

ARTICLES

CONSTITUTIONAL NONDEFENSE IN THE STATES

*Katherine Shaw**

Although scholars have long debated the scope of the President’s power to decline to defend statutes challenged in litigation, no one has yet undertaken a systematic examination of nondefense by state executives, who, like their federal counterparts, often find themselves torn between competing obligations to defend statutes, on the one hand, and to maintain fidelity to state and federal constitutions, on the other. This Article takes up the question of how the executive nondefense power is conceived, wielded, and constrained—within what institutional frameworks and with what implications—in the states. Drawing on a number of case studies, the Article sketches an initial taxonomy of approaches to executive nondefense in the states, argues that significant benefits can attach to the practice of nondefense, and provides a set of recommendations for ensuring that when nondefense occurs, its benefits can be realized. Although critics of executive nondefense in the federal system worry that its use threatens to inject partisanship, instability, and uncertainty into the law, the practice in the states, in which nondefense occurs relatively routinely in the context of a variety of institutional design choices, provides a powerful counterpoint to those objections.

| | |
|---|-----|
| INTRODUCTION | 214 |
| I. NONDEFENSE OF STATUTES IN THE FEDERAL SYSTEM | 221 |
| A. The Constitutional Framework | 221 |
| B. The Existing Debate | 221 |

* Assistant Professor of Law, Benjamin N. Cardozo School of Law. For helpful conversations and comments on earlier drafts, I am grateful to Michelle Adams, Kate Andrias, Tom Barnico, Ian Bassin, Eric Berger, Rick Bierschbach, Chaim Bryski, Steve Calabresi, Erin Delaney, Matthew Diller, Rebekah Diller, Myriam Gilles, Ed Hartnett, Chris Hayes, Helen Hershkoff, Michael Herz, Issa Kohler-Hausmann, Joe Landau, Jim Lindgren, Peter Markowitz, Bill Marshall, Dan Meltzer, Anton Metlitsky, Deborah Pearlstein, David Pozen, Alex Reinert, Daphna Renan, Jorge Roig, Aaron Simowitz, Mila Sohoni, Alex Stein, Ed Stein, Jim Tierney, Tobias Barrington Wolff, Kenji Yoshino, the current and former state executive officials who generously shared their time and insights with me, the members of the Cardozo Junior Faculty Workshop, and participants in workshops at Cardozo Law School and Northwestern University Law School. Thanks also to the editors of the Columbia Law Review for terrific editorial work, and to Sam Markowitz for invaluable research assistance.

| | |
|---|-----|
| C. Nondefense and the Supreme Court..... | 226 |
| II. NONDEFENSE BY STATE EXECUTIVES..... | 229 |
| A. Separated Powers in the States..... | 229 |
| B. State Executives, State Statutes, and the Federal Constitution.... | 235 |
| C. Nondefense by State Executives: Four Cases..... | 237 |
| 1. California..... | 237 |
| 2. Hawaii..... | 240 |
| 3. Nebraska..... | 242 |
| 4. New Jersey..... | 243 |
| III. STATE MODELS OF NONDEFENSE: A TAXONOMY..... | 246 |
| A. Legislative Defense..... | 247 |
| B. Alternate Executive Branch Actor..... | 250 |
| C. Outside Intervention and Defense..... | 253 |
| D. Outside Counsel..... | 255 |
| IV. MANDATORY EXECUTIVE DEFENSE AND ALTERNATIVE MECHANISMS... | 257 |
| A. “Mandatory” Executive Defense..... | 257 |
| B. Alternative Mechanisms..... | 259 |
| 1. Nonintervention..... | 259 |
| 2. Weak Defense..... | 260 |
| 3. The Settlement Power..... | 261 |
| 4. Outside Counsel, Revisited..... | 262 |
| V. LESSONS FROM (AND FOR) THE STATES..... | 263 |
| A. In Defense of Nondefense..... | 263 |
| 1. Comparative Institutional Competence..... | 264 |
| 2. Underenforcement of Constitutional Norms..... | 265 |
| 3. Modest Popular Constitutionalism..... | 267 |
| B. General Principles..... | 271 |
| 1. Transparency..... | 271 |
| 2. Substantive Guidelines and Decisional Processes..... | 275 |
| 3. Preserving Judicial Review..... | 276 |
| CONCLUSION..... | 280 |

INTRODUCTION

When the Obama Administration abandoned its defense of the Defense of Marriage Act (DOMA),¹ it reignited a long-running debate

1. See Press Release, U.S. Dep’t of Justice, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> [hereinafter Holder Letter] (on file with the *Columbia Law Review*) (notifying Congress of President’s

about the power of the federal executive to decline to defend statutes challenged in litigation. Opponents of the Administration's move charged that the rule of law requires the President and the Department of Justice to vigorously defend laws passed by Congress, either in all circumstances or at least wherever "reasonable arguments" can be made in their support.² Defenders of the Administration made normative and also historically grounded arguments in support of the decision, pointing to a handful of examples in which the federal executive opted not to defend a statute following an independent determination of the statute's unconstitutionality.³

The relatively narrow question of the circumstances under which the federal executive may deem a statute unconstitutional, and decline to defend it in court following such a determination, implicates far deeper questions about constitutional role and structure—in particular, the scope of the executive branch's authority to engage in independent constitutional interpretation.⁴ So it is not surprising that it has been the sub-

determination that statute was unconstitutional and inviting Congress to intervene in litigation to maintain statute's defense).

2. See, e.g., Editorial, *Flouting the Rule of Law*, N.Y. Post (Feb. 25, 2011, 5:00 AM), <http://nypost.com/2011/02/25/flouting-the-rule-of-law/> (on file with the *Columbia Law Review*) (calling decision "breathtaking act of arrogance, a precedent so fraught that it threatens one of the nation's bedrock founding principles: [t]hat America was to be ruled by law, not by individuals"); Adam Liptak, *The President's Courthouse*, N.Y. Times (Feb. 26, 2011), <http://www.nytimes.com/2011/02/27/weekinreview/27liptak.html> (on file with the *Columbia Law Review*) (quoting former Solicitor General Charles Fried's description of decision as "unbecoming" as well as "totally unconvincing" (internal quotation marks omitted)); Press Release, U.S. House of Representatives Comm. on the Judiciary, Smith: DOJ Has a Responsibility to Defend DOMA (Feb. 23, 2011), <http://judiciary.house.gov/news/2011/feb/110223DOMA.html> (on file with the *Columbia Law Review*) (providing statement by House Judiciary Committee Chairman Lamar Smith that "[t]he Justice Department has a responsibility to defend the laws passed by Congress regardless of the personal political views of the President or the Attorney General").

3. See, e.g., Carlos A. Ball, *When May a President Refuse to Defend a Statute? The Obama Administration and DOMA*, 106 Nw. U. L. Rev. Colloquy 77, 77 n.1 (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/21/LRColl2011n21Ball.pdf> (on file with the *Columbia Law Review*) (noting "[e]very recent administration has refused to defend some laws that it believed were unconstitutional" and listing examples); Walter Dellinger, *The DOMA Decision*, New Republic (Mar. 1, 2011), <http://www.newrepublic.com/article/politics/84353/gay-marriage-obama-gingrich-doma> (on file with the *Columbia Law Review*) (calling President's DOMA decision "bold" but also "justified"); Kermit Roosevelt III, *Op-Ed., Obama's DOMA Shift: Why Public Embrace of Gay Marriage—and Gays—Is Now Certain*, Christian Sci. Monitor (Feb. 25, 2011), <http://www.csmonitor.com/Commentary/Opinion/2011/0225/Obama-s-DOMA-shift-Why-public-embrace-of-gay-marriage-and-gays-is-now-certain> (on file with the *Columbia Law Review*) ("Declining to defend a federal law is not unprecedented.").

4. For strong (and varied) defenses of the view that each branch possesses at least some degree of interpretive autonomy, see generally Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004) [hereinafter Kramer, *The People Themselves*] (arguing for popular constitutionalism and against judicial supremacy); Mark Tushnet, *Taking the Constitution Away from the Courts* (1999) (providing strong argument for populist constitutionalism); Neal Devins & Louis Fisher,

ject of robust scholarly debate and extended consideration within the federal executive branch, including through a number of public opinions issued by the Office of Legal Counsel (OLC).⁵

Surprisingly, however, there is virtually no scholarly literature on the question of *state* executives and decisions not to defend *state* statutes following an independent determination of unconstitutionality.⁶ State statutes, of course, are regularly challenged on constitutional grounds in both state and federal courts.⁷ And like federal officials, state executives

Judicial Exclusivity and Political Instability, 84 Va. L. Rev. 83, 84–85 (1998) (arguing “concentrating complete interpretive authority in the Court would create political instability and undermine the fragile foundation that supports and sustains judicial power”); Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217 (1994) [hereinafter Paulsen, Most Dangerous Branch] (arguing for expansive presidential power of constitutional interpretation); *infra* Part V.A.3 (discussing popular constitutionalism). For examples of forceful arguments *against* departmentalism or coordinacy and in favor of judicial supremacy, see Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359, 1362 (1997) (arguing for deference to courts by nonjudicial actors in nearly all circumstances); Ronald Dworkin, The Forum of Principle, 56 N.Y.U. L. Rev. 469, 517 (1981) (defending judicial review as ensuring “most fundamental issues of political morality will finally be set out and debated as issues of principle and not simply issues of political power”). See generally Keith E. Whittington, Political Foundations of Judicial Supremacy (2007) (describing arguments in favor of judicial supremacy).

5. See, e.g., *infra* Part I.B (surveying positions advocated in both the literature and executive branch writings).

6. Notable exceptions include two recent pieces by Professor Vikram Amar, both of which focus on the early stages of the battle over same-sex marriage in California. Vikram David Amar, California Constitutional Conundrums—State Constitutional Quirks Exposed by the Same-Sex Marriage Experience, 40 Rutgers L.J. 741 (2009) [hereinafter Amar, California Constitutional Conundrums] (discussing constitutional design questions raised by California same-sex marriage cases); Vikram David Amar, Lessons from California’s Recent Experience with Its Non-Unitary (Divided) Executive: Of Mayors, Governors, Controllers, and Attorneys General, 59 Emory L.J. 469 (2009) [hereinafter Amar, Lessons from California’s Experience]. As the titles suggest, both pieces explore the structural dynamics at play in California, where, at every juncture, developments in the law of same-sex marriage have involved questions of executive power and executive nondefense or nonenforcement of statutes. Professor Amar does not, however, undertake an examination of the question of executive nondefense in the states more broadly.

An earlier piece takes up the question, closely related to the question at the center of this Article, of the authority of state executives to decline to enforce state statutes based on constitutional doubts about those statutes. Norman R. Williams, Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage, 154 U. Pa. L. Rev. 565, 643–47 (2006) [hereinafter Williams, Fragmented Executive]. Professor Williams’s descriptive work on the varieties of state “executive review”—which includes the nonenforcement of statutes—is extraordinarily useful, but he does not separately consider the question of nondefense. *Id.* at 614–23. In addition, the piece focuses on local, rather than statewide, officials, acknowledging that its proposal for determining when interpretive autonomy is appropriate would “not extend to governors and other constitutional officers.” *Id.* at 571.

7. Indeed, “[m]ost of the laws the Court invalidates are state laws. By one count, for example, the Burger Court struck down ten times as many state as federal laws.” Richard H. Pildes, Is the Supreme Court a “Majoritarian” Institution?, 2010 Sup. Ct. Rev. 103, 149;

must sometimes choose between competing obligations to defend statutes, on the one hand, and to maintain fidelity to state and federal constitutions, on the other. But while a lively debate exists about the legitimacy of executive nondefense in the federal system—one that sounds in both structural constitutional and also prudential and pragmatic terms—no one has yet undertaken a systematic examination of executive nondefense in the states. One potential explanation for this scholarly lacuna may be the simple variety in the states, and the concomitant difficulty of drawing any broad conclusions about their practices.⁸ But this Article suggests that, although state practice resists broad generalizations, the very diversity that characterizes nondefense in the states makes it a rich subject of study.⁹ Accordingly, this Article takes up the question of how the executive nondefense power is conceived, wielded, and constrained—within what institutional frameworks and with what implications—in the states.

Critics of executive nondefense in the federal system suggest that its use threatens rule-of-law values and may inject partisanship, instability, and uncertainty into the law.¹⁰ But the practice in the states, in which nondefense occurs relatively routinely in the context of a variety of institutional design choices,¹¹ provides a powerful counterpoint to those

see also Whittington, *supra* note 4, at 106 (“[M]ost of the laws struck down by the U.S. Supreme Court as unconstitutional have been the products of state and local governments, not the federal government.”).

8. See Robert F. Williams, Response, *Why State Constitutions Matter*, 45 *New Eng. L. Rev.* 901, 907 (2011) (“The states’ constitutional distribution-of-powers arrangements . . . differ greatly from state to state.”).

9. In addition, while the constitutional scheme within each state is to some degree unique, scholars of state constitutionalism regularly insist that the states are actually sufficiently similar that the study of “trans-state constitutional theory” can in fact be a fruitful endeavor. See, e.g., Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 *N.M. L. Rev.* 271, 301 (1998) (“[I]ssues which emerge within states’ legal and political systems . . . raise similar stakes and have more or less similar shapes.”); cf. Paul W. Kahn, *Commentary, Interpretation and Authority in State Constitutionalism*, 106 *Harv. L. Rev.* 1147, 1166 (1993) (“[E]ach state constitution represents, in large measure, an effort to realize within the bounds of a particular time and space a common ideal of American constitutionalism.”).

10. See, e.g., Daniel J. Meltzer, *Lecture, Executive Defense of Congressional Acts*, 61 *Duke L.J.* 1183, 1187 (2012) (raising serious concerns about “regime in which each administration views itself as having significant latitude to refuse to enforce and defend acts of Congress” (emphasis omitted)); see also Charles Fried, *The Solicitor General’s Office, Tradition, and Conviction*, 81 *Fordham L. Rev.* 549, 549 (2012) (describing Obama Administration’s “quite unjustified” decision to abandon defense of DOMA).

11. See, e.g., *infra* Part I.L.C (discussing several case studies of state nondefense); cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). The states-as-laboratories metaphor tends to be invoked most often in the context of experiments with policy; but it has just as much force (perhaps subject to the limits of the Guaranty Clause) when it comes to questions of structural constitutionalism. Cf. Amar, *California Constitutional Conundrums*, *supra* note

objections. As wielded in the states, the nondefense power neither threatens to unravel rule-of-law norms, nor produces a hypertrophied executive vis-à-vis the other branches of state government. Rather, nondefense is on balance more respectful of both legislatures (by ensuring that legislative enactments receive the most vigorous defense possible) and courts (by both facilitating judicial review and providing courts with a range of constitutional views) than a regime of mandatory executive defense would be.¹²

This Article proceeds in five Parts. Part I provides an overview of the literature on nondefense (and the related practice of nonenforcement) in the federal system. Part II shifts the focus to the states: It situates state nondefense within state separation of powers frameworks, then introduces four cases of state executive nondefense. Part III draws upon these case studies, along with other materials, to offer an initial taxonomy of executive nondefense in the states. Part IV then describes alternatives to these overt nondefense mechanisms: “mandatory” defense of laws by executive officials and a variety of alternative mechanisms that allow for indirect nondefense. Part V moves from the descriptive to the normative and prescriptive. It first argues that a relatively robust nondefense power can carry significant benefits, both by adding additional perspectives to debates about constitutional meaning, and by permitting state executives to leverage their comparative institutional expertise for the benefit of courts, citizens, and even the legislatures whose laws the executive chooses not to defend. Part V then provides a set of recommendations for ensuring that when nondefense occurs, its benefits can be realized.

Several caveats are in order before proceeding further. First, this Article’s concern is with the executive branch’s refusal to defend the constitutionality of a statute when it is challenged in court—what I term *constitutional nondefense*—and not the executive branch’s refusal to *enforce* a constitutionally objectionable statute; the latter is arguably a far more aggressive exercise of executive power, and one that raises significantly more difficult questions than nondefense. All of the case studies considered here involve nondefense, as do the substantive recommendations, but along the way this Article also engages with a good deal of literature on nonenforcement, for the simple reason that much of the literature contains important insights for thinking about nondefense. Second, “state executives” are regularly invoked in a way that might appear to

6, at 741–42 (“Just as there is a so-called laboratory value of federalism with respect to state and local statutory and administrative policies, so too, features of and innovations in state constitutionalism should be looked at by other states—and at times the federal government—for possible emulation.” (footnotes omitted)); Richard Briffault, *The Item Veto in State Courts*, 66 *Temp. L. Rev.* 1171, 1171 (1993) (“[A]s the ‘laboratories of democracy’ metaphor suggests, the study of the structural features of state constitutions can enable us to consider alternative means of organizing representative democratic governments . . .”).

12. See *infra* Part V (arguing for robust nondefense power).

oversimplify the institutional arrangements in effect in most states. State executive branches are plural, not unitary, and the relationship between governors and attorneys general is complex and often fraught.¹³ The intent is not to gloss over any of those complexities. But rather than delve into intrastate dynamics, this Article trains its focus on the way the non-defense power is conceived and wielded, and its exercise accommodated, by whatever state actors are understood to possess it within the state systems discussed,¹⁴ and the term “state executive” is simply used as convenient shorthand. Third, this Article uses “nondefense” to encompass both decisions not to defend the constitutionality of statutes that have been challenged in court and decisions to affirmatively attack statutes. Part V discusses some salient differences between the two courses of conduct, but until then the discussion largely collapses them. Fourth, the concern here is exclusively with nondefense based on constitutional objections to

13. See, e.g., Joseph Kanefield & Blake W. Rebling, Who Speaks for Arizona: The Respective Roles of the Governor and Attorney General when the State Is Named in a Lawsuit, 53 *Ariz. L. Rev.* 689, 691–93, 703–15 (2011) (exploring Arizona’s constitutional and statutory allocation of authority between Governor and Attorney General); Michael Signer, Commentary, Constitutional Crisis in the Commonwealth: Resolving the Conflict Between Governors and Attorneys General, 41 *U. Rich. L. Rev.* 43, 46–47, 58–76 (2006) (describing regular clashes between Virginia Governor and Attorney General over control of litigation and proposing solutions); Michael B. Holmes, Comment, The Constitutional Powers of the Governor and Attorney General: Which Office Properly Controls Litigation Strategy when the Constitutionality of a State Statute Is Challenged?, 53 *La. L. Rev.* 209, 219–27 (1992) (arguing Louisiana Attorney General, not Governor, is charged with control of litigation strategy); Erin L. Penn, Comment, *Perdue v. Baker*: Who Has the Ultimate Power over Litigation on Behalf of the State of Georgia—the Governor or the Attorney General?, 21 *Ga. St. U. L. Rev.* 751, 756–68, 770–72 (2005) (assessing executive authority in Georgia through lens of reapportionment dispute); cf. Scott M. Matheson, Jr., Constitutional Status and Role of the State Attorney General, 6 *U. Fla. J.L. & Pub. Pol’y* 1, 3–15 (1993) (providing broad overview of position of state attorney general). For judicial treatment of the issue, see *Riley v. Cornerstone Cmty. Outreach, Inc.* (Ex parte State), 57 *So. 3d* 704, 741 (Ala. 2010) (affirming Governor’s power to direct enforcement activities over objection of Attorney General); *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206, 1209 (Cal. 1981) (en banc) (finding Attorney General constitutionally subject to direction of Governor); *Perdue v. Baker*, 586 S.E.2d 606, 616 (Ga. 2003) (holding Governor lacked authority to direct Attorney General to dismiss appeal); *State ex rel. Condon v. Hodges*, 562 S.E.2d 623, 629 (S.C. 2002) (concluding Attorney General was not prohibited from initiating legal action against Governor).

14. In addition, this Article does not consider nondefense by local executives. For a discussion of nonenforcement, and to a degree nondefense, by local executives, see Amar, *Lessons from California’s Experience*, supra note 6, at 470–76 (considering, inter alia, authority of local officials in San Francisco to begin issuing marriage licenses to same-sex couples in violation of state statutes); see also David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 *Yale L.J.* 2218, 2221 (2006) (arguing under some circumstances “city officers may appropriately decline to enforce state statutes”); Sylvia A. Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 *Stan. J. C.R. & C.L.* 1, 5–27 (2007) (exploring decisions by local officials to begin permitting same-sex couples to marry); cf. Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 *J.L. & Pol.* 147, 154 (2005) (maintaining cities should be free to make “local determinations of marriage eligibility”).

a law—that is, constitutional nondefense. Executive officials may decline or abandon the defense of a law (or decline to appeal an adverse judgment) for a host of reasons unrelated to concerns about constitutionality—because of errors in the lower courts, for example, or the limited application of a particular law in the face of scarce resources¹⁵—and nondefense for those reasons is outside the scope of this Article.¹⁶ Finally, this Article does not purport to offer a definitive account of nondefense in the states. Rather, it identifies a largely unappreciated phenomenon and provides both source material and a framework for thinking about that phenomenon. The cases were selected after an initial survey of practices across the states, which included a review of state constitutional provisions, statutes, case law, attorney general opinions, and the popular press, as well as background interviews with attorneys in executive branch offices in a number of states. But the cases themselves are exemplary, not exhaustive.

15. See, e.g., William C. Haflett, Jr., Note, *Tice v. Department of Transportation: A Declining Role for the Attorney General?*, 63 N.C. L. Rev. 1051, 1053–54 (1985) (“[T]he attorney-general has power . . . to make any disposition of the state’s litigation that he deems for its best interest. . . . [sic] [H]e may abandon, discontinue, dismiss or compromise it’ . . . when he determines that continued litigation would be adverse to the public interest.” (misquotation in Haflett) (third alteration in Haflett) (footnote omitted) (quoting *State v. Finch*, 280 P. 910, 912 (Kan. 1929)); see also *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013) (noting ballot sponsors, in contrast to state officials, “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”).

16. Further, constitutional nondefense, as the term is used here, would not include decisions not to defend laws based on objections that sound purely in politics or policy. Of course, the distinction between constitutional law and politics/policy is much cleaner in theory than in practice. See *infra* notes 364–366 and accompanying text (discussing relationship between the two).

In addition, litigation is just one of many contexts in which the executive may interpose constitutional views of a statute. Such views may also be conveyed in the context of constitutional review of proposed bills or regulations; while preparing written advisory opinions; in the form of gubernatorial veto or signing statements; in the course of preparing a proposed popular initiative for the ballot; and in a range of other contexts.

In some states, statutes explicitly provide for such consideration. See, e.g., Neb. Rev. Stat. § 84-905.01 (2008) (requiring prepublication review by Attorney General of any rule or regulation promulgated under state’s Administrative Procedures Act); 71 Pa. Cons. Stat. Ann. § 732-204(b) (West 2012) (requiring Attorney General to “review, for form and legality, all proposed rules and regulations of Commonwealth agencies”). For a discussion of this phenomenon in the federal system, see Meltzer, *supra* note 10, at 1196–97 (“Executive-branch lawyers deal with constitutional issues frequently, and not merely, or perhaps even most often, in litigation.”); see also Dawn E. Johnsen, Presidential Non-Enforcement of Constitutionally Objectionable Statutes, *Law & Contemp. Probs.*, Winter/Spring 2000, at 7, 30 [hereinafter Johnsen, Presidential Non-Enforcement] (“The President may, and should, evaluate proposed legislation for constitutionality, work with Congress to cure any defects, veto bills when Congress has been unresponsive, and even after enactment, urge Congress to repeal unconstitutional provisions.”).

I. NONDEFENSE OF STATUTES IN THE FEDERAL SYSTEM

A. *The Constitutional Framework*

As a number of commentators have observed, a President faced with a statute he deems constitutionally problematic confronts two competing constitutional obligations¹⁷: his duty to “take [c]are” that *statutes* be “faithfully executed,”¹⁸ and his duty to uphold the *Constitution*, which emanates from both the Take Care Clause (since the Constitution is surely one of the laws the President is charged with executing) and the structure of the Constitution,¹⁹ and is set forth explicitly in the Constitution’s prescribed presidential oath.²⁰ How a President should resolve the conflict between these competing imperatives has been the subject of active debate—particularly when the President has confronted this question in a public way, as occurred recently in the context of DOMA.

B. *The Existing Debate*

Much of the scholarship addressing the federal executive’s options in the face of legal challenges to constitutionally problematic statutes can be roughly divided into two camps. Scholars in the first camp take the view that executive defense of statutes is a near-absolute imperative, at least until the courts have spoken.²¹ Those in the second camp take the

17. See, e.g., Presidential Auth. to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 203 (1994) [hereinafter OLC Presidential Authority Opinion] (“When the President’s obligation to act in accord with the Constitution appears to be in tension with his duty to execute laws enacted by Congress, questions are raised that go to the heart of our constitutional structure.”).

18. U.S. Const. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

19. See Johnsen, Presidential Non-Enforcement, *supra* note 16, at 27 (“The indeterminate text of the Take Care Clause must take its meaning from the constitutional structure.”).

20. “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.” U.S. Const. art. II, § 1, cl. 8.

21. See, e.g., Edward S. Corwin, *The President: Office and Powers, 1787–1984*, at 72 (Randall W. Bland et al. eds., 5th rev. ed. 1984) (“[O]nce a statute has been duly enacted, whether over his protest or with his approval, [the President] must promote its enforcement by all the powers constitutionally at his disposal unless and until enforcement is prevented by regular judicial process.”); Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 Vand. L. Rev. 389, 396 (1987) (describing as “profoundly erroneous” view that executive has power to “contest the validity of federal statutes”); cf. Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. Rev. 381, 381, 384 (1986) (“In our constitutional system of government . . . a refusal by the Executive to ‘take care that the Laws be faithfully executed’ cannot and must not be tolerated, . . . [although] the Executive can refuse to defend the constitutionality of a statute when judicial review has been properly instituted.” (quoting U.S. Const. art. II, § 3)); Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21

equally hard-line view that the executive's independent authority to interpret the Constitution implies a near-absolute power (and, in an even stronger form of the argument, an obligation) to decline to defend statutes the executive believes to be unconstitutional.²² This may even include, for some commentators and under certain circumstances, the power to disregard judgments of the Supreme Court.²³ Although scholarship in the area tends to focus on the President, similar questions arise with respect to the competing obligations of the Attorney General and the Solicitor General; indeed, much of the scholarship and executive branch writing on the topic slides between the President and these Justice Department officials without acknowledging potentially salient differences.²⁴

Hastings Const. L.Q. 865, 992 (1994) (critiquing presidential nonenforcement of statutes, but allowing “[o]nce the matter is in court, the Executive might decline to defend the law or join in seeking to have it held unconstitutional”).

22. See, e.g., Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 Colum. L. Rev. 507, 509 (2012) (“[T]here simply is no duty to defend federal statutes the President believes are unconstitutional.”); Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 906–07 (1990) (“There is a long history of presidential action on the basis of constitutional views . . .”); Paulsen, *Most Dangerous Branch*, supra note 4, at 221 (arguing for expansive presidential power of constitutional interpretation).

23. See Paulsen, *Most Dangerous Branch*, supra note 4, at 226 (describing “radical” but “logical conclusion” that “power of executive review . . . permit[s] the President to decline to enforce judicial decrees in cases within the courts’ jurisdiction”); see also Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 *Cardozo L. Rev.* 81, 88–99 (1993) (discussing classic example of President Lincoln’s refusal to obey Chief Justice Taney’s order granting writ of habeas corpus in *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487)). For a critique of Professor Paulsen’s views, see Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 *Minn. L. Rev.* 1421, 1425 (1999) (“The President is legally obligated to enforce judicial judgments in cases or controversies that he independently thinks are unconstitutional, subject to a rule of clear mistake.”).

24. Compare OLC *Presidential Authority Opinion*, supra note 17, at 201 (concluding President has authority to decline to execute unconstitutional statutes and responsibility is enhanced where “unconstitutional provisions . . . encroach upon the constitutional powers of the Presidency”), with *Att’y General’s Duty to Defend & Enforce Constitutionally Objectionable Legislation*, 43 *Op. Att’y Gen.* 275, 275 (1980) [hereinafter *AG’s Duty*] (noting Attorney General “has a duty to defend and enforce the Acts of Congress . . . [and] to defend and enforce the Constitution”). For a discussion of the Solicitor General’s approach to defending potentially unconstitutional legislation, see Seth P. Waxman, *Defending Congress*, 79 *N.C. L. Rev.* 1073, 1078 (2001) (“[T]he Solicitor General generally defends a law whenever professionally respectable arguments can be made in support of its constitutionality.”). Former Solicitor General Charles Fried recently suggested that the duty of the Solicitor General to defend statutes flows at least in part from commitments elicited by Senators during confirmation hearings. See Fried, supra note 10, at 550 (“Every Solicitor General . . . goes through a little dance [during] his or her confirmation hearings. . . . ‘[I]f confirmed, [will you] defend the constitutionality of acts of Congress?’ ‘Yes, Mr. Chairman, . . . unless no colorable argument can be made in their defense or unless they trench on the prerogatives of the executive branch.’”). The confirmation process, of course, separates the Attorney General and Solicitor General from the President.

The two positions outlined above map quite cleanly onto the broader debate regarding the relative authority of the courts and the political branches to interpret the Constitution. Advocates of defense as an imperative ground their arguments in notions of judicial supremacy, contending that within the American constitutional scheme, in which courts enjoy a privileged position as arbiters of constitutional meaning, the executive must maintain the defense of statutes in order to preserve the courts' ability to render ultimate constitutional judgments.²⁵ Defenders of executive nondefense take the departmentalist view that the executive branch is a coequal constitutional interpreter, and as such it may give expression to independent constitutional views in a variety of settings, including when a statute is challenged in litigation.²⁶

Meanwhile, opinions from the Office of Legal Counsel,²⁷ as well as a number of scholars, have eschewed these two extremes, taking the position that the executive possesses some authority, under some circumstances, to decline to defend statutes based on an independent determination of unconstitutionality, but that such power should be exercised sparingly and subject to a number of prudential constraints. A 1980 opinion by then-Attorney General Benjamin Civiletti—one of the first public opinions to grapple with the question of the executive's options vis-à-vis a potentially unconstitutional statute—takes this position.²⁸ As Civiletti explains, when the Attorney General identifies a conflict between a statute and the Constitution, “he must acknowledge his dilemma and decide how to deal with it.”²⁹ Most of the time the conflict can best

25. See, e.g., Adam Winkler, Why Obama Is Wrong on DOMA, HuffPolitics Blog (Feb. 24, 2011, 12:01 PM), http://www.huffingtonpost.com/adam-winkler/why-obama-is-wrong-on-dom_b_827676.html (on file with the *Columbia Law Review*) (noting Supreme Court decisions on sexual orientation and heightened scrutiny are “the law of the land and, for better or worse, it’s the Supreme Court, not the president, who gets to make that decision”).

26. See, e.g., Devins & Prakash, *supra* note 22, at 510 (“There is no plausible argument that the Constitution obliges the President to press constitutional claims that he finds unpersuasive or objectionable . . .”). A similar debate surrounds the practice of nonacquiescence by federal administrative agencies—the refusal of agencies to abide by circuit court precedent. Compare Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 *Yale L.J.* 679, 719 (1989) (rejecting constitutional bar against intracircuit nonacquiescence), with Matthew Diller & Nancy Morawetz, Comment, Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz, 99 *Yale L.J.* 801, 803, 822–23 (1990) (arguing rule of law, stability, and equality considerations militate strongly against intracircuit nonacquiescence).

27. For an overview of the processes and institutional context surrounding the provision of legal advice by OLC, see Trevor Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 *Colum. L. Rev.* 1448, 1458–70 (2010).

28. AG’s Duty, *supra* note 24, at 276. Civiletti’s opinion, which considered both nonenforcement and nondefense, also introduced the phrase “duty to defend” to refer to the strong presumption it advocated in favor of executive defense of statutes, even in the face of constitutional doubts. *Id.* at 275.

29. *Id.*

be resolved by both enforcing and defending statutes,³⁰ subject to two key (if narrow) exceptions: where an act of Congress is plainly and obviously unconstitutional,³¹ or where the statute touches on the separation of powers and specifically invades or undermines executive power.³² The opinion concludes that in those instances, the executive is justified in declining to enforce and defend the law.³³ A 1984 opinion by the OLC similarly advises that although “[i]t is generally inconsistent with the Executive’s duty, and contrary to the allocation of legislative power to Congress, for the Executive to take actions that have the practical effect of nullifying an Act of Congress[,] . . . [e]xceptions to this general rule, however rare, do and must exist.”³⁴ The opinion affirms that such exceptions include statutes that are “clearly unconstitutional”³⁵ and situations implicating separation of powers concerns,³⁶ and advises that, with respect to the statute at issue, “the Department, amply supported by prior precedent, should depart from its usual practice of defending the constitutionality of federal statutes.”³⁷ And a 1992 opinion on nonenforcement notes very broadly that “the Constitution provides the President with the authority to refuse to enforce unconstitutional provisions. . . . [T]he Take Care Clause does not compel the President to execute unconstitutional statutes.”³⁸ Although the opinion contends that the exercise of this power is especially justified “when the statutes in question would blur the separation of powers between the Congress and the President,”³⁹ it does

30. This position, Civiletti writes, is “supported by compelling constitutional considerations,” in that “the Judicial Branch is ordinarily in a position to protect both the government and the citizenry from unconstitutional action, legislative and executive,” while “only the Executive Branch can execute the statutes of the United States.” *Id.* at 275–76.

31. *Id.* at 276.

32. *Id.* at 276–77.

33. *Id.* An opinion by Attorney General William French Smith, written just one year later, further elaborates on the narrow set of circumstances under which the executive may decline to defend a statute in litigation: “[T]he Department has the duty to defend an act of Congress whenever a reasonable argument can be made in its support,” which means that “[t]he Department appropriately refuses to defend an act of Congress 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.” *Att’y General’s Duty to Defend the Constitutionality of Statutes*, 43 *Op. Att’y Gen.* 325, 325–76 (1981).

34. Recommendation that the Dep’t of Justice Not Defend the Constitutionality of Certain Provisions of the Bankr. Amendments and Fed. Judgeship Act of 1984, 8 *Op. O.L.C.* 183, 194 (1984).

35. *Id.*

36. *Id.* at 195.

37. *Id.* at 199.

38. *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 *Op. O.L.C.* 18, 31–36 (1992) [hereinafter *OLC Passports Opinion*] (footnote omitted) (citations omitted).

39. *Id.* at 35.

not suggest that the authority is *limited* to such contexts.⁴⁰ It too goes on to advise that the President may decline to enforce the provision of law at issue.⁴¹

Similarly, a number of scholars reject the two extremes outlined at the beginning of this Part in favor of a middle path. In general terms, these scholars contend that since the Constitution is best read to permit some degree of executive authority to decline to defend (and enforce) laws, it is most productive to focus on prudential or pragmatic guidelines—which, to be sure, emanate from constitutional principles—to guide the executive’s exercise of discretion within the constitutionally permitted zone of conduct. Professor Dawn Johnsen takes this approach in an article that uses as its jumping-off point a provision of the 1996 defense authorization bill that would have required the discharge of all HIV-positive service members from the armed forces.⁴² President Clinton signed the bill to which the HIV provision was attached, but explained in his signing statement that he had concluded that the provision served no legitimate governmental interest and was therefore unconstitutional.⁴³ He further announced that he would enforce the provision—which would have meant actually discharging HIV-positive service members—but would not defend its constitutionality.⁴⁴ The President then worked with Congress to repeal the provision before it took effect.⁴⁵ Based on a context-dependent approach she elsewhere terms “functional departmentalism,”⁴⁶ Professor Johnsen concludes that President Clinton’s decision to enforce but not defend the statute he had deemed unconstitutional struck an appropriate balance between the competing interests at play.⁴⁷

40. See Johnsen, Presidential Non-Enforcement, *supra* note 16, at 16 & n.38 (characterizing 1992 opinion as describing “presidential non-enforcement authority in sweeping terms that would seem to allow the President to refuse to enforce any law that in his view is unconstitutional”).

41. OLC Passports Opinion, *supra* note 38, at 37. Although the opinion does not separately consider nondefense, it would be permissible under its framework.

42. Johnsen, Presidential Non-Enforcement, *supra* note 16, at 7.

43. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 1 Pub. Papers 226, 227 (Feb. 10, 1996).

44. *Id.*; see also Press Release, Jack Quinn, Counsel to the President, and Walter Dellinger, Assistant Att’y Gen., White House Press Briefing (Feb. 9, 1996), <http://clinton6.nara.gov/1996/02/1996-02-09-quinn-and-dellinger-briefing-on-hiv-provision.html> (on file with the *Columbia Law Review*) (clarifying President Clinton would not defend constitutionality of HIV provision in court).

45. Johnsen, Presidential Non-Enforcement, *supra* note 16, at 13.

46. Dawn E. Johnsen, Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?, *Law & Contemp. Probs.*, Summer 2004, at 105, 108.

47. Professor Johnsen offers six factors Presidents should consider when deciding whether to decline to enforce or defend statutes: the clarity of the constitutional defect; the branches’ respective institutional expertise and interpretive abilities; whether Congress considered the constitutional issue; the likelihood of judicial review and the impact of

In a more recent piece, Professor Daniel Meltzer similarly rejects the dichotomous framework detailed at the outset of this Part, recasting the question as “one of judgment—of the desirability, in view of an extant and reasonably stable set of institutional practices and expectations, of the president’s determining in a particular case that he will not enforce or defend a statute.”⁴⁸ Professor Meltzer contends that executive nondefense and nonenforcement entail significant costs; he argues that in an increasingly polarized politico-legal environment, nondefense—at least of statutes that are not clearly unconstitutional and do not invade executive authority⁴⁹—poses a threat to stability norms and perhaps even to the rule of law itself.⁵⁰ Professor Meltzer writes:

[T]he concern [about the costs of a regime in which executives feel themselves at liberty to decline to defend statutes] seems to me to be salient . . . in view of the potential interaction among several aspects of contemporary legal and political culture. First, the blossoming of constitutional theory has generated an extremely broad range of views about proper constitutional interpretation. Second, presidents may be tempted to equate what is misguided or immoral with what is unconstitutional Third, views about constitutional interpretation have partisan correlations. Fourth, the parties are increasingly polarized Finally, the ideal of judicial restraint has been in retreat for many decades.⁵¹

C. *Nondefense and the Supreme Court*

While scholars and executive branch lawyers have long debated the scope of the federal executive’s authority to decline to defend statutes, the Supreme Court has considered the merits of a number of cases in which the executive declined to defend a law—or even attacked its constitutionality before the Court—without suggesting in any of those cases that the executive’s conduct was in any way noteworthy. *Myers v. United States*, invoked frequently in the literature, involved a statute requiring the President to obtain Senate consent before removing a postmaster.⁵² President Wilson, who concluded that the statute was unconstitutional,

nonenforcement on that likelihood; the seriousness of the harm that would result from nonenforcement; and the possibility of repeal. Johnsen, *Presidential Non-Enforcement*, supra note 16, at 53. But see David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*, *Law & Contemp. Probs.*, Winter/Spring 2000, at 61, 63 [hereinafter Barron, *Constitutionalism*] (challenging Johnsen’s “court-centered approach to the scope of the President’s non-enforcement power”).

48. Meltzer, supra note 10, at 1209.

49. See *id.* at 1198–201 (conceding that “refusing to defend a statute” in cases where statute is clearly unconstitutional or encroaches on executive power “provokes little controversy”).

50. *Id.* at 1228–29.

51. *Id.* at 1228–30 (footnotes omitted).

52. 272 U.S. 52, 106–07 (1926).

removed Myers without the consent of the Senate;⁵³ when Myers challenged his removal, the executive branch argued against the constitutionality of the statute.⁵⁴ Myers argued that the statute was constitutional, but after Myers's attorney twice failed to appear for oral argument, the Court appointed Pennsylvania Senator George Pepper to defend the statute's constitutionality as *amicus curiae*.⁵⁵ The Court sided with the President, concluding that the statute, "in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid."⁵⁶ And the Court treated the executive branch's attack on the constitutionality of the statute as entirely unremarkable, merely noting in passing that the statute had been defended by Court-appointed *amicus*.⁵⁷

United States v. Lovett, a similar case in many ways, featured a statute that singled out three individual executive branch employees and prohibited the government from paying their salaries.⁵⁸ In contrast to *Myers*, in which the executive branch refused to comply with the removal limitation and attacked its constitutionality,⁵⁹ the executive branch in *Lovett* complied with the objectionable law and withheld the salaries of the named officials.⁶⁰ But when the officials filed suit, the executive branch joined them in arguing against the law's constitutionality.⁶¹ As in *Myers*, special counsel defended the law's constitutionality.⁶² And as in *Myers*, the *Lovett* Court suggested no impropriety in the executive's nondefense of the law.⁶³

53. *Id.* at 107–08.

54. *Myers v. United States*, 58 Ct. Cl. 199, 203 (Ct. Cl. 1923), *aff'd*, 272 U.S. 52.

55. *Myers*, 272 U.S. at 176; see also Saikrishna Prakash, *The Story of Myers and Its Wayward Successors: Going Postal on the Removal Power*, in *Presidential Power Stories* 165, 169–77 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (describing litigation). Pepper also filed a brief, *Brief for the Appellant Filed by George Wharton Pepper, Amicus Curiae, Myers*, 272 U.S. 52 (No. 2), and appeared to present argument before the Court. Prakash, *supra*, at 172–73, 176.

56. *Myers*, 272 U.S. at 176.

57. *Id.* at 176–77 (“[W]e wish to express the obligation of the Court to [appointed *amicus*] The strong presentation of arguments against the conclusion of the Court is of the utmost value in enabling the Court to satisfy itself that it has fully considered all that can be said.”).

58. 328 U.S. 303, 304–05 (1946).

59. See *supra* notes 53–54 and accompanying text (discussing *Myers*).

60. *Lovett*, 328 U.S. at 305.

61. *Id.* at 306.

62. *Id.* This time a statute authorized the appointment of special counsel. *Id.*; see also *Brief for the Congress of the United States in Support of Petition for Writs of Certiorari at 2, Lovett*, 328 U.S. 303 (No. 45-809) (explaining Congress authorized special counsel to defend law because “Attorney General advised the Congress . . . he found it impossible to advocate the views of the Congress with conviction”).

63. *Lovett*, 328 U.S. at 306 (noting “Solicitor General, appearing for the Government, joined in the first two of respondents’ contentions [that the law at issue was

Though they vary in their particulars, *Buckley v. Valeo*,⁶⁴ *INS v. Chadha*,⁶⁵ *Dickerson v. United States*,⁶⁶ *Morrison v. Olson*,⁶⁷ and *Metro Broadcasting, Inc. v. FCC*⁶⁸ all featured constitutional nondefense of (or attack on) all or part of the statute in question. In all of these cases, the Court treated the fact that the executive disputed the constitutionality of the law in question as entirely unexceptional.

In *United States v. Windsor*,⁶⁹ the Court broke its silence on the practice of executive nondefense, and suggested at least a partial retreat from the implicit blessing of the practice that appeared in its early cases. After concluding that its Article III jurisdiction was secure and that prudential considerations counseled in favor of exercising rather than declining jurisdiction, the Court paused to issue a caution:

[T]here is no suggestion here that it is appropriate for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal. The integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise.⁷⁰

The Court elaborated:

The Executive's failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established

unconstitutional],” and special counsel, appearing on behalf of Congress, “denied all three of respondents’ contentions”).

64. 424 U.S. 1, 143 (1976) (per curiam) (concluding, at executive branch’s urging, congressional appointment of members of Federal Election Commission (FEC) constituted unconstitutional infringement of separation of powers); Brief for the Attorney General as Appellee and for the United States as Amicus Curiae at 112–22, *Buckley*, 424 U.S. 1 (No. 75-436) [hereinafter *Buckley* Attorney General Brief] (arguing certain powers conferred by FECA on FEC unconstitutionally infringe presidential powers).

65. 462 U.S. 919, 928 (1983) (“The Immigration and Naturalization Service agreed with Chadha’s position . . . and joined him in arguing that § 244(c) (2) is unconstitutional. In light of the importance of the question, the Court of Appeals invited both the Senate and the House of Representatives to file briefs *amici curiae*.”).

66. 530 U.S. 428, 441 n.7 (2000) (“Because no party to the underlying litigation argued in favor of § 3501’s constitutionality in this Court, we invited Professor Paul Cassell to assist our deliberations by arguing in support of the judgment below.”).

67. 487 U.S. 654, 696–97 (1988) (upholding independent counsel statute over executive branch’s objections); see also Brief for the United States as Amicus Curiae Supporting Appellees at 8–9, *Morrison*, 487 U.S. 654 (No. 87-1279), 1988 WL 1031600, at *3–*5 (arguing unconstitutionality of independent counsel statute).

68. 497 U.S. 547, 552 (1990) (upholding, over executive branch’s objection, constitutionality of Federal Communications Commission’s minority preference policies), overruled by *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The government’s brief, authored by acting Solicitor General John G. Roberts, Jr., argued that the preferences violated equal protection. See Brief for the United States as Amicus Curiae Supporting Petitioner at 6–7, *Metro Broad., Inc.*, 497 U.S. 547 (No. 89-453), 1989 WL 1126975, at *6–*8.

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

70. *Id.* at 2689.

in judicial decisions has created a procedural dilemma. On the one hand, . . . the Government's agreement with Windsor raises questions about the propriety of entertaining a suit in which it seeks affirmance of an order invalidating a federal law On the other hand, if the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's. . . . [W]hen Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court.⁷¹

Whether this admonition will have any effect on future decisions by executives confronting constitutionally problematic statutes remains to be seen; at the very least, it suggests there is a chance that when such cases arise in the future, the Supreme Court may decline to exercise jurisdiction on prudential grounds.

As this Part has shown, scholars and executive branch lawyers have long debated the merits of executive nondefense in the federal system, and the Supreme Court itself has recently weighed in on the practice, albeit in a statement whose impact is as yet unclear. But no one has yet considered a rich source of material on nondefense: the practice in the states. It is those materials to which the next Part turns.

II. NONDEFENSE BY STATE EXECUTIVES

This Part provides a very brief overview of the frameworks, both institutional and constitutional, in which nondefense in the states occurs. It then introduces four case studies of constitutional nondefense by state officials.

A. *Separated Powers in the States*

Although the federal Constitution does not expressly provide for the separation of powers, that principle is "a prominent feature of the body of the Constitution, dictating the form, function, and structure of a government of limited powers."⁷² As the Supreme Court has explained, "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative,

71. Id. at 2688.

72. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. Pa. L. Rev. 1513, 1513 (1991).

Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility.”⁷³

The question of whether the federal conception of the “separation of powers” is even properly applicable to the states is a contested one.⁷⁴ Michael Dorf argues that although the Supreme Court has insisted that federal conceptions of the separation of powers do not apply to the states,⁷⁵ that insistence is implausible given the number of provisions in the federal Constitution that presuppose the existence of state governmental structures that resemble those in the federal system.⁷⁶ And whether or not the *federal* Constitution requires states to adhere to separation of powers principles, states have in fact created their own systems of separated powers, many by enshrining that principle explicitly in their state constitutions. In contrast to the federal Constitution, thirty-five state constitutions contain clauses that not only announce that powers will be

73. *INS v. Chadha*, 462 U.S. 919, 951 (1983); see also *Miller v. French*, 530 U.S. 327, 341 (2000) (“The Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III, and it is this ‘very structure’ of the Constitution that exemplifies the concept of separation of powers.” (quoting *Chadha*, 462 U.S. at 946)); *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam) (“The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”).

74. Compare Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 *Roger Williams U. L. Rev.* 79, 92 (1998) (“[U]nlike federal individual rights precedent, federal separation of powers doctrine does not apply directly to the states.”), with Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 *Roger Williams U. L. Rev.* 51, 54 (1998) (“[I]t is something of an overstatement to say that the principle of separation of powers has *no* application to the states.”).

75. Dorf, *supra* note 74, at 53 (“The United States Supreme Court has repeatedly stated that the doctrine of separation of powers does not apply to the states.”). For judicial statements regarding the inapplicability of federal separation of powers norms to the states, see, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (plurality opinion) (“[T]his Court has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments.”); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) (“Whether the legislative, executive and judicial powers of a State shall be kept . . . separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State.”).

76. Among the federal constitutional provisions Dorf identifies are: Article V, which creates a mechanism for calling a Constitutional Convention “on the Application of the Legislatures of two thirds of the several States” and also requires ratification of constitutional amendments by either state “Legislatures” or conventions called in the states; Article I, Section 4, Clause 1, which confers on state legislatures in the first instance the power to set the “times, places and manner” of congressional elections; the Seventeenth Amendment, which explicitly references both state “executive authority” and state legislatures; and the Supremacy Clause, which “treats state courts as distinct from other organs of state government.” Dorf, *supra* note 74, at 54–55 (quoting U.S. Const. art. V; *id.* amend. XVII, cl. 2).

divided between the legislative, executive, and judicial branches,⁷⁷ but also in many instances expressly forbid the members of any branch from exercising powers assigned to one of the others.⁷⁸ This is not to say that such provisions separate powers in ways that exactly mirror the federal system; rather, state systems depart from the federal model in a number of significant ways.⁷⁹ But the key structural features within the states do bear at least some resemblance to the federal system.

Significantly, however, states separate powers *within* the executive branch in a manner that is entirely distinct from the federal framework.⁸⁰ While the federal executive power is vested in the President,⁸¹ who appoints, subject to the advice and consent of the Senate, “Officers of the United States,”⁸² state executives are divided, with power dispersed among two or more state officials.⁸³ Accordingly, “[t]he federal picture

77. E.g., Ark. Const. art. IV, §§ 1, 2 (“The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.”); see also, e.g., Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1190–91 (1999).

78. E.g., Colo. Const. art. III (“The powers of the government of this state are divided into three distinct departments,—the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to . . . the others . . .”); see also Rossi, *supra* note 77, at 1190.

79. Among the many relevant differences are the relative ease of amending state constitutions, as compared to the Federal Constitution, and the lack of a “case or controversy” requirement in many state courts. See G. Alan Tarr, *Introduction to Constitutional Politics in the States*, at xv (G. Alan Tarr ed., 1996) (“Within the states . . . constitutional change and constitutional politics have proceeded primarily through formal mechanisms for change, through constitutional amendment and constitutional revision, rather than [as in the federal system] through judicial interpretation.”); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1163 (1999) (“[S]tate constitutional amendments are relatively ordinary events in a state’s political life . . .”); see also Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1845 (2001) [hereinafter Hershkoff, “Passive Virtues”] (“[S]ome state courts play an explicit and accepted advisory role in their relations with the other branches.”).

80. Cf. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 Yale L.J. 2314, 2342 (2006) (proposing reforms to promote internal separation of powers within federal executive branch).

81. U.S. Const. art. II, § 1.

82. *Id.* § 2, cl. 2.

83. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2448 (2006) (“The states . . . employ a divided executive that apportions executive power among different executive officers not subject to gubernatorial control.”); see also Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. Chi. L. Rev. 1385, 1399–400 (2008) (discussing state and local executive regimes in which independently elected officials possess “primary responsibility for specific policy domains”); Williams, *Fragmented Executive*, *supra* note 6, at 566 (“In contrast to the Hamiltonian federal executive with its unitary executive structure, state executives are not unitary. Instead, state constitutions

does not accurately describe the fractured and dispersed executive authority in many states: Citizens routinely vote not only for governor, but also separately for lieutenant governor and scores of other officers whose functions and activities the governor only loosely coordinates.”⁸⁴

In forty-three states, the attorney general is popularly elected.⁸⁵ The Maine Attorney General is elected by the legislature,⁸⁶ and the Tennessee

fragment executive authority, providing for the direct popular election of several state officials and establishing relatively independent local governments.” (footnote omitted)).

84. Hershkoff, “Passive Virtues,” *supra* note 79, at 1897; see also Robert F. Williams, *The Law of American State Constitutions* 310 (2009) (“[T]he state executive branch, sometimes plural or fragmented and possibly containing constitutional agencies and officers, can be an entity that is substantially different from the powerful, arguably ‘unitary’ federal Executive.”); John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 *Temp. L. Rev.* 1205, 1226–27 (1993) (“Most states, in contrast [to the federal government], authorize multiple independently elected statewide executive officers, thus diffusing executive power . . .” (footnote omitted)); Schapiro, *supra* note 74, at 102 (“Executive branches of state governments often have a more diffused assignment of authority [than the federal executive].”).

It should be noted, however, that the unitary/nonunitary distinction between the federal and state executives can be overstated in the context of executive nondefense; that is, even in the federal system, there are examples of intrabrand disputes over the constitutionality of statutes challenged in litigation, something even the comparative unitariness of the federal executive cannot eliminate entirely. Perhaps the two best-known examples of this phenomenon are *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) and *Oregon v. Mitchell*, 400 U.S. 112 (1970) (plurality opinion). In *Buckley*, the federal government filed three briefs in the Supreme Court. One, captioned “Brief for the Attorney General and the Federal Election Commission,” defended the constitutionality of the substantive provisions of the Federal Election Campaign Act. Brief for the Attorney General and the Federal Election Commission, *Buckley*, 424 U.S. 1 (No. 75-436), 1975 WL 171459, at *14–*15. The second brief, captioned “Brief for the Attorney General as Appellee and for the United States as Amicus Curiae,” did not take a strong position on the constitutionality of the Federal Election Campaign Act’s substantive provisions, but, in the only part of the brief the Attorney General joined, argued that the structure of the FEC constituted an unconstitutional infringement of the President’s power. *Buckley* Attorney General Brief, *supra* note 64, at 2 (“[T]he Attorney General . . . joins only the separate portion of this brief that addresses the problem of the scope of the Federal Election Commission’s powers . . .”). The third brief, on behalf of just the FEC, defended both the powers and the structure of the FEC. Brief of the FEC, *Buckley*, 424 U.S. 1 (Nos. 75-436 & 75-437); see also Richard L. Hasen, *The Nine Lives of Buckley v. Valeo*, in *First Amendment Stories* 345, 361 (Richard W. Garnett & Andrew Koppelman eds., 2012) (describing briefing of *Buckley* in Supreme Court).

In *Mitchell*, the Solicitor General defended a statute that lowered the voting age to eighteen, but informed the Court that the President believed that the change required a constitutional amendment, and that the Attorney General, “because of his relationship to the President, . . . felt that he should not present the argument in this Court. . . . So, I am here and I and my associates have endeavored to support the statute as vigorously as we are able.” Motion for Leave to File Complaint, Complaint, Motion to Expedite and Briefs in Support of Motions, *Mitchell*, 400 U.S. 112 (No. 43).

85. 37 Council of State Gov’ts, *The Book of the States* 268 tbl.4.19 (2005).

86. Me. Const. art. 9, § 11.

Attorney General is appointed by the state supreme court.⁸⁷ In the remaining five states—New Jersey,⁸⁸ New Hampshire, Hawaii, Alaska, and Wyoming—the attorney general is appointed by the governor, subject to senate confirmation.⁸⁹ Although they are for the most part selected differently, state attorneys general do resemble the federal Attorney General in many ways: They advise legislatures on pending legislation;⁹⁰ counsel state agencies on contemplated courses of action;⁹¹ provide written opinions upon request;⁹² and, perhaps most crucially, represent the state in litigation in both federal and state courts.⁹³ Like the federal Attorney General, state attorneys general may serve more than one role in litigation: They act as *counsel* to other state officials who are named defendants in lawsuits, and they are *parties* when they themselves are named defendants, as when the challenged law is one they are charged with enforcing. The litigation authority of an attorney general may be set forth in a state constitutional provision, prescribed by statute, or simply exist as a matter of state common law.⁹⁴ And, although outside the scope of this Article, attorneys general are frequently in the affirmative posture of initiating lawsuits against private parties, the federal government, or other state officials.⁹⁵

87. Tenn. Const. art. 6, § 5.

88. Until recently, New Jersey alone elected no executive branch official other than the Governor. But in 2006, a New Jersey constitutional amendment that took effect during the 2009 election created an elected Lieutenant Governor. N.J. Const. art. V, § 1, para. 4 (“The Governor and Lieutenant Governor shall be elected conjointly and for concurrent terms by the legally qualified voters of this State, and the manner of election shall require each voter to cast a single vote for both offices.”).

89. 37 Council of State Gov’ts, *supra* note 85, at 268 tbl.4.19; see also Marshall, *supra* note 83, at 2448 n.3 (“In New Jersey, New Hampshire, and Hawaii, the Attorney General is appointed by the Governor but is not removable at will.”).

90. E.g., State Attorneys General Powers and Responsibilities 68 (Emily Myers ed., 3d ed. 2013).

91. E.g., *id.* at 52.

92. E.g., *id.* at 74–83; see also Peter E. Heiser, Jr., The Opinion Writing Function of Attorneys General, 18 Idaho L. Rev. 9, 9 (1982) (“Inherent in the role of attorneys general as chief legal officers for their states is the function of rendering legal opinions to various officials, departments, and agencies of government”); Thomas R. Morris, State Attorneys General as Interpreters of State Constitutions, 17 Publius 133, 134 (1987) (“All attorneys general render advisory opinions on questions of law in their capacities as the chief legal advisers to state officials.”). There is considerable variety among the states in the “method[s] by which opinions are required, the manner in which they are prepared, [and] the range of persons or entities deemed entitled to formal opinions.” Heiser, *supra*, at 9. Interestingly, in contrast to the federal system, the opinion-writing function in the states often includes the provision of detailed opinions to members of the legislature upon request. *Id.*

93. E.g., State Attorneys General Powers and Responsibilities, *supra* note 90, at 84.

94. *Id.* at 85–98.

95. See, e.g., Richard P. Ieyoub & Theodore Eisenberg, State Attorney General Actions, the Tobacco Litigation, and the Doctrine of *Parens Patriae*, 74 Tul. L. Rev. 1859, 1863 (2000) (noting power of attorneys general to bring *parens patriae* suits against

Beyond the governor and the attorney general, other state officials may play significant roles in considering the constitutionality of state statutes: secretaries of state, who are often independent constitutional officers and are selected in a variety of ways,⁹⁶ and state solicitors general, who reside within the offices of state attorneys general and frequently handle appellate litigation for those offices.⁹⁷ Although the existence of multiple centers of executive authority does in some sense undermine gubernatorial power, governors also exercise significant powers not enjoyed by the President, particularly vis-à-vis the legislature—perhaps most significantly in the form of the item veto, which allows most governors⁹⁸ to disapprove portions of legislative enactments, either in all bills or just in appropriations measures.⁹⁹

Scholarship on the states, with its almost exclusive focus on state courts,¹⁰⁰ has obscured important dynamics within the other branches of state government, and, as this abbreviated survey makes clear, state executive branches are well worth studying in their own right. One significant and unappreciated phenomenon—one for which the variety of state in-

private parties, including tobacco companies); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 *Harv. L. Rev.* 486, 487 (2012) (discussing role of attorneys general in aggregate litigation).

96. See 37 *Council of State Gov'ts*, *supra* note 85, at 231 tbl.4.9 (noting method of election for various state officials).

97. See generally Transcript, *The Rise of Appellate Litigators and State Solicitors General*, 29 *Rev. Litig.* 545, 635–45 (2010) (discussing history and function of state solicitors general).

98. *Id.* at 220 tbl.4.4; accord Briffault, *supra* note 11, at 1171 (“One of the distinctive structural features of state governments is the item, or partial, veto.”).

99. James A. Gardner, *The Positivist Revolution that Wasn't: Constitutional Universalism in the States*, 4 *Roger Williams U. L. Rev.* 109, 116 (1998) (“[G]overnors often have an item veto, increasing gubernatorial power in comparison to presidential power.”).

100. This focus is largely traceable to the effort, closely associated with Justice Brennan, to “enlist the states”—and really the state courts—in the project of promoting individual rights, generally through interpretation of state constitutional provisions. Kahn, *supra* note 9, at 1151; see William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 *Harv. L. Rev.* 489, 491 (1977) (“The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.”); William J. Brennan, Jr., *The Bill of Rights: State Constitutions as Guardians of Individual Rights*, *N.Y. St. B.J.*, May 1987, at 10, 17 (“For a decade now, I have felt certain that the Court’s contraction of federal rights and remedies on grounds of federalism should be interpreted as a plain invitation to state courts to step into the breach.”); see also Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 *U. Balt. L. Rev.* 379, 380–83 (1980) (discussing history of state court enforcement of individual rights); Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 *Rutgers L.J.* 871, 871 (1999) (describing Justice Brennan’s “new judicial federalism” as suggesting “legal regime of energetic state judges who interpret the unique, and not so unique, constitutional provisions of their respective state constitutions in vigorous ways to advance state-based individual rights that are independent of federal constitutional provisions”).

stitutional design choices may be partially responsible—is the range of methods by which state executive officials engage in independent constitutional interpretation. It is that phenomenon to which this Article now turns.

B. *State Executives, State Statutes, and the Federal Constitution*

The federal Constitution's Supremacy Clause contains two provisions, which are arguably somewhat distinct. The first half provides, categorically, that federal law is supreme;¹⁰¹ the second half refers exclusively to state *judges*, providing that “the Judges in every State shall be bound thereby.”¹⁰² It does not mention state legislators—or, more relevant to this project, state executives.¹⁰³ Is this textual distinction meaningful? That is, do state judges have different obligations vis-à-vis the federal Constitution than do state executive branch officials, in a way that both distinguishes the states from the federal government and raises questions about state executive authority to engage in independent constitutional interpretation?

In *Printz v. United States*,¹⁰⁴ the Supreme Court suggested that this textual distinction might actually be meaningful—particularly in terms of the contrast the *Printz* Court drew to *Testa v. Katt*.¹⁰⁵ In *Testa*, the Court affirmed Congress's authority to direct state courts to entertain certain types of federal claims;¹⁰⁶ by contrast, the *Printz* Court concluded that Congress could not require state executive officials to assist in the enforcement of certain provisions of federal law.¹⁰⁷ Writing for the majority in *Printz*, Justice Scalia explained, “*Testa* stands for the proposition that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause [T]hat says nothing about whether state executive officers must administer federal law.”¹⁰⁸ Of course, at issue in *Printz* was state executive officials' obligation to federal statutory law, rather than the federal Constitution. Moreover, the question of state executives' interpretive autonomy is surely distinct from

101. U.S. Const. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

102. *Id.* (“[T]he Judges in every State shall be bound [by the Constitution, federal laws, and treaties], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

103. *Id.*

104. 521 U.S. 898 (1997).

105. 330 U.S. 386 (1947).

106. *Id.* at 394 (“[T]he State courts are not free to refuse enforcement of petitioners' [federal] claim.”).

107. *Printz*, 521 U.S. at 935.

108. *Id.* at 928–29. Professor Dorf makes a similar argument. Dorf, *supra* note 74, at 56 (“Reconciling *Printz* and *New York [v. United States]*, 505 U.S. 144 (1992),] with *Testa* would seem to require an argument that state courts, as opposed to state executive and legislative bodies, have a distinctive role in enforcing federal law.”).

(and perhaps in some tension with) the question of the federal government's power to involve state officials in federal law enforcement efforts. Nevertheless, the distinction the *Printz* Court drew between state executive and judicial officials, and their respective obligations to federal law, may be meaningful.

In contrast to the Supremacy Clause, the federal Constitution's Oath Clause points to a more uniform conception of state officials' obligations to the federal Constitution, requiring *all* state officials—legislative, executive, and judicial—to “be bound by Oath or Affirmation, to support this Constitution.”¹⁰⁹ And again, in many instances state constitutional requirements themselves resolve any ambiguity: A number of state constitutions impose a direct obligation to the federal Constitution through state oath clauses, which require executive officials to swear to uphold not just the constitution of the state, but also (and generally first) the Constitution of the United States.¹¹⁰ State constitutions' “take care” clauses impose similarly broad obligations upon governors.¹¹¹

Against this backdrop, an examination of the practice in the states reveals that state executives often conceive of their obligation to uphold the Constitution as including the power to make independent judgments about constitutional meaning, including in the context of litigation. With striking frequency, state executives decide that the requirements of the Constitution, and their obligations to it, trump their constitutional, statutory, or common law duties to defend state laws in court. And most of the time it is the federal Constitution they find colliding with state statutes. There are, to be sure, exceptions¹¹²—but for the most part, when state

109. U.S. Const. art. VI, cl. 3 (“The Senators and Representatives . . . and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .”).

110. E.g., Mich. Const. art. XI, § 1 (“All officers . . . shall take . . . the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office . . . according to the best of my ability.”); see also Williams, *Fragmented Executive*, supra note 6, at 614 n.202 (noting, among states, “[o]nly Arizona, Idaho, North Dakota, and Washington lack a constitutionally prescribed oath for executive officers,” although in North Dakota and Washington such oaths are required by statute).

111. E.g., N.H. Const. pt. 2, art. 41 (“The executive power of the state is vested in the governor. The governor shall be responsible for the faithful execution of the laws.”); see also Williams, *Fragmented Executive*, supra note 6, at 639 (“[E]very state constitution, like the U.S. Constitution, provides in substance that the chief executive shall ‘take care’ or see to it that the laws are faithfully executed.”); *id.* at 639 n.287 (collecting state constitutional provisions).

112. Examples include *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Colo. 2003) (en banc), in which the Colorado Supreme Court concluded that the Attorney General's “grave doubts” about the constitutionality of the legislature's redistricting plan entitled him to file an original action challenging the plan in the Supreme Court, and *State ex rel. Spire v. Beermann*, 455 N.W.2d 749, 757 (Neb. 1990) (per curiam), in which the Nebraska Attorney General determined that a piece of legislation terminating the existence of a college, and recreating it under the auspices of the University of Nebraska,

executives attack or decline to defend state laws based on constitutional objections, those objections sound in federal constitutional terms.

C. Nondefense by State Executives: Four Cases

While debates about nondefense in the federal system have become largely impacted, state approaches to nondefense tell a rich and varied story about the range of possible mechanisms executives might employ when confronting constitutionally troubling statutes.¹¹³ The case studies in this Part are just four of many examples: They were chosen because they feature a range of conduct by state executives, and because they demonstrate a variety of methods by which alternative entities may step in to maintain the defense of laws the executive has opted not to defend.¹¹⁴

And they help us begin to evaluate some of the critiques lodged against the practice of nondefense in the federal system.

1. *California*. — In 2008, through a ballot initiative, California voters adopted Proposition 8, an amendment to the California Constitution

was unconstitutional under the state constitution. In an interesting postscript to *Beermann*, the Nebraska Supreme Court concluded 4-3 that the law was unconstitutional, but because Nebraska laws can only be deemed unconstitutional by a supermajority of five judges, the law was not invalidated. *Id.* at 749–50.

113. Cf. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *Yale L.J.* 1750, 1761, 1766, 1771–811 (2010) (describing emergence of interpretive consensus in several states around “new modified textualism,” in contrast to enduring interpretive divides at Supreme Court).

114. A number of constitutional and statutory provisions set forth the powers and authorities of the officials in these states. The California Constitution contains traditional gubernatorial vesting and faithful execution clauses, Cal. Const. art. 5, § 1 (“The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed.”), and a separate provision creating and describing the Office of the Attorney General, *id.* § 13 (“Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced.”). See also Cal. Gov’t Code §§ 12511–12512 (West 2011) (delineating responsibilities of Attorney General). The Hawaii Constitution’s gubernatorial clauses are similar. Haw. Const. art. V, § 1 (“The executive power of the State shall be vested in a governor.”); *id.* § 5 (“The governor shall be responsible for the faithful execution of the laws.”). The Hawaii Attorney General is not a constitutional officer, but Hawaii statutes set forth the powers and obligations of the office. Haw. Rev. Stat. Ann. §§ 26-7, 28 (LexisNexis 2012). The Nebraska Constitution contains similar gubernatorial provisions. Neb. Const. art. IV, § 6 (“The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed and the affairs of the state efficiently and economically administered.”). The Attorney General’s office is created by statute. Neb. Rev. Stat. § 84-203 (2008); *id.* § 84-205. Finally, the New Jersey Constitution creates both the office of the Governor, N.J. Const. art. V, § 1, ¶ 11, and the Attorney General, *id.* § 4, ¶ 3, with the Attorney General’s powers and responsibilities detailed in statute. N.J. Stat. Ann. §§ 52:17A-2, 52:17A-4 (West 2010).

defining marriage as the union of one man and one woman.¹¹⁵ The initiative, which purported to overturn a California Supreme Court decision finding that the state constitution guaranteed same-sex couples the right to marry,¹¹⁶ was immediately challenged on state constitutional grounds.¹¹⁷ The Attorney General, who had opposed the ballot initiative before its adoption, held a press conference announcing that he would defend it against the legal challenge,¹¹⁸ but his assurances failed to inspire confidence in the measure's supporters.¹¹⁹ Indeed, the official proponents of the measure sought and received permission to intervene in the case to defend the provision.¹²⁰

The Proposition 8 sponsors' fears were well founded. Notwithstanding the Attorney General's public pronouncements that he would defend the law, when he filed his brief, he reversed course and attacked its constitutionality, arguing that Proposition 8 "abrogate[s] fundamental constitutional rights without a compelling justification."¹²¹ It was not until the brief became public that Californians learned of the Attorney General's belief that the law was unconstitutional.¹²²

115. Cal. Const. art. I, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California."), invalidated by *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), vacated *sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

116. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

117. *Strauss v. Horton*, 207 P.3d 48, 68 (Cal. 2009).

118. See, e.g., 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_in6prop8.html (on file with the *Columbia Law Review*) ("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."). Brown also made clear, however, that his office would defend the validity of the same-sex marriages performed in California before the passage of Proposition 8. See Laura Norton, *Prop. 8 Passage Thwarts Vows: Sonoma County Halts Marriage Licenses for Same-Sex Couples*, Press Democrat (Nov. 6, 2008, 6:00 AM), <http://www.pressdemocrat.com/article/20081106/news/811060350#page=0> (on file with the *Columbia Law Review*) ("'The Attorney General's role is to defend California law,' Brown said in a written statement. 'I will defend in court the marriages contracted during the time that same-sex marriage was the law of California. I will also defend the proposition as enacted by the people of California.'").

119. Maura Dolan, *Brown Urges Prop. 8 Review*, L.A. Times (Nov. 18, 2008), <http://articles.latimes.com/2008/nov/18/local/me-gaymarriage18> (on file with the *Columbia Law Review*) (noting backers of Proposition 8 were "not confident the attorney general [would] vigorously defend Proposition 8 in light of his strong opposition to the measure" (quoting Frank Schubert, Proposition 8 campaign manager)).

120. *Strauss*, 207 P.3d at 69 ("On November 17, 2008, the official proponents of Proposition 8 filed a motion to intervene On November 19, 2008, we . . . granted the official proponents' motion . . .").

121. Answer Brief in Response to Petition for Extraordinary Relief at 5, *Strauss*, 207 P.3d 48 (No. S168047), available at <http://www.courts.ca.gov/documents/s168047-answer-response-petition.pdf> (on file with the *Columbia Law Review*).

122. Vikram David Amar & Alan Brownstein, *The California Attorney General's Brief in the California Supreme Court Case Challenging Proposition 8: The Questions It Raised*,

The California Supreme Court upheld the ballot initiative under the California Constitution,¹²³ and soon thereafter two California couples challenged the initiative in federal court under the U.S. Constitution.¹²⁴ From the outset of this round of litigation, the Attorney General took the position that the law was federally unconstitutional.¹²⁵ He remained in the case as a nominal defendant, while the sponsors of the ballot initiative received permission to intervene and maintain the substantive defense of the law.¹²⁶ The Governor, represented by private counsel, declined to take any position on the law's constitutionality, despite the district court's suggestion that his views would assist the court.¹²⁷

After trial, the court concluded that Proposition 8 violated the federal Constitution.¹²⁸ The ballot initiative proponents then attempted to persuade the California state courts to direct the state officials to appeal the decision.¹²⁹ The Attorney General explained by letter brief that "[a]lthough it is not every day that the Attorney General declines to defend a state law, . . . he may do so because his oath requires him [to] support the United States Constitution as the supreme law of the land."¹³⁰ After the California Supreme Court denied the proponents' petition,¹³¹ the proponents themselves appealed to the Ninth Circuit, which certified

and Why It Surprised Many Observers, FindLaw's Writ (Jan. 2, 2009), <http://writ.news.findlaw.com/amar/20090102.html> (on file with the *Columbia Law Review*) ("California Attorney General Jerry Brown caught many observers off guard with the brief he recently filed with the California Supreme Court in the case concerning Proposition 8 . . .").

123. *Strauss*, 207 P.3d at 122.

124. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). San Francisco was permitted to intervene in the litigation as an additional plaintiff. *Brown*, 671 F.3d at 1068.

125. Answer of Attorney General Edmund G. Brown Jr. at 2, *Perry*, 704 F. Supp. 2d 921 (No. 3:09-cv-02292-VRW), 2009 WL 1748382 [hereinafter Answer of Attorney General] ("The Attorney General of California is sworn to uphold the Constitution of the United States . . . Taking from same-sex couples the right to civil marriage that they had previously possessed under California's Constitution cannot be squared with guarantees of the Fourteenth Amendment.").

126. *Brown*, 671 F.3d at 1068.

127. Transcript of Proceedings at 70, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292 VRW) ("[I]t would be quite useful to have [the Governor's] input on a constitutional issue of this magnitude that affects the state in the way that it does.").

128. *Perry*, 704 F. Supp. 2d at 1003. At the same time, the district court denied the motion of a California county, Imperial County, to intervene as a defendant. *Brown*, 671 F.3d at 1069 n.6.

129. Verified Petition for Alternative Writ of Mandamus at 1, *Beckley v. Schwarzenegger*, No. C065920 (Cal. Ct. App. Aug. 26, 2010).

130. Letter Brief from Appellee-Respondent Attorney General Jerry Brown at 5, *Beckley*, No. S186072 (Cal. Sept. 8, 2010), 2010 WL 3874716, at *5.

131. See Appellate Courts Case Info., California Courts, http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1954641&doc_no=S186072 (on file with the *Columbia Law Review*) (documenting denial of petition for review).

to the state supreme court the question whether the proponents were authorized under state law “to defend the constitutionality of the initiative . . . or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.”¹³² The California Supreme Court answered the question in the affirmative, treating as thoroughly unremarkable (though not addressing on the merits) the state officials’ refusal to defend the law.¹³³

The Ninth Circuit explained that although Article III standing is a federal question, “[w]ho may speak for the state is, necessarily, a question of state law.”¹³⁴ Accordingly, the court concluded that it was “bound to accept the California [Supreme Court’s] determination” that the official proponents of the ballot initiative were “authori[z]ed to assert the State’s interests in defending the constitutionality of that initiative,”¹³⁵ and thus its jurisdiction was secure. On the merits the court agreed with the district court that Proposition 8 was unconstitutional, albeit on narrower grounds than the district court.¹³⁶ The ballot initiative proponents then successfully petitioned the Supreme Court for certiorari. In its order granting the petition, the Supreme Court requested briefing on “[w]hether petitioners have standing under Article III.”¹³⁷ In June 2013, the Court concluded by a 5-4 split that the ballot initiative sponsors lacked Article III standing.¹³⁸

2. *Hawaii*. — In 2011, a same-sex couple filed suit in Hawaii’s federal district court, challenging their denial of a marriage license under state law.¹³⁹ The suit named as defendants the Governor and the Director of the state’s Department of Health, the agency tasked with administering marriage licenses in Hawaii.¹⁴⁰ Shortly thereafter, the Governor an-

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

133. *Perry v. Brown*, 265 P.3d 1002, 1006 (Cal. 2011) (“[I]n an instance . . . in which the public officials have totally declined to defend the initiative’s validity at all, we conclude that . . . it would clearly constitute an abuse of discretion for a court to deny the official proponents . . . the opportunity to participate as formal parties . . .”). Notably, the Attorney General’s amicus brief in the California Supreme Court had argued that the ballot initiative proponents did *not* have the power under state law to defend the measure. Brief of Attorney General Kamala D. Harris as Amicus Curiae at 1, *Brown*, 265 P.3d 1002 (No. S189476), 2011 CA S. Ct. Briefs LEXIS 702, at *18–*27 [hereinafter Brief of Attorney General Harris].

134. *Perry v. Brown*, 671 F.3d 1052, 1072 (9th Cir. 2012), vacated sub nom. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

135. *Id.*

136. *Id.* at 1096 (finding unconstitutional state’s removal of marriage right from those already possessing it).

137. *Hollingsworth v. Perry*, 133 S. Ct. 786, 786 (2012) (granting certiorari to *Brown*, 671 F.3d 1052).

138. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

139. Complaint at 3, *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012) (No. CV11-00734 ACK-KSC).

140. *Id.* at 1–3. The head of the Department of Health is appointed by the Governor, subject to confirmation by the state’s senate. See Haw. Rev. Stat. Ann. §§ 26-13, 26-31

nounced that he would not defend the state's marriage statute,¹⁴¹ explaining, "My obligation as Governor is to support equality under law. This is inequality, and I will not defend it."¹⁴² The Director of the Department of Health announced that she *would* defend the law, issuing the following statement: "The Department of Health is charged with implementing the law as passed by the Legislature. Absent any ruling to the contrary by competent judicial authority regarding constitutionality, the law will be enforced. Because I am being sued for administering the law, I will also defend it."¹⁴³ The Attorney General of Hawaii announced that his office would continue to represent both the Governor and the Director of Health in the litigation, designating separate teams to manage the representations and erecting a firewall between them.¹⁴⁴

An outside group subsequently moved to intervene in the suit, arguing that the Governor's nondefense decision made its case for intervention particularly strong.¹⁴⁵ The intervenors acknowledged that the Director of Health was continuing to defend the law, but contended that her interests were "fundamentally different and weaker" than those of the intervenors, in part because "[the Director] is required to defend the law regardless of whether she agrees or disagrees with its policy."¹⁴⁶ The Director of Health supported the motion to intervene,¹⁴⁷ but both the

(LexisNexis 2012) (establishing Department of Health and authorizing Governor to appoint head of department).

141. Haw. Rev. Stat. Ann. § 572-1 (LexisNexis Supp. 2013) (specifying marriage "shall be only between a man and a woman"); see also Haw. Const. art. I, § 23 (amended 1998) ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

142. Press Release, Governor of the State of Haw., The Department of the Attorney General Files Answers to Same-Sex Marriage Lawsuit (Feb. 21, 2012) [hereinafter Press Release, AG Files Answer] (internal quotation marks omitted), available at <http://governor.hawaii.gov/blog/the-department-of-the-attorney-general-files-answers-to-same-sex-marriage-lawsuit/> (on file with the *Columbia Law Review*). Interestingly, however, while attacking the constitutionality of the marriage statute, Governor Abercrombie maintained that the provision of the Hawaii Constitution permitting the legislature to pass the statute did not contravene any provision of the Federal Constitution. Defendant Neil S. Abercrombie's Answer to First Amended Complaint at 3, *Jackson*, 884 F. Supp. 2d 1065 (No. CV11-00734 ACK-KSC). The Governor also conceded that Hawaii's marriage statute did not violate the state constitution. *Id.*

143. Press Release, AG Files Answer, *supra* note 142 (internal quotation marks omitted).

144. *Id.*

145. See Motion to Intervene of Hawaii Family Forum at 16, *Jackson*, 884 F. Supp. 2d 1065 (No. CV11-00734 ACK-KSC) ("[I]ntervention is especially warranted when a defending official seeks the same legal outcome as the plaintiff.").

146. *Id.* at 19.

147. Memorandum in Support of Motion to Intervene of Hawaii Family Forum at 2, *Jackson*, 884 F. Supp. 2d 1065 (No. CV11-00734 ACK-KSC) (noting case "presents an issue of fundamental importance that profoundly interests and concerns literally millions of Americans" and "it is vitally important that the court have the benefit of the broadest, most comprehensive, and best discussion of the issue possible," concluding "granting the motion will further this objective").

Governor and the plaintiffs opposed it.¹⁴⁸ The district court granted the motion to intervene,¹⁴⁹ and subsequently granted the Director's and intervenors' motions for summary judgment.¹⁵⁰ Both the plaintiffs and the Governor filed notices of appeal.¹⁵¹ Hawaii subsequently legalized same-sex marriage,¹⁵² and at the time of this writing, the appeal remained pending in the Ninth Circuit.¹⁵³

3. *Nebraska*. — A Nebraska campaign finance regulation created a voluntary public financing scheme, the Campaign Finance Limitation Act (CFLA).¹⁵⁴ Under the CFLA, candidates who agreed to abide by expenditure limits, faced opponents who opted out of public financing, and satisfied certain other conditions qualified for state matching funds.¹⁵⁵

148. Plaintiffs' Memorandum in Opposition to Motion to Intervene of Hawaii Family Forum at 9–29, *Jackson*, 884 F. Supp. 2d 1065 (No. CV11-00734 ACK-KSC) (arguing Hawaii Family Forum does not have “significantly protectable interest” required to intervene); Defendant Neil S. Abercrombie's Memorandum in Opposition to Motion to Intervene of Hawaii Family Forum at 2–4, *Jackson*, 884 F. Supp. 2d 1065 (No. CV11-00734 ACK-KSC) [hereinafter Abercrombie's Memorandum in Opposition] (arguing intervention should be denied because Director of Health “adequately represents [Hawaii Family Forum's] putative interests,” so “allowing [Hawaii Family Forum] to intervene will only delay this case and increase the cost of litigation”).

149. Order Granting Hawaii Family Forum's Motion to Intervene at 11, 34, *Jackson*, 884 F. Supp. 2d 1065 (No. CV11-00734 ACK-KSC) (finding four requirements of Federal Rule of Civil Procedure 24(a) satisfied).

150. *Jackson*, 884 F. Supp. 2d at 1119.

151. Defendant Governor Neil S. Abercrombie's Notice of Appeal at 2 n.1, *Jackson*, 884 F. Supp. 2d 1065 (No. CV11-00734 ACK-KSC) (“Governor Abercrombie is an Appellant, and not a Cross-Appellant Due to the unique posture of this case, Governor Abercrombie, while a named defendant, supports plaintiffs' claim Governor Abercrombie should thus be treated . . . as a true appellant in this matter, with plaintiffs' and the Governor's separate appeals consolidated.” (emphases omitted)).

152. Hawaii Marriage Equality Act, Haw. Rev. Stat. §§ 572-1 to 580-1 (Supp. 2013).

153. In late November 2013, the court sought briefing on whether the appeal had been mooted by the new marriage equality law, Order at 2–3, *Jackson v. Abercrombie*, No. 12-16995 (9th Cir. Nov. 26, 2013), and briefing remained ongoing through early January 2014 on the questions of both mootness and vacatur of the district court opinion. Compare Defendant-Appellant Governor Neil S. Abercrombie's Motion for Vacatur, Response to Ninth Circuit Order Dated November 26, 2013, and Memorandum in Support of Plaintiffs' Motion for Vacatur, *Jackson v. Abercrombie*, No. 12-16995 (9th Cir. filed Dec. 17, 2013) (arguing new marriage law likely moots appeal and vacatur is appropriate), with Hawaii Family Forum's Response to Plaintiffs' and Governor Neil S. Abercrombie's Motions to Vacate and Responses to the Court's November 26, 2013 Order, *Jackson v. Abercrombie*, No. 12-16995 (9th Cir. filed Dec. 27, 2013) (asserting newly filed challenges to marriage equality law save Ninth Circuit appeal from mootness and vacatur is unwarranted).

154. Neb. Rev. Stat. §§ 32-1601 to 32-1613 (2007).

155. *Id.* § 32-1604; e.g., *State ex rel. Bruning v. Gale*, 817 N.W.2d 768, 774–76 (Neb. 2012) (explaining CFLA's public funding scheme). The amount of public funds available to any individual candidate was pegged to the anticipated or reported expenditures of the opponent who chose not to abide by the expenditure limits (along with any independent

After the U.S. Supreme Court invalidated Arizona's matching funds scheme in 2011,¹⁵⁶ the executive director of the Nebraska Accountability and Disclosure Commission sought an opinion from the Nebraska Attorney General on the effect of the Supreme Court decision on the constitutionality of Nebraska's scheme.¹⁵⁷ The Attorney General concluded that Nebraska's law was likely unconstitutional under the First Amendment.¹⁵⁸ In reliance on the Attorney General's opinion, the Commission decided that it would no longer enforce the statute.¹⁵⁹ Pursuant to another Nebraska statute, this decision compelled the Attorney General to challenge the campaign finance statute in court.¹⁶⁰ Accordingly, the Attorney General filed suit in the Nebraska Supreme Court as relator for the state, and, pursuant to the same statutory scheme, the Secretary of State maintained the defense of the law's constitutionality.¹⁶¹ The Nebraska Supreme Court agreed with the Attorney General that the statute was unconstitutional,¹⁶² rendering its decision after an adversarial presentation of the issues before it (albeit one in which the figures were aligned in an atypical fashion).

4. *New Jersey*. — In 1997, over the Governor's veto, the New Jersey legislature passed a law prohibiting the procedure known as partial-birth abortion.¹⁶³ Planned Parenthood and several individual physicians

expenditures opposing the publicly financed candidate, or in favor of the nonpublicly financed opponent). *Id.* at 775–76.

156. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011).

157. *Gale*, 817 N.W.2d at 772.

158. Op. Att'y Gen. No. 11,003, at 5 (Neb. Aug. 17, 2011), available at http://www.ago.ne.gov/resources/dyn/files/592603zd0f5abb5/_fn/081711+AGO+Opinion+NADC.pdf (on file with the *Columbia Law Review*). In fact, as the Nebraska Supreme Court noted, “[T]he Attorney General did not issue a definitive opinion stating that the CFLA is unconstitutional. Rather, he surmised that a court ‘would likely find the public financing provisions of the [CFLA] to be unconstitutional.’” *Gale*, 817 N.W.2d at 773 (alteration in *Gale*). But before the state supreme court, the Attorney General advanced an argument that the statute was unconstitutional. See Brief of Relator at 8–12, *Gale*, 817 N.W.2d 768 (No. S-11-933), 2011 WL 6986864, at *8–*12 (alleging CFLA puts “substantial burden” on free speech and is not narrowly tailored to compelling interest).

159. *Gale*, 817 N.W.2d at 772 (“In reliance upon the [Attorney General’s] opinion, the Commission adopted a resolution refusing to implement, administer, or enforce the CFLA . . .”).

160. Neb. Rev. Stat. § 84-215 (1977) (directing Attorney General to file action challenging legislative act’s validity when state actor refuses to implement act); see also *Gale*, 817 N.W.2d at 772 (“Under § 84-215, if the Attorney General issues a written opinion that an act is unconstitutional [and an official tasked with implementing the act refuses to do so in reliance on that opinion,] the Attorney General is required to file a court action to determine the act’s validity.”).

161. *Gale*, 817 N.W.2d at 773–74.

162. *Id.* at 779–84.

163. 1997 N.J. Laws 1534. For the text of Governor Whitman’s veto, see Letter from Christine Todd Whitman, Governor of N.J., to N.J. Gen. Assembly (June 23, 1997)

immediately filed suit against the Governor, the Attorney General, and other state defendants.¹⁶⁴ From the outset of the litigation, the Attorney General made clear that he and the other state defendants would mount no defense of the law's constitutionality,¹⁶⁵ and when the time came to file an answer, the Attorney General asked the court to dismiss all of the executive branch entities from the suit, or at least to relieve them of the obligation to "file briefs, respond to discovery, or otherwise participate as parties in the conduct of the litigation."¹⁶⁶ The court did not dismiss the officials, but they remained only nominal parties in the district court litigation and before the court of appeals.¹⁶⁷ To fill this gap, the legislature sought and received leave to intervene to defend the statute.¹⁶⁸

The fact of executive nondefense was largely painted in local press as uncontroversial; one article explained that although the defense of state laws "typically would fall to the administration . . . [n]othing in the state's constitution says the Whitman administration would have to defend the law in court."¹⁶⁹ Although the precise basis for the nondefense decision was somewhat murky—the Governor had vetoed the bill,¹⁷⁰ and some reporting suggested that she had ordered her Attorney General not to defend it,¹⁷¹ but she explained in several public statements that the

[hereinafter *Whitman Veto*], available at http://law.njstatelib.org/law_files/njlh/lh1997/L1997c262.pdf (on file with the *Columbia Law Review*).

164. *Planned Parenthood of Cent. N.J. v. Verniero*, 41 F. Supp. 2d 478, 481–82 (D.N.J. 1998), *aff'd sub nom. Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127 (3d Cir. 2000).

165. N.J. Abortion Ban Put on Hold, *Wash. Post* (Dec. 17, 1997), <http://www.highbeam.com/doc/1P2-760689.html> (subscription required) (on file with the *Columbia Law Review*) ("The attorney general would normally defend state laws against legal challenges, but the Whitman administration contends this law is unconstitutional.").

166. Answer of Defendants Peter Verniero et al. at 2–3, *Verniero*, 41 F. Supp. 2d 478 (No. 97-6170(AET)).

167. The Attorney General's Office did, however, engage somewhat more actively at the close of the litigation, when attorney's fees were being litigated. See *Planned Parenthood of Cent. N.J. v. Att'y Gen. of N.J.*, 297 F.3d 253, 272–73 (3d Cir. 2002) (finding legislature may be liable for attorney fees when it undertakes defense in lieu of Attorney General).

168. See *Planned Parenthood of Cent. N.J. v. Verniero*, 22 F. Supp. 2d 331, 333 (D.N.J. 1998) ("On December 22, 1997, the New Jersey Legislature moved to intervene and defend the lawsuit. On December 24, 1997, the Court granted the Legislature's motion . . ."), *aff'd sub nom. Farmer*, 220 F.3d 127.

169. Thomas Ginsberg, *New Hurdle on Ban on Partial-Birth Abortion Looms the Senate Votes Today on Overriding Whitman's Veto. But Who Would Fight a Court Challenge?* [sic], *Phila. Inquirer* (Dec. 15, 1997), http://articles.philly.com/1997-12-15/news/25556281_1_new-jersey-ban-partial-birth-abortions-peter-verniero (on file with the *Columbia Law Review*).

170. *Whitman Veto*, *supra* note 163.

171. David Kocieniewski, *Ban on Type of Abortion Is Struck Down*, *N.Y. Times* (Dec. 9, 1998), <http://www.nytimes.com/1998/12/09/nyregion/ban-on-type-of-abortion-is-struck-down.html> (on file with the *Columbia Law Review*) ("Mrs. Whitman ordered her Attorney General not to defend the law in court.").

Attorney General had made the determination of unconstitutionality¹⁷²—the public reaction may have been based in part on the fact that the New Jersey courts have made clear (far clearer than the courts in many states) that the Attorney General has no obligation to defend laws he deems unconstitutional. As one court explained:

It may be unusual for the Attorney General to conclude that a statute is unconstitutional, but . . . his obligation to “enforce” the law includes the statutory law to the extent that it is constitutional. This is so because the Attorney General has an obligation to “[e]nforce the provisions of the Constitution” which is the fundamental or organic law. The fact that the Judiciary, under our doctrine of separation of powers, is the Branch which must ultimately decide a constitutional issue and is the final arbiter of constitutional disputes, does not mean that the Attorney General . . . can never interpret a statute as unconstitutional¹⁷³

Perhaps influenced in part by this background New Jersey law, neither the district court nor the court of appeals in the Planned Parenthood litigation engaged in any inquiry into the propriety of the conduct of the executive officials in opting not to defend the statute.¹⁷⁴ After a four-day hearing in which the legislature vigorously defended the law’s constitutionality, the district court issued an injunction barring enforcement of the law, and the legislature alone appealed to the Third Circuit.¹⁷⁵ The Third Circuit affirmed.¹⁷⁶

* * *

As these examples highlight, the conduct of state executives in the face of statutes they have concluded are unconstitutional reveals a significantly broader and more varied conception of executive nondefense

172. Jennifer Preston, Judge Temporarily Blocks State Ban on Some Abortions, N.Y. Times (Dec. 17, 1997), <http://www.nytimes.com/1997/12/17/nyregion/judge-temporarily-blocks-state-ban-on-some-abortions.html> (on file with the *Columbia Law Review*) (“Governor Whitman has said the State will not defend the law against legal challenges because the State Attorney General has found it to be unconstitutional . . .”).

173. *Mech. Contractors Ass’n of N.J., Inc. v. State*, 605 A.2d 743, 749 (N.J. Super. Ct. App. Div. 1992) (second alteration in *Mech. Contractors*) (citation omitted) (quoting N.J. Stat. Ann. § 52:17A-4(h) (West 2010)); see also *Trs. of Rutgers Coll. v. Richman*, 125 A.2d 10, 29 (N.J. Super. Ct. Ch. Div. 1956) (“The Attorney General, as part of the common-law duties of his office, participates in litigation to defend or attack the constitutionality of statutes.”).

174. See *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 131 (3d Cir. 2000) (describing procedural history and issues before court).

175. *Id.*; see also *Planned Parenthood of Cent. N.J. v. Verniero*, 41 F. Supp. 2d 478, 504 (D.N.J. 1998) (noting district court granted permission to New Jersey legislature to intervene to defend statute), *aff’d sub nom. Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127 (3d Cir. 2000).

176. *Farmer*, 220 F.3d at 152. While the case was pending before the Third Circuit, the Supreme Court issued its decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), which invalidated Nebraska’s partial-birth abortion ban, and no further review was pursued by the New Jersey legislature.

than the typical debate in the federal system suggests. And, despite the structural and legal differences across states, each of these schemes reduces to the same core features: significant latitude for executive non-defense (but continued enforcement),¹⁷⁷ paired with a careful allowance for defense by a party other than the executive (or, as in Nebraska, a party other than the executive official who ordinarily maintains the defense of laws),¹⁷⁸ often with the explicit goal of allowing the courts—whether state or federal—to have the final word on constitutional meaning.

The next Part draws on the foregoing cases, in addition to other materials, to offer four models of executive nondefense found in the states. Each of these models includes the mechanism by which states facilitate defense by an alternate entity.

III. STATE MODELS OF NONDEFENSE: A TAXONOMY

In surveying the practice across states in which the executive engages to some degree in nondefense, four models of nondefense emerge.¹⁷⁹ These models include four distinct mechanisms states use to facilitate defense by other entities: legislative defense, defense by an alternate executive branch actor, outside intervention and defense, and defense maintained by outside counsel. Some states appear to align relatively cleanly with one of the models; in others, more than one mechanism may be used at different times or for different purposes.

177. The only exception is the New Jersey partial-birth abortion statute, which was enjoined before taking effect. But the Attorney General informed the court that he and the other executive branch defendants would not “refuse to follow any validly issued court order concerning the constitutionality of the Act, nor did they prior to the filing of the suit,” and that their position was that “they intend[ed] to abide by any and all such orders of this court or of any court of competent jurisdiction, including but not limited to, any final declaration concerning constitutionality.” Answer of Defendants Peter Verniero, Board of Medical Examiners and Len Fishman at 2, *Verniero*, 41 F. Supp. 2d 478 (No. 97-6170(AET)). But cf. *supra* note 159 and accompanying text (noting Nebraska Accountability and Disclosure Commission’s decision to cease enforcement of CFLA).

178. See *supra* Part II.C.3 (discussing nondefense in Nebraska).

179. In some states, the authority of executive actors not to defend statutes they deem unconstitutional has been explicitly endorsed by the courts or the legislature. See, e.g., *Delchamps, Inc. v. Ala. State Milk Control Bd.*, 324 F. Supp. 117, 118 (M.D. Ala. 1971) (*per curiam*) (“[I]f the Attorney General for the State of Alabama is of the opinion that certain enactments of the Alabama Legislature are clearly violative of the Constitution of the United States, this Court does not conceive that he is under any duty to attempt to defend such legislative enactments.”); *People v. Pollution Control Bd.*, 404 N.E.2d 352, 355 (Ill. 1980) (“[T]he Attorney General’s duty to defend the constitution necessarily encompasses a duty to challenge, on behalf of the public, a statute which the Attorney General regards as constitutionally infirm.”); *supra* note 173 and accompanying text (New Jersey); *infra* note 196 (Tennessee).

A. Legislative Defense

One common model found in states in which the executive engages in nondefense is defense by the legislature. *Planned Parenthood v. Verniero*, the New Jersey case study described above,¹⁸⁰ provides a useful illustration: The Attorney General and Governor agreed that the new law was unconstitutional, and they announced that conclusion immediately after the law was passed over the Governor's veto.¹⁸¹ The legislature resolved to take up the defense of the law, and it did so very soon after Planned Parenthood filed its constitutional challenge, continuing to defend the law for the duration of the litigation.¹⁸²

Of course, this mechanism will only function if the legislature *chooses* to intervene to defend a law the executive has chosen not to defend, which will hinge on the constitutional views of the particular legislators in office.¹⁸³ It might appear self-evident that if a legislature has passed (or failed to repeal) a law, it will choose to take up the defense of that law if the executive declines to do so and state law permits it to act. But complications can and do arise, even in states that allow for legislative defense. *Karcher v. May* provides an illustration of this issue.¹⁸⁴ The statute at issue in *Karcher*, passed over the Governor's veto,¹⁸⁵ required New Jersey public schools to allow students to observe a moment of silence at the start of the school day.¹⁸⁶ A teacher, as well as several students and their parents, challenged the law in federal court.¹⁸⁷ When the Attorney General declined to defend the law,¹⁸⁸ the Speaker of the New Jersey

180. *Supra* Part II.C.4.

181. Preston, *supra* note 172 (describing Governor and Attorney General's nondefense posture).

182. *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 131 (3d Cir. 2000) (describing legislative defense); see *supra* notes 174–176 and accompanying text (same).

183. Professor Meltzer focuses on this issue—the contingent nature of party control of Congress and the identities of members in leadership roles, and the bearing those facts will have on whether the legislature will mount the defense of a statute—in arguing that the possibility of legislative defense does not solve the problems he identifies with executive nondefense in the federal system. Meltzer, *supra* note 10, at 1212–13 (“[C]ongressional pinch-hitting will often not be a full substitute for defense by the executive.”).

184. 484 U.S. 72 (1987).

185. Letter from Thomas H. Kean, Governor of N.J., to N.J. Gen. Assembly (Dec. 6, 1982) (on file with the *Columbia Law Review*) (“It is unlikely that the bill could pass constitutional muster.”).

186. N.J. Stat. Ann. § 18A:36-4 (West 2013).

187. *May v. Cooperman*, 572 F. Supp. 1561 (D.N.J. 1983), *aff'd*, 780 F.2d 240 (3d Cir. 1985).

188. *Id.* at 1563 (“The original defendants did not take an active role in the defense of the case. This inactivity flowed . . . from the fact that the State’s Governor and Attorney General had concluded that the statute violated the United States Constitution and that they could not in good faith defend it.”); see also Brief of Appellees, *Karcher*, 484 U.S. 72 (No. 85-1551), 1987 U.S. S. Ct. Briefs LEXIS 323, at *6–*7 (describing “seldom-used

General Assembly and the President of the New Jersey Senate, acting on behalf of the legislature, sought and received leave to intervene to defend the statute.¹⁸⁹ Both the district court and the court of appeals concluded that the statute violated the First Amendment.¹⁹⁰

After the Third Circuit issued its decision, both the Speaker of the House and the President of the Senate lost their leadership positions, although they remained in office as legislators.¹⁹¹ Both initially filed notices of appeal in the Supreme Court, but their successors subsequently notified the Court that they were withdrawing the appeal on behalf of the legislature.¹⁹² The former Speaker and Senate President attempted to continue to press their case in the Supreme Court in their capacities as individual legislators or, in the alternative, as representatives of the previously constituted legislative bodies.¹⁹³ The Supreme Court concluded that, having lost the official status on which they premised their participation below, the members lacked standing to continue the appeal.¹⁹⁴ But the Court made clear that the legislature had possessed standing below, and so it declined to vacate the lower court opinions in the case.¹⁹⁵

Karcher is best read to suggest that if state law is clear—and where legislative actors authorized to defend by state law choose to do so for the duration of litigation—legislative defense offers one clear and stable alternative to executive defense. Political dynamics and electoral outcomes will at times prevent a full defense by the legislature. But much of the time, legislative defense will ensure that a vigorous defense is mounted by an entity that possesses both the resources and the experience to effectively defend a statute, while the executive is free to offer the courts its true constitutional views.¹⁹⁶

discretion not to defend a state measure [the Attorney General] conscientiously believes is unconstitutional”).

189. See *Cooperman*, 780 F.2d at 242 (describing intervention).

190. *Cooperman*, 572 F. Supp. at 1576; 780 F.2d 240.

191. *Karcher*, 484 U.S. at 76, 78.

192. *Id.* at 76. William W. Robertson also wrote a letter to the Clerk of the Supreme Court of the United States, which attached letters from the Speaker of the State Assembly and counsel to the President of the Senate, asking that the appeal be withdrawn. Motion to Dismiss or Affirm, *Karcher*, 484 U.S. 72 (No. 85-1551), 1986 U.S. S. Ct. Briefs LEXIS 1242, at *40–*42.

193. *Karcher*, 484 U.S. at 78.

194. *Id.* at 81.

195. The *Karcher* Court rejected the argument that “New Jersey law d[id] not authorize the presiding legislative officers to represent the New Jersey Legislature in litigation.” *Id.* at 81. The Court explained that this argument “appears to be wrong as a matter of New Jersey law” since the New Jersey Supreme Court had previously permitted presiding officers to intervene on behalf of the legislature to defend a different legislative enactment. *Id.* at 82. This meant, the Court concluded, that the legislative leaders had been authorized to represent the state’s interests in the lower courts. *Id.*

196. Some states, by contrast, appear to actually *forbid* legislative defense of statutes. In Tennessee, executive nondefense has explicit statutory authorization. See Tenn. Code Ann. § 8-6-109(b)(9) (2011) (describing duty of Attorney General and Reporter “[t]o

Although state *decisional* law provided for legislative defense in both *Planned Parenthood* and *Karcher*, in some states legislative defense has express statutory authorization; this includes, in some instances, legislative authority to retain separate counsel without the consent of the attorney general, even in cases in which the attorney general intends to continue to defend the state law in question. Indiana, for example, provides by statute that the legislature—acting through either the House Speaker or the Senate President Pro Tempore—may hire its own counsel “without obtaining the consent of the attorney general,” in any case in which the Indiana House or Senate, or any individual state senator or representative, is named as a defendant in a lawsuit.¹⁹⁷

North Carolina has recently begun its own experiment with legislative defense. In August 2013, the legislature passed, and the Governor signed, Senate Bill 473, which conferred legislative standing on the Speaker of the House and the President Pro Tempore of the Senate “in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution.”¹⁹⁸ The bill’s proponents suggested that it reached further than just cases of executive nondefense, permitting legislative intervention even in cases the Attorney General chose to defend, but where “the attorney general provides what legislative leaders

defend the constitutionality and validity of all legislation of statewide applicability . . . enacted by the general assembly, except in those instances where the attorney general and reporter is of the opinion that such legislation is not constitutional”); see also *ACLU of Tenn. v. Tennessee*, 496 F. Supp. 218, 222 (M.D. Tenn. 1980) (finding Tennessee’s barratry statute unconstitutional and noting “[t]his conclusion is so transparent that the Court must confess some surprise that the Attorney General elected to defend this statute, given his discretion under [Tenn. Code Ann.] § 8-6-109”). And an Attorney General opinion suggests that the legislature lacks the power to hire outside counsel to defend statutes itself. *Op. Att’y Gen. No. 488*, at 962 (Tenn. Aug. 21, 1981) (“There is no statutory authority for the General Assembly or the speaker of either house to employ legal counsel for the purpose of defending the constitutionality of an act which the Attorney General has declined to defend because in his opinion said act is unconstitutional.”). Whether or not the Tennessee legislature accepts this view, it does appear to be the case that when the Tennessee Attorney General and Reporter (the title of the attorney general in Tennessee) exercises the nondefense power, challenged statutes appear primarily to be defended, if they are defended at all, by private parties. See, e.g., *Bell v. Shelby Cnty. Health Care Corp.*, 318 S.W.3d 823, 827 (Tenn. 2010) (noting Attorney General declined to defend constitutionality of statute and defendant hospital argued in favor of statute’s constitutionality); cf. *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Ehlmann*, 137 F.3d 573, 578 (8th Cir. 1998) (rejecting Missouri legislators’ attempt to intervene because while “legislators may obtain standing to defend the constitutionality of a legislative enactment when authorized by state law,” Missouri law did not so provide).

197. Ind. Code Ann. §§ 2-3-9-2 to 2-3-9-3 (LexisNexis 2012). A separate statute allows the state house and senate to “employ attorneys other than the Attorney General to defend any law enacted creating legislative or congressional districts for the State of Indiana.” *Id.* § 2-3-8-1.

198. Act of Aug. 23, 2013, No. 393, § 3, 2013 N.C. Sess. Laws (to be codified at N.C. Gen. Stat. § 1-72.2), available at <http://www.ncga.state.nc.us/Sessions/2013/Bills/Senate/PDF/S473v7.pdf> (on file with the *Columbia Law Review*).

think is an inadequate effort.”¹⁹⁹ The provision was recently invoked for the first time, in a suit by the federal government challenging a number of restrictive voting reforms recently enacted in the state.²⁰⁰

Of the mechanisms described in this section, legislative defense is the scheme that most closely mirrors the approach taken in the federal system. When the federal executive makes a nondefense decision, a statute requires the executive to notify Congress of that decision;²⁰¹ following that statutorily required notification, Congress may—and at times does—intervene to defend the statute itself.²⁰²

B. *Alternate Executive Branch Actor*

Allowing for nondefense by the attorney general (or governor, or both) while a different executive branch actor maintains the statute’s defense is another mechanism found in the states. Nebraska has actually codified this sort of scheme: A state statute provides that if the Attorney General concludes in a written opinion that a law is unconstitutional, and if a state official then relies on that opinion to refuse to enforce the law,²⁰³ the Attorney General must, within ten days, initiate a suit in court seeking a binding judicial resolution of the law’s constitutionality.²⁰⁴ The Attorney General may name as a defendant any person having “a litigable

199. Dan Way, Stam: ‘Standing’ Provision Will Help N.C. Fight Lawsuits, *Carolina J. Online* (Aug. 1, 2013), http://www.carolinajournal.com/exclusives/display_exclusive.html?id=10382 (on file with the *Columbia Law Review*).

200. See John Frank & Rob Christensen, NC Attorney General Questions McCrory on Voting Lawsuit; Governor’s Office Fires Back, *Raleigh News & Observer* (Oct. 1, 2013), <http://www.newsobserver.com/2013/10/01/3244928/roy-cooper-questions-pat-mccrory.html#storylink=cpy> (on file with the *Columbia Law Review*) (noting legislative leaders’ hiring of outside counsel in suit challenging voter ID law).

201. 28 U.S.C. § 530D(a)(1)(B) (2012) (requiring Attorney General to submit report to Congress when deciding to contest, or refrain from defending, constitutionality of any provision of federal law).

202. The Supreme Court explained in *INS v. Chadha*—a significant case involving congressional intervention in the face of an executive branch attack on a statute—that “Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.” 462 U.S. 919, 940 (1983). But in *United States v. Windsor*, the Court left unresolved the standing of congressional entities—in this instance, a committee of the House of Representatives—to defend statutes the executive has opted not to defend. 133 S. Ct. 2675, 2688 (2013).

203. Neb. Rev. Stat. § 84-215 (2008). A separate statute provides that the Attorney General must provide an opinion upon request from “the Governor, head of any executive department, Secretary of State, State Treasurer, Auditor of Public Accounts, Board of Educational Lands and Funds, State Department of Education, Public Service Commission, or Legislature.” *Id.* § 84-205.

204. *Id.* § 84-215 (requiring Attorney General to, “within ten working days of the issuance of the opinion, file an action in the appropriate court to determine the validity of the act” when state official, relying on Attorney General opinion of unconstitutionality, refuses to implement statute).

interest in the matter,”²⁰⁵ or the Secretary of State, who then must defend the statute.²⁰⁶

The Nebraska scheme has several unique features. Most obviously, it allows by statute for the Attorney General to advise nonenforcement, and engage in nondefense, of legislative enactments he deems unconstitutional. Although at first blush the scheme suggests legislative endorsement of the executive branch’s independent authority to engage in constitutional interpretation, it actually vests the *courts* with final interpretive authority. And the scheme as implemented is even more deferential to judicial authority. For example, the Nebraska Attorney General opinion that gave rise to *State ex rel. Bruning v. Gale* cast its legal analysis in decidedly juricentric terms: Rather than opining on the question of constitutionality, the opinion focused on predicting judicial action, concluding that, “[i]n our view, a court would likely reach the same conclusion [as the Supreme Court reached in *Bennett*²⁰⁷] with regard to the Nebraska public financing statutes and find them unconstitutional.”²⁰⁸

Moreover, state legislative history suggests that in creating the scheme, Nebraska’s unicameral legislature was animated by a desire not to empower the Attorney General, but rather to place limits and controls on the practice of autonomous executive branch constitutional interpretation. The legislation was taken up in early 1977, evidently prompted by an episode in which the state Department of Education refused to implement a portion of a state law the Department concluded was unconstitutional.²⁰⁹ In its final form, the statutory scheme providing for nondefense contained four related provisions: the statute invoked in *Gale*, which created the mechanism for an Attorney General opinion on unconstitutionality, followed by suit;²¹⁰ and a closely related provision directing the Attorney General, upon learning that an agency is failing to enforce a law, to send a letter to attempt to compel enforcement, followed by a lawsuit if necessary.²¹¹ A separate provision placed almost identical responsibilities upon the Governor in the face of agency nonenforcement (and empowered the Governor to direct the Attorney General to act to secure enforcement),²¹² and a final section provided

205. *Id.*

206. *Id.* (“If the Secretary of State is named as defendant, it shall be his duty to defend such action and to support the constitutionality of the act of the Legislature and for such purpose is authorized to employ special counsel.”).

207. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

208. *Op. Att’y Gen. No. 11,003*, at 4 (Neb. Aug. 17, 2011); see also *State ex rel. Bruning v. Gale*, 817 N.W.2d 768, 784 (Neb. 2012) (finding Nebraska law unconstitutional under *Bennett*).

209. J.R. Murphy, Neb. State Senator, Remarks at Meeting of Committee on Government, Military, and Veteran’s Affairs (Jan. 20, 1977), at 1–5 (transcript on file with the *Columbia Law Review*).

210. Neb. Rev. Stat. § 84-215.

211. *Id.* § 84-216.

212. *Id.* § 84-731.

that the knowing refusal of either the Governor or the Attorney General to comply with the foregoing obligations would “constitute a misdemeanor in office . . . and render the offender liable to a fine of one hundred dollars and to impeachment.”²¹³ Taken together, these provisions both sanction and circumscribe executive branch interpretive authority.

Nebraska’s scheme appears genuinely *sui generis*.²¹⁴ But in other states, executive branch actors other than those ordinarily charged with the defense of laws are sometimes in the position of mounting defenses in court. In *Jackson v. Abercrombie*, for example, the Governor opted not to defend Hawaii’s same-sex marriage prohibition,²¹⁵ while the Director of Health argued in favor of the law’s constitutionality.²¹⁶ Perhaps because the Attorney General was not a named defendant in *Jackson*, his office appeared to conclude that it could continue, as counsel, to represent state officials with divergent constitutional views.²¹⁷ And in *People ex rel. Salazar v. Davidson*, a case involving the constitutionality of a mid-decade redistricting plan promulgated by the Colorado General Assembly, the Attorney General attacked the plan under the Colorado Constitution, while the Secretary of State maintained its defense.²¹⁸

In cases in which the governor and attorney general take divergent views on the constitutionality of a statute, gubernatorial defense may represent another example of defense by an alternate executive branch actor. A saga currently unfolding in Pennsylvania provides an illustrative example: The Pennsylvania Attorney General recently announced that she would not defend the constitutionality of a state statute prohibiting

213. *Id.* § 84-732.

214. A Tennessee statutory provision, however, bears some resemblance to the Nebraska scheme, prescribing steps to be taken where the “attorney general and reporter” concludes that a statute is unconstitutional. Tenn. Code Ann. § 8-6-109(b)(9) (2011) (requiring Attorney General and Reporter “[t]o defend the constitutionality and validity of all legislation . . . except [when he or she] is of the opinion that such legislation is not constitutional, *in which event [he or she] shall so certify to the speaker of each house of the general assembly*” (emphasis added)); see also Op. Att’y Gen. No. 79-402a (Tenn. Sept. 6, 1979), 1979 WL 34154, at *1 (describing procedure). Unlike the Nebraska statute, however, the Tennessee statute does not provide expressly for an alternate defense in the event of litigation. See *supra* note 196 (noting private parties appear generally to defend Tennessee statutes when Attorney General refuses to do so).

215. 884 F. Supp. 2d 1065 (D. Haw. 2012).

216. See Gov. Abercrombie: Same-Sex Marriage Ban Unconstitutional, Haw. Rep. (Feb. 21, 2012), <http://www.hawaiiireporter.com/?p=45958> (on file with the *Columbia Law Review*) (“Attorney General David Louie said his office will represent both [Governor Neil] Abercrombie and [Director of Health Loretta] Fuddy in the lawsuit, despite their divergent positions.”).

217. For a fascinating discussion of the ethics of attorney general representation and conflicts in the California context, see the California Supreme Court’s opinion in *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206, 1207–15 (Cal. 1981) (en banc).

218. 79 P.3d 1221, 1224–25 (Colo. 2003) (en banc) (describing disagreement between Attorney General and Secretary of State).

same-sex marriage.²¹⁹ Instead, the Governor provided the initial defense, though his office has since successfully sought dismissal from the suit.²²⁰ The litigation is still in its early stages, but its future development—several additional state officials remain in the suit as defendants—will no doubt provide another fascinating story of state adaption to nondefense.

C. Outside Intervention and Defense

Outside intervention by parties other than the legislature, including ballot initiative proponents (where the law being challenged is the product of direct democracy), is another mechanism utilized in states in which executives engage in some degree of nondefense. California's Proposition 8, of course, provides the most salient example in recent years.

Until the Supreme Court's decision in *Hollingsworth v. Perry*,²²¹ a number of courts, both state and federal, had permitted ballot initiative proponents to defend laws the executive had chosen not to defend.²²² It is thus not surprising that in *Hollingsworth* itself, the lower state and federal courts concluded that the sponsors of Proposition 8 could defend the measure; indeed, the sponsors maintained its defense for several years, successfully in the state courts,²²³ and unsuccessfully in the federal district court²²⁴ and court of appeals.²²⁵

219. Marc Levy, Pennsylvania Attorney General Won't Defend Gay Marriage Ban, ABC.com (July 11, 2013), <http://abclocal.go.com/wpvi/story?section=news/local&id=9169245> (on file with the *Columbia Law Review*).

220. Stipulation and Notice of Dismissal at 2, *Whitewood v. Corbett*, No. 13-1861-JEJ (M.D. Pa. Nov. 6, 2013) (approving agreed dismissal of Governor Corbett from litigation).

221. 133 S. Ct. 2652 (2013).

222. See *Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012) (affirming Proposition 8's proponents' standing to bring appeal on behalf of State), vacated sub nom. *Hollingsworth*, 133 S. Ct. 2652; *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010) ("Defendant-intervenors, the official proponents of Proposition 8 under California election law ('proponents'), were granted leave . . . to intervene to defend the constitutionality of Proposition 8."), aff'd sub nom. *Brown*, 671 F.3d 1052, vacated sub nom. *Hollingsworth*, 133 S. Ct. 2652; see also *Yniguez v. Arizona*, 939 F.2d 727, 731-34 (9th Cir. 1991) (concluding official proponents of English-only ballot initiative had standing to appeal after governor declined to do so), rev'd on other grounds sub nom. *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). Note, however, that while disposing of the case on other grounds, the *Arizonans* Court in dicta expressed "grave doubts" about the ballot sponsors' "standing under Article III to pursue appellate review." *Id.* at 66; see also *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 912-16 (Alaska 2000) (permitting ballot committee members to intervene as of right where questions could be raised about zealotry of representation by state officials).

223. See *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009) (finding Proposition 8 valid and permissible amendment to California state constitution).

224. See *Perry*, 704 F. Supp. 2d at 991-95, 997-1003 (holding Proposition 8 unconstitutional on due process and equal protection grounds).

225. See *Brown*, 671 F.3d at 1076-95 (affirming on narrower grounds district court's finding of unconstitutionality). Note, however, that the Supreme Court subsequently vacated the Ninth Circuit's judgment. *Hollingsworth*, 133 S. Ct. at 2668.

But the Supreme Court in *Hollingsworth* held that Proposition 8's sponsors did not satisfy Article III standing requirements, and thus could not invoke the jurisdiction of the federal courts.²²⁶ The Court reasoned that the sponsors did not possess a genuinely personal stake in the outcome of the case, but rather a generalized grievance, insufficient to satisfy Article III's standing requirements; and, to the extent they purported to stand in for the state in the appellate courts, their lack of an agency relationship with the state was fatal.²²⁷ The Court concluded: "We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here."²²⁸ In the wake of *Hollingsworth*, it is evident that Article III does not permit ballot initiative sponsors to defend initiatives the executive has chosen not to defend—at least in federal court. As the *Hollingsworth* Court made clear, however, its decision does not "question . . . the right of initiative proponents to defend their initiatives in California courts, where Article III does not apply."²²⁹

In addition to ballot initiative proponents, other groups may also participate in the defense of statutes, in both state and federal courts—either in lieu of (in state court) or alongside (in federal court) executive branch officials. In *Jackson v. Abercrombie*, an outside group—Hawaii Family Forum—intervened to defend the state law, along with the Director of the Health Department.²³⁰ Since the Director remains in the litigation, *Hollingsworth's* requirement that parties stepping in to defend laws in the executive's stead be actual state *officials*²³¹ would appear to pose no obstacle to the outside group's continued participation. And such practice occurs, and will continue to occur post-*Hollingsworth*, in state courts, even absent participating state officials. In Wisconsin, after both the Attorney General and Governor declined to defend the constitutionality of the state's domestic partner registry, an outside group was granted permission to intervene, and is currently the sole party defending the registry in an appeal now pending before the Wisconsin Supreme Court.²³² Finally, *local* officials or units of government may attempt to intervene and participate in litigation where state executives decline to

226. *Hollingsworth*, 133 S. Ct. at 2668.

227. *Id.* at 2660–67.

228. *Id.* at 2668.

229. *Id.* at 2667.

230. See, e.g., *supra* Part II.C.2 (discussing conduct of Hawaii executives in *Jackson* litigation).

231. See *Hollingsworth*, 133 S. Ct. at 2665 (finding ballot initiative proponents lacked standing where they were sole defenders of law).

232. *Appling v. Doyle*, 826 N.W.2d 666, 667 n.2 (Wis. Ct. App. 2012), cert. granted, 839 N.W.2d 615 (Wis. 2013); cf. *Swarb v. Lennox*, 405 U.S. 191, 201 (1972) ("[T]he Pennsylvania Attorney General's office . . . no longer supports the position taken at the trial . . . and . . . now joins the appellants in urging here that the rules and statutes are facially invalid. . . . [A]rgument on the [other] side . . . has been presented . . . only by the intervenor finance companies and by *amici*.").

defend—indeed, one county attempted unsuccessfully to do so in *Perry*—although their ability to maintain a law’s defense in federal court remains an open question in the wake of *Hollingsworth*.

D. *Outside Counsel*

Many states permit executive branch officials to employ outside counsel to defend state laws, vesting such authority in executive branch agencies, the attorney general, or the governor.²³³ A number of courts have considered the scope of statutory outside-counsel provisions (or the general power to utilize outside counsel, even absent explicit provisions);²³⁴ although such power appears to be exercised primarily when conflicts prevent attorneys general from undertaking representations, it is at least possible that outside counsel could be used to fill a gap left by constitutional nondefense. For example, a 1961 address by former California Attorney General Stanley Mosk described a dispute between the state Department of Education and the state Department of Finance over a budget provision that purported to restrict the Department of Education’s ability to purchase a particular book. The Attorney General’s Office sided with the Department of Education on the impermissibility of the restriction, and accordingly declined to defend it, and the former Attorney General commented that “[w]e let the Department of Finance go out and hire private counsel to take care of their point of view.”²³⁵ Similarly, the North Carolina Supreme Court has affirmed that the Governor possesses the discretionary authority to hire special counsel as he deems necessary, whether or not the Attorney General has a conflict or is otherwise unable for any reason to provide representation.²³⁶

It remains to be seen whether *Hollingsworth* will pose an obstacle to this sort of use of outside counsel, since outside attorneys are technically “private parties,” a group about which the Court evidenced deep skepti-

233. See *State Attorneys General Powers and Responsibilities*, supra note 90, at 48–49 (discussing states’ approaches to hiring outside counsel). Many states provide for such counsel by statute, and each such statutory provision varies in its particulars. See, e.g., Ark. Code Ann. § 25-16-712 (2002) (requiring Arkansas Attorney General to seek funding from Legislative Council before employing outside counsel); Colo. Rev. Stat. Ann. § 24-20-106 (West 2008) (authorizing Colorado Governor to employ outside counsel with approval from state Attorney General); Fla. Admin. Code Ann. r. 2-37.010 (1998) (requiring agencies to request approval for hiring outside counsel from Florida Attorney General).

234. See, e.g., *State v. Lead Indus.*, 951 A.2d 428, 475 (R.I. 2008) (“[T]here is nothing unconstitutional or illegal or inappropriate in a contractual relationship whereby the Attorney General hires outside attorneys on a contingent fee basis to assist in the litigation of certain non-criminal matters.” (emphasis omitted) (footnote omitted)).

235. Stanley Mosk, *Extemporaneous Reflections of a Working Attorney General*, 1 *Santa Clara Law* 8, 13 (1961).

236. *Martin v. Thornburg*, 359 S.E.2d 472, 480 (N.C. 1987); see also Matheson, supra note 13, at 26 (noting attorney general may hire outside counsel based on “exigencies of a particular case”).

cism in *Hollingsworth*.²³⁷ But the best reading of *Hollingsworth* would suggest that as long as outside counsel has an agency relationship with *some* state official or entity—a governor or a state agency, for example—that relationship is sufficient to satisfy the Court’s new test.

In addition, courts themselves may appoint counsel to take positions that would otherwise be lacking. The Supreme Court, of course, does this routinely; in *United States v. Windsor*, the Court appointed outside amica to take the position that both the executive branch and the congressional group defending DOMA in the wake of the executive’s nondefense decision lacked Article III standing.²³⁸ Lower courts, of course, may follow the same course when they deem it necessary.²³⁹

One final possibility—not drawn from existing state practice, but advanced as a post-*Hollingsworth* proposal in a number of quarters—is the use of statutorily created “independent” or “special” counsels, whose participation in litigation might be triggered by executive nondefense.²⁴⁰

As this section has shown, states have devised a range of mechanisms to allow for and accommodate the practice of constitutional nondefense. Although the practices vary widely, the schemes also share a number of core features: nondefense by the executive official who normally maintains the defense of state laws, paired with defense by an alternate actor, either another government entity (the legislature, a different executive branch official, perhaps a local official or some sort of independent counsel), or a private actor (either outside counsel or an independent group). And, although each of these schemes involves a robust nondefense power, all have the effect of allowing the courts—whether state or federal—to play an active role (and often have the final say) in the development of constitutional meaning.

237. See *supra* notes 226–228 and accompanying text (discussing *Hollingsworth* Court’s reasoning that ballot initiative sponsors did not have standing to defend constitutionality of statute).

238. 133 S. Ct. 2675, 2684 (2013) (noting Court’s decision to appoint amicus curiae to argue Court lacked jurisdiction to decide matter); see also Brief for Court-Appointed Amica Curiae Addressing Jurisdiction at 6, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 315234, at *6 (arguing both executive branch and Bipartisan Legal Advisory Group of House of Representatives lack standing to defend DOMA). See generally Brian P. Goldman, Note, Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?, 63 *Stan. L. Rev.* 907 (2011) (assessing propriety of Supreme Court amicus invitations).

239. See, e.g., Brianna J. Gorod, Defending Executive Nondefense and the Principal-Agent Problem, 106 *Nw. U. L. Rev.* 1201, 1251–52 (2012) (urging lower courts to appoint amici where appropriate).

240. See Brief for Walter Dellinger as Amicus Curiae in Support of Respondents on the Issue of Standing at 32, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 768643, at *32 (“[T]he state could create an independent office responsible for defending initiatives in cases in which the Attorney General declines to do so.”); Scott L. Kafker & David A. Russcol, Standing at a Constitutional Divide: Redefining State and Federal Standing Requirements for Initiatives after *Hollingsworth v. Perry*, 71 *Wash. & Lee L. Rev.* (forthcoming 2014) (manuscript at 45–46) (on file with the *Columbia Law Review*) (advocating creation of “Special State Attorney”).

The next Part considers schemes that purport to much more tightly circumscribe constitutional nondefense by executive branch officials.

IV. MANDATORY EXECUTIVE DEFENSE AND ALTERNATIVE MECHANISMS

In contrast to the foregoing approaches, some states quite explicitly limit the power of executive officials to decline to defend or to challenge the constitutionality of state statutes. In still other states, executives do not typically engage in overt nondefense, but they may utilize a range of alternative mechanisms to avoid actively participating in the defense of laws they deem constitutionally problematic.

A. “Mandatory” Executive Defense

The Wisconsin Supreme Court has explained in a number of cases that the Attorney General has no general authority to attack statutes on constitutional grounds. Taking the position that the Attorney General is entirely a creature of statute, the court has held that “because the attorney general must defend the constitutionality of . . . statutes, any challenge to the statutes on his part would conflict with his duty to defend.”²⁴¹ And even the Wisconsin Attorney General has opined that “[o]nce legislation is enacted, it becomes the affirmative duty of the Attorney General to defend its constitutionality.”²⁴² The Maryland Supreme Court has similarly held that the Maryland Attorney General possesses no common law powers, and 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 Thus, he may not maintain [a] proceeding which seeks to have an act of the General Assembly declared unconstitutional.”²⁴³ And the New York Attorney General has articulated a quite narrow view of the ability of the executive to engage in independent constitutional interpretation (which would presumably extend to litigation): In a 2004 opinion, the Attorney

241. *State v. City of Oak Creek*, 605 N.W.2d 526, 536 (Wis. 2000); see also *State ex rel. Ozanne v. Fitzgerald*, 798 N.W.2d 436, 452 n.3 (Wis. 2011) (Abrahamson, C.J., concurring in part and dissenting in part) (claiming Attorney General lacks authority to attack constitutionality of statute).

242. Op. Att’y Gen. No. 71, at 195, 196 (Wis. Nov. 19, 1982), available at http://docs.legis.wisconsin.gov/misc/oag/archival/_70 (on file with the *Columbia Law Review*). The Attorney General later takes a less categorical position when he frames the question as “whether a reasonable defense of the legislation is available, not whether [he] would have found the bill constitutional had it been presented to [him] prior to passage.” *Id.* This framing may suggest that if no reasonable defense were possible, no obligation to defend would attach.

243. *State ex rel. Att’y Gen. v. Burning Tree Club, Inc.*, 481 A.2d 785, 799 (Md. 1984) (holding Maryland Attorney General could not bring declaratory judgment action challenging extension of tax benefit to discriminatory country club). The court, however, left open the possibility that the situation might be different if the statute in question were one the Attorney General was charged with enforcing. *Id.* at 793.

General declined to take a position on the constitutionality of the state's Domestic Relations Law, explaining that "New York courts have not yet ruled on this issue, and they are the proper forum for the resolution of this matter."²⁴⁴

Even in some states that purport to mandate defense, however, executive nondefense can and does occur. As discussed above,²⁴⁵ in 2009 Wisconsin's Governor signed a law creating a domestic partnership registry and extending certain rights and protections to registered same-sex couples.²⁴⁶ Opponents of the bill immediately challenged it,²⁴⁷ and the Attorney General (who was of a different party than the Governor) announced that he would not defend the law on the grounds that it violated the state constitution's limitation of marriage to opposite-sex couples.²⁴⁸ The Governor then hired outside counsel to defend the law, and at the same time an outside group, Fair Wisconsin, was granted permission to intervene.²⁴⁹ Following a change in gubernatorial administrations, outside counsel also ceased defending the law, leaving Fair Wisconsin as the sole defendant.²⁵⁰ The Wisconsin Court of Appeals upheld the domestic partnership law in December 2012,²⁵¹ and in June 2013 the Wisconsin Supreme Court granted the petition for review.²⁵² The court heard oral arguments in October 2013.²⁵³

244. Op. Att'y Gen. No. 2004-1, at 1001, 1002 (N.Y. Mar. 3, 2004), available at <http://www.ag.ny.gov/sites/default/files/opinion/I%202004-1%20pw.pdf> (on file with the *Columbia Law Review*). The opinion did note that excluding same-sex couples from marriage raised constitutional concerns, "which are best resolved by the courts of this State." Id. at 1017; see also Op. Att'y Gen. No. 81-91, at 235, 236 (N.Y. June 30, 1981) ("[I]t is our policy not to offer advice on the constitutionality of . . . State statute[s]. In part this is to protect the presumption of constitutionality . . . the Legislature enjoys in legislating. In part this is in recognition of the duty of the Attorney General to defend the constitutionality of State statutes . . .").

245. *Supra* note 232 and accompanying text (describing litigation regarding Wisconsin marriage statute).

246. Wis. Stat. § 770 (2009).

247. *Appling v. Doyle*, 826 N.W.2d 666, 667 (Wis. Ct. App. 2012), cert. granted, 839 N.W.2d 615 (Wis. 2013).

248. See Press Release, Wis. Dep't of Justice, Statement by Attorney General Van Hollen on Constitutional Challenge to Domestic Partnership Law (Aug. 21, 2009), <http://www.doj.state.wi.us/media-center/2009-news-releases/august-21-2009-0> (on file with the *Columbia Law Review*) ("My decision isn't based on a policy disagreement. . . . But I will not ignore the Constitution. . . . To defend the law would require me to ignore the command of the voters when they passed the recent marriage amendment . . .").

249. *Appling*, 826 N.W.2d at 667.

250. Id. at 667 n.2.

251. Id. at 667 ("Appling contends that the domestic partnership law violates the marriage amendment because the partnership law creates a 'legal status' that is 'substantially similar to that of marriage.' We agree with the circuit court that it does not.")

252. *Appling*, 826 N.W.2d 666; see also Andrew Harris, Top Wisconsin Court to Hear Domestic Partner Challenge, Bloomberg (June 15, 2013, 12:01 AM), <http://www.bloomberg.com/news/2013-06-14/top-wisconsin-court-to-hear-domestic->

B. *Alternative Mechanisms*

A number of additional mechanisms suggest that under some circumstances, defense and nondefense of statutes might best be conceived of as encompassing a range of conduct along a spectrum. On one end lies aggressive defense; on the other, a vigorous attack on constitutionality. But between those extremes lies not only nondefense without an affirmative argument against constitutionality—which this Article has considered throughout—but also other means by which executives may quietly undermine the defense of statutes without engaging in overt nondefense.²⁵⁴

1. *Nonintervention.* — State officials may engage in indirect nondefense by refraining from intervening in litigation questioning the constitutionality of a state statute.²⁵⁵ Most states require attorney general notification in any case in which a constitutional challenge to a state statute has been raised.²⁵⁶ In some states, the attorney general enjoys extremely broad intervention authority, even absent affirmative notification.²⁵⁷ In instances in which the attorney general opts not to intervene, nonintervention may be accompanied by a statement, possibly including constitutional concerns about the statute at issue. For example,

partner-challenge.html (on file with the *Columbia Law Review*) (outlining issue facing Wisconsin Supreme Court).

253. E.g., Patrick Marley, State Supreme Court Hints It May Strike Down Part of Domestic Partnership Law, *Milwaukee J. Sentinel* (Oct. 23, 2013), <http://www.jsonline.com/news/statepolitics/state-supreme-court-wednesday-to-hear-arguments-on-registries-for-gay-couples-b99126637z1-228943031.html> (on file with the *Columbia Law Review*) (describing oral arguments).

254. These mechanisms are in addition to the opportunities to express doubts about constitutionality prior to passage of a statute, and to offer advice, both formal and informal, on methods by which constitutional concerns might be addressed. See *supra* note 16 (detailing means by which state executives may provide views on constitutionality of statutes).

255. See, e.g., *Eifler v. Swartz* (In re Estate of Miltenberger), 753 N.W.2d 219, 220 (Mich. 2008) (Corrigan, J., concurring) (observing, in challenge to Michigan’s non-gender-neutral “dower” scheme, “Attorney General has not participated in this case on behalf of the state of Michigan”).

256. State Attorneys General Power and Responsibilities, *supra* note 90, at 99–104 tbl. 6-1 (summarizing circumstances when states require attorney general notification of constitutional challenge). Federal Rule of Civil Procedure 5.1 requires the same notification in the federal system. Fed. R. Civ. P. 5.1 (implementing 28 U.S.C. § 2403 (2012)).

257. In Michigan, for example, a statute provides that “[t]he attorney general of the state is hereby authorized . . . to intervene in any action heretofore or hereafter commenced in any court of the state whenever such intervention is necessary in order to protect any right or interest of the state, or of the people of the state.” Mich. Comp. Laws § 14.101 (2006). And some courts have held that the failure to notify an attorney general of a challenge to the constitutionality of a statute deprives the court of jurisdiction over the challenge. See, e.g., *Bratton v. City of Florence*, 688 So. 2d 233, 234 (Ala. 1996) (“If the notice is not given, the courts will not have jurisdiction to resolve any claims based on the challenge to the constitutionality of the statute or ordinance.”).

in *Construction Crane & Tractor, Inc. v. Wirtgen America, Inc.*, the Tennessee Attorney General and Reporter declined to intervene in a constitutional challenge to a state statute, filing a response explaining that “the Attorney General is of the opinion that Tenn. Code Ann. §§ 47-25-1301 *et seq.*, as written, is unconstitutional as an improper impairment of contract rights in violation of [the Tennessee Constitution].”²⁵⁸ In such cases, nonintervention may actually be more similar to genuine nondefense than more passive mechanisms like weak defense or the quiet allowance of outside counsel.

Of course, statements accompanying nonintervention decisions may be more understated. In *Venuti v. Riordan*, for example, the Massachusetts Attorney General’s Office declined a request by the City of Worcester to intervene in a challenge to a state licensing law, writing, “Best of luck in your effort to defend the statutes.”²⁵⁹

2. *Weak Defense.* — If they do participate in litigation, state executives may undertake weak or perfunctory defenses; they may even express hope that their positions will not succeed, or voice satisfaction with decisions against them.²⁶⁰ *Doe v. Ventura*, a 2000 state law challenge to Minnesota’s criminal sodomy statute, appears to represent an example of this phenomenon.²⁶¹ In *Doe*, the Minnesota Attorney General answered the plaintiffs’ complaint with a response that simply explained to the court that “[t]he dispositive issue in this case is whether the State constitution right of privacy extends to consensual, non-commercial sexual activity.”²⁶² The response took no position on the answer to this question, although it noted a “trend” in the state supreme court toward a broad reading of the state constitution’s privacy provisions.²⁶³ The Minnesota trial court invalidated the statute,²⁶⁴ and the state declined to appeal. The Attorney General’s conduct in *Doe v. Ventura* was subsequently the basis for a recall petition alleging that “[the Attorney General had] failed in

258. No. M2009-01131-COA-R3-CV, 2010 WL 1172224, at *6 n.11 (Tenn. Ct. App. Mar. 24, 2010) (quoting response of Attorney General to Wirtgen America, Inc.’s notice of intent to challenge constitutionality of statute).

259. 702 F.2d 6, 9 (1st Cir. 1983) (quoting Massachusetts Attorney General’s response to Worcester’s request to intervene in lawsuit).

260. Cf., e.g., Antony Barone Kolenc, Pretend to Defend: Executive Duty and the Demise of “Don’t Ask, Don’t Tell,” 48 Gonz. L. Rev. 107, 140–61 (2012) (criticizing Obama Administration for mounting what article deems insufficient defense to several constitutional challenges to “Don’t Ask, Don’t Tell”).

261. No. MC 01-489, 2001 WL 543734 (D. Minn. May 15, 2001).

262. Defendant’s Memorandum in Response to Plaintiffs’ Motion for Summary Judgment, *Doe*, No. MC 01-489, available at <http://www.glapn.org/sodomylaws/usa/minnesota/doeventuraresponse.htm> (on file with the *Columbia Law Review*); see also *Doe*, 2001 WL 543734, at *3 (“Defendants argue[] the Minnesota Supreme Court has not yet had the opportunity to decide squarely the issue of whether the state constitutional right of privacy extends to consensual, non-commercial sex.”).

263. *Doe*, 2001 WL 543734, at *3.

264. *Id.* at *9.

his duties as Attorney General and as a lawyer to defend the constitutionality of [the Minnesota sodomy statute].”²⁶⁵

There are shades of this dynamic in *Romer v. Evans*.²⁶⁶ After losing in the Colorado Supreme Court, Colorado Governor Roy Romer (represented by the state Attorney General) asked the United States Supreme Court to review the decision invalidating Colorado’s Amendment 2, which prohibited Colorado localities from providing protection against discrimination to gays and lesbians.²⁶⁷ After the Supreme Court concluded that Amendment 2 was unconstitutional, Governor Romer told the *New York Times*’s Linda Greenhouse that “the Court had given the ‘right answer’ and that he would ‘do everything [he could] to get Colorado to accept that answer.”²⁶⁸

Finally, although the case involved a local, rather than a statewide executive, there is some suggestion that the dynamics in *Lawrence v. Texas* were similar.²⁶⁹ After opposing certiorari in the Supreme Court, the head of the appellate division of the Harris County, Texas, District Attorney’s Office gave this comment to the *Houston Chronicle* about the Texas sodomy law his office was defending: “The Legislature had decided it. We may not necessarily agree with it. We may not be enthusiastic about enforcing it or prosecuting it, but the district attorney doesn’t get to pick and choose which laws to defend.”²⁷⁰

3. *The Settlement Power.* — Another way state executives might avoid the need to employ the nondefense power is through settlement—that is, by maintaining the initial defense of a constitutionally questionable law,

265. In re Proposed Petition to Recall Hatch, 628 N.W.2d 125, 126, 128 (Minn. 2001) (rejecting petition and declining to decide “whether the duties of the office require the Attorney General to defend the constitutionality of statutes”).

266. 517 U.S. 620, 623–26 (1996).

267. Petition for Writ of Certiorari to the Supreme Court of the State of Colorado at 1–4, *Romer*, 517 U.S. 620 (No. 94-1039), reprinted in 248 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 12*, 12–15 (Gerald Gunther & Gerhard Casper eds., 1997).

268. Linda Greenhouse, *The Gay Rights Ruling: The Ruling; Gay Rights Law Can’t Be Banned, High Court Rules*, *N.Y. Times* (May 21, 1996) (quoting Governor Roy Romer in interview with *New York Times*), <http://www.nytimes.com/1996/05/21/us/gay-rights-ruling-ruling-gay-rights-laws-can-t-be-banned-high-court-rules.html> (on file with the *Columbia Law Review*); see Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 *Tex. L. Rev.* 907, 984 (1997) (suggesting, in seeking Supreme Court review, Colorado executives in *Romer* were attempting to insulate themselves from political accountability for demise of Amendment 2).

269. 539 U.S. 558 (2003).

270. Patty Reinert, *Court May Review Texas Sodomy Law*, *Hous. Chron.* (Nov. 3, 2002), <http://www.glapn.org/sodomylaws/lawrence/lwnews008.htm> (internal quotation marks omitted) (on file with the *Columbia Law Review*); see also Dale Carpenter, *Flagrant Conduct: The Story of Lawrence v. Texas* 191 (2012) (“[Bill Delmore, who had filed the brief opposing certiorari,] told the *Houston Chronicle* that the D.A.’s office had defended the law ‘reluctantly,’ saying that ‘we’re stuck with it.’”).

but settling the case on very favorable terms before much substantive argument occurs in court, or agreeing to a broad consent decree in lieu of mounting a vigorous constitutional defense. Because state officials enjoy broad discretion to settle cases, they may be able to avoid judicial determinations of unconstitutionality while capitulating totally at the point of settlement. The Court came close to acknowledging one strain of this phenomenon in *Horne v. Flores*, in which Justice Alito wrote for the Court that in providing for relief from judgment,

Rule 60(b)(5) serves a particularly important function in what we have termed “institutional reform litigation.” . . .

. . . .
 . . . [T]he dynamics of institutional reform litigation differ from those of other cases. Scholars have noted that public officials sometimes consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law.²⁷¹

4. *Outside Counsel, Revisited.* — Outside-counsel authorization provisions, discussed above,²⁷² may represent another mechanism by which executives may engage in indirect nondefense. California’s mechanism for authorizing the appointment of outside counsel provides an illustrative example. A California statute confers on the Attorney General “charge . . . of all legal matters.”²⁷³ But another provision of law permits any state agency to employ outside counsel with the consent of the Attorney General.²⁷⁴ The permission letters issued by the Attorney General when granting authorization to employ outside counsel do not customarily state reasons for granting permission, which means this mechanism may be used to permit the Attorney General’s Office to avoid defending a statute the Attorney General concludes is constitutionally dubious, but without any public announcement of reasons or explanation.²⁷⁵ Offices may even sidestep dubious defenses by preemptively authorizing the use of outside counsel, even absent a formal request for it. The presence of outside counsel may also send a powerful signal to the judge, who may infer that the absent state officials

271. 129 S. Ct. 2579, 2593–94 (2009). But cf. 71 Pa. Cons. Stat. Ann. § 732-204 (West 2013) (prohibiting Attorney General from agreeing to consent decree in action against commonwealth or one of its agencies “without the approval of the Governor and notice to the General Assembly through the offices of the Secretary of the Senate and the Chief Clerk of the House of Representatives”).

272. *Supra* Part III.D (examining model of nondefense involving outside counsel employed to defend state law).

273. Cal. Gov’t Code § 12511 (West 2011). The statute carves out an exception for “[t]he Regents of the University of California and . . . such other boards or officers as are by law authorized to employ attorneys.” *Id.*

274. Cal. Gov’t Code § 11045 (West 2005) (setting forth procedures for hiring of outside counsel by state agencies).

275. The use of outside counsel in such cases may also raise questions about who is the principal to whom the agent—in this case the outside counsel—reports.

harbor doubts about the statute, even without any public statement to that effect. This is not to suggest that the substantive quality of representation by outside counsel will be in any way inferior—merely that the very presence of outside counsel may serve a signaling function.

V. LESSONS FROM (AND FOR) THE STATES

As the preceding Parts illustrate, constitutional nondefense, as practiced in the states, encompasses a range of conduct—both rich and varied—with a number of unifying features. This Part turns from the descriptive to the normative, arguing that the involvement of state executives in the elaboration of constitutional meaning—including through nondefense—offers a number of benefits. It then provides a set of recommendations for ensuring that when nondefense occurs, its benefits can be realized.

A. *In Defense of Nondefense*

Active participation by state executives in the project of constitutional interpretation—including in the context of providing state and federal courts with constitutional objections to statutes challenged in litigation—confers a number of significant benefits. First, executive branch officials may possess relevant institutional expertise, including the sort that flows from the actual enforcement of laws, providing a valuable additional perspective in debates about constitutional meaning. Second, state executives, who function free of the “screens of deference” the courts erect, may be able to give full expression to constitutional values the courts are likely to underenforce.²⁷⁶ Finally, state executives’ active engagement with the constitutionality of challenged statutes, in contrast to reflexive and dutiful defense of all statutes in all instances, furthers the values of popular constitutionalism.²⁷⁷ This Part considers each of these distinct (but closely related) arguments for executive nondefense.

276. H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 U. Chi. L. Rev. 365, 383 (1998) (reviewing David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* (1997)) (describing “screens of deference the courts employ”); accord Barron, *Constitutionalism*, supra note 47, at 69 (“The Supreme Court crafts its doctrine interpreting constitutional meaning through ‘screens of deference.’” (quoting Powell, supra)); see also Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1213–20 (1978) [hereinafter Sager, *Fair Measure*] (describing how various constitutional values are underenforced by judges).

277. Many scholars have noted the role of the executive in promoting values of popular constitutionalism. See, e.g., Kramer, *The People Themselves*, supra note 4, at 106–10 (explaining relationship between Jefferson’s and Madison’s view of departmentalism and popular constitutionalism); Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 Fordham L. Rev. 1837, 1842–45, 1867–68 (2009) (discussing role of inaugural address rhetoric as medium of presidential popular constitutionalism); Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 Chi.-Kent L. Rev. 991, 996 (2006)

1. *Comparative Institutional Competence.* — A powerful argument in support of state executive authority to engage in independent constitutional interpretation, including in the context of litigation, is supplied by Professor Christopher Eisgruber's "comparative institutional competence" thesis.²⁷⁸ Describing the federal system, Professor Eisgruber argues that although the judiciary is ordinarily the "most competent branch" in matters of constitutional interpretation,²⁷⁹ "[e]xperience and responsibility are invaluable teachers in the art of governance, and there may be times when Congress or the Executive, by virtue of their connection to the people or their knowledge of what government can do, have the best insight into how the Constitution balances competing principles."²⁸⁰

Eisgruber's theory has much to recommend it as a lens through which to view decisions not to defend statutes, or to attack them on constitutional grounds. Although he does not separately consider litigation, there is nothing venue-specific about the insight that nonjudicial officials may draw upon their experience when divining constitutional meaning—that experience might aid interpretation. And no less than federal officials, state officials have precisely the sort of "knowledge of what government can do," and, often, direct "connection to the people"²⁸¹ to confer on them superior interpretive authority in certain instances.

The state executive officials in the nondefense decisions discussed above surely possessed a degree of comparative expertise based on their administration of the laws at issue. In Hawaii and California, for example, the executive branch officials who declined to defend the states' marriage laws did so after serving to administer those laws, at least at a supervisory level (and, in the case of California, after briefly administering a regime in which marriage *was* open to same-sex couples, and then closed to them).²⁸² And in Nebraska, the Attorney General concluded that the state's public finance matching scheme was unconstitutional after spending significant time administering that scheme in conjunction with an

[hereinafter Tushnet, *Popular Constitutionalism*] (noting popular constitutionalism is generally mediated by executive branch and other nonjudicial actors).

278. Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 *Geo. L.J.* 347, 348 (1994).

279. *Id.* at 352, 354–55 ("Insulated from electoral control, required to justify decisions by written opinion, and selected partly on the basis of technical proficiency, judges have the opportunity, the incentive, and the ability to interpret the Constitution carefully.").

280. *Id.* at 355.

281. *Id.* Eisgruber, who notes in passing that "the federal government is clearly superior to the states at interpreting the federal Constitution," *id.* at 363, might quarrel with the application of his theory to state executives. This Article, however, does not advocate privileging the views of state executive officials above those of federal government entities.

282. See *supra* Part II.C.1–2 (describing circumstances of state officials' decisions not to defend marriage statutes).

independent state agency.²⁸³ It is simply not consistent with the practical realities of governance to suggest that these experiences would have no impact on the constitutional views of executive officials.

There is even some evidence that judges themselves recognize that executive officials' institutional expertise may aid in judicial decision-making. In *Hollingsworth*, for example, the district court suggested on at least one occasion that the constitutional views of Governor Schwarzenegger would be helpful, and there was no suggestion that this inquiry was animated by concerns about intervenor standing; rather, the court appeared genuinely interested in the Governor's views, presumably because they held some intrinsic value.²⁸⁴

2. *Underenforcement of Constitutional Norms.* — Closely related to Professor Eisgruber's comparative competence theory is Professor Lawrence Sager's concept of "underenforced constitutional norms": the idea that the Supreme Court will often, based on institutional concerns, "fail[] to enforce a provision of the Constitution to its full conceptual boundaries."²⁸⁵ In the space between the "ideal[s] . . . embodied in the Constitution" and their judicial translation into "workable standard[s] for the decision of concrete issues,"²⁸⁶ Professor Sager identifies opportunities for "robust participation by popular political institutions."²⁸⁷

The institutional concerns Professor Sager identifies translate into a variety of deference and justiciability doctrines, one of the most signifi-

283. Cf. Neb. Rev. Stat. §§ 49-1401 to 49-14,141 (2010) (creating Accountability and Disclosure Commission and providing for referral of possible criminal violations to Attorney General).

284. See Lisa Leff, Judge Sets January Trial Date for Prop. 8 Case, *Guardian* (Aug. 19, 2009), <http://www.guardian.co.uk/world/feedarticle/8665236> (on file with the *Columbia Law Review*) ("[Judge] Walker said he was surprised to find Schwarzenegger standing on the sidelines 'on an issue of this magnitude and importance. The governor's thoughts and views would be very much welcome and appreciated,' he said."); cf. *Eifler v. Swartz* (In re Estate of Miltenberger), 753 N.W.2d 219, 220 (Mich. 2008) (Corrigan, J., concurring) (noting Attorney General's decision not to participate in litigation, and observing "[i]t would have been useful to the Court to have had this issue briefed by the Attorney General").

285. Sager, *Fair Measure*, supra note 276, at 1213 (internal quotation marks omitted). A number of scholars have built on Professor Sager's insights. See, e.g., Richard H. Fallon, Jr., Foreword: Implementing the Constitution, 111 *Harv. L. Rev.* 54, 64 (1997) ("[T]he Court does not always frame constitutional doctrine to ensure that constitutional values are protected to the fullest possible extent. . . . [S]ome constitutional tests reflect an implicit judgment that it would be too costly or unworkable in practice for courts to enforce all constitutional norms to 'their full conceptual limits.'" (quoting Sager, *Fair Measure*, supra note 276, at 1221)); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 *Va. L. Rev.* 1649, 1655–56 (2005) (arguing "Court intentionally crafts decision rules that depart, in some cases quite substantially, from its understanding of constitutional operative propositions").

286. Sager, *Fair Measure*, supra note 276, at 1213.

287. Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 *Nw. U. L. Rev.* 410, 419 (1993).

cant of which is the rational basis test for most equal protection challenges.²⁸⁸ When courts decline to find a violation of a constitutional right based on one of these doctrines, those judicial pronouncements are not “authoritative determinations of constitutional substance”—rather, they are authoritative statements only of judicial competence.²⁸⁹ Since underlying constitutional rights and values are not coterminous with judicial pronouncements about those rights and values, there is ample space for executive and legislative branch actors to give those constitutional principles their full expression.

In her work on executive *nonenforcement* of statutes in the federal system, Professor Dawn Johnsen has drawn on Sager’s underenforcement thesis.²⁹⁰ Professor Johnsen argues that “[n]on-enforcement policy should reflect that the perspectives brought by the political branches specially contribute to the determination of constitutional meaning, when, for example . . . judicial review leaves constitutional norms . . . ‘underenforced.’”²⁹¹

The underenforcement thesis is in many ways a more natural justification for nonenforcement than nondefense: When the executive chooses not to *enforce* a law, that decision involves operationalizing, in a quite direct way, views about what the Constitution means and requires. By contrast, an executive who chooses to enforce but not defend a statute is allowing for the continued operation of a potentially unconstitutional law in anticipation of a judicial determination of unconstitutionality,²⁹² and is merely declining to mount a defense, or advising the courts of constitutional objections.

But the very decision to advise the courts of constitutional views might have some bearing on the ease with which courts reach for deference doctrines. This is not to suggest that courts will, or should, always side with executive officials who object to the constitutionality of challenged statutes, or that courts should revisit the longstanding rule, at least in the federal system, that deference to the executive does not ordinarily entail deference to litigating positions.²⁹³ But it is not difficult to

288. Sager, *Fair Measure*, supra note 276, at 1214–17 (arguing “judicial construct[s] may be truncated . . . upon various concerns of the Court about its institutional role” and giving example of “rational relationship test” as “reflexive validation of the challenged classification”).

289. *Id.* at 1226.

290. Johnsen, *Presidential Non-Enforcement*, supra note 16, at 42.

291. *Id.* (quoting Sager, *Fair Measure*, supra note 276, at 1212–13).

292. Cf. Aziz Z. Huq, *Enforcing (but Not Defending) ‘Unconstitutional’ Laws*, 98 Va. L. Rev. 1001, 1089–91 (2012) (critiquing decisions to enforce but not defend).

293. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13 (1988) (“Deference to what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate.”); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 1010 (1992) (“When an agency initially advances an interpretation while it is wearing its judicial litigant hat . . . the interpretation should not be regarded as precedent.”).

imagine that courts might be wary of reaching quite as easily for deference doctrines—where deference would result in upholding a challenged statute—in the face of the executive’s admonition *not* to defer.²⁹⁴

As we have seen, executive nondefense occurs in both state and federal courts, and the underenforcement thesis may apply with significantly less force in the context of challenges brought in state courts. This is because state courts frequently operate free from at least some of the deference and justiciability doctrines at play in the federal courts.²⁹⁵ Consequently, state courts may already be giving fuller expression to constitutional norms and values than federal courts.

3. *Modest Popular Constitutionalism.* — Nondefense of statutes by state officials holds out yet another promise: furthering the goals of popular constitutionalism. Theories of popular constitutionalism, which have gained increasing traction in recent years, call for greater participation by “the people themselves,” including through their representatives in the political branches, in the elaboration of constitutional meaning.²⁹⁶ Larry Kramer, a key figure in the emergence of popular constitutionalism, grounds his argument in historical practice, contending that “[b]oth in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution. Final interpretive authority rested with ‘the people themselves.’”²⁹⁷ Kramer advocates a return to this ethos, which entails a turn

294. Cf. Johnsen, *Presidential Non-Enforcement*, *supra* note 16, at 59 (arguing when President asserts “his considered judgment that a statutory provision is unconstitutional, and he possesses relevant interpretive expertise, judicial review should be more searching and assess the constitutional views presented by both the President and Congress, in light of their relative interpretive expertise”).

295. Hershkoff, “Passive Virtues,” *supra* note 79, at 1836 (“[J]udicial practice in some states differs—and differs radically—from the federal model.”). Although Hershkoff focuses on the comparatively permissive justiciability doctrines in many state courts, there are also examples of divergence from federal judicial practice in the other direction. For example, state law in both Nebraska and North Dakota requires a supermajority vote to invalidate a law on constitutional grounds. Neb. Const. art. V, § 2 (requiring five judges, rather than four-judge majority, to hold state statute unconstitutional); N.D. Const. art. VI, § 4 (requiring four of five judges to concur in holding state statute unconstitutional); see also *Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247, 250 (N.D. 1994) (“Because only three members of this Court have joined in this opinion, the statutory method . . . is not declared unconstitutional by a sufficient majority.”). And Wisconsin courts require the unconstitutionality of statutes to be established “beyond a reasonable doubt.” *State v. Cole*, 665 N.W.2d 328, 333 (Wis. 2003).

296. Kramer, *The People Themselves*, *supra* note 4, at 8. On the rise of popular constitutionalism, see David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 *Colum. L. Rev.* 2047, 2048 (2010) (“Few schools of constitutional thought have commanded more attention in recent years than popular constitutionalism.”); Purdy, *supra* note 277, at 1839 (“If one theme distinguishes the past decade of constitutional scholarship, it is that ‘the Constitution’ is more than that document’s text, and that its cast of interpreters runs well beyond the hierarchy of judges that culminates in the Supreme Court of the United States.”).

297. Kramer, *The People Themselves*, *supra* note 4, at 8.

away from the reflexive assumption that courts in general, and the Supreme Court in particular, are the sole institutions in our politico-legal order charged with the task of constitutional interpretation.²⁹⁸

Beyond that general claim, however, the specifics of popular constitutionalism can be elusive, as can the method by which its advocates would implement their theoretical insights.²⁹⁹ One significant unresolved tension in the literature is the interaction of the theory with judicial review. That is, does popular constitutionalism entail the power of the people and their political branch representatives to disregard opinions of the courts? If so, under what circumstances? And does the power to nullify opinions extend to judicial judgments—or are those at least binding?³⁰⁰

There is a degree of indeterminacy in much of the writing. At times popular constitutionalists suggest outright defiance of the Supreme Court, while at others they propose utilizing more traditional court-checking mechanisms available to the political branches, like jurisdiction stripping.³⁰¹ But while the interaction of the theory with judicial review

298. Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 *Calif. L. Rev.* 1027, 1043 (2004) (“Kramer’s fundamental indictment is that as federal courts have expanded and bureaucratized, and as the articulation of constitutional law has become pervasive and routinized, the participation of the American people in the formation of their Constitution has become correspondingly enervated and attenuated.”).

299. See, e.g., David L. Franklin, *Popular Constitutionalism as Presidential Constitutionalism?*, 81 *Chi.-Kent L. Rev.* 1069, 1069 (2006) (“[T]hose who march under the loose banner of popular constitutionalism have said very little about the particular institutional mechanisms that would make their vision a reality in today’s world.”); Pozen, *supra* note 296, at 2049 (“In contrast to the tremendous amount of attention that has been devoted to popular constitutionalism as a theoretical project, hardly any attention has been paid to questions of institutional design. The scholarship is heavily normative but rarely pragmatic.”); Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 *Harv. L. Rev. F.* 108, 108 (2008), http://www.harvardlawreview.org/media/pdf/vol124_blocher.pdf (on file with the *Columbia Law Review*) (“Popular constitutionalism is a bit like the dark matter of the constitutional universe—it seems to exert a powerful force on constitutional theory and doctrine, but even those who believe in it are not always entirely sure how it works.”); see also Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 *Harv. L. Rev.* 1594, 1635 (2005) (reviewing Kramer, *The People Themselves*, *supra* note 4) (“The obvious question for robust popular constitutionalism is ‘How?’ How can the people themselves interpret and enforce the Constitution through direct action?”).

300. See Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 *N.Y.U. L. Rev.* 123, 126 (1999) (describing difference between opinions and judgments).

301. Compare Kramer, *The People Themselves*, *supra* note 4, at 248 (“The Supreme Court is not the highest authority in the land on constitutional law. We are.”), with *id.* at 249 (“The Constitution leaves room for countless political responses to an overly assertive Court: Justices can be impeached, the Court’s budget can be slashed, the President can ignore its mandates, Congress can strip it of jurisdiction or [change its size] or give it burdensome new responsibilities or revise its procedures.”) And in a later piece, Kramer seems to suggest that the very possibility that the political branches might disregard the Court is sufficient to restrain judicial overreaching. Larry Kramer, *Response*, 81 *Chi.-Kent*

remains somewhat disputed,³⁰² the core premise of popular constitutionalism is straightforward and undeniably appealing: More active participation in the making of constitutional meaning by noncourt entities—executive and legislative branch agencies and officials, private institutions in which members of the public associate, and individual citizens themselves—is an unalloyed good.³⁰³

Scholars of popular constitutionalism have for the most part paid very little attention to institutions of state government.³⁰⁴ But state executive branch constitutionalism generally, and nondefense in particular, can significantly further the goals of popular constitutionalism. First, when state executive officials approach constitutional challenges to state statutes mindful of their need to engage in independent constitutional interpretation, they undoubtedly engage more deeply with the constitutional provisions at issue than would be possible if they viewed themselves as duty-bound from the outset to defend the challenged laws irrespective of their constitutional views.³⁰⁵ Second, executive nondefense spurs other players to take central roles in litigation—from state legislatures to private associations of individuals to sub-state entities like cities and counties³⁰⁶—and to add still more constitutional perspectives to important debates. Finally, executive nondefense can trigger public debates about the Constitution that reflexive defense alone might not. If public officials in fact have a choice about what course to pursue when a law is challenged on constitutional grounds, citizens may engage with public officials about the positions they take in litigation, and “interactions between

L. Rev. 1173, 1180–81 (2006). For a defense of Kramer’s *The People Themselves* that acknowledges this indeterminacy, see Tushnet, *Popular Constitutionalism*, supra note 277, at 991–97.

302. See Tushnet, *Popular Constitutionalism*, supra note 277, at 996 (noting “inherent fuzziness” of popular constitutionalism).

303. This version of popular constitutionalism looks a good deal like the “democratic constitutionalism” advanced by Robert Post and Reva Siegel, who argue that the Constitution’s democratic legitimacy “is sustained by traditions of popular engagement that authorize citizens to make claims about the Constitution’s meaning and to oppose their government—through constitutional lawmaking, electoral politics, and the institutions of civil society.” Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373, 374 (2007). Post and Siegel distinguish themselves from popular constitutionalists by embracing courts as central players in the iterative process of constitutional meaning-making. *Id.* (“Courts play a special role in this process.”).

304. But see Pozen, supra note 296, at 2052 (discussing “question of judicial selection” in states “through the lens of popular constitutionalism”).

305. This is separate and apart from the zealous advocacy interests nondefense serves. See *infra* notes 355–356 and accompanying text (arguing robust executive nondefense power preserves zealous advocacy).

306. For example, San Francisco intervened in the district court in the Proposition 8 litigation, and remained involved throughout the litigation, including in the Supreme Court. See Brief of Respondent City of San Francisco at 11–61, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 662703, at *11–*61 (advancing its arguments against Proposition 8 in front of Supreme Court).

citizens and officials might strengthen citizen confidence that the Constitution is theirs, . . . [while] popular engagement with constitutional questions might contribute to public confidence in the Constitution.”³⁰⁷

The distinction between state and federal courts necessitates that this theory be qualified, just as in the preceding subsection.³⁰⁸ Part of the appeal of political branch interpretive autonomy for popular constitutionalists is the relationship between elected officials and members of the polity, as compared to the politically insulated status of judges in the federal system. By contrast, state judges themselves are in the main elected.³⁰⁹ Still, the status of state judges as largely elected does not completely negate the claim that state-level elected officials will be more responsive to the desires of the people themselves than state judges will be, since “[j]udges are not actually authorized to ‘represent’ constituents in any formal sense, nor do they engage in the sorts of dialogic interactions that help make that representation meaningful.”³¹⁰

The claim that nondefense vindicates the values of popular constitutionalism may appear to falter when nondefense is invoked in the context of laws passed via direct democracy mechanisms. In such cases, nondefense places executive officials in direct conflict with the will of the people as expressed through direct democracy. If direct democracy mechanisms “hold privileged, if not paradigmatic, status as formal instruments of popular constitutionalism,”³¹¹ how could a practice that challenges the results of popular democracy advance popular constitutionalism’s goals?

It is true that executive *nonenforcement* of laws would genuinely undermine direct democracy. But the *nondefense* with which this Article is concerned gives full legal effect to the products of direct democracy; it simply allows state officials to add an additional constitutional perspective, while another party maintains the defense of the challenged product of direct democracy.

It is commonplace to assume that the executive possesses a comparative advantage, based on both experience and subject-matter expertise, when it comes to the administration of statutes—that, of course, is one of the principal rationales for judicial deference to executive interpretation

307. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 *Calif. L. Rev.* 1323, 1340 (2006).

308. See *supra* note 295 and accompanying text (explaining underenforcement thesis may apply with less force in state than in federal courts).

309. Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 *Va. L. Rev.* 719, 721 (2010) (“For over a century, the great majority of states have chosen to select or retain judges through popular elections.”).

310. Pozen, *supra* note 296, at 2116.

311. *Id.* at 2122.

in the context of administrative law.³¹² But notwithstanding the academic interest in popular constitutionalism in recent years, there remains a widely held view that courts enjoy a comparative advantage when it comes to answering constitutional questions.³¹³ This dichotomy, however, may suggest an unrealistically pristine distinction between the task of constitutional interpretation, on the one hand, and the administration of statutes, on the other. That is, the administration of statutes may involve more constitutional reasoning than is frequently allowed,³¹⁴ and the task of interpreting the Constitution may be more informed by experience and practice than we often acknowledge.

B. *General Principles*

Against the backdrop of these arguments for the benefits that can flow from granting state executives significant latitude to depart from the practice of defending statutes challenged on constitutional grounds, this section offers a number of recommendations designed to ensure that when nondefense occurs, its benefits can be realized. These recommendations include the transparent announcement and explanation of non-defense decisions; use of clear decisional processes and substantive guidelines for making nondefense decisions; and affirmative efforts to preserve judicial review.

1. *Transparency.* — Any executive nondefense decision should be announced publicly as early as practicable in the course of litigation. Although much executive branch constitutionalism necessarily happens behind closed doors, litigation is a uniquely public forum for the expression of constitutional views, and transparency holds out the promise of democratic engagement and public contestation. In addition, transparency maximizes opportunities for outside involvement, and provides legislatures (even those that will not seek to join litigation) notice of the executive's constitutional views.³¹⁵

312. See *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (“[A]n agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency” (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944))); *Skidmore*, 323 U.S. at 140 (“[R]ulings, interpretations and opinions of the Administrator [concerning the statute in question] . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”).

313. See *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013) (emphasizing “Supreme Court’s primary role in determining the constitutionality of a law”).

314. Cf. Merrill, *supra* note 293, at 1004 (noting, in context of statutory interpretation, “executive officials must interpret the law in order to promulgate regulations, bring enforcement actions, [and] instruct employees how to carry out programs”).

315. In a recent piece, Colorado Solicitor General Daniel Domenico acknowledges that at times such statements are appropriate, but fails to provide a detailed account of when statements should issue. Daniel D. Domenico, *The Constitutional Feedback Loop: Why No State Institution Typically Resolves Whether a Law Is Constitutional and What, If*

In addition to clearly and transparently announcing the fact of nondefense, executives who decline to defend statutes should ideally provide a detailed explanation of reasons. Most of the time, this will mean that executives who choose not to defend laws should affirmatively argue against them, rather than declining to defend but taking no further part in litigation. It also means that executives should refrain from employing more indirect mechanisms, like weak defense and the quiet allowance of outside counsel.³¹⁶

Here, the contrast between the conduct of the California and Hawaii executives in declining to defend their respective states' marriage laws is instructive. California Attorney General Jerry Brown, after answering the plaintiffs' complaint, failed to provide the district court or the court of appeals with any substantive constitutional views on Proposition 8 (although Brown's successor did file a brief in the Supreme Court, addressing both the standing of the Proposition 8 proponents and the constitutionality of Proposition 8³¹⁷). By contrast, Hawaii Governor Neil Abercrombie briefed the constitutional question in the trial court, and made clear that he planned to file a separate brief in the Ninth Circuit.³¹⁸ Separate and apart from the standing considerations discussed below,³¹⁹ the Hawaii approach seems better able to achieve the goals of non-defense identified above.³²⁰

The Nebraska scheme discussed above, in which the nondefense contemplated by statute follows an actual opinion by the Attorney General, also provides a useful template: The initial opinion provides the legal reasoning supporting the conclusion that a statute is unconstitutional, and the litigation in which the Attorney General attacks the statute's constitutionality follows.³²¹ The federal statutory framework governing executive nondefense is similar. The statute mandating congressional notification when the Attorney General declines or ceases to defend a statute essentially ensures that there be a written announcement of rea-

Anything, Should Be Done About It, 89 *Denv. U. L. Rev.* 161, 177-78 (2011) ("Sometimes . . . we feel it is necessary to make our position public. Given that the attorney general also owes a duty to the public[,] . . . the office sometimes decides that its conclusion that a proposed law is flawed must be exposed to the public.").

316. See *supra* Part IV.B (discussing indirect nondefense mechanisms).

317. Brief for the State of California as Amicus Curiae in Support of Respondents at 5-37, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 769329, at *5-*37.

318. See Defendant Governor Neil S. Abercrombie's Notice of Appeal at 2 & n.1, *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012) (No. CV11-00734 ACK-KSC) (noting trial court's summary judgment grant against Governor and asserting scheduling order "should have the Governor filing his opening brief simultaneously with plaintiffs' opening brief" (emphasis omitted)).

319. *Infra* notes 341-349 and accompanying text (describing courts' reasoning regarding standing in California same-sex marriage cases).

320. *Supra* Part V.A (outlining goals of executive nondefense).

321. See *supra* Part II.C.3 (outlining Nebraska statute setting out nondefense mechanism).

sons—that is, an explanation.³²² Although the letters sent by the Attorney General are addressed to Congress, they appear in many ways to be documents for the public. Some are quite short,³²³ and some, like Attorney General Holder’s DOMA letter,³²⁴ are long and comprehensive, analogous in many ways to judicial opinions. But all provide detailed explanations of the conclusion that the statute at issue is unconstitutional.³²⁵

Public statements, ideally detailed ones, are important for an additional reason. State executive officials, like their counterparts in the federal system, rely heavily on precedent.³²⁶ Indeed, the early activity around the Proposition 8 case starkly illustrates the importance of precedent to state executives. Throughout the Proposition 8 litigation, particularly in the early stages of the state court challenge, Attorney General Jerry Brown repeatedly invoked the constitutional nondefense decision made by one of his predecessors, Thomas Lynch, in explaining his decision not to defend Proposition 8.³²⁷ In fact, public reporting raises the possibility that it was sheer happenstance that brought Lynch’s nondefense to the attention of Brown’s office, and that this may have had some bearing on Brown’s nondefense decision. Two weeks before Brown filed his initial brief in the Proposition 8 state law challenge, when it was still largely assumed based on his initial post-passage remarks that Brown would defend Proposition 8, an op-ed appeared in the *San Francisco Chronicle*.³²⁸ Written by Derald Granberg, who served as a deputy under California

322. 28 U.S.C. § 530D (2012).

323. See, e.g., Letter from Paul D. Clement, Solicitor Gen., to Patricia Mack Bryant, Senate Legal Counsel (Dec. 23, 2004), available at http://www.aclu.org/files/FilesPDFs/mineta_letter.pdf (on file with the *Columbia Law Review*) (providing explanation required by § 530D for decision not to appeal district court’s ruling in *ACLU v. Mineta*, 319 F. Supp. 2d 69 (D.D.C. 2004)).

324. Holder Letter, *supra* note 1 (outlining Department of Justice’s anticipated course of action in DOMA litigation).

325. The federal system does contain one significant shortcoming when it comes to transparency values: There exists no automatic mechanism for publication of § 530D letters, which are not readily available to the public or to researchers.

326. For discussions of this phenomenon in the federal system, see Michael J. Gerhardt, *Non-Judicial Precedent*, 61 *Vand. L. Rev.* 713, 764 (2008) (“Examples abound of non-judicial authorities making precedent-based arguments.”); Meltzer, *supra* note 10, at 1232 (“[P]ast practice . . . commonly weighs heavily within the executive branch.”); see also Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 *Colum. L. Rev.* 1097, 1098 (2013) (“Presidential power in the United States is determined in part by historical practice.”).

327. See, e.g., Answer of Attorney General, *supra* note 125, at 2 (“[T]he Attorney General answers the Complaint consistent with his duty to uphold the United States Constitution, as Attorney General Thomas C. Lynch did when he argued that Proposition 14, passed by the California voters in 1964, was incompatible with the Federal Constitution.”).

328. Derald E. Granberg, *Op-Ed., Jerry Brown Has a Legal Obligation to Oppose Prop. 8*, SFGate (Dec. 4, 2008, 4:00 AM), <http://www.sfgate.com/opinion/article/Jerry-Brown-has-a-legal-obligation-to-oppose-3259541.php> (on file with the *Columbia Law Review*).

Attorney General Lynch, the op-ed explained that when Granberg heard Brown announce publicly that he had a responsibility to defend Proposition 8, he concluded that Brown was “unaware of some significant history of [the Attorney General’s] office.”³²⁹ In response, Granberg wrote, he “called Brown’s office in Sacramento to inform him” that Lynch’s predecessor as Attorney General, Stanley Mosk, had in fact argued against the constitutionality of Proposition 14, which purported to undo a statute prohibiting discrimination in housing,³³⁰ a position later also adopted by Mosk’s successor, Attorney General Lynch.³³¹ Brown later invoked Lynch’s decision in multiple court filings.³³²

It is, of course, sheer speculation to conclude that Granberg’s intervention had any impact on Brown’s decision, but Brown’s use of Proposition 14 highlights the importance executive offices tend to place on precedent. Executives may even draw on precedent from other jurisdictions. In his motion for partial summary judgment in the Hawaii marriage case, Governor Abercrombie, after reiterating his view that the law was unconstitutional, explained in a footnote: “There is substantial precedent for the Governor’s actions. California Governor Arnold Schwarzenegger declined to defend the constitutionality of Proposition 8 in California banning same sex marriage, and California Attorney General (now Governor) Jerry Brown also affirmatively conceded that Proposition 8 was federally unconstitutional.”³³³ He then went on to cite Attorney General Holder’s letter to Congress announcing his decision to cease defending DOMA.³³⁴

Finally, transparency can help guard against the erosion of the distinction between constitutional law and pure politics. That is, if state actors are required to publicly articulate their objections in constitutional terms, the chances that they will refuse to defend laws they find merely politically troubling, rather than genuinely constitutionally objectionable, are at least reduced.³³⁵

329. *Id.*

330. *Id.*

331. See Brief of the State of California as Amicus Curiae at 16, *Reitman v. Mulkey*, 387 U.S. 369 (1967) (No. 483) (describing Attorney General Lynch’s view that Proposition 14’s enactment constituted “affront to the dignity of the constitutional standards of the Fourteenth Amendment”).

332. See, e.g., Answer of Attorney General, *supra* note 125, at 2 (relying on previous decision of Attorney General Lynch not to defend Proposition 14 in support of his own argument against defending Proposition 8).

333. Countermotion for Partial Summary Judgment at 1 n.1, *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012) (No. CV11-00734 ACK-KSC).

334. *Id.*

335. This is not to suggest an entirely pristine distinction between the two; indeed, much of the work of popular constitutionalism’s advocates, discussed *supra* notes 296–314 and accompanying text, critiques the fetishization of “constitutional law” as entirely removed from the sorts of considerations we consider “political.” But granting executives

2. *Substantive Guidelines and Decisional Processes.* — State executive offices should craft general frameworks for the criteria that must be satisfied—or alternatively, the quantum of constitutional doubt that must be present—before a nondefense decision is made. As discussed in Part I, the Office of Legal Counsel and legal scholars have devoted considerable energy to this question in the federal system,³³⁶ but states have not grappled with it, at least in any sustained and public way.³³⁷ Substantive criteria might involve subject matter—for example, the nondefense power will be exercised in challenges to laws that threaten separation of powers principles, or that involve individual rights (or perhaps more specifically, claims of equal protection violations).³³⁸ Criteria could also require the official in question to conclude, not only that a law raises constitutional questions or is subject to constitutional doubt, but rather that a law *is* unconstitutional. Such standards could help to ensure that nondefense does not become so common that outside entities, which may not have the infrastructure in place to direct or supervise litigation in multiple cases at any given time, are taxed beyond their capabilities.

In addition, internal clarity should exist with respect to the processes for debate and consideration that will be followed before an executive office publicly takes the position that a statute is unconstitutional. Such clarity should extend to who is able to make the decision not to defend a statute. Requiring personal participation by the top official, ordinarily the attorney general, is one way to ensure that nondefense decisions are not taken lightly and that there are clear lines of democratic accountability. An ideal state process might also include consultation with the gover-

latitude to decline to defend laws on purely political grounds could entail significant costs, without any of the benefits outlined above. *Supra* Part V.A.

336. *Supra* notes 27–51 and accompanying text (recounting varied approaches of OLC and legal scholars to nondefense).

337. One exception to this is a recent piece by Colorado’s Solicitor General that explores, both descriptively and normatively, the approaches to constitutionally problematic statutes taken by different institutions of Colorado’s state government. Domenico, *supra* note 315, at 165–83 (discussing how “courts, the general assembly, and the governor” assess constitutionality).

338. A recent student comment argues that the President has a special degree of latitude to decline to defend statutes that undermine equal protection principles. Parker Rider-Longmaid, Comment, Take Care that the Laws Be Faithfully Litigated, 161 U. Pa. L. Rev. 291, 293–94 (2012) (“[W]hen the President believes that the courts should apply heightened scrutiny where they currently do not, [in the equal protection context] he has a duty not only to decline to defend the statute, but also to instruct the DOJ to argue this position before the courts.”); see also Dawn Johnsen, The Obama Administration’s Decision to Defend Constitutional Equality Rather than the Defense of Marriage Act, 81 Fordham L. Rev. 599, 614–18 (2012) (“[T]he nondefense of DOMA is consistent with executive branch precedent in a discrete category of historic cases involving the fundamental meaning of the constitutional guarantee of equal protection.”); Joseph Landau, Presidential Constitutionalism and Civil Rights, 55 Wm. & Mary L. Rev. (forthcoming 2014) (manuscript at 4) (on file with the *Columbia Law Review*) (defending DOMA nondefense decision as exercise of legitimate presidential constitutionalism “in the service of individual rights”).

nor, if the governor is not the official making the ultimate decision; the possibility exists, of course, that the attorney general and governor will have divergent views of the statute, but requiring some degree of consultation could further improve decisionmaking and accountability. State executive offices should also institute procedures for ensuring that officials with the ultimate authority to make nondefense decisions are aware of constitutional challenges to statutes early, to head off the possibility that defense will be undertaken not as a result of careful consideration, but because senior officials are unaware of a serious constitutional attack on a statute.³³⁹

An additional question, both substantive and procedural, is whether different standards should attach to decisions not to defend at different points in litigation—that is, when executives decline to defend at the trial court level, rather than when it comes to taking or defending an appeal. Some offices appear to employ a strong presumption in favor of trial court defense, which then weakens after an initial decision has been rendered, particularly if the trial court has found the statute in question unconstitutional.³⁴⁰ But there are costs involved in defending, and then not defending, laws in court. Most notably, the very change in position may erode public trust and legitimacy. Moreover, where a third party takes up the defense in the executive's stead, it makes far more sense, from the perspective of continuity and effective advocacy, for the third party to manage the defense from the outset. For these reasons, nondefense decisions may be best made early.

3. *Preserving Judicial Review.* — Perhaps more important than any of these pragmatic guidelines is clear state law regarding who may defend challenged laws in court—and in particular in federal court, in light of the Supreme Court's interpretation of Article III's standing requirements, most recently in *Hollingsworth*.³⁴¹ Even bracketing the question of whether courts in general should have the last word on constitutional meaning, nondefense without judicial review reduces to the far more

339. Of course, most states have statutes requiring that the state (ordinarily the attorney general's office) be notified of any constitutional challenges brought to state statutes in which the state is not already a party. See *supra* note 256 and accompanying text (summarizing attorney general notification requirements when constitutional challenge is brought against state statute). But my concern here is with internal notifications.

340. See, e.g., *Yniguez v. Arizona*, 939 F.2d 727, 730 (9th Cir. 1991) (explaining, after defending state's "English-only" constitutional provision in district court, Governor elected not to appeal opinion holding provision facially unconstitutional); see also Letter from Paul D. Clement to Patricia Mack Bryant, *supra* note 323 (explaining Department of Justice's decision not to appeal, after providing trial court defense, in *ACLU v. Mineta*, 319 F. Supp. 2d 69 (D.D.C. 2004)); cf. *Diamond v. Charles*, 476 U.S. 54, 56 (1986) (noting, after defending statute in district court and court of appeals, "[t]he State of Illinois . . . has chosen to absent itself from this appeal, despite the fact that its statute is at stake").

341. 133 S. Ct. 2652 (2013); see also *supra* notes 137–138 and accompanying text (discussing Court's holding in *Hollingsworth* that intervenors lacked standing).

controversial practice of nonenforcement, essentially foreclosing participation by both courts and legislatures in debates about what the Constitution requires.³⁴²

The Supreme Court's cases provide a measure of guidance on the standing of third parties to defend laws the executive has chosen not to defend, but many questions remain open. As discussed above,³⁴³ the Court in *Karcher v. May* found that until the change in control of both houses, "the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals."³⁴⁴ The *Hollingsworth* Court reaffirmed *Karcher's* recognition of legislative standing, explaining that, although states typically designate the attorney general as the official responsible for representing the state in federal court, "state law may provide for other officials to speak for the State in federal court, as New Jersey law did for the State's presiding legislative officers in *Karcher*."³⁴⁵ So it remains the case, following *Hollingsworth*, that as long as state law authorizes legislative defense, Article III poses no obstacle to the practice. Clear state law on this score is thus of paramount importance.

In the wake of *Hollingsworth*, it is also clear that ballot initiative sponsors, without more, will not be able to defend their handiwork in federal court. But *Hollingsworth* appears to pose no obstacle to defense by some *other* state official where the attorney general chooses not to defend. This means that states remain free to designate officials to defend in lieu of attorneys general. (For example, though it went unmentioned in *Hollingsworth*, California actually has such a provision with respect to its redistricting commission.)³⁴⁶ Such officials may include statutorily created independent or special counsels.³⁴⁷ *Hollingsworth's* emphasis on agency principles may also mean that states can continue to permit ballot-proponent defense, consistent with Article III's requirements, so long as they create some sort of agency relationship lashing proponents

342. In the context of direct democracy, nondefense without judicial review also permits elected officials to essentially undo popular enactments with no—or very limited—opportunities for judicial review. See *Hollingsworth*, 133 S. Ct. at 2671 (Kennedy, J., dissenting) (describing initiative system's "purpose of circumventing elected officials who fail or refuse to effect the public will").

343. *Supra* notes 184–196 and accompanying text (explaining background of and decision reached in *Karcher* case).

344. 484 U.S. 72, 82 (1987).

345. *Hollingsworth*, 133 S. Ct. at 2664.

346. Cal. Const. art. XXI, § 3(a) ("The commission has the sole legal standing to defend any action regarding a certified final map The commission has sole authority to determine whether the Attorney General or other legal counsel retained by the commission shall assist in the defense of a certified final map.").

347. See *supra* note 240 and accompanying text (discussing implications of *Hollingsworth* for standing of independent counsel).

to state officials.³⁴⁸ And of course, *Hollingsworth's* disapproval of ballot-proponent defense has no bearing on state courts, where liberal standing rules may permit such parties to defend in lieu of the executive.³⁴⁹

Both because of standing concerns and more generally, executive officials who decline to defend laws or attack their constitutionality should work to facilitate participation by others. In the Hawaii marriage case, for example, Governor Abercrombie's opposition to Hawaii Family Forum's motion to intervene was arguably inconsistent with this principle.³⁵⁰ Similarly, the California state defendants in the Proposition 8 challenge declined to file an appeal even to ensure appellate jurisdiction,³⁵¹ and the Attorney General opposed the proponents' standing throughout the appellate litigation.³⁵²

Again, the federal statutory framework provides a useful template. The federal statute requires that notification of a nondefense decision be given "within such time as will reasonably enable the House of Representatives and the Senate to take action, separately or jointly, to intervene in timely fashion in the proceeding, but in no event later than 30 days after the making of each determination."³⁵³ Even without analogous state statutes, state executives should not oppose attempts to intervene by parties who will increase the range of arguments provided to the

348. *Hollingsworth*, 133 S. Ct. at 2666–67 (explaining proponents do not qualify as agents of either people or State of California).

349. See Hershkoff, "Passive Virtues," supra note 79, at 1854 ("[S]ome states have standing rules that afford citizens, taxpayers, and legislators roles in vindicating shared state constitutional interests."); see also *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 914 (Alaska 2000) ("[A] sponsor's direct interest in legislation enacted through the initiative process . . . will ordinarily preclude courts from denying intervention as of right."); *Sportsmen for I-143 v. Mont. Fifteenth Judicial Dist.*, 40 P.3d 400, 402 (Mont. 2002) (finding "primary proponent of a ballot initiative has a legally protectable interest sufficient to allow it to intervene in a case challenging the resulting statute").

350. Abercrombie's Memorandum in Opposition, supra note 148, at 3–23 (arguing intervention should be denied because Director of Health "adequately represents [Hawaii Family Forum's] putative interests"). Interestingly, however, Governor Abercrombie has allowed the Director of Health, a gubernatorial appointee he could conceivably direct otherwise, to advance a constitutional argument that is opposed to his. Haw. Const. art. V, § 6 ("Each principal department [of which the Department of Health is one, Haw. Rev. Stat. § 26-4 (2013),] shall be under the supervision of the governor.").

351. In denying the proponents' request for a stay, the district court noted, "[I]t appears at least doubtful that proponents will be able to proceed with their appeal without a state defendant . . . [P]roponents may have little choice but to attempt to convince either the Governor or the Attorney General to file an appeal to ensure appellate jurisdiction." *Perry v. Schwarzenegger*, 702 F. Supp. 2d 1132, 1136 (N.D. Cal. 2010), aff'd sub nom. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), vacated sub nom. *Hollingsworth*, 133 S. Ct. 2652.

352. Brief of Attorney General Harris, supra note 133, at 1 (arguing permitting ballot initiative proponents to maintain law's defense would "intrude on the exercise of discretionary powers that the California Constitution and the Government Code entrust to state officials exercising executive power").

353. 28 U.S.C. § 530D(b)(2) (2012).

courts, and they should provide as much notice as practicable of nondefense decisions.

In addition to clear decisional frameworks and processes within the state executive branch, and separate and apart from Article III standing questions, *courts* should make special efforts, in the face of a nondefense decision, to accommodate defense by entities other than those ordinarily responsible for the defense of state laws. At present, many courts decline to do this. For example, in the New Jersey partial-birth abortion ban case, the district court not only declined to continue a hearing when it became clear that the legislature was not going to be able to secure counsel in time, but the judge also suggested that the legislature's absence from the hearing in part persuaded her to enter a preliminary injunction against the statute.³⁵⁴ Regardless of the merits of the underlying decision, there seems no principled reason to have treated the legislature's delay in obtaining counsel as substantively relevant.

Courts themselves should have an interest in facilitating nondefense by third parties, because a robust executive nondefense power preserves the principle of zealous advocacy: It permits executives to decline to defend statutes, rather than proceeding with defenses that lack true conviction, while allowing third parties to provide vigorous defenses.³⁵⁵ Executive nondefense, when paired with clear state law on who may defend a law the executive has declined to defend, can allow for a genuinely sharp adversarial presentation of constitutional issues to the courts.³⁵⁶

As this Part has attempted to show, a number of powerful normative justifications support the practice of constitutional nondefense. But nondefense as currently practiced in the states does not always achieve the normative goals detailed above. Attentiveness to transparency, substantive guidelines and decisional processes, and the significance of preserving judicial review could go a considerable distance toward ensuring that nondefense occurs in a way that maximizes its potential benefits.

354. Thomas Zolper, Judge Blocks New Abortion Restriction Says Law on 'Partial Birth' May Be Too Vague, *Record*, Dec. 17, 1997 ("Attorney General Peter Verniero . . . informed Thompson . . . his office would not represent the state Soon afterward, [the Legislature's leadership] informed the judge that the Legislature would hire . . . outside counsel. But the top lawmakers didn't hire an attorney in time The failure of the state . . . factored into Thompson's decision, she said.").

355. Cf. Transcript of Oral Argument at 5, *May v. Cooperman*, 582 F. Supp. 1458 (D.N.J. 1984) (No. 83-89) ("What we want is a presence in some form or other to advance that issue. I think it is important to have somebody enthusiastically in support of this statute as party to this action.").

356. See Gorod, *supra* note 239, at 1207-08 (arguing "executive nondefense may actually facilitate, rather than undermine, judicial resolution of disputes").

CONCLUSION

Through this account of state executive decisionmaking around the defense of statutes, this Article's goal has been to shed some light on this previously unexamined locus of constitutional interpretation and interbranch constitutional dialogue. Although much of the literature on executive nondefense in the federal system is concerned with the broader question of the propriety and even constitutionality of executive nondefense, this Article has shifted the focus not just to state rather than federal executive branch actors, but also toward a grounded examination of the circumstances and constraints within which state executive officials wield the nondefense power—and might wield it more effectively.

Scholars regularly advocate for more active involvement by state courts in debates about constitutional meaning, on one account because “[t]o the degree that state judges’ voices are added to the debate, we should expect a reinvigoration of the discursive ground of a democratic order committed to the rule of law. These voices are likely to enrich the debate . . . because they operate under different institutional constraints.”³⁵⁷ Although the point is made almost exclusively about state courts, the argument holds for state executive branch officials as well.

An executive branch official's public announcement of the view that a statute is unconstitutional—both in the public forum of litigation and perhaps through public announcements outside of litigation—may have expressive effects in the context of the public at large, and in particular on those affected by the law at issue.³⁵⁸ That is, by publicly voicing constitutional objections to a statute, executive branch officials demonstrate the active and dialogic processes through which constitutional meaning is forged.³⁵⁹ They also reveal the contested status of constitutional rights and norms, perhaps generating greater public interest in, and involvement with, constitutional disputes that unfold in the courts.³⁶⁰

357. Kahn, *supra* note 9, at 1155–56; cf. Heather K. Gerken, *Dissenting by Deciding*, 57 *Stan. L. Rev.* 1745, 1801–02 (2005) (discussing transformative potential of local decisionmaking).

358. The distinction between simple nondefense and nondefense paired with affirmative attack is significant here—nondefense without more will not carry the same benefits.

359. See Barry Friedman, *Dialogue and Judicial Review*, 91 *Mich. L. Rev.* 577, 580–81 (1993) (“[T]he everyday process of constitutional interpretation integrates all three branches of government Our Constitution is interpreted on a daily basis through an elaborate dialogue as to its meaning.”).

360. Aziz Huq notes the expressive effects of nondefense decisions, but argues that bifurcated or “enforce-but-do-not-defend” approaches actually erode trust and confidence in the government by suggesting to constitutional rights-holders that their rights are not valued by executive branch actors, who have acknowledged that a challenged law is unconstitutional but continue to subject citizens to it. Huq, *supra* note 292, at 1049–58. Chief Justice Roberts expressed a similar sentiment during the oral arguments in *United States v. Windsor*, when he suggested that if the President “has made a determination that executing the law by enforcing the terms is unconstitutional, I don’t see why he doesn’t

There is no question that decisions not to defend arise with the greatest frequency in the context of divided government—where the legislature that passes a law, or is unwilling to repeal it, is controlled by a different party than the party in control of the executive branch.³⁶¹ Although to date the use of the nondefense power has not threatened stability or rule-of-law norms, it bears considering whether we may see an increase in its use that is genuinely unsettling if, as Richard Pildes has argued, the hyperpolarization of our democracy is not “temporary or aberrational,” but “likely to be enduring.”³⁶² On the other hand, in an era of increasing partisanship, an additional set of voices on constitutional questions may serve as a release valve against hyperpolarized legislating.³⁶³

This observation might seem to lend support to Professor Meltzer’s concern that nondefense (or at least routine nondefense) threatens to elide the distinction between law and politics;³⁶⁴ the logic, presumably, is that executive branch officials will base their proffered “constitutional” views more on political exigency than genuine principle. But as Professor Jefferson Powell has convincingly argued, “policy and principle, politics and law, are not rigid, mutually exclusive categories.”³⁶⁵ So long as executive officials seek in good faith to engage in genuine interpretation of what the Constitution requires, the fact that their interpretive approaches are not identical to those engaged in by judicial actors does not render them illegitimate, or purely political.³⁶⁶

have the courage of his convictions and execute not only the statute, but do it consistent with his view of the Constitution.” Transcript of Oral Argument at 12, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 1232726, at *12. But Huq fails to fully acknowledge how radical a step nonenforcement is: An executive who chooses not to enforce the law is cutting both of the other branches out of the process altogether, asserting the sole power to engage in constitutional interpretation.

361. Or at least part of the executive branch, for as we have seen state executive branches can be populated by elected officials from more than one party.

362. Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 *Calif. L. Rev.* 273, 276 (2011).

363. *Id.* Pildes’s focus is on Congress, rather than state legislatures, but his larger claim that hyperpolarization is the new normal—“the maturation or full realization of American democracy,” *id.* at 333—is not so limited. Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *Harv. L. Rev.* 2312, 2385–86 (2006) (arguing party dynamics are more important organizing principle in contemporary political culture than interbranch dynamics, and urging recognition of that reality as critical “as we come to terms with an emerging equilibrium of ideologically coherent and polarized political parties”).

364. Meltzer, *supra* note 10, at 1228–29.

365. Powell, *supra* note 276, at 385.

366. Cf. Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 *Geo. L.J.* 373, 375 & n.7 (1994) (expressing doubts about “distinctions between law and politics and between Constitution and policy preference”); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 *Colum. L. Rev.* 665, 715 (2012) (“Constitutional law operates at the intersection of law and the political order . . .”).

In addition, even if there is genuine danger that in engaging in nondefense, executive branch officials will simply package partisan positions in constitutional wrapping, courts will still provide a check: In the schemes surveyed above, states have devised a range of methods to ensure that a robust nondefense power does not necessarily assert “political-branch power to have the last word on constitutional meaning.”³⁶⁷ Rather, when paired with an effective mechanism to preserve judicial review, nondefense can ultimately facilitate and perhaps even improve courts’ constitutional decisionmaking.³⁶⁸ Nondefense can invite more robust arguments by third parties, signal the strength of various positions, and perhaps even reduce potential backlash risk from striking down a statute, because the executive has already paved the way—allowing courts to engage in less constrained constitutional interpretation.

Even putting to one side the normative desirability of a regime in which state executives choose to engage in some degree of nondefense, this Article has aimed to provide both a framework and new descriptive material for thinking about an undertheorized phenomenon. There remains much work to be done in the state context, and future writing on executive nondefense in the federal system would do well to consider these lessons from the states.

367. Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 *Mich. L. Rev.* 676, 681 (2005).

368. See, e.g., Gerken, *supra* note 357, at 1749 (describing “traditional Millian view that exposure to a wide range of views improves the quality of our decisions”).