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**DECLINING CONTROVERSIAL CASES:
HOW MARRIAGE EQUALITY CHANGED
THE PARADIGM**

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Abstract: Until recently, state attorneys general defended their states' laws as a matter of course. However, one attorney general's decision not to defend his state's law in a prominent marriage equality case sparked a cascade of attorney general declinations in other marriage equality cases. Declinations have also increased across a range of states and with respect to several other contentious subjects, including abortion and gun control. This Essay evaluates the causes and implications of this recent trend of state attorneys general abstaining from defending controversial laws on the grounds that those laws are unconstitutional, focusing on the marriage equality cases as its example. It argues that reputational factors, in addition to legal and political considerations, play a role in determining whether attorneys general will defend their states' laws when they may have a basis for declining to do so. Moreover, the impact of nondefense goes beyond the directly connected litigation and can have negative ramifications for the public's perception of the legal system and for the functioning of direct democracy.

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INTRODUCTION

Before the recent wave of marriage equality litigation,¹ state attorneys general (“AGs”) rarely declined to defend state laws in court.² But now, the dynamic has changed. In 2008, the Attorney General of California declined to defend a state constitutional amendment prohibiting same-sex marriage against a challenge in state court, on the grounds that the amendment was unconstitutional.³ In 2009, he again declined to defend that law in federal court, in the case that became *Hollingsworth v. Perry* and resulted in

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¹ The litigation over marriage equality consisted of a series of challenges to state laws and constitutional provisions that limited the right to marry to heterosexual couples. See *Marriage Litigation*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/litigation> (last visited Sept. 30, 2015) (summarizing marriage equality litigation between June 2013 and June 2015). This litigation culminated in the Supreme Court’s decision in *Obergefell v. Hodges* that such restrictions on the right to marry violate the U.S. Constitution. 135 S. Ct. 2584 (2015); see also discussion *infra* Part II.A.

² Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2134–38 (2015).

³ Answer Brief in Response to Petition for Extraordinary Relief at 5, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (No. S168047), <http://www.courts.ca.gov/documents/s168047-answer-response-petition.pdf>. The challenged constitutional amendment provided that “[o]nly a marriage between a man and a woman is valid and recognized in California.” CAL. CONST. art. I, § 7.5, *invalidated by* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); see also CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE 128 (2008), <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop8>. The *Strauss* plaintiffs challenged the new law in state court as an illegal revision of the California constitution. See *Strauss*, 207 P.3d at 62.

the legalization of same-sex marriage in California.⁴ When the Supreme Court granted certiorari in *Hollingsworth* in 2012, it raised the profile of the nondefense question by asking the parties to brief the issue of the private intervenors' standing to defend the law in the absence of a defending state official.⁵ Then, when the Court found in 2013 that the intervenors lacked standing, it made front-page news of the California AG's discretion not to defend a law he deemed unconstitutional.⁶ At the same time, the reasoning in the Court's simultaneous decision in *United States v. Windsor*, while not addressing the question directly, provided a stronger legal basis for the argument that heteronormative state marriage laws were unconstitutional.⁷

Thus, the paradigm changed; rather than defense being the norm and nondefense being a rare exception, all AGs from states in which marriage laws were challenged found themselves publicly questioned about whether they intended to defend the arguably unconstitutional laws.⁸ Whichever way they decided—to defend or not to defend—they were subjected to public judgment for their decisions.⁹ Beginning slowly in 2012 and then with increasing rapidity in 2013 and 2014, more state AGs refused to defend their states' marriage laws on

⁴ Attorney General's Answer to Complaint in Intervention, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292 VRW), 2009 WL 2842155; *see also Perry*, 704 F. Supp. 2d at 928 (observing, in striking down Proposition 8 as unconstitutional, that the state AG had declined to defend the law), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁵ *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012).

⁶ *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013); Robert Barnes, *Supreme Court Strikes Down Key Part of Defense of Marriage Act*, WASH. POST (June 26, 2013), http://www.washingtonpost.com/politics/supreme-court/2013/06/26/f0039814-d9ab-11e2-a016-92547bf094cc_story.html; Adam Liptak, *Supreme Court Bolsters Gay Marriage with Two Major Rulings*, N.Y. TIMES (June 27, 2013), <http://www.nytimes.com/2013/06/27/us/politics/supreme-court-gay-marriage.html>.

⁷ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

⁸ *See, e.g.*, Matt Comer, *Virginia's Marriage Ruling Pressures North Carolina*, QNOTES (Feb. 14, 2014, 10:03 AM), <http://goqnotes.com/27630/virginias-marriage-ruling-pressures-north-carolina/> (discussing pressure on the North Carolina AG to consider nondefense); *Oregon Won't Defend Gay Marriage Ban in Lawsuit*, USA TODAY (Feb. 21, 2014, 12:44 AM), <http://www.usatoday.com/story/news/nation/2014/02/21/oregon-gay-marriage-ban/5669719/> (reporting that a non-defending AG in Oregon was both praised and criticized for her declination decision while defending AGs in Colorado and Texas were asked to consider nondefense).

⁹ *See, e.g.*, *Oregon: Attorney General Won't Defend Ban on Gay Marriage Lawsuit*, N.Y. TIMES (Feb. 20, 2014), <http://www.nytimes.com/2014/02/21/us/oregon-attorney-general-wont-defend-ban-on-gay-marriage.html> (reporting that the Oregon AG was praised and criticized for nondefense); *see also* John Cheves, *Beshear: Kentucky Will Appeal Federal Judge's Ruling in Same-Sex Marriage Case Without Conway's Help*, LEXINGTON HERALD-LEADER (Mar. 4, 2014), <http://www.kentucky.com/2014/03/04/3120213/live-at-1030-am-attorney-general.html#storylink=cpy>; Craig Jarvis, *LGBT Group Calls on Cooper to Oppose Same-Sex Marriage Law*, NEWS & OBSERVER: UNDER THE DOME (Raleigh, N.C.) (Jan. 24, 2014), <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article10291202.html>.

grounds of unconstitutionality.¹⁰ In the consolidated marriage equality cases decided by the Supreme Court in 2015, private attorneys represented one of the defending states' interests because that state's AG refused to participate in the defense.¹¹

While the trend of constitutional nondefense is most dramatic in the marriage equality context, it is emerging in other controversial cases as well. Since that first decision not to defend a marriage law in 2008, state AGs in Arizona, Illinois, Nebraska, Pennsylvania, New Jersey, Virginia, and California have also declined to defend laws on contentious subjects such as abortion, gun control, immigration, and failing public schools.¹² In each instance, the non-defending AGs have cited their determinations that those laws were unconstitutional.¹³

The rationale for nondefense is that the AG's responsibility to uphold the law extends not only to the state's laws and constitution, but also to the federal law and Constitution. Thus, if an AG concludes that a challenged state law or constitutional provision violates the federal Constitution, she may determine that

¹⁰ Michael Biesecker, *NC Attorney General Won't Defend His State's Gay Marriage Ban*, CHRISTIAN SCI. MONITOR (July 28, 2014), <http://www.csmonitor.com/USA/Latest-News-Wires/2014/0728/NC-attorney-general-won-t-defend-his-state-s-gay-marriage-ban>; Niraj Chokshi, *Seven Attorneys General Won't Defend Their Own States' Gay Marriage Bans*, WASH. POST: GOVBEAT (Feb. 20, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/02/20/six-attorneys-general-wont-defend-their-own-states-gay-marriage-bans/>.

¹¹ See Respondent's Brief in Support of Petition for Certiorari, *Bourke v. Beshear*, 135 S. Ct. 1041 (2015) (No. 14-574). Kentucky was represented by private attorneys, while the other defendant states were represented by their respective AGs. See *id.*; see also, e.g., Brett Barrouquere, *Kentucky Governor to Appeal Gay Marriage Ruling with Outside Counsel*, HUFFINGTON POST (Mar. 4, 2014, 11:17 AM), http://www.huffingtonpost.com/2014/03/04/kentucky-governor-gay-marriage-appeal_n_4896731.html (reporting an announcement by Governor Steve Beshear of Kentucky that the state government would retain outside counsel to take the appeal to the Supreme Court, following the state AG's declination to do so himself).

¹² See, e.g., Tracie Mauriello, *Refuseniks: Some Attorneys General Play a New Role Declining to Enforce Laws*, PITTSBURGH POST-GAZETTE (Dec. 21, 2014, 12:00 AM), <http://www.post-gazette.com/local/2014/12/21/Refuseniks-some-attorneys-general-play-a-new-role-declining-to-enforce-laws/stories/201412180301> (discussing decisions not to defend gun control, immigration, and school laws in Arizona, Pennsylvania, New Jersey, and Virginia); *Nebraska Attorney General Refuses to Defend State's Abortion Screening Law*, FOX NEWS (Aug. 18, 2010), <http://www.foxnews.com/politics/2010/08/18/nebraska-attorney-general-refuses-defend-states-abortion-screening-law/> (reporting on the Nebraska AG's decision not to appeal a ruling enjoining the enforcement of a state law concerning health screenings for women seeking abortions); cf. Anna Stolley Persky, *District Attorneys Are Declining to Defend Controversial State and Federal Laws*, A.B.A. J. (Mar. 1, 2013, 9:40 AM), http://www.abajournal.com/magazine/article/district_attorneys_are_declining_to_defend_controversial_state_and_federal/ (discussing decisions not to defend abortion and gun control laws in Illinois and Nebraska).

¹³ Mauriello, *supra* note 12 (discussing decisions not to defend gun control, immigration, and school laws in Arizona, Pennsylvania, New Jersey and Virginia); Persky, *supra* note 12 (discussing state officials' decisions not to defend laws in Illinois and Nebraska).

she should best fulfill her obligations by affirming the rights protected by the federal Constitution rather than defending the putatively unconstitutional state rule.¹⁴ As such, nondefense of laws by the AG on grounds of unconstitutionality is usually legally permissible,¹⁵ although the extent of the AG's authority varies from state to state,¹⁶ and the scope of that permissibility is debated.¹⁷ The open question is whether it is desirable for AGs to have the discretion to make defense decisions based on their own assessments of the challenged laws' constitutionality; the recent spate of nondefense decisions has given this question urgency.

This Essay evaluates the causes and implications of AGs' nondefense decisions. Concerning the causes, some have asserted that state AGs are focused primarily on their legal judgments about constitutionality in their decision-making about whether to defend.¹⁸ Others have argued that AGs are motivated primarily by political concerns with re-election,¹⁹ or by both legal and political considerations.²⁰ I suggest that nondefense decisions can be better understood as a blend of reputational considerations with the identified legal and political factors.²¹ Taking reputation into account helps to explain the sudden upsurge in declinations as well as the distribution across states with varying degrees of public and political support for the AGs' positions on the issues in question. Specifically, I contend that the trigger for this cascade of declinations was the national publicity of the AG's decision not to defend in the California marriage equality litigation. This had the unintended consequence of publicly highlighting the AG's authority to exercise discretion in such matters and thereby shifted the general perception of defense from an obligatory duty to a discretionary judgment reflecting the AG's values and character. Accordingly, any attempts to dissuade AGs from declining cases (or to persuade them to do so carefully and infrequently) will be more successful if the rules surrounding AGs' duties to defend are designed to avoid triggering AGs' reputational concerns by constraining the AGs' discretion to decline to defend.

The immediate implications of nondefense on the litigation process have also been thoroughly debated, with some arguing that nondefense promotes ro-

¹⁴ Devins & Prakash, *supra* note 2, at 2105; Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 221–22 (2014).

¹⁵ Devins & Prakash, *supra* note 2, at 2105; Shaw, *supra* note 14, at 236.

¹⁶ Devins & Prakash, *supra* note 2, at 2127–34; Shaw, *supra* note 14, at 230–34.

¹⁷ See Devins & Prakash, *supra* note 2, at 2127–34; Shaw, *supra* note 14, at 234; Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 IND. L.J. 513, 542–44 (2015) (arguing for a standard based on Rule 11 of the Federal Rules of Civil Procedure); see also *infra* Part II.B.

¹⁸ Shaw, *supra* note 14, at 221–22; Zoeller, *supra* note 17, at 528–35.

¹⁹ Devins & Prakash, *supra* note 2, at 2140.

²⁰ Jeremy R. Girton, Note, *The Attorney General Veto*, 114 COLUM. L. REV. 1783, 1804–08 (2014); see also *infra* Part II.B.

²¹ See *infra* Part IV.

bust, genuine arguments before the courts and others contending that nondefense harms or even undermines the integrity of the process.²² In this Essay, I suggest that we should also take into account the expressive effects of nondefense: what nondefense decisions communicate to the public, both about the cases and legal issues at hand and about the legal system and the democratic process more generally. While many actions by state AGs go unnoticed by the public and have implications only within the litigation process,²³ nondefense decisions have been well publicized and are highly visible to the public at large.²⁴ Concerning the immediate cases and legal issues, I argue that state AGs' nondefense decisions have the positive effect of communicating the AGs' legal positions emphatically and clearly to the public and, in the marriage equality cases, of mitigating slightly the stigma associated with the relevant laws. But more broadly, and especially where laws produced through direct democracy²⁵ are concerned, I contend that these nondefense decisions represent a reclaiming of power from the voters that risks undermining public trust in the AG's role and the legal process.²⁶

The two factors that I am adding to the discussion about state AGs' nondefense decisions—reputation-building and expressive effects—have eluded recognition thus far because they are rarely discussed directly, but rather must be gleaned from the subtext of AGs' public statements. However, because they influence both the causes and the implications of these nondefense decisions, they are nonetheless important. I rely on two well-established theories to access these factors and provide the analytic framework for this Essay.²⁷ The first theory, expressivism, provides a set of concepts for evaluating the communicative effects

²² See, e.g., Girton, *supra* note 20, at 1812–15 (arguing that nondefense is a threat to entrepreneurial statutes); Shaw, *supra* note 14, at 221–22 (summarizing major scholarly positions on the implications of nondefense); Zoeller, *supra* note 17, at 535–37 (arguing that nondefense undermines the rule of law).

²³ Cf. Editorial, *Attorneys General for Sale*, N.Y. TIMES (Nov. 20, 2014), http://www.nytimes.com/2014/11/21/opinion/attorneys-general-for-sale.html?_r=0 (observing that "[t]he position of attorney general is often both extremely powerful and relatively low-profile").

²⁴ See, e.g., Jess Bravin, *Gay Marriage Tests State Attorneys General*, WALL ST. J. (Mar. 7, 2014), <http://www.wsj.com/articles/SB10001424052702304732804579423591152481248> (reporting on several state AGs' refusals to defend their states' heteronormative marriage laws); Michael A. Lindenberger, *Kentucky's Attorney General Explains Why He Won't Defend Gay Marriage Ban*, TIME (Mar. 4, 2014), <http://time.com/12568/kentucky-gay-marriage-jack-conway/> (discussing such a situation as it unfolded in the Kentucky); John W. Suthers, Opinion, *A "Veto" Attorneys General Shouldn't Wield*, WASH. POST (Feb. 2, 2014), https://www.washingtonpost.com/opinions/a-veto-attorneys-general-shouldnt-wield/2014/02/02/64082fc8-887e-11e3-a5bd-844629433ba3_story.html (evaluating the wisdom of these decisions not to defend particular laws); see also Devins & Prakash, *supra* note 2; Aziz Huq, *Enforcing (but Not Defending) Unconstitutional Laws*, 98 VA. L. REV. 1001 (2012).

²⁵ "Direct democracy" refers to modes of legislation in which citizens vote directly on whether to enact a law, such as ballot initiatives and legislative referenda. See *infra* Part III.C.

²⁶ See *infra* Part IV.

²⁷ See *infra* Part III.

of laws and legal actions.²⁸ The second, preference falsification theory, develops a set of factors for understanding public choices like the nondefense decisions.²⁹

Part II of this Essay reviews the development of the recent trend of state AGs declining to defend controversial laws and the existing literature evaluating this phenomenon. Part III explains expressivism's framework for understanding the social significance of laws and legal actions and evaluates the implications of state AGs' nondefense decisions using the expressive framework. Part IV assesses the causes of the sudden upsurge in declination decisions, arguing that this trend can be best understood as resulting from a blend of reputational, political, and legal considerations predicted by preference falsification theory. Part V presents my conclusions.

II. BACKGROUND

A. Nondefense in the Same-Sex Marriage Cases

The recent nondefense trend originated in the context of the wave of marriage equality litigation that began in the 1990s and culminated in the Supreme Court's decision mandating marriage equality nationwide in 2015.³⁰ This roughly twenty-year period saw several iterative cycles of legislation and litigation concerning the legality of same sex marriage in the states.³¹ This history is

²⁸ See *infra* Part III.

²⁹ See *infra* Part III.

³⁰ See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that state law restrictions on homosexual couples' right to marry are unconstitutional); *Marriage Litigation*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/litigation> (last visited Sept. 30, 2015) (summarizing marriage equality litigation between June 2013 and June 2015).

³¹ In the early 1990s, no state permitted same-sex marriage, and litigation challenging heteronormative marriage laws was entirely unsuccessful. However, some states' laws did not expressly prohibit same-sex marriage; the limitation of marriage to heterosexual couples, instead, was implicitly understood. See, e.g., *Same-Sex Marriage Laws*, NAT'L CONF. ST. LEGISLATURES (June 26, 2015), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx> (noting that seven states had laws directly prohibiting same sex marriage before 1993). Following a 1993 Supreme Court of Hawaii case finding that the state must have a compelling reason for denying homosexual couples the right to marry under the state constitution, *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), and the enactment of the federal Defense of Marriage Act (DOMA) of 1996, Pub. L. No. 104-199, 110 Stat. 2419, *invalidated in part by* *United States v. Windsor*, 133 S. Ct. 2675 (2013), many state legislatures and voters passed new laws and constitutional provisions expressly prohibiting same-sex marriage. See *Same-Sex Marriage Laws*, *supra* (noting that thirty-three states adopted new marriage laws or enacted constitutional provisions prohibiting same-sex marriage between 1993 and 2000). Homosexual couples who wished to marry or to have their out-of-state marriages recognized in their home states filed lawsuits challenging these heteronormative marriage laws, at first primarily focusing on state constitutional claims, and later arguing that such laws violated the federal Constitution. See William C. Duncan, *Avoidance Strategy: Same-Sex Marriage Litigation and the Federal Courts*, 29 CAMPBELL L. REV. 29, 29-34 (2006) (reviewing pre-2006 marriage equality litigation). In turn, more states enacted marriage laws and constitutional provi-

important, because it created the setting of a hotly contested debate over the morality, legality, and social approval of marriage equality. As a consequence, when the nondefense question arose, the profile of the marriage equality issue with which it was associated could not have been higher: nondefense decisions that might have slid under the radar in a less contentious context instead became a highly publicized, intensely debated subject in their own right.³²

It is also important to understand the scope of state AGs' responsibilities and authority. While there is wide variation in the state laws and constitutional provisions governing AGs,³³ some generalizations can be made about the state AG's usual role. The AG is usually an elected official who is independent of the governor and other executive-branch officials.³⁴ Typically, a state's laws and constitutional provisions are defended by its AG as an ordinary part of the AG's duties, in addition to prosecuting cases, advising other state officials, and making policy.³⁵ However, state law rarely speaks directly and specifically to the precise scope of the AG's duty to defend.³⁶

The new declination trend began when California Attorney General Jerry Brown declined to defend Proposition 8, the ballot initiative that produced California's constitutional amendment prohibiting same-sex marriage, first in state court in 2008³⁷ and then in federal court in 2009.³⁸ This pair of decisions was a

sions, either in response to or in anticipation of such court challenges. *See Same-Sex Marriage Laws, supra*. Gradually, some states began to pass new laws and constitutional amendments granting homosexual couples marriage rights. *See id.*

³² *See, e.g.,* Jess Bravin, *Gay Marriage Tests State Attorneys General*, WALL ST. J. (Mar. 7, 2014), <http://www.wsj.com/articles/SB10001424052702304732804579423591152481248> (reporting on several state AGs' refusals to defend their states' heteronormative marriage laws); Michael A. Lindenberger, *Kentucky's Attorney General Explains Why He Won't Defend Gay Marriage Ban*, TIME (Mar. 4, 2014), <http://time.com/12568/kentucky-gay-marriage-jack-conway/> (discussing such a situation as it unfolded in the Kentucky); John W. Suthers, Opinion, *A "Veto" Attorneys General Shouldn't Wield*, WASH. POST (Feb. 2, 2014), https://www.washingtonpost.com/opinions/a-veto-attorneys-general-shouldnt-wield/2014/02/02/64082fc8-887e-11e3-a5bd-844629433ba3_story.html (evaluating the wisdom of these decisions not to defend particular laws); *see also* Devins & Prakash, *supra* note 2; Aziz Huq, *Enforcing (but Not Defending) Unconstitutional Laws*, 98 VA. L. REV. 1001 (2012).

³³ Devins & Prakash, *supra* note 2, at 2122–34 (reviewing state laws and constitutional provisions defining state AGs' authority).

³⁴ Forty-three states allow for the election of their AG, while five states allow the governor to appoint her, one state allowing the legislature, and one state allowing its supreme court. *See* Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 530 (1994); *see also* *Attorney General*, BALLOTPEdia, http://ballotpedia.org/Attorney_General (last visited Oct. 16, 2015).

³⁵ *See* Clayton, *supra* note 34, at 531; Devins & Prakash, *supra* note 2, at 2122–34.

³⁶ Devins & Prakash, *supra* note 2, at 2130 (reviewing state statutes on the duty to defend).

³⁷ Answer Brief in Response to Petition for Extraordinary Relief, *supra* note 3, at 5. The California marriage law was a new constitutional provision created by a ballot initiative, stating

turning point for constitutional nondefense, in two senses. First, they were a dramatic change from past practice.³⁹ Notably, it was the first time an AG in any state declined to defend his state's marriage law on the grounds that heteronormative marriage laws were unconstitutional.⁴⁰ In addition, as detailed in the Introduction to this Essay, the nondefense decision in the federal case became very well known when the Supreme Court considered its ramifications for the standing of intervening private defenders when the case appeared before the Court during the October 2012 Term.⁴¹ As such, the Court's grant of certiorari and subsequent decision that the private intervenors lacked standing⁴² sparked public recognition that an AG's defense of putatively unconstitutional cases was discretionary and thus reflected on the AG's reputation, as discussed *infra*.

At the time that California AG Brown made his nondefense decision, the fate of the marriage equality lawsuits was unclear. The Supreme Court's 2013 decision in *United States v. Windsor* shifted the momentum in favor of equality for homosexual couples by invalidating section three of the federal Defense of Marriage Act as unconstitutional.⁴³ The vast majority of state and federal courts to hear marriage equality cases after *Windsor* found that laws prohibiting same-

that "only a marriage between a man and a woman is valid and recognized in California. See CAL. SEC'Y OF STATE, *supra* note 3, at 128 (presenting the text of Proposition 8); see also CAL. CONST. art. I, § 7.5, *invalidated by* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). The *Strauss* plaintiffs challenged the new law in California state court by arguing that it violated the California constitution. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). Brown also declined to defend the initiative in the better known federal challenge to Proposition 8, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

³⁸ See Attorney General's Answer to Complaint in Intervention, *supra* note 4.

³⁹ The 2008 decision represented a complete about-face in the California AG office's handling of this case and this issue. Up until that point, the AG's office had been participating in its usual role in the litigation concerning Proposition 8 and in the several prior rounds of legislation and litigation concerning the issue of same-sex marriage in California. See Michael A. Lindemberger, *Jerry Brown Reverses Course on Gay Marriage*, TIME (Dec. 23, 2008), <http://content.time.com/time/nation/article/0,8599,1868504,00.html>. This was also a departure from the historical practice of the AG's office; the 2008 decision was only the second time in California history that an AG refused to defend a ballot initiative. The first was when Jerry Brown's father, who was then California's AG, declined to defend an initiative that would have undermined fair housing laws many years before. Chris Megerian, *Prop. 8 Battle Gives Jerry Brown Link to His Father*, L.A. TIMES (June 28, 2013, 12:26 PM), <http://www.latimes.com/local/political/la-me-pc-california-jerry-brown-proposition-8-20130628-story.html>. Nondefense is also unusual in the broader national context; one study found only fifteen prior instances of constitutional nondefense in any state prior to 2008. Devin & Prakash, *supra* note 2, app. II. The authors note that there were numerous judgment calls in their case selection. *Id.* at 2136 (describing the study's case selection methodology).

⁴⁰ Devin & Prakash, *supra* note 2, at 2139 ("Beginning with Jerry Brown's December 2008 refusal to defend California's ban on same-sex marriage, twelve attorneys general (as of November 1, 2014) have refused to defend their state bans.")

⁴¹ *Hollingsworth*, 133 S. Ct. 2652.

⁴² *Id.* at 2666 (holding that the petitioners lacked standing to litigate the issue of Proposition 8's validity).

⁴³ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

sex marriage were unconstitutional.⁴⁴ This prompted marriage equality supporters to file lawsuits in additional states as their victories mounted.

The rate of nondefense decisions quickened following the decision in *Windsor*, which provided support for the legal position that the challenged marriage laws were unconstitutional, and *Hollingsworth*, which publicized the discretion of state AGs not to defend on that basis. In some instances, state AGs were responding to new cases filed in their states. In other cases, AGs changed their positions in ongoing litigation as a legal consensus of unconstitutionality developed in the courts (although there was not unanimity in either the state or lower federal courts before *Obergefell*).⁴⁵ Jerry Brown was alone in declining defense in a marriage equality case until 2012, when Illinois AG Lisa Madigan joined him.⁴⁶ They were followed post-*Windsor* by Pennsylvania AG Kathleen Kane, New Jersey AG John Hoffman, and New Mexico AG Gary King in 2013, and by Virginia AG Mark Herring, Oregon AG Ellen Rosenblum, Nevada AG Catherine Cortez Masto, Hawaii AG David Louie, Kentucky AG Jack Conway, and North Carolina AG Roy Cooper in 2014.⁴⁷ These decisions were made in a

⁴⁴ In sixty-one cases between June 2013 and January 2015, courts ruled that traditional marriage laws violated the federal Constitution; courts have upheld such laws in only four cases. See *Marriage Rulings in the Courts*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/marriage-rulings-in-the-courts> (last visited Oct. 16, 2015) (listing a collection of marriage equality cases).

⁴⁵ While the vast majority of courts to hear marriage equality cases post-*Windsor* found the challenged laws unconstitutional, a few courts took the opposing position. In November 2014, the U.S. Court of Appeals for the Sixth Circuit consolidated several cases and reversed the district courts' rulings of unconstitutionality by finding that the challenged laws did not violate the Fourteenth Amendment's equality guarantee. *DeBoer v. Snyder*, 772 F.3d 388, 421 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In so doing, it became the first federal appellate court to hold that such laws are constitutional since the Supreme Court's decision in *Windsor*, 133 S. Ct. 2675 (2013). See Robert Barnes, *Appeals Court Upholds Ban on Same-Sex Marriage for First Time*, WASH. POST (Nov. 6, 2014), http://www.washingtonpost.com/politics/appeals-court-upholds-bans-on-same-sex-marriage-in-four-states/2014/11/06/6390904c-65fc-11e4-9fdc-d43b053ecb4d_story.html. This produced a circuit split between the Sixth Circuit on the one hand and the Fourth, Seventh, Ninth, and Tenth Circuits, which had all held that such laws were unconstitutional, on the other. Compare *DeBoer*, 772 F.3d 388, with *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014), and *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014), and *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014), and *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2931 (2015).

⁴⁶ Chokshi, *supra* note 10.

⁴⁷ See Bieseker, *supra* note 10 (noting that the North Carolina AG would not defend the state's law); Aaron Blake & Sean Sullivan, *Kentucky Gov. Steve Beshear (D) Will Appeal Pro-Gay Marriage Ruling*, WASH. POST (Mar. 4, 2014), <https://www.washingtonpost.com/news/post-politics/wp/2014/03/04/kentucky-wont-appeal-gay-marriage-ruling/> (observing that Kentucky AG Jack Conway had announced his decision to stop defending the state's ban on same-sex marriage); Chokshi, *supra* note 10 (listing Pennsylvania, Oregon, and Nevada); Warren Richey, *New Jersey Is 14th State to Allow Gay Marriage, as Chris Christie Ends Appeal*, LAS VEGAS TRIB. (Oct. 23, 2013), <http://lasvegastribune.net/jersey-14th-state-gay-marriage-chris-christie-ends-appeal/> (New

variety of circumstances. For instance, the Oregon AG declined defense from the outset of the case, the New Jersey AG initially defended and then withdrew his appeal at the governor's request, and the North Carolina AG defended until faced with the Fourth Circuit's decision that a similar Virginia law was unconstitutional.⁴⁸ The marriage equality litigation culminated in the Supreme Court's 2015 decision in *Obergefell v. Hodges* that states must guarantee same-sex couples the right to marry.⁴⁹

B. Building on the Existing Explanations for Nondefense

There is already a substantial literature on the federal AG's authority to decline to defend laws she believes to be unconstitutional.⁵⁰ However, such decisions by state AGs have been far less studied, perhaps because such declinations were, until recently, rare. Several new articles have responded to the new nondefense trend, and this Essay builds on their work.⁵¹ For purposes of the arguments made in this Essay, the most important aspects of the existing literature are their explanations of the two issues addressed here: the causes and implications of nondefense.

Because all AGs have an obligation to represent the state as part of their professional role, they should not decline cases without reason.⁵² Usually an AG's assessment that the challenged law is unconstitutional can provide a legitimate reason not to defend, because such a determination forms the basis for an argument that the AG is fulfilling her duty to uphold the law by upholding the higher law of the Constitution.⁵³ There is disagreement over how certain that unconstitutionality must be: whether the AG's professional judgment on the matter is sufficient even in the absence of a court ruling on the matter; whether, at the other extreme, the law must directly conflict with a Supreme Court ruling so that

Jersey); Nick Wing, *Gary King, New Mexico Attorney General, Calls for End to State's Prohibition on Gay Marriage*, HUFFINGTON POST (July 23, 2013, 12:03 PM), http://www.huffingtonpost.com/2013/07/23/gary-king-gay-marriage-new-mexico_n_3639478.html (New Mexico); Press Release, Department of the Attorney General, Marriage Equality (May 5, 2014), <http://ag.hawaii.gov/wp-content/uploads/2014/01/News-Release-2014-15.pdf> (announcing that Hawaii would not defend its law).

⁴⁸ Biesecker, *supra* note 10; Chokshi, *supra* note 10.

⁴⁹ *Obergefell*, 135 S. Ct. 2584.

⁵⁰ *E.g.*, Neil Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 513 (2012); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 L. & CONTEMP. PROBS. 7, 16 (2000); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 335 (1994).

⁵¹ Devins & Prakash, *supra* note 2; Girton, *supra* note 20; Shaw, *supra* note 14; Zoeller, *supra* note 17.

⁵² There are differences in the scope of AGs' authority and responsibilities from state to state, however. *See supra* Part II.A.

⁵³ Devins & Prakash, *supra* note 2, at 2103; Shaw, *supra* note 14, at 221. *But see* Zoeller, *supra* note 17 (arguing nondefense is usually illegitimate).

there is no plausible legal argument in favor of its constitutionality and the AG would risk sanctions by defending the case; or whether some other degree of certainty on the spectrum between these extremes is sufficient.⁵⁴

But while putative unconstitutionality provides a theoretical justification for nondefense, it does not predict when AGs will choose to defend or not; in the marriage equality cases, AGs faced with the same question of whether to defend their states' marriage laws against constitutional challenges came to different determinations. Also, when an AG cites unconstitutionality as the basis for a nondefense decision, she may nonetheless be motivated by other factors in deciding to defend one possibly unconstitutional law and not to defend another. The previous scholarship focuses on two factors that a state AG might take into account in determining whether to defend a case: the AG's substantive legal analysis of the challenged law's constitutionality and the political costs and benefits of defending.⁵⁵ One view posits that AGs are motivated predominantly by their professional assessments of the constitutionality of the laws,⁵⁶ whereas another perspective treats political motivations as playing a substantial role in AGs' decisions, in addition to legal analysis.⁵⁷

These political and legal factors establish certain prerequisites that must exist before an AG will refuse to defend a controversial case: on the legal side, her professional judgment that the law is unconstitutional and on the political side, the support of her party and of a substantial portion of the electorate.⁵⁸ However, these considerations do not suffice to explain why, when those prerequisites exist, some AGs decide to defend and others do not.⁵⁹ A more robust conception of the decision-making process requires the addition of a third factor: the AG's interest in building her public reputation and long-term legacy.⁶⁰

The small body of existing literature also assesses the implications of nondefense for the litigation process. One scholar has concluded that nondefense is not usually detrimental to this process and that it can actually contribute to the

⁵⁴ Devins & Prakash, *supra* note 2, at 2127–34 (arguing that state law determines AGs' obligations); Zoeller, *supra* note 17, at 543 (arguing that unconstitutionality should be so certain that an argument for constitutionality would be frivolous).

⁵⁵ Devins & Prakash, *supra* note 2, at 2144–47; Girton, *supra* note 20, at 1804–08; Zoeller, *supra* note 17, at 528–35.

⁵⁶ Zoeller, *supra* note 17, at 528–35.

⁵⁷ Devins & Prakash, *supra* note 2, at 2144–47; Girton, *supra* note 20, at 1804–08.

⁵⁸ Devins & Prakash, *supra* note 2, at 2151–53; Shaw, *supra* note 14, at 275–76; Zoeller, *supra* note 17, at 528–35 (outlining the legal factors).

⁵⁹ *But see* Devins & Prakash, *supra* note 2, at 2144–47 (arguing that political factors explain this distribution).

⁶⁰ *See infra* Part IV.

robustness and authenticity of the constitutional arguments heard by the courts.⁶¹ Others, who view the AGs as being motivated at least in part by political benefit, are less sanguine about the effects on the process. One concludes that the withdrawal of the AG tends to have a negative impact on the defense of the state's interests, but that those deleterious effects are typically mitigated because other state actors take up the defense.⁶² Another asserts that nondefense creates a functional veto when private parties are unable to intervene and thus primarily threatens a category of "entrepreneurial statutes" for which private parties cannot gain standing and other officials are unlikely to step in.⁶³ A third writer contends that nondefense is virtually always illegitimate and destabilizing to the rule of law.⁶⁴ Thus, the practical effects of AGs' nondefense on the litigation process—at least as they are understood in the scholarly literature—seem to depend in no small part on the available alternatives for defense, which vary from state to state and from case to case.

While the prior literature focuses primarily on the tangible effects of nondefense on the litigation in the concerned case, an article by Indiana AG Gregory Zoeller also suggests that it is important to look more broadly to the impact on public perception of the legal system as a whole.⁶⁵ This touches on the idea discussed in the following Section: that the public understanding of a law or legal action is based not only in the text of the law or the tangible effects of the action, but also in its conveyed meaning or message.⁶⁶ Thus, even if the practical effects of an AG's declination are nonexistent because other state actors take up the law's defense, that nondefense decision may still undermine public trust in the legal system and the state.

III. EXPRESSIVE IMPLICATIONS OF NONDEFENSE

A. Expressivism

Expressive theory provides a framework for assessing what laws and legal actions mean in society, outside the legal system. According to legal expres-

⁶¹ This conclusion was premised on the author's observations that AGs do not always argue effectively for positions they strongly oppose and that others more genuinely persuaded of the contested law's constitutionality typically step in to make better arguments on the law's behalf. In any individual case, if a law were to go entirely undefended or were to be inadequately defended as the result of an AG's nondefense decision, this analysis would presumably reach a different conclusion. See Shaw, *supra* note 14, at 276–79.

⁶² Devins & Prakash, *supra* note 2, at 2148–49.

⁶³ Girton, *supra* note 20, at 1801–02.

⁶⁴ The only exception Zoeller would permit is when there are only frivolous arguments to be made on the law's behalf, in which case the AG would be entitled to decline to defend. Zoeller, *supra* note 17, at 542–44.

⁶⁵ *Id.*

⁶⁶ See *infra* Part IV.

sivism, the communities that are governed by a law develop their own understandings of what the law means, and these social meanings are not necessarily identical to the formal legal interpretations that are formed through legal analysis.⁶⁷ A key contribution of expressivism is its notion that the legal interpretation of a law is not the only one that matters, and that the law's exogenous social meanings are shaped in ways other than legal analysis.⁶⁸

Instead of being stated explicitly in the text of a law, a law's expressive meaning—the meaning that it conveys to the communities it governs—is determined by two other factors: by the function of the law, that is, by what it does, and by the context of the existing social norms that provide a lens for interpreting that function.⁶⁹ For example, a law restricting the use of the drug mifepristone (RU-486) for the purpose of abortion would not merely regulate a pharmaceutical product, as inscribed in the text of the law. Because it would serve the function of decreasing access to abortion and because of the social context of the ongoing public conflict over the morality of abortion, such a law would also be understood to endorse a pro-life value.⁷⁰ In this way, laws manifest official beliefs and attitudes,⁷¹ signaling the state's endorsement or condemnation of particular values.⁷² As such, debate about the policy value or the constitutionality of a law may well reflect disagreement primarily about a law's expressive meaning, rather than about the substance of the law.⁷³ In addition, a law's understood message may change over time as the social norms that inform it change.⁷⁴

Two additional aspects of expressive theory are important for analyzing AGs' nondefense decisions. First, both laws and other legal actions—like implementation, enforcement, defense, or nondefense of a law—can express social meaning. Indeed, well-publicized legal actions may in some instances be more influential with the public than the laws are themselves, because the content of our laws is often relatively inaccessible and incomprehensible to non-lawyers.⁷⁵

⁶⁷ See generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1505 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

⁶⁸ *Id.*

⁶⁹ See Sunstein, *supra* note 68, at 2021–23 (treating laws as actions and focusing on the role of social norms).

⁷⁰ See *RU-486*, NAT'L RIGHT TO LIFE, <http://www.nrlc.org/abortion/ru486/> (last visited Oct. 16, 2015); *RU-486/Medical Abortion*, NARAL PRO-CHOICE AM., <http://www.prochoiceamerica.org/what-is-choice/abortion/abortion-ru-486.html> (last visited Oct. 16, 2015).

⁷¹ Anderson & Pildes, *supra* note 68, at 1505; Sunstein, *supra* note 68, at 2026–27.

⁷² Anderson & Pildes, *supra* note 68, at 1520–21; Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 401–04 (1965).

⁷³ See Sunstein, *supra* note 68, at 2022.

⁷⁴ *Id.* at 2021; see also Anderson & Pildes, *supra* note 68, at 1524.

⁷⁵ Sunstein, *supra* note 68, at 2021–23.

Second, legal actions do not necessarily merely re-express the same meaning as the original law.⁷⁶ Instead, legal acts like the implementation and enforcement of a law can amplify the law's original message, diminish it, or create a disjuncture with it.⁷⁷ For example, a law requiring business owners to provide racks for parking bicycles might be understood to endorse environmentalism and promote exercise. Vigorous enforcement of that law by actively inspecting businesses for bike racks would amplify that message, whereas timorously enforcing it would diminish the message. Refusing to enforce the law at all would create a disjuncture with the original message.

Expressive theory has been applied in several contexts; one of these is constitutional analysis.⁷⁸ Expressivist writers have argued that legal endorsement of certain values stigmatizes particular groups, and that this expressive harm violates constitutional requirements of equality.⁷⁹ For example, the stigmatizing effect of segregation laws on African American children was a basis for the Supreme Court's decision in *Brown v. Board of Education*; the Court found that such laws violated the constitutional guarantee of equality by endorsing the idea that African Americans were different from and inferior to white Americans.⁸⁰

While some expressivist scholars focus on the constitutionality of laws' value endorsements, expressivism is also concerned with identifying the meanings that laws take on in other settings. For example, Joel Feinberg notes that the legal act of punishment can have different meanings in alternative contexts, giving the example of a government punishing its pilot who wrongfully invades another country's airspace.⁸¹ In the legal context, punishment is understood to signify disapproval of the punished act.⁸² But in the context of the government's relationship with the invaded nation, the punishment signifies the government's disavowal of and disassociation from the invasive act.⁸³ This ensures that the infringement of the other nation's territory is considered an individual, private act of the pilot, rather than an official act of the government.⁸⁴ This alternate meaning of disassociation in the international relations context serves to preserve a

⁷⁶ See Nirej Sekhon, *The Pedagogical Prosecutor*, 44 SETON HALL L. REV. 1, 14–15 (2014).

⁷⁷ *Id.*

⁷⁸ Anderson & Pildes, *supra* note 68, at 1520–21; see also Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 577 (2003).

⁷⁹ See Primus, *supra* note 78.

⁸⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954); Anderson & Pildes, *supra* note 68, at 1541–43; Sunstein, *supra* note 68, at 2022.

⁸¹ Feinberg, *supra* note 72, at 404–05.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

friendly relationship with the invaded country and avoid a counterattack or other hostilities.⁸⁵

Along similar lines, Cass Sunstein gives the example of efforts to discourage risky behavior like smoking or drug use by prohibiting or restricting it and thereby strengthening social norms against these activities, even if the ban is not widely enforced.⁸⁶ As Sunstein notes, such behavior may be rooted in social norms that reward it by treating it as daring and appealing; accordingly, if those norms can be changed, fewer people may engage in the dangerous activity, even without direct enforcement.⁸⁷ This presents a useful example of how a law's understood social meaning may vary in different communities. In communities that tend to accept government positions as authoritative, the new law may signify that the banned activity is harmful and foolish, social norms may shift accordingly, and the smoking, drug use or other dangerous activity may decrease. But among a group of people who perceive themselves as rebellious and who admire subversive behavior, the ban itself may reinforce the understanding that smoking is reckless and therefore appealing.⁸⁸

There are two key implications of these analyses. First, and most simply, the same legal act has different meanings in different contexts. The punishment of the pilot that means condemnation to a domestic audience may signify disassociation or placation in the context of international affairs. The ban that signals that smoking is harmful and undesirable to one community may indicate to another that it is attractive and desirable.⁸⁹

Second, and as important, those additional meanings are not created through the logic that created the law or legal act itself but instead develop according to the logic of the external community or process to which that meaning is relevant.⁹⁰ So punishment of the pilot means disavowal and placation in the context of international relations not because of any characteristic of the process

⁸⁵ *Id.*

⁸⁶ Sunstein, *supra* note 68, at 2027–28, 2034–35.

⁸⁷ *Id.* This is known as a “consequentialist” expressive function, whereby laws attempt to change behavior indirectly by reshaping social expectations and activating social enforcement mechanisms. MATTHEW A. EDWARDS, LEGAL EXPRESSIVISM: A PRIMER 2–3 (2009), <http://goo.gl/OI1VjH>.

⁸⁸ Sunstein does not note this possibility; instead, he offers examples of successful private efforts to shift social norms of this kind and of the use of informative campaigns. See Sunstein, *supra* note 68, at 2034.

⁸⁹ *Cf.* Sekhon, *supra* note 76, at 16 (“prosecutorial choices may differentially produce social meaning in majority and minority groups”).

⁹⁰ See generally EMANUEL ADLER, COMMUNITARIAN INTERNATIONAL RELATIONS: THE EPISTEMIC FOUNDATIONS OF INTERNATIONAL RELATIONS 13–26 (2005); ETIENNE WENGER, COMMUNITIES OF PRACTICE: LEARNING, MEANING AND IDENTITY (1998) (analyzing the processes by which communities create meaning).

by which the state metes out punishment, but because the relationships between nations are based in the exercise and recognition of sovereign power. In the context of such relationships, acts function as symbols of recognition or rejection of sovereign power. The original act of illicitly crossing a border signified the flouting of sovereign power; thus, the punishment takes its meaning in the same context, as a restoration of the recognition of that power. A failure to punish would also be understood by the part it plays in that dynamic, that is, as a further incursion on sovereign authority. Likewise, a smoking ban expresses the counterproductive message that smoking is desirable to a community of young people not because of any feature of the process of government legislation of the ban, but because status in such a community is defined by shows of independence and disregard for consequences. Smoking in the face of a prohibition offers the opportunity for a display of recklessness and thus for a higher-status position within the community.⁹¹ Thus, in order to understand the social meaning of a law, we must look to the law's function within the dynamics and norms of the relevant context.

B. Implications for Individual Cases and the Legal System

Expressivism provides a framework for analyzing the implications of state AGs' nondefense of controversial cases. Legal acts such as state AGs' nondefense decisions have disparate meanings in different contexts, depending on the internal logic of those contexts. Accordingly, nondefense produces one meaning in constitutional analysis, another in the litigation process, and yet others in different political and social environments.⁹² Some of these understandings are synergistic, while others are in tension with each other. They may also either correspond to or conflict with the tangible consequences of nondefense in the legal and political arenas.

The most immediate context is the instant case in which a decision about defense arises. Here, the decision to defend or not sends a signal to the public about the AG's assessment of unconstitutionality. Nondefense amplifies the AG's argument for overturning an unconstitutional law by aligning her actions (refusing to defend the law) with her analysis (that the law is unconstitutional). Thus, nondefense communicates the AG's legal position more clearly and emphatically to the public than if she merely stated her determination that the law was unconstitutional, but nonetheless argued to preserve the law in court.⁹³

⁹¹ Sunstein, *supra* note 68, at 2034–35 (arguing that norms are enforced through reputational effects).

⁹² Compare Shaw, *supra* note 14, at 221–22 (discussing constitutional considerations), with ADLER, *supra* note 90, at 13–26 (discussing the social meaning of laws).

⁹³ See Anderson & Pildes, *supra* note 68, at 1507–08 (“We can evaluate any vehicle of expression, whether a statement or action, in terms of how well it expresses its mental states.”); Sun-

Another expressive meaning is produced in the context of constitutional analysis. In the marriage equality cases, the constitutional analysis focused on questions of stigmatization and equality. In *Obergefell v. Hodges*, the Supreme Court found that state laws prohibiting same-sex marriage endorsed the idea that homosexual relationships are different from and inferior to heterosexual relationships, that such laws thereby stigmatized same-sex couples and their children, and that the laws accordingly violated the federal constitutional guarantee of equality.⁹⁴ Conversely, AGs' acts of nondefense endorsed the countervailing value of the equality of homosexual relationships and families. As such, nondefense created a disjuncture between the meaning of the law (that homosexual relationships were unequal and stigmatized) and the meaning of the AGs' actions (that homosexual relationships should have equal legal status to heterosexual relationships and should not be stigmatized). Accordingly, in the constitutional context, nondefense of heteronormative laws disrupted the state's endorsement of the laws' expressive message by juxtaposing the AGs' condemnation of that stigma.

Litigants' reactions to AGs' nondefense decisions in the marriage equality cases suggest that they understood nondefense as playing both of these roles. For example, in Pennsylvania, when Attorney General Kane announced that she would not defend the state's marriage law, an attorney at the Pennsylvania office of the ACLU (which filed the affected lawsuit) commented in what a journalist described as an "audibly emotional" tone: "To have the highest law enforcement official of the Commonwealth come out and say, 'I agree with you, this law is unjust,' that's huge for us."⁹⁵ But why was it "huge" for the plaintiffs, and why did it produce an "audibly emotional" reaction? The AG's decision would not make any practical difference to the defense of the suit, since Pennsylvania's Office of General Counsel would handle the case instead.⁹⁶ The strength and emotional quality of this response to a decision with no apparent tangible consequences suggest that it was not the practical effect, but the meaning conveyed by nondefense that produced the attorney's reaction. The AG's official recognition of the "unjust" nature of the law counteracted, to some extent, the harm done by the state's prior endorsement of a discriminatory, stigmatizing value.⁹⁷

stein, *supra* note 68, at 2050–51 ("For law to perform its expressive function well, it is important that law communicate well.").

⁹⁴ 135 S. Ct. 2584, 2590 (2015).

⁹⁵ Juliet Eilperin, *Pa. Attorney General Says She Won't Defend State's Gay Marriage Ban*, WASH. POST (July 11, 2013) (internal quotation marks omitted), <http://www.washingtonpost.com/news/post-politics/wp/2013/07/11/sources-pa-attorney-general-wont-defend-states-gay-marriage-ban/>. Lambda Legal represented the plaintiffs in one of the initial challenges to the state law. *Id.*

⁹⁶ *Id.*

⁹⁷ See Anderson & Pildes, *supra* note 68, at 1527–30 (discussing expressive harm).

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Another plaintiffs' attorney's reaction to an AG's nondefense decision in Illinois confirms this understanding. The media reported:

Lambda Legal's marriage project director, Camilla Taylor, said she never has had a case in which the defendants agreed with her.

It "reflects the fact that we're at a tipping point now . . . (because) our government finds these laws indefensible," she said. "It comes at a time when a form of discrimination against a class of people in our society is so shameful and reprehensible that it's incapable of defense."⁹⁸

Once again, the language chosen by the plaintiff's attorney indicates that the AG's nondefense decision manifests her repudiation of the law's stigma: it indicates that the law is not indefensible merely because it is unconstitutional but because it is "shameful and reprehensible." In each of these instances, the plaintiffs' responses also affirm that the AG's decision—to not only name the law unconstitutional but to also act on that determination by declining its defense—communicated that position more emphatically than words alone would have done.

However, another message conveyed by nondefense is destructive to the systems that create and enforce the laws. Because nondefense creates a risk that the challenged law will go entirely undefended, the AG stepping out of the process has also been understood as coopting the role of the judiciary as the arbiter of the contested issue.⁹⁹ This threat to the judicial process and the corresponding meaning of disrespect for that process is raised most acutely in the context of laws produced by ballot initiatives and so is discussed in the following section on

⁹⁸ Tammy Webber, *Illinois Gay Marriage: State Prosecutors Refuse to Defend Gay Marriage Ban*, HUFFINGTON POST (June 21, 2012, 9:39 AM), http://www.huffingtonpost.com/2012/06/21/illinois-gay-marriage-sta_0_n_1615170.html.

⁹⁹ See Zoeller, *supra* note 17, at 535–37 (arguing that nondefense undermines the rule of law). While typically another state actor does take over the defense role, the possibility, however fleeting, that no one will do so and that the judicial process will not be allowed to run its course to a binding decision is one that has raised alarm with those on both sides of the marriage equality litigation. In the Illinois case described earlier, both the plaintiffs and the Thomas More Society, which was intervening on behalf of the defense, expressed concern at the effects of nondefense on the judicial process. Rex Huppke & Stacy St. Clair, *State's Gay Marriage Ban Unlawful, Alvarez Says*, CHI. TRIB. (June 15, 2012) (internal quotation marks omitted), http://articles.chicagotribune.com/2012-06-15/news/ct-met-gay-marriage-lawsuit-20120615a_1_gay-marriage-camilla-taylor-marriage-laws.

direct democracy.¹⁰⁰

Thus, within the litigation context, nondefense sends multiple messages. From a constitutional perspective, nondefense can create a welcome disjuncture between the message conveyed by the AG's action and the stigmatizing message of an unfair law.¹⁰¹ It also serves the function of communicating the AG's legal position more clearly and emphatically than merely stating the position would do.¹⁰² However, vis-à-vis the functioning of the legal system, the AG's action can also be understood as an unwillingness to let the adversarial process play itself out and as claiming the authority that would otherwise belong to the courts. As such, it can be detrimental to public trust in the legal system as a whole.

C. Implications for Direct Democracy

Many state marriage laws are the products of direct democracy¹⁰³ processes that allow the electorate to vote directly on whether to enact a proposed statute or constitutional amendment.¹⁰⁴ Specifically, about twenty of the laws prohibiting same-sex marriage originated as legislative referenda: state constitutional provisions that were required to be referred to the voters for their approval after being passed by the legislature.¹⁰⁵ Another eleven began as ballot initiatives

¹⁰⁰ See *supra* Part III.C.

¹⁰¹ Sekhon, *supra* note 76, at 14–15.

¹⁰² See Anderson & Pildes, *supra* note 68, at 1507–08.

¹⁰³ Direct democracy can be understood in contrast to representative democracy, which is the more common mode of legislation in the United States. In representative democracy, citizens have only an indirect role in the legislative process; the voters elect representatives who then enact laws on their behalf. In direct democracy, as the name suggests, voters have the opportunity to vote directly in an election on proposed laws. Nicole Doerr, *Direct Democracy*, *The Wiley-Blackwell Dictionary of Social and Political Movements* (2013).

¹⁰⁴ See SHAUNA REILLY, *DESIGN, MEANING AND CHOICE IN DIRECT DEMOCRACY: THE INFLUENCES OF PETITIONERS AND VOTERS* 6 (2010) (discussing referenda and initiatives as mechanisms of direct democracy); see also David Masci & Ira C. Lupu, *Overview of Same-Sex Marriage in the United States*, PEW RES. CTR. (Dec. 7, 2012), <http://www.pewforum.org/2012/12/07/overview-of-same-sex-marriage-in-the-united-states/> (discussing voter-approved referenda that amended state constitutions to ban same-sex marriage). Because federal laws are passed solely by Congress, the federal AG's nondefense decisions do not present this issue.

¹⁰⁵ Alabama, Alaska, Arizona, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin's constitutional provisions were referred to the voters by the legislature. See Patrick Garvin, *A Timeline of Same-Sex Marriage in the US*, BOS. GLOBE (July 3, 2015), <https://www.bostonglobe.com/2015/07/03/same-sex-marriage-over-time/mbVFMQPyxZCpM2eSQMUsZK/story.html>; see also *Marriage and Family on the Ballot*, BALLOTEDIA, http://ballotpedia.org/Marriage_and_family_on_the_ballot (last visited Oct. 1, 2015). Every state except Delaware requires legislatively initiated constitutional amendments to be referred to the people for a vote in addition to being passed by the legislature. *Supermajority Vote Requirements*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/supermajority-vote-requirements.aspx> (last visited Nov. 5, 2015); *Amending State Con-*

proposed and approved solely by voters without requiring the legislature or the governor's concurrence.¹⁰⁶

It is the internal dynamics of direct democracy that determine the implications of AGs' nondefense decisions for direct democracy processes.¹⁰⁷ The core dynamic of direct democracy is that it transfers power to the voters in the relationship between voters and the state government by allowing voters to directly create new laws.¹⁰⁸ Ballot initiatives enable voters to gain power vis-à-vis the legislature, executive, and judiciary because they allow the voters to authorize legislation that the legislature would not pass or the governor would not sign, or that countermands a judicial ruling.¹⁰⁹ Similarly, legislative referenda require the voters' approval of the legislature's proposed constitutional amendment or special legislation for the new law to take effect.¹¹⁰ It is not by chance that this shift in power occurs; the express purpose of implementing forms of direct democracy in state government is to accomplish this transfer of power to the people.¹¹¹ Nor is this power transfer uncontested; to the contrary, resistance by state officials to voters' exercise of their authority is expected.¹¹² Like the judicial system or the legislative process, direct democracy is a mechanism for airing and resolving disagreements over particular social policies. It is also a way for voters to

stitutions, BALLOTPEDIA, http://ballotpedia.org/Amending_state_constitutions (last visited Oct. 1, 2015).

¹⁰⁶ Heteronormative marriage laws began as ballot initiatives in Arkansas, California, Colorado, Florida, Louisiana, Montana, Nebraska, Nevada, North Dakota, Ohio, and Oregon. See Garvin, *supra* note 105; see also *Marriage and Family on the Ballot*, BALLOTPEDIA, http://ballotpedia.org/Marriage_and_family_on_the_ballot (last visited Oct. 1 2015).

¹⁰⁷ See *supra* Part III.A.

¹⁰⁸ REILLY, *supra* note 104, at 6 (“[D]irect democracy provided a way for citizens to exercise more power in government . . .”). Both democracy theory and empirical studies suggest that direct democracy influences state law and policy in two ways. Voters directly pass laws that the legislature will not pass or block laws that the legislature wishes to implement. Direct democracy also indirectly incentivizes the legislature to avoid the threat of an initiative or a failed referendum by accommodating voters' preferences to a greater degree than it otherwise would. Either way, the legislature must cede some of its power over the content of the law to the voters. See Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 ANN. REV. POL. SCI. 463, 472–73 (2004).

¹⁰⁹ For example, California's Proposition 13 was passed in spite of legislative disapproval. Lupia & Matsusaka, *supra* note 108, at 465.

¹¹⁰ *Id.*

¹¹¹ See, e.g., *Perry v. Brown*, 265 P.3d 1002, 1010 (Cal. 2011) (“[T]he [California] Constitution's purpose in reserving the initiative power to the People would appear to be ill-served by allowing elected officials to nullify either proponents' efforts to ‘propose statutes and amendments to the Constitution’ or the People's right ‘to adopt or reject’ such propositions.” (quoting CAL. CONST. art. II, § 8(a))); Lupia & Matsusaka, *supra* note 108, at 476 (“[L]aws passed by voters against the wishes of legislative majorities or governors face powerful postpassage opposition that laws passed by these government entities do not.”); David B. Magleby, *Let the Voters Decide: An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 16 (1995).

¹¹² See *Perry*, 265 P.3d at 1006; see also Lupia & Matsusaka, *supra* note 108, at 475 (demonstrating that state officials do not always implement initiatives' policies).

directly counteract what the government has done or has refused to do.

Evaluated within this context, all actions that affect ballot initiatives and referenda function either as ways of affirming, enhancing, and legitimizing the voters' power to the detriment of the state government's power, or to the contrary, of denying, diminishing or delegitimizing the voters' authority while aggrandizing the authority of the state. As such, an AG's refusal to defend a marriage law that has been directly approved by voters delegitimizes the voters' authority and reclaims power from the voters for the state government. In California, for example, the AG's decision not to defend Proposition 8 was repeatedly described as subverting the authority that had been exerted by voters in passing the ballot initiative, repossessing it from the voters and for the state:

Andy Pugno, the lawyer for the campaign that won passage of the measure, accused Brown of being "intent on undercutting Prop. 8 at every opportunity" when told of the filing.

"The people of California really deserve better than to have their vote just continually questioned and second-guessed by the attorney general," Pugno said.¹¹³

Other critics opined, "It would be a travesty if . . . the people's right of initiative were allowed to be sabotaged by politicians who pick and choose, on partisan or ideological grounds, whether and when the will of the people will be defended in court."¹¹⁴

The California example also suggests that an AG's nondefense decision is particularly likely to be understood in terms of its significance for the balance of power between voters and the state in controversial cases, where the lawsuit is part of a broader political and social dispute over a contentious issue. Here, the question of the validity of same-sex marriages had been through several hard-fought rounds of public dispute in which several branches of government and the electorate itself attempted to decide the issue. The controversy began in earnest with the executive branch, when the Mayor of San Francisco unilaterally instructed clerks to issue marriage licenses to gay couples. The judiciary had the next opportunity when it heard several cases challenging the executive action; then the voters sponsored and passed a ballot initiative; and finally the question

¹¹³ Maura Dolan & Carol J. Williams, *Jerry Brown Again Says Prop. 8 Should Be Struck Down*, L.A. TIMES (June 13, 2009), <http://articles.latimes.com/2009/jun/13/local/me-gay-marriage13> (noting California AG Jerry Brown's position prior to the *Hollingsworth* case).

¹¹⁴ Harold Johnson & Damien Schiff, *Who Is for People Power? Jerry Brown or Prop 8 Sponsors?*, S.F. CHRON. (Feb. 9, 2011, 5:03 PM), <http://blog.sfgate.com/opinionshop/2011/02/09/who-is-for-people-power-jerry-brown-or-prop-8-sponsors/> (noting California AG Jerry Brown's position post-*Hollingsworth*).

returned to the state and federal courts with new lawsuits over that initiative.¹¹⁵ Accordingly, the California AG's subsequent nondefense decision was not understood as a purely legal determination, but rather as a more complicated decision made within the context of this larger contestation.¹¹⁶

Support for the understanding of the nondefense decision as reflecting the balance of power between the state and the voters comes also from AGs who have chosen to defend their states' heteronormative marriage laws. For example, the Ohio AG whose case was before the Supreme Court described his decision to defend as an affirmation of the voters' authority in producing the contested law, rather than as a substantive inquiry on his part into the law's constitutionality: "The matter will ultimately be decided by the judge on the merits. And we look forward to that argument. My job as Attorney General is to follow the will of the people."¹¹⁷

More broadly, the act of nondefense signifies a refusal to exercise the authority and resources of the state on behalf of a law produced by the voters. In practical terms, by refusing to defend a law approved by the voters, the AG reduces the voters' power by making their law more vulnerable to attack in the courts.¹¹⁸ But even when another state official steps in to defend the law, nondefense reveals the ultimate vulnerability of the voters' position: that the defense and thus the survival of their law depends on the acquiescence of state officials.¹¹⁹

Finally, the credibility of the legal system is damaged when the public believes that the AG is thwarting the will of the people or undermining the role of the judicial system through her decision not to defend a voter-approved law.¹²⁰

¹¹⁵ See *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

¹¹⁶ See Johnson & Schiff, *supra* note 114; Dolan & Williams, *supra* note 113.

¹¹⁷ Chris Geidner, *Ohio Attorney General Has No Plans to Appeal Temporary Restraining Order in Gay Couple's Case*, BUZZFEED (July 25, 2013, 8:33 PM), <http://www.buzzfeed.com/chrisgeidner/ohio-attorney-general-has-no-plans-to-appeal-temporary-restr#.gu7Dz0w0a>.

¹¹⁸ If no other official can or will step up to defend the law, the AG has what amounts to a "veto over the law." Girton, *supra* note 20, at 1813–15; see also Editorial, *Prop. 8 Ruling Blow to Direct Democracy*, ORANGE COUNTY REG. (Aug. 21, 2013, 12:28 PM), <http://www.oregister.com/articles/state-514594-officials-california.html>.

¹¹⁹ This is a corollary to the implementation problem for ballot initiatives. See Lupia & Mastsusaka, *supra* note 108, at 475 ("[T]he people who create and support winning initiatives are not authorized to implement and enforce them. Instead they must delegate these tasks to legislatures and bureaucrats.").

¹²⁰ E.g., Johnson & Schiff, *supra* note 114; see also Girton, *supra* note 20, at 1816; Bill Mears, *California High Court Hears Key Legal Dispute over Same-Sex Marriage*, CNN (Sept. 6, 2011, 7:08 PM), <http://www.cnn.com/2011/CRIME/09/06/same.sex.marriage/index.html> ("You

Accordingly, the significance of nondefense in the direct democracy context is important not only for its implications for direct democracy itself but also for its effects on the legitimacy of the legal process.¹²¹ All in all, nondefense undercuts a core goal of direct democracy by transferring power from the state to the voters.

IV. CAUSES OF NONDEFENSE

A. Reputation

Some scholarly articles and news stories have suggested that AGs have made their decisions about whether to defend controversial cases with an eye to the next elections.¹²² Certainly, AGs' nondefense decisions can be understood in part as a function of their engagement in the process of political campaigning. However, AGs also are engaged in a broader process of public reputation-building that is not limited to political campaigns. This process both influences AGs' decision-making and threatens the public's perception of the legitimacy of the litigation process.

Most state AGs are elected and presumably would like to be re-elected, either to the position of AG or to another office.¹²³ The logic of campaigning is that each of the actions a candidate undertakes may either gain or lose aggregate votes for the candidate by appealing to certain constituencies and alienating others.¹²⁴ As such, within the campaign context, AGs' decisions about whether to

want the federal courts to answer this question with only one side represented?' asked a skeptical Justice Ming Chin of same-sex marriage supporters.'").

¹²¹ The argument that AGs' nondefense decisions undermine direct democracy has been tactically deployed by those who oppose the substantive outcome of the recognition of same-sex marriage. This Essay is not intended to serve that or any other political purpose. More broadly, we should not make the mistake of conflating a descriptive observation with the political purposes for which it has been put to use. Descriptively, nondefense does shift the balance of power between the state and voters, particularly in light of the Supreme Court's decision in *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666 (2013), that initiative proponents do not have standing to defend such laws themselves. However, politically, this observation does not mandate any particular conclusions about the advisability of this shift in power vis-à-vis the consequences for any individual political issue. Other ballot initiatives that have become the subject of nondefense decisions represent different political opinions. See sources cited *supra* note 12.

¹²² See, e.g., Devins & Prakash, *supra* note 2, at 2140.

¹²³ Of the AGs whose cases are before the Supreme Court, the AGs of Michigan, Ohio, and Kentucky are elected, while the Tennessee AG is appointed by the Tennessee Supreme Court. See *NAAG Welcomes New Attorneys General*, NAAGAZETTE (Nat'l Ass'n of Attorneys Gen., Wash., D.C.), Jan. 31, 2011, at 1, <http://www.naag.org/assets/files/pdf/gazette/5.1.Gazette.pdf>; see also *About the Attorney General's Office*, OFF. ATT'Y GEN. ST. TENN., <http://www.tn.gov/attorneygeneral/aboutoffice.htm> (last visited Oct. 1, 2015); *Attorney General*, BALLOTPEdia, http://ballotpedia.org/Attorney_General (last visited Oct. 16, 2015).

¹²⁴ See generally Jared Barton et al., *What Persuades Voters? A Field Experiment on Political Campaigning*, INTERDISC. CTR. FOR ECON. SCI. (2011), <http://cess.nyu.edu/policon2012/wp->

defend their states' marriage laws can be understood as a function of their relationships to their constituencies and can be measured as the gain or loss of some number of votes. Indeed, some AGs have stated directly that their decisions are intended to be a message to voters.¹²⁵ Others, like the Ohio AG who asserted that he had to "follow the will of the people,"¹²⁶ have couched their decisions as submission to the voters' authority. While such statements refer directly to the voters' authority in passing the contested law, they also obliquely raise the issue of voters' control over the AG's re-election. There are also other factors that signal that AGs' decisions may be made in part because of their meaning in the context of campaigning, voters, and votes. For example, all but one of the AGs who declined to defend their state marriage laws were Democrats¹²⁷ and could expect the support of their party for their decisions.¹²⁸

However, the role played by political aspirations and electoral campaigns does not appear to be dispositive, at least not in all cases. For example, since public opinion was opposed to or divided on same-sex marriage in several of the states in which AGs declined to defend,¹²⁹ these AGs' decisions might well lose them votes rather than offering a political advantage. Thus, rather than analyzing AGs' decisions solely by reference to the narrow context of political campaigns, AGs' engagement in campaigns is better understood as one aspect of a multifaceted process of public reputation-building. As suggested in the discussion of expressivism *supra*, an AG's act of refusing to defend a marriage law can be understood as rejection of the stigmatizing message of the law.¹³⁰ Reciprocally, an AG's decision to defend can likewise be understood as an endorsement of the

content/uploads/2012/02/Regan-Petrie-Candidate-Canvassing.pdf (using votes gained or lost as the measure of campaign methodologies' success).

¹²⁵ See, e.g., Eilperin, *supra* note 95.

¹²⁶ See Geidner, *supra* note 117.

¹²⁷ See *AG King Won't Defend Ban on Gay Marriage*, SANTA FE NEW MEXICAN (July 22, 2013, 11:30 PM), http://www.santafenewmexican.com/news/local_news/article_7a23f6b6-f60b-5132-a955-d7aae976ee1f.html; Cheves, *supra* note 9; *U.S. Attorney General Holder Supports State Attorneys General Who Won't Defend Bans on Gay Marriage*, PITTSBURGH POST-GAZETTE (Feb. 25, 2014, 1:10 PM), <http://www.post-gazette.com/news/state/2014/02/25/Holder-supports-state-attorneys-general-who-won-t-defend-bans-on-gay-marriage/stories/201402250145#ixzz2vDeKuXxD>; see also *Attorneys General Switching Sides on Gay Marriage*, USA TODAY (Feb. 14, 2014, 4:34 PM), <http://www.usatoday.com/story/news/politics/2014/02/14/attorneys-general-gay-marriage/5492785/>.

¹²⁸ See generally Tamara Keith, *Republicans, Democrats Still Divided on Same-Sex Marriage After Ruling*, NPR (June 26, 2015, 5:17 PM), <http://www.npr.org/2015/06/26/417840352/republicans-democrats-still-divided-on-same-sex-marriage-after-ruling> (observing the partisan split on the issue of support for same-sex marriage).

¹²⁹ ANDREW R. FLORES & SCOTT BARCLAY, WILLIAMS INST., PUBLIC SUPPORT FOR MARRIAGE FOR SAME-SEX COUPLES BY STATE 6 (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Flores-Barclay-Public-Support-Marriage-By-State-Apr-2013.pdf>.

¹³⁰ See *supra* Part III.B.

law and its stigmatizing message.¹³¹

This perspective highlights why the California cases were so critical to the pattern of nondefense decisions. Before this, defending was typically perceived as routine rather than discretionary, and so it did not trigger any reputational effects.¹³² After *Hollingsworth* went to the Supreme Court and the decision not to defend became highly publicized, however, defending marriage equality cases came to be viewed as discretionary and therefore became subject to public scrutiny. Evan Wolfson, president of the advocacy organization Freedom to Marry, captured the shift this produced in the implications of defense when commenting on Virginia AG Herring's decision not to defend his state's marriage law:

“Even if an attorney general says she is not going to defend this discrimination, there will still be a full and fair hearing in court. The imprimatur of the attorney general and the state should be on the side of families, not on the side of discrimination.”¹³³

Wolfson's use of the word “imprimatur” neatly captures the expressive concept that legal acts convey official endorsement or condemnation of values.

When the AG's defense of a law is not merely routine but rather represents her imprimatur of the values the law endorses, it necessarily evokes the AG's attentiveness to the reputational consequences of that endorsement. Indeed, some AGs' statements about their defense decisions evince a concern with the implications of such endorsements for their reputations. For example, in a public statement about his decision not to appeal a court decision finding Kentucky's marriage law unconstitutional, AG Jack Conway touched on this subject:

“There are those who believe it's my mandatory duty, regardless of my personal opinion, to continue to defend this case through the appellate process, and I have heard from many

¹³¹ See *supra* Part III.B.

¹³² Cf. Devins & Prakash, *supra* note 2, at 2150 (observing that prior to the recent nondefense decisions in the same-sex marriage law context, “nondefense was rare and seemingly never pursued for political gain”).

¹³³ David Freeland, *Pressure Builds on Democratic Attorneys General to Quit Fighting Gay Marriage*, DAILY BEAST (Jan. 24, 2014, 5:45 AM), <http://www.thedailybeast.com/articles/2014/01/24/pressure-builds-on-democratic-attorneys-general-to-quit-fighting-gay-marriage.html> (quoting a statement that Wolfson had made).

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of them. However, I came to the inescapable conclusion that, if I did so, I would be defending discrimination.”

“That I will not do. As Attorney General of Kentucky, I must draw the line when it comes to discrimination.

For those who disagree, I can only say that I am doing what I think is right. In the final analysis, I had to make a decision that I could be proud of — for me now, and my daughters’ judgment in the future.”¹³⁴

Similarly, according to news reports, in discussing his decision not to defend his state’s law, Virginia AG Mark Herring pointed to a long-term historical perspective:

“There have been times in some key landmark cases where Virginia was on the wrong side, was on the wrong side of history and on the wrong side of the law,” Herring said. “And as attorney general, I’m going to make sure that the [people] presenting the state’s legal position on behalf of the people of Virginia are on the right side of history and on the right side of the law.”¹³⁵

For the same reasons, some AGs who defended their state’s marriage laws took care to distinguish their personal views from their professional actions. In Arkansas, where public opinion at the time did not favor same sex marriage, AG Dustin McDaniel emphasized his concern about his future reputation in the eyes of history:

¹³⁴ *Read and Watch Attorney General Jack Conway’s Statement on Same-Sex Marriage*, WKYT (Mar. 4, 2014, 11:30 AM), <http://www.wkyt.com/news/kynewsmakers/headlines/Read--watch-Attorney-General-Conways-same-sex-statement-248381361.html> (quoting Ky. Attorney Gen. Jack Conway, Statement at News Conference on Same-Sex Marriage (Mar. 4, 2014)). AG Conway’s emotionally fraught delivery of this statement was an additional signal that factors beyond legal analysis were at play in his decision. *See Cheves, supra* note 9.

¹³⁵ Eyder Peralta, *Virginia’s New Attorney General Will Not Defend Gay-Marriage Ban*, NPR: THE TWO-WAY (Jan. 23, 2014, 12:17 AM) (alteration in original), <http://www.npr.org/blogs/thetwo-way/2014/01/23/265050444/virginias-new-attorney-general-will-not-defend-gay-marriage-ban>.

Nearly a week before the ban was struck down, Arkansas Attorney General Dustin McDaniel cited the state's spotty civil rights history as he declared his support for marriage equality. While vowing to defend the ban in court, McDaniel became the first statewide elected official to endorse same-sex marriage. McDaniel said he voiced his opinion because he wanted to avoid following the legacy of former Attorney General Bruce Bennett, who is little remembered after he didn't fight then-Gov. Orval Faubus' efforts to keep Little Rock's schools segregated in 1957. "(Bennett) would have lost the election in '58 if he had done so, but his place in history ... would be different," McDaniel said.¹³⁶

Once the public became conscious that AGs had the discretion to choose whether to defend laws they deemed unconstitutional, they began to treat AGs' choices as indications of their positions on the values endorsed by the laws, and to judge them for it.¹³⁷ How AGs weigh the implications of nondefense for their public reputations against other legal and political considerations is elucidated by the preference falsification theory of how publicly expressed preferences are formed.

B. Preference Falsification Theory

Taken literally, nondefense means simply that the AG has determined a law is so certain to be unconstitutional that it does not bear defending. An expressivist analysis reveals that nondefense of a controversial law nonetheless signals official condemnation of the law and of the values it endorsed. Timur Kuran's theory of how public preferences are formed provides an analytic framework for understanding the role that concerns about reputation play in shaping decisions, such as nondefense, that publicly endorse controversial values and thereby risk reputational harm.

¹³⁶ *History Shades Arkansas' Gay Marriage Debate*, WASH. TIMES (May 13, 2004), <http://www.washingtontimes.com/news/2014/may/13/history-shades-arkansas-gay-marriage-debate/?page=all> ("The fear of being judged harshly by history is a powerful one in a state that is still trying to shake off the effects of the Central High fight, including a desegregation settlement with three Little Rock-area school districts that has cost the state more than \$1 billion over the past 25 years. . . . At the same time, McDaniel's worries about opposing gay marriage may not resonate throughout Arkansas. Attitudes about gay marriage haven't moved significantly in the state in recent years, even as opinions have shifted nationwide.")

¹³⁷ See, e.g., David Benkof, *Jerry Brown Flouted Gay Marriage Law. Why Not a Kentucky Clerk?*, DAILY CALLER (Sept. 2, 2015, 1:29 PM, 1:29 PM), <http://dailycaller.com/2015/09/02/jerry-brown-flouted-gay-marriage-law-why-not-a-kentucky-clerk/> (discussing the influence that government officials' personal values have had on these officials' exercises of professional discretion).

Kuran argues that a publicly aired value judgment is neither a purely intellectual judgment on the merits of an issue (here, the AG's professional judgment about the law's constitutionality) nor simply strategic calculations for gain (here, the AG's assessment of the effects of her decision on the next election).¹³⁸ Instead, Kuran breaks down the factors affecting people's decisions about what opinion they will publicly express into three parts: intrinsic utility, reputational utility, and self-expression utility.¹³⁹ Intrinsic utility denotes the individual's private, internal view.¹⁴⁰ Reputational utility represents the response the individual gets from the community when he takes a particular position, that is, the comparative effect on his social reputation.¹⁴¹ Self-expression utility is the value to the individual of publicly expressing her true private preference rather than adjusting her public position to be consistent with others' opinions, even if these private views will not be popular with others.¹⁴² These categories illuminate the concerns expressed by the Kentucky, Virginia and Arkansas AGs. In their statements, AGs were concerned not only with intrinsic utility but also with reputational utility ("How will I be judged by others for this decision?") and with self-expression utility ("Am I the kind of person who defends laws I believe to be discriminatory? Can I live with myself if I act against my own beliefs?").

Moreover, these reputational calculations are not simple, and their complexities add unpredictability to AGs' defense decisions; AGs facing similar choices may weigh the various aspects of their reputations differently and thus come to divergent conclusions. One important consideration seems to be the evolving effects on reputation over time. In the Arkansas, Virginia, and Kentucky examples discussed above, where public opinion did not favor same-sex marriage at the time of the AGs' defense decisions,¹⁴³ immediate reputational utility suggested that the AGs should defend their states' heteronormative marriage laws. However, public support for same-sex marriage was trending upward at the time of these AGs' decisions.¹⁴⁴ The lessons from prior controversial constitutional battles showed that the judgment of the future might well differ from that of the present, placing AGs' anticipated future reputational utility at odds with their present reputational utility.¹⁴⁵ Thus, a forward-looking analysis helps to explain

¹³⁸ TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* 35 (1st ed. 1995).

¹³⁹ *Id.*; see also Cass R. Sunstein, *True Lies*, *NEW REPUBLIC* (Dec. 25, 1995) (book review). Kuran uses the term "expressive utility" for what I am calling "self-expression utility." I am using the alternative term here to avoid confusion with expressive theory. Sunstein uses Kuran's rubric but applies it to the public behavior the law is attempting to influence rather than to laws and law-related actions. See Sunstein, *supra* note 68, at 2031.

¹⁴⁰ KURAN, *supra* note 138, at 35.

¹⁴¹ *Id.*

¹⁴² *Id.* at 25–35. a

¹⁴³ FLORES & BARCLAY, *supra* note 129.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

the behavior of AGs who chose not to defend their states' marriage laws despite the attendant risk to their present electoral interests. These AGs were building their reputations in a broader sense than present electability: they were likely valuing their future esteem over their present popularity.

In addition, AGs seem at times to be conflating their individual status with the reputation of the state. While the Virginia AG associated his nondefense decision with Virginia's reputation, arguing that Virginia should be on the right side of this issue, in fact it was only his office that withdrew from the case, not the State of Virginia as a whole.¹⁴⁶ Conversely, as discussed *supra*, the intense reactions of participants and observers to nondefense decisions suggest that the withdrawal of the AG does indeed convey a sense of official sanction of the plaintiffs' position,¹⁴⁷ even if other state or private attorneys defend the statue in question. This inconsistent intermingling of personal and official reputations, both on the part of the public and on the part of the AGs themselves, highlights the fact that public recognition of the AG's discretion has resulted in public judgment of the AG's personal character for acts carried out on behalf of the state.

Like the process of direct democracy, the process of reputation-building produces an exogenous meaning that is utterly different from the constitutional meaning produced in the legal process but equally legitimate in its own context. By virtue of their decisions, AGs accumulate either reputational benefit or stigma in the short term and the long term, in public and in private. As with direct democracy, this benefit or stigma is not produced by the logic of litigation but by the internal logic of reputation-building.

Thus, while reputation-building processes may seem relatively intangible as compared to the well-established, visible structures of litigation and elections, reputation-building processes and the meanings they produce are nonetheless important. AGs' anticipation of reputational effects seems to influence their decision-making about whether to defend controversial laws. The implication is that whenever AGs have the option of declining defense, especially at their discretion, reputational concerns will be implicated because their decisions to accept or decline defense will then constitute endorsements of the law rather than merely routine job performance. Any effort to discourage nondefense in controversial cases would need to mitigate those reputational concerns by limiting or eliminating that discretion.

¹⁴⁶ Ashby Jones, *Virginia AG Aims to End Ban on Gay Marriages*, WALL ST. J. (Jan. 23, 2014, 7:38 PM), <http://online.wsj.com/articles/SB10001424052702304632204579338143157996198>.

¹⁴⁷ See *supra* note 137 and accompanying text.

V. CONCLUSION

This Essay has examined the causes and implications of state AGs declining to defend nondefense controversial cases, taking the marriage equality cases as its example. In addition to the legal and political considerations that others have identified as affecting AGs' nondefense decisions, reputational factors also play a role. Taking these reputational factors into account helps us better understand AGs' decision-making. It also suggests that nondefense in controversial cases will continue to be more prevalent, now that a decision to defend has come to be viewed as discretionary and, thus, linked to reputation.

By taking into account the expressive effects of nondefense decisions as well as the tangible effects within the legal process that others have discussed, we can also better understand the public reaction to these decisions. Specifically, nondefense can have some beneficial communicative effects *vis-à-vis* individual cases and issues. However, it may also harm the perceived credibility and legitimacy of the corresponding legal processes in the eyes of the public. The effects of nondefense will vary depending on the characteristics of the law or legal action at issue and the particular contexts; if we were to evaluate the impact of nondefense on other social and political processes aside from litigation and direct democracy, we would expect to find other implications in addition to those identified here.

Examining nondefense through an expressivist lens reveals that its role can be destructive as well as constructive, both for the legal system and for other sociopolitical processes. As such, while nondefense on constitutional grounds well may be legally permissible, as others have argued, discretionary nondefense of controversial cases is probably not desirable, especially in states with robust traditions of direct democracy. Any attempts to limit nondefense will need to take into account the reputational factors that encourage AGs to decline defense, as well as the expressive implications of nondefense decisions.

