Is It Too Late For Marriage? - Constitutionally Striking Down Abusive Judicial Decisions

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Recently, I had someone write me the following regarding the Supreme Court's decision, in <i>Obergefell v. Hodges</i> , regarding Marriage and the Supreme Court's legally abusive decision:
"I think we're too late to have any affect on this issue, since the Supreme Court already passed law that homosexual marriage is now legal in all states."
I was thankful to be reminded from this person how pervasive the mindset has become that when the Supreme Court rules on an issue that it is somehow "settled law" and that not much can be done from a Legislative, Executive, or State position (or for that matter as a concerned citizen).
Below are portions of my response, which I hope will point out three things: 1. that the Supreme Court only makes opinions which rely on the Legislative and the Executive branches to enact;

2. that under separation of powers, each branch of the government determines Constitutionality, and

3. that each branch, as well as the States as a whole, have the ability to check abusive Supreme Court decisions; either by not enforcing them (which includes de-funding the enforcement of the decision),

various limitations on the court through law, or through amending the U.S. Constitution.

particularly for their own branch; and

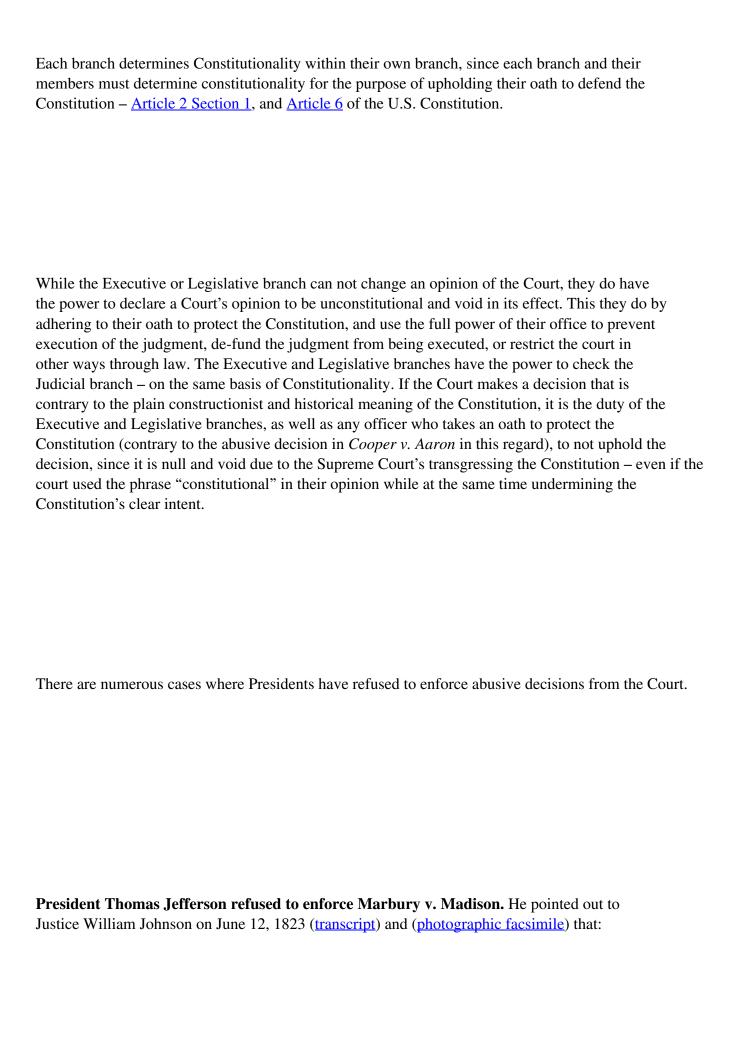
"We have seen that the original jurisdiction of the Supreme Court would be confined to two classes of causes, and those of a nature rarely to occur. In all other cases of federal cognizance, the original jurisdiction would appertain to the inferior tribunals; and the Supreme Court would have nothing more than an appellate jurisdiction, 'with such EXCEPTIONS and under such REGULATIONS as the Congress shall make."
Here Congress could limit the type of appellate cases that the Supreme Court could hear, leaving the case to be determined by State Supreme Courts. This actually was proposed, for this very issue, by Congress concerning the Defense of Marriage Act in 2004: • http://www.gpo.gov/fdsys/pkg/CHRG-108hhrg94458/html/CHRG-108hhrg94458.htm • (although the formatting is a little distracting, this link is well worth reading).
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Note: I would point out that much is made of Congress not being able to trespass on due process or equal protection in limiting the Supreme Court, although no branch is able to trespass on constitutional authority without being abusive, unlawful, and therefore the decision void. Here we must understand due process and equal protection in the historical constructionist sense, and resist the use of how the Supreme Court has manipulated these clauses of the U.S. Constitution into something wholly devoid of a constructionist and historical context. We must also remember that limiting or excluding the Federal Courts, including the appellate action of the Supreme Court, from hearing certain cases does not take the issue out of the jurisdiction of the judiciary, it only reassigns it to the State courts for determination within their state contexts.
• Congress can also specifically de-fund the decision from being executed.
In paper 78 of <i>The Federalist Papers</i> it is explained:

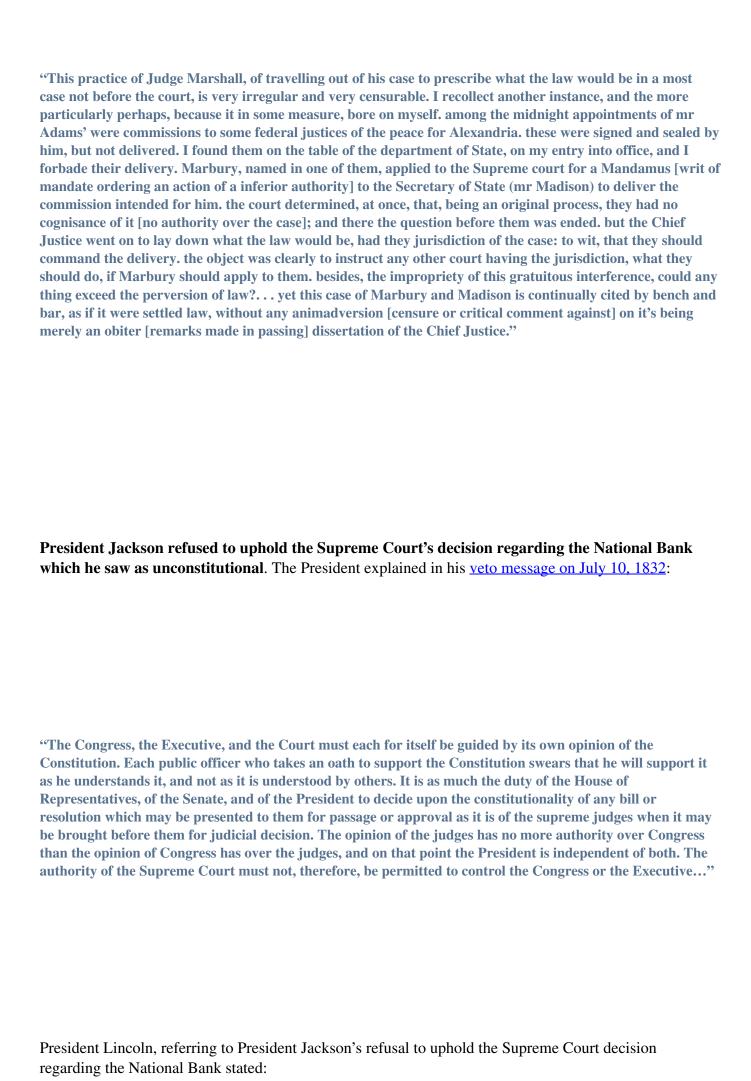
"... the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

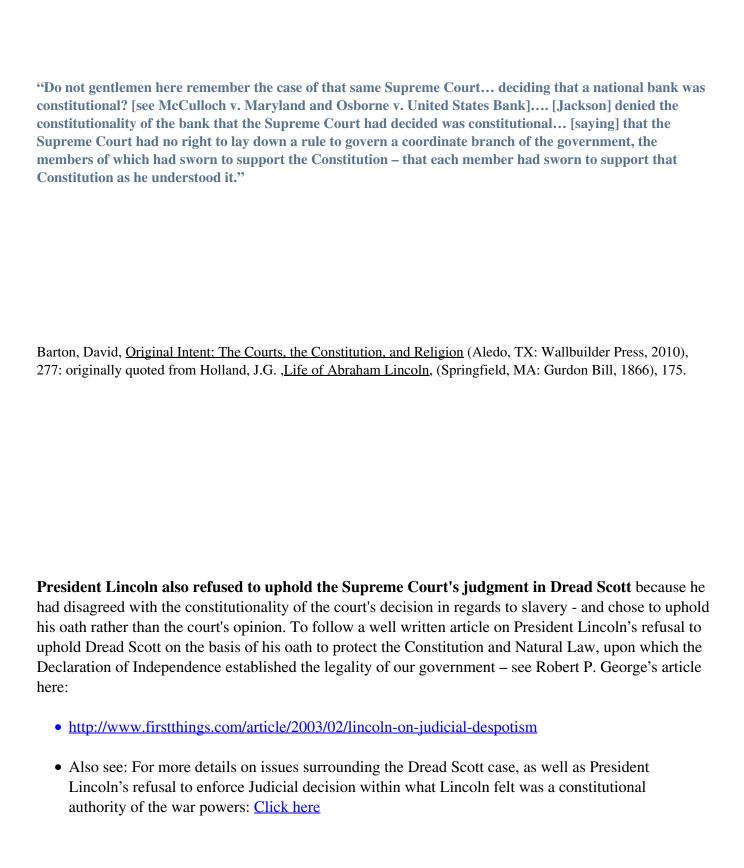
- Congress, or the States through a constitutional convention, can propose a constitutional amendment to the states for ratification (this was one of the reasons why the defense of marriage amendments through the states were so important; to not only protect marriage under DOMA, but to gain support within the states toward the 3/4 needed to ratify such an amendment, and the 2/3 needed for a state constitutional convention). This authority comes from Article 5 of the U.S. Constitution.
- The President (the next one of course), can specifically acknowledge the decision as unconstitutional and refuse to enforce it acknowledging the Supreme Court decision as abusive and therefore not binding either legally, or on the Executive branch.

Justice Joseph Story was a Supreme Court justice appointed by our fourth President, James Madison. He helped revive Harvard School of Law as the first Dane Professor of Law. Justice Story wrote the constructionist *Commentaries on the Constitution* in 1833. He explained, in section 1570 footnote 2 of that work, that it is the Constitution, not judicial authority, that allows the judiciary to declare a law void – and if they have abused that authority, their decision is as void as when Congress abuses their authority and passes laws that transgress the plain meaning of the Constitution:

"Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination, that the doctrine would imply a superiority of the judiciary to the legislative power.... It can be of no weight to say, that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature.... Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument [the Constitution]."







<u>Supreme Court Justices, Illustrated Biographies 1789 - 2012</u>, edited by Clare Cushman, Third Edition (Thousand Oakes, CA: CQ Press, 2013), 105; section on Justice Roger Taney.

We must always remember that the Court only passes judgment in terms of opinion on law - and that is why they are the weakest of the branches in legal terms. Practically though, the Supreme Court has become strong because Congress, the President, and the States have not used their powers to check the Court.

The first course of action that individuals might consider regarding the abusive marriage decision would be:

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http://www.bcsig.org/news-reader/items/consider-asking-for-a-federal-marriage-amendment.html); and

• to push for the First Amendment Defense Act in congress - which in practical terms will take precedence over the effect of the court's decision in regards to people (including businesses) being persecuted because of their religious convictions on this issue (if you would like to contact your representatives concerning this legislation, one option is to visit FRC Action here: https://www.frcaction.org/contact-officials).

I have read quite a few opinions from appellate courts and the Supreme Court, and while you may see the dissenting justices disagree with the legal approach of the majority, it is fairly rare for them to make a united outline of the reckless lack of any judicial history or legal precedent for the majority decision. In this decision regarding marriage, all four of the dissenting justices, not lightly, but with clarity and powerfully, asserted the abuse of the majority - each stating specifically that the decision had nothing whatsoever to do with constitutionality, or for that matter, any legal precedent or judicial precedent (and in fact they pointed out a number of cases in the court's precedence that not only refuted the majorities decision, but clearly pointed out the majority's lack of legal precedence in preference for their clear declarations [as if they were declaring law]).

We are to submit to a higher law - the Law of Nature and Nature's God – above every law. The Law of Nature and Nature's God is: law that has grown up in the western world that was directly shaped by the general revelation and special revelation of God - which is the same as saying the word of God contained in the New and Old testaments of the Bible. American Jurisprudence was founded on the basis of the Natural law of God – in other words, our Founding Fathers in the Declaration of Independence appealed to the legitimacy of the founding of our Country, as well as the authority of its officials, as being directly derived from the Law of Nature and Nature's God. Samuel Adams affirmed that the authority specified in the Declaration of Independence is the legal authority on which the U.S. Constitution rests when he stated:

Barton, David, <u>Original Intent: The Courts, the Constitution, and Religion</u> (Aledo, TX: Wallbuilder Press, 2010), 253: originally quoted from Adams, Samuel, <u>The Writings of Samuel Adams</u>, edited by Cushing, Harry Alonzo (New York: G.P. Putnam's Sons, 1908), Vol IV, 357, to the Legislature of Massachusetts, January 17 1794.

As a sample of the historical and legitimate meaning of the Law of Nature, see directly below. These are author's which our Founding Father's relied upon, as well as an example from one of the Founding Father's exposition of the Law of Nature's practical effects on human law (there are many other examples that could be quoted):

• "Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being.... consequently, as man depends absolutely upon his maker for everything, it is necessary that he should in all points conform to his maker's will. This will of his Maker Is called the law of nature.... This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.... The doctrines thus delivered we call the revealed or divine law and they are to be found only in the holy Scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature.... Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these"

Blackstone, William, Commentaries On The Laws Of England. (Oxford: Clarendon Press, 1778), Vol I, 38, 41, 42

• "What God has shown to be His will that is law"

Barton, David, <u>Original Intent: The Courts, the Constitution, and Religion</u> (Aledo, TX: Wallbuilder Press, 2010), 229: originally quoted from **Grotius, Hugo**, <u>Commentary on the Law of Prize and Booty</u>, translated from the original manuscript of 1604 by Gwladys L. Williams (Oxford: Clarendon Press, 1950), Vol. 1, 8

• "It may seem impossible or any state so long to subsist unless it were upheld by a constant particular care and by the power of a divine hand."

Barton, David, <u>Original Intent: The Courts, the Constitution, and Religion</u> (Aledo, TX: Wallbuilder Press, 2010), 229: originally quoted from **Grotius, Hugo**, <u>The Truth of Christian Religion</u> (London: Richard Royston, 1780), 20

• "Not to obey God, and not to obey the Civil Magistrate if taken asunder, are both notoriously sins; and yet... when the Magistrate commands anything contrary to the Divine Law, in this case disobedience to our earthly governors ceases to be evil because that law which binds us to conform to the will of human sovereigns is always understood with this provision and condition that they enjoin nothing repugnant to [in violation of] the laws of God."

Barton, David, <u>Original Intent: The Courts, the Constitution, and Religion</u> (Aledo, TX: Wallbuilder Press, 2010), 229: originally quoted from **Puffendorf, Samuel**, <u>Of the Law of Nature and Nations, Eight Books</u>, edited by Basil Kennet (London: R. Sare, 1717), Book 1, 68.

• "All [laws], however, may be arranged in two different classes. 1. Divine. 2. Human laws.... But it should always be remembered that this law, natural or revealed, made for men or for nations, flows from the same Divine source: it is the law of God.... Nature, or, to speak more properly, the Author of nature, has done much for us;... What we do, indeed, must be founded upon what he has done; and the deficiencies of our laws must be supplied by the perfections of his. Human law must rest its authority, ultimately, upon the authority of that law, which is Divine."

James Wilson - Signer of the Declaration of Independence, of the U.S. Constitution, and the first appointed justice to the Supreme Court. Wilson, James, "Of the General Principles of Law and Obligation," in <u>The Works of the Honourable James Wilson</u>, edited by Wilson, Bird. (Philadelphia: Lorenzo Press, 1804), Vol. I, 103, 104-105.

Just as Daniel and his friends, recorded in the Biblical book of Daniel, defied the king in order to adhere to a higher law, because they understood that the right to govern only went as far as God had defined it, so too it is now our turn to join in civil disobedience and suffer the consequences, and to do whatever we can to work to right the wrong the court has wrongly placed us under. It is to acknowledge with God, through Paul, in Colossians 1:15-16 that all things were created by and for Jesus Christ, whether powers or rulers or thrones or authorities, and when authorities in government step outside of that realm, they abuse their authority and position. Instead, we must adhere to the Supreme lawgiver and his higher law, as specified in the Bible.

Many Christians, and Christian organizations, recognize that this decision is a direct strike at religious liberty, as well as the freedom of speech. Unlike Roe v. Wade, they recognize that this decision will extend the silencing of Christians, and others, way beyond what was already happening in the States through sexual orientation, and gender identity and expression laws. They have already agreed that they would not recognize this opinion and would take the issue to court on First Amendment grounds, appealing to the majority's words in the *Hodges* opinion [this opinion] that somehow religious freedom and freedom of speech would be preserved before the court, and where that fails to choose the punishment over violating their conscience.

• See article: Christian Leaders Vow Civil Disobedience If Supreme Court Legalises Same Sex

Marriage

But, you must remember this - the media uses its money and influence to project a certain aspect that they portray as reality.

But, marriage, according to the traditional definition, on the whole has always been supported at the polls among people when it has been put to the vote, and people when asked in polling have supported the traditional definition of marriage.

As an example, Family Research Council has recently undertaken a new poll here (Feb. 2015): http://downloads.frc.org/EF/EF15B71.pdf. But, if the media, and others, can make you feel that you are the odd man out, and that it is all over with in regards to the legal definition of marriage (and its legal consequences across the board), then they can bring the opposition to this court decision to not act, because they have made them feel they are the only ones out there that recognize the moral reality that marriage is between one man and one woman alone - upon which we appeal to a higher power, to a Supreme Law Giver, and not to ourselves.

Here we must recognize that when the court supposedly redefined marriage, it affected a whole slew of legal issues and law (such as laws on marriage, insurance, adoption, divorce, discrimination, governmental interest in regards to the people bringing forward referendums, state rights, religious liberty, etc.), that were instantly changed - if this decision is allowed to stand.

Making their voice heard clearly and constantly is the exact way that America moved in the direction of the liberation movement for the past 40 years, and in the past 25 directly into the hands of the homosexual movement. They convinced Christians and others that you can not legislate morality (while they insisted on legislating a new "morality" which brings in its wake destructive realities that affect peoples' real everyday lives in an oppressive way), and that Christians and other's who would agree with what the Bible defines in terms of morality should not be involved in government - all the while taking our seats at the table to define what will be seen as good and right in society at law.

While we protect rights that God has defined as a part of Natural law for every human being, and not redefinitions of what God has defined and acknowledged as sinful and hurtful to human beings, we both grieve and work to restore the freedom that has been taken from those who find their rights to religious expression and free speech silenced. For instance, see the following where religious expression and free speech has been consistently challenged before the *Hodges* decision was even decided (see Section III and IV particularly): http://downloads.frc.org/EF/EF14G83.pdf

In the end it is determined by this one thing: who will fight harder (both in prayer and in action).

I hope this helps in seeing the importance of doing what we can to make sure our voice is heard clearly,

and that those who hear it understand that this is not an issue we will, or can, capitulate on - it is only then that action will be taken toward a Federal Marriage Amendment (or other legal protections), and that it will embolden those who have the influence and are in the correct position to act.