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THE EROSION OF THE RULE OF LAW WHEN A STATE ATTORNEY GENERAL REFUSES TO DEFEND THE CONSTITUTIONALITY OF CONTROVERSIAL LAWS

Rena M. Lindevaldsen*

INTRODUCTION

On June 26, 2015, the Supreme Court of the United States in *Obergefell v. Hodges*,¹ declared that it was unconstitutional for states to continue to define marriage as the union of one man and one woman.² Although there is much to be written on concerning the decision in *Obergefell*, including the strength of the legal analysis and the sharp division among the bench on the issues presented, this article will focus on one aspect of the marriage litigation that ultimately culminated in the *Obergefell* decision declaring a right to same-sex marriage—namely, the refusal of several state attorneys general to defend the marriage laws and amendments in their states. Although the Supreme Court has issued its decision on the marriage question, the broader questions of whether an attorney general can refuse to defend the constitutionality of a law and whether the people have recourse under those circumstances present ongoing issues that strike at the core of a government system based on separation of powers and the rule of law.

In the past few years, more than one-third of the state attorneys general faced the question of whether to defend the state marriage laws.³ In February 2014, United States Attorney General Eric Holder added fuel to the ongoing controversy by encouraging state attorneys general to refuse to defend any laws they *believed* were unconstitutionally discriminatory.⁴ In response, the state attorneys general took different approaches to their duty to defend.⁵

The Kentucky, Florida, Pennsylvania, Wisconsin, and Virginia attorneys general exemplify the various responses to federal litigation challenging state marriage laws.

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

2. *Id.* at 2608.

3. See, e.g., Edith Honan, *State Attorneys General Forced into Spotlight on Marriage Debate*, REUTERS (June 2, 2014), <http://www.reuters.com/article/2014/06/02/us-usa-gaymarriage-attorneysgeneral-idUSKBN0ED22D20140602> (discussing 12 cases filed in recent months); Austin Nimocks, *History and Recent Developments in Same-Sex Marriage Litigation*, FEDERALIST SOC'Y (May 28, 2014), <http://www.fed-soc.org/publications/detail/history-and-recent-development-in-same-sex-marriage-litigation> (discussing and listing the various pending cases).

4. See Matt Apuzzo, *Holder Sees Way to Curb Bans on Gay Marriage*, N.Y. TIMES (Feb. 24, 2014), <http://www.nytimes.com/2014/02/25/us/holder-says-state-attorneys-general-dont-have-to-defend-gay-marriage-bans.html>.

5. See *id.*

The Kentucky attorney general defended the marriage amendment at the trial court but then refused to file an appeal after the marriage laws were declared unconstitutional.⁶ In a public statement, he said that part of his decision rested on how he would be remembered in history: “I have a strong sense of where I think this issue is headed.”⁷ After he refused to file an appeal, the governor then hired outside counsel to continue the defense.⁸ The Kentucky case was one of the four consolidated cases before the United States Court of Appeals for the Sixth Circuit that led to the *Obergefell* decision.⁹

The Florida attorney general said that regardless of her personal opinions (which went undeclared), she had a duty to defend the law.¹⁰ The defense offered by the attorney general’s office, however, was wanting. The attorney for the state argued for approximately five minutes, which represented only a small portion of the allotted time.¹¹ During the argument, the attorney general’s office argued only that *Baker v. Nelson* controlled and, therefore, that the court should not even reach the merits of the case.¹² The Florida attorney general’s office did not offer any oral

6. See Laura Clawson, *Kentucky Attorney General Says He Won’t Appeal Marriage Ruling, Governor Says Not So Fast*, DAILY KOS (Mar. 4, 2014), <http://www.dailykos.com/story/2014/03/04/1282019/-Kentucky-governor-appealing-marriage-ruling-after-attorney-general-refuses-to-nbsp-appeal>.

7. Honan, *supra* note 3.

8. The governor ultimately hired a private law firm, with no prior marriage litigation experience, to handle the appeal. See Brett Snider, *Private Firm to Be Paid \$100K to Defend Ky. Gay Marriage Ban*, FINDLAW (Mar. 18, 2014), http://blogs.findlaw.com/sixth_circuit/2014/03/private-firm-to-be-paid-100k-to-defend-ky-gay-marriage-ban.html.

9. The Sixth Circuit decision specifically mentioned the different paths each marriage case took to reach a decision:

Since 2003, nineteen States and the District of Columbia have expanded the definition of marriage to include gay couples, some through state legislation, some through initiatives of the people, some through state court decisions, and some through the actions of state governors and attorneys general who opted not to appeal adverse court decisions.

DeBoer v. Snyder, 772 F.3d 388, 396 (6th Cir. 2014), *rev’d sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

10. See Matt Galka, *Florida’s Attorney General Upsets Advocates of Same-Sex Marriage*, NEWS4JAX (June 5, 2014), <http://www.news4jax.com/news/floridas-attorney-general-upsets-advocates-of-samesex-marriage/26350666>.

11. See Timothy Kincaid, *Florida Marriage Ban Ruled Unconstitutional*, BOX TURTLE BULL. (July 17, 2014), <http://www.boxturtlebulletin.com/tag/florida>.

12. See *Huntsman v. Heavilin*, No. 2014-CA-0305-K, slip op. at 4 (Fla. Cir. Ct. July 7, 2014), available at <http://static.lgbtqnation.com/assets/2014/07/Huntsman-Florida-marriage-decision.pdf> (Florida attorney general arguing *Baker v. Nelson* controlled thus warranting dismissal). *Baker v. Nelson* is a 1972 order from the Supreme Court of the United States that dismissed for want of a substantial federal question a due process and equal protection challenge to Minnesota’s marriage laws. *Baker v. Nelson*, 409 U.S. 810 (1972). Such a dismissal had a binding effect. Although this author agrees that *Baker* should control, most federal courts in the year or two before the oral arguments in the Florida marriage case had rejected the argument. See, e.g., *Kitchen v. Herbert*, 755 F.3d 1193, 1208 (10th Cir. 2014) (“[W]e think it is clear that doctrinal developments foreclose the conclusion that the issue is, as *Baker* determined, wholly insubstantial.”), *cert. denied*, 135 S. Ct. 265 (2014); *Windsor v. United States*, 699 F.3d 169, 179 (2d Cir. 2012) (“These doctrinal changes constitute another reason why *Baker* does not foreclose our disposition of this case.”), *aff’d*, 133 S. Ct. 2675 (2013); *Wolf v. Walker*, 986 F. Supp. 2d 982, 988–92 (W.D. Wis. 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 418–21 (M.D. Pa. 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1133 n. 1 (D. Or. 2014); *Latta v. Otter*, 19 F. Supp. 3d 1054, 1066–67 (D. Idaho 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 774 n. 6 (E.D. Mich. 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 648–49 (W.D. Tex. 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 470 (E.D. Va. 2014); *McGee v. Cole*, 993 F. Supp. 2d 639, 651–52 (S.D. W. Va. 2014); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1277 (N.D. Okla. 2014). *But see DeBoer*, 772 F.3d at 401–02:

argument that substantively defended the marriage amendment that had been passed with 61.9% of the voters in Florida in 2008.¹³

The Pennsylvania litigation presents another approach. From the outset, Attorney General Kathleen Kane refused to defend the law.¹⁴ She stated that, “I cannot ethically defend the constitutionality of Pennsylvania’s version of DOMA where I believe it to be wholly unconstitutional [I]t is a lawyer’s ethical obligation under Pennsylvania’s Rules of Professional Conduct to withdraw from a case in which the lawyer has a fundamental disagreement with the client”¹⁵ As a result, in the trial court, the governor’s office represented the state’s interests.¹⁶

After the trial court declared the marriage amendment to be unconstitutional, the governor abandoned the defense and refused to file an appeal.¹⁷ In an effort to maintain an appeal from the decision, a clerk who is responsible for issuing marriage licenses attempted to intervene.¹⁸ The court denied the motion to intervene, explaining that “[i]f the highest elected official in the commonwealth chooses to abide by our decision, it defies credulity that we would permit a single citizen to stand in for him to perfect an appeal”¹⁹ The judge further explained his belief that “[a]t bottom, we have before us a contrived legal argument by a private citizen

In the end, neither of the two preconditions for ignoring Supreme Court precedent applies here. *Windsor* as shown does not mention *Baker*, and it clarifies that its ‘opinion and holding’ do not govern the States’ authority to define marriage. *Hollingsworth* was dismissed. And neither *Lawrence* nor *Romer* mentions *Baker*, and neither is inconsistent with its outcome.

Id.

Federal circuit court decisions after the oral arguments in the Florida case continued to conclude that *Baker* was not controlling. See *Latta v. Otter*, 771 F.3d 456, 466 (9th Cir. 2014) (“However, ‘subsequent decisions of the Supreme Court’ not only ‘suggest’ but make clear that the claims before us present substantial federal questions.”), *cert. denied*, 135 S. Ct. 2931 (2015); *Bishop v. Smith*, 760 F.3d 1070, 1079 (10th Cir. 2014) (“[T]he Supreme Court’s summary dismissal in *Baker v. Nelson* . . . is not controlling”), *cert. denied*, 135 S. Ct. 271 (2014); *Bostic v. Schaefer*, 760 F.3d 352, 375 (4th Cir. 2014) (“In light of the Supreme Court’s apparent abandonment of *Baker* and the significant doctrinal developments that occurred after the Court issued its summary dismissal in that case, we decline to view *Baker* as binding precedent”), *cert. denied sub nom.* *Rainey v. Bostic*, 135 S. Ct. 286 (2014).

Thus, the attorney general’s office should have offered argument that addressed the substantive merits as well as a procedural defect that arguably precluded the court from properly deciding the case on a motion for summary judgment. Cf. Transcript of Proceedings of Oral Argument at 29–57, *Huntsman v. Heavilin*, No. 2014-CA-0305-K, slip op. at 4 (Fla. Cir. Ct. July 7, 2014) (arguments offered by amicus curiae in support of the State of Florida). In contrast to the six transcript pages of oral argument by the Attorney General’s office, amicus Liberty Counsel advanced procedural and substantive defenses of the marriage laws representing twenty-eight pages of transcript. *Id.*

13. See Official Results, *Florida Marriage Protection Amendment*, FLA. DEP’T STATE DIV. ELECTIONS (2008), <http://results.elections.myflorida.com/?ELECTIONDATE=11/4/2008&RACE=A02&PARTY=&DIST=&GRP=&DATAMODE=>

14. See Press Release, Attorney General Kane Will Not Defend DOMA, Pennsylvania Office of Attorney General (July 11, 2013), available at https://www.attorneygeneral.gov/Media_and_Resources/Press_Releases/Press_Release/?pid=913#.

15. *Id.*

16. See Sophia Pearson, *Pennsylvania County Official Can’t Appeal on Gay-Marriage*, BLOOMBERG (June 18, 2014), <http://www.bloomberg.com/news/2014-06-18/pennsylvania-county-official-can-t-appeal-on-gay-marriage.html>.

17. See *id.*

18. *Id.*

19. *Id.*

who seeks to accomplish what the chief executive of the commonwealth, in his wisdom, has declined to do.”²⁰ One reporter aptly summarized the ultimate effect of the governor’s refusal to file an appeal: “Governor Tom Corbett effectively legalized gay marriage by declining to appeal a state court ruling that a ban was unconstitutional.”²¹

The Wisconsin attorney general represents the straightforward undertaking to defend the marriage amendment. “This constitutional amendment was approved by a large majority of Wisconsin residents. I believe the amendment is constitutional, and I will vigorously defend it”²² Finally, and in direct contrast to the approach of the Wisconsin attorney general, the Virginia attorney general not only refused to defend the marriage amendment that was passed by fifty-seven percent of the voters in 2006, but he actively litigated against the law.²³

The response by those who support same-sex marriage to these attorney general decisions has been mixed.²⁴ A representative of Equality Florida faulted the Florida attorney general for following the law rather than the personal interests at stake.²⁵ On the other hand, Suzanne Goldberg of Columbia University’s Center for Gender and Sexuality Law, a long-time advocate of same-sex marriage, said the usual approach of attorneys general is to defend the law—it is in their “job description.”²⁶

For those who support the marriage amendments, they have characterized some of these situations as “collusive.”²⁷ The main point of contention is that when the state refuses to defend, defends half-heartedly, or joins with plaintiffs in arguing against the constitutionality of a duly enacted law, then there is no meaningful litigation of the issue or defense of the interests of the electorate.

Putting aside the controversial context from which the current duty to defend question arises—whether same-sex couples have a constitutional right to marriage—the straightforward question presented is whether a state attorney general has a duty to defend duly enacted state laws or state constitutional amendments when the attorney general *personally believes* the law is unconstitutional. How the question is answered implicates several foundational principles:

- (1) separation of powers (and the proper balance of powers between the branches);

20. *Id.*

21. Honan, *supra* note 3.

22. Patrick Marley, *ACLU Lawsuit Challenges Wisconsin Same-Sex Marriage Ban*, MILWAUKEE WIS. J. SENTINEL (Feb. 3, 2014), <http://www.jsonline.com/news/statepolitics/aclu-lawsuit-challenges-wisconsin-same-sex-marriage-ban-b99197217z1-243352101.html>.

23. See Tal Kopan, *Herring Explains Gay Marriage Shift*, POLITICO (Jan. 23, 2014), <http://www.politico.com/story/2014/01/virginia-gay-marriage-mark-herring-102508#ixzz3ncerxtB1>.

24. See Galka, *supra* note 10 (arguing attorneys general should consider the personal interests of those in same-sex relationships before defending a law based on politics, rather than people). *But see* Honan, *supra* note 3 (arguing regardless of their personal feelings, it is an attorney general’s job to defend duly enacted laws and to allow the courts to decide what is constitutional).

25. See Galka, *supra* note 10.

26. Honan, *supra* note 3.

27. Jeff Mapes, *Gay Marriage: U.S. Supreme Court Should Stay Out of Oregon Case, Attorney General Says*, OREGONLIVE, (June 2, 2014), http://www.oregonlive.com/mapes/index.ssf/2014/06/gay_marriage_us_supreme_court.html.

- (2) the rule of law (including the need for consistency and predictability);
- (3) the fact that public officials are servants of the people and not the masters of the laws (they are subject to the law, not above the law); and
- (4) protecting the integrity of our legal system (with unique issues arising when an attorney general joins the plaintiffs in challenging the constitutionality of state laws).

Although prosecutors have long held the discretion to refuse to enforce a law (subject to constitutional limitations), the refusal to defend a law (in response to a lawsuit)²⁸ implicates greater concerns than the refusal to enforce a law for at least two reasons. First, if an executive refuses to enforce a law, a subsequent administration can change course and decide to enforce it. When, however, an executive refuses to defend the law in ongoing litigation (and possibly actively litigating against the constitutionality of the law), any decision of unconstitutionality is binding on subsequent administrations and the electorate.²⁹ In other words, under those circumstances, there is no law for a subsequent executive to decide whether to enforce.

Second, the refusal to defend a law in ongoing litigation raises separation of power concerns. If an attorney general refuses to defend the law, depending on state and federal standing jurisprudence, there may be no one able to represent the will of the electorate in the litigation.³⁰ Under those circumstances, the attorney general essentially exercises a veto or suspension power over duly enacted laws. Additionally, when the chief law enforcement official, whose duty it is to defend the laws, refuses to defend a law or decides to join sides with the opposing party, the attorney general undermines public confidence in our legal system.

In this article, I focus on the duty of state attorneys general to defend laws with which they personally disagree. Part I of this article discusses two United States Supreme Court cases that laid the groundwork for the increased number of state attorneys general refusing to defend state laws. It also explores the various ways in which state attorneys general have handled litigation over the right to same-sex marriage when those attorneys general disagreed with the existing laws. Part II of this article discusses the legal duty of state attorneys general to defend the law and then explores the longstanding historical exceptions to that duty. Part III highlights the legal and political difficulties presented when a state attorney general refuses to defend the law based on personal beliefs of unconstitutionality. Finally, Part IV presents a viable approach to those situations where a state attorney general believes the law is unconstitutional, balancing the right of the people to have their laws defended in court with the attorney general's strong personal beliefs that prevent him from carrying out his duties.

28. See, e.g., Curt A. Levey & Kenneth A. Klukowski, *Take Care Now: Stare Decisis and the President's Duty to Defend Acts of Congress*, 37 HARV. J.L. & PUB. POL'Y 377, 380–91 (2014).

29. In a recent article, authors Curt Levey and Ken Klukowski explained that if the executive branch fails to defend a statute, resulting in it being struck down, that precedent could tie the hands of a future executive. *See id.*

30. *See id.* at 420.

I. RECENT PRECEDENT ON THE DUTY TO DEFEND

A. *United States v. Windsor*: The President and Attorney General Refused to Defend the Federal Defense of Marriage Act³¹

In *Windsor*, two women, who were New York residents, married in Canada in 2007.³² When Ms. Spyer died, Ms. Windsor sought to claim the federal estate tax exemption that is available for surviving spouses.³³ After Windsor paid the \$363,053 estate tax, she sought a refund.³⁴ The Internal Revenue Service denied the exemption because section 3 of the Federal Defense of Marriage Act (DOMA) defined marriage, for purposes of all federal statutes, regulations, and rulings, as the union of one man and one woman.³⁵

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.³⁶

Thus, Windsor was not a surviving spouse.

Windsor filed suit in the United States District Court for the Southern District of New York in November 2010, claiming that DOMA violated the guarantee of equal protection.³⁷ On February 23, 2011, while the tax refund suit was pending in the district court, United States Attorney General Eric Holder notified the speaker of the House of Representatives that “the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.”³⁸

In that letter, Attorney General Holder admitted that “[t]he Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation.”³⁹ The letter stated, however, that the Supreme Court has “rendered a number of decisions that set forth the criteria that should inform this and any other judgment as to whether heightened scrutiny applies”⁴⁰ The letter set forth an independent analysis of each of those factors and reached a decision that neither the Supreme Court nor any federal circuit court had reached at the time—that sexual

31. See *United States v. Windsor*, 133 S. Ct. 2675, 2687 (2013).

32. See *id.* at 2682.

33. See *id.*

34. See *id.* at 2683.

35. See *id.*

36. Defense of Marriage Act § 3, 1 U.S.C. § 7 (1996).

37. See *Windsor*, 133 S. Ct. at 2683.

38. Letter from Att’y Gen. Eric H. Holder, Jr., to John A. Boehner, Speaker, U.S. House of Representatives, (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

39. *Id.*

40. *Id.*

orientation should be considered a suspect classification.⁴¹ Applying heightened scrutiny, the letter concluded that DOMA is unconstitutional.⁴²

The attorney general notified the speaker that, pursuant to 28 U.S.C. § 530D, the Department of Justice (DOJ) would no longer defend DOMA.⁴³ That statute provides that the attorney general:

shall submit to the Congress a report of any instance in which the Attorney General . . . determines . . . to refrain (on the grounds that the provision is unconstitutional) from defending or asserting, in any judicial, administrative or other proceeding, the constitutionality of any provision of any Federal statute . . . or not to appeal or request review of any judicial, administrative or other determination adversely affecting the constitutionality of any such provision . . .

⁴⁴

In *Windsor*, the Supreme Court mentioned that the § 530D letter in that case was unique because it had been issued *before* any adverse judgment against the law.⁴⁵ In the past, the DOJ had submitted § 530D letters after a court had already ruled against the government.⁴⁶

This case is unusual, however, because the § 530D letter was not preceded by an adverse judgment. The letter instead reflected the Executive's own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.⁴⁷

Section 530D also mentions that the attorney general must submit the report "within such time as will reasonably enable the House of Representatives and the Senate to take action, separately or jointly, to intervene in timely fashion in the proceeding, but in no event later than 30 days after the making of each determination"⁴⁸ Pursuant to House Rule II.8, the House Bipartisan Legal Advisory Group (BLAG) voted three to two to intervene in the litigation to defend DOMA.⁴⁹ The district court granted the BLAG's motion to intervene in the case.⁵⁰

41. *See id.*

42. *See id.*

43. *See* Letter from Att'y Gen. Eric H. Holder, Jr., to John A. Boehner, Speaker, U.S. House of Representatives, (Feb. 23, 2011).

44. 28 U.S.C. § 530D(a)(1)(B) (2002).

45. *United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013).

46. *See id.* at 2683.

47. *See id.* at 2683–84.

48. 28 U.S.C. § 530D(b)(2).

49. *See* Molly K. Hooper, *House Leaders Vote to Intervene in DOMA Defense*, HILL (Mar. 9, 2011), <http://thehill.com/blogs/blog-briefing-room/news/148521-house-leaders-vote-to-intervene-in-doma-defense>.

50. *See Windsor*, 133 S. Ct. at 2684.

Despite the fact that DOMA had been enacted in 1996 with wide, bi-partisan support, and signed into law by President Clinton,⁵¹ there was significant public criticism of the BLAG's decision to use funds to defend the law.⁵² If the BLAG had not voted to defend the law, however, the litigation would have continued in the trial court with no real defense.⁵³

The United States District Court for the Southern District of New York granted summary judgment for the plaintiff.⁵⁴ Both the DOJ and the BLAG filed notices of appeal.⁵⁵ The United States Court of Appeals for the Second Circuit affirmed.⁵⁶ The Supreme Court of the United States granted certiorari review and instructed the parties to address two additional questions: (1) "whether the United States' agreement with Windsor's legal position precludes further review" and (2) "whether BLAG has standing to appeal the case."⁵⁷ Because all parties agreed that the Court had jurisdiction to hear the appeal under those circumstances, the Court appointed another attorney, as amicus curiae, to argue the position that the Court lacked jurisdiction.⁵⁸

The Supreme Court concluded that the United States retained a sufficient stake in the litigation to satisfy Article III jurisdiction.⁵⁹ Specifically, even though the executive agreed with Windsor's legal argument, the United States had continued to refuse to refund the estate taxes sought by Windsor.⁶⁰ Thus, Windsor had been denied the tax relief she sought.⁶¹ In addition to the Article III requirements, the Court explained that "prudential considerations demand that the Court insist upon "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."⁶² That requirement can be satisfied even where the named parties do not themselves present the adverseness.⁶³ According to the Court in *Windsor*, the presence of the BLAG and

51. *H.R. 3396 (104th): Defense of Marriage Act*, GOVTRACK, <https://www.govtrack.us/congress/votes/104-1996/h316> (passed by seventy-nine percent of the House) (last visited Oct. 17, 2015); *H.R. 3396 (104th): Defense of Marriage Act*, GOVTRACK, <https://www.govtrack.us/congress/votes/104-1996/s280> (passed by eighty-nine percent of the Senate) (last visited Oct. 17, 2015).

52. See Andrew Rosenthal, *G.O.P. Wastes Taxpayer Dollars*, N.Y. TIMES: THE OPINION PAGES (Jan. 15, 2003), <http://takingnote.blogs.nytimes.com/2013/01/15/g-o-p-wastes-taxpayer-dollars/> ("[T]hey seem to relish spending taxpayer dollars on the plainly unconstitutional Defense of Marriage Act."); Press Release, Nancy Pelosi, Pelosi Statement on Speaker Boehner's Waste of \$1.5 Million in Taxpayer Dollars Defending DOMA (Oct. 16, 2012), available at <http://www.democraticleader.gov/newsroom/pelosi-statement-speaker-boehners-waste-1-5-million-taxpayer-dollars-defending-doma/>.

53. See discussion *infra* Part III (finding the constitutionality of a duly enacted law should not be decided on a default when the only basis for refusing to defend is an official's personal belief that the law is unconstitutional).

54. *Windsor v. United States*, 833 F. Supp. 2d 394, 396 (S.D.N.Y. 2012).

55. *Windsor*, 133 S. Ct. at 2684.

56. *Windsor v. United States*, 699 F.3d 169, 188 (2d Cir. 2012).

57. *Windsor*, 133 S. Ct. at 2684.

58. *Id.*

59. *Id.* at 2686.

60. *Id.* Although not an issue in *Windsor*, if the United States had granted her refund, contrary to the law, arguably no one would have had standing to litigate the constitutionality of DOMA. In addition, the executive branch would have unilaterally effected a change in the law through an unconstitutional suspension of the law. See discussion *infra* Part II.A.1.

61. *Windsor*, 133 S. Ct. at 2686.

62. *Id.* at 2680, 2687 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

63. See *id.* at 2687.

other amicus curiae prepared to defend the constitutionality of DOMA was sufficient to satisfy the prudential concern with adverseness.⁶⁴

In concluding that it had Article III standing, the Court considered the fact that if it dismissed the case, other litigation would ensue across the country raising the exact issue.⁶⁵ In the meantime, the “[r]ights and privileges of hundreds of thousands of persons would be adversely affected, pending a case in which all prudential concerns about justiciability are absent.”⁶⁶ Thus, despite the DOJ’s refusal to defend the law, the Court found that the Article III requirements were satisfied and prudential concerns warranted a conclusion that the Court had jurisdiction to hear the case.⁶⁷

The Court did express concern, however, over the “Executive’s failure to defend an Act of Congress based on a constitutional theory not yet established in judicial decisions[.]”⁶⁸

[I]f the Executive’s agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court’s primary role in determining the constitutionality of a law . . . would become only secondary to the President’s. This would undermine the clear dictate of the separation-of-powers principle that “when an Act of Congress is alleged to conflict with the Constitution, ‘[i]t is emphatically the province and duty of the judicial department to say what the law is.’” Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress’ enactment solely on its own initiative and without any determination from the Court.⁶⁹

Although the Court acknowledged the “difficult choice” that an executive faces when he personally believes a statute is unconstitutional,⁷⁰ the Court explained that

there is no suggestion here that it is appropriate for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal. The integrity of the political process would be at risk if difficult

64. *See id.* at 2688.

65. *See id.*

66. *See Windsor*, 133 S. Ct. at 2688.

67. *See id.* As a result, the Court did not reach the question of whether the BLAG had standing to appeal the District Court’s decision. *Id.* at 2689.

68. *Id.* at 2688.

69. *Id.* (citations omitted) (quoting *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427–28 (2012)).

70. *Id.* at 2689.

constitutional issues were simply referred to the Court as a routine exercise.⁷¹

Justice Scalia, joined by the Chief Justice and Justice Thomas, took the position in a dissenting opinion that the Court should have dismissed the case for lack of Article III standing because the plaintiffs and the government “agree entirely on what should happen in this lawsuit.”⁷² He essentially characterized the majority opinion as a “jaw-dropping” power-grab—the “assertion of judicial supremacy over the people’s Representatives in Congress and the Executive.”⁷³ Justice Scalia explained that when the parties are not adverse, and agree on the appropriate outcome, the Court is stripped of the jurisdiction to hear the case.⁷⁴ “Article III requires not just a plaintiff (or appellant) who has standing to complain but *an opposing party* who denies the validity of the complaint.”⁷⁵ In *Windsor*, the government did not deny the validity of plaintiff’s claims.⁷⁶

Justice Scalia believes that the only recourse in a situation where the executive agrees with the plaintiff, and thus refuses to defend the constitutionality of the law, is political.⁷⁷

If majorities in both Houses of Congress care enough about the matter, they have available innumerable ways to compel executive action without a lawsuit—from refusing to confirm Presidential appointees to the elimination of funding. (Nothing says “enforce the Act” quite like “. . . or you will have money for little else.”) But the condition is crucial; Congress must care enough to act against the President itself, not merely enough to instruct its lawyers to ask *us* to do so. Placing the Constitution’s entirely anticipated political arm wrestling into permanent judicial receivership does not do the system a favor. And by the way, if the President loses the lawsuit but does not faithfully implement the Court’s decree, just as he did not faithfully implement Congress’s statute, what then? Only Congress can bring him to heel by . . . what do you think? Yes: a direct confrontation with the President.⁷⁸

71. *Windsor*, 133 S. Ct. at 2689.

72. *Id.* at 2698 (Scalia, J., dissenting).

73. *Id.*

74. *Id.* at 2699–2700 (“In the more than two centuries that this Court has existed as an institution, we have never suggested that we have the power to decide a question when every party agrees with both its nominal opponent *and the court below* on that question’s answer.”).

75. *Id.* at 2701.

76. *Windsor*, 133 S. Ct. at 2687.

77. *See id.*, at 2698, 2705 (Scalia, J., dissenting).

78. *Id.* at 2704–05. If each branch were fulfilling its obligation to jealously guard against encroachments by another branch, it would correct the situation raised when attorneys general refused to defend a law. James Madison explained in Federalist No. 51 that “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” In a broken system, however, where each branch

Relying on prior United States Supreme Court precedent, Justice Alito agreed that the BLAG has Article III standing to defend the constitutionality of a statute when the executive declines to defend the act.⁷⁹ In *INS v. Chadha*,⁸⁰ the Supreme Court explained that it had “long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.”⁸¹

B. *Hollingsworth v. Perry*: The California Attorney General Refused to Defend Proposition 8⁸²

In August 2004, six months after San Francisco had begun issuing marriage licenses to same-sex couples because the mayor and other municipal officials had concluded that the marriage laws were unconstitutional,⁸³ the Supreme Court of California held that “city officials had no authority to refuse to perform their ministerial duty in conformity with the current California marriage statutes on the basis of their view that the statutory limitation of marriage to a couple comprised of a man and a woman is unconstitutional.”⁸⁴ The Supreme Court of California specifically rejected the city’s argument that officials could refuse to enforce the law when they believed it was necessary to protect the rights of minorities.⁸⁵

In this case, the city has suggested that a contrary rule—one under which a public official charged with a ministerial duty would be free to make up his or her own mind whether a statute is constitutional and whether it must be obeyed—is necessary to protect the rights of minorities. But history demonstrates that members of minority groups, as well as individuals who are unpopular or powerless, have the most to lose when the rule of law is abandoned—even for what appears, to the person departing from the law, to be a just end. As observed at the outset of this opinion, granting every public official the authority to disregard a ministerial statutory duty on the basis of the official’s opinion that the statute is unconstitutional would be fundamentally inconsistent with our political system’s commitment to John Adams’ vision of a government where official action is

tolerates substantial encroachments and the citizenry do not realize the threat to liberty from such encroachment, the presumed recourse envisioned by our founders becomes a nullity.

79. *Id.* at 2714 (Alito, J., dissenting).

80. *INS v. Chadha*, 462 U.S. 919 (1983).

81. *Id.* at 940.

82. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660 (2013).

83. *See Lockyer v. City & Cnty. of S.F.*, 95 P.3d 459, 464–65 (Cal. 2004).

84. *Id.* at 488 (stating city officials in San Francisco issued marriage licenses to same-sex couples for nearly one month before the Supreme Court of California granted a stay).

85. *See id.* at 499.

determined not by the opinion of an individual officeholder—but by the rule of law.⁸⁶

In 2008, in subsequent litigation over the marriage laws, the Supreme Court of California held that defining marriage as the union of a man and a woman violated the equal protection clause of the California Constitution.⁸⁷ Later that year, California voters passed a ballot initiative (Proposition 8) that amended the California Constitution to provide that “[o]nly marriage between a man and a woman is valid or recognized in California.”⁸⁸ The text of the amendment was identical in wording to the law that had been struck down in 2008 by the Supreme Court of California.⁸⁹ A lawsuit was immediately filed challenging the constitutionality (under the California Constitution) of the marriage amendment.⁹⁰

In 2009, the Supreme Court of California rejected the argument that California voters lacked the authority to amend the constitution to define marriage as the union of one man and one woman.⁹¹ The litigation then headed to federal court, with plaintiffs challenging the amendment as an unconstitutional deprivation of equal protection and due process under the Fourteenth Amendment to the United States Constitution.⁹² Except for the attorney general, who took the position that Proposition 8 was unconstitutional, the remaining governmental defendants “refused to take a position on the merits of plaintiffs’ claims and declined to defend Proposition 8.”⁹³ As a result, the district court granted intervention to the official ballot proponents of Proposition 8 to defend the constitutionality of the law.⁹⁴ In its August 4, 2010 order, Judge Walker declared Proposition 8 unconstitutional under both clauses.⁹⁵ The California officials chose not to appeal the decision.⁹⁶

The proponents (defendant-intervenors) took an appeal to the United States Court of Appeals for the Ninth Circuit.⁹⁷ The Ninth Circuit certified a question to the Supreme Court of California to determine whether under California law the proponents of Proposition 8 (who had defended the amendment in the trial court) would have standing to pursue an appeal when the public officials charged with that duty had refused to do so.⁹⁸ The Supreme Court of California answered the question in the affirmative.⁹⁹

86. *Id.*

87. *See Hollingsworth*, 133 S. Ct. at 2659.

88. *See id.* (quoting CAL. CONST. art. 1, § 7.5).

89. *Strauss v. Horton*, 207 P.3d 48, 128–29 (Cal. 2009) (Moreno, J., concurring & dissenting).

90. *Id.* at 68.

91. *Id.* at 119.

92. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010).

93. *Id.* at 928.

94. *Id.*

95. *Id.* at 1003.

96. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660 (2013).

97. *Id.*

98. *See Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011).

99. *Hollingsworth*, 133 S. Ct. at 2660.

“In a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state’s interest in the initiative’s validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.”¹⁰⁰

Relying on that answer to the certified question, the Ninth Circuit concluded that petitioners had standing under federal law to defend Proposition 8.¹⁰¹ The Ninth Circuit reasoned that states have the prerogative to decide who may assert their interests.¹⁰² Thus, for purposes of standing, the federal court only needs to determine whether the state has suffered a harm sufficient to confer standing, and that the party seeking to invoke the court’s jurisdiction is authorized to represent the state’s interests.¹⁰³ On the merits, the Ninth Circuit concluded that Proposition 8 violated the Equal Protection Clause under the Fourteenth Amendment.¹⁰⁴

The Supreme Court of United States granted proponents’ petition for certiorari review and directed the parties to also brief the question of “[w]hether petitioners have standing under Article III, § 2, of the Constitution in this case.”¹⁰⁵ In a five to four decision, which was issued the same day as the *Windsor* opinion, the Supreme Court of United States held that the official proponents of Proposition 8 *lacked* Article III standing to appeal the judgment of the district court.¹⁰⁶

The Supreme Court rejected the argument that official proponents of a ballot measure have a particularized interest sufficient to create a controversy under Article III.¹⁰⁷ Once Proposition 8 was approved, the Court explained, it became a duly enacted amendment and the proponents were simply “concerned bystanders.”¹⁰⁸ Similarly, the Court rejected the idea that the federal courts should rely on state law to determine whether Article III standing is satisfied.¹⁰⁹ The Ninth Circuit decision was vacated with instructions to dismiss the appeal for lack of jurisdiction.¹¹⁰

100. *Id.* (quoting *Perry v. Brown*, 265 P.3d 1002, 1007 (Cal. 2011)).

101. *Id.*

102. *Perry*, 265 P.3d at 1014.

103. *See id.* at 1014–15.

104. *See Hollingsworth*, 133 S. Ct. at 2660.

105. *Id.* at 2661.

106. *See id.* at 2657, 2668; *United States v. Windsor*, 133 S. Ct. 2675 (2013).

107. *Hollingsworth*, 133 S. Ct. at 2663.

108. *Id.*

109. *Id.* at 2667.

110. *See id.* at 2668. In light of the Supreme Court’s instructions to vacate the Ninth Circuit decision, questions arose concerning the validity of the district court decision. To the extent the official ballot proponents did not have an interest sufficient enough to satisfy Article III standing for purposes of appeal, then on what basis did they have standing to litigate the case in the federal trial court? Although the state defendants filed answers in *Perry*, and thus arguably demonstrated participation in the litigation, the trial court explained that the attorney general took the position that the marriage amendment was unconstitutional while the remaining government defendants refused to take a position on the constitutionality of the law and refused to defend it. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010). Even if the answers that were filed and the subsequent refusal to participate in litigation were sufficient to satisfy Article III standing for the trial court litigation, once the Supreme Court vacated the Ninth Circuit decision, all that remained was a decision from the Northern District of California. Absent the immediate directive from Governor Brown for the clerks to issue marriage licenses to same-sex couples across the

Justice Kennedy, who authored the majority decision in *Windsor*, wrote a dissent in *Hollingsworth* that highlighted the irony of the majority's decision that the people who passed the amendment lacked standing to defend it, particularly when the state specifically grants the proponents the right to defend it.¹¹¹

A prime purpose of justiciability is to ensure vigorous advocacy, yet the Court insists upon litigation conducted by state officials whose preference is to lose the case. The doctrine is meant to ensure that courts are responsible and constrained in their power, but the Court's opinion today means that a single district court can make a decision with far-reaching effects that cannot be reviewed.¹¹²

. . . .
 . . . [T]he Court fails to grasp or accept . . . the basic premise of the initiative process. And it is this. The essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around. Freedom resides first in the people without need of a grant from government.¹¹³

Justices Alito, Thomas, and Sotomayor joined the opinion.¹¹⁴

C. The Virginia Attorney General Refused to Defend the Marriage Amendment¹¹⁵

The Virginia attorney general represents an executive who not only refused to defend an amendment, but who also actively litigated against the amendment's constitutionality.¹¹⁶ In some states, the attorney general has defended the amendment at the trial court but then refused to take an appeal after the amendment was declared unconstitutional.¹¹⁷ In at least one of those instances, the governor then appointed

entire state, the decision itself technically only applied to those counties situated within the Northern District of California. See Press Release, Office of Governor Edmund G. Brown, Jr., Governor Brown Directs California Department of Public Health to Notify Counties That Same-Sex Marriages Must Commence (June 28, 2013), available at <http://gov.ca.gov/news.php?id=18120>.

111. See *Hollingsworth*, 133 S. Ct. at 2668 (Kennedy, J., dissenting) (“[T]he Court today concludes that this state-defined status and this state-conferred right fall short of meeting federal requirements because the proponents cannot point to a formal delegation of authority that tracks the requirements of the Restatement of Agency.”); *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013).

112. *Hollingsworth*, 133 S. Ct. at 2674 (Kennedy, J., dissenting).

113. *Id.* at 2675 (Kennedy, J., dissenting).

114. *Id.* at 2668.

115. See *Bostic v. Schaefer*, 760 F.3d 352, 388 (E.D. Va. 2014).

116. *Id.*

117. See, e.g., Ed Vogel, *Nevada Officials Won't Defend Gay Marriage Ban*, LAS VEGAS REV.-J. (Feb. 12, 2014), <http://www.reviewjournal.com/news/nevada-officials-won-t-defend-gay-marriage-ban>; Trip Gabriel, *Kentucky Law Official Will Not Defend Ban on Same-Sex Marriage*, N.Y. TIMES (Mar. 4, 2014), <http://www.nytimes.com/2014/03/05/us/kentucky-governor-says-state-to-hire-lawyer-to-defend-ban-on-gay-marriage.html>.

outside counsel to represent the state's interest in the amendment.¹¹⁸ In other states, the attorney general declined from the outset to defend the laws.¹¹⁹ In one, the attorney general defended the amendments regardless of her personal views.¹²⁰ Because the Virginia litigation provides the context to discuss a variety of issues that arise when an attorney general refuses to defend a law based only on personal beliefs of unconstitutionality, this article will focus on that litigation.

On July 18, 2013, plaintiffs filed suit in federal court seeking an order declaring Virginia's marriage laws unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.¹²¹ Plaintiffs challenged both the definition of marriage as the union of one man and one woman and the non-recognition of same-sex marriages from other jurisdictions.¹²² In support of a motion for summary judgment, on September 30, 2013, then-Attorney General Ken Cuccinelli submitted a memorandum on behalf of the State Registrar of Vital Records, Janet M. Rainey, that defended the constitutionality of the marriage laws.¹²³

On January 23, 2014, twelve days after taking office, Attorney General Herring filed a Memorandum in Support of Change in Legal Position by Janet M. Rainey.¹²⁴ The memorandum stated:

[h]aving duly exercised his independent constitutional judgment, the Attorney General has concluded that Virginia's laws denying the right to marry to same-sex couples violate the Fourteenth Amendment to the United States Constitution. The Attorney General will not defend Virginia's ban on same-sex marriage, will argue for its being declared unconstitutional, and will work to ensure that both sides of the issue are responsibly and vigorously briefed

118. See, e.g., Aaron Blake & Sean Sullivan, *Kentucky Gov. Steve Beshear (D) Will Appeal Pro-Gay Marriage Ruling*, WASH. POST (Mar. 4, 2014), http://www.washingtonpost.com/blogs/post-politics/wp/2014/03/04/kentucky-wont-appeal-gay-marriage-ruling/?wprss=rss_politics&clsrd.

119. See e.g., Niraj Chokshi, *Seven Attorneys General Won't Defend Their Own State's Gay-Marriage Bans*, WASH. POST (Feb. 20, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/02/20/six-attorneys-general-wont-defend-their-own-states-gay-marriage-bans/> (discussing how attorneys general in Oregon, Pennsylvania, and California have refused to defend from the outset of the litigation same-sex marriage bans, and how the Illinois attorney general sought to intervene in litigation concerning the constitutionality of the marriage laws so that her office could argue that the laws were unconstitutional).

120. See, e.g., Letitia Stein, *Florida Attorney General Defends Gay Marriage Ban as Cities Fight Back*, REUTERS (June 25, 2014), <http://www.reuters.com/article/2014/06/25/us-usa-florida-gaymarriage-idUSKBN0F02WW20140625>.

121. *Bostic v. Rainey*, 970 F. Supp. 2d 456, 461 (E.D. Va. 2014).

122. *Id.* at 464.

123. Memorandum of Defendant Janet M. Rainey in Support of Motion for Summary Judgment at 34–35, *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014) (No. 2:13-cv-00395).

124. Memorandum in Support of Change in Legal Position by Defendant Janet M. Rainey at 1, *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014) (No. 2:13-cv-00395), available at http://www.ag.virginia.gov/Media%20and%20News%20Releases/News_Releases/Herring/Notice_of_Change_in_Position_by_Rainey_and_Memorandum_in_Support_%28Bostic_v_Rainey_1-23-2014%29.pdf.

and argued to facilitate a decision on the merits, consistent with the rule of law.¹²⁵

On January 24, 2014, the attorney general filed a Status Report on Behalf of Defendant, in which he stated that the “case certainly could be decided without a hearing,” but that the court should proceed with the already-scheduled oral arguments on January 30.¹²⁶ The report also answered the court’s question of “[w]hether, in light of the change of position by Rainey, any other parties or entities have grounds to present argument that the laws denying the right to marry to same-sex couples should be construed as constitutional[.]”¹²⁷

After pointing out that two county clerks remained to defend the law (one who was named as a defendant and another who was granted intervention), the attorney general stated, that “[n]o one other than the Attorney General, however, has standing to present the *Commonwealth’s* legal position as to whether Virginia’s same-sex-marriage ban violates the Fourteenth Amendment.”¹²⁸ He further explained that the attorney general is to provide all legal service in civil matters for the Commonwealth: “[p]ermitting any other official to speak for the State would lead to a ‘cacophony’ of voices that would undermine the Attorney General’s critical role in a system founded on the separation of powers”¹²⁹ Thus, the Commonwealth did not defend its constitution in the federal litigation, although two clerks were in the case to present arguments in defense of the law.¹³⁰

On February 13, 2014, the district court issued its opinion that the marriage laws violated both the due process and equal protection guarantees.¹³¹ On July 28, 2014, the United States Court of Appeals for the Fourth Circuit affirmed the trial court decision.¹³² The Supreme Court denied certiorari review.¹³³

D. The Alabama Federal-State Conflict

A related separation of powers issue that has surfaced during the marriage litigation arises out of federalism concerns. Specifically, even before the Supreme Court of the United States issued its decision in *Obergefell*, a federal–state conflict was brewing in Alabama. On January 23, 2015, Judge Granade of the United States District Court for the Southern District of Alabama issued an opinion concluding that Alabama’s marriage laws, which defined marriage as the union of one man and

^{125.} *Id.*

^{126.} Status Report on Behalf of Defendant Janet M. Rainey at 1, *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014) (No. 2:13-cv-00395).

^{127.} *Id.* at 2. Interestingly, just a few years earlier, as a State Senator of Virginia, Mark Herring voted to pass the Virginia marriage amendment. *Cf.* Timothy Williams & Trip Gabriel, *Virginia’s New Attorney General Opposes Ban on Gay Marriage*, N.Y. TIMES (Jan. 23, 2014), <http://www.nytimes.com/2014/01/24/us/new-virginia-attorney-general-drops-defense-of-gay-marriage-ban.html>.

^{128.} Status Report on Behalf of Defendant Janet M. Rainey, *supra* note 126, at 3.

^{129.} *Id.* at 4.

^{130.} *Bostic v. Schaefer*, 760 F.3d 352, 369 (4th Cir. 2014).

^{131.} *Bostic v. Rainey*, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014).

^{132.} *Schaefer*, 760 F.3d at 384.

^{133.} *Rainey v. Bostic*, 135 S. Ct. 286, 286 (2014).

one woman, violated the Due Process and Equal Protection Clauses of the United States Constitution.¹³⁴ The plaintiffs in that case were a same-sex couple, Cari Searcy and Kimberly McKeand, who were married under California law and who desired for Searcy to be able to adopt McKeand's eight-year-old son under Alabama's adoption code that permits a person to adopt her spouse's child.¹³⁵ The Probate Court of Mobile County denied the petition because Alabama law did not permit Searcy to be treated as a spouse to McKeand.¹³⁶

Judge Granade issued an "Order Clarifying Judgment" on January 28, 2015, to address statements made to the press by the Alabama Probate Judges Association indicating that despite the federal district court ruling, the probate judges were required to follow Alabama law, as written, and should refuse to issue marriage licenses to same-sex couples.¹³⁷ Judge Granade's order conceded that not all the probate judges were parties to the action, but took the position that as a result of the judge's order, the "Constitution require[d] the Clerk to issue such licenses" to same-sex couples.¹³⁸ Judge Granade also cautioned the judges to remember that for those judges who refuse to follow the ruling, the judge could certify a class action or issue successive injunctions, and "allow successful plaintiffs to recover costs and attorney's fees."¹³⁹

On February 12, 2015, Judge Granade issued another opinion in a separate case that enjoined Judge Don Davis of the Mobile County Probate Court from refusing to issue marriage licenses to same-sex couples.¹⁴⁰ That case involved four same-sex couples who were denied marriage licenses in Mobile County.¹⁴¹ The court concluded, again, that the marriage laws were unconstitutional and granted plaintiffs' motion for preliminary injunctive relief.¹⁴²

Less than a month later, the Supreme Court of Alabama issued its own opinion that temporarily enjoined every probate judge in the state from issuing any marriage licenses to same-sex couples.¹⁴³ The court explained that it took jurisdiction in the

134. *Searcy v. Strange*, 81 F. Supp. 3d 1285, 1290 (S.D. Ala. 2015). Two days later, the court issued a stay for fourteen days pending a request for a stay to the Eleventh Circuit Court of Appeals, which the circuit court did not issue. *See Searcy v. Strange*, No. 14-0208-CG-N, 2015 WL 328825, at *3 (S.D. Ala. Jan. 25, 2015). On February 9, 2015, the United States Supreme Court, over the dissent from Justices Thomas and Scalia, similarly declined to issue a stay. *See Strange v. Searcy*, 135 S. Ct. 940, 941 (2015). The dissent explained that it is common practice to grant stays pending appeal when laws are declared unconstitutional and that they would have "shown the people of Alabama they respect they deserve and preserved the status quo while the Court resolves this important constitutional question." *Id.* (Scalia, J., dissenting).

135. *Searcy*, 81 F. Supp. 3d at 1286.

136. *See id.* Alabama's laws both defined marriage as the union of one man and one woman but also prohibited recognition as valid any marriage by parties of the same-sex that occurred in another jurisdiction. *Id.* at 1286–87 (citing ALA. CONST. art. I, § 36.03).

137. Order Clarifying Judgment at 2, *Searcy v. Strange*, No. 14-0208-CG-N (S.D. Ala. Jan. 28, 2015), available at <http://www.washingtonblade.com/content/files/2015/01/254000010-1-14-cv-00208-65-Order-Clarifying-Judgment.pdf>.

138. *Id.* at 3.

139. *Id.*

140. *Strawser v. Strange*, 44 F. Supp. 3d 1206, 1210 (S.D. Ala. 2015).

141. *Id.* at 1207.

142. *Id.* at 1209–10.

143. *See Ex parte State ex rel. Ala. Policy Inst.*, No. 1140460, 2015 WL 892752, at *43 (Ala. Mar. 3, 2015) (per curiam).

matter by exercising its “superintending control over inferior tribunals”¹⁴⁴ The court acknowledged that such control should be exercised “only in extreme cases and under unusual circumstances” but that this situation satisfied those criteria.¹⁴⁵ Before explaining in detail the basis for its jurisdiction to hear the case, the standing of the parties, and the rationale of its decision, the court pointed out that it took action because it was one of those rare cases where, “[i]n the wake of the federal district court’s orders,” the attorney general had “refrained from fulfilling what would otherwise have been his customary role of providing advice and guidance to public officials, including probate judges, as to whether or how the duties under the law may have been altered by the federal district court’s decision.”¹⁴⁶

After discussing the court’s jurisdiction to hear the case, the court reached the question of whether the relators had standing to maintain the action.¹⁴⁷ The relators were two public policy organizations and a probate judge who sued in the name of the state.¹⁴⁸ The respondents argued that the relators lacked standing because they had “no *private interest or private right* in the performance by Alabama’s probate judges of their duty to issue marriage licenses only in accordance with Alabama law.”¹⁴⁹ The Supreme Court of Alabama concluded that the relators had standing under the public-interest exception because they “filed in the name of the State for the purpose of securing performance by public officials of *a duty owed to the public*, not in the name of a private party to enforce a private right or duty.”¹⁵⁰ The relators did not seek to vindicate a private right, but rather sought “*to uphold a State statute and to secure performance by respondents of a duty owed to the public.*”¹⁵¹ Several other states also apply the public-interest exception where a plaintiff seeks to compel a public officer to perform a legal duty in which the public has an interest.¹⁵² In concluding that the relators had standing, the court stated that “[i]t could not be clearer that the public—the people of Alabama—have an interest in the respondents’ faithful compliance with Alabama’s marriage laws.”¹⁵³

Apart from jurisdiction and standing, the court also responded to the argument that the federal district court decision prevented the Supreme Court of Alabama from deciding whether the probate judges should comply with the federal court ruling and, thereby, issue marriage licenses to same-sex couples.¹⁵⁴ “In passing on federal constitutional questions, the state courts and the lower federal courts have the same

144. *Id.* at *12 (citing P.V. Smith, Annotation, *Superintending Control over Inferior Tribunals*, 112 A.L.R. 1351, 1373 (1938)).

145. *Id.* at *12.

146. *Id.* at *2. The court explained that “[c]onfusion reigns” and “[t]here is no order or uniformity of practice.” *Id.* at *8.

147. *Id.* at *14–15.

148. *Ala. Policy Inst.*, 2015 WL 892752, at *1.

149. *Id.* at *15.

150. *Id.*

151. *Id.*

152. *See id.* at *17–18 (discussing cases applying the exception under the laws of Arkansas, California, Florida, Georgia, Indiana, Massachusetts, Michigan, Missouri, New Mexico, New York, Ohio, South Dakota, and West Virginia).

153. *Ala. Policy Inst.*, 2015 WL 892752, at *21.

154. *Id.* at *26.

responsibility and occupy the same position; there is a parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the Supreme Court.”¹⁵⁵

After reviewing the constitutionality of Alabama’s marriage laws, the court concluded that the laws were constitutional.¹⁵⁶ As a result, the court explained that the “Alabama probate judges have a ministerial duty not to issue any marriage license contrary to this law.”¹⁵⁷ The court enjoined probate judges from issuing marriage licenses “contrary to Alabama law as explained in this opinion.”¹⁵⁸

Approximately two months later, Judge Granade certified a plaintiff class and a defendant class in the federal court marriage litigation.¹⁵⁹ In a separate decision on the same day, Judge Granade granted plaintiffs’ motion for preliminary injunctive relief, enjoining the defendant class from enforcing Alabama laws that prohibit or fail to recognize same-sex marriages.¹⁶⁰ However, the court stayed its decision pending the decision by the Supreme Court of the United States in *Obergefell*.¹⁶¹

After *Obergefell*, the Supreme Court of Alabama issued an order stating that probate judges do not have to comply with the Supreme Court decision.¹⁶² Judge Granade responded with an order stating that all probate judges must comply with the ruling.¹⁶³ At least thirteen counties responded to the Supreme Court ruling by refusing to issue marriage licenses to any couples whatsoever.¹⁶⁴ On January 6, 2016, the Chief Justice of the Supreme Court of Alabama issued an administrative order stating that “the existing orders of the Alabama Supreme Court that Alabama probate judges have a ministerial duty not to issue any marriage license contrary to the Alabama Sanctity of Marriage Amendment or the Alabama Marriage Protection Act remain in full force and effect.”¹⁶⁵ Two federal prosecutors in Alabama issued a

155. *Id.* at *27 (quoting United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072, 1075 (7th Cir. 1970)). *See also* Lockhart v. Fretwell, 506 U.S. 364, 375–76 (1993) (Thomas, J., concurring) (Supremacy Clause does not require state courts to follow rulings by federal courts of appeals on questions of federal law); ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (“[S]tate courts . . . possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their interpretation of federal law.”).

156. *Id.* at *43.

157. *See id.*

158. *See Ala. Policy Inst.*, 2015 WL 892752, at *43.

159. *See* Strawser v. Strange, 307 F.R.D. 604, 614 (S.D. Ala. 2015).

160. *See* Strawser v. Strange, No. 14-0424-CG-C, 2015 WL 2449468, at *6 (S.D. Ala. May 21, 2015).

161. *Id.*

162. Polly Mosendz, *To Avoid Supreme Court Decision, Alabama Temporarily Bans Gay Marriage Licenses*, NEWSWEEK, (Jun. 29, 2015), <http://www.newsweek.com/avoid-supreme-court-gay-marriage-decision-alabama-temporarily-bans-gay-348366>.

163. *Alabama Judges Must Issue Gay Marriage Licenses if They Issue Straight Marriage Licenses*, Court Rules, ASSOCIATED PRESS (July 2, 2015), http://www.al.com/news/index.ssf/2015/07/alabama_judges_must_issue_gay.html.

164. *Id.*

165. Administrative Order, at 4 (Moore, C.J., Jan. 6, 2016), available at https://www.splcenter.org/sites/default/files/roymoore-adminorder_jan6-2016.pdf. Chief Justice Moore relied on decisions from the United States Court of Appeals for the Eighth Circuit and the United States District Court for the District of Kansas, which affirmed the basic principle that a court decision binds only those parties before it. Thus, following that logic, Chief Justice Moore concluded that *Obergefell* did not declare Alabama’s marriage laws unconstitutional. *Id.*

response, stating that the probate judges should ignore the January 6 administrative order.¹⁶⁶

II. AN ATTORNEY GENERAL'S DUTY TO DEFEND

A central question in the marriage litigation was whether an attorney general could refuse to defend a law she personally believed to be unconstitutional.¹⁶⁷ Given United States Attorney General Eric Holder's admonition to state attorneys general to refuse to defend any law they believed to be unconstitutional¹⁶⁸ and the large number of state attorneys general who subsequently refused to defend the marriage laws, it is realistic to believe that attorneys general in the future will similarly refuse to defend other laws with which they disagree.

States vary in the discretion afforded to the attorney general to direct and control litigation, including when state laws are challenged.¹⁶⁹ A recent, comprehensive review of the constitutional and statutory provisions concerning an attorney general's duty to defend discussed the varying approaches.¹⁷⁰

Forty-three [state constitutions] clearly do not provide anything about whether the attorney general has a duty to defend (or concede). . . . Of the remaining seven constitutions, four specify that the attorney general is the "legal officer" of the state, and three declare that the attorney general – as the Texas Constitution puts it – "shall represent the State in all suits . . . in which the State may be a party."¹⁷¹

On the other hand, state statutes address the power and responsibilities of the attorneys general:

Most state statutes provide that the attorney general is to represent (or appear on behalf of) the state or has a duty to represent it. As noted with respect to similar constitutional provisions, such language is rather equivocal because it is hard to tease out implications about when attorneys general may (or must) defend (or concede the invalidity of) state law. A handful of states have more specific directives. Two states mandate that their attorneys general defend the constitutionality of state law (Pennsylvania and Mississippi). Tennessee clearly empowers its attorney general to

166. Michelle Gorman, *Prosecutors Urge Alabama Judges to Issue Gay Marriage Licenses Despite Order from Top Justice*, NEWSWEEK, (Jan. 7, 2016, 12:36 PM), <http://www.newsweek.com/prosecutors-urge-alabama-judges-issue-gay-marriage-licenses-despite-order-top-412783>.

167. See Apuzzo, *supra* note 4.

168. *Id.*

169. See Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2130 (2015).

170. See generally *id.* at 2157–77 (Appendix I to the article sets forth the statutory and constitutional provisions of each state concerning an attorney general's duty to defend).

171. *Id.* at 2128.

refuse to defend laws she finds unconstitutional. Louisiana has a suggestive but ambiguous statute. It provides that the attorney general “at his discretion, shall represent . . . the state in any action or proceeding in which the constitutionality of a state statute or of a resolution of the legislature is challenged or assailed.” . . . By statute, Nebraska *compels its attorney general to challenge* the constitutionality of state law whenever two preconditions are satisfied: first, she has previously opined that the law is unconstitutional; and second, a state officer refuses to enforce the law in reliance on that opinion.¹⁷²

State laws also differ on the question of whether, and how, outside counsel can be hired to defend the constitutionality of a law.¹⁷³ The various statutes, however, do not squarely address the scope of the duty to defend, including what arguments an attorney general must advance in litigation and whether an attorney general must take an appeal from an adverse trial court ruling.¹⁷⁴ Whatever the answers to these questions, it is clear that the underlying question of whether an attorney general has a duty to defend is a pressing one, with attorneys general increasingly refusing to defend. Approximately “fifty-seven percent of state refusals to defend (twenty of thirty-five) have occurred since 2008, with same-sex marriage accounting for one-third of all refusals.”¹⁷⁵

A. The Historical Roots of the Duty to Enforce and Defend

The discussion of the duty to defend, as distinct from an executive’s duty to enforce, is a fairly recent phenomenon.¹⁷⁶ Authors Curt Levey and Kenneth Klukowski explained that prior to 1980, the discussion in United States attorney general opinions focused only on the duty to enforce the law.¹⁷⁷ In 1980, the executive’s “duty to defend” was the central focus in an opinion by the then-United States Attorney General Benjamin Civiletti.¹⁷⁸ In that opinion, he wrote, “I concur fully in the view expressed by nearly all of my predecessors that when the Attorney General is confronted with such a choice, it is almost always the case that he can best discharge the responsibilities of his office by *defending* and enforcing the Act of Congress.”¹⁷⁹

The Declaration of Independence proclaims that all people are endowed by their Creator with certain unalienable rights and that the purpose of civil government, which derives its powers from the people, is to secure those rights:

172. *Id.* at 2130.

173. See Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 IND. L.J. 513, 552–53 (2015) (discussing state approaches to the hiring of outside counsel).

174. Devins & Prakash, *supra* note 169, at 2131.

175. See *id.* at 2178–87 (Appendix II to the *Fifty States, Fifty Attorneys General* article describes each case the authors uncovered where an attorney general had refused to defend the constitutionality of a state law or constitutional provision).

176. See Levey & Klukowski, *supra* note 28, at 385.

177. See *id.* at 385–86.

178. See *id.* at 385.

179. *Id.*

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.—*That to secure these rights*, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, *it is the Right of the People* to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.¹⁸⁰

The United States Constitution similarly begins with a recognition that power resides in the people—“We the People of the United States . . . do ordain and establish this Constitution for the United States of America.”¹⁸¹ The Tenth Amendment then explains that all power resides in the people, except to the extent the people have delegated certain authority to the federal government or to the states.¹⁸² If a state were to attempt to exercise authority over an area of law that had been exclusively delegated in the Constitution to the federal government, the courts should declare the state law unconstitutional.¹⁸³ Similarly, the Court should declare unconstitutional congressional acts that exceed their authority by infringing on the authority reserved by the states.¹⁸⁴ However, the balance of powers between the three branches on the one hand, and between the state and federal governments on the other hand, has not been jealously guarded. This has led to an increasingly large scope of matters over which the federal government asserts jurisdiction.¹⁸⁵

180. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added). See also 1 WILLIAM BLACKSTONE, COMMENTARIES *120 (“Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals.”).

181. U.S. CONST. pmbl.

182. U.S. CONST. amend. X.

183. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”). See also *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015) (“It is apparent that this Clause creates a rule of decision: Courts ‘shall’ regard the ‘Constitution,’ and all laws ‘made in Pursuance thereof,’ as ‘the supreme Law of the Land.’ They must not give effect to state laws that conflict with federal laws.”) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)); *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (“It is a familiar and well-established principle that the Supremacy Clause invalidates state laws that ‘interfere with, or are contrary to,’ federal law.”) (citations omitted).

184. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (declaring unconstitutional the Violence Against Women Act because Congress lacked authority to enact the law); *United States v. Lopez*, 514 U.S. 549 (1995) (declaring unconstitutional the Gun-Free School Zones Act because Congress lacked authority to enact the law). See also THE FEDERALIST No. 78 (Alexander Hamilton) (“There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.”).

185. See Richard A. Epstein & Mario Loyola, *The United States of America: Washington is Expanding its Power by Turning State Governments into Instruments of Federal Policy*, ATLANTIC (July 31, 2014), <http://www.theatlantic.com/politics/archive/2014/07/the-federal-takeover-of-state-governments/375270/>. See also Charles R. Kesler, *Separation of Powers and the Administrative State*, in THE IMPERIAL CONGRESS: CRISIS IN THE SEPARATION OF POWERS 20, 23 (Gordon S. Jones & John A. Marini eds., 1988).

The separation of power provisions are designed to accomplish the purpose of government set forth in the Declaration of Independence—to secure the rights of the people.¹⁸⁶ The question of whether an attorney general has a duty to defend laws enacted either through the elected representatives of the people or the people themselves (initiative power) must be informed by the fact that the people are the sovereign and the government officials the agents of the sovereign.¹⁸⁷ Article I, section 2 of the Virginia Constitution states that “all power is vested in, and consequently derived from, the people,”¹⁸⁸ and, as a result, “that magistrates are their trustees and servants, and at all times amenable to them.”¹⁸⁹ When an attorney general refuses to defend a law, it directly disturbs the separation and balance of powers.

The doctrine of separation of powers has long been rooted at the core of our nation’s system of government. As the Supreme Court has recognized, “[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.”¹⁹⁰ The Framers believed “[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective may justly be pronounced the very definition of tyranny.”¹⁹¹ Thus, to protect against the risk of tyranny, it is crucial that the established branches of government be separate and distinct from one another. In addition to deterring tyrannical rule, specific allocation of powers serves to create an “effective and accountable” national government.¹⁹² Such precise delineation of responsibilities amongst branches enables citizens to identify who is responsible for making, or failing to make, various decisions.¹⁹³

186. See Kesler, *supra* note 185, at 25–26. See also THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

187. See, e.g., Kamper v. Hawkins, 1 Va. Cas. 20, 51 (Va. 1793) (“Our government is declared to be founded on the authority of the people. The people, in convention, have ordered that a legislature shall be chosen, a governor and council shall be chosen, judges shall be appointed.—All these different characters are servants of the people, have different duties, and are amenable to them.”); Stephanie Hall Barclay, *Retained by the People: Federalism, the Ultimate Sovereign, and Natural Limits on Government Power*, 23 WM. & MARY BILL RTS. J. 257, 280 (2014) (“[G]overnments were created as agents of people and were entrusted with a limited portion of the people’s sovereign power.”); *id.* at 257 (“[T]he people—as a sovereign body separate and distinct from the states—were viewed by both the framers and states as the ultimate source and residuary location of sovereign power.”); *id.* at 268 (“[I]n our governments, the supreme, absolute, and uncontrollable power *remains* in the people.” (quoting JONATHAN ELLIOT, 2 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 423, 432 (2d ed. 1891))); *id.* at 281 (“Patrick Henry of Virginia similarly explained that since the people have delegated power to the government, ‘[t]he governing persons are the servants of the people.’”); Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL’Y 1, 12 (1993) (“American constitutional developments during the revolutionary period shifted sovereignty to the people, who select their representatives to exercise delegated sovereign authority.”); Stephen S. Trott, *The Two-Sided Guarantee of Religious Freedom, Commencement Address: Albertson College*, 46 ADVOCATE (IDAHO) 34, 37 (Oct. 2003) (“This government is ours. The first three words in our Constitution are the most important: ‘We the People.’ We, as a united people, chose its guiding principles. Government does our bidding.”); THE FEDERALIST NO. 39 (James Madison) (“[W]e may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people”).

188. VA. CONST. art. 1, § 2.

189. *Id.*

190. Buckley v. Valeo, 424 U.S. 1, 124 (1976).

191. INS v. Chadha, 462 U.S. 919, 960 (1983) (Powell, J., concurring) (quoting THE FEDERALIST NO. 47 (James Madison)).

192. Loving v. United States, 517 U.S. 748, 757 (1996).

193. *Id.* at 758.

Like most state constitutions,¹⁹⁴ Article I, section 5 of the Virginia Constitution specifies that “the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct”¹⁹⁵ The Virginia Constitution further emphasizes this concept in Article III, section 1 where it states that these “departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time.”¹⁹⁶

The separation of powers requirement is directly implicated where an attorney general refuses to defend a law based on personal preferences rather than on the plain language of the constitution. When an attorney general makes a policy determination that a law should be declared unconstitutional through non-defense based on personal beliefs or preferences, the executive is encroaching upon the powers delegated to the legislature (which is the branch charged with making policy determinations) or the judiciary.¹⁹⁷ Under those circumstances, the attorney general is nullifying the will of the people.

1. The Executive Branch Does Not Possess an Absolute Veto Power

The expectation that the executive branch, which includes the attorney general, will defend and enforce laws arises in part from the rejection by the drafters of the

194. See, e.g., CAL. CONST. art. III, § 3 (“The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.”); GA. CONST. art. I, § 2, para. 3 (“The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided.”); LA. CONST. art. II, §§ 1, 2 (“The powers of government of the state are divided into three separate branches: legislative, executive, and judicial. . . . Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others.”); MINN. CONST. art. III, § 1 (“The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.”); MONT. CONST. art. III, § 1 (“The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.”); N.C. CONST. art. I, § 6 (“The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.”); TENN. CONST. art. II, § 1 (“The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.”); TEX. CONST. art. 2, § 1 (“The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.”); W. VA. CONST. art. V, § 1 (“The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.”).

195. VA. CONST. art. I, § 5.

196. *Id.* art. III, § 1.

197. As discussed *infra* at Part IV.A, unless the law is a plain violation of the separation of powers or plainly contradicts the express terms of the written constitution, then the attorney general exceeds his authority in refusing to defend the law. Similarly, as discussed *infra* at Part III, even a decision by a higher court is not necessarily binding precedent.

Constitution of the *absolute* presidential veto in favor of a *qualified* veto power.¹⁹⁸ Unlike the English kings who had held the power of an absolute veto, the United States Constitution limits such power to a presidential veto, which Congress can override with a two-thirds vote, and the power to pardon certain crimes after conviction.¹⁹⁹

The first article of England's 1689 Bill of Rights declared "[t]hat the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal."²⁰⁰ Subsequently, the power to suspend laws to avoid implementing a law that had been used for nearly 400 years prior to 1689 "was never again exercised by the English crown."²⁰¹ William Blackstone explained that

[a]n act of parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. . . . And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms, and by the same authority of parliament . . . It is true it was formerly held, that the king might in many cases, dispense with penal statutes: but now by statute . . . it is declared, that the suspending or dispensing with laws by regal authority, without consent of parliament, is illegal.²⁰²

The United States Constitution includes at least three provisions that belie any claim that the executive has the authority to ignore duly enacted laws.²⁰³ First, Article II, Section 3 declares that the President "shall take Care that the Laws be faithfully executed . . ."²⁰⁴ The command to take care that the laws be faithfully executed "is a succinct and all-inclusive command through which the Framers sought to prevent the Executive from resorting to the panoply of devices employed by English kings to evade the will of Parliament."²⁰⁵ Subject to two exceptions discussed below, the executive's duty is to honor and enforce duly enacted statutes even if he disagrees with them.

Second, the Constitution grants the power of suspension to Congress, not the executive.²⁰⁶ Congress holds the authority to suspend laws by passing subsequent amendments to the law or revoking the law in whole or in part.²⁰⁷ Even that power, however, is expressly limited by the Constitution. Article I, section 9, clause 2

198. Levey & Klukowski, *supra* note 28, at 389. *See also* THE FEDERALIST NO. 69 (Alexander Hamilton) ("The qualified negative of the President differs widely from this absolute negative [of the king] . . .").

199. U.S. CONST. art. I, § 7, cl. 2; *id.* art. II, § 2, cl. 2.

200. ENGLISH BILL OF RIGHTS 1689.

201. Christopher N. May, *Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 872 (1994).

202. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 178–79 (1765).

203. *See* U.S. CONST. art. II, § 3; *id.* art. I, § 9, cl. 2; *id.* art. I, § 1.

204. *Id.* art II, § 3.

205. May, *supra* note 201, at 873.

206. *See generally id.* (discussing how the text and history of the U.S. Constitution evince an intent by the framers to grant power to suspend laws to Congress alone and not to the President).

207. *See* U.S. CONST. art. I, § 1.

prohibits Congress from suspending the writ of habeas corpus.²⁰⁸ There is no language in the Constitution limiting a presidential suspension power because the President's duty under the Take Care Clause is to enforce the law, which would be directly undermined by any alleged power to suspend the enforcement of laws.²⁰⁹ The Virginia Constitution, however, also states that "all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."²¹⁰

Writing for the United States Circuit Court for the District of New York in 1806, Justice William Patterson, who had been a member of the Constitutional Convention as a New Jersey delegate, rejected the argument that the President had the authority to suspend laws.²¹¹ The law:

imparts no dispensing power to the president. Does the constitution give it? Far from it, for it explicitly directs that he shall "take care that the laws be faithfully executed." . . . True, a nolle prosequi may be entered, a pardon may be granted; but these presume criminality, presume guilt, presume amenability to judicial investigation and punishment, which are very different from a power to dispense with the law.²¹²

The refusal to defend a constitutional amendment and duly enacted civil law seems tantamount to suspending the enforcement of specific laws.²¹³

Third, to permit the executive to suspend laws is tantamount to the exercise of legislative powers, which is reserved to Congress in Article I.²¹⁴ The Constitution specifies that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."²¹⁵ After identifying the specific areas over which Congress has authority to legislate, Article I, Section 9 confers authority to "make all Laws which shall be necessary and proper for carrying into execution the foregoing powers."²¹⁶ Article II, in contrast, which specifies the powers of the executive branch, contains no authority to make any laws.²¹⁷ It confers powers concerning treaty-making, appointments of certain officials, granting of pardons, his role as commander-in-chief of the Army and Navy, and the power to convene or adjourn Congress under certain circumstances.²¹⁸ The President's only delegated authority with respect to

208. See *id.* § 9, cl. 2.

209. See *id.* art. II, § 3.

210. VA. CONST. art. I, § 7.

211. *United States v. Smith*, 27 F. Cas. 1192, 1229 (Cir. Ct. D.N.Y. 1806).

212. *Id.* at 1129–30.

213. See Zoeller, *supra* note 173, at 531–32 (discussing the Founders' rejection of the English King's absolute prerogative to suspend or dispose of laws).

214. See generally U.S. CONST. art. I (granting legislative powers to the Congress).

215. *Id.* § 1.

216. *Id.* § 9.

217. *Id.* art. II (granting no law-making authority to the executive).

218. See *id.* §§ 2–3.

lawmaking is his ability to veto laws, which veto can be overridden by Congress,²¹⁹ and his duty to faithfully execute the laws.²²⁰

In addition, the records of the constitutional debates demonstrate that the drafters specifically rejected giving the President an absolute veto power over proposed legislation.²²¹ James Wilson, Alexander Hamilton, and George Read proposed plans for an executive who would possess an absolute veto.²²² Mr. Wilson's proposal was unanimously defeated by the Committee of the Whole; Mr. Hamilton's did not even make it to a vote; and Mr. Read's proposal was defeated nine to one.²²³

In fact, even the qualified veto given to the President generated debate.²²⁴ One of the last changes made to the proposed Constitution was to make it easier to override a presidential veto.²²⁵ The Convention reduced the majority vote needed from three-fourths to two-thirds.²²⁶ Some delegates were concerned that the three-fourths requirement "put too much in the power of the President."²²⁷ At one point, the delegates voted on a proposal to give the President the power to suspend any law for a specified period of time.²²⁸ The proposal was rejected by all the states.²²⁹ The history of the Constitutional Convention has led one author to conclude that the President never has the authority to refuse to enforce a law, even if it is patently unconstitutional or plainly encroaches upon the executive's constitutionally delegated authority.²³⁰

2. Prosecutorial Discretion Does Not Confer the Power to Refuse to Defend

One argument that has been advanced in support of an attorney general who refuses to defend a law based on personal beliefs of unconstitutionality is prosecutorial discretion.²³¹ To suggest, however, that the public official charged with upholding the laws of a state can refuse to defend a law when challenged in court, as distinct from refusal to enforce in a particular case, based on prosecutorial discretion, is to undermine the delicate balance of separation of powers.

219. See U.S. CONST. art. I, § 7.
 220. *Id.* § 3.
 221. May, *supra* note 201, at 876.
 222. *Id.* (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 98–103, 200, 292 (Max Farrand ed. 1966)).
 223. *Id.* (citing THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 222, at 98–103, 200, 292).
 224. *Id.*
 225. *Id.* (citing THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 220, at 585–87).
 226. *Id.*
 227. May, *supra* note 201, at 876–77 (citing THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 222, at 585).
 228. *Id.* at 877 (citing THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 222, at 103–04).
 229. *Id.*
 230. See *id.* at 877–78.
 231. See, e.g., Bennett L. Gershman, *Refusing to Defend Unjust Laws: Prosecutorial Discretion or Prosecutorial Nullification?*, HUFFINGTON POST: BLOG (Feb. 27, 2014, 6:06 PM), http://www.huffingtonpost.com/bennett-l-gershman/refusing-to-defend-unjust_b_4869212.html.

The roots of prosecutorial discretion extend back to before the birth of our nation.²³² In many ways the colonists imitated legal systems with which they were most familiar.²³³ In England, even though there was not a public prosecutor who routinely controlled criminal prosecutions, the English attorney general did possess the ability to dismiss an ongoing prosecution with a device called the *nolle prosequi*.²³⁴ The theory of prosecutorial discretion, as interpreted in federal case law, has undergone incremental changes over time.²³⁵ An analysis of these changes suggests that “the *nolle prosequi*’s royal origins facilitated the development of the notion that criminal prosecution is an unreviewable executive function.”²³⁶ These early roots help to explain and justify the contemporary theory of this discretionary authority.²³⁷

The theory of prosecutorial discretion, as justified by the separation of powers doctrine, is also linked to the Take Care Clause.²³⁸ Executive power is vested in the President of the United States, who is in turn required to “take Care that the Laws be faithfully executed”²³⁹ This constitutional provision “requires the President to enforce the laws of the United States.”²⁴⁰ One scholar has stated that this “take care duty, the duty to enforce law faithfully, is, in many respects, the most basic responsibility the Constitution imposed upon the Chief Executive.”²⁴¹ This clause has now become “the most commonly cited textual support for executive control over criminal prosecutions.”²⁴²

As the United States Court of Appeals for the District of Columbia Circuit has acknowledged: “[i]t is well established that the exercise of prosecutorial discretion is at the very core of the executive function.”²⁴³ The D.C. Circuit also previously held that, in the context of prosecutorial discretion, “it is not the function of the judiciary to review the exercise of executive discretion whether it be that of the President himself or those to whom he has delegated certain of his powers.”²⁴⁴

232. Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 2 (2009).

233. Michael Edmund O’Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 674 (2010) (citing JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 17 (1980)).

234. Krauss, *supra* note 232, at 2.

235. *Id.* at 4, 13–26.

236. *Id.* at 4.

237. *Id.*

238. *See id.* at 10 (quoting *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 976 (D.C. Cir. 2005), *superseded*, 438 F.3d 1141 (D.C. Cir. 2006); *United States v. Greater Blouse, Skirt & Neckwear Contractors Ass’n*, 228 F. Supp. 483, 489 (S.D.N.Y. 1964); U.S. CONST. art. 2, § 3; William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 484 (1989)).

239. U.S. CONST. art. II, §§ 1, 3.

240. Ted Cruz, *The Obama Administration’s Unprecedented Lawlessness*, 38 HARV. J.L. & PUB. POL’Y 63, 65 (2015).

241. *Id.* at 65–66 (quoting Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS U.L.J. 791, 801 (1999)).

242. Krauss, *supra* note 232, at 23 (citing William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 484 (1989)).

243. *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 976 (D.C. Cir. 2005), *superseded by* 438 F.3d 1141 (D.C. Cir. 2006).

244. *Newman v. United States*, 382 F.2d 479, 482 (D.C. Cir. 1967).

The United States Court of Appeals for the Fifth Circuit has stated that “as an incident of the constitutional separation of powers, . . . the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.”²⁴⁵ Additionally, that court declared that “[a]lthough as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official . . . , and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution”²⁴⁶

In *Ponzi v. Fessenden*, the Supreme Court recognized that the attorney general is “the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses be faithfully executed.”²⁴⁷ Decades later, the Court also acknowledged that “[f]or the faithful execution of such laws the President has . . . wide discretion as to method vested in him by the Constitution for the purpose of executing the laws.”²⁴⁸ Thus, the duty to “take care” to enforce the laws does allow for some necessary discretion in how executive officers choose to enforce them.

While prosecutorial discretion is often now thought of as nearly absolute and unreviewable, the Supreme Court has articulated that prosecutors are limited by “fundamental conceptions of justice.”²⁴⁹ The Court stated that a “prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence may exist which would support a conviction.”²⁵⁰ The Court cited factors that prosecutors may properly consider in exercising discretion, including:

- (i) the prosecutor’s reasonable doubt that the accused is in fact guilty; (ii) the extent of the harm caused by the offense; (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender; (iv) possible improper motives of a complainant; (v) reluctance of the victim to testify; (vi) cooperation of the accused in the apprehension or conviction of others; (vii) availability and likelihood of prosecution by another jurisdiction.²⁵¹

In making a decision not to file charges in a criminal case, the Supreme Court has also stated that a prosecutor is to determine whether the prosecution would be in the

245. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965).

246. *Id.*

247. *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922).

248. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 695 (1952).

249. *United States v. Lovasco*, 431 U.S. 783, 790–91 (1977) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

250. *Id.* at 794 n.15 (quoting ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION § 3.9(b) (App. Draft 1971)).

251. *Id.*

public's interest.²⁵² In another case, the Supreme Court further acknowledged that "[a]lthough prosecutorial discretion is broad, it is not 'unfettered.' Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints."²⁵³

Therefore, there are limits and guidelines to a prosecutor's exercise of discretion. Even with the limits, however, in practice the nature of that discretion remains far-reaching in scope.²⁵⁴ The few legal constraints that do "exist stem from other areas of law—equal protection and due process—and these constraints rarely lead to successful prosecutorial misconduct claims."²⁵⁵

While prosecutorial discretion is perhaps most often thought of in the criminal law context, it functions in the civil realm of the American legal system as well.²⁵⁶ Courts acknowledge that this powerful tool is applicable in civil, administrative settings as it is in criminal law.²⁵⁷ The Supreme Court has stated, for example, "that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."²⁵⁸ In doing so, the Court cited to 5 U.S.C. § 701(a)(2) and also remarked that this acknowledgment of discretion was "attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement."²⁵⁹ The Court analogized between an agency's refusal to initiate proceedings and a prosecutor in the executive branch's decision not to indict by stating that both share similar characteristics.²⁶⁰ Furthermore, the Court recognized that a decision of the prosecutor not to indict is "a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"²⁶¹

Looking back to the founding of our nation, it is clear that the Framers' "constant aim [was] to divide and arrange the several offices [of government] in such a manner as that each may be a check on the other."²⁶² Danger of violating this delicate system of checks and balances can arise in the area of prosecutorial discretion since "the other branches of government provide almost no check on prosecutorial powers."²⁶³ The more the nature of this discretionary authority broadens, the greater the risk becomes. To permit an attorney general to rely on prosecutorial discretion to refuse

252. See *id.* at 784 (citing *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888); *In re Neagle*, 135 U.S. 1 (1890); *Kern River Co. v. United States*, 257 U.S. 147 (1921)).

253. *Wayte v. United States*, 470 U.S. 598, 608 (1985) (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)).

254. See Krauss, *supra* note 232, at 4.

255. *Id.* (citing Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1076 (1997)).

256. Memorandum from Doris Meissner, Comm'r of INS, on Exercising Prosecutorial Discretion 3 (Nov. 17, 2000), available at <http://www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00>.

257. *Id.*

258. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (citing *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 74 U.S. 454 (1869)).

259. *Id.* at 831.

260. *Id.* at 832.

261. *Id.* (quoting U.S. CONST. art. II, § 3).

262. Krauss, *supra* note 232, at 11 (citing THE FEDERALIST NO. 51, at 322 (James Madison)).

263. *Id.*

to defend a duly enacted law or constitutional amendment when one is challenged in court broadens the authority beyond any previously recognized limits.

B. Attorney General Herring's Reasons for the Refusal to Defend

When Attorney General Herring decided that his office would no longer defend the constitutionality of the state marriage amendment, it represented a change in litigation stance from his predecessor.²⁶⁴ Thus, the Attorney General filed a memorandum with the district court in support of the change.²⁶⁵ In that memorandum, Mr. Herring cited four types of precedent to support his decision to refuse to defend the amendment.²⁶⁶ He cited the conduct of two prior Virginia attorneys general, the longstanding position taken at the federal level that there are circumstances under which the United States attorney general could refuse to defend a duly enacted law, two United States Supreme Court opinions, and two instances where the United States solicitor general had taken the position in court that a law was unconstitutional.²⁶⁷ His arguments should be analyzed within the framework of the constitutional and statutory obligations imposed upon the attorney general.

Article V, section 15 of the Virginia Constitution establishes the Office of the Attorney General and grants the General Assembly power to specify the attorney general's duties.²⁶⁸ The General Assembly has specified that:

*[a]ll legal service in civil matters for the Commonwealth, the Governor, and every state department, institution . . . including the conduct of all civil litigation in which any of them are interested, shall be rendered and performed by the Attorney General, except as provided in this chapter and except for any litigation concerning a justice or judge initiated by the Judicial Inquiry and Review Commission.*²⁶⁹

Thus, absent an exception, the attorney general is charged with defending the Commonwealth in litigation.²⁷⁰

One of the exceptions to that duty is “[i]f, in the opinion of the Attorney General, it is impracticable or uneconomical for such legal service to be rendered by him or

264. See Notice of Change in Legal Position by Defendant Janet M. Rainey at 1, *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014) (No. 2:13-cv-00395), available at http://www.oag.state.va.us/Media%20and%20News%20Releases/News_Releases/Herring/Notice_of_Change_in_Position_by_Rainey_and_Memorandum_in_Support_%28Bostic_v_Rainey_1-23-2014%29.pdf.

265. See Memorandum in Support of Change in Legal Position by Defendant Janet M. Rainey, *supra* note 124, at 1.

266. See *id.* at 2–5.

267. *Id.*

268. VA. CONST. art. IV, §§ 1, 14; *id.* art. V, § 15.

269. VA. CODE ANN. § 2.2-507(A) (2015) (emphasis added).

270. See Zoeller, *supra* note 173, at 524 n.77 (identifying several statements by attorneys general about how they understand their duty to defend).

one of his assistants,” the Attorney General “may employ special counsel for this purpose, whose compensation shall be fixed by the Attorney General.”²⁷¹

The governor also has the ability to hire special counsel under certain circumstances.²⁷² One of those situations is “where the Attorney General certifies to the Governor that it would be improper for the Attorney General’s office to render legal services *due to a conflict of interests*,” or that he is unable to render certain legal services.²⁷³ The Supreme Court of Virginia has explained that the governor has independent authority to certify that the attorney general is unable to render legal services due to a conflict of interests so that the governor can then appoint special counsel.²⁷⁴

In *Wilder*, for example, the Governor Wilder set forth in writing the basis for his belief that the attorney general had a conflict of interest that precluded him from representing the Virginia Retirement System and that the governor intended to appoint special counsel to serve as counsel for the Virginia Retirement System until such time as the conflicts ceased.²⁷⁵ The attorney general filed suit seeking a declaration that the governor lacked authority to appoint “regular” counsel (as distinct from “special” counsel).²⁷⁶ The court held that although the statute prohibits appointment of regular counsel for a state agency, the governor’s appointment of counsel for the Retirement System constituted “special” counsel as it was “limited by objective parameters”²⁷⁷

The attorney general also challenged the governor’s conclusion that the attorney general was unable to represent the Retirement System due to a conflict of interest.²⁷⁸ The court afforded wide latitude to the governor’s decision, concluding that his decisions were not “arbitrary and capricious.”²⁷⁹

In his memorandum in support of a change of position, Attorney General Herring first cited his predecessor’s refusal to defend a law establishing the Opportunity Education Institution.²⁸⁰ The law provided for a statewide school division that would take over academically failing local schools.²⁸¹ The Virginia Constitution, however, as long interpreted by the Supreme Court of Virginia, grants supervision of public schools to local school districts.²⁸² The constitution states that “[t]he supervision of schools in each school division shall be vested in a school board, to be composed of

271. VA. CODE ANN. § 2.2-507(C) (2015).

272. *See id.* § 2.2-510(4).

273. *Id.* § 2.2-510.2 (emphasis added). One question raised by the statute is whether an attorney general’s disagreement with a law, or mere belief of its unconstitutionality, satisfies the conflict of interest or inability to render services provisions. Two authors believe that it is insufficient. *See* John Paul Jones & Afsana Chowdhury, *Administrative Law*, 47 U. RICH L. REV. 7 (Annual Survey 2012) (discussing the Attorney General’s refusal to defend a regulation passed by the Virginia Board of Health).

274. *See Wilder v. Att’y Gen. of Virginia*, 439 S.E.2d 398, 401–02 (Va. 1994).

275. *See id.* at 400.

276. *See id.*

277. *Id.* at 402.

278. *See id.*

279. *See Wilder*, 439 S.E.2d at 402.

280. *See* Memorandum in Support of Change in Legal Position by Defendant Janet M. Rainey, *supra* note 124, at 2.

281. *See* VA. CODE ANN. § 22.1-27.2 (2015).

282. *See* VA. CONST. art. VIII, § 7.

members selected in the manner, for the term, possessing the qualifications, and to the number provided by law.”²⁸³ The Supreme Court of Virginia has interpreted the constitutional provision to mean that “[n]o statutory enactment can permissibly take away from a local school board its fundamental power to supervise its school system.”²⁸⁴ As a result, it previously ruled unconstitutional state action that divested school boards of authority to decide when school property could be put up for sale,²⁸⁵ attempted to direct the use of funds derived from school construction bonds,²⁸⁶ attempted to interfere with the school board’s decision to terminate a teacher,²⁸⁷ or otherwise interfered with the authority to run the schools.²⁸⁸

The 2013 amendments to the Virginia Opportunity Education Act “transferred to the Opportunity Educational Institution” supervision of “any school that has been denied accreditation”²⁸⁹ Thus, the then-attorney general concluded that a statute transferring supervision of a school away from the local school board to the state Opportunity Educational Institution violated the state constitution.²⁹⁰ On June 10, 2014, in litigation filed by the local school board and the Virginia School Boards Association, a Virginia circuit court declared the provision unconstitutional.²⁹¹

Attorney General Herring’s memorandum also cited another predecessor who had joined an amicus brief in a Colorado Supreme Court case where forty-four state attorneys general defended the authority of the Colorado attorney general to seek to enjoin the enforcement of a newly-enacted state statute.²⁹²

In that case, the Attorney General of Colorado filed suit to enjoin the enforcement of newly enacted legislation that redrew the boundaries of Colorado’s seven congressional districts.²⁹³ The law intended to supplant a court-ordered 2002 redistricting plan.²⁹⁴ The attorney general argued that the state constitution limits the timeframe and frequency of the general assembly’s authority to redistrict.²⁹⁵ Specifically, the attorney general stated that the general assembly could only redistrict once every ten years, and that it had to occur immediately following the federal census.²⁹⁶ In response to the attorney general’s petition, the secretary of state filed a petition asking the court to enjoin the attorney general from proceeding with the suit against the statute.²⁹⁷ The secretary of state argued that the attorney general

283. *Id.*
 284. *Russell Cnty. Sch. Bd. v. Anderson*, 384 S.E.2d 598, 604 (Va. 1989).
 285. *See Howard v. Cnty. Sch. Bd. of Alleghany Cnty.*, 122 S.E.2d 891, 893 (Va. 1961).
 286. *See Cnty. Sch. Bd. of Fluvanna Cnty. v. Farrar*, 100 S.E.2d 26, 30 (Va. 1957).
 287. *See Russell Cnty. Sch. Bd.*, 384 S.E.2d at 604.
 288. *See Harrison v. Day*, 106 S.E.2d 636 (Va. 1959).
 289. VA. CODE ANN. § 22.1-27.2(B) (2015).
 290. *See Sch. Bd. of Norfolk v. Opportunity Educ. Inst.*, 88 Va. Cir. 317 (Va. Cir. Ct. 2014).
 291. *See id.* at *6.
 292. *See Memorandum in Support of Change in Legal Position by Defendant Janet M. Rainey*, *supra* note 124, at 2; *see also* Brief of Thurbert E. Baker, et al. as Amici Curiae in Support of Respondent, *Davidson v. Salazar*, No. 03SA147, 2003 WL 23221412 [hereinafter Brief].
 293. *See People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1224 (Colo. 2003).
 294. *See id.*
 295. *See id.* at 1225.
 296. *See id.*
 297. *See id.*

had no authority to petition the Supreme Court of Colorado for relief.²⁹⁸ The court agreed with the attorney general's interpretation of the plain text of the constitution.²⁹⁹ The amicus brief in which the Virginia attorney general joined stated that "the 'real client' of the Attorney General is the people of the state"³⁰⁰ The attorneys general explained in the brief that they have a duty to uphold the state constitution—whether in the face of a state law that conflicts with the constitution, or as against a claim that the state constitution violates the Federal Constitution.³⁰¹

Attorney General Herring's memorandum also cited federal examples to justify his refusal to defend Virginia's marriage amendment, including five opinions by the Office of Legal Counsel.³⁰² Each of these opinions, however, addressed the refusal to defend or enforce a federal statute that either unconstitutionally encroached upon the President's delegated authority or contradicted the plain language of the Constitution.³⁰³ These are the two longstanding exceptions to a duty to defend.³⁰⁴

Two of the five opinions cited by Attorney General Herring discussed the general duty of the President to defend and enforce acts of Congress while setting forth the longstanding exceptions to that duty.³⁰⁵ One of those two, a 1980 opinion (Opinion 4a), which is the earliest of the opinions cited and often cited on the topic of the duty to defend and enforce, was drafted in response to a letter from the Chairman of the Senate Subcommittee on Limitations of Contracted and Delegated Authority.³⁰⁶ Opinion 4a answers eleven questions posed by the Chairman to support the Justice Department's position that there are circumstances when the executive branch can deny the validity of acts of Congress.³⁰⁷ Those instances included situations where the law unconstitutionally encroached upon the executive's delegated authority or where the law was patently unconstitutional.³⁰⁸ In Opinion 4a, the Attorney General also stated that he "concur[red] fully in the view expressed by nearly all of my predecessors that when the Attorney General is confronted with such a choice, it is almost always the case that he can best discharge the responsibilities of his office by defending and enforcing the Act of Congress."³⁰⁹

The other opinion (Opinion 18) that generally discussed the executive's authority to refuse to defend or enforce an act of Congress concurred with Opinion

298. See *Davidson*, 79 P.3d at 1229.

299. *Id.* at 1225.

300. Brief, *supra* note 293, at *6.

301. See *id.* at *9–10.

302. See Memorandum in Support of Change in Legal Position by Defendant Janet M. Rainey, *supra* note 124, at 3–4.

303. See *id.*

304. See *infra* Part IV.

305. See Memorandum in Support of Change in Legal Position by Defendant Janet M. Rainey, *supra* note 124, at 3–4.

306. See The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4a Op. O.L.C. 55 (1980).

307. See *id.* Nine of the questions asked for specific authority from the English constitutional history, the Constitutional Convention, Supreme Court opinions, attorney general opinions, statutory or legislative history, scholarly work, ethical pronouncements, or bar association materials to support the Justice Department's position that it could deny the validity of acts of Congress. *Id.* at 57–62.

308. See *id.* at 59–60.

309. *Id.* at 55.

4a.³¹⁰ Opinion 18 explained that the “President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency.”³¹¹ The assistant attorney general cautioned, however, that the President should also “base his decision to comply (or decline to comply) in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch.”³¹² In other words, the President should attempt to preserve justiciability for any suit seeking to challenge the validity of the act where it is questionable whether the act is constitutional.

The other three cited opinions stand for the general proposition that the President can refuse to defend or enforce an act of Congress that unconstitutionally encroaches upon the President’s constitutionally delegated authority.³¹³ One of those opinions (Opinion 8) involved a law that retroactively extended the term of bankruptcy judges after their terms had expired, which the attorney general’s office asserted violated the Appointments Clause given that the President, not Congress, had authority to appoint bankruptcy judges.³¹⁴ However, Opinion 8 explains that “[i]t is generally inconsistent with the Executive’s duty, and contrary to the allocation of legislative power to Congress, for the Executive to take actions which have the practical effect of nullifying an Act of Congress.”³¹⁵

Opinion 8 also reiterated that historically there have been two categories of cases where the executive has chosen not to defend an act of Congress.³¹⁶ The first category of cases involved those the executive believes to be so clearly unconstitutional “as to be indefensible but which do not trench on separation of powers.”³¹⁷ The opinion characterized that category of cases as “exceedingly rare.”³¹⁸ The second category involves statutes the executive believes “usurp executive authority and therefore weaken the President’s constitutional role.”³¹⁹

The two other opinions cited (Opinion 16 and Opinion 14) involved acts of Congress that encroached upon the President’s authority to control foreign affairs.³²⁰

310. See Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199 (1994) [hereinafter Opinion 18].

311. *Id.* at 201.

312. *Id.*

313. See Memorandum in Support of Change in Legal Position by Defendant Janet M. Rainey, *supra* note 124, at 3–4.

314. See Recommendation that the Department of Justice Not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984, 8 Op. O.L.C. 183 (1984) [hereinafter Opinion 8].

315. *Id.* at 194.

316. See *id.*

317. *Id.*

318. *Id.* The opinion indicates in a footnote three prior situations where the executive had refused to execute or defend a statute. The first involved a private suit challenging the constitutionality of a federal law that provided federal funds for hospitals having separate but equal facilities. The United States intervened and took the position that the statute was unconstitutional. The second instance involved former Attorney General Civiletti’s refusal to defend the Public Broadcasting Act of 1967 and the third instance involved the Attorney General Civiletti’s refusal to prosecute an alleged violation of a statute prohibiting the mailing of truthful, non-deceptive advertising regarding abortions. Opinion 8, *supra* note 315, at 194–95 & n.2.

319. *Id.* at 195.

320. See Memorandum in Support of Change in Legal Position by Defendant Janet M. Rainey, *supra* note 124, at 3–4.

Opinion 16 addressed a law that prohibited the issuance of two passports to United States foreign diplomats despite the fact that those serving in the Middle East needed two passports in order to travel freely between Israel and the Arab nations.³²¹

Opinion 14 addressed an act of Congress that required the President to permit a member of Congress to be present at certain foreign negotiations.³²² The Attorney General's opinion explained that the law infringed on the President's exclusive authority to conduct negotiations on behalf of the United States abroad.³²³ Opinion 14 cited prior United States Supreme Court precedent for the proposition that the President held "exclusive authority to represent the United States abroad."³²⁴ Citing Alexander Hamilton's Federalist No. 78, the opinion explained the delicate balancing required in deciding whether to defend or enforce an act of Congress:

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.³²⁵

Attorney General Herring's memorandum also cited two United States Supreme Court decisions for the proposition that the Supreme Court has implicitly approved the President's power not to enforce an unconstitutional statute.³²⁶ In *Myers v. United States*,³²⁷ a federal statute provided that postmasters "shall be appointed and may be removed by the President by and with the advice and consent of the Senate. . . ."³²⁸ Ignoring the law, the President removed a postmaster without the advice and consent of the Senate.³²⁹ The question presented in the case was whether "under the Constitution the President has the exclusive power of removing executive officers of

321. See Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18 (1992) [hereinafter Opinion 16]. The State Department concluded that the law unconstitutionally intruded upon the President's authority to conduct diplomacy on behalf of the United States as it could interfere with the discretion and flexibility needed to send diplomats to different countries. For example, "U.S. officials traveling to the Middle East could be expected to face obstacles to their entry to many Arab League countries if their passports reflect travel to Israel." *Id.* at 25.

322. See Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37, 37–38 (1990) [hereinafter Opinion 14].

323. See *id.* at 44.

324. *Id.* at 39.

325. *Id.* at 47. The Attorney General similarly explained in Opinion 16 that a law that unconstitutionally encroached upon the executive's delegated powers—a law that is passed in contradiction of the Constitution—is not a valid law and therefore is not treated as "the supreme Law of the Land." Opinion 16, *supra* note 322, at 32.

326. See Memorandum in Support of Change in Legal Position by Defendant Janet M. Rainey, *supra* note 124, at 4.

327. *Myers v. United States*, 272 U.S. 52 (1926).

328. *Id.* at 107.

329. See *id.*

the United States whom he has appointed by and with the advice and consent of the Senate.”³³⁰ In a suit for lost wages, the Supreme Court declared the statute unconstitutional as it conflicted with the constitutional grant of exclusive power to the President of removing executive officers who have been appointed by the President with the advice and consent of the Senate.³³¹

In *Freytag v. Commissioner*,³³² the Court concluded that the authority Congress had granted the Chief Judge of the United States Tax Court to appoint special trial judges did not transgress the structure of separated powers.³³³ The Court engaged in a lengthy discussion about the original intent behind the separation of powers, how the separation of powers had built into it the ability of one branch to prevent encroachment by another branch, and the scope of the federal appointment power.³³⁴ In a concurring opinion, Justice Scalia explained that to prevent against legislative encroachments upon the executive branch’s delegated power, the President had the authority to veto laws “or even to disregard them when they are unconstitutional.”³³⁵

Finally, the memorandum cited two instances where solicitor generals had filed briefs as *amicus curiae* arguing that a particular law was unconstitutional.³³⁶ In one case, *Metro Broadcasting, Inc. v. FCC*,³³⁷ the Solicitor General took the position that the “minority distress sale policy, which permits certain licenses to be transferred only to minority-controlled firms, violate[d] the equal protection component of the Fifth Amendment.”³³⁸ The solicitor general argued that the law would not withstand the strict scrutiny standard.³³⁹ In that case, the Federal Communications Commission was represented by its own general counsel.³⁴⁰ The second case mentioned by Attorney General Herring was *Buckley v. Valeo*.³⁴¹ However, in that case, the then-solicitor general filed a brief defending the constitutionality of the election laws on behalf of the Federal Elections Commission but then joined a portion of an *amicus curiae* brief that “addresses the problem of the scope of the Federal Election Commissioner’s powers, which apparently trench on authority reserved to the Executive by Article II of the Constitution.”³⁴² As discussed below, the positions

330. *Id.* at 106.

331. *See id.* at 176.

332. *Freytag v. Commissioner*, 501 U.S. 868 (1991).

333. *See id.* at 870.

334. *See id.* at 870–92.

335. *Id.* at 906 (Scalia, J., concurring).

336. *See* Memorandum in Support of Change in Legal Position by Defendant Janet M. Rainey, *supra* note 124, at 4.

337. *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990).

338. Brief for the United States as *Amicus Curiae* Supporting Respondent Shurberg Broad. of Hartford, Inc., *Astroline Commc’ns Co. v. Shurberg Broad. of Hartford, Inc.*, 493 U.S. 1018 (1990) (No. 89-700), 1989 WL 1127048 at *11.

339. *See id.* at *14.

340. *See id.* at *29. The FCC’s website explains that “The Office of General Counsel of the Federal Communications Commission serves as the chief legal advisor to the Commission and its various bureaus and offices. The Office of General Counsel also represents the Commission in litigation” *See Office of General Counsel*, FCC, <https://www.fcc.gov/office-general-counsel> (last visited Oct. 17, 2015).

341. *See* Memorandum in Support of Change in Legal Position by Defendant Janet M. Rainey, *supra* note 124, at 4.

342. Brief of the Attorney General as Appellee and for the United States as *Amicus Curiae*, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436, 75-437), 1975 WL 412237, at *2.

taken by the solicitors general in *Metro* and *Buckley*, if taken by a state attorney general, would be inappropriate in *Metro* but appropriate in the *Buckley* case. Significantly, in *Metro* the solicitor general refused to enforce based on his interpretation of the Constitution, whereas in *Buckley* the law entrenched upon the expressly delegated authority of the President.³⁴³ The Supreme Court agreed with the solicitor general's position and declared those portions of the Federal Election Campaign Act unconstitutional.³⁴⁴

III. PROBLEMS INHERENT IN A SUBJECTIVE TEST OF UNCONSTITUTIONALITY

Although attorneys general are vested with discretion in handling litigation, the attorney general is ultimately a civil servant. That duty as a civil servant translates into an expectation that the attorney general will defend duly enacted laws. When an attorney general refuses to defend the laws based on a subjective belief or preference, the rule of law is undermined because it injects instability, unpredictability, and subjectivity into the governing process. The refusal to defend essentially confers upon the attorney general an absolute veto power over the legislative process. The attorney general's refusal to defend, or worse, his active litigation against, the constitutionality of duly enacted laws, undermines the public confidence in the integrity of the office as it becomes just another political player when the public expects more of a detached neutral.

The United States is described as a "rule of law" system.³⁴⁵ It is a phrase "often used but difficult to define."³⁴⁶ The "rule of law" is frequently described as a government of laws, not of men.³⁴⁷ That understanding is consistent with Samuel Rutherford's 1644 work entitled *Lex, Rex – The Law and the Prince*, which articulated the governmental philosophy that the "law is king" as compared to the king as the law.³⁴⁸ The Magna Carta is often cited as a significant victory for the "rule of law" because King John acknowledged in writing that he was subject to the law.³⁴⁹

The most recent edition of Black's Law Dictionary defines the "rule of law" as the "supremacy of regular as opposed to arbitrary power" and includes the idea "that

343. See Brief for the United States as Amicus Curiae Supporting Respondent Shurberg Broad. of Hartford, Inc., *supra* note 339, at *2; Brief of the Attorney General as Appellee and for the United States as *Amicus Curiae*, *supra* note 343, at *107–120.

344. See *Buckley v. Valeo*, 424 U.S. 1, 140 (1976).

345. See, e.g., Douglas McElvy, *No Greater Gift*, 66 ALA. LAW. 252, 252 (2005) ("If you paint a portrait of America's national character, the Rule of Law would be a dominant image.")

346. Part I: *What is the Rule of Law*, in Dialogue on the Rule of Law 4, available at <http://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf> [hereinafter ABA Paper].

347. See James McClellan, *Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government* 282 (3d ed. 2000), available at http://lf-oll.s3.amazonaws.com/titles/679/McClellan_0088_EBk_v6.0.pdf.

348. See McElvy, *supra* note 346, at 253. See also McClellan, *supra* note 348, at 284 ("Under God, said the exponents of the rule of law, the law governs us; it is not by mere men that we ought to be governed; we can appeal from the whims and vagaries of human rulers to the unchanging law.")

349. See McElvy, *supra* note 346, at 252. See also HERMAN BELZ, CONSTITUTIONALISM AND THE RULE OF LAW IN AMERICA (2009).

every person is subject to the ordinary law within the jurisdiction.”³⁵⁰ The sixth edition of Black’s Law Dictionary stated it slightly differently as “the supremacy of law; provides that decisions should be made by application of known principles or laws without the intervention of discretion in their application.”³⁵¹ One author characterized it this way:

In essence, rule of law refers to having rules that are established, known, accepted, and respected—by both government and non-government actors. Rule of law invokes a predictable legal system with fair, transparent, and effective judicial institutions to protect citizens against the arbitrary use of state authority and lawless acts. Rule of law also implies a set of procedures and processes for the resolution of disputes that are accessible and fair to all.³⁵²

The American Bar Association Division for Public Education has published materials discussing the meaning of the rule of law.³⁵³ Key aspects of the discussion paper included the following ideas:

- “no one person is able to gain absolute power and stand above the law”;³⁵⁴
- “a person’s fate should not be in the hands of a single individual”;³⁵⁵
- the need in a republican form of government for respect of the laws;³⁵⁶
- that chaos ensues when every individual is free to determine for himself what is law;³⁵⁷
- that “the laws must not be arbitrary”;³⁵⁸
- the rule of law is “intended to promote stability”;³⁵⁹ and

350. BLACK’S LAW DICTIONARY 1448 (9th ed. 2009).

351. BLACK’S LAW DICTIONARY 1332 (6th ed. 1990). *See also* McClellan, *supra* note 348, at 283 (“The test is not what the rule is called, but whether the rule is general, known, and certain.”).

352. Sidney B. Brooks, *Building Blocks for a Rule of Law*, 36-DEC Colo. Law. 19, 19–20 (2007).

353. ABA Paper, *supra* note 347, at 4.

354. *Id.* *See also* Stacy Pepper, *The Defenseless Marriage Act: The Legitimacy of President Obama’s Refusal to Defend DOMA* § 3, 24 STAN. L. & POL’Y REV. 1, 12 (2013) (recognizing that “a President free to disregard the will of the Court and Congress is dangerously tantamount to a king.”).

355. ABA Paper, *supra* note 347, at 4. *See also* Trott, *supra* note 187, at 35 (2003) (“[T]he Founders made it crystal clear in drafting our Constitution that our government would be with the consent of the governed, and that we would be guided not by the whim of self-anointed leaders, but by the rule of law.”).

356. *See* ABA Paper, *supra* note 347, at 5 (Elizabeth Cady Stanton is quoted as stating that “[i]t is very important in a republic, that the people should respect the laws, for if we throw them to the winds, what becomes of civil government?”).

357. *Id.* (U.S. Supreme Court Justice Felix Frankfurter is quoted as stating that “[i]f one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny.” *United States v. United Mine Workers*, 330 U.S. 258, 312 (1947)). *See also* Levey & Klukowski, *supra* note 28, at 380 (leaving the enforcement or defense of laws to the subjective whim of each administration is a “recipe for chaos.”).

358. ABA Paper, *supra* note 347, at 5. The ABA paper quoted U.S. Court of Appeals Judge Diane Wood. *See* Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHIC. L. REV. 455, 457 (2003).

359. ABA Paper, *supra* note 347, at 5.

- that “people can expect predictable results from the legal system.”³⁶⁰

The ABA paper also referred to the World Justice Project’s working definition of the rule of law as comprising four principles.³⁶¹ Those principles included “[a] system of self-government in which all persons, including the government, are accountable under the law” and “[a] system based on fair, publicized, broadly understood and stable laws.”³⁶² John Locke similarly explained that:

[f]reedom of men under government, is, to have a standing rule to live by, common to every one of that society . . . a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.³⁶³

When a government official charged with defending duly enacted laws refuses to do so, he puts himself above the law—not subject to it.

The separation of powers built into the American system is based on a foundational premise that governmental authority is necessarily limited.³⁶⁴ Key aspects of a limited government are that decision-makers are bound by express and certain constitutional standards and restricted to acting within their “delegated authority.”³⁶⁵ Writing in the Federalist Papers, James Madison explained that in structuring the system of government, the branches must be constructed such that the ambition of one branch can counteract the ambition of another.³⁶⁶ He further cautioned that “[t]he accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”³⁶⁷

The antithesis, then, of a limited government is a “unitary and centralized government, or a government in which all the functions or functionaries were concentrated in a single office”³⁶⁸ Such a government would be one “that invited despotism and would inevitably become tyrannical and corrupt.”³⁶⁹ Thus, the

360. *Id.*

361. *Id.* at 6.

362. *Id.*

363. D. Brooks Smith, *Promoting the Rule of Law and Respecting the Separation of Powers: The Legitimate Role of the American Judiciary Abroad*, 7 AVE MARIA L. REV. 1, 1 (2008) (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 284 (Peter Laslett ed., 1988)).

364. See McClellan, *supra* note 348, at 285 (“[T]he Constitution rested on the proposition that all constitutional government is by definition limited government.”).

365. DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 15 (1988). See also McClellan, *supra* note 348, at 285.

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

367. THE FEDERALIST NO. 47 (James Madison).

368. McClellan, *supra* note 348, at 285.

369. *Id.* See also THE FEDERALIST NO. 51 (James Madison) Madison explained the basis of the fear that people in power, if left unrestrained and unchecked, would abuse their authority. “If men were angels no government would be necessary.” *Id.* Men (and women) are not angels and, thus, we must “enable the government to control the governed; and in the next place oblige it to control itself.” *Id.*

separation of powers that exists in our state and federal governments is a “means to certain ends,” which includes “preservation of political liberty”³⁷⁰

An attorney general who refuses to fulfill his obligation to defend duly enacted laws merges legislative and executive powers in one branch or individual. That encroachment into the legislative function by an executive officer thus threatens our liberties by ignoring the separation of powers and eroding the rule of law. The threat is magnified if no one else has standing to defend the laws that an attorney general has refused to defend.

As *Hollingsworth* demonstrates, even if state law grants standing for parties to intervene to defend the law, the federal courts might conclude that state standing rules are insufficient to confer Article III standing.³⁷¹ Thus, as happened in the California litigation, the state defendants refused to defend, and the amendment’s proponents were granted intervention to defend, the amendment.³⁷² When the court declared the amendment unconstitutional, no one except the intervenors attempted to appeal.³⁷³ The Supreme Court of the United States eventually held that they lacked Article III standing and, as a result, the Ninth Circuit decision was vacated—leaving only a trial court opinion that arose from litigation where the state failed to defend its duly enacted laws and constitutional amendment.³⁷⁴ After *Hollingsworth*, a federal court might simply deny a request to intervene, leave no one to defend the laws, and then declare laws unconstitutional by default.³⁷⁵

The federal-state conflict in Alabama, discussed earlier, highlights how vital it is to jealously guard against governmental overreaching outside its delegated sphere of authority. The brief submitted on behalf of the relators in the Alabama case discussed the importance of, and judicial precedent for, a state’s refusal to independently determine the meaning of the United States Constitution.³⁷⁶ In a seminal case involving the Fugitive Slave Act, the Supreme Court of Washington declared the Act unconstitutional, which led to freeing a captured slave.³⁷⁷ Writing for the court, Justice Smith explained:

370. Matheson, *supra* note 187, at 6. Another important component of limited government is that there are limits on government even when they are acting within their delegated sphere because all law is subject to a higher law. LUTZ, *supra* note 366, at 15. For example, the Declaration of Independence recognizes that certain rights are inalienable and thus cannot be taken away by government. *Id.* Martin Luther King, Jr., in his Letter from the Birmingham Jail echoed this same truth when he stated that “there are two types of laws: There are *just* and there are *unjust* laws.” Martin Luther King, Jr., *Letter from a Birmingham Jail*, (Apr. 16, 1963), available at <http://www.nlnrac.org/american/american-civil-rights-movements/primary-source-documents/letter-form-a-birmingham-jail>. He explained that a “just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law.” *Id.*

371. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

372. *Id.* at 2659.

373. *Id.*

374. *Id.*

375. *Hollingsworth* did indicate that where a state statute authorized state officials other than the attorney general to represent the state in federal litigation, then those officials would have Article III standing. It also indicated, however, that when those state officials became private parties, they no longer had Article III standing to represent the state’s interest in defending a duly enacted law. *Id.* at 2664–65.

376. Relators Alabama Policy Institute and Alabama Citizens Action Program’s Brief Addressing the Effect of *Obergefell* on this Court’s Existing Orders, *Ex parte* State *ex rel.* Ala. Policy Inst. v. King, No. 1140460, 2015 WL 1036064 (Ala. Mar. 10, 2015).

377. *In re* Booth, 3 Wis. 157, 160 (1854).

But believing as I do, that every state officer who is required to take an oath to support the constitution of the United States as well as of his own state, was designedly placed by the federal constitution itself as a sentinel to guard the outposts as well as the citadel of the great principles and rights which it has intended to declare, secure and perpetuate, I cannot shrink from the discharge of the duty now devolved upon me. . . . I believe most sincerely and solemnly that *the last hope of free, representative and responsible government rests upon the state sovereignties and fidelity of state officers to their double allegiance*, to the state and federal government; and so believing, I cannot hesitate in performing a clear, an indispensable duty. . . . Our system of government is two fold, and so is our allegiance. . . . To yield a cheerful acquiescence in, and support to every power constitutionally exercised by the federal government, is the sworn duty of every state officer; but *it is equally the duty to interpose a resistance, to the extent of his power, to every assumption of power on the part of the general government, which is not expressly granted or necessarily implied in the federal constitution.*³⁷⁸

In a subsequent appeal in the same case, Justice Smith again wrote for the court, explaining that “[i]t is much safer to resist unauthorized and unconstitutional power, at its very commencement, when it can be done by constitutional means, than to wait until the evil is so deeply and firmly rooted that the only remedy is revolution.”³⁷⁹ The Founders did not envision that states would so readily permit federal encroachment upon the authority delegated by the people to the state.³⁸⁰ In fact, in Federalist No. 46, Madison stated that there was no fear that the people would become too attached to the federal government because “it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered.”³⁸¹ He actually called state officials “traitors” who would permit such encroachment.³⁸²

An attorney general who refuses to defend a law because she personally believes it is unconstitutional ignores the important role that *each* constitutional officer at *every* level of government plays in preserving our liberties by ensuring that each branch is restrained to act only within its delegated authority.

Addressing the refusal of fellow attorneys general to defend their states’ marriage laws, Colorado Attorney General John Suthers aptly described the negative impact on the respect for the legal system that results from their refusal to defend

378. Relators Alabama Policy Institute and Alabama Citizens Action Program’s Brief Addressing the Effect of Obergefell on this Court’s Existing Orders, *supra* note 377, at 21–22 (quoting *In re Booth*, 3 Wis. at 122–23 (1854)) (sic) (emphasis added).

379. *In re Booth*, 3 Wis. at 201 n.1.

380. THE FEDERALIST NO. 46 (James Madison).

381. *Id.*

382. *Id.*

laws duly enacted through the political process.³⁸³ He referred to the refusal of an attorney general to defend the laws as a “litigation veto.”³⁸⁴ “It appears that some attorneys general are wielding the litigation veto for the same reasons a governor might wield a constitutional veto: They strongly disagree with the law. But in contrast to the president or a governor, there is no constitutional authority for this litigation veto.”³⁸⁵ An attorney general is a member of the executive branch but does not yield the veto power held by the Chief Executive.³⁸⁶

He explained the natural temptation to use one’s official power to garner support from a political base for future political aspirations, which, in the short term, may seem “a terrific thing.”³⁸⁷ But, “in the longer term, this practice corrodes our system of checks and balances, public belief in the power of democracy and ultimately the moral and legal authority on which attorneys general must depend.”³⁸⁸ The ends simply do not justify the means. Nor do we want a system of law that is dictated by the maxim that “might makes right.” Attorney General Suthers explained that when attorneys general refuse to defend laws they are:

viewed as simply one more player in a political system rather than as legal authorities in a legal system. . . . It can be hard to resist the urge to effectively purge from the books a law one finds unwise and possibly unjust. My hope, though, is that my colleagues will recognize that our system of divided power – however messy, frustrating or imperfect – is more important than any particular law it may produce.³⁸⁹

Attorney General Suthers understands, as our founders did, that jealously preserving the separation of powers is vital to preserving the rule of law and our liberties.

IV. STRIKING A BALANCE THAT RESPECTS THE RULE OF LAW

Although most of the scholarship has focused on whether a federal executive has the authority to refuse to defend or enforce a law, the same separation-of-powers principles are implicated at the state level. Although each branch has the responsibility to interpret the Constitution,³⁹⁰ the tension arises in what steps one branch can take when a state law, action, or ruling is considered unconstitutional.

383. John Suthers, *Suthers: A ‘Veto’ Attorneys General Shouldn’t Wield*, PILOTONLINE (Feb. 4, 2014), <http://hamptonroads.com/2014/02/suthers-veto-attorneys-general-shouldnt-wield>.

384. *Id.*

385. *Id.*

386. See U.S. CONST. art. III, § 7, cl. 1.

387. Suthers, *supra* note 384.

388. *Id.*

389. *Id.* Speaking directly to the marriage question, Attorney General Suthers added that “[o]ne must be cynical when an attorney general refuses to defend a controversial law as ‘clearly unconstitutional’ when there is no binding precedent and it is apparent to most knowledgeable people that the U.S. Supreme Court is likely to decide the case on a 5-4 vote.” *Id.*

390. See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994–1995) (“The power to interpret law is not the sole province of the judiciary; rather,

The starting point to determine the scope of each branch's authority should be the text of the relevant constitution. The U.S. Constitution and most, if not all, state constitutions specify the branches of government and then delegate specific powers to each.³⁹¹ Turning first to the U.S. Constitution, the Constitution grants each branch a specific authority to act as a check against unconstitutional acts of a coordinate branch.³⁹² Congress is given authority to impeach the President or members of the federal judiciary³⁹³ or effectively overrule the judiciary by enacting legislation that undermines a judicial opinion.³⁹⁴ The President has the authority to check Congress by vetoing a bill.³⁹⁵ The judiciary's powers are simply described in the Constitution as being vested with the "judicial Power"³⁹⁶ Alexander Hamilton, in Federalist No. 78, described the power of the judiciary as ascertaining the meaning of the constitutional provision or legislative act in question.³⁹⁷ He explained, however, that the judiciary is to treat the Constitution as fundamental law and not resort to "substitut[ing] their own pleasure to the constitutional intentions of the legislature."³⁹⁸ The same three-branch structure is replicated in virtually all states.³⁹⁹ A difficult balancing act exists when an executive who is tasked only with executing duly enacted laws believes a law is unconstitutional. Does the executive—whether a president, governor, or attorney general—possess the authority to refuse to enforce or defend the law?

A. The Historical Grounds for Refusing to Enforce or Defend

Historically, there have been two, recognized exceptions to the duty to defend and enforce: when the law unconstitutionally encroaches upon the power of the executive or when the law is patently unconstitutional based on the text of the Constitution.⁴⁰⁰ Each is "premised on the assumed, understood duty of the attorney general to defend and enforce because the separation of powers requires it."⁴⁰¹ In

it is a divided, *shared* power not delegated to any one branch but ancillary to the functions of all of them within the spheres of their enumerated powers."); THE FEDERALIST NO. 49 (James Madison) (stating with respect to the executive and judicial branches that "[t]he several departments being perfectly co-ordinate by the terms of their common commission, none of them, it is evidence, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.").

391. See, e.g., CAL. CONST. art. III, § 3; GA. CONST. art. I, § 2, para. 3; ILL. CONST. art. II, § 1; KY. CONST. § 27; MINN. CONST. art. III, § 1; MISS. CONST. art. I, § 1; MO. CONST. art. II, § 1; MONT. CONST. art. III, § 1; N.C. CONST. art. I, § 6; S.C. CONST. art. I, § 8; TENN. CONST. art. II, § 1; TEX. CONST. art. II, § 1; W. VA. CONST. art. V, § 1.

392. U.S. CONST. art. I; *id.* art. II; *id.* art. III.

393. *Id.* art. I, § 3; *id.* art. II, § 4; *id.* art. III, § 1.

394. *Id.* art. I, § 1 (stating Congress is delegated *all* legislative powers without a limitation that it be bound by a prior opinion).

395. *Id.* § 7.

396. *Id.* art. III, § 1.

397. THE FEDERALIST NO. 78 (Alexander Hamilton).

398. *Id.*

399. See Matheson *supra* note 187, at 6.

400. Levey & Klukowski, *supra* note 28, at 407.

401. See *id.* at 391 (explaining that the tension of the President's duty pursuant to the Take Care Clause and his oath to preserve, protect, and defend the Constitution is best balanced by defending a law unless it is clearly unconstitutional).

those circumstances, the exceptions would be “‘exceedingly rare.’”⁴⁰² As discussed earlier, there are unique issues presented as a result of an attorney general who is tasked with representing the state in civil litigation but refuses to defend a constitutional attack on a statute or amendment.

1. The President or Governor Can Refuse to Enforce a Law That Unconstitutionally Encroaches upon the Executive’s Constitutionally Delegated Authority

When a legislative act unconstitutionally encroaches on the constitutionally delegated authority of the executive branch, the executive can refuse to enforce it.⁴⁰³ Former United States Supreme Court Chief Justice Salmon P. Chase offered a rationale for the exception:

Nothing is clearer to my mind than that acts of Congress not warranted by the Constitution are not laws. In case a law believed by the President to be unwarranted is passed, notwithstanding his veto, by the required two-thirds majority, it seems to me that it is his duty to execute it precisely as if he held it to be constitutional, except in the case where it directly attacks and impairs the Executive power confident to him by the Constitution.⁴⁰⁴

As discussed above, United States attorneys’ general opinions have consistently taken this position. In Opinion 8, the attorney general opined that the retroactive extension of the term of bankruptcy judges after their terms had expired violated the Appointments Clause because the President, not Congress, had authority to appoint bankruptcy judges.⁴⁰⁵ Opinion 16 involved a law that prohibited the issuance of two passports to United States foreign diplomats despite the fact that those serving in the Middle East needed two passports in order to travel freely between Israel and the Arab nations.⁴⁰⁶ Opinion 14 addressed an act of Congress that required the President to permit a member of Congress to be present at certain foreign negotiations.⁴⁰⁷ The Attorney General’s opinion explained that the law infringed on the President’s exclusive authority to conduct negotiations on behalf of the United States abroad.⁴⁰⁸

In *Myers* and *Freytag*, the Supreme Court of the United States affirmed the President’s authority to refuse to enforce (or comply with) laws that unconstitutionally encroach upon the President’s power.⁴⁰⁹ In *Myers*,⁴¹⁰ the Supreme

402. *Id.* at 411 (quoting Recommendation that the Department of Justice not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments & Fed Judgeship Act of 1984, 8 Op. O.L.C. 183, 194 (1984)).

403. John E. Beerbower, *Ex parte McCardle and the Attorney General’s Duty to Defend Acts of Congress*, 47 U.S.F. L. REV. 647, 678 (2013).

404. JACOB W. SHUCKERS, *THE LIFE SALMON PORTLAND CHASE* 577 (1874).

405. *See supra* notes 315–20 and accompanying text.

406. *See supra* note 322 and accompanying text.

407. *See* Opinion 14, *supra* note 323.

408. *See supra* note 322 and accompanying text.

409. *See* cases cited *supra* notes 328–336 and accompanying text.

410. *Myers v. United States*, 272 U.S. 52 (1926).

Court declared unconstitutional a federal statute prohibiting presidential removal of postmasters without the advice and consent of the Senate.⁴¹¹ In *Freytag*,⁴¹² the Court upheld a statute granting the Chief Judge of the United States Tax Court authority to appoint special trial judges but affirmed the ability of one branch to prevent encroachment by another branch.⁴¹³

2. The Executive Can Refuse to Enforce a Law That Is Patently Unconstitutional

An executive also can refuse to enforce a law when it is patently unconstitutional.⁴¹⁴ As recent as 1976:

the top Justice Department officials described what laws fell into the second exception using language such as “transparently invalid;” “so patently unconstitutional that it cannot be defended;” “so clearly unconstitutional as to be indefensible;” “the most blatantly unconstitutional;” “prior precedent overwhelmingly indicates that the statute is valid;” and “statutes whose constitutionality has been undermined by Supreme Court decisions.”⁴¹⁵

Patent unconstitutionality is not premised, however, solely on the executive’s beliefs and interpretations that are not grounded on the actual text of the Constitution or prior, controlling precedent. Rather, it should be applied in the same manner as the first exception where one branch encroaches on the express, delegated authority of another branch. Thus, where the actual text of the Constitution conflicts with the enacted law, it is patently unconstitutional.

In a recent article, Indiana Attorney General Gregory F. Zoeller agreed that the patently unconstitutional standard should, in theory, require an attorney general to defend laws that the attorney general personally believed were unconstitutional, but pointed out that too many are “applying their own independent judgment” or “[a]t worst . . . abandoning their duty for purely political reasons.”⁴¹⁶ Attorney General Zoeller asserts that a Rule 11 exception is stronger and would deter attorneys general from refusing to defend based on their personal opinions.⁴¹⁷ However, Pennsylvania Attorney General Kane refused to defend that state’s marriage laws in 2013, stating

411. *Id.* at 60.

412. *Freytag v. Commissioner*, 501 U.S. 868 (1991).

413. *Id.* at 906 (Scalia, J., concurring).

414. *Levey & Klukowski*, *supra* note 28, at 410.

415. *Id.* at 412.

416. Zoeller, *supra* note 173, at 549.

417. *Id.* at 549–50. Seth Waxman, former Solicitor General during President Clinton’s administration has similarly stated that the “President, acting through his Solicitor General, rejects a law as unconstitutional only when no ‘professionally respectable arguments can be made in support of its constitutionality.’” Stacy Pepper, *The Defenseless Marriage Act: The Legitimacy of President Obama’s Refusal to Defend DOMA § 3*, 24 STAN. L. & POL’Y REV. 1, 12 (2013).

that she could not “ethically defend the constitutionality” of them.⁴¹⁸ She cited Pennsylvania’s Rules of Professional Conduct to support her position that she had an “ethical obligation . . . to withdraw from a case in which the lawyer has a fundamental disagreement with the client.”⁴¹⁹ The fundamental disagreement was based on the attorney general’s belief that the marriage laws were “wholly unconstitutional.”⁴²⁰ Similarly, the Oregon attorney general would not defend [the marriage laws] because she said the law “[could not] withstand a federal constitutional challenge under any standard of review.”⁴²¹

To the extent an attorney general believes the law is wholly unconstitutional, the attorney general could assert that defending the law would violate Federal Rule of Civil Procedure 11. Rule 11 states that by submitting a document to the court, an attorney or party certifies that “to the best of the person’s knowledge, information, and beliefs . . . the claims . . . are warranted by existing law”⁴²² When an attorney general asserts that a law is wholly unconstitutional and cannot withstand federal constitutional challenge under any standard of review, the attorney is asserting that there are no claims or arguments to be made under existing laws in defense of the law.⁴²³ The Rule 11 exception leaves a great deal of room for subjective beliefs of unconstitutionality. The patently unconstitutional exception, however, decreases the subjectivity to the extent a law must be defended unless it conflicts with the plain text of the Constitution—not if it allegedly conflicts with lower court interpretations of the text of the Constitution or with a higher court decision that is not directly on point.

One potential criticism of the patently unconstitutional exception is that it does not leave room for the coordinate duty of each branch of government to act as an independent check on the unconstitutional acts of another branch. There is a natural tension between the duty to defend and the duty to independently act as a check against unconstitutional actions of coordinate branches. Thus, the duty to defend cannot be absolute. The patently unconstitutional standard actually best balances the concerns as it curtails subjective determinations of unconstitutionality and limits exercise of powers to the text of the Constitution. Although there may be situations where it is questionable whether a law violates the plain text of the Constitution, most situations will more readily fall at either end of the spectrum. For example, if a law were passed stating that the Supreme Court had authority to declare war, there would be little doubt that the executive could properly refuse to defend or enforce that law because it directly contradicts the plain language of the Constitution.⁴²⁴

418. Joe Wolverton, II, *Pennsylvania Attorney General Refuses to Enforce State DOMA Law*, NEW AM. (July 21, 2013), <http://www.thenewamerican.com/culture/item/16044-pennsylvania-attorney-general-refuses-to-enforce-state-doma-law>.

419. *Id.*

420. *Id.*

421. Chokshi, *supra* note 119.

422. FED. R. CIV. P. 11.

423. *Id.*

424. U.S. CONST. art. I, § 8, cl. 11.

One case of patent unconstitutionality involved Mayor Michael Bloomberg in New York City.⁴²⁵ Shortly before the effective date of the Equal Benefits Law, the mayor began a declaratory judgment action against the city council, arguing that the Equal Benefits Law was preempted by provisions of the New York General Municipal Law, New York City Charter, and ERISA.⁴²⁶ The next day, the city council filed a petition to direct the mayor to immediately implement and enforce the local law that prohibited the city from doing business with certain vendors that discriminated in the provision of employment benefits between employees with spouses and those with domestic partners.⁴²⁷

The highest court in New York held that although the Mayor has “a duty to implement *valid* legislation passed by the City Council, whether over his veto or not,” he also has a “duty to comply with valid state and federal legislation, including state competitive bidding laws and ERISA.”⁴²⁸ Where a local law seems to the Mayor to conflict with a state or federal one, the Mayor’s obligation is to obey the latter . . .⁴²⁹ The court agreed with the mayor that the ordinance conflicted with state law requiring contracts to be awarded to the lowest responsible bidder.⁴³⁰

An older case from Nebraska presents another situation where the law was patently unconstitutional.⁴³¹ In *Van Horn*, the board of supervisors refused to act pursuant to a recent law on the claim that it was passed in clear violation of the constitutional mandate that no bill contain more than one subject.⁴³² The county attorney applied for a writ of mandamus directing the board to comply.⁴³³ Although the Supreme Court of Nebraska concluded that the bill did not contain two subjects, it rejected the city’s argument that ministerial officers must enforce the law regardless of its constitutionality.⁴³⁴ The court, relying on *Marbury v. Madison*, explained that ministerial officers are sworn to uphold the Constitution and are not bound to obey an unconstitutional statute.⁴³⁵ The court cautioned, however, that they should “exercise the greatest caution on such questions. A doubt as to the validity of a statute would not justify them in disregarding it. The peace of the community, the orderly conduct of government, require that only in clear cases of unconstitutionality should they refuse obedience to legislative acts.”⁴³⁶

In contrast, when a San Francisco mayor directed his clerks to begin marrying same-sex couples contrary to the marriage laws, the Supreme Court of California held he lacked the authority to refuse to enforce the law:

425. Council of the City of N.Y. v. Bloomberg, 846 N.E.2d 433 (N.Y. 2006).
 426. *Id.* at 440.
 427. *Id.* at 443.
 428. *Id.* at 437.
 429. *Id.*
 430. *Bloomberg*, 846 N.E.2d at 437.
 431. *Van Horn v. State ex rel. Abbott*, 64 N.W. 365 (Neb. 1895).
 432. *Id.* at 366.
 433. *Id.*
 434. *Id.* at 372.
 435. *Id.*
 436. *Van Horn*, 64 N.W. at 372.

[G]ranting every public official the authority to disregard a ministerial statutory duty on the basis of the official's opinion that the statute is unconstitutional would be fundamentally inconsistent with our political system's commitment to John Adams' vision of a government where official action is determined not by the opinion of an individual officeholder – but by the rule of law.⁴³⁷

One author echoed the court's sentiment when she explained that:

[i]n order to refuse to enforce a legislative enactment, the executive must be confident that the enactment is invalid based on the plain text of the higher law and judicial precedent. . . . If non-enforcement based solely on the executive's own interpretation of higher law were allowed, "any semblance of a uniform rule of law quickly would disappear"⁴³⁸

B. A Practical Approach to the Duty to Defend

Recognizing the duty of an attorney general to defend duly enacted laws is just the starting point for the proper remedy when an attorney general personally disagrees with the law, has publically spoken against the law, or refuses to defend it. Attorney General Suthers asserts that an attorney general should simply do his job and defend the laws—regardless of personal beliefs.⁴³⁹ Unfortunately, given how politicized the Office of Attorney General has become, it seems a better preservation of the rule of law to ensure a zealous defense of the law by someone who desires to defend the challenged statute or constitutional amendment.

The starting presumption in each state should be that an attorney general has a duty to defend the constitutionality of duly enacted laws. The duty arises from the fact that the attorney general derives its existing powers from the consent of the governed and, thus, is a servant of the people.⁴⁴⁰

An attorney general can refuse to defend the constitutionality of a duly enacted law or amendment where the law is clearly invalid because it either encroaches on the expressly delegated powers of another branch or conflicts with the express text of the Constitution.⁴⁴¹ "Clear invalidity," however, does not exist absent direct conflict with plain and express text of the Constitution, it does not exist where there are conflicting judicial rulings, and it does not exist simply because the public official disagrees with the law or personally believes it is unconstitutional.

If an attorney general believes a law is unconstitutional, and therefore cannot or will not defend the law, the attorney general can invoke the conflicts-of-interest

437. *Lockyer v. City & Cnty. of S.F.*, 95 P.3d 459, 499 (Cal. 2004).

438. Lisa-Beth C. Meletta, *Non-Enforcement by a Local Executive: Limitations of Judicial Review and Considerations to Restrain the Use of Executive Power*, 63 N.Y.U. ANN. SURV. AM. L. 511, 539 (2008).

439. See Suthers, *supra* note 384.

440. See *supra* notes 188–90 and accompanying text for a discussion of the attorney general acting as a servant of the people.

441. See *supra* Parts IV.A–B for a discussion of the two historical exceptions to the duty to defend.

exception. Under those circumstances, there should be in place a statutory provision that allows the governor to appoint outside counsel; allows the legislature to appoint outside counsel; or permits citizens, as relators, to defend the constitutionality of the law.⁴⁴² To alleviate the concern that a federal court would conclude that relators lacked standing under *Hollingsworth*, the statute would need to define a relator as a state official authorized to speak on behalf of the state in federal court for purposes of defending duly enacted laws when the attorney general has refused to do so.⁴⁴³

CONCLUSION

We are living in times when the maxim “might makes right” is leading interest groups to achieve their goals not through the proper legislative channels but through unconstitutional encroachments of each branch into the proper sphere of another branch. In 1985, Harvard Law Professor Harold Berman lamented the problem with that approach:

The law itself is becoming more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity. The historical soil of Western legal tradition is being washed away in the twentieth century, and the tradition itself is threatened with collapse.⁴⁴⁴

Benjamin Franklin is quoted as saying to a woman he met outside the constitutional convention that the Founders had given us a republican form of government, *if we could keep it*.⁴⁴⁵ We seem to have lost an understanding of the important link between separation of powers and protection of liberties. When governmental power is accumulated in the hands of one, it becomes arbitrary and subjective. We may be willing to dismiss such concerns when we achieve a “victory,” justifying the means with the end, but history has proven that absolute power corrupts and wields an increasingly uncontrollable power.

The men who signed the Declaration of Independence knew that freedom from tyranny was worth the price of their lives. As a result, the Founders designed a structure they believed would best protect its citizens from tyranny; political expedience for a desired result should not trample those protections. When attorneys general refuse to defend duly enacted laws, they refuse to perform their unique role in preserving separation of powers and the rule of law. Given the various and

442. See Beerbower, *supra* note 404, at 685 (“Any system that allows the Attorney General to refuse to argue in defense of an act of Congress necessitates an alternative mechanism by which some party would have standing to defend the statute.”); Levey & Klukowski, *supra* note 28, at 419 (stating the duty to defend “gives the American people their day in court . . .”).

443. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664–65 (2013) (suggesting that a state could not authorize private parties to represent state interests but that only state officers designated to represent the state interests in federal court would have Article III standing).

444. Harold J. Berman, *The Crisis of Legal Education in America*, 26 B.C. L. REV. 347, 351 (1985).

445. John F. McManus, “*A Republic, if You Can Keep It*”, NEW AM. (Nov. 6, 2000), <http://www.thenewamerican.com/usnews/constitution/item/7631-a-republic-if-you-can-keep-it>.

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constant encroachments upon power among the branches, it is vital that steps be taken to ensure that someone can constitutionally defend laws when the constitutional officer charged with doing so refuses to act.