONG. REC. 4550 (1956) (statement of Sen. Herbert Lehman) “Shall each individual in our Nation have the right to say that he disagrees with the Supreme Court’s interpretation of the Constitution and, therefore, will not abide by the . . . Supreme Court? Obviously, that would be anarchy, and our Nation would collapse in chaos and disorder.”).

171. *Id.* at 1117.

172. Bernick, *supra* note 154.

and governor since her jailing,¹⁷³ but her dramatic ordeal made national headlines and presented the public with a view as to what precisely the sort of mass public officeholder “constitutional resistance” to which the APP Statement alludes might look like in practice. Suffice it to say that, while antijudicial supremacy and proreligious liberty Republican Party presidential candidates Mike Huckabee and Ted Cruz celebrated Davis,¹⁷⁴ many constitutional pragmatists and functionalists assuredly did not.

Most recently, controversial Alabama Supreme Court Chief Justice Roy Moore was charged with six counts of violating judicial ethics by the Alabama Judicial Inquiry Commission in early May 2016, for issuing a post-*Obergefell* order that nonetheless blocked Alabama probate judges from issuing marriage licenses for same-sex couples statewide.¹⁷⁵ In charging Moore, the Commission alleged that he had “flagrantly disregarded and abused his authority” and “abandoned his role as a neutral and detached chief administrator of the judicial system.”¹⁷⁶ Some notable social conservatives have arisen in Moore’s defense,¹⁷⁷ while some progressive-leaning groups have lambasted him.¹⁷⁸ Such incidents as Moore’s only threaten to further ossify the contemporary judicial supremacy debate along social conservative versus progressive lines, perhaps further confining opposition to judicial supremacy to a narrower slice of the American citizenry and only aiding the long-term interests of pro-judicial supremacy functionalists.

E. Due to Justices’ Life Tenure, the Supreme Court Enjoys Peculiar Institutional Capital

One final possible explanation for the long-term triumph of judicial supremacy is that the US Supreme Court, by virtue of being comprised of

173. See, e.g., Leah Barkoukis, *Kim Davis Just Won a Major Victory in Fight Over Gay Marriage Licenses in Kentucky*, TOWNHALL (Apr. 15, 2016, 8:10 AM), <http://townhall.com/tipsheet/leahbarkoukis/2016/04/15/kim-davis-just-won-fight-over-gay-marriage-licenses-in-kentucky-n2148803> (“Kentucky Gov. Matt Bevin . . . signed a bill that removes the names of county clerks from the state marriage license forms.”).

174. See, e.g., Tom LoBianco et al., *Mike Huckabee Leads Kim Davis out of Kentucky Jail*, CNN (Sept. 8, 2015, 4:22 PM), <http://www.cnn.com/2015/09/08/politics/kim-davis-kentucky-clerk-2016-candidates-chris-christie>.

175. See Matt Ford, *Roy Moore’s Last Stand?*, THE ATLANTIC (May 7, 2016), <http://www.theatlantic.com/politics/archive/2016/05/roy-moore-alabama-ethics/481776/>.

176. *Id.*

177. See, e.g., Michael Bryboski, *Suspended Alabama Chief Justice Roy Moore Wanted Clarity in Gay Marriage Ruling, Conservative Says*, CHRISTIAN POST (May 10, 2016), <http://www.christianpost.com/news/suspended-alabama-chief-justice-roy-moore-gay-marriage-ruling-conservative-163662/> (noting that Sam Rohrer of the American Pastors Network argued that this unfortunate fallout of *Obergefell* evinced “another glaring example of the federal government exceeding its authority and disturbing and upsetting the very important balance of power between the federal government and the states.”).

178. See *id.* (noting that Richard Cohen of the Southern Poverty Law Center called Moore a “religious zealot” and an “egomaniac”).

justices whose tenures exceed twenty-six years, on average,¹⁷⁹ may enjoy “certain built-in advantages in the perennial struggle for political power.”¹⁸⁰ While the two political branches are electorally checked amidst their oftentimes partisan-fueled wrangling, the Court is uniquely positioned to play a longer institutional game.¹⁸¹ In today’s age of frequent political gridlock, it is intuitive to think of the judiciary as perhaps being above the quotidian fray—and thus less narrowly self-interested as an institution. Moreover, the fact that justices stay on the bench for far longer than do presidents and most legislators may, quite simply, make them often more competent at their jobs; their near unanimous composition of exceptionally bright attorneys and jurists might be viewed by the public as more specialized, elite, and ultimately more trustworthy, wielding tremendous power. The judiciary’s lack of democratic accountability and isolation from plebiscitary demands may empower the court with unique institutional capital simply not available to the two other political branches. Overall, such institutional capital may allow the justices “to temper temporary individual advantage in order to promote the interests of the institution, which are implicitly understood to mean aggrandizement of its power relative to other institutions.”¹⁸²

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There are surely other possible explanations for the long-term triumph of judicial supremacy in the legal academy and the political arena, besides the five considered here. In particular, I think future research should focus on elementary through high-school age civics curricula and analyze as much as possible how uniformly (perhaps even subconsciously) in favor of judicial supremacy such curricula indeed are.

IV. CONCLUSION

The public debate over judicial supremacy is, quite literally, as old as the republic itself. Far from being required by either constitutional structure or the Article III text, there is a strong argument that judicial supremacy is not only not required, but is indeed actually repudiated by the Constitution’s structure, text and the landmark *Marbury* decision itself. Some early presidents, such as Jefferson and Jackson, were openly favorable toward departmentalism; Lincoln, in his 1858 Douglas debates’ rhetoric, and ultimately in practice as president, took opposition to judicial supremacy all the

179. See Merrill, *supra* note 123, at 149.

180. *Id.*

181. A prime example of this strategy being deployed can be seen in Chief Justice John Roberts, Jr., who oftentimes has engaged in a two-step jurisprudence where he will first warn about the possible unconstitutionality of a federal statute, and then strike it down in the second instance. In the context of the 1965 Voting Rights Act, see *Northwest Austin Mun. Util. District No. One v. Holder*, 557 U.S. 193 (2009). See also *Shelby County v. Holder*, 133 S.Ct. 2612 (2013).

182. Merrill, *supra* note 123, at 149.

way to its logical conclusion both by defying *Dred Scott* as political principle and refusing to enforce the specific judgment in *Ex parte Merryman*. By the turn of the twentieth century, *laissez-faire* Republicans were prejudicial authority whereas populist Democrats were not; thus, the partisan mirror image from the Lincoln-Douglas debates demonstrates that the judicial supremacy debate transcends political parties. Today, opposition to judicial supremacy has largely, but not exclusively,¹⁸³ been cabined to social conservative elements of the political right.

The APP Statement is extraordinarily bold not for its stance on the doctrinal merits of either *Obergefell* or judicial supremacy more broadly, but for being such an outlier amidst a rising consensus of judicial supremacist sentiment in both the legal academy and the political arena. The APP Statement is both more and less audacious than its most superficially natural predecessor, the Southern Manifesto of 1956: it is much more stridently and explicitly opposed to judicial authority, but it is simultaneously more normatively defensible as a political tool both due to the deeply split nature of the *Obergefell* Court and to the much stronger moral defensibility of taking a strong policy stand against same-sex marriage in 2015 than there was for taking an equivalently strong stand against school desegregation in 1956.

Thus far, it seems that no sitting federal or state officeholders have cited the APP Statement as a means to not apply *Obergefell*.¹⁸⁴ And yet, at minimum, the Statement still greatly contributes to the public discourse by means of proffering an older, perhaps almost nostalgic, legal argument so rarely heard today. Thus, while I am personally deeply sympathetic to the Statement on the merits, I think everyone should at least appreciate its adding intellectual diversity to contemporary erudite constitutional discourse.

183. For an example of a prominent left-wing scholar staunchly opposing judicial supremacy, see, e.g., TUSHNET, *supra* note 112.

184. See also REPUBLICAN PARTY OF TEXAS, REPORT OF THE PERMANENT COMMITTEE ON PLATFORM AND RESOLUTIONS 12 (2016) (“We believe [*Obergefell v. Hodges*], overturning the Texas law prohibiting same sex marriage in Texas, has no basis in the Constitution and should be reversed . . . The Governor and other elected officials of the state of Texas should assert our Tenth Amendment right and *reject the Supreme Court ruling.*”) (emphasis added).