

# THE YALE LAW JOURNAL

NEAL DEVINS & SAIKRISHNA BANGALORE PRAKASH

## Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty To Defend

**ABSTRACT.** Whether a state attorney general has a duty to defend the validity of state law is a complicated question, one that cannot be decided by reference either to the oath state officers must take to support the federal Constitution or the supremacy of federal law. Instead, whether a state attorney general must defend state law turns on her own state's laws. Each state has its own constitution, statutes, bar rules, and traditions, and not surprisingly, the duties of attorneys general vary across the states. To simplify somewhat, we believe that there are three types of duties. One set of attorneys general has a duty to defend state law against state and federal challenges, while a second group has no duty to defend state law in such scenarios. A third cohort of attorneys general has a power (and in some cases a duty) to attack state statutes of dubious validity. They may (or must) proactively file suit to obtain judicial resolution of constitutional questions. Given that these duties vary across the states, politicians (including attorneys general) who blithely conclude that all state attorneys general must defend all state laws or, conversely, that all may refuse to defend whenever they believe a state law is unconstitutional evince a lamentable indifference to the power of states to craft an office that suits their particular needs. As the same-sex marriage debate reveals, categorical statements about whether state attorneys general must (or must not) defend bars on same-sex marriage are usually little more than self-serving sound bites from elected, politically ambitious attorneys general, intended for constituents focused on policy outcomes rather than legal questions. With Democrats and Republicans squarely divided on issues like same-sex marriage, gun control, and campaign finance, we predict that attorneys general will increasingly seek political advantage by refusing to defend (or insisting on the defense of) laws that divide the parties. We also foresee that failures to defend will be especially likely to occur in states where the attorney general is of a different political party than the governor, legislature, or the preceding attorney general.

**AUTHORS.** Neal Devins: Goodrich Professor of Law and Professor of Government, College of William and Mary. Saikrishna Bangalore Prakash: James Monroe Distinguished Professor of Law & Horace W. Goldsmith Research Professor, University of Virginia Law School. Thanks to Adam Adler, Emily Barnet, Rachel Bayefsky, John Harrison, Jonathan Mitchell, Kevin Newsom, and Kate Shaw for helpful comments and conversations. Thanks to the student participants in the *Yale Law Journal's* Contemporary Legal Scholarship Reading Group. Thanks to Jared Kelsen, Kevin MacWhorter, and Alexander Viana for research assistance. Thanks to the wonderful research librarians at the University of Virginia Law School & Paul Hellyer at the William and Mary Law School. We are grateful for summer research grants that funded work on this piece.



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**INTRODUCTION**

Increasingly, state attorneys general<sup>1</sup> are declining to defend state laws on the grounds that those laws transgress the federal and state constitutions.<sup>2</sup> With their prominent refusals to defend state bans on same-sex marriage, Democratic attorneys general seem to be at the vanguard of the movement.<sup>3</sup> But in fact they have good company, for their Republican counterparts have refused to defend other state laws.<sup>4</sup>

Justifications for these failures to defend state law have been unsophisticated. Attorneys general who have declined to defend state prohibitions on same-sex marriage sometimes have done little more than echo arguments made by U.S. Attorney General Eric Holder in connection with his refusal to defend the federal Defense of Marriage Act (DOMA).<sup>5</sup> State anti-same-sex marriage laws are unconstitutional, say these attorneys general, and so defenses of them are unnecessary and perhaps even impermissible.<sup>6</sup> Meanwhile, criticism of these nondefenses has been equally shallow. Detractors, including several Republi-

1. Unless otherwise noted, future references to “attorneys general” are limited to state attorneys general.
2. See Matt Apuzzo, *Holder Sees Way To Curb Bans on Gay Marriage*, N.Y. TIMES, Feb. 24, 2014, <http://www.nytimes.com/2014/02/25/us/holder-says-state-attorneys-general-dont-have-to-defend-gay-marriage-bans.html> [<http://perma.cc/T2CM-PUPD>] (noting that attorneys general in California, Illinois, Nevada, Oregon, Pennsylvania, and Virginia have all refused to defend bans on same-sex marriage); Niraj Chokshi, *Seven Attorneys General Won't Defend Their Own State's Gay-Marriage Bans*, WASH. POST: GOVBEAT (Feb. 20, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/02/20/six-attorneys-general-wont-defend-their-own-states-gay-marriage-bans> [<http://perma.cc/6WYZ-AMMX>] (same).
3. See Apuzzo, *supra* note 2.
4. See, e.g., Laura Vozzella, *Cuccinelli Won't Defend School Take-Over Law Championed by McDonnell*, WASH. POST, Sept. 3, 2013, [http://www.washingtonpost.com/local/virginia-politics/cuccinelli-wont-defend-school-take-over-law-championed-by-mcdonnell/2013/09/03/af8469b8-14fb-11e3-880b-7503237cc69d\\_story.html](http://www.washingtonpost.com/local/virginia-politics/cuccinelli-wont-defend-school-take-over-law-championed-by-mcdonnell/2013/09/03/af8469b8-14fb-11e3-880b-7503237cc69d_story.html) [<http://perma.cc/ERB3-XDSG>] (describing the Virginia Attorney General's decision not to defend state statute on the grounds that it was unconstitutional). For additional discussion, see *infra* note 155, 161.
5. Letter from Eric H. Holder, Jr., Att'y Gen. of the United States, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), <http://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> [<http://perma.cc/L3XM-6VDC>].
6. See, e.g., Timothy Williams & Trip Gabriel, *Virginia's New Attorney General Opposes Ban on Gay Marriage*, N.Y. TIMES, Jan. 23, 2014, <http://www.nytimes.com/2014/01/24/us/new-virginia-attorney-general-drops-defense-of-gay-marriage-ban.html> [<http://perma.cc/F7WP-87TM>] (“I cannot and will not defend a law that violates Virginians’ fundamental constitutional rights. . . . [To do so] would be a violation of the law and my oath.”).

can attorneys general, often have done no more than parrot criticisms leveled against Holder, intoning platitudes that shed little light on the legal questions.<sup>7</sup>

The acute split among the attorneys general is predictable; the absence of clear law and the abundance of politics account for the divide. When it comes to law, state constitutions and statutes generally do not reference a duty to defend, often leaving the duty to arise (or not) from norms or structural inference. Moreover, the interplay of federal and state law gives state attorneys general great latitude. To justify a failure to defend state statutes, attorneys general can cite their oaths to support the federal and state constitutions.<sup>8</sup> To rationalize vigorous defenses of state laws, attorneys general can exploit the sense that they must make any plausible argument for their “client,” the state. They also can invoke “rule of law” rhetoric, insisting that picking and choosing which state laws to defend is lawless.

If law seems to place few clear constraints on the state attorneys general, politics accounts for the divergence between those who emulate and those who shun Holder’s example. State attorneys general have different incentives than

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7. *Holder Gives Nod to State AGs To Drop Defense of Gay Marriage Bans Amid Court Challenges*, FOX NEWS, Feb. 25, 2014, <http://www.foxnews.com/politics/2014/02/25/holder-gives-nod-to-state-ags-to-drop-defense-gay-marriage-bans-amid-court> [http://perma.cc/8P5U-TU3P] (“A state attorney general has a solemn duty to the state and its people to defend state laws and constitutional provisions against challenge under federal law. To refuse to do so because of personal policy preferences or political pressure erodes the rule of law on which all of our freedoms are founded. A government that does not enforce the law equally will lead our society to disrespect the rule of law.” (quoting a statement by Alabama Attorney General Luther Strange)).

8. See, e.g., CAL. CONST. art. 20, § 3 (“I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.”); N.Y. CONST. art. 13, § 1 (“I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of [attorney general], according to the best of my ability . . . .”); TEX. CONST. art. 16, § 1(a) (“I, \_\_\_\_\_, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of [attorney general] of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God.”); VA. CONST. art. II, § 7 (“I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the Commonwealth of Virginia, and that I will faithfully and impartially discharge all the duties incumbent upon me as [attorney general], according to the best of my ability (so help me God).”); 15 ILL. COMP. STAT. ANN. § 205/1 (West 1990) (“I do solemnly swear (or affirm, as the case may be), that I will support the constitution of the United States and the constitution of the state of Illinois, and that I will faithfully discharge the duties of the office of attorney general, according to the best of my ability.”).

attorneys in the Department of Justice (DOJ). As we have argued elsewhere, DOJ attorneys insist upon a duty to defend both to increase their influence in intrabranched legal disputes and to curry favor with the courts by exalting judicial superiority in constitutional matters.<sup>9</sup> The duty to defend bolsters the status and independence of DOJ lawyers, and so they cling to it.

In contrast, almost all state attorneys general are elected politicians, and many seek higher office.<sup>10</sup> Because they generally are not long-term players before the courts, they are less likely to genuflect before them. They would rather curry favor with those who might back their aspirations for higher elected office. Sometimes an attorney general can endear herself to an electoral block by refusing to defend a reviled state statute. In other contexts, the attorney general's electoral coalition might insist upon a spirited defense of a controversial statute, particularly when it fought for its passage. These are among the considerations that weigh on attorneys general and that shape their decisions to defend (or not to defend).

We wish to tell a tale of law and politics and, in the process, to shed light on the duty to defend at the state level. With respect to law, we think the current debate obscures vital duty-to- defend questions and pays too little attention to the rich differences found across state constitutions, statutes, bar rules, and norms.<sup>11</sup> The debate about state-level duties to defend, because it is so enmeshed with the federal constitutionality of state same-sex marriage bans, has left obscured two related questions. First, do attorneys general have a duty to defend state law, either statutes or constitutions, when there is an alleged conflict with *federal statutes or treaties*? After all, federal statutes and treaties are no less supreme over state law than is the Constitution.<sup>12</sup> Second, must attorneys general defend state statutes when there is an alleged conflict with the *state constitution*?

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9. Neal Devins & Saikrishna Prakash, *The Indefensible Duty To Defend*, 112 COLUM. L. REV. 507, 538 (2012).

10. See NAT'L ASS'N OF ATTORNEYS GEN., STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 12 (Emily Myers ed., 3d ed. 2013) (noting that the attorney general is popularly elected in forty-three states); Colin Provost, *When is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS 597, 604 (2009) (reporting that about fifty-four percent of attorneys general who began their service between 1988 and 2003 eventually ran for higher office).

11. For example, while forty-three states popularly elect their attorneys general, others fill the office by appointment. Attorneys general are appointed by the governor in Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming; by the legislature in Maine; and by the state supreme court in Tennessee. See *id.* For additional discussion, see *infra* Part II.A.

12. U.S. CONST. art. VI, cl. 2 (declaring all laws made pursuant to the Constitution, and "all Treaties made . . . under the Authority of the United States," to be "the supreme Law of the Land").

We believe that the answers to these questions must be found in state law, as can the resolution of the question whether state attorneys general may (or must) defend state laws from federal constitutional challenge. In other words, state law determines the stance that attorneys general may (or must) take when considering whether one form of law supersedes another. Although federal statutes empower attorneys general in limited ways, they neither impose nor forbid a duty to defend the validity of state law. Much the same can be said of the Constitution. Neither the Supremacy Clause nor the constitutional oath of support details the powers and duties of state officers, including attorneys general. Federal law neither bars states from imposing a duty to defend nor obliges attorneys general to refuse to defend state law.

Yet the federal Constitution is not entirely immaterial. We believe that it implicitly bars states from discriminating against federal law. If state law dictates that an attorney general may (or must) refuse to defend state statutes from state constitutional challenges, then she may (or must) decline to defend state statutes from federal constitutional challenge. This rule against discrimination still leaves states in the driver's seat when it comes to the duty to defend.<sup>13</sup>

Looking to actual state law, we see three general approaches.<sup>14</sup> First, some attorneys general have a duty to defend state law. This duty exists even if the attorney general privately believes that some higher law supersedes. As one might expect, this duty plays out differently across the states. Some attorneys general have a relatively absolute obligation, while others face a more nuanced duty. Second, other attorneys general lack a duty to defend. Even when a reasonable defense exists, such attorneys general may decline to defend a state law based on their considered legal judgment that it is more-likely-than-not preempted by a superior law, be it the Constitution, statutes and treaties of the United States, or the state constitution. Third, some attorneys general have power to file suit and seek an authoritative judicial pronouncement on the validity of a state law. For some attorneys general, this is a discretionary authori-

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13. In previous work, we argued that the federal Constitution never imposed upon the President a duty to defend the constitutionality of federal statutes in litigation. Grounding our argument on text, structure, history, and the current realities of federal litigation, we labeled the duty to defend “indefensible.” See Devins & Prakash, *supra* note 9. Our claim about the federal Constitution and the duties of the federal executive did not imply that state-level duties to defend were not grounded in law or were somehow indefensible. We did not discuss the issue of whether states had imposed a duty to defend on their attorneys general.

14. We discuss these different approaches in greater detail *infra* Part II.B. We previously documented the way in which the federal approach to the duty to defend has changed in rather dramatic ways over time. See Devins & Prakash, *supra* note 9, at 513-21. If the federal government's approach has changed over time, it should hardly be surprising that, at a particular moment in time, states might have divergent stances towards the duty.

ty, a power to be exercised after a consideration of sound policy, resource constraints, and politics. For others in this third cohort, it is a mandatory duty. They must file suit to contest the validity of a state statute when they conclude that a constitution, federal or state, is inconsistent with the statute. In other words, some attorneys general have a *duty to attack* state statutes of dubious validity, with the courts serving as final arbiters of constitutionality.<sup>15</sup>

Our political yarn seeks to explain why the duty to defend issue has exploded recently and to predict what is in store for the future. In states with stable political coalitions (what we call red and blue states),<sup>16</sup> voter preferences, attorney general priorities, and state law generally align. In these states the duty-to-defend issue rarely will trigger a tempest. Refusals to defend, when they arise, likely will mirror a shift in public opinion and are likely to be popular with the dominant party (for example, the shift to support same-sex marriage in blue states). By contrast, controversies over the duty to defend are most likely to arise in politically volatile “purple” states, where the political and constitutional views of the attorney general are more likely to diverge from those of the legislature or the governor. In purple states, refusals to defend will simultaneously win favor with the attorney general’s political base and spark uproar among her political opponents. Rising party polarization is also a crucial part of the story because in recent decades, Democratic and Republican lawmakers have embraced fundamentally different stances on abortion, same-sex marriage, gun control, and several other issues. Decisions not to defend certain state laws now represent another way to cater to an increasingly polarized base.

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15. The contours of what constitutes a defense of state law—and, by implication, a nondefense of state law—are hardly self-evident. The duty to defend and its antipode, the duty to attack, can be conceived as forming a continuum of stances. On one end would be a duty to defend vigorously the validity of state law against claims of supersession, even in the face of judicial opinions that seem to render the state law invalid. At the other extreme would be a duty to vindicate the federal and state constitutions and file suit forcefully challenging the validity of state law whenever its validity seems even slightly dubious to the state attorney. In between these poles would be a discretionary power to choose either to defend state law or concede its invalidity, a duty to defend state law whenever there is not a supreme court opinion, federal or state, on point, and a duty to defend whenever there is a plausible argument in favor of the validity of state law. See Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 259-63 (2014). Because we seek to quantify instances of nondefense in the states, we adopt a particular understanding of nondefense of state law. See *infra* note 114.

16. Our use of “red states,” “blue states,” and “purple states” does not track the ways in which states vote in presidential elections. Instead, we use these terms to refer to the partisan composition of *state* offices, legislative and executive. We use the term “purple states” to signify states that frequently experience divided party control of those branches. Similarly, we use the phrase “red states” to mean states where Republicans typically control the executive and legislative branches. Finally, we use “blue states” to refer to states whose political branches generally are controlled by Democrats.

Going forward, we anticipate that more attorneys general will decline to defend state laws. Lacking a strong bureaucratic constituency that favors the duty to defend and buffeted by demands from constituent groups who detest some state law, attorneys general will increasingly succumb to the temptation to curry favor with members of their electoral coalition. For good or ill, the duty to defend is likely to become something of a rhetorical tool that attorneys general will trot out when they wish to defend state law and toss aside in favor of talk of oaths and federal supremacy when they prefer not to defend state law.

Part I argues that state law is supreme in defining a state attorney general's potential duty to defend. Part II surveys state law, revealing a multiplicity of approaches, a pattern hardly unusual in a federal system. Part III discusses the differing incentives of the attorneys general and their federal counterpart. Part IV speculates about the future of the duty to defend at the state level.

## I. THE SUPREMACY OF STATE LAW

Each attorney general is bound by two legal regimes—federal and state. Theoretically, either regime might grant an attorney general discretionary power to acknowledge the invalidity of state law when confronted with a legal challenge to its validity. Either might compel attorneys general to defend (or refuse to defend) state law. Yet despite the possibility that federal law might have something to say about state-level duties to defend, we conclude that in practice, state law is supreme when it comes to the powers and duties of state attorneys general. The authorities and obligations of attorneys general arise almost entirely from state law, and federal law plays but a minimal role.

At the outset we note that the question whether a state attorney general has a duty to defend state law is more intricate than the question whether the federal executive has a duty to defend federal statutes. While only the Constitution supersedes inconsistent federal statutes, state law must contend with more species of superior law. Besides the federal Constitution, federal statutes and treaties also may invalidate state law. Additionally, in the case of state statutes, state constitutions trump as well. At the state level, the duty-to-define issue must be considered with respect to each type of superior law.

### A. *The Relative Unimportance of Federal Law*

As a conceptual matter, federal law might empower or oblige state officers in a variety of ways. In fact, however, neither the Constitution nor federal statutes empower or oblige attorneys general to concede the invalidity of a chal-



lenged state law.<sup>17</sup> We first discuss authority—whether federal law grants attorneys general a discretionary power to concede the invalidity of state law. Then we turn to duty—whether federal law obliges attorneys general to concede the invalidity of state law.

We begin with the Constitution. Although Article I, Section 10 mentions certain actions that the states may take with congressional approval, it manifestly limits states rather than empowering them: each clause begins, “No state shall . . . .”<sup>18</sup> Rather than granting power, it assumes its existence and proceeds to limit it.<sup>19</sup> Moreover, though the Constitution mentions high state officials (judges,<sup>20</sup> legislators,<sup>21</sup> and “the executive Authority”<sup>22</sup>) and their roles in the federal system, it never mentions attorneys general in particular, much less grants them any power. We therefore believe that the Constitution is indifferent to whether a state has an “attorney general” at all. We further suppose that the Constitution is generally agnostic about the powers of attorneys general, just as it is about the authority that states choose to vest in lieutenant governors, superintendents of public instruction, and cities. Admittedly, the Constitution is not wholly silent on these issues. For instance, we think that no state could grant its governor (or its attorney general) the power to pardon federal offenses because the Constitution is best read as granting such power exclusively to the President.<sup>23</sup> Likewise, no state may grant its legislature the power

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17. We do not know of anyone who supposes that any species of federal law addresses whether state attorneys general may, must, or must not defend state statutes from state constitutional challenges, or who asserts that federal law somehow requires attorneys general to defend state law when confronted with a federal challenge. We don’t discuss these possibilities in this Part.
  18. See, e.g., U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation . . . .”); *id.* art. I, § 10, cl. 2 (“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . . .”). A few constitutional provisions are exceptional. See *id.* art. I, § 4, cl. 1 (instructing states to prescribe the time, place, and manner of elections for senators and representatives); *id.* art. II, § 1, cl. 2 (empowering states to decide the manner in which presidential electors are selected).
  19. The Tenth Amendment is not to the contrary. In stating that the powers not delegated to the federal government nor prohibited to the states are reserved to the states or the people, the Amendment does no more than suggest that there likely are powers not delegated to the federal government. The Amendment does not suggest that the Constitution itself delegates significant powers to the states. See *id.* amend. X.
  20. See *id.* art. VI, cl. 2 (binding “the Judges in every State” to the “supreme Law of the Land”).
  21. See, e.g., *id.* art. V (empowering state legislatures to demand a constitutional convention).
  22. See *id.* art. IV, § 2, cl. 2 (referring to the role of the executive in demanding return of fugitives); *id.* art. IV, § 4 (referring to the role of the executive in applying for aid “against domestic Violence”).
  23. See *id.* art. II, § 2, cl. 1 (“The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”).

to make laws for the District of Columbia because federal legislative power over the District is exclusive.<sup>24</sup> But while the Constitution bars states (and state officers) from exercising certain powers reserved to the federal government, it does not purport to specify the affirmative authority attached to state offices.<sup>25</sup> Given this absence of such affirmative grants of power, and given that the Constitution does not more generally empower states or their officers, we think it certain that the Constitution does not grant attorneys general a discretionary power to concede the invalidity of state law.

Even though federal statutes reference attorneys general, they are indifferent to whether these state officials have authority to concede the invalidity of state law. Federal law mentions attorneys general in different contexts: authorizing them to bring suit to vindicate federal law; ensuring that federal statutes are not construed to authorize suits against them; and requiring federal courts to notify them of federal suits challenging the constitutionality of state law.<sup>26</sup> Yet no federal statute purports to empower attorneys general to concede that federal law trumps a state law. The absence of any such statute makes sense, for Congress can rely upon federal or private attorneys to argue that federal law supersedes state law,<sup>27</sup> leaving the merits to the courts.

If the Constitution and federal statutes do not grant attorneys general a discretionary power to concede the invalidity of state law, then do these sources

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24. See *id.* art. I, § 8, cl. 17 (granting Congress “exclusive” jurisdiction over a capital district to be created).
  25. To be clear, we admit that when the Constitution grants a power or imposes a duty upon a state and the state delegates the power or duty to its attorney general, the Constitution does bear on the power or duty. For instance, the Constitution seems to impose an obligation on a state’s “executive Authority” to return fugitives of justice. See *id.* art. IV, § 2, cl. 2. If a state saw fit to delegate implementation of that duty to its attorney general, then the attorney general would be constrained by the Constitution in fulfilling that duty. As noted in the text, however, we deny that the Constitution itself grants a power (or imposes a duty) related to conceding the invalidity of state law.
  26. See, e.g., 15 U.S.C. § 1477 (2012) (authorizing state attorneys general to bring suits to enforce regulations related to the packaging of hazardous substances); 49 U.S.C. § 14711(a) (2012) (authorizing state attorneys general to enforce the consumer protection provisions of the interstate transportation code); 15 U.S.C. § 6309(e) (2012) (declaring that the chapter does not authorize enforcement of any of its provisions against “the chief legal officer of any State”); 28 U.S.C. § 2403(b) (2012) (requiring notification of state attorney general when state law is challenged as unconstitutional).
  27. For the claim about federal lawyers, see Letter from Eric H. Holder, Jr. to John H. Boehner, *supra* note 5 (noting “the Department [of Justice] has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense”). The claim about private lawyers rests on the commonsense notion that private lawyers will make arguments that advance their interests, including claims that some federal law supersedes state law. Devins & Prakash, *supra* note 9, at 538-41 (noting that federal attorneys usually defend the constitutionality of federal laws).

of law nonetheless *oblige* them to admit such invalidity? Although the analysis is more complicated and although the claims of supposed federal obligation have a surface plausibility, the answer is “no.”

Two portions of the Constitution might cause some to imagine that the federal Constitution sometimes requires attorneys general to act as neutral arbiters of the interplay of state and federal law and concede the invalidity of the former. First, the Supremacy Clause might require state executives sometimes to concede the invalidity of state law because failure to do so would be inconsistent with the supremacy of federal law. Second, the oath to “support” the Constitution might compel state executives to decline to defend the validity of state laws that are of dubious validity. We don’t believe either argument has merit.

The Supremacy Clause does not oblige attorneys general to decline to defend state law whenever they conclude that state law is more-likely-than-not inconsistent with federal law. The bare fact that federal law is supreme over state law tells us nothing about what federal and state personnel must do as a means of ensuring that supremacy. With respect to attorneys general, federal supremacy tells us nothing about whether these state officials must refuse to defend the validity of state law whenever they believe that federal law likely renders the state law invalid.

Consider a parallel case. Everyone infers that the Constitution is supreme over contrary federal statutes and treaties; indeed, this principle goes back to the nation’s founding.<sup>28</sup> Yet we know of no one who supposes that the implicit supremacy of the Constitution over contrary federal statutes, by itself, requires all members of the federal bureaucracy to concede (or declare) that federal statutes are unconstitutional whenever such personnel believe that federal statutes are more likely than not to be unconstitutional.<sup>29</sup> Again, the supremacy of certain laws within a regime does not establish, by itself, the duties that bureaucrats have, much less that all of them have the authority to ignore a subset of laws on the grounds that they believe them to be inconsistent with higher law. We don’t think a GS-1, step one (the lowest rung for federal employees)

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28. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803) (“It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it . . . .”); see also Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 901, 915 (2003) (noting instances where Founders declared that statutes contrary to constitutions would be void).

29. While we have elsewhere denied that the federal executive has a duty to defend federal statutes, we do not believe that the supremacy of the Constitution, by itself, forbids the federal executive from advancing insincere arguments in defense of federal statutes. See Devins & Prakash, *supra* note 9.

has an obligation, stemming from the Supremacy Clause, to disobey federal statutes she believes to be unconstitutional.<sup>30</sup>

Of course, the Supremacy Clause does single out certain officials – namely, state judges.<sup>31</sup> Like others, we think “Judges in every State” is a reference to state judges (rather than federal judges who might hold court in states).<sup>32</sup> Binding state judges to supreme law means that in deciding cases, they should ignore state constitutions or laws that are contrary to supreme law.<sup>33</sup> But that particular duty conspicuously does not extend to all state personnel. The text does not conscript state executives (including attorneys general) to judge independently whether supreme law trumps contrary state law and then act on the supreme law in the course of their duties. We believe one can draw a negative inference using the *expressio unius* maxim<sup>34</sup>: the imposition of a duty on a particular set of state officers (state judges) suggests that other state officers are not so burdened, at least not by the Constitution.

Perhaps the more plausible source of a federal constitutional duty to concede the invalidity of state laws is the oath of “support,” something that the Constitution requires of all state officers.<sup>35</sup> In its first act, Congress carried into execution this obligation, commanding each state officer to “solemnly swear that [she] will support the Constitution of the United States.”<sup>36</sup> Some might

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30. Admittedly state attorneys general are different than run-of-the-mill federal bureaucrats. But for these purposes, our point is simply that supremacy of one set of laws over another set does not, by itself, establish who may do what to vindicate that supremacy.
  31. U.S. CONST. art. VI, cl. 2 (“[T]he Judges in every State shall be bound [to the supreme laws of the land], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).
  32. See Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1034 n.129 (2005) (claiming that this is the “conventional view”).
  33. See Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2011-12 (1993).
  34. Application of the *expressio unius* maxim to the Constitution stretches back to the founding. See, e.g., THE FEDERALIST NO. 83, at 421 (Alexander Hamilton) (Garry Wills ed., 1982) (noting that the Constitution’s opponents had invoked it); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 624 (1833) (concluding that the list of qualifications for legislative office is exclusive). For a more recent invocation, see *Marx v. General Revenue Corp.*, 133 S.Ct. 1166, 1181 (2013) (Sotomayor, J., dissenting) (applying the canon of construction).
  35. U.S. CONST. art. VI, cl. 3 (requiring state officers to “be bound by Oath or Affirmation, to support this Constitution”). For discussion of the oaths state officers take to support their state constitutions, see *infra* notes 106-108 and accompanying text.
  36. An Act To Regulate the Time and Manner of Administering Certain Oaths ch. 1, 1 Stat. 23 (1789) (codified as amended at 4 U.S.C. § 101 (2012)). For an insightful discussion of whether the oath empowers state officeholders to act independently on their interpretations of the federal Constitution, see Norman Williams, *Executive Review in the Fragmented Execu-*

imagine that if an attorney general defends the federal constitutionality of a state law she subjectively views as unconstitutional, she contravenes her obligation to “support” the federal Constitution.<sup>37</sup> After all, by defending state law that she believes is unconstitutional, doesn’t she undercut (rather than support) the Constitution?

We believe that this reading crams too much into the supportive oath.<sup>38</sup> This oath does not demand that attorneys general decline to defend state law (or concede its invalidity) whenever they personally conclude that a state law is unconstitutional. More generally, the supportive oath never requires attorneys to shed their ordinary role of advancing the interests of their states (whether that refers to state officials or to the people) and instead only act on the “best” reading of the law.

The folly of reading a duty to concede into the supportive oath comes into focus when we consider its collateral consequences. First, if the oath requires attorneys general to confess that the federal Constitution supersedes state law, the same confessionary onus applies equally to federal statutes and treaties. After all, the Constitution makes federal statutes and treaties supreme over contrary state law.<sup>39</sup> If supporting the Constitution requires candid confessions that it trumps state law whenever an impartial and professional legal judgment leads to that conclusion, then it likewise compels confessions that federal statutes and treaties trump state law. And yet we rather doubt that *any* attorney general regularly adopts the stance of being a purely disinterested arbiter of the interplay between federal and state law. More generally, we doubt that *any* state attorney, at whatever level in state bureaucracies, acts as if she must neutrally referee the supposed conflicts of state and federal law. For good reason,

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*tive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565 (2006). For additional discussion (including our critique of other aspects of Williams’s analysis), see *infra* text accompanying note 58.

37. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 257-60 (1994). Although Paulsen makes much of the supportive oath in his quest to show that the President enjoys independent authority to decide the Constitution’s meaning, he ultimately lays greater emphasis on the more plausible (and correct) claim that the President’s unique oath implies interpretive independence. See *id.* at 261.
38. We note that there is a long history of making too much of supportive oaths. In *Marbury v. Madison*, Chief Justice Marshall tried to derive judicial review from the oath. See 5 U.S. (1 Cranch) 137, 180 (1803) (arguing that the oath to perform duties in accordance with the Constitution obliges judicial enforcement of the Constitution). But there has also been a long history of denying such claims. See, e.g., *Eakin v. Raub*, 12 Serg. & Rawle 330, 352 (Pa. 1825) (“The oath to support the constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty . . .”).
39. U.S. CONST. art. VI, cl. 2 (declaring all laws made pursuant to the Constitution, and all treaties made under the authority of the United States, to be the supreme law of the land).

no one, as far as we can tell, believes the supportive oath has such far-reaching implications.

Second, because the Constitution trumps inconsistent federal statutes, the broad reading of the supportive oath would require all federal executives, including U.S. attorneys, the Attorney General and the Solicitor General, to concede that the Constitution trumps a federal statute or treaty whenever they have personally concluded that the latter was more-likely-than-not inconsistent with the Constitution. Though we have vigorously denied that the federal executive has a duty to defend, we never cited the Constitution's supportive oath as a reason why the federal executive lacks such a duty.<sup>40</sup> More significantly, because the conventional wisdom imagines that the federal executive has a duty to defend the constitutionality of federal statutes (that is, to advance any plausible or reasonable arguments in their defense), advocates of this conventional view must imagine that the supportive oath *does not require* all federal attorneys to act on their professional judgment that a federal statute is likely unconstitutional. In other words, if one supposes that the federal executive has a duty to defend federal statutes, then one must necessarily conclude that the supportive oath does not obligate the executive to concede the invalidity of a federal statute whenever the executive concludes that the statute is likely constitutional.

Third, governmental attorneys would not be the only ones forced to confess. *Thousands of litigators* would be duty-bound to yield arguments because many state bars require their members to "support" the Constitution.<sup>41</sup> The Supreme Court (and many federal courts) requires bar members to take an oath of support.<sup>42</sup> Yet no one imagines that such lawyers are barred from advancing a viable argument in favor of the validity of state law merely because that lawyer personally concludes that federal law more likely than not trumps the state law in question. Relatedly, no one supposes that such lawyers are barred from advancing a viable argument in favor of the constitutionality of a federal statute merely because the lawyer personally concludes that the federal statute is unconstitutional. Private lawyers routinely and properly oppose the

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40. Our argument against the duty to defend at the federal level turned on the unique attributes of the President and not on the federal oath of support. See Devins & Prakash, *supra* note 9, at 521-22.

41. See, e.g., N.Y. CONST. art. XIII, § 1 (as required by N.Y. JUD. LAW § 466 (McKinney 1960)) ("I do solemnly swear (or affirm) that I will support the constitution of the United States . . ."); CAL. BUS. & PROF. CODE § 6067 (West 1939) ("Every person on his admission shall take an oath to support the Constitution of the United States . . ."); see also Carol Rice Andrews, *The Lawyers' Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3, 44-49, n.292 (2009) (claiming that twenty-one states require oaths of support to the Constitution).

42. *Id.* at 48-49 & n.293 (noting that Supreme Court requires an oath of support to the Constitution and that the oath is the "prevailing" one in federal courts).

preemption of state law even though they may privately suppose that federal law actually supersedes the state law. Such lawyers also routinely argue in favor of the validity of a federal statute even when they privately believe it is unconstitutional.

To our knowledge, no one has ever argued that all attorneys who have taken a supportive oath must be so candid as to confess their private view that some law is more-likely-than-not invalid. In part this may reflect the fact that the claim would require sweeping and breathtaking changes in practice. But it also likely reflects the commonsense view that an oath of support simply does not regulate the arguments that lawyers make on behalf of their clients in court.

To be clear, we don't cite current understandings and practices as *proof* of our claim that the oath does not regulate the arguments that attorneys make in court. Yet if no one has read the supportive oath as requiring confessions of supersession of the sort described above, and no one who has taken the supportive oath believes that they always must act as disinterested arbiters of supersession, surely those facts strongly suggest that the supportive oath likely does not require concessions and disinterestedness on the part of state attorneys.

Summing up, we do not believe the federal oath of support commandeers all oath takers, public and private, requiring each to engage in constitutional and statutory interpretation, disinterestedly analyze questions of supersession, and then act consistent with the results. With astonishing frequency, state attorneys would be forced to confess the preemption of state law, usually citing a federal statute as the cause. Somewhat less often (but far, far more often than now), federal attorneys would have to acknowledge the unconstitutionality of federal statutes and treaties. Finally, private attorneys would have to concede that federal law preempted their client's plausible state law claims and defenses, including claims and defenses that might have convinced the court to rule in their client's favor. And all these concessions and confessions would arise from a shadowy implication of the oath to "support" the Constitution.

In our view, the supportive oath does not even bar oath takers from making frivolous legal arguments. Again, while one might conclude that advancing insubstantial arguments to support the validity of some state or federal law would undermine (and not "support") the Constitution, a legal system may well rest on the belief that lawyers should advance whatever arguments (frivolous or otherwise) they believe are in the best interests of their clients, leaving the courts to sort through them and discern the proper outcome. This system would esteem the adversarial system and evince faith in the courts to hear arguments from all sides and reach the best result. Our Constitution permits such a system because it never sets a "plausibility threshold" for legal arguments, even for those who take an oath to support it. The familiar (and, we

think, useful) bar on making frivolous arguments before courts arises from subconstitutional law<sup>43</sup> and not from the oath to support the Constitution.

The duty to support the federal Constitution is meaningful without being transmogrified to encompass a duty to concede or a duty to decline to defend. Rather than requiring concessions as a gesture of “support,” the oath requires loyalty to the Constitution and the government it establishes. Oath takers must be faithful to the Constitution and ensure that they do not transgress it. Legislators should oppose bills that violate the Constitution; governors wielding a veto pen should thwart unconstitutional bills rather than sign them into law; and the police should respect the constitutional rights of those they investigate.

All told, nothing in the Constitution, either explicitly or implicitly, obliges all governmental attorneys (federal and state) to concede the invalidity of some law (or decline to defend its validity) merely because those attorneys personally conclude that the law is likely superseded by some higher species of law. The Constitution generally does not constrain the arguments that governmental attorneys make in court.

As a matter of constitutional structure, the absence of a federal duty for state attorneys general to concede the invalidity of state law makes sense. Our Constitution’s federalism, resting on the notion that states may check the aggrandizing impulses of the federal government,<sup>44</sup> presupposes that states, through their officers, might contest the constitutionality of federal statutes and treaties. Foisting upon state officials a duty to concede the invalidity of state law or a duty to refuse to defend state law would go a long way towards eviscerating this check. It would convert every state attorney into a defender of federal law, forcing them to admit that state statutes and constitutions are unconstitutional. Moreover, such a duty also would require state attorneys to concede that federal statutes and treaties trump both forms of state law. The states, and their officers, were meant to be safeguards of a limited federal Constitution, not the front-line champions of federal power via candid confessions of federal supersession.

Federal statutes are similarly indifferent as to whether attorneys general have a duty to concede the invalidity of state law. Just as there is no federal statute *empowering* attorneys general to concede the invalidity of state law,

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43. See, e.g., MODEL RULES PROF’L CONDUCT R. 3.1 (2011) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”); ILL. ST. SUP. CT. RULES PROF’L CONDUCT R. 3.1; N.Y. ST. RULES PROF’L CONDUCT R. 3.1(a) (same); TEX. ST. RULES PROF’L CONDUCT R. 3.01 (same); VA. SUP. CT. R. pt. 6, § 2, R. 3.1 (same).

44. See THE FEDERALIST NO. 46 (James Madison) (discussing the ability of states to check claims of federal authority).



there is none *obliging* state officers to use their state law authority to make such concessions. Again, Congress need not rely upon state concessions of federal supersession. When states wish for their attorneys general to vigorously defend the validity of state law, Congress can rely upon the courts to evaluate the claimed supersession.

In sum, we believe that neither the federal Constitution nor federal statutes say anything about the powers and duties of state attorneys general vis-à-vis the defense of state law. That federal law is supreme and that state attorneys general take an oath to support the Constitution does not establish that these officers must concede the invalidity of state law whenever their best legal judgment points to that conclusion. Supremacy and support do not imply a duty of candor and damaging concessions on the part of attorneys, including state attorneys general.

### *B. The Dominance of State Law*

As noted earlier, the federal Constitution generally leaves states to determine their own internal governance. Each state must have an executive authority, a legislature, and judges, because the Constitution commandeers each in limited ways.<sup>45</sup> But beyond this and a minimal republican requirement,<sup>46</sup> the Constitution is silent. Therefore, whether a state attorney general has a duty to defend, a duty to decline to defend, a duty to concede, a duty to attack, or exercises discretion as to when to defend, stay silent, concede, or attack, is a function of state law. Subject to a limitation discussed below (and a few others that are hardly controversial),<sup>47</sup> states may grant whatever powers and impose whatever obligations on an attorney general that they wish, assuming they choose to have one in the first place.

Begin with the simplest situation: whether an attorney general should defend state laws in the face of a state constitutional challenge. A state has *carte blanche* here because it seems hard to imagine why federal law would say much of anything in this area where no species of federal law is implicated. Each state may determine for itself whether (and how) its attorney general defends a statute in the face of state constitutional challenge. Directions may come from the constitution, statutes, popular initiatives, bar rules, or common law of the state. For instance, Pennsylvania statutes provide that “[i]t shall be the duty of

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45. See, e.g., U.S. CONST. art. I, § 2 (requiring executive authority to issue writs of election), § 4 (authorizing legislatures to create rules for elections to House); *id.* art. VI, cl. 2 (requiring state courts to vindicate federal law).

46. See *id.* art. IV, § 4 (guaranteeing that every state have a republican form of government).

47. See *infra* note 25.

the Attorney General to uphold and defend the constitutionality of all statutes,”<sup>48</sup> while the Colorado Supreme Court has read state ethics rules and the attorney general’s oath to require the latter to file suit whenever she “has grave doubts about the constitutionality” of some governmental act.<sup>49</sup>

Differing senses of optimal policy might motivate the adoption of different approaches. Some states may surmise that their constitutions will function best when their executives cannot second-guess the constitutionality of statutes. These states may suppose that their governors always should enforce, and their attorneys general always should defend, statutes passed by the people or their legislators. Such states may espouse the benefits of specialization and conclude that only lawmakers and judges should evaluate the state constitutionality of statutes. These states may imagine that state attorneys should be analogized to private attorneys and zealously advocate on behalf of their clients’ interests, conceived of as the people, the legislature, or the bureaucracy. Other states may suppose that their constitutional system will be optimized when their attorneys general refuse to defend whenever they conclude that a state statute is more-likely-than-not contrary to the state constitution. Some of these states also may decide that governors should not execute state statutes that are inconsistent with the state constitution. That is to say, some states may impose a duty to disregard state laws whenever high-ranking executive officers believe that the statutes contravene the state constitution. States might adopt this approach if they imagine that the optimal defense of the state constitution requires checks at multiple stages, including passage in the chambers, presentment to a governor, enforcement, and litigation. A third cluster of states may determine that the need to vindicate the state constitution is so paramount that when an attorney general doubts the validity of a state law, she should turn to the courts to have those doubts addressed. Rather than being passive (waiting to respond to a lawsuit), the power to attack makes attorneys general proactive, by giving them the means of securing a prompt judicial resolution on the validity of dubious state statutes.

Our claim is not that every state can be neatly pigeonholed into one of these categories, or that every state precisely defines the powers and obligations of its attorney general. As we discuss in Part II, many states in fact are quite hard to classify.<sup>50</sup> Moreover, some states may adopt more than one approach, allowing attorneys general to concede the invalidity of state law in the face of a challenge while simultaneously empowering them to seek a judicial resolution in the first

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48. See 71 PA. STAT. ANN. § 732-204(a)(3) (West 2014).

49. See *State ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Colo. 2003).

50. For additional discussion, see *infra* Part II.B, which notes the wide array of state approaches to this question.

instance. And states may choose to hybridize these approaches, requiring defense of statutes that raise individual rights questions but permitting concessions in the face of separation of powers claims. Or a state might authorize its attorney general to contest the state constitutionality of legislation only when her powers are at stake. The permutations seem infinite.

Whatever permutation a state chooses, it will bear on the way in which the state regulates the conduct of its attorney general in the face of an alleged conflict with federal law. Although we previously argued that federal law does not establish any particular rule when it comes to the duty to defend, federal law may nonetheless influence how states regulate their attorneys general. More precisely, the Supremacy Clause may implicitly bar discrimination against species of federal law. In all cases, state officers (executive and judicial) should treat federal law no less favorably than they treat analogous state law. In 1947, the Supreme Court embraced this principle in *Testa v. Katt* in the context of a state court.<sup>51</sup> The Court refused to allow the court to discriminate against federal claims, noting that federal law, because it is the “law of the land,” is state law.<sup>52</sup>

This *Testa*-derived principle helps ensure that a state does not regard federal law as that of an alien sovereign or as something marked for disadvantaged treatment. If a state court has jurisdiction over state constitutional issues, then it should adjudicate federal constitutional questions. Similarly, if prior to enforcing a state statute, a state executive must decide whether that statute is contrary to the state constitution, then the state executive must decide whether the statute is contrary to the federal Constitution. Otherwise the state constitution would be receiving preferential treatment vis-à-vis its federal counterpart. But if a state officer is not obligated to consider state constitutional issues as he executes his duties, the federal Constitution does not require him to consider the corresponding federal constitutional questions. As we noted earlier, some state officers may be walled off from state constitutional issues, leaving them to higher-level officials. If so, the state also may bar such officers from considering federal constitutional issues.

This principle suggests that if an attorney general may (or must) concede the unconstitutionality of a state statute in the face of a state constitutional claim, then she must have the same authority or duty vis-à-vis a claim about the federal Constitution. Likewise if an attorney general may (or must) file suit to contest the state constitutionality of a state statute, she may (or must) file

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51. 330 U.S. 386 (1947).

52. *Id.* at 389, 391.

suit to contest the federal constitutionality of a state statute.<sup>53</sup> Put simply, attorneys general cannot discriminate against federal law because doing so would fail to treat federal law as a species of state law.

Understood as a bar on discriminating against federal law, the principle does not forbid states from favoring federal law. For example, a state would not violate any federal constitutional principle if it granted its attorney general authority to concede federal supersession of state law even if its attorney general lacked authority to concede that the state constitution invalidated a state statute.

Our research suggests that no state discriminates against (or in favor of) federal law. For instance, we know of no state that permits its attorney general to concede the state unconstitutionality of state statutes but requires her to vigorously defend the federal constitutionality of state law.<sup>54</sup> Nor do we know of any state that obliges its attorney general to challenge the state constitutionality of state law but that bars the attorney general from challenging the federal constitutionality of state law.<sup>55</sup>

### C. *The Powers of Attorneys General as Constitutional Officers*

We have said that the answer to the question whether a state attorney general may (or must) defend state law or concede its invalidity rests solely on state law, as constrained by the principle barring discrimination against federal law. Before refusing to defend a state law or challenging the validity of state law, a state attorney general must invoke powers arising from state law. In

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53. The principle has no clear application when it comes to the claim that a federal statute or treaty supersedes a state constitution or a state statute. On the one hand, one might suppose that there is no analogous state law treatment of such questions because most (perhaps all) states do not have a rule where some state statutes always supersede others. If that characterization is correct, it would be up to each state to establish its own rule for how its attorney general responds to the claim that subconstitutional federal law preempts state law, either constitutional or statutory. On the other hand, one could characterize such laws at varying degrees of generality. While a state could characterize the rule as one concerning constitutional preemption, a state also could characterize it more broadly as a rule of higher law preemption or supersession. In other words, if the state has a rule about higher law supersession, one might say that if the state attorney general could concede that a higher state law supersedes an inferior state law (the constitution supersedes a statute), the attorney general must be able to concede that any higher law (including federal statutes and treaties) supersedes any inferior law (including the state constitution and statutes). We do not take a position on how best to characterize a state rule relating to the duty to defend (or concede) at the state level.

54. For a summary of state constitutional and statutory provisions, see *infra* Part II.B. For an inventory of state law provisions, see *infra* Appendix I.

55. For summaries of state law provisions, see *infra* Appendix I and Part II.B.

making claims about state law, we believe that an attorney general must do more than point to the nature of her office or to the fact that the state constitution created it.

Hence, we disagree with Attorney General Eric Holder. In an interview, Holder claimed that state attorneys general could gauge the constitutionality of a state law and refuse to defend because that “is something that’s appropriate for an attorney general to do.”<sup>56</sup> Yet the office of state attorney general need not necessarily enjoy authority to concede the unconstitutionality of statutes. The federal office has changed over time and the state office has rather different contours across the fifty states. The fact that the office of attorney general invariably comes with authority to serve as an attorney—to advise and to litigate—tells us little about who an attorney general’s principals are (whom she represents) or whether she can decline to defend the constitutionality of state law.<sup>57</sup>

We also may diverge from Norman Williams. Williams claims that “constitutional officers”—officers mentioned in the state constitution—must be able to refuse to enforce state law that they believe is inconsistent with the Constitution, at least when the matter concerns these officers’ constitutionally granted powers.<sup>58</sup> While Williams’s article focuses on governors and their particular features, his argument extends to attorneys general who have constitutionally granted powers.<sup>59</sup> Because some constitutions mention dozens of officers, Williams would read them as authorizing these “constitutional officers” to ignore statutes that contravene their constitutional powers. For instance, on Williams’s account the Louisiana Commissioner of Agriculture<sup>60</sup> and State Police Commissioners<sup>61</sup> could ignore statutes that impinge upon their constitutional powers.

We fail to see why every constitutional officer “necessarily”<sup>62</sup> must enjoy authority to refuse to enforce legislation that the officer believes impinges upon her constitutional powers. The explicit grant of certain constitutional powers to

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56. Apuzzo, *supra* note 2.

57. Our legal analysis also differs from Katherine Shaw’s *Constitutional Nondefense in the States*. See Shaw, *supra* note 15. At the end of her piece, Shaw broadly argues that attorneys general should have the power to decline to defend statutes that they believe are unconstitutional. *Id.* at 263-79. We are inclined to think that a one-size-fits-all approach is unnecessary and inappropriate.

58. Williams, *supra* note 36, at 637-43.

59. See *id.* at 637 (noting that an “executive’s ability to engage in executive review is both given by and limited by the scope of the constitutional delegation of authority”).

60. LA. CONST. art. IV, § 10.

61. *Id.* art. X, § 43.

62. Williams, *supra* note 36, at 571.

an executive does not logically or necessarily entail implicit authority to ignore statutes that circumscribe such powers. A constitution may dictate that only certain officers can engage in executive review, or that none can, without containing any internal contradiction. The bare fact that a constitution grants power to an officer does not tell us which measures the officer may take to safeguard her constitutional authority.<sup>63</sup>

We also disagree with those who insist that attorneys general necessarily have a duty to defend their state statutes and constitutions. For example, in response to Holder, J.B. Van Hollen, Attorney General of Wisconsin, asserted that state attorneys general must defend state constitutional amendments.<sup>64</sup> He further argued that state attorneys general may concede the unconstitutionality of state statutes only in “rare cases.”<sup>65</sup> Even if Van Hollen has accurately described how Wisconsin constrains its attorney general, we do not believe that he has accurately captured the complexities of the laws across the other forty-nine states.<sup>66</sup> Indeed, like Holder, Van Hollen has not offered any reason why anyone should suppose that every state necessarily has an office of attorney general that exactly matches his description of the office’s metes and bounds.

We hope to have demonstrated in this Part that when evaluating an attorney general’s decision to concede that state law is preempted or unconstitutional, or her decision to challenge a state law proactively, the crucial question is whether state law authorizes the state officer’s actions. State officers, including attorneys general, have powers, duties, and discretion grounded on the best reading of the law rather than self-serving readings. Holder wishes to see the demise of anti-same-sex marriage laws and hopes that others emulate his non-defense of DOMA, thereby validating his decision not to defend DOMA and

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63. If Norman Williams is right about the implicit constitutional authority of constitutional officers, we wonder what else such officers may do to safeguard their constitutional powers. For instance, could they ignore court judgments that rest on (from the officer’s point of view) erroneous understandings of the officer’s constitutional powers? Likewise, could constitutional officers expend unappropriated funds as a means of ensuring the proper exercise of their constitutional powers? Carried to its logical extreme, this theory about the scope of constitutional authority of constitutional officers has a sweep that some might find disturbing.

64. Apuzzo, *supra* note 2. The Republican Attorneys General Association echoed these remarks in comments criticizing Holder. *See infra* note 71.

65. Apuzzo, *supra* note 2. Holder apparently agrees with Van Hollen that “[a]ny decisions—at any level—not to defend individual laws must be exceedingly rare.” *See* Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, Remarks as Prepared for Delivery by Attorney General Eric Holder at the National Association of Attorneys General Winter Meeting (Feb. 25, 2014), <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-1402251.html> [<http://perma.cc/4W6P-L433>]. It would seem, however, that they disagree on what constitutes a “rare case.”

66. *See infra* Part II.B.

furthering his policy aims. Van Hollen opposes same-sex marriage<sup>67</sup> and argues that other attorneys general have an obligation to defend same-sex marriage bans, thereby reinforcing his policy stance on the issue. We think that both are wrong. They suppose that there is a one-size-fits all answer to the question whether attorneys general may concede the invalidity of state statutes and constitutions. While attorneys general all share the same title, they can and do have different powers and duties.

## II. A SURVEY OF STATE LAW AND PRACTICES

We find it curious that *state* officials frequently act as if state law issues should be evaluated without reference to state law.<sup>68</sup> Although each attorney general serves a particular state and derives virtually all her authority from state law, attorneys general have shown a lamentable indifference to state laws, rules, and norms when discussing the duty to defend. As noted, some Democratic attorneys general pointed to Attorney General Holder's refusal to defend DOMA when justifying their own refusal to defend state bans on same-sex marriage.<sup>69</sup> Democratic attorneys general have also cited their oaths to the federal constitution or their desire to do what is "right" and be on the right side of "history."<sup>70</sup> For its part, the Republican Attorney General Association slammed

67. See Jason Stein, *Falk, Van Hollen To Face Off for Attorney General Incumbent Lautenschlager Loses in the Democratic Primary*, WIS. STATE J. & CAP. TIMES, Sept. 13, 2006, [http://host.madison.com/news/falk-van-hollen-to-face-off-for-attorney-general-incumbent/article\\_7231a02c-ed57-57bf-a2a3-258c73e6dc32.html](http://host.madison.com/news/falk-van-hollen-to-face-off-for-attorney-general-incumbent/article_7231a02c-ed57-57bf-a2a3-258c73e6dc32.html) [<http://perma.cc/4W36-MBM4>].

68. Popular and academic commentators also make use of one-size-fits-all nationalistic standards in evaluating state law issues. See, e.g., Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1630-33 (2010) (highlighting nationalistic rhetoric used by commentators in critiquing state courts interpreting state constitutions to establish right to same-sex marriage).

69. See, e.g., *Hawaii Attorney General: State of Hawaii Will No Longer Defend Traditional Marriage Law*, HAW. REP., May 6, 2014, <http://www.hawaiiireporter.com/hawaii-attorney-general-state-of-hawaii-will-no-longer-defend-traditional-marriage-law> [<http://perma.cc/9LSF-QZ97>]. While other state attorneys general did not explicitly cite Holder, they nevertheless mimicked his approach to the issue by declaring that their states would facilitate judicial review of the issue by enforcing but not defending the marriage ban. See, e.g., Associated Press, *Virginia Won't Defend Gay Marriage Ban*, N.Y. TIMES, Jan. 23, 2014, <http://www.nytimes.com/aponline/2014/01/23/us/ap-us-gay-marriage-virginia.html> [<http://perma.cc/4JED-XJAG>].

70. See, e.g., Brief on Behalf of Janet M. Rainey at 57-60, *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (No. 14-1169) ("One cannot separate the legal question here from the point in history when it is answered."); John Cheves, *Beshear: Ky. Will Appeal Federal Judge's Ruling in Same-Sex Marriage Case Without Conway's Help*, LEXINGTON HERALD-LEADER, Mar. 4, 2014, [http://www.kentucky.com/2014/03/04/3120213\\_live-at-1030-am-attorney-general](http://www.kentucky.com/2014/03/04/3120213_live-at-1030-am-attorney-general)

Holder for asserting that attorneys general could refuse to defend state laws, calling Holder's approach "as inappropriate as it is unprecedented."<sup>71</sup> These Republicans seem to suppose that there is an absolute duty to defend unless there is an authoritative and adverse U.S. Supreme Court precedent on point.<sup>72</sup> Noticeably absent are meaningful references to state law, which might mandate defense of state law or might grant power to decline to defend.<sup>73</sup> Also missing is any recognition of the prospect that the powers and duties of attorneys general might vary across the states, such that the answer for Virginia's attorney general might be rather different than the answer for Maine's or Alaska's.

These omissions and blind spots are regrettable. Though there are some commonalities, the office of the attorney general is not the same across the fifty states. As we will discuss, while most attorneys general are elected, some are appointed by the legislature or the state supreme court. Though most attorneys general are in the executive branch, some are in the judicial. Several write opinions at the behest of either the legislative or judicial branches; others don't. Some are the exclusive representatives of their states in court; in some states, other officers also may litigate for the state, including in defense of state laws. For our purposes, some attorneys general have authority not to defend state law after concluding that some higher law supersedes a species of state law. Other attorneys general must defend the validity of state law. Finally, some (but not all) have common law authority to represent the "public interest" and challenge the constitutionality of state law.

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.html [<http://perma.cc/377D-6LR2>]; Press Release, Oregon Dep't of Justice, Statement of Oregon Attorney General Ellen Rosenblum on the Subject of Pending Litigation Challenging Same-Sex Marriage Ban (Feb. 20, 2014), <http://www.doj.state.or.us/releases/Pages/2014/relo22014.aspx> [<http://perma.cc/JW29-3TW3>].

71. Tal Kopan, *GOP AGs: Eric Holder 'Inappropriate'*, POLITICO, Feb. 25, 2014, <http://www.politico.com/story/2014/02/eric-holder-republican-state-attorneys-general-103940.html> [<http://perma.cc/5EMD-REZG>] (quoting statement by Republican attorneys general).
72. *See id.*; *see also* John W. Suthers, Op-Ed, *A 'Veto' Attorneys General Shouldn't Wield*, WASH. POST, Feb. 2, 2014, [http://www.washingtonpost.com/opinions/a-veto-attorneys-general-shouldnt-wield/2014/02/02/64082fc8-887e-11e3-a5bd-844629433ba3\\_story.html](http://www.washingtonpost.com/opinions/a-veto-attorneys-general-shouldnt-wield/2014/02/02/64082fc8-887e-11e3-a5bd-844629433ba3_story.html) [<http://perma.cc/MH25-Z8RD>] (arguing that, since the same-sex marriage debate has not yet been decided by "clear high court precedent," state attorneys general may not refuse on principle "to defend unpopular or politically distasteful laws").
73. Occasionally, attorneys general refer to their oath to support their state's constitution. Yet they never really make an argument for that constitution's relevance. We doubt that an oath of "support" to a state constitution, one taken by all state officers, implies that an attorney general may (or must) refuse to defend the validity of a state statute. As we have already discussed, the generic oath to defend the federal constitution does not provide specific authority to refuse to defend state law. *See supra* Part I. For additional discussion, *see infra* notes 106-108 and accompanying text.



This Part begins by highlighting the origins and functions of the office of state attorney general. We then consider state law, both constitutional and statutory, and note that very few states directly address whether their attorneys general must (or must not) defend state law, though most states' constitutions and laws nonetheless determine the contours of these duties. The absence of explicit reference to the duty to defend (or its alternatives) enables attorneys general to adopt self-serving stances and make superficially plausible claims about their duties.<sup>74</sup> By surveying the variations across the states, this section underscores the need to look to the peculiar constitutions, laws, and traditions of each state. We end by examining practice. Before the controversy over same-sex marriage, examples of state nondefense were few and far between (and many stemmed from the U.S. Supreme Court's invalidation of another's states nearly identical law). Since the marriage controversy, the number of nondefenses has ballooned, suggesting that the controversy is a watershed moment. For reasons discussed both in this Part and the next, the stances of attorneys general on the duty to defend are almost entirely a product of politics rather than law.

A. *The Origins and Functions of the State Attorneys General*

Unlike the U.S. Attorney General, most state attorneys general are not part of a unified executive; typically they are neither subordinate to, nor serve at the pleasure of, the governor.<sup>75</sup> Only some states mandate that the attorney general work in conjunction with the governor.<sup>76</sup> Six states formally place the attorney general in the governor's cabinet (Alaska, Arizona, Florida, Hawaii, Michigan, and New Jersey) but in only three of those does the governor appoint the attorney general (Alaska, Hawaii, and New Jersey).<sup>77</sup> In most states, the attorney general is independent of the governor—either because he is selected by the

74. The general failure of state constitutionalism to look to state-specific sources may also speak to the willingness of attorneys general to make self-serving claims without meaningful reference to state law. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992). Critics of this view often recognize that state constitutional discourse "is impoverished" but that either state constitutions are richly diverse or that states "can develop a sophisticated independent constitutional culture." David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 276, 280 (1992).

75. See William P. Marshall, *Break up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 (2006).

76. Justin G. Davids, Note, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power To Sue State Officers*, 38 COLUM. J.L. & SOC. PROBS. 365, 371 & n.26 (2005).

77. See Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 529-30 (1994). Governors also appoint the attorney general in New Hampshire and Wyoming. *Id.* at 530.

legislature (Maine), the state Supreme Court (Tennessee), or—as is the case in forty-three states—elected.<sup>78</sup>

Under the common law, English attorneys general both served the wishes of the Crown and occupied a position of power and discretion.<sup>79</sup> When the office was transplanted to the American colonies, the diffusion of power throughout many agencies and heads of government necessitated a broader grant of discretion. According to one scholar, the “incidents of the office were so numerous and varied as to discourage the framers of the state constitutions and legislatures from setting them out in complete detail, thus permitting [attorneys general] to look to common law to fill in the gaps.”<sup>80</sup> Accordingly, “the common law is a vital source of power for attorneys general who seek to protect [the] public interest in developing areas of the law.”<sup>81</sup>

The common law power to represent the public authorizes many attorneys general to file suits on behalf of the people. Attorneys general have launched lawsuits against tobacco companies, America Online, General Motors, Mazda, Sears Roebuck, and many others, and have thereby imposed “state-based regulation with nationwide impact” in consumer protection, environmental regulation, and securities regulation.<sup>82</sup> Attorneys general have also invoked their common law authority “to represent the public interest” when filing lawsuits challenging the validity of state law.<sup>83</sup> Because of constraints on federal court jurisdiction, these common law challenges are filed in state court, often against the secretary of state.<sup>84</sup> As one might expect, the scope of this common law power varies from state to state.<sup>85</sup>

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78. See *id.* at 530. Early state attorneys general were appointed. The move towards popular elections was not intended to divide power in the executive; instead, it reflected Jacksonian Democratic sentiments for a more direct role of the people in state government. See NAT’L ASS’N OF ATTORNEYS GEN., *supra* note 10, at 13.

79. See *id.* at 2-4.

80. John Ben Sheppard, *Common Law Powers and Duties of the Attorney General*, 7 BAYLOR L. REV. 1, 1 (1955).

81. NAT’L ASS’N OF ATTORNEYS GEN., *supra* note 10, at 27.

82. Timothy Meyer, Comment, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CALIF. L. REV. 885, 889 (2007). See generally PAUL NOLETTE, *FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA* (2015).

83. Brief for Thurbert E. Baker et al. as Amici Curiae in Support of Respondents at 6, *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003) (No. 03-SA147). For additional discussion, see *infra* notes 121-126.

84. For discussions of state court authority to resolve intra-governmental disputes, see Devins, *supra* note 68, at 1650-51; Hans A. Linde, *The State and the Federal Courts in Governance: Vive La Différence!*, 46 WM. & MARY L. REV. 1273 (2005).

85. See NAT’L ASS’N OF ATTORNEYS GEN., *supra* note 10, at 37-44.

State positive law also empowers attorneys general to represent the state, its agencies, and its officials. In some states, attorneys general have a monopoly over state litigation.<sup>86</sup> In others, litigation authority is dispersed (for example, an agency might employ its own attorney, an elected district attorney might control some litigation, and the governor might have concurrent authority to defend state conduct).<sup>87</sup> Moreover, as discussed later, states have different rules regarding who – if anyone – can stand in for the attorney general when the latter perceives a conflict between her responsibilities to the people (because, for example, she thinks state law is unconstitutional) and her duties to state entities.<sup>88</sup>

Attorneys general also must issue legal opinions and therefore regularly interpret state and federal law, including whether federal law supersedes state law. Unlike the U.S. attorney general (who issues opinions only to members of the executive branch),<sup>89</sup> state attorneys general often supply legal opinions to the other branches. Most attorneys general write opinions for the legislative branch and individual legislators;<sup>90</sup> some attorneys general also supply opinions to the judiciary.<sup>91</sup> In one state (Kentucky), private citizens may request opinions.<sup>92</sup>

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86. See *id.* at 47-48 (noting state statutory provisions and Supreme Court rulings recognizing complete attorney general control of state litigation).

87. See *id.* at 49 (noting states where agencies can hire outside counsel); Marshall, *supra* note 75, at 2457-58 (noting the concurrent authority of the Georgia governor and attorney general); Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y. 1, 22-23 (1993) (noting the variety of arrangements whereby agencies control agency litigation); Note, *Appointing State Attorneys General: Evaluating the Unbundled State Executive*, 127 HARV. L. REV. 973, 980-81 (2014) (noting both the authority of popularly elected local district attorneys and the possibility of attorney general intervention in their lawsuits).

88. See *infra* notes 116-120; see also Shaw, *supra* note 15, at 246-56 (noting some state arrangements).

89. Unlike the federal Office of Legal Counsel, many state attorneys general cannot issue opinions without a request. See NAT'L ASS'N OF ATTORNEYS GEN., *supra* note 10, at 75-78 (discussing procedures governing state attorney general opinion power and seeming to assume without explicitly stating that state attorneys general may only issue opinions after the receipt of a request from an "appropriate requester."). For reasons discussed *infra* note 178 and accompanying text, this limitation is potentially relevant in understanding why the federal attorney general is more apt to embrace court-centric norms than the state attorney general.

90. See Peter E. Heiser, Jr., *The Opinion Writing Function of Attorneys General*, 18 IDAHO L. REV. 9, 9 (1982); Thomas R. Morris, *State Attorneys General as Interpreters of State Constitutions*, 17 PUBLIUS 133, 135 (1987).

91. See, e.g., General Sessions Judge's Legal Authority, Tenn. Att'y Gen. Op. No. 00-001 (Jan. 4, 2000) (answering questions concerning the powers of the state judiciary).

92. Morris, *supra* note 90, at 136.

Attorneys general, through opinions on the constitutionality of state law, help to shape state enforcement. Within one year of the 1962 Supreme Court opinion forbidding the reading of prayers or the Bible, “the attorneys general of 17 states, or about 41 percent of the states whose practice was affected, wrote opinions explicating the issues involved.”<sup>93</sup> In response, several states reconsidered whether they ought to enforce laws permitting the recitation of prayers or the Bible in public schools.<sup>94</sup> A 1990 Utah Attorney General opinion that the state’s domestic violence law was “probably unconstitutional” led several Utah jurisdictions to refuse to enforce the statute.<sup>95</sup> Sometimes attorneys general act on their own opinions. After Nebraska Attorney General John Bruning opined that a state campaign finance statute was unconstitutional, he brought suit and secured a judicial declaration to the same effect.<sup>96</sup>

### *B. State Law and the Duty To Defend*

Here we provide a snapshot of state law related to the duty to defend, a summary not meant to make definitive claims about all states. Rather our discussion is, in some measure, meant to complicate matters. The complications arise from the near universal absence of clear-cut state law on the duty to defend. State constitutions lack explicit reference to a duty to defend. State statutes are more of a mixed bag. Sometimes these statutes reference a duty to defend. In one state, the statute references a rather different obligation, a duty to contest the constitutionality of state law. A few state statutes explicitly mention

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93. Henry J. Abraham & Robert R. Benedetti, *The State Attorney General: A Friend of the Court?*, 117 U. PA. L. REV. 795, 802 (1969).

94. See *id.* at 815-20. For additional discussion, see Morris, *supra* note 90, at 139-44.

95. See Bob Bernick, Jr., *Utah Justices To Decide if Police Can Shun New Law*, DESERET NEWS, Oct. 4, 1990, <http://www.deseretnews.com/article/125450/UTAH-JUSTICES-TO-DECIDE-IF-POLICE-CAN-SHUN-NEW-LAW.html> [http://perma.cc/P4PS-MTZ4]. In response to this opinion, the state legislature initially filed suit to compel attorney general enforcement and later amended the statute. See David Wolf, Comment, *Restrictions on Release of Individuals Arrested for Domestic Violence*, in *Legislative Enactments: Family Law, in Recent Developments in Utah Law*, 1992 UTAH L. REV. 366, 370; Bernick, *supra*. Another example of an attorney general opinion shaping the behavior of state officials is *Mechanical Contractors v. State*, a 1992 New Jersey appellate court decision. 605 A.2d 743 (N.J. Super. Ct. App. Div. 1992). In *Mechanical Contractors*, plaintiffs sought to compel enforcement of a plumber licensing law that municipal code officials refused to enforce. Those officials had earlier sought guidance from the New Jersey Attorney General who issued an opinion claiming that the law was unconstitutional and unenforceable. *Id.* at 745-46.

96. Kevin O’Hanlon, *Supreme Court Overturns Campaign Finance Law*, LINCOLN J. STAR, Aug. 3, 2012, [http://journalstar.com/news/state-and-regional/statehouse/supreme-court-overturms-campaign-finance-law/article\\_30do7ef-81do-5dd5-9683-01be5cd1602a.html](http://journalstar.com/news/state-and-regional/statehouse/supreme-court-overturms-campaign-finance-law/article_30do7ef-81do-5dd5-9683-01be5cd1602a.html) [http://perma.cc/MVZ8-8SXX].

that others may defend state law, thereby implying that the attorney general lacks a duty to defend.

Start with the state constitutions. Forty-three clearly do not provide anything about whether the attorney general has a duty to defend (or concede).<sup>97</sup> Most of these declare that the attorney general's powers come from state statutes<sup>98</sup> or merely create the office without specifying its attributes.<sup>99</sup> Some of these, such as Indiana's, say nothing about an attorney general at all.<sup>100</sup> Of the remaining seven constitutions, four specify that the attorney general is the "legal officer" of the state,<sup>101</sup> and three declare that the attorney general—as the Texas Constitution puts it—"shall represent the State in all suits . . . in which the State may be a party."<sup>102</sup> These seven constitutions seem deeply ambiguous. While being the "legal officer" of a state suggests that the "state" is the client, this hardly implies that the attorney general always must defend the validity of state law. Similarly, saying that an attorney general "shall represent" the state in all suits might mean that the attorney general can, in that representation, refuse to appeal a lower court defeat or otherwise concede the invalidity of state law.<sup>103</sup> Take the case of California. California's Constitution speaks of the Attorney General's obligation to represent the state and her "duty" to "see that

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97. For an inventory of state constitutional provisions, see *infra* Appendix I.

98. See, e.g., ALA. CONST. art. V, § 137 ("The attorney-general . . . shall perform such duties as may be prescribed by law."); N.D. CONST. art. V, § 2 ("The powers and duties of the attorney general . . . must be prescribed by law.").

99. See, e.g., MINN. CONST. art. V, § 1; OHIO CONST. art. III, § 2.

100. For a detailed summary of state law provisions compiled by our research assistants, see *infra* Appendix I.

101. These states are Florida, Illinois, Montana, and Pennsylvania. FLA. CONST. art. IV, § 4(b) ("The attorney general shall be the chief state legal officer. There is created in the office of the attorney general the position of statewide prosecutor."); ILL. CONST. art. V, § 15 ("The Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law."); MONT. CONST. art. VI, § 4(4) ("The attorney general is the legal officer of the state and shall have the duties and powers provided by law."); PENN. CONST. art. IV, § 4.1 ("An Attorney General . . . shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties as may be imposed by law.").

102. TEX. CONST. art. 4, § 22. California and Maryland also have constitutions that require the attorney general to represent the state in suits in which the state is a party. CAL. CONST. art. 5, § 13; MD. CONST. art. V, § 3(a).

103. Consistent with Model Rule of Professional Conduct 3.1 (barring frivolous arguments), attorneys general might determine that the pursuit of litigation is fruitless if, for example, the U.S. Supreme Court has declared similar legislation unconstitutional. Or they might decide not to appeal an adverse judgment for some other reason, such as when the affected agency acquiesces to the decision or when the case has bad facts. For additional discussion, see *infra* note 105.

the laws of the State” are “adequately enforced.”<sup>104</sup> While one might suppose that this language means that the attorney general must defend state law, in litigation over exclusionary zoning (1966) and same-sex marriage (2008), California attorneys general have refused to defend state law.<sup>105</sup>

To be sure, many state constitutions require state officers to take an oath to “support” the state constitution.<sup>106</sup> We doubt that such oaths address the duty to defend, especially because they are imposed on a broad swath of officers. For example, the Virginia Constitution requires “[a]ll officers elected or appointed under or pursuant to this Constitution” to take its oath of support.<sup>107</sup> As we argued with respect to the federal oath of support,<sup>108</sup> we think that supportive oaths are about loyalty to the government; they do not incorporate a duty to defend state laws (or a duty to concede their invalidity). The fact that state officers almost always take an oath to support both the federal and state constitutions further suggests that the oath is about loyalty and allegiance and does not specifically mandate defenses or concessions. After all, it would be odd to have one oath requiring support for both federal and state constitutions but have “support” mean different things with respect to the two constitutions.

Having said this, we do not deny the possibility that a state *could* craft an oath that requires the state attorney general to defend state law (or concede its invalidity). If an oath declared that an officer “shall defend state law,” that would seem more relevant, even if still ambiguous. Our narrow point is that the case for an alleged duty to defend (or not to defend) cannot rest on an oath that merely requires “support.” An attorney general who insists that she must defend state law (or concede its invalidity) on the basis of only her state oath of “support” has not established her case.

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104. CAL. CONST. art. 5, § 13.

105. See Shaw, *supra* note 15, at 237-40 (discussing a refusal to defend same-sex marriage); Jeremy Zeitlin, *Whose Constitution Is It Anyway? The Executives’ Discretion To Defend Initiatives Amending the California Constitution*, 39 HASTINGS CONST. L.Q. 327, 342 (2012) (discussing a refusal to defend exclusionary zoning). That California attorneys general have refused to defend state law does not disprove the possibility that representation of the state encompasses a requirement to defend all state laws. Still, it is at least evidence in favor of the idea that representation of a state does not necessarily preclude an ability to concede the invalidity of state law.

106. For examples of state oath provisions, see, for example, VA. CONST. art. II, § 7, which requires an oath of support to federal and state constitutions; and N.Y. CONST. art XIII, § 1, which requires the same. We make a similar argument with respect to the federal oath in *supra* Part I.A.

107. VA. CONST. art. II, § 7.

108. See *supra* notes 35-43 and accompanying text.

Unlike state constitutions, state statutes invariably speak to the power and responsibilities of the attorneys general.<sup>109</sup> Most state statutes provide that the attorney general is to represent (or appear on behalf of) the state or has a duty to represent it. As noted with respect to similar constitutional provisions, such language is rather equivocal because it is hard to tease out implications about when attorneys general may (or must) defend (or concede the invalidity of) state law. A handful of states have more specific directives. Two states mandate that their attorneys general defend the constitutionality of state law (Pennsylvania and Mississippi).<sup>110</sup> Tennessee clearly empowers its attorney general to *refuse* to defend laws she finds unconstitutional.<sup>111</sup> Louisiana has a suggestive but ambiguous statute. It provides that the attorney general “at his discretion, shall represent . . . the state in any action or proceeding in which the constitutionality of a state statute or of a resolution of the legislature is challenged or assailed.”<sup>112</sup> It is suggestive because one might conclude that the Louisiana Attorney General may choose, “at his discretion,” *not to defend* the constitutionality of state law. By statute, Nebraska *compels its attorney general to challenge* the constitutionality of state law whenever two preconditions are satisfied: first, she has previously opined that the law is unconstitutional, and second, a state officer refuses to enforce the law in reliance on that opinion.<sup>113</sup> This express du-

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109. All information in this paragraph is drawn from a document prepared by research assistants and reference librarians. See *infra* Appendix I.

110. See MISS CODE ANN. § 7-5-1 (2014); 71 PA. STAT. ANN. § 732-204(a)(3) (West 2014). The fact that a state statute may seem to mandate the defense of state law does not mean, in fact, that the state attorney general will defend state law. See Melissa Daniels, *A.G. Kane Won't Defend NRA-Backed Law on Firearm Rules*, TRIBLIVE (Dec. 5, 2014, 5:32 PM), <http://triblive.com/state/pennsylvania/7314808-74/story#axzz3RjDiPo30> [<http://perma.cc/S5GV-XAVH>] (noting that despite the duty to defend state statutes, Kane would not do so). Pennsylvania law makes allowance for an agency counsel or the state general counsel to stand in for the attorney general, see 71 PA. STAT. ANN. §§ 732-303 -402, -403 (West 2014), and Kane cited those laws as enabling the General Counsel to defend the gun law. See Karen Langley, *Pennsylvania AG Kane Won't Defend Gun Law That Permits Lawsuits*, PITTSBURGH POST-GAZETTE, Dec. 5, 2014, <http://www.post-gazette.com/news/state/2014/12/05/Pennsylvania-AG-Kane-won-t-defend-controversial-gun-law/stories/201412050163> [<http://perma.cc/SV8L-KZFQ>].

111. TENN. CODE ANN. § 8-6-109(b)(9) to (10) (2010) (providing that the attorney general is under no duty to defend statutes that she believes are unconstitutional). The Tennessee Attorney General (the only attorney general selected by a state supreme court) has exercised this authority on numerous occasions, refusing—more than any other attorney general—to defend state laws on constitutional grounds. See *infra* Appendix II, Part II.C (detailing findings about state attorneys general refusals to defend).

112. LA. REV. STAT. ANN. § 49:257 (2006). The Virginia statute is likewise ambiguous, authorizing the governor to stand in for the attorney general when the attorney general is “unable to render certain legal services.” VA. CODE ANN. § 2.2-510(4) (2014).

113. See NEB. REV. STAT. § 84-215 (2014).

ty to attack is somewhat narrow because it only applies when the two preconditions are met.

Even when codified state law imposes an obligation to defend, the duty's implications are rather uncertain and raise a host of questions. What sort of arguments must the attorney general make at trial or on appeal? Any argument, even if implausible? Only plausible arguments? Or only those arguments that actually persuade the attorney general, meaning that if there are none, she need not mount a defense even if others think there is a plausible argument? Relatedly, must she advance (plausible or persuasive) legal arguments that the state supreme court or the U.S. Supreme Court has previously rejected in another legal context? What if a supreme court has already declared a state law to be unconstitutional (or otherwise preempted)? Must the attorney general nonetheless make the same arguments again because she has a duty to defend and hope that the supreme court will change its view?

There is the separate issue of whether to appeal. In particular, must the attorney general with a duty to defend appeal unfavorable trial court judgments that strike down state law? If so, must she continue to appeal until the highest court rules?<sup>114</sup> One might suppose that anything short of continual defense, however futile, violates the duty to defend. Yet one might also imagine that duties have implicit limits and that context matters. Though soldiers are duty-bound to defend their country, that obligation is not unyielding, for even soldiers may surrender to the enemy in certain circumstances.<sup>115</sup> Similarly, one might suppose that the duty to defend applies only when a defense has a prospect of success in the courts.

Some states have statutes specifying that someone other than the attorney general may defend state law.<sup>116</sup> Others anticipate that the attorney general will

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114. We do not think that all refusals to appeal lower court constitutional rulings should be counted as refusals to defend. A refusal to appeal may gratify the desires of an affected agency or may simply reflect the attorney general's desire to wait for a better set of facts to defend the state statute. *See supra* note 103. For our purposes, a refusal to defend connotes (1) that the attorney general will not defend and (2) that the attorney general's decision is predicated on her interpreting the state constitution, the federal constitution, or a higher court ruling (typically the U.S. Supreme Court or state supreme court). *See infra* note 141 (discussing methodology for calculating refusals to defend). We recognize that our metric is contestable. For example, some might argue that the duty to defend should be understood to require the defense of a law until it is formally invalidated by the state or U.S. Supreme Court.

115. *See* George S. Prugh, Jr., *The Code of Conduct for the Armed Forces*, 56 COLUM. L. REV. 678, 689-90 (1956).

116. For instance, Arizona permits its topmost legislative officers to intervene in cases, presumably with a view to defending state law. ARIZ. REV. STAT. ANN. § 12-1841 (2010).



opt out of litigation for one reason or another<sup>117</sup> or require the attorney general to notify the governor, affected agency, or state legislature that she will not defend the state's position on appeal,<sup>118</sup> provisions that imply that these others might take over the litigation. In situations where the attorney general has refused to defend, sometimes the affected agency or legislature is authorized by statute either to intervene or appoint counsel.<sup>119</sup> In other instances, statutes authorize the governor to take over litigation.<sup>120</sup>

As noted earlier, common law may also grant authority and imposes duties. In 2003, citing their "common law duty to represent the public interest," forty-three attorneys general claimed that attorneys general may file lawsuits challenging the constitutionality of state legislation on behalf "of the state and its citizens."<sup>121</sup> This claim came in a brief meant to support a suit by the Colorado Attorney General challenging the state constitutionality of a statute. The brief cited four state cases upholding the authority of certain attorneys general to file such suits.<sup>122</sup> We agree that state law (either statutory or common law) authorizes *some* attorneys general to file suit challenging the state constitutionality of state statutes.<sup>123</sup> But just because some may file suit does not mean that all may. One author asserts that some attorneys general *lack* common law authority to file constitutional challenges,<sup>124</sup> and another argues that a "significant minority" of states have wholly abandoned the common law, thereby limiting their

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117. See, e.g., ARIZ. REV. STAT. ANN. § 12-1841 (2010); VA. CODE ANN. § 2.2-510(4) (2014); ILL. SUP. CT. R. 19(c).

118. See, e.g., CAL. CIV. PROC. CODE § 902.1 (West 2014); TENN. CODE ANN. § 8-6-109(b)(9).

119. See N.C. GEN. STAT. § 1-72.2, amended by 2014 N.C. Sess. Laws 115 (authorizing intervention by state legislature in judicial challenges to state law); see also Shaw, *supra* note 15, at 243-49 (discussing state legislature taking over the defense of New Jersey statutes on abortion and religion in the public schools); Adam Smeltz, *Pa. Attorney General Kane's Views on Same-Sex Marriage Ban Fuel ACLU Lawsuit*, TRIBLIVE (Aug. 9, 2013, 11:18 PM), <http://triblive.com/state/pennsylvania/4499334-74/kane-law-state#axzz3ES5SLofA> [<http://perma.cc/B649-NZTC>] (noting a 1980 state statute that allows the general counsel to take over litigation when the attorney general thinks it in "the best interest of the commonwealth").

120. See, e.g., VA. CODE ANN. § 2.2-510(4) (2014) (authorizing the governor to hire counsel when the attorney general is "unable" to render legal services).

121. Brief of Thurbert E. Baker et al., *supra* note 83, at 6, 9. By recognizing this common law authority, state courts expand their authority to adjudicate disputes.

122. See *id.* at 9 n.18.

123. See *id.*; see also NAT'L ASS'N OF ATTORNEYS GEN., *supra* note 10, at 99-104 (collecting cases involving attorney general constitutional challenges); *id.* at 88-91 (discussing states that supposedly authorize or compel attorneys general to file suits challenging the constitutionality of state legislation).

124. NAT'L ASS'N OF ATTORNEYS GEN., *supra* note 10, at 89, 99-104.

attorneys general to powers flowing from constitutions and statutes.<sup>125</sup> Moreover, even among states that recognize a common law power to challenge the constitutionality of statutes, the standard varies for when an attorney general may file such suits.<sup>126</sup>

In other states, courts have read state law as imposing a duty to attack the constitutionality of some state statute. The Florida Supreme Court long ago spoke of its state attorney general having such a duty.<sup>127</sup> The Colorado Supreme Court held that whenever the state attorney general “has grave doubts about the constitutionality” of some governmental act, “he must seek to resolve those doubts as soon as possible” by filing suit.<sup>128</sup> Similarly, an Illinois appellate court has said that its attorney general has a “duty to challenge” statutes that she regards as “constitutionally infirm.”<sup>129</sup>

The juxtaposition of a duty to defend *and* a duty to attack may seem odd, even nonsensical. But there are ways of squaring the two apparently discordant duties. It may be that the duty to defend exists only when the case against the constitutionality of some law is less than overwhelming. And it may be that the duty to attack comes into play only when the case against the constitutionality of some law is overwhelming. This would suggest that attorneys general that confront a duty to defend and a duty to attack have no breathing room; they must honor one duty or the other. But one can imagine innumerable permutations: a duty to litigate on separation of powers matters coupled with a broad duty to defend otherwise; a duty to litigate when confronted with a clearly unconstitutional law and a duty to defend when faced with a law that is merely likely unconstitutional, with some discretionary authority in the space between clearly unconstitutional and likely unconstitutional; a duty to defend coupled with a discretionary power to litigate when a law is clearly unconstitutional. And so on.

These are not just matters of speculation. The Nebraska Attorney General, for example, seems to be under both obligations. As noted, the Nebraska legis-

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125. Davids, *supra* note 76, at 372 (citing 7 AM. JUR. 2D *Attorney General* § 7 (2003)).

126. See Brief of Thurbert E. Baker et al., *supra* note 83, at 9 n.17 (stating that the standard for when attorneys general may bring suit might vary from state to state). Curiously, some signatories to the amicus brief (Delaware, Indiana, Iowa, Kansas, Maine, Maryland, Minnesota, Missouri, Montana, Oklahoma, Pennsylvania, West Virginia, and Wisconsin) came from states without common law authority to launch constitutional challenges. See NAT’L ASS’N OF ATTORNEYS GEN., *supra* note 10, at 99-104. Other signatories to the brief have statutory, not common law, authority to initiate constitutional challenges. See *id.* (listing Nebraska and Texas as states with statutory authority).

127. *State ex rel. Landis v. S.H. Kress Co.*, 155 So. 823, 828 (Fla. 1934).

128. *State ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Colo. 2003).

129. *People v. Pollution Control Bd.*, 404 N.E. 2d 352, 355 (Ill. App. Ct. 1980).

lature statutorily compelled the attorney general to challenge the constitutionality of state statutes in limited circumstances.<sup>130</sup> Nonetheless, since then, Nebraska attorneys general have claimed that by law they have a duty to defend the constitutionality of state law.<sup>131</sup>

One-size-fits-all claims about the duty to defend vastly oversimplify. When Republican state attorneys general insist that attorneys general, as a group, must defend state law,<sup>132</sup> they presume to know the law of fifty states and that these laws all point to the same conclusion. Likewise, when Holder says that all attorneys general may decline to defend,<sup>133</sup> he paints with too broad a brush. In hoping to find one answer for fifty different states, both sides have substituted sweeping generalizations for the demanding, contextual, fine-grained legal analysis that is necessary.

### C. Attorney General Opinions & Practices

Before 2008, state attorneys general routinely defended state law and non-defense of state law seemed non-politicized.<sup>134</sup> A survey of attorney general opinions suggests that nondefense was of little interest to lawmakers, agencies, and private citizens seeking opinions by attorneys general.<sup>135</sup> We could find only two opinions (Tennessee, Maine) that responded to a specific question about

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130. NEB. REV. STAT. § 84-215 (2014). This law was a response to the state Department of Education's refusal to implement state law on constitutional grounds. In particular, the state legislature wanted to constrain the then-existing practice of autonomous executive branch constitutional interpretation. See Shaw, *supra* note 15, at 250-52 (recounting legislative history).

131. See, e.g., Subject: Constitutional Prohibitions and Legislative Authority for Government Subdivisions to Join Risk Retention Groups, Neb. Op. Att'y Gen. No. 94045 (May 24, 1994), 1994 WL 243685, at \*7.

132. See *supra* notes 64-65.

133. See *supra* note 56.

134. Our study focuses on nondefense of state law; we did not undertake a systematic analysis of attorney general nondefenses of gubernatorial action, including vetoes. In the course of our research, we did identify two cases involving gubernatorial vetoes—one in which the Mississippi Attorney General challenged the governor's ability to make partial vetoes and one involving a nondefense in the face of a constitutional challenge to the Massachusetts governor's exercise of a line item veto. See Alliance, AFSCME/SEIU v. Commonwealth, 682 N.E. 2d 607 (Mass. 1997); Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

135. We searched two databases. One search used the Westlaw AG opinions database; the search terms were adv: (unconstitutional! Constitutional!) /s (act statute law) /s (defend defending defended defense). The other was run in Lexis's Attorney General Opinions, All States Databases. The search terms were ((obligat! or duty or require! or must) /4 (defend or defending or uphold!) /8 (statute or act or law) and (constitutional! or unconstitutional!)).

the duty;<sup>136</sup> we could find only one opinion (Pennsylvania) containing substantial discussion of the duty.<sup>137</sup> All other references to the duty were found in opinion letters where someone had requested an opinion about the constitutionality of state law and the attorney general *sua sponte* noted an obligation to defend. Most opinions suggested that the duty to defend was absolute, although some said that the obligation was inapplicable if the law “clearly and undoubtedly” was unconstitutional.<sup>138</sup> We found two opinions (Connecticut, South Carolina) suggesting that non-defense could be justified by nothing less than a binding U.S. or state supreme court decision on the underlying issue.<sup>139</sup>

The practices of attorneys general likewise suggest that before 2008 the defense of state laws was remarkably routine. For instance, it seems that attorneys general rarely used their common law authority to challenge the constitutionality of state law; we identified only sixteen cases between 1930 and 2011.<sup>140</sup> Refusals to defend seem less rare, especially more recently. In calculating refusals to defend, we relied principally on Westlaw searches in the state and federal

136. The Tennessee request concerned the power of the state legislature to retain counsel to defend state statutes, not the Attorney General’s duty to defend. *See* Tenn. Op. Att’y Gen. No. 81-470 (Aug. 21, 1981), 1981 WL 169418. The Maine request is somewhat ambiguous; it was not directly about the duty to defend but instead assumed that a state law was unconstitutional and asked what the Attorney General would do to “uphold the laws and the Constitution of Maine.” Me. Op. Att’y Gen. No. 05-4 (Mar. 30, 2005), 2005 Me. AG LEXIS 4, at \*13. The Attorney General noted that the law was likely constitutional and in any event “my obligation and duty is to defend statutes enacted by the Legislature.” *Id.*

137. Pa. Op. Att’y Gen. No. 78-15 (Aug. 11, 1978), 1978 Pa. AG LEXIS 17. In this opinion, the Attorney General explained that he was obligated both to represent state agencies “in any litigation arising from our opinions” and to initiate litigation challenging laws that he found unconstitutional. *See id.* at \*20-26. In so doing, the Pennsylvania Attorney General claimed that courts should pass final judgment on the constitutionality of state legislation. *Id.* at \*26.

138. That is how Missouri Attorney General (and later U.S. Attorney General) John Ashcroft put it in a 1981 opinion. Mo. Op. Att’y Gen. No. 89 (June 8, 1981), 1981 WL 154474, at \*1. Because different language was used in different opinions (some suggesting an absolute duty and some suggesting something short of that), it is impossible to provide a conclusive count on the number of states that now embrace an absolute duty through their attorney general opinions. We found nine states that embraced a near-absolute duty at one or another time (Alabama, Connecticut, Louisiana, Missouri, Montana, Nebraska, North Dakota, Pennsylvania, Washington).

139. *See* Conn. Op. Att’y Gen. No. 2004-006 (May 17, 2004), 2004 WL 1110332, at \*1; Letter from Daniel R. McLeod, Attorney Gen., S.C., to Nae Parks, Sheriff of Lancaster Cnty., (July 30, 1975), 1975 WL 29042 (S.C.A.G.).

140. We did not conduct a comprehensive search for cases in which an attorney general brought suit to challenge the constitutionality of state law. Rather, our figure represents the number of challenges we came across in the scope of researching the duty to defend. Footnote 141 details our research methodology for discerning duty to defend cases. Though our research is hardly comprehensive, it is somewhat telling that we discovered so few examples of attorneys general bringing suit to challenge the constitutionality of state law.

case database. We also made numerous judgment calls, focusing on refusals to defend where the attorney general made a professional judgment that the state law was unconstitutional or that a court would invalidate the law.<sup>141</sup> Based on

141. For the case law, we ran these two searches in Westlaw's state and federal case databases: "attorney general" /3 (declin! refus!) /3 defend; "attorney general" /s "not defend" /s (law section statute act provision article). We supplemented this list with cases discussed in secondary sources we identified over the course of researching this project. We also learned of refusal to defend cases from others who have studied this topic, especially Kate Shaw. We anticipate that some refusals to defend were not picked up in our searches (for example, cases that were settled because the attorney general would not defend the statute).

Our research focused on cases where the refusal to defend was grounded in the attorney general's professional judgment that the state law was unconstitutional or her judgment that a court would conclude as much. Hence we did not tally cases where a decision not to appeal was made for some other reason.

Furthermore, we counted some (but not all) refusals to appeal unfavorable federal circuit court rulings (by seeking a stay or a grant of certiorari from the U.S. Supreme Court). For example, we did not count Arizona Attorney General Tom Horne's October 17 decision not to appeal a district court ruling striking down Arizona's ban on same-sex marriage. See Julie Westfall & James Queally, *Arizona and Wyoming Gay Marriage Bans Struck Down*, L.A. TIMES, Oct. 17, 2014, <http://www.latimes.com/nation/nationnow/la-na-nn-arizonas-gay-marriage-ban-struck-down-20141017-story.html> [<http://perma.cc/NTX2-BHW7>]. That district court ruling followed the logic of a recent Ninth Circuit ruling (a ruling which was to take immediate effect and apply throughout the circuit) as well as the U.S. Supreme Court's refusal to grant a stay to Alaska. *Id.* Based on these reasons, Horne said it would be "unethical" to pursue further appeals. *Id.*

On the other hand, we did count North Carolina Attorney General Roy Cooper's withdrawal from a challenge to his state's same-sex marriage ban. See Erik Eckholm, *Appeals Panel Rejects Virginia Gay-Marriage Ban*, N.Y. TIMES, July 28, 2014, <http://www.nytimes.com/2014/07/29/us/virginias-ban-on-gay-marriage-is-unconstitutional-court-rules.html> [<http://perma.cc/7NBF-TGV2>]. Although Cooper referenced the just-issued Fourth Circuit ruling on same-sex marriage, that ruling had not yet taken effect and was ultimately stayed pending Supreme Court consideration. See Richard Wolf, *Supreme Court Blocks Same Sex Marriages in Virginia*, USA TODAY, Aug. 20, 2014, <http://www.usatoday.com/story/news/nation/2014/08/20/gay-marriage-virginia-supreme-court/14282579> [<http://perma.cc/QCV4-YMEZ>]. Indeed, the Fourth Circuit did not act on a stay petition (which it rejected) two weeks after General Cooper's decision. See Alan Blinder, *Court Refuses To Stay Its Decision Striking Down Virginia's Same-Sex Marriage Ban*, N.Y. TIMES, Aug. 13, 2014, <http://www.nytimes.com/2014/08/14/us/virginia-same-sex-marriages.html> [<http://perma.cc/6FC9-LKDW>]. For that reason, we thought Cooper exercised interpretive independence when announcing his refusal to defend the ban.

Finally, we did not count cases in which the attorney general provided a weak defense of state law by, for example, defending the state law while also expressing doubts about the constitutionality of state law. For this reason, we did not count Ohio Attorney General Mike DeWine's 2014 filing of an amicus brief raising constitutional questions about a law in which he also filed a merits brief in support of state officials. See Marty Lederman, *DeWine v. DeWine (with the United States Somewhere in Between)*, SCOTUSBLOG (Apr. 8, 2014), <http://www.scotusblog.com/2014/04/dewine-v-dewine-with-the-united-states-somewhere-in-between> [<http://perma.cc/6J4R-5Z3Y>]; see also *infra* note 164.

these calculations, we identified three refusals before 1980<sup>142</sup> and twelve from 1980 to 2007 (eight of which are from three states—Texas, New Jersey, Tennessee).<sup>143</sup> Of these fifteen cases, there is no obvious pattern: some were refusals to defend at the outset; some were refusals to appeal an adverse judgment; some were federal claims, others state claims; some in federal courts, others in state courts; some involved legal issues on which the U.S. Supreme Court had ruled; some refusals were by elected, and others by appointed, attorneys general, including governor-appointed attorneys general who were refusing to defend laws vetoed by the Governor; twelve concerned high-profile issues (abortion, religion, voting, same-sex sodomy, gender discrimination); three involved low-salience subjects (tax notices, milk regulation, and debtor waiver).<sup>144</sup>

The infrequency of refusals to defend before 2008 is striking. Particularly infrequent were refusals by elected attorneys general to defend statutes on high-profile issues where the U.S. Supreme Court was silent (four total).<sup>145</sup> At-

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We recognize that the process we used to determine whether to count a case is subject to challenge. *See supra* notes 5, 114. As noted earlier, some might think that any refusal to appeal is a nondefense. *See supra* note 114. Correspondingly, others might think that the refusal to appeal in the face of a related higher-court ruling should not count as a nondefense. At the same time, we are confident that—no matter what measure is used—there is a dramatic change in attorney general practices starting in 2008. Our research is collected in Appendix II.

142. In 1965, California Attorney General Thomas Lynch concluded that a 1964 voter initiative overturning a fair housing law was unconstitutional, leaving the defense of that initiative to private lawyers representing sponsors. *See* Bob Egelko, *Brown First in Decades To Go Against Voters*, S.F. CHRON., Dec. 24, 2008, <http://www.sfgate.com/politics/article/Brown-first-in-decades-to-go-against-voters-3179147.php> [<http://perma.cc/V3TZ-KE2A>].

143. *See infra* Appendix II. Only one of these three states (Texas) had an elected attorney general. The Tennessee Attorney General is selected by the Tennessee Supreme Court and the New Jersey Attorney General is appointed by the governor. In other words, elected attorneys general account for just ten of the identified pre-2008 refusals to defend. The Tennessee Attorney General, moreover, has long claimed the power to refuse to defend state laws based on her independent interpretation of the state and federal constitutions. *See* Tenn. Op. Att’y Gen. No. 81-740 (Aug. 21, 1981), 1981 WL 169418.

144. *See infra* Appendix II.

145. Three of these four cases involved the Texas Attorney General; one involved the California Attorney General. All four involved equality issues (race, gender, sexual orientation). *See id.* Twelve of the fifteen pre-2008 cases involved high-profile refusals to defend. Six of these twelve refusals either involved an appointed attorney general (New Jersey) or an issue already decided by the Court (Florida, Kentucky, Illinois, Tennessee). Specifically, attorneys general in Kentucky, Florida, and Illinois abandoned their defense of state partial birth abortion law after the U.S. Supreme Court invalidated Nebraska’s partial birth abortion law. *See id.* Tennessee’s Attorney General—appointed by the state Supreme Court—refused to defend second-trimester regulations of abortion that had been invalidated by the U.S. Supreme Court. *See id.* In New Jersey, the governor-appointed attorney general refused to

torneys general routinely defended school segregation,<sup>146</sup> bans on interracial marriage, and other laws ultimately invalidated by the Supreme Court.<sup>147</sup> While most of these laws were politically popular within their states, attorneys general also defended unpopular statutes. For example, from 2006 to 2008 Connecticut Attorney General Richard Blumenthal defended the then-unpopular state ban on same-sex marriage, a ban that he later opposed as a Senate candidate.<sup>148</sup>

Blumenthal was something of a dying breed. After 2008, attorneys general proved increasingly willing to refuse to defend state laws. Unlike Blumenthal (who, adhering to tradition, defended state laws unless the law was clearly unconstitutional under Connecticut or U.S. Supreme Court precedent),<sup>149</sup> many attorneys general, post-2008, have deviated from past practice by refusing to defend statutes unpopular with their political base.<sup>150</sup> Despite state constitutional and statutory provisions that the laws be “adequately enforced”<sup>151</sup> or that

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defend two laws in which the state legislature had overridden constitutionally based gubernatorial vetoes—a 1982 moment of silence law (vetoed by Republican Thomas Kean) and a 1997 partial birth abortion ban (vetoed by Republican Christine Todd Whitman). *See id.*

146. In *Brown v. Board of Education*, the Kansas attorney general was a reluctant defender of school segregation. Initially, he intended to leave the defense of the Kansas law to the school district. *See* Paul E. Wilson, *The Genesis of Brown v. Board of Education*, 6 KAN. J.L. & PUB. POL'Y. 7, 15-16 (1996). But political forces within the state pushed for his participation, as did a formal request of the three-judge district court hearing the challenge to segregation. *See id.* at 16. In all other school segregation cases, as well as cases involving anti-miscegenation statutes, attorneys general seemed willing defenders of Jim Crow. Our research turned up no examples of attorneys general refusing to defend these statutes.
147. In the years following *Brown* (1954-1967), attorneys general issued sixty-four opinions on state segregation (thirty-seven of which backed segregationist practices). *See* William N. Thompson, *Should We Elect or Appoint State Government Executives? Some New Data Concerning State Attorneys General*, 8 AM. REV. PUB. ADMIN. 17, 39-41 (1974) (citing Vanderbilt University Law School, *I-XII Race Relations Law Reporter* (monthly, 1955-1968)).
148. Public opinion polling at the time of a 2008 Connecticut Supreme Court decision approving same-sex marriage revealed majority support for the Court's invalidation of the state ban. *Connecticut Voters Back Same-Sex Marriage*, QUINNIPIAC U. (Dec. 17, 2008), <http://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/connecticut/release-detail?ReleaseID=1243> [<http://perma.cc/QXQZ-7QUG>]. Among Democrats (Blumenthal's constituency), it is nearly certain that support for same-sex marriage was substantially stronger. When running for the Senate in 2010, and as Senator, Blumenthal has strongly supported same-sex marriage. *See* Brian Lockhart, *McMahon, Blumenthal Offer Views on Domestic Issues*, CONN. POST (Oct. 16, 2010, 4:59 PM), <http://www.ctpost.com/news/article/McMahon-Blumenthal-offer-views-on-domestic-issues-709571.php> [<http://perma.cc/59EL-KYHX>].
149. *See* discussion *supra* note 139.
150. We will explain why it is that state attorneys general might seek political advantage by either defending or refusing to defend state law. *See infra* Part III.
151. CAL. CONST. art. 5 § 13. California Attorneys General Jerry Brown in 2008 and Kamala Harris in 2010 refused to defend the state ban on same-sex marriage. *See infra* Appendix II.

the attorney general “appear for”<sup>152</sup> and “represent”<sup>153</sup> the state, text that could be read to require a defense of state law, many attorneys general have declined to defend the validity of certain state laws. Even language that the attorney general “defend”<sup>154</sup> the state has not constrained attorneys general from refusing to defend laws unpopular with their political constituents.<sup>155</sup>

In particular, same-sex marriage became a watershed issue in refusals to defend. Beginning with Jerry Brown’s December 2008 refusal to defend California’s ban on same-sex marriage, twelve attorneys general (as of November 1, 2014) have refused to defend their state bans.<sup>156</sup> Moreover, by our count, around fifty-seven percent of state refusals to defend (twenty of thirty-five) have occurred since 2008, with same-sex marriage accounting for one-third of all refusals.<sup>157</sup> Other post-2008 refusals also have involved high salience issues,

152. KY. REV. STAT. ANN. § 15.020 (2012); OR. REV. STAT. § 180.060 (2008); WIS. STAT. § 806.04(11) (2013). Kentucky Attorney General Jack Conway and Oregon Attorney General Ellen Rosenblum refused to defend state bans on same-sex marriage in 2014. Wisconsin Attorney General J.B. Van Hollen refused to defend the state’s domestic partner registry law in 2010. See *infra* Appendix II.

153. 15 ILL. COMP. STAT. 205/4 (2010). Illinois Attorney General Lisa Madigan refused to defend the state ban on same-sex marriage in 2013. See *infra* Appendix II.

154. IND. CODE § 4-6-2-1 (2011); N.C. GEN. STAT. § 114-2 (2014); N.M. STAT. ANN. § 8-5-2 (1978). Indiana Attorney General Greg Zoeller refused to defend the state’s immigration law in 2012. New Mexico Attorney General Gary King (2013) and North Carolina Attorney General Roy Cooper (2014) refused to defend state bans on same-sex marriage. See *infra* Appendix II.

155. This is not to say that all nondefenses involved somewhat dubious interpretations of state law governing the attorney general’s responsibilities. In Virginia, for example, state law could be read to allow attorneys general to opt out of the defense of state statutes. If the attorney general certifies that he cannot “render certain legal services,” the governor can appoint a special counsel. VA. CODE § 2.2-510.4 (2014). Pennsylvania dictates that the attorney general must defend state statutes. See 71 P.S. 732-204(a) (3). But the state also provides that its agencies can stand in for the attorney general in various circumstances. See 71 P.S. 732-303, 402 & 403. In Virginia, Attorney General Mark Herring refused to defend the state ban on same-sex marriage in 2014. In Pennsylvania, Attorney General Kathleen Kane refused to defend two state laws in 2014: the state ban on same-sex marriage and state law prohibiting local gun control ordinances. See *infra* Appendix II.

156. As noted above, Kamala Harris also refused to defend the state ban in 2010—so there are twelve attorneys general from eleven states. See *infra* Appendix II. We count the Hawaii Attorney General as one of the eleven, as he made legal arguments both against the law (on behalf of the Governor who appointed him) and for the law (on behalf of the state official charged with its enforcement). See Nick Visser, *Hawaii Gov. Won’t Defend State’s Gay Marriage Ban*, ADVOCATE.COM (Feb. 22, 2012, 1:15 PM), <http://www.advocate.com/news/daily-news/2012/02/22/hawaii-gov-wont-defend-states-gay-marriage-ban> [<http://perma.cc/2GLN-URFN>].

157. See *infra* Appendix II. Our data, as discussed in *supra* note 141, covers cases from 1930-2014; the dataset is intended to be comprehensive, but we recognize that we may not have uncov-



including gay rights, immigration law, gun control, education, and property rights.<sup>158</sup> Outside of the same-sex marriage context, most post-2008 refusals involve Republican attorneys general (six of eight) invoking state constitutional guarantees and requirements (five of eight).<sup>159</sup>

A desire to curry favor with the political base helps explain most decisions not to defend. Aside from three cases in which the U.S. or state supreme courts had issued seemingly definitive rulings about the validity of the state statute,<sup>160</sup> the post-2008 laws left undefended were overwhelmingly unpopular with the attorney general's political base (or the governor's when the latter appointed the attorney general). Democrats refused to defend same-sex marriage bans; Republicans refused to defend restrictive gun laws and statutes protecting same-sex couples.<sup>161</sup>

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ered every example of nondefense. At the same time, the numbers are so striking that there is no question that same-sex marriage is a true watershed.

158. See *infra* Appendix II.

159. See *id.* In one case, the attorney general refused to defend without specifying whether she thought the law unconstitutional on either state or federal grounds. When Pennsylvania Attorney General Kathleen Kane announced her refusal to defend a state law banning localities from enacting gun control measure, Kane simply stated that it would "be in the best interest of the commonwealth" for another state office to handle the defense. See David DeKok, *Republican Bashes Pennsylvania Attorney General for Refusing To Defend Pro-NRA Gun Law*, HUFFINGTON POST (Dec. 5, 2014, 3:54 PM), [http://www.huffingtonpost.com/2014/12/05/kathleen-kane-nra-gun-law-pennsylvania\\_n\\_6278124.html](http://www.huffingtonpost.com/2014/12/05/kathleen-kane-nra-gun-law-pennsylvania_n_6278124.html) [<http://perma.cc/DL87-4VSR>].

160. It is, of course, possible to question attorney general claims that a court ruling is definitive and, relatedly, that there is no prospect of winning a case. In Indiana and New Jersey, for example, claims that holdings by either the U.S. Supreme Court (Indiana) or state supreme court (New Jersey) justified refusals to defend were criticized by those who wanted the attorneys general to continue defending the statutes. See Jonathan Capehart, *Look for Christie To Replace 'Activist' Gay-Marriage Judge*, WASH. POST: POST PARTISAN, Oct. 23, 2013, <http://www.washingtonpost.com/blogs/post-partisan/wp/2013/10/23/look-for-christie-to-replace-activist-gay-marriage-judge> [<http://perma.cc/FE6G-5H6Y>] (New Jersey); Tim Evans, *Judge Permanently Blocks Parts of Ind. Immigration Law*, USA TODAY, Mar. 29, 2013, <http://www.usatoday.com/story/news/nation/2013/03/29/immigration-ruling-indiana/2036477> [<http://perma.cc/Y35H-37LF>] (Indiana).

161. Associated Press, *Wisconsin Court Upholds Domestic Partnership Registry*, USA TODAY, Dec. 21, 2012, <http://www.usatoday.com/story/news/nation/2012/12/21/wisconsin-domestic-partner/1784207> [<http://perma.cc/459Q-SMXS>] (describing Republican Wisconsin Attorney General's refusal to defend domestic partnership registry); Michael Phillis & Michael Linhorst, *Christie Administration Opts Out of Defending State's Handgun Law*, NORTHJERSEY.COM (Jan. 2, 2014, 11:41 PM), <http://www.northjersey.com/news/christie-administration-opts-out-of-defending-state-s-gun-laws-in-second-case-1.670969> [<http://perma.cc/CM69-RPEA>].

Equally telling, most post-2008 states with refusal-to-defend controversies were states where neither Democrats nor Republicans dominated.<sup>162</sup> Eleven of the seventeen cases (not involving clear-cut state or U.S. Supreme Court precedent) occurred in “purple states,” and in all twelve cases the attorney general’s litigation position aligned with the views of her political base—Republican in Virginia, Colorado, New Jersey, and Wisconsin; Democratic in Virginia, New Mexico, Nevada, Kentucky, Pennsylvania, and North Carolina.<sup>163</sup> Five of the remaining six cases involved blue state attorneys general who did not defend state bans on same-sex marriage.<sup>164</sup>

Other examples suggest that politics influenced decisions. In states with Democratic attorneys general refusing to defend marriage laws and Republican

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162. Conflicts between Democrats and Republicans, of course, did not begin in 2008, and partisanship figured into some earlier refusal-to-defend controversies, too. Examples include New Jersey’s refusal to defend a moment of silence law that the governor had vetoed and the refusal of two Texas Democratic attorneys general to defend challenges to the state sodomy statute and a male-only band at Texas A&M. See Bill Aleshire, *The Texas Attorney General: Attorney or General?*, 20 REV. LITIG. 187, 191-92, 223 (2000); Stuart Taylor, Jr., *Moment of Silence Is Ended in Jersey*, N.Y. TIMES, Dec. 2, 1987, <http://www.nytimes.com/1987/12/02/nyregion/moment-of-silence-is-ended-in-jersey.html> [<http://perma.cc/G647-CWBE>].

163. Another example (although we do not formally count it as a refusal to defend for reasons detailed *supra* note 141) is Republican Ohio Attorney General Mike DeWine’s filing of an amicus brief supporting the free speech rights of an anti-abortion group in the face of an Ohio law barring the making of false statements about a candidate with reckless disregard of whether the statement was false. In particular, the Susan B. Anthony List filed a preemptive claim in an attempt to have the law declared unconstitutional. The group noted that although it did not intend to violate the statute, it was prepared to target lawmakers who supported the Affordable Care Act on the grounds that they supported taxpayer-funded abortion. See Marty Lederman, *Commentary: The Return of the Robert Bork “Dueling Briefs” Strategy: Buckley v. Valeo, Susan B. Anthony List, and Ohio Attorney General DeWine*, SCOTUSBLOG (Mar. 17, 2014, 11:42 AM), <http://www.scotusblog.com/2014/03/commentary-the-return-of-the-robert-bork-dueling-briefs-strategy-buckley-v-valeo-susan-b-anthony-list-and-ohio-attorney-general-dewine> [<http://perma.cc/B38R-TS65>]. By signing a brief arguing that the Susan B. Anthony List lacked jurisdiction to file their complaint, DeWine mounted a defense of the state statute. Yet he simultaneously backed the speech rights of the Susan B. Anthony List by filing an amicus brief in which he raised constitutional concerns about the statute, a filing clearly in tension with his merits filing. See Lederman, *supra* note 141. DeWine seemed to suppose that his duty to defend was absolute and that he could, consistent with that duty, advance his personal views on a law’s constitutionality. See Associated Press, *Court OKs Challenge to Ohio Ban on Campaign Lies*, WASH. EXAMINER, June 16, 2014, <http://www.washingtonexaminer.com/court-oks-challenge-to-ohio-ban-on-campaign-lies/article/feed/2141722> [<http://perma.cc/VED8-WRSE>] (quoting DeWine’s spokesperson—after the Supreme Court ruling that Susan B. Anthony List could challenge the Ohio law—as recognizing that the Attorney General “has a duty and will continue to defend” the statute while also making “the courts aware of his significant First Amendment concerns”).

164. The remaining case involved a protest provision of a zoning law that the Montana Attorney General refused to defend in 2010. See *infra* Appendix II.

governors (Pennsylvania, Nevada), the governor initially defended the law.<sup>165</sup> In New Jersey (where the attorney general is appointed), Republican Governor Chris Christie carried favor with the national party by initially defending the state ban on same-sex marriage while refusing to defend gun control legislation.<sup>166</sup>

As we have shown, state law and practices regarding the duty to defend vary from state to state and from attorney general to attorney general, meaning that one cannot generalize about the powers and duties of the attorneys general. There is no neat answer to the question of whether attorneys general are legally obliged to defend state law. Sometimes state law addresses the duty to defend, either requiring as much or suggesting there is no duty. Moreover, some states impose a duty to litigate the constitutionality of state law. But most often, state law seems utterly silent.

In practice, attorneys general have long asserted in response to this silence that they have a strong duty to defend. But that view has greatly eroded in the past decade. Many attorneys general have declared that their duty to defend has various exceptions and caveats, sometimes making the claim in the face of same-sex marriage laws and sometimes in other contexts.

But competing conceptions of the state duty to defend are not really about the duty to defend; the fight is about same-sex marriage. Holder and others who favor same-sex marriage imagined that the federal Constitution imposed a duty not to defend upon state officers or at least authorized non-defense. At-

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165. See Anjeanette Damon, *Nevada Attorney General Backs off Defense of State's Gay Marriage Ban*, RENO GAZETTE-J., Jan. 24, 2014, <http://www.rgj.com/article/20140124/NEWS/301240052> [<http://perma.cc/KC93-LFCZ>] (Nevada); Juliet Eilperin, *Pa. Attorney General Says She Won't Defend State's Gay Marriage Ban*, WASH. POST: POST POL., July 11, 2013, <http://www.washingtonpost.com/blogs/post-politics/wp/2013/07/11/sources-pa-attorney-general-wont-defend-states-gay-marriage-ban> [<http://perma.cc/JY7V-R3RZ>] (Pennsylvania).

166. In both cases, Christie was reaching out to potential supporters outside the state. Within New Jersey, the marriage law was unpopular while the gun law was popular. See Phillis & Linhorst, *supra* note 161. At the same time, Christie seemed somewhat attentive to New Jersey public opinion when he decided to stop defending the same-sex marriage ban before the New Jersey Supreme Court. See Salvador Rizzo, *N.J. Legalizes Gay Marriage After Decade-Long Push*, STAR-LEDGER, Oct. 22, 2013, [http://www.nj.com/politics/index.ssf/2013/10/nj\\_legalizes\\_gay\\_marriage\\_after\\_decade-long\\_push.html](http://www.nj.com/politics/index.ssf/2013/10/nj_legalizes_gay_marriage_after_decade-long_push.html) [<http://perma.cc/6MB3-WG4E>] (indicating that Christie dropped the appeal when the court unanimously refused to stay a lower court decision to allow gay marriages to proceed); see also *supra* note 160. In Missouri, the same political calculus led to the opposite result—the Democratic Attorney General defended the politically popular state ban on same-sex marriage notwithstanding his “personally support[ing] the goal of marriage equality.” Reuters, *Missouri: Official Sued Over Granting Marriage License to Gay Couples*, N.Y. TIMES, June 26, 2014, <http://www.nytimes.com/2014/06/27/us/missouri-official-sued-over-granting-marriage-licenses-to-gay-couples.html> [<http://perma.cc/R9SC-64V6>].

torneys general who opposed same-sex marriage imagined there was a uniform, almost “national” obligation to defend, without regard to state law. Both sides were searching for an expedient legal answer that furthered their side in the culture wars. Both sides found one in the form of a nationwide rule when the reality is far more complicated.

### III. POLITICAL AMBITION AND THE DUTY TO DEFEND

Elected attorneys general seek political advantage.<sup>167</sup> They invariably curry favor with their political base (party, interest groups, voters) as they seek reelection or a new office.<sup>168</sup> Correspondingly, elected attorneys general pay more attention to the needs of their political base than to the institutional or political interests of other parts of the executive branch, including the governor.<sup>169</sup> By pursuing litigation strategies (challenges, defenses, appeals, arguments, targets) designed to win favor with their constituents, attorneys general further their careers.<sup>170</sup> Recent refusals to defend reflect the same dynamic: by refusing to defend laws that their bases oppose, attorneys general have sought to cement their standing with their bases.

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<sup>167</sup>. Appointed attorney generals are less likely to seek elected office and, as such, have far different incentives than elected attorneys general. See Thompson, *supra* note 147, at 29-31 (noting, among other things, that nineteen percent of appointees sought elected office and that appointed attorneys general were more apt to become judges). Appointed attorneys general, moreover, were more likely than elected attorneys general to have worked at law firms. See *id.* at 25.

<sup>168</sup>. Wooing goes on from both sides. Lobbyists – as they do with other elected officials – seek to curry favor with attorneys general. Lobbyists (including former attorneys general) contribute money, invite attorneys general to junkets, and so on, in an effort to persuade attorneys general to pursue litigation strategies that favor their interests. See Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General To Sue*, N.Y. TIMES, Dec. 18, 2012, <http://www.nytimes.com/2014/12/19/us/politics/lawyers-create-big-paydays-by-coaxing-attorneys-general-to-sue.html> [<http://perma.cc/F8JH-WKNN>] [hereinafter *Lawyers Create Big Paydays*]; Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES, Oct. 28, 2014, <http://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html> [<http://perma.cc/9HG5-DW26>] [hereinafter Lipton, *Lobbyists, Bearing Gifts*].

<sup>169</sup>. In Part III.A, we detail the political incentives of attorneys general and explain why they are policy entrepreneurs who seek political advantage through litigation. They clearly see themselves as independent of the governor and other parts of the state executive (especially when the governor is of a different political party). See generally Marshall, *supra* note 75 (discussing division of authority between state governors and attorneys general).

<sup>170</sup>. See Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998 (2001). For additional discussion, see *infra* notes 181-185.

This Part focuses on the political ambitions of attorneys general and contrasts their incentives to those of the court-centric attorneys in the DOJ. We also try to explain why the duty-to-defend controversy erupted over same-sex marriage. Party polarization has now created incentives for Republican and Democratic attorneys general to cater to their base on the issues that divide their parties.

*A. Politics in the Office of the State Attorney General*

Attorneys general frequently seek higher office, so much so that the “AG” label has been described as shorthand for “Aspiring Governor.”<sup>171</sup> Studies have shown that around 21.5% of attorneys general run for Governor and around 10% run for Congress (7.7% for Senate; 1.9% for House).<sup>172</sup> In four-year electoral cycles, on average more than eleven attorneys general run for governor; in ten-year electoral cycles, on average nine attorneys general run for Senate.<sup>173</sup> In Alabama, all but one Attorney General ran for Governor from 1955-1997 (and the one who did not run had previously lost his reelection bid).<sup>174</sup> The long list of attorneys general that have sought higher office leaves no doubt that the position is a political stepping stone. This is especially true of elected attorneys general; as compared to appointees, they are around twice as likely to seek higher office:<sup>175</sup> 37% of elected attorneys general (as compared to 19% of appointed) seek higher office; 26% (as compared to 13.4%) run for governor, 9.3% (as compared to 4.7%) ran for Senate.<sup>176</sup>

The office of attorney general – something of “a strange hybrid” in American government<sup>177</sup> – nurtures the political ambitions of its occupants because it facilitates policy entrepreneurship. While obliged to write opinions and represent government agencies, elected attorneys general can pursue their own

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171. See, e.g., Colin Provost, *supra* note 10.

172. See Thompson, *supra* note 147, at 30. Even when attorneys general leave office to work for law firms, they often work as lobbyists. As detailed by Eric Lipton, several former attorneys general have joined law firms where they lobby sitting attorneys general to pursue favored litigation or steer clear of disfavored litigation. See Lipton, *Lobbyists, Bearing Gifts*, *supra* note 168.

173. Colin Lowell Provost, *Litigation and the Electoral Connection: The Policymaking of Ambitious State Attorneys General* 49-52 (2004) (unpublished Ph.D. dissertation, State University of New York at Stony Brook) (on file with authors).

174. See *id.*

175. See Provost, *supra* note 171, at 612 (noting the tendency of elected but not appointed attorneys general to use high profile litigation to enhance future political prospects).

176. Thompson, *supra* note 147, at 30.

177. Clayton, *supra* note 77, at 528.

agendas even as they fulfill these duties. Elected attorneys general sometimes use their opinions to assert and advance their legal policy preferences.<sup>178</sup> Furthermore, attorneys general typically have wide-ranging policymaking discretion stemming from their ability to sue on behalf of the state. They may sue state instrumentalities<sup>179</sup> and, by bringing lawsuits against private parties, increasingly function as an omnicompetent regulatory agency.<sup>180</sup>

Consistent with political science claims that politicians are influenced by the “structure of opportunities” afforded by their office and more likely to “run for a higher office when their current office affords them many opportunities to advance in politics,” ambitious attorneys general have proven adept at expanding their base by launching high-visibility legal challenges.<sup>181</sup> Most notably, state attorneys general capitalized on gaps in federal regulation by filing suits related to consumer protection, antitrust, and other matters.<sup>182</sup> They likewise have played to their bases by challenging federal legislation (including over two dozen challenges to the Affordable Care Act)<sup>183</sup> and by issuing opin-

178. See Thomas R. Morris, *States Before the U.S. Supreme Court: State Attorneys General as Amicus Curiae*, 70 JUDICATURE 299 (1987) (noting that a “new breed of state attorneys general” exploit their offices’ political advantages and “supplement[] the traditional legal defense roles of the office with public advocacy activities”); cf. James Brent, *The Judiciary and the Dual Executive in the American States* 60-63 (2005) (unpublished Ph.D. dissertation, Ohio State University) (on file with authors) (arguing that elected state attorneys general are particularly independent of governors, enabling them to frustrate governors’ programs and to represent “the public as they see it”).

179. See Marshall, *supra* note 75, at 2455-59 (discussing how the attorney general is a check on other parts of state government); text accompanying *supra* notes 79-85 (discussing the common-law authority of the attorney general).

180. See *supra* notes 82-83; see also *infra* notes 181-182.

181. Provost, *supra* note 173, at 4 (quoting JOSEPH SCHLESSINGER, *AMBITION AND POLITICS: POLITICAL CAREERS IN THE UNITED STATES* 11 (1966)).

182. See NAT’L ASS’N OF ATTORNEYS GEN., *supra* note 10, at 231-46, 270-92; Lynch, *supra* note 170. The ability to fill in such gaps was facilitated by three interrelated phenomena—an increase in the budget of most attorney general offices, Ronald Reagan’s deregulatory initiatives, which helped create such gaps, and the efforts of the National Association of Attorneys General to help coordinate efforts of state attorneys general. See Clayton, *supra* note 77, at 532, 539-48.

183. See Kevin Sack, *Suit on Health Care Bill Appears Likely To Advance*, N.Y. TIMES, Sept. 14, 2010, [www.nytimes.com/2010/09/15/health/policy/15health.html](http://www.nytimes.com/2010/09/15/health/policy/15health.html) [http://perma.cc/WX9L-7U6X]. Attorneys general also seek political advantage by challenging presidential initiatives (including a challenge by twenty-six states to President Obama’s 2014 immigration initiative). See Joseph Tanfani, *Obama Administration Seeks To Reverse Texas Judge’s Immigration Ruling*, L.A. TIMES, Feb. 23, 2015, <http://www.latimes.com/nation/nationnow/la-na-immigration-stay-20150223-story.html> [http://perma.cc/QK3X-S9EX].

ions defending state practices said to violate federal rules.<sup>184</sup> They increasingly file certiorari petitions and amicus briefs in the Supreme Court, thereby attempting to make names for themselves.<sup>185</sup>

The relationship of attorneys general to their staff also facilitates their entrepreneurial tendencies. Attorneys general are often personally involved in individual cases as “they are closer, geographically and personally, to those actually handling and supervising trials and appeals.”<sup>186</sup> This proximity better enables attorneys general to advance their electoral and policy interests in litigation.

With the rise of politically salient regulatory lawsuits against private interests and increased participation in U.S. Supreme Court cases, most attorneys general have appointed solicitors that help advance their legal policy agenda.<sup>187</sup> These solicitors are part of an attorney general’s senior staff and sometimes handle a range of delicate non-appellate work – including the writing of formal legal opinions and the handling of important trials.<sup>188</sup> While state solicitors are often court-centric in their orientation (many are former U.S. Supreme Court clerks who eventually will pursue court-centered careers in private practice, the bench, and the academy),<sup>189</sup> they also must be sensitive to “the immediate po-

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184. Paul Hammel, *Abortion Clinic Files Lawsuit Against State*, OMAHA WORLD HERALD, Aug. 13, 1994, at 1 (discussing Nebraska Attorney General Don Stenberg’s refusal to comply with federal abortion regulations until a thorough legal analysis is complete).

185. David Lauter, *States Strive To Win High Court Favor*, NAT’L L.J., Jan. 28, 1985, at 30 (noting an increase in certiorari petitions at the time then-Attorney General John Ashcroft was running for governor); Clayton, *supra* note 77, at 533-38 (discussing an increase in participation before the Supreme Court); Morris, *supra* note 178, at 298 (discussing an increase in amicus filings). On the issue of same-sex marriage, attorneys general for thirty-two states joined one of two amicus briefs urging Supreme Court review (fifteen states supporting same-sex marriage filed one brief; seventeen states defending same-sex marriage bans also filed a brief). See Associated Press, *32 States Ask Supreme Court To Settle Gay Marriage*, YAHOO! NEWS, Sept. 4, 2014, <http://news.yahoo.com/massachusetts-files-pro-gay-marriage-court-brief-224345276.html> [<http://perma.cc/6C8K-QFYB>].

186. James R. Layton, *The Evolving Role of the State Solicitor: Toward the Federal Model?*, 3 J. APP. PRAC. & PROCESS 533, 549 (2001).

187. See Marcia Coyle, *Justices Listen to a Key Voice: State Solicitors General Get More Time in High Court*, NAT’L L.J., Apr. 7, 2008, at 2 (noting that, in 2008, thirty-five states had solicitors general); Banks Miller, *Describing the State Solicitors General*, 93 JUDICATURE 238, 240 (2010) (noting the adherence of solicitors general and attorneys general to policy priorities).

188. Layton, *supra* note 186, at 542.

189. Former U.S. Supreme Court clerks who have served as state solicitors include Ted Cruz (Texas), Kevin Newsom (Alabama), and Mike Scodro (Illinois). See Tony Mauro, *Sollicitous Behavior*, AM. LAW., Aug. 2003, Factiva, Doc No. ALAW000020040320dz8100016 [<http://perma.cc/84MY-KYJL?type=pdf>] (noting examples). Law professors who have served as state solicitors include Bill Marshall (Ohio), Steven McCallister (Kansas), and Barbara Underwood (New York). While a few state solicitors have sought political office (most notably

litical ramifications of many appeals”<sup>190</sup> and the electoral fallout of their exertions, appellate or otherwise, because they labor for a political creature (the attorney general) keenly interested in those consequences.<sup>191</sup>

The recent high-profile refusals to defend (along with the noisy choices to defend) are yet another example of attorneys general exploiting the advantages of their offices to advance their electoral fortunes. Just as suits against cigarette companies advanced the careers of ambitious attorneys general, the same is true of the choice whether to defend bans on same-sex marriage and regulation of guns.

As compared to the U.S. Attorney General, state attorneys general seem more apt to decide not to defend.<sup>192</sup> To begin with, the U.S. Attorney General rarely seeks higher office and is in charge of an agency whose authority is linked to federal courts deciding cases litigated by DOJ lawyers.<sup>193</sup> Moreover, at the federal level, the duty to defend helps stave off congressional and agency attempts to limit DOJ control of government litigation.<sup>194</sup> In contrast, state attorneys general frequently seek reelection or higher office and, as such, are less court-centric and far more likely to pursue policies that enhance their status and reputation among their political allies and voters more generally. As noted

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Ted Cruz), most enter private practice or return to the academy. For example, Newsom, Scodro, John Bursch (Michigan), and Jeff Sutton (Ohio) used their positions as solicitors—where they argued cases before the U.S. Supreme Court—as stepping-stones to court-centered legal practices. Sutton subsequently became a federal appeals courts judge. *See id.*

190. *Id.*

191. When state solicitors provide high quality legal advice and representation, they not only advance the political ambitions of their attorneys general, they also advance their own careers. *Id.* In this way, state solicitors are like their court-centered counterparts in the federal DOJ (where many attorneys who worked in the Solicitor General’s office have become leading members of the so-called Supreme Court bar, a cluster of elite lawyers who litigate a substantial number of U.S. Supreme Court cases). *See* Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court*, 96 GEO. L.J. 1487, 1498-1501 (2008).

192. We do not wish to overstate the point, as presidents also may view non-defense as a means of advancing their electoral and policy interests. For example, Republican presidents may choose not to defend gun laws and campaign finance restrictions, and Democratic presidents may choose not to defend federal laws that limit abortion.

193. Since Attorney General Robert F. Kennedy ran for president in 1968, only three former U.S. attorneys general have sought higher elected office. Elliot Richardson unsuccessfully ran for a Senate seat in 1984, as did Richard Thornburgh in 1991. *See The Vote in Massachusetts*, WASH. POST, Sept. 20, 1984, at A18; Hobart Rowen, *Primaries Offer Economic Primer*, WASH. POST, Feb. 23, 1992, at H1. Janet Reno unsuccessfully ran for Florida Governor in 2002. *See* Edward Walsh, *Reno’s Call for Recount Rejected; Fla. Officials: Law Doesn’t Allow It*, WASH. POST, Sept. 14, 2002, at A1.

194. *See* Devins & Prakash, *supra* note 9, at 539-41, 550-55.



earlier, state attorneys general are independent power brokers who frequently engage in entrepreneurial lawsuits and litigation choices.<sup>195</sup>

Three factors limit fallout from state failures to defend, thereby making the choice more acceptable to state attorneys general. First, sometimes other state attorneys have principal litigation authority.<sup>196</sup> For instance, some agencies and localities control their own litigation.<sup>197</sup> In most states, local prosecutors handle criminal cases.<sup>198</sup> Hence some attorneys general may be forced to play a circumscribed role in some litigation—sometimes they may be able to take over a case, and other times they may be limited to intervening or filing an amicus brief.<sup>199</sup> The Kansas Attorney General initially did not participate in *Brown v. Board of Education* and the Texas Attorney General never participated in *Lawrence v. Texas*.<sup>200</sup> Where someone else has sole or primary litigation authority, a

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195. See generally NAT'L ASS'N OF ATTORNEYS GEN., *supra* note 10 (highlighting ways that state attorneys general can control litigation concerning the state); Colin Provost, *State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism*, 33 PUBLIUS 37 (2003) (arguing that attorneys general seek out regulatory gaps they can fill in order to advance their political careers).

196. Private parties, too, may defend the constitutionality of state law. In two cases that we identified, state attorneys general did not participate in defenses of state law that were defended by private parties. Both cases involved a private party that benefitted from an allegedly unconstitutional law and was sued by a private party that was aggrieved by the law's operation. In each case, the attorney general could have participated in the defense of the statute but elected—without comment—to leave the defense to the private party. See *Lawnwood Med. Ctr. v. Seeger*, 990 So. 2d 503, 508 n.5 (Fla. 2008); *Estate of Bell v. Shelby Cnty. Health Care Corp.*, 318 S.W.3d 823, 827 (Tenn. 2010).

197. Matheson, *supra* note 87, at 21–22. Outside the nondefense context, the disbursement of litigation authority often is opposed by attorneys general who seek greater control of legal policymaking through the centralization of litigation authority. See NAT'L ASS'N OF ATTORNEYS GEN., *supra* note 10, at 45–46 (noting that “[t]here is a trend toward expansion of the duties and powers of” state attorneys general and arguing that “[a]ttorneys general are uniquely qualified for this role because of their position and perspective in state government”).

198. See *Appointing State Attorneys General*, *supra* note 87, at 980–81.

199. Of course, attorneys general may opt out of low-salience cases altogether when another state entity is defending state law. One example is a private bill approved by the Tennessee legislature allowing a local county to impose a mineral severance tax increase. *Decatur Cnty. v. Vulcan Materials Co.*, No. W2001-00858-COA-R3-CV, 2002 WL 31786985 (Tenn. Dec. 12, 2002). In this case, the Attorney General left the defense of the tax to the county after issuing an ambiguous legal opinion about the distribution of severance tax revenues under the state constitution. See *id.* at \*2 nn.2, 3.

200. See *supra* note 146 (discussing *Brown*). For a more general treatment of how southern attorneys general thought about their political ambitions when staking out positions on the segregation issue, see Samuel Krislov, *Constituency Versus Constitutionalism: The Desegregation Issue and Tensions and Aspirations of Southern Attorneys General*, 3 MIDWEST J. POL. SCI. 75 (1959). *Lawrence* was briefed and argued by Houston prosecutor Charles A. Rosenthal. A more recent example of attorney general nonparticipation is *Town of Greece v. Galloway*, 134

failure to defend on the part of the attorney general may seem more palatable precisely because she does not control the litigation in the first instance. Second, and equally significant, an attorney general's refusal to defend does not necessarily mean that a particular law will go wholly undefended. As discussed in Part II, sometimes the governor, affected agency, or state legislature may defend state law.<sup>201</sup> In states where someone else can mount a defense, the institutional costs of *attorney general* non-defense shrinks or disappears, meaning that few may be troubled by an attorney general's decision to gratify his constitutional or political preferences. Third, attorneys general may choose not to defend with little risk of upsetting expectations within a state's legal bureaucracy. Unlike the court-centered attorneys in the federal DOJ,<sup>202</sup> attorneys who work for the state attorney general are more apt to be quite attentive to her concerns.<sup>203</sup> Moreover, these attorneys are seeking "to learn specific types of law in order to gain benefits for subsequent private practice."<sup>204</sup> They are not part of a "jurocracy" that delegates substantial decision-making power to careerists.<sup>205</sup>

In sum, because attorneys general have ample incentive to use their office for political advancement, and because the consequences of their nondefense likely are minimal, attorneys general are free to take litigation positions that reflect their legal policy preferences and resonate with their political base.<sup>206</sup>

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S. Ct. 1811 (2014). Twenty-four states filed or signed amicus briefs in the case but New York steered clear of the dispute. See Brief of Indiana, Texas, and Twenty-One Additional States as *Amici Curiae* in Support of the Petitioner, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (No. 12-696), 2013 WL 4072518.

201. See *supra* notes 116-120 and accompanying text; see also Shaw, *supra* note 15, at 246-57 (discussing how states may facilitate defense by other entities).

202. Using bureaucratic theory, we have argued that the DOJ has a strong incentive to embrace court-centered norms. We rely on that analysis in this paragraph. See Devins & Prakash, *supra* note 9, at 537-59.

203. See Morris, *supra* note 90, at 136.

204. *Id.* at 148.

205. See DONALD L. HOROWITZ, *THE JUROCRACY* (1977); Devins & Prakash, *supra* note 9, at 539-40, 546 (noting that DOJ attorneys are often legal elites); Thomas W. Merrill, *High-Level, "Tenured" Lawyers*, 61 L. & CONTEMP. PROBS. 83, 84 (1998) (noting that at the highest levels of the Office of the Solicitor General, some career civil servants enjoy considerable power and responsibility).

206. In highlighting the nexus between the political ambitions of state attorneys general and their litigation decisions, we are not arguing that attorneys general *never* make unpopular litigation decisions. We have already given the example of Attorney General Blumenthal in Connecticut. See *supra* note 148 and accompanying text. We would add that unpopular litigation decisions sometimes advance an attorney general's non-political ambitions. In Alabama, for example, then-Attorney General William Pryor sought the ouster of state Chief Justice Roy Moore for his refusal to remove a monument of the Ten Commandments that he had placed in a state judicial building. See Jeffrey Gettleman, *Alabama Panel Ousts Judge*

If we are correct about the latitude enjoyed by attorneys general, one may wonder why nondefense was not more common before 2008. Recall that before the recent spate of attorneys general refusing to defend laws unpopular with their base, nondefense was rare and seemingly never pursued for political gain.<sup>207</sup> For the most part, attorneys general advanced their political interests by bringing suits calculated to their advantage and by hiring effective solicitors general.<sup>208</sup> As discussed below, growing party polarization helps explain the recent dust-up between Republican and Democrat attorneys general over the duty to defend and the corresponding rise in opportunistic nondefense. Polarization also explains why attorneys general will increasingly turn to nondefense as another mechanism to advance their legal policy agenda.

### B. Party Polarization and the Duty To Defend

Sharp differences between Republican and Democratic views about the propriety of same-sex marriage bans explain why Republican attorneys general claim that same-sex marriage bans must be defended and why many Democratic attorneys general argue that the duty to defend does not apply to same-sex marriage bans.<sup>209</sup> After all, Republican attorneys general really don't all believe that all state laws must be defended; recall that some Republican attorneys general have refused to defend state domestic partnership registry laws and gun control measures.<sup>210</sup> Relatedly, we suspect that if a large number of Republican attorneys general stopped defending affirmative action plans or campaign finance laws, some Democratic attorneys general might vigorously criticize the nondefenses. Because Democratic and Republican politicians often

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*over Ten Commandments Monument*, N.Y. TIMES, Nov. 14, 2003, <http://www.nytimes.com/2003/11/14/national/14JUDG.html> [<http://perma.cc/VYD7-FF6Y>]. Pryor had previously offered the services of his office to help defend Moore but reversed his position after being nominated to the federal Court of Appeals. *See id.*

207. *See supra* notes 142, 145-148 and accompanying text.

208. *See supra* notes 82-83, 180-182.

209. A vivid illustration of the split between Democrats and Republicans on this issue is the decision of the Republican House majority—through the House Bipartisan Legal Advisory Group—to defend the Defense of Marriage Act in court. In response, one hundred and thirty-two House Democrats filed an amicus brief in July 2012 arguing that DOMA was unconstitutional and that the House Bipartisan Legal Advisory Group did not speak for a “unanimous House on this issue.” Brief of Members of the U.S. House of Representatives—Including Objecting Members of the Bipartisan Legal Advisory Group, Representatives Nancy Pelosi and Steny H. Hoyer—as Amici Curiae in Support of Plaintiff-Appellee and Urging Affirmance at 1, *Golinski v. U.S. Office of Pers. Mgmt.*, 680 F.3d 1048 (9th Cir. 2013) (No. 12-15288); *see also supra* notes 5-7 (discussing competing views of Republican and Democrat attorneys general).

210. *See supra* notes 159, 161.

seek to distance themselves from the opposite party by embracing polarizing policies,<sup>211</sup> we expect that Republican and Democratic attorneys general will continue to refuse to defend laws that frustrate their party's diverging agendas.

For earlier attorneys general, seeking political gain by appealing to partisans in their party was often fraught with difficulty. Before party polarization created an ideological divide, Democrats and Republicans were strewn across the spectrum.<sup>212</sup> In that era, issues like abortion, same-sex marriage, and gun rights did not serve as wedges dividing the parties.<sup>213</sup> Moreover, attorneys general, legislators, and governors were less likely to engage in partisan battles over legislation. In other words, it was less likely that an attorney general from one political party would disagree—as a matter of partisan loyalty—with the views of the governor or legislators of the other party.

Today, Democrats and Republicans are more ideologically distant than ever before, especially the partisans who donate and vote in primaries.<sup>214</sup> Now, when attorneys general are from a different party than the dominant legislative party or the governor, there is greater risk of conflict. Attorneys general are much more likely to espouse views that resonate with their coherent ideological base and are much more likely to seek political advantage by refusing to defend laws unpopular with that base.<sup>215</sup>

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211. On how it is that Republicans and Democrats fuel polarization by purposefully embracing conflicting messages, see C. Lawrence Evans, *Committees, Leaders, and Message Politics*, in CONGRESS RECONSIDERED 217 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001).

212. See Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737, 751-59 (2011) (tracking the rise of polarization in Congress).

213. Indeed, unlike modern day political elites (who are especially polarized), political elites tended to come together on race and other issues. See Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOWARD L.J. 661, 681-703 (2013).

214. See Devins, *supra* note 212, at 741 (highlighting the ideological distance between parties); Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 423 (2004) (noting the increasing importance of highly polarized party primaries).

215. In litigation regarding IRS rules governing federal and state exchanges established under the ACA, seven Republican Attorneys General (and no Democratic attorneys general) pushed for Supreme Court review of the issue; in sharp contrast, eighteen Democratic Attorneys General filed an amicus brief before the D.C. Circuit supporting the IRS rule. See Amicus Curiae Brief of the States of Oklahoma et al., *King v. Burwell*, 135 S. Ct. 475 (2014) (mem.) (No. 14-114), <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/09/Cert-Amicus-Brief-States.pdf> [<http://perma.cc/R8HH-UZNX>]; *Virginia Leads Multi-State Defense of Healthcare Affordability Assistance*, AUGUSTA FREE PRESS, Nov. 3, 2014, <http://augustafreepress.com/virginia-leads-multi-state-defense-healthcare-affordability-assistance> [<http://perma.cc/XJ9V-GHJW>]. Correspondingly, as illustrated by the efforts of Republi-

In purple states, the risk of conflict within the political leadership is especially acute. A majority of voters in these states have not settled on one side in today's partisan wars, and hence their elected statewide representatives often come from different parties. Even when leading elected officials belong to the same party, it may be that the current attorney general is of a different party than the former attorney general or former legislature. On same-sex marriage, for example, purple state attorneys general have clashed with governors,<sup>216</sup> legislatures,<sup>217</sup> and former attorneys general (whose policies they have reversed).<sup>218</sup>

In deep red and blue states, the risks of controversy are mitigated by the fact that one party dominates the political branch. Responding to the same electoral groups, this leadership will either uniformly support existing state laws or work in concert to repeal or disavow them.<sup>219</sup> On same-sex marriage, blue states either voluntarily repealed prohibitions on same-sex marriage or acquiesced to court orders striking down same-sex marriage bans.<sup>220</sup> Because red

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can attorneys general to repudiate U.S. Attorney General Holder and Democratic attorneys general who refused to defend same-sex marriage prohibitions, attorneys general will also appeal to their base by embracing their duty to defend laws backed by their political base.

216. See generally *supra* note 165 (discussing Pennsylvania and Nevada). In Kentucky, Governor Steve Beshear hired outside counsel to appeal a judicial invalidation of the state same-sex marriage ban (after the attorney general refused to defend the ban); see also Brett Barrouquere, Associated Press, *Kentucky Governor To Appeal Gay Marriage Ruling with Outside Counsel*, HUFFINGTON POST, Mar. 4, 2014, [http://www.huffingtonpost.com/2014/03/04/kentucky-governor-gay-marriage-appeal\\_n\\_4896731.html](http://www.huffingtonpost.com/2014/03/04/kentucky-governor-gay-marriage-appeal_n_4896731.html) [<http://perma.cc/E75Z-ZSYP>].
217. In Wisconsin, Republican attorney general J.B. Van Hollen refused to defend a domestic partner registry law enacted by a Democratic legislature. See Associated Press, *supra* note 161. In North Carolina, the Republican legislature threatened to enact legislation allowing leaders of the General Assembly to intervene in litigation in order to defend the constitutionality of state laws—an effort to curb the power of Democratic Attorney General Roy Cooper on the same-sex marriage issue. Cooper later refused to defend the ban after the Fourth Circuit invalidated a similar Virginia ban. See Richard Wolf, *Appeals Panel Strikes Down Gay Marriage Ban*, USA TODAY, July 29, 2014, <http://www.usatoday.com/story/news/nation/2014/07/28/virginia-gay-marriage-appeals-court-decision/12536403> [<http://perma.cc/DV7K-5JFJ>].
218. In Virginia, for example, Democrat Mark Herring made clear during his campaign for attorney general that he no longer supported the same-sex marriage ban that had been vigorously defended by his predecessor, Republican Ken Cuccinelli, and would like to see it repealed. See *Herring for Attorney General*, VIRGINIAN PILOT, Sept. 10, 2013, <http://hamptonroads.com/2013/09/herring-attorney-general> [<http://perma.cc/H5HL-2GHG>].
219. For an insightful treatment of how red states embrace the Republican agenda and blue states the Democratic agenda on family policy matters, see NAOMI CAHN & JUNE CARBORNE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF A CULTURE* (2010).
220. With the possible exception of New Hampshire, all eleven States in which lawmakers nullified (or submitted nullification proposals for referendum votes) state bans on same-sex

state voters generally back these bans, their elected politicians tend to support them as well. Not surprisingly, red state attorneys general have vigorously defended these bans in court and go out of their way to condemn blue state attorneys general who refuse to defend these bans.<sup>221</sup>

Going forward, we believe that the duty-to- defend issue will figure prominently in elections for attorney general because the power to choose not to defend may seem an attribute of the office and can be used to satisfy a political base that abhors certain aspects of standing law. This will be especially true for purple states, where party polarization causes elected officials, including attorneys general, to focus their energies on the issues that divide the parties. In Virginia (2013), Georgia (2014), and Wisconsin (2014), for example, elections prominently featured the duty-to- defend issue.<sup>222</sup>

None of this is surprising. In highlighting the way in which political actors in red and blue states are likely to act in concert to pursue a shared agenda, we are not suggesting that state attorneys general will disavow clear responsibilities under state law. An attorney general faced with an unambiguous and codified duty to defend likely will defend unpopular state law provisions until those provisions are repealed. Still, attorneys general are ambitious. Where there is some ambiguity or wiggle room, ambition will propel them to exploit the uncertainty. The nondefense (or defense) of state statutes, like the power to initiate common law lawsuits, is one of many means by which state attorneys general can cater to their political base and advance their political careers. Red state attorneys general gain political advantage by refusing to defend gun control

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marriage are blue states. See *States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states> [<http://perma.cc/NR7E-4XAY>]. Blue state attorneys general in Illinois and Oregon also refused to appeal trial court orders repudiating same-sex marriage bans. Before 2008, however, blue state attorneys general defended same-sex bans. See sources cited *supra* note 148 (discussing Connecticut's defense of its same-sex marriage ban notwithstanding public support for same-sex marriage in 2008). At that time, however, Connecticut state public opinion was in flux—initially supporting the existing civil union statute while later supporting same-sex marriage. See *Connecticut Voters Back Same-Sex Marriage*, *supra* note 148.

221. See Associated Press, *supra* note 69 (describing Republican criticism of Virginia attorney general Herring's decision not to defend the same-sex marriage ban); Kopan, *supra* note 71 (discussing a statement of Republican attorneys general on duty-to- defend bans on same-sex marriage); see also Dan Kedmey, *Utah Petitions Supreme Court for Gay Marriage Ruling*, TIME, Aug. 5, 2014, <http://time.com/3083112/utah-gay-marriage-supreme-court> [<http://perma.cc/FGA6-LZUW>] (discussing the Utah Attorney General's defense of the state's same-sex marriage ban).

222. See Kathleen Baydala Joyner, *Defending a Law: Is There a Choice*, FULTON COUNTY DAILY REP., Aug. 20, 2014, <http://www.dailyreportonline.com/id=1202667348790/Defending-a-Law-Is-There-a-Choice> [<http://perma.cc/MA4T-AGWD>] (noting conflicting views of Georgia Attorney General candidates); *supra* note 218 (noting that candidates for Attorney General discussed their views on which laws they would and would not defend).

laws and by defending same-sex marriage bans; blue state attorneys general similarly gain by declining to defend same-sex marriage bans and by defending gun control laws.

### CONCLUSION: CONSEQUENCES AND DIFFERENCES

We have emphasized the centrality of state law to the duty to defend. While crude generalizations are possible, the powers and duties of attorneys general are hardly uniform throughout the states. The fact that opportunistic attorneys general often insist upon a uniform approach to the duty to defend and give short shrift to state law should not obfuscate the supremacy and diversity of state law when it comes to the duty to defend. States are independent sovereigns that may react in fundamentally different ways to questions implicating the duty to defend and other matters related to the powers and responsibilities of their attorneys general. When a party challenges a state law on state or federal grounds, differences in how attorneys general may (or must) react should be embraced as part of our federal system. A desire to impose a uniform approach with respect to the duty to defend is at odds with the idea of states as laboratories of democracy. Correspondingly, federalism is undermined by the failure of attorneys general to meaningfully discuss state law when explaining whether they do or do not have a duty to defend.

Compared to issues related to the duty to defend at the federal level, the hazards of getting the wrong mix of defense, concession, and lawsuits are more easily remedied in the states.<sup>223</sup> At the federal level, a unitary executive both enforces and defends federal statutes. If the president concludes a federal statute is unconstitutional and refuses to defend it, it is unclear if anyone outside of the executive can intervene to defend the law.<sup>224</sup> Moreover, if the president considers a statute to be unconstitutional, there is good reason for the president to act on that belief and refuse to enforce the statute. Sometimes this means there will be no aggrieved individual to challenge the non-enforcement. Finally, even if many suppose that a constitutional amendment is warranted, it

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223. For our assessment of the possible costs of a president's refusing to either enforce or defend a federal statute, see Devins & Prakash, *supra* note 9, at 571-76.

224. In *United States v. Windsor*, the Supreme Court did not definitively answer the question of whether lawyers for the House or Senate could intervene in a dispute to defend the constitutionality of a federal law that the president would not defend. 133 S. Ct. 2675 (2013); see generally Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power To Represent Itself in Court*, 99 CORNELL L. REV. 571, 622-30 (2014).

is next to impossible to reform the federal separation of powers through amendments.<sup>225</sup>

As a group, states exhibit much more flexibility on matters of defense. Most state constitutions are easy to amend, and all are easier to amend than the federal constitution, making it easier to respond to perceived problems with defenses (and nondefenses).<sup>226</sup> Further, because state law typically allows someone other than the attorney general to defend state law, and because state law seems to facilitate judicial resolution of disputes in such situations, attorney general nondefense at the state level has fewer consequences than nondefense at the federal level.<sup>227</sup> In the controversy over same-sex marriage, all states allowed the governor (or some other state official) to represent the state.<sup>228</sup> Moreover, when someone challenges a particular state law as contrary to the federal constitution, and an attorney general refuses to defend that law, another attorney general may defend a similar state law. In other words, even if a case is dismissed because no one chooses to defend the controverted state law, the underlying issues may be adjudicated in another state. For example, even though the failure of the Attorney General and Governor to defend the Proposition 8 ban on same-sex marriage in California resulted in dismissal of that lawsuit,<sup>229</sup> attorneys general in other states are vigorously defending their similar same-sex marriage bans. For example, after unsuccessfully defending its same-sex marriage ban before the Tenth U.S. Circuit, Utah's Attorney General Sean Reyes petitioned the Supreme Court to hear its defense of the ban.<sup>230</sup>

Of course, the fact that refusals to defend come with few tangible costs does not mean that attorneys general should refuse to defend whenever they per-

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225. For example, lawmakers did not act on a bipartisan proposal (prompted by the September 11 terrorist attacks) to amend the Constitution to allow Congress to temporarily appoint members in case a large number of members were either killed or unable to perform their legislative duties. For a discussion of the need for such an amendment, see *Preserving Our Institutions: The First Report of the Continuity of Government Commission*, CONTINUITY GOV'T COMMISSION (2003), <http://www.brookings.edu/~media/research/files/reports/2003/5/governance%20continuity%20of%20government/continuityofgovernment.pdf> [<http://perma.cc/YS32-6KZC>].

226. See Devins, *supra* note 68, at 1640-44.

227. See *supra* notes 116-120, 201 and accompanying text.

228. In Oregon and California, for example, the attorneys general's refusals to defend did not alone moot their cases; instead, it was the failure of both the attorneys general and the governors. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662-63, 2666 (2013) (California); Kirk Johnson, *Judge Blocks Motion To Defend Oregon Gay Marriage Ban*, N.Y. TIMES, May 14, 2014, <http://www.nytimes.com/2014/05/15/us/judge-blocks-motion-to-defend-oregon-marriage-ban.html> [<http://perma.cc/2VU7-YBWX>] (Oregon).

229. *Hollingsworth*, 133 S. Ct. 2652.

230. See Kedmey, *supra* note 221.



sonally oppose a law or whenever they can reap political advantage. As a legal matter, state law may cabin their flexibility. Still, the combination of motive and opportunity will sometimes be too tempting to resist. Because attorneys general are apt to be politically opportunistic, there is good reason to expect a continued upswing in refusals to defend. The party polarization that fueled the same-sex marriage controversy is likely to propel other duty-to-defend controversies over such things as abortion, gun rights, campaign finance, and affirmative action.

The duty-to-defend question, grounded as it is on the complexities of state law and the imagined constraints of federal law, allows attorneys general to claim that their decisions not to defend are permissible, even obligatory, but that the decisions of others not to defend are unwarranted and lawless. Despite our arguments and appeal for a more state-centric understanding of whether there is a duty to defend, what seems relatively certain is that Republicans and Democrats will accuse the other side of playing politics and violating the rule of law, albeit without much grounding in actual law.

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STATE ATTORNEYS GENERAL AND THE DUTY TO DEFEND

**APPENDIX I: STATE CONSTITUTIONAL AND STATUTORY PROVISIONS CONCERNING THE DUTY TO DEFEND**

<i>State</i>	<i>Source</i>	<i>Details</i>
Alabama	<i>Constitutional Provisions</i>	<p>Silent as to the duty to defend.</p> <p>The attorney-general . . . shall perform such duties as may be prescribed by law. ALA. CONST. art. V, § 137.</p> <p>The legislature may require the attorney general to defend any or all suits brought against the state, or any subdivision thereof, or against any state school board or state board of education, or against any county or city school board or board of education, or against like boards or commissions by whatever name designated, or against any members, officers or employees of any such boards, or against any school official or employee throughout Alabama. ALA. CONST. art. V, § 137.</p>
	<i>Statutory Provisions</i>	<p>[The State Attorney General] shall attend, on the part of the state, to all criminal cases pending in the Supreme Court or Court of Criminal Appeals, and to all civil actions in which the state is a party in the Supreme Court or Court of Civil Appeals. He or she shall also attend to all cases other than criminal that may be pending in the courts of this state, in which the state may be in any manner concerned, and shall appear in the courts of other states or of the United States, in any case in which the state may be interested in the result. ALA. CODE § 36-15-1(2) (1975).</p> <p>All litigation concerning the interest of the state, or any department of the state, shall be under the direction and control of the Attorney General. ALA. CODE §36-15-21 (1975).</p>
Alaska	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	<p>The principal executive officer for the Department of Law is the attorney general. ALA. STAT. § 44-23-010 (2014).</p> <p>(a) The attorney general is the legal advisor of the governor and other state officers. (b) The</p>

		attorney general shall (1) defend the Constitution of the State of Alaska and the Constitution of the United States of America; (3) represent the state in all civil actions in which the state is a party[.] ALA. STAT. § 44-23-20 (2014).
Arizona	<i>Constitutional Provisions</i>	Silent as to the duty to defend.  The powers and Duties . . . [of the attorney-general] shall be prescribed by law. ARIZ. CONST. art. V, § 9.
	<i>Statutory Provisions</i>	[The department of law shall] prosecute and defend in the supreme court all proceedings in which the state or an officer thereof in his official capacity is a party. ARIZ. REV. STAT. § 41-193(1) (1995).  [The department of law shall] represent the state in any action in a federal court, the cost thereof and the expenses of the attorney general incurred therein to be a charge against the state. ARIZ. REV. STAT. § 41-193(3) (1995).  <i>Contrary Notice Statute:</i> This section shall not be construed to compel the attorney general . . . to intervene as a party in any proceeding or to permit them to be named as defendants in a proceeding. The attorney general . . . may file briefs in the matter or may choose not to participate in a proceeding that is subject to the notice requirements of this section. ARIZ. REV. STAT. § 12-1841(D) (2010).
Arkansas	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	The Attorney General shall be the attorney for all state officials, departments, institutions, and agencies. ARK. CODE ANN. § 25-16-702 (West 1991).  If, in the opinion of the Attorney General, it shall at any time be necessary to employ special counsel to prosecute any suit brought on behalf of the state or to defend a suit brought against any official, board, commission, or agency of the state, the Attorney General, with the approval of the Governor, may employ special counsel. ARK. CODE ANN. § 25-16-

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702(b)(2) (West 1991).

If any official, department, institution, or agency of the state needs the service of an attorney and the Attorney General fails to render the service when requested in writing, then, upon the establishment of that fact, the Governor may appoint counsel to look after the matter or may authorize the employment of counsel by the officer, department, agency, or institution needing the services of an attorney. ARK. CODE ANN. § 25-16-702(c) (West 1991).

The Attorney General shall maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts and shall be the legal representative of all state officers, boards, and commissions in all litigation where the interests of the state are involved. ARK. CODE ANN. § 25-16-703(a) (West 1947).

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California

*Constitutional Provisions*

[T]he 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. CAL. CONST. art. 5, §13.

An administrative agency . . . has no power . . . [to] refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional. CAL. CONST. art. 3, §5.

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*Statutory Provisions*

It is the intent of the Legislature that overall efficiency and economy in state government be enhanced by employment of the Attorney General as counsel for the representation of state agencies and employees in judicial and other proceedings. CAL. ANN. GOV. CODE § 11040 (West 1995).

The Attorney General shall attend the Supreme Court and prosecute or defend all causes to which the State, or any State officer is a party in his or her official capacity. CAL. GOV. CODE § 12512 (West 2001).

*Notice Statute:* If the Attorney General elects not to intervene and participate in the appeal, he or she shall file a statement with the Legis-

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		lature and the Judicial Council stating the reason or reasons for the decision not to intervene and participate in the appeal. CAL. CIV. PROC. CODE § 902.1 (West 1997).
Colorado	<i>Constitutional Provisions</i>	Silent as to the duty to defend.  [The attorney general] shall perform such duties as are prescribed by this constitution or by law. COLO. CONST. art. IV, §1.
	<i>Statutory Provisions</i>	The attorney general . . . shall appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to do so by the governor, and he shall prosecute and defend for the state all causes in the appellate courts in which the state is a party or interested. COLO. REV. STAT. §24-31-101(a) (2014).
Connecticut	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	The attorney general . . . shall appear for the state . . . in all suits and other civil proceedings, except upon criminal recognizances and bail bonds. CONN. GEN. STAT. §3-125 (2000).
Delaware	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	Notwithstanding any other laws, [the Attorney General shall have the powers, duties, and authority] to provide legal advice, counsel and services for . . . agencies. DEL. CODE ANN. tit. 29, §2504(2) (West 1985).
Florida	<i>Constitutional Provisions</i>	Silent as to the duty to defend.  The attorney general shall be the chief state legal officer. There is created in the office of the attorney general the position of statewide prosecutor. FLA. CONST. art. IV, § 4(b).
	<i>Statutory Provisions</i>	[The Attorney General] [s]hall appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this state. FLA. STAT. ANN. § 16.01(4) (West 2001).

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STATE ATTORNEYS GENERAL AND THE DUTY TO DEFEND

Georgia	<i>Constitutional Provisions</i>	<p>Silent as to the duty to defend.</p> <p>The Attorney General shall act as the legal advisor of the executive department, shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor, and shall perform such other duties as shall be required by law. GA. CONST. art. V, § 3, ¶ IV.</p>
	<i>Statutory Provisions</i>	<p>[It is the duty of the Attorney General] [w]hen required to do so by the Governor, to participate in, on behalf of the state, all criminal actions in any court of competent jurisdiction when the district attorney thereof is being prosecuted, and all other criminal or civil actions to which the state is a party[.] GA. CODE ANN. § 45-15-3(3) (West 2002).</p> <p>[It is the duty of the Attorney General] [t]o represent the state in all civil actions tried in any court. GA. CODE ANN. § 45-15-3(6) (West 2002)</p>
Hawaii	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	<p>The department of the attorney general shall . . . represent the State in all civil actions in which the State is a party. HAW. REV. STAT. § 26-7 (1990).</p> <p>The attorney general shall appear for the State personally or by deputy, in all the courts of record, in all cases criminal or civil in which the State may be a party, or be interested, and may in like manner appear in the district courts in such cases. HAW. REV. STAT. § 28-1 (1989).</p>
Idaho	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	<p>[It is the duty of the attorney general] [t]o perform all legal services for the state and to represent the state and all departments, agencies, offices, officers, boards commissions, institutions, and other state entities, in all courts and before all administrative tribunals or bodies of any nature. Representation shall be provided to those entities exempted pursuant to the provisions of section 67-1406, Idaho Code.</p>

		Whenever required to attend upon any court or administrative tribunal, the attorney general shall be allowed necessary and actual expenses, all claims for which shall be audited by the state board of examiners. IDAHO CODE ANN. § 67-1401(1) (West 2014).
Illinois	<i>Constitutional Provisions</i>	Silent as to the duty to defend.  The Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law. ILL. CONST. art. V, § 15.
	<i>Statutory Provisions</i>	The duties of the attorney general shall be— First—To appear for and represent the people of the State before the supreme court in all cases in which the State or the people of the State are interested. . . . Fifth—To investigate alleged violations of the statutes which the Attorney General has a duty to enforce. 15 ILL. COMP. STAT. ANN 205/4 (West 2010).  <i>Notice Statute:</i> The purpose of such notice shall be to afford the State, political subdivision, agency or officer, as the case may be, the opportunity, but not the obligation, to intervene in the cause or proceeding for the purpose of defending the law or regulation challenged. ILL. SUP. CT. R. 19(c) (2006).
Indiana	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	The attorney general shall prosecute and defend all suits instituted by or against the state of Indiana . . . and he shall be required to attend to the interests of the state in all suits, actions or claims in which the state is or may become interested in the Supreme Court of this state. IND. CODE § 4-6-2-1(a) (West 2011).  [The attorney-general] shall represent the state in any matter involving the rights or interests of the state, including actions in the name of the state, for which provision is not otherwise made by law. IND. CODE § 4-6-1-6 (West 1978).
Iowa	<i>Constitutional Provisions</i>	Silent.

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STATE ATTORNEYS GENERAL AND THE DUTY TO DEFEND

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	<i>Statutory Provisions</i>	It shall be the duty of the attorney general to: (1) Prosecute and defend all causes in the appellate courts in which the state is a party or interested. (b) Prosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in the attorney general's judgment, the interest of the state requires such action, or when requested to do so by the governor, executive council, or general assembly. IOWA CODE ANN. §13.2(a), (b) (West 2014).
Kansas	<i>Constitutional Provisions</i>	Silent.  <i>Oath:</i> All state officers before entering upon their respective duties shall take and subscribe an oath or affirmation to support the constitution of the United States and the constitution of this state, and faithfully to discharge the duties of their respective offices. KAN. CONST. art. XV., § 14.
	<i>Statutory Provisions</i>	The attorney general shall appear for the state, and prosecute and defend any and all actions and proceedings, civil or criminal, in the Kansas supreme court, the Kansas court of appeals and in all federal courts, in which the state shall be interested or a party, and shall, when so appearing, control the state's prosecution or defense. KAN. STAT. ANN. § 75-702 (West 2013).
Kentucky	<i>Constitutional Provisions</i>	Silent.  The duties and responsibilities of these officers [including the Attorney General] shall be prescribed by law. KY. CONST. § 93.
	<i>Statutory Provisions</i>	[The Attorney General] shall appear for the Commonwealth in all cases in the Supreme Court or Court of Appeals wherein the Commonwealth is interested, and shall also commence all actions or enter his appearance in all cases, hearings, and proceedings in and before all other courts, tribunals, or commissions in or out of the state, and attend to all litigation and legal business in or out of the state required of him by law, or in which the Commonwealth has an interest. KY. REV. STAT. ANN. § 15.020 (West 2012).

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Louisiana	<i>Constitutional Provisions</i>	[T]he attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action. The attorney general shall exercise other powers and perform other duties authorized by this constitution or by law. LA. CONST. art. IV, § 8.
	<i>Statutory Provisions</i>	[T]he attorney general shall represent the state and all departments and agencies of state government in all litigation arising out of or involving tort or contract. . . . [T]he attorney general, at his discretion, shall represent or supervise the representation of the interests of the state in any action or proceeding in which the constitutionality of a state statute or of a resolution of the legislature is challenged or assailed. LA. REV. STAT. ANN. § 49:257(A), (C) (2006).
Maine	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	The attorney general . . . shall appear for the State . . . in all civil actions and proceedings in which the State is a party or interested . . . . All such actions and proceedings must be prosecuted or defended by the Attorney General or under the Attorney General's direction. ME. REV. STAT. ANN. tit. 5, § 191(3) (2004).
Maryland	<i>Constitutional Provisions</i>	The Attorney General shall: (1) Prosecute and defend on the part of the State all cases pending in the Appellate Courts of the State, in the Supreme Court of the United States or the inferior Federal Courts, by or against the State, or in which the State may be interested . . . . (2) Investigate, commence, and prosecute or defend any civil or criminal suit or action or category of such suits or actions in any of the Federal Courts or in any Court of this State, . . . on the part of the State or in which the State may be interested, which the General Assembly by law or joint resolution, or the Gov-

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		ernor, shall have directed or shall direct to be investigated, commenced and prosecuted or defended. MD. CONST. art. V, § 3(a).
	<i>Statutory Provisions</i>	Unless a law expressly provides for a general counsel as the legal adviser and representative of the officer or unit, the Attorney General is the legal adviser of and shall represent and otherwise perform all of the legal work for each officer and unit of the State government. MD. CODE. ANN., State Government §6-106(b) (West 2009).
Massachusetts	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	The attorney general shall appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested . . . . MASS. GEN. LAWS ANN. ch. 12, § 3 (West 2010).
Michigan	<i>Constitutional Provisions</i>	The attorney general shall recommend to the legislature as soon as practicable such changes as may be necessary to adapt existing laws to this constitution. MICH. CONST. art. Schedule § 1.
	<i>Statutory Provisions</i>	The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party . . . . MICH. COMP. LAWS ANN. § 14.28 (West 2014).
Minnesota	<i>Constitutional Provisions</i>	Silent.  <i>Oath:</i> Each officer created by this article before entering upon his duties shall take an oath or affirmation to support the constitution of the United States and of this state and to discharge faithfully the duties of his office to the best of his judgment and ability. MINN. CONST. art. V, § 6.
	<i>Statutory Provisions</i>	The attorney general shall appear for the state in all causes in the supreme and federal courts wherein the state is directly interested . . . . MINN. STAT. ANN. § 8.01 (West 2013)  <i>Notice Statute:</i> The rule does not require any action by the Attorney General and in many instances intervention will not be sought until the litigation reaches the appellate courts.

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		MINN. R. CIV. P. 5A advisory committee cmt. (2007 amend.).
Mississippi	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	The Attorney General . . . shall intervene and argue the constitutionality of any statute when notified of a challenge thereto, pursuant to the Mississippi Rules of Civil Procedure. MISS. CODE ANN. §7-5-1 (West 2012).
Missouri	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	The attorney general shall institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights . . . . MO. ANN. STAT. §27.060 (West 2014).
Montana	<i>Constitutional Provisions</i>	The attorney general is the legal officer of the state and shall have the duties and powers provided by law. MONT. CONST. art. VI, §4(4)
	<i>Statutory Provisions</i>	[It is the duty of the attorney general] to prosecute or defend all causes in the supreme court in which the state or any officer of the state in the officer's official capacity is a party or in which the state has an interest . . . . MONT. CODE. ANN. §2-15-501(1) (West 1999).
Nebraska	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	[The duties of the Attorney General shall be] [t]o appear for the state and prosecute and defend all civil or criminal actions and proceedings in the Court of Appeals or Supreme Court in which the state is interested or a party . . . . NEB. REV. STAT. ANN. § 84-205(10) (West 2012).
		When the Attorney General issues a written opinion that an act of the Legislature is unconstitutional and any state officer charged with the duty of implementing the act, in reliance on such opinion, refuses to implement the act, the Attorney General shall, within ten working days of the issuance of the opinion, file an action in the appropriate court to determine the

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		validity of the act. NEB. REV. STAT. ANN. § 84-215 (West 1977).
Nevada	<i>Constitutional Provisions</i>	[The] Attorney General . . . shall perform such other duties as may be prescribed by law. NEV. CONST. art. V, § 22.
	<i>Statutory Provisions</i>	If the Attorney General neglects or refuses to perform any of the duties required of him or her by law, the Attorney General is guilty of a misdemeanor or is subject to removal from office. NEV. REV. STAT. ANN. § 228.210 (West 1977).
New Hampshire	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	The attorney general shall act as attorney for the state in all criminal and civil cases in the supreme court in which the state is interested, and in the prosecution of persons accused of crimes punishable with death or imprisonment for life. The attorney general shall have and exercise general supervision of the criminal cases pending before the supreme and superior courts of the state, and with the aid of the county attorneys, the attorney general shall enforce the criminal laws of the state. The attorney general shall have the power to collect uncollected debts owed to the state as set forth in RSA 7:15-a. N.H. REV. STAT. ANN. § 7:6 (2007).
New Jersey	<i>Constitutional Provisions</i>	Silent.  <i>Oath:</i> Every State officer, before entering upon the duties of his office, shall take and subscribe an oath or affirmation to support the Constitution of this State and of the United States and to perform the duties of his office faithfully, impartially and justly to the best of his ability. N.J. CONST. art. VII, § 1.
	<i>Statutory Provisions</i>	The functions, powers and duties conferred upon, or required to be exercised or performed by the Attorney-General are continued but such functions, powers and duties are hereby transferred to and vested in the Division of Law established hereunder, and shall be exercised and performed by the Attorney General as the head of such division. N.J. STAT. ANN. § 52:17B-5 (West 1948).

New Mexico	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	Except as otherwise provided by law, the attorney general shall: A. prosecute and defend all causes in the supreme court and court of appeals in which the state is a party or interested; B. prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor; C. prosecute and defend all actions and proceedings brought by or against any state officer or head of a state department, board or commission, or any employee of the state in his official capacity . . . . N.M. STAT. ANN. 1978, § 8-5-2 (West 1975).
New York	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	[The attorney-general shall]. . . [p]rosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state, but this section shall not apply to any of the military department bureaus or military offices of the state. N.Y. EXEC. LAW § 63(1) (McKinney 2014).
North Carolina	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	It shall be the duty of the Attorney General: <p>(1) To defend all actions in the appellate division in which the State shall be interested, or a party, and to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested.</p> <p>(2) To represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State. N.C. GEN. STAT. § 114-2 (West 2014).</p>

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North Dakota	<i>Constitutional Provisions</i>	Silent as to the duty to defend.  The powers and duties of . . . the attorney general . . . must be prescribed by law. N.D. CONST. art. V, § 2.
	<i>Statutory Provisions</i>	The attorney general shall:  1. Appear for and represent the state before the supreme court in all cases in which the state is interested as a party.  2. Institute and prosecute all actions and proceedings in favor or for the use of the state which may be necessary in the execution of the duties of any state officer.  3. Appear and defend all actions and proceedings against any state officer in the attorney general's official capacity in any of the courts of this state or of the United States. If both parties to an action are state officers, the attorney general may determine which officer the attorney general will represent and the other officer may employ counsel to represent that other officer. N.D. CENT. CODE ANN. § 54-12-01 (West 1997).
Ohio	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested. When required by the governor or the general assembly, the attorney general shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, the attorney general shall prosecute any person indicted for a crime. OHIO REV. CODE ANN. § 109.02 (West 1995).
Oklahoma	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	A. The duties of the Attorney General as the chief law officer of the state shall be:  1. To appear for the state and prosecute and defend all actions and proceedings, civil or

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criminal, in the Supreme Court and Court of Criminal Appeals in which the state is interested as a party;

2. To appear for the state and prosecute and defend all actions and proceedings in any of the federal courts in which the state is interested as a party;

3. To initiate or appear in any action in which the interests of the state or the people of the state are at issue, or to appear at the request of the Governor, the Legislature, or either branch thereof, and prosecute and defend in any court or before any commission, board or officers any cause or proceeding, civil or criminal, in which the state may be a party or interested; and when so appearing in any such cause or proceeding, the Attorney General may, if the Attorney General deems it advisable and to the best interest of the state, take and assume control of the prosecution or defense of the state's interest therein;

4. To consult with and advise district attorneys, when requested by them, in all matters pertaining to the duties of their offices, when said district attorneys shall furnish the Attorney General with a written opinion supported by citation of authorities upon the matter submitted. OKLA. STAT. ANN. tit. 74, § 18b(A)(1)-(4) (West 2010).

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Oregon

*Constitutional Provisions*

Silent.

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*Statutory Provisions*

(1) The Attorney General shall:

(a) Appear for the state in the trial of all civil and criminal causes in the Supreme Court or the Court of Appeals in which the state may be directly or indirectly interested.

...

(2) The Attorney General shall give opinion in writing, when requested, upon any question of law in which the State of Oregon or any public subdivision of the state may have an interest, submitted to the Attorney General by the Gov-

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ernor, any officer, agency, department, board or commission of the state or any member of the legislature. OR. REV. STAT. ANN. § 180.060(1)-(2) (West 2008).

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Pennsylvania

*Constitutional Provisions*

Silent.

An Attorney General . . . shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties as may be imposed by law. PA. CONST. art. IV, § 4, para. 1.

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*Statutory Provisions*

It shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction. 71 PA. CONS. STAT. § 732-204(a)(3) (West 1981).

(a) Representation of agency by General Counsel.—Whenever any action is brought by or against any executive branch agency, the Governor or other executive branch official, the Governor may request . . . the Attorney General to authorize the General Counsel to supersede the Attorney General and represent the agency, the Governor or other executive branch official. (b) Intervention by General Counsel.—If the Attorney General does not grant the request, the Governor may authorize the General Counsel to intervene in the litigation. 71 PA. CONS. STAT. § 732-303 (West 1981).

The chief counsel [of an independent agency may] . . . initiate appropriate proceedings or defend the agency when an action or matter has been referred to the Attorney General and the Attorney General refuses or fails to initiate appropriate proceedings or defend the agency . . . 71 PA. CONS. STAT. § 732-402(3)(i) (West 1981).

(a) Representation of agency by agency counsel.—Whenever any action is brought by or against any independent agency or independent agency official, the agency head may request in writing, setting for his reasons, the Attorney General to authorize the agency

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		counsel to supersede the Attorney General and represent the agency or its official. (b) Intervention by agency counsel.—If the Attorney General does not grant the request, the agency head may authorize the agency counsel to intervene in the litigation. 71 PA. CONS. STAT. § 732-403 (West 1981).
Rhode Island	<i>Constitutional Provisions</i>	Silent.  The duties and powers of the secretary, attorney-general and general treasurer shall be the same under this Constitution as are now established, or as from time to time may be prescribed by law. R.I. CONST. art. IX, § 12.
	<i>Statutory Provisions</i>	It shall be mandatory upon the attorney general of this state to prosecute all civil and criminal cases which shall be referred by the director to the attorney general. It shall be the duty of the attorney general to prosecute actions, both civil and criminal, for those violations of this chapter that come to his or her knowledge and to independently enforce the provisions of this chapter. R.I. GEN. LAWS ANN. § 28-14-22 (1986).
South Carolina	<i>Constitutional Provisions</i>	The Governor shall take care that the laws be faithfully executed. To this end, the Attorney General shall assist and represent the Governor, but such power shall not be construed to authorize any action or proceeding against the General Assembly or the Supreme Court. S.C. CONST. art. IV, § 15.  The duties and compensation of such offices shall be prescribed by law and their compensation shall be neither increased nor diminished during the period for which they shall have been elected. S.C. CONST. art. VI, § 7
	<i>Statutory Provisions</i>	He shall appear for the State in the Supreme Court and the court of appeals in the trial and argument for all causes, criminal and civil, in which the State is a party or interested, and in these causes in any other court or tribunal when required by the Governor or either branch of the General Assembly. S.C. CODE ANN. § 1-7-40 (1999).  In the event that any officer or employee of the

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		State, or of any political subdivision thereof, be prosecuted in any action . . . or special proceeding . . . , by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the Attorney General, when requested in writing by any such officer or employee, to appear and defend the action or proceeding in his behalf. S.C. CODE ANN. § 1-7-50 (1960).
South Dakota	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	The duties of the attorney general shall [include] . . . [t]o appear for the state and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court, in which the state shall be interested as a party. S.D. CODIFIED LAWS § 1-11-1(1) (1939).
Tennessee	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	The attorney general and reporter has and shall exercise all duties vested in the office by the Constitution of Tennessee and all duties and authority pertaining to the office of the attorney general and reporter under the statutory law. The attorney general and reporter is authorized to utilize and refer to the common law in cases in which the state of Tennessee is a party. TENN. CODE ANN. § 8-6-109(a) (West 2006).  [The attorney general has a duty] [t]o defend the constitutionality and validity of all legislation of statewide applicability, . . . except in those instances where the attorney general and is of the opinion that such legislation is not constitutional, in which event the attorney general and reporter shall so certify to the speaker of each house of the general assembly . . . TENN. CODE ANN. § 8-6-109(b)(9) (West 2006).
Texas	<i>Constitutional Provisions</i>	The Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, . . . and perform such other duties as may be required by law. TEX. CONST. art. 4, § 22.
	<i>Statutory Provisions</i>	The attorney general shall prosecute and de-

	<i>Provisions</i>	<p> fend all actions in which the state is interested before the supreme court and courts of appeals. TEX. GOV'T CODE ANN. § 402.021 (West 1987).</p>
Utah	<i>Constitutional Provisions</i>	<p>Silent.</p> <p>The Attorney General shall be the legal adviser of the State officers, except as otherwise provided by this Constitution, and shall perform such other duties as provided by law. UTAH CONST. art. VII, § 16.</p> <p><i>Oath:</i> All officers made elective or appointive by this Constitution or by the laws made in pursuance thereof, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this State, and that I will discharge the duties of my office with fidelity.["] UTAH CONST. art. IV, § 10.</p>
	<i>Statutory Provisions</i>	<p>The attorney general shall:</p> <p>(1) perform all duties in a manner consistent with the attorney-client relationship under Section 67-5-17;</p> <p>(2) except as provided in Sections 10-3-928 and 17-18a-403, attend the Supreme Court and the Court of Appeals of this state, and all courts of the United States, and prosecute or defend all causes to which the state or any officer, board, or commission of the state in an official capacity is a party, and take charge, as attorney, of all civil legal matters in which the state is interested; . . .</p> <p>(6) exercise supervisory powers over the district and county attorneys of the state in all matters pertaining to the duties of their offices, and from time to time require of them reports of the condition of public business entrusted to their charge. UTAH CODE ANN. § 67-5-1 (West 2013).</p>
Vermont	<i>Constitutional Provisions</i>	Silent.

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	<i>Statutory Provisions</i>	<p>(a) The attorney general shall have the general supervision of criminal prosecutions, shall consult with and advise the state's attorneys in matters relating to the duties of their office, and shall assist them by attending the grand jury in the examination of any cause or in the preparation of indictments and informations when, in his judgment, the interests of the state require it.</p> <p>(b) The attorney general may appoint a deputy attorney general with the approval of the governor, remove him or her at pleasure, and be responsible for his or her acts. Such deputy shall perform such duties as the attorney general shall direct, and in the absence or disability of the attorney general perform the duties of the attorney general. In case a vacancy occurs in the office of attorney general, such deputy shall assume and discharge the duties of such office until such vacancy is filled. Such appointment shall be in writing and be recorded in the office of the secretary of state. Such deputy attorney general shall take the oath required by the constitution, shall be an informing officer and have the same authority throughout the state in civil or criminal matters as state's attorneys have in their respective counties. VT. STAT. ANN. tit. 3, §153(a)-(b) (West 1979).</p>
Virginia	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	No special counsel shall be employed for or by the Governor or any state department, institution, division, commission, board, bureau, agency, entity, official, justice of the Supreme Court, or judge of any circuit court or district court except in the following cases: . . . 4. In cases where the Attorney General certifies to the Governor that it would be improper for the Attorney General's office to render legal services due to a conflict of interests, or that he is unable to render certain legal services, the Governor may employ special counsel or other assistance to render such services as may be necessary. VA. CODE ANN. § 2.2-510 (West 2014).

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Washington	<i>Constitutional Provisions</i>	Silent as to the duty to defend.  The attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law. WASH. CONST. art. III, § 21.
	<i>Statutory Provisions</i>	The attorney general shall: (1) Appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested; (2) institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer; (3) Defend all actions and proceedings against any state officer or employee acting in his or her official capacity, in any of the courts of this state or the United States . . . . WASH. REV. CODE ANN. § 43.10.030 (West 2009).
West Virginia	<i>Constitutional Provisions</i>	Silent as to the duty to defend.  [The attorney general] shall perform such duties as may be prescribed by law. W. VA. CONST. art. VII, § 1.
	<i>Statutory Provisions</i>	The Attorney General shall appear as counsel for the state in all causes pending in the Supreme Court of Appeals, or in any federal court, in which the state is interested . . . . W. VA. CODE ANN. § 5-3-2. (West 1987).
Wisconsin	<i>Constitutional Provisions</i>	Silent as to the duty to defend.  The powers, duties and compensation of the . . . attorney general shall be prescribed by law. WIS. CONST. art. VI, § 3.
	<i>Statutory Provisions</i>	The department of justice shall: (1) Represent State in Appeals and on Remand. Except as provided in ss. 5.05(2m)(a) and 978.05(5), appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded to any circuit court in which the state is a party . . . . (1m) Represent State in Other Matters. If requested by the governor or either house of the legislature, appear for and represent the state, any state department, agency, official, employee or agent, whether

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required to appear as a party or witness in any civil or criminal matter, and prosecute or defend in any court or before any officer, any cause or matter . . . in which the state or the people of this state may be interested. WIS. STAT. ANN. § 165.25 (West 2014).

If a statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard. WIS. STAT. ANN. § 806.04 (West 2014)

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Wyoming	<i>Constitutional Provisions</i>	Silent.
	<i>Statutory Provisions</i>	The attorney general shall: (i) Prosecute and defend all suits instituted by or against the state of Wyoming . . . ; (ii) Represent the state in criminal cases in the supreme court; (iii) Defend suits brought against state officers in their official relations, except suits brought against them by the state; (iv) Represent the state in suits, actions or claims in which the state is interested in either the Wyoming supreme court or any United States court; (v) Be the legal adviser of all elective and appointive state officers and of the county and district attorneys of the state; (vi) When requested, give written opinions upon questions submitted to him by elective and appointive state officers and by either branch of the legislature, when in session. WYO. STAT. ANN. § 9-1-603(a)(i)-(vii) (West 2011).

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## APPENDIX II: STATE ATTORNEYS GENERAL REFUSALS TO DEFEND

<i>Year</i>	<i>Topic</i>	<i>Details</i>
1967	<i>State</i>	California
	<i>Issue</i>	Fair Housing (state constitutional amendment)
	<i>Party</i>	Democrat
	<i>Case</i>	N/A. See Brief of the State of California as Amicus Curiae at 1, <i>Reitman v. Mulkey</i> , 387 U.S. 369 (1967) (No. 483).
	<i>How Did the AG Refuse?</i>	AG refused to defend the amendment at any level because he concluded that a voter-backed amendment to the state constitution violated the U.S. Constitution.
	<i>Federal or State Constitutional Law?</i>	Federal
1971	<i>State</i>	Alabama
	<i>Issue</i>	Alabama Milk Control Act
	<i>Party</i>	Democrat
	<i>Case</i>	<i>Delchamps, Inc. v. Ala. State Milk Control Bd.</i> , 324 F. Supp. 117 (M.D. Ala. 1971)
	<i>How Did the AG Refuse?</i>	AG refused to defend: inherited the case, withdrew as a defendant and then asked to be realigned as a plaintiff.
	<i>Federal or State Constitutional Law?</i>	Federal
1972	<i>State</i>	Pennsylvania
	<i>Issue</i>	Confession of Judgments
	<i>Party of Appointing Governor</i>	Democrat (Pennsylvania AG was appointed by the governor until 1980)
	<i>Case</i>	<i>Swarb v. Lennox</i> , 405 U.S. 191 (1972)
	<i>How Did the AG Refuse?</i>	AG defended at trial level and did not appeal (and joined plaintiffs on their appeal).
	<i>Federal or State Constitutional Law?</i>	State

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1980	<i>State</i>	Texas
	<i>Issue</i>	Gender Discrimination
	<i>Party</i>	Democrat
	<i>Case</i>	Zentgraf v. Tex. A&M Univ., 492 F. Supp. 265 (S.D. Tex. 1980)
	<i>How Did the AG Refuse?</i>	AG used the settlement power to end the case favorably for the plaintiffs.
	<i>Federal or State Constitutional Law?</i>	Federal
1985	<i>State</i>	Texas
	<i>Issue</i>	Sodomy
	<i>Party</i>	Democrat
	<i>Case</i>	Baker v. Wade, 769 F.2d 289 (5th Cir. 1985)
	<i>How Did the AG Refuse?</i>	AG withdrew the case on appeal.
	<i>Federal or State Constitutional Law?</i>	Federal
1985	<i>State</i>	New Jersey
	<i>Issue</i>	Moment of Silence
	<i>Party of Appointing Governor</i>	Republican
	<i>Case</i>	May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983), <i>aff'd</i> , 780 F.2d 240 (3d Cir. 1985)
	<i>How Did the AG Refuse?</i>	AG defended in part: filed one answer for the state but engaged in no further defense.
	<i>Federal or State Constitutional Law?</i>	Federal
1991	<i>State</i>	Texas
	<i>Issue</i>	Reapportionment Legislation
	<i>Party</i>	Democrat
	<i>Case</i>	Terrazas v. Ramirez, 829 S.W.2d 712 (Tex. 1991)
	<i>How Did the AG Refuse?</i>	AG used the settlement power to end the



		case favorably for the plaintiffs.
	<i>Federal or State Constitutional Law?</i>	State
1993	<i>State</i>	Tennessee
	<i>Issue</i>	Abortion
	<i>Party</i>	No political identity because the state supreme court selects the AG
	<i>Case</i>	Rice v. Family Planning Clinic for Reproductive Health, No. 01A01-9210-CV-00391, 1993 WL 101862 (Tenn. Ct. App. Apr. 7, 1993)
	<i>How Did the AG Refuse?</i>	AG did not defend in any capacity.
	<i>Federal or State Constitutional Law?</i>	State
1997	<i>State</i>	New Jersey
	<i>Issue</i>	Partial-Birth Abortion Ban
	<i>Party of Appointing Governor</i>	Republican
	<i>Case</i>	Planned Parenthood of Cent. N.J. v. Verniero, 41 F. Supp. 2d 478 (D.N.J. 1998), <i>aff'd sub nom.</i> Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127 (3d Cir. 2000)
	<i>How Did the AG Refuse?</i>	AG did not defend in any capacity (and made clear that he would not from the outset).
	<i>Federal or State Constitutional Law?</i>	State
1999	<i>State</i>	Tennessee
	<i>Issue</i>	Abortion
	<i>Party</i>	No political identity because the state supreme court selects the AG
	<i>Case</i>	McGlothlin v. Bristol Obstetrics, Gynecology & Family Planning, Inc., No. 03A01-9706-CV-00236, 1998 WL 65459 (Tenn. Ct. App. Feb. 11, 1998)
	<i>How Did the AG Refuse?</i>	AG defended in part by responding to the notice of challenge of constitutionality.

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	<i>Federal or State Constitutional Law?</i>	State
1999	<i>State</i>	Tennessee
	<i>Issue</i>	Tax Notices
	<i>Party</i>	No political identity because the state supreme court selects the AG
	<i>Case</i>	Romans v. Tatum, No. 01A01-9806-CV-00274, 1999 WL 415175 (Tenn. Ct. App. June 23, 1999)
	<i>How Did the AG Refuse?</i>	AG attacked in part: defended the Bank until the plaintiffs challenged the constitutionality of the statute.
	<i>Federal or State Constitutional Law?</i>	State
2000	<i>State</i>	Illinois
	<i>Issue</i>	Partial-Birth Abortion
	<i>Party</i>	Republican
	<i>Case</i>	Hope Clinic v. Illinois, 249 F.3d 603 (7th Cir. 2001)
	<i>How Did the AG Refuse?</i>	AG dismissed the appeal because of intervening precedent ( <i>Stenberg v. Carhart</i> , 530 U.S. 914 (2000)).
	<i>Federal or State Constitutional Law?</i>	Federal
2000	<i>State</i>	Florida
	<i>Issue</i>	Partial-Birth Abortion
	<i>Party</i>	Democrat
	<i>Case</i>	A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148 (S.D. Fla. 1998)
	<i>How Did the AG Refuse?</i>	AG dismissed the appeal because of intervening precedent ( <i>Stenberg</i> , 530 U.S. 914).
	<i>Federal or State Constitutional Law?</i>	Federal
2000	<i>State</i>	Kentucky
	<i>Issue</i>	Partial-Birth Abortion
	<i>Party</i>	Democrat

	<i>Case</i>	Eubanks v. Stengel, 224 F.3d 576 (6th Cir. 2000)
	<i>How Did the AG Refuse?</i>	AG dismissed the appeal because of intervening precedent ( <i>Stenberg</i> , 530 U.S. 914).
	<i>Federal or State Constitutional Law?</i>	Federal
2001	<i>State</i>	Minnesota
	<i>Issue</i>	Sodomy
	<i>Party</i>	Democrat
	<i>Case</i>	Doe v. Ventura, No., MC 01-489, 2001 WL 543734 (D. Minn. 2001); <i>see also</i> Devosci v. Ventura, 195 F. Supp. 2d 1146 (D. Minn. 2002) (suit alleging that anti-sodomy law violated federal constitution. Because the AG had refused to defend the law the previous year, the issue was mooted)
	<i>How Did the AG Refuse?</i>	AG defended at trial level and declined to appeal.
	<i>Federal or State Constitutional Law?</i>	State/Federal (found unconstitutional under the state constitution, which mooted the federal question)
2008	<i>State</i>	California
	<i>Issue</i>	Same-Sex Marriage
	<i>Party</i>	Democrat
	<i>Case</i>	Hollingsworth v. Perry, 133 S. Ct. 2652 (2013)
	<i>How Did the AG Refuse?</i>	AG did not defend in any capacity.
	<i>Federal or State Constitutional Law?</i>	Federal
2008	<i>State</i>	Colorado
	<i>Issue</i>	Eminent Domain
	<i>Party</i>	Republican
	<i>Case</i>	Town of Telluride v. San Miguel Valley Corp., 185 P.3d 161 (Colo. 2008)
	<i>How Did the AG Refuse?</i>	AG did not defend the constitutionality of in trial or on appeal.

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STATE ATTORNEYS GENERAL AND THE DUTY TO DEFEND

	<i>Federal or State Constitutional Law?</i>	State
2010	<i>State</i>	Nebraska
	<i>Issue</i>	Partial-Birth Abortion
	<i>Party</i>	Republican
	<i>Case</i>	Planned Parenthood of Heartland v. Heineman, 724 F. Supp. 2d 1025 (D. Neb. 2010) (legislature amended the unconstitutional statute)
	<i>How Did the AG Refuse?</i>	AG refused to appeal after the district court granted an injunction.
	<i>Federal or State Constitutional Law?</i>	State
2010	<i>State</i>	Montana
	<i>Issue</i>	Protest Provision of a Zoning Law
	<i>Party</i>	Democrat
	<i>Case</i>	Williams v. Bd. of Cnty. Comm'rs, 371 Mont. 356 (2013)
	<i>How Did the AG Refuse?</i>	AG did not defend in any capacity.
	<i>Federal or State Constitutional Law?</i>	State
2010	<i>State</i>	Wisconsin
	<i>Issue</i>	Domestic Partnership Regulation
	<i>Party</i>	Republican
	<i>Case</i>	McConkey v. Van Hollen, 783 N.W.2d 855 (Wis. 2010)
	<i>How Did the AG Refuse?</i>	AG did not defend in any capacity.
	<i>Federal or State Constitutional Law?</i>	State
2010	<i>State</i>	California
	<i>Issue</i>	Same-Sex Marriage
	<i>Party</i>	Democrat
	<i>Case</i>	Hollingsworth v. Perry, 133 S. Ct. 2652 (2013)

	<i>How Did the AG Refuse?</i>	AG did not defend: inherited the case after the government had lost at trial level and did not appeal.
	<i>Federal or State Constitutional Law?</i>	Federal
2012	<i>State</i>	Indiana
	<i>Issue</i>	Immigration
	<i>Party</i>	Republican
	<i>Case</i>	Buquer v. City of Indianapolis, 797 F. Supp. 2d 905 (S.D. Ind. 2011)
	<i>How Did the AG Refuse?</i>	AG did not appeal injunction, citing intervening precedent (Arizona v. United States, 132 S. Ct. 2492 (2012)).
	<i>Federal or State Constitutional Law?</i>	Federal
2013	<i>State</i>	New Jersey
	<i>Issue</i>	Gun Control
	<i>Party of Appointing Governor</i>	Republican
	<i>Case</i>	<i>In re Wheeler</i> , 81 A.3d 728 (N.J. Super. Ct. 2013)
	<i>How Did the AG Refuse?</i>	AG defended at trial level and then withdrew appeal per governor's order.
	<i>Federal or State Constitutional Law?</i>	State
2013	<i>State</i>	Virginia
	<i>Issue</i>	Education Reform
	<i>Party</i>	Republican
	<i>Case</i>	Sch. Bd. v. Opportunity Educ. Inst., 2014 Va. Cir. LEXIS 53 (2014)
	<i>How Did the AG Refuse?</i>	AG did not defend in any capacity.
	<i>Federal or State Constitutional Law?</i>	State
2013	<i>State</i>	Illinois
	<i>Issue</i>	Same-Sex Marriage

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STATE ATTORNEYS GENERAL AND THE DUTY TO DEFEND

	<i>Party</i>	Democrat
	<i>Case</i>	Gray v. Orr, 2013 WL 6355918 (N.D. Ill. 2013)
	<i>How Did the AG Refuse?</i>	AG did not defend in any capacity.
	<i>Federal or State Constitutional Law?</i>	Federal
2013	<i>State</i>	New Jersey
	<i>Issue</i>	Same-Sex Marriage
	<i>Party of Appointing Governor</i>	Republican
	<i>Case</i>	Garden State Equal. v. Dow, 82 A.3d 336 (N.J. Super. Ct. 2013)
	<i>How Did the AG Refuse?</i>	AG defended at trial level and then withdrew appeal per governor's order.
	<i>Federal or State Constitutional Law?</i>	State
2013	<i>State</i>	New Mexico
	<i>Issue</i>	Same-Sex Marriage
	<i>Party</i>	Democrat
	<i>Case</i>	Griego v. Oliver, 316 P.3d 865 (N.M. 2013)
	<i>How Did the AG Refuse?</i>	AG did not defend in any capacity.
	<i>Federal or State Constitutional Law?</i>	State
2014	<i>State</i>	Hawaii
	<i>Issue</i>	Same-Sex Marriage
	<i>Party of Appointing Governor</i>	Democrat
	<i>Case</i>	Jackson v. Abercrombie, 884 F. Supp. 2d 1065 (D. Haw. 2012)
	<i>How Did the AG Refuse?</i>	AG did not defend, but did advise both the Director of Health's defense and the Governor's refusal to defend.
	<i>Federal or State Constitutional Law?</i>	Federal

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2014	<i>State</i>	Pennsylvania
	<i>Issue</i>	Same-Sex Marriage
	<i>Party</i>	Democrat
	<i>Case</i>	Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014)
	<i>How Did the AG Refuse?</i>	AG did not defend in any capacity.
	<i>Federal or State Constitutional Law?</i>	Federal
2014	<i>State</i>	Virginia
	<i>Issue</i>	Same-Sex Marriage
	<i>Party</i>	Democrat
	<i>Case</i>	Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014)
	<i>How Did the AG Refuse?</i>	AG did not defend in any capacity.
	<i>Federal or State Constitutional Law?</i>	Federal
2014	<i>State</i>	Oregon
	<i>Issue</i>	Same-Sex Marriage
	<i>Party</i>	Democrat
	<i>Case</i>	Geiger v. Kitzhaber, 994 F. Supp. 2d 1128 (D. Or. 2014)
	<i>How Did the AG Refuse?</i>	AG defended in part: filed a brief at the trial level stating she believed the law was unconstitutional, but remained a party until the court granted relief to the plaintiffs; then, refused to appeal.
	<i>Federal or State Constitutional Law?</i>	Federal
2014	<i>State</i>	Nevada
	<i>Issue</i>	Same-Sex Marriage
	<i>Party</i>	Democrat
	<i>Case</i>	Sevcik v. Sandoval, 911 F. Supp. 2d 996 (D. Nev. 2012)
	<i>How Did the AG Refuse?</i>	AG defended in part: defended until the Ninth Circuit determined another, similar

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STATE ATTORNEYS GENERAL AND THE DUTY TO DEFEND

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		law was unconstitutional; then, she withdrew her defense, stating the law was no longer defensible.
	<i>Federal or State Constitutional Law?</i>	Federal
2014	<i>State</i>	Kentucky
	<i>Issue</i>	Same-Sex Marriage
	<i>Party</i>	Democrat
	<i>Case</i>	Borque v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky. 2014)
	<i>How Did the AG Refuse?</i>	AG defended in part: defended at district court but will not appeal in light of recent Circuit Court decisions.
	<i>Federal or State Constitutional Law?</i>	Federal
2014	<i>State</i>	North Carolina
	<i>Issue</i>	Same-Sex Marriage
	<i>Party</i>	Democrat
	<i>Case</i>	Fisher-Borne v. Smith, 14 F. Supp. 3d 695 (M.D.N.C. 2014)
	<i>How Did the AG Refuse?</i>	AG defended in part: defended in district court until the Fourth Circuit ruled Virginia's same-sex marriage ban unconstitutional.
	<i>Federal or State Constitutional Law?</i>	Federal
2014	<i>State</i>	Pennsylvania
	<i>Issue</i>	Gun Legislation
	<i>Party</i>	Democrat
	<i>Case</i>	Leach v. Commonwealth, No. 2014 (Pa. Commonw. filed Nov. 10, 2014)
	<i>How Did the AG Refuse?</i>	AG refused to defend, leaving another executive officer, the General Counsel, to handle the matter.
	<i>Federal or State Constitutional Law?</i>	State

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