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OBAMA ADMINISTRATION'S NON-DEFENSE OF DOMA AND EXECUTIVE DUTY TO REPRESENT

KATHLEEN TIPLER*

In February 2011, the Obama Administration announced it believed the Defense of Marriage Act¹ (“DOMA”) was unconstitutional on equal protection grounds.² The Department of Justice would no longer defend DOMA in court, wrote Attorney General Eric H. Holder, but the Obama Administration would nonetheless continue to enforce it.³ The decision to enforce but not defend—while not wholly unprecedented⁴—is a peculiar one: the decision to not defend is based on an executive judgment that the statute is unconstitutional, and if a statute is unconstitutional, then an obvious implication is that the statute should not be enforced.

Why did the Obama Administration engage in this particular and peculiar parsing? The Department of Justice (“DOJ”) argued this path both respects the Executive’s constitutional obligation to “take Care that the Laws

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1. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006)).

2. See Letter from Eric H. Holder, Jr., Att’y Gen. of the United States, to Hon. John H. Boehner, Speaker of the United States House of Representatives (Feb. 23, 2011) [hereinafter Attorney General Letter], available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>

(“After careful consideration . . . the President of the United States has made the determination that . . . the Defense of Marriage Act . . . violates the equal protection component of the Fifth Amendment.”).

3. See *id.* (“[T]he President has instructed the Department not to defend the statute . . . [n]owwithstanding this determination, the President has informed that Section 3 will continue to be enforced by the Executive Branch.”).

4. See *United States v. Lovett*, 328 U.S. 303, 329 (1946) (Frankfurter, J., concurring) (upholding the government’s obligation to pay defendants for services rendered but avoiding adopting the interpretation of the statute at issue because “grave constitutional doubts will arise”); *INS v. Chadha*, 462 U.S. 919, 951 (1983) (noting that “[t]he President’s participation in the legislative process [] to protect the Executive Branch from Congress and to protect the whole people from improvident laws” was intentionally designed as part of a bicameral system of government).

be Faithfully executed,”⁵ as well as the Executive’s obligation to the Constitution.⁶ In not defending the statute, the executive branch demonstrates its belief that no “reasonable” defense of the statute’s constitutionality exists.⁷ In enforcing the statute until congressional repeal or a “definitive verdict” by the judiciary, the Executive “respects the actions of the prior Congress” and “recognizes the judiciary as the final arbiter of the constitutional claims raised.”⁸

Debates over the Obama Administration’s decision to enforce but not defend DOMA (and debates over executive non-defense and enforcement more generally) tend to balance these two competing executive duties: the duty to execute laws passed by Congress, and the duty to interpret and uphold the Constitution.⁹ Yet even the most sympathetic supporters of the Obama Administration can find this argument hard to swallow.¹⁰ It is difficult to understand the decision to not defend but enforce as driven by principled, legal reasons. There is too much complicated, back-bending parsing of what would seem to be an obvious choice (either enforce *and* defend, or do neither);¹¹ too little precedent, in both quantity and type;¹² and too many standing and jurisdictional questions.¹³

5. U.S. CONST. art. II § 3.

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

7. See Attorney General Letter, *supra* note 2 (stating that “[t]his is the rare case where the proper course is to forgo the defense of [DOMA]” despite its “longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense”).

8. *Id.*

9. See Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 509–10 (2012) (rejecting the positions of both critics and advocates for the Obama Administration’s policy on DOMA and instead suggesting that “the duties to enforce and defend are inconsistent with the Constitution’s text and structure, both of which speak to the President’s responsibility to preserve, protect, and defend the Constitution as he understands it”).

10. See Halimah Abdullah, *Optimistic Obama Touts Movement on Gay Rights, but Frustrations Remain*, CNNPOLITICS.COM (June 14, 2013, 6:38 PM), <http://www.cnn.com/2013/06/13/politics/obama-lgbt> (recognizing that “frustrations among some gays and lesbians who have been steadfast Obama supporters but had hoped for even more action during his first five years in office”).

11. See Devins & Prakash, *supra* note 9, at 509 (arguing that either position is misplaced and misunderstood by both Obama’s critics and supporters).

12. See *infra* Part I.

13. Matthew I. Hall, *How Congress Could Defend DOMA in Court (and Why the BLAG Cannot)*, 66 STAN. L. REV. ONLINE 92, 95 (2013), available at <http://www.stanfordlawreview.org/congress-defend-doma> (arguing that only the Department of Justice has the right to assert the legal interest of the United States).

While the legal rationale is not obvious, the political rationale is. The Obama Administration's decision makes sense as a response to the interests of its political base and party, as well as the growing number of Americans who believe in same-sex marriage.¹⁴ (If one is not so sympathetic, pandering might be substituted here for "response.") Not insignificantly, the Obama Administration's decision is also one that avoids a potentially high-cost, out-and-out constitutional confrontation with Congress or the judiciary.¹⁵ The decision to enforce but not defend could be reasonably interpreted as a politically beneficial "executive deferral" to the Court (in an adaptation of Mark Graber's notion of a "legislative deferral")¹⁶ or an act of symbolic "position-taking."¹⁷ Conservative commentators have said as much, anticipating or echoing Chief Justice John Roberts's remarks that President Obama failed to display "the courage of his convictions."¹⁸ Whether one is sympathetic to Chief Justice Roberts or President Obama, it is clear that what is a highly peculiar course of action from a legal perspective is not peculiar at all from a political perspective.

In this Essay, I argue that debates over the constitutionality of the Obama Administration's decision to enforce but not defend DOMA should take into account not only the duties to execute the law and uphold the Constitution but also a duty of democratic representation. Applying this duty of democratic representation enables the evaluation of behavior that might otherwise be simply dismissed as "political." All too often, constitutional analysis ignores the so-called "political" aspects of decisions, believing those aspects to be beyond constitutional judgment.¹⁹ But dismissing par-

14. See, e.g., Allison Kopicki, *Polls Show Consistent Gains in Support for Same-Sex Marriage*, N.Y. TIMES (Mar. 26, 2013, 4:30 PM), <http://thecaucus.blogs.nytimes.com/2013/03/26/polls-show-consistent-gains-in-support-for-same-sex-marriage> (reporting that the percent of Americans in support of legalizing same-sex marriage rose from forty-six percent last July to fifty-three percent).

15. See Devins & Prakash, *supra* note 9, at 511 (explaining "the modern duties to enforce and defend" persist because they "curry good will with Congress and the courts").

16. Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary* 7 STUD. AM. POL. DEV. 35 (1993). See also GEORGE LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY 8 (2003) (observing "there are instances where the opportunity for judges to influence policy arises because legislators deliberately avoid making choices about policies and instead allow judges to make those choices").

17. KEITH WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 140 (2007).

18. Transcript of Oral Argument at 12, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307_jnt1.pdf.

19. See Devins & Prakash, *supra* note 9, at 549 (noting that "[t]he separation of powers exception to the duty to enforce . . . facilitates the OLC's [Office of Legal Counsel] reputation as

ticular actions as “political” suggests certain behavior is somehow beyond principled analysis and constitutionally grounded judgments.

I argue that both the electoral character of the executive office as outlined in Article II, as well as the Take Care Clause, generate a constitutional duty of democratic representation. I give specific content to this duty by examining the principles entailed in the concept of representation. I review four models of democratic representation: 1) “promissory,” 2) “anticipatory,” 3) “gyroscopic,” and 4) “surrogate.”²⁰ These models describe empirical constraints on representative behavior (such as the pressure of elections) and normative standards for evaluating democratic representative behavior and representative institutions.²¹ I apply these models of representation to debates over the Obama Administration’s non-defense of DOMA, showing how a duty of democratic representation alters the terms of the debate and enables the constitutional evaluation of actions that otherwise appear unprincipled and purely “political.” In the case of the Obama Administration’s decision to enforce but not defend DOMA, applying a duty of democratic representation increases concerns regarding standing.²² It also suggests that fears of expansive executive power should be refocused on fostering the “systemic” aspects of democracy, such as interbranch dialogue and the quality of mass deliberation.²³

This Essay proceeds in six parts. First, I provide some brief background on DOMA and the administration’s position.²⁴ Next, I outline debates over the constitutionality of the administration’s position.²⁵ These debates balance competing executive duties to, on one hand, enforce and defend congressional statutes; and, on the other, offer an independent constitutional vision. The terms of this debate do not leave room to explain, and therefore evaluate, the so-called “political” behavior in the Obama Administration’s decision to enforce yet not defend DOMA.

being above politics,” thereby allowing them to “look[] to courts to settle the constitutionality of federal legislation”).

20. Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 515 (2003).

21. *Id.*

22. See Hall, *supra* note 13, at 95, (emphasizing that “[t]he United States certainly possesses an interest in defending any challenged federal law, but the authority to assert the interests of the United States in Court is granted by statute to the Department of Justice, and not to the BLAG or to Congress”).

23. See Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS., Summer 2004, at 105, 109 (2004) (proposing a cooperative form of interbranch constitutional interpretation in which each branch recognizes the strengths of the others).

24. See *infra* Part I.

25. See *infra* Part II.

In the third part of this Essay, I argue an executive duty of democratic representation is entailed in the Constitution.²⁶ A duty to represent may prompt fears of undisciplined interpretations of the Constitution and expansive executive power. I argue that many of these fears are unwarranted, the product of a problematic understanding of democratic representation. Using models of democratic representation developed in political science, I show how we might understand the duty to represent as a disciplined one.²⁷ In other words, democratic representation entails specific constraints and obligations. Because of the constraints and obligations entailed in the concept of representation, I suggest that explicitly balancing a duty to represent with other constitutional duties should not unduly increase worries over executive power. In the penultimate section of this Essay, I show how applying this duty to the debates over the Obama Administration's decision to enforce but not defend DOMA changes the terms of the debate, highlighting new dimensions that have been overlooked.²⁸

Deriving a duty of democratic representation from the Constitution is a reasonable interpretation of what the Constitution requires. Legal experts regularly appeal to extra-constitutional resources to fill in these contours. The same can be done with the executive duty of democratic representation. "Political" need not translate to "beyond principled constitutional judgment."

I. DOMA AND THE OBAMA ADMINISTRATION'S DECISION TO ENFORCE BUT NOT DEFEND

In 1996, the Supreme Court of Hawaii opined that prohibiting same-sex marriages might violate the state constitution's equal protection clause.²⁹ The Hawaii Supreme Court returned the case to a lower court.³⁰ During that time, voters passed an initiative amending the Hawaii constitution, rendering the equal protection question moot.³¹

26. *See infra* Part III.

27. *See infra* Part IV.

28. *See infra* Part V.

29. *See* Baehr v. Miike, 910 P.2d 112, 116 (Haw. 1996), *remanded to* 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997) ("If Hawaii permits same-sex marriages, and the Applicants' religious beliefs forbade them from solemnizing marriages of same-sex couples, then the state could not require them to do so. Such a requirement would create excessive entanglement between government and religion, resulting in a violation of the free exercise clause.")

30. Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997).

31. *See* Mark Niese, *Hawaii Legislature Approves Same-Sex Civil Unions*, NBCNEWS.COM (Feb. 16, 2011, 6:19 PM), http://www.nbcnews.com/id/41630515/ns/us_news-life/t/hawaii-

While Hawaii did not legalize same-sex marriage, the initial court decision prompted the passage of DOMA. Members of Congress argued if Hawaii or another state legalized same-sex marriage, other states would be forced to recognize these marriages under the Full Faith and Credit Clause.³² Section 2 of DOMA thus provided that states need not recognize same-sex marriages from other states, and Section 3 defined marriage as “only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”³³ Although members of Congress focused their arguments on state recognition, Section 3 of DOMA has had great influence on federal law in such areas as employee benefits, immigration, and taxes.³⁴

In the past few years, the constitutionality of Section 3 was repeatedly challenged, with a growing number of federal courts finding Section 3’s application to be in violation of equal protection (with some courts applying rational basis review, and others, heightened scrutiny).³⁵ In December of 2012, the Supreme Court agreed to review Section 3 in *United States v. Windsor*,³⁶ and in June 2013, the Court found Section 3 unconstitutional.³⁷

legislature-approves-same-sex-civil-unions/#.Uh2uPn-gY4k (reporting that the Hawaii Legislature’s “approval marked an end to . . . the gay rights movement since [*Baehr v. Lewin*]”).

32. See Joseph W. Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 4 (2005) (“In the multi-state context, the focus is on the claim that couples whose marriages are valid where celebrated have a right to have their marriages respected in other jurisdictions, pursuant to the Full Faith and Credit Clause of the Constitution.”).

33. Defense of Marriage Act § 3(a), 1 U.S.C. § 7 (2006).

34. For a discussion of executive discretion in the distribution of Federal benefits under DOMA, see Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619, 621 (2012) (“[S]ection 3 of DOMA prevents thousands of couples with valid marriages from receiving any of the more than 1,000 privileges the federal government provides married couples under tax, pension, Medicare, and Social Security benefit programs.”).

35. See, e.g., *United States v. Windsor*, 699 F.3d 169, 188 (2d Cir. 2012) (holding that DOMA is not “substantially related to an important government interest” and is thereby unconstitutional), *aff’d*, 133 S. Ct. 2675 (2013); *Massachusetts v. United States Dep’t of Health and Human Servs.*, 682 F.3d 1, 16 (1st Cir. 2012) (holding that “Congress’ denial of federal benefits to same-sex couples lawfully married in Massachusetts has not been adequately supported by any permissible federal interest”); *Massachusetts v. United States Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010) (holding that “[t]he federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state, and . . . offends the Tenth Amendment”), *aff’d*, 682 F.3d 1 (1st Cir. 2012); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 343 (D. Conn. 2012) (finding that “a ‘concern for the public fisc’ affords no rational basis for Section 3 of DOMA”); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 994 (N.D. Cal. 2012) (“[T]he Court does not find that the third proffered reason for the passage of DOMA—to defend traditional notions of morality—provides a justification that is substantially related to an important governmental objective.”).

36. *United States v. Windsor*, 133 S. Ct. 786, *aff’d*, 133 S. Ct. 2675 (2013).

Throughout most of the litigation leading up to *Windsor*, however, the Obama Administration defended the statute's constitutionality. But on February 23, 2011, Attorney General Holder notified Congress that the DOJ would no longer defend DOMA.³⁸ In prior cases in which the DOJ had defended DOMA, some circuit courts established that sexual orientation was subject to rational basis review.³⁹ In two district court cases that involved the DOJ and were not yet decided, *Windsor v. United States*⁴⁰ and *Pedersen v. Office of Personnel Management*,⁴¹ the circuit courts had not yet established the level of review.⁴² Attorney General Holder claimed "the Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation."⁴³ Using the criteria the Court had previously set forth, the Attorney General explained, "Each . . . factor[] counsels in favor of being suspicious of classifications based on sexual orientation."⁴⁴ Attorney General Holder thus argued "classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional."⁴⁵

Attorney General Holder also explained the Executive would continue to enforce and comply with Section 3, "unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality."⁴⁶ Warding off criticisms that the Executive saw itself as equal to the Judiciary or superior to Congress, Attorney General Holder wrote: "This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised."⁴⁷ After this clear declaration of the judiciary as "final arbiter," Attorney General Holder reaffirmed judicial supremacy, stating that:

If asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that

37. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) ("DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.").

38. See Attorney General Letter, *supra* note 2.

39. See *supra* note 35 and accompanying text.

40. 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

41. 881 F. Supp. 2d 294 (D. Conn. 2012).

42. See Attorney General Letter, *supra* note 2.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard.⁴⁸

With House Speaker John Boehner's advocacy, the House's Bipartisan Legal Advisory Group ("BLAG") met shortly after Holder released the DOJ memo and decided in a 3-2 vote (along partisan lines) to hire legal counsel.⁴⁹ That summer, the DOJ filed briefs arguing the unconstitutionality of DOMA.⁵⁰

II. COMPETING EXECUTIVE DUTIES AND THE "POLITICS" OF NON-DEFENSE

The Obama Administration's decision to continue to enforce but not defend DOMA was met with criticisms from many sides. Orin Kerr saw it as an "executive power grab," setting a dangerous precedent for the exercise of executive discretion in choosing which laws to defend and which to not defend—all at "the expense of Congress's power."⁵¹ While progressives might have liked President Obama's decision not to defend DOMA, the Administration's decision to apply "a contested constitutional theory within the Executive branch," was, Kerr warned, like John Yoo's use of Article II: "a power grab disguised as academic constitutional interpretation."⁵²

48. *Id.*

49. See Felicia Sonmez, House to Defend the Defense of Marriage Act in Court, Washingtonpost.com (Mar. 9, 2011, 7:26 PM), http://voices.washingtonpost.com/2chambers/2011/03/house_to_defend_the_defense_of.html (the Republican majority being Boehner, House Majority Leader Eric Cantor, Majority Whip Kevin McCarthy; and the dissenting Democrats being Minority Leader Nancy Pelosi and Minority Whip Steny Hoyer). The BLAG defense of DOMA was led by former Solicitor General Paul Clement. See, e.g., Michael D. Shear, Law Firm Backs out of Defending Marriage Act, N.Y. Times (Apr. 25, 2011, 3:45 PM), <http://thecaucus.blogs.nytimes.com/2011/04/25/law-firm-backs-out-of-defending-marriage-act-partner-resigns>. The firm that was initially hired, King & Spalding, withdrew under pressure. *Id.* Clement resigned and continued as BLAG's attorney. See *id.* (reporting that the law firm's decision to withdraw "amid pressure from gay rights groups" prompted Clement to resign out of loyalty to his client, BLAG).

50. E.g., Defendants' Brief in Opposition to Motions to Dismiss, *Golinski v. United States Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012) (No. 3:10-cv-00257-JSW), available at <http://equalityontrial.com/wp-content/uploads/2011/07/DOJ-OppToBLAGMtD.pdf>; Defendant United States' Memorandum of Law in Response to Plaintiff's Motion for Summary Judgment and Intervenor's Motion to Dismiss, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 1:10-cv-08435-BSJ-JCF), available at <http://metroweekly.com/poliglot/WindsorVUS-USResponse.pdf>.

51. Orin Kerr, *The Executive Power Grab in the Decision Not to Defend DOMA, THE VOLOKH CONSPIRACY* (Feb. 23, 2011, 3:49 PM), <http://www.volokh.com/2011/02/23/the-executive-power-grab-in-the-decision-not-to-defend-doma/>.

52. *Id.*

This apparent expansion of executive discretion seemed particularly alarming because the DOJ's rationale for non-defense has traditionally required that either a statute infringe on executive authority or that no "reasonable" defense exists.⁵³ With DOMA, there was no obvious infringement of executive authority,⁵⁴ and the fact that the DOJ had been defending DOMA prior to February 2011 seemed clear evidence that a reasonable argument remained available. Furthermore, previous arguments put forward by the academy and former members of the DOJ to justify non-defense do not seem to hold in this case. If the Executive had vetoed a statute on constitutional grounds, or even voiced constitutional concerns, the Executive might have sensibly declined to defend. For example, when former President Bill Clinton declined to defend a 1996 statute banning HIV-positive members from the military, not only did he voice constitutional concerns during the legislative process, but his defenders also argued the Executive had a particular institutional capacity or expertise as Commander in Chief to do so.⁵⁵

In the case of DOMA, however, the traditional DOJ rationales do not hold.⁵⁶ Then-President Clinton signed the original (DOMA) legislation and did not voice strong constitutional concerns as he had with the HIV-positive ban.⁵⁷ Nor is same-sex marriage an issue that clearly involves executive

53. See Marty Lederman, *John Roberts and the SG's Refusal to Defend Federal Statutes in Metro Broadcasting v. FCC*, BALKINIZATION (Sep. 8, 2005, 12:11 AM), <http://balkin.blogspot.com/2005/09/john-roberts-and-sgs-refusal-to-defend.html> ("As a general matter, the Department has traditionally adhered to a policy of defending the constitutionality of federal enactments whenever 'reasonable' arguments can be made in support of such statutes . . ."); see also Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7, 49 ("The Department of Justice routinely defends statutes that are unconstitutional under the President's view, as well as under the best understanding of applicable judicial precedent, as long as a reasonable argument can be made in their defense.").

54. See Daniel J. Meltzer, Lecture, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1231 (2012) (declaring that Obama's decision to enforce but not defend was not granted by an infringement of executive powers).

55. See Johnsen, *supra* note 53, at 56–57 (recognizing the "considerable expertise" President Clinton brought "to the issue in his role as commander in chief"). Such an argument is also contained in then Assistant Attorney General Andrew Fois's letter to Congress explaining the decision, citing "the needs and purposes of the armed services." Letter from Andrew Fois, Assistant Att'y Gen. of the United States, to Senator Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary (Mar. 22, 1996).

56. See, e.g., Meltzer, *supra* note 54, at 1231–32 (highlighting several differences from the typical situation in which the executive might refuse to enforce or defend an act of Congress, including: precedence, failure to seek Supreme Court review, statutory implementation, etc.).

57. See Chris Geidner, *Becoming Law*, METROWEEKLY.COM (Sep. 29, 2011, 3:42 AM), <http://metroweekly.com/feature/?ak=6613> (detailing the history of DOMA including excerpts of President Clinton's statement).

capacity and power, unlike military readiness.⁵⁸ That said, Dawn E. Johnsen claims that the equal protection dimension of this issue requires executive participation, and on these grounds she defends the Administration's decision to enforce but not defend.⁵⁹ She argues the President should play an important role in advancing the "understanding of constitutional equality" considering the national representative character of the office, and that the Solicitor General has always played "a special role" in protecting civil rights.⁶⁰ While both these arguments are compelling as new arguments for not defending a statute, it is not clear that either falls under the traditional DOJ rationales.

Furthermore, the Administration's decision not to defend risks problems with justiciability. If a goal of executive non-defense is to generate a constitutional dialogue among the branches and the public, then the Executive should take care that its defense and enforcement decisions promote justiciability.⁶¹ If the Department of Justice did not defend DOMA, it is not clear who could have standing to take its place. Although federal courts have so far recognized BLAG,⁶² the Supreme Court in *Windsor* raised the question of whether BLAG has standing, as well as whether the executive branch's agreement that DOMA is unconstitutional deprives the Court of jurisdiction.⁶³ The Court asked both BLAG and the DOJ to file briefs specifically on the jurisdictional question, and also appointed Harvard professor Vicki Jackson to argue the question as "friend of the court."⁶⁴ In short, the question of standing and justiciability is clearly a very real concern.

58. See Johnsen, *supra* note 53, at 56 (emphasizing that Clinton's decision not to uphold the ban on HIV-members in the military "appropriately considered the likely effect of section 567 and concluded that discharging healthy, trained, and productive members of the military would be detrimental to military efficiency and effectiveness").

59. See Dawn E. Johnsen, *The Obama Administration's Decision to Defend Constitutional Equality Rather Than the Defense of Marriage Act*, 81 *FORDHAM L. REV.* 599, 618 (2012) ("President Obama properly and admirably has chosen to take part in this historic constitutional debate, thereby providing a valuable perspective while leaving the resolution of the dispute over DOMA's constitutionality to the Supreme Court.").

60. *Id.* at 615.

61. For a powerful defense and clear framework for evaluating executive nondefense and nonenforcement grounded in promoting constitutional dialogue and sensitive to institutional capacity, see Johnsen, *supra* note 53.

62. See, e.g., *McLaughlin v. Panetta*, No. 11-11905 (D. Mass. filed Oct. 27, 2011) (dealing with Title 38 of the Armed Forces, which excludes same-sex married couples from veterans' benefits); *Dragovich v. United States Dep't of the Treasury*, 848 F. Supp. 2d 1091, 1105 (N.D. Cal. 2012) (upholding plaintiffs' equal protection claims despite "Federal Defendants' attempts to demonstrate a legitimate rationale for excluding long-term insurance for same-sex partners).

63. *United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013).

64. *Id.*

Others addressing the issue have argued that the Administration's decision to enforce but not defend was incoherent, unprincipled, and, even, cowardly. Conservative commentators joined Chief Justice John Roberts in decrying President Obama's failure to display "the courage of his convictions."⁶⁵ Professors Devins and Prakash have argued claiming such a decision only serves the DOJ, solidifying its reputation to Congress and the judiciary as politically independent and unbiased.⁶⁶ They have advocated a strong departmentalist vision of constitutional interpretation, arguing that although the Constitution contains no duty to defend, the administration has a duty to follow and uphold its independent constitutional vision.⁶⁷ Furthermore, as Prakash has pointed out elsewhere, there appears to be incoherence in arguing for heightened scrutiny of DOMA while also publicly stating opposition to same-sex marriage being "federalized."⁶⁸ In an interview on the ABC News, President Obama emphasized that he thought it was "a mistake to—try to make what has traditionally been a state issue into a national issue."⁶⁹ Given how equal protection standards might be applied to state as well as federal law, a successful argument for a heightened standard of review would seem to (eventually) invalidate state prohibitions on same-sex marriage.⁷⁰

While the above is not an exhaustive account of the current debate over the Obama Administration's decision to enforce but not defend DOMA, it is illustrative in capturing the terms of debate. On one hand, there is an executive duty to defend and enforce statutes passed by Congress.⁷¹ On the other hand, there is an executive duty to interpret and uphold an independent constitutional vision.⁷² Although the boundaries of these duties are contested, the basic terms of this debate do not vary according to the constitutional theory at work—advocates of both constitutional

65. See *supra* note 18 (highlighting Chief Justice Roberts's statement: "And if [President Obama] has made a determination that executing the law by enforcing the terms is unconstitutional, I don't see why he doesn't have the courage of his convictions and execute not only the statute, but do it consistent with his view of the Constitution, rather than saying, oh, we'll wait till the Supreme Court tells us we have no choice.")

66. Devins & Prakash, *supra* note 9, at 510.

67. *Id.* at 510–11.

68. Saikrishana B. Prakash, *Missing Links in the President's Evolution on Same-Sex Marriage*, 81 *FORDHAM L. REV.* 553, 554 (2012).

69. 12 *Transcript: Robin Roberts ABC News Interview with President Obama*, ABCNEWS (May 9, 2012), http://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-with-president-obama/story?id=16316043#UEy_laPUSuk.

70. See Prakash, *supra* note 68, at 555, 562–69 (discussing the "wholesale invalidation" of state laws governing marriage were DOMA to be subjected to the "heightened scrutiny" standard).

71. U.S. CONST. art. II §3.

72. See *supra* note 6 and accompanying text.

dialogue theories as well as departmentalist theories agree that the debate involves negotiating these two competing duties.⁷³ There is also a third “political” element. The decision to enforce but not defend DOMA smacks of political compromise: President Obama and Attorney General Holder appear to have done the work of “cool politicians who thread political needles.”⁷⁴

President Obama’s reluctance to take a clear, public stand on same-sex marriage, while having the DOJ argue against its constitutionality (yet ultimately defer to the judiciary), recalls what Graber and others have discussed, in reference to Congress, as “legislative deferrals”⁷⁵ or symbolic “position-taking.”⁷⁶ That is, the Obama Administration seems to want to appease its base while ultimately passing its hard and unpopular decisions to the judiciary, thus avoiding political backlash and electoral accountability.⁷⁷ That the DOJ filed its first brief against DOMA’s constitutionality at a low point in the news cycle—the Friday before a Fourth of July weekend—is consistent with this interpretation.⁷⁸ The strongly worded brief, recounting a long history of discrimination, including the role of the federal government, was celebrated in Lesbian Gay Bisexual & Transgender (“LGBT”) presses such as *Metro Weekly* but appears to have received little to no coverage in mainstream media.⁷⁹ The whole situation seems a little sneaky and unprincipled, fitting Kerr’s description of a “power grab disguised as academic constitutional interpretation.”⁸⁰ In order to locate a principled, constitutional decision, it seems one must engage in a significant amount of maneuvering and post hoc justification.

In the fifth section, however, I argue that this “political” element of President Obama’s decision to enforce but not defend is neither unconstitutional nor unprincipled. I suggest we read the Constitution as creating an executive duty to represent, a democratic duty that should be balanced against the duty to defend and enforce statutes, and the duty to interpret and

73. See *supra* note 23 and accompanying text.

74. Prakash, *supra* note 6, at 561.

75. See *supra* note 16 and accompanying text.

76. See *supra* note 17 and accompanying text.

77. See *supra* note 16 and accompanying text.

78. See Chris Geidner, *DOJ: Court Should Not Dismiss Karen Golinski’s Health Benefits Claim, Should Instead Find DOMA Unconstitutional*, METRO WEEKLY (Jul. 1, 2011, 10:55 PM) <http://metroweekly.com/poliglot/2011/07/doj-court-should-not-dismiss-k.html> (noting that the DOJ filed its brief for *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012), on July 1, 2011); see also *supra* note 50.

79. See, e.g., Geidner, *supra* note 78 (reporting one sentence summaries of Attorney General Holder’s letter announcing the decision to enforce but not defend DOMA).

80. Kerr, *supra* note 51.

uphold a constitutional vision. I also argue that introducing this “duty to represent” does not open the door to great executive discretion, increase of power, or unprincipled evaluations of executive power. Democratic representation contains its own constraints and its own principled standards for evaluation.

III. A DUTY OF DEMOCRATIC REPRESENTATION

The Constitution creates the Office of the President as one that is, in part, an office of representation. From this office, certain constitutional duties follow. The Constitution authorizes the President, as head of the executive branch, to represent the United States in a number of areas. The President represents the United States in dealing with foreign powers.⁸¹ The President also represents the United States internally, via the Take Care Clause, as executor of the laws.⁸² Perhaps the most obvious instance of this latter form of representation occurs in the courts, when the executive branch, via the DOJ, legally represents the United States.⁸³

The Constitution also defines the presidency as an elected office and makes this office the only one elected by the nation.⁸⁴ Thus, we also understand the presidency as an office of democratic representation, and a unique one, insofar that it is the only office of democratic representation tied to a national constituency. What these duties are precisely is not clearly specified in the Constitution. Some duties can be derived from the few details provided in Article II’s construction of the office—a four year term, now limited to two terms; indirect election by state legislatures, now the Electoral College; and that the President’s successor in emergency or removal, the Vice President, is elected by the same procedure.⁸⁵ All this points to a national constituency of states and citizens. That said, given the degree of indirectness in elections and that the second term begins but does not end with an election, there is interpretive room for a broader notion of a constituency—one that may not be precisely tied to those who directly or indirectly vote for the President. In general, the few details provided do not immediately suggest much about the sort of representative duties the office entails.

81. U.S. CONST. art II, § 2.

82. U.S. CONST. art II, § 3.

83. *See* Pub. L. No. 89-554 § 4(c), 80 Stat. 613 (1966) (codified at 28 U.S.C. § 516 (2006)) (“Except as otherwise provided by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General.”).

84. U.S. CONST. art II, § 1.

85. *Id.*

Finding such a duty to represent may seem to leave open the door to great executive discretion and the undisciplined exercise of power as long as a degree of popular and partisan support exists. Consequently, it may be hard to see how executive behavior could be disciplined by a constitution or even the rule of law. One might reasonably fear that deriving a constitutional duty to represent would lead to pure majoritarianism (or partisanship), with an emphasis on presentist political concerns.

These concerns, however, are rooted in a problematic concept of democratic representation and are alleviated by a different approach to the concept. The concept of democratic representation that generates these concerns is based on the incorrect idea that democratic representation requires representatives' "continuing responsiveness" to voter preferences.⁸⁶ The normative model underlying responsiveness goes something like this: In a representative democracy, the people are represented in the legislative process. Through elections, the people communicate their will to their representatives. Good democratic representation is defined as representatives acting in accordance with the interests of the people. Representatives are then evaluated according to the degree they do or do not act in the people's interests.

The representative relationship is unidirectional with both power and the directives for exercising that power flowing from the people to their political representatives.⁸⁷ This relationship has also been conceived of as a "principal-agent" relationship, with people understood as the principal, and representatives as their agents.⁸⁸

This idea that democratic representation involves and requires continuing responsiveness to constituent preferences has been increasingly challenged in the political science literature.⁸⁹ Models of democratic representation have taken a "constructivist" turn.⁹⁰ Democratic representation is rarely conceived as a dyadic, unmediated, unidirectional relationship between a representative and her constituents. Instead, democratic representa-

86. See ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 1 (1971) (arguing "a key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens"); Lisa Disch, *Toward a Mobilization Conception of Democratic Representation*, 105 AM. POL. SCI. REV. 100, 100 (2011) (refuting "the idea that representative democracy is defined by the 'continuing responsiveness of the government to the preferences of its citizens'" with evidence that "[e]mpirical findings . . . reveal, instead, that the representative process is dynamic and interactive") (internal citations omitted).

87. Disch, *supra* note 86, at 100.

88. *Id.* at 106.

89. See *id.* at 100 ("Empirical findings . . . reveal, instead, that the representative process is dynamic and interactive.").

90. *Id.* at 102–03.

tion is increasingly understood as a mediated, systemic process—involving institutions like the media and relationships between governing institutions—as well as a multi-directional one.⁹¹ Voter preferences are no longer seen as the “bedrock” of democratic representation that the responsiveness paradigm assumes.⁹² Empirical political scientists model *dynamic* models of representation that assume preferences are endogenous to the process of representation,⁹³ and many have replaced voter *interests* with the more complex, multidimensional concept of *attitudes*.⁹⁴

The notion of “continuing responsiveness” no longer makes sense as the only—or even central—way to understand what democratic representatives actually do or what they should do. Work conducted through this new, “constructivist” paradigm of democratic representation shows how the concept of representation contains its own constraints, both empirical and normative. Below, I show how these new models of democratic representation can be used to give specific content to the constitutional duty to represent and alleviate fears of expansive executive power, majoritarianism, and presentism.

IV. THE CONTOURS OF A DUTY OF DEMOCRATIC REPRESENTATION

Quite helpfully, the political theorist Jane Mansbridge has parsed out the central models of democratic representation found in the empirical literature, models she labels “promissory,” “anticipatory,” “gyroscopic,” and “surrogate” representation.⁹⁵ These models are not exclusive but complementary. Each model describes the institutional and political constraints experienced by democratic representatives and outlines the standards that should be used to evaluate both a representative’s behavior and institutional design.

91. *See id.* at 105 (explaining that “systemic” forms of representation are more “interactive and more continually reflexive” than the promissory model).

92. *Id.* at 100.

93. *See, e.g.,* Elisabeth R. Gerber & John Jackson, *Endogenous Preferences and the Study of Institutions*, 87 AM. POL. SCI. REV. 639, 639 (1993) (describing how “voter preferences” are “endogenous in the model of electoral competition” because they “shift in direct response to the actions of the parties as they search for strategies to increase their likelihood of winning elections”); James A. Stimson, Michael B. Mackuen, & Robert S. Erikson, *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 552 (1995) (analyzing the effects of public opinion and executive policy using a model of “endogenous effects”).

94. *See, e.g.,* Larry Bartels, *Democracy with Attitudes*, in ELECTORAL DEMOCRACY 48, 49 (Michael B. Mackuen & George Rabinowitz eds., 2003) (arguing “that citizens should be thought of as having *attitudes* rather than *preferences*” because “those beliefs are not sufficiently complete and coherent to serve as a satisfactory starting point for democratic theory”).

95. Mansbridge, *supra* note 20, at 515.

“Promissory representation” emphasizes the promises candidates make in running for office.⁹⁶ The normative concept underlying this model is that the representative represents the electoral will at the time of her election.⁹⁷ The model involves a “forward-looking concept of power,” where the elected official becomes the electorate’s agent and is disciplined by the threat of sanction at re-election.⁹⁸ Evaluation involves examining the representative’s promise-keeping behavior, as well as the conditions that enable voters to evaluate promise-keeping, such as the conditions under which the election is held and the transparency of representative behavior.⁹⁹

“Anticipatory representation” is based on the idea of retrospective voting.¹⁰⁰ In retrospective voting, the voter evaluates the representative’s behavior over the past term.¹⁰¹ The representative thus represents the electoral will not at the time of the initial, or authorizing election (as in the promissory model), but at the time of re-election. In making decisions, the representative should—in both prudential and moral terms—anticipate the electorate’s will in the next election.¹⁰² This model need not only apply to representatives running for re-election. For example, a representative might anticipate voters’ evaluation of his party, while a President might look to his legacy, and the so-called “judgment of history.”

The anticipatory representation adds complications absent in the straightforward model of promissory representation. For one, good anticipatory representation can involve acting in contradiction to the stated preferences of the majority. The anticipatory model does *not* look to past or immediate congruence between voter preferences and a representative’s action.¹⁰³ And unlike the promissory model, the expressed preferences of the electorate at the authorizing election are not the only standard used to evaluate representative behavior. This is because the electorate may change its mind between elections, and these changes may be facilitated by the representative. Anticipatory representation thereby introduces an element of endogeneity and encourages representatives to become potential policy entrepreneurs or, to use a more normatively colored descriptor, leaders.¹⁰⁴

96. *Id.* at 516.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 516–20.

101. *Id.* at 516.

102. *Id.* at 516–17.

103. *See id.* at 518 (noting that this anticipatory model “undermines the traditional understanding of accountability”).

104. *Id.* at 520.

Anticipatory representation calls attention to the conditions under which the electorate's preferences are formed.¹⁰⁵ In anticipatory representation, evaluation involves examining the communicative and deliberative qualities of the institutional system as a whole.¹⁰⁶

In "gyroscopic" representation, "representatives act like gyroscopes, rotating on their own axes, maintaining a certain direction, pursuing certain built-in (although not fully immutable) goals."¹⁰⁷ This model does not depend on sanctions or electoral incentives. Instead, voters select representatives based on their goal(s), value(s), interpretative schema(s), or common sense.¹⁰⁸ Evaluation thus depends on transparency, openness, and the quality of deliberation at the time of initial election or authorization, as well as representative behavior that is consistent and predictable.¹⁰⁹ Representative accountability, suggests Mansbridge, is not to the voters, but to one's self or political party.¹¹⁰ Similar to anticipatory representation, there is emphasis on the institutional system as a whole—institutions should be designed such that representative "gyroscopes" can properly engage and deliberate.¹¹¹

In "surrogate representation," the representative represents individuals or groups with whom he has no electoral connection.¹¹² To illustrate, consider Massachusetts Representative Barney Frank, who explicitly saw himself as representing LGBT people, including those outside his district.¹¹³ Surrogate representation is evaluated according to the perspectives represented in the legislative process, with the aim of inclusion along with criteria such as diversity, all-affected principles, or expertise and wisdom.¹¹⁴

Taken together, these models help us specify the contours of an executive duty of political representation. Democratic representation requires that the Executive keep promises made at election (the promissory model).¹¹⁵ It also requires that the Executive look forward in time and anticipate the judgment of a future electorate or the judgment of history (the anticipatory model).¹¹⁶ Democratic representation further requires that the

105. *Id.* at 518.

106. *Id.* at 519–20.

107. *Id.* at 520.

108. *Id.*

109. *Id.* at 521.

110. *Id.* at 522.

111. *Id.*

112. *Id.*

113. *Id.* at 523.

114. *Id.*

115. *Id.* at 516.

116. *Id.* at 520.

Executive present a clear and accurate view to the electorate of his or her own values and interests, those principles and beliefs that will guide the Executive during his or her time in office (the gyroscopic model).¹¹⁷ And if the Executive represents a certain group or groups to which he or she has no electoral connection, then democratic representation requires that the Executive represent that perspective (the surrogate model).¹¹⁸

Besides providing standards for evaluating the behavior of executives, these models also point to the features that should be included in institutional design. Democratic representation requires transparency at the time of elections, and transparency in behavior while holding office (the promissory, anticipatory, and surrogate models).¹¹⁹ Democratic representation demands that we look to the conditions under which preferences are formed, and encourage good deliberative practices between the voting public and their representatives (all models).¹²⁰ Democratic representation also requires institutions that foster engagement and deliberation between governing officials (the gyroscopic model).¹²¹

At this point, the astute reader will have noticed that it is not always clear what the duty of democratic representation demands. In fact, the demands of a duty of democratic representation may sometimes—perhaps often—conflict. For example, a representative might learn new information while in office, and her values might lead her to change her beliefs regarding a policy and then break a promise she made during her electoral campaign. In this case, she would be fulfilling her duty under the gyroscopic model but not under the promissory model. Alternatively, a representative might change his personal beliefs about a policy, but follow the platform he articulated in his campaign. He would then be following the promissory model of representation but not the gyroscopic model. In a classic case of conflict created by this duty, a representative might sacrifice transparency for reasons of national security.¹²² To put this in terms of the demands of representation, the representative might sacrifice the conditions needed for representation (the promissory, anticipatory, and surrogate models), for the campaign promises regarding security (the promissory model), for future

117. *Id.* at 521.

118. *Id.* at 522.

119. *See supra* text accompanying notes 96–106, 112–114.

120. *See supra* text accompanying notes 96–114.

121. *See supra* text accompanying notes 107–111.

122. *See, e.g.,* Johnsen, *supra* note 23, at 131 (acknowledging that despite “[t]he public release of OLC legal opinions, . . . strong reasons for not releasing some material . . . [include] national security concerns.”).

evaluations of his action (the anticipatory model), and for his understanding of national interest (the gyroscopic model).

The fact that the demands of democratic representation may often conflict should not give us too much pause. Constitutional duties *often* conflict. The Constitution requires the balancing of different obligations, and it is not always clear what the Constitution requires. But the Constitution contains within it mechanisms for resolving these dilemmas. We have theories of interbranch dialogue and conflict, and of judicial resolution.¹²³ We also have electoral constraints, and the judgment of the people—immediately, in the next election, and over the course of history.¹²⁴ What is most essential is that the duty of democratic representation—like any constitutional duty—offers standards that can be applied to give specificity to judgments and constrain the behavior of elected officials, whether those constraints be a function of institutional design (such as mechanisms for transparency), the power of another branch (such as a decision by the Supreme Court), the prospects of re-election, or the weight of the judgment of history. Recognizing this duty of democratic representation offers further standards and constraints, as illustrated by debates around the Obama Administration’s decision to enforce DOMA but not defend it.

V. REVISITING THE DECISION TO ENFORCE BUT NOT DEFEND

Applying a duty of democratic representation alters the debates over the Obama Administration’s decision to enforce but not defend DOMA. In light of this duty of democratic representation, the Obama Administration engaged in a constitutionally adequate balancing of conflicting constitutional duties including conflicting duties of representation. This is not to say that this analysis here should conclude the debate. Others might reasonably disagree with the conclusion that the Administration engaged in merely adequate balancing. Regardless, applying a duty of democratic representation gives greater specificity and rigor to the question of whether that decision was constitutionally justified and points to additional dimensions of constitutionality that had previously been ignored through the bracketing of “political” questions. A duty of democratic representation also gives additional weight to standing concerns. Not only is the DOJ’s standing an is-

123. *See id.* at 111 (discussing several different theories of interbranch authority, including: “‘presidential’ or ‘coordinate’ review, ‘constitutional protestantism,’ ‘policecentric constitutionalism,’ ‘constitutional construction,’ ‘constitutional dialogue,’ and ‘populist constitutionalism.’”).

124. *See* Mansbridge, *supra* note 20, at 516 (emphasizing, for example, promissory representation’s “focus[] on the . . . promises made in the authorizing election”).

sue from a Take Care Clause perspective,¹²⁵ it is also a concern when evaluating the Administration's decision from the perspective of a duty of democratic representation.¹²⁶ In addition, applying a duty of democratic representation draws attention away from executive behavior towards systemic concerns regarding the quality of democracy.¹²⁷

First, consider the demands of the promissory model. Overall, the decision to enforce but not defend DOMA meets the obligations of the promissory model. President Obama's position in his 2008 campaign was that marriage should be between opposite-sex couples, although he also supported civil unions, while opposing a federal ban on same-sex marriage as well as California's Proposition 8.¹²⁸ Attorney General Holder's letter to Congress did not explicitly contradict that campaign statement,¹²⁹ and the position in regard to DOMA could be interpreted, as President Obama stated, as consistent with the argument that the issue should be decided at the state level.¹³⁰ As Professor Prakash pointed out, however, an equal protection ruling at the federal level would likely have implications for state law, eventually leading to the invalidation of state prohibitions on same-sex marriage.¹³¹ That said, the implications for state-level law would likely be far down the road, with many opportunities for the democratic and judicial processes to intervene.¹³² The decision to enforce but not defend does not exactly break a campaign promise. Of equal importance, the non-defense aspect of the Administration's decision kept President Obama's campaign promise to work for LGBT rights.¹³³

125. See Adam Winkler, *Why Obama Is Wrong on DOMA*, HUFFINGTONPOST.COM (Feb. 24, 2011, 12:01 PM), http://www.huffingtonpost.com/adam-winkler/why-obama-is-wrong-on-dom_b_827676.html (suggesting that Obama has set a "terrible precedent" in demonstrating that "if the president doesn't agree with a law . . . he can choose not to defend it").

126. See *supra* note 6 and accompanying text.

127. See Johnsen, *supra* note 23, at 110 (suggesting five characteristics beyond the President's "limited authority to act contrary to the views of the Court and Congress" that are "likely to encourage principled, high-quality political branch constitutional interpretation").

128. See Katharine Q. Seelye, Shan Carter, Jonathan Ellis, Farhana Hossain, & Alan Mclean, *On the Issues: Social Issues*, N.Y. TIMES, <http://elections.nytimes.com/2008/president/issues/abortion.html> (last visited Aug. 27, 2013) (comparing then Presidential candidates Barack Obama and John McCain's positions on a list of social issues).

129. See generally Attorney General Letter *supra* note 2.

130. See *supra* text accompanying note 69.

131. See *supra* note 70 and accompanying text.

132. See Attorney General Letter, *supra* note 2 (indicating explicitly the Administration's willingness and desire to defer to the Supreme Court on this constitutional issue).

133. See *The Obameter—Support Repeal of the Defense of Marriage Act (DOMA)*, POLITIFACT.COM, <http://www.politifact.com/truth-o-eter/promises/obameter/promise/>

Rather than a failure to meet the duty of democratic representation, the Administration's decision to enforce but not defend draws attention to what was a tension in his platform: LGBT rights and no same-sex marriage.¹³⁴ Yet those campaign promises were transparent, so the failure does not seem to be one of executive representation. If there is any failure here, it is more a failure of democracy to neither recognize the tension in his campaign platform nor anticipate a complex parsing of the issue while he was in office.

It is with regard to gyroscopic representation that the Obama Administration may be most culpable. By attempting to appeal to and appease advocates of LGBT rights and same-sex marriage, while also wanting to stay in line with mainstream public opinion (which has opposed same-sex marriage),¹³⁵ President Obama may have failed on the transparency and predictability dimensions. But, again, if this is a failure, it is failure that should be understood as a democratic one as much as a representative one—the electorate should have realized that a tension existed within President Obama's own position.

According to the standards of the surrogate model, we might understand the Obama Administration to represent a viewpoint that had less electoral representation due to its minority status. This argument is consistent with those who have defended the Administration's action because the issue at hand was an equal protection one, requiring special protection of historically disempowered minorities.¹³⁶

In the case of the decision to enforce but not defend, it is the anticipatory model that adds the most to existing constitutional debates. In taking a position that anticipated movement in public opinion while also deferring to the Supreme Court and delaying explicit position-taking, the Obama Administration is responding to the electorate's will in the next election. At least in the short term, the position of the national electorate has clearly and

294/support-repeal-of-the-defense-of-marriage-act/ (last visited Aug. 28, 2013) (rating Obama's progress in supporting same-sex rights as "in the works").

134. See Tom Curry, *The 'Evolution' of Obama's Stance on Gay Marriage*, NBCPOLITICS.COM (May 9, 2012, 5:36 PM), http://nbcpolitics.nbcnews.com/_news/2012/05/09/11623172-the-evolution-of-obamas-stance-on-gay-marriage?lite (tracking Obama's change in policy regarding gay rights and same-sex marriage).

135. See *Top Issues for 2008*, PEWRESEARCH CTR. FOR THE PEOPLE & PRESS (Aug. 21, 2008), <http://www.people-press.org/2008/08/21/section-3-issues-and-the-2008-election/> (reporting that in 2008, "[a]bout half of Americans (52%) oppose allowing gays and lesbians to marry legally").

136. See Johnsen, *supra* note 23, at 114 (noting that the President, Congress, and courts have all "effected substantial constitutional change" in notable circumstances such as "the protection of minority and fundamental rights").

significantly moved toward approval of same-sex marriage.¹³⁷ There is no obvious reason to think this trend will be reversed anytime soon.

The anticipatory model also draws attention to the conditions of democratic deliberation. According to this systemic dimension of anticipatory representation, the Obama Administration's decision is not as easily defended. The Administration's non-defense has prompted jurisdictional questions at the risk of impeding interbranch constitutional dialogue.¹³⁸ The DOJ, representing the United States, agreed with the constitutional finding of the lower court ruling in *Windsor*, as well as the party that was supposedly its adversary (*Windsor*).¹³⁹ It is not clear, then, that an actual case or controversy existed.

This is no small concern, and has the potential to hamper, instead of foster, interbranch dialogue. As mentioned above, the Supreme Court clearly took the jurisdictional question seriously, asking both BLAG and the DOJ to address the issue, as well as appointing Jackson as a "friend of the court."¹⁴⁰ The precedents for DOJ standing are debatable. In both *United States v. Lovett*¹⁴¹ and *INS v. Chadha*,¹⁴² individuals were injured by the executive enforcement of a statute and brought suit.¹⁴³ In *Lovett*, President Franklin D. Roosevelt signed the statute, but at the time of his signature, noted his constitutional objections and explained he was signing the bill for national security reasons.¹⁴⁴ In its opinion, the Court noted the President's objection, as well as the piece of legislation—an appropriations bill—and the timing—World War II.¹⁴⁵ The Congressional statute at issue in *Lovett* involved employees of the executive branch, and Congress voted, in a Joint

137. See *supra* note 14 and accompanying text.

138. See Johnsen, *supra* note 23, at 109 (accusing departmentalism and its "near-plenary authority for each branch to act on its own constitutional views" as "denigrat[ing] the value of interbranch constitutional debate").

139. See *United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013) (noting as one of its preliminary issues "whether the United States' agreement with *Windsor*'s legal position precludes further review").

140. See *supra* text accompanying notes 63–64.

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

142. 462 U.S. 919 (1983).

143. See *supra* note 4 and accompanying text; see also Brief for Court-Appointed Amica Curiae Addressing Jurisdiction at 28, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter Brief] ("What the Court in *Chadha* did *not* decide is whether the INS had Article III standing to appeal from the Ninth Circuit to this Court or whether, without the intervenors, a sufficient case or controversy would have been present on appeal to this Court.").

144. 328 U.S. 303, 313 (1946).

145. See *id.* (noting President Roosevelt's words: "The Senate yielded, as I have been forced to yield, to avoid delaying our conduct of the war. But I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional.").

Resolution, to authorize counsel to defend the statute.¹⁴⁶ All these features were lacking in *Windsor*.

In *Chadha*, the Court did not address the question of whether the Immigration and Nationalization Service—who agreed with the plaintiff, Chadha—had Article III standing.¹⁴⁷ In *Windsor*, however, the lower court sided with the injured individual, and the DOJ agreed with the lower court decision, yet still asked for Supreme Court review.¹⁴⁸ The DOJ claims that a controversy existed because it would lose money to Windsor (who, the lower court has said, will not have to pay an inheritance tax on her deceased spouse's property).¹⁴⁹ It is not at all clear that an actual controversy existed in *Windsor* or that *Lovett* and *Chadha* are indeed precedents for appealing a decision while not defending it.

Regardless of what the Supreme Court actually decided in *Windsor*, it is clear that the answer to this question was not, and is not, obvious: the Administration took a risk in pursuing this path of enforcement absent defense. This risk entailed not only a Take Care concern, but also a concern with a duty of democratic representation, because a failure to appeal the case may impede interbranch dialogue. If the Administration had both defended and enforced DOMA, these concerns about standing would not exist. In addition, a critic applying the duty of democratic representation might also argue that in avoiding an explicit statement on same-sex marriage as a policy issue, President Obama has impeded rather than encouraged open communication and deliberation.

By taking a deferential position toward the judiciary and avoiding a more direct constitutional confrontation with the courts,¹⁵⁰ however, it is possible that the Administration has created conditions more conducive to dialogue and persuasion. As Bryan Garsten has written, persuasion begins with acknowledgement of shared values and concerns.¹⁵¹ Part of the value of recognizing other models of representation beyond the traditional “responsiveness” concept of representation is that notions of accountability

146. *Id.* at 305–06. Recall also that the counsel hired by BLAG was initially authorized by a partisan, three to two vote within the one House committee. *See supra* text accompanying note 49.

147. *See* Brief, *supra* note 143, at 28.

148. *United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013).

149. *Id.* at 2683.

150. *See supra* text accompanying note 15.

151. *See, e.g.*, BRYAN GARSTEN, SAVING PERSUASION: A DEFENSE OF RHETORIC AND JUDGMENT 3 (2006) (“Persuasion is worthwhile because it requires us to pay attention to our fellow citizens and to display a certain respect for their points of view and their judgments. The effort to persuade requires us to engage with others wherever they stand and to begin our argument there.”).

shift: the Administration may be less explicit with regard to its own position at one moment in time, but the anticipatory model does not demand personal accountability so much as systemic accountability.

Some of the systemic concerns that the anticipatory model draws attention to are harder to address. The ability for accountability to occur now and in the future rests not only on transparency at the time of election—which exists—and transparency in executive behavior—which has existed, although not without some room for improvement—but also upon the conditions of deliberation. In other words, to constrain executive power in a representative democracy, the practices of democracy must flourish. Citizens must evaluate their governing officials, and they must give their judgments force through voting and other forms of political action.¹⁵² The ability of citizens to judge and give force to their judgments depends not only on their individual willingness and capacity, but also upon the conditions of deliberation themselves—the so-called information environment, the character of communication between representatives and constituents, as well as the character of mass communication, including the health of social institutions like the media. As many have pointed out, it is unclear whether the contemporary conditions of mass communication—including the effects of campaign finance laws—are able to foster the sort of deliberation needed to sustain a healthy representative democracy.¹⁵³

VI. CONCLUSION

Applying a duty of democratic representation generates some conclusions that dovetail with existent debates over the Obama Administration's decision to enforce but not defend DOMA. Concerns about transparency, predictability, and personal accountability are all prominent in the existent debates. Far from opening the door to justifying broad executive discretion, introducing a duty to represent gives more content and specificity to existent normative concerns. In addition, the anticipatory model also enables a principled evaluation of Administration action that others have dismissed as "political" or accountability-avoidant, by both altering the moment of accountability (from the present to the future) as well as the communicative relationship (from communication between the representative and the con-

152. See, e.g., NADIA URBINATI, REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY, 33 (2006) (highlighting different "political action[s] people perform . . . directly and publicly, by talking and listening, writing and reading, associating and demonstrating, petitioning and voting, and voting again").

153. See, e.g., Disch, *supra* note 86, at 111 (noting, at the very least, that the current system of "mass media and opinion shapers" leaves open "the degree to which audiences expose themselves to diverse sources or remain in discrete ideological 'silos'" and thus does not inherently support greater reflexivity).

stituency to systemic communication). In the case of the Obama Administration's duty to enforce but not defend, applying a duty of democratic representation adds additional concerns to certain dimensions of the debate—such as standing and interbranch dialogue—while also suggesting that fears of expansive executive power should be refocused on systemic democratic failures.

Although this Essay's analysis has suggested the Obama Administration engaged in a reasonable balancing of conflicting constitutional duties, I do not intend to say that recognizing and applying a duty of democratic representation definitively resolves the question of whether the Administration's decision was the correct one. Perhaps the most significant implication of recognizing and specifying this duty of democratic representation is that it reminds us that the Constitution does not resolve—nor does it aim to resolve—all questions. This aspect is essential to the Constitution's democratic character. The Constitution constructed a liberal democracy, where the law is intended to provide consistent restraints on the behavior of governing officials, but the law does not determine officials' actions. The people of a democracy are required to play a central role in constraining officials. Some actions of the Executive, like the actions of any democratic representative, may only have their moment of accountability in the future. This reliance on popular accountability is inherent in the concept of democratic representation, and whether that constraint is a meaningful one will depend in no small part upon the health of *all* democratic institutions, not just institutions of governance.