STANDING DOCTRINE’S STATE ACTION PROBLEM

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ABSTRACT

Something surprising happened in the recent gay marriage cases that did not involve striking down the Defense of Marriage Act. The Supreme Court discovered standing doctrine’s state action problem. In standing doctrine, as elsewhere, the law distinguishes private from governmental action. There are, simply put, different standing rules for state actors than for private litigants. How should the law sort state actors from private litigants for the purposes of standing? In Hollingsworth v. Perry the Court held that Article III limits government standing to common law agents who owe fiduciary duties to the state. The Perry Court’s apparent concern was the risk of abuse of the power to stand for the government in federal court. This Article critiques the Court’s newfound agency rule, offering an alternative way to address standing’s state action problem. Though the Perry Court looked to Article III, its concern about the abuse of government power has little to do with limiting federal courts to adjudicating cases and controversies. Rather, it sounds in due process. Abuse of litigation authority may offend a structural due process principle that protects life, liberty, and property against arbitrary and inadequate enforcement. This principle cannot be applied mechanically because due process also supports a system of remedies to right wrongs. Focusing upon due process provides an intelligible structure for identifying when standing presents the risk of abuse of government power and redesigning the doctrine to reduce that risk.

INTRODUCTION

The U.S. Supreme Court’s opinions in the recent gay marriage cases make an odd couple. In Hollingsworth v. Perry the Court refused to address the question of full and equal citizenship for gay and lesbian Americans, instead offering what struck many Americans as a hypertechnical aside on jurisdiction.1 By contrast, in United States v. Windsor the Court brought the Nation “one step closer” to full marriage equality under the law,2 making new jurisdictional law to do so. Whether Windsor set the stage for a new Loving v. Virginia3 striking down gender-specific marriage laws is among the most

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1 133 S. Ct. 2652, 2659 (2013).
3 388 U.S. 1, 11-12 (1967) (striking down anti-miscegenation laws prohibiting marriage
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important civil rights questions of our day. Scholars and jurists have rightly explored the impact of Windsor and Perry on gay and lesbian Americans' longstanding fight for full citizenship.

This Article, by contrast, considers the jurisdictional law that Perry and Windsor made. This law cannot be divorced from the merits of the equal protection questions before the Court, but neither can it be reduced to them. Perry ruled that Article III constrains the authority of states to delegate the power to defend their laws in federal court. In that case, the California Supreme Court had held that state law authorized the proponents of Proposition 8 to defend the law on appeal. Nevertheless, the U.S. Supreme Court held that the proponents lacked standing under Article III. Permitting the private proponents of Proposition 8 to defend the law’s definition of marriage as “between a man and a woman” would be unconstitutional, the Court reasoned, because it would involve the judiciary in a politically charged controversy. Yet the Court addressed that controversy in United States v. Windsor, considering a constitutional challenge to the federal Defense of Marriage Act notwithstanding serious standing objections. And it held on the merits that Congress could not define marriage as between only a man and woman, which seems to raise a potential federal separation-of-powers between whites and nonwhites).

4 See David Freeman Engstrom, The Civil Rights Act at Fifty: Past, Present, Future, 66 Stan. L. Rev. 1195, 1195-96 (2014) (“recent events — including Supreme Court decisions limiting job discrimination class actions, the quickening march toward legal recognition of gay marriage, and the waning of the Voting Rights Act — have produced a reckoning of sorts about where civil rights law has been and where it might be going”); see also Michael J. Klarman, From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage 203 (2013) (“Ultimately, the gay marriage debate is likely to be resolved for the nation through litigation”); Leslie, supra note 2, at 1078.

5 It would not do to pretend the Court’s standing decisions in Windsor and Perry had nothing to do with the Justices’ interest (or lack thereof) in reaching the merits. The Court — and in particular members of its so-called “liberal” wing — gave “a little something” to each side of the debate about gay marriage by striking down DOMA while leaving the definition of marriage to the states. Cf. Trevor Burrus, Commentary, A Tactful Move Toward Marriage Equality: How the Supreme Court Will Give Both Sides a Victory in the Gay Marriage Cases, The Blaze, Ap. 1, 2013, available at http://www.cato.org/publications/commentary/tactful-move-toward-marriage-equality-how-supreme-court-will-give-both-sides (last accessed Apr. 10, 2014) (predicting that “[e]veryone will get a little something” from Court’s decisions in two cases). Even so, Windsor and particularly Perry helpfully frame the long-term structural question of standing’s state action problem. Perry confronted the problem head-on and adopted a relatively restrictive, and doctrinally questionable, solution, or so this Article argues.

6 133 S. Ct. 2652, 2667 (2013).
9 Perry, 133 S. Ct. at 2659.
10 133 S. Ct. 2675, 2682 (2013).
11 United States v. Windsor, 133 S. Ct. 2675, 2695 (2013); see 1 U.S.C. § 7 (2012) (“the word ‘marriage’ means only a legal union between one man and one woman as husband and
problem more readily than California’s decision to authorize proponents of a constitutional amendment to defend it in court.\footnote{12}{See Clapper v. Amnesty Int’l USA, 133 S. Ct. 1138, 1147 (2013) (“[o]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional” (internal quotation marks omitted)).}

The majority in \textit{Perry} was worried about the potential for abuse of public power while the \textit{Windsor} majority was not. In \textit{Perry}, the Court held that Article III prohibits states from bifurcating their standing by delegating the authority to defend a state constitutional amendment to its private proponents. There was no Article III case or controversy in \textit{Perry} because “[u]nlike California’s attorney general,” Proposition 8’s unelected proponents “answer[ed] to no one” and thus were “plainly not agents of the State.”\footnote{13}{Perry, 133 S. Ct. at 2666.}

In other words, Proposition 8’s proponents could not be trusted with the power to defend the California law. By contrast, in \textit{Windsor} the Court permitted the “federal government to bifurcate its standing”\footnote{14}{Suzanne B. Goldberg, Article III Double-Dipping: Proposition 8’s Sponsors, BLAG, and the Government’s Interest, 161 U. Pa. L. Rev. Online 164, 172 (2013) (arguing that it is far from “clear . . . that Article III . . . permit[s] the federal government to bifurcate its standing for purposes of having federal courts resolve policy disputes between the executive and legislative branches”).} between the Executive Branch, which had constitutional standing though it refused to defend DOMA, and a group of House Representatives who provided the “substantial argument for the constitutionality” of DOMA necessary for prudential standing.\footnote{15}{Windsor, 133 S. Ct. at 2687. Though the Court did not hold that the House members had standing in their own right, it relied upon them for the arguments necessary to reach the merits.}

\textit{Windsor} and \textit{Perry} make apparent something that has been lurking in the law of standing for some time. Standing doctrine has a state action problem. The reason is simple: There are different standing rules for state actors than for private litigants. Standing doctrine must therefore determine when a “person . . . may fairly be said to be a state actor”\footnote{16}{Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982) (explaining when deprivation of federal right may be attributable to state).} entitled to stand for the government in litigation.

Elsewhere in public law we recognize that the distinction between state actors and private parties is not self-evident. State action doctrine in particular aims to distinguish between the abuse of public power, which is the subject of constitutional concern, and the abuse of private power, which is left to statutes and the common law to address. The doctrine, however, is a “conceptual disaster area”\footnote{17}{Charles L. Black, Jr., Foreword: “State Action,” Equal Protection, and California’s Proposition 14, 81 Harv. L. Rev. 69, 70 (1967).} that contains many “conflicting intuitions concerning what is
Courts and commentators have called for substantial revisions, even wholesale abandonment, of the doctrine’s distinction between public and private actors, with an occasional contrarian defense of the doctrine appearing in the law reviews. Standing’s state action problem has gone unnoticed by comparison. The black letter standing doctrine does not provide a compelling solution. In theory, standing limits Article III courts to judicial business by requiring private litigants to show a concrete, imminent, and personal injury in fact. Standing doctrine privileges state actors over private litigants by ignoring the injury-in-fact requirement or otherwise showing “special solicitude” to government claimants. The doctrine’s distinction between public and private enforcement has only the most tenuous link with limiting courts to adjudicating cases and controversies. Put simply, Article III cannot solve standing’s state action problem because Article III did not create it. The Article III “Judicial Power” extends to public and private enforcement alike and does not help sort between the two. We need an alternative strait to navigate standing’s state action problem.

This Article shifts the focus from Article III to due process. Though Perry’s shot was off, its target was true. All instances of standing involve

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22 Here and throughout I use “state actors,” as well as “government litigants,” “public litigants,” and “public enforcers” to refer any person or institution whose actions are attributable to the federal government or a state government. Where necessary, I draw a distinction between federal action and action by one of the states.
government action in the sense that a litigant with standing has the power to put “judicial machinery in motion.”23 This machinery may be put in motion for public reasons or out of raw preferences. Both have their place in a “scheme of ordered liberty” and a “fair and enlightened system of justice.”24

Standing doctrine’s distinction between state actors and private litigants seeks to put each in its proper place in light of three potentially competing due process principles.

First, the doctrine addresses the risk that arbitrary enforcement will distort the development of substantive law and impinge upon constitutionally-protected individual rights. Due process precludes a litigant from hauling another before a forum where it would be “unreasonable” for the court to assert personal jurisdiction.25 It prohibits “biased” adjudication by requiring “an impartial and disinterested tribunal.”26 It precludes “arbitrary punishments” through excessive punitive damages awards.27 It prohibits vague criminal statutes that give the police leeway to engage in “arbitrary enforcement.”28 It limits the privatization of government regulation.29 And it explains why standing doctrine addresses the risk that a litigant would abuse the power of government standing.30 This risk is acute where government

24 Palko v. Connecticut, 302 U.S. 319, 325 (1937) (internal quotation marks omitted), overruled on other grounds, Benton v. Maryland, 395 U.S. 784 (1969). While some commentators have linked due process and standing in ways that differ from this Article’s principal argument, they have not systematically explored standing’s place in a scheme of ordered liberty. See Nadia B. Soree, Whose Fourth Amendment and Does it Matter? A Due Process Approach to Fourth Amendment Standing, 46 Ind. L. Rev. 753, 757 (2013) (arguing that “once exclusion is grounded in due process, defendants have a right to exclusion even when the Fourth Amendment violation “belongs” to another); Ann Woolhandler & Caleb Nelson, Does History Defeat Standing Doctrine?, 102 Mich. L. Rev. 689, 731 (2004) (noting that standing may implement “demands of due process”); Lea Brilmayer, The Jurisprudence of Article III: Perspectives on the Case or Controversy” Requirement, 93 Harv. L. Rev. 297, 306 (1979) (arguing that standing addresses due process problem that would arise if bystander inadequately represented someone else’s rights). In linking three distinct due process principles to the problem of standing, this Article provides a thorough rethinking of standing doctrine. One of these principles, a concern with arbitrary coercion, has been explored by Grove, supra note XX, at 781, who argues that Article II prohibits Congress from delegating too much prosecutorial discretion to private litigants, and by commentators considering the delegation of lawmaking power to private actors, see, e.g., Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367 (2003); David M. Lawrence, Private Exercise of Governmental Power, 61 Ind. L.J. 647 (1986).
30 Thus, standing is another of what Dan Coenen has called the “constitutional ‘who’ rules,” that is, a species of “semisubstantive doctrine” that “steer[s]” particular enforcement
interests, which sweepingly include enforcing the laws, are at stake. The doctrine addresses the risk of abuse of government standing by limiting which litigants may stand for the government in court.  

Second, standing law aims at a system of remedies that rights wrongs and ensures the rule of law. As Chief Justice John Marshall put it in Marbury v. Madison, “the very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives injury.” Marbury's remedial aspiration has been lost in standing law, with its obsession with injuries in fact. Due process analysis reclaims this remedial principle.

Third, standing concerns the individual right to one’s day in court, which sounds in due process, and the fairness problems arising from inadequate representation of absent parties’ rights. When a private party sues, the doctrine has recognized this due process concern. Not so, however, when a government sues.

Rethinking standing in “structural due process” terms thus clarifies the problem and anchors the solution in forthright analysis of enforcement design. The doctrine needs a more nuanced approach than its current policy choices “away from one decisionmaker to another, on account of” the different “institutional capacities” of public and private enforcement. Dan T. Coenen, 75 S. Cal. L. Rev. 1281, 1370 (2002).

This principle could be understood in Article III terms, though not the traditional ones encapsulated by the injury-in-fact requirement. Cf. Maxwell L. Stearns, Standing Back from The Forest: Justiciability and Social Choice, 83 Cal. L. Rev. 1309, 1316 (1995) (arguing that standing helps “limit[] the bases for judicial decisionmaking to legal principles rather than pure preferences”). It also could be understood in Article II terms, see Grove, supra note XX at 781, though that explanation does not account for standing’s limitations on a state legislature’s authority to authorize “private” litigants to stand for the state in federal court. Standing behind these alternative explanations, this Article argues, is a structural postulate that sounds in due process.

5 U.S. (1 Cranch) 137, 163 (1803).


Brilmayer, supra note XX, at 306.

Structural due process was first described by Laurence Tribe, who used in the term to refer to a constitutional command that “governmental policy-formation and/or application are constitutionally required to take a certain form, to follow a process with certain features, or to display a particular sort of structure.” Laurence H. Tribe, Structural Due Process, 10 Harv. Civ. Rts.-Civ. Lib. L. Rev. 269, 291 (1975).

In theory, the doctrine might address any due process concern with a private right against arbitrary enforcement. To a limited extent we have done just that. In egregious cases, a criminal defendant may raise due process as a defense to an exercise of prosecutorial discretion. Moreover, tort law provides proxy enforcement of the constitutional due process concern by providing a right against malicious and vexatious litigation. But we do not address the due process concern with arbitrary enforcement by subjecting every litigation decision to reasonableness review, which would be a far cry from our adversarial model. Instead, we address the problem through a combination of prophylactic jurisdictional and procedural rules and case-specific inquiries. Standing’s role is prophylactic and structural. See infra notes XX-
application of the injury-in-fact requirement in light of a simple distinction between state actors and private litigants. If standing is to be a device for limiting the abuse of the power of government standing, then it is necessary to identify when standing involves government power (and when it does not) and to reassess Perry’s formal distinction between “officials” entitled to stand for the government and “private” litigants who are not.36

A more sensible approach is to begin by considering the plaintiff’s injury as a measure of the strength of the plaintiff’s claim (if any) to a right to redress. At the same time, a court should consider the depth and breadth of the enforcement discretion that standing would entail. Would it lead to sweeping policies affecting many claims of private and public right? Would it free the litigant arbitrarily to select targets for enforcement actions? If so, is the litigant’s discretion limited, either substantively or procedurally? All else being equal, the weaker a plaintiff’s due process interest in redress and the deeper and broader her enforcement discretion, the more likely it is that recognizing standing to administer the law by enforcing it would present a serious due process problem.

To implement this approach, this Article prescribes a three-part order of battle for government standing doctrine. From a due process perspective, the first question is what interest the litigant aims to stand for in court. The second question is whether recognizing standing to litigate that interest “seem[s] likely to involve conflicts between public and private interest” of constitutional concern.37 And the third question is whether there are sufficient protections to reduce the risk that raw preferences, rather than public reasons, will drive an enforcement decision where they shouldn’t.

These arguments unfold in five parts. Part I sketches the structure of government and private standing. Part II specifies standing’s state action problem through the lens of Windsor and Perry. Part III reassesses standing’s state action problem by linking standing and due process. Part IV explores how to implement standing in a scheme of ordered liberty. Part V discusses implications of this Article’s restatement of standing’s state action problem in due process terms. Returning to Perry, it argues the issue was not simply the due process of standing. To the extent popular lawmaking presents a due process problem, executive nondefense provides a filter to check egregious abuses of the ballot initiative process. Thus, this Article reconsiders standing not as a hypertechnical jurisdictional aside, but rather as a species of the due process of lawmaking and law enforcement.

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37 Lawrence, supra note XX, at 661 (arguing that due process explains nondelegation doctrine).
I. PRIVATE STANDING AND GOVERNMENT STANDING

At first glance, standing should have little to do with state action. According to the Supreme Court, standing doctrine is “built upon a single basic idea — the idea of separation of powers.”\(^{38}\) In theory, standing limits Article III courts to judicial business by requiring private litigants to show a concrete, imminent, and personal injury in fact traceable to the defendant and redressable by a judicial remedy. Yet standing doctrine does not require the same showing from government litigants in all cases. Rather, there are distinct rules for government standing. In some cases a government may have standing where a private party wouldn’t. In other cases, though the modern trend cuts the other way, standing rules might impose “an additional hurdle” to government claimants.\(^{39}\) This Part sketches the different rules for private and government standing.

A. Sweeping Interests

Standing, the Supreme Court has explained, is not about rights or powers. It is about injuries — at least, that is, when a private litigant seeks to raise a claim or defense. To satisfy the “irreducible constitutional minimum of standing,” a private plaintiff must have suffered an “injury in fact” traceable to the defendant and redressable by a judicial remedy.\(^{40}\) To qualify, an injury must be concrete, imminent, and personal to the litigant.\(^{41}\) Traditional claims of private right usually suffice, but claims premised primarily upon public rights usually will not.\(^{42}\)

Standing doctrine’s focus upon injuries in fact creates a conceptual conundrum when a government claims a right to judicial relief. After all, “There is no such thing as the State.”\(^{43}\) It cannot be struck. It cannot be jailed. It cannot feel disappointment, or frustration, or pain. It is therefore more accurate (and useful) to speak of government interests when considering government standing.\(^{44}\)

\(^{41}\) See id.
\(^{42}\) See, e.g., Hessick, supra note XX, at 276-78 (discussing distinction between public and private rights and arguing that Supreme Court has erred in sometimes denying standing to vindicate private rights).
\(^{44}\) Indeed, it is more useful to speak of interests when considering private standing. The Court has sometimes done just that. In Lujan v. Defenders of Wildlife, for example, the Court stated that to show a justiciable injury in fact, the plaintiff may point to “an invasion of a legally protected interest which is . . . concrete and particularized.” 504 U.S. 555, 560 (1992). To qualify for standing purposes, the Court explained in Vermont Agency of Natural Resources v. United States ex rel. Stevens, the “interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right.” 529 U.S. 765, 772 (2000).
Governments’ judicially-cognizable interests are sweeping and need not depend upon a concrete injury in fact. As a result, governments may have standing where private parties would not. For instance, the United States needs no injury in fact to have standing to enforce federal law.45 A state has standing to vindicate its “sovereign power . . . to create and enforce a legal code” and to protect public health and welfare.46 Unlike a private party, therefore, the United States or a state may litigate a “generalized grievance.”47

More specifically, there are four types of interests a government may litigate.48 Like private corporations, governments have standing as property owners and parties to contracts and may enforce their corporate interests as a private corporation could. As a political institution, a government has standing to enforce its institutional interests in constitutional or statutory law that creates its authority to govern or immunizes the government or its officials from regulation by another government. In addition, a government has administrative interests in implementing particular laws. Where Congress has authorized it, federal executive officials prosecute crimes and bring civil suits to enforce the law without any judicial inquiry into standing. Though states do not have a freestanding authority to enforce federal law in federal courts, they also have judicially cognizable interests where Congress has delegated authority to implement federal law to them. Finally, a government may claim substitute interests, arguing that — notwithstanding the prudential ban on third-party standing in private litigation49 — its general authority as its citizens’ political representative provides it standing to sue to vindicate their private rights. Substitute standing can be quite sweeping, permitting a state to protect the “health and well-being . . . of the state’s residents in general.”50

B. Special Solicitude

Standing doctrine privileges state actors over private litigants by ignoring the injury-in-fact requirement or otherwise showing “special solicitude” to
government claimants.\textsuperscript{51} For example, federal courts may relax standing doctrine’s causation and redressability requirements in public enforcement actions. The most recent controversial example is \textit{Massachusetts v. EPA}. In that case, the state of Massachusetts sued to force the Environmental Protection Agency to consider regulating greenhouse gas emissions. The state claimed that the agency’s failure to do so caused injuries to its coastline property, as well as to its citizens, in the form of rising tides and temperatures as a result of global warming. This sort of probabilistic injury often does not suffice when a private plaintiff sues.\textsuperscript{52} But in \textit{Mass v. EPA} it did. States, the Court explained, are sometimes due “special solicitude in standing analysis.”\textsuperscript{53}

\textbf{C. Judicial Disfavor}

Standing doctrine strictly limits “private attorney general” litigation of generalized grievances in which a private party’s interest is “in the proper application of the Constitution and laws.”\textsuperscript{54} In \textit{Lujan v. Defenders of Wildlife}, the Court held that the Constitution prohibits Congress from authorizing a private litigant to vindicate the public interest in seeing that the law is enforced.\textsuperscript{55} \textit{Lujan} involved a citizen suit under the Endangered Species Act against the Fish and Wildlife Service. The Court held the citizens could not sue simply to ensure the Service complied with the Act, because this generalized grievance is not for private litigants to vindicate.\textsuperscript{56} \textit{Lujan} thus called into question the constitutionality of citizen suit provisions that authorize a private litigant to sue to enforce a particular regulatory law. In \textit{Hollingsworth v. Perry} the Court applied this rule to state standing, reasoning that a state may not “issu[e] to private parties who otherwise lack standing a ticket to the federal courthouse.”\textsuperscript{57} And even where a private litigant plausibly claims an interest distinct from the general public, the Court may deem it a generalized grievance if the interests appears too abstract.\textsuperscript{58} Private attorney general suits are, in a word, disfavored.

Public attorneys general — that is, litigants deemed proper representatives of the government’s interest — are not so limited. At the same time, however, standing doctrine occasionally imposes \textit{additional} hurdles when a state actor sues, evincing a special concern for the abuse of government power. For example, a private association may espouse the rights of its members without

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\item[\textsuperscript{51}] Massachusetts v. EPA, 549 U.S. 497, 521 (2007).
\item[\textsuperscript{52}] See, e.g., Jonathan Remy Nash, Standing’s Expected Value, 111 Mich. L. Rev. 1283, 1285 (2013).
\item[\textsuperscript{53}] Mass v. EPA, 549 U.S. at 521.
\item[\textsuperscript{54}] Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992).
\item[\textsuperscript{55}] Id. at 573.
\item[\textsuperscript{56}] See id.
\item[\textsuperscript{57}] 133 S. Ct. 2652, 2664 (2013).
\item[\textsuperscript{58}] See, e.g., Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).
\end{itemize}
alleging an independent interest, but a state cannot sue on its citizens’ behalf without an interest “apart from the interests of particular private parties.” Moreover, while the United States needs specific statutory authorization to have standing to vindicate its citizens’ civil rights, private organizations’ representative standing may be implied in a common law mode. Ironically, this split between organizational and government standing arises from Hunt v. Washington State Apple Advertising Commission, a case involving an association of private companies that was also a state agency. In some cases, surprisingly enough, courts treat traditional state agencies like private organizations in order to find organizational standing where there wouldn’t be state standing.

Thus, whether the question is judicial solicitude or judicial disfavor for governments, standing doctrine has a state action problem. When does standing involve the exercise of government power? Who may stand for the government in court?

II. SPECIFYING STANDING’S STATE ACTION PROBLEM

This Part considers United States v. Windsor and Hollingsworth v. Perry together in order to specify standing’s action problem. The Perry Court considered standing a device to curtail the use and abuse of government power. The doctrine must therefore identify when standing involves the exercise of a government power. To the extent the doctrine addresses the risk of abuse of government standing by prohibiting “private” litigants from standing for the government, it must distinguish between private and state actors. In Perry the Court adopted the common law of agency in the hopes of solving standing’s state action problem. To assert government standing, it now appears, a litigant must be an agent who owes fiduciary duties to the state. The Court grounded its newfound agency rule in Article III, but Article III does not specify when standing involves the exercise of a government power or helps distinguish state actors from private litigants.

A. Distinguishing a State Action Problem from the State Action Doctrine

State action doctrine distinguishes state action, which is subject to constitutional constraint, from private action, which isn’t. The question is whether “there is such a close nexus between the State and the challenged

63 See Hunt, 432 U.S. at 333.
action” that the Constitution should apply.\textsuperscript{65} Answering this question requires “normative judgment, and the criteria lack rigid simplicity.”\textsuperscript{66}

Under black letter doctrine, however, judicial action is state action. By suing, a litigant invokes the state’s power to resolve a dispute through the judicial process. In that sense, whenever “legal obligations would be enforced through the official power of . . . courts,” there is state action.\textsuperscript{67}

Standing’s state action problem, by contrast, concerns a litigant’s power to call upon the court’s judicial power. Standing is a power in its own right. More specifically, it is a “remedial power” to invoke the judicial process, including, if the litigant’s claim has merit, a favorable judgment and a judicial remedy.\textsuperscript{68} Like any power, this remedial power is subject to abuse. A litigant may seek judicial relief though her claim is frivolous. Or a litigant with a meritorious claim may sue a defendant solely out of malice, discriminatory animus, and the like.\textsuperscript{69} Both private and public litigants may abuse their standing to seek judicial relief. Nevertheless, standing doctrine distinguishes government from private standing, addressing the risk of abuse of government power differently than the risk of abuse of private power.

It is therefore necessary for the doctrine to identify when standing involves the exercise of government power and to distinguish state actors from private litigants when allocating that power. The Court’s recent standing decisions in


\textsuperscript{66} Id. at 2693. State action doctrine’s critics argue the law is a mess, a muddle, a game of judicial word-play, or worse, a sub rosa method of deciding deep disputes about who we are as a people and what kind of society we want to have. See, e.g., Cass R. Sunstein, The Partial Constitution 71 (1993); Gary Peller & Mark Tushnet, State Action a New Birth of Freedom, 92 Geo. L.J. 779, 789 (2004).

\textsuperscript{67} Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991). That does not mean, however, that courts treat every instance of private enforcement as presenting a state action problem. The closest the Court has come to doing so is Shelly v. Kraemer, 334 U.S. 1 (1948), and it has never read that case for all that it may be worth.

In a sense, standing’s state action problem presents the Shelly dilemma. Judicial enforcement of a racially restrictive covenant, the Court held, was unconstitutional state action in violation of the Fourteenth Amendment. See id. In other words, the exercise of even a common law right of action entails state action and thus the risk of abuse of government power. Properly understood, however, the Shelly dilemma is orthogonal to the question whether standing doctrine should distinguish “private” from “government” standing. There is no denying that our legal system backs up private discretion with government power, not just in Shelly, but whenever a private litigant seeks judicial redress. There are many ways in which our litigation system confronts the risk of abuse of private rights of action, including standing as well as pleading requirements, tort remedies for abuse of process, and so on. The question is whether standing doctrine does (and should) distinguish raw preferences from public reasons and private from public enforcement. There are sensible reasons for the doctrine to address “private” and “government” standing differently, or so this Article argues.


\textsuperscript{69} Of course, defining “abusive litigation” is complicated and controversial. For a more precise and thorough exploration, see infra notes XX-XX and accompanying text.
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Windsor and Perry bring the unacknowledged difficulty of these state action questions into sharp focus. Looking to Article III, the Court purported to find an obvious constitutional distinction between “officials” entitled to government standing and “private parties” who aren’t. But, as in state action doctrine, this distinction is not self-evident.

B. United States v. Windsor

In Windsor the Court held that the Defense of Marriage Act, which defined “marriage” for purposes of federal law to exclude same-sex marriages, violated the Fifth Amendment Due Process Clause. To reach that holding, the Court had to find that someone had standing to defend DOMA. In the normal course, the Department of Justice would have had standing to do so. The United States had an institutional interest in defending its laws and a corporate interest in challenging its liability to Edith Windsor, who was due a tax refund under the district court’s judgment. Congress has directed the DOJ’s attorneys to defend those interests, and there is no question this delegation to a traditional state actor is valid. The DOJ, however, declined to defend DOMA. Instead, the Bipartisan Legal Advisory Group (BLAG), a small group of members of the House of Representatives, defended DOMA on appeal. The Court held that the United States’ liability under the district court’s judgment sufficed for constitutional standing and that BLAG’s “substantial” defense of DOMA had provided the adversity required for prudential standing. The Court all but thanked BLAG for its argument, calling it not only “sharp” but also “capable” and “substantial” and explaining that BLAG had made it possible for the Court to vindicate its “primary role in determining the constitutionality of a law that has inflicted real injury” and to determine the “[r]ights and privileges of hundreds of thousands and persons” who otherwise “would be adversely affected.” The Executive should not, the Court explained, “be able to nullify Congress’ enactment solely on its own initiative” and create widespread legal uncertainty in the process.

In dissent, Justice Antonin Scalia’s retort was typically acerbic: “What . . . are we doing here?” Federal courts are reticent to permit Congress, much less the House alone or a group of House members, to take on the task of vindicating federal law. To be sure, the Court found it “need not decide whether BLAG would have standing” in its own right. But Windsor apparently stands for a prudential rule that where congressional representatives

71 Id. at 2687.
72 Id. at 2687-89.
73 Id. at 2688.
74 Id. at 2698 (Scalia, J., dissenting).
75 See, e.g., Tara Leigh Grove & Neal Devins, Congress’s (Limited) Power to Represent Itself in Court, 99 Cornell L. Rev. 571 (2014).
76 Windsor, 133 S. Ct. at 2688.
present a “capable defense” of a law the Executive enforces but refuses to defend, the Court may proceed to the merits despite the absence of “disagreement between the parties.”

C. Hollingsworth v. Perry

It is not easy to reconcile *Windsor* with the Court’s denial of standing in *Hollingsworth v. Perry*. *Perry* concerned the constitutionality of Proposition 8, a ballot initiative that California voters adopted to define “marriage [as] between a man and a woman.” Two same-sex couples sued state officials to enjoin implementation of Proposition 8, arguing it violated their rights to due process and equal protection. California’s governor and attorney general, like the President and DOJ in *Windsor*, refused to defend the law. The district court permitted Proposition 8’s proponents to intervene, and ultimately struck down the law. The Ninth Circuit held that Proposition 8’s proponents had standing on appeal, and affirmed on the merits. The Supreme Court reversed on jurisdictional grounds, holding the proponents lacked standing to appeal the district court’s judgment.

As *Perry* would have it, Article III precluded standing in order to prevent the judiciary from resolving a policy question better left to politicians. But if the purpose of standing doctrine is to limit the judiciary from becoming involved “in an active political debate,” then something is amiss in standing law, as the comparison of *Windsor* with *Perry* suggests. If anything, the separation-of-powers objection to reaching the merits in *Windsor* was far more serious than any in *Perry*, because *Windsor* required the Court to decide the constitutionality of a federal statute in light of the Executive’s refusal to defend it. *Perry*, by contrast, did not threaten to embroil the judiciary in a dispute between the political branches over execution of federal law.

There was no doubt that the state of California had a judicially cognizable injury. A state has standing to vindicate its authority to govern and to defend its laws. There was also no doubt that California had authorized Proposition

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77 Id. at 2689.
78 Id. at 2701 (Scalia, J., dissenting).
80 See id. at 2660.
81 See id.
82 See id. at 2659.
83 Id.
84 Even where Congress has not expressly authorized it, executive officials sue to vindicate the United States’ institutional interest in the validity and supremacy of federal law. See Davis, Public Rights, supra note XX, at 1 (discussing Arizona v. United States, 132 S. Ct. 2492 (2012), which pitted the Obama Administration against the states’ “hand me your papers, please” immigration policy and depended upon implied public right of action). Like the United States, a state has a judicially cognizable interest in defending its authority to “exercise . . . sovereign power over individuals and entities within the [state’s] jurisdiction.” Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 601 (1982).
8's proponents to litigate the state’s institutional interest. The Ninth Circuit certified the authorization question to the California Supreme Court, which held that Proposition 8’s proponents had authority to stand for the state in defending the ballot initiative they proposed when the Attorney General and Governor would not. To deny standing, the California Supreme Court reasoned, would undermine the ballot initiative process by leaving the defense of an initiative solely in the hands of elected officials — the very officials whose control a ballot initiative is designed to avoid.

In theory, the California Supreme Court’s holding could have been the end of the standing question. But the U.S. Supreme Court held otherwise. The “fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary,” the Court explained, because “standing in federal court is a question of federal law, not state law.” As far as it goes, this pronouncement seems sensible in federal question cases. But it does not go very far. State law is surely relevant to the federal standing question, because the Court conceded that a state “must be able to designate agents to represent it in federal court.”

Apparent there is a jurisdictionally-significant distinction between traditional state actors and private litigants when it comes to defending statutes in federal court. After Windsor, it seems, a small group of federal legislators can be authorized to provide the arguments necessary for a federal court to reach the merits of a divisive constitutional dispute when federal executive officials agree with the plaintiffs. After Perry, the proponents of a state ballot measure cannot be authorized to provide the arguments necessary for a federal court to reach the same dispute when state executive officials agree with the plaintiffs. Neither the United States nor a state may “issu[e] to private parties who otherwise lack standing a ticket to the federal courthouse.” At the same time, however, the United States or a state may authorize “officials to speak [for them] in federal court” even though the officials would otherwise lack standing. This distinction between “private” litigants and government “officials” is hardly self-defining, however.

D. Standing as Fiduciary Law?

To reconcile Windsor and Perry, it is necessary to think outside of Article III and the injury-in-fact requirement. The Court in Perry was forced to rove far beyond Article III to decide whether Proposition 8’s proponents had

86 See id. at 1007.
87 See Perry, 133 S. Ct. at 2667.
89 Perry, 133 S. Ct. at 2664.
90 Perry, 133 S. Ct. at 2667.
91 Id. at 2664.
standing. In particular, the Perry Court turned to private fiduciary law to solve standing’s state action problem. Citing the Restatement (Third) of Agency, the Court reasoned that Proposition 8’s proponents lacked standing because they were not common law agents of the state. The absence of a fiduciary relationship, the Perry Court explained, created too great a risk that Proposition 8’s proponents would abuse their litigation authority under state law. The Restatement requires that a principal authorize an agent to act on her behalf, that the agent agree to do so, and that the principal retain a right to control the agent’s actions. While Proposition 8’s proponents were authorized by state law to defend the ballot initiative, the Perry Court reasoned, they were not common law agents because the state had no right to control them. Agents are fiduciaries for their principals, the Court went on, but Proposition 8’s proponents were not fiduciaries for the state. “Unlike California’s attorney general,” Proposition 8’s proponents are not elected; they “answer to no one”; “they decide for themselves, with no review, what arguments to make”; cannot be removed; could defend the law for an indeterminate period of time in an indeterminate number of cases; are “free to pursue a purely ideological commitment”; and do not need to worry about “resource constraints, changes in public opinion, or potential ramifications for other state priorities.” For these reasons the Court concluded that the power of government standing could not be given to litigants who are not “acting in an official capacity” and “hold no office.”

The Court’s themes are familiar from fiduciary law, which is one solution to the risk of abuse of power that arises when one person is dependent upon the decisions of another. By creating private rights of action, “[f]iduciary law plays an important role in ensuring the continued efficacy of social and economic interdependency by preventing those who hold power in fiduciary interactions from abusing the trust and confidence reposed in them.” From a fiduciary perspective, the problems with proponent standing were plain and numerous, or so the Court concluded.

At the same time, the Court assured, a state may designate “other officials

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92 See id. at 2666-67.
93 See Restatement (Third) of Agency § 1.01.
94 See Perry, 133 S. Ct. at 2667. The Court simply got agency law wrong on this point. The very comment the Court cited makes clear “[t]o establish that a relationship is one of agency, it is not necessary to prove its fiduciary character as an element.” Restatement (Third) of Agency § 1.01, cmt. e.
95 Perry, 133 S. Ct. at 2666-67.
96 Id. at 2665.
97 Seth Davis, The False Promise of Fiduciary Government, 89 Notre Dame L. Rev. 1145, 1146 (2014) (explaining that fiduciary law “aim[s] to protect the beneficiaries of delegations of power to others from becoming victims of that dependence”).
Standing’s State Action Problem

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to speak for the State in federal court.” In particular, the Court pointed to *Karcher v. May* as the example of when a state may designate someone other than the attorney general to stand for it.99 As in *Windsor*, so too in *Karcher* legislators provided the arguments necessary to reach the merits when the attorney general declined to defend a law. But, *Karcher* held, an official who has lost his state law authority to litigate has no standing to defend state law in federal court.100 By parity of reasoning, the *Perry* Court implied, because Proposition 8’s proponents “hold no office and have always . . . litigat[ed] solely as private parties,”101 they lacked standing.

This reasoning begs the question. Under California law, didn’t Proposition 8’s proponents hold a limited “office” tasked with defending the ballot initiative if the attorney general would not? Or, if that seems to stretch “office’s” normal meaning, isn’t *Karcher* irrelevant where a litigant claims standing based upon legislative authorization but not legislative office?102

Something more than the meaning of Article III’s “Judicial Power” is at stake when the Court finds it necessary to incorporate the Restatement (Third) of Agency into standing law. As I have argued elsewhere, defining government power in fiduciary terms has significant conceptual, doctrinal, and practical problems.103 Defining government standing in fiduciary terms presents the same problems. Conceptually, the *Perry* Court left unclear in what ways standing for the state must involve a fiduciary relationship. At times it seemed to envision a fiduciary relationship between the litigant and the people.104 At others it seemed to say that a litigant must be a fiduciary for elected officials in order to stand for the government.105 Even traditional state actors might lack standing to enforce federal law if *Perry* requires a litigant to show it “owes” a fiduciary duty of loyalty to elected officials or to We the People.106

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99 *Perry*, 133 S. Ct. at 2664 (citing *Karcher v. May*, 484 U.S. 72 (1987)).
100 *Karcher*, 484 U.S. at 82.
101 *Perry*, 133 S. Ct. at 2665.
102 *Perry*, 133 S. Ct. at 2672 (Kennedy, J., dissenting) (“proponents’ authority under California law is not contingent on officeholder status”).
103 See *Davis, Fiduciary Government*, supra note XX, at 1145.
104 See *Perry*, 133 S. Ct. at 2667.
105 See id. at 2666.
106 A host of federal agencies, including the Federal Reserve, the Consumer Financial Protection Bureau, the Consumer Product Safety Commission, the Federal Energy Regulatory Commission, the Federal Housing Finance Agency, the Federal Labor Relations Agency, the Federal Maritime Commission, the Federal Trade Commission, the Surface Transportation Board, and the National Labor Relations Board have independent litigation authority and standing to enforce the United States’ administrative interests. See *Kirti Datla & Richard L. Revesz, Deconstructing Independent Agencies (And Executive Agencies)*, 98 Cornell L. Rev. 769, 799 (2013). Many might not, however, be fiduciaries entitled to the stand for those interests under *Perry*.

If only common law fiduciaries may assert a government’s interests in court, it is not clear
As a doctrinal matter, the Perry Court’s newfound agency rule is hard to reconcile with longstanding rules. Private attorneys have legislative authorization and constitutional standing to prosecute criminal contempt charges even though they are not common law agents of the court, political officials, or We the People.\(^\text{107}\) Qui tam relators are not common law agents of the state, but the Perry Court purported to leave this long-recognized “private attorney general” mechanism untouched.\(^\text{108}\) As a practical matter, the Court’s agency rule thus calls into question settled enforcement regimes and leaves legislatures uncertain about their flexibility to design new ones.

Perhaps the game is worth the candle. It is necessary, however, to assess more carefully why the doctrine might limit government standing to litigants “acting in an official capacity.” Why, in other words, might standing law be a device to curtail the use and abuse of government power?

III. STANDING AND DUE PROCESS

To begin to answer that question this Part turns from Article III to due process. The aim is to make better sense of standing’s state action problem by identifying the “conflicts between competing values” that government standing raises.\(^\text{109}\) By identifying these competing constitutional values, this Part makes possible “contextual, specific analyses of both the benefits and dangers of different [enforcement] arrangements.”\(^\text{110}\) Thus, it makes intelligible the choice between Perry’s formal approach to standing’s state action problem and the comparatively functional approach elaborated in Part IV.

A. Structural Due Process

Standing doctrine’s distinction between state actors and private litigants

\(^{107}\) See Perry, 133 S. Ct. at 2673 (Kennedy, J., dissenting) (citing Fed. R. Crim. P. 42(a)(2) and Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 807 (1987)).

\(^{108}\) See Perry, 133 S. Ct. at 2665 (majority op.).


implements potentially competing structural principles inherent in a scheme of ordered liberty. First, it addresses the risk that arbitrary enforcement will distort the development of substantive law and impinge upon constitutionally-protected individual rights. Second, standing law aims at a system of remedies that rights wrongs and ensures the rule of law. Third, it concerns the individual right to one’s day in court and the fairness problems arising from inadequate representation of absent parties’ rights.

Government standing puts all three principles in play. First, because governments have far-reaching judicially cognizable interests, abuse of the power of government standing has great potential to foster “sweeping and unjust policies” and to burden individual rights.111 Second, government standing plays an important role in “ensur[ing] an effective enforcement system” and the rule of law.112 Third, government enforcement — particularly substitute standing to espouse citizens’ private rights — may crowd out private enforcement by “collecting many claims into one suit,”115 even if there’s no assurance the government will adequately represent claims of private right.

Before explaining these links between due process and government standing, a few words on structural due process. The idea that the separation of powers entails due process norms is not unfamiliar. Rebecca Brown in particular has rethought the separation of powers in due process terms, arguing that “individual liberty [is] an important value in resolving structural issues.”114 But the structural due process argument offered here involves more than a negative right against “encroachment by a tyrannical majority.”115

On the one hand, structural due process limits the delegation of public power, so as to promote constitutional accountability and to limit the risk of arbitrary coercion, and constrains other institutional arrangements that foster “sweeping and unjust policies.”116 On the other hand, structural due process encompasses a right to one’s day in court and “a right to law of redress.”117 Structural due process supports judicial review of lawmaking and enforcement arrangements “to ensure they are made by the most legitimate decisionmakers in a procedurally accountable way.”118 Structural due process review includes

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112 Davis, Public Rights, supra note XX, at 5.
115 Id. at 1516-17 (arguing that separation of powers involves “protecting individual rights against encroachment by a tyrannical majority”).
116 Eskridge, supra note XX, at 1206.
118 Eskridge, supra note XX, at 1206.
what Dan Coenen calls “constitutional ‘who’ rules” that “steer policy choices away from one decisionmaker to another, on account of institutional capacities.” Under the Due Process Clause, in other words, some decisions are matched with specific decisionmaking structures. Standing’s distinction between private and government enforcement is one such “constitutional who” principle, or so this Article argues.

Structural due process recognizes “rights to structures,” but these rights are not necessarily enforced by individuals through private rights of action or available as defenses in individual cases. Like the separation of powers or federalism, these rights to structure are deeply rooted in our constitutional tradition, but not necessarily discernible through textual interpretation of a single constitutional clause. The test of structural due process’s constitutional legitimacy, as with other arguments from text and structure, depends upon a “close and perpetual interworking between the textual and the relational and structural modes of reasoning” in light of precedent.

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119 Coenen, supra note XX, at 1370.
120 Hampton v. Mow Sun Wong provides a clear example of structural due process doctrine. Five immigrants challenged a Civil Service Commission policy excluding non-citizens from most federal employment. See 426 U.S. 88 (1976). The plaintiffs had been “admitted as a result of decisions made by the Congress and the President” and implemented by “the Immigration and Naturalization Service acting under the Attorney General of the United States.” Id. at 116. The CSC justified the policy by pointing to foreign affairs and immigration even though the agency’s sole “business” was “to adopt and enforce regulations which will best promote the efficiency of the federal civil service.” Id. at 114. Given the CSC’s limited competence, the Court held that the policy had been adopted by the wrong institution in violation of Fifth Amendment due process. Specifically, the Court concluded that even if Congress or the President could have decided to bar the plaintiffs from federal employment, the CSC could not. Rather, “due process require[d] that the decision to impose [the] deprivation of an important liberty be made either” by Congress or by a high-level executive official or “justified by reasons which are properly the concern” of the CSC. Id. at 116.

121 Goldberg, supra note XX, at 625.
122 Unlike these “textually unspecified principles,” however, structural due process has a specific textual hook. See generally Gillian E. Metzger, The Constitutional Legitimacy of Freestanding Federalism, 122 Harv. L. Rev. F. 98, 98 (2009) (arguing for constitutional legitimacy of federalism, though it is “textually unspecified”). Notwithstanding its textual hook, however, structural due process combines structural interpretation of the Due Process Clause with interpretation of other clauses, such as Articles II and Articles III, and thus may be vulnerable to textualist criticisms. See John F. Manning, Federalism and the Generality Problem in Constitutional Interpretation, 122 Harv. L. Rev. 2003. Still, structural interpretation is a familiar feature of constitutional argument. See Charles L. Black, Jr., Structure and Relationship in Constitutional Law 23 (1983) (considering how “our federal constitutional law might use the method of reasoning from structure and relation”); see also Michael Coenen, Combining Constitutional Clauses 2 (unpublished manuscript) (2014) (on file with author) (arguing that Court has “occasionally” and rightly “combined constitutional clauses, deriving an overall conclusion of constitutional validity (or invalidity) from the joint decisional force of two or more provisions of the constitutional text”).

123 Black, supra note XX, at 31.
“method not unknown” to constitutional law, and not without its limits.

B. Arbitrary Enforcement

Of course, “[m]odern American jurisprudence contains myriad limitations on arbitrary action by government officials,” not all of them sounding in the Due Process Clauses. To prove that standing is a tool to address arbitrary enforcement, it is not enough to prove that there is a recurring constitutional concern with arbitrary government action. Rather, this section’s argument proceeds in four steps. First, it defines “arbitrary enforcement.” Second, it sketches the longstanding link between due process and structural values, beginning with the “separation-of-powers logic” of early court decisions applying due process to legislative acts. Third, it shows that this longstanding structural due process entails a recurring concern with the risk of arbitrary enforcement. Fourth, it explains how the law of government standing addresses the same recurring concern about arbitrary enforcement.

1. What is “Arbitrary Enforcement”? — Within public law, “arbitrariness” is defined in multiple and only partially overlapping ways to include decisions that are “without adequate determining principle,” “irrational,” “not based in reason,” and “tyrannical, despotic, oppressive or by caprice.” Within administrative law, where its modern usage is perhaps most familiar, an agency acts “arbitrarily” if it fails rationally to explain its choice in light of the evidence before it, does not consider the relevant factors or considers factors Congress directed it to ignore, makes a clear error in judgment, or otherwise arrives at a decision that is “so implausible” it could not have been “the product of agency expertise.” This Article does not use “arbitrariness” in that sense. Rather, at its most concrete, “arbitrary enforcement” here means two things. First, a decision to sue on a baseless claim is arbitrary. It is this sense of “arbitrary” at play when the Court has held that suits that lack a “reasonable basis” are “not

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124 See id.
125 See infra notes XX-XX and accompanying text (discussing criticisms of prophylactic rules).
127 The Administrative Procedure Act, for example, authorizes courts to set aside arbitrary agency action. 5 U.S.C. § 706. But cf. Gillian E. Metzger, Ordinary Administrative Law as Constitutional Common Law, 110 Colum. L. Rev. 479, 483 (2010) (“One area in which constitutional common law remains particularly prevalent . . . is ordinary administrative law.”).
immunized by the First Amendment right to petition.”

Second, a decision to sue on a meritorious claim is arbitrary when the decision is based upon personal whim, animus, or invidious discrimination. This second sense undergirds the selective prosecution doctrine, which prohibits a public prosecutor from singling out defendants based upon, among others, racially discriminatory reasons. At its most conceptual, “arbitrary enforcement” means an enforcement decision that is not based upon public reasons, but rather raw preferences. It is precisely this sense of “arbitrary enforcement” the Court suggested in *Marshall v. Jerrico, Inc.* when it left open the possibility that an enforcement “scheme, injecting a personal interest, financial or otherwise, into the enforcement process” may “raise serious constitutional questions.”

2. The Separation-of-Powers Logic of Early Due Process. — At its most basic, due process prohibits a deprivation of life, liberty, or property except in accordance with law. The Court has interpreted the due process guarantee as “equivalent to the ‘law of the land,’” which from Magna Carta onward protected a person from the deprivation of a vested private right “except by the lawful judgment of his peers or by the law of the land.” In enacting the Due Process Clause, the Founders intended to “guarantee that deprivations [of life, liberty, and property] would accord with positive law.” Did they intend more than that? There is no scholarly consensus about this question. Many have argued that, as an original matter, due process referred to “lawful procedures” alone. Others have found in the constitutional history a substantive component to the Fifth Amendment Due Process Clause. Describing a third way, Ryan Williams has argued that the original understanding of the Fifth Amendment’s Due Process Clause encompassed procedures alone, but, contrariwise, the original understanding of the Fourteenth Amendment’s Due Process Clause encompassed substance as well as process. Responding to Williams, Nathan Chapman and Michael McConnell have argued that, as an original matter, “[l]egislative acts violated due process not because they were unreasonable or in violation of higher law,

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132 See infra notes XX-XX and accompanying text.
133 446 U.S. 238, 250 (1980).
135 Magna Carta, ch. 39 (1215).
139 Ryan C. Williams, The One and Only Substantive Due Process Clause, 120 Yale L.J. 408, 415 (2010).
but because they exercised judicial power or abrogated common law procedural protections.”

Even on this narrower understanding, the Founders considered due process and structural values as linked. Chapman and McConnell explain that court decisions applying due process to legislative acts “were consistently based on [a combined] . . . separation-of-powers and due process logic.” On this logic, “[l]egislative acts violated due process [when] . . . they exercised judicial power or abrogated common law procedural protections.” Thus, a due process violation could inhere in an improperly structured delegation of authority from the legislature to a co-ordinate branch. A similar structural link between due process and delegation, Ann Woolhandler has argued, existed from the Reconstruction until the New Deal. Drawing upon tax-assessment and rate-regulation cases, she shows that “the fact of delegation” from the legislature to an agency “mean[t] that more process would be required of the delegee” than would have been required if the legislature had assessed taxes or regulated rates directly. In this vein, in *Yick Wo v. Hopkins* the Court struck down under the Due Process Clause a standardless delegation of authority to city officials, who were free to deny permits to operate laundries to Chinese-Americans. In *Yick Wo* the Court set out a distinction that has animated due process doctrine since. Liberal democracies demand that government action be based upon public reasons, not raw preferences, or what *Yick Wo* called “the play and action of purely personal and arbitrary power.”

3. The Structural Due Process Concern with Arbitrary Enforcement. — Eventually this understanding of due process — which sounds in procedure and in structure — expanded to embrace substantive review of legislative action for arbitrariness. Just months after *Yick Wo*, the Court explained that the “great purpose” of the due process requirement “is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen.” Around the same time, the Court embraced an evolutionary conception of due process, explaining that the Constitution “was made for an undefined and

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140 Chapman & McConnell, supra note XX, at 1677.
141 Id. at 1678.
142 Id.
143 See id. at 1724 (“Most American courts and jurists in the early Republic agreed, at a minimum, that legislative enactments that authorized other branches to deprive persons of life, liberty, or property without traditional procedural protections or their equivalent violated due process.”).
145 Id. at 237.
146 118 U.S. 356, 369-70 (1886); see Woolhandler, supra note XX, at 240 (noting conceptual connection between tax-assessment and rate-regulation cases and *Yick Wo*).
147 118 U.S. at 369.
148 See Woolhandler, supra note XX, at 247-55.
149 Dent, 129 S. Ct. at 124.
expanding future” and that “[t]here is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age.” Though the link between structure and due process preceded it, this understanding made considerable room for a “general concept of due process” that includes judicial review of the structures of lawmaking and law enforcement.\footnote{Standing’s State Action Problem}

According to the Court’s gloss, the due process clauses aim at a “scheme of ordered liberty” and a “fair and enlightened system of justice” that are “rooted in the traditions and conscience of our people.” These traditions recognize “the basic unfairness of depriving citizens of life, liberty, or property, through the application . . . of arbitrary coercion.”\footnote{Courts construe due process as limiting arbitrary government action, whether in the form of arbitrary legislation, police action, or other governmental activity.}

\begin{itemize}
\item \textit{a. Private Lawmaking.} — Private lawmaking presents due process concerns under both federal and state law. The leading Supreme Court precedent is \textit{Carter v. Carter Coal Co.}, which held that Congress violated the Due Process Clause of the Fifth Amendment by delegating to coal producers and miners the power to make wage and hour laws.\footnote{Carter Coal, 298 U.S. 238 (1936); see A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 49 (1935).} This delegation of lawmaking authority was “clearly arbitrary,” the Court held, and thus violated due process.\footnote{Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940).} When Congress later reenacted the statute, this time tasking an agency with adopting the standards in consultation with industry representatives, the Court held the delegation was constitutional because Congress had not “delegated its legislative authority to the industry.”\footnote{298 U.S. 238 (1936); see A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 49 (1935).} Thus, the Court countenanced interdependence between public officials and private parties in the lawmaking enterprise while setting an outer limit on “clearly arbitrary” delegations of private lawmaking authority.

The private nondelegation resurfaced last year in \textit{Association of American Railroads v. U.S. Department of Transportation}, in which the D.C. Circuit held that Congress had invalidly delegated lawmaking authority to Amtrak.\footnote{721 F.3d 666 (D.C. Cir. 2013).} Calling Amtrak “a curious entity that occupies the twilight between the public and private sectors,” the court of appeals reasoned that delegating authority to Amtrak to regulate its competitors violated the private nondelegation doctrine, which it partly rooted in the Due Process Clause. Due process, the court explained, “ensures that regulations are not dictated by those who . . . may

\begin{itemize}
\item \textit{Hurtado v. California,} 110 U.S. 516, 530-31 (1884).
\item Tribe, supra note XX, at 293 (“More plausible . . . is a view that reads the Constitution as a mandate for a process that seeks to incorporate evolving visions of law and society into constitutional principle.”).
\item \textit{Tribe, supra note XX, at 293 (“More plausible . . . is a view that reads the Constitution as a mandate for a process that seeks to incorporate evolving visions of law and society into constitutional principle.”).}
\item \textit{Tribe, supra note XX, at 293 (“More plausible . . . is a view that reads the Constitution as a mandate for a process that seeks to incorporate evolving visions of law and society into constitutional principle.”).}
\end{itemize}
instead act ‘for selfish reasons or arbitrarily.’”

To the extent that law enforcement itself involves lawmaking, the private nondelegation doctrine is directly relevant to standing doctrine. The familiar Legal Realist insight is therefore a propos: “Remedies are not mere ‘adjective’ law” and lawmaking and law enforcement are “functionally inseparable.”

b. Criminal Law and Procedure. — The due process concern for arbitrary coercion entails a concern for arbitrary enforcement. We have no difficulty describing this concern when the litigant is a government prosecutor with standing to bring a criminal complaint. The Fifth Amendment Due Process Clause, for example, imposes various restrictions upon a federal prosecutor’s discretion. In Oyler v. Boles, the Court held that due process precludes a prosecutor from prosecuting an individual based upon “an unjustifiable standard such as religion, or other arbitrary classification.” Selective prosecution may violate due process where the prosecutor singles out a defendant for his exercise of another constitutionally protected right, such as the right to free speech. Or selective prosecution may violate due process where there is evidence of an office-wide arbitrary prosecutorial policy. Nor can a prosecutor, consistent with due process, make a charging decision out of

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158 Id. at 676. But see Calvin Massey, The Non-Delegation Doctrine and Private Parties, 17 Green Bag 2d 157, 169 (2014) (arguing it is “wise to eschew due process as the rationale for a general prohibition of private delegation” so that “states may make their own decisions concerning ministerial delegations”).

159 Of course, the analysis is more complicated if the private nondelegation doctrine stems solely from Article I. It would then be necessary to explain how the authorization of a private right of action involves an impermissible delegation of legislative authority. Cf. Lisa Schultz Bressman, Judicial Review of Agency Inaction: An Arbitrariness Approach, 79 N.Y.U. L. Rev. 1657, 1703 (2004) (arguing that citizen-suit standing impermissibly shifts legislative power to private parties). Even if it does, that would not explain the outcome in Perry, of course.

160 Davis, Public Rights, supra note XX, at 10 (quoting Karl N. Llewellyn, A Realistic Jurisprudence — The Next Step, in Jurisprudence: Realism in Theory and Practice 3, 10-11 (1962)).


162 For discussion of the constitutionality of private prosecutors, see infra pt. IV (discussing Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 807 (1987)).


164 See, e.g., United States v. Falk, 479 F.2d 616, 621-22 (7th Cir. 1973) (discussing evidence that “Assistant United States Attorney had told [defendant’s] attorney” that “defendant’s draft-counseling activity was one of the reasons why the prosecution for non-possession of draft cards was brought”); Anne Bowen Poulin, Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong, 34 Am. Crim. L. Rev. 1071, 1108-09 (1997) (discussing case).

165 See United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1987) (discussing evidence that prosecutor had described enforcement “policy . . . ‘brought on by the arrogance on the part of blacks’” in jurisdiction); Poulin, supra note XX, at 1109 (discussing case).
personal vindictiveness. Indeed, even the “potential for vindictiveness,” regardless of proof of bad faith, may violate due process.

These private rights against selective and vindictive prosecution enforce due process on a case-by-case basis. But due process does not entail reasonableness review of every prosecutorial decision. Invoking the separation of powers, federal courts are reluctant to police prosecutorial discretion in the ordinary course, reasoning “that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.” Federal courts will not subject prosecutorial policies to review unless the challenger is facing prosecution. And prosecutorial decisions are due a “presumption of regularity” when the courts do review them. In United States v. Armstrong the Court summed up this presumption against judicial review, holding that if the prosecutor has probable cause to charge, the decision to do so (or not) “generally rests entirely in his discretion.” It therefore falls to structure and subconstitutional law to do much of the working of addressing the risk of arbitrary enforcement by public prosecutors.

Some structural checks on arbitrary prosecutions stem from the Due Process Clause itself. The Court’s void-for-vagueness cases explain that a constitutional concern with arbitrary enforcement is “basic,” deeply rooted, and cuts across the usual conceptual division between structure and rights. In Kolender v. Lawson, the Court located the void-for-vagueness doctrine in due process, requiring legislatures to notify an “ordinary” person “what conduct is prohibited” and to discourage “arbitrary and discriminatory enforcement.” At the same time, the Court reasoned that the doctrine does not focus upon actual notice to individuals, but rather upon the structure of law enforcement, namely, “the requirement that a legislature establish minimal guidelines to govern law enforcement.” Without sufficient structural constraints, the Court explained, there is a constitutionally unacceptable risk that policemen, prosecutors, and jurors will enforce the law based upon “their

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167 Id. at 28.
171 Id. at 464 (internal quotation marks omitted).
174 Id.
175 Id.
personal predilections" — that is, based upon raw preferences rather than public reasons.

In *Berger v. United States* the Court explained the prosecutor's charge in these terms: “The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation is to govern impartially . . . and whose interest . . . [is] that justice shall be done.”

The Court has suggested, without so holding, that due process precludes incentive structures that would encourage partiality on the part of prosecutors. In *Marshall v. Jerrico, Inc.*, the Court considered whether, under the Due Process Clause, there was an “impermissible risk of bias” in the enforcement of the Fair Labor Standards Act. Under the FLSA, civil penalty awards went to the coffers of the Department of Labor, the agency tasked with enforcing the Act. Did this bounty offend due process? Due process prohibits, the Court had held, “biased” adjudication by requiring “an impartial and disinterested tribunal.” This prophylactic rule, the Court explained, mitigates the risk of actual bias in a particular proceeding and preserves the appearance of fair government decisionmaking. But while due process sets stringent prohibitions upon conflicts of interests for judges, the Court went on, it does not prohibit Congress from directing civil penalty awards to the funding of the enforcing agency. Importantly, the Court found, risk of bias in that case was “exceptionally remote,” not least because no agency official's salary depended upon the civil penalty awards. Though making clear that prosecutors are not subject to “strict requirements of neutrality,” the Court also explained that “[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions” under the Due Process Clause.

The constitutional concern for arbitrary enforcement also recurs across a wide array of other constitutional doctrines that reduce the risk of capricious enforcement. The Fourth Amendment protects against arbitrary enforcement by controlling police discretion. The right to a jury trial, which is

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176 See id.
178 446 U.S. 238, 239 (1980).
180 See id. at 242.
181 Id. at 250.
182 Id. at 249-50 (citing 28 U.S.C. § 528 (1976 ed., Supp. III) (precluding federal prosecutor with personal interest from participating in case)).
183 See, e.g., Payton v. New York, 445 U.S. 573, 616-17 (1980) (White, J., dissenting) (“The felony requirement [for home arrests] guards against abusive or arbitrary enforcement and ensures that invasions of the home occur only in case of the most serious crimes.”); Tracey Maclin, Race and the Fourth Amendment, 51 Vand. L. Rev. 333, 356 (1998) (“where unequal or arbitrary enforcement exists, the protection afforded by the Fourth Amendment is properly directed at such intrusions”) (citing Wayne R. LaFave, Controlling Discretion by
incorporated against the states under the Fourteenth Amendment’s Due Process Clause, reflects the Constitution’s “deep commitment” to providing “a defense against arbitrary law enforcement.”

Likewise, the writ of habeas corpus is a structural check on “arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions.”

c. Civil Procedure and Remedies. — The due process concern for arbitrary enforcement appears not only in criminal procedure, but also in law of civil remedies. Due process, the Court has held, limits the size of punitive damage awards. As a structural matter, due process requires a judicial check on punitive damage awards so that they “are not imposed in an arbitrary manner.” As a substantive matter, due process “prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” Here, as elsewhere, the Due Process Clause draws a distinction between public reasons and raw preferences in the enforcement of law, requiring “[e]xacting” judicial review to reduce the risk of a deprivation of property based upon a “decisionmaker’s caprice.”

Farther afield, but still instructive, are the due process restrictions upon personal jurisdiction. Due process prohibits one litigant from hauling another before a forum where it would be unreasonable for the court to assert personal jurisdiction. Rather, the defendant must have “sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there.”

4. Rethinking Standing Doctrine in Due Process Terms. — Standing is another doctrine that addresses the risk of arbitrary enforcement by limiting federal administrative regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication, 89 Mich. L. Rev. 442, 449 (1990) (“Protection against arbitrary searches and seizures lies in controlling police discretion, which requires a determination that the police action taken against a particular individual corresponds to that which occurs with respect to other persons similarly situated.”)).


188 Id. at 618 (internal quotation marks omitted).

jurisdiction. Even traditional state actors, of course, cannot stand for the government if the government has no judicially cognizable interest in the dispute. The range of judicially cognizable government interests is sweeping. It includes an interest in enforcing the law, an interest in preserving the “sovereign power . . . to create . . . a legal code,” and an interest that, like the police power, concerns protecting the “health and well-being” of the citizenry. These sweeping interests create a risk that government litigation will foster “sweeping and unjust policies.” In theory, of course, the doctrine could address this risk by narrowing the range of judicially cognizable government interests, which would limit legislative discretion to authorize public enforcement. Or Congress could address the risk by specifying how often, or against whom, or under what circumstances prosecutorial discretion should be exercised. But Congress often creates rights of action without setting out enforcement policies or priorities.

Standing doctrine addresses the risk of arbitrary enforcement by trying to ensure a broad-based political judgment will occur before some types of enforcement decisions are made. The structural principle is that sweeping powers to enforce the law, so-called “generalized grievances,” for instance, should not be widely distributed. Perry, for example, “specifies who may decide” that a state “shall exercise its power” to stand in court, limiting this decision to formal government officials and agents.

In its standing decisions, the Court has gestured towards the distinction between raw preferences and public reasons, though imprecisely. In Diamond v. Charles the Court explained that the power of government standing should not be “placed in the hands” of litigants “who will use it simply as a vehicle for the vindication of value interests.” In Perry the Court worried that Proposition 8’s proponents would be “free to pursue a purely ideological commitment” if it held they had standing. But this doesn’t seem quite right. After all, we elect public officials based in no small measure on their “value interests” and “ideological commitment[s].”

The Court has been closer to the mark when considering an issue that

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190 See, e.g., United States v. San Jacinto Tin Co., 125 U.S. 273, 285-86 (1888) (holding that “interest or duty of the United States must exist as the foundation of the right of action” when Attorney General sues in United States’ name).
191 See supra Part I.A.
193 See Eskridge, supra note XX, at 1206 (defining structural due process as concerned with “sweeping and unjust policies”).
194 Jonathan R. Siegel, Congress’s Power to Authorize Suits Against States, 68 Geo. Wash. L. Rev. 44, 80 (1999) (arguing that “qui tam statute does not delegate, to private parties, the power of the United States to sue states” but rather “specifies who may decide that the United States itself shall exercise its power”).
195 476 U.S. at 62.
196 133 S. Ct. at 2667.
conceptually, though not doctrinally, overlaps with standing, namely, implied private rights of action. Perhaps the most prominent example is the implied private right to litigate a 10(b)-5 securities fraud claim. First recognized by the Court during the heyday of implied private rights of action, the 10(b)-5 claim has come under fire from Congress, courts, and commentators. Consider the Court’s recent holding in Stoneridge Investment Partners LLC v. Scientific Atlanta that it “must give” to the 10(b)-5 right of action “narrow dimensions” because “Congress did not authorize” right and because of the “practical consequences of an expansion” of private enforcement. These consequences included the risk of arbitrary enforcement, leading to “extensive discovery,” “the potential for uncertainty and disruption,” and the “extort[ion of] settlements from innocent companies.” Better, the Stoneridge Court reasoned, to leave broader enforcement authority to the DOJ and the SEC.

The due process concern is that some enforcement decisions should be based upon public-spirited political judgments, not raw preferences. Standing doctrine’s distinction between private and government standing allocates enforcement authority in a way sensitive to this concern. For example, Perry’s distinction between “officials” entitled to stand for the state and “private” litigants who are not makes a rough cut at this allocation of enforcement power. Thus, standing addresses the risk that litigation decisions driven by raw preferences will distort the development of substantive doctrine and result in arbitrary enforcement that impinges upon individual rights.

5. The Role of Article II. — The potential overlap of a due process theory of standing with Article II should now be apparent. In Buckley v. Valeo the Court suggested that an Article II constraint on private standing stems from the Appointments Clause, but the lower courts have rejected this aside as dicta and treated Buckley as concerned with extensive congressional aggrandizement. Guidance might be better found in Morrison v. Olson, in which the Court upheld the Ethics in Government Act’s creation of a special independent prosecutor tasked with investigating and prosecuting wrongs by

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198 Id.
199 See id. at 166 (“Secondary actors are subject to criminal penalties . . . and civil enforcement by the SEC.”).
200 424 U.S. 1, 140 (1976) “primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights . . . may be discharged only by persons who are ‘Officers of the United States’ within the language of the appointments clause”).
high-ranking government officials. The Court found that the Act had not “impermissibly undermin[ed]” or otherwise “disrupt[ed]” the proper balance between the branches because the Executive retained a measure of control over the independent counsel, including through a for-cause removal provision. This functional test suggests that private standing to enforce federal law may be permissible depending upon the depth and breadth of the grant of standing and the degree of retained executive control. This Article does not give a full accounting of the reasons for restricting (or permitting) private standing under Morrison, particularly because these reasons substantially overlap with those reflected in structural due process.

A few commentators have hinted at a due process account of standing grounded in Article II. For example, Harold Krent and Ethan Shenkman have placed standing within Article II, arguing that Congress may not delegate “outside the Executive’s control the power to protect the interests of the public as a whole in the face of external or internal threats.” In part they locate this nondelegation principle in the “Constitution’s [structural] preference for democratic decisionmaking.” In part they argue that “[e]mploying private attorneys general to combat the risk of under-enforcement also creates the risks of overenforcement and arbitrary rule.”

This argument is best understood in terms of structural due process, as Krent and Shenkman believe that Congress can authorize broad enforcement as long as it does so in the right way, by being “explicit about the interests it creates.” As Cass Sunstein has argued, moreover, Article II cannot by itself sustain Krent and Shenkman’s argument, for “[i]f suits against the executive by people with individuated interests do not violate Article II — as everyone agrees — it is hard to see why the same suits violate Article II merely because of the absence of an individuated interest.”

203 Id. at 696.
206 Id. at 1806.
207 Id. at 1808.
208 Id. at 1807.
209 Cass R. Sunstein, Article II Revisionism, 92 Mich. L. Rev. 131, 136 (1993). The problems with the conventional Article II accounts of standing are well-known and need no lengthy recitation here. Justice Antonin Scalia, among others, has argued that when Congress authorizes an “ideological” plaintiff to seek judicial review of federal agency action, it encroaches upon the President’s “executive power” to enforce and administer the law. See
There is, however, a more promising way to think of standing in nondelegation terms. Like Krent and Shenkman, Tara Leigh Grove and Lisa Schultz Bressman describe “standing as [a] nondelegation doctrine.” Bressman sketches an argument that standing “reflect[s] nondelegation limits rather than case or controversy limits,” arguing that citizen-suit provisions violate Article I by “shift[ing] . . . legislative power to private parties.” Grove’s theory sounds in Article II, which she argues imposes a nondelegable duty upon the Executive Branch to enforce federal law. By prohibiting Congress from creating sweeping “private prosecutorial discretion” to litigate generalized grievances, standing doctrine implements the Article II nondelegation principle. This nondelegation principle does not protect Executive discretion so much as limit private plaintiffs from arbitrarily burdening the property and liberty rights of private defendants. Grove’s elegant and powerful theory thus sounds in concerns about arbitrary enforcement and due process.

There are limits to locating standing doctrine in Article I or Article II. For one, these theories do not explain why standing doctrine would limit the authority of the states to delegate the power of state standing to defend state law to private parties. In addition, an account focused upon due process can explain state standing to enforce federal law, on the theory that the formal checks on state attorneys general address due process concerns. Moreover, linking standing and due process reaches beyond the question of private standing to litigate generalized grievances to address other aspects of the doctrine, including government standing to enforce private rights. This section now turns to those other aspects.

C. Rights to Remedies

Given the due process concern about arbitrary enforcement, why not eliminate private standing entirely? After all, criminal justice, with few exceptions, is today the province of public officials. On the civil side, commentators have argued for replacing private tort litigation with publicly-managed compensation funds. Justice William Brennan’s statement that the

Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881 (1983). But a litigant with an injury in fact can interfere with executive policymaking as readily as one without it. Whether a litigant has an injury in fact has nothing to do with whether judicial review encroaches upon a constitutionally-protected zone of presidential prerogative.

200 Bressman, supra note XX, at 1702; Grove, supra note XX, at 781.
211 Id. at 1703.
212 Grove, supra note XX, at 790-91.
213 See id. at 788-90.
214 See, e.g., Linda S. Mullenix, Mass Tort Funds and the Election of Remedies, 31 Rev. Litig. 833, 833 (2012) (“The twenty-first century may very well mark both the advent and triumph of fund approaches to resolving mass tort litigation.”).
“[c]ourts are the central dispute-settling institutions in our society,” \textsuperscript{215} rings less soundly today than it did during the era of \textit{Bivens}\textsuperscript{216} and \textit{Borak},\textsuperscript{217} when the federal courts expanded private enforcement of public law. Mandatory arbitration clauses, restrictions on class action relief, plausible pleading standards and a host of other legislative and judicial restrictions have curtailed private enforcement. Perhaps that is a good thing.

To the contrary, there are sound reasons why standing doctrine permits a wide range of private enforcement actions. First, private enforcement helps satisfy a regulatory demand for a system of remedies sufficient to ensure the rule of law. Private victims of legal wrongs often are in the best position to identify, and to decide whether to sue, the wrongdoer. All else being equal, it is less costly for private victims to enforce the law than for the state to employ investigators to identify and pursue wrongdoers.\textsuperscript{218} A government’s enforcement resources are finite, after all. Public enforcement may be — indeed, in the real world is — inadequate to achieve a cost-justified level of enforcement on its own. In many cases, the regulatory benefits of private standing to enforce the law are worth the costs.

Second, private standing is necessary in many cases to satisfy the “adjudicatory” principle that a right implies a remedy.\textsuperscript{219} This principle sounds in structural due process and is deeply rooted in our tradition of ordered liberty, as John Goldberg and Tracy Thomas have argued.\textsuperscript{220} Citing Blackstone (who in turn relied upon John Locke), Chief Justice John Marshall celebrated the right-remedy principle in \textit{Marbury v. Madison}, explaining that “the essence of civil liberty” requires government to recognize a remedy “for the violation of a vested legal right.”\textsuperscript{221} The Court’s seminal decision in \textit{Texas & Pacific Railway Co. v. Rigsby} held that the “especial” beneficiaries of a federal statute had standing under the common law to sue for harms they suffered from statutory violations.\textsuperscript{222} In \textit{Bivens} Justice John Marshall Harlan reasoned the law must supply a damages remedy because, for Webster Bivens, it was “damages or nothing.”\textsuperscript{223}

\textsuperscript{216} Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971) (inferring damages remedy to enforce fourth amendment).
\textsuperscript{217} J.I. Case & Co. v. Borak, 377 U.S. 426, 432 (1964) (recognizing implied private right of action to sue to enforce securities law prohibition on fraudulent proxy solicitations).
\textsuperscript{218} Steven Shavell, The Optimal Structure of Law Enforcement, 36 J. L. Econ. 255, 267 (1993).
\textsuperscript{220} See Goldberg, supra note XX, at 527; Tracy A. Thomas, Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process, 41 San Diego L. Rev. 1633 (2004).
\textsuperscript{221} 5 U.S. (1 Cranch) 137, 163 (1805); see Goldberg, supra note XX, at 545.
\textsuperscript{222} \textit{Rigsby}, 241 U.S. 33, 39 (1916).
Standing’s State Action Problem

Nineteenth century due process case law recognized this right to a remedy as a structural right sounding in due process. In *Missouri Pacific Railway Co. v. Humes*, the Court explained that “if it is the duty of every State to provide, in the administration of justice, for the redress of private wrongs.” As Goldberg has described, Humes’s dictum echoed the Court’s holding in *Poindexter v. Greenbow* that due process supports a right to redress: “No one,” the Court held, “would contend that a law of a State, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law.”

This account of the remedial implications of due process, though controversial, is a sound one. One objection is that the Constitution is a charter of negative liberties, not affirmative rights like the right to redress. When it comes to criminal prosecutions, for instance, the Court has held that the separation of powers requires substantial deference to prosecutorial decisions not to enforce the law. The Court has been quite clear that “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.” But the question whether due process protects a right to personal redress is distinct from a claim that public officials must enforce the law on a person’s behalf. The due process guarantee of a system adequate to redress wrongs, unlike a right to demand the prosecution of another person, leaves government “with substantial discretion in shaping the contours of . . . law.”

More problematic for the claim of a right to redress is the current Court’s disfavor for implied private rights of action. Citing the separation of powers, federalism, and the pathologies of private litigation, the Court has disavowed authority to create private rights of action to enforce statutes and retreated from implying constitutional remedies in a common law mode. The right-remedy principle is not absolute, and due process does not guarantee redress in every individual case. As Richard Fallon and Daniel Meltzer have argued, the adjudicatory right to a remedy has, and legitimately can be, compromised in light of countervailing interests, such as a concern for unfairly burdening defendants. At the same time, the regulatory principle, at least in constitutional cases, “demands a system of constitutional remedies adequate to

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224 115 U.S. 512, 521 (1885).
225 Goldberg, supra note XX, at 570 (quoting Poindexter v. Greenbow, 114 U.S. 270, 303 (1884)).
227 Goldberg, supra note XX, at 592-93.
228 Id. at 595.
keep government generally within the bounds of law.”

The law of standing plays an important role in recognizing rights to remedies and ensuring the rule of law. Consider a well-known example of the denial of private standing. In *City of Los Angeles v. Lyons*, the Court denied an African-American man who had been choked by police standing to seek injunctive relief, though it permitted him to pursue damages for the due process violation. As Fallon has argued, for a “black male” in a city that “encourages its officers to apply unconstitutional chokeholds to . . . black males,” the “meaning of the due process right is a practical . . . question.”

Practically speaking, the denial of standing in *Lyons* amounted to a “door-closing” decision based upon an injury-in-fact analysis that shed little light on the difficult remedial questions.

Now consider government standing. Unlike private litigants, governments may not have a plausible personal demand for a remedy to redress wrongs. But government enforcement helps ensure an adequate system of remedies and the rule of law. Though the “enormous power” of government standing “may be abused,” the Court held in *United States v. San Jacinto Tin Co.*, that reason alone does not suffice to deny standing where the government has an “obligation to the general public” to enforce the law.

**D. Adequate Representation**

The final link between due process and standing has been described by other commentators. It concerns the due process right to one’s day in court. Like the right to a remedy, this right is not absolute. But though due process may not guarantee a right to stand in court in all cases, it entails a “right to adequate representation” when one’s rights are litigated, as in the case of class actions.

The link between the right to adequate representation and standing needs no lengthy rehearsal. Lea Brilmayer has argued standing addresses “fairness problems that would arise if an ideological challenger” were to inadequately represent “someone else’s . . . rights.” By limiting standing to those who

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231 Id.
234 Id. at 74.
235 125 U.S. 273, 286 (1888).
236 See Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 232-33 (1992) (“the American system of adjudication has historically recognized classes of cases in which individuals did not have a strong claim to participate at all”).
237 Epstein v. MCA, Inc., 179 F.3d 641, 648 (9th Cir. 1999).
238 Brilmayer, supra note XX, at 306, 308. Mark Tushnet has criticized Brilmayer’s account of standing while acknowledging the problem of inadequate representation. Noting that the “analogy to class actions is particularly apt,” Tushnet argues the solution is not an
have suffered an injury in fact, the doctrine (in theory) mitigates the due process problem of inadequate representation. The Court’s private standing decisions are consistent with this reasoning, frequently labeling private parties without injuries in fact as “concerned bystanders” — read “officious intermeddlers” — seeking to litigate someone else’s rights.

Though the courts do not heed the problem, government standing can crowd out private enforcement and thus undermine rights to adequate representation and one’s day in court. Consider substitute standing, which permits a government litigant to espouse citizens’ private rights. State *parens patriae* litigation espousing citizens’ private rights, for example, is preclusive against subsequent private suits. Thus, substitute standing presents a serious due process problem.

IV. IMPLEMENTING STANDING IN A SCHEME OF ORDERED LIBERTY

We are now in a position to reconsider the questions that *Perry* and *Windsor* raise. When does standing involve the exercise of government power? What should be the solution to standing’s state action problem? This Part addresses those questions, elaborating the structural due process approach to government standing. It proposes retooling the Court’s injury-in-fact requirement to encompass “analyses of both the benefits and dangers of different” enforcement arrangements. From a due process perspective, the first question is what interest the litigant aims to stand for in court. The second question is whether recognizing standing to litigate that interest “seem[s] likely to involve conflicts between public and private interest” of constitutional concern. And the third question is whether there are sufficient “protections” to reduce the risk that raw preferences, rather than public reasons, will drive an enforcement decision where they shouldn’t.

“elaborate” standing doctrine but rather “auxiliary devices” — like the Rule 23 procedures — “to enhance the representativeness of the litigating process.” Mark V. Tushnet, The “Case or Controversy” Controversy, 93 Harv. L. Rev. 1698, 1716 (1980). For consideration of the use of auxiliary devices rather than standing, see infra notes XX-XX and XX-XX and accompanying text.

241 Freeman, supra note XX, at 665.
243 See id. at 661 (arguing that when there are sufficient “protections against the domination of private interest, no deprivation without due process will have occurred”). This rethinking of standing’s state action problem closest analogues are Grove, supra note XX, at 781 (arguing that standing implements Article II nondelegation principle and thus reduces risk of arbitrary enforcement), Lawrence, supra note 242, at 661 (arguing that “due process basis for reviewing private delegations permits a court to approach and resolve the problem in terms of the essential danger that such delegations present”), and Metzger, supra note XX, at 1461 (arguing for private delegation approach focused upon “identifying constitutionally
A. What Interests?

The first question is what interest the litigant aims to stand for in court. The distinction between private rights and public rights provides a first cut at answering this question. Private rights are individual rights of property and liberty, with “[w]holy private tort, contract, and property cases” serving as the paradigm. They also include rights that do not fit the common law mold. The equal protection right to equality in the provision of public schooling and the statutory right to a non-discriminatory work place are familiar examples. The moral demand behind recognition of private remedies for private rights is the redress of individual wrongs. Public rights, by contrast, involve collective interests. As defined here, they include the public interests in observance of the law, as well as interests that governments typically possess, such as jurisdictional claims to exercise regulatory authority over a particular territory or subject matter. Public rights thus encompass the four types of interests — corporate, institutional, administrative, and substitute — that may be the basis for government standing under current doctrine.

There is no shortage of dicta for the proposition that private litigants may stand for private rights while only government officials may stand for public rights. In *Lujan*, for example, the Court stated that “individual rights,” which will support private standing, “do not mean public rights.” In *Buckley v. Valeo*, the Court opined that the vindication of “public rights . . . may be discharged only by persons who are ‘Officers of the United States.’” Similarly, in *Schenck v. Pro-Choice Network of W. New York*, the Court stated that “a plaintiff customarily alleges violations of private rights, while ‘public safety’ expresses a public right enforced by the government through its criminal laws and otherwise.” Ann Woolhandler and Caleb Nelson have argued that, though history may not “compel[] acceptance of the modern Supreme Court’s vision of standing,” it does support “the requirements of public control over troublesome private delegations,” “assessing whether such delegations are adequately structured to ensure constitutional accountability,” and “remedying unconstitutional delegations”).

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245 See Woolhandler & Nelson, supra note XX, at 693 (“private rights may generally be distinguished by private law’s focus on individual compensation (or the avoidance of private loss by injunctive remedies”); cf. Fallon & Meltzer, supra note XX, at 1793 (“The strongest moral argument against denial of a remedy is that corrective justice demands redress on particular facts.”).
246 See Woolhandler & Nelson, supra note XX, at 693. Thus, I exclude public law rights that individuals possess against government, although in other contexts these are labeled public rights. See, e.g., Stern v. Marshall, 131 S. Ct. 2594, 2612-14 (2011).
248 *424 U.S. 1, 140 (1976).*
249 *519 U.S. 357, 376 (1997).*
Standing’s State Action Problem

Quoting Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts, they argue that the “general rule” in the Early Republic was “[u]ndoubtedly” that “it is for the public officers exclusively to apply [for judicial relief], where public rights are to be subserved.” This rule, they argue, aimed to keep “the control of public rights . . . in the hands of public officials” and to protect “individuals . . . from arbitrary enforcement at the hands of private actors.” On this view, the solution to standing’s state action problem could be straightforward: “Officials” may stand for public rights and “private” litigants may stand for (their own) private rights.

Perry shows how this approach is underdetermined. The distinction between “officials” and “private” litigants is not self-defining and cannot be inferred from the distinction between “public rights” and “private rights.” Nor can it be deduced from history. The distinction between “public officials” and “private enforcers” was not so sharp at the Founding (or for some time thereafter) as we like to think it is today. The English had a tradition of victim prosecution of crimes. America abandoned this tradition, but not all at once and not always cleanly.

The distinction between public rights and private rights is a starting point, but only a starting point. If a claim of private or public right is at stake, the question then becomes whether this claim presents a constitutionally troubling risk of “conflicts between public and private interest.”

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250 Woolhandler & Nelson, supra note XX, at 695.
251 Id. at 708 (quoting In re Wellington, 33 Mass. (16 Pick.) 87, 104 (1834)).
252 Id. at 711.
256 It might be objected that the distinction between private rights and public rights is too analytically imprecise to be useful. Not so. To be sure, the definitions of private and public rights have been flexible over time. See, e.g., Gordon G. Young, Public Rights and the Federal Judicial Power: From Murray’s Lessee Through Crowell to Schor, 35 Buff. L. Rev. 765, 863-64 (1987). But the distinction has persisted as a way of balancing demands for individual autonomy and collective reason and is coherent “when considered on its own terms.” Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 561-62 (2007). The argument here is in part conceptual, but “conceptual” does not mean inflexible. Properly understood, the distinction between private and public rights is a way of beginning, not ending, discussion about the proper contours of private and public enforcement.
257 Lawrence, supra note XX, at 661.
B. When Do Potentially Conflicting Interests Raise Constitutional Concerns?

1. The Role of State Action Doctrine. — One obvious answer to this question could be found in state action doctrine. Standing involves government power — and the potential for a constitutionally troubling conflicts between raw preferences and public interests — when a litigant claims standing because she is a state actor. After all, if the primary constitutional concern underlying government standing doctrine is due process, then state action should be the lodestar. The state action doctrine holds that the Constitution applies to only state actors, not to private actors. Government standing doctrine might mirror that rule.

State action doctrine is important, but not in this way. Where a formal government actor, such as an attorney general, sues, the constitutional due process concern applies as a result of the state action doctrine. The Court implicitly acknowledged the point in United States v. San Jacinto Tin Co., one of the leading cases on the United States’ standing.258

The due process concern should also apply where a litigant is acting on the government’s behalf. An obvious example is a private attorney retained to stand for the government in court. A litigant acting on behalf of state actors and under their control, no less than a formal state actor, may abuse “governmental power . . . to further private rather than public interests.”259

Perry thus got the analysis backwards. A formal agent authorized to stand for the government in court clearly has been granted government power. Accordingly, a federal court should ask whether that the legislature has made that agent accountable to the public. But it does not follow that the legislature must create a formal agency relationship in all cases before a litigant may stand for public rights in court.260

2. Public Rights. — At the same time, the law should address the due process concerns created by the delegation of the power of government standing to private litigants. The range of judicially cognizable government interests is sweeping.261 It includes an interest in enforcing the law, an interest in preserving the “sovereign power . . . to create . . . a legal code,” and an interest that, like the police power, concerns protecting the “health and well-

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258 See United States v. San Jacinto Tin Co., 125 U.S. 273, 284 (1888) (acknowledging “enormous power, and [the] capacity for evil . . . reposed” in Department of Justice).

259 Lawrence, supra note XX, at 662; cf. Metzger, supra note XX, at 1462 (arguing that agency is central to determining when private delegation raises constitutional concerns).

260 Nor does it follow that only the standing of formal state actors and agents presents due process concerns for standing law to address. Even formally private litigants standing for private rights may present constitutional concerns. For example, consider the due process concern with adequate representation. The Court has been attentive to this concern in the law of third-party standing by generally declining to permit one party to stand upon another’s private rights. It has, however, been less sensitive to the problem when a government litigant seeks to substitute public for private enforcement of private rights.

261 See supra Part I.A.
being” of the citizenry.\textsuperscript{262}

These sweeping interests create a risk of “sweeping and unjust policies.”\textsuperscript{263} We recognize this risk when the government bases its suit upon an implied, rather than an express, right of action. Understood in “standing” terms, \textit{United States v. Hudson & Goodwin} held that the United States does not have standing to prosecute crimes unless Congress has authorized it.\textsuperscript{264} By contrast \textit{In re Debs} held the United States has standing to seek an injunction against a labor strike that disrupts interstate commerce because the United States “obligations” to promote the “general welfare” are “often . . . sufficient to give it a standing in court.”\textsuperscript{265} Critics have contested this sweeping definition of a government’s judicially cognizable interests, arguing that, at least when Congress has not authorized it, the United States does not have standing to enforce the laws.\textsuperscript{266}

From a structural due process perspective, therefore, the doctrine might narrow the range of judicially cognizable government interests. Standing law has not taken this approach, however. Instead, it has tended towards a rule, which was inchoate in \textit{Lujan} and made explicit by \textit{Perry}, that the power to litigate public rights can only be delegated to public officials and formal state agents. Maintaining a broad range of judicially-cognizable government interests makes sense from a structural due process perspective. Though this power “may be abused,”\textsuperscript{267} the risk of arbitrary enforcement is not the sole criterion by which to assess standing in a scheme of ordered liberty. Equally important is the concern with ensuring the rule of law. At the same time, however, lumping all public rights together makes little sense when standing is seen in a due process light.

\begin{itemize}
\item \textit{Corporate Interests}. — Like a private corporation, a government has property and contractual interests. Under current law, the legislature may delegate to a \textit{qui tam} plaintiff standing to litigate these interests. In \textit{Vermont Agency of Natural Resources v. United States ex rel. Stevens}, the Court held that the False Claims Act had validly assigned to a private relator the United States’ corporate interests in recovering public money paid out based upon a “false or fraudulent claim for repayment.”\textsuperscript{268} If Article III precludes anyone but formal government actors from litigating the public rights of the United States, then \textit{Stevens} doesn’t make sense. Indeed, \textit{Perry}’s offhand treatment of \textit{Stevens} as a
\end{itemize}

\textsuperscript{263} See Eskridge, supra note XX, at 1206 (defining structural due process as concerned with “sweeping and unjust policies”).
\textsuperscript{264} See 11 U.S. (7 Cranch) 32, 34 (1812) (“The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”).
\textsuperscript{265} 158 U.S. 564, 584 (1895).
\textsuperscript{266} See Hartnett, supra note XX, at 2255.
\textsuperscript{268} 529 U.S. 765 (2000); 31 U.S.C. § 3729.
Standing’s State Action Problem

grandfathered-in anomaly suggests the embarrassment that *qui tam* standing presents to an Article III theory of government standing. Stevens also isn’t easily reconciled with a nondelegation account under which Congress cannot delegate the Executive’s duty to enforce the laws.

From a due process perspective, however, a distinction between the FCA’s assignment of the United States’ corporate interests and the assignment of other public rights makes perfect sense. The power to litigate corporate interests is not sweeping. It extends no further than the power to litigate a fraud against a private corporation. To be sure, the FCA’s assignment of litigation authority raises a potential due process concern if opportunistic litigants arbitrarily troll the country for potential bounties from defendants. But the FCA aims to address this concern at permitting the government to intervene and seek to dismiss a *qui tam* suit.

*b. Substitute Interests.* — While the Court’s treatment of *qui tam* assignments of the United States’ corporate interests makes sense from a due process perspective, its treatment of substitute suits does not. The Court has been solicitous of state substitute suits, holding that a state may sue in *parens patriae* to address problems it would otherwise address through police power regulations. This warrant for wholesale substitution of public for private enforcement is in tension with the due process right to adequate representation. Because neither Congress nor the courts have created a procedural system to police the adequacy of representation, “substitute litigation may wrest control of private rights from an individual beneficiary without the procedures that protect a beneficiary’s right to her day in court.” There are many solutions to this problem, including policing of the adequacy of representation at the front end through, as in the case of Rule 23 class actions, judicial inquiry and notice and opt-out rules, or at the back end through preclusion doctrine. Standing doctrine may also play a role in addressing this due process concern.

c. *Institutional Interests.* — Institutional interests consist of a government’s interests as a political institution. *New York v. United States*, for example, concerned the institutional interests of New York, which claimed a Tenth

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270 But see David Freeman Engstrom, Harnessing the Private Attorney General: Evidence from *Qui Tam* Litigation, 112 Colum. L. Rev. 1244, 1319 (2012) (“Professional’ relators . . . are neither supermen nor bogeymen, despite the considerable attention they have received in the popular and academic press.”).
273 Davis, Public Rights, supra note XX, at 41.
274 Lemos, supra note XX, at 548.
Amendment immunity from commandeering. The litigation of a government’s institutional interests presents a less obvious case for due process concern. That is because a “due process approach . . . normally protects individual rights and not the system itself.” Though a government may be a “person,” and persons enjoy due process protections, there is no straightforward sense in which litigation of institutional interests presents a risk of an unconstitutional burden upon liberty or property.

This may go a long way towards explaining why, as Aziz Huq has put it, Bond v. United States “occasioned thunderous silence in the law reviews.” Bond confirmed a longstanding, but unexplained, practice of recognizing private standing to litigate institutional interests. This practice, Bond explained, followed from the imbrication of due-process protected individual interests and constitutional structure. “Federalism,” the Court stated, “protects the liberty of the individual from arbitrary power” by preventing any one government institution “complete jurisdiction over all the concerns of public life.” When it comes to institutional interests, to extend the point, sweeping standing serves due process.

Look to its underlying facts, however, and Bond also suggests how institutional standing may undermine due process interests. There may be life, liberty, and property interests on all sides of an institutional dispute. Carol Anne Bond, the criminal defendant challenging her conviction in Bond, had harassed and ultimately attacked another woman who had had an affair with her husband. In another type of institutional litigation, a government may raise a defense of intergovernmental immunity to regulation of its officials by another government. There too there are due process interests on both sides of the dispute. And, therefore, there too the recognition of government standing may raise a due process concern for the law to address.

d. Administrative Interests. — Unlike in the case of institutional interests, in the case of administrative interests the due process concerns are apparent. The United States needs no injury in fact to have standing to enforce federal law. Though states do not have general authority to enforce federal law in federal courts, Congress has often authorized them to enforce significant regulatory programs ranging from consumer to environmental protection. This far-ranging administrative standing may be necessary to implement federal law, but it raises the risk of arbitrary enforcement.

Tara Grove has explained the threats to individual liberty and property from administrative standing in memorable terms: “If a private plaintiff had

276 Lawrence, supra note XX, at 661.
278 Bond v. United States, 131 S. Ct. 2355, 2364 (2011).
279 Id. at 2359.
the discretion to sue any person, anywhere in the country, for any violation of law, she too would have the ‘most dangerous power of the prosecutor’ — the power to target the defendants of her choice.”

Formal state actors, such as the U.S. Attorney General, are subject to many legal and political checks against arbitrary use of this “most dangerous power.” Formally private parties are subject to far fewer constraints. Standing doctrine addresses the inherent risks by limiting private standing to litigate a government’s administrative interests.

It might be objected that there is no reason to think the litigation of administrative interests is a uniquely public function. After all, private prosecutions are not unknown to our history. And it is not hard to identify cases that involve administrative interests where, nevertheless, standing is uncontroversial under the Court’s injury-in-fact test. This objection, however, misses the significance of the link between standing and due process. Properly conceived, the question is not whether law enforcement is an exclusively governmental function or executive duty. The question is not, in other words, whether only public “officials” may litigate “public rights.” Rather, it is whether recognizing standing would result in a “clearly arbitrary” burden upon due-process protected rights. If it would, then the question is how, if at all, standing law should protect due process rights.

C. How Should Standing Protect Due Process Rights?

1. Considering Objections. — a. Standing Minimalism. — One answer might be, “not at all.” Standing instead should take a “barebones approach” that “insist[s] only on real adversity between plaintiff and defendant, and a plaintiff capable of generating a reasonably good, ‘concrete’ record for decision.” The doctrine, in other words, should eliminate the distinction between private and government standing by eliminating the injury-in-fact requirement for private litigants. This requirement, and standing doctrine generally, is simply not well-equipped to address difficult questions of institutional design.

280 Grove, supra note XX, at 823.

281 Consider federal securities litigation. In J.I. Case & Co. v. Borak, for example, the Court implied a private right of action from the Exchange Act’s prohibition on fraudulent proxy solicitations, on the theory that private enforcement is a “most effective weapon” and a “necessary supplement” to enforcement by the Securities and Exchange Commission. 377 U.S. 426, 432-33 (1964). The primary purpose of the Borak shareholder derivative suit was deterrence, not compensation for a significant individual harm. Thus, the Borak Court’s implication of a private right of action can easily be understood as the delegation of government power to a “private attorney general.” Rosenblatt v. Nw. Airlines, Inc., 435 F.2d 1121, 1124 (2d Cir. 1970). At the same time, however, the private attorney general who alleges a financial loss clearly has suffered an injury in fact for standing purposes.


Standing minimalism is a powerful challenge. The purely pragmatic response is that the public-private divide is too deeply set in the foundation of public law to be dug out and tossed aside. The more sympathetic response is that a barebones approach to standing would either disregard the problem or, more likely, simply shift how the law addresses it. Properly conceived, standing is well-situated to address — prophylactically and only partially — the risk of abuse of government power, or so this Article argues.

b. Challenging the Public-Private Distinction. — Nor is this approach to standing undermined by the recognition that private rights of action depend upon state power. Critics of the state action doctrine have argued there is no meaningful distinction between government power and private power. Erwin Chemerinsky, for example, has asked “why infringements of the most basic values — speech, privacy, and equality — should be tolerated just because the violator is a private entity rather than the government.” The question is powerful, and not simply because there is an undeniable “artifice” to the “constitutional public-private divide.” As Felix Cohen long ago pointed out with respect to private property, behind every private right looms the power of the state.

Retaining the concept, while rethinking standing doctrine to permit a more “contextual” analysis of “the benefits and dangers” of public and private enforcement, is not immune to the criticism that the public-private divide presents a stylized picture of a messy reality of “interdependence.” But, as Chemerinsky has explained, even “eliminating the concept of state action would not mean that private parties always would be held to the same institutional standards as the government” because “[o]ften there might be justifications for private behavior that would not sanction governmental conduct.” This Article’s approach to standing is not subject to the criticism that it disregards the potential pathologies of private action. Indeed, though it has focused upon government standing, in an important sense the argument is concerned with standing writ large. From an Article III perspective, which holds that courts may not act unless presented in injuries in fact, government

Rev. 635, 637 (1985).
285 The doctrine might respond to this reality by eliminating the distinction between private and government standing. One non-starter would be to require a government litigant to demonstrate an injury-in-fact in every case. This approach would foster an artifice too transparent to withstand scrutiny. Even the most skillful Langdellian scientists could not transmute every criminal prosecution into an injury-in-fact to the United States. See Hartnett, supra note XX, at 2255.
287 Metzger, supra note XX, at 1447.
289 See Freeman, supra note XX, at 665.
290 Chemerinsky, supra note XX, at 506.
Standing is anomalous.291 Not so when due process is taken in account. Rather, it becomes apparent that the distinction between government and private standing is a species of a larger set of concerns that animate all standing doctrine.

At the same time, this Article’s aim is not to redesign standing doctrine solely by reference to the Due Process Clauses. Rather than supplant Article III or Article II, the argument describes a structural due process principle immanent in both. It does not preclude other standing considerations, whether basic (“is there adversity and a satisfactory record for decision”) to more complex (“would abstaining avoid unnecessary judicial intervention in a political spat”). For example, it would be too hasty to argue that limits on government standing have nothing to do with Article III concerns. For instance, if states could deputize all their citizens to litigate states’ rights, then the federal courts’ role in resolving controversial questions of federalism might significantly expand. Moreover, ideological litigants armed with the sweeping power of state standing might strategically manipulate the development of substantive doctrine, as the Perry Court hinted.292

c. A Private Right to Non-Arbitrary Enforcement? — In theory, the doctrine might eliminate any due process considerations from standing analysis and create a robust private right to non-arbitrary enforcement. At first glance, this approach would be straightforward. But only at first glance. It would entail an overhaul of criminal procedure, which limits an individual defendant’s opportunities to challenge prosecutorial discretion.293 Perhaps federal criminal procedure should be overhauled, for some of the reasons discussed in this Article. The creation of a private right to non-arbitrary enforcement would also entail an overhaul of civil procedure, especially because it is not clear that private tort actions for malicious prosecution, abuse of process, and the like are sufficient proxies to enforce constitutional due process. Moreover, a private right to non-arbitrary enforcement would raise potentially insuperable conceptual and evidentiary difficulties. Bringing a frivolous lawsuit is arbitrary. But is it (always or only sometimes) arbitrary for a private litigant to sue, rather than to negotiate, simply because she dislikes the defendant? Even if personal animus is an arbitrary reason in some (or all) cases, how easy would it be to prove?

2. Standing as a Due Process “Prophylactic Rule.” — Standing provides a way

291 See Hartnett, supra note XX, at 2255.

292 Cf. Stearns, supra note XX, at 1316. Perry, however, was not the case in which to “wave [this reconceived] Article III banner.” Heather Elliott, Federalism Standing, 65 Ala. L. Rev. 435, 454 (2013). California did not purport to deputize its citizens to sue anywhere anytime on its behalf. And Perry’s denial of standing creates, rather than limits, the opportunity for state executive officials to limit democratic lawmaking. As Perry shows, Article III cannot, standing alone, provide a sensible distinction between “officials” entitled to stand for the state and “private” litigants who are not.

293 See supra Pt. II.
around some of these conceptual and doctrinal difficulties. In this sense it offers a “prophylactic measure” designed not to ferret out arbitrary bias or inadequate representation in every case, but rather to identify categories of cases where there is (more or less) concern about due process.

It is commonly argued that prophylactic rules are illegitimate because they are over-inclusive, *Miranda v. Arizona*\(^{294}\) being the famous example.\(^{295}\) This is not the place to erect a defense of prophylactic rules, save to say that the criticism is both descriptively inaccurate and normatively unsound. Descriptively, a great many constitutional doctrines are “prophylactic” in that they arguably overprotect a right. Courts adopt these doctrines based upon judgments about their own, and other institutions’, competence. “Prophylactic,” then, is usually a derogatory label for an institutional judgment that should be assessed on its merits. Normatively, “...because courts frequently cannot determine with much certainty whether or not a constitutional violation has occurred in a given case,” they appropriately “develop prophylactic rules safeguarding constitutional rights.”\(^{296}\)

Understanding standing as a due process prophylactic rule rationalizes elements of the doctrine that are puzzling when Article III is considered alone. The Court insists that the injury-in-fact requirement is a bedrock of Article III and a bulwark against judicial encroachment on the political branches. Yet it has frequently been observed that the legislature can usually accomplish its enforcement goals by specifying private rights, which, when violated, give rise to standing.\(^{297}\) It isn’t clear that Article III should be so easily circumvented. But permitting Congress to find a “functional equivalent” is a familiar feature of structural due process and “semi-substantive review.”\(^{298}\)

3. The Order of Battle. — Indeed, whether the legislature has structured a right of action to address due process concerns is an important part of standing’s order of battle from a structural due process perspective. The first question is what interest the litigant aims to stand for in court. The second question is whether recognizing standing to litigate that interest “seem[s] likely to involve conflicts between public and private interest” of constitutional concern.\(^{299}\) And the third question is whether there are sufficient

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\(^{294}\) 384 U.S. 436 (1966).

\(^{295}\) Evan H. Caminker, *Miranda* and Some Puzzles of “Prophylactic” Rules, 70 U. Cin. L. Rev. 1, 1 (2001) (“Constitutional law scholars have long observed that many doctrinal rules established by courts to protect constitutional rights seem to ‘overprotect’ those rights, in the sense that they give greater protection to individuals than those rights, as abstractly understood, seem to require.”).

\(^{296}\) Id. at 1-2.

\(^{297}\) See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in judgment) (“Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”).

\(^{298}\) Coenen, supra note XX, at 1287.

\(^{299}\) David M. Lawrence, Private Exercise of Governmental Power, 61 Ind. L.J. 647, 661
“protections” to reduce the risk that raw preferences, rather than public reasons, will drive an enforcement decision where they shouldn’t. 300

a. A First Cut: “Officials” Versus “Litigants.” — In answering that third question, standing’s distinction between formal government officials and private litigants is an appropriate first cut, but only a first cut. For all its flaws, 301 Perry’s approach rests on familiar, and often times sensible, intuitions about the different incentives and structures of public and private enforcement. Traditional state actors may be held politically accountable for their enforcement decisions, directly through elections or indirectly through elected officials. They may have expertise in calibrating enforcement decisions to changing circumstances and coordinating enforcement priorities across multiple institutions. In the normal course formal governmental attorneys do not have personal financial incentives in a particular enforcement action. Internal agency controls, not to mention bar ethics standards, constitutional rights, and a sense of public responsibility bear upon a public attorney general’s litigation decisions. Accordingly, we expect that elected officials and traditional government employees will “look to the public good, not private gain,” and enforce the law based upon public reasons, not for “selfish reasons or arbitrarily.” 302

Formally private litigants may be public-interested as well, of course. But the incentives and structures of private enforcement differ in important ways from public enforcement. For one, we sometimes expect — and even encourage — private litigants to enforce the law out of “personal ill will” or other private preferences. 303 For another, private litigants are in no position to internalize the social costs of using the litigation system, which may lead them to “sue too often in order to collect fines.” 304 They may answer to someone, but not, at least formally, to the public. Recognizing thus a robust measure of “individual autonomy” is consistent with our constitutional tradition, 305 but so is the demand that some decisions be made for public reasons.

Social and political reality is messier than this stylized account suggests, however. Perry provides a perfect example. The Court was never clear on whether a litigation agent of the government must be a fiduciary for other government officials or rather for the people. Courts might limit “special solicitude” for state standing to actors who are peculiarly accountable to state

(1986) (arguing that due process explains nondelegation doctrine).
300 See id. at 661 (arguing that when there are sufficient “protections against the domination of private interest, no deprivation without due process will have occurred”).
301 See supra notes XX-XX and accompanying text.
304 Davis, Public Rights, supra note XX, at 25.
oversight, as the Perry Court did, but oversight by other state actors may undermine the public interest in law enforcement, as the problem of referenda enforcement in Perry suggests.

In addition, litigation brought by traditional government employees can deploy public power to pursue private ends. Perry's simple distinction between publicly interested state actors and privately biased private litigants is in considerable tension with the Court's attentiveness in other areas of constitutional law to public choice accounts of state action.\textsuperscript{306} That being said, the doctrine recognizes the dangers of faction in government enforcement, requiring a state suing on behalf of its citizens to articulate an interest separate from its citizens and an “injury to a sufficiently substantial segment of its population.”\textsuperscript{307}

\textbf{b. The Role of Injury Analysis.} — The Court uses injury analysis to sort litigants into one box or the other. If a litigant has a concrete and personal injury in fact, then she may stand on her own two (private) feet. If a litigant does not have an injury in fact, then she may stand in court only upon a showing that she's validly authorized to litigate a judicially cognizable government interest. Webster Bivens, for example, had private standing directly under the Constitution to sue for damages for deprivation of his Fourth Amendment rights because, like a common law litigant, he had suffered a wrongful trespass.\textsuperscript{308} The judicial process has traditionally been available to remedy such an injury.\textsuperscript{309} From a due process perspective, standing in \textit{Bivens} recognizes the state’s duty to provide redress to the victim of a wrong. After all, for Bivens it was “damages or nothing.”\textsuperscript{310} By contrast, where a state attorney general appears in defense of state law, the Court grants standing as a matter of course, though neither she, nor the state, have been injured in \textit{fact}.

If litigants always appeared in the guise of Webster Bivens or the Attorney General this approach to injury analysis might sort allocate private and public enforcement authority reasonably well. They don’t always so appear. In \textit{Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.},\textsuperscript{311} for

\begin{itemize}
\item \textsuperscript{306} See Bertrall L. Ross II, Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics, 101 Cal. L. Rev. 1565, 1570 (2013) (“By the time of the Rehnquist Court, public choice theory had replaced pluralism as the preeminent theoretical conception of American politics. According to public choice theorists, small groups have a critical organizational advantage . . . . [and thus] are better positioned to lobby for legislative goods by providing legislators with special benefits in the form of campaign contributions and votes . . . . [L]egislators, in turn, pass laws favorable to these small groups . . . .”).
\item \textsuperscript{309} E.g., Sina Kian, The Path of the Constitution: The Original System of Remedies, How it Changed, and How the Court Responded, 87 N.Y.U. L. Rev. 132, 138-49 (2012).
\item \textsuperscript{310} Bivens, 403 U.S. at 409-10 (Harlan, J., concurring).
\item \textsuperscript{311} 528 U.S. 167 (2000).
\end{itemize}
example, the Court held that an environmental group had standing under the Clean Water Act’s citizen-suit provision to sue an alleged polluter even though “there had been ‘no demonstrated proof of harm to the environment,” 312 and, therefore, arguably no injury in fact to the group’s members. The Court reasoned that the group’s “reasonable concerns” about harm to the environment made out an injury in fact. 313 This injury sufficed to permit them to sue for damages on behalf of the United States because the threat of damages would deter future pollution.

If injury in fact is an on-switch/off-switch, then the Laidlaw Court should have flipped the latter. But Laidlaw can be read to apply injury analysis in a due process mode. To wit, the Court explained that the citizen suit did not pose “grave implications for democratic governance,” contrary to the dissent’s argument, because of Executive checks on private enforcement. 314 For one, the Executive may “undertak[e] its own [enforcement] action” and thus “foreclose a citizen suit.” 315 For another, the Executive had a right to intervene in any citizen suit to inform the court of its views of the dispute. 316 Due process does not demand these procedural checks when a Webster Bivens exercises his right to redress. But it does demand them when a citizen has no special claim to redress and her suit seeks to implement a regulatory program. Understood in due process terms, injury analysis helps distinguish litigants with private rights to redress from those whose suit raises concerns about arbitrary enforcement and inadequate representation.

This distinction matters because due process entails rights to remedies. Though not unyielding, this due process principle “recognizes the corrective justice ideal” of remedying wrongs. 317 It holds that the government has a political duty to provide avenues of personal redress to victims. To treat all claims of private right as simply forms of public regulation is to give short shift to the right-remedy principle. 318

Standing doctrine’s distinction between private injuries and generalized grievances gestures toward this tension between different aspects of due process. Hence the Court’s frequent quotation of Marbury’s admonition that the judicial role is “solely, to decide on the rights of individuals.” 319 Andrew Hessick has made the point explicit, arguing that the Court should not deny

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312 Id. at 199 (Scalia, J., dissenting).
313 Id. at 183-84 (majority op.).
314 Id. at 188 n.4.
315 Id.
316 Id.
standing for lack of an injury-in-fact when a litigant claims a private right.  

Standing doctrine might hold that a litigant is not a state actor if she (or it) has a right to a remedy. On this view, where standing satisfies the state’s duty to provide redress, public reason and raw preferences are congruent. Where there is a right to a remedy, recognition of standing “empowers” a victim of a wrong not in order to regulate behavior but rather to place the “decision to complain about an alleged wrong . . . uniquely with the victim.”

Standing in these cases is thus categorically different from “criminal prosecutions and administrative proceedings.” Therefore, where a litigant can claim that her private right entails a remedy, standing should be unproblematic because it would not present a constitutionally troubling conflict between private and public interests.

This substantive distinction, while normatively attractive, cannot be the last word. One reason is simple. If rights to remedies are few and far between, then many cases that are unproblematic under the Court’s injury-in-fact test would become unnecessarily problematic under this approach. For much of the Nation’s history this problem would not have been significant, because courts implied remedies to protect rights as a matter of course. But in the last three decades the Court has cut back sharply on implied private rights of action.

c. The Range of Doctrinal Solutions. — Another reason is more complex. Looking to the right-remedy principle as an on/off switch would impose an inflexibility not required (or merited) by due process. There are many tools the doctrine may use to satisfy the demands of due process when government interests are the basis for standing. These tools range from hard constitutional rulings to soft enforcement by reliance upon nonconstitutional law.

At one end of the spectrum, a court may hold that a grant of standing is invalid because of the threat of due process problems. Lujan can be read in these terms. Properly understood, so too can Perry.

Alternatively, a court may permit standing but subject a litigant’s enforcement decision to judicial review under the due process clause. Direct constitutional review of prosecutorial discretion is disfavored, however.

Still, the case for distinguishing private attorneys general from public attorneys

321 Goldberg, supra note XX, at 601.
322 Id. at 602.
323 See Davis, Public Rights, supra note XX, at 10-15.
324 See id.
325 Grove’s analysis of citizen standing is instructive. She writes that such standing “raise[s] the liberty [and] the arbitrariness concerns at the heart of the Article II nondelegation principle.” Grove, supra note XX, at 831.
326 See infra Pt. V.
general in this respect can be made; where there are not formal political controls on prosecutorial discretion, courts have a warrant for more searching judicial review.

Less intrusively, a court may hold that standing is permissible, but only in light of legislatively or judicially-mandated auxiliary procedures to address due process concerns. Laidlaw provides an example; there the Court concluded the Executive could exert enough control over private Clean Water Act suits to address constitutional accountability concerns.

Or a court may attempt to force legislative deliberation concerning standing by adopting default rules for interpreting standing provisions. Here the Court’s rejection of parens patriae standing in Hawaii v. Standard Oil Co. is instructive. The Court refused to permit Hawai’i to sue for damages to its economy for lack of a “clear expression of a congressional” authorization. Congress responded by clearly expressing its authorization in a subsequent statute.

Finally, a court may hold that though a grant of standing presents a serious due process concern, private law addresses it. Constitutional enforcement by proxy is not unknown to our constitutional tradition. When the Court recognizes representative standing based upon contractual assignment, which involves the transfer of legal rights and entails rights and duties between the assignor and assignee, it effectively relies upon private law constraints.

d. Government Interests and the Demands of Due Process. — While not purporting to lay down unyielding rules, this section sketches how courts might coordinate these tools to satisfy the demands of due process depending upon the government interest at stake.

i. Corporate Interests, Private Law, and Procedural Controls. — Where the government interest looks like a private injury, recognizing standing is not likely to raise significant due process concerns because the litigant’s discretion is necessarily circumscribed to redressing specific claims arising from contract, “torts to real or personal property, and from frauds, deceits, and other [bilateral] wrongs.” That is the case with standing to litigate a government’s corporate interests. In the ordinary course, therefore, federal courts may find that a formally private litigant has standing to vindicate a government’s

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328 405 U.S. 251 (1972).
329 Id. at 264.
332 See Sprint Commcs. Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 290 (2008) (holding there is no third-party standing problem when there has been assignment of rights, even where litigant has duty to return “all proceeds of the litigation”).
corporate interests as long as there are existing private law or procedural checks on arbitrary exercises of discretion. Both are present, for example, with respect to *qui tam* litigation under the FCA. For example, “defendants sued by private relators may counterclaim for malicious prosecution.” They also may have causes of action for libel, defamation, and abuse of process, as long as the relator’s claims are false. Federal courts have noted these private law mechanisms as well as statutory procedures when declining to dismiss *qui tam* suits on jurisdictional grounds.

**ii. Substitute Interests and Deliberation-Forcing Default Rules.** — Though a government’s substitute standing also involves typically private claims, it presents more serious concerns. Judicial refusal to imply substitute standing and resistance to legislative authorization of substitute standing would be a principled stance based in due process. Where Congress has authorized substitute suits and provided procedures to police the adequacy of representation, the courts have no warrant to deny standing. But where Congress has been unclear about the existence or scope of substitute standing, the courts should deny standing, particularly in the absence of “specific rules” that “delineat[e]” the scope of potential liability, “establish[ing] who is bound by the action,” and “prevent[ing] duplicative recoveries.” Like semi-substantive review, this deliberation-forcing default rule would aim to induce Congress to address the underlying constitutional concerns.

To drive home the argument against substitute standing, it is worth comparing the substitute standing of the United States, which requires clear congressional authorization, with the standing of private organizations. This comparison suggests the courts have a special concern for the abuse of substitute standing. In *United States v. Solomon*, the U.S. Attorney General sued state officials who were operating a hospital for mentally disabled individuals, alleging the officials had deprived them of Eighth, Thirteenth, and Fourteenth Amendment rights. Congress had not specifically authorized the Attorney General to sue to vindicate the patients’ constitutional rights, and the Fourth Circuit refused to imply a public right of action from the Constitution.

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336 See supra notes XX-XX and accompanying text (noting statutory procedures under FCA to check relator discretion).

337 See supra notes XX-XX and accompanying text.

338 Hawaii v. Std. Oil Co. of Cal., 405 U.S. 251, 266 (1972) (dismissing state *parens patriae* action under these circumstances).

339 See Coenen, supra note XX, at 1281-83.

340 563 F.2d 1121, 1123 (4th Cir. 1977).

341 See id. at 1129.
At the same time, “[t]here is no reason to doubt that a class action could have been brought on behalf of the same patients.” Even more perplexing, a private association would have standing to sue on behalf of the patients. In *Advocacy Center for the Elderly and Disabled v. Louisiana Department of Health & Hospitals*, for example, a private advocacy organization had associational standing to sue state agencies and officials on behalf of mentally disabled criminal defendants. The state defendants argued the private association was “not empowered to ‘stand in the shoes of’” the criminal defendants. That was true — in the sense that Congress had not specifically authorized the association to sue, and the association had no injury in fact in its own right. Nevertheless, the private association had standing to sue to vindicate the mentally disabled defendants’ rights. Thus, while the U.S. Attorney General must show specific statutory authorization and an independent interest of the United States to substitute public for private enforcement, a private organization needs neither to represent its members.

This otherwise inexplicable distinction begins to look sensible from a due process perspective. Where rights holders have no opportunity to voice their concerns, or exit from aggregate representation, there may be a substantial risk of abuse of representational standing and inadequate representation. This concern may explain the (minimal) requirement that a state suing in a substitute capacity, unlike a private organization, must articulate an interest separate from that of its citizens and that it “allege[] injury to a sufficiently substantial segment of its population.” Courts do not display the same concern when assessing private associations’ standing, perhaps on the assumption that an association’s members have greater opportunities to control the litigation of their rights through exit or voice.

343 See id.
344 731 F. Supp. 2d 583, 591 (E.D. La. 2010).
345 See id. at 596.
347 Cf. Adam B. Cox & Adam M. Samaha, Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory, 5 J. Legal Analysis 61, 94 (2013) (“sorting across government institutions tends to become easier as the scale of the governments becomes smaller”).

A second explanation focuses upon how abuse of the power to litigate burdens defendants’ rights in light of a unique asymmetry between the litigation resources of traditional state actors and those of a private litigant. Consider, for example, the potential for an Attorney General, with his already-extensive resources, to abuse standing to seek “far-reaching mandatory injunctions” to vindicate any citizen’s Fourteenth Amendment rights. *United States v. City of Philadelphia*, 644 F.2d 187, 203 (3d Cir. 1980). Private organizations may not have the same far-reaching resources and thus their power to represent their members does not pose the same threats as a freestanding government power to represent the citizenry would.
iii. Institutional Interests and Auxiliary Procedures. — Unlike corporate standing, a government’s institutional standing presents broad-ranging questions of government structure that may impact an array of private and public interests. Accordingly, recognition of institutional standing raises serious concerns about the adequacy of representation and the risk of distorted doctrinal development. At the same time, there are strong reasons, sounding in due process, to permit both formally private and formally governmental actors to stand for institutional claims.

Consider first private claims that depend upon institutional interests. A criminal defendant, for example, might argue that she cannot be prosecuted because the statute criminalizing her conduct violates the separation of powers or federalism. These institutional interests are quintessential public rights. If, as the Court and commentators have suggested, “public rights” may be litigated by only public “Officers,” then perhaps the doctrine should deny standing where private rights depend upon institutional and other public interests.

Federal courts have indeed held that a plaintiff whose private rights are patently at issue cannot premise standing upon government powers. For example, federal courts have held that private plaintiffs do not have standing to challenge federal legislation as encroaching upon a state’s reserved powers under the Tenth Amendment. In Bond v. United States, however, the Supreme Court recently held that a criminal defendant has standing to raise a Tenth Amendment challenge to the federal law under which she is being prosecuted. Whether this rule applies where a private litigant is not the subject of an enforcement action remains an open question. And scholars have questioned whether the Court was right to recognize private standing based upon government powers in Bond. Aziz Huq questions Bond in light of the ban on third-party standing, arguing that “the Court has strived to cabin Article III justiciability to those categories of cases in which the practical results of litigation neither depend upon nor fall heavily upon third parties.”

Given a plausible risk of inadequate representation of institutional interests by private litigants, Huq continues, “standing for the structural constitution” should be limited to government officials.

If standing is simply a vehicle to implement Article III, then Huq’s argument has a strong bite. A due process account, however, helps reconcile

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351 Cf. Nance v. EPA, 645 F.2d 701, 716 (9th Cir. 1981).
353 Id. at 1439.
354 See id. at 1440.
the ban on third-party standing with standing to vindicate private rights that are premised upon public rights. Due process demands that a private party have standing to raise a claim that the law under which she is being prosecuted is invalid because it violates a public right. The Due Process Clause provides an enforcement defendant standing to challenge invalid rules for the same reason it forbids vague criminal statutes: “due process forbids sanctions unless a defendant had fair notice of a valid rule of law.” In some cases, due process thus demands private standing to litigate institutional interests.

The Court has traditionally treated the institutional standing of formal state actors as wholly unproblematic. The reason is not hard to see: In the normal course, who else but the Attorney General would stand for the state in defending its laws or vindicating its intergovernmental immunities? At the same time, institutional standing may raise a concern about crowding out claims of private right. Consider Arizona v. United States. In that case the Obama Administration sued to enjoin Arizona’s “hand me your papers, please” immigration policy on preemption grounds. The hand me your papers, please policy concerned not only the United States’ institutional interests in regulating immigration and foreign relations, but also private rights under the Fourth Amendment and the Fourteenth Amendment’s Due Process and Equal Protection Clauses. The United States’ preemption claim, by proceeding first through the courts, could have resulted in doctrine that impacted follow-on claims of private right.

Auxiliary procedures provide a solution to the problems of widespread and overlapping claims of public and private right in institutional cases. While recognizing standing to litigate institutional claims the federal courts do, and should, invite broad participation from public officials and potentially affected private parties through amici briefing or intervention. Conscientious docket management also can play an important role where the sequencing and consolidation of cases is necessary to allow consideration of the multifarious interests at stake in institutional litigation.

iv. Administrative Interests and Direct Invalidation or Judicial Review of Enforcement Decisions. — The litigation of administrative interests — particularly the sweeping interest in enforcing the law — has generated much debate about the metes and bounds of Article II and Article III. A due process perspective offers some clarity to the terms of the debate. The ordinary administrative suit, in which the power of government standing is brought to bear upon the

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358 See Tushnet, supra note XX, at 1716 (discussing use of “auxiliary devices” as alternative to injury analysis for standing).
liberty or property of a private defendant, directly presents the risk of arbitrary enforcement.

It is worth drawing out the distinction between institutional and administrative suits. In an institutional suit between government litigants, there is no direct due process concern. Rather, any concerns arise, as in Arizona v. United States, from the potential impact of government litigation on related claims of private right. By contrast, an administrative suit to enforce the law against a private person puts due process directly in play.

Or does it? It is possible to argue that only standing by traditional state actors, such as the U.S. Attorney General, presents a constitutionally cognizable concern about arbitrary enforcement. To be sure, due process is concerned with arbitrary enforcement when the Department of Justice (or a state’s equivalent) criminally prosecutes someone. And though there is a divide between criminal and civil procedure, it is consistent with the doctrine to conclude that due process also limits the DOJ from arbitrarily bringing civil enforcement actions. But the Court has never squarely held that the same due process concerns apply when a private party is empowered to administer a regulatory law by enforcing it in court. Perhaps the long history of qui tam suits, and the Founders experience of private criminal prosecutions, together suggest there is no such problem.

Looming here is the question whether private criminal prosecutions comport with due process. On the one hand, there is an undeniable history of private prosecution in America. Moreover, in Young v. United States ex rel. Vuitton Et Fils S.A. the Court held that district court has discretion to appoint a private attorney to prosecute a contempt action. On the other, our understanding of the prosecutor’s role as a disinterested servant of justice suggests private prosecutorial discretion could violate due process. In Young, for instance, the Court reasoned that a private attorney could not prosecute contempt in the name of the United States if that attorney had a personal interest in the underlying case. Though a full accounting of the question is beyond this Article’s aims, the due process analysis here is instructive. In particular, it suggests we should distinguish between delegation of the authority to prosecute to a victim of a crime and a more general delegation of prosecutorial authority that allows a citizen to search out crimes and prosecute wherever she finds them. A victim has a personal stake in prosecuting the crime, which could raise a due process concern, but her discretion is also


See, e.g., Roots, supra note XX, at 689.


Id. at 809.
limited to seeking justice for the wrong she suffered. Conversely, the general
degregation of authority to a disinterested citizen might mitigate the problem of
personal bias, but increase the risk of arbitrary selection of defendants,
particularly if there is a bounty attached to successful prosecutions.

One way to respond to try to answer this type of question is to invoke the
state action doctrine’s public function exception. Under that exception, a
formally private actor who discharges a public function is a state actor whose
decisions are subject to constitutional constraint. The problem with this
response is that the Court tends to limit the public function exception to actors who “‘substitute’ for the government in the performance of a function ‘traditionally associated with sovereignty.’” Given that, until Lujan, most
commentators assumed that Congress could authorize citizen suit provisions
and other forms of private enforcement of public rights, it is hard to conclude
that administering the law through civil enforcement actions is a traditional
public function. Criminal prosecutions may not be either.

The state action inquiry mistakes the nature of the constitutional problem,
however. The structural due process analysis is addressed to the legislative
decision to grant private standing itself. The private nondelegation doctrine
provides an analogy. That doctrine, which “finds a textual home in the Due
Process Clauses,” holds that a “private delegation [may] itself violate[] the
Constitution because it fails to ensure a sufficient level of constitutional
accountability.”

Standing to administer the law by enforcing it presents that due process
problem. When it comes to formal state actors, our constitutional tradition
has settled on a combination of constitutional rights, statutory procedures, and
political constraints to address the problem of arbitrary enforcement. In
theory, standing might play a greater part in constraining arbitrary enforcement
by traditional state actors. It might, for example, require the U.S. Attorney
General to show that someone, even if not the United States, has been injured
before bringing a criminal prosecution. More plausibly, it might require state
attorneys general suing to enforce federal law to make a greater showing of
injury or the need for state enforcement. The doctrine has not done so for
good reason. Public enforcement of federal law by formal state actors plays an

365 See Redish, supra note XX, at 95-96.
366 Freeman, supra note XX, at 578.
367 Metzger, supra note XX, at 1461.
368 If standing is founded primarily in an Article II restriction on the delegation of
the Executive's enforcement authority, then it is not apparent why states may enforce federal
regulatory law without demonstrating a concrete and personal injury in fact. But if
government standing is primarily concerned with due process, including protections against
arbitrary enforcement, then the distinction between state and private enforcement of federal
law is more readily apparent. As long as the state appears through formal state actors who are
politically accountable, there are political accountability mechanisms that mitigate the due
process concern.
important part in ensuring the rule of law.

Private enforcement may also play an important role, but formally private litigants are not subject to the same non-constitutional checks as formal state actors. One remedy for overbroad grants of private enforcement discretion, suggested by the nature of the constitutional problem, is to strike down the legislative grant of standing. That is precisely what the Court did in *Lujan* and *Perry*.

The challenge, of course, is to identify when private standing to administer the law by enforcing it raises such serious due process concerns that a court should hold the delegation invalid. The Court and commentators have suggested that invalidation is appropriate whenever a public right is at issue, but that is surely overbroad. There is no shortage of examples where a private party clearly has standing even though its claim sounds primarily in public rights. More plausibly, the Court might hold that private standing is inappropriate when a claim of public right clearly predominates, but here too the cases cut the other way. More plausible still is a rule under which private standing is invalid only where it is indistinguishable from the Attorney General’s open-ended charge under 28 U.S.C. § 516 to conduct litigation on behalf of the United States.

Injury analysis cannot alone reach a sensible allocation of public and private enforcement of the law. To be sure, a requirement that a formally private litigant allege an injury in fact will address the due process problem of arbitrary coercion by limiting private enforcement. But so would eliminating private enforcement altogether.

A more sensible approach is to begin by considering the plaintiff’s injury as a measure of the strength of the plaintiff’s claim (if any) to a right to redress. At the same time, a court should consider the depth and breadth of the enforcement discretion that standing would entail. Would it lead to sweeping policies affecting many claims of private and public right? Would it free the litigant arbitrarily to select targets for enforcement actions? If so, is the litigant’s discretion limited, either substantively to certain regulatory areas or procedurally? All else being equal, the weaker a plaintiff’s due process interest in redress and the deeper and broader her enforcement discretion, the more likely it is that recognizing standing to administer the law by enforcing it would present a serious due process problem.

V. *Perry* Reconsidered

Thus re-envisioned, standing doctrine plays an important role in ensuring due process of law enforcement. This Part broadens the lens, considering due process of lawmaking and law enforcement together by reconsidering *Perry*.

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A. Due Process of Lawmaking and Law Enforcement

Critics of Perry’s standing holding, including the dissenting Justices, have a straightforward and powerful argument. The Perry Court’s conclusion that Proposition 8’s proponents lacked standing because they had “always participated in [the] litigation as private parties” is question-begging. Proposition 8’s proponents argued they were state actors for purposes of standing and, therefore, unlike a private litigant, did not need to show a concrete and personal injury in order to defend the law on appeal. Nor was it obvious the proponents were wrong, as both the California Supreme Court and the Ninth Circuit agreed with them. Four Justices, moreover, agreed with the Ninth Circuit’s holding, if not its reasoning. In his dissenting opinion Justice Anthony Kennedy enumerated the many public functions Proposition 8’s proponents perform under state law. Justice Kennedy would have held the proponents were state actors with Article III standing to defend the “right” of the people of California “to make law.”

If it is permissible for California citizens to bypass public officials and make civil rights law by popular initiative, then it is difficult to understand why California law cannot make popular lawmaking effective by authorizing the initiative’s proponents to defend it when public officials will not. Nor is it clear why the U.S. Supreme Court would decline to defer to the California Supreme Court’s conclusion that granting standing was necessary to ensure the integrity of the state’s popular lawmaking process. Surely the California Supreme Court has the comparative expertise on that question of state law.

The puzzle only deepens from a due process perspective. Proposition 8’s proponents claimed standing to defend state law. This institutional claim, unlike a claim to administrative standing, does not directly impact a defendant’s due process-protected liberty and property rights.

Standing in Perry might therefore have been analogized to citizen standing to seek judicial review of federal agency action. An agency has no due process claim to liberty or property at stake when a citizen seeks review of its compliance with law. Therefore, at first glance, standing should not be a bar to citizen suits against agencies, regardless whether the citizen-litigant has suffered an injury in fact.

At second glance, however, the matter is not so simple, as Perry underscores. Though California had no due process right at stake, the plaintiffs certainly did. And though some cases of judicial review of agency action do not implicate an individual’s due process rights, many do. It

371 See id. at 2660.
372 See id. at 2669-70 (Kennedy, J., dissenting).
373 Id. at 2675.
374 See Grove, supra note XX, at 829-30.
375 See id.
follows that citizen standing in institutional and administrative cases may present a due process problem even when the government is a defendant.

Recognizing this possibility suggests a different account of the standing problem in Perry, one more plausible than the Court’s awkward incorporation of the Restatement (Third) of Agency into Article III. To the extent that popular lawmaking presents a due process problem, executive nondefense provides a filter to check egregious abuses of the ballot initiative process. The argument that popular lawmaking regarding civil rights presents due process concerns may be simply stated. Considering a proposed popular amendment to Oregon’s Constitution that would have “group[ed] ‘homosexuality’ with ‘pedophilia, sadism, and masochism’ as ‘abnormal, wrong, unnatural, and perverse,’” Justice Hans Linde argued that the “design of republican government . . . [does] not allow such policies to be put to a statewide plebiscite upon initiative petitions that bypass deliberation by elected legislators and governors . . . . Rather, such deliberations [are] the only guarantee safeguarding minorities against unmediated swings of majority passions.”

From this perspective, the reason for denying standing in Perry sounded in a due process of lawmaking and law enforcement considered together. Perhaps popular lawmaking subject to a functional executive override does not run afoul of the Constitution. Remove that override and the picture changes. To be sure, there is no indication that the Perry majority had this concern. But re-reading Perry from a structural due process makes sense of a rule under which popular lawmaking can occur, but the state executive can check its abuses by declining to defend its most odious productions.

**B. Standing in State Court**

Of course, the Perry Court suggested that California was free to authorize Proposition 8’s proponents to defend the law in state court. These and other state law work-arounds have been considered in Perry’s wake. These possibilities raise a final objection to rethinking government standing in due process terms. Standing grounded in Article III does not apply in state courts. Standing rules grounded in structural due process would. Federalism, in other words, may be a reason to reject a due process theory of standing. That is particularly true to the extent that state courts provide

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377 Perry, 133 S. Ct. at 2667.

opportunities for private enforcement that the federal courts would deny for lack of an injury in fact.

Imposing federal requirements on state standing law is not as novel as it may seem, however. In *Nike v. Kasky* the Court nearly reached the question. In that case a private plaintiff sued Nike under California’s unfair competition law, claiming standing for the “Public of the State of California.” His suit alleged Nike had violated the unfair competition law by falsely denying that it had operated sweatshops in Southeast Asia. Nike defended on First Amendment grounds. The U.S. Solicitor General filed an amicus brief arguing that California could not authorize a private litigant to seek redress under the competition law not “for actual harm, but rather” out of “disagreement with [a] speaker’s policies, practices, or points of view.” The Court ultimately dismissed the writ as improvidently granted. Dissenting from the dismissal, Justice Stephen Breyer argued that California likely could not authorize private plaintiffs to bring false advertising actions on the State’s behalf because “ideologically” motivated private litigants, unlike public officials, are not subject to “legal and practical checks that tend to keep [their] energies focused upon more purely economic harm.” While there are strong arguments against Breyer’s First Amendment theory, similar concerns sounding in due process would support restrictions on private attorney general enforcement of state law.

This possibility seems less objectionable to the extent that state law already restricts delegation of law enforcement authority to private parties. In that regard, it is important to recognize that “[i]t is generally acknowledged among the states that delegations to private parties violate state constitutions.” State law often invalidates delegations that federal due process would permit; for instance, many states do not permit the delegation of state authority to federal officials, who are politically accountable. Some state courts closely police delegations of enforcement authority to unelected public officials in order to ensure that they are subject to adequate controls. It is thus far from clear that applying due process limits would significantly change most states’ standing laws.

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381. Nike, 539 U.S. at 654.
382. Id. at 680 (Breyer, J., dissenting).
383. See Morrison, supra note XX, at 646-69.
384. Massey, supra note XX, at 165.
385. See id.
386. See *State v. Robertson*, 924 P.2d 889, 894 (Utah 1996).
387. Some states have adopted standing law consistent with this Article’s analysis. See, e.g., *Duncan v. New Hampshire*, 2014 WL 4241774 (N.H. Aug. 28, 2014) (rejecting grant of citizen standing as impermissible delegation). To be sure, many states recognize “public right”
CONCLUSION

That is particularly true because this Article’s due process framework aims at a more nuanced and context-sensitive approach to standing than the formal analysis of Perry and Lujan. Difficulties distinguishing state from private actors are ubiquitous in public law, particularly in an era of privatization of public regulation. Developments in standing jurisprudence have brought standing’s state action problem into sharp focus, as has renewed interest in the state action and private nondelegation doctrines. Scholars have pored over private standing and considered government standing, but have not explored how standing law should distinguish state actors entitled to stand for the state from private litigants who are not. By grounding the distinction in due process, this Article has reclaimed the right-remedy principle for standing analysis and shown that striking down a private delegation of government standing based upon injury analysis may not be always required by The Constitution.

standing more generous than the Court’s injury-in-fact test or treat standing law as prudential. E.g., Trustees for Alaska v. State, 736 P.2d 324 (Alaska 1987). Here too, however, it is not clear that due process analysis always would lead to significant changes in state law. For example, under Ohio standing law a citizen may bring a “public-right action” in the “rare and extraordinary case where the challenged statute operates directly and broadly to divest of judicial power.” Brown v. Columbus City Schs. Bd. of Educ., 2009 WL 1911904 (Ohio Ct. App. June 30, 2009) (summarizing case law).

