The Problem of Judicial Supremacy

Matthew J. Franck

As now happens every year, the last Supreme Court term closed with its fair share of controversial, narrowly decided decisions. But one in particular, Obergefell v. Hodges, a case in which the Court held that the 14th Amendment requires states to grant marriage licenses to same-sex couples, stood out for several reasons. For one, Obergefell dealt serious blows to the West’s traditional approaches to marriage, the family, and religious liberty — blows from which our society will be reeling for some time. For another — and perhaps more important for our political process — the decision exhibited judicial aggrandizement on a truly grand scale. Justice Anthony Kennedy, the author of the majority’s opinion, insisted that the Constitution guarantees a blanket right to be married, a claim for which there was no support in its text or history. And, to add insult to injury, Kennedy’s opinion largely failed to incorporate standard legal norms and categories, instead employing a freewheeling appeal to sentiment that defied analytical response and offered no limiting principle.

The policy result of Obergefell was a long time coming. The campaign for same-sex marriage began in earnest nearly two decades ago when support for the cause was low. By the time Obergefell was decided, some polls showed a slim majority of Americans favored legalizing same-sex marriage. It is possible that, over time, had Obergefell been decided differently, some states would have undone the amendments to their constitutions that forbid same-sex marriage, but at least those
would have been democratic decisions. Nevertheless, Justice Kennedy and the rest of the majority in *Obergefell* did not think democracy and public opinion could sufficiently render justice. To do that, they thought, an almost unassailable right to marriage had to be located in the Constitution and promulgated by the Court.

Even more than in *Roe v. Wade*—another a case in which the Court posited a right that does not appear in the Constitution—*Obergefell* put an abrupt end to an ongoing and robust public debate. In that respect, the recent case is more striking. Almost all the furor over the *Roe* decision *followed* the ruling, and it is fair to say that the justices who decided it probably had little idea that they’d be touching off a firestorm. But the Supreme Court had two decades’ notice that the American people were paying close attention to the same-sex-marriage issue, that they cared about it considerably, and that they were seriously divided about it.

Nearly all objections to *Obergefell* have therefore centered on the Court’s brazen invocation of judicial supremacy. Not only did the Court undermine many Americans’ dearly held social institutions, it also insisted on a controversial interpretation of the Constitution, quashed ongoing debate about an important political issue, and proclaimed that it and it alone has the final word on the matter. Even the Court’s four dissenters recognized this, going so far as to suggest that opponents resist the ruling in various ways. To say the least, *Obergefell* has brought the issue of judicial supremacy into clear focus, and the fallout from the case, especially thanks to the dissents, gives us a wealth of material with which to reconsider the proper place of the Supreme Court in our constitutional structure.

**Democratic Debate**

America’s vigorous debate over same-sex marriage began in the mid-1990s, when a few same-sex couples in Hawaii and Alaska applied for marriage licenses after noticing that their states’ marriage statutes used gender-ambiguous language. The county clerks denied their applications, and so the couples filed lawsuits, alleging that the ambiguous statutes—in conjunction with the state constitutions’ non-discrimination provisions—meant they were legally allowed to marry. When it appeared that some judges in Hawaii and Alaska would rule that the states were legally required to grant marriage licenses to same-sex couples, the states passed constitutional amendments—in Alaska to forbid the practice, and in Hawaii to enable the legislature to do so. The cases
in Hawaii and Alaska then prompted a wave of constitutional amendments in other states and the passage of the Defense of Marriage Act by Congress in 1996, an effort to forestall a domino effect should one or more states’ marriage laws be toppled by their own activist judges.

When the first state fell—Massachusetts in 2003—activists redoubled their efforts, and a large number of states amended their constitutions at the polls the following year. (Ultimately, three-fifths of states amended their constitutions to ban same-sex marriage.) The ease or difficulty of amending a state’s constitution was a major variable in the outcome of these state-by-state struggles. This accounts in large part for the early same-sex marriage judicial victories in Massachusetts, Connecticut, and Iowa, each of which has a constitution that is difficult to amend. Same-sex marriage advocates, however, while hardly scornful of democratic institutions wherever they could be persuaded, focused heavily on activist courts because their cause was, in most places, unpopular.

California, of course, became the hinge of the struggle. When the activist state supreme court redefined marriage in 2008 under the pretext that the California constitution required it, the people of the state succeeded in amending the constitution only a few months later. The referendum, referred to as “Prop 8” for the spot in which it appeared on the ballot, passed by a hair under 600,000 votes, but invited even more scrutiny.

When Prop 8 landed in U.S. district court, Judge Vaughn Walker declared the referendum unconstitutional, grounding his reasoning on the “fact” that Prop 8 was passed only to express disapproval of homosexuality. On appeal, the Ninth Circuit affirmed Walker’s ruling but on very different reasoning. When the people of California appealed to the Supreme Court, the justices balked, indicating that there was no standing for the people of California to defend their handiwork. This yielded the very strange result that their defeat in district court was left standing, meaning that a case with adequate standing at trial in U.S. district court had somehow lost that status on appeal, a phenomenon no lawyer in America has yet explained.

The very same day it decided the Prop 8 case, the Supreme Court also struck down one of the two key provisions of the Defense of Marriage Act in *United States v. Windsor*. Notwithstanding the decision’s explicit holding that marriage laws are for the states to decide, and notwithstanding the continued survival of a 1972 precedent that there is no federal constitutional right of same-sex marriage, *Windsor* was taken as a green
light by activist lower-court judges that they should begin to follow Judge Walker’s lead and strike down state laws protecting marriage as a union of a man and a woman. Their reading of the crystal ball was correct: Five justices of the Court, led by Justice Kennedy, were ready to change the legal meaning of marriage at the next convenient opportunity.

Over the last two decades then, defenders of marriage have consistently worked within democratic norms to defend what they think is right, while judges, at the behest of same-sex marriage advocates, have violated one legal and constitutional norm after another. Wherever democracy failed them—which was, truth be told, in most of the country—those advocates turned to undemocratic means.

**Judicial Supremacy**

The four dissents in *Obergefell*, written by justices familiar with this history, together make for something like a call to arms against judicial supremacy. Chief Justice Roberts and Justices Scalia, Thomas, and Alito all express much more than mere disagreement with the majority over the legal issues in the case. They directly attack the *legitimacy* of the majority’s decision.

The chief justice sets a strong tone from the very start, writing that the majority has engaged in “an act of will, not of legal judgment,” thereby “[s]tealing the issue from the people.” “Just who do we think we are?” he asks. The chief justice puts a sharp point on the usurpation of politics by the majority when he writes, “Nowhere is the majority’s extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate regarding same-sex marriage.”

Let us dwell on this expression “judicial supremacy.” Many people use the phrase and know it describes a problem, but tracing the contours of that problem is actually quite challenging. What does Chief Justice Roberts—and what do the other dissenters—mean by “judicial supremacy”? There are three possibilities.

First, the dissenters could be referring to a supreme authority of the federal judiciary to decide any important political or social question confronting the country—never mind whether the Constitution authentically addresses it or not. We’ll call this the *judicial supremacy of imperial power* for short. The justification for this understanding of the Court’s supremacy is that the Court alone is insulated from politics and self-interest, so it is peculiarly suited to use the Constitution’s “majestic
generalities” to generate substantive legal and policy responses to the nation’s contemporary needs.

Second, Roberts could mean the power of the federal judiciary to interpret any and all textual provisions or principles in the Constitution, so long as bare jurisdictional and “standing” requirements are met. We’ll call this the judicial supremacy of textual breadth. In this understanding of judicial supremacy, the Court stays inside the four corners of the Constitution’s text, but it gathers everything found there under its purview.

For much of our history, this was not the Court’s own view of things. There was, for instance, even in Marbury v. Madison — the 1803 case celebrated as the first instance of judicial review declaring part of a federal law unconstitutional — a companion doctrine that came to be called the “doctrine of political questions.” Judicial review and the doctrine of political questions coexisted comfortably for many years, the one saying “judges in appropriate cases can decide which acts of other institutions are constitutional,” and the other saying “but not every constitutional question gives rise to such appropriate cases, and so some issues the judges simply won’t decide.”

The third view of judicial supremacy that Roberts might be referencing — and perhaps the most troubling — is the decisive right to be obeyed, which we can call the judicial supremacy of authoritative depth. This means, as Charles Evans Hughes remarked before he became chief justice, that “we are under a Constitution, but the Constitution is what the judges say it is.” Hence all other citizens, but particularly those who serve in public office, are obliged to act in accordance with what the Supreme Court justices — or at least five of them — tell them the Constitution means. The justices of the Court, on the other hand, need not even follow the Court’s precedents. The Court is always right, except when five of the current justices decide it has been wrong. The Supreme Court becomes a kind of ongoing constitutional convention, authorized to alter and amend the “real” Constitution, which de facto exists only in their opinions.

Today, this understanding of judicial supremacy is virtually dogmatic in America’s law schools, and it is widely embraced in the media and by the public. But it, too, is of relatively recent origin in the Court’s own opinions, first being expressed in a 1958 case called Cooper v. Aaron, in which the justices demanded the governor of Arkansas abide by their ruling in Brown v. Board of Education. Their logic was this: If the
Constitution is the supreme law of the land, as Article VI maintains, and if ever since *Marbury v. Madison* the country has understood that “the federal judiciary is supreme in the exposition of the law of the Constitution,” then the decisions of the Court are themselves “the supreme law of the land,” and must be followed by oath-bound public officials as equivalent to the Constitution itself.

The logic is impeccable, and so the conclusion follows, if all the premises are true. But it must be noted that, even if *Marbury* stood for the judicial supremacy of authoritative depth — and many scholars believe the best reading is that it does not — it is simply not true that “the country” has believed ever since 1803 that whatever the Court says about the Constitution simply *is* the Constitution.

**The Living Constitution and Judicial Supremacy**

Which of these three possible meanings did Chief Justice Roberts mean to denounce when he wrote of “the majority’s extravagant conception of judicial supremacy”? It was almost certainly not the third. It seems a safe bet that *all* the justices of the current Supreme Court believe what their predecessors said in *Cooper v. Aaron* about their own rulings being the supreme law of the land, effectively the same as the Constitution itself as far as the obligations of all other public officials are concerned. The judicial supremacy of authoritative depth is fixed in the modern judicial mindset.

It is also doubtful that Roberts was denouncing the second meaning, the judicial supremacy of textual breadth. For practical purposes, all the justices of the modern Court are on board with “enforcing” any and every provision or principle of the Constitution. Whatever is in the Constitution is fair game for judicial interpretation. The chief justice probably intended only to denounce the first meaning above, the judicial supremacy of imperial power, which insists that the Court can be wise enough to decide all of society’s great political questions so long as they can be connected in some creative way to the Constitution. He did, after all, once famously describe the Supreme Court as an umpire calling balls and strikes — and he really meant it. No mere umpire could embrace such a capacious vision of judicial power.

The core of Roberts’s argument is a familiar one to legal conservatives: Justice Kennedy’s opinion explicitly embraces a “living Constitution” approach to jurisprudence — an approach often practiced but rarely confessed so openly. Kennedy writes:
The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal structure, a claim to liberty must be addressed.

This is a funhouse-mirror image of the Constitution. Of course the framers did not imagine that their work captured the meaning of a free society in all its dimensions. But their purpose in putting a charter of government down in writing was to limit institutions of government within its terms — the judiciary no less than other institutions. The idea was to leave us free to govern ourselves democratically within those strictures, and, if need be, to amend the Constitution whenever we find it inadequate to our needs.

Yet Justice Kennedy takes a commonplace truism — that no generation has a monopoly on wisdom about the meaning of freedom — and states its blandly true corollary: that “future generations” can come to “new insight” about such things. The argument then becomes a shell game for the reader, who belatedly realizes that Kennedy means future generations of judges are free to change the meaning of the Constitution, never mind our difficult but honest and democratic amendment process.

This is where Roberts raises his most salient objection. It’s one thing to say that judicial interpretation of the actual Constitution carries an obligation that other officeholders will respect what the judges say it means. And it may seem plausible to say that all issues of constitutional meaning are matters fit for judges to decide. But a made-up Constitution, “evolving” from year to year according to the “new insight” of any five out of a set of nine unelected judges with life tenure? That Constitution must be considered binding on everyone else? This cannot be.

Chief Justice Roberts and his fellow dissenters could have gone further, however. If one accepts the judicial supremacy of textual breadth and the judicial supremacy of authoritative depth — if everything the justices say about anything in the Constitution is simply to be obeyed as “the law of the land” by all other political actors — then the judicial supremacy of imperial power follows quickly thereafter. Not logically, perhaps, but it follows politically, for what can forestall the temptation?
Even the dissenting justices in *Obergefell*, then, seem unaware of how much they too are part of the problem. The late Justice Scalia, for instance, was right to say that the majority opinion represents “the furthest extension one can even imagine” of a “claimed power” on the Court’s part to “create ‘liberties’ that the Constitution and its Amendments neglect to mention.” This, he rightly said, “robs the People” of the “freedom to govern themselves” that was the whole point of fighting the American Revolution. The ruling, Scalia went on to say, “put[s] a stop” to the “public debate” over same-sex marriage.

Justice Thomas, for his part, expresses outrage that a “‘bare majority’” of justices “wip[es] out with a stroke of the keyboard the results of the political process in over 30 States,” and “short-circuits” a process of democratic decision-making. Like Scalia, he seems to think that, at the behest of his five majority colleagues, a debate has ended for good. They all seem to regard the issue of same-sex marriage as impossible to re-open — unless it is by a new majority on the Court itself, in some future case, by paths that are at present very difficult to see.

**RESCUING SELF-GOVERNMENT**

Because the four dissenting justices unanimously question the very legitimacy of *Obergefell* — essentially saying it is not the law of the land — we should read them as inviting the American people to resist the decision. But if these justices — like their fellows in the majority, and typical of their kind — accept the dogma of judicial supremacy, what possible form can such resistance take?

Justice Scalia, in a strident note at the end of his dissent, cites the famous Federalist No. 78 to the effect that the judiciary relies on the executive “‘even for the efficacy of its judgments.’” He concluded: “With each decision of ours that takes from the People a question properly left to them — with each decision that is unabashedly based not on law, but on the ‘reasoned judgment’ of a bare majority of this Court — we move one step closer to being reminded of our impotence.” Here was a most daring hint from the characteristically acerbic Scalia, that the other branches have it in their power to frustrate the ambition of the judges to rule.

From inside the bubble created by the dogma of judicial supremacy, only two conventional responses to an unconstitutional ruling seem possible. One is to amend the Constitution to reverse a wrong and harmful ruling of the Court. This has been accomplished on only a few occasions
in our history, and it is a Herculean undertaking. The lack of progress on a human-life amendment since *Roe* is a sobering reminder of the difficulty. Moreover, the route of amending the Constitution is not necessarily a challenge to judicial supremacy specifically, and might even be a concession to it. The other conventional response is to appoint better justices in the future, justices who will get the Constitution right, not abuse their authority, and perhaps even overturn abuses such as *Obergefell*.

But how to present them with the opportunity? The pro-life movement has been maneuvering for five votes to overturn *Roe* for four decades now, and it has not been difficult to present the justices with opportunities to do the right thing. Because *Roe* laid a prohibition on the states—do not ban abortions or impede access to them—state legislatures have been able to probe at the edges of the Court’s precedents with new forays into regulation of the abortion license, and even limited bans on some abortion procedures. One of these days, five justices may be willing to right the wrong of *Roe*, and the pressure to create an opening should be maintained.

*Obergefell*, by contrast, laid an affirmative obligation on the states to grant marriage licenses to same-sex couples. This obligation is both simpler and more sweeping than the inhibition of legislative power imposed by *Roe*. If a challenge arises to state laws that refuse to recognize polygamous, polyamorous, or incestuous unions as marriages, then the justices might be drawn into reconsidering *Obergefell*. Otherwise, a state would presumably have to pass a law of exactly the kind the Court just declared unconstitutional. While the lower courts stand ready to strike down such attempts, and while legislators stand in thrall to the dogma of judicial supremacy, this is highly improbable.

**CONSTITUTIONAL GOVERNMENT**

But if it is imprudent merely to wait for better justices and to hope that an appropriate case lands before them, what active steps might be taken to challenge judicial supremacy itself? First, it will take determined leadership by a presidential administration and members of Congress. Second, it will take rhetorical persistence. Third, it will take some creative re-imagining of the way our institutions of government interact with one another.

First, only the president and Congress, not state and local officials, can rival the Supreme Court on this matter. While judicial supremacy today preys chiefly on the right of the people to govern themselves at the state level—and thus can be seen as an assault on the federalism of
our constitutional arrangement—the growth of judicial power can be meaningfully checked only by the Court’s institutional counterparts, since they alone possess the tools of checks and balances. At first blush, some of those explicit constitutional tools—like impeachment, as Federalist No. 81 suggests—seem extreme, so we ought to treat them as something of a nuclear option.

Luckily, more modest methods exist. At various times in our history, judicial supremacy was challenged by presidents and Congress. As Princeton political scientist Keith Whittington points out in his 2007 book *The Political Foundations of Judicial Supremacy*, strong presidents like Jefferson, Jackson, Lincoln, Franklin Roosevelt, and even Reagan did so. Jefferson, for one, essentially nullified the Sedition Act of 1798 upon assuming office, and Lincoln, in express defiance of the *Dred Scott* decision, issued patents and passports to black Americans. The president, then, should invoke his prerogative to act in accordance with his own reading of the Constitution.

Similarly, Congress passed a law in 1862 that banned slavery in U.S. territories, which was in express defiance of the *Dred Scott* decision. It’s not extreme, therefore, to suggest that Congress should pass laws directly contradicting the Court when it believes the Court has overstepped its bounds.

A kind of public education is also required, which leads to the second point: rhetorical persistence. Whittington notes that judicial supremacy, which cannot be inferred in some uncontroversial and automatic way from our Constitution, has been “constructed” over the course of our history. Just as certain presidents and Congress resisted judicial supremacy, so too did many justices (in addition to other presidents and Congresses) push for judicial supremacy when it suited their interests. It bears repeating, then, that there was, for much of our history, a robust debate about the place of the Court in our constitutional structure.

Lincoln again is our true model here. As a candidate for office and emerging leader of the new Republican Party in the late 1850s, Lincoln resolutely opposed any acceptance of the *Dred Scott* decision as the law of the land. The decision had to be accepted as resolving the dispute for the parties in the case, but it could not be taken as instruction for other public officials. He spoke about the issue with trenchant clarity and frequency—from the ruling’s immediate aftermath until he was president. As he said in his first inaugural address:
[T]he 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.

Lincoln identified the stakes. Are we our own rulers? Or have we resigned our government into the hands of a tribunal of nine lawyers, any five of whom have authority to govern us? Those questions must be asked repeatedly over the coming years— not only in dissents, but also in the media, in the academy, and among citizens. It’s the duty of leaders like the president, congressional representatives, and public figures to encourage us to ask such questions.

Third, and finally, we must creatively re-imagine how the Supreme Court functions. In the mid-1910s the Court was sometimes disposing of as many as 600 cases per year, because the laws governing the jurisdiction of the federal courts gave many litigants the right to a mandatory appeal to the Court. This left the docket crowded, and many cases were held over, undecided, until succeeding terms. When former president William Howard Taft became chief justice in 1921, he made it his mission to get the docket under control, which required Congress to adopt reforms, because federal statutes dictated the flow of cases to the Court.

The result was the Judiciary Act of 1925, which was known at the time as “the Judges’ Bill,” because members of the Supreme Court had actually drafted the legislation. The Judiciary Act instituted the modern writ of certiorari system, giving the Court the power to take a lower court’s case or leave it alone. As the leading historians of this change, Felix Frankfurter and James Landis, put it, the Supreme Court after 1925 would be “the arbiter of legal issues of national significance.” And the Court itself would be in charge of saying what those were.

The Court certainly downsized the docket: In the 1931 term, the justices decided just 262 cases, 175 with signed opinions and another 87 with brief, unsigned “per curiam” opinions. The decline continued, and, over time, the Court acquired more time to rule on fewer cases. By 1988, Congress had dispensed with most mandatory appeals, and the docket shrank still more, from about 150 cases per year to half that today.
The Supreme Court hears fewer cases today than at any time in the last century and a half. Undeniably, it now hears only “important” cases; that is assuredly the justices’ own view of the matter. And the Court has maximized its time to consider each of these relatively few cases and to write lengthy opinions in deciding them.

Many other cases — cases with real significance — go unheard, because it’s easier not to hear them. In the autumn of 2014, the Court declined to review decisions from the Fourth, Seventh, Ninth, and Tenth Circuits, which had collectively struck down the marriage laws of more than 20 states. Only when the Sixth Circuit caused a split among the circuits that November, upholding the laws of four states, did the Court feel obliged to take up the issue. When it did, Justice Kennedy then had the temerity to suggest that the lower court rulings he had done much to encourage — and which he and his colleagues would not lift a finger to review or stay — constituted a trend. Had the Court taken the cases it declined earlier, it might have reached the same result as *Obergefell* a few months sooner. But it should appall us that the justices were, by and large, content to have circuit judges revolutionize the laws of marriage in state after state as long as they themselves could get away with saying nothing.

The 1925 Judiciary Act, and its successors in later “reforms” of the Court’s jurisdiction, have turned out to be extremely problematic features of our legal system. They have contributed to an inflation of the Court’s importance and of the justices’ self-importance. And the wholly discretionary control of the Court’s docket by its justices has enabled them to impose their will on the country with minimum effort, relying on lower courts to do much of their dirty work. It’s therefore time to reform these laws.

One major provision that should be revived is a state’s traditional right of appeal, with mandatory review by the Supreme Court, in cases where a state law was declared contrary to the Constitution by a federal appeals court. This right of mandatory appeal was even preserved in the original Judges’ Act, though it was done away with later. Moreover, that right of appeal should be augmented with the proviso that the Court has no power of summary dismissal or affirmance. The justices should be required to place such cases on the docket, to receive briefs from the parties and from friends of the court, to hear oral arguments, and to publish the reasons for their decisions. Moreover, while such
cases are pending, any adverse judgments of lower federal courts holding a state law unconstitutional could be automatically stayed in any class of cases Congress chooses to define. Still more salutary mischief could be achieved by making the justices consider cases from each state individually, with consolidation of similar cases for joint argument and decision ruled out of order. All of these suggestions are squarely within the power of Congress to enact, as it has total control over the judicial processes of the lower courts, and a capacious regulatory power over the Supreme Court’s appellate jurisdiction.

All in all, these steps would constitute a start toward reinsing in judicial supremacy, which has become a defining feature of our constitutional system at the federal level. Defenders of liberty, of course, should continue to play the long game—getting reasonable judges on the Court and giving them opportunities to mitigate the Court’s excesses—but in the meantime things can be done to counteract the worst of the Court’s diktats.

REVIVING THE CONSTITUTION

Over time, the political process can create opportunities for the president and the Senate to fill vacancies on the Court with justices who understand that the country cannot tolerate a rogue Supreme Court. The thing to do now, however, is to create opportunities for the Court to revisit its mistake in Obergefell, which means tough cases must be placed before the Court. Constitutional government did not always operate as it does today, and our long history of robust competition among the branches should encourage us that a healthier, freer constitutional arrangement is still possible.

Ordinary citizens and government officials alike must be reminded that it is not the judges’ Constitution—a falsehood that has been increasingly fashionable since the Judges’ Bill of 1925. Rather, it is the people’s Constitution. And with intelligent, creative leadership using the tools the Constitution already makes available, we can have it back.

Obergefell represented the worst that the Supreme Court and many decades of judicial supremacy could offer. The dissenting justices themselves have issued the call for resistance. We should not fail them, or our posterity.