Who may speak for the interests of a state or the United States in federal court? In the wake of decisions by state and federal executive officials not to defend laws they believe are unconstitutional, scholars and commentators have debated whether other parties might have Article III standing to represent what is variously described as “a State’s,” “the government’s” or “the People’s” interest in the defense and enforcement of the law. Yet there has been no examination of the implications of the American principle of popular sovereignty for Article III standing to defend such sovereign interests. The American Framers broke with English political tradition by separating the sovereignty of the new American republics from their governments, thereby creating a novel political form. Scholars have examined the implications of popular sovereignty for the law in a variety of areas, including state sovereign immunity, statutory interpretation, judicial review, and the evolution of constitutional meaning, but they have yet to consider its implications for standing to defend sovereign interests. This article begins to fill the gap.

The article argues that in a republic founded on the principle of popular sovereignty no party may announce the sovereign’s constitutional views. Put simply, the people do not sit at counsel’s table alongside the United States Attorney or a State Attorney General. The Framers did not give any governmental actor the power to speak for the sovereign. Beyond the narrow confines of clear constitutional text, we simply have no way of knowing with certainty where the sovereign’s interest lies in any constitutional dispute. Moreover, the Framers separated the state and federal governments into competitive branches, both to protect popular sovereignty and to foster a deliberative process that might inform citizens’ constitutional views. Therefore, just as no one may speak for the sovereign, no elected official may speak for the government as a whole.

Consequently, executive officials who defend and enforce laws do so based on the sovereign’s constitutional command that they “take care that the law be faithfully executed,” rather than any power to speak for the sovereign or the government. This precludes standing to represent sovereign interests by non-executive parties in most cases. Accordingly, the article calls for a fundamental rethinking of Article III standing to enforce and defend laws, grounding standing in express duties and obligations of government officials, rather than in their ability to wear the mantle of sovereignty.

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# STANDING IN THE SHADOW OF POPULAR SOVEREIGNTY

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## TABLE OF CONTENTS

Introduction ................................................................................................................................................................................. 1

I. The American Principle of Popularity Sovereignty ........................................................................................................ 7
   A. Separating Sovereignty from the Government ................................................................................................................. 7
      1. Sovereignty in English Political Theory ....................................................................................................................... 7
      2. Popular Sovereignty and the American Revolution ........................................................................................................ 8
      3. Popular Sovereignty and the American Constitution ...................................................................................................... 10
   B. Separating Powers to Preserve Popular Sovereignty ...................................................................................................... 13
   C. Enhancing Deliberation through Representative Democracy ............................................................................................ 15

II. Standing to Defend Sovereign Interests .............................................................................................................................. 18
   A. Article III Standing and Injuries in Fact ............................................................................................................................ 19
   B. Popular Sovereignty and Sovereign Interests .................................................................................................................. 21
      1. The Sovereign’s Interests in Defending its Laws ............................................................................................................. 21
      2. The Government’s Interest in Defending its Laws .......................................................................................................... 24
         a. The Qualified Nature of the Government’s Interest ...................................................................................................... 25
         b. The Absence of a Single Government Interest .......................................................................................................... 27
         c. The Distinction between Interests and Injuries for Purposes of Standing .................................................................... 28
      C. The Executive’s “Take Care” Duty and Standing to Defend ......................................................................................... 29

III. Standing Jurisprudence in the Shadow of Popular Sovereignty .......................................................................................... 31
   A. Standing with the Executive: United States v. Windsor ................................................................................................. 32
      1. The Executive’s Decision to Enforce but Not Defend DOMA ...................................................................................... 33
      2. The Supreme Court’s Jurisdictional Holding ................................................................................................................. 35
   B. Standing of Non-Governmental Actors: Hollingsworth v. Perry ...................................................................................... 39
   C. Legislative Standing ......................................................................................................................................................... 49
      1. The Separation of Powers Problem ................................................................................................................................. 50
      2. The Appointments Clause Problem ............................................................................................................................... 51
      3. The Windsor Problem ..................................................................................................................................................... 52

Conclusion ...................................................................................................................................................................................... 54
INTRODUCTION

Who may speak for the interests of a state or the United States in federal court? This question lies at the heart of several current debates over Article III standing prompted by the decisions of state and federal executive officials not to enforce or defend laws prohibiting same sex marriage on the grounds that they are unconstitutional.1 These executive decisions have required courts and scholars to grapple with (1) the scope of the executive’s constitutional duty and Article III standing to defend laws the executive believes are unconstitutional,2 (2) whether non-executive actors, either private parties or the legislature, have standing to play the role traditionally played by the executive in defending such laws,3 and (3) whether the legislature may sue the executive for not enforcing a

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2 Cf. Daniel J. Meltzer, Executive Defense of Congressional Acts, 61 DUKE L.J. 1183, 1235 (2012) (arguing based on historical and institutional concerns that the executive should enforce and defend statutes “even when it views them as wrongheaded, discriminatory, and indeed as shameful denials of equal protection.”); Christopher N. May, Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative, 21 HASTINGS CONST. L.Q. 865, 886 (1994) (arguing based on constitutional text and practice that the President may not generally refuse to enforce a law that he believes is unconstitutional); Eugene Grossman, Take Care, Mr. President, 64 N.C. L. REV. 381, 384 (1986) (arguing that “the Executive can refuse to defend the constitutionality of a statute” but should not “refus[e] to execute it in the first instance”); EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1984, 72 (5th rev. ed. 1984); with Neal Devins & Saikrishna Prakash, The Indefensible Duty to Defend, 112 COLUM. L. REV. 507, 509 (2012) (arguing that there is no duty to defend or enforce laws President believes are unconstitutional); Saikrishna Bangalore Prakash, The Executive’s Duty To Disregard Unconstitutional Laws, 96 GEO. L.J. 1613, 1616 (2008) (arguing that “the Constitution actually requires the President to disregard unconstitutional statutes”); Dalena Marcott, The Duty to Defend: What is in the Best Interests of the World’s Most Powerful Client? 92 GEO. L.J. 1309, 1309-10 (2004) (arguing that “the duty to defend should not extend to statutes the Executive considers unconstitutional”); Michael Sant’Ambrogio, The Extra-Legislative Veto, 102 GEO. L.J. 351, 411 (2014) (arguing that the President should have particularly compelling reasons not to enforce laws he believes are unconstitutional).

3 Cf. Brianne J. Gorod, Defending Executive Non-Defense and the Principal-Agent Problem, 106 NW. U. L. REV. 1201 (2012) (arguing that in the absence of executive defense Congress or appointed outside counsel should defend the law); Abner S. Greene, Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-But-Not-Defend Problem, 81 FORDHAM L. REV. 577, 582 (2012) (arguing that Congress should be able to assert standing to defend federal laws when the Executive declines to do so and to seek declaratory judgments when the Executive declines to enforce the law); William K.
law based on constitutional objections. Such debates inevitably involve claims about who may and may not represent the interests of what is variously described as “a State,” “the government,” or “the People,” and can be described collectively as “sovereign interests.”

Yet despite the depth and breadth of this growing body of work, the literature has yet to interrogate the implications of the American principle of popular sovereignty for standing to represent sovereign interests. Specifically, no one has considered how the fundamental division between sovereignty and the government wrought by the Framers of the American Constitution shapes who may and may not speak for sovereign interests in court. Consequently, the Supreme Court and scholars alike have inadvertently conflated political concepts


See Greene, supra note 3, at 578 (arguing that Congress should be able to sue the President “to seek a judicial declaration regarding the statute’s constitutionality” when he does not enforce it). See also BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 143-146 (2010) (proposing a “Supreme Executive Tribunal” to hear congressional suits challenging presidential actions without establishing the traditional elements of standing); J CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 260-379 (1980) (arguing that courts should abstain from adjudicating disputes over the constitutional powers of the political branches). Note that a suit against the executive for non-enforcement based on constitutional objections is different in nature from the House’s recent proposal to sue President Obama for his delayed implementation of the Affordable Care Act, see Memo From Speaker Boehner to House Colleagues, June 25, 2014, available at http://s3.documentcloud.org/documents/1208355/06-25-14-speaker-memo-to-house-members-on.pdf, although popular sovereignty has implications for such a suit as well.

See, e.g., Hollingsworth v. Perry, 133 S. Ct. 2652, 2664 (2013) (“No one doubts that a State has a cognizable interest ‘in the continued enforceability’ of its laws that is harmed by a judicial decision declaring a state law unconstitutional.” (quoting Maine v. Taylor, 477 U.S. 131, 137 (1986)); Diamond v. Charles, 476 U.S. 54, 62 (1986) (“a State has standing to defend the constitutionality of its statute.”).

See, e.g., Goldberg, supra note 3, at 166 (describing “the government’s interest” in defending its laws); Grove, supra note 3, at 1336 (grounding the executive’s standing to defend laws in “[t]he government’s interest” in the enforcement of the law).

See, e.g., Sidney A. Shapiro & Rena I. Steinzor, The People’s Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism, 69 LAW & CONTEMP. PROBS. 99, 104 (2006) (“although, through statutes, Congress directs the executive branch, the executive branch is still the agent of the people”).
that are distinct in the American political system and encouraged private parties to grasp at the mantle of sovereignty to implement their ideological agendas. This article begins to fill this gap by unpacking the implications of popular sovereignty for Article III standing to represent sovereign interests.

The ratification of the Constitution fundamentally altered the relationship between the American people and their government. In stark contrast to England, in which all sovereignty was located in the government, the Framers consciously denied sovereignty to the government of the new American Republic. Rather, the United States was founded on the principle that sovereignty was retained by the people and that government officials merely served as their agents, exercising authority within prescribed constitutional limits. Indeed, with a keen understanding of the fallibility of human nature, the Framers recognized that government officials could not always be trusted to pursue the interests of the people. Accordingly, the Framers both denied government officials the authority to act as the sovereign and divided the government into competitive branches to prevent the government from intruding on the sovereignty of the people.

This article argues that in a republic founded on the principle of popular sovereignty, no party may claim the sovereign’s interest as a basis for standing in constitutional disputes. Put simply, American sovereigns do not walk into court with a United States Attorney or a State Attorney General. Like the monotheistic god from whom the concept of sovereignty is derived, the sovereign is omnipotent, omniscient, and omnipresent, yet rarely seen. The Framers did not give any governmental actor the power to announce the sovereign’s constitutional views. Beyond the narrow confines of clear constitutional text, we simply have no way of knowing with certainty where the sovereign’s true interest lies in any constitutional dispute; we do not know the sovereign’s constitutional views. Indeed, granting the power to announce the sovereign’s constitutional view to a government official would make a mockery of the idea of popular sovereignty.

Therefore, we must look closer to earth for the government’s standing to defend sovereign interests. It is not grounded in constitutional clairvoyance. Rather, the Framers imposed certain constitutional obligations on government officials. Most importantly, Article II of the U.S. Constitution and various state

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8 We have become so enamored with judicial review and the Court’s power to “say what the law is” that the Court’s pronouncements are sometimes mistakenly viewed as the one true meaning of the Constitution. See Meltzer, supra note 2 at 1188 (describing the view known as judicial supremacy and citing the important literature). But as I explain below the Court, like the other branches of government, merely interprets the Constitution as necessary to meet its constitutional obligations. The Court does not speak for the sovereign.


10 The defense of a law includes both the defense in the initial trial court and the appeal of adverse judicial judgments. Thus, standing to defend includes standing to appeal.
STANDING IN THE SHADOW OF POPULAR SOVEREIGNTY

constitutional analogs direct executive officials to “take care that the laws be faithfully executed.” These constitutional commands, rather than the power to announce the sovereign’s views, give the executive standing both to enforce the law and to appeal adverse judgments that impair its ability to do so. Moreover, like other executive responsibilities, it may not be delegated to another branch of government. The Framers specifically separated the government in order to prevent it from infringing the people’s sovereignty through the consolidation of legislative, executive, and judicial power.

Thus, this article calls for a fundamental rethinking of Article III standing to enforce and defend laws, grounding standing in express duties and obligations of government officials as they understand them, rather than in their ability to wear the mantle of sovereignty. To be sure, all government officials should seek to further the sovereign’s interest in pursuit of their duties. But it is precisely the provisional nature of government officials’ constitutional views, always subject to argument, revision, and the possibility of popular intervention, that drives our deliberative democracy; not the power of a government official or private party to announce the sovereign’s position in court.

While popular sovereignty requires a rethinking of Article III standing to defend sovereign interests, it does not require a major overhaul of the case law. Rather, it provides more secure doctrinal moorings for a body of opinions that has been widely criticized for incoherence and inconsistency. For example, popular sovereignty vindicates the Court’s reluctance to grant standing to non-executive actors to defend state and federal laws. When the Court has recognized the standing of such parties it has usually done so based on concrete injuries to the parties themselves rather than injuries to the state or the sovereign. Indeed, the Court has never clearly and unambiguously endorsed such derivative standing by non-governmental parties, although its opinions are sufficiently ambiguous to encourage continued attempts to claim the mantle of the sovereign.

At the same time, the Court has recognized the standing of the executive to appeal judicial orders striking down laws the executive enforces, even if the executive agrees that the law is unconstitutional. The Court has not, as some have advocated, barred the executive from appealing such decisions because there can be no sovereign interest in an unconstitutional law. Thus, the Court

11 See, e.g., U.S. CONST. art. II, § 3; CAL. CONST. art. V, § 1 (“The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed.”); § 13 (“It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced.”); Norman R. Williams, Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage, 154 U. PA. L. REV. 565, 639 (2006) (noting that “every state constitution … provides in substance that the chief executive shall ‘take care’ or see to it that the laws are faithfully executed”).
13 See, e.g., Windsor, 133 S. Ct. at 2700 (Scalia, J. dissenting) (“Since both parties agreed with the judgment of the District Court for the Southern District of New York, the suit should have ended there.”); Grove supra note 3, at 3 (“The executive has standing only when it asserts the federal government’s interests in the enforcement and continued enforceability of federal law.”).
has implicitly recognized that the constitutional views of the executive and the sovereign are distinct, and the latter are unknowable. The executive has standing to enforce and defend laws based on its view of how best to fulfill its “take care” obligations, whether its view is right or wrong, not based on the executive’s ability to act as the sovereign in court. If the executive were in fact speaking for the sovereign, it could not enforce a law that it believed was unconstitutional.

Thus, while paying lip service to abstract “State interests,” the Court has in fact taken a more concrete approach to testing standing to defend laws. The Court has held that a party asserting standing to defend sovereign interests must demonstrate that a court has ordered it to do or refrain from doing something.\textsuperscript{14} It is not enough for a party to assert that the interests of the United States or a state have been harmed by a judicial declaration of a law’s unconstitutionality. The Court has usually, although not always, reached the correct result in these cases, but its reasoning leaves much to be desired. It would do better to rely on popular sovereignty and hold that no party may speak for the sovereign in court. The Court could then abandon the unsettling notion that a party can claim the sovereign’s interest to press their ideological agenda.

Finally, examining standing in light of popular sovereignty suggests that the Court should not recognize legislative standing either to step into the shoes of the executive and represent the interests of a State or to sue the executive for non-enforcement of legislative acts based on constitutional objections. The executive’s enforcement and defense of laws is based on its “take care” responsibilities as it understands them, not any power to act as the sovereign or the sovereign’s lawyer. Thus, it is not the case that the executive has abandoned either the role or representation of the sovereign, creating space for another party to assume the position. The sovereign does not appear in court; only government officials do. Nor does the executive violate a duty to the legislature when the latter is not pleased with how the President meets his “take care” responsibilities.\textsuperscript{15} This constitutional command is an obligation to the sovereign people, not to Congress.

Popular sovereignty has been called a legal fiction. But it is a powerful one. Legal fictions can shape institutions and popular sovereignty has an impressive resume in this regard. Indeed, it is difficult to make sense of many aspects of our constitutional system without it. Scholars have explored the implications of popular sovereignty for state sovereign immunity,\textsuperscript{16} suits between states,\textsuperscript{17} the

\textsuperscript{14} See, e.g., Hollingsworth, 133 S. Ct. at 2656 (denying proponents standing because the lower court did not order them “to do or refrain from doing anything”); Windsor, 133 S. Ct. at 2686 (“[a]n order directing the Treasury to pay money is a real and immediate economic injury” (citation and internal quotation signals omitted)).

\textsuperscript{15} This article uses the male pronoun when referring to the President because to date they have all been men.


justiciability of citizen suits,\textsuperscript{18} statutory interpretation,\textsuperscript{19} judicial review,\textsuperscript{20} and the evolution of constitutional meaning.\textsuperscript{21} This article adds to this literature by examining its implications for Article III standing to represent sovereign interests. Any debate about who may speak for sovereign interests must come to terms with the division between the sovereign and the government that the Framers wrought.

Regardless of one’s view of the usefulness of popular sovereignty as a legal fiction, whether it continues to benefit our political system or is an outdated relic of an eighteenth-century American elite, both proponents and opponents should agree that the worst use of that fiction would be to allow a party to claim the sovereign’s authority in our deliberative democracy. No governmental actor is beyond the constitutional limits set down by the sovereign and no governmental actor may announce the sovereign’s constitutional views. Even the judiciary’s power to say what the law means is limited to specific cases and controversies that demand adjudication, lest the judiciary assume the sovereign’s crown. Consequently, all constitutional interpretations are inherently provisional—subject to deliberation by citizens, revision by government officials, and the possibility of popular intervention. Granting either government officials or individual citizens the power to speak for the sovereign has no place in our deliberative democracy.

* * *

The article proceeds in three parts. Part I begins by describing the principle of popular sovereignty established by the Framers and how it broke with both English political theory and the experience of the states under the Articles of Confederation. The Framers created a political system in which sovereignty was separated from the government and the government itself was divided into branches with different powers and responsibilities. This dual separation was designed to protect the people from governmental power and enhance political deliberation over both government policy and constitutional meaning, thereby allowing elected representatives to inform the views of the sovereign people.


\textsuperscript{21} Bruce Ackerman, \textit{We the People, Volume 1: Foundations} (1993).
Part II then offers an original account of the implications of popular sovereignty for the enforcement and defense of state and federal laws by executive officers. It is the first attempt in the literature to examine the meaning of popular sovereignty for Article III standing to defend sovereign interests. Part II argues that the executive has standing to enforce and defend laws based on its specific and personal constitutional duties, rather than any power to speak for the sovereign or the government as a whole.

Part III then evaluates the Supreme Court’s standing jurisprudence in the shadow of popular sovereignty, including (1) the executive’s standing to defend laws that it believes are unconstitutional, (2) the standing of private parties to assert sovereign interests, and (3) the standing of legislatures to step into the shoes of the executive to defend the constitutionality of laws or sue the executive for non-enforcement. Part III argues that even when the Court has reached the right result in these cases, its reasoning falls short of the mark. The Court would do better to embrace popular sovereignty to justify its solitude for executive standing and its reluctance to recognize other parties to defend sovereign interests. The article then concludes.

I. THE AMERICAN PRINCIPLE OF POPULARITY SOVEREIGNTY

The Framers of the Constitution fundamentally transformed the eighteenth-century idea of sovereignty as it was understood in European political theory. Unlike the governments that preceded it, the American Republic was founded on the principle that the government served as the agent of the sovereign people rather than the embodiment of sovereignty. This revolutionary idea emerged from the political battles during the post-Revolutionary period and has had profound implications for our governmental system that reverberate to this day.

A. Separating Sovereignty from the Government

1. Sovereignty in English Political Theory

The eighteenth-century idea of sovereignty assumed that in every state there must be “one final, indivisible, and incontestable supreme authority.” This idea had roots in classical antiquity, but sixteenth-century political theorists developed the theory to justify monarchical control of the emerging European
nation states in which the “sovereign” claimed to be the source of all supreme power embodied in the State. The sovereign derived this political authority from his role as God’s lieutenant on earth, a legal fiction used to justify his power over the subjects of his realm. As God’s lieutenant the sovereign was omniscient, omnipotent, and could do no wrong: “The government was his government, the people ... were his subjects.” This was the divine right of kings.

Nevertheless, subjects did have “rights, and English subjects had more rights than the subjects of other kings.” The idea of popular sovereignty—that all sovereign power came from “the People”—was born of the struggle over these rights, even if popular sovereignty, like the idea of sovereignty itself, had ancient roots. Specifically, the English Parliament used the idea of popular sovereignty to constrain the King, interposing the People between God and the monarch. The new legal fiction pushed aside the old divine right of kings and proposed that the King derived his power from the consent of the people. Of course, the people could not act as a whole. Therefore, they had endowed Parliament with their sovereign power to “begin, end, and change governments.”

During the long conflict between Parliament and the crown, which culminated in the Glorious Revolution of 1688 and the succession of William and Mary to the throne in 1689, however, the English people never formally exercised their sovereignty by forming a new government. Thus, even as Parliament wrested a measure of sovereignty from the king, sovereignty remained embodied in the government. Whereas before the monarch had claimed all of the state’s sovereignty, now Parliament—comprising the Monarchy, the Lords, and the Commons—claimed England’s sovereignty. Parliamentary supremacy was justified by the belief that each of the three constituent estates of English society was represented in Parliament: the monarchy in the King, the aristocracy in the House of Lords, and the people in the House of Commons. This representational character bound the English subjects to obey all parliamentary acts because they were, according to this new legal fiction, the acts of the people.

2. Popular Sovereignty and the American Revolution

The America colonists subsequently turned the “representative” justification of parliamentary sovereignty to their advantage in the fight with Parliament over taxation in the pre-Revolutionary period. When the colonists first challenged parliamentary authority in the 1760s, they sought to create separate spheres of authority for Parliament and the colonial legislatures, drawing distinctions

24 BAILYN, supra note 22, at 198; WOOD, supra note 22, at 345.
25 MORGAN, supra note 22, at 17-18; WOOD, supra note 22, at 346.
26 MORGAN, supra note 22, at 17, 19.
27 MORGAN, supra note 22, at 19.
28 MORGAN, supra note 22, at 19.
29 MORGAN, supra note 22, at 56; Gonzalez, supra note 19, at 640.
30 MORGAN, supra note 22, at 56.
31 MORGAN, supra note 22, at 59-60.
32 MORGAN, supra note 22, at 120.
33 WOOD, supra note 22, at 346-347.
between internal and external taxation, or taxation and trade regulation. But the American revolutionaries could not defend such theories without abandoning the well-established principle that in every form of government, regardless of how it was formed, “there is and must be ... a supreme, irresistible, absolute, uncontrolled authority, in which ... the rights of sovereignty[] reside.” Thus, under the then-established view of sovereignty, Parliament must either exercise all sovereign power over the colonies or none at all. Because the colonists had no representation in Parliament, the American revolutionaries ultimately concluded that it was the latter—Parliament could have no sovereign authority over the colonies without colonial representation.

But the Revolutionaries of 1776 continued to accept the idea that all sovereign power must be lodged in the government. Thus, whereas sovereignty had previously been lodged in Parliament, it was now placed in the colonial legislatures. Until the final break with England, the colonies remained linked with the mother country in the American mind through the King. Just as the House of Commons was linked to the King through Parliament, these colonial “mini parliaments” continued to have a relationship with the King in his personal capacity. But this connection, never fully developed, was extinguished by the events of 1776.

Untethered from King and Parliament, Americans were forced to grapple with the nature of the relationship between the new state governments and the sovereign people. While English political theorists had first developed the idea that all sovereign power ultimately resided with the people, it was an abstraction with little operative currency. One might accept that at some time in the distant past the people had exercised their God-given power to create a government, but only in times of revolution did the people act upon this power. During times of peace and good government, sovereignty remained with Parliament. In post-revolutionary America, however, popular sovereignty became more than an abstract political idea. The people increasingly sought to exercise their sovereignty on an ongoing basis, resorting to political mobbing, “directing” their representatives how to vote, and ignoring laws they did not think aligned with the people’s interests.

At the same time, with the King and House of Lords replaced by democratically accountable executives and upper legislative houses, the lower houses of the state legislatures could no longer claim, as the House of Commons

34 WOOD, supra note 22, at 350-353.
36 WOOD, supra note 22, at 352-353.
37 Id.
38 Id.
39 WOOD, supra note 22, at 362-363.
did, to be uniquely “representative” of the People. In America, both lower and upper houses of the legislature and many executive officials were now accountable, directly or indirectly, to the people. Therefore, it was no longer necessary to transfer the people’s power to a lower legislative house to enable it to compete with the monarch and the aristocracy.40 All political institutions were in some sense representative of the people. But with each branch of government created to represent the interests of the people, it was difficult to make sense of disagreements among them. If each branch had sovereign authority to speak for the people, how could they disagree?41 Thus, the English idea that the people transferred their sovereignty to the government by virtue of their representation in the House of Commons broke down during the post-Revolutionary period with the diminishing relevance of “mixed government” in the new American states.

Finally, many of the Framers were alarmed by the power of the new state legislatures in the post-Revolutionary period. Americans who traditionally thought of themselves as the natural leaders of society watched as new men without education or status were elected to the legislative assemblies. Even more troubling, the state legislatures took actions that American elites saw as threatening the sanctity of property rights.42 Many Americans came to believe, as Hamilton expressed it, that while “the people commonly intend the public good,” they did not always “reason right about the means of promoting it.”43 Increasingly, American elites saw the people’s representatives in the state legislature as acting arbitrarily for the interests of certain segments of society at the expense of the public good.

Thus, on the eve of the Constitutional Convention, Americans were searching for new governmental forms to make sense of popular sovereignty in the American experience.

3. Popular Sovereignty and the American Constitution

The Framers of the Constitution ultimately rejected the English view of sovereignty as embodied in the government.44 Rather, the Framers “drove an analytic wedge between the government and [the] People, relocating sovereignty from the former to the latter.”45 Thus, they created a new political form to implement the American theory of popular sovereignty.

The primacy of the people is apparent from the first three words of the Preamble to the Constitution. Whereas the American revolutionaries of 1776 had declared independence in a “unanimous Declaration of the thirteen united States

40 WOOD, supra note 22, at 388.
41 Id.
42 WOOD, supra note 22, at 404-405.
43 THE FEDERALIST No. 71 (Hamilton), at _.
44 WOOD, supra note 22, at 382; Akhil Reed Amar, supra note 16, at 1432.
See Snowiss, supra note 31, at 2 (noting that “judicial authority to enforce the Constitution... [acted as] a judicial substitute for revolution”).
45 Amar, supra note 16, at 1435-36.
of America,” and the Articles of Confederation instituted “a confederation of Sovereign states,” the U.S. Constitution was “ordain[ed] and establish[ed]” by “We the People of the United States.” In the new American Republic the people were the “pure, original fountian of all legitimate authority.” Thus, the Constitution was “written by the people” in a national convention, rather than in the state legislatures, and “ratified by the people” in conventions specifically organized for the purpose, rather than by the state governments.

More important, however, than the nod to the people’s power to form their own government, which was not an entirely new idea, was the relationship between the people and the newly formed government, which was unprecedented. The Constitution was not an agreement between the people and the government, “it [was] a solemn, explicit agreement of the people among themselves.” Therefore, although government officials would act as the representatives or agents of the people, the people did not invest the government with their sovereignty. As the Supreme Court has explained, “while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.” Thus, “government entities were sovereign only in a limited and derivative sense, exercising authority only within the boundaries set by the sovereign People.”

The Constitution plays the critical role in separating the people’s sovereignty from the government. As one scholar has suggested, the Constitution created a structure to minimize “the agency costs inherent in the principal-agent relationship between a principal/people and their constituted agent/government.” For this reason, Alexander Hamilton wrote in Federalist No. 78 that:

No legislative act ... contrary to the Constitution[] can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people

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46 Declaration of Independence.
47 WOOD, supra note 22, at 357.
48 U.S. CONSTITUTION, Preamble.
49 THE FEDERALIST NO. 22 (Hamilton), at 152; see also THE FEDERALIST NO. 49 (Madison), at 313 (“the people are the only legitimate fountain of power”).
50 WOOD, supra note 22, at 532-533; Akhil Reed Amar, The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem, 65 U. COLO. L. REV. 749, 761 (1994) (calling the adoption of the Constitution “the most participatory, majoritarian (within each state) and populist event that the planet Earth had ever seen”).
53 Amar, supra note 16, at 1436.
54 Gonzalez, supra note 19, at 637.
are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.... [T]he Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.55

In addition, the people did not pass quietly from the scene after forming their government. Madison explained that:

[a]s the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power .... the people ... as the grantors of the commission, can alone declare its true meaning, and enforce its observance[].56

The Constitution itself provides the means for the people to alter their agreement among themselves and the authority of their government, both indirectly through their electoral controls and directly through the amendment process. In addition, some scholars have argued that there are “constitutional moments” in which the people have altered the meaning of the Constitution outside of the amendment process.57 To be sure, our constitutional commitments change over time, as the Court itself has recognized in its evolving constitutional jurisprudence. Both the formal and informal means of amending the Constitution speak to the people’s retention of sovereignty and their role in supervising government agents.

Finally, the Constitution drove a similar wedge between the state governments and the sovereign people. As Madison explained, “[t]he federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes.... [U]ltimate authority, wherever the derivative may be found, resides in the people alone[].”58 In this respect the Constitution completed a process that was already underway under the Articles of Confederation as states amended their constitutions to implement the new view of popular sovereignty then taking shape.59

Consequently, the Constitution did not merely remove certain powers from the state governments and relocate them to the new national government. It also demonstrated that any sovereignty possessed by the states was also located in the people rather than their state governments. Otherwise, the people could not have transferred any powers from the states to the federal government.60 Thus, the Constitution did not just remove powers from the state governments; it also

55 THE FEDERALIST NO. 78 (Hamilton), at 435.
56 THE FEDERALIST NO. 49, supra note 49, at 282. See also KRAMER, supra note 9, at 8.
57 ACKERMAN, supra note 21.
58 THE FEDERALIST NO. 46 (Madison), at 262.
60 WOOD, supra note 22, at 530-531. States remained sovereign in some sense, as the battles over the Tenth Amendment confirm, but the state governments were, like the federal governments, merely the agents of the sovereign people.
fundamentally transformed the internal structure and organization of the states as states.

B. Separating Powers to Preserve Popular Sovereignty

In addition to separating sovereignty from the government, the Framers also divided the national government into three separate branches with distinct powers and responsibilities. Today, separation of powers is more widely appreciated than popular sovereignty. This is ironic because separation of powers was primarily a means of separating sovereignty from the government and retaining it for the people.61

The idea of separation of powers had its roots in the seventeenth-century idea of “mixed-government” that emerged from the political struggles between European sovereigns and their subjects, including the aristocracy.62 In a mixed governmental system such as England’s, each constituent of society—the monarchy, the aristocracy, and the people—were represented in government, and thus each constituent could claim to share in the sovereign power of the government.63 Because each component evolved with distinct rights and responsibilities, they also exercised distinct or “separated” powers. Thus, there was an association between the principles of mixed government and separation of powers well into the eighteenth century.

Indeed, during the Confederation period there were some attempts to implement mixed government in the new states, by creating upper legislative chambers elected by those with more property, or with representatives elected for life, similar to the way in which members of the House of Lords held their seats of right. But as it gradually dawned on the Americans that each component of government was now representative in some sense of the people, the principle of separation of powers was decoupled from the idea of mixed government. Consequently, the division of government no longer sought to provide each constituent member of society with a share in the government’s sovereignty. Rather, separation of powers was designed to check the government itself, and particularly the state legislatures.

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61 Gonzalez, supra note 19, at 592-93 (arguing that separation of powers was the “central institutional device for effectuating the federal Constitution’s version of popular sovereignty”). Gonzales argues that popular sovereignty is the foundation for all the “more familiar constitutional pillars including federalism, electoral checks, separation of powers, the jury system, the enumeration of powers, and bicameralism.” Id. at 639. See also Mistretta v. United States, 488 U.S. 361 (1989) (it was “the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty”).

62 Pushaw, supra note 18, at 400 (“Separation of powers was first mentioned during the 1640s, became a major tenet for Locke a half-century later, and then underwent continual refinement that culminated in Montesquieu’s work.”).

63 WOOD, supra note 22, at _; Pushaw, supra note 18, at 404 (1996).
Although it is often thought that the primary concern of the Framers was restraining an executive who would be King, their experience with the state legislatures in the post-Revolutionary period led them to be more concerned with restraining the power of the legislature. The Framers believed the state constitutions had been “flagrantly violated by the [state] legislature[s] in a variety of important instances.” Madison wrote in the Federalist Papers that during the period of Confederation “[t]he legislative department [was] everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.” It did not matter that the legislatures were popularly elected: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” Accordingly, Madison argued that the people should “exhaust all their precautions” against “the enterprising ambition” of the legislature.

The Constitution incorporated this new version of separation of powers, dividing authority among the three branches of the federal government to better protect the sovereignty of the people. “Ambition must be made to counteract ambition[,]” Madison wrote. Today, the checks and balances inherent in our system of separated powers are often understood merely as a means of making government action difficult. To be sure, one purpose of checks and balances is to prevent the enactment of “bad law.” But separation of powers was also designed to prevent the government from intruding on the sovereignty of the people. The “tyranny” the Framers feared was the usurpation of powers the people had not delegated to the government. As Jefferson wrote in Notes on the State of Virginia, “the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others.”

64 Wood, supra note 22, at _.
65 Id. at 277-278.
66 The Federalist No. 48 (Madison), at 277.
67 The Federalist No. 47 (Madison), at 269.
68 The Federalist No. 48, supra note _, at 277.
69 Pushaw, supra note 18, at 413 (“The Constitution incorporated a theory of separation of powers transformed by popular sovereignty.”).
70 Laurence H. Tribe, American Constitutional Law s 1-2, at 2 (2d ed. 1988) (“That all lawful power derives from the people and must be held in check to preserve their freedom is the oldest and most central tenet of American constitutionalism.”) Martin H. Redish & Elizabeth J. Cisar, “If Angels Were to Govern”: The Need for Pragmatic Formalism in Separation of Powers Theory, 41 DUKE L.J. 449, 463 (1991) (“the separation of powers must operate in a prophylactic manner—in other words, as a means of preventing a situation in which one branch has acquired a level of power sufficient to allow it to subvert popular sovereignty and individual liberty”); see also Gonzalez, supra note 19, at 668 (“[T]he answer to the question ‘why separation of powers?’ is: ‘To effectuate popular sovereignty.’”).
71 The Federalist No. 51 (Madison), at 290.
72 See Sant’Ambrogio, supra note 2, at 373-374.
73 Id. at 279 (quoting Jefferson at 195).
separation of powers was designed to prevent the “guardians of the people” from “assum[ing] to themselves, or exercis[ing], ... other or greater powers than they are entitled to by the Constitution.”  

At the same time as the Framers separated legislative, executive, and judicial power, they also enhanced the power of the second two branches of government. The courts now came to play a particularly important role, as they were charged with ensuring that the legislature and (albeit to a lesser extent) the executive did not overstep their constitutional limits. Judicial review thus served to “reject all acts of the Legislature that are contrary to the trust reposed in them by the people.” 

In sum, the Framers separated the powers of the new government to better protect the sovereignty of the people. They divided the government into three branches so that they would compete for the people's affections and check each other from intruding on the people’s sovereignty.

C. Enhancing Deliberation through Representative Democracy

While the Framers conceived the government as the agent of the sovereign people, they did not imagine elected representatives taking their orders directly from the people. Once again, the Framers were reacting to their experience during the post-Revolutionary period, when popular extra-legislative assemblies had claimed the right to direct their representatives how to vote in the legislatures. The Framers were increasingly alarmed by “democratic despotism,” which they viewed as threatening traditional property rights and undermining respect for the rule of law. Indeed, part of the logic behind a national legislature was that it would attract to its ranks “public-spirited members of the better sort” and would be difficult for local constituencies to control. Consequently, the Framers rejected the idea that elected representatives would be bound by the electoral mandates of their constituencies. Unlike in a “pure democracy,” in the American republic the legislative bodies would,

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74 *Id.* at 279 (quoting the Pennsylvania Council of Censors)
75 WOOD, supra note 22, at 453-456.
76 WOOD, supra note 22, at 469 (quoting James M. Varnum, *The Case, Trevett against Weeden ... Tried before the Honorable Superior Court in the County of Newport, September Term, 1786* (Providence 1789), at 29).
77 MORGAN, supra note 22, at 275-76; WOOD, supra note 22, at 404.
78 MORGAN, supra note 22, at 266-67; WOOD, supra note 22, at 404.
79 MORGAN, supra note 22, at 305.
80 See, e.g., Keith Werhan, *Popular Constitutionalism, Ancient and Modern*, 46 U.C. DAVIS L. REV. 65, 75 (2012) (“In the framers' optimal democracy, ordinary citizens themselves do not make the law or set government policy. The demos instead select representatives, who in turn, govern the community. The American framers expected these elected representatives, as “trustees” of the People, to exercise independent judgment of the public good, instead of channeling the will of their constituents.”) (citing Federalist No. 10 (James Madison)).
refine and enlarge the public views by passing through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.\(^{81}\)

Therefore, the relationship between the people and their elected representatives was not a traditional principal-agent relationship. To be sure, the agents of the people were bound by the people's constitutional commands. But outside of clear constitutional constraints, the people's agents would exercise their independent judgment in pursuing what they believed to be the public good. Moreover, it was hoped that their deliberation about the public good would improve the people's own understanding of their true interests. Thus, the Framers took what is now known as a Civic Republican view of political deliberation. According to Civic Republicanism, deliberation allows judgment and reason to prevail over private interests, resulting in legislation for the public good.\(^{82}\)

\[\text{This conception reflects a belief that debate and discussion help to reveal that some values are superior to others. Denying that decisions about values are merely matters of taste, the republican view assumes that 'practical reason' can be used to settle social issues.}\(^{83}\]

The key mechanisms for fostering reasoned, public regarding deliberation were bicameralism, with differently structured constituencies for each legislative chamber, and presentment of all bills to the President, with super-majority voting requirements to override his veto. Three representative institutions—the House, the Senate, and the Presidency—or a two-thirds majority of each house of Congress, would have to agree to the enactment of new law.\(^{84}\) Because each institution represented different constituents, they would bring distinct perspectives to bear on legislative deliberation. Representatives in the House would represent (in most cases) the smallest and most concentrated constituencies, each Senator would represent a broader state interest, and the President would represent the nation as a whole. By providing a voice in the process to political representatives with different constituencies, the Constitution sought to improve the deliberative process and reduce the likelihood that Congress would pass bad laws “through haste, inadvertence, or design.”\(^{85}\)

In addition, the President's limited veto played a key role in fostering deliberation over controversial public policies.\(^{86}\) The Framers believed the veto

\(^{81}\) *The Federalist* No. 10 (Madison), at 50.


\(^{83}\) *Id.*

\(^{84}\) U.S. Const. art. I, § 7.

\(^{85}\) *The Federalist* No. 73, at 372 (Hamilton) (Ian Shapiro ed., Yale Univ. Press 2009).

\(^{86}\) To be sure, the Founders conceived the veto in part as a shield for the Presidency to defend itself against the legislative depredations they had seen during the post-Revolutionary period. The veto provided the Executive with the means for its own...
would improve the legislative acts of Congress by establishing “a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of [Congress].” 87 First, the President would bring a unique perspective to legislation by virtue of his position as the chief magistrate of the whole nation. 88 Accordingly, the President might identify errors overlooked by the legislature.  Second, because the veto could be overridden by super majority votes in each chamber of Congress, the President’s veto would prompt further legislative deliberation. 89 The President’s veto would force Congress to choose between abandoning its legislative proposal, modifying the legislation to address the President’s concerns, or attempting to override the President’s veto. Thus, the limited veto was designed to serve as a deliberation-forcing mechanism. 90

The deliberation-forcing structure of bicameralism and presentment illuminates the “representative” rather than “agent” nature of elected officials. If elected representatives were agents in the principal-agent sense of the word, debates and disagreements among them would make little sense. They would merely take their commands from the people. But elected representatives were envisioned as voicing the interests and views of different elements of the sovereign people.  No political constituency could claim to be the sovereign; 91 each constituency represented only a subset of the people. Moreover, because elected representatives could not claim to speak for the sovereign, they would be forced to give reasons for the policies they advocated and respond to the arguments of other officials with different views. Put differently, the allusiveness of popular sovereignty facilitates debates among elected officials about the public good based on reason giving rather than authority. Therefore, the “representative,” rather than “agent,” character of elected officials was important to how the Framers intended the new American Republic to function.

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87  THE FEDERALIST NO. 73, supra note 85, at 371.
88  Id. (“The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it . . . .”). See also SPITZER, supra note 86, at 17; Kory A. Atkinson, In Defense of Federalism: The Need for a Federal Institutional Defender of State Interests, 24 N. ILL. U. L. REV. 93, 113 (2003) (“The founders bestowed the president with the veto . . . not because they expected the president to possess more wisdom and virtue than Congress, but because they expected Congress to make mistakes.”).
89  SPITZER, supra note 86, at 9.
90  SPITZER, supra note 86, at 9.
91  The closest we might come is the national electorate, but to this day they have never directly elected even the President and Vice-President.
In sum, and to reiterate, the Framers were committed to the idea that all sovereignty would remain with the people and would not be embodied in the government of the American Republic. The primary institutional mechanism of American popular sovereignty was separation of powers. First, it ensured that the government did not overstep its limits by dividing authority and fostering political competition for the public’s affection. Second, it encouraged enhanced political deliberation over the public good. Deliberation by elected representatives both apprised the people of their agent’s actions and helped the people refine their own understanding of the public good. The entire system was predicated on the assumption that no part of government could claim to act as the sovereign and the government itself might be divided in its views.

II. STANDING TO DEFEND SOVEREIGN INTERESTS

Executive officials typically defend and enforce laws passed by their legislatures or other law-making bodies, including the citizenry itself in states that have ballot initiatives. This is rarely controversial and has elicited virtually no attention by courts or the scholarly literature. Indeed, some scholars have suggested that government officials need not demonstrate Article III standing when defending their laws. When the Supreme Court has addressed the question at all, it has referred to “a “State's interest” either in the “enforcement” of its laws or in the “constitutionality” of its laws. The Court has added that a

92 See, e.g., Richard H. Fallon, Jr., The Linkage Between Justiciability and Remedies–And Their Connections to Substantive Rights, 92 VA. L. REV. 633, 667 (2006) (“In suits by the government, courts characteristically make no inquiry into injury.”). Part of the explanation may lie in the fact that defendant standing is generally not controversial, see Matthew I. Hall, Standing of Intervenor-Defendants in Public Law Litigation, 80 FORDHAM L. REV. 1539, 1551-52 (2012) (“Doubts about a defendant’s standing arise infrequently, because in the vast majority of cases, the defendant’s standing is apparent. Any defendant against whom relief is sought will always have standing to defend, because the exposure to risk of injury from an adverse judgment is a sufficient personal stake to satisfy Article III.”), and the government is usually a defendant in cases involving constitutional challenges to a law. But see Edward A. Hartnett, The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places, 97 MICH. L. REV. 2239, 2246 (1999) (arguing that Article III cannot require an injury in fact because the government cannot show an injury in fact in criminal prosecutions).


94 See Taylor, 477 U.S. at 137 (“a State clearly has a legitimate interest in the continued enforceability of its own statutes”); Diamond, 476 U.S. at 62 (“a State has standing to defend the constitutionality of its statute.”). See also Atwater v. City of Weston, 64 So. 3d 701, 703 (Fla. Dist. Ct. App. 2011) (“The proper defendant in a lawsuit challenging a statute’s constitutionality is the state official designated to enforce the statute. See ACLU v. The Florida Bar, 999 F.2d 1486, 1490–91 (11th Cir.1993) (citing Diamond v.
State’s authority “to create a legal code” gives it a “‘direct stake’ ... in defending the standards embodied in that code.”

This part argues that the Supreme Court’s use of the term “State” elides the fundamental distinction that the Framers established between “sovereignty”—the locus of ultimate authority in a political community—and “the government”—the officials who serve as agents of the sovereign. Consequently, the Court has muddled the rationale for government officials’ standing to defend laws and encouraged assertions of standing by ideological plaintiffs claiming to represent the sovereign. The principle of popular sovereignty suggests that the executive has a unique role in defending laws based not on its ability to know the sovereign’s interest or announce a clear and unified governmental interest, but based on the specific constitutional command set forth in Article II and its state constitutional analogs that executive officials “take care that the laws are faithfully executed.”

A. Article III Standing and Injuries in Fact

Article III of the Constitution confines the judicial power of federal courts to deciding actual “Cases” or “Controversies.” The Supreme Court has interpreted this to mean, among other things, that parties invoking the power of the federal courts must establish that they have standing. Scholars have long complained that the Court’s standing jurisprudence is incoherent, inconsistent, and value laden. Nevertheless, the Court has been relatively consistent in articulating three basic elements of standing, even if it is rarely consistent in applying them. First, the party must establish that it has suffered an “injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” Second, “[t]he injury must be ‘fairly’ traceable to the challenged action.” Third, relief from the injury must be “likely to follow from a favorable [judicial] decision.” In short, a party

Charles, 476 U.S. 54, 64 (1986); Harris v. Bush, 106 F.Supp.2d 1272, 1276 (N.D.Fla.2000); Walker v. President of the Senate, 658 So.2d 1200, 1200 (Fla. 5th DCA 1995)).

Diamond, 476 U.S. at 65.

U.S. CONST. art. II, § 3; Williams, supra note 11, at 639 (noting similar provisions in state constitutions).

Hollingsworth v. Perry, 133 S.Ct. at 2661 (citing U.S. CONST. art. III, § 2).

The one exception to this is whether an injury in fact must be “personal” or “particularized,” and whether there is a difference between the two. But this is perhaps really a disagreement about the application of the injury in fact requirement rather than the requirement itself. In stark contrast to the elements of Article III standing, the Court has been all over the map in its treatment of so-called “prudential” standing—so called, because in Lexmark Int‘l, Inc. v. Static Control Components, Inc., 134 S.Ct. 1377 (2014), the Court recently overturned much, if not all, of its prudential standing jurisprudence.

See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations and internal quotation signals omitted); Allen v. Wright, 468 U.S. 737, 751 (1984) (“The injury alleged must be, for example, ‘distinct and palpable,’ and not ‘abstract’ or ‘conjectural’ or ‘hypothetical.’”)

Allen v. Wright, 468 U.S. at 751.

Id.
wishing to avail itself of the power of the federal courts must establish that it is seeking a judicially available remedy for a personal and tangible harm.\textsuperscript{102} A mere “disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art[icle] III’s requirements.”\textsuperscript{103}

While most disputes over standing concern whether a plaintiff has standing to ask a federal court to adjudicate its legal claim, Article III demands that an actual case or controversy “persist throughout all stages of litigation.”\textsuperscript{104} Consequently, a party seeking standing to appeal a judicial decision must meet the same requirements of standing as the party who files a complaint in the federal court with initial jurisdiction.\textsuperscript{105} This means that the appellant must show that it is injured by the judgment it seeks to appeal.\textsuperscript{106} The focus of standing therefore shifts from the harm caused by the defendant to the plaintiff to the harm caused by the judicial order to the appellant.\textsuperscript{107}

Thus, when a plaintiff challenges the constitutionality of a state or federal law, the plaintiff must show that it is suffering an injury that is traceable to the law and redressable by the federal court. Plaintiffs challenging laws prohibiting same-sex marriage, for example, typically allege that they seek to marry, that they are injured by their inability to marry, that their injury is traceable to the law prohibiting same-sex marriage, and that a court order enjoining the law’s enforcement will remedy their injury. If the trial court agrees and declares the law unconstitutional, the party seeking review of the court’s decision must then show that it is injured by the judicial decision and that the appellate court can redress this injury.\textsuperscript{108}

Ordinarily in such cases the appellant is either the United States or one of the fifty states whose law has been declared unconstitutional or the executive officials named as defendants in the complaint based on their responsibility for enforcing the law. Regardless of whether the named defendant is a State or one or more executive officials responsible for enforcing the law,\textsuperscript{109} executive officials typically make the appeal and the appellant’s standing is not controversial based on what the Court has described as “a State’s interest” in the enforceability of its

\textsuperscript{102} Hollingsworth, 133 S.Ct. at 2661.
\textsuperscript{103} Id. (citation omitted).
\textsuperscript{104} Id. (citing Already, LLC v. Nike, Inc., 133 S.Ct. 721, 726 (2013)).
\textsuperscript{105} Id. (citing Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997)).
\textsuperscript{106} See ASARCO Inc. v. Kadish, 490 U.S. 605, 618 (1989). Indeed, an appellant may have standing to appeal an adverse judicial order even if it would not have had standing to seek that judicial order in the court of initial jurisdiction. Id.
\textsuperscript{107} Id. at 623-25 (1989) (“When a state court has issued a judgment . . . where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment . . . causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.”).
\textsuperscript{108} Hollingsworth, 133 S.Ct. at 2661 (citing Already, LLC, 133 S.Ct. at 726).
\textsuperscript{109} This is merely a function of sovereign immunity and its exceptions, discussed infra.
laws. But what exactly does the Court mean by “a State” in a republic based on popular sovereignty? The answer to this question is fundamental to understanding who may and may not assert standing to defend state interests.

B. Popular Sovereignty and Sovereign Interests

The Court might mean one of two things by “a State’s interest” in enforcing and defending its laws against constitutional challenge. It might mean (1) the sovereign—the political community that wields ultimate authority in the United States or one of the fifty states; or (2) the government created and maintained by the people in one of those sovereign states. Each of these constitutes a distinct interest in a republic founded on the principle of popular sovereignty. I will address each in turn before turning to the executive’s interest in enforcing the law, which I argue can be the only basis for standing to defend their constitutionality.

1. The Sovereign’s Interests in Defending its Laws

One could hardly dispute that a sovereign state has an interest in defending and enforcing its laws. But what if two of those laws conflict? If a plaintiff claims that a state or federal law conflicts with the United States Constitution, which law does the sovereign have an interest in upholding? There can be only one answer: to the extent that any law conflicts with the United States Constitution, the sovereign’s interest lies with the Constitution.

This is true of both state and federal sovereigns, as the people of each state are a part of “We the People of the United States” who,

acting as sovereigns of the whole country; and in the language of sovereignty, establish[ed] a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform.  

Thus, because the people of the states ratified the Constitution as the supreme law of the Republic, state sovereigns can have no interest in any law that conflicts with the supreme law. “To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves[].”

This explains why in Ex parte Young the Supreme Court held that an official who violates federal law is not shielded by the doctrine of state sovereign immunity: “The State has no power to impart to him any immunity from

\footnote{110 See Hollingsworth v. Perry, 133 S. Ct. 2652, 2664 (2013) (“No one doubts that a State has a cognizable interest ‘in the continued enforceability’ of its laws that is harmed by a judicial decision declaring a state law unconstitutional.” (quoting Maine v. Taylor, 477 U.S. 131, 137 (1986)); Diamond v. Charles, 476 U.S. 54, 62 (1986) (“a State has standing to defend the constitutionality of its statute.”)).}

\footnote{111 Chisholm v. Georgia, 2 U.S. 419, 470-71 (1793) (opinion of Jay, C.J.).}

\footnote{112 MORGAN, supra note 22, at 277; U.S. CONST., art. VI, cl. 2.}

\footnote{113 THE FEDERALIST NO. 78, supra note 55, at 467.}
responsibility to the supreme authority of the United States.” A state has no such power because a state sovereign has no interest in law or acts that violate federal law. Similarly, neither a state nor the federal sovereign can have any interest in enforcing or defending an unconstitutional law.

Of course, just because a plaintiff claims that a law is unconstitutional does not make it so. In such cases there is usually a dispute over the law’s constitutionality, with government officials taking the position that it does not violate the Constitution. Can the government officials’ opinion create a sovereign interest in defending the constitutionality of the law?

In a unitary system in which the government and the sovereign are one and indivisible, it is clearly in the sovereign’s interest to defend and enforce any law that the government believes is constitutional. But when sovereignty is separated from the government, no government official has the power to decide the meaning of the Constitution for the sovereign. Certainly our state and federal executive officials do not have such power. No state or federal constitution gives executive officials the power to announce the meaning of the Constitution as prescribed by the sovereign people. In a republic based on popular sovereignty, no government official can have this power.

The judiciary has the strongest claim to “say what the law is.” But notably, this remarkable power is confined to the necessity of deciding specific cases and controversies. As Hamilton wrote in Federalist No. 78, “the courts were designed to be an intermediate body between the people and the legislature, in order, among other things to keep the latter within the limits of assigned authority.” Yet this did not make the judiciary superior to the legislature or the true voice of the people. The power of the people was “superior to both” the legislative and judicial power and “declared in the constitution.” Thus, judges in deciding cases “ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.” This did not make judges “arbiters” of the Constitution superior to the legislatures; rather they were simply fulfilling their appointed duties and applying the superior law as they understood it. Limiting the judiciary to announcing law in the context of cases and controversies, and barring it from issuing advisory opinions, prevents the judiciary from usurping the role of the sovereign. No part of the government

114 Virginia Office for Protection and Advocacy v. Stewart, 131 S.Ct. 1632, 1638 (2011) (citing Ex parte Young, 209 U.S. 123, 159-60 (1908)).
117 THE FEDERALIST NO. 78, supra note 55, at 435.
118 THE FEDERALIST NO. 78, supra note 55, at 436.
119 THE FEDERALIST NO. 78, supra note 55, at 436.
120 WOOD, supra note 22, at 461 (quoting Iredell).
121 Thus, although the case or controversy requirement is frequently thought of as a means of separating the powers of government, Lujan, 504 U.S. at 577 (noting how the case or controversy requirement prevents the judiciary from intruding on the executive’s Article II powers), it is perhaps more important as a means of limiting the judiciary’s power to play the part of the sovereign.
has the power to announce the sovereign’s view of the Constitution. This would make the deputy greater than the principal.\textsuperscript{122}

To be clear, the agents of the sovereign must interpret the Constitution in discharging their duties, and ideally they will always pursue the sovereign’s highest interests. Indeed, the Constitution requires elected officials to take an oath to support the Constitution.\textsuperscript{123} But all interpretations of the Constitution by the executive, the legislature, and even the judiciary, are ultimately provisional, subject to debate, reappraisal, and the possibility of intervention by the sovereign, either indirectly at the ballot box or more rarely through constitutional amendment.

The three branches’ constitutional interpretations are thus akin to agency interpretations of ambiguous statutes. Administrative and regulatory agencies act as agents of Congress,\textsuperscript{124} implementing the authority delegated to them by law. Their interpretations have the force of law within their sphere of authority, and even when challenged, courts will frequently defer to their reasonable interpretations of congressional statutes. Yet the courts do not ascribe the agencies’ interpretations to Congress.\textsuperscript{125} To the contrary, courts defer to reasonable agency interpretations of law precisely because Congress did not speak to the issue.\textsuperscript{126} Similarly, each branch seeks to give its best interpretation of the sovereign’s interest as expressed in the Constitution. We may as citizens agree or disagree with their conclusions; but no branch, not even the judiciary, may authoritatively speak for the sovereign.

Thus, standing to enforce, defend, and appeal adverse decisions regarding ordinary law cannot depend on the sovereign’s interest in the constitutionality of those laws because we cannot know with certainty the sovereign’s interest beyond the narrow confines of clear constitutional text.

Moreover, the fact that the executive and the judiciary might disagree about the sovereign’s constitutional views—i.e., about the law’s constitutionality—creates an additional problem when it comes to Article III standing. If the government officials defending a law truly represent the sovereign, then how can a court declare a law defended by the sovereign unconstitutional? Either the executive was wrong about the sovereign’s interests, which would mean the

\textsuperscript{122} The Federalist No. 78, supra note 55, at 435.
\textsuperscript{123} U.S. CONST., art. II, sec. 1; and art. VI.
\textsuperscript{124} They are also in different sense agents of the President who appoints them.
\textsuperscript{125} Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (“if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).
\textsuperscript{126} Id. at 865 (“Perhaps [Congress] consciously desired the Administrator to [answer the interpretive question]; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.”)
executive had no standing to defend the law in the first place, or the court’s view of the Constitution is superior to the sovereign’s, which is obviously impossible.

Each branch has the right to its own interpretation of the meaning of the Constitution in pursuit of its assigned duties, but none has the right to announce the sovereign’s view. If the legislature or the executive had this authority, judicial review would make no sense because it would elevate the judiciary above the sovereign. Thus, standing to defend a law cannot depend on the political branches’ ability to represent the sovereign’s interest.

In sum, in a republic founded on the principle of popular sovereignty, the sovereign’s interest in defending its laws is unavailable to government officials as a basis for standing to enforce and defend laws against federal constitutional challenge. They have no special authority to speak for the sovereign.

2. The Government’s Interest in Defending its Laws

If no party has the power to step into court to defend laws based on the sovereign’s interest, may they be defended based on the government’s interest? The Court’s reference to “a State’s interest” in the “enforcement” and “constitutionality” of its laws, based on its authority “to create a legal code,” might refer to the government’s interest in defending the laws that it enacts.

Unlike the sovereign, who is always present but rarely acts as a body, governments are manifest in the institutions, elected officials, political appointees, and civil servants that work on behalf of the people. Therefore,

127 The question of standing is distinct from and precedes the adjudication of the merits of a legal dispute—i.e., a federal court cannot assert jurisdiction to adjudicate a legal claim on the merits unless the party invoking its jurisdiction has standing. See United States v. AVX Corp., 962 F.2d 108, 113 (1st Cir. 1992) (“If a party lacks standing to bring a matter before the court, the court lacks jurisdiction to decide the merits of the underlying case.”) (citing FW/PBS v. City of Dallas, 493 U.S. 215, 231 (1990)); Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986); Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 475–76 (1982). Thus, if executive officials derived their standing to defend laws from the sovereign their standing would depend on them being right about the sovereign’s interest. But this is of course the merits question that the courts must address in any constitutional challenge and standing, as we currently understand it, cannot depend on the merits of a suit.

128 Indeed, the power of a citizen to invoke a court’s jurisdiction to challenge the executive’s view belies the idea that any government officials can speak for the sovereign.

129 See supra note 110. But see Atwater v. City of Weston, 64 So. 3d 701, 703 (Fla. Dist. Ct. App. 2011) (“The proper defendant in a lawsuit challenging a statute’s constitutionality is the state official designated to enforce the statute. See ACLU v. The Florida Bar, 999 F.2d 1486, 1490–91 (11th Cir.1993) (citing Diamond v. Charles, 476 U.S. 54, 64 (1986); Harris v. Bush, 106 F.Supp.2d 1272, 1276 (N.D.Fla.2000); Walker v. President of the Senate, 658 So.2d 1200, 1200 (Fla. 5th DCA 1995)).”)

130 Diamond, 476 U.S. at 65.

131 See Ex parte Young, 209 U.S. at 174 (Harlan, J., dissenting) (noting that “the intangible thing called a state, however extensive its powers,” can only be represented “by and through its officers”). Although the federal government has grown significantly over
unlike the sovereign’s interest, the government’s interest is theoretically ascertainable, and government officials frequently express their constitutional views in the discharge of their duties.

Nevertheless, in a republic founded on the principle of popular sovereignty the government’s interest in the defense of its laws must always be qualified by its higher obligation to the sovereign. In addition, when governmental powers are separated to protect popular sovereignty, there is no single government view of how best to balance the governmental interest in the defense of a particular law with the government’s higher obligation to the sovereign people.

a. The Qualified Nature of the Government’s Interest

In a republic founded on the principle of popular sovereignty, the government can have no interest in an unconstitutional law. Consequently, whatever the government’s interest in defending its laws might be, it cannot be absolute or unqualified. As the agent of the sovereign, whose interests the Constitution protects, the government must always temper its desire to defend its enacted laws with its higher interest in avoiding unconstitutional acts.

Of course, most of the time, governmental officials believe their acts are constitutional. But they must nevertheless recognize that their constitutional views are not necessarily shared by the sovereign, whose constitutional views are supreme, but frequently unknown. Therefore, even when government officials believe a law is constitutional, they must recognize that their constitutional views are inherently provisional; they must have the humility to accept that they may be wrong. “To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves[.]” Thus, the government’s interest in the defense of its law is qualified by the higher sovereign interest that it must always protect.

One might argue that any law passed by Congress, with or without the President’s signature, represents the interest of the Government of the United States unless and until the judiciary declares in a final judgment that the law is not in the interest of the United States because the law is unconstitutional. That is, the legislature has the authority to declare the interest of the Government of the United States when passing legislation and the judiciary has the power to

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132 Ex parte Young, 209 U.S. 123, 159 (1908) (“The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of ... the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.”).

133 The Federalist No. 78, supra note 55, at 435.
declare the government interest when interpreting the Constitution in a judicial challenge.

There is undoubtedly a strong government interest in defending duly enacted laws, but it cannot be unqualified when sovereignty is separated from and superior to the government. The government can never have an interest in a law beyond its constitutional authority.\textsuperscript{134} Most scholars would agree, for example, that there is no government interest in defending laws that are clearly unconstitutional based on settled Supreme Court doctrine.\textsuperscript{135} Indeed, Congress has been known to pass such laws and no one complains when the executive branch does not defend them.\textsuperscript{136} In such cases, it is understandable if the executive decides that the law is not in the interest of the sovereign people.

Moreover, there are a variety of other factors that, although not as strong as settled Supreme Court doctrine, might diminish the government interest in the defense of certain laws. For example, when there has been a significant passage of time since the law’s enactment or a dramatic change in public opinion about the law’s appropriateness;\textsuperscript{137} when plaintiffs raise non-frivolous constitutional claims and that have been accepted by one or more state or federal courts; when elected officials are divided in their view of the law’s constitutionality; or when the cost of defending the law is not worth any conceivable benefits,\textsuperscript{138} the government’s interest in defending the law might be tempered significantly.\textsuperscript{139}

\begin{thebibliography}{136}
\bibitem{Young} Ex parte Young, 209 U.S. at 159.
\bibitem{Johnsen supra} See Johnsen supra note 135, at 8 (“Congress continues to enact provisions that purport to allow a single house (or committee) of Congress to block executive branch action despite the Supreme Court’s declaration that such “legislative vetoes” are unconstitutional. Presidents routinely announce that they are not bound to comply with such provisions.”).
\bibitem{Sant'Ambrogio} See Sant’Ambrogio, supra note 2, at 381-82.
\bibitem{Gabriel} See, e.g., Trip Gabriel, \textit{Pennsylvania Governor Won’t Fight Ruling That Allows Gay Marriage}, N.Y. TIMES, May 22, 2014, at A16 (Pennsylvania Governor Tom Corbett decided not to appeal an adverse judicial decision despite his support for the state’s marriage law given the unlikelihood of success on appeal); Kate Zernike and Marc Santora, \textit{As Gays Marry in New Jersey, Christie Yields}, N.Y. TIMES, Oct. 21, 2013, at A1 (New Jersey Governor Chris Christie abandoned the defense of the state’s marriage law after concluding that his appeal had no “reasonable probability of success”).
\bibitem{Huq} See, e.g., Aziz Z. Huq, \textit{Enforcing (But Not Defending) Unconstitutional Laws}, 98 VA. L. REV. 1001 (2012); Johnsen supra note 135; Sylvia A. Law, \textit{Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality}, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 1 (2007) (analyzing when executive action based on their constitutional interpretation is appropriate). But a full analysis of all the factors that weaken the government’s interest in enforcing the law is beyond the scope of this paper.
\end{thebibliography}
Thus, in a republic founded on the principle of popular sovereignty, the government interest in defense of its laws is qualified by the government’s position as the agent of the sovereign people. Although there is a strong governmental interest in defending laws that government officials believe are constitutional, they must recognize that they may be wrong about the sovereign’s interest. To the extent that there is evidence suggesting that a given law is not in the sovereign’s interest, the government’s interest in its defense may be significantly weakened. Government officials must always strive to balance their interest in defending enacted laws with their higher interest in protecting the sovereign people.

b. The Absence of a Single Government Interest

Each government official will strike this balance differently depending on how confident they are that their constitutional views match those of the sovereign and the other values that might be served by enforcement or non-enforcement and defense or non-defense of a given law. Indeed, there is significant tension between the idea of a single government interest and the Framers’ separation of government powers to protect popular sovereignty. After all, the Framers wanted the branches to compete with each other: “Ambition must be made to counteract ambition.”140 It is hard to imagine such a separated government having a single interest.

Indeed, inter-branch disagreements over law and constitutional obligations are commonplace. In any legal dispute involving the government, executive branch officials make arguments to the judiciary and the judiciary may or may not agree with the executive’s views. Courts enjoin executive officials from taking certain actions and may hold them in contempt of court for failure to comply with their orders, while executive officials petition courts for writs of mandamus to compel action by other judges. Congress issues subpoenas to executive officials and the executive sometimes resists those subpoenas in court.141 At the federal level, the fact that one branch of the government (the judiciary) not infrequently declares the acts of another (the legislature, with or without the executive) unconstitutional belies the suggestion that the Government of the United States is injured by such judicial orders. Such cases represent inter-branch disputes in which one branch of government, the judiciary, is threatening an interest of the political branches that passed the law. Moreover because Congress might have passed the law without the President’s signature or after overriding the President’s veto, we cannot even always say that the executive has an interest in the defense of the law. Congress may be the only institution with such an interest.142

140 The Federalist No. 51 (Madison), at 290.
141 Notably, it is generally accepted that the executive need not defend laws that infringe on executive power, belying the idea that there is a single government interest. See Johnsen, supra note 135, at 23.
142 When a federal court declares a state law unconstitutional it is not an inter-branch dispute, yet the different branches of state government will also disagree about the constitutionality of state laws.
Nor are inter-governmental disagreements always between the branches. Different parts of the executive branch sometimes disagree about the sovereign’s interests.143 “[T]he volume of public disputes between the Solicitor General and independent agencies is far from insignificant. Substantive conflicts arise every year in cases argued before the Court.”144 Moreover, Congress itself was designed to produce robust debate over the public good by structuring the constituencies of elected officials so that they would represent diverse interests.145 The Framers would likely be pleased by the diversity of constitutional views among and within the different branches of government.

Thus, there is no single government interest in a republic of separated government powers. Each branch of government and each elected official must judge the government’s interest in a law in light of its own constitutional views.

c. The Distinction between Interests and Injuries for Purposes of Standing

Whatever interest government officials might have in defending a State’s laws, an interest is not sufficient to provide a party with standing. Although the Court has recognized a broad range of cognizable interests for purposes of standing,146 “the ‘injury in fact’ test requires more than an injury to a cognizable interest. It requires that the party seeking review be ... among the injured.”147 Put differently, “[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing. The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right.”148 Thus, even if we were to recognize an unqualified government interest in the defense of enacted law, the government must also be injured by a judicial declaration that the law is unconstitutional in order to have standing to appeal the decision.

143 Neal Devins, Unitariness and Independence: Solicitor General Control over Independent Agency Litigation, 82 CALIF. L. REV. 255, 262 (1994) (“Cabinet-level departments and executive agencies sometimes air their disputes with each other, Congress, and independent agencies before the Supreme Court.”); Michael Herz, United States v. United States: When Can the Federal Government Sue Itself?, 32 WM. & MARY L. REV. 893, 907 (1991) (“[T]he idea of the United States as a single litigant is extraordinarily abstract. After all, the government is composed of millions of actual persons who are frequently at odds with one another.”).
144 Devins, supra note 143, at 258-59. There are even occasionally divisions within the Department of Justice that are aired before the Court. In Buckley v. Valeo, 424 U.S. 1 (1976), the DOJ filed briefs with opposing views of the constitutionality of the Federal Election Campaign Act.
145 See supra Part I.C.
146 F. Andrew Hessick, Probabilistic Standing, 106 NW. U. L. REV. 55, 60 (2012) (noting that the Court recognizes “injuries not only to economic and physical interests but also to spiritual and aesthetic interests”).
147 Lujan, 504 U.S. at 563.
There are two problems with establishing such an injury to the government. First, it is difficult to understand how the declaration of one branch of government can injure the government as a whole. Second, a court order declaring a law unconstitutional does not mandate that the state or federal legislature do or refrain from doing anything. As noted above, Congress has been known to pass statutory provisions that it knows are unconstitutional based on clear Supreme Court precedent.\footnote{See supra note 136.} Thus, the argument can be made that Congress’ interest is similar to a citizen’s interest in the government not violating the law. It is undoubtedly a very strong interest, but it is not a sufficient basis for standing unless the citizen has been injured in a concrete and personal way by the government violation.\footnote{Lujan, 504 U.S. at 573-74 (“We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy”).} Similarly, Congress may have a strong interest in the constitutionality of its laws,\footnote{Although it questionable whether Congress can have this interest if the law is in fact unconstitutional given that there can be no interest in laws contrary to the sovereign’s interest.} but it may not be injured in a concrete, imminent, and personal way.

Thus, whatever interest the government might have in defense of its laws, the Court requires more than a mere interest; standing requires an injury to those interests. As the next part explains, only the executive can show a concrete injury when a court declares a law unconstitutional.

C. The Executive’s “Take Care” Duty and Standing to Defend

Executive branch officials who defend laws do not need to claim an injury to the sovereign or the government to defend laws because the official charged with enforcing the law suffers a concrete and personal injury that is actual or imminent whenever a court declares a law unconstitutional. Such a judicial declaration either enjoins the executive from enforcing the law or mandates that the executive take some action to cure the constitutional violation. To the extent that a court prevents the executive from fulfilling its duty (as the executive understands it) to “take care that the laws be faithfully executed,”\footnote{U.S. CONST. art. II, § 3.} the court’s order injures the executive.

Consequently, the executive has an interest in defending laws, including appealing adverse judicial judgments, to the extent that it believes it has an interest in enforcing those same laws. In order to “take care that the laws be faithfully executed,” the executive must defend the laws consistent with its view of its constitutional duties. Just as Congress is entrusted with expressing its judgment about the sovereign’s interest when passing legislation, confirming presidential nominees, declaring war, and carrying out any of its assigned constitutional duties, the President is entrusted with expressing his judgment...
concerning the sovereign’s interests when ensuring that the laws are faithfully executed.

In some cases, this may mean the enforcement of a law the executive believes is unconstitutional.\textsuperscript{153} Even if the executive has a strong belief that the law violates the Constitution, out of respect for the opinions of the other branches of government and recognition that it cannot know the sovereign’s view, it may believe the best way to fulfill its “take care” duties is to enforce the law while presenting its constitutional views to the court. It does not matter whether the executive’s view of its “take care” responsibilities is right or wrong any more than it matters whether we agree with an individual’s aesthetic preferences when they have been injured.\textsuperscript{154} All that matters is that the executive believes that it can best fulfill its “take care” obligations in this way and a judicial order stands in the way. That is, the court order injures the executive by preventing it from fulfilling its “take care” responsibilities as the executive understands them just as a court order allowing the destruction of a natural habitat injures those who derive aesthetic pleasures from observing them. In each case, the court order injures the party in a concrete, actual or imminent, and personal way.

At least one commentator has argued that defense of law is distinct from the President’s “take care” duties because unlike non-enforcement, “the law remains in operation, and someone else can explain to the court why the statute should be upheld.”\textsuperscript{155} There is no doubt that many parties can present arguments in defense of the constitutionality of a statute, but only the President can assert standing based on his “take care” responsibilities. That is, the President must defend a law if he wishes to enforce the law. If a party challenges the constitutionality of a law executive officials will not be able to continue to enforce the law for very long unless they defend it and appeal adverse judicial judgments. This is true regardless of whether the constitutional challenge arises directly in an enforcement proceeding brought by the government or in a suit between two private parties.\textsuperscript{156} The law will not “remain[ ] in operation” for long if it is not defended.

Thus, the “take care” clause and its state analogs assign the duty of defending laws to the executive. It gives the executive the power to present legal

\textsuperscript{153} See Hall, supra note 92, at 1568 (“The Chief Executive’s decision not to defend a particular statute on the ground that it is inconsistent with the higher law of the Constitution is a straightforward exercise of his duty to take care that the laws be faithfully executed; faced with contradictory laws, he must determine which one takes precedence.”)

\textsuperscript{154} See Hessick, supra note 146, at 60 (noting that the Court recognizes “injuries not only to economic and physical interests but also to spiritual and aesthetic interests”).

\textsuperscript{155} Gorod, supra note 3, at 1219-21 (“there is a difference between enforcing a law and defending it”).

\textsuperscript{156} 28 U.S.C. § 2403(a) (2012) (“[W]here[] the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.”).
arguments in defense of the government’s laws based on its view of the sovereign’s interest.\footnote{\textit{Windsor}}

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In sum and to reiterate, beyond the narrow confines of clear constitutional text, the sovereign’s interest in constitutional challenges is both unknown and unclaimable by government officials because popular sovereignty denies government officials the power to speak as the sovereign. Moreover, the subordination of the government to the sovereign people and the separation of government powers mean that there is no single and unqualified government interest in the defense of its laws. Finally, only the executive is injured when a court declares a law unconstitutional because the court’s order prevents the executive from fulfilling its “take care” responsibilities as it understands them.

With this understanding of the executive’s standing to defend laws in light of popular sovereignty, I turn to the court’s jurisprudence in cases in which the executive does not defend a law based on its constitutional objections.

III. STANDING JURISPRUDENCE IN THE SHADOW OF POPULAR SOVEREIGNTY

The Supreme Court’s Article III standing jurisprudence has been the subject of frequent complaint by scholars and advocates, but it is perhaps nowhere more muddled than in the context of executive decisions not to defend a law based on constitutional objections. This is because the Court has failed to fully engage with the implications of popular sovereignty for standing to represent sovereign interests. Yet at the same time the Court can never quite escape popular sovereignty’s long shadow. Consequently, the Court often reaches the correct result in individual cases, but does so based on ad hoc and unsatisfactory reasoning. Although the Court has never clearly and unambiguously recognized the standing of a party to step into the shoes of the executive to defend sovereign interests, the Court continues to suggest that it might find such a party in an appropriate case. This has encouraged parties to continue to claim the mantle of the sovereign to pursue their ideological agendas. The Court would do better to deny the standing of any party to represent the sovereign based on the principle of popular sovereignty.

This Part reviews the major decisions by the Court in this area, showing where the Court’s reasoning both implicitly recognizes the implications of popular sovereignty and also where it falls short. Part III.A introduces \textit{United States v. Windsor}, in which the Court held that the executive has standing to defend a law even when it believes the law is unconstitutional and should be struck down. The Court was right in \textit{Windsor} to avoid probing into the executive’s motives for appealing a judicial decision with which it concurred, but popular sovereignty provides a fuller explanation for the executive’s standing in such cases. Because

\footnote{\textit{Windsor}} It is akin to a citizen-suit provision for the executive. Unlike citizen suit provisions, however, it is a constitutional command. Thus, it does not raise the same problems with citizen suit provisions that the Court identified in \textit{Lujan}.
the executive does not speak for the sovereign, it may defend laws that it believes, but does not know, are unconstitutional out of respect for other constitutional values.

Part III.B then turns to Hollingsworth v. Perry, in which the Court denied standing to proponents of a ballot initiative in California who sought to defend the law in lieu of California’s executive officials. The Court was right to deny the proponents standing, but not because they were not the proper parties to represent the sovereign, but because no party may represent the sovereign in a republic founded on the principle of popular sovereignty. Thus, a state government’s attempts to delegate sovereign interests to non-executive actors are unavailing because the Constitution separates sovereignty from the federal and state governments alike.

Part III.C concludes by examining the Court’s jurisprudence governing legislative standing to defend laws in lieu of the executive. It argues that although legislators have a more robust agency relationship with the sovereign people than private parties such as the proponents of state ballot initiatives, popular sovereignty precludes any party, governmental or non-governmental, from speaking for the sovereign. Thus, when the executive decides not to enforce a law it does not create an opportunity for a new lawyer to represent the people. The executive is meeting its constitutional obligations as it understands them; there is no vacancy to be filled.

A. Standing with the Executive: United States v. Windsor

The decision by the Obama Administration not to defend the Defense of Marriage Act (DOMA) prompted a debate among scholars and commentators about whether the executive should have standing to appeal judicial decisions declaring a law unconstitutional when the executive agrees with that decision, and in fact affirmatively advocates striking down the law. It has been a longstanding maxim of standing jurisprudence that “[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it.”158 Consequently, some scholars argued that the executive should have no standing to appeal decisions that it agrees with,159 while others advocated granting standing so long as the executive continued to enforce the law.160 The Supreme Court ultimately decided that the executive had standing to appeal judgments it agreed with so long as it continued to enforce the law.161 This part argues that the Court’s decision is consistent with the theory of

159 See, e.g., Grove, supra note 3, at 1314.
160 See, e.g., Ryan W. Scott, Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases, 89 IND. L.J. 67, 68 (2014) (approving the Court’s decision to preserve “the executive power to enforce but not defend laws that the Executive deems unconstitutional”); Ernest A. Young, In Praise of Judge Fletcher-and of General Standing Principles, 65 ALA. L. REV. 473, 498 (2013) (suggesting the Court was correct to recognize the executive’s standing given the adversariness provided by BLAG’s participation).
standing in a republic founded on popular sovereignty as outlined in Part II. Specifically, because Article II charges the President with exercising his independent judgment in juggling sometimes conflicting “take care” responsibilities rather than acting as the lawyer for the sovereign, the executive is injured by any court order that prevents him from enforcing the law, even if he believes that the law is unconstitutional.

1. The Executive’s Decision to Enforce but Not Defend DOMA

In United States v. Windsor, Edith Windsor filed a complaint in federal court naming the United States as a defendant and seeking a refund of $363,053 in taxes levied on the estate of her deceased spouse, Thea Spyer. New York State recognized their same-sex marriage as valid, but section 3 of DOMA prohibited the federal government from recognizing same-sex marriages for purposes of federal law. Consequently, Windsor did not qualify for the marital exemption from the federal estate tax. Windsor argued that section 3 of DOMA denied her equal protection of the laws, as guaranteed by the Fifth Amendment to the United States Constitution.

Before the United States’ answer was due, Attorney General Eric Holder announced that the DOJ would no longer defend DOMA because he and the President had concluded that the statute was unconstitutional. This was based on their belief that the Second Circuit, where Windsor had been filed, would likely hold that classifications based on sexual orientation were subject to heightened scrutiny under the equal protection clause. Consequently, DOJ would have to argue that Congress’ actual motivations for the law were “substantially related to an important government objective,” rather than merely offer hypothetical rationales that could satisfy rational basis review. The Attorney General concluded that DOJ could not make this argument because the congressional record contained numerous expressions of moral disapproval of gays and lesbians and their intimate relationships. This, Attorney General Holder noted, was “precisely the kind of stereotype-based thinking and animus that the Equal Protection Clause was designed to guard against.”

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162 133 S. Ct. 2675, 2677 (2013).
163 Id.
165 133 S.Ct. at 2677 (quoting 26 U.S.C. § 2056(a)).
166 Id.
168 Id.
169 Id. at 2-4. Indeed, on October 18, 2012, the Second Circuit held that intermediate scrutiny applied to classifications based on sexual orientation. Windsor v. United States, No. 12-2335, Slip op. at 10 (Oct. 18, 2012).
171 Id.
172 Id. at 5 (citation omitted).
Nevertheless, the Administration pledged to continue to enforce the law—i.e., not recognize same-sex marriages—until either Congress repealed DOMA or “the judicial branch render[ed] a definitive verdict against the law’s constitutionality.”173 The Attorney General explained that this course of action recognized “the judiciary as the final arbiter of the constitutional claims raised.”174

At this point, as discussed more fully below in Part III, C, the House Bipartisan Leadership Advisory Group (BLAG), which consists of the Speaker, the majority leader, the majority whip, the minority leader, and the minority whip, voted 3-2 along party lines to intervene to defend the constitutionality of the Act175 and the district court granted BLAG’s motion.176 Subsequently, Ms. Windsor moved for summary judgment and both BLAG and the United States moved to “dismiss” her complaint.177 The district court granted Ms. Windsor’s motion, concluding that DOMA failed to satisfy rational basis review under the Equal Protection Clause, denied BLAG’s motion, and ignored the United States’ rather bizarrely titled (given its agreement with Windsor) “motion to dismiss.”178 Both BLAG and the United States filed a notice of appeal.179

In the Second Circuit, BLAG moved to dismiss the United States’ appeal because it had prevailed in the result it advocated in the district court below.180 The Second Circuit denied the motion, however, and a divided panel held on the merits that DOMA was subject to a heightened standard of review and was not substantially related to an important government interest.181 Ms. Windsor, the United States, and BLAG then all petitioned the Supreme Court for a writ of certiorari.182 The Court granted the cert. petition of the United States and directed the parties to brief “whether the Executive Branch’s Agreement with the

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173 Id. at 5.
174 Id. Of course, defense and enforcement are often choices for different authorities. DOJ will normally decide whether to defend a law, while enforcement is generally the decision of the relevant agency.
177 The United States’ decision to enforce but not defend created some bizarre filings. As Justice Scalia pointed out, “one might search the annals of Anglo-American law for another ‘Motion to Dismiss’ like the one the United States filed in [the] District Court: It argued that the court should agree ‘with Plaintiff and the United States’ and ‘not dismiss’ the complaint. (Emphasis [added].) Then having gotten exactly what it asked for, the United States promptly appealed.” Windsor, 133 S. Ct. at 2699 n.1 (Scalia, J. dissenting).
180 Id.
181 Id.
court below that DOMA is unconstitutional deprives this court of jurisdiction to decide the case.”

2. The Supreme Court’s Jurisdictional Holding

In the Supreme Court, Justice Kennedy writing for the majority held that the Executive’s agreement with the lower court decisions declaring section 3 of DOMA unconstitutional did not preclude the Executive from seeking review of these decisions by a higher court so long as it continued to enforce the law. The Court reasoned that “[a]n order directing the Treasury to pay money is ‘a real and immediate economic injury,’” giving the government standing to appeal and petition for certiorari, regardless of whether the Executive welcomed a “constitutional ruling” accompanying the order. The Court noted that it would have been “a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court’s reasoning.”

For authority, the Court relied primarily on INS v. Chadha, in which an alien challenged the constitutionality of a “legislative veto” contained in the Immigration and Nationality Act (INA). The INA authorized the Attorney General to suspend the deportation of an alien otherwise subject to removal on the grounds of “extreme hardship,” but also authorized either house of Congress to “veto” the Attorney General’s decision. Chadha challenged the legislative veto as a violation of separation of powers after the House vetoed the Attorney General’s decision to suspend his deportation. The Executive agreed with Chadha that the legislative veto was unconstitutional but nevertheless decided to comply with the statute until the case was finally resolved. In addition, the Attorney General appealed the decision of the Court of Appeals enjoining the Attorney General from taking any steps to deport Chadha—i.e., complying with the legislative veto. Thus, the Executive’s actions in Chadha—enforcing, but not defending the challenged law, and appealing adverse judicial decisions against it—were virtually identical to the Executive’s actions in Windsor. The Court in Chadha held that “the INS was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take,”—i.e.,

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184 Windsor, 133 S.Ct. at 2686.
185 Id. (quoting Hein v. Freedom from Religion Foundation, Inc., 551 U.S. 587, 599 (2007) (plurality opinion)).
186 Id.
188 Id. at 923-24 (citing section 244(a)(1) of the INA, 8 U.S.C. § 1254(a)(1)).
189 Id. at 928.
190 Windsor, 133 S.Ct. at 270 (citing 462 U.S. at 930).
191 The only distinction, which is a distinction without a difference, is that in Windsor the Executive refrained from doing something prohibited by law—refunding the estate tax levied against Windsor’s same-sex spouse—while in Chadha the Executive pledged to do something required by law—deporting Chadha. The Executive was only restrained from enforcing the legislative veto in Chadha by the Court of Appeal’s injunction.
deporting Chadha—“regardless of whether the agency welcomed the judgment.”

The Chadha Court’s “aggrieved party” analysis, however, addressed statutory jurisdiction of the federal courts under 28 U.S.C. § 1252, not constitutional standing under Article III. Moreover, in a related footnote the Chadha Court expressly acknowledged that “[i]n addition to meeting the statutory requisites of § 1252, … an appeal must present a justiciable case or controversy under Art. III.” The Chadha Court then explained that “[s]uch a controversy clearly exists because of the presence of the two Houses of Congress as adverse parties.”

Therefore, one might ask whether the Windsor Court was misstating the holding of Chadha and erred in relying on its statutory analysis for its own Article III analysis. But in another section of its opinion the Chadha Court had also held that there was “Art[icle] III adverseness even though the only parties were the INS and Chadha” because the Court’s decisions would have “real meaning: if we rule for Chadha, he will not be deported; if we uphold § 244(c)(2), the INS will execute its order and deport him.” The Windsor Court cited this part of the Chadha opinion along with its citation of Chadha’s statutory standing analysis.

Therefore, the Windsor Court seems to have folded Chadha “aggrieved party” analysis of statutory standing under 28 U.S.C. § 1252 into its own Article III standing analysis.

Justice Scalia, in his dissenting opinion, criticized the Court for this move. He argued that in Chadha Article III standing was satisfied in the Supreme Court because both houses of Congress had by that point intervened as parties. This provided the “adverseness” that Justice Scalia argued was an essential ingredient of Article III standing. According to Justice Scalia, not only must

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192 Id. (quoting Chadha, 462 U.S. at 930).
193 Chadha, 462 U.S. at 930.
194 Id. at 931 n.6.
195 Id.
196 Chadha, 462 U.S. at 939-40 (quoting Chadha v. INS, 634 F.2d 408, 419 (9th Cir. 1980)). The Ninth Circuit opinion in Chadha was written by then-Judge Anthony Kennedy. Thus, in Windsor Justice Kennedy was relying upon Judge Kennedy’s opinion in Chadha.
197 133 S.Ct. at 2686.
198 Windsor, 133 S.Ct. at 2700-01 (Scalia, J. dissenting). Justice Scalia is surely right about what the Court in Chadha thought it was doing. See supra note 192.
199 While Justice Scalia took the majority to task for converting what he considers a “jurisdictional” requirement of Article III into a “prudential” element of standing, 133 S.Ct. at 2701 (Scalia, J. dissenting) (“Relegating a jurisdictional requirement to ‘prudential’ status is a wondrous device, enabling courts to ignore the requirement whenever they believe it ‘prudent’—which is to say, a good idea.”), he did not cite any clear precedent to support his position. Rather, he tried to take down the cases upon which the majority relied, arguing that there were in fact on-going disputes between the parties in Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980), and Camreta v. Greene, 131 S.Ct. 2020 (2011). 133 S.Ct. at 2701-02 (Scalia, J. dissenting). It is true that “adversity” has never been included in the Court’s traditional list of “prudential” standing considerations. See, e.g., Allen v. Wright, 468 U.S. 737, 751 (1984) (“Standing doctrine
the party seeking the jurisdiction of the appellate court establish an injury traceable to the lower court’s order that can be redressed, but there must also be a genuine “controversy (which requires contradiction)” between the parties.200

The majority in Windsor held that “concrete adverseness[,] which sharpens the presentation of issues upon which the court largely depends for illumination of difficult constitutional questions[,]” was not an Article III requirement.201 Although a party may not generally appeal a judgment that gives it all that it wants, for the majority this was a prudential rather than a constitutional limit on standing.202 The Executive’s agreement with the plaintiff’s constitutional arguments might raise prudential concerns—that is, a court might stay its hand from hearing such a suit because the parties’ agreement on the merits prevents them from sharpening the presentation of the issues.203 But in Windsor the Court felt that BLAG’s defense of DOMA’s constitutionality as an amicus party alleviated these concerns.204

Thus, Windsor either clarifies Chadha (an exceedingly confusing opinion) or goes a step further. In any event, it is now abundantly clear that the government’s enforcement of a law and appeal of adverse decisions against the law is sufficient basis for Article III jurisdiction, even if the Executive agrees with the opposing party on the merits of the controversy. It does not matter whether Congress is a party to the case.

Professor Tara Leigh Grove argues that the executive should not have standing to appeal a decision declaring a law unconstitutional if the executive agrees with that decision. Professor Grove reasons that the executive’s power to invoke the federal court’s jurisdiction in defense of federal laws stems from the embrace of several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.”). But the Court has not been particularly consistent with the line between constitutional and prudential standing requirements. See, e.g., FEC v. Akins, 524 U.S. 11, 23 (1998) (declining to say whether the prohibition on “generalized grievances” is a constitutional or prudential limit on standing). Moreover, the authorities cited by the majority are not inconsistent with a constitutional aspect of adversity (i.e., the order to pay Windsor, which provides an injury in fact) and a prudential aspect of adversity (i.e., an actual disagreement with the order to pay Windsor).

200 Windsor, 133 S.Ct. at 2701 (Scalia, J. dissenting).
201 Id. at 2687.
202 Id. Query whether there is anything left of “prudential standing” in the wake of Lexmark Int’l, Inc. v. Static Control Components, Inc., 134 S.Ct. 1377 (2014), which overturned much, if not all, of prudential standing jurisprudence. But the current state of prudential standing is beyond the scope of this article.
203 Windsor, 133 S.Ct. at 2687-88.
204 Id. at 2688. In addition, the Court noted the costs of delay if it stayed its hand: the absence of precedential guidance for the lower courts in the face of ongoing DOMA litigation, the cost of the ongoing litigation itself, and the continued harms attributable to DOMA. Id.
“take care” clause of Article II and “[t]he executive has standing only when it asserts the federal government’s interests in the enforcement and continued enforceability of federal law.” Therefore, Grove argues, “when the executive no longer seeks to protect that [federal government] law enforcement interest—when (as in Windsor) the executive refuses to defend a federal law—it no longer has an Article II power to invoke federal jurisdiction.”

Although I agree that the executive’s standing to defend stems from its Article II duties, I understand those duties somewhat differently based on the principle of popular sovereignty. Because the executive in the American Republic is neither the sovereign nor the whole of the government, the executive cannot announce either’s constitutional views. Thus, the executive has standing to defend and enforce laws based not on an assertion of either the sovereign’s or the government’s interest, but based on the executive’s own interest in pursuing its “take care” responsibilities as it understand them. These responsibilities include, most importantly, pursuing the sovereign’s interests and avoiding unconstitutional acts. But because the executive is not the sovereign, popular sovereignty also requires humility on the part of the executive. When the constitutional views of the sovereign are unclear, it may be reasonable for the President to pursue his Article II duties by continuing to enforce the law until a final judicial decision concurs with the President’s assessment of the sovereign’s interest. This allows the President to present his arguments concerning the law’s constitutionality, while respecting the coordinate branches of government.

Thus, there may be times when the Executive believes Article II requires it to enforce and defend federal laws; other times when it believes its constitutional duties are best met by neither enforcing nor defending clearly unconstitutional laws; and still others when the Executive believes the best way to meet its Article II responsibilities is to enforce the law while presenting arguments against its constitutionality. There is no one right answer in every case because in each case in which the Executive has constitutional doubts it must weigh these doubts against a variety of competing concerns. The strength of the Executive’s constitutional views and countervailing factors, such as the views of the legislature and existing jurisprudence, will vary from case to case.

The Court’s jurisdictional holding in Windsor is consistent with this understanding of the executive’s duties in a republic founded on the principle of popular sovereignty. If the executive’s standing to appeal adverse judicial decisions depended on its power to represent the sovereign’s interest, then the executive would have no standing to defend a law the executive qua sovereign believes is unconstitutional. Similarly, if the executive’s standing depended on the government’s interest in the defense of its laws, the executive qua the government would have no standing to defend a law against the government interest. But the executive’s standing depends on neither of these interests because the executive is neither the sovereign nor the whole of the government. It is simply fulfilling its constitutional duties as it understands them. If the

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205 See Grove, supra note 3, at 1314.
206 See Grove, supra note 3, at 1314.
executive does not think it is appropriate, for whatever reason, to stop enforcing a law, it has standing to defend the law, including appealing any adverse judicial judgments.

Thus, the Court was correct that the executive’s standing does not depend on its constitutional views, but popular sovereignty provides a fuller explanation of why the Court got it right.

B. Standing of Non-Governmental Actors: Hollingsworth v. Perry

The Supreme Court’s willingness to recognize executive standing to defend laws, irrespective of the executive’s constitutional views, has been matched by his reluctance to recognize the standing of non-governmental parties to defend laws, even when those parties are likely to be a law’s most zealous advocates. Although the Supreme Court has claimed that states may appoint non-governmental parties to represent a State’s interest in the defense and enforcement of its laws, in fact it has yet to recognize the standing of any such party. The Supreme Court’s reasons for denying standing to such parties, however, have been perplexing. The Court would do better to utilize the principle of popular sovereignty as a basis for denying standing in these cases.

The most recent Supreme Court opinion addressing the standing of non-executive branch parties to defend laws is Hollingsworth v. Perry, which was issued on the same day as United States v. Windsor. In Hollingsworth v. Perry, two same-sex couples who sought to marry in California filed a complaint in federal district court challenging California’s Proposition 8, a ballot initiative amending the state constitution to provide that “[o]nly marriage between a man and a woman is valid or recognized in California.”207 The plaintiffs argued that Proposition 8 violated both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution.208 The complaint named as defendants California’s Governor, Attorney General, and various other state and local officials responsible for enforcing Proposition 8. The named defendants refused to defend the law, even as they continued to enforce it during the litigation,209 but the district court allowed the official proponents of the initiative—i.e., those responsible for placing Proposition 8 on the ballot—to intervene to defend its constitutionality.210 After a twelve-day bench trial, the district court held that Proposition 8 was unconstitutional under both the Due Process and Equal Protection Clauses and enjoined the public officials from enforcing the law.

The state defendants, unlike their federal counterparts in Windsor, chose not to appeal the district court’s order; but the proponents of Proposition 8 did.211 Consequently, the Ninth Circuit certified a question to the California Supreme Court asking whether under California law,

208 Hollingsworth, 133 S.Ct. at 2659.
209 Id.
210 Id.
211 The injunction was stayed during appeal.
the official proponents of an initiative measure possess either a particularized interest in the initiative’s validity or the authority to assert the State’s interest in the initiative’s validity, which would enable them to defend the constitutionality of the initiative ... when the public officials charged with that duty refuse to do so.212

The California Supreme Court answered that,

[in] a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state’s interest in the initiative’s validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.213

The Ninth Circuit then affirmed the district court’s judgment on the merits, albeit on narrower grounds. The proponents of Proposition 8 subsequently petitioned the Supreme Court for a writ of certiorari. The Supreme Court granted the petition and asked the parties to brief whether the petitioners had Article III standing in the case.

In an opinion written by Chief Justice Roberts, the Supreme Court held that neither it nor the Ninth Circuit had jurisdiction to hear the appeal by the official proponents of Proposition 8. What made the difference in the jurisdictional outcomes of Windsor and Perry? Put simply, the Obama Administration appealed the adverse judgments of the federal courts declaring the law unconstitutional, whereas the California executive officials did not.

First, relying heavily on Lujan v. Defenders of Wildlife, the Court explained that “[t]o have standing, a litigant must seek relief for an injury that affects him in a ‘personal and individual way.’”214 But the district court “had not ordered [the official proponents] to do or refrain from doing anything.”215 Rather, the court had enjoined the state officials from enforcing the law, but they had not sought an appeal of the district court’s order. Moreover, the official proponents had no “‘direct stake’ in the outcome of their appeal.”216 Once Proposition 8 was approved by the voters and became a duly enacted part of the California Constitution, the proponents’ special role came to an end.217 At that point, their only interest in having the district court order reversed was to vindicate the constitutional validity of a generally applicable California law.218 But the Court has repeatedly held that such a “‘generalized grievance,’ no matter how sincere, is insufficient to

214 133 S.Ct. at 2662 (quoting Defenders of Wildlife, 504 U.S. 555, 560 n.1 (1992)).
215 Id.
216 Id.
217 Id. at 2663. By contrast, the proponents surely would have had standing in a dispute over the placement of the ballot proposal on the ballot.
218 Id. at 2662.
confer standing.”219 “No matter how deeply committed petitioners may be to upholding Proposition 8,” its invalidity must cause them an injury in fact that is personal, concrete, and not abstract, to provide them with standing to appeal.220 Thus, the proponents failed to establish that they themselves had been injured by the district court’s order.

Second, the Court held that the proponents could not assert the State of California’s interest in the law’s constitutionality, notwithstanding the California Supreme Court’s judgment to the contrary.221 The proponents had attempted to step into the shoes of the executive based on the Court’s opinion in Karcher v. May, in which the Court held that “two New Jersey state legislators … could intervene in a suit against the State to defend the constitutionality of a New Jersey law, after the New Jersey attorney general had declined to do so.”222 The Court in Hollingsworth acknowledged that “a State must be able to designate agents to represent it in federal court.”223 And while “[t]hat agent is typically the State’s attorney general[,] state law may provide for other officials to speak for the State[.]”224 Nevertheless, the Court concluded that “[t]he point of Karcher is not that a State could authorize private parties to represent its interests; Karcher and Orechio were permitted to proceed only because they were state officers, acting in an official capacity.”225

The Court also rejected the petitioners’ reliance on Arizonans for Official English, in which the Ninth Circuit had similarly held that the principal sponsor of a ballot initiative had standing to defend the measure when the Governor announced that she would not.226 The Court in Hollingsworth pointed out that Arizonans for Official English was mooted in the Supreme Court by other events, but that the Court had nevertheless expressed “grave doubts” about the Ninth Circuit’s standing analysis because the proponents were not “elected representatives” and the Court was aware of “no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.”227 According to the Court in Hollingsworth, “public officials,” such as “presiding legislative officers,” unlike the proponents of ballot initiatives, have an “agency relationship” with the people of the State. For this, the Court turned to the Restatement (Third) of Agency, which stipulates that an “essential element of agency is the principal’s right to control the agent’s actions.”228 The proponents of Proposition 8 “answer to no one; they decide for themselves, with no review, what

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219 Id.
220 Id. at 2663.
221 Id. at 2668.
222 Id. at 2664 (citing Karcher v. May, 484 U.S. 72, 75, 81-82 (1987)).
223 Id.
224 Id.
225 Id. at 2665 (emphasis in the original).
226 Id. at 2665-66 (discussing Arizonans for Official English, 520 U.S. 43 (1997)).
227 Id. at 2666 (quoting Arizonans for Official English, 520 U.S. at 65).
228 Id. (quoting 1 Restatement (Third) of Agency § 1.01, Comment 5 (2005)).
arguments to make and how to make them.”

They are neither elected nor removable. They have taken no oath of office, have no fiduciary duty to the State of California, and are “free to pursue a purely ideological commitment to the law’s constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramification for other state priorities.” In short, the Court concluded, “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.”

Justice Kennedy, who wrote the opinion of the Court in Windsor, wrote a dissenting opinion in Hollingsworth that Justices Thomas, Alito, and Sotomayor joined. The dissent believed that the proponents met the Article III requirement for a justiciable case or controversy based on the California Supreme Court’s decision. Whether a party may stand in the shoes of the State to defend a state law’s constitutionality is a question of state law, the dissent reasoned. Therefore, the Court should defer to the California Supreme Court’s ruling on the matter: “It is for California, not this Court, to determine whether and to what extent the Elections Code provisions are instructive and relevant in determining the authority of proponents to assert the State’s interest in post-enactment judicial proceedings.”

Moreover, Justice Kennedy did not understand Karcher to require any type of formal agency relationship between the State (or “the people”) and those who may defend the State’s interest in court, other than the assignment of that responsibility by state law. In Karcher, the Court merely looked to New Jersey law to decide whether Karcher and Orechio had standing to intervene in defense of legislation the state executive chose not to defend. According to Kennedy, the Court determined that they did so long as they were the presiding officers of their respective houses, but that they did not once they had lost those positions and were merely individual legislators. Kennedy also found support in Arizonans for Official English because there the Court’s doubts regarding the standing of the purported defenders of the initiative stemmed from the absence of Arizona law appointing initiative sponsors as agents of the people of Arizona to defend ... the constitutionality of initiatives.” By contrast, in Hollingsworth the California Supreme Court had ruled that the proponents had standing to represent the State.

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229 Id.
230 Id. at 2666-67.
231 Id. at 2667.
232 Id.
233 Id. at 2668 (Kennedy, J dissenting).
234 Id.
235 Id. at 2669.
236 Id. at 2670.
237 Id. at 2672.
238 Id.
239 Id. (quoting 520 U.S. at 65)
Justice Kennedy pointed out that the Court had never before required a formal agency relationship to permit individuals to assert claims on behalf of the government or others. He noted that the Federal Rule of Criminal Procedure 42(1)(2) “allows a court to appoint a private attorney to investigate and prosecute potential instances of criminal contempt” on behalf of the United States. Yet these private attorneys are neither elected nor accountable to the State. They are merely charged with pursuing the public interest in vindication of the court’s authority. Similarly, agency principles are irrelevant to whether a party has standing to bring a qui tam action or a “next friend” case. Moreover, Justice Kennedy doubted whether there is any greater agency relationship between elected legislators or executive officials and their principal—i.e., “the people.” “At most, a Governor or attorney general can be recalled or voted out of office in a subsequent election, but proponents, too, can have their authority terminated or their initiative overridden by a subsequent ballot measure.” Ironically, Justice Kennedy emphasized the fact that the proponents would provide “vigorous representation” of the State’s interest in the case, something he deemed irrelevant to Article III standing in his opinion for the Court in Windsor, although he considered it relevant to prudential standing.

Justice Kennedy is correct that the majority’s agency theory is novel. But the standing of private parties to represent the interests of the State was something of a question of first impression. The Court did not need to reach the question in Arizonans for Official English because there was no state law purporting to provide such authority. And Karcher involved presiding officers of the state legislature rather than non-governmental parties. Therefore, the agency theory’s novelty alone is not a reason to dismiss it.

Furthermore, Justice Kennedy’s examples of private parties representing state interests are distinguishable. To begin, both judicial appointment of private attorneys to prosecute contempt of a judicial order and qui tam suits by private parties have a long and established history in this country and in England. More importantly, the Court has expressly limited the kinds of plaintiffs that

\begin{footnotes}
\footnote{Id. at 2673.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id. at 2674.}
\footnote{Id. at 2672.}
\footnote{Id.}
\footnote{Id. at 2674.}
\footnote{Windsor, 133 S.Ct. at 2687.}
\footnote{Hollingsworth, 133 S.Ct. at 2666 (quoting Arizonans for Official English, 520 U.S. at 65).

Karcher, 484 U.S. at 78.

See, e.g., Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 795 (1987) (“That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law.”) (citations and internal quotation signals omitted);

may prosecute contempt actions and implicitly limited the nature of the state interests represented by qui tam plaintiffs in ways that would disqualify the proponents from defending Proposition 8. First, the Court has held that private attorneys prosecuting contempt judgments in vindication of a court’s authority “should be as disinterested as a public prosecutor who undertakes such a prosecution.”  Consequently, in Young v. U.S. ex rel. Vuitton et Fils S.A., the Court reversed a conviction for contempt because the lower court had appointed a private party who benefited from a court order to prosecute its violation. As the Court explained, “where a prosecutor represents an interested party ... the ethics of the legal profession require that an interest other than the Government’s be taken into account.” Such dual loyalty creates an unacceptable conflict of interest.

Similarly, the proponents of Proposition 8’s singular interest in the ballot initiative would likely conflict with the broader interests of a sovereign, and thus make them unsuitable to represent the state, even if it were possible for private parties to claim the sovereign as a client in court. Moreover, although contempt actions are brought in the name of the United States, because no branch of government may truly represent either the sovereign or the government as a whole in court, contempt proceedings are better understood as suits brought by the court itself, which is injured by disobedience to its order.

Second, in U.S. Ex Rel. Stevens, the Court in an opinion written by Justice Scalia (among the majority in Perry) held that qui tam plaintiffs have standing to challenge violations of the False Claims Act based on their partial assignment of the government’s damages claim. Professor Myriam Gilles suggests that the Court in Stevens recognized a distinction between the assignment of the

252 Young, 481 U.S. at 804.
253 Id.
254 Young, 481 U.S. at 807.
255 Young, 481 U.S. at 796 (“The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches.... Courts cannot be at the mercy of another Branch in deciding whether such proceedings should be initiated.”)
256 The FCA imposes civil liability upon “[a]ny person” who, inter alia, “knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval.” 31 U.S.C. § 3729(a). A private person may bring a qui tam civil action “for the person and for the United States Government” against the alleged false claimant, “in the name of the Government.” 31 U.S.C. § 3730(b)(1). A private qui tam plaintiff receives a share of any damages award—the amount depending on whether the government intervenes, the private plaintiff’s contribution to the prosecution, and the court’s assessment of what is reasonable—plus attorney’s fees and costs. 31 U.S.C. §§ 3730(d)(1)–(2).
government’s damages claims to qui tam plaintiffs from the assignment of injuries to other sovereign interests.\textsuperscript{258} The Court noted that the qui tam plaintiff’s complaint asserted two types of injuries to the United States: “the injury to its sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government) and the proprietary injury resulting from the alleged fraud.”\textsuperscript{259} Yet the Court grounded the qui tam plaintiff’s standing in the partial assignment of the injury to the proprietary rather than the sovereign interest.\textsuperscript{260} Analogizing to the private law context, in which “only property rights and the concomitant power to bring suit to enforce those rights are assignable; the right to enforce liberty or other non-monetary interests is not[,]”\textsuperscript{261} Gilles argues that the Court has established a similar dichotomy in the public law context:

\begin{quote}
[T]he government may assign the right to vindicate the proprietary injury it suffers where the federal treasury is diminished. Such claims look to compensate the government for the loss it directly suffers in its capacity as a proprietor, as the keeper of the public fisc and the owner of public property. Sovereign interests, by contrast, implicate “injury ... arising from violation of [the government’s] laws,” the paradigmatic example being criminal law. In keeping with the private law analogy, such injuries are “personal” to the government.... Under the traditional formulation of assignment, then, claims seeking to vindicate the government’s non-proprietary, sovereign interests are not assignable.\textsuperscript{262}
\end{quote}

\textit{Perry} would have been an opportunity for the Court to expand on the proprietary/sovereign interest dichotomy implied by Justice Scalia’s opinion in \textit{Stevens} and hold that sovereign interests may not be represented by private parties. But it did not go this route.\textsuperscript{263} Instead, the Court set forth its agency theory of who may represent a state’s interests. Thus, it shifted its standing analysis from whether a particular type of sovereign interest is assignable to whether a particular type of party may represent the sovereign. The Court would have done better to turn to popular sovereignty.

The ultimate conclusion the Court reached—i.e., that the proponents of Proposition 8 did not have standing to represent California—is consistent with the theory of popular sovereignty in which no one may claim to represent the

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\begin{enumerate}
\item[259] Ex rel. Stevens, 529 U.S. at 771.
\item[260] Id. at 773 (“We believe ... that adequate basis for the relator’s suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.”).
\item[261] Gilles, \textit{supra} note 258, at 342.
\item[262] Gilles, \textit{supra} note 258, at 344.
\item[263] Perhaps the Court never intended to draw such a stark line in \textit{Stevens} or perhaps there was no longer majority support for such a distinction after the retirements of Chief Justice Rehnquist and Justice O’Connor (and the defection of Justice Thomas), who had joined the majority opinion in \textit{Stevens}. We may never know.
\end{enumerate}
\end{footnotesize}
sovereign in court. But the majority’s principal-agent theory is perplexing. The Court cannot literally mean that an agent of the state may not decide for him or herself “what arguments to make and how to make them.”\(^{264}\) After all, the California Attorney General decides for herself “what arguments to make and how to make them” when she defends the constitutionality of a state law. This is true of any elected official. The Framers expressly rejected an agency conception of democratic governance.\(^{265}\) Rather, elected officials are free to vote their conscience.

Nor does it seem likely that removal is an essential characteristic of an agent of the sovereign. While California’s state and local elected officials are indeed subject to removal by the voters through recall elections,\(^{266}\) federal officials are not. While federal executive branch officials are removable by means of impeachment, this process is conducted by the Senate, after articles of impeachment are prepared by the House, rather than by the voters.\(^{267}\) Moreover, if removal were an essential attribute of those who represent the sovereign, federal legislators would not qualify: the United States Constitution provides each house of Congress alone with the power to remove its own members.\(^{268}\) Thus, many state and federal officials who routinely defend sovereign interests in court would not meet the Restatement’s definition of an agent.

If we peel away these puzzling aspects of the Court’s analysis, its underlying concerns seem to be that those who represent sovereign interests must (1) be electorally accountable and (2) have a broader focus and responsibilities than merely an ideological commitment to the defense of a single law. The California Attorney General, for example, is subject to periodic elections in which the voters review her performance and decide whether to return her to office or elect a substitute.\(^{269}\) The proponents of Proposition 8, in contrast, are not accountable to the people through elections.\(^{270}\) In addition, the Court was reluctant to grant

\(^{264}\) 133 S.Ct. at 2666.  
\(^{265}\) See supra notes 80-81 and accompanying text.  
\(^{267}\) U.S. CONST., Art. I, Sec. 2 (“The House of Representatives … shall have the sole Power of Impeachment.”) & 3 (“The Senate shall have the sole Power to try all Impeachments.”).  
\(^{268}\) U.S. CONST., Art. I, Sec. 5(2) (“Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.”)  
\(^{269}\) But even this must be qualified. The United States Attorney General is not directly accountable to the electorate for his decisions and yet no one would challenge his ability to represent the United States in court. Rather, the Attorney General is accountable to the President, who in turn is accountable to the voters. Thus, because the buck stops with the President and the President is subject to periodic elections, and removable by Congress, even if not removable by the People, then the federal Executive satisfies the agency requirements set forth by the Court.  
\(^{270}\) Notwithstanding Justice Kennedy’s suggestion that proponents, like political officers, can be removed, it is not entirely clear how this might be accomplished other than through a subsequent ballot measure, an unwieldy process. By the time of the next regular election, there role in defending a statute may be at an end.
standing to the proponents of Proposition 8 because they were “free to pursue a purely ideological commitment to the law’s constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramification for other state priorities.”

By contrast, the executive is responsible for defending and enforcing all of the sovereign’s laws and interests. Thus, at bottom the Court was concerned that the proponents of Proposition 8 could not adequately represent the California sovereign.

Interestingly, the adequacy of the sovereign’s representation drove Justice Kennedy’s dissent as well. Justice Kennedy’s primary concern was with the “practical dynamics of the initiative system in California” and in “26 other States that use an initiative or popular referendum system[.]”

He pointed out that the purpose of citizen initiatives is to empower the people to propose and adopt constitutional and statutory law that “their elected public officials had refused or declined to adopt.” By not recognizing the standing of initiative proponents to defend approved initiatives when state officials declined to do so, the Court has given them a “de facto veto” over citizen initiatives. In addition, “a single district court can make a decision with far-reaching effects that cannot be reviewed.” For Justice Kennedy, the people of California had acted through the initiative process and elected officials now stood in their way. Therefore, he would have recognized the standing of the proponents of Proposition 8 in order to defend the act of the sovereign. Thus, while the majority was concerned that the proponents were not adequate to the task of representing the sovereign, the dissent was concerned that no one was representing the sovereign.

The majority did not engage the dissent’s concern that the sovereign was without a defender because the majority did not ground its opinion in popular sovereignty. If it had, it would have responded by holding that no party can claim to speak for the sovereign in court. This is true at the state level as well as the federal level because the Constitution separates sovereignty from the state governments as well as from the federal government. Thus, the executive’s decision not to defend Proposition 8 is of no relevance to the representation of the sovereign because the executive itself does not represent the sovereign. Rather, the executive fulfills its delegated constitutional duties as it understands them.

Moreover, the fact that the people of California had themselves approved Proposition 8 as a state constitutional amendment does not itself give a party the power to speak for the people in court. Even if we assume that Proposition 8 was

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271 133 S.C.t at 2667.
272 Indeed, the Court has recognized the executive’s peculiar expertise when it comes to allocating enforcement resources among competing priorities. See Heckler v. Chaney, 470 U.S. 821 (1985).
273 133 S.Ct. at 2668.
274 Id. at 2671 (quoting 52 Cal. 4th, at 1140, 265 P.3d at 1016).
275 Id.
276 Id. at 2674.
277 See supra notes _ and accompanying text.
an act of the sovereign people of California, this does not mean that a party can walk into court and claim the sovereign’s view of a federal constitutional challenge to the state constitutional amendment, any more than a party can claim to know the sovereign’s view of the Equal Protection Clause. The sovereign’s views are not static. They are not frozen by the passage of a constitutional amendment. The Framers recognized that the sovereign’s views would evolve over time in response to public deliberation. How are lawyers for the sovereign to meet their professional obligation to “abide by a client's decisions concerning the objectives of representation and ... consult with the client as to the means by which they are to be pursued”? How are they to “abide by [the sovereign’s] decision whether to settle a matter”? Did the people of California prefer to defend Proposition 8 on the grounds that same-sex marriage was bad for children or because they sought to maintain the status quo while other states considered their own marriage laws? Did the people of California remain committed to Proposition 8 after hearing the emotional testimony of the plaintiff couples or were they unmoved? Did they learn something from the many experts who testified in the case or were they unconvinced? Did the people of California change their mind about the wisdom of their amendment after the Ninth Circuit explained why it violated the federal constitution or did they reject the Ninth Circuit’s reasoning? Did the people of California want to take their case all the way to the Supreme Court, force a national constitutional ruling, and forever associate California in the national mind with traditional marriage or did they prefer to stand down after their initial appeal? We obviously have no way of knowing the answers to any of these questions, and neither did the proponents of Proposition 8. There is simply no way to consult your client when your client is the sovereign people.

The Court’s concern with the electoral accountability and perspective of a sovereign agent is not irrational, but it merely describes characteristics of state and federal executives imbued with responsibility for enforcing the law. The

278 I leave to the side whether this constituted an act of the sovereign people of California. Professor Glen Staszewski argues that state ballot initiatives are more appropriately “viewed as lawmaking by ‘initiative proponents’ whose general objective is either ratified or rejected by the voters[,]” rather than constitutional acts of “the people.” Glen Staszewski, Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy, 56 VAND. L. REV. 395, 399 (2003). See also Glen Staszewski, The Bait-and-Switch in Direct Democracy, 2006 WIS. L. REV. 17 (2006) (discussing the structural flaws in ballot initiatives). But see City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 672 (1976) (“in establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature”).

279 The Federalist No. 10 (Madison), at 50.

280 Model Rules of Professional Conduct, Rule 1.2.

281 Id.

282 U.S. Const. art. II, § 3 (“take care” clause); Cal. Const. art. V, § 1 (“The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed.”); § 13 (“It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced.”).
people may have entrusted the executive with the duty to enforce the law because of its political accountability and broad perspective, but this does not mean that the executive is speaking for the sovereign, or that some other party may assume the executive’s role if they are electoral accountable and have a broader perspective. Whether the executive defends and enforces, enforces but does not defend, or neither enforces nor defends a law, it is meeting its constitutional duties as it sees them. There are no empty executive shoes for another party to fill.

C. Legislative Standing

Several scholars have suggested that when the President does not wish to defend a law based on constitutional objections, Congress should be able to step into the shoes of the executive and defend the law. Moreover, in Hollingsworth, Arizonans for Official English, and Karcher, the Supreme Court has approved the representation of state interests by state legislative officers in lieu of the state executive. Specifically, the Court has held that state legislators have standing “to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State’s interests.” May the legislature, unlike private parties, step into the shoes of the executive and defend laws the executive objects to on constitutional grounds?

This part argues that the legislature is in no better position than private parties such as the proponents of Proposition 8 to assert standing to defend sovereign interests. As discussed in Part II, no government official can claim to speak for the sovereign people. In addition, the government’s interest in the defending laws against constitutional challenge is qualified, will vary among elected officials depending on their constitutional views, and only gives rise to an injury in fact in the context of the executive’s “take care” responsibilities. Consequently, absent its own constitutional “take care” duties, the legislature may defend laws only by stepping into the shoes of the executive. Part III.C.1 explains why this presents a delegation problem at the federal level and many states. Part III.C.2 argues that legislative appointment of counsel to represent sovereign interests would also violate the federal Appointments Clause. Finally, Part III.C.3 argues that in the wake of the Court’s jurisdictional holding in Windsor, and with a proper understanding of popular sovereignty, the executive does not take off its shoes when it continues to enforce, but not defend a law. Therefore, there are no executive shoes for the legislature to fill.

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283 Gorod, supra note 3, at 1248 (“[W]hen Congress defends a statute in the Executive’s stead, it is not acting for itself but instead for the United States. To put it somewhat differently, Congress is merely acting as the United States’ agent in the defense of the validly enacted law that is being challenged in court.”); Greene, supra note 3, at 582; Matthew I. Hall, How Congress Could Defend DOMA in Court (and Why the BLAG Cannot), 65 STAN. L. REV. ONLINE 92, 95-96 (2013) (suggesting that Congress may litigate on behalf of the United States with proper statutory authorization).

284 See supra notes _ and accompanying text.

285 Arizonans for Official English, 520 U.S. at 65 (citing Karcher, 484 U.S. at 82); see also Hollingsworth, 133 S.Ct. at 2657.
1. The Separation of Powers Problem

As discussed in Part II.C, I argue that the executive’s standing to defend laws is based on its “take care” obligations. Nevertheless, Professor Abner Greene suggests that even if defending the constitutionality of laws is generally an executive function, the Constitution contemplates overlapping executive, legislative, and judicial functions, rather than strict separation of powers.\[^{286}\] That is, while “generally speaking the legislature legislates, the executive executes, and the judiciary judges, the federal government’s system of divided powers is more complex than that. The legislature also impeaches and convicts, and confirms or rejects nominees; the executive also signs or vetoes legislation[.].”\[^{287}\] Accordingly, at least where the Executive decides not to defend a law, Greene suggests that we should view enforcement as “multi-branch in nature.”\[^{288}\]

Yet one is hard pressed to find an example in which the Constitution permits one branch of government to delegate a core responsibility to another, let alone arrogate another’s core responsibility to itself. The examples cited by Greene all involve distinct responsibilities assigned by the Constitution to a particular branch, rather than exchanges among the branches of their assigned powers. The Court does not let Congress delegate its core legislative powers to the executive\[^{289}\] and recognizes limits on Congress’s power to supervise the executive.\[^{290}\] Surely, we should be wary of allowing Congress to usurp one of the President’s core responsibilities.

Indeed, Madison defended the Constitution against the Anti-Federalist charge that there was too much blending of legislative, executive, and judicial power by pointing out that:

> The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function .... The legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices ....\[^{291}\]

More importantly, the Constitution provides for overlapping areas of power to provide each branch with a check on the choices of the other, not to provide for

\[^{286}\] See Greene, supra note 3, at 582 (arguing that Congress should be able to represent the interests of the United States and seek a declaration judgment as to a statute’s constitutionality when the Executive decides either not to defend or to enforce the law).

\[^{287}\] Greene, supra note 3, at 591.

\[^{288}\] Id.

\[^{289}\] See Schechter Poultry; Clinton v. City of New York. Nevertheless, the Constitution does charge the President with proposing legislation to Congress and the White House often drafts legislative proposals for Congress. Yet these proposals must ultimately be approved by Congress.


\[^{291}\] The Federalist No. 47, supra note 67, at 271.
shared constitutional responsibilities or allow one branch to usurp the constitutional powers of the other branches.\(^{292}\) Powers are separated in order to protect popular sovereignty. The Senate has the power to confirm or reject presidential nominees, but not to choose them.\(^{293}\) The President has the power to veto proposed legislation, but not to re-write it.\(^{294}\) Congress has the power to override the President’s veto, but not to change it.\(^{295}\) Allowing the Legislature to usurp the President’s “take care” responsibilities would be just as strange.

Thus, to the extent that legal defense is a function of the executive’s enforcement responsibilities, it would be constitutionally unorthodox to allow the executive to share its “take care” responsibility with another branch of government.

2. The Appointments Clause Problem

Congressional designation of its own agent to represent the United States also conflicts with the Appointments Clause.\(^{296}\) The Framers granted the President the power, with the advice and consent of the Senate to appoint all Officers of the United States.\(^{297}\) The only exception is the appointment of inferior officers, which the Constitution permits Congress to vest “in the President alone, in the Courts of Law, or in the Heads of Departments.”\(^{298}\) The Constitution nowhere contemplates congressional appointments of officers to represent the United States.\(^{299}\) Indeed, in Bousher v. Synar, the Court held that executive officers may not be subject to congressional appointment or removal.\(^{300}\) If Congress may not appoint or remove executive officials charged with representing the United States, how can it appoint itself or its agent to defend the constitutionality of a law of the United States? Thus, the Appointments Clause suggests that Congress may not represent the United States.\(^{301}\)

\(^{292}\) See supra note _ and accompanying text regarding the plural executive.

\(^{293}\) U.S. CONST. art. II, § 2. (The President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”).

\(^{294}\) See Clinton v. City of New York.

\(^{295}\) U.S. CONST. art. I, § 7.

\(^{296}\) U.S. CONST. art. II, § 2, cl. 2; Buckley v. Valeo, 424 U.S. 1, 135 (1976) (Congress may not “vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.”).

\(^{297}\) Id.

\(^{298}\) Id.

\(^{299}\) Although there are a few federal agencies within the legislative branch and some could be said to exercise executive power, such as the Copyright Office, legislative agencies all serve important support functions for Congress. See http://www.usa.gov/Agencies/Federal/Legislative.shtml.

\(^{300}\) 478 U.S. 714 (1986).

\(^{301}\) Indeed, it is difficult to think of another context in which Congress formally represents the position of the United States with respect to third parties.
that the interests of the United States must be defended, the executive must do the defending.

3. The Windsor Problem

Although the Court in Windsor punted the question of legislative standing, declining to rule on the House’s assertion of standing to defend DOMA, the Court’s jurisdictional holding makes it practically more difficult for a legislature to step into the shoes of the executive. First, Windsor narrows the universe of cases in which legislative standing might make a difference to a court’s jurisdiction. The executive’s agreement with a plaintiff that a law is unconstitutional will not deprive the courts of jurisdiction so long as the executive continues to enforce the law and appeal adverse judicial decisions against it. Thus, legislative standing is unnecessary to ensuring a judicial resolution of such cases. Moreover, legislative parties may then present arguments in defense of the law as an amicus in the case. Although amicus status might limit Congress’s ability to introduce and test evidence in support of the law, this could be cured if the court permitted amicus to introduce and test evidence to sharpen the issues and to improve the judicial resolution of the case.

Second, the jurisdictional holding in Windsor makes it more difficult for the legislature to step into the shoes of the executive because, put simply, the executive has not taken off its shoes. Even if we maintain the legal fiction that the executive is representing the United States, the executive’s continued participation makes it unlikely that the Court would admit another party such as Congress to join the representation. The Court has suggested that the United States should generally speak with one voice, lest the Court “be deluged with ... a variety of inconsistent positions shaped by the immediate demands of the case sub judice, rather than by longer term interests in the development of the law.” Thus, if the executive continues to represent the United States, it is doubtful that the Court would confer standing upon the legislature based on an injury to the United States.

But if the executive is not, as I argue, representing the United States, but instead representing itself in pursuit of its “take care” duties, then it is impossible for the legislature to step into the executive’s shoes. Indeed, it would interfere with one of the executive’s core constitutional responsibilities. Popular sovereignty bars the legislature from intruding on the executive in this way.

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302 Windsor, 133 S.Ct. at 2686.
Third, if the executive decides not to enforce the law, the Court is even less likely to allow the Legislature to step into the shoes of the executive because there would be no injury to the United States that the legislature could assert. For example, if the Obama Administration had decided not to enforce DOMA and not taxed the estate of Edith Windsor’s spouse, Thea Spyer, Ms. Windsor would not have had an injury upon which to assert standing to sue the United States. Thus, there would have been no case or controversy that the legislature might join. Moreover, at least at the federal level and probably in most states as well, any attempt by the legislature to step into the shoes of the executive to enforce the law would raise profound separation of powers concerns. The Constitution commands the President, not Congress, to “take care that the laws be faithfully executed.” And the Court has not shied away from beating back congressional attempts to assert executive power. Notably, no one has gone so far as to suggest that Congress has the power to step into the shoes of the executive and actually enforce laws the President deems objectionable. Thus, there seems to be consensus that this would clearly encroach on the President’s “take care” responsibilities.

Finally, any congressional attempt to continue the case after the Executive decided to stop enforcing the law and injuring Ms. Windsor, absent some independent injury to Congress, would be asking for an advisory opinion, which is beyond the jurisdiction of federal courts.

Thus, in the wake of Windsor, it will be very difficult for legislatures to step into the shoes of the executive and assert standing as a party to defend laws based on an injury to the State because the executive does not take off its shoes unless it stops enforcing the law. Consistent with the Court’s view of executive standing in Windsor, the question for legislative standing should be whether the legislature is injured by executive action or a court order. For example, when Congress subpoenas an executive official and the official refuses to comply with the subpoena, Congress has standing to compel the executive’s compliance in court. The executive’s failure to produce the officer or documents clearly injures Congress in a concrete and actual way. And if a court takes the executive’s side in the dispute, the court order refusing to compel the officer or documents provides a basis for standing to appeal the judicial order. There is a lively debate beyond the scope of this article about whether Congress is injured by

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304 The Federalist No. 47, supra note 67, at 271 (“When the legislative and executive powers are united in the same person or body,’ says he, ‘there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.”).
305 U.S. Const. art. II, § 3.
307 U.S. Const. art. II, § 3.
308 Flast, 392 U.S. at 96; United Pub. Workers of Am. (C.I.O.), 330 U.S. at 89.
309 See Grove & Devins, supra note 3.
either a judicial declaration that a law is unconstitutional or the executive’s decision not to enforce the law. Given the malleability of the injury in fact test it may be impossible to reach a consensus about whether Congress is injured. But what should be clear from this article is that Congress cannot step into the shoes of the executive and claim to represent either a sovereign or governmental interest in the defense of its laws.

CONCLUSION

Popular sovereignty is a legal fiction, but it is a powerful one. The Framers’ transformation of popular sovereignty shaped the governmental institutions and political culture that emerged in the new American Republic. Nevertheless, whatever one thinks of its continuing value to our political and legal system, the worst use of popular sovereignty would be to allow parties to speak for the sovereign in pursuit of their ideological agendas. Executive officials who defend sovereign interests have Article III standing to do so based on their constitutional “take care” obligations. Regardless of whether they present arguments in support of or against a law’s constitutionality, they are fulfilling their “take care” duties as they understand them. Therefore, the Court should stop encouraging parties without similar constitutional obligations to assert claims in defense of sovereign interests. Put simply, no party may wear the sovereign’s crown.