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The Separation of Powers and the Federal and State Executive Duty to Review the Law

Honorable William H. Pryor Jr.[†]

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

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1. Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905 (1990).

2. Many scholars have cited and expanded on Judge Easterbrook's argument. *See, e.g.*, Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 Colum. L. Rev. 507 (2012); Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 Wm. & Mary Bill Rts. J. 81 (2007); Saikrishna Prakash & John Yoo,

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

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

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

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

5. *Id.* at 924.

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

7. *Id.*

8. *Id.*

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

10. *Id.* at 2684–89.

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

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

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

11. Juliet Eilperin, *State Officials Decline to Defend Some Divisive Laws*, Wash. Post, July 19, 2013, at A1; Jess Bravin, *Gay Marriage a Test for State Laws' Defenders*, Wall St. J., Mar. 8–9, 2014, at A6; Matt Apuzzo, *Holder Sees Way to Curb Bans on Gay Marriage*, N.Y. Times, Feb. 25, 2014, at A1.

12. Press Release, Commonwealth of Va. Office of the Att'y Gen., Attorney General Herring Changes Virginia's Legal Position in Marriage Equality Case (Jan. 23, 2014), *available at* http://www.oag.state.va.us/index.php/media-center/news-releases/96-attorney-general-herring-changes-virginia-s-legal-position-in-marriage-equality-case.

13. Amanda Lamb, *NC to Stop Defending Marriage Amendment*, WRAL.com (July 29, 2014), http://www.wral.com/nc-to-stop-defending-marriage-amendment/13846324/.

14. Aaron Blake & Sean Sullivan, *Kentucky Gov. Steve Beshear (D) Will Appeal Pro-Gay Marriage Ruling*, Wash. Post (Mar. 4, 2014), http://www.washingtonpost.com/blogs/post-politics/wp/2014/03/04/kentucky-wa ath61 TD7.rc'post-vn8an,

Colorado, for example, published an op-ed in the *Washington Post* on February 3 in which he argued that "this practice corrodes our system of checks and balances, public belief in the power of democracy and ultimately the moral and legal authority on which attorneys general must depend."[19] General Suthers acknowledged that on some occasions an attorney general cannot "in good faith defend a law," but he argued that an attorney general must defend a controversial law so long as it is not "'clearly unconstitutional'" based on binding precedent of the Supreme Court.[20] In January, Attorney General Lawrence Wasden of Idaho argued that he had an "obligation as the attorney general . . . to defend [his] state's view, the people's view."[21] In March, former attorney general Ken Cuccinelli of Virginia criticized his successor, Mark Herring, for refusing to defend the Virginia amendment on marriage.[22] Cuccinnelli asserted, "If you're going to run for attorney general, this is part of the job. . . . If you're not willing to do it, you ought not run."[23] In Michigan, Attorney General Bill Schuette argued that he was "duty-bound to defend the wishes of the voters. To do anything less would be a dereliction of duty."[24] And conservative commentator Ed Whel

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

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

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

As Judge Easterbrook explained in his lecture, early presidents often vetoed legislation on constitutional grounds.[29] President Washington vetoed the first bill apportioning representatives among the states.[30] President Madison vetoed a bill chartering a church in the District of Columbia[31] and a bill for internal improvements[32] both on constitutional grounds. And President Jackson vetoed a bill to reauthorize the national bank[33]

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

What about the argument that a state attorney general owes a duty, as a lawyer, to his client—the State or the people—to make an argument in defense of state law? Conservative commentator Ed Whelan's central criticism of the state attorneys general who have refused to defend the marriage laws of their states is that those attorneys general have abandoned their client. But the problem with that argument is that the state attorney general *is* the client.[42]

II. Examples from My Service in an Office of State Attorney General

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

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

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

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

45. *Id.*

46. *Id.*

47. *Id.*

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

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

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

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

49. 240 F.3d at 956.

50. 378 F.3d at 1250.

51. *Id.*

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

53. *Id.* at 850–51 n.2.

54. *Id.* at 852.

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

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

I disagreed with Chief Justice Moore's approach. I instead assisted the associate justices of the state supreme court in removing the monument and complying with the federal injunction.[60] Although I did not think that a depiction of the Ten Commandments in a courthouse necessarily violated the Constitution, I recognized that Article III of the Constitution vested the federal courts with the judicial power to decide cases or controversies arising under the Constitution and laws of the United States. I recognized that Chief Justice Moore's refusal to comply with an injunction entered after he had been given an opportunity to de

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

In the highest profile representation that General Sessions appointed me to undertake,[68] I confessed that a state judicial ruling violated the constitutional rights of voters.[69] A state circuit court had ordered state election officials to count previously uncounted absentee ballots in the election for Chief Justice of Alabama in 1994.[70] In keeping with the longstanding interpretation of state officials, the local election officials had refused to count any absentee ballot for which a voter's signature had not been witnessed by either two adults or a notary public.[71] When the state circuit court ordered the counting of the excluded ballots after the election, the challenger in the election for Chief Justice filed a federal complaint and obtained an injunction to stop the after-the-fact changing of the rules of the

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

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

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

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

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

76. *Id.* at 1071.

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

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

III. The Comparative Advantages of Executive Review

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

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

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

The Constitution is not the exclusive province of the judiciary. The Constitution begins with three words—"We the people"—because the Constitution belongs to the American people. The American people wrote it, ratified it, and many times amended it, and many thousands of Americans died fighting for it. The American people own it. And the American people have a right to demand that our leaders obey it as the supreme law of the land. The right to make that demand explains why the Constitution crisTD -.0005 TcW11.4i6 0 s—.

Facilitating Incomplete Contracts

Wendy Netter Epstein[†]

Abstract

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

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

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