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## 2014 Sumner Canary Memorial Lecture: The Separation of Powers and the Federal and State Executive Duty to Review the Law

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# THE SEPARATION OF POWERS AND THE FEDERAL AND STATE EXECUTIVE DUTY TO REVIEW THE LAW

*Honorable William H. Pryor Jr.*<sup>†</sup>

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Twenty-four years ago, Judge Frank Easterbrook delivered the Sumner Canary Lecture on the topic “presidential review.”<sup>1</sup> In that memorable and often-cited lecture,<sup>2</sup> Judge Easterbrook argued that the President must interpret the Constitution in the performance of his executive duties and act “at variance with statutory law, when persuaded that the law departs from the Constitution.”<sup>3</sup> He maintained that the President has a duty to exercise a power of executive review on par with the power of judicial review exercised by the Supreme Court.<sup>4</sup> I want to return to the topic of executive review but not limit myself to the topic of the President’s duty.

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1. Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990).
2. Many scholars have cited and expanded on Judge Easterbrook’s argument. *See, e.g.*, Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507 (2012); Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81 (2007); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539 (2005); John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333 (1998); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).
3. Easterbrook, *supra* note 1, at 905–06.
4. *Id.* at 919–22.

I want to endorse and restate Judge Easterbrook's argument using both a contemporary controversy and my earlier experience as a state attorney general as frames of reference. In the last few years, both federal and state executives have refused to defend laws respecting traditional marriage. Although I cannot discuss whether the Constitution grants homosexual couples a right to marry while that issue is being litigated in several courts, I will argue that supporters of judicial restraint and the separation of powers should defend the authority of both the federal executive and state executives not to enforce or defend laws that they, in good faith, conclude violate the Constitution.

I acknowledge that, by addressing the duty of state executives, I go beyond what Judge Easterbrook was willing to argue. In his lecture, Judge Easterbrook declined to defend the authority of a state executive to interpret the Constitution. He put it this way: "There is a big difference between a power in the President and a power in Orville Faubus."<sup>5</sup> But I will argue that the logic of Judge Easterbrook's argument for presidential review suggests no material difference between federal and state executive review.

Let us consider the contemporary context. In 2011, President Barack Obama concluded that Section 3 of the Defense of Marriage Act, as applied to homosexual couples married under state law, violated the equal protection guarantee of the Fifth Amendment to the United States Constitution.<sup>6</sup> Attorney General Eric Holder then instructed attorneys in the Department of Justice not to defend Section 3 of the Act in pending litigation.<sup>7</sup> But President Obama instructed other executive officials to comply with Section 3 while that litigation remained pending.<sup>8</sup> Nevertheless, the Supreme Court decided last year in *United States v. Windsor*<sup>9</sup> that, even though the executive branch refused to defend Section 3, there still remained a "case or controversy" between Edith Windsor and the executive branch.<sup>10</sup>

Meanwhile, in lawsuits challenging state constitutional amendments defining marriage as between a man and a woman, several state attorneys general refused to defend those amendments and instead argued that the amendments violate the Equal Protection

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5. *Id.* at 924.

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

7. *Id.*

8. *Id.*

9. 133 S. Ct. 2675 (2013).

10. *Id.* at 2684–89.

Clause of the Fourteenth Amendment to the United States Constitution.<sup>11</sup> Even the attorneys general of a few Southern states—Virginia,<sup>12</sup> North Carolina,<sup>13</sup> and Kentucky<sup>14</sup>—refused to defend the marriage amendments to their state constitutions. Attorney General Holder weighed in on that issue in February of this year and argued that state attorneys general are not obligated to defend their state constitutional amendments.<sup>15</sup> He explained that “[i]f [he] were attorney general in Kansas in 1953, [he] would not have defended a Kansas statute that put in place separate-but-equal facilities.”<sup>16</sup>

Some state officials refused to continue the defense of their state laws only after lower federal courts ruled that traditional marriage laws were unconstitutional. On May 21, Governor Tom Corbett, for example, announced that he would not appeal a decision by a federal district judge that the marriage laws of Pennsylvania violated the federal Constitution.<sup>17</sup> And on July 28, Attorney General Roy Cooper of North Carolina announced that he would no longer defend the marriage laws of his state after the United States Court of Appeals for the Fourth Circuit ruled that the same kind of laws in Virginia violated the federal Constitution.<sup>18</sup>

These refusals to defend laws have been sharply criticized, especially by conservatives. Attorney General John Suthers of

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11. Juliet Eilperin, *State Officials Decline to Defend Some Divisive Laws*, WASH. POST, July 19, 2013, at A1; Jess Bravin, *Gay Marriage a Test for State Laws’ Defenders*, WALL ST. J., Mar. 8–9, 2014, at A6; Matt Apuzzo, *Holder Sees Way to Curb Bans on Gay Marriage*, N.Y. TIMES, Feb. 25, 2014, at A1.
  12. Press Release, Commonwealth of Va. Office of the Att’y Gen., Attorney General Herring Changes Virginia’s Legal Position in Marriage Equality Case (Jan. 23, 2014), available at <http://www.oag.state.va.us/index.php/media-center/news-releases/96-attorney-general-herring-changes-virginia-s-legal-position-in-marriage-equality-case>.
  13. Amanda Lamb, *NC to Stop Defending Marriage Amendment*, WRAL.COM (July 29, 2014), <http://www.wral.com/nc-to-stop-defending-marriage-amendment/13846324/>.
  14. Aaron Blake & Sean Sullivan, *Kentucky Gov. Steve Beshear (D) Will Appeal Pro-Gay Marriage Ruling*, WASH. POST (Mar. 4, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/03/04/kentucky-wont-appeal-gay-marriage-ruling/>.
  15. Apuzzo, *supra* note 11.
  16. *Id.*
  17. Press Release, Office of the Governor of PA, Statement Regarding the Opinion of Judge Jones in the Whitewood Case (May 21, 2014), available at <http://www.pa.gov/pages/newsdetails.aspx?agency=pagovnews&item=15643>.
  18. See Lamb, *supra* note 13.

Colorado, for example, published an op-ed in the *Washington Post* on February 3 in which he argued that “this practice corrodes our system of checks and balances, public belief in the power of democracy and ultimately the moral and legal authority on which attorneys general must depend.”<sup>19</sup> General Suthers acknowledged that on some occasions an attorney general cannot “in good faith defend a law,” but he argued that an attorney general must defend a controversial law so long as it is not “clearly unconstitutional” based on binding precedent of the Supreme Court.<sup>20</sup> In January, Attorney General Lawrence Wasden of Idaho argued that he had an “obligation as the attorney general . . . to defend [his] state’s view, the people’s view.”<sup>21</sup> In March, former attorney general Ken Cuccinelli of Virginia criticized his successor, Mark Herring, for refusing to defend the Virginia amendment on marriage.<sup>22</sup> Cuccinelli asserted, “If you’re going to run for attorney general, this is part of the job. . . . If you’re not willing to do it, you ought not run.”<sup>23</sup> In Michigan, Attorney General Bill Schuette argued that he was “duty-bound to defend the wishes of the voters. To do anything less would be a dereliction of duty.”<sup>24</sup> And conservative commentator Ed Whelan wrote earlier this year in *The Weekly Standard* that state attorneys general must “vigorously defend any [state] laws against challenge under federal law so long as there are reasonable (i.e., nonfrivolous) grounds for doing so.”<sup>25</sup>

On this issue, the so-called duty to defend, I part ways with these conservatives. I submit that neither the President nor the Attorney General of the United States nor any state executive, whether a governor or attorney general, is bound to either enforce or defend a

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19. John W. Suthers, Editorial, *State Legal Authorities Turn Political*, WASH. POST, Feb. 3, 2014, at A15.
  20. *Id.*
  21. Scott Graf, *Idaho Attorney General Wasden Will Continue to Defend State’s Gay Marriage Ban*, BOISE ST. PUB. RADIO (Jan. 28, 2014, 6:00 AM), <http://boisestatepublicradio.org/post/idaho-attorney-general-wasden-will-continue-defend-states-gay-marriage-ban>.
  22. Jacob Fenston, *Cuccinelli Blasts Herring for Not Defending Virginia Gay Marriage Ban*, WAMU 88.5 (Mar. 16, 2014), [http://wamu.org/news/14/03/16/cuccinelli\\_blasts\\_herring\\_for\\_not\\_defending\\_virginia\\_gay\\_marriage\\_ban](http://wamu.org/news/14/03/16/cuccinelli_blasts_herring_for_not_defending_virginia_gay_marriage_ban).
  23. *Id.*
  24. Bill Schuette, Letter to the Editor, *Defending Traditional Marriage Is Defending the State Constitution*, DETROIT FREE PRESS, Mar. 25, 2014, <http://archive.freep.com/article/20140325/OPINION04/303250017/michigan-gay-marriage-same-sex-bill-schuette-response-rights>.
  25. Edward Whelan, *Falling Down on the Job: State AGs Shirk Their Duty to Defend State Laws*, WKLY. STANDARD, Feb. 17, 2014, at 14, 16.

law that the executive officer in good faith concludes violates the federal Constitution. Executive officers, both federal and state, are duty-bound to interpret and obey the Constitution in the performance of their duties, and in doing so, they owe no deference to other authorities.

To explain my perspective, I will address three matters. First, I will explain the classical understanding of an executive's authority to interpret the Constitution in the performance of his duties. Second, I will explain how that understanding guided me in the performance of my duties in different kinds of legal controversies when I formerly served as a state attorney general. Third, I will explain the comparative advantages of having executive officials take seriously the duty to obey the Constitution without deferring to other branches of government.

## I. THE DUTY OF EXECUTIVE REVIEW

The duty to interpret the Constitution begins and ends with every officer's oath. The Constitution provides that all executives, legislators, and judges, both federal and state, "shall be bound by Oath or Affirmation, to support this Constitution."<sup>26</sup> That clause appears in clause 3 of Article VI, and fittingly follows the Supremacy Clause in clause 2 of Article VI. And the Supremacy Clause, of course, makes the Constitution the supreme law of the land. So when an executive officer, federal or state, swears to support the Constitution, he swears to support it as the highest of all laws.

In the event of a conflict between the Constitution and a federal or state law, every executive must support the Constitution. As Chief Justice John Marshall explained in *Marbury v. Madison*,<sup>27</sup> "a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument."<sup>28</sup> That concluding passage of *Marbury* means that a law in conflict with the Constitution is a nullity—that is, no law at all—and all departments—executive, legislative, and judicial—must follow the Constitution as the law and ignore the nullity. And that logic applies no matter whether the executive sworn to support the Constitution is a federal or state officer.

Our constitutional history establishes that many presidents have exercised an independent power of executive review. Washington, Jefferson, Madison, Jackson, and Lincoln, among others, interpreted the Constitution in the performance of their executive duties without

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26. U.S. CONST. art. VI, cl. 3.

27. 5 U.S. (1 Cranch) 137 (1803).

28. *Id.* at 180.

deferring to the interpretations of either the judiciary or Congress. And sometimes those presidents had the last word.

As Judge Easterbrook explained in his lecture, early presidents often vetoed legislation on constitutional grounds.<sup>29</sup> President Washington vetoed the first bill apportioning representatives among the states.<sup>30</sup> President Madison vetoed a bill chartering a church in the District of Columbia<sup>31</sup> and a bill for internal improvements<sup>32</sup> both on constitutional grounds. And President Jackson vetoed a bill to reauthorize the national bank<sup>33</sup> even though the Supreme Court had held that Congress had the power to charter the bank.<sup>34</sup>

Thomas Jefferson provided perhaps the most provocative examples of executive review. Jefferson considered the Sedition Act of 1798 to violate the First Amendment.<sup>35</sup> As a result, while he served as president, he refused to prosecute anyone for violating the Act, and he pardoned all who had been convicted for violating it even though the courts had upheld the Act.<sup>36</sup>

President Lincoln, of course, rejected the decision of the Supreme Court in *Dred Scott v. Sandford*.<sup>37</sup> Lincoln acknowledged the authority of the decision as between the parties.<sup>38</sup> But he refused to abide by its rule in other matters of executive responsibility.<sup>39</sup>

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29. Easterbrook, *supra* note 1, at 907–08.
  30. George Washington, Veto Message (Apr. 5, 1792), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 124 (James D. Richardson ed., 1896).
  31. James Madison, Veto Message (Feb. 21, 1811), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 489–90 (James D. Richardson ed., 1896).
  32. James Madison, Veto Message (Mar. 3, 1817), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 584–85 (James D. Richardson ed., 1896).
  33. Andrew Jackson, Veto Message (July 10, 1832), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 576, 582 (James D. Richardson ed., 1896).
  34. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 774 (1824).
  35. Paulsen, *supra* note 2, at 255.
  36. *Id.*
  37. 60 U.S. (19 How.) 393 (1857).
  38. 3 ABRAHAM LINCOLN, *Sixth Debate with Stephen A. Douglas, at Quincy, Illinois*, in THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 255 (Roy P. Basler ed., 1953).
  39. 4 ABRAHAM LINCOLN, *First Inaugural Address*, in THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 38 at 262, 268.

Critics of executive review say that the president has a duty of faithful execution of law,<sup>40</sup> but that argument begs the question, “Execution of what law?” The Supremacy Clause declares that the Constitution is the supreme law. And *Marbury* declares, as Hamilton had argued in *The Federalist*,<sup>41</sup> that conflicting laws are void. If legislation conflicts with the supreme law, which must the executive faithfully execute—the legislation or the supreme law? The question answers itself.

What about the argument that a state attorney general owes a duty, as a lawyer, to his client—the State or the people—to make an argument in defense of state law? Conservative commentator Ed Whelan’s central criticism of the state attorneys general who have refused to defend the marriage laws of their states is that those attorneys general have abandoned their client. But the problem with that argument is that the state attorney general *is* the client.<sup>42</sup> The state attorney general is an executive officer who ordinarily serves either by appointment of the governor or more often by election as an independent officer. Like any executive officer, the state attorney general takes an oath to support the Constitution in the performance of his duties. The state attorney general, as the chief legal officer of the state government, has duties that are not equivalent to those of a private lawyer representing a client. The state attorney general frequently also serves as the chief prosecutor, a minister of justice who must seek the truth in the performance of his duties. The state attorney general is no ordinary lawyer. His first duty is to the Constitution.<sup>43</sup>

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40. See, e.g., Curt A. Levey & Kenneth A. Klukowski, *Take Care Now: Stare Decisis and the President’s Duty to Defend Acts of Congress*, 37 HARV. J.L. & PUB. POL’Y 377 (2013).

41. THE FEDERALIST No. 78 (Alexander Hamilton).

42. MODEL RULES OF PROF’L CONDUCT: PREAMBLE AND SCOPE § 18 (2013). (“Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships.”).

43. I acknowledge that, in some but not all states, an attorney general may not mount, as a plaintiff, an affirmative challenge to the constitutionality of a state law because the attorney general is the defender of those laws. See Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 257–58 (2014). But I am unaware of any state judicial decision that would deny the authority of a state attorney general to admit that a state law violates the Constitution when representing a state defendant.

## II. EXAMPLES FROM MY SERVICE IN AN OFFICE OF STATE ATTORNEY GENERAL

Allow me to offer four examples from my tenure in an office of state attorney general as each example presents nuances about the duty to defend and executive review. The first involves a state ban of the commercial distribution of sex toys, a silly law that I defended in litigation—despite criticism—because I concluded that it did not violate the Constitution. The second involves the installation of a monument of the Ten Commandments in a state judicial building, which I did not think necessarily violated the Constitution, but litigation about that monument led me to prosecute a state chief justice on charges of judicial misconduct after he refused to abide by a federal injunction to remove the monument. The third involves a state law restricting school prayer that I refused to defend after I concluded that the law violated the free-speech and free-exercise rights of students. And the fourth involves two voting rights cases I handled under the direction of then Attorney General and now U.S. Senator Jeff Sessions. In those cases, we confessed error in federal court because other state executive and judicial officials had violated the civil rights of Alabama voters.

Let us consider the silly law first. In 1998, a year after I took the oath to serve as attorney general, the Alabama Legislature amended the criminal code to make it “unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute . . . any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value.”<sup>44</sup> A first offense was a misdemeanor, and a second offense was a felony.<sup>45</sup> The law did not prohibit the use or possession of sex toys, but only the commercial distribution of them.<sup>46</sup> Not surprisingly, some sellers of sex toys and their customers filed a federal lawsuit to challenge that state law. We now cite that lawsuit, to the amusement of my friends and law clerks, as *Williams v. Pryor*.

I defended that silly law in two appeals to the court on which I now serve, the United States Court of Appeals for the Eleventh Circuit. Each time, the Eleventh Circuit agreed with my argument that the law was constitutional. The first ruling involved a facial challenge to the law,<sup>47</sup> and the second ruling involved an as-applied

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44. *Williams v. Pryor*, 240 F.3d 944, 947 (11th Cir. 2001) (quoting Ala. Code § 13A-12-200.2(a)(1) (Supp. 1998)).

45. *Id.*

46. *Id.*

47. *Id.*

challenge.<sup>48</sup> On both occasions, the Eleventh Circuit reversed the district court, which had ruled that the law violated the Constitution. In the first appeal, the Eleventh Circuit ruled that the law satisfied the rational-basis test based on “the State’s legitimate government interest in public morality.”<sup>49</sup> In the second appeal, the Eleventh Circuit refused to “redefine the constitutional right to privacy to cover the commercial distribution of sex toys.”<sup>50</sup>

Defending that law was not always pleasant. Some voters fail to appreciate the distinction between a silly law and an unconstitutional law, and the Alabama press had a field day mocking the law and my defense of it. But the Eleventh Circuit understood what was at stake when it wrote, “If the people of Alabama in time decide that a prohibition on sex toys is misguided, or ineffective, or just plain silly, they can repeal the law and be finished with the matter.”<sup>51</sup> At one point, one of the legislative sponsors of the law visited me and urged me to stop defending the law. I responded that my duty required me to defend the law so long as I thought the law was constitutional. I had a duty to defend the law even though I had no interest in devoting substantial resources of my office to enforcing it. I suggested to the legislator that he sponsor a bill to repeal the law. I assured him that I would not criticize that effort, but he declined to do so. I suppose he did not want to draw any new attention to his role in sponsoring the law in the first place. But again, my duty as a state executive was clear: I had a duty to defend the silly law because it did not violate the Constitution.

Let us consider next the controversy that received the most public scrutiny during my tenure as a state attorney general. That controversy involved not a state law but a decoration in a state judicial building. After his election in 2000 as the Chief Justice of Alabama, Roy Moore designed and installed a monument of the Ten Commandments to “depict the moral foundation of law.”<sup>52</sup> Chief Justice Moore invited a Christian media organization to film the installation,<sup>53</sup> and soon afterward several citizens filed two federal lawsuits that sought an injunction to remove the monument.<sup>54</sup> I had differences of opinion with Chief Justice Moore about several matters, but I did not think that a display of the Ten Commandments in a

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48. *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1234 (11th Cir. 2004).

49. 240 F.3d at 956.

50. 378 F.3d at 1250.

51. *Id.*

52. *Moore v. Judicial Inquiry Comm’n*, 891 So. 2d 848, 850 (Ala. 2004).

53. *Id.* at 850–51 n.2.

54. *Id.* at 852.

courthouse violated the Constitution. After all, depictions of the Decalogue appear in other American courtrooms, including in the courtroom of the Supreme Court of the United States. But Chief Justice Moore did not make his defense of his monument easy as he questioned longstanding precedents about the First Amendment. Eventually both the district court<sup>55</sup> and the Eleventh Circuit<sup>56</sup> ruled that Moore's monument violated the Constitution. Then things got interesting.

Chief Justice Moore refused to obey an injunction to remove the monument.<sup>57</sup> Moore argued that he could ignore the rulings of the federal courts as contrary to the Constitution.<sup>58</sup> He argued that the federal courts, not he, had violated the Constitution.<sup>59</sup> His approach of state review of a federal judgment would turn the Supremacy Clause upside down.

I disagreed with Chief Justice Moore's approach. I instead assisted the associate justices of the state supreme court in removing the monument and complying with the federal injunction.<sup>60</sup> Although I did not think that a depiction of the Ten Commandments in a courthouse necessarily violated the Constitution, I recognized that Article III of the Constitution vested the federal courts with the judicial power to decide cases or controversies arising under the Constitution and laws of the United States. I recognized that Chief Justice Moore's refusal to comply with an injunction entered after he had been given an opportunity to defend his position in a trial and an appeal was lawless. And I later prosecuted him on charges of judicial misconduct and succeeded in having him removed from office.<sup>61</sup>

Now let us consider a case where I refused to defend a state law because I concluded that the law violated the Constitution. In 1993, the Alabama Legislature enacted a law about school prayer.<sup>62</sup> The law provided that "non-sectarian, non-proselytizing student-initiated voluntary prayer . . . shall be permitted during compulsory or non-compulsory" public school events.<sup>63</sup> A parent of a public school student and others filed a federal lawsuit that challenged that law as

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55. *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1293 (M.D. Ala. 2002).

56. *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003).

57. 891 So. 2d at 853.

58. *Id.* at 856–57.

59. *Id.*

60. *Id.* at 853.

61. *Id.* at 853–54.

62. *Chandler v. James*, 958 F. Supp. 1550, 1553 (M.D. Ala. 1997).

63. *Id.* (quoting ALA. CODE § 16–1–20.3(b) (1995)).

violating the First Amendment, and in March 1997, two months after I had taken the oath to serve as the attorney general, the district court ruled in the parent's favor.<sup>64</sup> I quickly studied the ruling because I had not previously represented the state, as a deputy attorney general, in that litigation, and I announced that I would not appeal the ruling. I agreed with the district court that the Alabama law infringed the rights of students under the Free Speech and Free Exercise Clauses of the First Amendment. As the district court concluded, the Alabama law "define[d] students' free speech and religion rights too narrowly. When these rights attach to students in school, they may engage in sectarian, proselytizing religious speech."<sup>65</sup>

I never thought I had a duty to defend that Alabama law because I thought it was plainly unconstitutional. I felt no obligation to appeal the ruling to the Eleventh Circuit or to petition the Supreme Court to allow further judicial review of the law even though neither of those courts had ever squarely addressed a law like it. And I felt no obligation to defend the constitutional interpretation of the Alabama Legislature embodied in that law. The Alabama law favored what it called non-sectarian and non-proselytizing prayer even though it is unclear whether speech that is both non-sectarian and non-proselytizing can even be called a prayer. The law purported to uphold the free-speech and free-exercise rights of students, but it violated those rights instead by favoring certain kinds of speech over others.

Later, the district court and I disagreed about the requirements of the First Amendment when the district court enjoined a public school system from permitting students to engage in any kind of religious speech at a school event.<sup>66</sup> In two appeals, the Eleventh Circuit agreed with me that the First Amendment protects student-initiated prayer and religious speech, and the Eleventh Circuit vacated the injunction.<sup>67</sup> But the governor hired separate counsel and argued that even teacher-led prayer was permissible. The Eleventh Circuit rejected that argument, of course, but the governor, as a matter of executive review, thought that Supreme Court precedents in that area were wrong. I stuck to defending the free-speech rights of the students.

My decisions about the executive duty to defend were influenced by the perspective of my predecessor, now U.S. Senator Jeff Sessions, for whom I had served as deputy attorney general in charge of any civil litigation that he considered to be a priority of his admini-

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64. *Id.* at 1568.

65. *Id.* at 1561.

66. *Chandler v. James*, 985 F. Supp. 1062 (M.D. Ala. 1997).

67. *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999); *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000).

stration. In that role, I had confessed that state officials had violated the federal civil rights of Alabama voters in two cases. And in both cases, General Sessions refused to defer to state authorities when doing so would have violated federal law.

In the highest profile representation that General Sessions appointed me to undertake,<sup>68</sup> I confessed that a state judicial ruling violated the constitutional rights of voters.<sup>69</sup> A state circuit court had ordered state election officials to count previously uncounted absentee ballots in the election for Chief Justice of Alabama in 1994.<sup>70</sup> In keeping with the longstanding interpretation of state officials, the local election officials had refused to count any absentee ballot for which a voter's signature had not been witnessed by either two adults or a notary public.<sup>71</sup> When the state circuit court ordered the counting of the excluded ballots after the election, the challenger in the election for Chief Justice filed a federal complaint and obtained an injunction to stop the after-the-fact changing of the rules of the election to alter the outcome.<sup>72</sup> When General Sessions assumed office, we changed the litigation position of the State and refused to defend the ruling of the state circuit court. We agreed with the challenger in the federal lawsuit that changing the rules of the election would violate the constitutional rights of Alabama voters. We maintained that position about the requirements of federal law, even after the Eleventh Circuit certified the question of state law to the Supreme Court of Alabama, which sustained the ruling of the state circuit court.<sup>73</sup> General Sessions and I, as his deputy, never deferred to the decisions of the state courts or defended them as not violating federal law.

In the second case, I confessed error that a state-sponsored settlement of a voting-rights lawsuit violated federal law.<sup>74</sup> When voters filed a lawsuit that challenged the at-large election of appellate judges, the previous attorney general crafted a settlement.<sup>75</sup> That settlement, which had been approved by a federal district court, required the creation of new judgeships on those courts to be filled by gubernatorial appointment—not election—and created a nominating

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68. *Roe v. Alabama*, 68 F.3d 404 (11th Cir. 1995).

69. *Roe v. Mobile Cnty. Appointing Bd.*, 904 F. Supp. 1315, 1318 n.5 (S.D. Ala. 1995).

70. 68 F.3d at 405.

71. *Id.* at 406–07.

72. *Id.* at 405.

73. *Id.* at 406.

74. *White v. Alabama*, 74 F.3d 1058, 1068 n.35 (11th Cir. 1996).

75. *Id.* at 1062.

commission for those appointments. And that nominating commission had a racial quota. But on behalf of General Sessions, I confessed error. Voters intervened in the lawsuit and challenged the settlement. Those intervening voters and I agreed that the settlement violated the Voting Rights Act of 1965. The Eleventh Circuit ruled, as we had argued, that Alabama could not remedy a denial of voting rights with an appointment process.<sup>76</sup> The whole point of the Voting Rights Act is to allow voters an opportunity to elect the candidates of their choice.

In none of these instances where I, or my predecessor, refused to defend a state law, state judicial ruling, or state-sponsored settlement did any conservatives criticize our exercise of the power of executive review. Perhaps that absence of criticism can be attributed to the fact that political conservatives liked the end result of our decisions. The governor of my state favored teacher-led prayer, but he agreed with me that a state law favoring non-sectarian and non-proselytizing prayers was not worth defending. The state judicial ruling about absentee ballots that we refused to defend favored the incumbent chief justice, a Democrat supported by the trial lawyers' association, and our position in the federal lawsuit favored the Republican challenger supported by the business community. And the state-sponsored settlement of the voting rights case we refused to defend had been crafted by a Democratic attorney general and favored the interests of his political party.

Perhaps the politics of the moment can help a state executive better interpret the Constitution. It can fairly be said, after all, that Presidents Washington, Jefferson, and Lincoln favored the interests of their political allies when they engaged in executive review. It can be said too that President Obama and the state executives, all Democrats, who have favored a constitutional right for homosexual couples to marry have sided with their political allies, but we will have to wait to see whether their argument ever achieves the widespread acceptance that Jefferson's and Lincoln's perspectives now enjoy.

What matters is not whether an executive defends a law with which he or his political party disagrees but whether his interpretation adheres to the text and structure of the Constitution. Jefferson and Lincoln passed that test. And, when contested, my legal positions in the earlier-described controversies, where I sided with my political allies, prevailed in the end—in the objective view of the federal courts.

In my experiences as a state executive, I understood my duty to be true to the Constitution and federal law as supreme. I understood

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76. *Id.* at 1071.

that my oath required me to defend laws that do not violate the Constitution and to refrain from violating the civil rights of Americans. I understood that duty required me to interpret the Constitution and not surrender my responsibility of interpretation to another branch of government. I understood that I would violate my oath if I were to enforce and defend an unconstitutional law that had caused a real injury to some person and that I would shirk my responsibility if I were to leave it to the judiciary to correct the problem without my aid. And I understood that, when the judiciary decided a case within its jurisdiction, the Constitution obliged me to respect the final judgment of the judiciary in that case.

The rule of law demands that conservatives who favor the exercise of executive review not criticize liberals for exercising that power but consider instead the merits of their interpretations. Conservatives can make their case against a constitutional right to same-sex marriage, but conservatives should respect the authority for executive review, as practiced by Washington, Jefferson, and Lincoln.

### III. THE COMPARATIVE ADVANTAGES OF EXECUTIVE REVIEW

There are at least three comparative advantages to this classical understanding of executive review. First, for those concerned about respecting the judicial role, the classical understanding of an executive's duty better protects the integrity of the judicial process. Second, a classical understanding of executive review forces public officials to take the Constitution seriously. Third, when we accept the rightfulness of executive review, we can move beyond a trivial debate about doing a job without thought of its consequences to the important discussion about what the Constitution means.

As to the first advantage, those concerned about the judicial role should want the judiciary to entertain controversies where the executive enforces and defends the law because the executive genuinely believes that the law satisfies the Constitution. An executive committed to enforcing the law is more likely to make the best argument for its defense. The Supreme Court explained long ago that, because a "collusive" suit "is not in any real sense adversary," it fails to "safeguard . . . the integrity of the judicial process, . . . which [is] . . . indispensable to adjudication of constitutional questions . . ." <sup>77</sup> But when the executive enforces a law that it refuses to defend or defends a law that it believes should not be enforced, the executive invites charges of collusion.

The Supreme Court debated what to do about this problem in *Windsor*, where the Obama administration continued to enforce the

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77. *United States v. Johnson*, 319 U.S. 302, 305 (1943).

Defense of Marriage Act while it refused to defend the constitutionality of the Act. The majority described that posture as having “created a procedural dilemma.”<sup>78</sup> The majority fretted that it had to protect what it called “the Supreme Court’s primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff” and avoid having that role become “only secondary to the President’s.”<sup>79</sup> The majority declared that “it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress’s enactment solely on its own initiative and without any determination from the Court.”<sup>80</sup> But Justice Scalia responded in a dissenting opinion joined by the Chief Justice and Justice Thomas, “[w]here the Executive is enforcing an unconstitutional law, suit will of course lie; but if, in that suit, the Executive admits the unconstitutionality of the law, the litigation should end in an order or a consent decree enjoining enforcement.”<sup>81</sup>

I agree with Justice Scalia’s related suggestion that the better course for the executive is “neither to enforce nor to defend the statute he believe[s] to be unconstitutional.”<sup>82</sup> The executive sends a terrible message when he enforces a law that he believes violates the Constitution. That is, the executive tells the person he injures that enforcing a defective law matters more than respecting the Constitution. When he later admits the unconstitutionality of the law in court, the executive tells the injured person that having the judiciary take years to make a final judgment about whether the law violates the Constitution matters more than the injury the executive admits causing in the interim. But if the executive refuses to enforce the law he believes violates the Constitution, he ordinarily injures no person and leaves for another day the duty of defending that law for an executive committed to its enforcement. If that day comes, because the voters decide to elect an executive who believes the law is constitutional and should be enforced, then the judiciary will likely have the opportunity to adjudicate the question without any procedural dilemma. The judiciary has no right to complain about being relegated to a secondary role so long as it remains empowered to decide cases or controversies where the parties are truly adverse.

I acknowledge that, when a state attorney general refuses to defend an unconstitutional law, the controversy may remain justiciable because he may play no role in its enforcement. States ordinarily

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78. *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013).

79. *Id.*

80. *Id.*

81. *Id.* at 2702.

82. *Id.*

lack the unitary executive of the federal government. That is why the Attorney General of Ohio last term filed a brief in defense of an elections commission and a separate brief as amicus curiae about the constitutionality of a state law in a case before the Supreme Court.<sup>83</sup> In a case that involved the Federal Elections Commission, Solicitor General Robert Bork and Assistant Solicitor Frank Easterbrook too filed a separate amicus brief in a landmark case about the constitutionality of a federal campaign finance law.<sup>84</sup> But the multiple legal positions that accompany a government with several executive officers means that no harm comes from a state attorney general providing an independent perspective that a law violates the Constitution. The judiciary can still hear an opposing argument from an officer charged with enforcing the law and perhaps another official such as the governor.

As to the second advantage of the classical understanding, executive review requires elected officials to take the Constitution seriously. Executive review demands that elected officials not be lazy in the performance of their duties, and it allows the people to hold executives accountable for their interpretations. We should not allow executives to escape responsibility for violating the Constitution by shifting the blame to the judiciary as the only branch with the authority to interpret our fundamental law. We should not condone, for example, a president or governor signing legislation while denouncing it as unconstitutional and leaving the judiciary responsible for repairing any damage from that violation. For example, when he signed the Bipartisan Campaign Reform Act of 2002, President George W. Bush stated that the legislation had “flaws” and presented “serious constitutional concerns.”<sup>85</sup> I agree with Professor Saikrishna Prakash that this practice of sign and denounce “should be consigned to the ash heap of history, like communism and bell bottom pants.”<sup>86</sup> After all, this practice only encourages legislators to enact more unconstitutional legislation.

Executives—and legislators, for that matter—swear to support the Constitution, but they take no oath to judicial precedents. And

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83. Brief of Amicus Curiae Ohio Attorney General Michael Dewine in Support of Neither Party, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014) (No. 13-193).

84. Brief for the Attorney General as Appellee and for the United States as Amicus Curiae, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

85. Press Release, George W. Bush, President of the United States, The White House, President Signs Campaign Finance Reform Act (Mar. 27, 2002).

86. Prakash, *supra* note 2, at 82.

we should not want them to do so. Executives should consider judicial precedents for their persuasive weight, but the judiciary has not always been correct in its interpretation of the Constitution. At times the Supreme Court has been outrageously wrong. The federal courts were wrong, and President Jefferson was right about the Sedition Act. The Supreme Court was wrong, and President Lincoln was right about *Dred Scott*. And that infamous mistake by the Supreme Court, of course, helped cause the Civil War. Sometimes executives have prevailed in the course of history in interpreting the most contested and important provisions of the Constitution, and we should be thankful for it.

And the judiciary cannot deny its own fallibility. After all, the Supreme Court was wrong in *Plessy v. Ferguson*,<sup>87</sup> as the Supreme Court later admitted in *Brown v. Board of Education*.<sup>88</sup> An executive necessarily errs when he defers to the precedents of the Supreme Court, instead of the Constitution itself, as the supreme law of the land. As Attorney General Edwin Meese explained in a famous speech more than a quarter-century ago, if the decisions of the Supreme Court were on par with the Constitution itself, then the Court could not overrule or even reconsider its erroneous decisions.<sup>89</sup> And the whole reason the judiciary has jury trials, appellate review, and petitions for writs of certiorari is that the judiciary needs those processes to help correct its own errors.

Executive review respects the fact that Americans can disagree in good faith about the meaning of the Constitution. After all, even when it adheres to precedent in its controversial decisions, the Supreme Court is often divided five to four with excellent legal minds in sharp disagreement about what the Constitution requires. If justices of the Supreme Court disagree among themselves about the meaning of the Constitution in the exercise of their judicial power, then other constitutional officers too have a right in the exercise of their powers to disagree with the Supreme Court about the meaning of the Constitution. To be sure, the Constitution is law, and courts have expertise in construing laws, but executives ordinarily either are lawyers too—as in the case of state attorneys general—or, in the case of governors and the President, have expert lawyers to provide them counsel. At least with executives, the American people have the right to oust them from office when they misconstrue the Constitution. Congress, of course, has never impeached a federal judge for misconstruing the Constitution.

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87. 163 U.S. 537 (1896).

88. 347 U.S. 483, 495 (1954).

89. Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983 (1987).

Finally, when we agree about the legitimacy of executive review, we can have a more meaningful debate about what the Constitution actually requires. When an executive interprets the Constitution in a controversial manner and an opponent charges that the task should be left to the judiciary, we hear only one side of the debate about what the Constitution requires. To criticize an executive for interpreting the Constitution is not to criticize his interpretation, but his interpretation is what matters. Instead of demanding that the executive defend a law, we should debate whether the law violates the Constitution. Instead of hearing one state attorney general criticize another for “not doing his job,” we should hear two attorneys general explain their conflicting interpretations of the Constitution. If one attorney general concludes that homosexual couples have a constitutional right to marry never before recognized in our constitutional history, then that attorney general should explain his interpretation. If another attorney general disagrees and concludes that the Constitution leaves the definition of marriage to the States, then that attorney general too should explain his interpretation. But that debate will be impoverished if it instead involves only the propriety of executive review, which is as old as the Republic itself.

History proves that our country benefits when ordinary Americans and their officials engage in serious constitutional debate. Our Nation benefited from those kinds of serious debates, for example, at our Founding, during and after our Civil War, and during the Civil Rights Movement. We should welcome appeals to the Constitution by our elected officials. We should welcome appeals to the Constitution in debates among lawyers and judges whether associated with the Federalist Society or the American Constitution Society. We should welcome appeals to the Constitution by our citizenry in our political discourse too whether from the Tea Party or the American Civil Liberties Union.

The Constitution is not the exclusive province of the judiciary. The Constitution begins with three words—“We the people”—because the Constitution belongs to the American people. The American people wrote it, ratified it, and many times amended it, and many thousands of Americans died fighting for it. The American people own it. And the American people have a right to demand that our leaders obey it as the supreme law of the land. The right to make that demand explains why the Constitution requires all our high officials—executives, legislators, and judges—to swear an oath to support it. We say that we have a government of laws, not of men, but that saying presupposes that every branch can and will interpret it and follow it in the performance of its powers. We should demand nothing less.

# FACILITATING INCOMPLETE CONTRACTS

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## ABSTRACT

Contract law abhors incompleteness. Although no contract can be entirely complete, the idea of a purposefully incomplete or underspecified contract is antithetical to lawyers' ideals of certainty for the parties and for the law. Indeed, contract law is designed to incentivize parties to specifically articulate their intentions. Yet there is a growing body of interdisciplinary work in economics and cognitive psychology demonstrating that highly specified contracts tend to stifle intrinsic motivation and innovation, whereas less-specified contracts—particularly in public-private contracting, IP, and contracting for innovation—can induce higher effort levels and a more cooperative principal-agent relationship than the traditional approach. Nevertheless, there remain both entrenched doctrinal and sociolegal deterrents to drafting less-specified contracts.

This Article argues that the existing doctrinal roadblocks to incomplete contracts are out of step with the normative goals of commercial contracting—promoting efficiency and incentivizing commercial activity. The indefiniteness doctrine and current approaches to contract interpretation, for instance, over-deter the use of incomplete contracting even when it would be efficient. Ultimately, this Article suggests a new doctrinal approach for those contracts where the law should incentivize incomplete contracting, borrowing from principles of constitutional interpretation: dynamic contextualist interpretation. Courts should look not only to party intent at the moment when the contract was formed but should consider how intentions developed during contract performance. Rather than punishing incompleteness, flexibility should guide determinations of validity and questions of interpretation.

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