

# TAKE CARE NOW: STARE DECISIS AND THE PRESIDENT'S DUTY TO DEFEND ACTS OF CONGRESS

CURT A. LEVEY\* & KENNETH A. KLUKOWSKI\*\*

## INTRODUCTION

On January 20, 1981, Ronald Wilson Reagan took the Article II oath of office to become the fortieth President of the United States.<sup>1</sup> Following his inaugural address to the assembled throng on the National Mall streaming west from the Capitol, Reagan entered the Capitol building for the traditional lunch with members of Congress in Statuary Hall.<sup>2</sup> On that day, President Reagan also established what is now a tradition of going to the President's Room in the Capitol after taking his oath to sign a series of executive orders and officially transmit to the Senate his first series of nominations for many Cabinet-rank officials and various other principal officers.<sup>3</sup>

Now step away from history into an alternate reality. Imagine that in the aforementioned series of nominations, there was no Secretary of Education. The explanation is found in one of President Reagan's executive orders. The President is acting upon the position he articulated as a candidate in 1980, that the

---

\* President, Committee For Justice. J.D. 1997, Harvard Law School.

\*\* Research Faculty, Liberty University School of Law. Senior Legal Analyst, Breitbart News. B.B.A. 1998, University of Notre Dame; J.D. 2008, George Mason University.

1. See U.S. CONST. art. II, § 1, cl. 8 (Presidential Oath Clause).

2. *Fifty-Seventh Presidential Inauguration: Inaugural Luncheon*, JOINT CONGRESSIONAL COMMITTEE ON INAUGURAL CEREMONIES, <http://www.inaugural.senate.gov/days-events/days-event/inaugural-luncheon>, [<http://perma.law.harvard.edu/0VWv4bKbMBp>].

3. See *Obama to officially sign Cabinet nominations*, ASSOCIATED PRESS (Jan. 21, 2013), <http://news.yahoo.com/obama-officially-sign-cabinet-nominations-163831156--politics.html>, [<http://perma.law.harvard.edu/08xjhbKD2v6>]. In the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, the Constitution differentiates principal officers from inferior officers in the Executive Branch, where the former are presidential nominees subject to Senate confirmation, and the latter can be directly appointed by the President, department heads, or the courts. *Morrison v. Olson*, 487 U.S. 654, 670–73 (1988).

Department of Education is unconstitutional,<sup>4</sup> as is the Act of Congress that created it and annually authorizes it. Therefore, President Reagan (1) will not nominate any principal officers to lead this agency; (2) will not appoint any inferior officers to implement its programs; (3) will order all civil servants in the agency not to do any work for its programs; (4) will spend no money on any of the agency's programs (beyond the salaries and benefits for employees), even if appropriated by Congress; and (5)—especially relevant to this Article on the duty to defend—will not defend any aspect of the agency or its programs against any legal challenges.

Similarly, the Reagan Administration will not enforce or defend myriad provisions of the Clean Air Act,<sup>5</sup> Clean Water Act,<sup>6</sup> and Endangered Species Act,<sup>7</sup> as the President deems those statutes to be in excess of Congress's enumerated powers under the Commerce Clause.<sup>8</sup> Moreover, the President is ordering the Attorney General to identify additional Acts of Congress that are unconstitutional in whole or in part, as determined in accordance with the original meaning of Congress's enumerated powers in Article I, Section 8 of the Constitution, so that he may order such acts to be left dormant and undefended. The President is confident there are many such statutes and will also, by executive order, repeal all regulations implementing those statutes, once identified.

President Reagan informs the nation that he can do so because the Constitution requires him to "take Care that the Laws

---

4. See Julie Borowski, *Abolishing the Department of Education is the Right Thing to Do*, FREEDOMWORKS (Sept. 19, 2011), <http://www.freedomworks.org/blog/jborowski/abolishing-the-department-of-education-is-the-right>, [http://perma.law.harvard.edu/0AqLHzdhUwM].

5. Pub. L. No. 91-604, 84 Stat. 1676 (1970); Pub. L. No. 95-95, 91 Stat. 685 (1977). Although the 1970 statute is commonly referred to as the Clean Air Act, the original Clean Air Act is Pub. L. No. 88-206, 77 Stat. 392 (1963). It has been amended several times. The official titles of the 1970 and 1977 statutes are the Clean Air Act Amendments of 1970 and 1977, respectively. (Years later, there would also be the Clean Air Act Amendments of 1990. Pub. L. No. 101-549, 104 Stat. 2399). The 1970 and 1977 amendments largely supplanted the 1963 statute with sweeping expansions of federal power that generated the constitutional concerns relevant to this Article.

6. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566. A predecessor to this statute was the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, passed shortly after the Clean Air Act, *see supra* note 5, as part of the same legislative agenda.

7. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884.

8. *See* U.S. CONST. art. I, § 8, cl. 3.

be faithfully executed.”<sup>9</sup> He explains that this not only empowers him, but in fact *obligates* him, as a sworn constitutional officer, to make his own judgment regarding whether an Act of Congress is constitutional, and if in his *sole* judgment it is not, then to him it is a complete nullity. For each such statute, the President will not administer it, not fund it, and not defend it. In sum, it will be as if the statute does not exist.

Had President Reagan invoked this rationale to effectuate his campaign statements regarding his sincerely-held opinions on the Constitution, much of the federal government would have been indefinitely paralyzed. Major federal programs would have been effectively abolished. As soon as a new President were elected to succeed President Reagan, however, those agencies and programs might come roaring back to life while a new slate of agencies and programs would suddenly be left dormant and undefended if a constitutional challenge were brought against them.

Some scholars and law review articles argue that not only is the scenario sketched above possible—the Constitution actually *demand*s it in so far as the President believes Acts of Congress to be unconstitutional.<sup>10</sup> They argue for a weak duty to defend—defined by the absence of an obligation to defend laws the President contends are unconstitutional—and seem to proceed from the view that the President’s oath to preserve, protect, and defend the Constitution obliges him to essentially review the constitutionality of the entire United States Code *de novo*, with regard to each statute on the books and each provision within each of those statutes.<sup>11</sup>

Although a plausible defense of that view can be made, this Article highlights the weaknesses in it and contrasts it with the opposite theory: a strong duty to defend, under which the President and his administration are obligated to defend the constitutionality of Acts of Congress, subject only to the two narrow

---

9. U.S. CONST. art. II, § 3.

10. See Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1616 (2008) (stating that “the Constitution actually requires the President to disregard unconstitutional statutes”).

11. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 262 (1994); Prakash, *supra* note 10, at 1675 (noting that the “significant obligation” of constitutional defense might justify such thorough scrutiny while conceding such a practice would be “unrealistic”).

exceptions discussed in Part IV of this Article.<sup>12</sup> This strong duty is premised on a different view of the President's oath, one which focuses on the inherently executive aspects of the presidency, including the enforcement and defense of statutes.<sup>13</sup> Under this view, which we adopt and expand on, the President's proper response to a law he believes to be unconstitutional is not to abandon it, but to adjust its enforcement within the bounds of the statute or to press for its repeal.

As the judicial doctrine of *stare decisis* provides stability, consistency, and predictability to the rule of law, a strong duty to defend provides stability to federal law and the federal government. Equally important, by facilitating justiciable cases with adverse parties wherein the federal courts can properly resolve constitutional issues, this duty maintains the constitutional equilibrium—rooted in the separation of powers and the system of checks and balances—under which the judiciary serves as the final voice in constitutional challenges. Finally, this duty prevents a President from enacting “a form of post-enactment veto of legislation that [he] dislikes” through failure to defend the legislation when it is challenged in court,<sup>14</sup> in contravention of the text and structure of the Constitution.

Justice Robert Jackson famously said in the context of national security that the Constitution is not a “suicide pact.”<sup>15</sup> Applying that concept more broadly to all areas of government, we would add that the Constitution is not a recipe for chaos. The election of a President is not a free-for-all whereby every

---

12. See e.g., *Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 94th Cong., 2d Sess. 9–10 (1976) (statement of Rex Lee, Assistant Att’y Gen. of the United States) [hereinafter Lee Testimony]; William French Smith, *Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer*, 6 Op. O.L.C. 13, 26 (1982) [hereinafter *Constitutionality of Legislation*]; Chrysanthe Gussis, *The Constitution, the White House, and the Military HIV Ban: A New Threshold for Presidential Non-Defense of Statutes*, 30 U. MICH. J.L. REFORM 591, 604–06 (1997) (noting the executive branch’s belief that the President may decline to defend statutes that “encroach on the authority or powers of the presidency” or that are “‘clearly’ or ‘patently’ unconstitutional”).

13. See David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 *FORDHAM L. REV.* 71, 82 (2009) (describing the President’s job, as envisioned by the Framers, as “‘Chief Magistrate,’ i.e., as the principal officer who must obey and properly carry out the law”).

14. Drew S. Days III, *In Search of the Solicitor General’s Clients: A Drama with Many Characters*, 83 *KY. L.J.* 485, 502 (1995).

15. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

instrumentality and aspect of federal governance is suddenly a national question mark that depends on the winner's opinion about its constitutionality.

While our theory of a strong duty to defend looks to the text, structure, and history of the Constitution, we acknowledge that several scholars advocating a weak duty also do so based on text, structure, and history.<sup>16</sup> This is one instance where lawyers adhering to the same interpretive principles can arrive at very different conclusions. But in examining the original meaning of the Take Care Clause and the structure of the first three articles of the Constitution, one must consider that if the President were to refuse to enforce or defend every Act of Congress he considers unconstitutional, the President would vitiate vital checks and balances that the Constitution vests in Congress and the courts as a limit on his executive power. That cannot be what the Framers wrought when they drafted the Take Care Clause. Although this Article will look to practical consequences to the extent that they shed light on what the Framers wrought, we want to make it clear that we are not adopting a consequentialist approach.<sup>17</sup> Courts should not *focus* on practical consequences when interpreting legal text—constitutional or otherwise—as that invades the policy purviews of the legislative and executive branches.<sup>18</sup>

This question of whether—and if so, when—a President can refuse to defend an Act of Congress he believes to be unconstitutional has been prominent in national discourse since Attor-

---

16. See generally, e.g., Prakash, *supra* note 10.

17. Consequentialism is more conventionally a reference to a school of thought in ethics, that the rightness or wrongness of an action should be assessed by the consequences it produces. See, e.g., Brian G. Sellers & Bruce A. Arrigo, *Adolescent Transfer, Developmental Maturity, and Adjudicative Competence: An Ethical and Justice Policy Inquiry*, 99 J. CRIM. L. & CRIMINOLOGY 435, 451–53 (2009). Here, we refer to an interpretive method driven by the kind of purported pragmatism that Justice Breyer embraces in his recent book. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 4–6 (2006).

18. Compare, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 78–93 (2012) (explaining that courts should apply a fixed-meaning principle of assigning to words the meaning they were understood to have when the legal text was adopted), with Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, *passim* (2002) (defending courts' interpretation of law based on the consequences a particular interpretation would create). We embrace the former and reject the latter.

ney General Eric Holder informed Congress in 2011<sup>19</sup> that President Barack Obama had decided to discontinue defending section 3 of the Defense of Marriage Act<sup>20</sup> (DOMA) against constitutional challenges,<sup>21</sup> even though strong arguments could be made in its defense.<sup>22</sup> In 2014, debate about the duty to defend intensified after several state attorneys general refused to defend their states' prohibition of same-sex marriage—raising the same issues of stability, justiciability, and the separation of powers implicated at the federal level—and Attorney General Holder encouraged the trend.<sup>23</sup>

The correct approach to the President's duty under the Take Care Clause is illustrated by President Reagan's actual approach to reconciling his convictions about the constitutionality of the statutes mentioned above, rather than by our fictitious scenario. Instead of refusing to enforce or defend Acts of Congress he believed to be unconstitutional, President Reagan sought their repeal through the legislative process. During his first State of the Union address, Reagan announced that he was

---

19. Letter from Attorney Gen. Eric H. Holder, Jr., to John A. Boehner, Speaker, U.S. House of Representatives, (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>, [perma.cc/0bjmKwKgZUH] [hereinafter Holder Letter].

20. § 3, 1 U.S.C. § 7 (2012). Section 3 defined marriage as a union between one man and one woman.

21. *E.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

22. See Neal Devins & Saikrishna Prakash, *The Indefensible Duty To Defend*, 112 COLUM. L. REV. 507, 519–20 (2012). In a subsequent opinion by Justice Anthony Kennedy, the Supreme Court narrowly held by a 5-4 vote that Section 3 failed rational basis review and was thus invalid. *Windsor*, 133 S. Ct. at 2695–96. The holding was premised on the majority's conclusion that the Congress that passed the legislation and the President who signed the legislation (William Jefferson Clinton) were motivated by a bare desire to "injure," "harm," and "demean" homosexuals. *Id.* at 2693, 2695–96. The majority's finding evoked multiple strong dissents, including from Chief Justice John Roberts who wrote that, "At least without some more convincing evidence that the Act's principal purpose was to codify malice, and that it furthered *no* legitimate government interests, I would not tar the political branches [of the federal government] with the brush of bigotry." *Id.* at 2696 (Roberts, C.J., dissenting).

23. See David Ingram, *U.S. states do not have to defend gay marriage bans: Holder*, REUTERS, Feb. 25, 2014, <http://www.reuters.com/article/2014/02/25/us-usa-courts-holder-idUSBREA1011320140225>, [http://perma.cc/4L47-XQ4C]; Curt Levey, Op-Ed., *An attorney general's job is to defend the law—no exceptions*, FOX NEWS, Feb. 25, 2014, <http://www.foxnews.com/opinion/2014/02/25/attorney-general-job-is-to-defend-law-no-exceptions>, [http://perma.cc/SU4D-XS5M].

proposing legislation to abolish the Department of Education.<sup>24</sup> Nonetheless, President Reagan continued to faithfully administer those statutes whose constitutionality he rejected and surely would have defended their constitutionality in court had they come under legal attack.<sup>25</sup>

This Article focuses on the President's duty to defend Acts of Congress rooted in the Take Care Clause, as distinct from his broader duty to enforce and otherwise effectuate federal statutes. In Part I of this Article, we give an overview of the duty to defend. Part II explores the origin of this duty, including its relation to the separation of powers and system of checks and balances. Part III explains how judicial principles of *stare decisis* analogously support the President's duty to defend. Part IV discusses the scope and contours of the duty to defend, including exceptions to the duty and Attorney General Eric Holder's seeming expansion of one exception. Part V concludes with an illustration of how these principles might apply under a future President.

## I. OVERVIEW OF THE DUTY TO DEFEND

The duty to defend requires the President and the executive branch he heads to defend the constitutionality of federal laws when they are challenged in court. Although both the duty to defend and the President's concomitant duty to enforce federal laws arise from the Constitution's Take Care Clause,<sup>26</sup> the two duties are distinct.<sup>27</sup> Unfortunately, discussions of the duty to defend in

---

24. President Ronald Reagan, Address Before a Joint Session of the Congress Reporting on the State of the Union (Jan. 26, 1982), available at <http://www.presidency.ucsb.edu/ws/?pid=42687#axzz2j71Slfbp>, [<http://perma.law.harvard.edu/02XzGeu3gJ1>].

25. President Reagan's only refusal to defend an Act of Congress was in *INS v. Chadha*, 462 U.S. 919 (1983), which involved a universally accepted exception to the duty to defend. As discussed in Part IV of this Article, the President need not defend a statute if its alleged unconstitutionality stems from its encroachment on the President's constitutional powers. See Devins & Prakash, *supra* note 22, at 534–35; Gussis, *supra* note 12, at 606.

26. U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed. . .”). See *infra* Part II for a more detailed discussion of the origins of the duty to defend.

27. Seth P. Waxman, Essay, *Defending Congress*, 79 N.C. L. REV. 1073, 1078 n.14, (2001) (“Note the salient difference between a decision by the Executive not to *defend* an Act of Congress from the analogous, but quite distinct, decision a President may make not to *enforce* the law.”).

academic literature and in United States Department of Justice (DOJ) opinions do not always make that distinction clear.<sup>28</sup>

The literature takes it for granted that the duty to defend arises only when the constitutionality of a law is challenged.<sup>29</sup> That seems correct, at least as a definitional matter, but the reason is worth a brief discussion. Our best explanation is that a statute's legitimacy can only be challenged on a constitutional basis, whether substantive or procedural.<sup>30</sup> Although it is true, for example, that a statute can be contested in court on the basis that it is superseded by a more recent statute, the challenge would be to the interpretation of the older statute—what its provisions mean in light of the newer statute—rather than to its legitimacy.<sup>31</sup> Once the question turns to the correct interpretation of a statute, it is difficult to define what a duty to defend means. That

---

28. See Simon P. Hansen, Note, *Whose Defense Is It Anyway? Redefining the Role of the Legislative Branch in the Defense of Federal Statutes*, 62 EMORY L.J. 1159, 1163 (2013) (“Though the ideas of executing and defending laws often get conflated with each other, the two are not the same.”).

29. See, e.g., Devins & Prakash, *supra* note 22, at 513 (“Under the duty to defend, the federal executive must defend the constitutionality of laws before the courts.”); Waxman, *supra* note 27, at 1073 (“The issue is this: If the constitutionality of an Act of Congress is challenged in court, when, if ever, does the Solicitor General’s responsibility permit, or require, him not to defend the Act?”).

30. An example of a procedural constitutional challenge to a statute is the claim made by some that the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, is unconstitutional because its passage by Congress was in violation of the Constitution’s Origination Clause, U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives. . . .”). See, e.g., Timothy Sandefur, *So It’s a Tax, Now What?: Some of the Problems Remaining After NFIB v. Sebelius*, 17 TEX. REV. L. & POL. 203, 227–28 (2013).

31. See Carlos E. González, *The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms*, 80 OR. L. REV. 447, 453 (2001) (“Whether, for example, a newly passed statute trumps a conflicting preexisting statute is never the key question in a case involving two possibly conflicting statutes. It is axiomatic and undisputable that a newly passed statute trumps a conflicting pre-existing statute. . . . [Instead,] lawyers and courts focus their argumentative energies on the interpretive question. . . .”). In the unlikely case that the older statute were enforced, despite having been repealed by implication by the newer one, the challenge would again be a constitutional one, arguing that the executive has no authority to enforce a repealed statute. Although readers may be able to think of other aberrational examples to test the assumption that a statute’s legitimacy can only be challenged on a constitutional basis, we suspect those examples would only prove the rule.



is likely why disputes about statutory interpretation lie beyond the conventional usage of the term “duty to defend.”<sup>32</sup>

A. *Previous Discussions of the Duty to Defend*

Even though Presidents have faced decisions about how to respond to lawsuits challenging federal statutes since the beginning of the nation,<sup>33</sup> explicit discussion of the President’s duty to defend federal laws is a recent phenomenon. Even at the Department of Justice—which would lead any such defense—the first known uses of the term and concept in opinions did not occur until 1980,<sup>34</sup> most notably in an opinion by Attorney General Benjamin Civiletti titled “The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation.”<sup>35</sup>

In his opinion, the Attorney General writes, “I concur fully in the view expressed by nearly all of my predecessors that when the Attorney General is confronted with such a choice, it is almost always the case that he can best discharge the responsibilities of his office by *defending* and enforcing the Act of Congress.”<sup>36</sup> At least with regard to the published opinions of Civiletti’s predecessors, however, discussion of duties when the executive branch is confronted with statutes it believes to be un-

---

32. Issues of statutory interpretation do arise, however, within the context of constitutional challenges. It is common for the constitutionality of a statute to hang on its interpretation. *See, e.g.,* *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 162 (2001) (holding that the Corps of Engineers’ “migratory bird rule” exceeded the authority granted by Section 404 of the Clean Water Act, thus avoiding the question of whether the rule exceeds Congress’s powers under the Commerce Clause).

33. *See, e.g.,* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 143–44 (1803). President Jefferson’s administration made no effort to defend the relevant statute. No one represented the defendant, Secretary of State James Madison, in the litigation, and Attorney General Levi Lincoln appeared in the case only as a reluctant witness. *Id.*

34. Devins & Prakash, *supra* note 22, at 517 (“In 1980, the phrase ‘duty to defend’ found its way into DOJ opinions. Prior to that time, there seems to have been no case where Attorneys General or other officials used that term or discussed the concept.”).

35. Benjamin Civiletti, *The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4a Op. O.L.C. 55 (1980) [hereinafter *Civiletti Opinion*]. The duty to defend was also briefly mentioned in a 1980 opinion by Leon Ulman, a Deputy Assistant Attorney General in the Office of Legal Counsel. *Constitutionality of Legislation Establishing the Cost Accounting Standards Board*, 4b Op. O.L.C. 697, 698 (1980). Several years earlier, Rex Lee, then head of the Civil Division at DOJ, explained the duty at a hearing of the Senate Judiciary Committee. *Lee Testimony*, *supra* note 12, at 9–10.

36. *Civiletti Opinion*, *supra* note 35, at 55 (emphasis added). Note that Civiletti here acknowledges that the duty to defend is distinct from the duty to enforce.

constitutional was limited to the duty to enforce and the general issue of when the President or Attorney General can question the constitutionality of a law.<sup>37</sup> We can only speculate about why discussion of the duty to defend is a modern phenomenon. Former United States Solicitor General Seth Waxman noted that:

The issue [of the duty to defend] is particularly salient these days because we are living in a period of constitutional ferment. For most of our nation's history, the Supreme Court only rarely struck down federal statutes on constitutional grounds . . . . These days, however, the extraordinary act of one branch of government declaring that the other two branches have violated the Constitution has become almost commonplace.<sup>38</sup>

Perhaps in the past the infrequency of litigation concerning the constitutionality of federal statutes resulted in the duty to defend being subsumed by the duty to enforce, which arises regardless of whether a statute is challenged in court. In his statement above, Attorney General Civiletti may have assumed such subsumption in describing the views of his predecessors. In any event, the perception that recent Presidents have become more assertive in declining to defend federal statutes has spawned discussion of the issue.<sup>39</sup>

Even now, however, not much has been written about the President's duty to defend federal laws. We have not found a single published federal court opinion that expounds upon the

---

37. See, e.g., Rendition of Opinions on Constitutionality of Statutes—Federal Home Loan Bank Act, 39 Op. Att'y Gen. 11, 13–16 (1937) (stating that “only the President ordinarily can have proper interest in questioning the validity of a measure passed by the Congress, and that such interest ceases when he [signs or vetoes the bill]” and mentioning defense only in so far as “if the Attorney General should regard a statute as clearly constitutional, an opinion to that effect might not be immediately harmful—aside from the fact that he might later be called upon to defend the statute in the courts”); Income Tax—Salaries of President and Federal Judges, 31 Op. Att'y Gen. 475, 476 (1919) (acknowledging a duty to enforce “where it does not involve any conflict between the prerogatives of the legislative department and those of the executive department”).

38. Waxman, *supra* note 27, at 1073–74.

39. See Hansen, *supra* note 28, at 1160 (concluding that there is an “emerging trend of the Executive Branch refusing to defend the constitutionality of federal statutes challenged in litigation”); Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 970 (1983) [hereinafter *Executive Discretion*] (describing an increase in cases where “the Executive has asserted a discretionary authority to decline to defend federal laws against constitutional challenges”).

duty to defend, and only a handful of Justice Department opinions and law review articles have focused on the duty.<sup>40</sup>

*B. Decisions About Defending a Statute Are Not Binary Choices*

What has been written about the President's duty to defend federal laws largely treats it as a binary choice—defend or do not defend—with only an occasional reference to the many forms that either decision can take. Although treating the decision as binary is helpful when analyzing the wisdom and scope of the duty to defend, it is worth noting some of the complexities. Seth Waxman mentions several of them in his essay:

Every year the Solicitor General must decide, one case at a time, what the interests of the United States are with respect to several thousand different cases in the federal and state courts. Should the United States appeal, or seek rehearing, or petition for certiorari, or file a brief *amicus curiae*, or intervene? What issues should the United States raise, and what arguments should it make?<sup>41</sup>

Adding to the complexities, the Executive's decision about whether to defend may not be the same at different stages of a case. An example is a lawsuit challenging the special treatment given to some Christian Science nursing services under Medicaid and Medicare statutory provisions.<sup>42</sup> The Justice Department defended the provisions in United States district court, but after the provisions were struck down there as unconstitutional, the Department decided not to appeal.<sup>43</sup>

---

40. Considerably more has been written about the President's duty to enforce federal laws. It is possible that some of those judicial opinions, Justice Department opinions, and articles assumed, without stating, that enforcement of a statute includes its defense.

41. Waxman, *supra* note 27, at 1076; see also Theodore B. Olson et al., *The Advocate as Friend: The Solicitor General's Stewardship Through the Example of Rex E. Lee*, 2003 BYU. L. REV. 3, 5 ("[The Solicitor General] ultimately decides whether the United States will appeal a case it has lost, seek rehearing en banc, seek an issuance of an extraordinary writ, file a brief *amicus curiae*, or intervene to defend the constitutionality of an act of Congress.").

42. *Children's Healthcare Is a Legal Duty, Inc. v. Vladeck*, 938 F. Supp. 1466, 1468 (D. Minn. 1996).

43. Waxman, *supra* note 27, at 1081. Instead, the district court decision was appealed by an intervenor defendant, the First Church of Christ, Scientist, among others. *Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084 (8th Cir. 2000).

Moreover, different parts of the executive branch may make different decisions. In *Metro Broadcasting, Inc. v. FCC*,<sup>44</sup> involving the Federal Communications Commission's preferences for minority-owned stations, the Solicitor General declined to defend the relevant statutory provisions in the Supreme Court and filed an amicus curiae brief arguing that the provisions were unconstitutional.<sup>45</sup> The Solicitor General, however, allowed the FCC to defend the preference provisions before the Court.<sup>46</sup> Even different units within the same agency may make different decisions.<sup>47</sup> In the aforementioned *Vladeck* case involving Medicaid and Medicare, the decision to defend was apparently made by the Justice Department's Civil Division, whereas the decision not to appeal was made by the Solicitor General.<sup>48</sup>

Further complexity arises because, even among the cases where the President decides to defend a federal law, there are variations in the strength of the defense.<sup>49</sup> Similarly, among the decisions not to defend, there is a distinction between the Administration's passively declining to defend a law—for example, deciding not to appeal in the *Vladeck* Medicaid and Medicare case—and affirmatively arguing against the law's constitutionality or otherwise actively seeking to have it struck down. The latter situation is exemplified by the Obama Administration's decision to argue against the constitutionality of section 3 of DOMA, while also seeking review of district court and Second Circuit Court of Appeals decisions striking down Sec-

---

44. 497 U.S. 547 (1990).

45. See Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 295–96 (1994).

46. *Id.* at 296.

47. See e.g., Robert H. Bork, *Offense to the Constitution Act*, NATIONAL REVIEW, March 21, 2011, <http://www.nationalreview.com/nrd/articles/303447/offense-constitution-act>, [<http://perma.cc/M7FY-U6BC>] (article by a former United States Solicitor General reporting that “In 1976, the [Justice] department was faced with defending a statute, the Federal Election Campaign Act, that seemed to Attorney General Edward Levi, and to me, to be clearly unconstitutional. . . . Our solution was to delegate to the senior deputy of the solicitor general's office the defense of the statute. . . . Simultaneously, Levi and I filed a friend-of-the-court brief exploring the difficulties of the statute but not taking sides in the dispute.”).

48. Waxman, *supra* note 27, at 1081.

49. See Devins & Prakash, *supra* note 22, at 513 n.15 (“Administrations have occasionally filed briefs defending the constitutionality of a law while simultaneously signaling, in some way, doubts.” (citing Waxman, *supra* note 27, at 1081–83)).

tion 3, in a successful attempt to get a Supreme Court ruling doing the same.<sup>50</sup>

Considering all the permutations of these complexities would be mind boggling, which probably explains why decisions under the duty to defend are generally treated as binary. We will do the same here for the sake of clarity and simplicity, except where a more nuanced treatment is necessary.

## II. ORIGINS OF THE DUTY TO DEFEND

### A. *The Take Care Clause*

The President's duty to defend federal laws is grounded in the Constitution's command that he "shall take Care that the Laws be faithfully executed."<sup>51</sup> The Take Care Clause, in turn, was inspired by the rejection of the English monarch's "royal prerogative" — the power to nullify a law in whole or in part by suspending its enforcement<sup>52</sup> — in the Glorious Revolution of 1688.<sup>53</sup> In contrast to the royal prerogative, the Framers intended to ensure that the President be duty-bound to execute the law as it exists.<sup>54</sup> As Justice James Wilson, who was instrumental in drafting the Take Care Clause,<sup>55</sup> explained, the President has "authority, not to make, or alter, or dispense with the laws, but to execute and act the laws, which [are] established."<sup>56</sup>

---

50. See *United States v. Windsor*, 133 S. Ct. 2675, 2685 (2013).

51. U.S. CONST. art. II, § 3; see also *Constitutionality of Legislation*, *supra* note 12, at 26 (citing the Take Care Clause to explain the "settled practice that the Department of Justice must and will defend Acts of Congress except in . . . rare case[s]"); Olson, *supra* note 41, at 7 (explaining that the Solicitor General's "responsib[ility] for defending the constitutionality of congressional statutes" arises from the Take Care Clause).

52. See Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 798–99, 803–04 & nn.132–41 (2013) (collecting other sources); Christopher M. May, *Presidential Defiance of "Unconstitutional" Laws* 21 HASTINGS CONST. L.Q. 865, 873 (1994). The English monarch's suspension power is indirectly referenced in the Suspension Clause of the Constitution. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be *suspended*, unless when in Cases of Rebellion or Invasion the public Safety may require it." (emphasis added)).

53. See Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1305 (1996) (citing May, *supra* note 52, at 869–73).

54. See WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 147–50 (Philadelphia, Philip H. Nicklin, 2d ed. 1829).

55. See Delahunty & Yoo, *supra* note 52, at 802–03.

56. *Id.* at 802 (citation omitted).

Although the Take Care Clause serves, most famously, as the basis for the President's duty to enforce federal laws, faithful execution of the nation's laws requires not only enforcement but also defense when those laws are challenged in court.<sup>57</sup> Were a President free to passively allow or actively seek the undermining of federal laws in court, his obligation to execute those laws would be rendered partially vacuous. Even the President's duty to enforce laws, construed narrowly, would mean little if those people subject to enforcement actions could challenge the laws in court knowing that the government would offer no resistance.

Professor Orin Kerr of George Washington University Law School describes what would happen without a strong duty to defend:

If you take [the Obama Administration's] view, the Executive Branch essentially has the power to decide what legislation it will defend based on whatever views of the Constitution are popular or associated with that Administration. . . . If that approach becomes widely adopted, then it would seem to bring a considerable power shift to the Executive Branch. . . . [A]ctivists on [the President's] side can file constitutional challenges based on the [President's] theories . . . and then the challenges to the legislation will go undefended. . . . [I]t will be a power grab disguised as academic constitutional interpretation.<sup>58</sup>

In at least one sense, the President's duty to defend is the most important component of the Constitution's mandate that he faithfully execute the laws. Consider that a President's fail-

---

57. *Executive Discretion*, *supra* note 39, at 970 ("'Execution' means enforcement, but it also implies the responsibility to defend and to uphold the laws against attacks in court."); *see also* Devins & Prakash, *supra* note 22, at 513 ("The duty to defend is typically seen as a subset of a broader duty to enforce the law."). *But see id.* at 511 (arguing that "the duties to enforce and defend have no place in the constitutional system" and stating that that conclusion is "buttressed" by constitutional provisions including the Take Care Clause).

58. Orin Kerr, *The Executive Power Grab in the Decision Not to Defend DOMA*, VOLOKH CONSPIRACY (Feb. 23, 2011 3:49 PM), <http://volokh.com/2011/02/23/the-executive-power-grab-in-the-decision-not-to-defend-doma/>, [<http://perma.cc/0wBrkfDzM49>] (writing about possible ramifications of the Obama Administration's decision not to defend section 3 of the Defense of Marriage Act); *see also* Bork, *supra* note 47 (arguing that, by not defending DOMA, the Obama Administration was "usurping the function of the courts by announcing constitutional decisions by the executive branch. This aggrandizement of the executive-branch powers poses a very real threat to American liberty.").

ure to enforce a federal statute has no binding effect on future Presidents (assuming the statute is not repealed by Congress). By contrast, where a President's failure to defend a statute results in the law being struck down by the courts as unconstitutional, the resulting precedent may tie the hands of future Presidents with respect to enforcement and render futile their attempts to defend the law in court.

Nonetheless, the duty to defend is generally not viewed as absolute. The reason lies in a degree of tension between the Take Care Clause and another constitutional provision, the Presidential Oath Clause, requiring the President to "preserve, protect and defend the Constitution of the United States."<sup>59</sup> Attorney General Civiletti describes the tension:

The Attorney General has a duty to defend and enforce the Acts of Congress. He also has a duty to defend and enforce the Constitution. . . . He must examine the Acts of Congress and the Constitution and determine what they require of him; and if he finds in a given case that there is conflict between the requirements of the one and the requirements of the other, he must acknowledge his dilemma and decide how to deal with it.<sup>60</sup>

As a result of this tension, there is a general consensus that, at least in exceptional cases, the President's duty to defend a law should give way where the law is clearly unconstitutional.<sup>61</sup> The contours of this exception to the duty to defend are examined in Part IV.

#### B. *The Duty to Defend Serves the Separation of Powers*

The President's duty to defend federal laws also draws support from the constitutional doctrine of the separation of powers. As Attorney General Civiletti explained in his 1980 opinion:

Within their respective spheres of action the three branches of government can and do exercise judgment with respect to constitutional questions . . . but only the Executive Branch can execute the statutes of the United States. For that reason

---

59. U.S. CONST. art. II, § 1, cl. 8.

60. Civiletti Opinion, *supra* note 35, at 55.

61. See, e.g., Walter Dellinger, *Legal Opinion from the Office of Legal Counsel to the Honorable Abner J. Mikva*, 48 ARK. L. REV. 313, 314 (1995) (asserting that "the general proposition that in some situations the President may decline to enforce unconstitutional statutes is unassailable").

alone, if executive officers were to adopt a policy of ignoring or attacking Acts of Congress whenever they believed them to be in conflict with the provisions of the Constitution, their conduct in office could jeopardize the equilibrium established within our constitutional system.<sup>62</sup>

Similarly, an executive policy of failing to defend Acts of Congress that are challenged in court would upset the constitutional equilibrium by threatening to deprive cases of the adverseness of parties necessary for jurisdiction, thus jeopardizing the judiciary's conclusive role in determining the constitutionality of statutes properly before the courts.<sup>63</sup> The President's duty to provide adverseness is discussed in Part IV.C.

It is, however, not always that simple. As former Solicitor General Waxman points out, "when defending the statute would require the Solicitor General to ask the Supreme Court to overrule one of its constitutional precedents . . . the interests of the legislative and judicial branches are in direct tension."<sup>64</sup> In that case, due regard for the two other coequal branches of government points the President in conflicting directions.

Further complicating the analysis, an argument can be made that the separation of powers authorizes the President to reject the constitutional reasoning of both the legislative and judicial branches and reach his own conclusions about a statute's constitutionality. In other words, the reasoning goes, separation-of-powers principles actually free the President from a duty to defend.<sup>65</sup>

---

62. Civiletti Opinion, *supra* note 35, at 55–56; *see also* Days, *supra* note 14, at 502. (arguing that defense of "the acts of Congress fosters comity between the Executive and Legislative Branches in two important ways," one of which is to "prevent[] the Executive Branch from using litigation as a form of post-enactment veto of legislation that the current administration dislikes"); Dalena Marcott, *The Duty to Defend: What is in the Best Interests of the World's Most Powerful Client?*, 92 GEO. L.J. 1309, 1320 (2004) ("The Solicitor General's willingness to presume and defend the constitutionality of Acts of Congress is an assertion of due regard for the constitutional functions of the Legislature as a co-equal branch of government.").

63. *See* Poe v. Ullman, 367 U.S. 497, 503 (1961) (discussing the Article III requirement of adverse parties).

64. Waxman, *supra* note 27, at 1085.

65. Devins & Prakash, *supra* note 22, at 511 ("Each branch has powers and duties that require it to engage in constitutional interpretation, with nothing obliging it to adhere to the constitutional reasoning of others. The duties to enforce and defend are at odds with this principle . . .").



Although we agree with one commentator that “the fundamental role that [the duty to defend] plays in the doctrine of separation of powers [has] not been thoroughly explored,”<sup>66</sup> we nonetheless reject the argument that separation-of-powers principles undercut the President’s duty to defend federal laws. After all, one can debate what concept the Constitution’s Framers had in mind regarding the separation of powers, but whatever that concept was, they must have thought it was consistent with giving the President the explicit and exclusive duty to faithfully execute the laws enacted by the legislative branch.

### III. PRINCIPLES OF STARE DECISIS SUGGEST A DUTY TO DEFEND

We contend that principles of stare decisis also counsel in favor of the Executive’s duty to defend Acts of Congress. The Supreme Court has held that the doctrine of stare decisis is predicated upon certain principles. Those principles apply, by analogy, to the duty of a President to defend federal statutes.

Former Solicitor General Seth Waxman notes that it is “an important premise in our constitutional system—that when Congress passes a law and the President signs it, their actions reflect a shared judgment about the constitutionality of the statute.”<sup>67</sup> At that point, the President has weighed in on the matter, and it becomes an operative law. This dynamic is conceptually similar to a court hearing arguments from both sides of a case, then rendering a decision with a written opinion. The words of that opinion are now operative as law.

That is how stare decisis regards federal court decisions. Take, for example, the Supreme Court’s declaration of a right to abortion in *Roe v. Wade*,<sup>68</sup> decided in 1973. When the Court reconsidered *Roe* in its 1992 *Casey* case,<sup>69</sup> only three of the Justices from 1973 were still sitting on the Court—Rehnquist, White, and Blackmun (the author of *Roe*). Nonetheless, the six newer Justices did not absolve themselves from stare decisis considerations on the basis that they had not individually voted on the matter. To the contrary, three of those newer Justices—O’Connor, Kennedy, and Souter—wrote a joint opinion in

---

66. Marcott, *supra* note 62, at 1309.

67. Waxman, *supra* note 27, at 1078.

68. 410 U.S. 113, 163–65 (1973).

69. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

which they upheld what they called the “central holding” in *Roe* largely on the basis of stare decisis.<sup>70</sup> At no point in that opinion did the plurality say that because the membership of the Court had changed they were free to abandon the earlier opinion. The institution of the Court ruled upon the constitutionality of a statute, and no matter how wrong the previous decision may be,<sup>71</sup> the Court is still the Court, no matter how many of the nine seats are occupied by new Justices.

Note that abortion is not some sort of sui generis exception to general principles. In 2010, the Court declined to consider whether to extend the Second Amendment right to bear arms to the States through the Privileges or Immunities Clause on account of the 1873 *Slaughter-House* decision<sup>72</sup> that almost everyone acknowledges was wrong in at least some respects.<sup>73</sup> Instead, four Justices voted to incorporate the right through substantive due process.<sup>74</sup>

This institutional concept applies to the other two branches of the government regarding the constitutionality of federal statutes. When Congress passes a statute, it does not automatically expire after the next biennial congressional election, or at any point thereafter.<sup>75</sup> The institutions of the House and Senate affirm the constitutionality of the legislation when they pass it, and that determination endures indefinitely. So, too, the executive branch of government can determine the constitutionality of legislation de novo only once, when the bill sits upon the President’s desk in the Oval Office for signature or veto.

In this regard, presidential power under the Presentment Clause<sup>76</sup> is not about any particular President, but rather about the Office of the President. Once any given President has signed a bill into law, the institutional presidency has now af-

---

70. See *id.* at 843–79 (lead opinion).

71. See *id.* at 944–66 (Rehnquist, C.J., dissenting); *id.* at 979–81 (Scalia, J., dissenting).

72. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

73. See *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3028–30, 3050 (2010) (plurality opinion).

74. *Id.* at 3050.

75. Although Congress can elect to include a sunset provision in statutes, whereupon the statute will expire on a certain date, most statutes have no such provision. Additionally, such provisions do not impact the general principle that Congress as an institution only passes upon the constitutionality of a piece of legislation once, when the bill receives a final vote.

76. See U.S. CONST. art. I, § 7, cl. 2.

firmed the constitutionality of the matter, and generally all the successors in office to the President who signed the bill must be bound in privity with his judgment for purposes of the constitutionality of that particular enactment (subject to certain exceptions articulated in this Article).

This theory appears consistent with the original meaning of the Take Care Clause. As Attorney General Benjamin Civiletti explained:

The available evidence concerning the intentions of the Framers lends no specific support to the proposition that the Executive has a constitutional privilege to disregard statutes that are deemed by it to be inconsistent with the Constitution. The Framers gave the President a veto for the purpose, among others, of enabling him to defend his *constitutional* position. They also provided that his veto could be overridden by extraordinary majority in both Houses. That being so, an argument can be made that the Framers assumed that the President would not be free to ignore, on constitutional grounds or otherwise, an Act of Congress that he had been unwilling to veto or had been enacted over his veto.<sup>77</sup>

Civiletti emphasizes here that the Framers intended, through the override provision, to bind a President to adhere to some laws even when he did everything within his power to declare the laws unconstitutional.

In sum, if a President regards legislation before him as unconstitutional, then his veto is the means the Constitution gives him to express that view.<sup>78</sup> In that moment, the President is playing a role in the legislative process as part of the system of checks and balances. Once a bill becomes law, the legislative process ends, as does the President's prerogative to offer constitutional objections. At that point, his role switches purely to that of an executive officer, and the check-and-balance is complete, as the implicated powers revert to their normal status of separation. In that executive capacity, the President's duty—and those of his successors—is to faithfully execute the law, which includes defending it if challenged.

---

77. Civiletti Opinion, *supra* note 35, at 58 (citations omitted); *but see id.* at 58 n.2.

78. See Recommendation that the Department of Justice not Defend the Constitutionality of Certain Provisions of the Bankr. Amendments. & Fed. Judgeship Act of 1984, 8 Op. O.L.C. 183, 194 (1984) [hereinafter Bankr. Amendments Recommendation].

A. *Understanding Stare Decisis*

A general discussion of stare decisis will help to demonstrate the doctrine's salience in examining the Executive's duty to defend. Stare decisis is the abbreviated form of the Latin phrase *stare decisis et non quieta movere*, meaning "to stand by and adhere to decisions and not disturb what is settled."<sup>79</sup> It is the rule that causes court precedents to endure over time.

Under this judicial policy, a federal court will generally adhere to the conclusion and essential reasoning of a previous case presenting the same legal question. The Supreme Court has said, "[W]e will not depart from the doctrine of stare decisis without some compelling justification."<sup>80</sup> Stare decisis "enjoys lofty status as the emblem of a stable judiciary."<sup>81</sup> The importance of stability also applies to the executive branch and supports a presidential duty to defend federal statutes.

Stare decisis is of "fundamental importance to the rule of law."<sup>82</sup> As a policy, this doctrine "avoids the instability and unfairness that accompany disruption of settled legal expectations."<sup>83</sup> This principle is particularly important with respect to the actions of a President. The overwhelming majority of the nation's 2,739,000 federal employees<sup>84</sup> are in the executive branch, all under the President. That is a vast number of people administering and enforcing the multitudinous functions and programs of the United States government, upon which all Americans rely. A President who did not regard himself as obligated to provide some semblance of continuity and consistency of those functions in the executive branch would be a profoundly destabilizing influence in the lives of American citizens.

---

79. *In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996).

80. *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Justice Anthony Kennedy recently elaborated, writing for the Court in *Citizens United* that stare decisis requires adhering to precedent "unless the most convincing of reasons demonstrates that adherence to it puts [the Court] on a course that is sure error." *Citizens United v. FEC*, 558 U.S. 310, 362 (2010).

81. Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 412 (2010).

82. *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987).

83. *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality opinion).

84. Daniel Halper, *1,350,000 'Essential' Federal Government Employees Continue to Work*, WKLY. STANDARD, Oct. 2, 2013, [http://www.weeklystandard.com/blogs/1350000-essential-federal-government-employees-continue-work\\_759071.html](http://www.weeklystandard.com/blogs/1350000-essential-federal-government-employees-continue-work_759071.html), [<http://perma.cc/06xE2QC2Vwu>].

### 1. Vertical and Horizontal Stare Decisis

We should clarify that scholars actually refer to two types of stare decisis, only one of which is colloquially referred to by that term. The first type is the binding effect of a superior court upon the inferior courts within its jurisdiction. This can be called “vertical precedent,”<sup>85</sup> resulting in a form of constraint that could be termed “vertical stare decisis.” For example, all trial and intermediate courts in the federal system are utterly bound by Supreme Court precedent,<sup>86</sup> and all federal district courts are absolutely bound by the precedent of the federal court of appeals in the circuit wherein the district court is found.<sup>87</sup> The California Supreme Court’s explanation of its own court system also applies to federal courts: “Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. . . . It is not their function to attempt to overrule decisions of a higher court.”<sup>88</sup>

Next there is what could be called “horizontal precedent,”<sup>89</sup> resulting in “horizontal stare decisis.” This more common use of the term “stare decisis” is simply the rule that once a court has decided an issue in our common-law system, that precedent should generally control later cases presenting the same issue to the court. Because the doctrine of horizontal stare decisis includes factors for making exceptions to the rule, horizontal stare decisis is often referred to as a policy more than a rule.

---

85. Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism,”* 92 CALIF. L. REV. 1441, 1466 (2004) (citing Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 276 n.106 (1992)).

86. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam). The U.S. Supreme Court has stated this principle in inflexible and unconditional terms: “If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Justice John Paul Stevens correctly wrote that a lower court that ignores controlling precedent from the Supreme Court is “engag[ing] in an indefensible brand of judicial activism.” *Id.* at 486 (Stevens, J., dissenting).

87. So long, of course, as a subsequent decision of the Supreme Court does not overturn the appeals court’s precedent.

88. *Auto Equity Sales, Inc. v. Superior Court*, 369 P.2d 937, 939–40 (Cal. 1962).

89. See Kmiec, *supra* note 85, at 1467 (quoting Richard G. Kopf, *An Essay on Precedent, Standing Bear, Partial-Birth Abortion and Word Games—A Response to Steve Grasz and Other Conservatives*, 35 CREIGHTON L. REV. 11, 11–12 n.5 (2001)).

## 2. *Stare Decisis Is Often in the Eye of the Beholder*

As a practical matter, horizontal stare decisis varies from judge to judge. Every jurist seems to have his or her own formulation of where and why the line has been crossed, beyond which a court can abandon its prior decision. These differences are almost imperceptible between federal district judges, as they are so thoroughly bound by vertical precedent that often they do not even seek to reconsider district-level precedent and have few meaningful opportunities to do so. In the federal courts of appeals, the law of the circuit doctrine categorically bars an appellate panel from overruling a prior panel—only the full circuit court sitting en banc can overrule prior precedent.<sup>90</sup>

But parties regularly ask the Supreme Court to overrule precedent, and the Court has full discretion to do so. Debates between the Justices on stare decisis often ensue, and it is often possible to extract the theory of each Justice on stare decisis. All Justices agree that the Court has more leeway to overrule precedent where constitutional questions are concerned<sup>91</sup> because unlike statutory cases, the American people cannot counter a constitutional decision they disagree with by demanding that Congress amend whatever statute led to the decision.

But that might be the only common denominator. Beyond that, the members of the Court seem to draw the line in differing places, even when they agree on whether stare decisis counsels against overruling precedent. Although a full treatment of this issue is well beyond the scope of this Article, a recent case sufficiently illustrates this point for present purposes.

*United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, a case involving a Dormant Commerce Clause challenge to county ordinances for solid waste disposal,<sup>92</sup> showcases differences between Justice Antonin Scalia and Justice Clarence Thomas on stare decisis. The Court upheld the ordinances as consistent with Dormant Commerce Clause precedent,<sup>93</sup> noting that it has “long interpreted the Commerce Clause

---

90. *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc); see also *Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc). Indeed, the law of the circuit doctrine is a corollary principle of stare decisis. *United States v. Rodríguez*, 527 F.3d 221, 224 (1st Cir. 2008).

91. *Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring).

92. 550 U.S. 330, 334 (2007).

93. *Id.* at 345–47.

as an implicit restraint on state authority, even in the absence of a conflicting federal statute.”<sup>94</sup> Chief Justice John Roberts wrote a majority opinion for the Court in which *stare decisis* was not mentioned, which is unsurprising given that evidently the parties had not asked the Court to abandon any precedent. In an opinion rejecting the majority’s conclusion on the legality of the ordinance, Justice Samuel Alito nonetheless fully endorsed applying the Dormant Commerce Clause doctrine, joined by Justices John Paul Stevens and Anthony Kennedy.<sup>95</sup>

Justice Scalia concurred in part, writing that despite his “view that ‘the so-called “negative” Commerce Clause is an unjustified judicial invention’ . . . . I have been willing to enforce on *stare decisis* grounds a ‘negative’ self-executing Commerce Clause in two situations.”<sup>96</sup> After explaining why he believed neither situation was present in the case, he added that he could not agree the challenged measure violated the Dormant Commerce Clause because invoking the Court’s precedents to do so “would broaden the negative Commerce Clause beyond its existing scope.”<sup>97</sup>

Justice Thomas concurred in the judgment only and reached a broader conclusion about why *stare decisis* did not counsel against overruling precedent.<sup>98</sup> Beginning by noting that in 1994 he joined a Dormant Commerce Clause decision, he said: “I no longer believe it was correctly decided. The negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice. . . . I would discard the Court’s negative Commerce Clause jurisprudence.”<sup>99</sup> He then goes on to explain why that doctrine is not rooted in the Constitution,

---

94. *Id.* at 338.

95. *See id.* at 356 (Alito, J., dissenting).

96. *Id.* at 348 (Scalia, J., concurring in part).

97. *Id.* (citations omitted) (internal quotation marks omitted).

98. *See id.* at 349 (Thomas J., concurring in the judgment). Anecdotally, it seems that on the current Court, Justice Thomas is the most willing to overturn constitutional precedent—so much so that Justice Scalia says, perhaps hyperbolically, that Justice Thomas does not believe in *stare decisis* at all. *See* Lincoln Caplan, Op-Ed., *Clarence Thomas’s Brand of Judicial Logic*, N.Y. TIMES, Oct. 22, 2011, <http://www.nytimes.com/2011/10/23/opinion/sunday/clarence-thomass-brand-of-judicial-logic.html>, [<http://perma.cc/0aWUzNxT3B6>]. The authors of this Article emphatically reject Caplan’s criticism of Thomas’s jurisprudence.

99. *United Haulers*, 550 U.S. at 349 (Thomas, J., concurring in the judgment).

cannot be applied in a principled manner, and accordingly should be jettisoned.<sup>100</sup>

Many other Supreme Court cases similarly illustrate the range of differing opinions as to where stare decisis draws the line requiring continued adherence to erroneous precedent, while also demonstrating that a Justice's larger judicial philosophy can sometimes influence where the line is drawn. Sometimes it is a conservative-led majority of the Court that overrules precedent. That was the case in *Citizens United*, where the Court overruled two anomalous precedents, one of which was less than a decade old.<sup>101</sup> Other cases show the liberal Justices even more willing to overrule precedent, such as in *McDonald v. City of Chicago*, where the Court held that the Second Amendment right to keep and bear arms is a fundamental right that applies to state and local governments through the Fourteenth Amendment.<sup>102</sup> In that case, the four more liberal Justices not only voted against incorporating Second Amendment rights against the States, but also voted to overrule *District of Columbia v. Heller*,<sup>103</sup> a recent watershed precedent in which the Court held that the Second Amendment secures the right of private citizens to own firearms unconnected to any public militia service.<sup>104</sup>

Scholarly opinion varies even more than judicial opinion on when and how stare decisis applies.<sup>105</sup> Although stare decisis is

---

100. See *id.* at 349–53. When Justice Thomas applied a similar standard in *Randall v. Sorrell*, 548 U.S. 230 (2006), a First Amendment challenge to a Vermont campaign finance statute, Justice Scalia joined his concurrence in full. Thomas wrote:

I continue to believe that *Buckley* provides insufficient protection to political speech, the core of the First Amendment. The illegitimacy of *Buckley* is further underscored by the continuing inability of the Court (and the plurality here) to apply *Buckley* in a coherent and principled fashion. As a result, *stare decisis* should pose no bar to overruling *Buckley* and replacing it with a standard faithful to the First Amendment.

*Id.* at 266 (Thomas, J., concurring) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding federal limits on campaign contributions)).

101. *Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010) (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), and overruling in part *McConnell v. FEC*, 540 U.S. 93 (2003)).

102. 130 S. Ct. 3020, 3036–42 (2010).

103. 554 U.S. 570 (2008).

104. *McDonald*, 130 S. Ct. at 3120–22, 3136 (Breyer, J., dissenting); *id.* at 3103 (Stevens, J., dissenting).

105. Some scholars seem to suggest jettisoning stare decisis altogether, at least in constitutional cases. For example, Professor Gary Lawson contends, "If the Constitution says X and a prior judicial decision says Y, a court has not merely the



a very flexible doctrine, there is widespread judicial agreement on what principles underlie it, and so we now turn to the analogous principles underlying the President's duty to defend federal statutes under the Take Care Clause.

*B. Applying Stare Decisis's Predicate Principles*

The Court has explicated various principles and factors upon which the doctrine of stare decisis is predicated. Several—but not all—of these can be analogized to the Executive, and support the position that a President has a duty to defend Acts of Congress.<sup>106</sup> Although various cases may cite factors other than those listed here, those discussed below are the most commonly cited when the Supreme Court performs a stare decisis analysis.

*1. Stare Decisis Principles Supporting a Duty to Defend*

First, stare decisis is important because “only by following the reasoning of previous decisions can the courts provide guidance for the future, rather than a series of unconnected outcomes in particular cases.”<sup>107</sup> An analogous principle of stability applies with even greater force in the executive branch. As already noted, the overwhelming majority of federal employees serve under the President in the administrative branch. All Americans rely, to one degree or another, upon the functions those employees serve and the agencies and programs they administer.

Although the wisdom of many of these federal programs is contested because of their cost, ineffectiveness, or lack of respect for the principles of federalism, no one denies the massive role these agencies and programs currently play in national life. In such a system, stability is vitally important. The prospect of a President unilaterally discontinuing a program like Social Security—which now has over 55 million beneficiaries<sup>108</sup>—would be destabilizing on a scale far grander than all

---

power, but the obligation, to prefer the Constitution.” Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994).

106. Although this Article focuses on the presidential duty to defend Acts of Congress, stare decisis principles permeate all aspects of the duty of faithful execution imposed by the Take Care Clause.

107. Daniel A. Farber, Essay, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1179 (2006).

108. *Number of Social Security Beneficiaries*, SOC. SEC. ADMIN., <http://www.ssa.gov/oact/progdata/icpGraph.html>, [<http://perma.cc/0q7BPZc3rp4>].

but perhaps a few Supreme Court cases could ever be. The same instability would result if a plaintiff with standing sued to challenge the constitutionality of Social Security as being in excess of Congress's enumerated powers,<sup>109</sup> and the President decided he agreed, and so refused to defend the federal statute that created the program, resulting in an uncontested court judgment that the program is unconstitutional. Although such a contingency seems extremely unlikely, this hypothetical demonstrates one reason a President is obligated under the Take Care Clause to provide stability by defending federal programs against attack. People expect from their President either maintenance of services, an orderly transition to new services, or a new paradigm, not an erratic change due to a President concluding he does not believe one of the programs under his charge is constitutional. Those who insist the President has no duty to defend federal statutes he thinks are unconstitutional are prescribing a recipe for chaos, one that is antithetical to the text and history of the Take Care Clause.

Recent actions by President Obama regarding his own Patient Protection and Affordable Care Act (a.k.a. Obamacare)<sup>110</sup> have given us a taste of the chaos that can ensue when a President disregards his duty under the Take Care Clause to faithfully execute the laws—in this case, by unilaterally declaring that he is suspending various statutory provisions of the Act,<sup>111</sup>

---

109. As far-fetched as such challenges intuitively seem today, the constitutionality of Social Security has been challenged in several cases, most notably *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), and *Helvering v. Davis*, 301 U.S. 619 (1937). Although the program was upheld in these cases, the Court was not unanimous—there were Justices who voted to invalidate these programs on Tenth Amendment grounds. See *Steward Machine Co.*, 301 U.S. at 610–11 (Sutherland, J., dissenting). If stare decisis did not apply to these cases in the federal judicial system, then these cases theoretically could be overruled, and consequently Social Security abolished. This result would be distinctly possible if a justiciable challenge were filed and the Executive did not defend against it.

110. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

111. E.g., Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, TREASURY NOTES (July 2, 2013), <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx>, [<http://perma.cc/BUU4-EMV2>] (announcing that the Obama Administration is suspending sections 6055 and 6056 of the Affordable Care Act for the year 2014). That the President is suspending provisions of a statute he lobbied for only makes the destabilizing effect worse.

even though Congress's language in those provisions is mandatory,<sup>112</sup> and even though most of these provisions are direct statutory commands to private actors (i.e., there is no executive role beyond taking enforcement actions against violators).<sup>113</sup> Similarly, the President has effectively suspended provisions of federal immigration<sup>114</sup> and drug laws.<sup>115</sup> The public confusion and anxiety that have resulted from the President's frequent "tweaking" of the Affordable Care Act demonstrate why such suspension of the laws—at odds with the Framers' intent to prevent the return of the royal prerogative<sup>116</sup>—is irreconcilable with the *stare decisis* principle of "protect[ing] the legitimate expectations of those who live under the law."<sup>117</sup>

A second principle, related to stability and supporting *stare decisis*, is "the evenhanded, predictable, and consistent development of legal principles."<sup>118</sup> This principle of predictability strongly counsels in favor of a President's duty to defend. Voters should be able to reliably predict the President's legal response when federal laws are challenged, without wondering whether he will defend those laws. This predictability can only exist if a President consistently and unwaveringly adheres to his duty to defend federal laws in court. *Stare decisis* seeks to "protect[] the legitimate expectations of those who live under

---

112. See, e.g., Patient Protection and Affordable Care Act §§ 1513–14, 124 Stat. 253–58 (codified at 26 U.S.C. §§ 4980H, 6056).

113. See Ken Klukowski, *Obama's Insurance 'Fix' Is Unconstitutional*, BREITBART, (Nov. 14, 2013), <http://www.breitbart.com/Big-Government/2013/11/14/Obama-s-Fix-is-Unconstitutional>, [<http://perma.cc/EWW6-VDQL>] (discussing President Obama's announcement that insurance companies can disregard whichever Affordable Care Act requirements were compelling them to cancel policies). President Obama claims he has the power to "tweak" provisions of a federal statute—a euphemism for *de facto* amending the statute without congressional action—so long as the modification "doesn't go to the essence of the law." President Barack Obama, Remarks by the President in a Press Conference (Aug. 9, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference>, [<http://perma.cc/UG-K7-JY8W>].

114. See Delahunty & Yoo, *supra* note 52, at 787–92.

115. See Ken Klukowski, *Holder Does End-Run Around Congress on Federal Drug Laws*, BREITBART NEWS, (Aug. 12, 2013), <http://www.breitbart.com/Big-Government/2013/08/12/Holder-Does-End-Run-Around-Congress-on-Federal-Drug-Laws>, [<http://perma.cc/QTS4-BPZM>].

116. See Lawson & Moore, *supra* note 53, at 1304–05.

117. *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part).

118. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

the law.”<sup>119</sup> When a President refuses to defend a statute, claiming it is unconstitutional, his refusal violates those expectations.

In addition to the underlying principles of stability and predictability, our analysis looks to the Supreme Court’s discussion of “relevant factors in deciding whether to adhere to the principle of *stare decisis* includ[ing] the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.”<sup>120</sup> Two of these three factors find a parallel in the President’s duty to defend.

The antiquity factor finds a parallel in the length of time a challenged statute or program has been in existence. Social Security<sup>121</sup> was a novel concept when it was instituted in 1935, but in 2014 the concept of the federal government providing some minimal level of financial support for older Americans is deeply embedded in our national conscience and is an integral part of the modern American paradigm on the role of government. Partial or complete dismantling of Social Security—or Medicare or Medicaid for that matter—through an abrupt, unilateral finding of unconstitutionality by the President would be utterly unthinkable. By contrast, failure by the next Republican President to defend a massive statutory scheme that is still new, such as the Affordable Care Act, would be highly controversial but not nearly as unlikely as the Social Security hypothetical. At least as a practical matter, the duty to defend, like the strength of judicial *stare decisis*, depends to some degree on antiquity.

The *stare decisis* factor of reliance interests also has a parallel in the executive branch.<sup>122</sup> For many programs, the longer an agency has been functioning or a program has been in operation, the greater the number of citizens who rely upon it and accordingly, the greater the President’s duty to defend it. Archetypal examples would once again include Social Security, Medicare, and Medicaid. The Affordable Care Act, though equally massive, has engendered less reliance and thus a somewhat reduced duty to defend because of its recency.

---

119. *Hubbard*, 514 U.S. at 716 (Scalia, J., concurring in part).

120. *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009).

121. See Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935).

122. One scholar writes that the relative objectivity of this factor should make it the dominant factor in a *stare decisis* analysis, and argues that employing it in such a fashion could standardize *stare decisis* rulings and produce more consistent and predictable results. See Kozel, *supra* note 81, at 452–65.

Length of existence, however, is not synonymous with reliance. Some longstanding laws engender little if any reliance, such as the federal excise tax on long-distance telephone calls that was imposed in 1898 to finance the Spanish-American War, but was not discontinued until 2006.<sup>123</sup> It is likely that few Americans were even aware they were paying this tax.

## 2. *Stare Decisis Principles That Do Not Support a Duty to Defend*

Some stare decisis principles do not find a parallel in the presidential duty to defend federal statutes. Consider that stare decisis does not require the Court to revise the theoretical basis of a prior decision “in order to cure its practical deficiencies. To the contrary, the fact that a decision has proved ‘unworkable’ is a traditional ground for overruling it.”<sup>124</sup> Workability in and of itself does not seem to have a clear analogue in the executive branch, and so we leave that factor on the shelf when analyzing the duty to defend.

One stare decisis factor actually works against our duty to defend analogy. That factor asks whether the judicial decision from which the precedent arises was well reasoned.<sup>125</sup> The executive branch parallel would ask whether there are sound public policy reasons for the statute in question and would suggest that the President has a stronger duty to defend where sound reasons exist. This is an inherently political question, however, that would give the President, an inherently political

---

123. See Paul Davidson, *Feds cut off phone tax after 108 years*, USA TODAY (May 25, 2006, 11:07 AM) [http://usatoday30.usatoday.com/money/industries/telecom/2006-05-25-phone-tax\\_x.htm](http://usatoday30.usatoday.com/money/industries/telecom/2006-05-25-phone-tax_x.htm), [<http://perma.cc/0871aLC8WFF>].

124. *Montejo*, 556 U.S. at 792.

125. Discussing a closely related principle, the Court has explained that “when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.” *Smith v. Allwright*, 321 U.S. 649, 665 (1944). Note, however, that the Supreme Court only discusses stare decisis in the context of casting doubt on or seeking to expunge precedent; if the precedential decision were clearly correct, the Court would simply rely on it without opining on the policy of adhering to precedent. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987). So the question becomes what degree of error supports the overruling of precedent. Some suggest that often when the Court overrules precedent, it is doing so because the decision was not only wrong, it was egregiously wrong. See, e.g., Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8 (2001). This has some resemblance to the “clear error” standard of review for appellate examinations of trial court findings of fact.

actor,<sup>126</sup> much leeway in deciding which statutes to defend. Hence this factor does not support our argument for a strong presidential duty to defend.

#### IV. THE SCOPE OF THE DUTY TO DEFEND

Given the close relationship between the President's duties to enforce and to defend the laws, it would be easy to assume that the two duties are coextensive—that is, subject to the same exceptions and degree of presidential discretion. But that is not necessarily the case.<sup>127</sup> The duty to defend is sometimes said to allow more discretion than the duty to enforce,<sup>128</sup> as evidenced by the fact that Presidents sometimes choose to enforce but not defend a federal statute.<sup>129</sup> Decisions by the Obama and Clinton Administrations to enforce but not defend, respectively, section 3 of DOMA and a 1996 law discharging HIV-positive service members from the military are recent examples.<sup>130</sup>

Although there is debate about the proper scope of the President's duty to defend, the debate focuses entirely on the cases where he believes the law in question is unconstitutional. We have found no sources arguing for an exception to the duty to defend where a President merely disagrees with a law.<sup>131</sup> At one end of the spectrum of debate is the view that the President has no duty to defend laws he believes to be unconstitutional. Most notably, law professors Neal Devins and Saikrishna Pra-

---

126. Even though some scholars point to evidence that the Framers expected the President to be more an administrator of domestic policy than a formulator of it, there is no constitutional impediment to the President's making political decisions based on policy. *See, e.g.,* Driesen, *supra* note 13, at 73 & n.5.

127. Devins & Prakash, *supra* note 22, at 513 (explaining that although the "duty to defend is typically seen as a subset of a broader duty to enforce the law," the two duties are not "coterminous").

128. *See, e.g.,* Gussis, *supra* note 12, at 592 (concluding that there is "an emerging distinction asserted by the executive branch between the strength of constitutional precedent necessary for non-defense, as opposed to [a higher standard for] non-enforcement, of legislation it deems unconstitutional").

129. An additional reason a President might choose to enforce a statute he believes is unworthy of defense in the courts is to enable a lawsuit challenging the statute.

130. Devins & Prakash, *supra* note 22, at 513.

131. *Cf.* Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 *LAW & CONTEMP. PROBS.* 7, 16 (2000) ("The President clearly may not refuse to enforce a law because he disapproves of the policy behind it. But this does not resolve the narrower question that arises when the basis for non-enforcement is itself an obligation to uphold the Constitution." (footnote omitted)).

kash, relying on the separation of powers argument discussed in Part II.B,<sup>132</sup> argue in a 2012 article that the President “cannot subordinate himself to either the courts or Congress by enforcing [or defending] statutes he believes are unconstitutional.”<sup>133</sup> The duty to defend reduces the President to being “the mouthpiece of Congress before the courts,” they say.<sup>134</sup> But that view ignores the larger picture. The duty to defend is not about making the President a spokesman for Congress or any other branch of government. Instead, the reality is that there is only one government and the duty to defend that government’s laws, like the duty to prosecute, is an inherently executive function. It must therefore be carried out by the executive branch, typically the Department of Justice.

Even Devins and Prakash acknowledge that theirs is the minority view.<sup>135</sup> The majority view is that the President has a duty to defend laws he deems to be unconstitutional, subject to exceptions for 1) laws he believes unconstitutionally encroach upon executive power, and 2) laws that do not threaten executive authority but are transparently unconstitutional.<sup>136</sup> The second exception is apparently the more common one. Professors Devins and Prakash report that from December 1975 to May 2011, the Department of Justice notified Congress that it would not defend seventy-five different statutory provisions. Sixty-one of those provisions fell into the second category, with the remaining fourteen belonging to the first category.<sup>137</sup>

A. *The Exception for Encroachment on Executive Authority*

Virtually all the debate centers on the second exception, which is discussed below in Part IV.B. The authorities are in agreement

---

132. See Devins & Prakash, *supra* note 22, at 511.

133. *Id.* at 521; see also, Marcott, *supra* note 62, at 1309 (arguing that “the duty to defend should not extend to statutes the Executive considers unconstitutional”).

134. Devins & Prakash, *supra* note 22, at 509.

135. See *id.* at 508.

136. We choose to use the term “transparently unconstitutional” for this category. Other terms, such as “clearly unconstitutional,” have been used to capture a similar concept. Judge Frank Easterbrook derives three exceptions by dividing the second exception into two categories: “statutes that are incompatible with recent decisions of the Supreme Court” and those where “the solicitor general is in grave doubt that the laws should be viewed as constitutional.” See Olson, *supra* note 41, at 30–31 (citing Frank H. Easterbrook, *Presidential Review*, 1990 CASE W. RES. L. REV. 905).

137. Devins & Prakash, *supra* note 22, at 561.

about the first exception, which Theodore Olson, then Assistant Attorney General in charge of the Justice Department's Office of Legal Counsel, explained in a 1984 opinion:

[This] category involves statutes that the Executive believes are unconstitutional (although not necessarily so clearly unconstitutional as statutes falling in the [other] category) and that usurp executive authority and therefore weaken the President's constitutional role. . . . [There is a practice that has] been followed by the Executive under which the President need not blindly execute or defend laws enacted by Congress if such laws trench on his constitutional power and responsibility. . . . This category of cases exists because, in addition to the duty of the President to uphold the Constitution in the context of the enforcement of Acts of Congress, the President also has a constitutional duty to protect the Presidency from encroachment by the other Branches.<sup>138</sup>

This exception also flows from the fact that where a statute is allegedly unconstitutional precisely because it limits the President's power, it will typically be only the President who can challenge the law. In a 1994 opinion for the Office of Legal Counsel, Walter Dellinger, then head of that office, elaborated on this point:

If the President does not challenge such provisions (i.e., by refusing to execute them), there often will be no occasion for judicial consideration of their constitutionality; a policy of consistent Presidential enforcement of statutes limiting his power thus would deny the Supreme Court the opportunity to review the limitations and thereby would allow for unconstitutional restrictions on the President's authority.<sup>139</sup>

---

138. Bankr. Amendments Recommendation, *supra* note 78, at 195; *see also* Civiletti Opinion, *supra* note 35, at 56 ("[T]he Executive can rarely defy an Act of Congress without upsetting the equilibrium established within our constitutional system; but if that equilibrium has already been placed in jeopardy by the Act of Congress itself, the case is much more likely to fall within [the exception]."); Devins & Prakash, *supra* note 22, at 534–35 ("[M]odern DOJ officials have created a laundry list of exceptions to the duties to enforce and defend. . . . [T]he [Take Care] Clause does not apply when the executive believes that the law encroaches upon presidential powers . . .").

139. Presidential Auth. to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 201 (1994) [hereinafter Presidential Authority]; *see also* Civiletti Opinion, *supra* note 35, at 57 ("[T]he Executive determined that it could best preserve our constitutional system by refusing to honor the limitation [on executive power] imposed by the Act, thereby creating, through opposition, an opportunity for change and correction that would not have existed had the Executive acquiesced.").



If the duty to defend applied to such cases, the President would have to choose between acquiescing to the questionable statute—thus preventing judicial consideration of its constitutionality—or being put in the nonsensical position of simultaneously challenging the law and defending it.

Presidential challenges under this exception have resulted in a number of notable Supreme Court cases. Examples include *INS v. Chadha*, involving a legislative veto provision in the Immigration and Nationality Act;<sup>140</sup> *United States v. Lovett*, involving a statutory provision prohibiting the President from paying salaries to several executive branch employees;<sup>141</sup> and *Myers v. United States*, involving a statute that required the Senate’s advice and consent before the President could remove a postmaster.<sup>142</sup>

### B. *The Exception for Transparently Unconstitutional Laws*

The focus of the second exception is those laws that do not threaten executive authority but that the President nonetheless believes are unconstitutional. We think the exception can best be defined by conceptually dividing those laws into 1) those whose unconstitutionality is obvious enough that the President may choose not to defend them, and 2) those whose unconstitutionality is not clear enough to justify an exception to the duty to defend. The key question then becomes where exactly the line between those two subcategories should be drawn.

#### 1. *The Majority View*

The Department of Justice has articulated various formulations for where the dividing line lies, and they are somewhat subjective, making this exception harder to define than the executive authority exception. Nonetheless, it is helpful—if not completely illuminating—to review those different formulations. The earliest formulation we found comes from former Solicitor General Rex Lee, who was head of the Justice Department’s Civil Division when he testified in 1976 before the Senate Judiciary Committee:

---

140. 462 U.S. 919, 923 (1983).

141. 328 U.S. 303, 305 (1946).

142. 272 U.S. 52, 106–07 (1926); see also *Executive Discretion*, *supra* note 39, at 970–71 n.1 (listing other cases involving alleged encroachment on executive authority).

The second situation in which the Department will not defend against a claim of unconstitutionality involves cases where the Attorney General believes, not only personally as a matter of conscience, but also in his official capacity as the Chief Legal Officer of the United States, that a law is so patently unconstitutional that it cannot be defended. Such a situation is thankfully most rare.<sup>143</sup>

During the Carter Administration, Attorney General Benjamin Civiletti stated the same concept in his 1980 opinion, using the term “transparently invalid” instead of “patently unconstitutional.”<sup>144</sup> Civiletti intended the exception for transparently invalid laws to be quite narrow, as evidenced by the example he gave—a law requiring the arrest and imprisonment of all members of the opposition party without trial<sup>145</sup>—and the analogy he cited—a Supreme Court case holding that a person must obey a court injunction even if he believes it is unconstitutional.<sup>146</sup>

Two years later, President Reagan’s Attorney General, William French Smith, stated a similar formulation in an opinion submitted to the Senate Judiciary Committee. Smith explained that “it is settled practice that the Department of Justice must and will defend Acts of Congress except in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid.”<sup>147</sup>

Yet another formulation of the same standard came in a 1984 Office of Legal Counsel opinion authored by its head, Theodore Olson. Olson repeated Attorney General Smith’s language, while also stating that:

Cases in which the Executive has chosen not to defend an Act of Congress may be placed in one of two categories. One

---

143. Lee Testimony, *supra* note 12, at 10.

144. See Civiletti Opinion, *supra* note 35, at 56 n.1. In the relevant sentence, Civiletti refers to *enforcement* of a law—specifically to a law that “directs or authorizes the Executive to take action which is ‘transparently invalid’”—but the context and the title of his opinion indicate that his point applies to the defense of laws as well.

145. *Id.* at 56.

146. *Id.* at 56 n.1 (citing *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967)). Civiletti notes that the Court in *Walker* emphasized that it did not have before it a transparently invalid injunction. *Id.*

147. Constitutionality of Legislation, *supra* note 12, at 26. Smith used virtually identical language in a 1981 letter to the same committee. Bankr. Amendments Recommendation, *supra* note 78, at 198.

category of cases involves statutes believed by the Executive to be so clearly unconstitutional as to be indefensible but which do not trench on separation of powers. Refusals to execute or defend statutes based upon a determination that they meet these criteria are exceedingly rare.<sup>148</sup>

Ten years later, during the Clinton Administration, Solicitor General Drew Days III discussed the duty to defend in a lecture and article for the University of Kentucky College of Law. Days endorsed Rex Lee's "patently unconstitutional" formulation as possibly "[t]he best formal statement of the Justice Department's policy of defending congressional statutes,"<sup>149</sup> while also referring to his office's "policy of defending all but the most blatantly unconstitutional congressional statutes."<sup>150</sup>

In the final year of the Clinton Administration, Solicitor General Seth Waxman delivered a lecture in which he formulated the exception somewhat differently but at least as narrowly as other Justice Department officials had done:

The second exception to the general principle of defending Acts of Congress . . . arises when defending the statute would require the Solicitor General to ask the Supreme Court to overrule one of its constitutional precedents. . . . Most commonly, cases falling under this exception involve statutes whose constitutionality has been undermined by Supreme Court decisions rendered *after* the law's enactment.<sup>151</sup>

For examples of statutes that fall within the exception, Waxman pointed to the 1968 federal law that purported to repeal the requirement for *Miranda* warnings,<sup>152</sup> a federal prohibition against casino advertising by broadcasters located in states

---

148. Bankr. Amendments Recommendation, *supra* note 78, at 194.

149. Days, *supra* note 14, at 500–01.

150. *Id.* at 502. In the same year, Walter Dellinger, then head of the Office of Legal Counsel, referred to a somewhat different standard, but he was speaking about the President's duty to enforce laws. Dellinger said that the President has discretion where, "exercising his independent judgment, [he] determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him." Presidential Authority, *supra* note 139, at 200.

151. Waxman, *supra* note 27, at 1085–86.

152. *Id.* at 1087–88 (citing *Dickerson v. United States*, 530 U.S. 428 (2000)).

with casino gambling,<sup>153</sup> and the application of patent laws against state actors in suits for damages.<sup>154</sup>

Over the next decade, nothing was added to the mix of exception formulations by top Department of Justice officials. That changed in 2011, when Attorney General Eric Holder suggested a new standard for the second exception when announcing that the Obama Administration would not defend court challenges to DOMA.<sup>155</sup> The new standard represents a break with the past that would substantially expand the scope of the exception.

Before we look at Holder's formulation in detail, it is worth summarizing where the standard stood prior to Holder's announcement. Going back to 1976, the top Justice Department officials described what laws fell into the second exception using language such as "transparently invalid;" "so patently unconstitutional that it cannot be defended;" "so clearly unconstitutional as to be indefensible;" "the most blatantly unconstitutional;" "prior precedent overwhelmingly indicates that the statute is invalid;" and "statutes whose constitutionality has been undermined by Supreme Court decisions." The language varies but the conclusion is the same:<sup>156</sup> Except for statutes threatening presidential authority, the President must defend a law unless, given prior Supreme Court precedent, the law is transparently unconstitutional.<sup>157</sup>

## 2. Eric Holder's New Standard

In February 2011, Attorney General Holder wrote to House Speaker John Boehner to explain why the Obama Administration had decided not to defend section 3 of DOMA in then-

---

153. *Id.* at 1086 (citing *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999)).

154. *Id.* (citing *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999)).

155. Holder Letter, *supra* note 19.

156. Professors Devins and Prakash state that there are "numerous approaches to the duties to enforce and defend" before rejecting them all. Devins & Prakash, *supra* note 22, at 511. Perhaps that is true of the duty to enforce, but if we limit ourselves to the duty to defend, we believe it is more accurate to say that there are numerous ways of stating the same approach to the second exception.

157. The sense of the word "transparent" that we are trying to capture is defined by one dictionary as "manifest; obvious" and "easily seen through, recognized, or detected." *Definition of "transparent"*, DICTIONARY.COM, <http://dictionary.reference.com/browse/transparent>, (last visited Nov. 16, 2013) [perma.cc/0zLY6qfGEnh].

pending litigation.<sup>158</sup> Holder purported to be following what sounds like a version of the standard established since 1976, stating “the [Justice] Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense.”<sup>159</sup> Holder suggested a new standard, however, when he added that “the Department does not consider every plausible argument to be a ‘reasonable’ one.”<sup>160</sup> Professors Devins and Prakash explain the deviation from past practice:

Prior executives, when they embraced the duty to defend, had emphasized that a defense was necessary whenever a court might uphold a law as constitutional. Despite all but acknowledging that there were professionally responsible or plausible arguments that section 3 was constitutional, Holder declared that the DOJ would not defend. Because the executive saw no reasonable arguments for the constitutionality of section 3, it had no obligation to make plausible or professionally responsible but unreasonable arguments in defense of it. Holder’s distinction between plausible and reasonable arguments seems inconsistent with past practice.<sup>161</sup>

Attorney General Holder’s break with the past and substantial expansion of the scope of the second exception can only be fully appreciated by recognizing that, if Section 3 truly falls under the exception, then he is using “unreasonable” arguments to mean little more than arguments that the Administration does not approve of.<sup>162</sup> Even UCLA Law Professor Adam Winkler, who believes that “DOMA is a discriminatory law and

---

158. Holder Letter, *supra* note 19.

159. *Id.* Holder’s formulation of the established standard sounds a lot like the language used by then-Solicitor General Ted Olson when he described the duties of a Solicitor General in remarks at Brigham Young University in 2003. Olson, *supra* note 41, at 7 (“He has thus long been responsible for defending the constitutionality of congressional statutes, so long as a defense can reasonably be made.”).

160. Holder Letter, *supra* note 19.

161. Devins & Prakash, *supra* note 22, at 519–20. As explained later in this Part, Holder’s contention that there are no reasonable arguments for the constitutionality of Section 3 is not supported by precedent.

162. See Kerr, *supra* note 58 (“If you take [Holder’s] view, the Executive Branch essentially has the power to decide what legislation it will defend based on whatever views of the Constitution are popular or associated with that Administration.”).

should be repealed,"<sup>163</sup> has stated that the Obama Administration's "interpretation of the Constitution [has] little support in Supreme Court doctrine." has stated that the Obama Administration's "interpretation of the Constitution [has] little support in Supreme Court doctrine."<sup>164</sup> More specifically, as Devins and Prakash explain,

[R]ather than adopting the standard of review most favorable to the government, the DOJ argued that strict scrutiny was applicable. Indeed, [Holder's] letter suggested that the DOMA was constitutional under rational basis review, noting that the Department had previously advanced "reasonable" arguments in support of it under that "permissive" standard.<sup>165</sup>

Professor Orin Kerr describes what a sea change the standard suggested by Holder would be if taken to its logical conclusion:

[T]he Obama Administration has moved the goalposts of the usual role of the Executive branch in defending statutes. Instead of requiring DOJ to defend the constitutionality of all federal statutes if it has a reasonable basis to do so, the new approach invests within DOJ a power to conduct an independent constitutional review of the issues.<sup>166</sup>

Professor Winkler explores the ramifications of this new approach to the second exception:

This sets a terrible precedent that could well come back to haunt those who are cheering the president's decision. Don't be surprised if a President Palin points to Obama's decision when announcing her refusal to enforce and defend the landmark healthcare reform law because, in her view, the individual mandate is unconstitutional.<sup>167</sup>

---

163. Adam Winkler, *Why Obama Is Wrong on DOMA*, HUFFINGTON POST (Feb. 24, 2011), [http://www.huffingtonpost.com/adam-winkler/why-obama-is-wrong-on-dom\\_b\\_827676.html](http://www.huffingtonpost.com/adam-winkler/why-obama-is-wrong-on-dom_b_827676.html), [<http://perma.cc/0HbN2Xhuobs>].

164. *Id.*

165. Devins & Prakash, *supra* note 22, at 569; *see also* Winkler, *supra* note 163 ("Twice the Supreme Court has been asked to hold that discrimination against gay people warrants heightened scrutiny. And twice the Supreme Court has rejected that argument."); Kerr, *supra* note 58 ("This theory [of heightened scrutiny] is not compelled by caselaw.").

166. Kerr, *supra* note 58; *see also* Hansen, *supra* note 28, at 1179 ("The Obama Administration's asserted justification fell outside the nondefense framework and pushed departmentalism to a level never previously experienced.").

167. Winkler, *supra* note 163. Winkler also asks the reader to "[t]hink of the laws that might be undermined by the next Republican president. Senator Rand Paul

The ramifications of expanding the second exception to the duty to defend, as well as the lack of precedent for the change, may explain why Attorney General Holder made only a half-hearted attempt at legally justifying the Administration's decision not to defend DOMA. In his letter to Speaker Boehner, the Attorney General devotes only one paragraph to defining the second exception, does not acknowledge even a small change in the standard, and includes as justification only two authorities, neither of which is on point.<sup>168</sup> It is, therefore, difficult to know if the expansive exception suggested by Holder's explanation for not defending DOMA represents a serious attempt at permanently reformulating the standard or just an aberration motivated by the politics of the gay marriage issue.<sup>169</sup> Likewise, it is difficult to assess the precedential value of Holder's letter.

### 3. *The Standard for State Attorneys General*

That Mr. Holder did not fully develop, or at least explain, his new standard for the second exception makes it particularly troubling that Holder is now encouraging state attorneys general—who have a duty to defend their states' laws<sup>170</sup>—to adopt

---

has argued that the Civil Rights Act may be unconstitutional. Senator Mike Lee has insisted that the federal laws barring child labor were not within Congress's constitutional authority to enact." *Id.*

168. See Holder Letter, *supra* note 19 Holder supports his distinction between "reasonable" arguments on the one hand and "plausible" and "professionally responsible" arguments on the other by citing to a 1996 letter from Assistant Attorney General Andrew Fois, which states that "different cases can raise very different issues with respect to statutes of doubtful constitutional validity" and that there are "a variety of factors that bear on whether the Department will defend the constitutionality of a statute." *Id.* It is difficult to see how these truisms support Mr. Holder's distinction. Holder cites to Seth Waxman's essay in stating that "the [Justice] Department has declined to defend a statute 'in cases in which it is manifest that the President has concluded that the statute is unconstitutional.'" *Id.* If Holder means anything more than that the Justice Department takes its orders from the President, then Waxman's essay provides no support. See Waxman, *supra* note 27, at 1083.

169. See Devins & Prakash, *supra* note 22, at 569 ("[The Obama Administration's] change in litigation strategy [in DOMA cases] seemed prompted, in part, by a desire to reevaluate executive branch policy toward the DOMA.").

170. See Tal Kopan, *GOP AGs: Eric Holder 'inappropriate,' POLITICO*, February 25, 2014, <http://www.politico.com/story/2014/02/eric-holder-republican-state-attorneys-general-103940.html>, [<http://perma.cc/N5YC-QHJH>] (quoting Alabama Attorney General Luther Strange's statement that "A state attorney general has a solemn duty to the state and its people to defend state laws and constitutional provisions against challenge"); John W. Suthers, Op-Ed., *A 'veto' attorneys general shouldn't wield*, WASHINGTON POST, Feb. 2, 2014, <http://www.washingtonpost.com/opinions/a-veto-attorneys-general-shouldnt-wield/2014/02/02/64082fc8-887e-11e3-a5bd->

a broader exception, at least with regard to defending states' prohibition of same-sex marriage. In an interview with the *New York Times* and subsequent speech to the National Association of Attorneys General in February 2014, he implicitly endorsed a growing trend that has seen a number of state attorneys general follow in Holder's footsteps by refusing to defend lawsuits challenging their states' traditional definition of marriage despite the lack of Supreme Court precedent compelling their refusal.<sup>171</sup> The trend has heightened national discourse about the duty to defend.

As summarized by the *New York Times*, Mr. Holder said in the interview that state attorneys general "who have carefully studied bans on gay marriage could refuse to defend them" because they "are not obligated to defend laws that they believe are discriminatory." "Holder said when laws touch on core constitutional issues like equal protection, an attorney general should apply the highest level of scrutiny before reaching a decision on whether to defend it."<sup>172</sup> Note that Holder's attempt to limit increased discretion for state attorneys general to laws that touch on core constitutional issues is largely empty because the duty to defend arises only when the constitutionality of a law is challenged.<sup>173</sup>

Even putting aside the fact that Mr. Holder's advice to state attorneys general was arguably inappropriate in light of the comity required by our federal system,<sup>174</sup> his remarks raised

---

844629433ba3\_story.html, [<http://perma.cc/J37F-4C3A>] (article by Colorado's attorney general explaining that "Attorneys general have an ethical obligation to provide zealous representation of their clients—in this case, the people whose laws they are charged with defending").

171. See Matt Apuzzo, *Holder Sees Way to Curb Bans on Gay Marriage*, N.Y. TIMES, Feb. 25, 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/9VFW-ZADF>]; Ingram, *supra* note 23; see also Suthers, *supra* note 170 (explaining that while "[t]here is clear high court precedent that decides some issues . . . [t]hat's not yet the case with state laws banning same-sex marriage").

172. Apuzzo, *supra* note 171.

173. See *supra* notes 31–34 and accompanying text.

174. See *Younger v. Harris*, 401 U.S. 37, 44 (1971) (describing "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways"); Apuzzo, *supra* note 171 (reporting that "It is highly unusual for the United States attorney general to advise his state counterparts on how and when to refuse to defend state laws" and quoting Wisconsin Attorney General J. B. Van



concerns among some of them because what he was encouraging—the dilution of their duty to defend state laws by expanding the second exception beyond laws that are transparently unconstitutional—poses the same dangers discussed by this Article regarding federal laws, including concerns about the separation of powers,<sup>175</sup> the rule of law,<sup>176</sup> and the justiciability of constitutional challenges.<sup>177</sup> In one sense, the refusal of a state attorney general to defend a law that is not transparently unconstitutional, such as a prohibition of same-sex marriage, can offend the state constitutional structure even more than the federal constitutional structure is offended when the President does the same. On the state level, the duty to defend can—and in the case of gay marriage bans, typically does—involve state

---

Hollen’s statement that “It really isn’t [Holder’s] job to give us advice on defending our constitutions any more than it’s our role to give him advice on how to do his job. We are the ultimate defenders of our state constitutions.”); Kopan, *supra* note 170 (quoting Montana Attorney General Tim Fox’s statement that Holder’s “approach is as inappropriate as it is unprecedented. What General Holder is asking state attorneys general to do is accept a gratuitously offered nonbinding legal opinion on an issue that has not been decided by a national court of competent jurisdiction at this time.”).

175. See Suthers, *supra* note 170 (explaining that a state attorney general’s use of a “litigation veto” to undermine “an unpopular law . . . corrodes our system of checks and balances”); Levey, *supra* note 23 (explaining that the duty to defend is “essential to our system of checks and balances, which places lawmaking authority in the legislature and—in some states—the voters as well”).

176. See Kopan, *supra* note 170 (quoting Alabama Attorney General Luther Strange’s statement that refusing “to defend state laws and constitutional provisions against challenge . . . because of personal policy preferences or political pressure erodes the rule of law on which all of our freedoms are founded”); Suthers, *supra* note 170 (stating that “I fear that refusing to defend unpopular or politically distasteful laws will ultimately weaken the legal and moral authority that attorneys general have earned and depend on. We will become viewed as simply one more player in a political system rather than as legal authorities in a legal system.”).

177. See Suthers, *supra* note 170 (explaining that “Attorneys general must play their assigned role in the system to ensure legal controversies are resolved”); Apuzzo, *supra* note 171 (quoting Wisconsin Attorney General J. B. Van Hollen’s statement that “If there’s one clear-cut job I have, it’s to defend my Constitution. There is no one else in position to defend the State Constitution if it comes under attack.”). The example Mr. Holder gave the New York Times to justify not defending state law—“If I were attorney general in Kansas in 1953, I would not have defended a Kansas statute that put in place separate-but-equal facilities”—fails to take into account the importance of facilitating a judicial determination of constitutional challenges. *Id.* Had attorneys general refused to defend their states’ segregation policies in court, the landmark decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), that Holder is alluding to may never have happened. Absent a party with standing to defend the policies, the landmark litigation could not have proceeded.

constitutional amendments.<sup>178</sup> The constitutional amendment process in virtually every state excludes any formal role for the attorney general or governor, involving, instead, the legislature, the voters, or both.<sup>179</sup> On the federal level, by contrast, the duty to defend necessarily involves statutes, such as DOMA, for which the Constitution intends an executive role, albeit a pre-enactment role rather than “a form of post-enactment veto of legislation that the current administration dislikes.”<sup>180</sup>

### C. *Duty to Defend to Facilitate Justiciable Cases Resulting in Constitutional Rulings*

We contend that the exception to the duty to defend for transparently unconstitutional laws should not be absolute. The exception should give way where the Administration’s defense of a federal statute is the only way to facilitate a judicial determination of the merits of a constitutional challenge to a federal statute.<sup>181</sup> In these cases, the need to maintain constitutional equilibrium among the three branches demands that the President facilitate, rather than obstruct, the judiciary’s role in resolving constitutional questions that are properly before the courts.<sup>182</sup>

---

178. See *List of U.S. state constitutional amendments banning same-sex unions by type*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_U.S.\\_state\\_constitutional\\_amendments\\_banning\\_same-sex\\_unions\\_by\\_type](http://en.wikipedia.org/wiki/List_of_U.S._state_constitutional_amendments_banning_same-sex_unions_by_type), [http://perma.cc/H894-ZAPM] (last visited April 14, 2014).

179. See *Amending state constitutions*, BALLOTPEDIA, [http://ballotpedia.org/Amending\\_state\\_constitutions](http://ballotpedia.org/Amending_state_constitutions) (last visited March 8, 2014).

180. Days, *supra* note 14, at 502.

181. Sometimes a statute will be transparently unconstitutional precisely because the Supreme Court has already made a determination that it is unconstitutional. In that case, the law has been struck down and there is nothing to challenge or defend.

182. Like the broader duty to defend, this means that the Administration must appeal when it is the losing party in the lower courts and must continue to defend when victory causes the party challenging the statute to appeal, until either the Supreme Court decides the matter or the Justices deny review.

We realize that there are several ways to conceptualize the proper role of federal courts in our national life, not all of which are compatible with the role of the judiciary envisioned here. At one end of the spectrum are those who believe that judges should have broad authority to pass upon the weighty matters of our time, and thus, Article III should be understood to confer broad and expansive jurisdiction to decide those pressing concerns. At the other end of the spectrum is the populist view that democratic self-rule requires that the citizenry be able to effectuate its will through its elected leaders in the two political branches of the federal government, with minimal interference by the

This addition to the President's duty to defend narrows his discretion within the exception for transparently unconstitutional laws, while not impacting statutes outside that exception. Recall that laws that the President believes are unconstitutional can be divided into three categories: 1) laws that threaten executive authority, 2) laws that do not threaten executive authority but whose unconstitutionality is obvious enough that the President may choose not to defend them, and 3) laws that do not threaten executive authority and whose unconstitutionality is not clear enough to justify an exception to the duty to defend. Our addition to the duty to defend does not affect laws in the third category, because the President is already obligated to defend such laws. Nor does it affect laws in the first category. When the challenged federal statute threatens the President's prerogatives under Article II, he can allow it to go undefended even if it means there can be no constitutional adjudication; the President is never obligated to argue against his own constitutional interests. It would make no sense to put the President in the position of simultaneously challenging and defending a law that threatens those interests.

This addition to the duty to defend serves vitally important interests under our constitutional system. First, it gives the American people their day in court, specifically a judicial determination of the constitutionality of a law enacted by the leaders they sent to Congress. Second, it ensures that the President *fully* discharges the duty imposed upon him to take care that the laws be faithfully executed to the best of his ability. And third, by maintaining an adversarial posture against the law's challengers, thus facilitating a justiciable case, it allows the federal courts to rule upon the merits of the constitutional challenge, resulting in a settled rule of law.

---

judiciary. Our view falls between these two ends of the spectrum. Although a full discussion of the proper role of federal courts is well beyond the scope of this Article, we believe, in sum, that the Constitution assigns to unelected federal judges a circumscribed but vital role—central to our system of checks and balances—in sitting in judgment upon the products of the elected leaders who are answerable to the voters. When the Constitution does empower the courts to act—that is, when a case meeting all the requirements of Article III is properly before a court for decision—the judiciary's judgment on constitutionality supersedes the other branches of government. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

The indispensable purpose the duty to defend serves in assisting the federal courts in reaching a fully reasoned judgment on the constitutionality of a challenged law is well illustrated by Seth Waxman's description of his defense of the Communications Decency Act<sup>183</sup> before the Supreme Court:

I can confirm that there is nothing quite like standing in front of the Supreme Court to defend the constitutionality of a law that not a single judge has ever found to be constitutional in any respect. . . . But our adversarial system of constitutional adjudication was served. The United States' briefs served the valuable purpose of articulating for the Supreme Court the strongest possible rationale in support of constitutionality—a much stronger case than anything that had been articulated by or to Congress. Those arguments in turn prompted the parties challenging the statute to hone and improve their own positions. And when the Court concluded that the statute should be invalidated, it did so with assurance that it had considered the very best arguments that could be made in its defense.<sup>184</sup>

An administration's role here is indispensable not just because the Department of Justice has the legal talent and resources to make the strongest possible case for constitutionality. Even if there are third parties who wish to defend the challenged statute in lieu of the administration, they will not have the standing to do so unless they independently satisfy Article III requirements.<sup>185</sup> And without a party defending the statute, the challenge to the law will lack the adversity required to satisfy Article III's jurisdictional requirements and will not produce a decision on the merits.<sup>186</sup> In other words, the Presi-

---

183. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified at 47 U.S.C. § 223(a), (d)–(h) (1994 and Supp. IV 1998)).

184. Waxman, *supra* note 27, at 1079.

185. See *Diamond v. Charles*, 476 U.S. 54, 68 (1986). "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). The judicial power in Article III extends only to cases and controversies, categories that have strictly defined limits. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). Indeed, every federal court has an affirmative duty to ensure that all jurisdictional requirements are satisfied before proceeding to the merits. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999).

186. The requirement that the parties in a lawsuit be adverse is an essential element of an Article III case because "within the framework of our adversary system, the adjudicatory process is most securely founded when it is exercised under the

dent's refusal to defend the law at any stage in the litigation—since justiciability must be maintained at every stage<sup>187</sup>—might result in there being *no* constitutional determination by the courts. In sum, the requirement that the President defend statutes when doing so is essential to creating the adverseness necessary to satisfy Article III's requirements and result in a constitutional determination "prevents the Executive Branch from using litigation as a form of post-enactment veto of legislation that the current administration dislikes."<sup>188</sup>

*United States v. Windsor*,<sup>189</sup> the constitutional challenge to section 3 of DOMA, provides a good example. Despite the Obama Administration's decision in the middle of the litigation not to defend Section 3, the Supreme Court reached the merits of the case after finding by a 6-3 vote that the Court had jurisdiction because intervenors, the Bipartisan Legal Advisory Group of the House of Representatives (BLAG), provided "sharp adversarial presentation of the issues satisf[ying] the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree."<sup>190</sup> But the American people were very nearly denied a final determination of Section 3's constitutionality. Suppose that BLAG did not exist, or that it did not vote to intervene to defend DOMA, or that its motion to intervene was denied by the district court, or that one additional Supreme Court Justice concluded that jurisdiction was lacking once the Administration dropped its defense of Section 3. Had any of those hypotheticals occurred, the resulting lack of a constitutional determination might well have left both those challenging DOMA and those wanting it upheld feeling cheated. In fact, in an analogous situation, the Supreme Court ruled on the same day *Windsor* was decided

---

impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity." *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (citations omitted). Where it is lacking, a court has jurisdiction only to enter a consent judgment and no authority to reach the merits.

187. See *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 255 (1994). Some authorities seek to differentiate subject-matter jurisdiction from Article III standing, noting their distinct purposes and differing inquiries, while acknowledging the close relationship between the two. *E.g.*, HARRY T. EDWARDS ET AL., *FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS* 27 (2d ed. 2013). Such distinctions are immaterial to this discussion, however.

188. *Days*, *supra* note 14, at 502.

189. 133 S. Ct. 2675 (2013).

190. *Id.* at 2688.

that it could not reach the merits of a constitutional challenge to a California ballot initiative (Proposition 8) prohibiting same-sex marriage, because California officials refused to appeal a lower court decision against Proposition 8 and the remaining defendants lacked standing.<sup>191</sup> By contrast, our requirement that the President defend statutes when doing so is essential to creating adverseness would have rendered such roadblocks irrelevant and ensured a decision on the constitutionality of Section 3 regardless of BLAG's fate.<sup>192</sup>

Finally, note that the President's duty to facilitate a judicial determination of constitutionality when statutes are challenged in court includes a duty to seek a prompt determination. That is to say, the duty to defend should not permit the President to wait for a different case presenting the same issue in a different procedural posture or for a case in which a third party might have standing to defend the law. If there are procedural problems with the case at hand, then it is the role of a court to dispose of the suit.

## V. CONCLUSION

The importance of the Take Care Clause and its duty to defend cannot be overstated. More than any other constitutional provision, it makes the President a servant of the law, rather than its master. It binds the President to abide by the judgments of the American people's other elected leaders in the House and Senate. Even while exercising his duty to defend a statute, the President may explain to the American people why he believes the law to be unconstitutional and may try to persuade Congress to repeal the law. But where the American people and the Congress they elect choose not to repeal a law, the President may not, through a dereliction of his duty to de-

---

191. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661–68 (2013). See Suthers, *supra* note 170 (explaining that “Attorneys general must play their assigned role in the system to ensure legal controversies are resolved”).

192. We acknowledge that determining whether presidential defense of a statute is essential to creating adverseness is not cut and dried. It would appear to have been essential in *Windsor*, because BLAG's standing was in doubt until the Supreme Court issued its decision and thus could not be relied on to produce a ruling on Section 3's constitutionality. See *id.* at 2712 (Alito, J., dissenting) (calling BLAG's standing a “difficult question”). Moreover, Justice Scalia made a strong argument that the Court's conclusion that it had jurisdiction to decide the merits of the case was wrong. See *id.* at 2697–2703 (Scalia, J., dissenting).

fend, do an end-run around them by enacting “a form of post-enactment veto of legislation”<sup>193</sup> or stand in the way of a judicial determination of the law’s constitutionality.

Imagine a scenario that could plausibly arise if the President had no duty to defend Acts of Congress when he decides those statutes are unconstitutional. Imagine that a staunch constitutional conservative is elected to the White House. He believes the Affordable Care Act is unconstitutional and wishes to repeal it, but does not have the votes in Congress to pass repeal legislation. Fortunately for the President, a party sympathetic to his view of the Act challenges a central provision of the statute that was not challenged in *NFIB v. Sebelius*,<sup>194</sup> such as the mandate that employers with fifty or more employees must provide Affordable Care Act-compliant insurance policies.<sup>195</sup> The plaintiff, who has standing, argues that the mandate exceeds Congress’s authority under the Commerce Clause<sup>196</sup> and also raises the argument, made in *NFIB*, that the challenged provision cannot be severed from the remainder of the statute.

A persuasive argument can be made that the employer mandate should be sustained so long as the substantial affects test and aggregation principle from *Wickard v. Filburn* remain as rules governing Commerce Clause analysis.<sup>197</sup> The President, however, orders his Attorney General not to make that argument but, instead, to file responsive pleadings that allow the suit to proceed but do no more. Accordingly, the Justice Department files a one-page letter brief that states only, “The position of the United States is that the arguments presented by the plaintiff should be summarily denied.” Given no substantive arguments by the United States, the federal district judge rules that the arguments that would sustain the employer mandate are not self-evident and therefore holds that the mandate is unconstitutional. He further holds that the employer mandate is nonseverable from the other 450 sections in the statute and strikes down the

---

193. Days, *supra* note 14, at 502.

194. 132 S. Ct. 2566 (2012).

195. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1513, 124 Stat. 119, 253-56 (2010) (codified at 26 U.S.C. § 4980H).

196. U.S. CONST. art. I, § 8, cl. 3.

197. *See* 317 U.S. 111, 127-28 (1942).

Affordable Care Act in its entirety.<sup>198</sup> Even though this is only a district court decision, all the relevant federal departments and Cabinet secretaries were named as defendants in the case, and so they are bound by the district court's order permanently enjoining any of them from implementing any provision of the Act. The President then further orders the Attorney General not to appeal the district court's decision.

We doubt that those who have cheered President Obama's refusal to defend DOMA would likewise applaud the scenario we have just painted. Yet, the only barrier to such a scenario is the Take Care Clause and the President's duty to defend.

In sum, the President's duty—subject to the narrow exceptions discussed in this Article—is to facilitate a judicial determination of a challenged statute's constitutionality and to provide the best possible arguments in its defense, even if he regards the law as unconstitutional. That duty is fully discharged even if the statute is struck down, as the President believes it should be. Thus, in a strong sense, the President cannot lose: If the law truly is unconstitutional, then the court system will vindicate the President by striking it down. If, instead, the courts uphold the statute, the President will have fulfilled his constitutional duty and can rest assured that the law was determined to be constitutional only after thorough consideration of the best arguments on both sides.

---

198. See *NFIB*, 132 S. Ct. at 2668 (Scalia, Kennedy, Thomas & Alito JJ., dissenting) (stating that “severability principles” dictate that because “central provisions of the [Affordable Care] Act—the Individual Mandate and Medicaid Expansion—are invalid[,]” “all other provisions of the Act must fall as well”).