

# Should State Attorneys General Defend Unconstitutional Laws?

## Non-Defense and Same-Sex Marriage Bans

Kathleen Tipler, Ph.D., ktipler@gmail.com

Prepared for the Annual Meeting of the Western Political Science Association, April 2015.

Manuscript; please do not cite without the author's permission.

### I. Introduction

Should state attorneys general (AGs) defend unconstitutional laws? This question has been recently debated in the media and by AGs themselves, as a number of AGs have publicly announced their intention to either defend or not defend their state bans on same-sex marriage (SSM). However, the subject has received little attention by scholars, consistent with political science's larger neglect of state AGs (Nolette 2015). The few scholarly analyses of the question of non-defense have appeared in law reviews and written by legal scholars (Amar 2008; Amar 2009; Girton 2014; Harris 2014; Shaw 2014).<sup>1</sup> In contrast to these legal analyses, in this paper I take a distinctly political approach to the normative question of state AG non-defense, considering its value from the perspective of democratic legitimacy.

Using SSM bans as a case study, I argue that, for those AGs that are elected, a non-defense decision is not only legitimate, it can be of democratic value. Highly publicized non-defense decisions draw attention to the politicization of the AG

---

<sup>1</sup> The most comprehensive review of the issue is not an article but a website created by Columbia Law School's National State Attorney General Program, available at <http://web.law.columbia.edu/attorneys-general/ag-101-brief-introduction-world-attorneys-general/state-attorney-general-nondefense>.

office, the influence of the AG office, and the autonomy of the AG office.

Paradoxically, non-defense increases accountability while actually having little influence on the litigation process– non-defense is usually a symbolic act. Beyond its symbolic value, it is a valuable act from the perspective of democratic accountability, as it enables the public to judge an actor who exercises great power, much of it out of sight. Non-defense highlights the politicization of the office, the discretion AGs exercise, and, ultimately, how much is at stake in AG selection.

The office of AG has grown increasingly powerful over the past few decades, with AGs exercising significant influence over both state and national policy (Clayton 1994; Nolette 2015). With this increase in power, the politicization of the office has increased, as more politically ambitious individuals seek and hold the AG office, and use the office for partisan purposes – which in turn, has lead the entrepreneurial occupants of the AG office to expand its powers even more (Clayton 1994; Nolette 2015; Provost 2003, 2010a). The AG is also an office with great autonomy and lacks significant oversight. In distinct contrast to the federal AG office, the state AG is part of a divided executive. AGs have discretion over how to use their resources, both in terms of finance and personnel. AGs choose which cases to litigate and how vigorously, when and how to settle, and how far to push an appeals process; this discretion is nicely illustrated in the wide response of state AGs to SSM bans. Because much AG litigation is settled out of court, the vast majority of policy produced by AG litigation lacks oversight (Nolette 2015).

AGs do not just have, as a matter of practice, broad discretion in litigation; that discretion is also legitimated by a public interest mandate built into the

structure of the office. For most AGs, the source of that public interest mandate is twofold. One, the common law authorizes the AG to act in the public interest, a mandate that constructs the office as not simply a legal officer or agent of the governor or legislature, but also as a particular type of representative of the public. In addition, in the forty-three states that elect AGs in a popular election, the office is not simply a representative one, but also has a democratic character.

Yet, the nature of the office of state AGs – the office’s power, discretion, and public interest duty – is not always clear to the public. Given the increasing influence of AGs, as well as the ways in which their power is largely exercised out of sight, the public attention that non-defense draws generates valuable public accountability. In this paper, I also address common arguments that AGs should defend all laws. Opponents of non-defense often characterize it as an illegitimate AG “veto,” arguing that AG non-defense is the equivalent of striking down or refusing passage of a law. While there are variations of this argument, the central concerns are that this “veto” conflicts with AGs’ duties to defend the law, overturns proper democratic processes, and prevents judicial settlement of legal controversies.

It is misleading to think of AG non-defense as a veto, as it never, on its own, leads to the invalidation or non-enforcement of a statute. Many other political officials must contribute to the blockage of the law, and, usually, all branches of government need to have rejected the law for AG non-defense to prevent strong defense of a law and judicial settlement. As I show below, the mechanics of both

legislation and litigation, as well as the case of same-sex marriage, support this argument that non-defense rarely prevents proper legal defense of laws.<sup>2</sup>

Given that AG non-defense does not operate as a unilateral veto, I argue that non-defense is a proper component of a democratic system, where the public is given voice by many different elected and non-elected officials. We might even understand such non-defense as playing a further, valuable role, as an important democratic “check” on direct legislation. To privilege the outcome of an initiative over all of the other democratic components of the state political system – as some implicitly do, in their argument against non-defense – is to assume direct democracy is normatively superior to representative democracy; this assumption has been widely challenged by democratic theorists (e.g., Manin 1997; Young 2000; Urbinati 2006). Thus, I suggest that there is only one instance in which AG non-defense should be disconcerting – when an initiative that corrects a deficiency in democratic procedures goes undefended. As far as I am aware, no such case exists; if such cases do exist, it would seem they are quite rare.

## II. The Foundations of the Obligations of State Attorneys General

State AGs’ obligations are complex, rooted as they are in a legal background of the state-specific constitutional and statutory rules that construct the office, common-law precedent that generates a broad public interest obligation, and professional ethical code. Complicating the terrain even further, state AGs have various appointment processes, suggesting that governor-appointed AGs may have

---

<sup>2</sup> I have provided a table at the end of this article of AGs defense decisions in the case of SSM bans. As of yet there has been no exhaustive study of state AG non-defense.

a special obligation to the governor; legislature-appointed AGs may have a special obligation to the legislature; the one court-appointed AG, in Tennessee, may have a special obligation to the state court; and that the forty-three publically elected AGs may have a special obligation to the public.<sup>3</sup> This complexity leads to a great amount of discretion. As any field where rules are over-determined, there is not only space for individual judgment, individual judgments are necessary to give precise content to obligations. The large role individual judgment plays in AG actions enables more popular involvement in the governing process, but only if AGs are held publically accountable for the discretion they exercise. I address this question of democratic accountability later in this paper. Here, I briefly outline the competing obligations state AGs face when deciding whether to not defend laws.

While widely covered by the media, there have been few scholarly analyses of state-level AG non-defense decisions (Amar 2008; Amar 2009; Girton 2014; Harris 2013; Shaw 2014). More has been written on attorney general non-defense at the federal level. The Obama administration's recent decision to not defend the Defense of Marriage Act (DOMA) was followed by legal analyses in the media and law reviews, and previous administrations' announcements to not defend have also generated analysis. As I have argued elsewhere, the most common approach to the question of federal AG non-defense is to parse two competing legal obligations: on one side, the Take Care Clause – the President's obligation to "take Care that the Laws be Faithfully executed" – and on the other, the President's obligation, as specified in the presidential oath, to "preserve, protect and defend the Constitution

---

<sup>3</sup> For selection methods, see *The Book of States 2014*, p. 166.

of the United States” (U. S. Const. art II, sec. 3; U. S. Const. art II, sec. 8; Tipler 2013). While these two competing obligations are apparent in AGs’ non-defense decisions, analyses of federal non-defense cannot be easily transferred to state AG non-defense, given the structural differences between the two offices, as Shaw (2014) points out.

Unlike at the federal level, the vast majority of state AG offices are part of a divided, rather than unified, executive. In pre-revolutionary times, the colonies created their own offices of attorney general, such that the (divided) state AG office precedes the (unified) federal AG office by more than a century. Richard Lee served as the first colonial AG for Virginia, appointed in 1643, while the federal AG office was first created – as a part-time position – with the Federal Judiciary Act of 1789 (Clayton 1992, 14-15). The office of attorney general is itself of medieval origins, created as an advisor to the English crown (Clayton 1992; Marshall 2006; Myers 2013). In the 16<sup>th</sup> and 17<sup>th</sup> centuries, the English AG began advising Parliament and department officials in addition to the Crown (Clayton 1992; Cooley 1958; Marshall 2006; Myers 2013). In early colonial days, the English attorney general represented the Crown’s interests in the colonies (Clayton 1992; Cooley 1958; Marshall 2006; Myers 2013).

The office’s English origins provide state AGs with common-law powers to act in the public interest and as the public’s agent (Marshall 2006; Myers 2013). The little historical work on the AG suggests that, as Parliament grew in power, and the AG office became an advisor to Parliament as well as the Crown, the AG developed this common law authority to act in the public interest and on behalf of the people at

large (Marshall 2006; Myers 2013).<sup>4</sup> Regardless of its precise origins, state AGs are widely recognized to have this common law authority to act independently in the public interest.

For example, the Colorado Supreme Court in *People Ex Rel. Salazar v. Davidson* (2003) recognized its AG's power to sue the Colorado Secretary of State, "because 'it is the function of the Attorney General . . . to protect the rights of the public...'" (quoting *People v. Tool*, 1905). In this case, Colorado's AG, Ken Salazar, argued the legislature's redistricting plan violated the Colorado Constitution, and the Secretary of State was sued because her office administers election law. The Colorado Supreme Court agreed with the AG that he was within his authority to bring suit as a representative of the public, citing "the well-settled principle that the Attorney General has common law powers unless they are specifically repealed by statute" (sec. 5).

The constitutions of most (forty-four) states establish the AG office. In most states, the AG is established either constitutionally or statutorily as the state's chief legal officer, and is charged with representing the state in litigation. The relevant law may be quite specific or fairly vague (Myers 2013). Often, what is written reflects or summarizes common-law understandings of state AG rules, with *People v. Miner*, an 1868 New York case, frequently cited as containing the best list of common law powers (Myers 2013, 37-38). A number of state courts have found

---

<sup>4</sup> Studies of the AG appear to derive all colonial and pre-colonial historical information on the office from two sources: Rita Cooley's 1958 article, and William Holdsworth's foundational *History of English Law*. Given the age of these original sources, such information should be treated with caution. (This also seems an area ripe for further research.)

that acting in the public interest provides AGs with wide discretion in pursuing or not pursuing litigation. A few states, however, have expressly limited AGs' common law authority, with courts in Arizona, Connecticut, Iowa, Louisiana, Maryland, New Mexico, Washington, and Wyoming upholding limitations on AGs' common law authority (see Meyers, 2013, p4n74). The precise powers of AGs vary from state-to-state, as one might expect given the variation in constitutions, statutes, and judicial interpretation.

### III. Competing Obligations and the Debate Over AG Non-Defense

Whether non-defense is a legitimate course of action for AGs – and the larger question of how AGs should handle laws they believe to be unconstitutional – is itself a debated topic among AGs. The National Association of Attorneys General (NAAG) addressed the topic in its ethics training at its 2009 annual meeting. In this meeting, James Tierney, former Massachusetts AG (D), at the 2009 annual meeting of NAAG, provocatively framed the question of whether to acknowledge one's beliefs about the unconstitutionality of a law is akin to asking "When is it okay to lie to the public?" (Tierney, 2009). As SSM bans have been increasingly and successfully challenged in courts over the past few years, a number of AGs have publically announced their position for or against non-defense, through press releases from their offices, in public speeches, in newspaper op-eds, and in both lengthy interviews as well as short comments to the media.<sup>5</sup>

---

<sup>5</sup> For some examples, see the list of links compiled by Columbia Law School's National State Attorneys General Program at "State Attorney General Nondefense." 2015. *Columbia Law School*.



The question is not simply a partisan one or one of political strategy. Non-defense decisions with regards to SSM bans have fallen on partisan lines, with only Democrats publicly declaring their intention to not defend. However, the question of non-defense is not a partisan debate – non-defense decisions have also been taken by Republican AGs as well, just not regarding SSM bans.<sup>6</sup> Some have reduced non-defense to self-interested politicking. In the case of SSM bans, public non-defense decisions have often preceded an AG's running for higher office. Of those who did not defend their state SSM bans, Kentucky's Jack Conway, New Mexico's Gary King, North Carolina's Roy Cooper, Virginia's Mark Herring are all either now or expected to soon be running for governor. California's Kamala Harris is running for a U.S. Senate seat in 2016. Harris's predecessor, Jerry Brown, announced his non-defense decision prior to running for governor, an office he still occupies. Nevada's Catherine Cortez Masto is expected to run for the U.S. Senate in 2016. Only Kathleen Kane of Pennsylvania and Ellen Rosenblum of Oregon are now expected to run for AG reelection (both have already announced their intentions).

It could certainly seem these non-defense announcements are strategic moves, with such decisions raising AGs' profiles, increasing their popularity among their Democratic constituents, and creating a record on which they will run (Provost 2010b). At the same time, however, it should also not be too surprising that ambitious AGs are willing to exercise independent discretion and push the bounds of their office's power (Provost 2010b). Without further research, it would be

---

Accessed March 21. <http://web.law.columbia.edu/attorneys-general/ag-101-brief-introduction-world-attorneys-general/state-attorney-general-nondefense>.

<sup>6</sup> See Girton, 2014, 1806-7, for a good overview of high profile non-defense decisions made by Republican AGs.

premature to dismiss these non-defense actions as wholly the product of self-interested actors, strategically seeking higher office. To simplify the question of non-defense to its value in future electoral campaigns flattens an issue that has complex legal and ethical dimensions, dimensions which AGs have themselves spent much time discussing.

The question of non-defense is not easily resolved given the multiple mandates of AGs: to act as the state's chief legal officer, and thus defend its laws, both statutory and constitutional (which may conflict), and to act as an agent of the public, in the public interest. In addition, there is the American Bar Association Model Rules, which outlines attorneys' professional ethical code. This professional ethical code further complicates the question of non-defense. For example, Michael Cardozo (D), the Corporation Counsel for the Government of New York City from 2002 to 2013, recently spoke against non-defense on ethical grounds, in a speech published in the ABA's *The Professional Lawyer*:

The duty to defend a duly enacted law is somewhat similar to the duty a criminal lawyer owes to the defendant he or she represents. While concededly the details of the rights and responsibilities at stake differ in each situation, on a macro level the adversarial system of justice demands unfailing advocacy on both sides of the courtroom. Just as the criminal defendant is entitled to a defense until his or her guilt is proven beyond a reasonable doubt and all appeals are exhausted, so, too, must the government lawyer provide a defense for a law until the highest court declares it invalid. (2014, p. 8)

Similarly, Colorado's AG, John W. Suthers (R) justifies his position of defending his state's SSM ban on professional, ethical grounds. In an op-ed published in *The Washington Post*, Suthers argued "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" (2014).

Cardozo, Suthers, and others have tied their ethical duties of defense to the particular office of the AG, which, they argue, is not a lawmaking one, but, rather, an agent. The argument is that because AGs are not properly legislators, but legal officers, their duties should derive from their professional ethical code. The duties of attorney's professional code is itself derived from the values of an adversarial process, settled by impartial judges. Cardozo argued that his duty was to put legal interpretation over moral considerations, given that, in the American political system, "The courts and the legislature set the rules of the litigation game by which the government must play" (4). Suthers himself refused to defend a law that he argued was clearly a 1<sup>st</sup> Amendment violation; he argued, SSM bans are different, as the Supreme Court has yet to review the legality of state bans (2014). Certain elected officials such as the mayor could properly direct a government lawyer to sue to have a law overturned on constitutional grounds, as long as another "government entity with a genuine stake in defending the law" intervened – but this was not a decision for the government lawyers themselves, argued Cardozo (2014, 8). Suthers emphasizes that AGs "are not part of the lawmaking apparatus; they are elected or appointed to defend the laws, not to undermine them" (2014).

But, as Cardozo himself noted, the question is complicated given that, when it comes to government's chief legal officers, it is not always clear who the client is – is it the mayor or governor, the public, or a legislative body? References to both public interest as well as higher law –the state constitution or the U.S. Constitution – are invoked by those who chose not to defend their states' SSM bans. Eric Holder, when serving as Attorney General, controversially told the NAAG at their 2014 annual meeting it was important for AGs to “do justice.” While noting that non-defense decisions “must be exceedingly rare.... reserved only for exceptional circumstances,” and rest “on firm constitutional grounds,” he also urged state AGs to “uphold and advance” American values of equality. The constitutional vision he put forth was an aspirational one – of reading constitutional rights and protections in accordance with Americans' “highest ideals,” rather than always adhering to past interpretations (Holder, 2014). With both Holder's and Cardozo's argument, it is clear that not only the text of statutes, the text of relevant state constitution, the text of the U.S. Constitution, and professional ethical code are at play in the non-defense question, also at play is a background theory of constitutional interpretation and meaning, with accompanying roles and duties.

Using state resources wisely can also be considered as one of AGs' ethical, as well as public interest, duties. This obligation provides a middle road between defense and non-defense: AGs may simply (and quietly) not provide many resources for litigation, or not aggressively pursue litigation. As AGs various responses to SSM bans illustrate, parsing the decision into a binary defend/ not-defend is misleading. For example, it seems the newly appointed AG in Alaska, Craig Richards, was not

eager to defend his state's ban. AGs in Alaska are appointed by the governor and confirmed by the legislature. After his appointment in the fall of 2014, both the newly-elected governor (an Independent) and Richards were unclear on their position. But they suggested it may be a waste of resources – the governor, Bill Walker, had said in his campaign that he believed marriage should be between men and women, but he also expressed concern in wasting the state's resources on litigation (AP, 2014). Richards initially said he would need to take time to consider the question (AP, 2014). He did defend the ban briefly and seek a stay of the 9<sup>th</sup> Circuit's October ruling overturning Alaska's ban, but he later placed his appeal in abeyance pending Supreme Court review. After this, when questioned during his confirmation hearing, Richards told the Republican legislature it was his duty to defend the state's constitution (AP, 2015).

Similarly, Wyoming's Republican governor-appointed AG, Peter K. Michael, offered something less than Cardozo's "exhaustive" defense. Michael did not appeal a federal district court invalidation of WY's ban, enabling same-sex marriages to immediately take place. He supported his decision by claiming that further litigation would not change the result (Whitcomb, 2014). Likewise, Arizona's Tom Horne told the media "It would be unethical for me to file an appeal that would have no chance of success," in reference to a district court's decision to overturn his state's SSM ban (Westfall and Queally, 2014). Compared with, for example, the very public, avid defense of SSM bans by Arkansas's Leslie Rutledge – who is still defending her state's ban and likely will until the Supreme Court issues its opinion – Richard, Michael, and Horne, are taking a different approach. While all three reasonably say

they have fulfilled their duty to defend, their defense is less than the “exhaustive” defense of Rutledge and several others.

Given the complex and sometimes competing duties of AGs, there are many cases in which the obligations of AGs are overdetermined, requiring that AGs exercise their own individual judgments on whether or not to defend a law, or how vigorously to defend it. In this exercise of independent judgment, combined with their public interest mandate, AGs are acting as a type of public representatives. (Public representatives need not be of a democratic sort. Hobbes’s authoritarian Leviathan is typically considered a type of public representative, for example.<sup>7</sup>) There are advantages in making AGs the sort of public representatives that are democratically accountable, not just in terms of selecting a strong legal officer, but in representing the public’s ideas and opinions. We might understand a democratically accountable AG as contributing to popular constitutionalism, through directly representing citizens’ constitutional views in interbranch and intergovernmental constitutional dialogue. In addition, AG non-defense spurs other actors to participate in constitutional litigation. More views may encourage better constitutional debate, as Shaw (2014) has pointed out.

### III. The Expanding but Hidden Role of State AGs

In addition to fostering popular constitutionalism, I argue that there is another, perhaps more important reason to support non-defense (and less contentious, as it does not require support of popular constitutionalism). Attorneys

---

<sup>7</sup> See Pitkin (1972), for a discussion of different types of representation.

generals have emerged as powerful actors on both the state and national levels, and the state AG should be viewed by the public for the powerful, political office it is. Non-defense draws public attention to the influence the office has, and its politicization. Outright non-defense, as Suthers rightly points out, politicizes the office of AG in the eyes of the public. “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,” wrote Suthers, “[w]e will become viewed as simply one more player in a political system rather than as legal authorities in a legal system” (2014). While Suthers, like most AGs, is elected, he argues that elections should serve to select a good legal officer, rather than have a “political” component – much like elected state judges justify their appointment by the public. I argue (contra Suthers) that such public politicization of the AG office is a good thing, given how politicized the office is in practice. This is not simply because AGs engage in interpretation, which itself has a political component; it is also because of the expanding power of the state AG as a national policymaker.

State AGs are understudied in American politics, but a few scholars have attempted to draw political scientists’ attention to the role AGs play in policymaking, particularly on the national level. Two decades ago, Cornell Clayton pointed out how the devolution that occurred under “New Federalism” of the 1970s and 1980s prompted state AGs to take on a larger role in regulation (1994). With devolution, AGs began taking over enforcement of federal regulations, and they also increasingly sued the federal government to demand federal enforcement and compliance, as well as limit the federal government’s efforts to preempt state action

in these new “vacuums created by federal withdrawal” (Clayton 1994, 548). As attorney generals became more powerful and visible actors, more ambitious and better educated attorneys were attracted to the position (Clayton 1994). These ambitious attorneys, in turn, often sought higher profile and important cases, expanding the power and reach of the office even further (Clayton 1994), creating policy solutions that were in demand by the public, but unfulfilled by other political actors (Provost 2003).

In other words, AGs began to increasingly act as political entrepreneurs (Provost 2003), filling in regulatory gaps (Nolette 2014, 2015). They were enabled by an increase in state *parens patriae* authority in the 1970s, such that AGs could legally represent large groups of consumers (Nolette 2015). Not only did courts contribute to the growth of AG power, Congress did as well, through federal grants (Nolette 2015). The result is that multistate AG litigation has risen exponentially from 1980 to the present day, according to Paul Nolette’s calculations (2015).

In response to devolution, AGs coordinated enforcement polices, creating a “de facto system of national law” in key regulation areas, such as antitrust (Clayton, 1994, 540-1). As Nolette (2015) shows in his recent and comprehensive book on state AGs’ role in the national policymaking process, AGs are able to create national policy through settlements with national industries and suits against federal agencies. Depending on AGs’ preferences, they may create new, tighter regulation through industry settlements or by forcing federal agencies to expand regulation (Nolette 2015). Or, alternatively, AGs may block federal agencies’ own attempts to regulate, loosening national regulatory policy (Nolette 2015).



During the 1980s and 1990s, AGs quickly learned that their influence on national-level policy depended on their ability to coordinate their actions. Much of this coordination is facilitated by the NAAG, founded in 1907. Over the past few decades the NAAG has played a greater role in coordinating AGs, as AGs united to respond to federal devolution (Clayton 1994), contributing to the construction of a system of cooperative federalism (Nolette 2015). Coordination allowed a sharing of resources and strategic litigation, and the NAAG also offers specific resources itself, such as the Supreme Court Clearinghouse Project created in 1982. The Project serves as a source of Supreme Court litigation expertise, given that most state AGs are new to Supreme Court advocacy, but often litigating against repeat players. The Project reviews AG merit briefs and coordinates amicus brief filings, increasing both the efficacy and amount of AGs Supreme Court litigation and coordinated amici filings (Clayton 1994; Nolette 2015). While AGs have continued to coordinate among each other, national AG policymaking has also been increasingly marked by partisanship and partisan coordination, with the formation of a Democrat and Republican Attorneys General Association's (DAGA and RAGA, Nolette 2014). RAGA has recently broken off from the Republican State Leadership Committee to have greater autonomy (Burns, 2015).

As Nolette (2015) convincingly illustrates, much of this increasingly partisan policymaking of AGs occurs in "the shadow of the law" (Mnookin and Kornhauser, 1979). "The bulk of AGs' litigation is resolved via out-of-court agreements before formally entering the court system, with little, if any, judicial oversight," and because of the constant threat of litigation, "defendants are willing to sign

settlements containing regulatory standards not otherwise required by existing law” (Nolette 2015, 8-9). This is not to suggest that all AG action is completely hidden from view. As noted above, the office has increased in power in part because it has attracted ambitious political entrepreneurs who have been attracted, at least in part, by the office’s increased visibility. Colin Provost has, for example, detailed how consumer class action suits have provided a powerful platform on which state AGs might build political careers (2010a, 2010b). That said, many settlements are not as known to the public, as, say, the tobacco industry settlement (the most well know of AG policymaking), and it is not always clear to the public that settlements produce new policy. In addition – and equally important – the “shadow of the law” does not stop at the settlement stage: there is little oversight of the regulatory regime produced by out-of-court settlements. Yet, these settlements have the power of law behind them, in a way that closed-door agreements often do not.

The result is, as Nolette (2015) shows, an “especially resilient” form of policymaking, one that should be equally disturbing to those on the left as on the right. Progressives should be concerned about the lack of oversight, and whether such closed-door policymaking does indeed work for the public interest (Nolette 2015, 212). Those on the right should be concerned because AGs national policymaking tends to create a “regulatory ratchet” effect (Nolette 2015, 212). The policymaking process conducted by state AGs is an example of Suzanne Mettler’s “submerged state,” where the mechanics of governance is hidden from the public, submerged in an opaque regulatory process (Mettler 2011; Nolette 2015).

It is not surprising, then, that many AGs, like John Suthers, resist the politicization of the office that accompanies non-defense decisions. The power of the regulatory regime generated by AGs, and the AGs' influence, is partly a product of the way in which AGs act outside of the "normal", public legislative process.

#### IV. Not a "Veto": the Non-Defense of SSM Bans

Opponents of non-defense frequently argue it functions as an "attorney general veto."<sup>8</sup> This is intended as harsh criticism, given that AGs are not considered to be policymakers – a veto here indicates an illegitimate seizure of democratic authority. While rhetorically compelling, characterizing AG non-defense as a veto is misleading for two reasons. One, rarely do AG decisions not to defend influence whether a law is defended, defended well, and generates judicial settlement. Two, unlike a veto, an AG non-defense decision is not blocking a legislative process. If an AG non-defense decision does result in a law going undefended, other elected officials have had to choose not to defend as well. This is hardly a veto: if non-defense limits litigation, it is the product of consensus decision-making by many elected and non-elected officials.

In the case of SSM bans, there are two cases where AGs have publically announced their non-defense, and, following that, laws have not had full defense in courts. This occurred in California and in North Carolina. The most prominent and clear case of non-defense influencing the judicial process is California's AGs' decision not to defend Proposition 8. Both Jerry Brown and Kamala Harris chose not

---

<sup>8</sup> See Girton 2014 for an overview.

to defend Proposition 8, arguing that the law was unconstitutional, violating Equal Protection guarantees. States are given standing when the constitutionality of their laws are challenged, as states are understood to have an interest in continued enforcement that is injured by that constitutional challenge. In *Hollingsworth v. Perry* (2013), however, the Supreme Court decided a state could not transfer this enforcement interest to private parties. The interest group that had helped sponsor and pass Proposition 8 was not given standing to intervene, given that California did not want to defend the ban. The Supreme Court in *Hollingsworth* thus did not settle the controversy of state SSM bans, allowing a lower court's ruling, invalidating Proposition 8, to stand. For those that criticize so-called "attorney general veto," the non-defense of Proposition 8 is the paradigmatic case. For example, in explaining his own decision to defend, Suthers wrote that the constitutionality of SSM bans is still undecided because California's AG did not defend the law in *Hollingsworth* (2014).

However, to consider whether non-defense in such a case actually damages legitimacy – by breaking the rules established by elected officials and preventing judicial settlement, by unilaterally overturning democratically-made law – it is necessary to consider non-defense in the larger political and inter-institutional context. First, Proposition 8 could have been defended by other state actors, as was done in almost every other state where an AG chose not to defend a SSM ban. The governor might have appointed an attorney to defend, as the Pennsylvania and Kentucky governors did, but he declined to do so. Similarly, the legislature may have tried to intervene by appointing counsel to act in its interest and defend the law, as the House did to defend DOMA, but the legislature did not. Likewise, it may have

been possible for a group of county clerks to intervene and argue the case, as they did in New Mexico. (County clerks issue marriage licenses and so have an interest in enforcement.)

Although unlikely, given that all of the aforementioned are state actors and have compelling arguments for an enforcement interest, it is possible efforts to intervene might be denied standing by the court. However, that concern simply points to the role courts plays as another actor complicit in the so-called “veto.” Standing is not simply a set of legal rules but a political resource, a resource controlled by courts. Many argue that standing enables courts to exercise discretion in taking and deciding cases.<sup>9</sup> Many observes of the Supreme Court in *Hollingsworth* have argued that standing was used to by the Court to avoid settling the constitutionality of SSM bans.<sup>10</sup> Whether the standing dimension of *Hollingsworth* was part of a larger trend in restricting standing at the federal level, or whether it was used to delay decision on the constitutionality of SSM bans, the point remains that courts, through standing, also have the power to influence the litigation process when a state AG decides not to defend. In the case of SSM, even when legal defense has been lacking, it has not prevented judicial settlement of the controversy. The Supreme Court will hear arguments on SSM bans this spring, and SSM bans have had vigorous legal defense in every federal circuit court.

The non-defense of Proposition 8 is also a useful case as it points to the conditions in which laws are likely not be defended – direct legislation is the most likely “victim” of non-defense, as Girton (2014) has pointed out. But enforcement

---

<sup>9</sup> Insert.

<sup>10</sup> Insert.

and implementation are arguably the norm for initiatives and referenda. Such direct legislation is typically sponsored by groups that form solely to support an initiative or referendum, and then disband after the electorate votes (Gerber, Lupia, and McCubbins 2004; Lupia and Matsusaka 2004). Because implementation is then delegated (often to multiple actors), and the group supporting the law has often dissolved, some degree of noncompliance is the norm, rather than the exception (Gerber, Lupia, and McCubbins 2004). Furthermore, the elected officials charged with the implementation of direct legislation are usually officials that previously blocked the legislation – direct legislation is costly and thus not the first avenue for policy reform, so those laws that are directly legislated are typically laws that would not be passed by the legislature (Gerber 1996, 1999).

This means that the sorts of laws most likely to be passed as a result of direct legislation are also the sorts of laws least likely to be implemented and enforced (Gerber, Lupia, and McCubbins 2004). For example, consider California’s 1986 “English Only” initiative, which passed with 73% of the electorate’s vote, “made English the state’s official language and required state officials to ‘preserve and strengthen it’” (California Secretary of State 1996, in Gerber, Lupia, and McCubbins 2004, 43). A number of governing officials opposed the law and did little to enforce it. When a complaint was filed, the Attorney General “argued that Proposition 63 required only that official publications be made available in English, not that they be offered in English *only*” (Gerber, Lupia, and McCubbins 2004, 44).

That said, AG non-defense usually leads to legal defense by other actors – counsels appointed by governors, city- and county-level officials, and advocacy groups. On those rare occasions when laws lacked legal defense in the SSM case, it is not only because AGs have failed to defend the law – governors and state legislatures’ have also failed to provide defense, and courts have failed to allow outside groups to intervene. As Shaw (2014) has argued, one of the best ways to allow for other parties to intervene is to insure that AGs announce their non-defense decision in time for other political actors, such as the governor or state legislature, to act, and AGs typically have done this.

It is possible that, in North Carolina, the one other case where a SSM ban went undefended after an AG’s non-defense decision was not remedied, the governor or legislature may have appointed counsel if the AG had announced his intention earlier. Two state legislators attempted, on their own, to intervene at the last minute, but were denied standing (Gordon 2014). In North Carolina, the governor had clear statutory authority to appoint counsel to defend the ban in the name of the state, and the legislature had passed a bill in 2013 that authorized them to represent the state if a statute’s constitutionality was challenged (Harris 2014). While these statutes do not determine federal standing rules, it seems likely that federal courts would recognize either the governor or legislature if either had officially attempted to intervene, since *Hollingsworth* was directed at private parties. However, North Carolina’s AG’s non-defense decision came late in the litigation process because the AG, Roy Cooper, had defended the SSM bans up until the 4<sup>th</sup> Circuit struck down Virginia’s SSM ban (Biesecker, 2014). Thus, even though

Cooper's non-defense decision was widely publicized, it is more analogous to the less discussed non-defense decision of Alaska's, Wyoming's, and Arizona's attorney generals, who, like Cooper, ceased defense for reasons of resources and the futility of future litigation (Biesecker 2014).

#### V. Further Democratic Virtues of Non-Defense

Some worry that current support of AG non-defense is product of progressive's distaste for SSM bans, and they worry over the precedent non-defense sets. For example, what if an initiative was passed that limited industrial pollution? Wealthy corporate interests would then face public interest groups in court, which often have less resources for litigation – and this sort of “tilted playing field” may be typical given the legislation favored by the left (Waldman, 2013). If one worries that AG non-defense will lead to the invalidation of a preferred statute, then there doubts must lie with the larger system of democratic governance, rather than AG obstruction. If, for example, an initiative that reduces industrial pollution goes undefended, then that law would not have had the support of the public's democratically elected or appointed representatives: the governor, the state legislature, and the courts would all have had to participate in invalidating the law. We should not worry when an initiative is invalidated, when that initiative lacks the support of democratic representatives across all branches. To argue otherwise is to put forth a stilted view of democratic governance, one at odds with what contemporary democratic theory. (And by contemporary theory, I mean here theory developed over the past several decades.)



Among democratic theorists, the increasingly prevalent view that direct democracy is in no way normatively superior or more democratic than representative democracy (see, e.g., Manin 1997, Plotke 1997). Rather, the people are given voice through the political process that constructs them. Feminist theorists have long suggested that the construct of “women” is created by the political process of representing “women.” For example, Iris Marion Young (2000) conceived of representation as a process which created a “perspective,” as opposed to the earlier, static model, which assumed the prior existence of a group such as women (with scare quotes intentionally absent).

We can also see this idea of the constitutive character of political processes in the post-structuralist tradition, with its operating assumption that meaning and coherence only exist insofar that they are created through linguistic and social practices over time. That which is represented becomes a contingent “hegemonic articulation” (LaClau and Mouffe, 1985); a field of struggle (LaClau, 1996); an “empty place” (Lefort, 1988); or, say, in an appeal to aesthetic theory, an always insufficient, incomplete “perspective” (Ankersmit, 1996, 2002). This particular group of theorists share an agonistic view of politics, where any unity created through representation is only *apparent* unity, forged through struggles over power; on this view, democracy is, essentially, the constant political recreation of this (false, temporary) unity of “the people.”

Facing this dynamic, multi-directional character of political processes – what Disch has called the “constructivist” turn (2011, 102-3) – a broad group of contemporary democratic theorists have argued for the “decentering” of democracy

or “indirect” democracy (Habermas, 1996, 296-307). Democracy, this argument, goes should not be reduced to particular moments in formal governing institutions. Democracy is not “one big meeting at the conclusion of which decisions are made,” but involves formal and informal exchanges over a range of places and times, where “there is no final moment of decision” (Young, 2000, 45). It is “a circular march that starts from outside the government, reaches political institutions, ends temporarily with the vote of the representatives, and returns to society, from where it starts its path all over again since the citizens have the right to propose abrogative referenda or new laws,” writes Urbinati (describing the model of democracy in Condorcet’s proposed constitution, 2006, 202).

According to contemporary democratic theory, then, to privilege one particular institutional site as the source of popular will – as some do when they place the result of initiatives above review by elected officials – is to misconstrue the nature of democratic governance. Rather, if we understand democracy as this iterative, reflexive process, in which different actors, representing the people in different ways, review laws at different times, state AG non-defense would seem to invite democracy, not block it. In the case of SSM bans, AG non-defense triggers a reflexive review of law by many different actors, representing the people in different ways, according to their distinct institutional capacities, as well as in the ideology and ethical dispositions that led their selection.

The one case in which we might worry about non-defense is when an initiative is passed that is intended to remedy deficiencies in the democratic process, and current members of government do not wish to defend the law for self-

interested reasons. Such a situation seems feasible, particularly given the populist origins of direct legislation, which was intended to provide a way around corrupted governance (Gerber 1999). That said, I have not discovered such a case in my research, though given that there is no exhaustive study of non-defense, such a case may exist. The closest case I have found is that Nevada's AG Jon Bruning's non-defense of a campaign finance law. However, Nevada has a statutory mechanism for alternative defense: the AG was required to bring suit, and then the Nevada Secretary of State was required to defend the law (Girton 2014). Bruning was later fined by the FEC for violating campaigns laws in his run for U.S. Senate (Tysver 2013). Given the apparent rarity of non-defense of laws passed to remedy or improve democratic procedures, the possibility of such cases should not overrule the clear virtues of non-defense. Also, statutory mechanisms to insure alternate defense, such as the one Nevada, has in place, are a straightforward solution to such problems, as Shaw (2014) has noted.

## VI. Conclusion

Non-defense invites the type of reflexive process that contemporary theorist associate with democracy. But even if one rejects the "constructivist turn" in democratic theory, non-defense is valuable according to the long accepted democratic standard of public accountability and transparency. Non-defense brings public attention to the "submerged" powers of state AGs, accountability that is of paramount importance now, given how AGs influence has expanded over the past

three decades, and expanded in a way that largely avoids oversight by elected officials or the judicial branch.

I suggest we think of AG non-defense as a cue or “informational shortcut” that enables the public to judge the complex and submerged policymaking process in which AGs are engaged (Lupia and McCubbins 1998). AG non-defense signals to the public not simply the ideological bent of an AG (which the public might readily learn through the campaign process), it signals to the public the role AGs play. Non-defense provides the public with information shortcut to AGs’ potential influence in the larger policymaking process, the politicization of the office, and the discretion AGs may exercise. In other words, non-defense sends the very message that AGs like John Suthers fear.

In considering the question of AG non-defense, one other point is worth emphasizing regarding my analysis and its limits. The question of AG non-defense hinges on the health of the political system as a whole. If we believe in the vitality of our larger democratic system, then there is value in AG non-defense. This essay has assumed the vitality of American democracy (outside of the AG’s hidden role in policymaking), but that assumption may be incorrect.

## Works Cited

Associated Press. 2015. "New Alaska Attorney General to Review Gay Marriage Case, Guard Issues." *Fairbanks Daily News-Miner*. Accessed March 20.

[http://www.newsminer.com/news/alaska\\_news/new-alaska-attorney-general-to-review-gay-marriage-case-guard/article\\_bc1f32ec-7bfd-11e4-93b7-53b795a37f12.html](http://www.newsminer.com/news/alaska_news/new-alaska-attorney-general-to-review-gay-marriage-case-guard/article_bc1f32ec-7bfd-11e4-93b7-53b795a37f12.html).

Press, Associated. 2015. "Gay Marriage among Topics at Alaska Attorney General's Confirmation Hearing." *Fairbanks Daily News-Miner*. Accessed March 31.

[http://www.newsminer.com/news/alaska\\_news/gay-marriage-among-topics-at-alaska-attorney-general-s-confirmation/article\\_28b85028-cc44-11e4-ad31-a356fd4e837f.html](http://www.newsminer.com/news/alaska_news/gay-marriage-among-topics-at-alaska-attorney-general-s-confirmation/article_28b85028-cc44-11e4-ad31-a356fd4e837f.html).

Amar, Vikram David. 2008. "California Constitutional Conundrums-State Constitutional Quirks Exposed by the Same-Sex Marriage Experience." *Rutgers LJ* 40: 741.

Amar, Vikram D. 2009. "Lessons from California's Recent Experience with Its Non-Unitary (Divided) Executive: Of Mayors, Governors, Controllers, and Attorneys General." *Emory L. J.* 59: 469 - .

Ankersmit, Frank. 1996. *Aesthetic Politics: Political Philosophy Beyond Fact and Value*. Stanford: Stanford University Press.

Ankersmit, Frank. 2002. *Political Representation*. Stanford: Stanford University Press.

Biesecker, Michael. 2014. "NC Attorney General Won't Defend His State's Gay Marriage Ban." *Christian Science Monitor*, July 28.

<http://www.csmonitor.com/USA/Latest-News-Wires/2014/0728/NC-attorney-general-won-t-defend-his-state-s-gay-marriage-ban>.

Burns, Alexander. 2015. "Republican State Leadership Committee Splits Apart." *POLITICO*. Accessed March 26.

<http://www.politico.com/story/2014/01/republican-state-leadership-committee-split-102443.html>.

Cardozo, Michael A. 2014. "The Conflicting Ethical, Legal, and Public Policy Obligations of the Government's Chief Legal Officer." *The Professional Lawyer*, 4.

Clayton, Cornell W. 1992. *The Politics of Justice: The Attorney General and the Making of Legal Policy*. New York: M.E. Sharpe, Inc.

Clayton, Cornell W. 1994. "Law, Politics and the New Federalism: State Attorneys General as National Policymakers." *The Review of Politics* 56 (03): 525-53.

Cooley, Rita W. 1958. "Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies." *Am. J. Legal Hist.* 2: 304 – .

Council of State Governments. 2014. *The Book of the States 2014*. Lexington, KY: Council of State Government.

Disch, Lisa. 2011. "Toward a Mobilization Concept of Representation." *American Political Science Review* 105(1): 100-14.

Gerber, Elizabeth R. 1996. "Legislatures, Initiatives, and Representation: The Effects of State Legislative Institutions on Policy." *Political Research Quarterly* 49(2): 263-286.

Gerber, Elisabeth R. 1999. *The Populist Paradox*. Princeton, NJ: Princeton University Press.

Gerber, Elisabeth R., Arthur Lupia, and Mathew D. McCubbins. 2004. "When Does Government Limit the Impact of Voter Initiatives? The Politics of Implementation and Enforcement." *Journal of Politics* 66(1): 43-68.

Girton, Jeremy R. 2014. "The Attorney General Veto." *Columbia Law Review* 114 (7): 1783-1824.

Gordon, Michael. 2014. "Federal Judge Overturns NC Same-Sex Marriage Ban." *Charlotte Observer*. October 10.  
<http://www.charlotteobserver.com/news/local/article9200495.html>.

Harris, John E. 2014. "Holes in the Defense: Evaluating the North Carolina Attorney General's Duty to Defend and the Responses of Other Government Actors." *NCL Rev.* 92: 2027.

Krislov, Marvin, and Daniel Martin Katz. 2008. "Taking State Constitutions Seriously." *Cornell Journal of Law and Public Policy* 17: 295.

LaClau, Ernesto and Chantal Mouffe. 1985. *Hegemony and Socialist Strategy: Towards as Radical Democratic Politics*. New York: Verso.

LaClau, Ernesto. 1996. *Emancipations*. New York: Verso.

Lefort, Claude. 1988. *Democracy and Political Theory*. Trans, David Macey. Minneapolis: University of Minnesota Press.

Lupia, Arthur, Yanna Krupnikov, Adam Seth Levine, Spencer Piston, and Alexander Von Hagen-Jamar. 2010. "Why State Constitutions Differ in Their Treatment of

Same-Sex Marriage." *The Journal of Politics* 72 (04): 1222–35.  
doi:10.1017/S0022381610000642.

Lupia, Arthur, and John G. Matsusaka. 2004. "Direct Democracy: New Approaches to Old Questions." *Annual Review of Political Science* 7: 463-782.

Lupia, Arthur and Mathew D. McCubbins. 1998. *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* Cambridge: Cambridge University Press.

Manin, Bernard. 1997. *The Principles of Representative Government*. New York: Cambridge University Press.

Marshall, William P. 2006. "Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive." *The Yale Law Journal*, 2446–79.

Mettler, Suzanne. 2011. *The Submerged State: How Invisible Government Policies Undermine American Democracy*. Chicago: University Of Chicago Press.

Mnookin, Robert H., and Lewis Kornhauser. 1979. "Bargaining in the Shadow of the Law: The Case of Divorce." *The Yale Law Journal* 88 (5): 950. doi:10.2307/795824.

Myers, Emily. 2013. *State Attorneys General: Powers and Responsibilities*. 3rd Edition. Washington, D.C.: National Association of Attorneys General.

Nolette, P. 2014. "State Litigation during the Obama Administration: Diverging Agendas in an Era of Polarized Politics." *Publius: The Journal of Federalism* 44 (3): 451–74. doi:10.1093/publius/pju023.

Nolette, Paul. 2015. *Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America*. Lawrence, Kansas: University Press of Kansas.

Pitkin, Hanna F. 1972. *The Concept of Representation*. Berkeley: University of California Press.

Plotke, David. 1997. "Representation is Democracy." *Constellations*, 4(1): 19-34

Shaw, Provost, Colin. 2003. "State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism." *Publius* 33 (2): 37–53.

Katherine. 2014. "Constitutional Nondefense in the States." *Columbia Law Review*, 213–82.

Provost, Colin. 2010a. "An Integrated Model of U.S. State Attorney General Behavior in Multi-State Litigation." *State Politics & Policy Quarterly* 10 (1): 1–24.

Provost, C. 2010b. "When Is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General." *Publius: The Journal of Federalism* 40 (4): 597–616. doi:10.1093/publius/pjp034.

"State Attorney General Nondefense." 2015. *Columbia Law School*. Accessed March 27. <http://web.law.columbia.edu/attorneys-general/ag-101-brief-introduction-world-attorneys-general/state-attorney-general-nondefense>.

Suthers, John W. 2014. "A 'veto' Attorneys General Shouldn't Wield." *The Washington Post*, February 2. [http://www.washingtonpost.com/opinions/a-veto-attorneys-general-shouldnt-wield/2014/02/02/64082fc8-887e-11e3-a5bd-844629433ba3\\_story.html](http://www.washingtonpost.com/opinions/a-veto-attorneys-general-shouldnt-wield/2014/02/02/64082fc8-887e-11e3-a5bd-844629433ba3_story.html).

Tipler, Kathleen. 2013. "Obama Administration's Non-Defense of DOMA and Executive Duty to Represent." *Md. L. Rev.* 73: 287.

Tysver, Robynn. 2013. "FEC Fines Jon Bruning \$19K for Violating Rules, Intent of 'Exploratory Committee.'" *Omaha.com*. May 14. [http://www.omaha.com/news/fec-fines-jon-bruning-k-for-violating-rules-intent-of/article\\_fa040697-580a-5d3c-b9c3-f81b9ec6f4a6.html](http://www.omaha.com/news/fec-fines-jon-bruning-k-for-violating-rules-intent-of/article_fa040697-580a-5d3c-b9c3-f81b9ec6f4a6.html).

Urbinati, Nadia. 2006. *Representative Democracy: Principles and Genealogy*. Chicago: The University of Chicago Press.

Waldman, Paul. 2013. "Why the Prop. 8 Decision Should Make Liberals Uneasy." *The American Prospect*, June 27. <http://prospect.org/article/why-prop-8-decision-should-make-liberals-uneasy>.

Westfall, Julie, and James Queally. 2014. "Arizona and Wyoming Gay Marriage Bans Struck down." *Los Angeles Times*, October 17. <http://www.latimes.com/nation/nationnow/la-na-nn-arizonas-gay-marriage-ban-struck-down-20141017-story.html>.

Whitcomb, Dan. 2014. "Wyoming Attorney General Says Gay Marriages Can Begin on Tuesday." *Reuters*, October 20. <http://www.reuters.com/article/2014/10/20/us-usa-gaymarriage-wyoming-idUSKCN0I923220141020>.

Young, Iris Marion. 2000. *Inclusion and Democracy*. New York: Oxford University Press.

## Cases

Hollingsworth v. Perry. 2013. 133 S. Ct. 2652.



People Ex Rel. Salazar v. Davidson. 2003. 79 P.3d 1221. Supreme Court of Colorado.

People v. Tool. 1905, 35 Colo. 225, 86. Supreme Court of Colorado.

## State Attorney General Action in States with Litigation on Same-Sex Marriage Bans

State	AG Selection Method	Attorney General Action	Reason for non-defence	If did not defend, counsel?	Attorney General (AG)	DCI State?*	Ban or Restriction	Court	Ruling Year	Status**
Alabama	Election	Defended			Luther Strange, R	No	Constitutional and statutory	Federal	Litigation	11th put appeals on hold pending SCOTUS
Alaska	Appointed by governor and confirmed by legislature	Defended, appeal in abeyance	Futile/ wasted resources		Craig Richards (I governor)	No	Constitutional and statutory	Federal	2014	Overturned
Arizona	Election	Defended			Tom Horne; Mark Brnovich, R	Yes	Constitutional and statutory	Federal	2014	Overturned
Arkansas	Election	Defended			Dustin McDaniel, D; Leslie Rutledge, R	Yes	Constitutional and statutory	Federal	Litigation	Overturned
California	Election	Did not defend	Unconstitutional	No	Jerry Brown, D; Kamala Harris, D	Yes	Constitutional and statutory	Federal	2010	Overturned
Colorado	Election	Defended			John Suthers, R	Yes	Constitutional and statutory	Federal	2013	Overturned
Connecticut	Election	Defended			Richard Blumenthal, D	No	Statutory	State	2008	Overturned
Florida	Election	Defended			Pam Bondi, R	Yes	Constitutional and statutory	Federal	Litigation	11th put appeals on hold pending SCOTUS
Georgia	Election	Defended (part of 2014 campaign)			Sam Olens, R	No	Constitutional and statutory	Federal	Litigation	Stayed pending SCOTUS
Hawaii	Appointed by governor and confirmed by senate	Defended (Dir. Of Health) and did not defend (Gov.)	Split representation	Split representation	David Louie, D	No	Constitutional and statutory	Federal and State	2014	District upheld; Nith declared moot bc HI legislature legalized
Idaho	Election	Defended			Lawrence Wasden, D	No	Constitutional and statutory	Federal	2014	Overturned
Indiana	Election	Defended			Greg Zoeller, R	No	Statutory	Federal	2014	Overturned
Kansas	Election	Defended			Derek Schmidt, R	No	Constitutional and statutory	Federal and state	2014	Varies by district
Kentucky	Election	Did not defend	Unconstitutional	Governor (D) hired outside counsel	Jack Conway, D	No	Constitutional and statutory	Federal	Litigation	Upheld; SCOTUS
Louisiana	Election	Defend, hired outside counsel to assist			James "Buddy" Caldwell, R	No	Constitutional and statutory	Federal and state	Litigation	In State and 5th
Massachusetts	Election	Defend			Tom Reilly, D	No	Statutory	State	2003	Overturned
Michigan	Election	Defend			Bill Schuette, R	Yes	Constitutional and statutory	Federal	Litigation	Upheld; SCOTUS
Mississippi	Election	Disagrees but defends			Jim Hood, D	No	Constitutional and statutory	Federal	Litigation	In 5th Circuit
Missouri	Election	Disagrees but defends (but doesn't challenge recognition of other states SSMS)			Chris Koster, D	Yes	Constitutional and statutory	Federal and state	Litigation	Overturned by State Court; In 8th Circuit
Montana	Election	Defend, but suspended 2015 pending			Tim Fox, R (D Governor supports plaintiffs)	Yes	Constitutional and statutory	Federal	2014	Overturned; Appeal suspended pending SCOTUS
Nebraska	Election	Defend			Doug Peterson, R	Yes	Constitutional	Federal	Litigation	in 8th Circuit
Nevada	Election	Stopped defending after 9th Circuit <i>Smithkline Beecham v. Abbot</i> (2014)	Unconstitutional	Argued by Coalition for the Protection of Marriage (with no legal standing)	Catherine Cortez Masto, D (supported by Governor Brian Sandoval, R)	Yes	Constitutional	Federal	2014	Overturned
New Jersey	Appointed by governor and confirmed by senate	Defend			Acting AG, John Hoffman, R	No	Statutory	State	2013	Overturned

State	AG Selection Method	Attorney General Action	Reason for non-defence	If did not defend, counsel?	Attorney General (AG)	DCI State?*	Ban or Restriction	Court	Ruling Year	Status**
New Mexico	Election	Defend (Madrid) and not defend (King)	Unconstitutional	County clerks	Patricia Madrid, D; Gary King, D	No	Statutory	State	2004; 2013	Overtured
North Carolina	Election	Defend; Did not appeal 4th (Cooper)	Futile/ wasted resources	Did not allow last minute intervention by 2 NC legislators (R)	Roy Cooper, D	No	Constitutional and statutory (2012 ban)	Federal	2014	Overtured
North Dakota	Election	Defend			Wayne Stenejem, R	Yes	Constitutional and statutory	Federal	Litigation	Stayed pending SCOTUS
Ohio	Election	Defend			Mike DeWine, R	Yes	Constitutional and statutory	Federal	Litigation	Upheld; SCOTUS
Oklahoma	Election	Defend			Scott Pruitt, R	Yes	Constitutional and statutory	Federal	2014	Overtured
Oregon	Election	Did not defend	Unconstitutional	Summary judgment; NOM not allowed to intervene	Ellen Rosenblum, D	Yes	Constitutional	Federal	2014	Overtured
Pennsylvania	Election	Did not defend	Unconstitutional	Governor (R) hired outside counsel; did not appeal Distict Court, county court not allowed to intervene	Kathleen Kane, D	No	Statutory (by legislature)	Federal	2014	Overtured
South Carolina	Election	Defend			Alan Wilson, R	No	Constitutional and statutory	Federal	2014	Overtured
South Dakota	Election	Defend			Marty Jackley, R	Yes	Constitutional and statutory	Federal	Litigation	In 8th Circuit
Tennessee	Appointed by TN Supreme Court (itself selected in "hybrid" process), 8 year	Defend			Robert Cooper, D; Herbert Slatery III, R	No	Constitutional and statutory	State upheld; Federal	Fed in litigation	Upheld; SCOTUS
Texas	Election	Defend			Greg Abbott, R	No	Constitutional and statutory	Federal	In litigation	In 5th Circuit
Utah	Election	AG's office hired private outside counsel	To "find the best to represent the state"		Sean Reyes, R	No	Constitutional and statutory	Federal	2014	Overtured
Virginia	Election	Defend (Cuccinelli); Did not defend, argued against (Herring)	Unconstitutional	Clerk of the Circuit Court for City of Norfolk ;Clerk of the Circuit Court for the City of Staunton; state registrar of vital records	Ken Cuccinelli, R; Mark Herring, D	No	Constitutional and statutory	Federal	2014	Overtured
West Virginia	Election	Defended			Patrick Morrissey, R	No	Statutory	Federal	2014	Overtured
Wisconsin	Election	Defended (note AG did not defend domestic partnership laws; WI Court allowed Lambda Legal to intervene)			J.B. Van Hollen, R	No	Constitutional and statutory	Federal	2014	Overtured
Wyoming	Appointed by governor	Defended but did not appeal District	Futile/ wasted resources		Peter K. Michael (R governor)	No	Statutory	Federal	2014	Overtured

\* DCI state = "Direct Constitutional Amendment" State, meaning the initiative does not require legislature's participation (Krislov and Katz, 2008; Lupia et al., 2010)

\*\*Note that for "overtured," it could be through Circuit ruling rather than direct ruling

\*\*\* Citations available on request