

Duty to Defend and the Rule of Law

GREGORY F. ZOELLER*

INTRODUCTION	513
I. HISTORICAL VIEWS OF THE ATTORNEY GENERAL’S DUTY TO DEFEND	515
A. GENERAL DEVELOPMENT OF THE ROLE OF THE ATTORNEY GENERAL AS IT RELATES TO DEVELOPMENT OF THE RULE OF LAW	515
B. THE DUTY TO DEFEND AT THE FEDERAL LEVEL	521
C. THE DUTY TO DEFEND AT THE STATE LEVEL	524
D. SOME GENERAL CONCLUSIONS ABOUT THE DUTY TO DEFEND.....	528
II. WHEN CAN DUTY TO DEFEND GIVE WAY? RULE 11 AS GUIDEPOST.....	542
III. APPLICATION OF THE RULE 11 STANDARD TO PARTICULAR CASES	544
A. INDIANA’S IMMIGRATION LAW ALLOWING WARRANTLESS ARRESTS: NO DUTY TO DEFEND.....	544
B. COLORADO’S LAW PROHIBITING PUBLIC DISPLAY OF MARIJUANA MAGAZINES: NO DUTY TO DEFEND	545
C. TRADITIONAL MARRIAGE LAWS: DUTY TO DEFEND.....	546
IV. IMPLICATIONS OF THE DUTY TO DEFEND FOR ANCILLARY ATTORNEY GENERAL PRACTICES	551
A. IMPLICATIONS FOR USE OF OUTSIDE COUNSEL AND ASSUMPTION OF DEFENSE BY OTHER OFFICIALS.....	551
B. IMPLICATIONS FOR THE ADVISORY FUNCTION	553
CONCLUSION.....	556

INTRODUCTION

In a speech delivered at the 2014 winter meeting of the National Association of Attorneys General, U.S. Attorney General Eric Holder drew attention to a growing debate over the duty to defend statutes that an attorney general personally believes to be unconstitutional. According to Holder, state attorneys general may legitimately refuse to defend their states’ traditional definitions of marriage.¹ Holder’s comments, coming three years after his announcement that the Justice Department would “enforce but not defend” the federal Defense of Marriage Act (DOMA), endorsed the practices of several state attorneys general who have refused to defend their state’s traditional definition of marriage (i.e., as being between one man and one woman).²

* Attorney General of Indiana; J.D., 1982, Indiana University Law School-Bloomington. This article in its previous drafts was co-authored by Deputy Attorney General Jonathan R. Sichtermann. Special thanks to Mr. Sichtermann and Indiana Solicitor General Thomas M. Fisher for their assistance. Thanks also to Joe Stephens and the staff of the *Indiana Law Journal* for editing and publishing my Article.

1. Eric Holder, U.S. Attorney General, *Remarks as Prepared for Delivery by Attorney General Eric Holder at the National Association of Attorneys General Winter Meeting*, U.S. DEP’T OF JUSTICE (Feb. 25, 2014), available at <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-1402251.html>.

2. Currently the state attorneys general of California, Illinois, New Mexico, Nevada, North Carolina, Oregon, Pennsylvania, Virginia, and Kentucky have abandoned defense of their state’s marriage definition. Some of these states, such as California, have left no attorney

According to Holder, in deciding not to defend DOMA the Obama administration was “motivated by [its] strong belief that all measures that distinguish among people based on their sexual orientation must be subjected to a heightened standard of scrutiny—and, therefore, that [DOMA] was unconstitutional discrimination.”³ Although conceding that decisions not to defend “must be exceedingly rare” and “reserved only for exceptional circumstances,” he explained that state attorneys general could refuse to defend marriage definitions because attorneys general “must be suspicious of legal classifications based solely on sexual orientation.”⁴ In a subsequent interview with the *New York Times*, Holder analogized today’s same-sex marriage cases to *Brown v. Board of Education* and explained that he would not have defended Kansas’s segregation statute if he had been the Kansas Attorney General in 1954, implying that state attorneys general should not defend their states’ marriage definitions either.⁵ Holder did not point to any legal authority to support his declarations in this unsolicited suggestion by a federal official to separately elected state officials, perhaps because countless attorneys general opinions and commentary at the state and federal levels support the opposite position: state attorneys general have a duty to defend state statutes against constitutional attack in all but the rarest circumstances, even when they personally view the statute to be unconstitutional.

In a speech delivered at the annual Case Western Reserve School of Law Sumner Canary Lecture, Eleventh Circuit Judge and former Alabama Attorney General Bill Pryor echoed Holder’s sentiments regarding a selective, subjective nondefense of statutes. In his remarks, he argued that “executives” can appropriately engage in constitutional review, including attorneys general who are deciding whether to defend a challenged law. Pryor even opined that “the politics of the moment can help a state executive better interpret the constitution.”⁶

Holder’s and Pryor’s statements attempt to justify decisions by several state attorneys general to abandon defense of their states’ marriage definitions. In addition to marriage definitions, attorneys general have on rare occasions also declined to defend portions of state immigration laws and state laws regulating the dissemination of marijuana-focused magazines.⁷ Each fact scenario is discussed in detail below, but from the following discussion, the attorney general’s duty to defend statutes in all but the most exceptional circumstances is clearly established, though its specific limits have been debated in recent years.

with standing to defend the statute. Others, such as Kentucky’s attorney general, initially defended the case at the trial court, but then abandoned defense on appeal and authorized the governor to maintain a defense using outside counsel. For a more thorough discussion of these states’ abandonment, *see infra* Part III.C.

3. Holder, *supra* note 1.

4. *Id.*

5. Matt Apuzzo, *Holder Sees Way to Curb Bans on Gay Marriage*, N.Y. TIMES Feb. 25, 2014, at A1.

6. Judge William H. Pryor, Speech at the Case Western Reserve University School of Law Sumner Canary Lecture: How the Separation of Powers Informs the Executive Duty to Defend the Law (Oct. 2, 2014), available at http://law.case.edu/Lectures.aspx?lec_id=376.

7. *See infra* Part III.A (discussing Indiana’s immigration statute); Part III.B (discussing Colorado’s marijuana statute).

This Article challenges Holder's and Pryor's views and explains the proper role of a state attorney general when a party challenges a state statute. In short, an attorney general owes the state and its citizens, as sovereign, a duty to defend its statutes against constitutional attack except when controlling precedent so overwhelmingly shows that the statute is unconstitutional that no good-faith argument can be made in its defense. To exercise discretion more broadly, and selectively to pick and choose which statutes to defend, only erodes the rule of law.

This Article relies on state and federal court decisions and attorney general opinions to put the duty to defend in its proper context. It begins with a historical overview of the office of the attorney general, the rule of law, and an attorney general's duty to defend,⁸ then analyzes the impacts an attorney general's decision not to defend a statute has on the rule of law, separation of powers, and the adversarial justice system.⁹ The Article argues that an attorney general, whether of a state or of the United States, owes a duty to defend all statutes—even statutes that he or she personally opposes or finds distasteful—unless the only available defense is frivolous and devoid of good faith and therefore barred by Federal Rule of Civil Procedure 11 and analogous state rules, or the statute infringes on executive power.¹⁰ Next, the Article applies this framework to examples of nondefense in same-sex marriage and other cases to illustrate when attorneys general properly adhere to the duty to defend.¹¹ The Article concludes by briefly examining the duty to defend as it applies to two ancillary practices: an attorney general's decision to hire outside counsel and an attorney general's opinion-writing function.¹²

I. HISTORICAL VIEWS OF THE ATTORNEY GENERAL'S DUTY TO DEFEND

A. General Development of the Role of the Attorney General as it Relates to Development of the Rule of Law

To understand the attorney general's role as it exists today, it is important first to examine the office's historical development. This Part reviews the office's origins and development in England,¹³ then highlights several milestones in the development of colonial attorneys general,¹⁴ before briefly detailing the powers and duties held by state attorneys general today.¹⁵ Although the Article primarily addresses a state attorney general's duty to defend, this Part also briefly outlines the development of the federal attorney general.¹⁶

The role of the Attorney General of England can be traced through a 400-year period of English history culminating shortly after the Glorious Revolution of 1688. Originally, the Attorney General was the King's representative in the courts and

8. *See infra* Part I.A–C.

9. *See infra* Part I.D.1–3.

10. *See infra* Part II.

11. *See infra* Part III.A–C.

12. *See infra* Part IV.

13. *See infra* notes 17–27 and accompanying text.

14. *See infra* notes 28–32 and accompanying text.

15. *See infra* notes 33–36 and accompanying text.

16. *See infra* notes 37–50 and accompanying text.

represented only his interest.¹⁷ By the sixteenth century, the Attorney General served “as a liaison between the House of Lords and House of Commons”; but since the Attorney General was “an assistant to the Lords,” the office was not yet viewed as the legal representative of the entire Parliament that it is today.¹⁸ The Attorney General’s role again transformed when Sir Heneage Finch, a member of the House of Commons, became Attorney General in 1670.¹⁹ The Attorney General retained his seat in the House of Commons and “played an active role in presenting Commons’ cases to the Lords.”²⁰ The following year, the Attorney General successfully resolved a legal dispute between the two houses of Parliament in Commons’ favor, and by the eighteenth century, the Attorney General had “evolved from an assistant to the Lords to an advocate for Commons as an elected [m]ember of parliament.”²¹ During the struggles between the King and Parliament, the Attorney General “formed part of the ‘government,’ the ministerial group able to govern because it had the king’s confidence and the ability to control Parliament,”²² such that by the mid-eighteenth century, the Attorney General of England was not only the King’s legal advisor appearing on the King’s behalf in court, but also the legal advisor “to all departments of state.”²³ The Attorney General of England’s role, therefore, was transformed from the King’s representative to the public official responsible for maintaining the rule of law.²⁴

An executive’s duty to defend statutes and constitutional provisions also developed during this same time period.²⁵ The King of England initially retained the unilateral power to revoke acts of Parliament until this practice was declared unconstitutional in the late thirteenth century.²⁶ The King continued to have the power to suspend acts of Parliament until 1688, when the King’s Bench declared the power unconstitutional, a ruling that was codified one year later in the 1689 Bill of Rights.²⁷ The enactment of the English Bill of Rights, and specifically the provisions prohibiting royal powers to suspend and dispense with laws, was a significant milestone in the development of the rule of law. The development of the attorney general’s role as legal officer for the state, and specifically the development of his duty to defend, was also critical to the development of the rule of law.

17. Emily Myers, *Origin & Development of the Office*, in STATE ATTORNEYS GENERAL POWERS & RESPONSIBILITIES 2 (Emily Myers ed., 3d ed. 2013) [hereinafter Myers, *Origin & Development*]. “[T]he lawyer who might lay claim to being the first attorney general was authorized to take legal action to protect state property, employees, and exercises of official discretion; to prosecute serious criminal cases; and to commence special investigations at the direction of state executive authority.” *Id.*

18. *Id.* at 3.

19. *See id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 3–4.

24. *Id.* at 4.

25. For an in-depth examination of the development of the duty to defend in England, see Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 869–72 (1994).

26. *Id.* at 870 n.10 (citing 2 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 308, 437 (4th ed. 1936)).

27. *Id.* at 872.

The attorney general's role continued to develop first in the prerevolutionary American colonies and then in the states.²⁸ Many of a state attorney general's current duties date back to early colonial times. For instance, by at least 1660, the Maryland colonial attorney general had the duty to defend government actions.²⁹ As early as 1708, the South Carolina attorney general was bringing collection actions on behalf of the governor against citizens who owed taxes.³⁰ By the mid-eighteenth century, the opinion function of the attorney general had developed in North Carolina.³¹ However, the attorney general's role as chief legal officer for the colony, and later the state, was most clearly established in Pennsylvania, where the attorney general represented the governor but also had the power to oppose the governor or other appointed officials and provide legal advice to appointed officials which "tended to restrict rather than expand those officials' powers or privileges and to confine them to the wishes of the people's elected representatives."³²

As a result of this gradual development, today the state attorney general unquestionably holds the title of "chief legal officer of the state," vested with a mixture of common law, statutory, and constitutional powers and duties.³³ Among the duties entrusted to the state attorney general are the duty to advise the legislature on the constitutionality of proposed legislation;³⁴ to advise the various executive agencies on the meaning of laws the agency is required to enforce and on the legality of various enforcement actions;³⁵ to enforce certain

28. See Myers, *Origin & Development*, *supra* note 17, at 4–9 (outlining the office's development in the American colonies and states).

29. *Id.* at 4.

30. *Id.* at 6.

31. *Id.* at 5.

32. *Id.* at 6.

33. Meyers, *Origin & Development*, *supra* note 17, at 45; see also, e.g., OHIO REV. CODE ANN. § 109.02 (LexisNexis 2014) ("The attorney general is the chief law officer for the state and all its departments."); Michigan *ex rel.* Kelley v. C.R. Equip. Sales, Inc., 898 F. Supp. 509, 513–14 (W.D. Mich. 1995) (noting the Michigan Attorney General's common law and statutory powers); Amemiya v. Sapienza, 629 P.2d 1126, 1128 (Haw. 1981) ("The attorney general is without question the chief legal officer of the State."); EPA v. Pollution Control Bd., 372 N.E.2d 50, 51–52 (Ill. 1977) (noting that as the state's chief legal officer, the Illinois Attorney General possesses common law powers that cannot be limited by the legislature or the judiciary); Fieger v. Cox, 734 N.W.2d 602, 611 (Mich. Ct. App. 2007); William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2456–57 (2006) (citing *Ex parte Weaver*, 570 So. 2d 675, 684 (Ala. 1990)) (explaining that an attorney general possesses both statutory and common law powers).

34. See, e.g., COLO. REV. STAT. § 24-31-101(b) (2008); CONN. GEN. STAT. § 3-125 (2007); FLA. STAT. § 16.01(3) (2014); KAN. STAT. ANN. § 75-704 (1997); OHIO REV. CODE ANN. § 109.13 (LexisNexis 2014); Henry J. Abraham & Robert R. Benedetti, *The State Attorney General: A Friend of the Court?*, 117 U. PA. L. REV. 795, 798 (1969); Emily Myers, *Status in State Government*, in STATE ATTORNEYS GENERAL POWERS & RESPONSIBILITIES 68 (Emily Myers ed., 3d ed. 2013) [hereinafter Myers, *Status in State Government*].

35. See, e.g., COLO. REV. STAT. § 24-31-101(b) (2008); CONN. GEN. STAT. § 3-125 (2007); FLA. STAT. § 16.01(3) (2014); KAN. STAT. ANN. § 75-704 (1997); OHIO REV. CODE ANN. § 109.12 (LexisNexis 2014); Abraham & Benedetti, *supra* note 34 at 798; Emily Myers & Andy Bennett, *Opinions*, in STATE ATTORNEYS GENERAL POWERS & RESPONSIBILITIES 74–75

statutes;³⁶ and, most relevant to this Article, to defend state statutes and constitutional provisions against constitutional challenges.

In drafting the U.S. Constitution, the Founders drew heavily from the developments both in England and in the colonies and vested the unitary federal executive with powers and limitations similar to those that existed both in England and in the states.³⁷ The Founders, well aware of what was to them a new development in the executive-legislative division of power, wanted to ensure that the President could not acquire the suspension powers recently wrested from the King by Parliament and the English judiciary.³⁸ In drafting the “Take Care Clause,” the

(Emily Myers ed., 3d ed. 2013).

36. Dennis Cuevas, *Consumer Protection*, in STATE ATTORNEYS GENERAL POWERS & RESPONSIBILITIES 238–45 (Emily Myers ed., 3d ed. 2013); John J. Watkins, *Adventures in FOIA Land*, 1999 ARK. L. NOTES 111, 119 n.100 (2012) (noting that Delaware, Iowa, Kansas, Massachusetts, Missouri, Nebraska, New Mexico, Texas, and Wisconsin provide enforcement authority for their states’ attorneys general); Amy Widman & Prentiss Cox, *State Attorneys General’s Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 CARDOZO L. REV. 53, 53 (2011) (“Currently, twenty-four federal laws explicitly provide for concurrent federal and state public enforcement authority.”). It is important to note that in the divided state executive branch, the office of the attorney general does not have the power to enforce most statutes; that duty rests with the various agencies. Instead, the duty to enforce statutes rests with the attorney general only in limited circumstances, such as telephone privacy, consumer protection, and legislation enacted pursuant to the Tobacco Master Settlement Agreement. *See, e.g.*, IND. CODE § 24-5-0.5-4(c) (2006) (allowing the Indiana Attorney General to enforce Indiana’s consumer protection statutes); IND. CODE § 24-4.7-5-2 (2006) (allowing the Indiana Attorney General to enforce Indiana’s telephone privacy statutes); IND. CODE § 24-3-5.4 (2006). Congress occasionally enacts legislation enforceable by state attorneys general as well. *See, e.g.*, Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(g) (2012); Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

37. May, *supra* note 25, at 883. The term “unitary federal executive” is used throughout this Article to refer to the President’s power to appoint, remove, and direct the actions of the U.S. Attorney General, and other cabinet officials, and to distinguish the federal governmental structure from the state governmental structure in which nearly all attorneys general are independent from the governor and not susceptible to the governor’s control. The precise scope of the unitary federal executive theory, which has been the subject of extensive scholarly debate for decades, is beyond the scope of this article. For this Article’s purposes, it is sufficient to understand that the U.S. Attorney General reports to the President and carries out the President’s preferred legal strategy, while most state attorneys general are separately elected and do not report to the governor and implement their own legal policy.

38. *See, e.g.*, Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381, 409 (“Commentators generally agree that at least one purpose of the clause was to make it clear the president cannot arbitrarily suspend the enforcement of laws enacted by Congress.”) (citing Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 583–84 (1994)); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1313 (1996) (“[T]he most important, if not the sole, aspect of this limitation is to make clear that ‘the executive Power’ does not include a power analogous to a royal prerogative of suspension.”); May, *supra* note 25, at 873–74 (“[The take care clause] means that the President may not—whether by revocation, suspension, dispensation, inaction, or otherwise—fail to honor and enforce statutes to which he or his predecessors have assented, or which may have been enacted over his objection.”). The Founders included the Take Care Clause in order to “counter

Founders looked to well-respected authorities like Montesquieu, who explained in his *Spirit of the Laws* that “when, in a popular government, there is a suspension of the laws, as this can proceed only from the corruption of the republic, the state is certainly undone.”³⁹ To ensure that did not happen, the Founders included the Take Care Clause in the Constitution, which required the President to faithfully execute laws passed by Congress.⁴⁰

To be sure, the Take Care Clause does not explicitly mandate a duty to defend congressional statutes, and it is important to account for the distinction between a duty to *defend* the law from the duty to *enforce*. An executive’s duty to enforce arises at all times because the executive is charged with enforcing the statute.⁴¹ As a result, one administration’s choice not to enforce a statute does not prevent a subsequent administration from enforcing the statute. Conversely, the duty to defend arises only when a party challenges a statute’s constitutionality in court, because “a statute’s legitimacy can only be challenged on a constitutional basis.”⁴² When a plaintiff challenges a statute on other grounds—for instance, by alleging that a statute is superseded by a more recent statute or conflicts with a different statute—the plaintiff is merely challenging the statute’s *interpretation*, not its underlying *validity*.⁴³ As discussed in greater detail later, an executive who fails to adhere to the duty to defend erodes the rule of law to a greater extent than one who fails to adhere to the duty to enforce, because failure to defend can result in binding legal precedent declaring the statute unconstitutional.⁴⁴

Regardless, the prevailing opinion at the Founding was that the federal executive owed a duty to defend statutes even if the executive believed them to be

not only centuries of English history, but also the writings of John Locke,” who argued that the executive possessed the prerogative to act according to the executive’s discretion even if it meant acting without the force of law or against the law. Bales, *supra* note 38, at 409 n.215 (citing JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT § 160 (1689)).

39. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 38 (1748) (Thomas Nugent trans., Batoche Books 2001) (1752).

40. U.S. CONST. art. II, § 3. President Washington, in discussing the Whiskey Rebellion, explained that it was his “duty to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to” that duty. Letter from George Washington to Alexander Hamilton (Sept. 7, 1792), available at <http://www.loc.gov/teachers/classroommaterials/lessons/washington/hamilton2.html>; see also Curt A. Levey & Kenneth A. Klukowski, *Take Care Now: Stare Decisis & the President’s Duty to Defend Acts of Congress*, 37 HARV. J.L. & PUB. POL’Y 377, 389 (2014) (“As Justice James Wilson, who was instrumental in drafting the Take Care Clause, explained, the President has ‘authority, not to make, or alter, or dispense with the laws, but to execute and act the laws, which [are] established.’”); May, *supra* note 25, at 873–74 (“The duty to execute the laws faithfully means that the President may not—whether by revocation, suspension, dispensation, inaction, or otherwise—fail to honor and enforce statutes to which he or his predecessors have assented, or which may have been enacted over his objection.”).

41. Levey & Klukowski, *supra* note 40, at 386.

42. *Id.* at 384.

43. See *id.* (citing Carlos E. Gonzalez, *The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms*, 80 OR. L. REV. 447, 453 (2001)).

44. See *infra* notes 139–40 and accompanying text (comparing the impact of abandoning the duty to defend with the impact of abandoning the duty to enforce).

unconstitutional.⁴⁵ The Founders enshrined this duty in the Constitution through the Take Care Clause which, when read in its historical context, “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.”⁴⁶

The Founders provided the President with an opportunity to determine a bill’s constitutionality, but that occurs before signing it into law. The President has the duty to determine a bill’s constitutionality when it is presented for signing, and can veto unconstitutional bills.⁴⁷ At this point, and only this point, the President has the ability to review a statute’s constitutionality *de novo*.⁴⁸ The Founders provided the veto power in part to ensure that the President could defend the powers delegated to the executive branch by the Constitution against infringement from the other two branches.⁴⁹ Indeed, President Washington, on the advice of James Madison (the principal drafter of the Constitution), refused to veto bills that were not clearly unconstitutional based on the belief that such a power should be reserved only for those bills that violated the Constitution.⁵⁰ Although subsequent Presidents have not used their veto power so sparingly, constitutional analysis remains one of the key reasons for vetoing a bill.

45. Cf. May, *supra* note 25, at 873–74 (explaining that the Founders drafted the Take Care Clause to ensure that the President adhered to the duty to enforce); Levey & Klukowski, *supra* note 40, at 385–86 (explaining that historically, the duty to defend has been viewed as part of the duty to enforce).

46. *Id.* at 873.

47. John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, & Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 378 (1993) (citing THE FEDERALIST NO. 73 (Alexander Hamilton)); JAMES MADISON, *Observations on the “Draught of a Constitution for Virginia,”* in THE PAPERS OF JAMES MADISON 292–93 (Robert A. Rutland & Charles F. Hobson, eds. 1977); Michael B. Rappaport, *The President’s Veto & the Constitution*, 87 NW. U. L. REV. 735, 771–76 (1993); Levey & Klukowski, *supra* note 40, at 395 (“[I]f a President regards legislation before him as unconstitutional, then his veto is the means the Constitution gives him to express that view.”). The other two branches each have their own role to play in determining a statute’s constitutionality as well. Congress’s duty also comes before the bill becomes law—both houses of Congress must ensure that bills they pass are constitutional. See Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 719 (1985) (citing the Congressional Oath Clause) (discussing Congress’s duty). Postenactment, the federal court system must determine whether challenged statutes are constitutional. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[T]he federal judiciary is *supreme* in the exposition of the law of the Constitution.” (emphasis added)); see also David A. Weinstein, *Rutgers v. Waddington: Alexander Hamilton and the Birth Pangs of Judicial Review*, 9 JUD. NOTICE 26, 27 n.2 (2013) (noting the development of judicial review in state court systems).

48. Levey & Klukowski, *supra* note 40, at 394.

49. *Id.* at 395 (citing *The Att’y Gen.’s Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 58 (1980)).

50. STUART LEIBIGER, *FOUNDING FRIENDSHIP: GEORGE WASHINGTON, JAMES MADISON, AND THE CREATION OF THE AMERICAN REPUBLIC* 136 (1999); see also Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 907–08 (1989) (listing other early Presidents who vetoed bills on constitutional grounds, and noting that Andrew Jackson’s veto of the Bank Bill was controversial because he vetoed for reasons other than constitutionality).

B. The Duty to Defend at the Federal Level

As early as 1806, the courts were grappling with the limits of the President's ability to enforce federal statutes selectively. For instance, in *United States v. Smith*, the Circuit Court for the District of New York explained that if the President could refuse to enforce a statute (or allow a person to violate the statute), "it would render the execution of the laws dependent on his will and pleasure[,] which" has no support in the federal constitutional system.⁵¹

These views continued to dominate at the federal level into the twentieth century in the form of federal attorney general opinions and Office of Legal Counsel opinions. In 1937, the U.S. Attorney General issued an opinion that established the federal executive's duty to enforce, and not question the constitutionality of, federal statutes.⁵² The opinion explained that rarely would it be proper for the Attorney General to question a statute's constitutionality because "it is not within the province of the Attorney General to declare an act of the Congress unconstitutional."⁵³ Although these early cases and opinions explicitly addressed the duty to enforce, it appears as though the two duties were viewed as one single duty, with the duty to defend a statute comprising part of the President's overall duty to enforce it.⁵⁴

More recently, U.S. Attorneys General in both Democrat and Republican administrations have articulated the duty to defend congressional legislation against constitutional challenges. In 1976, Assistant Attorney General Rex Lee testified that the Department of Justice (DOJ) would defend federal statutes unless the statutes were "so patently unconstitutional that [they] cannot be defended"—a situation that he termed "thankfully most rare."⁵⁵ In 1980, Attorney General Benjamin Civiletti issued an opinion explaining that "[t]he Attorney General has a duty to defend and enforce both the Acts of Congress and the Constitution."⁵⁶ Civiletti acknowledged that these duties could conflict and explained that when they do, "it is almost always the case that [the Attorney General] can best discharge the responsibilities of his office by defending and enforcing the Act of Congress."⁵⁷ This opinion "concur[red] fully in the view expressed by nearly all of [Civiletti's] predecessors."⁵⁸

51. *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342). In *Smith*, which addressed the Neutrality Acts, the court explained that the President lacked the power to control or "dispense with [the Acts'] execution." Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 972 n.6 (1983) [hereinafter *Executive Discretion*] (quoting *Smith*, 27 F. Cas. at 1230).

52. Rendon of Opinions on Constitutionality of Statutes—Fed. Home Loan Bank Act, 39 Op. Att'y Gen. 11 (1937).

53. *Id.* The opinion qualified this statement by explaining that the President may decline to enforce a statute that "involve[s] conflict between the prerogatives of the legislative and executive departments." *See id.*

54. Levey & Klukowski, *supra* note 40, at 385–86.

55. *Representation of Congress & Congressional Interests in Court: Hearings Before the Subcomm. on the Separation of Powers of the S. Comm on the Jud.*, 94th Cong., 2d Sess. 10 (1976) (statement of Rex Lee, Assistant Att'y Gen. of the United States).

56. The Att'y Gen.'s Duty to Defend & Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 55 (1980).

57. *Id.*

58. *Id.*

According to Civiletti, refusing to defend a statute would upset the delicate balance of powers among the three coordinate branches of the federal government:⁵⁹ While the judicial branch “protect[s] both the government and the citizenry from unconstitutional [legislative and executive] actions,” the executive branch is the only one with the power to defend the statutes.⁶⁰ Therefore, attorneys general who “ignor[e] or attack[] [a]cts of Congress whenever they believed them to be in conflict with the provisions of the Constitution, . . . could jeopardize the equilibrium established within our constitutional system.”⁶¹

In making his argument, Civiletti analogized an arguably unconstitutional law to an unconstitutional or illegal injunction. In order to preserve the integrity of the judicial process, all parties are bound by such an injunction until it is modified or dissolved on appeal.⁶² Similarly, in order to preserve the adversarial judicial process, the government must defend a statute until the Supreme Court declares it unconstitutional.⁶³

The following year, Attorney General William French Smith echoed his Democratic predecessor’s opinion when he explained that the Attorney General may decline to defend an act only “in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent *overwhelmingly* indicates that the statute is invalid.”⁶⁴ Otherwise, the Attorney General “has the duty to defend an act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts.”⁶⁵

Most recently, Attorney General John Ashcroft explained that the duty to defend acts of Congress extends even to situations in which the *attorney general personally disagrees with the challenged law*.⁶⁶ According to Ashcroft, “the proper role of an officer of the executive branch” is to defend the interests of the federal government

59. *See id.* at 55–56.

60. *Id.* at 56.

61. *Id.*

62. *Id.* at n.1 (citing *Walker v. City of Birmingham*, 388 U.S. 307 (1967)). Civiletti explained that the injunction at issue in *Walker* was not “transparently invalid” and that if a statute is “‘transparently invalid’ when viewed *in light of established constitutional law*,” the President should not enforce and defend it. *Id.* (emphasis added).

63. *See id.* at 55–56.

64. The Att’y Gen.’s Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25 (1981) (emphasis added); *see also* *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972); *Furda v. State*, 1 A.3d 528 (Md. Ct. Spec. App. 2010); *Bd. of Treasurers of Cmty. Coll. v. Cool Cnty. Teachers*, 356 N.E.2d 1089 (Ill. Ct. App. 1976). This rule only applies in the judicial context, however, *Dickinson*, 465 F.2d at 510, because the judicial branch is the weakest branch, having neither Congress’s power of the purse nor the President’s power of the sword. THE FEDERALIST NO. 78 (Alexander Hamilton). Indeed, “disobedience to the statute may be the only means of obtaining judicial determination of its constitutionality.” *Dickinson*, 465 F.2d at 510.

65. The Att’y Gen.’s Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25, 25–26 (1981).

66. John Ashcroft, U.S. Attorney General, Remarks at the Federalist Society 20th Anniversary Gala (Nov. 14, 2002) (transcript available at <http://www.justice.gov/archive/ag/speeches/2002/111402finalfederalistsociety.htm>).

and statutes passed by Congress even if those officers do not believe that the statutes are “the best view of the law, or what it should be.”⁶⁷

A 1994 opinion from the Office of Legal Counsel (OLC) articulated a narrower view of the President’s duties. In the opinion, OLC advised that the President should exercise independent judgment to decide whether to *enforce* a statute that “*appears to conflict with the constitution,*” giving deference to Congress, which believed it was passing constitutional legislation.⁶⁸ According to OLC, when the Attorney General concludes both that a statute is unconstitutional and that a court would invalidate it, the President should refuse to enforce the statute.⁶⁹ This OLC opinion addresses the duty to *enforce*, but because enforcement decisions are made by a unitary federal executive, historically the executive branch has defended a statute when it is enforced unless the statute infringes on executive powers⁷⁰—a situation discussed in detail later.⁷¹ OLC cited Supreme Court cases,⁷² as well as various presidential signing statements, attorney general opinions, and other historical materials, which it termed “consistent and substantial executive practice.”⁷³ These “consistent” examples dealt with statutes that impeded the proper functions of the executive.⁷⁴ Although the OLC opinion explicitly addressed the duty to *enforce*, the

67. *Id.*

68. Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200 (1994) (emphasis added). It should also be noted that the Carter Justice Department did not defend the Public Broadcasting Act of 1967 in *League of Women Voters v. FCC* on the ground that it violated citizens’ First Amendment rights, *Executive Discretion*, *supra* note 51, at 974–75, but on rehearing, the Reagan Justice Department defended the statute. The Att’y Gen.’s Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25 (1981).

69. Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 205 (1994).

70. *See, e.g., id.* at 210 (citing *Morrison v. Olson*, 487 U.S. 654 (1988); *INS v. Chadha*, 462 U.S. 919 (1983); *United States v. Lovett*, 328 U.S. 303 (1946)). In two recent instances, Presidents have expanded the “enforce but not defend” practice to statutes that do not infringe on their powers. *See Levey & Klukowski, supra* note 40, at 406 (noting only two instances in which a President announced that he would enforce a statute but not defend it: President Obama with DOMA and President Clinton with “a 1996 law discharging HIV-positive service members from the military”).

71. *See infra* Part I.D.4.

72. Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199 (1994) (citing *Freytag v. Comm’r*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring); *Myers v. United States*, 272 U.S. 52 (1926)).

73. *Id.* (citing Memorial of Captain Meigs, 9 Op. Att’y Gen. 462, 462–70 (1860)).

74. *Id.* at 209–11 (citing *Freytag v. Comm’r*, 501 U.S. 868 (1991); *Morrison v. Olson*, 487 U.S. 654 (1988); *INS v. Chadha*, 462 U.S. 919 (1983); *United States v. Lovett*, 328 U.S. 303 (1946); *Myers v. United States*, 272 U.S. 52 (1926); *Lear Siegler, Inc., Energy Prods. Div. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988)). The opinion also cites various presidential signing statements, attorney general opinions, and other historical materials. These documents all deal with some mechanism that encroaches on the executive’s authority generally, and specifically, most deal with the legislative veto. The others deal with statutes that appoint officers to executive agencies, limit the President’s power to remove appointments to executive agencies, require the President to terminate provisions in certain treaties, condition executive actions on the approval of a congressional committee, and require one-third of the members of an

drafter appears to have treated the enforcement and defense duties as synonymous because its appendix cites several cases where the President either enforced the statute and then later challenged its constitutionality in subsequent litigation or refused to enforce and defend the statute.⁷⁵

Therefore, to the extent that the 1994 OLC opinion addresses the duty to defend, it can be reconciled with the 1980 opinion because the 1994 opinion dealt only with a subset of the statutes addressed in the 1980 opinion. The 1994 opinion applies only to statutes that infringe on the President's executive authority.⁷⁶ In such situations, the President could refuse to enforce, and refuse to defend, the statute even though the statute was not clearly unconstitutional. When statutes do not infringe on the executive's constitutional authorities, the 1980 opinion controls and the President must defend them in the face of constitutional challenges.

C. *The Duty to Defend at the State Level*

Like the federal attorney general, state attorneys general owe a duty to defend state statutes against constitutional challenges.⁷⁷ To prevail on a constitutional

executive board to be chosen by the Speaker of the House and another one-third by the Senate Majority Leader. *Id.*

75. *See id.* (citing *Morrison v. Olson*, 487 U.S. 654 (1988) (enforcing but refusing to defend); *INS v. Chadha*, 462 U.S. 919 (1983) (enforcing but refusing to defend); *United States v. Lovett*, 328 U.S. 303 (1946) (enforcing but refusing to defend); *Myers v. United States*, 272 U.S. 52 (1926) (refusing to enforce and defend)).

76. *See* Levey & Klukowski, *supra* note 40, at 408. In such situations, the President should be given more latitude to determine a statute is not constitutional because "typically . . . only the President . . . can challenge the law." *Id.*

77. *See, e.g.,* Ariz. Att'y Gen. Op. No. 78-10 (Jan. 26, 1978) (explaining that the office would only conclude that a statute was unconstitutional in "the most clear and compelling circumstances" because of the office's duty to defend all statutes and because of the presumption of constitutionality); Idaho Att'y Gen. Op. No. 98-1 (1998) (explaining that "the Attorney General has a duty to defend the state statutes" upon which the Supreme Court has not ruled); La. Att'y Gen. Op. No. 97-361 (Aug. 20, 1997) ("[I]t is the policy of the Attorney General's office to refrain from opining whether an [sic] statute is constitutional inasmuch as the Attorney General is charged with defending the constitutionality of *all* legislative statutes." (emphasis added)); Code Revision—Whether 1964 Statute Prohibiting Receipt of Remuneration for Participation in a "Racial Demonstration" is Constitutional, 93 Md. Att'y Gen. Op. 154 (2008) ("[W]e are mindful of the obligation of the Attorney General to defend, in litigation, the constitutionality of statutes enacted by the Legislature."); Mo. Att'y Gen. Op. No. 89-81 (1981) (noting the office "ha[d] no authority to declare a statute invalid"); Or. Att'y Gen. Op. No. OP-6500 n.3 (Oct. 15, 1993) ("It is our duty to defend the constitutionality of a statute *unless no argument worthy of the court's consideration can be made in its behalf.*") (emphasis added) (citing 42 Op. Att'y Gen. 377, 380 n.2 (1982)); 53-55 Wash. Att'y Gen. Op. No. 310 (1954) (noting that statutes have a strong presumption of constitutionality and that the office has a duty to defend the statute "[u]nless the invalidity . . . is apparent"); Letter from Robert K. Killian, Att'y Gen., Conn., to Mati Koiva, Deputy Comm'r, Conn. Motor Vehicle Dep't. (May 23, 1973), *available at* 1973 WL 25973 (refusing to opine on the statute's constitutionality because "such issues should be decided by the Courts and . . . it is the duty of the Attorney General's Office to defend the constitutionality of *all* statutes" (emphasis added)); Letter from Daniel R. McLeod, Att'y Gen., S.C., to Mrs. Harold A. Moore (Jan. 29,

challenge, the plaintiff must prove that the statute is unconstitutional beyond a reasonable doubt.⁷⁸ It is the attorney general's duty to defend, not overcome, this

1968), *available at* 1968 WL 12900 (“Whether the statute is good or bad is beside the point in that such a determination is a legislative matter, and if the Legislature acts, it is my duty to attempt to support its position.”); Letter from Robert M. Spire, Att’y Gen., Neb., to Sen. Chris Beutler (Dec. 20, 1985) *available at* 1985 WL 168642 (“This office is required by law to defend existing statutes, or any interpretation and application of these statutes by the executive branch of government, if challenged in a court of law.”). State courts have also recognized a broad mandatory duty to defend. The Wisconsin Supreme Court, for instance, held that “the attorney general *must* defend the constitutionality of . . . statutes.” *State v. City of Oak Creek*, 605 N.W.2d 526, 536 (Wis. 2000) (emphasis added). According to the court, if the attorney general challenged the constitutionality of a state statute, such a challenge “would conflict with his duty to defend.” *Id.* Likewise, the Maryland Supreme Court held that “under the Constitution and statutes of Maryland the Attorney General ordinarily has the duty of appearing in the courts as the defender of the validity of enactments.” *State ex rel. Att’y Gen. v. Burning Tree Club, Inc.*, 481 A.2d 785, 799 (Md. 1984). Finally, the New York Attorney General declined to issue an opinion on the constitutionality of a law in part because of the office’s duty to defend state statutes against constitutional challenge. 1981 N.Y. Att’y Gen. Op. 235, 236 (1981).

78. *See, e.g.*, Mo. Att’y Gen. Op. No. 94-81 (Mar. 6, 1981); *Barber v. Jefferson Cnty. Racing Ass’n*, 960 So. 2d 599, 615 (Ala. 2006) (“In reviewing the constitutionality of a statute, we approach the question with every presumption and intentment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of the government. Overcoming that presumption is a heavy burden, which is borne by the party challenging the validity of the statute.” (citations omitted) (internal quotation marks omitted)); *People v. Ford*, 773 P.2d 1059, 1062 (Colo. 1989) (“[A] statute is presumed to be constitutional, and the party attacking the statute has the burden of proving it unconstitutional beyond a reasonable doubt.”); *State v. Keene*, 629 N.W.2d 360, 364 (Iowa 2001) (explaining that all statutes are presumed constitutional and, to overcome the “heavy burden” borne by a challenger, the challenger “must prove beyond a reasonable doubt the statute’s unconstitutionality” by “refut[ing] every reasonable basis upon which the statute could be found to be constitutional”); *LaFournaise v. Montana Developmental Ctr.*, 77 P.3d 202, 206 (Mont. 2003) (“Statutes are presumed to be constitutional. A person challenging the constitutionality of a statute bears a heavy burden of proving the statute unconstitutional beyond a reasonable doubt.”); *In re Termination of Parental Rights to Diana P.*, 694 N.W.2d 344, 350 (Wis. 2005) (“A party challenging a statute’s constitutionality bears a heavy burden to overcome the presumption of constitutionality. Therefore, it is insufficient for the party challenging the statute to establish either that the statute’s constitutionality is doubtful or that the statute is probably unconstitutional. Instead, a party challenging a statute’s constitutionality must demonstrate that the statute is unconstitutional beyond a reasonable doubt.”) (citations omitted); *Manigault v. State*, 881 N.E.2d 679, 687 (Ind. Ct. App. 2008) (“In considering a constitutional challenge to a statute, we presume that the statute is valid and place a heavy burden on the challenger, who must clearly overcome that presumption. All reasonable doubts must be resolved in favor of the statute’s constitutionality.”); *Commc’ns Workers of Am., AFL-CIO v. State*, 22 A.3d 170, 179 (N.J. Super. Ct. Law Div. 2011) (“When faced with a constitutional challenge, a statute is presumed constitutional. To overcome this presumption, the plaintiff must demonstrate that there are no conceivable grounds to support its validity.”); *Bobka v. Town of Huntington*, 532 N.Y.S.2d 561, 562 (N.Y. App. Div. 1988) (“In challenging the constitutionality of Chapter 149, the plaintiffs face a heavy burden. Statutes are presumed to be constitutional, and that presumption can only be rebutted by proof beyond a reasonable

presumption.⁷⁹ The South Carolina attorney general has explained that whether attorneys general believe a law to be “good policy” is irrelevant because such considerations are for the legislature to make; the attorney general must defend the statute.⁸⁰

In recent decades, attorneys general have used a variety of (ultimately unhelpful) terms to describe when a statute is indefensible, such as “manifestly invalid”;⁸¹ “most clear and compelling circumstances”;⁸² “no argument worthy of the court’s consideration”;⁸³ or “patently illegal or unconstitutional.”⁸⁴ This Article collectively refers to these as the “clearly unconstitutional” standard. Following this standard, attorneys general have refused to defend statutes only when “a court of competent jurisdiction” has issued an opinion directly on point.⁸⁵ Attorneys general applying the “clearly unconstitutional” standard have explained that abandoning a defense in situations when no Supreme Court precedent dictates that a defense would be frivolous leads to one of two unacceptable outcomes—either “an [a]ttorney [g]eneral who is a political rubber stamp or one who is a political spokesman for political opposition to the [g]overnor.”⁸⁶ My concern, explained in more detail in Part III.C., below, is that a nominal “clearly unconstitutional” standard is too easily manipulated by political opportunists.

It is certainly the case that, throughout history, adhering to a duty to defend a statute not already directly invalidated has put state attorneys general in awkward, highly undesirable positions. But fealty to the rule of law can require attorneys general to do just that. In *Brown v. Board of Education*, for example, the Kansas Attorney General and his team were put in the difficult position of defending educational segregation decisions that they knew to be morally and constitutionally objectionable and offensive, yet they were compelled to defend the law anyway according to their understanding of their roles and obligations. In *Brown*, the Kansas Attorney General had often criticized school segregation as being “morally, politically, and economically indefensible,”⁸⁷ yet he chose to defend the statute

doubt.”); *Grimaud v. Pennsylvania Ins. Dep’t*, 995 A.2d 391, 407 (Pa. Commw. Ct. 2010) (“In order to succeed on this argument, [the challenger] must overcome the strong presumption that legislative enactments . . . do not violate the Constitution. The burden to overcome the presumption is heavy: ‘[A] statute will not be declared unconstitutional unless it *clearly, palpably, and plainly* violated the Constitution [and a]ll doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster.’” (emphasis in original) (quoting *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 393 (2005)).

79. See Mo. Att’y Gen. Op. No. 94-81.

80. See, e.g., Letter from Daniel R. McLeod to Mrs. Harold A. Moore, *supra* note 77 (“Whether the statute is good or bad is beside the point in that such a determination is a legislative matter, and if the Legislature acts, it is my duty to attempt to support its position.”).

81. Letter from Daniel R. McLeod to Mrs. Harold A. Moore, *supra* note 77.

82. Ariz. Att’y Gen. Op. No. 78-10 (1978).

83. Or. Att’y Gen. Op. No. OP-6500 n.3 (Oct. 15, 1993), available at 1993 WL 437896.

84. Letter from David Souter, Attorney General, New Hampshire, to Robert A. Backus (Mar. 30, 1978) (on file with the Indiana Law Journal).

85. See Ala. Op. Att’y Gen. 2001-087; 1998 Idaho Att’y Gen. Op. 5, 4 (1998).

86. Letter from David Souter to Robert Backus, *supra* note 84.

87. PAUL E. WILSON, A TIME TO LOSE: REPRESENTING KANSAS IN *BROWN V. BOARD OF EDUCATION* 112 (1995).

expressly because it was his office's duty to "defend the validity of a Kansas statute that was constitutional under all of the law we then knew or could know."⁸⁸

Similarly, the attorney assigned to argue *Brown* before the Supreme Court in 1954 was also personally opposed to segregation but he "was not a legislator, nor . . . an individual seeking to implement [his] personal moral standards"; rather, he was "a lawyer committed to uphold the law and the adversary process."⁸⁹ He believed that his job was to present the arguments that supported the State's position under the rule of law that existed at that time so that the Court could make an informed decision after hearing both sides.⁹⁰ He concluded that a "lawyer who has been faithful to his responsibility [to present his client's arguments] will have made a useful contribution to the result" even if that attorney is on the losing side.⁹¹ In short, the Kansas Attorney General and his team did not shirk from their duty to defend their client, the Kansas statute, just because they were aware it was a bad law or because they feared being on the "wrong side of history."

Clearly we do not mean to suggest a cavalier position with regard to the defense of segregation laws—which everyone today recognizes were a grave injustice—but using *Brown* as a case study is particularly useful precisely because no responsible lawyer today can imagine a Fourteenth Amendment that would permit racial segregation anywhere. The duty to defend underscores the requirement that for those who aspire to become a state (or federal) attorney general, to do the job properly they must be prepared to defend the state's most controversial laws from constitutional challenge, even if they do not personally believe those laws to be constitutional.⁹² Those who are not prepared to mount such a defense and fulfil their duty should neither seek nor accept the office. Running for the office precisely so one can choose not to defend laws one dislikes is a particularly dishonorable course.⁹³ In suggesting a selective, subjective nondefense, Eric Holder said in February of 2014 that if he had been Kansas Attorney General in 1954, he would not have defended segregation. In view of the duty to defend, our analysis is slightly different. Knowing that segregation was a fundamental and controversial regulatory institution being subjected to (or likely to be subjected to) constitutional attack and that the challenge should be properly allowed to run its course, I never would have entertained the idea of becoming Kansas Attorney General at all in an elected or appointed capacity in the early 1950s. I would not have run for or sought such an office, knowing I would have to in court defend a law I so strongly disagreed with. The duty to defend that statute—odious and offensive as that law was, in hindsight—was intrinsic to the job description for the officeholder who served as State's lawyer in 1954. To put it

88. *Id.*

89. *Id.* at 100.

90. *Id.*

91. *Id.* at 101.

92. See Jacob Fenston, *Cuccinelli Blasts Herring for Not Defending Virginia Gay Marriage Ban*, WAMU 88.5 (Mar. 16, 2014), http://wamu.org/news/14/03/16/cuccinelli_blasts_herring_for_not_defending_virginia_gay_marriage_ban ("As attorney general, he says, voters have hired you to defend state laws whether you like those laws or not. If you're going to run for attorney general, this is part of the job," Cuccinelli says. "If you're not willing to do it, you ought not run.").

93. *Id.*

another way, I repudiate and denounce the early-1950s segregation laws today; but the very nature of the adversarial system required that in 1954 the State of Kansas and its statute be represented in court by competent counsel, which the Kansas Attorney General at that time was obligated to provide, even though his side, properly, lost the *Brown* case.

D. Some General Conclusions about the Duty to Defend

The Holder Doctrine for state attorneys general of selective, subjective nondefense of certain statutes is deeply flawed on many fronts. First, Holder's non-binding and unsolicited suggestion as a federal official to state attorneys general that they refuse to defend state statutes "they believe are discriminatory"⁹⁴ would permit attorneys general to resort to their own subjective opinions of the law when determining whether to maintain a defense.

Second, and relatedly, Holder's suggestion that attorneys general can refuse to defend statutes "that they believe to be discriminatory,"⁹⁵ if taken to its logical conclusion, would enable attorneys general to abandon a defense in virtually any situation; there would be no limiting principle. Laws reflect choices made by elected legislators to prioritize or prefer one economic activity or course of action over another. Laws, by their nature, can be perceived to discriminate among people. Statutes that mandate a certain retirement age discriminate against the elderly.⁹⁶ These statutes may be based on poor policy choices by policy-makers in the legislative branch. Yet an attorney general should not abandon the duty to defend these statutes merely because the statute discriminates, or more precisely, codifies choices and decisions made by the people's elected representatives in the legislature. Even if the attorney general believes the enacted version of a statute represents bad policy or insufficient consideration and analysis by elected politicians of another branch of government, viable constitutional defenses are still available in court if such a statute, as codified, has not previously been struck down by the highest appellate court, as will be explained later in this Article.

Even Holder's attempt to clarify his doctrine represents an inaccurate view of the law. He explains that any statute that infringes on citizens' civil rights—including, in his view, a traditional marriage definition—is subject to the "highest level of scrutiny."⁹⁷ But age discrimination claims brought under the Equal Protection Clause, such as the claim in *Murgia*, are evaluated under rational basis review—the lowest level of scrutiny—as are Equal Protection claims based on disability.⁹⁸

94. Apuzzo, *supra* note 5.

95. *Id.*

96. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (holding that, although discriminatory, a Massachusetts statute that mandated retirement for uniformed police officers at fifty-years-old did not violate the Equal Protection Clause of the Fourteenth Amendment).

97. Holder, *supra* note 1.

98. *See, e.g., Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that the protections of Section 5 of the Fourteenth Amendment did not extend to ADA Title I because disability discrimination is evaluated under rational basis review); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) (explaining that Fourteenth Amendment age discrimination equal protection claims are evaluated under rational basis); *City of Cleburne v. Cleburne*

Gender and legitimacy discrimination claims proceed under intermediate scrutiny.⁹⁹ Strict scrutiny, the highest level of scrutiny, is limited to Equal Protection claims based on race, national origin, and (in some cases) alienage.¹⁰⁰ The most significant case against Holder's argument is *Romer v. Evans*, where the Court applied rational basis review to a sexual-orientation discrimination Equal Protection claim.¹⁰¹

In his recent speech mentioned above, Judge William Pryor argued that state attorneys general can decline to defend a challenged statute if they conclude "in good faith" that the statute is unconstitutional based on independent executive review.¹⁰² In conducting such review, he contended, attorneys general need not wait for a court to address the issue or defer to court opinions construing the statute or similar statutes.¹⁰³

While serving as Alabama Attorney General, however, Pryor issued four advisory opinions in which he articulated the duty to defend in much the same terms as described in this article. In these opinions, his office refused to opine on a statute's constitutionality even if the statute was not currently subject to a constitutional challenge.¹⁰⁴ Instead, Pryor's office explained that the attorney general has an "obligation to defend [the statute's] constitutionality, unless the law is patently unconstitutional."¹⁰⁵ Although he did not personally sign these opinions, they were issued under his name and, presumably, with his approval. Rather than engage in independent executive review, an attorney general must "defer questions on the constitutionality of statutes to the courts," said Pryor.¹⁰⁶ The attorney general must abstain from questioning a statute's constitutionality because "such a determination does not fall within the scope of an Attorney General's opinions[;] it is a proper

Living Ctr., Inc., 473 U.S. 432 (1985). Commentators sometimes claim that the Court applies a slightly higher standard—"rational basis with bite"—to Equal Protection claims involving disability, but there is virtually no case law to support the existence of a higher standard for these types of claims. Note, *The Benefits of Unequal Protection*, 126 HARV. L. REV. 1348, 1363 (2013) (noting that courts have not indicated that a different standard governs, except in "a few rare instances").

99. *Clark v. Jeter*, 486 U.S. 456 (1988) (applying intermediate scrutiny to legitimacy discrimination); *Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny to gender discrimination).

100. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Graham v. Richardson*, 403 U.S. 365 (1971).

101. 517 U.S. 620 (1996). As with disability claims, commentators sometimes argue that the Court applies a higher standard to sexual orientation discrimination claims. See *The Benefits of Unequal Protection*, *supra* note 98, at 1363. U.S. Supreme Court jurisprudence does not support this claim. The Court expressly applied rational basis review in *Romer* and implicitly applied rational basis in *Lawrence* and *Windsor*. See *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013); *Romer*, 517 U.S. at 631–32 (1996). *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); The Court invalidated the Defense of Marriage Act (DOMA) in *Windsor* because the federal government had no "legitimate purpose" for the law, which is a hallmark of rational basis review. *Windsor*, 133 S. Ct. at 2696.

102. Pryor, *supra* note 6.

103. *Id.*

104. Ala. Op. Att'y Gen. 2000-104.

105. *Id.*

106. Ala. Op. Att'y Gen. 2000-123. Then-Attorney General Pryor himself described this deference as a "longstanding policy of [his] Office. *Id.*

function of the courts.”¹⁰⁷ Until the court makes such a determination, Pryor explained that his office must “presume[] that . . . any act that is not patently unconstitutional is constitutional.”¹⁰⁸

Changing directions in his recent speech, Pryor cited examples of scenarios where *other* state and federal executives—that is, *not* attorneys general—have reviewed legislation and deemed it unconstitutional, including presidential vetoes,¹⁰⁹ presidential prosecutorial discretion and pardons,¹¹⁰ presidential statements regarding the scope of Supreme Court decisions,¹¹¹ and, curiously, his own decisions to defend a law he deemed “silly,”¹¹² and to prosecute former Alabama Chief Justice Roy Moore for refusing to obey a court order to remove a Ten Commandments monument.¹¹³

107. Ala. Op. Att’y Gen. 2000-104.

108. Ala. Op. Att’y Gen. 2000-143; Ala. Op. Att’y Gen. 2001-087.

109. Pryor cites three Presidents who vetoed bills because they believed the bills violated the constitution: Washington, Madison, and Jackson each vetoed bills they believed were unconstitutional. Pryor, *supra* note 6. As Easterbrook points out, constitutional review was such an integral part of a decision to veto a bill that Jackson’s veto of the Bank Bill was controversial because he vetoed for reasons in addition to constitutional ones. Easterbrook, *supra* note 50, at 907. The examples of presidential vetoes do nothing to advance Pryor’s argument because, as noted previously, a President can only review a statute’s constitutionality *de novo* when Congress presents a bill for his signature or veto.

110. Pryor cites Jefferson’s decision not to prosecute citizens under the Sedition Act and to pardon those who had already been convicted. These examples also do not support abandoning a defense to a constitutional challenge. When Jefferson chose not to prosecute Sedition Act violators, he exercised prosecutorial discretion, which is an executive function that is entirely distinct from defending a statute against a legal challenge. Likewise, when Jefferson pardoned all convicted Sedition Act violators, he exercised a power specifically delegated to him in Article II of the Constitution. U.S. Const. art. II, § 2 (“[The President] shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.”). Had he refused to defend the Sedition Act against a citizen’s constitutional challenge, he would have exercised a royal prerogative power specifically denied him in Article II. *See supra* notes 37–40 (explaining that the Take Care Clause prohibited the President from exercising the royal prerogatives of suspension and dispensation). A detailed comparison of the pardon power is beyond the scope of this article. For purposes of this article, it is sufficient to understand that before the 1689 English Bill of Rights, the King possessed the prerogative to suspend laws, i.e., to make an illegal act legal, and pardon subjects who violated them, i.e., “free[] the guilty party from the effect of a violation of the law.” William F. Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 496 (1977). Of these two prerogatives, only the second was given to the President.

111. Pryor cites Lincoln’s statement that the *Dred Scott* decision bound the parties to the litigation but not actions taken in the Lincoln Administration. Pryor, *supra* note 6. This example too does nothing to advance his argument. It is an example of an executive interpreting the law in order to determine how to implement the law. It is not a decision made in the face of a challenge to a statute’s constitutionality.

112. As discussed below, this example actually supports the duty to defend. *See infra*.

113. Here Pryor cites both his initial defense of the Chief Justice of the Alabama Supreme Court who placed a copy of the Ten Commandments in the Supreme Court courtroom and Pryor’s subsequent efforts to remove the Chief Justice from office after the Chief Justice refused to abide by a court order requiring the Ten Commandments’ removal. Pryor, *supra*

The central problem with Judge Pryor's argument, however, is that it confuses the duties and responsibilities of government executives who are called upon to enforce or implement the law with the duties of those who are not policymakers but whose special task it is to defend the law from constitutional challenge. Judge Pryor relies heavily on the work of his federal judiciary colleague, Frank Easterbrook, who has written about the inherent responsibility of executive officials to construe and interpret the Constitution as it bears on the exercise of their responsibilities. But Easterbrook's point was that courts are not the exclusive authorities as to the meaning of the constitution. To the contrary, executives, particularly those with enforcement authority such as the President and governors, must interpret the constitution in order to implement the law, properly understood.¹¹⁴ All government officers take an oath to support and defend the Constitution of the United States (and, in the case of state officials, their respective states). Of necessity this means that such officials must have some understanding of what those constitutions mean in daily practice; that is, they must "interpret" their governing organic documents.

But such a responsibility is not at odds with the special role of the attorney general to defend duly enacted statutes where a minimal good-faith argument for doing so exists. Although the President and U.S. Attorney General have historically subsumed the duty to defend into the duty to enforce,¹¹⁵ the two duties originated at different times and in response to different threats to the rule of law. This Article takes no position on an executive's duty to enforce statutes because such a duty is conceptually distinct from the duty to defend.

The duty to enforce originated as a response to King James II's attempts to assert an absolute prerogative to suspend or dispense with the law. English kings never enjoyed an absolute prerogative under the common law system; instead, that was traditionally a continental conception of power.¹¹⁶ Parliament responded by forcing James II to abdicate and forcing his successor, William III, to acknowledge in the 1689 Bill of Rights that the king possessed no such prerogatives.¹¹⁷ One hundred

note 6. Pryor was not defending a statute's constitutionality; instead he was defending the constitutionality of a state actor's actions and subsequently prosecuting in the civil sense the state actor for acting against a court order. Pryor also cited decisions to abandon defense on appeal after a district court invalidated a statute and decisions to confess violating a federal statute. *Id.*

114. Easterbrook, *supra* note 50, at 905. Pryor relies heavily upon Judge Easterbrook's article and applies the logic therein to the duty to defend even though Easterbrook's article focuses on the duty to enforce and never addresses the duty to defend.

115. See *supra* note 54 and accompanying text (noting that early U.S. Attorney General opinions treated the duty to defend as part of the duty to enforce).

116. See PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 26 (2014) (explaining that the English attempted to "restore governance through and under the law" as early as the Middle Ages, while kingdoms on the continent retained absolute power); *id.* at 65–67 (noting that the absolute prerogative to suspend the law was based on the "canon or civil law" of continental Europe); see also MICHAEL BARONE, OUR FIRST REVOLUTION 229–30 (2007) (explaining that absolute governments had replaced representative throughout the continent, and that such a trend was evident during Charles II's and James II's reigns). James II was not the first King to assert the prerogative. See HAMBURGER, *supra* (noting that other Stewart monarchs such as James I and Charles II asserted the suspending prerogative).

117. BARONE, *supra* note 116 at 191–92; HAMBURGER, *supra* note 116 at 68–69.

years later, the Founders drafted the Take Care Clause to ensure that Presidents could never assert these same prerogatives.¹¹⁸

The duty to defend was not a direct response to the prerogative tradition. Instead, it is best understood as a limit on an attorney general's power to invalidate a law indirectly. Rather than being based directly on the anti-prerogative tradition, it is based on the older and broader concept, articulated by Edward Coke, that "the King in his own person cannot adjudge any case . . . but that [cases] ought to be determined and adjudged in some Court of Justice, according to the law and Custom of England."¹¹⁹ Whereas the duty to enforce prevents the executive from exercising the prerogatives by not enforcing a statute, the duty to defend prevents the executive from exercising them by passively standing by while a court rules in favor of a challenger who seeks to have the law invalidated.

Viewing the duty to defend in its historical context shows just how far afield Judge Pryor has gone in his remarks. Those who argue for *nonenforcement* seek to revive an absolute royal prerogative that has been eliminated for over three hundred years. Those, like Pryor, who argue for *nondefense*, seek to create a *new* executive prerogative never before asserted in the Anglo-American legal tradition.

These distinctions underscore the lack of persuasive historical or doctrinal support for Judge Pryor's position, including discretion over pardons and prosecutions. A President or Governor who pardons an individual exercises a prerogative specifically delegated in Article II of the United States Constitution or a state constitution respectively.¹²⁰ An attorney general who refuses to defend a statute against constitutional challenge asserts a new prerogative analogous to, but distinct from, the absolute prerogatives of suspension and dispensation which were specifically denied to the President in the Take Care Clause and were denied to governors in state take care clauses.¹²¹

Pryor concludes that attorneys general may decide against defending a statute based on the attorney general's own view of the statute's constitutionality, unimpeded by any presumptions or deference in favor of a duty to defend. Such attorney general review, Pryor asserts, possesses three comparative advantages over the duty to defend: 1) refusing to defend a statute the attorney general deems unconstitutional "better protects the integrity of the judicial process"; 2) refusing to defend a statute the attorney general deems unconstitutional "forces public officials to take the constitution seriously"; and 3) refusing to defend a statute the attorney general deems unconstitutional allows attorneys general and the public to "move beyond a trivial debate about doing a job

118. See May, *supra* note 25, at 873; see also HAMBURGER, *supra* note 116 at 26 (explaining that Americans included prohibitions on absolute prerogatives in the Constitution).

119. Jim Powell, *Edward Coke: Common Law Protection for Liberty*, THE FREEMAN (Nov. 1, 1997), http://fee.org/the_freeman/detail/edward-coke-common-law-protection-for-liberty.

120. U.S. CONST. art. II, § 2 ("[The President] shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."); see, e.g., IND. CONST. art. I, § 15 ("The Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law.")

121. U.S. CONST. art. II, § 3; see e.g., IND. CONST. art. I, § 16 ("The Governor shall take care that the laws are faithfully executed"); see also *supra*, notes 37–40, 45–46 (explaining that the Take Care Clause prohibited the President from exercising the royal prerogatives of suspension and dispensation).

without thought of its consequences to the more important discussion about what the constitution means.”¹²² He also claims that executive review in a divided executive “means that no harm comes from a state attorney general providing an independent perspective that a law violates the constitution.”¹²³

Pryor’s claim that abandonment protects the integrity of the judicial process seems to be a rebuke of the Obama Administration’s decision to enforce but not defend DOMA. According to Pryor, executives who enforce but do not defend a law, or who defend a law they believe should not be enforced, invite charges of collusion with the plaintiffs challenging the law. Instead, he asserts that a government executive should neither enforce nor defend a law the executive deems unconstitutional, but instead should leave defense for a future executive who believes the law should be both enforced and defended. This line of reasoning overlooks two important points.

First, the executive branch has an opportunity to engage in *de novo* executive review when presented with a bill.¹²⁴ Perhaps a successor has a contrary view and refuses to enforce. That too is beyond the duty described in this article, and is no doubt subject to its own debate over prerogative and limits. But in any event if there is no enforcement, the duty to defend should not arise. And an executive so internally divided as to enforce a law that it refuses to defend could never hope to achieve a coherent understanding of the rule of law, let alone the duty to defend.

Second, in a divided executive, the governor may enforce the statute even though the attorney general believes it to be unconstitutional. In that situation, if the attorney general opts not to defend a statute today, a court will invalidate the statute and foreclose a future attorney general from maintaining a defense.¹²⁵ Instead, attorneys general best protect the integrity of the judicial process by defending all laws where a good-faith defense is available, regardless of their personal views.

Pryor next asserts that executive review, as opposed to the duty to defend, “forces executives to take the constitution seriously” and “not be lazy in the performance of their duties.”¹²⁶ Certainly Pryor is correct if he means that an executive is “be[ing] lazy in the performance of [his] duties” when the executive chooses to enforce but not defend a law. But so too is an executive who chooses neither to enforce nor defend a law or one who, like a state attorney general, has no enforcement authority and chooses not to defend a law. Attorneys general who defend all laws susceptible to good-faith supporting arguments, regardless of their personal views of constitutionality, are principled, not “lazy.”

Pryor also claims that allowing attorneys general to engage in independent review and opt not to defend a statute allows them and the public to move beyond “the trivial

122. Pryor, *supra* note 6.

123. According to Pryor, “[t]he judiciary can still hear an opposing argument from an official charged with enforcing the law and perhaps another official such as the Governor.” *Id.* For a discussion of the problems caused by another official defending a statute in the absence of the attorney general, see *infra* notes 164–165 and accompanying text.

124. See *supra* notes 47–50 and accompanying text (discussing the President’s ability to engage in *de novo* review upon presentment of a bill).

125. Pryor, *supra* note 6.

126. Pryor cites presidential signing statements as an example of executives who are lazy in the performance of their duties and who shift the responsibility of constitutional review to the courts. Pryor, *supra* note 6.

debate of doing a job without thought of consequences” and thereby ensures that both sides’ views can be heard in the debate.¹²⁷ This is a perplexing assertion, not least because one significant rationale for a strong duty to defend is that the contrary view threatens significant negative consequences, including undermining the legislative process by placing the attorney general in the position of exercising a “litigation veto” over legislation whose constitutionality is open to debate. Pryor’s concern seems fairly specific to the same-sex marriage context, where perhaps he thinks state attorneys general have become too concerned with the debate over duty to defend rather than the merits of same-sex marriage itself.¹²⁸ Taken to its logical conclusion, this rationale would mean that the public would benefit if some attorneys general would defend traditional marriage and others would not, thus enabling the public to hear arguments both for and against the law’s constitutionality.

But state attorneys general are not some sort of professional speech and debate society. They may well influence public discussions, but that is secondary to their role as attorneys for sovereigns, that is, the citizens of their states. Whether the topic is same-sex marriage or anything else, the public can hear arguments over costs, benefits, tradition, risk, and constitutionality from any number of perspectives. And if an attorney general steps up to defend the law against constitutional attack, the public will benefit from the courtroom debate over the law’s constitutionality. It is only where an attorney general refuses to defend that citizens are deprived of such robust debate and where—ironically, given Pryor’s stated concerns—the focus of debate shifts to the duty to defend rather than the constitutional merits of the law. In short, once a party challenges the law, the debate has moved into the court system, both sides are represented by counsel, and the public can best hear both sides’ arguments if attorneys general present arguments in favor of the law’s constitutionality. Otherwise, the public hears only arguments against the law.

Professor Katherine Shaw, who also argues for a “robust nondefense power,”¹²⁹ is equally unable to provide examples to support her argument. As discussed in more detail later, the first case she cites to support her argument, *Perry v. Schwarzenegger*,¹³⁰ represents an incorrect application of the duty to defend. The second case she cites represents a situation in which the attorney general defends a statute by representing one of the two named defendants who wished to defend the statute.¹³¹ The third case she cites represents a narrow exception to the duty to defend

127. *Id.*

128. *Id.* (noting that the current Colorado, Idaho, and Michigan Attorneys General and the former Virginia Attorney General have criticized fellow attorneys general for not adhering to the duty to defend).

129. Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 256 (2014).

130. *See id.* at 239–40 (citing *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010)).

131. *See id.* at 240–41 (citing *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012)). The plaintiffs sued both the Hawaii Governor and Director of the state Department of Health. The Governor announced that she would not defend, but the Director of the Department of Health announced that she would. The Hawaii Attorney General represented both parties. *Id.* Therefore, although the attorney general represented one party who wished not to defend the statute, *id.*, he satisfied his duty to defend by representing the Director of the

in which the Nebraska Attorney General was required to challenge a statute when the government official charged with enforcing the statute announced that he would not enforce it.¹³² The fourth case she cites arose in New Jersey, one of the few states in which the governor appoints the attorney general.¹³³ In that case, the governor ordered the attorney general to decline to defend a statute for an inappropriate reason—because “the [g]overnor had vetoed the bill.”¹³⁴ Hence, the New Jersey case represents both a situation that is largely unique at the state level—a unitary executive—and an incorrect reason for abandoning a defense. In short, although the four examples cited in the article highlight some differences that exist among the state attorneys general offices, they do not accurately illustrate a widely accepted or coherent understanding of the duty to defend.

Instead of the policy-driven view espoused in the Holder Doctrine of selective, subjective nondefense, state and federal attorneys general have historically taken their duty to defend seriously, and with good reason. Refusal to defend state statutes against constitutional challenges violates the careful balance of powers among coequal branches of government,¹³⁵ deprives courts of their power to determine a statute’s constitutionality,¹³⁶ and *erodes the rule of law*.¹³⁷ Instead, abandonment grants an attorney general the power to suspend laws by choosing based on policy preferences which statutes will be defended in court and which will not.

1. The Duty to Defend Is Implicit in the Rule of Law and Nondefense Vitiates the Rule of Law

The greatest problem posed by selective, subjective nondefense is the undermining of confidence in the legal system and the resulting erosion of the rule of law. Broad exceptions to the duty to defend vitiate the rule of law because they leave “the laws dependent on [the] will and pleasure” of the executive.¹³⁸ At the federal level, failure to strictly adhere to the duty to *defend* does more to undermine the rule of law than a failure to strictly adhere to the duty to *enforce*. If the President refuses to enforce a statute, the statute will have no effect during that President’s administration, but future administrations will be free to enforce it.¹³⁹ Although use of this practice will decrease the public’s faith in the stability of the laws, the practice will not render any particular statute permanently ineffective. Conversely, when a

Department of Health and defending the statute.

132. *See id.* at 243 (citing *State ex rel. Bruning v. Gale*, 817 N.W.2d 768, 773–74 (Neb. 2012)).

133. *See* Emily Myers, *Qualifications, Selection and Term*, in *STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES* 17 (Emily Myers ed., 3d ed. 2013) (noting that the governor appoints the attorney general in only five states) [hereinafter Myers, *Qualifications, Selection and Term*].

134. *See* Shaw, *supra* note 129, at 244 (discussing *Planned Parenthood of Cent. N.J. v. Verniero*, 41 F. Supp. 2d 478, 481–82 (D.N.J. 1998)).

135. *See infra* Part I.D.2.

136. *See infra* Part I.D.3.

137. *See infra* Part I.D.1.

138. *See* *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342).

139. *See* Levey & Klukowski, *supra* note 40, at 390–91 (“Consider that a President’s failure to enforce a federal statute has no binding effect on future Presidents . . .”).

President refuses to defend a statute against a constitutional attack in court, the remedy often is for the court to enter a default judgment against the government and *permanently enjoin the statute's enforcement*, which will prohibit all of the President's successors from enforcing it in the future.¹⁴⁰

Although abandoning the duty to defend at the federal level erodes the rule of law, abandonment at the state level has an even more serious effect on the rule of law. In the unitary federal executive, the President decides whether to enforce a statute and thereby precipitate a conflict that would give rise to the duty to defend. The President oversees both the agency enforcement and legal defense arms of the executive branch. By virtue of the power to hire and fire cabinet officials, the President could instruct the U.S. Attorney General to defend a statute even if the Attorney General personally believes it to be unconstitutional.¹⁴¹

At the state level, executive authority is divided among numerous separately elected executive officials. Many officials, including the governor, secretary of state, auditor, and treasurer, are charged with enforcing statutes.¹⁴² An attorney general is the state official charged with defending state statutes against constitutional challenges, and is often elected (or, in the case of Tennessee, selected) independently from the governor.¹⁴³ A state attorney general who abandons the duty to defend simultaneously abandons the role as law officer for the state.¹⁴⁴ In all but five states, the governor and other separately elected enforcement officials cannot exercise control over the attorney general analogous to the control exercised by the President over the U.S. Attorney General at the federal level.¹⁴⁵ The enforcement agencies and the governor may both believe a challenged statute is constitutional but will be unable to maintain a defense if

140. *See id.* at 391 (“[W]here a President’s failure to defend a statute results in the law being struck down by the courts as unconstitutional, the resulting precedent may tie the hands of future Presidents with respect to enforcement and render futile their attempts to defend the law in court.”).

141. There are significant exceptions, of course, with respect to independent agencies such as the FCC, FEC, FTC, FDA, SEC, and the Federal Reserve Board of Governors. In those scenarios, it is possible that agencies may enforce constitutionally questionable statutes but not have the authority over the Attorney General to require defense of that enforcement. For that reason, some agencies have their own litigation defense authority. Elliott Karr, Essay, *Independent Litigation Authority and Calls for the Views of the Solicitor General*, 77 GEO. WASH. L. REV. 1080, 1085 (2009) (explaining that many independent agencies can maintain their own defenses in lower courts and that the FTC and possibly the NLRB and TVA can maintain their own defense in the United States Supreme Court). Regardless, the problems of divided executive power at the federal level are far less central to the duty to defend than at the state level.

142. *See, e.g.*, IND. CODE § 6-8.1-3-1 (2013) (requiring the Department of Revenue, which reports to the governor, to administer, collect, and enforce all listed taxes); IND. CODE § 23-19-6-1 (Supp. 2014) (requiring the secretary of state to administer Indiana’s securities statutes).

143. *See Myers, Qualifications, Selection and Term, supra* note 133, at 12 (noting that attorneys general are elected in forty-three states).

144. *See supra* Part I.A. (detailing the development of this duty).

145. *See Myers, Qualifications, Selection and Term, supra* note 133, at 12 (explaining that attorneys general in five states—Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming—are appointed by the governor).

the attorney general believes it is unconstitutional and refuses to exercise the duty to defend—particularly in states such as Indiana, where other government officials need the attorney general’s permission to represent themselves in court.¹⁴⁶

Given the original rationale for the role of the attorney general as a separate government officer, abandonment of any essential duty vitiates the rule of law. The role of an independent attorney general developed in part in response to executive (or more precisely, royal) suspension of statutes.¹⁴⁷ The working assumption behind the office is that the law exists apart from executive will and prerogative.¹⁴⁸ An attorney general who refuses to defend based solely on personal conclusions about statutory constitutionality merely substitutes one autocratic prerogative for another and negates the purpose of having an attorney general.

2. Abandonment Also Violates the Separation of Powers

An attorney general also fundamentally alters the system of checks and balances by abandoning the duty to defend. When arguing that abandonment violates separation of powers principles, most commentators focus on the overlap with judicial functions. An attorney general who refuses to defend a statute when good-faith defenses exist puts himself and his subjective opinion in the place of the court. Once a statute is challenged in litigation, the judicial branch is the proper branch to determine whether an enacted statute is constitutional.¹⁴⁹ At that point, an attorney general must evaluate the statute under the “clearly unconstitutional” standard and

146. See, e.g., *State ex rel. Sendak v. Marion Cnty.* Superior Court, 373 N.E.2d 145, 148 (Ind. 1978) (explaining that another party may represent the state only if the Indiana Attorney General consents).

147. See *supra* notes 17–27 and accompanying text (chronicling this development).

148. See Marshall, *supra* note 33, at 2456 (citing *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867, 868 (Ky. 1974) (explaining that the state attorney general exists separately from the governor to ensure that the attorney general does not merely represent “the machinery of government”)); Scott M. Matheson, Jr., *Constitutional Status & Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL’Y 1, 12 (1993).

149. As the Court recently noted:

It is thus a “permanent and indispensable feature of our constitutional system” that “the federal judiciary is supreme in the exposition of the law of the Constitution.” *Miller v. Johnson*, 515 U.S. 900, 922–23 (1995) (quoting *Cooper v. Aaron*, 358 U.S. 1, 18 (1958)).

No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text. As we emphasized in *United States v. Nixon*, 418 U.S. 683 (1974): “In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. . . . Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury* that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Id.* at 703 (citation omitted).

United States v. Morrison, 529 U.S. 598, 616 n.7 (2000); Ala. Op. Att’y Gen. 2001-087.

only abandon a defense if it fails that standard; to do otherwise infringes on the court's power to determine the statute's constitutionality.¹⁵⁰

At the state level, abandonment can also infringe on powers delegated to other executive officers, particularly those created by state constitutions. Challenges to a state statute fall into one of two categories: either the plaintiff is challenging how the state agency is enforcing the statute, which is an as-applied challenge to the statute, or the plaintiff is challenging the validity of the entire statute, which is a facial challenge.

Attorneys general have a duty to defend against both. If another executive official is sued for enforcing a statute in a particular way, the attorney general's job is to defend the official, not to make an independent evaluation. Making such an independent judgment undercuts the other executive official's separate executive authority. Therefore, to the extent there is a role for an attorney general to determine a statute's constitutionality, it must be done so as not to undercut a separate and coequal officer of the executive branch from carrying out his own executive functions.¹⁵¹

The real question for the duty to defend arises when a party brings a facial challenge against a statute. To prevail, the plaintiff must not only overcome a heavy presumption of constitutionality¹⁵² but must also demonstrate that the statute is unconstitutional in *all* applications, under *any* set of facts.¹⁵³ These two barriers to facial challenges afford significant institutional protection from judicial interference to officials who enforce the law. An attorney general who opts to abandon the duty to defend against a facial challenge—particularly when abandonment would result in a default judgment—forfeits these structural protections and thereby violates the separation of powers to a greater extent than one who abandons a defense only against a particular as-applied challenge.

150. See Ala. Op. Att'y Gen. 2000-104; Ala. Op. Att'y Gen. 2000-123; Ala. Op. Att'y Gen. 2001-087.

151. A potential exception arises where different officials interpret a statute differently and the attorney general must choose one interpretation to advocate in court. In that situation, the attorney general's role as chief legal officer for the state and his corresponding role in setting the state's legal policy, compare *Feeny v. Commonwealth*, 366 N.E.2d 1262, 1266 (Mass. 1977) (explaining that the attorney general, when appearing for state officers, may decide matters of legal policy ordinarily in the client's purview), allow him to resolve conflicting interpretations even if it means undercutting one agency's executive authority.

152. See *supra* note 78 and accompanying text (explaining that challengers must prove a statute is unconstitutional beyond a reasonable doubt).

153. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Note that this standard does not apply to some First Amendment cases, where the overbreadth doctrine sometimes permits facial invalidation even where some unprotected speech is regulated. *Id.* at 745 (noting that the overbreadth doctrine occurs within "the limited context of the First Amendment"). Courts disagree over whether *Salerno* applies to abortion regulations evaluated under the *Casey* "undue-burden" standard. See Shara L. Boonshaft, Recent Decisions, *The United States Court of Appeals for the Fourth Circuit*, 60 MD. L. REV. 1242, 1246 (2001) ("The Supreme Court's decisions in *United States v. Salerno* and *Planned Parenthood v. Casey* changed the focus of abortion cases, leading lower courts to struggle further in determining whether *Casey*'s 'undue-burden' standard replaced *Salerno*'s 'no set of circumstances' test.").

3. Nondefense Impairs Adversarial Hearings and the Advancement of Legal Doctrine

The state's attorney general, as chief law officer of the state, unquestionably has standing to defend a challenged statute or constitutional amendment.¹⁵⁴ Other state officers may also have standing in limited situations. For example, the governor and other executive officers may have standing to defend a statute that their offices are charged with enforcing.¹⁵⁵ Further, the House and Senate leaders may have standing to defend state statutes if state law allows them to do so.¹⁵⁶ These prerogatives vary greatly state by state.¹⁵⁷ Judge Pryor believes that because other officials could step in to defend, "no harm would result from an attorney general declining to defend."¹⁵⁸

However, any standing of other officials to appear in court will be more limited than the state attorney general's. For example, legislative leaders may initially have standing to defend a statute, but only if a state statute specifically confers standing and only so long as the legislators hold their leadership roles in their respective houses.¹⁵⁹ Therefore, it is possible that an attorney general's decision to abandon a defense will effectively act

154. Scott L. Kafker & David A. Russcol, *Standing at a Constitutional Divide: Redefining State and Federal Requirements for Initiatives after Hollingsworth v. Perry*, 71 WASH. & LEE L. REV. 229, 237 (2014) (explaining that a state has standing to defend the constitutionality of a state statute or constitutional provision because the state suffers a cognizable injury under Article III when a court invalidates a state statute (citing *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664 (2013); *Maine v. Taylor*, 477 U.S. 131, 137 (1986))); *see also* *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 763 (10th Cir. 1980) ("[T]he attorney general has the exclusive right to represent the state in actions to enforce its interests."); *Feeney*, 366 N.E.2d at 1266 (noting "[t]he authority of the [a]ttorney [g]eneral, as chief law officer, to assume primary control over the conduct of litigation which involves the interests of the Commonwealth").

155. *See, e.g.*, COLO. REV. STAT. § 24-31-101(1)(e) (West 2008) (allowing an agency of the executive or judicial branch to employ its own counsel when either the governor or chief justice determines that the attorney general has failed to provide legal services to the agency); MISS. CODE ANN. § 7-5-39(3)(a) (West Supp. 2013) (requiring the attorney general to authorize "an arm or agency of the state or a statewide elected officer acting in his official capacity" to use outside counsel when the attorney general refuses to represent the state entity); MONT. CODE ANN. § 2-15-201(4) (2013) (allowing the governor either to order the attorney general to represent the state or hire outside counsel to serve as litigation counsel); 71 PA. CONS. STAT. ANN. § 732-303 (West 2012) (allowing the governor to intervene and defend a statute when the attorney general refuses to do so). *But see* IND. CODE § 4-6-5-3 (2009) (prohibiting any agency from hiring outside counsel "without the written consent of the attorney general").

156. *See, e.g.*, IND. CODE §§ 2-3-8-1 to 2-3-9-3 (2011) (allowing the Speaker of the House and President of the Senate to defend Indiana statutes); *Karcher v. May*, 484 U.S. 72, 81 (1987) (allowing the New Jersey Speaker of the House and Senate President to defend a state statute only so long as they retained their leadership positions); *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Ehlmann*, 137 F.3d 573, 578 (8th Cir. 1998) (noting that legislators lack standing to defend statutes if their state's law does not specifically grant them standing).

157. Myers, *Status in State Government*, *supra* note 34, at 47-49 (describing the different prerogatives in various states).

158. Pryor, *supra* note 6.

159. *See* Shaw, *supra* note 129, at 247-48 (explaining how this precise scenario occurred in *Karcher v. May*, 484 U.S. 72 (1987)).

as a veto by depriving a court of an adversarial hearing with two opposing sides presenting arguments about the provision's constitutionality.¹⁶⁰

Even if another officer has standing and elects to maintain a defense, the attorney general's abandonment could provide persuasive evidence that the challenged provision is unconstitutional.¹⁶¹ The District Court for the District of Columbia observed that the executive branch declines to defend statutes only on "exceedingly rare" occasions and only when it has "the weightiest of reasons," namely, that it could not conceive of a defense to advance.¹⁶² Accordingly, the court categorized executive nondefense as "a significant circumstance" to consider when determining whether the statute is constitutional.¹⁶³

When an attorney general abandons the duty to defend, particularly when no other state entity can maintain a defense, the abandonment prevents a court from evaluating the statute at all. Even if another state entity chooses to maintain a defense, such a defense will not advance the state's interests as effectively as an attorney general defense because the attorney general is the officer charged with advancing a single, uniform litigation policy for all state entities.¹⁶⁴ When one office represents all agencies in all actions, "statutory and case law are [sic] applied more consistently," which reduces the number of interagency conflicts.¹⁶⁵ When another office defends a statute, that office may be more inclined to advance its interests at the expense of the broader state interest.

Courts are well aware of the value that state attorneys general and their teams provide in cases challenging state laws. Only an attorney general, as chief legal officer of a sovereign whose laws are before the court, can draw on a deep reservoir of institutional knowledge provided by both the State's electorate and state government agencies who are his clients. And as the experience of *Hollingsworth* in part demonstrates, the function of a State's attorney general as a defender of a State's laws is critical to sound resolution of core constitutional issues. It ensures not only that the appropriate, statewide chief legal officer has elected to make a defense,¹⁶⁶ but also that the precise arguments being offered to courts have been vetted by an official who is subject to statewide political accountability. Perhaps as important, it also ensures that

160. For a recent example of this situation, see *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). For a more detailed discussion of the *Hollingsworth* opinion, see *infra* notes 209–83 and accompanying text.

161. See *Gavett v. Alexander*, 477 F. Supp. 1035, 1044 (D.D.C. 1979).

162. *Id.*

163. *Id.*

164. See, e.g., *Indiana State Toll Bridge Comm'n v. Minor*, 139 N.E.2d 445, 448 (Ind. 1957) (explaining that the Office of the Attorney General has a duty to represent all agencies and harmonize the state's legal position before the courts); *State ex rel. Young v. Niblack*, 99 N.E.2d 839, 842–43 (Ind. 1951) (prohibiting the superintendent of public instruction from representing himself in court and instead explaining that the attorney general represents the state and "attend[s] to the interests of the state in all suits . . ."); Myers, *Status in State Government*, *supra* note 34, at 59.

165. Myers, *Status in State Government*, *supra* note 34, at 59.

166. See *Hollingsworth*, 133 S. Ct. at 2667 (explaining that, unlike state officials, private entities are "free to pursue a purely ideological commitment to the law's constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities").

courts are not faced with confusion over who, in fact, represents the interests of the State. By contrast, when an attorney general stakes out a position against his own State's law before the Court, competing parties can make equally plausible claims to be voicing the State's interests. If the court is to achieve a fully informed resolution of complex and controversial legal issues, it must have the assurance that it is hearing an unfettered, uncontradicted articulation of state interests from the very official charged by law with advocating on behalf of those interests in court.

4. The Duty to Defend Is Not Absolute

Of course, an attorney general's duty to defend statutes against constitutional attack is not limitless. Federal and state attorneys general have not always defended statutes in the face of constitutional challenges.

At the federal level, the attorney general has developed the well-accepted tradition of not defending statutes that erode executive power. The President has a constitutional duty to ensure that other branches do not encroach upon the powers granted to the President by the constitution.¹⁶⁷ In the unitary federal executive, requiring the President to defend a statute that infringes on his powers could leave no party to challenge its constitutionality in court.¹⁶⁸ By challenging instead of defending the statute, the President is able to protect against infringements by other branches those duties that have been constitutionally reserved to his office.

At the state level, the divided executive structure largely mitigates these concerns because the governor or another enforcement officer could challenge a statute that infringes on his office's powers while the attorney general simultaneously defends the statute. In that situation, the court will still be presented with arguments for and against the statute's constitutionality and will be able to determine whether the statute is constitutional.

Finally, there is the category of laws for which no defense is warranted because no good-faith argument can possibly be made for their constitutionality. There can be no doubt that the duty to defend can give way to unconstitutionality—but only in the rarest of circumstances. All authorities as to the duty to defend hold as such, albeit according to different standards. Some refer to the standard as the “manifestly invalid” standard;¹⁶⁹ others, the “most clear and compelling circumstances” standard;¹⁷⁰ the “no argument worthy of the court's consideration” standard;¹⁷¹ or the “patently illegal or unconstitutional” standard.¹⁷²

167. Levey & Klukowski, *supra* note 40, at 408 (citing Recommendation that the Department of Justice not Defend the Constitutionality of Certain Provisions of the Bankr. Amendments & Fed. Judgeship Act of 1984, 8 Op. O.L.C. 183, 195 (1984)).

168. *Id.* (“[W]here a statute is allegedly unconstitutional precisely because it limits the President's power, it will typically be only the President who can challenge the law.”).

169. Letter from Daniel R. McLeod to Mrs. Harold A. Moore, *supra* note 77.

170. Ariz. Att'y Gen. Op. No. 78-10 (1978).

171. Or. Att'y Gen. Op. No. OP-6500 n.3 (Oct. 15, 1993), available at 1993 WL 437896.

172. Letter from David Souter to Robert Backus, *supra* note 84; Ala. Op. Att'y Gen. 2000-143; Ala. Op. Att'y Gen. 2001-087.

II. WHEN CAN DUTY TO DEFEND GIVE WAY? RULE 11 AS GUIDEPOST

Even the strongest adherents to the duty to defend concede that, in certain cases, the attorney general should not defend certain statutes,¹⁷³ but these situations should be “most rare”¹⁷⁴ and should occur only when the statute is “transparently invalid” or “patently illegal or unconstitutional.”¹⁷⁵ How, then, should attorneys general determine whether the statute before them is one of the many that must be defended or one of the few that are indefensible? The most compelling answer is to tie defense decisions to Rule 11.

In federal court, Federal Rule of Civil Procedure 11 limits an attorney general’s advocacy by prohibiting frivolous filings that are not “warranted by existing law.”¹⁷⁶ State courts have corresponding rules that similarly limit an attorney general’s advocacy by prohibiting frivolous filings.¹⁷⁷ Rule 11 was amended in 1983 in an effort to curb “abusive litigation practices [that] abounded in the federal courts.”¹⁷⁸ Rule 11 curbs these practices by both “streamlin[ing] the administration and procedure of the federal courts” and by deterring attorneys from making frivolous arguments.¹⁷⁹ A frivolous argument is more than simply a losing argument; it is one that has no chance of success based on clearly established, binding legal precedents and has no chance of being extended or modified from existing precedent.¹⁸⁰ Rule 11 is designed to protect the adversarial system from these types—and only these types—of arguments.¹⁸¹ The proper Rule 11 inquiry is whether an unsuccessful filing

173. See, e.g., John W. Suthers, *A “Veto” Attorneys General Shouldn’t Wield*, WASH. POST, Feb. 2, 2014, http://www.washingtonpost.com/opinions/a-veto-attorneys-general-shouldnt-wield/2014/02/02/64082fc8-887e-11e3-a5bd-844629433ba3_story.html.

174. *Representation of Congress & Congressional Interests in Court*, *supra* note 55.

175. See, e.g., *The Att’y Gen.’s Duty to Defend & Enforce Constitutionally Objectionable Legislation*, 4A U.S. Op. O.L.C. 55, 56 n.1 (1980) (quoting *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967); Ala. Op. Att’y Gen. 2001-087; Ala. Op. Att’y Gen. 2000-143; Ariz. Att’y Gen. Op. No. 78-10 (Jan. 26, 1978) (explaining that the office would only conclude that a statute was unconstitutional in “the most clear and compelling circumstances” because of the office’s duty to defend all statutes and because of the presumption of constitutionality); Or. Att’y Gen. Op. No. OP-6500 n.3 (Oct. 15, 1993), available at 1993 WL 437896 (“It is our duty to defend the constitutionality of a statute *unless no argument worthy of the court’s consideration can be made in its behalf.*”) (emphasis added) (citing 42 Or. Att’y Gen. Op. 377, 380 n.2 (1982)); 53-55 Wash. Att’y Gen. Op. No. 310 (1954) (noting that statutes have a strong presumption of constitutionality and that the office has a duty to defend the statute “unless the invalidity . . . is apparent”); Letter from David Souter to Robert Backus, *supra* note 84.

176. FED. R. CIV. P. 11(b)(2).

177. E.g., ILL. S. CT. R. 137; IND. R. TRIAL P. 11(A); KY. R. CIV. P. 11; MICH. CT. R. 2.114(D)(1)–(3); MINN. R. CIV. P. 11.02(a)–(b); OHIO R. CIV. P. 11.

178. *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 393 (1990).

179. *Id.*

180. *Rodriguez v. United States*, 542 F.3d 704, 710 (9th Cir. 2008) (“[A] frivolous [argument] is one that is groundless, and an argument is groundless if it is foreclosed by binding precedent or . . . obviously wrong.” (second alteration in original) (internal quotation marks omitted) (citing *United States v. Manchester Farming P’ship*, 315 F.3d 1176, 1183 (9th Cir. 2003))); *Mareno v. Rowe*, 910 F.2d 1043, 1047 (2d Cir. 1990).

181. *Mareno*, 910 F.2d at 1047 (explaining that not all losing arguments are frivolous).

was “at least well founded.”¹⁸² Rule 11 is not, however, “intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories.”¹⁸³

Rule 11 provides attorneys general with a useful guidepost because it provides an objective standard already applied in other types of cases.¹⁸⁴ An objective standard will ensure that attorneys general can more easily determine whether to maintain a defense—either controlling precedent renders a potential defense frivolous (and therefore sanctionable) or it does not.

My view is that an attorney general who can advance a defense that satisfies Rule 11’s requirement must do so. Only by defending all laws—unless doing so would be frivolous—can an attorney general maintain the proper balance between the legislative, executive, and judicial branches; provide stability in the jurisdiction’s laws; and ensure protection of the rule of law.¹⁸⁵ So, if a potential nonfrivolous defense exists, the attorney general must raise it, even if it is a weak defense or one not embraced by popular opinion or other stakeholders in the political process. For instance, if a number of federal circuits have rejected the defense but neither the attorney general’s circuit nor the U.S. Supreme Court has addressed it, the defense may be weak and the attorney general may be unsure whether it will prevail. But the defense is not one for which there is *no* chance of prevailing based on clearly-established, controlling precedent; thus, it is not frivolous. In this situation, the attorney general’s duty to defend his state’s laws controls.

Implicit in the decision to tie enforcement decisions to Rule 11 is the caveat that an attorney general’s duty cannot extend to situations in which the attorney general must argue that the court reverse prior precedent in order to find the statute constitutional. For example, an attorney general could justifiably refuse to defend a statute that prohibited stores from displaying pornographic magazines because the attorney general could prevail only by convincing the U.S. Supreme Court to overturn its doctrine invalidating precisely such a law.¹⁸⁶ An attorney general could satisfy Rule 11 only by arguing that the Supreme Court should overturn that precedent. To be sure, the attorney general *could* mount such a defense, but, as I conceive it, the duty to defend does not require such an effort. Instead, the attorney

182. *Business Guides, Inc. v. Chromatic Commc’ns Enters., Inc.*, 498 U.S. 533, 553 (1991).

183. *Woodrum v. Woodward Cnty.*, 866 F.2d 1121, 1127 (9th Cir. 1989) (citing *Hurd v. Ralph’s Grocery Co.*, 824 F.2d 806, 810 (9th Cir. 1987)).

184. *See Business Guides, Inc.*, 498 U.S. at 551.

185. When I say “defend,” what I mean to say is that when faced with a challenge to a state statute an attorney general must at the very least appear in court and defend the statute before the trial court and the court of appeals. Beyond the intermediate appellate court level, other considerations come into play, including the strength of that state’s particular case vis à vis other states’ cases addressing a similar statute, whether a pre-existing circuit court split exists, and whether it is clear that United States Supreme Court review is imminent. An attorney general must exercise special care in determining whether to appeal a case to the U.S. Supreme Court because, while a victory can bring favorable results to many other cases, a loss can undo “years of litigation progress” in the lower courts. Dan Schweitzer, *The Supreme Court of the United States, in STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES* 405 (Emily Myers ed., 3d ed. 2013).

186. *See, e.g., Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972).

general could apply the Rule 11 standard, determine that such a defense would be frivolous and properly decline to defend the statute without violating the duty to defend.

III. APPLICATION OF THE RULE 11 STANDARD TO PARTICULAR CASES

Now I shall apply the foregoing standard to three types of cases to determine when an attorney general must defend a statute and when the attorney general may properly decline to defend it. First, this Part examines two situations in which attorneys general properly declined to defend their states' statutes. This Part will then examine attorneys general's decisions not to defend their states' marriage definitions and conclude that such decisions are improper.

A. Indiana's Immigration Law Allowing Warrantless Arrests: No Duty to Defend

In 2011 and 2012, the Office of the Indiana Attorney General was called upon to defend a new statute enacted by the 2011 Indiana General Assembly. The statute regulated the use of consular identification cards and allowed law enforcement officers to arrest a person without first obtaining a warrant when the officer had an immigration court-issued removal order, a Department of Homeland Security-issued detainer, or notice of action.¹⁸⁷ Section 18 “create[d] a new infraction . . . for any person (other than a police officer) who knowingly or intentionally offers or accepts a consular identification card as a valid form of identification for any purpose.”¹⁸⁸ Section 20 allowed police to arrest a person “when the officer has [(1)] a removal order . . . for the person . . . [;] [(2)] a detainer or notice of action . . . for the person [issued] by the United States Department of Homeland Security [(“DHS”)] [;] or . . . [(3)] probable cause to believe [that] the person has been indicted for or convicted of one or more aggravated felonies”¹⁸⁹

The challenged sections included a provision identical to a statute at issue in *Arizona v. United States*, which was before the U.S. Supreme Court at the time.¹⁹⁰ My office joined an amicus brief in support of the State of Arizona as part of the office's duty to defend, but the U.S. Supreme Court held that federal law preempted Arizona's registration, work application, and warrantless arrest provisions and permanently enjoined their enforcement.¹⁹¹ My office defended Indiana's consular identification and warrantless arrest provisions until the U.S. Supreme Court decided

187. SEA 590 §§ 18, 20. (codified at IND. CODE §§ 34-28-8.2 (2013), 35-33-1-1 (2011)) (current version at 2014 Ind. Acts 2926-27).

188. *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 909 (S.D. Ind. 2011).

189. *Id.*

190. Emily Myers, *Decisions Affecting the Powers and Duties of Attorneys General*, NAAGAZETTE (Aug. 29, 2013), <http://www.naag.org/decisions-affecting-the-powers-and-duties-of-state-attorneys-general1201010.php> (citing *Arizona v. United States*, 132 S. Ct. 2492 (2012)).

191. 132 S. Ct. 2492. Section 3 prohibited the “willful failure to complete or carry an alien registration document” *Id.* at 2501. Section 5(C) criminalized “an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor” *Id.* at 2503. Section 6 stated that law enforcement “without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States.” *Id.* at 2505.

Arizona v. United States. Prior to the Court's decision, my office conducted discovery and filed a cross motion for summary judgment. After the Court's decision, I announced that the office would no longer defend the warrantless arrest provision because it was clearly unconstitutional in light of the Court's decision in *Arizona*; however, the office continued to defend the consular identification provision in the district court.¹⁹² In reaching my decision, I applied the Rule 11 standard and told the court that "warrantless arrests of persons with a removal order, notice of action, or a commission of an aggravated felony are unconstitutional" based on *Arizona*, but that "a federal, state, or immigration detainer justified an arrest before Indiana Code section 35-33-1-1, and still justifies an arrest after the *Arizona* decision."¹⁹³

During litigation, three state legislators attempted to intervene to maintain their own defense.¹⁹⁴ The court ultimately denied their motion to intervene because they did not allege an injury that would provide them with standing; instead, they "merely disagree[d] with" my office's litigation strategy.¹⁹⁵

*B. Colorado's Law Prohibiting Public Display of Marijuana Magazines:
No Duty to Defend*

The Office of the Colorado Attorney General declined to defend a statute that prohibited "marijuana-focused magazines" from being displayed in stores because controlling Supreme Court precedent held that such restrictions violated the First Amendment.¹⁹⁶ The statute, which would force stores to conceal magazines that focused on marijuana-related subjects, was a content-based regulation and was therefore "presumptively invalid."¹⁹⁷ The Supreme Court has repeatedly held that content-based restrictions are subject to the highest judicial scrutiny because "above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."¹⁹⁸ The Colorado Attorney General applied the Rule 11 standard and decided not to defend the statute because "binding precedent was clear, on point, and unavoidable."¹⁹⁹

192. *Buquer v. City of Indianapolis*, No. 1:11-CV-00708-SEB-MJD, 2013 WL 1332137, at *1 (S.D. Ind. Mar. 28, 2013).

193. *Id.*; see Press Release, Supreme Court Ruling Guides Final State Brief in Immigration Suit (July 31, 2012), available at http://www.in.gov/activecalendar/EventList.aspx?fromdate=7/1/2012&todate=7/31/2012&display=Month&type=public&eventidn=57958&view=EventDetails&information_id=116961 ("[T]he Supreme Court's ruling in the *Arizona v. U.S.* case makes it clear that state laws authorizing local law enforcement officers to make warrantless arrests of people for immigration violations are unconstitutional.").

194. *Buquer*, 2013 WL 1332137, at *2.

195. *Id.* at *3.

196. Suthers, *supra* note 173.

197. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

198. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

199. Suthers, *supra* note 173.

C. Traditional Marriage Laws: Duty to Defend

In the past five years, several state attorneys general have made highly publicized announcements in which they abandoned their duty to defend their state's traditional marriage definition. The first such instance occurred in 2008, when plaintiffs challenged California's Proposition 8 in state court. Initially, California Attorney General Jerry Brown announced that he would fulfill his "responsibility" to defend Proposition 8.²⁰⁰ But then, when his office filed its brief, it actually argued *against* the amendment's constitutionality, contending that the amendment "abrogate[d] fundamental constitutional rights without a compelling justification."²⁰¹ The California Supreme Court ultimately rejected the plaintiffs' claim.²⁰²

Then in 2009, Brown and California Governor Arnold Schwarzenegger announced that their offices would not defend California's constitutional marriage definition against a constitutional challenge in federal court because the marriage definition "[could] not be squared with guarantees of the Fourteenth Amendment."²⁰³ When the California state officials abandoned their defense, the amendment's sponsors intervened to defend the statute.²⁰⁴ Following a twelve-day bench trial in the U.S. District Court for the Northern District of California, the court "declared Proposition 8 unconstitutional, permanently enjoin[ed] the California officials named as defendants from enforcing the law, and 'direct[ed] the official defendants that all persons under their control or supervision' shall not enforce it."²⁰⁵

The California elected officials chose not to appeal the district court's order, and left the amendment's proponents to appeal.²⁰⁶ On appeal, the Ninth Circuit certified

200. Shaw, *supra* note 129, at 238 n.118 (citing Michael Gardner & Greg Moran, *Gay Marriage Ban Foes Take Fight to the Courts*, SAN DIEGO UNION-TRIB., Nov. 6, 2008, http://www.utsandiego.com/uniontrib/20081106/news_1n6prop8.html ("State Attorney General Jerry Brown . . . announced yesterday that he will take Proposition 8's side in court. 'We will defend the law as enacted by the people. . . . We have that responsibility,' Brown said.")).

201. *Id.* at 238 (citing Answer Brief in Response to Petition for Extraordinary Relief at 5, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (No. S168047)).

202. *Strauss v. Horton*, 207 P.3d 48, 122 (2009).

203. Shaw, *supra* note 129, at 239 n.125 (citing Answer of Attorney General Edmund G. Brown Jr. at 2, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (2010) (No. 3:09-cv-02292-VRW)); Maura Dolan, *Schwarzenegger Decides Against Defending Prop. 8 in Federal Court*, L.A. TIMES, June 18, 2009, available at <http://articles.latimes.com/2009/jun/18/local/me-gay-marriage18>; Letter from Edmund G. Brown Jr., Cal. Att'y Gen., and Tamar Pachter Cal. Deputy Attorney General, to Frederick K. Ohlrich, Clerk, Sup. Ct. of Cal. (Sept. 8, 2010), available at <http://www.kqed.org/assets/pdf/radio/brownletteropposing.pdf> [hereinafter Letter from Edmund G. Brown Jr.]. California residents approved Proposition 8 in response to a 2008 California Supreme Court decision that held that the traditional definition of marriage violated the equal protection clause of California's constitution. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) (citing *In re Marriage Cases*, 183 P.3d 384 (2008)).

204. *Hollingsworth*, 133 S. Ct. at 2660 (discussing the defenders); see also Letter from Edmund G. Brown Jr., *supra* note 203 (explaining why the California Attorney General's Office would not appeal the lower court's decision).

205. *Hollingsworth*, 133 S. Ct. at 2660 (citing *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010)).

206. *Id.*

a question to the California Supreme Court asking whether the amendment's proponents had standing to defend the amendment.²⁰⁷ After the California Supreme Court concluded that the proponents had standing, the Ninth Circuit addressed the merits of the constitutional claim and affirmed the district court's decision.²⁰⁸ When the case reached the U.S. Supreme Court, the California Attorney General again refused to defend the amendment, this time claiming that the definition "violates the Constitution" and "[t]he time has come for this right to be afforded to every citizen."²⁰⁹ The Supreme Court, of course, refused to reach the merits of the case and instead dismissed the appeal, holding that the amendment's sponsors did not have standing to appeal the federal district court's decision invalidating the proposed amendment.²¹⁰

Hollingsworth's procedural history is significant for two reasons. First, the Court dismissed the appeal for lack of standing after both the federal district court and court of appeals had concluded that the amendment's proponents had standing.

One can make the case that, rather than allowing the district court judgment to stand, the Supreme Court should have directed that it be vacated under the "exceptional circumstances" standard applicable to cases that become moot on appeal.²¹¹ A case must exist throughout the entire appellate review process because Article III requires a case or controversy for the court to have the power to decide the merits.²¹² A federal court's power to vacate a lower court ruling, provided by 28 U.S.C. § 2106, "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance."²¹³ At the district and appellate court levels, a live case or controversy existed between the amendment's sponsors and the same sex couples, but once the Court held that the sponsors lacked standing, a case or controversy no longer existed. Therefore, because the case became moot on appeal, vacatur was the proper remedy. Had the Court vacated the district court's decision, the issue would have been preserved for future litigation in which a party with standing might have defended Proposition 8.

Second, because the Court never addressed the merits of the marriage definition, the important constitutional questions raised by the case remain unresolved on a consistent national basis to this day. As a result, states are continuing to debate the same sex marriage issue in statehouses and courthouses across the country, and other attorneys general have refused to defend their states' traditional marriage definitions, including in Illinois, New Mexico, Nevada, North Carolina, Oregon, Pennsylvania, Virginia, and Kentucky.²¹⁴

207. *Id.*

208. *Id.* at 2660–61.

209. Press Release, Attorney General Kamala D. Harris Issues Statement on Prop. 8 Arguments (Mar. 26, 2013), *available at* <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-issues-statement-prop-8-arguments>. Once again, the California Attorney General chose to abandon her duty to defend her state's law.

210. *Hollingsworth*, 133 S. Ct. at 2659.

211. *See* U.S. Bancorp Mortg. v. Bonner Mall P'ship, 513 U.S. 18 (1994); *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

212. *U.S. Bancorp Mortg.*, 513 U.S. at 21.

213. *Id.* at 21, 22–23 (quoting *Munsingwear*, 340 U.S. at 40).

214. *See* 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>

These attorneys general have announced that they would abandon their duty to defend at different stages of court proceedings and have offered differing reasons for doing so. Some attorneys general have made their announcements at the start of litigation. For instance, Oregon's Attorney General announced that her office would not defend Oregon's definition of marriage because it "[could] not withstand a federal constitutional challenge under any standard of review."²¹⁵ Pennsylvania's Attorney General cited her state's rules of professional conduct (but not Rule 11), explaining that she was obligated to withdraw because her belief that her state's definition was "wholly unconstitutional" created a "fundamental disagreement with [her] client."²¹⁶

Other attorneys general have waited until a federal district court invalidated their states' marriage definitions and then refused to continue defending on appeal. For example, following the U.S. Supreme Court's decision in *United States v. Windsor*,²¹⁷ Nevada's Attorney General announced that she would not maintain an appeal because decisions issued from the U.S. Supreme Court and Ninth Circuit Court of Appeals made "its arguments grounded upon equal protection and due process . . . no longer sustainable."²¹⁸ Similarly, Kentucky's Attorney General announced that he would not appeal a decision striking down Kentucky's law, reasoning that he "draw[s] the line at discrimination" and did not want to "regret [defending Kentucky's definition] for the rest of his life."²¹⁹

North Carolina's attorney general initially defended his state's definition until the Fourth Circuit invalidated Virginia's definition; at that time, he announced that he would no longer defend North Carolina's definition, explaining that "it is time to stop making arguments we will lose and instead move forward, knowing that the ultimate resolution will likely come from the U.S. Supreme Court."²²⁰

Following the 2013 election, Virginia's new attorney general announced—during the middle of trial—that his office would no longer defend the state's marriage definition and would instead help the plaintiffs prevail because he believed the definition "violate[d] the Fourteenth Amendment of the U.S. Constitution on two

/govbeat/wp/2014/02/20/six-attorneys-general-wont-defend-their-own-states-gay-marriage-bans/ (explaining that the attorneys general from Illinois, Nevada, Oregon, Pennsylvania, Virginia, and Kentucky have declined to defend their states' marriage definitions); Christine Mai-Duc, *North Carolina Says It Will No Longer Defend Gay Marriage Ban in Court*, L.A. TIMES, July 28, 2014, <http://www.latimes.com/nation/nationnow/la-na-nn-north-carolina-drops-opposition-same-sex-marriage-20140728-story.html> (North Carolina attorney general declined to defend); *AG King Won't Defend Ban on Gay Marriage*, SANTA FE NEW MEXICAN, July 23, 2013, http://www.santafenewmexican.com/news/local_news/article_7a23f6b6-f60b-5132-a955-d7aae976ee1f.html (New Mexico attorney general declined to defend).

215. Chokshi, *supra* note 214.

216. *Id.*; see also Press Release, Attorney General Kane Will Not Defend DOMA (July 11, 2013), available at https://www.attorneygeneral.gov/Media_and_Resources/Press_Releases/Press_Release/?pid=913.

217. 133 S. Ct. 2675 (2013).

218. Chokshi, *supra* note 214.

219. Michael A. Lindenberger, *Kentucky's Attorney General Explains Why He Won't Defend Gay Marriage Ban*, TIME (Mar. 4, 2014), <http://time.com/12568/kentucky-gay-marriage-jack-conway/>.

220. Mai-Duc, *supra* note 214.

grounds: marriage is a fundamental right being denied to some Virginians, and the ban unlawfully discriminates on the basis of both sexual orientation and gender.”²²¹ In his words, he wanted to be on the “right side of history and the law.”²²²

In Illinois, the state’s attorney general intervened in a case against Cook County officials so that her office could “present the [c]ourt with arguments that explain why the challenged statutory provisions do not satisfy the guarantee of equality under the Illinois Constitution.”²²³ The New Mexico Attorney General also argued that the New Mexico Supreme Court should invalidate the state’s traditional marriage definition.²²⁴

Some of these attorneys general nominally use the “clearly unconstitutional” standard.²²⁵ Other attorneys general do not even purport to apply that standard.²²⁶ But at best, these attorneys general are applying their own independent judgment as an attorney general would when asked to provide an advisory opinion.²²⁷ At worst, they are abandoning their duty for purely political reasons.

The same-sex marriage cases highlight the weaknesses of the “clearly unconstitutional” standard and its inferiority to the Rule 11 standard. The “clearly unconstitutional” standard permits an attorney general to rely on personal subjective views of the law to a far greater extent than the Rule 11 standard. If attorneys general actually applied the “clearly unconstitutional” standard as strictly as attorneys

221. Press Release, Attorney General Herring Changes Virginia’s Legal Position in Marriage Equality Case (Jan. 23, 2014), available at http://www.oag.state.va.us/Media%20and%20News%20Releases/News_Releases/Herring/012314_Bostic_v_Rainey.html.

222. Eyder Peralta, *Virginia’s New Attorney General Will not Defend Gay-Marriage Ban*, NPR.ORG (Jan. 23, 2014), <http://www.npr.org/blogs/thetwo-way/2014/01/23/265050444/virginias-new-attorney-general-will-not-defend-gay-marriage-ban>.

223. Chokshi, *supra* note 214. In 2012, two same-sex couples challenged Illinois’s traditional marriage definition on state constitutional law grounds and the attorney general intervened in the suit on the side of the plaintiffs, arguing that the statute was unconstitutional. *Id.*; Rex W. Huppke, *Attorney General Backs Challenges to Gay Marriage Ban*, CHI. TRIB., June 1, 2012, <http://www.chicagotribune.com/news/local/breaking/chi-attorney-general-backs-challenges-to-gay-marriage-ban-20120601-story.html>. The Tazewell and Effingham County Clerks defended the statute and were represented by the Thomas More Society. *Defending Marriage in Illinois*, THOMAS MORE SOC’Y, <https://www.thomasmoresociety.org/cases/thomas-more-society-defends-marriage-in-illinois/>. Governor Quinn signed Illinois’s same-sex marriage bill into law in November 2013, after which the court dismissed the cases as moot. *See id.*; Monique Garcia, *Signed and Sealed: Illinois 16th State to Legalize Gay Marriage*, CHI. TRIB., Nov. 21, 2013, <http://www.chicagotribune.com/news/chi-illinois-gay-marriage-bill-signing-20131120-story.html#page=1>.

224. *AG King Won’t Defend Ban on Gay Marriage*, *supra* note 214.

225. *See supra* notes 201, 203, 215–218, 220 and accompanying text (providing the California, North Carolina, Pennsylvania, Oregon, and Nevada attorneys general’s reasons for abandoning defense of their statutes).

226. *See supra* notes 219, 221–223 and accompanying text (providing the Virginia, Kentucky, and Illinois attorneys general’s reasons for abandoning defense of their statutes). Although the California Attorney General appeared to cite the “clearly unconstitutional” standard in refusing to defend California’s definition in state court and federal district court, the attorney general’s announcement that she would not defend before the U.S. Supreme Court appears to rest more on policy reasons. *See supra* note 209 (noting Attorney General Harris’s reason).

227. This practice is precisely what Judge Pryor endorsed in his recent speech at Case Western Reserve Law School. *See Pryor, supra* note 6.

general had in non-same-sex marriage cases, each of these attorneys general (except for North Carolina's) would have had to defend their definitions because no binding precedents had yet established that traditional marriage definitions are unconstitutional, except in the Fourth Circuit, where the Court of Appeals had already invalidated Virginia's definition.²²⁸

Under the Rule 11 standard I advocate, carrying out the duty to defend ought to be an easy call for a state attorney general, even if traditional marriage definitions run counter to one's preferred view of policy and constitutional law.

Marriage has existed for thousands of years, and until the past decade or so has always and everywhere been defined as an opposite-sex institution.²²⁹ The idea that either the Founding generation or the framers and ratifiers of the Fourteenth Amendment thought they were enshrining same-sex marriage into the Constitution is utterly implausible.²³⁰ Accordingly, constitutional arguments against traditional marriage must proceed strictly from logic rather than text or history.²³¹

The U.S. Supreme Court granted certiorari in *Hollingsworth*, in which Prop. 8's proponents claimed that the traditional marriage definition was constitutional. The Court's decision to grant certiorari recognizes that the issue satisfies Rule 11 and that a good faith defense has been made.²³² The Sixth Circuit's recent decision upholding four

228. Compare Suthers, *supra* note 173 (noting that attorneys general should decline to defend when "binding precedent [is] clear, on point, and unavoidable"), with *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (holding that "no legitimate purpose" supported § 3 of DOMA); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that the state law "further[ed] no legitimate state interest"); *Romer v. Evans*, 517 U.S. 620, 631–32 (1996) (holding that the law "lack[ed] a rational relationship to legitimate state interests"); *id.* at 635 (explaining that the statute "must bear a rational relationship to a legitimate governmental purpose" in order to be constitutional); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 953–54 (7th Cir. 2002) ("[H]omosexuals are not entitled to any heightened protection under the Constitution. Therefore, discrimination against homosexuals . . . will only constitute a violation of equal protection if it lacks a rational basis." (citing *Romer*, 517 U.S. at 634–35)).

229. See, e.g., *DeBoer v. Snyder*, 772 F.3d 388, 400 (6th Cir. 2014) (citing *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013)).

230. See, e.g., *id.* at 16 (explaining that the right to marry and the right generally to same-sex marriage specifically "appear nowhere in the Constitution"); see also *Windsor*, 133 S. Ct. at 2689–90 ("By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States.").

231. *Baskin v. Bogan*, 766 F.3d 648, 655–65 (7th Cir. 2014) (applying a cost-benefit analysis to determine whether Indiana's and Wisconsin's laws were unconstitutional).

232. This brief discussion does not address the merits of both sides' positions. For a more complete recitation of my office's responses to constitutional challenges to same-sex marriage arguments, see Brief of Indiana et al. as Amici Curiae Supporting Petitioners, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144); Brief of Indiana et al. as Amici Curiae Supporting Respondents, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307); Brief of Indiana et al. as Amici Curiae Supporting Petitioners, Bipartisan Legal Advisory Group of the U.S. House of Representatives v. Gill, U.S. Supreme Court, 12–13; Brief of Indiana et al. as Amici Curiae Supporting Petitioners, *Brewer v. Diaz*, 133 S. Ct. 2884 (No. 12-13); Brief of Appellant, *Baskin v. Bogan*, Nos. 14-2386, 14-2387, 14-2388, 14-2526, 2014 WL 4359059 (7th Cir. Sept. 4, 2014); Brief of Indiana et al. as Amicus Curiae Supporting Respondents, *Sevcik v. Sandoval*, No. 12-17668 (9th Cir. argued Sept. 8, 2014); Brief of Indiana et al. as

states' traditional definitions further clarifies that good faith defenses exist.²³³ Indeed, I am aware of no case where a plaintiff challenging a traditional marriage definition has filed a motion for Rule 11 sanctions against an official that dared to defend such a definition. Such a motion would itself likely be met with Rule 11 sanctions.

IV. IMPLICATIONS OF THE DUTY TO DEFEND FOR ANCILLARY ATTORNEY GENERAL PRACTICES

The preceding discussion shows that the duty to defend is vital to the rule of law and that an attorney general should decline to defend a statute only when defending would violate Rule 11. In certain circumstances, an attorney general will have to weigh other considerations before deciding whether to defend the statute or authorize outside counsel to do so. For example, the attorney general's office may encounter a conflict of interest or a statute that falls outside its area of expertise.²³⁴ Or, the office may have previously issued an advisory opinion regarding the statute that could complicate its defense.²³⁵ Each scenario is discussed below.

A. Implications for Use of Outside Counsel and Assumption of Defense by Other Officials

In some cases, an attorney general will authorize outside counsel to represent the state, either as plaintiff or defendant. This authorization can give rise to unique considerations when the outside counsel must defend a state's constitution. If the attorney general makes the authorization because the case falls outside of the office's expertise or because a conflict of interest arises, use of outside counsel may well ensure that the state statute will receive a stronger defense. If, however, the attorney general authorizes outside counsel to avoid having to defend the state statute, the decision is self-defeating, because the attorney general remains accountable for the defense regardless of whether it is made by deputies in the office or outside lawyers working on contract.

Amicus Curiae Supporting Appellees, *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, 2014 WL 3702493 (4th Cir. July 24, 2014); Brief of Indiana et al. as Amici Curiae Supporting Appellants, *Kitchen v. Herbert*, 755 F.3d 1193 (2014) (No. 13-4178); Brief of Indiana et al. as Amici Curiae Supporting Appellants, *Golinski v. U.S. Office of Personnel Management*, Nos. 12-15388, 12-15409 (9th Cir. July 23, 2013); Brief of Indiana et al. Amici Curiae Supporting Appellants, *Windsor v. Bipartisan Legal Advisory Group of the U.S. House of Representatives*, 699 F.3d 169 (2d Cir. 2012) (No. 12-2335); Brief of Indiana et al. as Amici Curiae Supporting Appellee, *Massachusetts v. U.S. Dept. of Health & Human Servs.*, 682 F.3d 1 (5th Cir. 2012) (Nos. 10-2204, 10-2207, 10-2214); Brief of Indiana et al. as Amici Curiae Supporting Appellants, *Perry v. Schwarzenegger*, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696); see also Richard A. Posner, *Should There Be Same-Sex Marriage? And if so, Who Should Decide?*, 95 MICH. L. REV. 1578, 1579 (1997) (“[H]omosexual marriage has nowhere been a common practice, even in societies in which homosexuality was common.” (emphasis omitted)).

233. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

234. See *infra* Part IV.A.

235. See *infra* Part IV.B.

In this regard it is important to observe how attorney general powers differ from state to state. In Indiana, except in very few cases, none of the attorney general's client agencies may hire outside counsel without the consent of the attorney general.²³⁶ This distribution of power sometimes frustrates our clients, but it has the fundamental effect of carrying out the principal justification for having a separately elected attorney general: to vest one politically accountable official with the responsibility of determining legal policy for all (or nearly all) of state government.²³⁷ The main value of an independent attorney general would be undermined by permitting client agencies to hire their own lawyers whenever they disagreed with the attorney general on matters of legal policy.²³⁸

Other states, however, authorize various state officials to exercise their own discretion when deciding to hire outside counsel or mount a defense apart from the attorney general. Such states generally limit such discretion to governors, but some extend it to other officials.²³⁹ Such dual control over legal policy can lead to confusing outcomes, such as when the Governor and Attorney General of Georgia disagreed over whether to pursue defense of legislative redistricting laws in the U.S. Supreme Court. The Supreme Court of Georgia held that both officials had authority over litigation decisions, and that primary responsibility would fall to the attorney general when they disagreed.²⁴⁰ In that case, the court concluded that the governor lacked "a clear legal right to compel the [a]ttorney [g]eneral" to take the governor's desired legal action.²⁴¹

Other states limit the governor's ability to maintain a defense. For instance, in Pennsylvania, where the attorney general has a statutory duty to defend "all statutes,"²⁴² the governor can only maintain a defense after requesting authorization from the attorney general to do so and specifically setting forth his reasons for wanting to do so.²⁴³ If the attorney general refuses to give authorization, the governor may intervene as of right.²⁴⁴

Even where a governor or other official besides the attorney general has authority to mount a defense without the attorney general, the attorney general may not be saved from accountability for the decision whether to defend. In order to defend a state statute from constitutional attack, a governor (or other official) must be a

236. IND. CODE § 4-6-5-3 (2009); *see also* State *ex. rel.* Sendak v. Marion Cnty. Super. Ct., 373 N.E.2d 145, 148 (Ind. 1978); Banta v. Clark, 398 N.E.2d 692, 693 (Ind. Ct. App. 1979).

237. *See, e.g.*, Sec'y of Admin. & Fin. v. Att'y Gen., 326 N.E.2d 334, 338-39 (Mass. 1975); Myers, *Status in State Government*, *supra* note 34, at 55.

238. *See* Myers, *Status in State Government*, *supra* note 34, at 55 (listing the benefits and noting these benefits could be jeopardized if agencies hired their own counsel).

239. *Compare* VA. CODE ANN. § 2.2-510(1) (Supp. 2014) ("The Governor may . . . employ special counsel to render such service as he may deem necessary . . ."), with Woodahl v. State Hwy. Comm'n, 465 P.2d 818 (Mont. 1970) (holding that client agencies can hire outside counsel).

240. *Perdue v. Baker*, 586 S.E.2d 606, 609-10, 614 (Ga. 2003).

241. *Id.* at 616.

242. 71 PA. CONS. STAT. ANN. § 732-204(a)(3) (West 2012) ("It shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction.")

243. *Id.* § 732-303(a).

244. *Id.* § 732-303(b).

suitable defendant in such a case. Both Article III and the Eleventh Amendment preclude plaintiffs from challenging the constitutionality of statutes by suing a governor (or an attorney general for that matter) who is not responsible for enforcing the challenged law.²⁴⁵ Unlike a governor, however, a state attorney general typically has the authority under both state and federal law to intervene in a matter to defend a statute's constitutionality.²⁴⁶ Accordingly, state attorneys general have a role to play in constitutional litigation that cannot in all cases be shirked in favor of another official.

The bottom line is that when the state is a defendant and the state statute or state constitution is challenged, the authority to permit an agency to hire outside counsel does not afford an avenue to avoid making a difficult decision regarding the duty to defend. Rule 11 binds outside counsel as much as an attorney general, and the attorney general, as chief law officer of the state, remains accountable for maintaining a nonfrivolous defense to the plaintiff's lawyer's lawsuit.

B. Implications for the Advisory Function

A state attorney general also has the ability to address a statute's constitutionality outside of the litigation context. State attorneys general typically have the authority to provide a legal opinion as to a statute's constitutionality when requested to do so by a client agency or official.²⁴⁷ The Indiana Attorney General is required to give an opinion on a statute's constitutionality when requested by the Governor or either house of the General Assembly, but the Attorney General may *exercise discretion* in issuing such opinions to any other person or entity.²⁴⁸ This means that in practice, the Indiana Attorney General gives legal advice to his state government clients only and does not give private legal advice to non-clients. Properly understood, the attorney general's role here is far different from the role defending a statute in litigation. When the legislature or an executive agency requests an opinion on a proposed or enacted statute's constitutionality, an attorney general should opine as to the constitutionality based on independent judgment. An attorney general discharges his opinion duties by providing well-reasoned analysis of a statute, even if that analysis concludes that the bill is unconstitutional.

While such advice may well take account of how the statute is likely to fare in litigation, it is different from the review that an attorney general undertakes when determining whether to defend a statute. Not all attorneys general agree about the proper moment at which the analysis changes from the well-reasoned opinion analysis to deferential review—whether it is the “clearly unconstitutional” standard or my Rule 11

245. *See, e.g.*, *Okpalobi v. Foster*, 244 F.3d 405, 424–25, 427–28 (5th Cir. 2001) (en banc); *Hearne v. Bd. of Educ. of Chi.*, 185 F.3d 770, 777 (7th Cir. 1999); *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998); *Children's Healthcare Is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416–18 (6th Cir. 1996); *1st Westco Corp. v. Sch. Dist. of Phila.*, 6 F.3d 108, 113–14 (3d Cir. 1993); *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992); *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 441 (7th Cir. 1992); *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979); *Mendez v. Heller*, 530 F.2d 457, 460 (2d Cir. 1976).

246. Emily Myers, *Conduct of Litigation*, in *STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES* 88–89 (Emily Myers ed., 3d ed. 2013).

247. Myers & Bennett, *supra* note 35, at 74–75.

248. *See* IND. CODE § 4-6-2-5 (2009).

standard. Some offices refuse to opine once a statute is enacted, believing that doing so would conflict with their duty to defend.²⁴⁹ Other offices continue to issue opinions until a statute is challenged in court.²⁵⁰

Ordinarily, these two duties remain distinct and do not create conflicts. However, a situation can arise where an attorney general issues an opinion at a time when there is no pending litigation and concludes that, despite the availability of good-faith defenses, a statute is unconstitutional.²⁵¹ If the government enforces the statute anyway and prompts a constitutional challenge in court, the attorney general must confront whether to mount a legal defense notwithstanding the earlier advisory opinion. Though the advisory opinion will no doubt undercut arguments made in court to defend that statute, the advisory opinion does not prevent the attorney general from making those arguments. The attorney general's opinion, after all, did not invalidate the statute²⁵² but merely educated the state client as to the weaknesses of the statute which allowed state policymakers to consider revising the statute legislatively. Moreover, enabling the judiciary to afford the statute proper review remains a legitimate function of the office. The awkwardness accompanying such a situation, however, counsels strongly against issuing an advisory opinion at all when a statute's constitutionality is in doubt.²⁵³ Attorneys general typically have the power

249. See, e.g., 71 Wis. Op. Att'y Gen. 195, 196 (1982) (“[M]y role in rendering opinions on legislation already enacted differs from my role in regard to proposed legislative action. Once legislation is enacted, it becomes the affirmative duty of the Attorney General to defend its constitutionality. Prior to enactment, however, no such obligation exists.”) (citing *Chi. & N.W.R. Co. v. La Follette*, 135 N.W.2d 269 (1965)). The opinion further explained that once legislation has been enacted the Office could only opine as to whether “a reasonable defense of the legislation is available.” *Id.*; see also *Ariz. Att’y Gen. Op. No. 78-10* (Jan. 26, 1978) (refusing to opine on a statute’s constitutionality and instead presuming it is constitutional).

250. See *Code Revision—Whether 1964 Statute Prohibiting Receipt of Remuneration for Participation in a “Racial Demonstration” is Constitutional*, 93 Md. Op. Att’y Gen. 154 (2008) (analyzing a statute’s constitutionality and concluding that it is likely unconstitutional). The Maryland Attorney General explained that, although it has a duty to defend statutes, it could conclude in an advisory opinion that a statute was unconstitutional because it was “not act[ing] as the advocate for the provision before a tribunal”; instead it was “asked by an arm of the Legislature to assess the constitutionality of its own enactments, indulging all of the presumptions in favor of, and against, the statute that a court would consider.” *Id.* at 160.

251. See, e.g., *id.* In the Maryland opinion, the attorney general noted its obligations to defend statutes against constitutional attack and to provide the “Legislature with [his] best legal analysis.” *Id.* at 160. Because there was no pending litigation at the time of the opinion, the Maryland Attorney General “assess[ed] the constitutionality of [the statute], indulging all of the presumptions in favor of, and against, the statute that a court would consider,” and concluded that the statute violated both the U.S. and Maryland constitutions. *Id.*

252. *Sch. Dist. of E. Grand Rapids v. Kent Cnty. Tax Allocation Bd.*, 330 N.W.2d 7, 12 (Mich. 1982) (“[T]he opinion of the Attorney General that a statute is unconstitutional does not have the force of law and certainly does not compel agreement by a governmental agency”); *Myers & Bennett*, *supra* note 35, at 78 (“The general rule seems to be that the recipient [agency] ‘is free to follow [an attorney general opinion] or not as he or she chooses.’”) (citing 7 AM. JUR. 2d *Attorney General* § 11, at 4 (1997)); 7A C.J.S. *Attorney General* § 38 (2014) (explaining that an attorney general’s opinion has “no controlling authority upon the state of the law discussed in it”).

253. For examples of attorneys general who chose not to opine on a statute’s

not to issue advisory opinions even when their clients solicit such opinions. Careful discretion is required, particularly where constitutional issues are at stake.²⁵⁴

An even more difficult situation arises where the attorney general concludes in a published opinion that a statute is unconstitutional and advises an agency not to enforce a statute. Bear in mind that while an opinion of this sort may reach a negative conclusion about the statute's constitutionality, it does not mean that no good-faith arguments in support of the statute are available. It merely means that the attorney general has considered and rejected them for purposes of that opinion, based on constitutional text, history, and doctrine available at the time. Not only might good-faith arguments to the contrary exist at the time, but also subsequent doctrinal developments might point the way to an even more plausible defense of the statute. If litigation challenging the statute arises, what should the attorney general do?

A situation similar to this arose in 1983, when the Tennessee Attorney General issued an opinion concluding that various state tax exemptions violated the Tennessee Constitution and urged the State Board of Equalization to not enforce the exemptions.²⁵⁵ The Board, acting on the attorney general's advice, could have prompted an action by a potential beneficiary of the statute to *require* enforcement. If so, the attorney general would have been called upon to defend the agency. While many non-merits defenses may be available, eventually the attorney general might have once again confronted the issue whether to defend the statute. The decision would be, in effect, whether to defend the statute but not the agency, or to defend the agency but not the statute.

Both defending agency clients and defending statutes are central to an attorney general's mission, but statutory defense where good-faith arguments are available is *the* irreducible role of the Attorney General. Indeed, federal judicial procedure expressly provides for state intervention to defend a state statute only when a state attorney general undertakes that intervention.²⁵⁶ Many states have similar statutes or court rules.²⁵⁷

constitutionality, see Ala. Op. Att'y Gen. 2000-143; Letter from Robert M. Spire, Att'y Gen., Neb., to Sen. Chris Beutler (Dec. 20, 1985), *available at* 1985 WL 168642, and 32 W. Va. Op. Att'y Gen. 70 (1926).

254. See Myers & Bennett, *supra* note 35, at 76 (noting situations in which it is inappropriate for an attorney general to issue an opinion); see also Ala. Op. Att'y Gen. 2000-143 (noting that the office declines to issue opinions about a statute's constitutionality during litigation and instead presumes the statute to be constitutional unless patently unconstitutional); La. Att'y Gen. Op. No. 97-361 (Oct. 23, 1997) (noting the Office's "policy . . . to refrain from opining whether an [sic] statute is constitutional inasmuch as the Attorney General is charged with defending the constitutionality of all legislative statutes"); letter from Robert M. Spire to Sen. Chris Beutler, *supra* note 253 (declining to issue an opinion); 32 W. Va. Op. Att'y Gen. Op. No. 70 (1926) (same).

255. Tenn. Att'y Gen. Op. No. 83-418 (Dec. 16, 1983).

256. See FED. R. CIV. P. 5.1(a)(2), (c) (requiring a party challenging a state statute's constitutionality to serve notice on the state attorney general and allowing the attorney general to intervene).

257. *E.g.*, IND. CODE § 34-14-1-11 (2011) ("In any proceeding in which a statute, ordinance, or franchise is alleged to be unconstitutional, the court shall certify this fact to the attorney general, and the attorney general shall be permitted to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for arguments on the question

Furthermore, defending a statute implicates public accountability with respect to constitutional line drawing. Typically, even in a case with a statute of highly questionable constitutionality, a broad array of lawyers with diverse viewpoints would be able to formulate a variety of good-faith arguments in defense. Choosing among such arguments requires a lawyer to make judgments about broader implications for state policy, government operations, and individual rights, not to mention judgments about public sensibility. Such balancing of multiple, competing considerations calls for a formulation of legal policy that should be subject to a political check, and an independently elected state attorney general inherently provides that accountability when appearing in court and making arguments.

Formulating the precise legal position of a client agency also calls for such political accountability. Yet an agency will be either a separately elected official or an agency that reports to one, and accordingly will have its own channels of public accountability regardless of attorney general representation. In the usual case the requirement of attorney general representation imposes an additional check on such clients. But when the attorney general is unable to undertake that representation, the client's baseline political accountability remains. Where the attorney general authorizes outside counsel to defend a statute, however, no political accountability underlies the legal policy formulations of counsel—a highly undesirable state of affairs, to say the least.²⁵⁸

CONCLUSION

In short, the Holder Doctrine advocating, without support, a selective, subjective nondefense represents abdication of official duty. It amounts to a license to substitute an individual's political will for legal responsibility. State attorneys general are elected for an important purpose: to represent a state's popular sovereignty according to law. Accordingly, the value of independently elected attorneys general lies not in some imagined leeway to simply override the political decisions of elected representatives (and other elected officials), but in the strength to advocate according to law rather than politics that comes from political independence.

Applying the Rule 11 test rather than the Holder²⁵⁹ Doctrine when deciding whether to defend a statute will greatly benefit the legal system and, more

of constitutionality.”).

258. This should not be taken as a general endorsement of authorizing outside counsel whenever an attorney general and agency client disagree over legal policy. As the preceding discussion mentions, attorneys general play an important role in the formulating and synthesizing of legal policy for all agency clients and impose an important public check on the ability of an agency to impose its will through the courts. *Ind. State Toll Bridge Comm'n v. Minor*, 139 N.E.2d 445, 448 (Ind. 1957) (explaining that the Office of the Attorney General must harmonize the state's legal position before the courts); Myers, *Status in State Government*, *supra* note 34, at 55. The extraordinary circumstance where the attorney general, in effect, must choose between two clients justifies the extraordinary remedy of authorizing outside counsel.

259. Eric Holder announced September 25, 2014, that he would step down as United States Attorney General and his resignation would be effective upon the confirmation of his successor. Eric Holder, U.S. Attorney General, Remarks by Attorney General Eric Holder Announcing his plans to Depart the Justice Department (Sept. 25, 2014) (transcript available

fundamentally, the rule of law. It will allow courts to assume their proper role of deciding the constitutionality of state statutes and will subject the statute to the proper adversarial proceeding through which the statute's challengers and defenders will be able to present their legal arguments without having to address questions of standing. It will also maintain the proper balance of powers by ensuring that the attorney general does not usurp a judicial function (by declaring a statute unconstitutional) or an executive function (by infringing on another executive officer's ability to execute statutes). Finally, and most importantly, it will require the attorney general to fulfill his proper role as the state's chief legal officer committed to upholding the rule of law.

at <http://www.justice.gov/opa/speech/remarks-attorney-general-eric-holder-announcing-his-plans-depart-justice-department>). The premise of this law review Article is to present a critique of the Holder Doctrine regarding the duty to defend, a discussion applicable and relevant even after Mr. Holder no longer serves as U.S. Attorney General.