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## STANDING IN THE SHADOW OF POPULAR SOVEREIGNTY

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*Who may speak for a state or the United States in federal court? Recent decisions by executive officials to not defend laws they believe are unconstitutional have reignited a long-standing debate among scholars and commentators over 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 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 Framers broke with English political tradition by separating the sovereignty of the new American republic from its government, creating a new political form in which "the People" were said to retain sovereign authority. Scholars have examined the implications of popular sovereignty in a variety of areas of law, but they have yet to consider its implications for standing to defend sovereign interests.*

*This Article argues that in a republic founded on the principle of popular sovereignty no party may announce the sovereign people's constitutional views—the Framers did not give any governmental actor this power. Beyond the narrow confines of clear constitutional text and long-settled commitments, the sovereign's interest in constitutional disputes is frequently unknown. Moreover, the Framers separated the government into competitive branches to protect popular sovereignty and refine citizens' constitutional views through public deliberation. Therefore, just as no party may speak for the sovereign, no official may speak for the government as a whole.*

*Consequently, executive officials defend and enforce laws based on the sovereign's command that they "take Care that the Laws be faithfully executed," rather than any power to speak for the sovereign or the government. This precludes standing to represent sovereign interests by parties without similar constitutional duties. Accordingly, this Article calls for a fundamental rethinking of Article III standing to enforce and defend laws,*

*grounding standing in express duties of government officials, rather than in their ability to wear the mantle of sovereignty.*

#### INTRODUCTION

Who may speak for a state or the United States in federal court? This question lies at the heart of several long-running debates surrounding decisions by state and federal executive officials not to enforce or defend laws based on constitutional objections.<sup>1</sup> Such decisions force courts and scholars to grapple with (1) the scope of the executive's duty to defend<sup>2</sup> laws the executive believes are unconstitutional,<sup>3</sup> (2) whether executive officials have Article III

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<sup>1</sup> The most recent examples involve laws prohibiting same-sex marriage. *See, e.g.*, Trip Gabriel, *Kentucky Law Official Will Not Defend Ban on Same-Sex Marriage*, N.Y. TIMES, Mar. 5, 2014, at A17 (counting seven states in which the state attorney general refused to defend a ban on same-sex marriage); Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) [hereinafter Holder Letter], <http://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> [<http://perma.cc/5QL4-TRWS>] (declining to defend the Defense of Marriage Act). But executive decisions not to defend or enforce laws are not new. Both state and federal executive officials have long declined to enforce or defend laws based on a variety of constitutional objections. *See* Carlos A. Ball, *When May a President Refuse to Defend A Statute? The Obama Administration and DOMA*, 106 NW. U. L. REV. COLLOQUY 77, 77 n.1 (2011) ("Every recent administration has refused to defend some laws that it believed were unconstitutional."); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000) (describing presidential non-enforcement and non-defense); Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 237-46 (2014) (describing cases of non-defense in the states). Indeed, President Thomas Jefferson declined to enforce the Sedition Act based on constitutional objections soon after the Founding. Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 740 (2014).

<sup>2</sup> Defending a law comprises both procedural aspects (filing an answer and appealing adverse judgments) and substantive aspects (presenting legal arguments in defense of the law's constitutionality). These aspects of defending usually, but not always, go hand-in-hand. References hereinafter to "defending" a law include both these meanings, while references to decisions "not to defend" mean that the executive is not presenting a substantive legal defense of the law, even if executive officials continue to enforce the law and meet the procedural requirements of "defense," including appealing adverse judicial decisions.

<sup>3</sup> Compare Eugene Gressman, *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"), Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 986 (1994) (arguing that presidential non-enforcement is contrary to constitutional text and practice), and Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1235 (2012) (arguing that the executive should enforce and defend statutes "even when it views them as wrongheaded, discriminatory, and indeed as shameful denials of equal protection"), with Neal Devins & Saikrishna Prakash,

standing to appeal judicial orders declaring a law unconstitutional when they agree with the court's constitutional views,<sup>4</sup> (3) whether other parties may play the executive's traditional role defending such laws,<sup>5</sup> and (4) whether the legislature may sue the executive for not enforcing a law.<sup>6</sup> These debates inevitably involve claims about who may and may not represent the interests of

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*The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 509 (2012) (arguing that there is no duty to defend or enforce laws the President believes are unconstitutional), Saikrishna Prakash, *The Executive's Duty To Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1616 (2008) ("[T]he Constitution actually *requires* the President to disregard unconstitutional statutes."), and 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 a law).

<sup>4</sup> Compare Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1314 (2014) (arguing the President should not have standing to defend and appeal adverse judgments when he believes the law is unconstitutional), with 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"), and Ernest A. Young, *In Praise of Judge Fletcher—And of General Standing Principles*, 65 ALA. L. REV. 473, 498 (2013) (suggesting the Court is correct to recognize the executive's standing where another party provides adversariness).

<sup>5</sup> Compare Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1247-55 (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 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), and Erwin Chemerinsky, *Prop. 8 Deserved a Defense*, L.A. TIMES, June 28, 2013, at A21 (suggesting that a special attorney for the state be appointed when the state elects not to defend an initiative), with Grove, *supra* note 4, at 1315-16 (arguing Congress may not assert standing to defend laws), and Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 593-96 (2014) (arguing that Congress may not assert standing to defend laws that the state does not defend), Suzanne B. Goldberg, *Article III Double-Dipping: Proposition 8's Sponsors, BLAG, and the Government's Interest*, 161 U. PA. L. REV. ONLINE 164, 173-76 (2013) (arguing the executive cannot transfer its standing to defend laws to other parties).

<sup>6</sup> Compare Greene, *supra* note 5, at 578-79 (arguing that "we should be open to congressional lawsuits" when the executive refuses to enforce a law), with BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 143-46 (2010) (proposing a "Supreme Executive Tribunal" to hear congressional suits challenging presidential actions without establishing the traditional elements of standing), and JESSE H. 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).

what is variously described as “a State,”<sup>7</sup> “the government,”<sup>8</sup> or “the People,”<sup>9</sup> and this Article describes collectively as “sovereign interests.”

But the literature has yet to interrogate the implications of the American principle of popular sovereignty for standing to represent sovereign interests.<sup>10</sup> Specifically, no one has considered how the fundamental division between sovereignty and the government wrought by the Framers shapes who may and may not speak for sovereign interests in court. Consequently, courts and commentators have conflated political concepts that are distinct in the American political system and encouraged private parties to grasp at the mantle of sovereignty to implement their ideological agendas.<sup>11</sup> This Article begins to fill the gap.

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 Parliament, the Framers consciously denied sovereignty to the government of the new American republic.<sup>12</sup> The United States was founded on the principle that “the people”<sup>13</sup> retained their sovereignty, with authority over constitutional meaning, while government officials merely served as their agents.<sup>14</sup> 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 public interest.

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<sup>7</sup> 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.” (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.”).

<sup>8</sup> See, e.g., Goldberg, *supra* note 5, at 166 (describing “the government’s interest” in defending its laws); Grove, *supra* note 4, at 1336 (grounding the executive’s standing to defend laws in “[t]he government’s interest” in the enforcement of the law).

<sup>9</sup> See, e.g., Sidney A. Shapiro & Rena I. Steinzor, *The People’s Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism*, 69 L. & CONTEMP. PROBS. 99, 104 (2006) (“[A]lthough, through statutes, Congress directs the executive branch, the executive branch is still the agent of the people.”).

<sup>10</sup> *But see infra* notes 38-40 (citing articles discussing the implications of popular sovereignty for other jurisdictional questions).

<sup>11</sup> See *infra* Section III.B (describing the tension between the idea of representative democracy and allowing private parties to represent the sovereign’s interests in court).

<sup>12</sup> See *infra* Section I.A (describing the separation of sovereignty from the government after the American Revolution).

<sup>13</sup> At the Founding, “the people” were largely white men of property. But over the course of the nineteenth and twentieth centuries, as Americans fiercely debated (and sometimes fought over) who comprised the body politic, the ranks of the sovereign people gradually expanded. See CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* 5 (2008).

<sup>14</sup> See *infra* Section I.A.3 (“[A]lthough government officials would act as the representatives or agents of the people, the people did not invest the government with their sovereignty.”).

Accordingly, the Framers both denied government officials the authority to act as the sovereign and divided the government into competitive branches to prevent it from intruding on popular sovereignty.<sup>15</sup>

This Article argues that in a republic founded on the American principle of popular sovereignty, no party may claim the sovereign's interest as a basis for standing in constitutional disputes. The Framers did not give any government actor the power to announce the sovereign people's constitutional views.<sup>16</sup> American sovereigns do not walk into court with a United States Attorney or a State Attorney General at their side. Like the monotheistic god from whom the concept of sovereignty is derived, the people are omnipotent and omnipresent, yet their will is not always clear. Beyond the confines of clear constitutional text and long-settled constitutional commitments, we do not always know the sovereign's constitutional views.<sup>17</sup> Granting government officials the power to announce the sovereign's views would make a mockery of popular sovereignty.<sup>18</sup>

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 United States Constitution, and various state constitutional analogues, direct executive officials to "take Care that the Laws be faithfully executed."<sup>19</sup> 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

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<sup>15</sup> See *infra* Section I.B (describing how separation of powers preserves popular sovereignty).

<sup>16</sup> See *infra* Section I.A.3.

<sup>17</sup> The Supreme Court's pronouncements are sometimes mistaken for the one true meaning of the Constitution. See Meltzer, *supra* note 3, at 1188 (citing the literature on judicial supremacy). Indeed, in recent years, the Court has seemingly claimed authority to decide all constitutional questions itself. See Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 317 (2002) (arguing that "[t]he demise of the political question doctrine is part and parcel of [a] larger trend" in which the Court "refus[es] to accord interpretive deference to the political branches['] interpretation of the Constitution). But as discussed more fully *infra* at notes 153-60 and accompanying text, the Court, like the political branches, merely interprets the Constitution as necessary to meet its constitutional obligations. The Court does not speak for the sovereign. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004) (explaining that the people retain ultimate interpretive authority over the Constitution).

<sup>18</sup> THE FEDERALIST NO. 78, at 393 (Alexander Hamilton) (Ian Shapiro ed., 2009) (stating that the representatives of the people cannot be superior to the people themselves).

<sup>19</sup> U.S. CONST. art. II, § 3; see also Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565, 639 (2006) ("[E]very state constitution . . . provides in substance that the chief executive shall 'take care' or see to it that the laws are faithfully executed.").

to do so.<sup>20</sup> Thus, this Article calls for a fundamental rethinking of Article III standing to enforce and defend laws, grounded in express constitutional duties of government officials, rather than in their ability to wear the sovereign's crown.

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 have been criticized for their incoherence and inconsistency.<sup>21</sup> For example, the Court has recognized the executive's standing to appeal judicial orders striking down a law even when the executive agrees that the law is unconstitutional.<sup>22</sup> The Court has not, as some advocate, barred the executive from appealing such decisions on the grounds that there can be no sovereign interest in an unconstitutional law.<sup>23</sup> Thus, the Court has implicitly recognized that the constitutional views of the executive and the sovereign are distinct. The executive has standing to enforce and defend laws based on its view of how best to fulfill its "take care" obligations, *not* its ability to announce the sovereign people's views.<sup>24</sup> If the executive did in fact speak for the sovereign, it could not enforce laws it believes are unconstitutional because there can be no sovereign interest in an unconstitutional law.<sup>25</sup> But because the executive is not the sovereign, and the sovereign's views may be unknown, the executive may "take care" by enforcing the law while attempting to persuade the other branches and the people that the law is unconstitutional.<sup>26</sup>

At the same time, popular sovereignty vindicates the Court's reluctance to grant standing to non-executive parties to defend sovereign interests absent their own independent basis for standing.<sup>27</sup> Because the executive does not

<sup>20</sup> See *infra* Section II.C (discussing the executive's "take care" duty in the Constitution, and its standing to defend the laws and appeal adverse judgments in order to fulfill that duty).

<sup>21</sup> See Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 466-67 (2008) (reviewing the criticisms of the Court's standing jurisprudence).

<sup>22</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2685-88 (2013).

<sup>23</sup> See *id.* 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 4, at 1315 ("The executive has standing *only* when it asserts the federal government's interests in the enforcement and continued enforceability of federal law.").

<sup>24</sup> See *infra* Section II.C.

<sup>25</sup> See *infra* Section II.B.1.

<sup>26</sup> See *infra* Section II.C.

<sup>27</sup> The Court has never recognized the standing of non-governmental parties to "defend the constitutionality of a state statute when state officials have chosen not to," *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013), and has rarely recognized the standing of legislators in such cases. *But see Karcher v. May*, 484 U.S. 72, 82 (1987) (recognizing the authority of the New Jersey Legislature "under state law to represent the State's interests" in federal court).

derive its standing to defend laws from any power to act as the sovereign or the sovereign's lawyer, non-defense does not create a job vacancy for another party to fill. Rather, whether the executive enforces and defends, enforces but does not defend, or neither enforces nor defends, the executive fulfills its "take care" obligations as it understands them. There are no empty shoes to be filled. Nevertheless, the Court's failure to ground its decisions in popular sovereignty has encouraged continued attempts to represent the sovereign in the executive's stead.<sup>28</sup>

Although it might seem surprising that popular sovereignty favors the defense of sovereign interests by executive officials over citizens, it is entirely consistent with the representative nature of American democracy. While the Framers sought to preserve popular sovereignty, they also limited the people's ability to exercise sovereignty directly, concerned they would act rashly when aroused by passions.<sup>29</sup> Thus, the Framers created a representative rather than direct democracy and erected various procedural constraints to ensure robust public deliberation preceded actions on behalf of the sovereign people.<sup>30</sup> Just as the Constitution does not permit individuals to exercise legislative power directly,<sup>31</sup> it does not permit them to exercise the executive's "take care" powers.

Of course, any party, public or private, with its own independent basis for standing may defend a law's constitutionality in pursuit of a proper legal claim or defense. Moreover, the people retain the power to assign "take care" powers to non-executive officials at either the state or federal level.<sup>32</sup> This Article explains how the people might do so.<sup>33</sup> But parties without their own constitutional duties may not represent a State or the people—i.e., the sovereign—in lieu of the executive, because the executive itself is not playing the role of counsel to the sovereign.<sup>34</sup> Rather, the executive has standing to enforce and defend laws based on its own constitutional obligations.

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<sup>28</sup> See *infra* Section III.B.

<sup>29</sup> Sanford Levinson contends that the Constitution "could not, in its own way, be more antagonistic to the enactment of such sovereignty by the mass of living and breathing citizens. . . . [N]o one should confuse government *of* or *for* the people with government *by* the people." Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 *YALE L.J.* 2644, 2658 (2014).

<sup>30</sup> See *infra* Section I.C (describing the Framers' vision of a representative democracy).

<sup>31</sup> The states are different in this regard, as many states have mechanisms that allow citizens to place laws on the ballot for approval by the state's voters. *State I&R, INITIATIVE & REFERENDUM INST.*, [http://www.iandrinstitute.org/statewide\\_i%26r.htm](http://www.iandrinstitute.org/statewide_i%26r.htm) [<http://perma.cc/QLG5-JJVW>]. Nevertheless, none of the state constitutions authorize the people to take executive actions. See *infra* Section III.B.

<sup>32</sup> See *infra* Section III.B.4 (describing how the California Constitution empowers the Governor and Attorney General to take care that the laws are faithfully executed, but could also assign this duty to others).

<sup>33</sup> See *id.*

<sup>34</sup> See *infra* Section II.C.



Popular sovereignty has been called a legal fiction.<sup>35</sup> But legal fictions have the power to shape institutions,<sup>36</sup> and popular sovereignty has an impressive resume in this regard. Despite the Supreme Court's long campaign to assert judicial supremacy over constitutional interpretation,<sup>37</sup> it is difficult to make sense of our constitutional system without understanding popular sovereignty. Scholars have explored its implications for state sovereign immunity,<sup>38</sup> suits between states,<sup>39</sup> the justiciability of citizen suits,<sup>40</sup> statutory interpretation,<sup>41</sup> judicial review,<sup>42</sup> the evolution of constitutional meaning,<sup>43</sup> and alternative

<sup>35</sup> See, e.g., EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 306 (1988).

<sup>36</sup> See LON L. FULLER, *LEGAL FICTIONS*, at ix-x (1968) (“[L]egal fictions proliferate into the interstices of their subject and enter intimately into its everyday concerns . . .”); Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 *ST. THOMAS L. REV.* 1, 3 (2010) (“Far from being a historical oddity, legal fictions are common features of not only our common law, but also our statutory and regulatory law.”).

<sup>37</sup> KRAMER, *supra* note 17, at 221 (observing that in one unanimous opinion the Supreme Court declared that “the federal judiciary is supreme in the exposition of the law of the Constitution” (quoting *Cooper v. Aaron*, 358 U.S. 1, 18 (1958))).

<sup>38</sup> See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1466-92 (1987) (arguing that when a government entity acts outside of its delegated authority, it surrenders any sovereign immunity by ceasing to act in the name of the sovereign).

<sup>39</sup> See, e.g., Ann Woolhandler & Michael G. Collins, *State Standing*, 81 *VA. L. REV.* 387, 396-97 (1995) (suggesting that courts limit state standing because “constitutional rights are held by people, not government”); Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 *VA. L. REV.* 2051, 2053 (2011) (explaining the importance of state standing for the federalist system).

<sup>40</sup> See, e.g., Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 *CORNELL L. REV.* 393, 399, 481 (1996) (arguing that popular sovereignty calls for a more liberal approach to the standing of private parties utilizing citizen-suit provisions).

<sup>41</sup> See, e.g., Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 *N.C. L. REV.* 585, 593-94 (1996) (arguing that popular sovereignty calls upon the federal courts to act not as agents of Congress, but as agents of “the People”); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 *STAN. L. REV.* 1, 5 (2000) (arguing that popular sovereignty suggests a legislative shaping role for the judiciary).

<sup>42</sup> Jack Wade Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 *NOTRE DAME L. REV.* 171, 177 (2002) (discussing the “problem of judicial overreach as a ‘structural problem’ in light of . . . the American constitutional design that expansive constitutional power erodes”).

<sup>43</sup> Bruce Ackerman argues in his powerful three-volume *WE THE PEOPLE* series that there are “constitutional moments” in which the people change the meaning of the Constitution outside of the amendment process. 1 *BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS* (1993); 2 *BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS* (2000); 3 *BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014).

means of constitutional amendment.<sup>44</sup> This Article adds to the literature by examining popular sovereignty's implications for Article III standing to defend state and federal laws. Any debate about who may speak for sovereign interests must come to terms with the division between sovereignty and the government wrought by the Framers.

Whether one believes popular sovereignty continues to play an important role in 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. No private or public party 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,<sup>45</sup> lest the judiciary assume the sovereign's crown. All constitutional interpretations by government officials are merely provisional, subject to debate, reappraisal, and the possibility of popular intervention. Granting either government officials or individual citizens the power to speak for the sovereign has no place in a deliberative democracy in which final constitutional authority remains with the people at large.

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This Article proceeds in three parts. Part I begins by describing the principle of popular sovereignty established by the Framers and how it broke with English political theory and the colonial experience. The Framers created a political system in which sovereignty was separated from the government and the government itself was divided into distinct branches. The system was designed to protect the people from governmental power and enhance deliberation over policy and constitutional meaning.

Part II then offers an original theory 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 (whether substantively or merely procedurally)<sup>46</sup> based on its personal constitutional duties, rather than any power to speak for the sovereign or the government as a whole.

Finally, Part III evaluates the Supreme Court's standing jurisprudence in the shadow of popular sovereignty, including (1) the executive's standing to appeal adverse judicial decisions when it agrees with the court that the law is unconstitutional, (2) the standing of private parties to assert sovereign interests

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<sup>44</sup> Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 489-94 (1994) (arguing that a popular majority of voters may amend the Constitution without using the Article V amendment process).

<sup>45</sup> U.S. CONST. art. III, § 2 (outlining the scope of the federal judicial power).

<sup>46</sup> See *supra* note 2.

in such cases, and (3) the standing of the legislature to step into the shoes of the executive to defend the constitutionality of laws. It explains how recognizing the Framers' understanding of popular sovereignty would bring greater coherence to an often-perplexing body of law.

## I. THE AMERICAN PRINCIPLE OF POPULAR SOVEREIGNTY

The Framers of the Constitution fundamentally transformed the idea of sovereignty as it was understood in eighteenth-century European political theory.<sup>47</sup> Unlike European states, the American republic was founded on the principle that the government served as the agent of the sovereign people rather than the embodiment of the nation's sovereignty. This revolutionary idea had profound implications for our governmental system that reverberate to this day.

### A. *Separating Sovereignty from the Government*

#### 1. Sovereignty in English Political Theory

Eighteenth-century political theorists assumed that every state must have "one final, indivisible, and incontestable supreme authority."<sup>48</sup> This idea had roots in classical antiquity, but was developed in the sixteenth century to justify monarchical control of the emerging European nation-states.<sup>49</sup> The European "sovereign" claimed to be the source of all supreme power embodied in the State.<sup>50</sup> As God's lieutenant on earth, the sovereign claimed to be omniscient, omnipotent, and unable to do wrong: "The government was his government, the people . . . were his subjects."<sup>51</sup> This was the divine right of kings—a legal fiction used to justify the sovereign's power over his subjects.<sup>52</sup>

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<sup>47</sup> The most important historical works examining the Framers' theory of popular sovereignty and the Constitution are: BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1992); EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988); and GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 345-89 (1998). *See also* Pushaw, *supra* note 40, at 407 ("The Revolutionary War ushered in a decade . . . during which Americans gradually reevaluated—and ultimately transformed—English notions of separation of powers and sovereignty.").

<sup>48</sup> WOOD, *supra* note 47, at 345.

<sup>49</sup> *See* BAILYN, *supra* note 47, at 198; WOOD, *supra* note 47, at 345.

<sup>50</sup> *See* MORGAN, *supra* note 47, at 17-18; WOOD, *supra* note 47, at 346.

<sup>51</sup> MORGAN, *supra* note 47, at 17, 19; *see also* 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*255 ("That the king can do no wrong, is a necessary and fundamental principle of the English constitution.").

<sup>52</sup> *See* JOHN NEVILLE FIGGIS, *THE DIVINE RIGHT OF KINGS* (1914); ERNST H. KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY* (1998).

“But subjects did have rights, and English subjects had more rights than [most.]”<sup>53</sup> The modern idea of popular sovereignty—that all sovereign power came from “the People”—was born of the struggle over these rights during the seventeenth century.<sup>54</sup> To justify parliamentary authority to restrain the King, the English Parliament interposed the people between God and the monarch, arguing that the King derived his power not directly from God, but from the consent of the people, whom the Creator had endowed with the authority to govern themselves.<sup>55</sup> Of course, because the people could not act as a whole, they had endowed Parliament with their sovereign power to “begin, change, and end governments.”<sup>56</sup> Thus, popular sovereignty was an ideological weapon used by Parliament to appropriate some of the King’s authority.

During the long conflict between Parliament and the Crown, however, the English people never formally exercised their sovereignty by forming a new government.<sup>57</sup> 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 England’s sovereignty, now Parliament claimed it. Parliamentary supremacy was justified by the fact 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.<sup>58</sup> This representational character bound English

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<sup>53</sup> MORGAN, *supra* note 47, at 19.

<sup>54</sup> González, *supra* note 41, at 640 (finding colonial compacts were the first practical application of popular sovereignty before the Constitution). However, popular sovereignty, like sovereignty itself, had ancient roots. See MARTIN OSTWALD, FROM POPULAR SOVEREIGNTY TO THE SOVEREIGNTY OF LAW: LAW, SOCIETY, AND POLITICS IN FIFTH-CENTURY ATHENS, at pt. I (1986) (describing the emergence of popular sovereignty from democracy in ancient Athens).

<sup>55</sup> MORGAN, *supra* note 47, at 56 (discussing the ideological shift in fifteenth-century England from the doctrine of the divine right of the monarchy to that of Parliament’s authority through popular sovereignty).

<sup>56</sup> *Id.* at 59-60.

<sup>57</sup> See MICHAEL BRADDICK, GOD’S FURY, ENGLAND’S FIRE: A NEW HISTORY OF THE ENGLISH CIVIL WARS, at xxv-xxvi (2008) (acknowledging that the formation of the “Free State” and the abolition of the monarchy during the English Revolution of 1646-1649 was short-lived politically); MORGAN, *supra* note 47, at 120 (stating that the Convention Parliament of 1689 established in defiance of the English constitution was nonetheless so restrained in its manner of reshaping the government that “England did not achieve—and never would—a formulation and establishment of its constitution by a popular sanction or authority separate from its government”); STEVE PINCUS, 1688: THE FIRST MODERN REVOLUTION 8 (2009) (arguing that, since the cultural and political debates underlying the English Revolution of 1688-1689 had been entrenched in English society for a long period of time preceding the Revolution, “it would be wrong to understand 1688 or 1689 as a fundamental break in English history”).

<sup>58</sup> WOOD, *supra* note 47, at 346-48.

subjects to obey all parliamentary acts because they were, according to this new legal fiction, also the acts of the people.

## 2. Popular Sovereignty and the American Revolution

The American 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 power for Parliament and the colonial legislatures, drawing distinctions between internal and external taxation, or taxation and trade regulation.<sup>59</sup> But the American revolutionaries could not defend such theories without abandoning the well-established principle that every state must have one “supreme, irresistible, absolute, uncontrolled authority, in which . . . sovereignty[] reside[s].”<sup>60</sup> Thus, Parliament must either exercise all sovereign power over the colonies or none at all.<sup>61</sup> Because the colonists had no representation in Parliament, the American revolutionaries ultimately concluded that it was the latter—Parliament could have no authority over the colonies without colonial representation.<sup>62</sup>

But the colonists continued to accept the idea that all sovereign power must be lodged in the government. Thus, whereas sovereignty had previously been lodged in Parliament, they now placed it in the colonial legislatures.<sup>63</sup> Until the final break with England, the colonies remained linked in the American mind with the mother country 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.<sup>64</sup> But this connection, never fully developed, was extinguished by the events of 1776.

Untethered from King and Parliament, Americans grappled with the relationship between the new state governments and the sovereign people. In England, popular sovereignty was an abstraction with little operative currency.

<sup>59</sup> JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 58-59 (1979); WOOD, *supra* note 47, at 350-53.

<sup>60</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*49. Blackstone’s *Commentaries on the Laws of England*, published in 1765-1769, was widely read by the American revolutionaries. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 35 & n.151 (2001).

<sup>61</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*46 (“[I]t is . . . the very essence of a law[] that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.”); *see also* RAKOVE, *supra* note 59, at 10-11 (citing Governor Thomas Hutchinson’s defense of the “indivisible sovereignty of Parliament”).

<sup>62</sup> WOOD, *supra* note 47, at 352-53.

<sup>63</sup> *Id.*

<sup>64</sup> RAKOVE, *supra* note 59, at 32, 36; WOOD, *supra* note 47, at 352-53.

One might accept that in the distant past the people had exercised their God-given power to create a government, but in times of peace and good government, sovereignty remained firmly planted in the government.<sup>65</sup> In post-revolutionary America, however, popular sovereignty became more than an abstract political idea. Americans outside of government increasingly sought to exercise their sovereignty, first by forming new governments, and then by "directing" their representatives how to vote, resorting to political mobbing, and ignoring laws they did not think aligned with "the people's" interests.<sup>66</sup>

At the same time, the lower houses of the state legislatures could no longer claim, as the House of Commons did, to be uniquely "representative" of the people. In post-Revolutionary America, both lower and upper houses of the legislature and many executive officials were now directly or indirectly accountable to the electorate and thus "representative" of the people.<sup>67</sup> Consequently, the English idea that the people transferred their sovereignty to a lower legislative house so that it could compete with the monarchy and aristocracy broke down with the diminishing relevance, already weak to begin with, of "mixed government" in the new American states.<sup>68</sup> Moreover, the increasingly "representative" character of governmental institutions made it difficult to reconcile disagreements among them. If each institution had authority to speak for the people, how could they disagree?

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.

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<sup>65</sup> WOOD, *supra* note 47, at 346 ("While some theorists well into the eighteenth century continued to speak of the ultimate sovereignty of the people, it seemed obvious that such a popular sovereignty was but a vague abstraction of politics, meaningful only during those rare moments of revolution when the people took back all power into their hands.").

<sup>66</sup> FRITZ, *supra* note 13, at 44-46 (chronicling the formation of the sovereign state of Vermont by a group of inhabitants of the state of New York, as well as the unsuccessful bid by inhabitants of North Carolina to form the state of "Franklin"); WOOD, *supra* note 47, at 362-63 (describing the rise of popular participation in American government before and after the Revolution).

<sup>67</sup> WOOD, *supra* note 47, at 388 ("All elected officials could be considered as kinds of representatives of the people . . ."); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1085 (1988) ("All three branches of government derive, with various degrees of directness, from the People; all three are agencies of the People. No branch . . . can uniquely claim to speak for the People themselves; no branch is uniquely representative.").

<sup>68</sup> James Wilson, *Lectures on Law (1791)*, in 1 THE WORKS OF JAMES WILSON 293 (Robert G. McCloskey ed., 1967) ("The executive and judicial powers are now drawn from the same source . . . [as] the legislative authority: they who execute, and they who administer the laws, are as much the servants, and therefore as much the friends of the people, as they who make them.").

### 3. Popular Sovereignty and the American Constitution

The Framers of the Constitution rejected the English view of sovereignty as embodied in the government.<sup>69</sup> Rather, the Framers “drove an analytic wedge between the government and [the] People, relocating sovereignty from the former to the latter,”<sup>70</sup> and creating a new political form to implement their theory of popular sovereignty.<sup>71</sup>

The primacy of the people is announced in the first three words of the Constitution. Whereas the revolutionaries of 1776 had declared independence in a “unanimous Declaration of the thirteen united States of America,”<sup>72</sup> and the Articles of Confederation instituted “a Confederation of Sovereign states,”<sup>73</sup> the U.S. Constitution was “ordain[ed] and establish[ed]” by “We the People of the United States.”<sup>74</sup> In the new American republic the people were the “pure, original fountain of all legitimate authority.”<sup>75</sup> The Constitution was “written by the people” in a national convention, rather than in the state legislatures, and “ratified by the people” in conventions organized for the purpose, rather than by the state governments.<sup>76</sup>

More important than the nod to the people’s power to form a government, however, which was not an entirely new idea, was the relationship between the people and the newly formed government, which was virtually unprecedented outside America.<sup>77</sup> The Constitution was not an agreement between the people and the government, but rather “a solemn, explicit agreement of the people among themselves.”<sup>78</sup> Therefore, although government officials would act as

<sup>69</sup> WOOD, *supra* note 47, at 382; Amar, *supra* note 38, at 1432.

<sup>70</sup> Amar, *supra* note 38, at 1435-36.

<sup>71</sup> WOOD, *supra* note 47, at 615 (highlighting the novelty of the American system of government).

<sup>72</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

<sup>73</sup> WOOD, *supra* note 47, at 357.

<sup>74</sup> U.S. CONST. pmb.

<sup>75</sup> THE FEDERALIST NO. 22, *supra* note 18, at 115 (Alexander Hamilton); *see also* THE FEDERALIST NO. 49, *supra* note 18, at 256 (James Madison).

<sup>76</sup> WOOD, *supra* note 47, at 532-33 (detailing the Federalists’ efforts to instill the concept of popular sovereignty in the Constitution itself and in its ratification); 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”).

<sup>77</sup> *See* FRITZ, *supra* note 13, at 15 (“Americans’ chief innovation and enduring constitutional legacy came from actually involving the people in forming new governments.”); WOOD, *supra* note 47, at 615 (remarking on the novelty of the American political system); Amar, *supra* note 38, at 1436 (describing how “relocating true sovereignty in the People themselves” broke with prior “notions of ‘sovereign’ governmental omnipotence”).

<sup>78</sup> Joseph Lathrop, *A Sermon on a Day Appointed for Publick Thanksgiving (1787)*, reprinted in POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730-1805, at 867, 871

the representatives or agents of the people, the people did not invest the government with their sovereignty. As the Supreme Court later 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.”<sup>79</sup> Thus, “government entities were sovereign only in a limited and derivative sense, exercising authority only within the boundaries set by the sovereign People.”<sup>80</sup>

Consequently, as Alexander Hamilton explained: “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 are superior to the people themselves . . . .”<sup>81</sup> In other words, not only did the people limit the power they gave to their government, but they remained sovereign over the government that worked on their behalf.

Moreover, the people did not pass quietly from the scene after ratifying the Constitution. In Madison’s words: “[T]he 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 . . . . [A]s the grantors of the commissions, [*the people*] can alone declare its true meaning, and enforce its observance . . . .”<sup>82</sup> Under this view, the people need not rely on the Article V amendment process to effect constitutional change.<sup>83</sup> Rather, they retain final interpretative authority over the Constitution, something that today is commonly (but erroneously) associated with the Supreme Court.<sup>84</sup> This should not be surprising given that many members of the revolutionary

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(Ellis Sandoz ed., 1991); see also Wilson R. Huhn, *Constantly Approximating Popular Sovereignty: Seven Fundamental Principles of Constitutional Law*, 19 WM. & MARY BILL RTS. J. 291, 300 (2010) (discussing the central role of the “people” in the government formed by the Constitution, in contrast to that created under the Articles of Confederation).

<sup>79</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>80</sup> Amar, *supra* note 38, at 1436.

<sup>81</sup> THE FEDERALIST NO. 78, *supra* note 18, at 393 (Alexander Hamilton); see also *Chisholm v. Georgia*, 2 U.S. 419, 457 (1793) (opinion of Wilson, J.) (stating that the people “reserved the Supreme Power in their own hands”). As one scholar puts it, the Constitution “minimizes the agency costs inherent in the principal-agent relationship between a principal/people and their constituted agent/government.” González, *supra* note 41, at 637.

<sup>82</sup> THE FEDERALIST NO. 49, *supra* note 18, at 256 (James Madison) (emphasis added); see also KRAMER, *supra* note 17, at 8 (“Final interpretive authority [of the Constitution] rested with ‘the people themselves,’ and courts no less than elected representatives were subordinate to their judgements.”).

<sup>83</sup> Indeed, Article V does not provide the people with a direct means of amending the Constitution. Rather, Congress or the state legislatures must initiate amendments using Article V, and the amendments themselves must be approved by three-fourths of the state legislatures or three-fourths of state ratifying conventions called for that purpose. U.S. CONST. art. V.

<sup>84</sup> See *supra* note 17.



generation believed the people could change their minds and their government whenever and however they liked.<sup>85</sup> This is the logical end of popular sovereignty.<sup>86</sup>

Nor is the idea of popular control of constitutional meaning consigned to history. Even today many scholars argue for a robust view of popular constitutionalism. Akhil Amar suggests that America's "unwritten Constitution" embodies rights and principles derived from Americans' lived experience that are as strong as many included in the text of the written Constitution.<sup>87</sup> Barry Friedman has described how the Court never strays far from public opinion.<sup>88</sup> And Bruce Ackerman has made a compelling case for "constitutional moments" since the Founding when the people have changed the Constitution outside of the amendment process.<sup>89</sup> It is indisputable that our constitutional commitments change over time, as the Court's evolving constitutional jurisprudence reflects.<sup>90</sup> Even if the constitutional text has not changed, the constitutional commitments of the sovereign people have.<sup>91</sup>

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<sup>85</sup> ACKERMAN, 2 WE THE PEOPLE, *supra* note 43, at 78 (stating that James Wilson declared that "the people may change the constitutions whenever and however they please"); FRITZ, *supra* note 13, at 23-25 (explaining how the "alter or abolish" provisions of various state constitutions took the place of the "right of revolution," and over time superseded the idea that constitutional change could not occur in the absence of oppressive government). Professor Amar argues that to this day a majority of the electorate may change the government outside of the Article V amendment process. Amar, *supra* note 44, at 458.

<sup>86</sup> Another means by which the people exercise their sovereign authority is the jury, which was established in Article III as a way to check government action inconsistent with the people's fundamental rights and liberties. See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 55 (2003) ("As Alexis de Tocqueville observed, the jury was 'a political institution . . . one form of the sovereignty of the people.'").

<sup>87</sup> AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY, at ch. 3 (2012) (arguing that despite no explicit protections in the Constitution, many of the liberties that Americans enjoy on a daily basis are "generally upheld by American governments, absent compelling reasons for abridgement").

<sup>88</sup> BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 14-16 (2009) (arguing that the Supreme Court is actually one of the most popular institutions in American democracy, and that the Court "exercises the power it has precisely because that is the will of the people").

<sup>89</sup> ACKERMAN, 2 WE THE PEOPLE, *supra* note 43, at 5. *But see* Randy E. Barnett, *We the People: Each and Every One*, 123 YALE L.J. 2576, 2605 (2014) (advocating the importance of the Article V amendment process for safeguarding fundamental rights); David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 4 (1990) ("[T]he only way to amend the Constitution is in accordance with the mechanism outlined in article V.").

<sup>90</sup> See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (finding no fundamental right under the Constitution to engage in homosexual sodomy), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that the Constitution protects intimate consensual sexual

Finally, the Constitution drove a similar wedge between the state governments and the sovereign people. As Madison explained, “The 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 . . . .”<sup>92</sup> Consequently, the Constitution did not merely relocate certain powers from the states to the national government. It demonstrated that the sovereignty of the states also resided in the people rather than their governments.<sup>93</sup> Otherwise, the people could not have removed certain powers from the states.<sup>94</sup> In this respect, the Constitution completed a process that was already underway during the post-Revolutionary period as the people of the states amended their constitutions to implement the new view of popular sovereignty taking shape.<sup>95</sup> Thus, the Constitution confirmed the new

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conduct); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that state laws requiring “separate but equal” public facilities do not violate the Fourteenth Amendment), *overruled by* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (holding that state laws segregating educational facilities violate the Fourteenth Amendment).

<sup>91</sup> An exchange between Justice Scalia and Ted Olson during oral arguments in *Hollingsworth v. Perry* is illuminating. Justice Scalia asked, “[W]hen did it become unconstitutional to exclude homosexual couples from marrying?” Transcript of Oral Argument at 38, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144). Given his originalist views, Justice Scalia’s point was presumably that no one thought excluding homosexual couples from marrying was unconstitutional when the Fourteenth Amendment was ratified in 1868. But Mr. Olson replied with his own questions: “When did it become unconstitutional to prohibit interracial marriages? When did it become unconstitutional to assign children to separate schools?” *Id.* at 38. Few people thought segregation was unconstitutional in 1868, but few people would doubt that it is unconstitutional today. This is not merely because the Court says so. It is because of deep constitutional commitments of the people. See also Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1038 (2004) (“We regard the tension between popular constitutionalism and judicial supremacy as generative; the fundamental constitutional beliefs of the American people are informed and sustained by the constitutional law announced by courts, just as that law is informed and sustained by the fundamental constitutional beliefs of Americans.”).

<sup>92</sup> THE FEDERALIST NO. 46, *supra* note 18, at 239 (James Madison).

<sup>93</sup> Both the Ninth and Tenth Amendments also allude to the people’s sovereignty with respect to the state governments. U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

<sup>94</sup> WOOD, *supra* note 47, at 530-31. The states retained some sovereignty, as battles over the Tenth Amendment confirm, but the state governments, like the federal government, were merely agents of their sovereign peoples.

<sup>95</sup> See FRITZ, *supra* note 13, at 18-20 (comparing the “[m]any state constitutions [that] acknowledged the subordination of government to the people”); WOOD, *supra* note 47, at

political structure of the states at the same time that it created the national republic.

### B. *Separating Powers to Preserve Popular Sovereignty*

In addition to separating sovereignty from the government, the Framers divided the national government into three branches with distinct powers and responsibilities. Separation of powers was a key mechanism to protect the sovereignty of the people from government tyranny.<sup>96</sup>

The Framers' post-Revolutionary experience led them to be wary of placing too much power in the legislature, irrespective of its democratic credentials. Madison wrote 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."<sup>97</sup> 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."<sup>98</sup> Indeed, the Framers believed the state legislatures had "flagrantly violated" the state constitutions "in a variety of important instances" and threatened the sanctity of property rights.<sup>99</sup> Accordingly, Madison argued that the people should "exhaust all their precautions" against "the enterprising ambition" of the legislature.<sup>100</sup>

133-41 (detailing the development of early state constitutions and how they were influenced by popular sovereignty); Amar, *supra* note 38, at 1438-39 (explaining how the state constitution ratification processes in Massachusetts, New Hampshire, and other states "set the stage" for the framing and ratification of the Federal Constitution).

<sup>96</sup> González, *supra* note 41, at 592-93 (arguing that separation of powers was the "central institutional device for effectuating the federal Constitution's version of popular sovereignty"). González 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.

<sup>97</sup> THE FEDERALIST NO. 48, *supra* note 18, at 252 (James Madison).

<sup>98</sup> THE FEDERALIST NO. 47, *supra* note 18, at 245 (James Madison).

<sup>99</sup> THE FEDERALIST NO. 48, *supra* note 18, at 254 (James Madison); *see also* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 52-53 (1913) ("Under [the Articles of Confederation], the state legislatures were substantially without restrictions or judicial control; private rights in property were continually attacked by stay laws, legal tender laws, and a whole range of measures framed in behalf of debtors; and in New England open rebellion had broken out."); RAKOVE, *supra* note 59, at 285-88 (discussing how disputes between the states over land and credit led to "[s]erious doubts about the adequacy of the Articles [of Confederation]"); WOOD, *supra* note 47, at 277-78, 404-05 (reviewing the concerns over whether the laws of Rhode Island and Connecticut could be "altered at pleasure by the legislature," and observing the oppressive actions of American state governments generally in the 1780s).

<sup>100</sup> THE FEDERALIST NO. 48, *supra* note 18, at 252-53 (James Madison).

Therefore, the Framers divided the authority of the government to prevent it from intruding on the sovereignty of the people.<sup>101</sup> According to Jefferson, “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.”<sup>102</sup> Or in Madison’s famous precept: “Ambition must be made to counteract ambition.”<sup>103</sup> In this way, separation of powers would 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.”<sup>104</sup> By competing for the people’s affections, each branch would check the others from intruding on the people’s sovereignty.<sup>105</sup>

### C. *Enhancing Deliberation Through Representative Democracy*

While the Framers conceived the government as the agent of the people, they did not imagine elected representatives taking orders directly from their constituents.<sup>106</sup> Once again, the Framers were reacting to their experience during the post-Revolutionary period, when popular extra-legislative

<sup>101</sup> González, *supra* note 41, at 668 (“[T]he answer to the question ‘why separation of powers?’ is: ‘To effectuate popular sovereignty.’”); Pushaw, *supra* note 40, at 413 (“The Constitution incorporated a theory of separation of powers transformed by popular sovereignty.”); 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) (“[T]he 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* Bond v. United States, 131 S. Ct. 2355, 2365 (2011) (“The structural principles secured by the separation of powers protect the individual as well.”); *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (confirming that it was “the central judgment of the Framers of the Constitution that . . . the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty”).

<sup>102</sup> THE FEDERALIST NO. 48, *supra* note 18, at 254 (James Madison) (quoting THOMAS JEFFERSON, NOTES ON VIRGINIA (1784)).

<sup>103</sup> THE FEDERALIST NO. 51, *supra* note 18, at 264 (James Madison).

<sup>104</sup> THE FEDERALIST NO. 48, *supra* note 18, at 254 (James Madison) (describing the Pennsylvania Council of Censors, which had the duty of investigating whether branches of government had violated the principle of separation of powers).

<sup>105</sup> James Madison described how the state and federal governments would compete for the people’s affections in THE FEDERALIST NO. 46, *supra* note 18, at 239. *See also* Todd E. Petrys, *Competing for the People’s Affection: Federalism’s Forgotten Marketplace*, 56 VAND. L. REV. 329, 336 (2003). But this also provides an apt description of how the political branches seek to resolve their disputes by resort to the electorate.

<sup>106</sup> The Framers defended the Constitution as “simultaneously an embodiment of majority rule and an institutional mechanism which embraced various salutary restraints on the majority.” Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in HOW DEMOCRATIC IS THE CONSTITUTION? 102, 102 (Robert A. Goldwin & William A. Schambra eds., 1980).

assemblies claimed the right to direct their representatives how to vote.<sup>107</sup> The Framers were alarmed by the “democratic despotism” they viewed as threatening traditional property rights and undermining respect for the rule of law.<sup>108</sup> Many American elites came to believe that, as Hamilton expressed it, while “the people commonly *intend* the public good,” they did not always “*reason right* about the *means* of promoting it.”<sup>109</sup>

Consequently, the Framers rejected the idea that elected representatives should be bound by the electoral mandates of their constituents.<sup>110</sup> Unlike in a “pure democracy,” the American republic would:

[R]efine and enlarge the public views, by passing them 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. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.<sup>111</sup>

Thus, the Framers took what is now called a Civic Republican view of political deliberation, which denies that “decisions about values are merely

<sup>107</sup> MORGAN, *supra* note 47, at 275-76; WOOD, *supra* note 47, at 404.

<sup>108</sup> WOOD, *supra* note 47, at 404. During the Constitutional Convention, Elbridge Gerry of Massachusetts complained that “[t]he evils we experience flow from the excess of democracy.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48 (Max Farrand ed., 1966). Americans who viewed themselves as the natural leaders of society were no doubt taken aback by the men without education or status elected to the state assemblies in the post-Revolutionary period. See FRITZ, *supra* note 13, at 4-5; RAKOVE, *supra* note 59, at 121; WOOD, *supra* note 47, at 404; Michael Parenti, *The Constitution as an Elitist Document, in HOW DEMOCRATIC IS THE CONSTITUTION?*, *supra* note 106, at 39, 41-43.

<sup>109</sup> THE FEDERALIST NO. 71, *supra* note 18, at 362 (Alexander Hamilton).

<sup>110</sup> THE FEDERALIST NO. 10, *supra* note 18, at 51 (James Madison) (“[The] difference between a democracy and a republic [is] . . . the delegation of the government, in the latter, to a small number of citizens elected by the rest.”); see also Keith Werhan, *Popular Constitutionalism, Ancient and Modern*, 46 U.C. DAVIS L. REV. 65, 75 (2012) (“The American framers expected . . . elected representatives, as ‘trustees’ of the People, to exercise their independent judgment of the public good, instead of channeling the will of their constituents.”).

<sup>111</sup> THE FEDERALIST NO. 10, *supra* note 18, at 51 (James Madison); see also THE FEDERALIST NO. 57, *supra* note 18, at 290 (James Madison) (“The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society . . .”); THE FEDERALIST NO. 71, *supra* note 18, at 362 (Alexander Hamilton) (“When occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.”).

matters of taste” and “assumes that ‘practical reason’ can be used to settle social issues.”<sup>112</sup> They envisioned deliberation as allowing judgment and reason to prevail over private interests, resulting in legislation for the public good.<sup>113</sup> To be sure, elected representatives were bound by the people’s constitutional commands. In addition, legislators were expected to bring their knowledge of the experiences and needs of their constituents to bear in national debates.<sup>114</sup> But outside of clear constitutional constraints, the people’s agents would exercise independent judgment in pursuing what they believed to be the public good.

Moreover, political deliberation about the public good would, in turn, improve the people’s own understanding of their true interests.<sup>115</sup> This was not simply because representatives would be “better” citizens, but because they would have the time and information to engage in “collective reasoning about common concerns.”<sup>116</sup> At the same time, political debate would prompt input from political constituencies as issues and policies came to the fore, creating a deliberative dialectic between the people and their representatives.<sup>117</sup>

To accomplish these lofty goals, the Framers created a national legislature designed to attract “public-spirited members” and encourage reasoned deliberation about the public good.<sup>118</sup> The key mechanisms for fostering public-regarding deliberation were bicameralism and presentment. Three political institutions—the House of Representatives, the Senate, and the Presidency—or a two-thirds majority of each house of Congress would need to agree on the enactment of new law.<sup>119</sup> In addition, each institution would bring distinct perspectives to the task based on their different constituencies, ranging

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<sup>112</sup> Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32 (1985).

<sup>113</sup> *Id.* at 31-32; see also CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 15 (1990).

<sup>114</sup> Bessette, *supra* note 106, at 107-08; Alfred F. Young, *Conservatives, the Constitution, and the “Spirit of Accommodation,”* in *HOW DEMOCRATIC IS THE CONSTITUTION?*, *supra* note 106, at 140-41.

<sup>115</sup> Sunstein, *supra* note 112, at 31 (“Politics . . . was not a scheme in which people impressed their private preferences on the government. It was instead a system in which the selection of preferences was the object of the governmental process.”).

<sup>116</sup> Bessette, *supra* note 106, at 105.

<sup>117</sup> Cf. Bruce Ackerman, *De-Schooling Constitutional Law*, 123 YALE L.J. 3104, 3116 (2014) (“From the time of the founding, higher lawmaking in America has neither been an elite construction nor the simple reflex of grass-roots mobilization. It has been the product of an ongoing dialogue between transformative leaders and ordinary Americans, culminating in a series of self-conscious popular decisions by the voters in support of the new regime.”); Sunstein, *supra* note 112, at 47 (discussing the “hybrid conception of representation, in which legislators were neither to respond blindly to constituent pressures nor to undertake their deliberation in a vacuum”).

<sup>118</sup> MORGAN, *supra* note 47, at 305.

<sup>119</sup> U.S. CONST. art. I, § 7.

from the local interests represented by each member of the House to the national interests represented by the President.<sup>120</sup> By providing a voice to different interests, the Framers sought to improve deliberation and reduce the likelihood that Congress would pass bad laws “through haste, inadvertence, or design.”<sup>121</sup>

Moreover, the “representative,” rather than pure “agent,” character of elected officials encourages reason-giving in debates about the public good. Elected officials cannot merely cite the desires of their constituents. They must convince both their fellow representatives and their constituents of the wisdom of their views. And because the legislature does not merely aggregate the desires of various constituencies, legislative acts are not the acts of the sovereign people. Rather, they are acts of duly elected representatives, pursuing what they believe to be the interests of the people.

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In sum, the Framers were committed to the idea that the sovereignty of the American republic would be lodged with the people rather than in the government. 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 acts on behalf of the sovereign. Deliberation by elected representatives both apprised the people of their agents’ 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 laws against constitutional challenges. This is rarely controversial and has elicited virtually no attention by courts or

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<sup>120</sup> The President’s limited veto played a key role in fostering deliberation 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 . . . .” THE FEDERALIST NO. 73, *supra* note 18, at 371 (Alexander Hamilton). The President could bring a national perspective to bear on proposed legislation and prompt further deliberation in Congress over proposed policies. *Id.*; ROBERT J. SPITZER, THE PRESIDENTIAL VETO: TOUCHSTONE OF THE AMERICAN PRESIDENCY 17 (1988) (“A revisionary power is meant as a check to precipitate, to unjust, and to unconstitutional laws.”). It is noteworthy that although the President may veto a bill for any reason, the Constitution expressly requires him to *give* a reason. U.S. CONST. art. I, § 7, cl. 2 (“If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.”).

<sup>121</sup> THE FEDERALIST NO. 73, *supra* note 18, at 372 (Alexander Hamilton).

scholars.<sup>122</sup> Indeed, some scholars suggest that government officials need not demonstrate Article III standing when defending their laws.<sup>123</sup> When the Supreme Court has addressed the question at all, it has referred to “a State[’s] . . . interest” in the “enforcement” and “constitutionality” of its laws.<sup>124</sup> The Court has added that a State’s authority “to create a legal code” gives it a “‘direct stake’ . . . in defending the standards embodied in that code.”<sup>125</sup>

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 misconstrued the basis of government officials’ standing to defend laws and has encouraged assertions of standing by ideological plaintiffs claiming to represent the sovereign. The American principle of popular sovereignty suggests that the executive has a unique role in defending laws based not on its ability to speak for the sovereign or a unitary government, but based on the obligation set forth in Article II and state constitutional analogues to “take Care that the Laws be faithfully executed.”<sup>126</sup> This duty requires the executive to exercise judgment in defense of sovereign interests, but does not give the executive the power to play the sovereign’s part in court.

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<sup>122</sup> 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 a defendant’s standing is generally not controversial, and the government is usually a defendant in cases involving constitutional challenges to a law. See Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1551-52 (2012) (“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.”).

<sup>123</sup> See, e.g., Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 627 (2005) (“Federal courts regularly adjudicate government enforcement actions that would lack ‘injury in fact’ if brought by private plaintiffs.”).

<sup>124</sup> *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (“[A] State clearly has a legitimate interest in the continued enforceability of its own statutes . . . .”); *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (“[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.”).

<sup>125</sup> *Diamond*, 476 U.S. at 65.

<sup>126</sup> U.S. CONST. art. II, § 3; Williams, *supra* note 19, at 639 (identifying similar provisions in state constitutions).



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.’”<sup>127</sup> 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.<sup>128</sup> Scholars have long complained that the Court’s standing jurisprudence is incoherent, inconsistent in its application, and value-laden.<sup>129</sup> This Article does not engage the debate over whether the Court’s standing jurisprudence is too restrictive or constitutionally compelled.<sup>130</sup> Rather, it argues that whether we accept the Court’s view of standing or a less rigorous test, the standing of government officials to defend and enforce laws stems from express constitutional commitments, not the power to speak for the sovereign.

Notwithstanding the critiques of standing doctrine, the Court has been relatively consistent in articulating its three basic elements,<sup>131</sup> even if courts apply them inconsistently. 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

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<sup>127</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (citing U.S. CONST. art. III, § 2).

<sup>128</sup> *Allen v. Wright*, 468 U.S. 737, 750-51 (1984); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 76-77 (2007) (listing the “constellation of [justiciability] constraints” derived from the “Cases” or “Controversies” requirement of Article III). In addition to Article III standing, the Court has in the past recognized a form of “prudential” standing. But in *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386-88 (2014), the Court overturned much, if not all, of its prudential standing jurisprudence.

<sup>129</sup> *E.g.*, Elliott, *supra* note 21, at 466-67 (describing criticisms regarding the difficulties in applying standing doctrine); Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine’s Dirty Little Secret*, 107 NW. U. L. REV. 169, 214 (2012) (“Much, if not most, of the public law professoriat regards the Article III standing doctrine as intellectually bankrupt.”).

<sup>130</sup> *See, e.g.*, Elliott, *supra* note 21, at 468 (arguing standing doctrine does not serve the separation-of-powers goals the Court seeks to vindicate); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (arguing the injury-in-fact test is not compelled by Article III); Siegel, *supra* note 128, at 75 (arguing standing doctrine unreasonably constrains courts); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 166-68 (1992) (arguing standing doctrine lacks support in the text or history of Article III); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1418-25 (1988) (arguing standing doctrine lacks an adequate historical basis).

<sup>131</sup> One exception is whether an injury must be “personal” or “particularized,” and whether there is a difference. Another is that the courts relax certain elements of standing in “procedural rights” cases, which are not relevant here. *See* Lee & Ellis, *supra* note 129, at 199.

hypothetical.”<sup>132</sup> Second, “[t]he injury must be ‘fairly’ traceable to the challenged action.”<sup>133</sup> Third, “relief from the injury must be ‘likely’ to follow from a favorable [judicial] decision.”<sup>134</sup> In short, a party 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.”<sup>135</sup> A mere “disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III’s requirements.”<sup>136</sup>

While most disputes over standing concern whether a plaintiff may ask a federal court to adjudicate its claim, Article III demands that an actual case or controversy “persist throughout all stages of litigation.”<sup>137</sup> Consequently, the party seeking standing to appeal a judicial decision must meet the same requirements of standing as the party that files a complaint in the court with initial jurisdiction.<sup>138</sup> The appellant must show that it is injured by the judgment it seeks to appeal.<sup>139</sup> The focus therefore shifts from the harm caused by the defendant to the plaintiff, to the harm caused by the judicial order to the appellant.<sup>140</sup>

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. The plaintiffs who challenged laws prohibiting same-sex marriage, for example, typically alleged that they sought to marry, that they were injured by their inability to marry, that their injury was traceable to the law prohibiting same-sex marriage, and that a court order enjoining the law’s enforcement would remedy their injury.<sup>141</sup> If the trial court agrees with the plaintiff’s claims on the merits and declares the law unconstitutional, the party seeking review of the court’s decision must then

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<sup>132</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotation marks omitted); see also *Allen*, 468 U.S. at 751 (“The injury alleged must be, for example, ‘distinct and palpable,’ . . . and not ‘abstract’ or ‘conjectural’ or ‘hypothetical . . . .’”).

<sup>133</sup> *Allen*, 468 U.S. at 751.

<sup>134</sup> *Id.*

<sup>135</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013).

<sup>136</sup> *Id.* (citation omitted).

<sup>137</sup> *Id.* (citing *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013)).

<sup>138</sup> *Id.* (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

<sup>139</sup> See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989) (holding that a lower court’s declaratory judgment constituted a legally cognizable injury).

<sup>140</sup> *Id.* at 623-25 (analyzing the harm a lower court’s order inflicted on the appellant). 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.* at 618 (“Although respondents would not have had standing to commence suit . . . [p]etitioners have standing to invoke the authority of a federal court . . .”).

<sup>141</sup> See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 929-30 (N.D. Cal. 2010) (summarizing plaintiff’s case challenging California’s Proposition 8), *aff’d sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

show that it is injured by the judicial decision and that the appellate court can redress this injury.<sup>142</sup>

Ordinarily in such cases, the appellant is either the state whose law has been declared unconstitutional or the executive officials named as defendants based on their responsibility for enforcing the law.<sup>143</sup> Regardless of who the named defendant or appellant is, executive officials typically bring the appeal.<sup>144</sup> The appellant's standing is not controversial, based on what the Court has described as "a State . . . interest" in the enforceability of its laws.<sup>145</sup> But what exactly does the Court mean by "a State" in a republic based on popular sovereignty? The answer to this question is key 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 . . . interest." It might mean (1) the interest of the sovereign—the political community that wields ultimate authority in the United States or one of the fifty states; or (2) the interest of the government created and maintained by the people in one of those sovereign states. These are two distinct interests in a republic founded on the principle of popular sovereignty. This section addresses each in turn.

#### 1. The Sovereign's Interests in Defending Its Laws

One could hardly dispute that a sovereign has an interest in defending and enforcing its laws, including the laws of its agents. 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 do the sovereign people have an interest in upholding—the ordinary law or the Constitution? There can be only one answer: the sovereign's interest lies with the Constitution.<sup>146</sup>

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 . . . the State Governments should be bound, and to which the State Constitutions should be made to conform."<sup>147</sup> Thus, because

<sup>142</sup> See *Hollingsworth*, 133 S. Ct. at 2661 (citing *Already*, 133 S. Ct. at 726) ("Article III demands that an 'actual controversy' persist throughout all stages of litigation.").

<sup>143</sup> This is generally merely a function of sovereign immunity and its exceptions, discussed *infra* note 151 and accompanying text.

<sup>144</sup> See *Hollingsworth*, 133 S. Ct. at 2664 ("[A State's] agent is typically the State's attorney general.").

<sup>145</sup> See *id.*; *Diamond v. Charles*, 476 U.S. 54, 62 (1986) ("[A] State has standing to defend the constitutionality of its statute.").

<sup>146</sup> THE FEDERALIST NO. 78, *supra* note 18, at 393 (Alexander Hamilton) ("No legislative act . . . contrary to the Constitution, can be valid.").

<sup>147</sup> *Chisholm v. Georgia*, 2 U.S. 419, 470-71 (1793) (opinion of Jay, C.J.).

the people of the states ratified the Constitution as their supreme law,<sup>148</sup> state sovereigns can have no interest in any law that conflicts with it: “To deny this, would be to affirm, that the deputy is greater than his principal . . . .”<sup>149</sup>

This explains why, in *Ex parte Young*,<sup>150</sup> 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 responsibility to the supreme authority of the United States.”<sup>151</sup> A state has no such power because a state sovereign has no interest in laws 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, a claim that a law is unconstitutional does not make it so. In such cases there is usually a dispute, with government officials arguing that the law 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 people.<sup>152</sup>

The judiciary has the strongest claim to “say what the law is.”<sup>153</sup> But, notably, this remarkable power is confined to the necessity of deciding specific “Cases” and “Controversies.”<sup>154</sup> As Hamilton wrote, “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 assigned to their authority.”<sup>155</sup> 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 was “declared in the [C]onstitution.”<sup>156</sup> Thus, judges in deciding cases “ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.”<sup>157</sup> This did not make judges “arbiters” of the Constitution; rather, they were simply fulfilling their appointed duties and applying the superior law as they

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<sup>148</sup> MORGAN, *supra* note 47, at 277 (explaining how each state legislature consented to popular state conventions for ratifying the Constitution); U.S. CONST. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land . . .”).

<sup>149</sup> THE FEDERALIST NO. 78, *supra* note 18, at 393 (Alexander Hamilton).

<sup>150</sup> 209 U.S. 123 (1908).

<sup>151</sup> Virginia Office for Prot. and Advocacy v. Stewart, 131 S. Ct. 1632, 1638 (2011) (quoting *Ex parte Young*, 209 U.S. at 159-60).

<sup>152</sup> See *supra* notes 79-82 and accompanying text.

<sup>153</sup> Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>154</sup> U.S. CONST. art. III, § 2.

<sup>155</sup> THE FEDERALIST NO. 78, *supra* note 18, at 394 (Alexander Hamilton).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

understood it.<sup>158</sup> 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.<sup>159</sup> No part of the government has the power to announce the sovereign's views.<sup>160</sup>

To be clear, the people's agents must interpret the Constitution in discharging their duties, and ideally they will always pursue the sovereign people's highest interest. Indeed, elected officials must take an oath to support the Constitution.<sup>161</sup> But all constitutional interpretations by the executive, the legislature, and even the judiciary, are merely provisional, subject to debate, reappraisal, and the possibility of popular intervention, either at the ballot box, through public agitation, or in demands for formal constitutional amendment.<sup>162</sup>

Therefore, standing to enforce, defend, and appeal judicial decisions adverse to ordinary law cannot depend on the sovereign's interest in the constitutionality of those laws because we cannot be certain of the sovereign's interest beyond the narrow confines of clear constitutional text and long-recognized constitutional commitments.

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 executive officials defending a law truly represented the sovereign, how could a court declare the law unconstitutional? It would mean either that the executive was wrong about the sovereign's interests, which would mean the executive had no standing in the first place,<sup>163</sup> or the court's view of the

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<sup>158</sup> WOOD, *supra* note 47, at 461 (quoting Justice Iredell).

<sup>159</sup> Thus, although the case or controversy requirement is sometimes thought of as a means of separating the powers of government, *see* *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (explaining how the 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.

<sup>160</sup> THE FEDERALIST NO. 78, *supra* note 18, at 393-94 (Alexander Hamilton).

<sup>161</sup> U.S. CONST. art. II, § 1, cl. 8; *id.* art. VI, cl. 3.

<sup>162</sup> Article V requires the participation of Congress or the state legislatures to formally amend the Constitution, U.S. CONST. art. V, but the people can lobby their representatives to utilize the process.

<sup>163</sup> 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). 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 view. But this is the question the courts must address in any constitutional challenge, and standing, as currently understood, cannot depend on the merits of a suit. *See* *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997) ("Whether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can

Constitution is superior to the sovereign's, which is impossible. Rather, each branch interprets the Constitution in pursuit of its assigned duties, but none has the power to announce the sovereign people's view.

Thus, in a republic founded on the principle of popular sovereignty, the sovereign's interest is unavailable as a basis for standing to defend laws against constitutional challenge. Public officials have no special authority to declare the sovereign people's interest.

## 2. The Government's Interest in Defending Its Laws

If no party has the power 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 "constitutionality" of its laws based on its authority "to create a legal code"<sup>164</sup> might refer to the government's interest in defending laws that it enacts. The government is manifest in the institutions and elected officials, political appointees, and civil servants that work on behalf of the people and express their constitutional views in discharging their duties.<sup>165</sup> Therefore, the government's interest should be more easily ascertainable than the sovereign people's. Nevertheless, the government interest also fails as a basis for executive standing to defend laws.

### a. *The Qualified Nature of the Government's Interest*

To begin, in a republic founded on the principle of popular sovereignty, the government can have no interest in an unconstitutional law.<sup>166</sup> 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 enacted law with its higher interest in avoiding unconstitutional acts.

Of course, most of the time, government officials believe their acts are constitutional. Nevertheless, they must recognize that the sovereign people, whose constitutional views are supreme,<sup>167</sup> may not share their views.

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demonstrate that he will succeed on the merits. Otherwise, every unsuccessful plaintiff will have lacked standing in the first place.").

<sup>164</sup> See *supra* notes 124-25125 and accompanying text.

<sup>165</sup> See *Ex parte Young*, 209 U.S. 123, 174 (1908) (Harlan, J., dissenting) (asserting that "the intangible thing called a state, however extensive its powers," can only be represented "by and through its officers").

<sup>166</sup> *Id.* at 159 ("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.").

<sup>167</sup> See *supra* note 82 and accompanying text (quoting Madison, who argued that the people, and the people alone, provide the Constitution with legitimacy and are the only body that could theoretically expound its meaning).

Accordingly, government officials 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 . . . .”<sup>168</sup> Thus, the government’s interest in defending its laws is qualified by the higher sovereign interest that it must always protect.

One might argue that any law passed by Congress 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 it 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 declare the government interest when interpreting the Constitution in a judicial challenge.<sup>169</sup> Such a proceduralist approach, however, is only available when all sovereignty rests in the government. 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.<sup>170</sup>

Most scholars agree, for example, that the executive need not defend laws that are unconstitutional under settled Supreme Court doctrine<sup>171</sup> or clear constitutional text.<sup>172</sup> Indeed, Congress has been known to pass such laws, and no one complains when the executive ignores them.<sup>173</sup> It is understandable for the executive to conclude that the law is not in the interest of the sovereign people. Moreover, there are a variety of other factors that might diminish the government interest in defending certain laws. When there has been a dramatic

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<sup>168</sup> THE FEDERALIST NO. 78, *supra* note 18, at 393 (Alexander Hamilton).

<sup>169</sup> This also suggests the executive has the power to interpret the Constitution when executing the law.

<sup>170</sup> *Ex parte Young*, 209 U.S. at 159 (stating that an unconstitutional act enforced by a state official “is simply an illegal act upon the part of a state official”).

<sup>171</sup> See Johnsen, *supra* note 1, at 7, 10; Chrysanthe Gussis, Note, *The Constitution, the White House, and the Military HIV Ban: A New Threshold for Presidential Non-Defense of Statutes*, 30 U. MICH. J.L. REFORM 591, 607-08 (1997) (acknowledging *United States v. Lovett*, 328 U.S. 303 (1946), where President Roosevelt did not defend a law he believed to be unconstitutional in court and “no Justice suggested that the President had overstepped his authority, or even acted improperly, by refusing to defend the statute”).

<sup>172</sup> If Congress passes a law inviting the President to serve a five-year term, for example, the President should decline the invitation. See U.S. CONST., art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years . . .”).

<sup>173</sup> See Johnsen *supra* note 1, at 8 (describing how “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,” and Presidents routinely ignore them (citations omitted)).

change in public opinion about the law's appropriateness;<sup>174</sup> when plaintiffs raise non-frivolous constitutional claims accepted by one or more state or federal courts; when elected officials are divided in their constitutional views; the government's interest in defending the law might be tempered significantly.<sup>175</sup>

Thus, when sovereignty is separated from the government, the government interest in defense of its laws is qualified by its position as the agent of the sovereign people.

b. *The Absence of a Single Government Interest*

Each government official will reach his or her own conclusion about the government interest based on the strength of their constitutional views and the other values 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 powers to protect popular sovereignty. After all, the Framers *wanted* the branches to compete with each other.<sup>176</sup> It is hard to imagine such a separated government having a single interest.<sup>177</sup>

Indeed, inter-branch disagreements over law and constitutional obligations are commonplace.<sup>178</sup> In any legal dispute involving the government, executive branch officials make arguments to the judiciary and the judiciary accepts or rejects their views. Courts enjoin executive officials from taking certain actions and hold them in contempt of court for failure to comply with their orders, while executive officials petition courts for writs of mandamus to compel

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<sup>174</sup> See Sant'Ambrogio, *supra* note 3, at 381-82 (establishing the change in public opinion as a key ingredient in the Obama administration's decisions not to enforce "Don't Ask, Don't Tell," DOMA, or federal marijuana statutes in states that legalized marijuana).

<sup>175</sup> There is a substantial literature considering the factors that might warrant executive non-defense or non-enforcement notwithstanding a general duty to defend. See, e.g., Aziz Z. Huq, *Enforcing (But Not Defending) Unconstitutional Laws*, 98 VA. L. REV. 1001 (2012); Johnsen, *supra* note 1; Sylvia A. Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 STAN. J. C.R. & C.L. 1 (2007). A full analysis of the factors that weaken the government's interest in a law is beyond the scope of this paper. For present purposes it is enough to show that the government's interest may vary from case to case.

<sup>176</sup> THE FEDERALIST NO. 51, *supra* note 18, at 264 (James Madison) ("Ambition must be made to counteract ambition.").

<sup>177</sup> This does not mean there are three distinct governments comprising the United States, but merely that there is no single interest of that government. Cf. *United States v. Providence Journal Co.*, 485 U.S. 693, 701 (1988) ("[E]ven when exercising distinct and jealously separated powers, the three branches are but 'co-ordinate parts of one government.'" (citation omitted)).

<sup>178</sup> See Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 910-11 (1991) (chronicling the various ways in which branches litigate against each other).



action by other judges.<sup>179</sup> Congress issues subpoenas to executive officials and they sometimes resist those subpoenas in court.<sup>180</sup> The fact that one branch of government not infrequently declares the acts of the other two unconstitutional belies the idea that the Government of the United States has a single interest.

Nor are inter-governmental disagreements always between the branches. Different parts of the executive branch sometimes disagree about the sovereign's interests.<sup>181</sup> The Solicitor General, for example, does not always concur in the legal positions of executive branch agencies, particularly the independent agencies: "Substantive conflicts arise every year in cases argued before the Court."<sup>182</sup> 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.<sup>183</sup> The Framers would likely be pleased by the abundance of constitutional views among government officials.

In sum, there is no single government interest in a republic of separated governmental powers. Each elected official must judge the government's interest in light of his or her own constitutional views. Therefore, we must look elsewhere for the standing of executive officials to defend the law.

### C. *The Executive's Take Care Duty and Standing to Defend*

The executive does not need to claim an injury to the sovereign or the government to defend laws because the executive has a duty under Article II and its state constitutional analogues to "take Care that the Laws be faithfully executed."<sup>184</sup> The Take Care Clause gives the executive an interest in

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<sup>179</sup> *Id.* at 911.

<sup>180</sup> See Grove & Devins, *supra* note 5 (discussing inter-branch disputes over congressional subpoenas). It is generally accepted that the executive need not defend laws that infringe executive power, belying the idea that there is a single government interest. Johnsen, *supra* note 1, at 23 ("[T]he President should decline to enforce a law . . . when a statute infringes on presidential power." (citation omitted)).

<sup>181</sup> 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."); Herz, *supra* note 178, at 907 ("[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.").

<sup>182</sup> Devins, *supra* note 181, at 259. 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.

<sup>183</sup> See *supra* notes 118-21 and accompanying text.

<sup>184</sup> U.S. CONST. art. II, § 3; Williams, *supra* note 19 (recognizing the state analogues). Article II's Vesting Clause, U.S. CONST. art. II § 1, cl. 1, which vests "executive Power" in the President, may also provide the President with standing to enforce and defend laws,

enforcing, defending, and appealing adverse judgments when the executive believes such actions are necessary to ensure faithful execution of the law. Moreover, anything that interferes with the executive's ability to fulfill its Article II duty, as the executive understands it, injures the executive in a concrete, actual or imminent, and personal way.

Accordingly, the executive has standing to bring criminal or civil enforcement actions whenever a law is violated that the executive believes it has a duty to ensure is faithfully executed.<sup>185</sup> Similarly, when the constitutionality of a law is challenged, the executive has standing to defend the law whenever it believes it has a duty to enforce the law. And if the lower court strikes down the law as unconstitutional, the executive has standing to appeal the order whenever it believes the Take Care Clause requires the law's continued execution. In each case, there is an actual or imminent injury to the executive's ability to take care that the law is faithfully executed. Thus, the Take Care Clause provides the executive with standing under even the narrowest conception of an Article III "case" or "controversy."<sup>186</sup> The Take Care Clause turns what for others would be a generalized grievance into a concrete, actual or imminent, and personal injury to the executive. It is the executive's standing trump card.

At least one commentator has argued that defending a 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."<sup>187</sup> 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.<sup>188</sup> That is, the President *must* defend a law if he wishes to ensure its execution. This is true regardless of whether the constitutional challenge arises in an enforcement action brought by the government or a suit between two private parties.<sup>189</sup> The

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inasmuch as execution of the law is part of executive power, but it is unnecessary to look to the vesting clause given the Take Care Clause's express and specific directive.

<sup>185</sup> Cf. 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, 2256 (1999) (arguing that Article II provides the government with the power to pursue criminal prosecutions irrespective of Article III).

<sup>186</sup> See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992).

<sup>187</sup> Gorod, *supra* note 5, at 1219-21.

<sup>188</sup> This Article uses the male pronoun when referring to the President because, to date, they have all been men.

<sup>189</sup> 28 U.S.C. § 2403(a) (2012) ("[W]herein 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."). For examples of executive defense of laws without public rights of action, see *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009); *Cutter v. Wilkinson*, 423 F.3d

law will not “remain[] in operation” for long if it is not defended and any adverse judgments appealed.<sup>190</sup>

But faithful execution of the law does not require the executive to enforce and defend all laws. Because the executive’s highest duty is to the sovereign people, the executive may choose not to enforce or defend a clearly unconstitutional law.<sup>191</sup> In such cases, the executive is protecting the sovereign’s interest by ensuring the execution of the Constitution over a conflicting subordinate law.<sup>192</sup> In other cases, if the executive believes the law is unconstitutional but is not certain of the sovereign’s views, the executive may enforce but not defend the law.<sup>193</sup> Uncertainty about the sovereign’s views and respect for the coordinate branches of government may mean the best way to “take care” is to enforce the law while presenting arguments to the judiciary that the law is unconstitutional. Because the executive’s highest duty is to the sovereign, but the sovereign’s constitutional views may not be known, the executive must exercise judgment and restraint in juggling potentially conflicting legal obligations. Whether the executive enforces and defends, enforces but does not defend, or neither enforces nor defends, the executive is fulfilling its “take care” duties as it understands them.

#### D. *Objections, Responses, and Limitations*

This Article contributes to a long-running debate over whether the Framers envisioned the President refusing to enforce laws he believed were unconstitutional. Professor Christopher May argues that in most cases such a power is incompatible with the Framers’ rejection of the royal prerogative enjoyed by English monarchs to suspend laws.<sup>194</sup> Rather, the Framers confined

579 (6th Cir. 2005); *Turner v. D.C. Bd. of Elections & Ethics*, 354 F.3d 890 (D.C. Cir. 2004).

<sup>190</sup> Gorod, *supra* note 5, at 1220.

<sup>191</sup> People will not always agree on everything that is “clearly unconstitutional,” but it certainly includes actions contrary to clear constitutional text (e.g., granting the President a five-year term) and longstanding constitutional commitments (e.g., separate but equal educational facilities).

<sup>192</sup> See THE FEDERALIST NO. 78, *supra* note 18, at 394 (Alexander Hamilton) (arguing that the Constitution takes precedence over any statute); WOOD, *supra* note 47, at 461 (proclaiming the constitution to be “the *fundamental un repealable* law” that takes precedence over any statute (quoting Justice Iredell)). I do not go as far as Devins and Prakash, who suggest that unconstitutional laws are “not law.” Devins & Prakash, *supra* note 3, at 532-34. My point is merely that they are inferior law in conflict with a superior law. But the result may be no different.

<sup>193</sup> See Hall, *supra* note 122, 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.”).

<sup>194</sup> May, *supra* note 3, at 986-88 (“If the Executive does possess a limited right of noncompliance, to be invoked properly four principles would have to be satisfied. . . .

the President to a limited veto that could be exercised only when Congress presented him with a bill.<sup>195</sup> Those who defend presidential non-enforcement contend that it is distinct from the royal prerogative, inasmuch as the President must identify a constitutional defect in the law, while the King could suspend any law for any reason.<sup>196</sup> In addition, they point to other constitutional obligations, such as the Oath Clause, which requires the President to uphold the Constitution.<sup>197</sup>

In truth, we search in vain for statements by the Framers expressly approving or disapproving presidential non-enforcement or non-defense based on constitutional objections.<sup>198</sup> However, it is abundantly clear that the Framers withheld sovereignty from the government and separated government powers to check unconstitutional acts.<sup>199</sup> Some degree of departmentalism—i.e., the duty of each branch, not just the judiciary, to independently interpret the Constitution and act on those interpretations to protect the people—is inherent in a constitutional structure in which all government agents are subordinate to the people.<sup>200</sup> Thus, popular sovereignty provides a way of

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Without these safeguards, the narrow privilege of noncompliance could easily become a modern equivalent of the suspending power.”).

<sup>195</sup> *Id.* at 987 (“The Constitution gave the President other means of dealing with this situation, most notably by allowing him to exercise a qualified veto.”).

<sup>196</sup> *See, e.g.,* Devins & Prakash, *supra* note 3, at 536 (“The President’s obligation to leave unconstitutional laws unenforced . . . is a duty arising out of the President’s oath to preserve, protect, and defend the Constitution while the [Crown’s discretionary power to suspend] could be exercised whether or not the Crown believed the law to be consistent with the English Constitution.”). It was, after all, the King’s law. MORGAN, *supra* note 47, at 17, 19 (“And in England, the legal fictions that accompanied the everyday workings of the king’s government endowed him with all the attributes of divinity. . . . And like God he was perfect: he could do no wrong, so no action at law could ever lie against him.”).

<sup>197</sup> *See, e.g.,* Devins & Prakash, *supra* note 3, at 521-22.

<sup>198</sup> *See* May, *supra* note 3, at 881. The closest Professor May comes in his exhaustive study is an 1806 opinion by Supreme Court Justice William Paterson, who had been among the Framers. *Id.* at 884. In *United States v. Smith*, 27 F. Cas. 1192 (C.C.D.N.Y. 1806), the defendants claimed that President Jefferson had authorized their actions in violation of the Neutrality Act and sought to postpone their trial until they could secure testimony from a member of the Jefferson Administration. May, *supra* note 3, at 884. Paterson denied the motion, explaining that, “[t]he president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure.” *Id.* (quoting *Smith*, 27 F. Cas. at 1230). Leaving aside the peculiar circumstances of this case, there is nothing inconsistent with Paterson’s opinion and the view that the President may, consistent with his take care duty, not enforce an unconstitutional law. This does not suspend the law or trump the court’s own interpretation of what the law requires.

<sup>199</sup> *See supra* Section I.C.

<sup>200</sup> *See* KRAMER, *supra* note 17, at 201 (“If different interpretations are put upon the Constitution by the different departments, the people is the tribunal to settle the dispute. Each of the departments is the agent of the people, doing their business according to the

understanding the Take Care Clause based on the location of sovereign power in the American republic.

Moreover, the description of the executive's take care duty in light of popular sovereignty should be more palatable to those who fear the strict departmentalist position that the President should never enforce a law he believes is unconstitutional.<sup>201</sup> Popular sovereignty suggests a more limited role for executive non-enforcement and non-defense than pure departmentalism. Because the executive speaks for neither the sovereign nor the whole government, the President must show deference to the people's interpretive authority and the acts of other branches in their proper spheres. Consequently, executive decisions not to enforce laws should be exceedingly rare. People will disagree on where to draw the line, but the President should have great confidence in his constitutional views, and that they are shared by the people, or would be upon deliberative reflection. Even non-defense should be based on deep constitutional commitments rather than trivial or technical questions about which the people are unlikely to form a deliberative opinion.<sup>202</sup> The will of the people cannot be ascertained from snap opinion polling. The Framers designed the republic so that robust deliberation would precede acts on behalf of the sovereign.<sup>203</sup>

Furthermore, it is worth remembering that executive decisions not to enforce or defend laws are not merely theoretical. They are a well-established practice.<sup>204</sup> And even scholars who contend the executive should generally enforce and defend laws recognize exceptions to the rule.<sup>205</sup> Popular sovereignty provides a theoretical framework for understanding why executives act in this way and the function of those actions within our

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powers conferred; and where there is a disagreement as to the extent of these powers, the people themselves, through the ballot-boxes, must settle it." (quoting MARTIN VAN BUREN, *INQUIRY INTO THE ORIGIN AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES* 329-30 (1867)).

<sup>201</sup> Devins & Prakash, *supra* note 3, at 509.

<sup>202</sup> The Obama Administration's decision to not defend DOMA, discussed *infra* in Section III.A, fits the bill. It was based on a deep constitutional commitment to equality and a robust shift in views of same-sex marriage over nearly two decades of public deliberation on the question. See Michael D. Sant'Ambrogio & Sylvia A. Law, Baehr v. Lewin and the Long Road to Marriage Equality, 33 U. HAW. L. REV. 705, 724 (2011); cf. JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY & AMERICAN NATIONAL GOVERNMENT* 55 (1997) (stating that even legislators will not have preexisting opinions on many issues).

<sup>203</sup> See *supra* Section I.C.

<sup>204</sup> See *supra* note 1 (providing recent examples of executive decisions not to defend or enforce law and collecting sources).

<sup>205</sup> See, e.g., Gressman, *supra* note 3, at 384 (recognizing that "the Executive can refuse to defend the constitutionality of a statute" but should not "refus[e] to execute it in the first instance"); May, *supra* note 3, at 987-88 (approving non-enforcement under certain conditions).

constitutional system. Moreover, popular sovereignty provides a more compelling account than either a version of departmentalism that holds the President should never enforce a law he believes is unconstitutional, because his declaration of the federal interest is supreme in law execution; or a theory of congressional-judicial supremacy that asks the President to muzzle his constitutional views and mount insincere legal defenses.

The downside of such executive non-enforcement is that the executive's action may be difficult for another branch to check if it disagrees with the President's constitutional views.<sup>206</sup> Unlike when the President vetoes a bill passed by Congress, Congress cannot directly override an executive decision not to enforce a law based on constitutional objections. To be sure, parties injured by non-enforcement will have standing to challenge the executive's action in court. The judiciary will then have an opportunity to weigh in on the constitutional debate, and a court may order enforcement if it upholds the law's constitutionality.<sup>207</sup> But there may be cases when no party benefits from the law in a concrete and tangible way, and it is therefore difficult to find a party with standing.<sup>208</sup> In addition, litigation can be time consuming, putting important statutory mandates on hold while cases work their way through the courts. Overzealous use of presidential non-enforcement based on constitutional objections could upset and destabilize government policy.<sup>209</sup> Therefore, even if such a power is consistent with the text and structure of the Constitution, it is a power that should be used sparingly.

By contrast, to the extent that the President enforces but does not defend, as discussed more fully below in Section III.A, the courts will retain jurisdiction and other parties can present arguments in defense of the law as amici.<sup>210</sup> The President must accept the judgments of the Supreme Court in the cases it decides out of deference to the Court's responsibility for interpreting the Constitution in "Cases" and "Controversies."<sup>211</sup> Nor are the courts the only check on executive non-enforcement. Congress has a variety of means by

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<sup>206</sup> See Sant'Ambrogio, *supra* note 3, at 407-11.

<sup>207</sup> Even among enthusiastic advocates of departmentalism, few believe that the President can or should ignore a court judgment based on constitutional objections. See, e.g., Devins & Prakash, *supra* note 3, at 532 ("[T]he President must faithfully execute judicial judgments because the power to decide who wins or loses a case rests with those who wield the judicial power. This obligation to enforce judgments exists as an implication of the separation of executive and judicial power.").

<sup>208</sup> Though perhaps we should not worry so much about laws that raise serious constitutional objections without any benefits.

<sup>209</sup> Sant'Ambrogio, *supra* note 3, at 392 (explaining that there is value in the stability of the system, and that Presidential non-enforcement would make the system less stable, as one branch would have greater power to change policy and subject government programs to its whims than the rest).

<sup>210</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013) (crediting "the capable defense of the law by BLAG" as an amicus party).

<sup>211</sup> See *supra* note 207 and accompanying text.

which it can respond to the President's choices,<sup>212</sup> and rare is the President who will stray too far from the people's will. But we do elect our representatives to lead, and the President is the only nationally accountable figure that can.

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In sum and to reiterate, popular sovereignty denies government officials the power to speak for the sovereign in constitutional disputes. Moreover, separation of powers and subordination of the government to the sovereign people mean there is no single and unqualified government interest in defense of its laws. Finally, the executive has standing to enforce and defend laws, including appealing adverse judicial decisions, based on its view of how best to meet its "take care" duties. With this theoretical framework established, the Article now turns to the Supreme Court's treatment of standing to represent sovereign interests.

### III. STANDING JURISPRUDENCE IN THE SHADOW OF POPULAR SOVEREIGNTY

The Supreme Court's Article III standing jurisprudence is perhaps nowhere more muddled than when it comes to executive decisions not to defend laws based on constitutional objections. Using the theory set forth in Part II, this Part assesses the major decisions of the Court addressing: (1) the standing of the executive to defend procedurally, but not substantively,<sup>213</sup> laws the executive believes are unconstitutional; (2) the standing of non-governmental parties to play the executive's traditional role in defending laws when the executive does not; and (3) the standing of the legislature to step into the shoes of the executive to represent a state or the United States in defense of such laws. Although the Court has failed to fully recognize the implications of popular sovereignty, it can never quite escape its long shadow. Consequently, the Court often reaches the right result in individual cases, but for the wrong reasons, making the case law difficult to reconcile.

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

It is 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."<sup>214</sup> Consequently, the decision

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<sup>212</sup> For example, "[n]othing says 'enforce the Act' quite like ' . . . or you will have money for little else.'" *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting). If all else fails, Congress may institute impeachment proceedings. *See infra* note 337.

<sup>213</sup> *See supra* note 2 (explaining the difference between defending procedurally and defending substantively).

<sup>214</sup> *Windsor*, 133 S. Ct. at 2687 (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980)).

by the Obama Administration not to defend the Defense of Marriage Act<sup>215</sup> (“DOMA”) prompted a lively debate about whether the executive should have standing to appeal a judicial decision declaring a law unconstitutional when the President agrees with the court.<sup>216</sup> Some scholars argued that the executive should not have standing in such cases,<sup>217</sup> while others advocated granting standing so long as the executive continued to enforce the law.<sup>218</sup> In *United States v. Windsor*,<sup>219</sup> the Supreme Court held that the executive maintains standing to appeal judicial decisions declaring a law unconstitutional, notwithstanding the executive’s agreement with the lower court, so long as the executive continues to enforce the law.<sup>220</sup> This Part argues that the Court’s decision in *Windsor* is consistent with the theory of standing outlined in Part II.

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

In *Windsor*, Edith Windsor filed a complaint in federal court against the United States seeking a refund of \$363,053 in taxes levied on the estate of her deceased spouse, Thea Spyer.<sup>221</sup> New York recognized their same-sex marriage as valid,<sup>222</sup> but section 3 of DOMA prohibited federal recognition of same-sex marriages for purposes of federal law.<sup>223</sup> Consequently, Windsor did not qualify for the marital exemption from the federal estate tax.<sup>224</sup> Windsor argued that section 3 of DOMA violated her Fifth Amendment right to equal protection of the laws.<sup>225</sup>

<sup>215</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) & 28 U.S.C. § 1738C (2006)), *invalidated in part by Windsor*, 133 S. Ct. 2675.

<sup>216</sup> *See supra* note 1.

<sup>217</sup> *See Grove, supra* note 4, at 1315 (“In . . . nondefense cases, the executive seeks further review simply to obtain a higher court resolution of a constitutional question. Although the executive may have strong political and institutional reasons to seek such a judicial decision, no provision of Article II (or any other part of the Constitution) gives the executive branch standing to obtain a judicial settlement of a constitutional question.” (citations omitted)).

<sup>218</sup> *See Scott, supra* note 4, at 68 (suggesting that “the executive power to enforce but not defend laws that the Executive deems unconstitutional” will “benefit all three branches of government in constitutional litigation”); Young, *supra* note 4, at 498 (“There is room, even as a constitutional matter, for standing rules that take into account the need to counterbalance executive prerogatives of non-defence and non-enforcement.”).

<sup>219</sup> 133 S. Ct. 2675 (2013).

<sup>220</sup> *Id.* at 2686.

<sup>221</sup> *Id.* at 2683.

<sup>222</sup> *Id.*

<sup>223</sup> 1 U.S.C. § 7 (2006), *invalidated in part by Windsor*, 133 S. Ct. 2675 (defining marriage as “a legal union between one man and one woman” for determining the meaning of any Act of Congress).

<sup>224</sup> *Windsor*, 133 S. Ct. at 2683 (quoting 26 U.S.C. § 2056(a) (2012)).

<sup>225</sup> *Id.*



Before the United States' answer was due, Attorney General Eric Holder announced that the Department of Justice would no longer defend DOMA because he and the President had concluded that the statute was unconstitutional.<sup>226</sup> Nevertheless, the Administration pledged to continue enforcing the law—and therefore not recognize same-sex marriages—until either Congress repealed DOMA, or “the judicial branch render[ed] a definitive verdict against the law’s constitutionality.”<sup>227</sup>

Following the Attorney General’s announcement, the district court permitted the House Bipartisan Leadership Advisory Group (“BLAG”) to intervene in defense of the law.<sup>228</sup> When Ms. Windsor moved for summary judgment, both BLAG and the United States moved to “dismiss” her complaint.<sup>229</sup> 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

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<sup>226</sup> See Holder Letter, *supra* note 1, at 1. Holder and the President, writing before the Second Circuit considered *Windsor*, argued that classifications based on sexual orientation should be subject to heightened scrutiny under the Equal Protection Clause. See *id.* at 2-5. Indeed, the Second Circuit held that intermediate scrutiny applied to classifications based on sexual orientation. See *Windsor v. United States*, 699 F.3d 169, 176, 185 (2d Cir. 2012). Consequently, the DOJ would have to argue that Congress’s 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. See Holder Letter, *supra* note 1, at 4 (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988)). Attorney General Holder concluded that the DOJ could not make this argument because the congressional record contained numerous expressions of moral disapproval of gays and lesbians and their intimate relationships, which is “precisely the kind of stereotype-based thinking and animus that the Equal Protection Clause was designed to guard against.” *Id.* at 4.

<sup>227</sup> Holder Letter, *supra* note 1, at 5. Attorney General Holder explained that “[t]his course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.” *Id.*

<sup>228</sup> *Windsor v. United States*, 797 F. Supp. 2d 320, 322 (S.D.N.Y. 2011). BLAG consists of the Speaker of the House, the majority leader, the majority whip, the minority leader, and the minority whip, and voted three-to-two along party lines to defend DOMA. Molly K. Hooper, *House Leaders Voteleaders Vote to Intervene in DOMA Defense*, THE HILL: BRIEFING ROOM (Mar. 9, 2011, 10:43 PM), <http://thehill.com/blogs/blog-briefing-room/news/148521-house-leaders-vote-to-intervene-in-doma-defense> [<http://perma.cc/J4KS-R5U8>].

<sup>229</sup> The United States’ decision to enforce but not defend DOMA created some odd 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 District Court: It argued that the court should agree ‘with Plaintiff and the United States’ and ‘not dismiss’ the complaint. . . . Then, having gotten exactly what it asked for, the United States promptly appealed.” *Windsor*, 133 S. Ct. at 2699 n.1 (Scalia, J., dissenting).

agreement with Windsor) “motion to dismiss.”<sup>230</sup> BLAG and the United States then filed separate notices of appeal.<sup>231</sup>

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.<sup>232</sup> The Second Circuit denied the motion, 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.<sup>233</sup> Ms. Windsor, the United States, and BLAG then all petitioned the Supreme Court for a writ of certiorari.<sup>234</sup> The Court granted the United States’ petition and directed the parties to brief “whether the Executive Branch’s Agreement with the court below that DOMA is unconstitutional deprives this court of jurisdiction to decide the case.”<sup>235</sup>

## 2. The Supreme Court: Standing with the Executive

In a five-to-four decision written by Justice Kennedy, the Supreme Court 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.<sup>236</sup> 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.<sup>237</sup> The Court acknowledged that it would have been “a different case if the

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<sup>230</sup> *Windsor v. United States*, 833 F. Supp. 2d 394, 406 (S.D.N.Y. 2012).

<sup>231</sup> *Windsor*, 699 F.3d at 176.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 176, 181, 188.

<sup>234</sup> Petition for Writ of Certiorari, Bipartisan Legal Advisory Grp. of the U.S. House of Representatives v. Windsor, No. 12-785, 2012 WL 6755143 (Dec. 28, 2012) [hereinafter BLAG’s Petition]; Petition for Writ of Certiorari, United States v. Windsor, No. 12-307, 2012 WL 3991414 (Sept. 11, 2012) [hereinafter United States’ Petition]; Petition for Writ of Certiorari, Windsor v. United States, No. 12-63, 2012 WL 2904038 (July 16, 2012) [hereinafter Windsor’s Petition].

<sup>235</sup> *Windsor*, 699 F.3d 169, cert. granted, 133 S. Ct. 786 (Dec. 7, 2012) (No. 12-307).

<sup>236</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2686-87 (2013) (“[E]ven where ‘the Government largely agree[s] with the opposing party on the merits of the controversy,’ there is sufficient adverseness and an ‘adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party.’” (quoting *INS v. Chadha*, 462 U.S. 919, 940 n.12 (1983))).

<sup>237</sup> *Id.* at 2686 (quoting *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 599 (2007) (plurality opinion)). The Court added, “That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not.” *Id.*

Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling."<sup>238</sup>

For authority, the Court relied primarily on *INS v. Chadha*,<sup>239</sup> in which the Court struck down a "legislative veto" contained in the Immigration and Nationality Act ("INA").<sup>240</sup> 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.<sup>241</sup> 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.<sup>242</sup> 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.<sup>243</sup> 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.<sup>244</sup> Thus, the executive's actions in *Chadha*—enforcing, but not defending the challenged law, and appealing adverse judicial decisions—were virtually identical to the executive's actions in *Windsor*.<sup>245</sup> 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"<sup>246</sup>—i.e., deporting Chadha—"regardless of whether the agency welcomed the judgment."<sup>247</sup>

The *Chadha* Court's "aggrieved party" analysis, however, addressed statutory jurisdiction of the federal courts under 28 U.S.C. § 1252, and not constitutional standing under Article III.<sup>248</sup> Moreover, in a related footnote, the 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."<sup>249</sup> The Court then explained that "[s]uch a

<sup>238</sup> *Id.*

<sup>239</sup> 462 U.S. 919 (1983).

<sup>240</sup> *Id.* at 959.

<sup>241</sup> *Id.* at 925 (quoting 8 U.S.C. § 1254(c)(2) (1982)).

<sup>242</sup> *Id.* at 928.

<sup>243</sup> *Id.* at 930 (explaining that even though the executive submitted a brief in the Court of Appeals arguing against the constitutionality of the INA, it continued to enforce the statute).

<sup>244</sup> *Id.*

<sup>245</sup> The only difference, which is not meaningful, 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—deport Chadha. The executive was only restrained from enforcing the legislative veto in *Chadha* by the Court of Appeals's injunction.

<sup>246</sup> *Chadha*, 462 U.S. at 930.

<sup>247</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2686 (2013).

<sup>248</sup> *Chadha*, 462 U.S. at 930.

<sup>249</sup> *Id.* at 931 n.6.

controversy clearly exists . . . because of the presence of the two Houses of Congress as adverse parties.”<sup>250</sup> Therefore, one might ask whether the *Windsor* Court erred in relying on *Chadha*’s statutory analysis for its own Article III analysis. But the *Chadha* Court also held in another part of its opinion that there was “adequate Art. III adverseness even though the only parties were the INS and Chadha” because the Court’s decision 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.”<sup>251</sup> The *Windsor* Court cited this part of the *Chadha* opinion along with its “aggrieved party” analysis.<sup>252</sup> Therefore, *Windsor* suggests that the Court may now use the same analysis for both statutory standing under 28 U.S.C. § 1252 and Article III standing.

Justice Scalia criticized the majority for this move in his dissent. He argued that Article III standing was satisfied in *Chadha* because both houses of Congress had intervened as parties by the time the case arrived in the Supreme Court.<sup>253</sup> This provided the “adverseness” that Justice Scalia argued was an essential ingredient of Article III standing.<sup>254</sup> According to Justice Scalia, a party seeking the jurisdiction of an appellate court must not only 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.<sup>255</sup>

The majority in *Windsor*, however, 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.<sup>256</sup> 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 constitutional, limit on standing.<sup>257</sup> Hence, a court might stay its hand from hearing such a suit because the parties’ agreement on the merits prevents them from sufficiently sharpening the presentation of the issues.<sup>258</sup> But in *Windsor*

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.* 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 his own opinion in *Chadha*.

<sup>252</sup> *Windsor*, 133 S. Ct. at 2686.

<sup>253</sup> *Id.* at 2701 (Scalia, J., dissenting).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 2687 (majority opinion) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

<sup>257</sup> *Id.* Query whether there is anything left of “prudential standing” in the wake of *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (holding that a court “cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates”). But the current state of prudential standing is beyond the scope of this Article.

<sup>258</sup> See *Windsor*, 133 S. Ct. at 2687-88. Justice Scalia took the majority to task for converting a “jurisdictional” requirement of Article III into a “prudential” element of standing. *Id.* at 2701 (Scalia, J., dissenting) (“Relegating a jurisdictional requirement to

the Court found that BLAG's defense of DOMA as an amicus party alleviated these concerns.<sup>259</sup>

Thus, regardless of whether *Windsor* clarifies *Chadha* (an exceedingly confusing opinion) or goes a step further, it is now abundantly clear that the government's enforcement of a law, and appeal of adverse decisions against the law, is a sufficient basis for Article III jurisdiction, even if the executive agrees with the opposing party on the merits.

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 the court.<sup>260</sup> Professor Grove reasons that the executive has standing pursuant to the Take Care Clause of Article II “only when it asserts the federal government's interests in the enforcement and continued enforceability of federal law.”<sup>261</sup> 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.”<sup>262</sup>

Although I agree with Professor Grove on the importance of the executive's “take care” 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 government, the executive cannot

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‘prudential’ status is a wondrous device, enabling courts to ignore the requirement whenever they believe it ‘prudent’—which is to say, a good idea.”). But 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 real disputes between the parties in *Camreta v. Greene*, 563 U.S. 692 (2011), and *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980). See *Windsor*, 133 S. Ct. at 2701-02. Justice Scalia is correct 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). The Court, however, has not always been clear about the line between constitutional and prudential standing. 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). Leaving aside whether there is anything left to prudential standing in the wake of *Lexmark*, 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*. Moreover, regardless of who had the better doctrinal understanding of adversity, as discussed more fully below, the majority's opinion in *Windsor* is consistent with the executive's “take care” duties in a republic founded on the idea of popular sovereignty.

<sup>259</sup> *Windsor*, 133 S. Ct. at 2688 (majority opinion) (“BLAG's sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree.”). Because the Court held that the executive had standing, it never addressed whether BLAG had standing as a party to the case. *Id.*

<sup>260</sup> Grove, *supra* note 4, at 1314.

<sup>261</sup> *Id.* at 1315.

<sup>262</sup> *Id.*

announce the constitutional views of either. Thus, the executive has standing to defend laws based not on an assertion of either the sovereign's or the government's interest, but rather based on the executive's own interest in pursuing its "take care" responsibilities as it understands them. These responsibilities include, most importantly, pursuing the sovereign's interests and avoiding unconstitutional acts. But because the executive is *not* the sovereign, the executive must exercise caution when acting on its constitutional views. Thus, even if the executive believes a law is unconstitutional, when the views of the sovereign are unclear, it may be reasonable to enforce the law until a final judicial decision concurs with the executive's assessment of the sovereign's interest. This allows the President to present his constitutional arguments, while respecting the views of the coordinate branches of government.<sup>263</sup>

Thus, there may be times when the President believes Article II requires him to enforce and defend federal laws; other times when he believes his constitutional duties are best met by neither enforcing nor defending clearly unconstitutional acts; and still others when he believes the best course is to enforce the law while presenting arguments against its constitutionality. There is no single right answer because in each case the President must weigh the strength of his constitutional views against a variety of competing concerns, including the views of Congress, existing jurisprudence, and signs of the sovereign people's will.

The Court's jurisdictional holding in *Windsor* is consistent with this understanding of the executive's duty. If the executive's standing to appeal adverse judicial decisions depended on its power to represent the sovereign, then the executive would have no standing to appeal a judicial decision striking down a law that the executive *qua* sovereign believes is unconstitutional. But the executive's standing does not depend on its representation of the sovereign, and it cannot represent the government as a whole. Rather, the executive simply fulfills its constitutional duties as it understands them. If the executive does not deem it appropriate under the Take Care Clause to stop enforcing a law, the executive maintains standing to appeal adverse judicial judgments, even as it presents arguments against the law's constitutionality.

Thus, the Court in *Windsor* was correct that the executive's standing does not depend on its view of the constitutionality of the challenged law; it depends on how the executive chooses to meet its "take care" responsibilities. But popular sovereignty explains why the Court reached the right result.

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<sup>263</sup> For example, although President James Madison never changed his view that the Second Bank of the United States was unconstitutional, he did not veto a bill establishing the Second Bank on constitutional grounds because "the acts of the legislative, executive, and judicial branches of the Government, accompanied by indications . . . of a concurrence of the general will of the nation" had approved the institution. KRAMER, *supra* note 17, at 48-49 (quoting James Madison, *Veto Message (Jan. 30, 1815)*, in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 555 (James D. Richardson ed., 1900)).

### B. *Standing of Non-Governmental Actors*

The Supreme Court's willingness to recognize executive standing to defend, regardless of the executive's constitutional views, has been matched by its reluctance to recognize the standing of non-governmental parties to defend, even when those parties are likely to be the law's most zealous advocates. Although the Court has not expressly ruled out the possibility of non-governmental parties representing a state's interest in defense of its laws, the Court has yet to recognize the standing of any such party.<sup>264</sup>

The Court is right to be wary of permitting private parties to represent sovereign interests because the executive's power to enforce and defend laws stems from its "take care" responsibilities, and not from its power to know the mind of the sovereign. This may seem counterintuitive given that popular sovereignty recognizes the people's primary interpretive authority over the Constitution. But the Framers created a representative rather than a direct democracy. There is no more reason to believe that the Framers imagined individual citizens asserting executive "take care" power than that they imagined citizens asserting direct control over legislative powers. This is not to say that the people cannot assign "take care" powers to individual citizens. Some state constitutions assign lawmaking power to the electorate,<sup>265</sup> and they might also delegate executive powers to non-governmental parties. But no state constitution has yet to credibly do so.

#### 1. The Court's Agency Rule for Asserting a State's Interest

The most recent Supreme Court opinion addressing the standing of non-executive branch parties to defend laws is *Hollingsworth v. Perry*,<sup>266</sup> issued the same day as *Windsor*. In *Hollingsworth*, two same-sex couples filed a complaint in federal district court challenging California's Proposition 8,<sup>267</sup> 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."<sup>268</sup> The plaintiffs argued that Proposition 8 violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>269</sup> Plaintiffs named as defendants in the complaint those charged with enforcing Proposition 8, including California's Governor, Attorney General, and various other state and local officials.<sup>270</sup> The named defendants refused to defend the law, even though

<sup>264</sup> See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013) ("We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to.").

<sup>265</sup> See *supra* note 31 and accompanying text.

<sup>266</sup> 133 S. Ct. 2652 (2013).

<sup>267</sup> *Id.* at 2660.

<sup>268</sup> CAL. CONST. art. I, § 7.5, *invalidated by Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010).

<sup>269</sup> *Hollingsworth*, 133 S. Ct. at 2660.

<sup>270</sup> *Id.*

they continued to enforce it during the litigation.<sup>271</sup> The district court, however, allowed the official proponents of the initiative—those responsible for placing Proposition 8 on the ballot—to intervene to defend its constitutionality.<sup>272</sup> After a bench trial, the district court held that Proposition 8 was unconstitutional under both the Due Process and Equal Protection Clauses and enjoined its enforcement.<sup>273</sup>

The state defendants, unlike their federal counterparts in *Windsor*, chose not to appeal the district court's order; however, the proponents of Proposition 8 did.<sup>274</sup> Consequently, the Ninth Circuit certified a question to the California Supreme Court asking whether under California law:

[T]he 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.<sup>275</sup>

The California Supreme Court answered: “[T]he 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.”<sup>276</sup>

The California Supreme Court cited both the California Constitution and the Elections Code in support of its position.<sup>277</sup> The Ninth Circuit then affirmed the district court's judgment on the merits, albeit on narrower grounds,<sup>278</sup> and the proponents of Proposition 8 petitioned the Supreme Court for a writ of certiorari.<sup>279</sup>

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 proponents of Proposition 8.<sup>280</sup> What made the difference in the outcomes of *Windsor* and *Hollingsworth*? Put simply, the Obama Administration appealed

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<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Perry*, 704 F. Supp. 2d at 1004.

<sup>274</sup> The injunction was stayed during appeal. *See Perry v. Schwarzenegger*, 628 F.3d 1191, 1194 (9th Cir. 2011).

<sup>275</sup> *Id.* at 1193.

<sup>276</sup> *Perry v. Brown*, 265 P.3d 1002, 1007 (Cal. 2011).

<sup>277</sup> *Id.* at 1006. The court's opinion is quoted at length below in the text accompanying note 357.

<sup>278</sup> *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012) (affirming the judgment of the district court on the grounds that Proposition 8 is an unconstitutional violation of the Equal Protection Clause).

<sup>279</sup> Petition for Writ of Certiorari, *Hollingsworth v. Perry*, No. 12-144, 2012 WL 3109489 (July 30, 2012).

<sup>280</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).



the adverse judgments 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.’”<sup>281</sup> But the district court “had not ordered [the official proponents] to do or refrain from doing anything.”<sup>282</sup> 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. Therefore, the official proponents had no “‘direct stake’ in the outcome of their appeal.”<sup>283</sup> 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.<sup>284</sup> At that point, “[t]heir only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.”<sup>285</sup> But the Court has repeatedly held that such a “‘generalized grievance,’ no matter how sincere, is insufficient to confer standing.”<sup>286</sup> Thus, “[n]o 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.<sup>287</sup> This the proponents could not show.

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.<sup>288</sup> The proponents had attempted to step into the shoes of the executive, based on the Court’s opinion in *Karcher v. May*,<sup>289</sup> holding 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.”<sup>290</sup> The Court in *Hollingsworth* acknowledged, “a State must be able to designate agents to represent it in federal court.”<sup>291</sup> And while “[t]hat agent is typically the State’s attorney general[,] . . . state law may provide for other officials to speak for the State . . . .”<sup>292</sup> Nevertheless, the Court concluded that “[t]he point

<sup>281</sup> *Id.* at 2662 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992)).

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 2663 (“Petitioners have no role—special or otherwise—in the enforcement of Proposition 8.”). By contrast, the proponents surely would have had standing in a dispute over the placement of the ballot proposal on the ballot.

<sup>285</sup> *Id.* at 2662.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 2663.

<sup>288</sup> *Id.* at 2668.

<sup>289</sup> 484 U.S. 72 (1987).

<sup>290</sup> *Hollingsworth*, 133 S. Ct. at 2664 (citing *Karcher*, 484 U.S. at 75, 81-82).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

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.<sup>293</sup>

The Court also rejected the petitioners' reliance on *Arizonans for Official English v. Arizona*,<sup>294</sup> 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.<sup>295</sup> The Court in *Hollingsworth* pointed out that while *Arizonans for Official English* was mooted in the Supreme Court by other events, the Court had nevertheless expressed "grave doubts" about proponents' standing because they 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."<sup>296</sup>

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.<sup>297</sup> For this, the Court turned to the Restatement (Third) of Agency, which stipulates that "[a]n essential element of agency is the principal's right to control the agent's actions."<sup>298</sup> The proponents of Proposition 8, the Court noted, "answer to no one; they decide for themselves, with no review, what arguments to make and how to make them."<sup>299</sup> They are neither elected nor removable; they take 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

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<sup>293</sup> *Id.* at 2665. The Court in *Karcher* accepted that New Jersey law permitted the New Jersey Legislature to represent "the State's interests" in defense of state law based on a single case in which the New Jersey Supreme Court had permitted the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent in defense of a legislative enactment, which the Attorney General was also defending, *see Karcher*, 484 U.S. at 82 (citing *In re Forsythe*, 450 A.2d 499, 500 (N.J. 1982)), and a rather cryptic discussion at bar in the lower court when the legislative officers sought to intervene. *See id.* at 82 n.2 ("THE COURT: You say there is a rule which provides the Speaker of each House—[INTERVENORS' COUNSEL]: It is the presiding officer of each House and in charge of all administrative duties, and from that we have been in numerous suits and have cooperated with counsel anytime they want a deposition. I don't envision this to be a problem, your Honor." (internal quotation marks and citation omitted)).

<sup>294</sup> 520 U.S. 43 (1997).

<sup>295</sup> *Hollingsworth*, 133 S. Ct. at 2665-66 (discussing *Arizonans for Official English*, 520 U.S. 43).

<sup>296</sup> *Id.* at 2666 (quoting *Arizonans for Official English*, 520 U.S. at 65, 66).

<sup>297</sup> *Id.* ("[T]he most basic features of an agency relationship are missing here. Agency requires more than mere authorization to assert a particular interest.").

<sup>298</sup> *Id.* (quoting RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f (AM. LAW INST. 2005)).

<sup>299</sup> *Id.*

potential ramification for other state priorities.”<sup>300</sup> 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.”<sup>301</sup>

## 2. The Domain of the Court’s Agency Rule

The Court in *Hollingsworth* did not hold that private parties could never represent a State’s interest in court. It expressly distinguished qui tam plaintiffs and private attorneys appointed to prosecute contempt actions on behalf of the courts, whom the Court has never required to have a formal agency relationship to assert claims on behalf of the government.<sup>302</sup> The way in which the Court distinguished these plaintiffs reveals the domain of the Court’s agency rule.

### a. *Proprietary Interests*

The Court did not disturb the power of private parties to bring qui tam actions “based on a partial assignment of the Government’s damages claim and a ‘well nigh conclusive’ tradition of such actions in English and American courts dating back to the 13th Century.”<sup>303</sup> It described qui tam actions as “readily distinguishable” from constitutional defense and cited to *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*,<sup>304</sup> in which the Court held that qui tam plaintiffs have standing to challenge violations of the False Claims Act<sup>305</sup> based on their partial assignment of the government’s damages claim.<sup>306</sup>

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<sup>300</sup> *Id.* at 2667-67.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 2673 (citing FED. R. CRIM. P. 42(1)(2)). Rule 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. *Id.* 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.” *Id.* (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987) (internal quotation marks and citation omitted)). Similarly, agency principles are irrelevant to whether a party has standing to bring a qui tam action or a “next friend” case. *Id.* at 2674.

<sup>303</sup> *Id.* at 2665 (citing *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771-78 (2000)).

<sup>304</sup> 529 U.S. 765 (2000).

<sup>305</sup> The FCA imposes civil liability upon “[a]ny person” who, inter alia, “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval . . . to an officer, employee, or agent of the United States . . .” 31 U.S.C. § 3729 (2012). 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.” *Id.* § 3730. 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. *Id.*

Professor Myriam Gilles suggests that the *Stevens* Court recognized a distinction between the assignment of the government's damages claims to qui tam plaintiffs and the assignment of injuries to sovereign interests.<sup>307</sup> The Court noted that the qui tam plaintiff's complaint asserted two types of injuries to the United States: "[T]he 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."<sup>308</sup> 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.<sup>309</sup> 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,"<sup>310</sup> Gilles suggests the Court has established a similar dichotomy in the public law context:

[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 . . ." 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.<sup>311</sup>

The distinction between proprietary and sovereign interests makes sense from the perspective of popular sovereignty. First, proprietary claims do not necessarily involve constitutional questions. Therefore, allowing private parties to pursue these claims on behalf of the government does not give them the

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<sup>306</sup> *Stevens*, 529 U.S. at 773. See also Sunstein, *supra* note 130, at 232 (arguing that a qui tam bounty provides an injury for purposes of Article III standing); see generally Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989) (arguing that qui tam actions are a constitutionally acceptable means by which Congress may use private parties to shape public policy).

<sup>307</sup> Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 344 (2001).

<sup>308</sup> *Stevens*, 529 U.S. at 771.

<sup>309</sup> *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.").

<sup>310</sup> Gilles, *supra* note 307, at 342 (footnote omitted).

<sup>311</sup> *Id.* at 344.

power to speak the sovereign's constitutional mind.<sup>312</sup> Rather, they are protecting a unitary interest of the government in its property. In contrast, when execution of the law requires constitutional judgments, Article II entrusts those judgments to the executive. Second, proprietary interests involve external relations between a sovereign State and other parties, like traditional State interests in the field of international law,<sup>313</sup> even if citizens are on the other side of the "v." In contrast, disputes over the constitutionality of laws are internal to a State because the central question is whether the government has exceeded the authority delegated to it by the sovereign people. Again, the Constitution delegates these judgments to the executive in the context of law execution, and prohibits any party from claiming to speak the sovereign's mind.

b. *Agents of the Courts*

Like *qui tam* actions, judicial appointments of private attorneys to prosecute contempt of court orders have a long and established history in this country and in England.<sup>314</sup> Moreover, the Court has expressly limited the kinds of plaintiffs that may prosecute contempt actions in ways that distinguish them from the proponents of 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."<sup>315</sup> 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.<sup>316</sup> 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."<sup>317</sup> Such dual loyalty creates an unacceptable conflict of interest. This concern with pursuing

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<sup>312</sup> See *Cotton v. United States*, 52 U.S. 229, 231 (1850) ("Every sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property, both real and personal.").

<sup>313</sup> JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* 24 (C.H. Wilson & R.B. McCallum eds., M.J. Tooley trans., 1955) (discussing the interests of distinct and sovereign states in alliances); see also Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373, 391 n.69 (1995) (noting the "dominant classical view" of a State as a territorially defined entity).

<sup>314</sup> *Young v. United States 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." (citation omitted)); *Stevens*, 529 U.S. at 774 (acknowledging "the long tradition of *qui tam* actions in England and the American Colonies").

<sup>315</sup> *Vuitton et Fils S.A.*, 481 U.S. at 804.

<sup>316</sup> *Id.* at 806.

<sup>317</sup> *Id.* at 807.

interests distinct from the State is akin to the concern expressed in *Hollingsworth* with permitting non-governmental parties to claim the sovereign's authority to pursue narrow ideological agendas. The proponents' singular interest in Proposition 8 puts them in conflict with the broader interests of a sovereign and made them unsuitable to represent a State.

Furthermore, although contempt actions are brought in the name of the United States, contempt proceedings are better understood as brought by the court itself, which is seeking to enforce its order.<sup>318</sup> Indeed, the Court in *Hollingsworth* suggested as much when it pointed out that, although "[s]uch prosecutors do enjoy a degree of independence in carrying out their appointed role . . . no one would suppose that they are not subject to the ultimate authority of the court that appointed them."<sup>319</sup> Thus, such prosecutors are better understood as agents of the courts rather than agents of the sovereign.<sup>320</sup>

### c. *Agents of the Executive*

Although it may be too obvious to mention, the holding in *Hollingsworth* has little relevance to agents of the executive. In *Morrison v. Olson*,<sup>321</sup> the Court upheld the appointment of independent counsel to prosecute crimes committed by government officials under the Ethics in Government Act of 1978.<sup>322</sup> The Court held that the Act did not violate the Appointments Clause or separation of powers so long as independent counsel could be removed "for cause" by the Attorney General.<sup>323</sup> Therefore, any agent of the executive removable for cause should have the same standing to defend laws as the executive itself. But from the perspective of popular sovereignty, he or she is doing so as an agent of the executive rather than as counsel to the sovereign.<sup>324</sup>

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In sum, private parties may represent sovereign interests to the extent they are agents of government officials who have their own standing. In addition, the government may assign (at least partially) its proprietary interests to private

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<sup>318</sup> *Id.* 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.").

<sup>319</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2665 (2013).

<sup>320</sup> However, in *United States v. Providence Journal Co.*, the Court held that pursuant to 28 U.S.C. § 518(a) such prosecutors may not represent the interests of the United States in the Supreme Court without the approval of the Solicitor General. 485 U.S. 693, 707-08 (1988).

<sup>321</sup> 487 U.S. 654 (1988).

<sup>322</sup> *Id.* at 665 (reviewing 28 U.S.C. §§ 49, 591 et seq. (1982)).

<sup>323</sup> *Id.* at 691-92.

<sup>324</sup> Of course, agents of the executive are also agents of Congress, which delegated its power to them.

parties. But, according to *Hollingsworth*, private parties may not represent the sovereign itself unless they have a principal-agent relationship with “the people.”

### 3. The Problems with the Court’s Agency Rule

The agency rule announced by the Court in *Hollingsworth* is novel. As Justice Kennedy pointed out in his dissent, joined by Justices Thomas, Alito, and Sotomayor, *Karcher* did not 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.<sup>325</sup> 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.<sup>326</sup> Justice Kennedy also found support in *Arizonans for Official English* because there the Court’s doubts regarding standing stemmed from the absence of “Arizona law appointing initiative sponsors as agents of the people of Arizona to defend . . . the constitutionality of initiatives.”<sup>327</sup> By contrast, the California Supreme Court had ruled that the proponents had standing to represent the State under California law.<sup>328</sup> For this reason, Justice Kennedy thought the Court should defer to the California Supreme Court’s ruling on “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.”<sup>329</sup>

Nevertheless, the standing of private parties to represent the interests of a 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.<sup>330</sup> And *Karcher* involved presiding officers of the state legislature rather than non-governmental parties.<sup>331</sup> Therefore, the rule’s novelty alone is not a reason to dismiss it.

Still, 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.”<sup>332</sup> After all, the California

<sup>325</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) (Kennedy, J., dissenting).

<sup>326</sup> *Id.* at 2672. *But see supra* note 293.

<sup>327</sup> *Id.* (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997)).

<sup>328</sup> *See Perry v. Brown*, 265 P.3d 1002, 1007 (Cal. 2011).

<sup>329</sup> *Hollingsworth*, 133 S. Ct. at 2669. Ironically, Justice Kennedy also emphasized the fact that the proponents would provide “vigorous representation” of the State’s interest in the case, *id.* at 2674, something he deemed irrelevant to Article III standing in *Windsor*, although he considered it relevant to prudential standing. *United States v. Windsor*, 133 S. Ct. 2675, 2687 (2013).

<sup>330</sup> *Arizonans for Official English*, 520 U.S. at 65.

<sup>331</sup> *Karcher v. May*, 484 U.S. 72, 78 (1987).

<sup>332</sup> *Hollingsworth*, 133 S. Ct. at 2666.

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.<sup>333</sup> The Framers expressly rejected a formal principle-agent conception of democratic governance.<sup>334</sup> Elected officials may vote their conscience, and this independence is critical to the public deliberation the Framers sought to foster.<sup>335</sup>

Nor does it seem right that removal is an essential characteristic of an agent of the sovereign. While California's elected officials are indeed removable by means of recall elections,<sup>336</sup> federal officials are not. While federal executive branch officials are removable by means of impeachment, this process is conducted by the Senate in response to articles of impeachment prepared by the House, rather than by the voters.<sup>337</sup>

If we peel away these puzzling aspects of the opinion, the Court's concerns seem to be, first and foremost, that the proponents of Proposition 8 are not electorally accountable (either directly or indirectly), and second, that they do not have the broad perspective of government officials due to their ideological commitment to the defense of a single law. The California Attorney General, for example, is subject to periodic elections in which the voters decide whether to return her to office or elect a substitute.<sup>338</sup> The proponents of Proposition 8, in contrast, are not accountable to the people through elections.<sup>339</sup> In addition,

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<sup>333</sup> *Id.* at 2672 (Kennedy, J., dissenting) (suggesting that government officials are controlled by the people only inasmuch as they can be removed from office through the electoral process).

<sup>334</sup> See *supra* notes 110-13 and accompanying text.

<sup>335</sup> See *supra* Section I.C.

<sup>336</sup> OFFICE OF THE CAL. SEC'Y OF STATE, PROCEDURE FOR RECALLING STATE AND LOCAL OFFICIALS (2014), <http://elections.cdn.sos.ca.gov/recalls/recall-guide-123014.pdf> [<http://perma.cc/H4HX-5BUX>].

<sup>337</sup> U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."); *id.* § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."). 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. *Id.* § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.").

<sup>338</sup> CAL. CONST. art. V, § 11 ("[The] Attorney General[] . . . shall be elected at the same time and places and for the same term as the Governor."). In contrast, the United States Attorney General is not directly accountable to the electorate, but is accountable to the President, who in turn is accountable to the voters.

<sup>339</sup> Justice Kennedy rejected the majority's claim that state executive officials were more electorally accountable than the proponents. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2672 (2013) (Kennedy, J., dissenting) ("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."). But given the regularity of statewide elections, the need for elected officials to maintain public support to



the Court was reluctant to grant 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.”<sup>340</sup> By contrast, the executive is charged with pursuing a broader range of sovereign interests expressed in the entire body of constitutional, statutory, and regulatory law.<sup>341</sup> Thus, the Court’s core concern seemed to be that the proponents of Proposition 8 could not adequately represent the California sovereign.

The adequacy of the sovereign’s representation also drove Justice Kennedy’s dissent, although he reached a very different conclusion. Justice Kennedy’s primary concern was the “practical dynamics of the initiative system in California” and “26 other States that use an initiative or popular referendum system . . .”<sup>342</sup> 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.”<sup>343</sup> 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.<sup>344</sup> In addition, “a single district court can make a decision with far-reaching effects that cannot be reviewed.”<sup>345</sup> Therefore, Justice Kennedy would have recognized the standing of the proponents of Proposition 8 to defend the act of the sovereign people of California. Thus, while the majority was concerned that the proponents were not fit to represent the sovereign, the dissent was concerned that no one else would.

The Court’s concern with a sovereign agent’s electoral accountability and perspective is reasonable, but it merely describes the characteristics of state and federal executives imbued with responsibility for the execution of the law—it is not a constitutional requirement. The people may have been willing to entrust the executive with the duty to enforce the law because of its political accountability and broad perspective, but there is no reason why they could not assign the duty to someone else if they chose. Indeed, this is what the California Supreme Court seemed to hold—i.e., that the people of California

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accomplish their agendas, and the lack of precedent for using a ballot initiative either to grant or rescind the power to defend ballot initiatives, this claim is dubious.

<sup>340</sup> *Id.* at 2667.

<sup>341</sup> 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, 831 (1985) (“[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise.”).

<sup>342</sup> *Hollingsworth*, 133 S. Ct. at 2668 (Kennedy, J., dissenting).

<sup>343</sup> *Id.* at 2671 (quoting *Perry v. Brown*, 265 P.3d 1002, 1016 (Cal. 2011)).

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 2674.

had given a similar power to the proponents of Proposition 8. After all, most states divide executive power among multiple public officials rather than delegating it all to the governor.<sup>346</sup> Why not add the proponents of citizen initiatives to the list?

#### 4. An Alternative Holding in *Hollingsworth*

The Court in *Hollingsworth* reached the right result but for the wrong reasons. From the perspective of popular sovereignty, the proponents of Proposition 8 could not defend the amendment to the California constitution without their own personal standing<sup>347</sup> because (1) no party may represent a sovereign in court, and (2) the people of California had not, in fact, delegated any power to proponents akin to that which permits executive officers to defend and enforce laws based on their view of the sovereign's interests. Nevertheless, just as the citizens of California have empowered the Governor and the Attorney General to "take care" that the laws are faithfully executed,<sup>348</sup> they might also assign this duty to others.

##### a. *No Party May Speak for 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 might have responded that no party may speak for the sovereign in court. This is true at the state level as well as the federal because the federal and state constitutions separate sovereignty from the state governments.<sup>349</sup> The state executive's standing to defend laws stems not from a power to speak for the sovereign but from a constitutional obligation to "take care" that the laws are faithfully executed.

Therefore, 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 as a client. Whether the executive enforces

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<sup>346</sup> The state attorneys general in forty-three states are elected (only five are appointed by their governor) and exercise independent executive power. *NAAG Welcomes New Attorneys General*, NAAGAZETTE (Jan. 31, 2011), <http://www.naag.org/publications/naagazette/volume-5-number-1/naag-welcomes-new-attorneys-general.php> [<http://perma.cc/8X5B-WKEX>]. Moreover, there are literally thousands of other elected officials with executive power at the state level. See Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1399-1400, 1430-33 (2008) (presenting "Census of Government" data).

<sup>347</sup> Thus, I assume without deciding that the proponents could not establish their own independent standing to defend the law.

<sup>348</sup> 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."); *id.* art. V, § 13 ("It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced.").

<sup>349</sup> See *supra* notes 92-94 and accompanying text (discussing why the sovereignty of the states also resides in the people rather than their governments).

and defends, enforces but does not defend, or neither enforces nor defends, it is meeting its constitutional “take care” responsibilities as it understands them. There are no empty executive shoes for another party to fill.

Moreover, the fact that the people of California had themselves approved Proposition 8 as a state constitutional amendment does not change the analysis. Even if we assume that Proposition 8 was an act of the sovereign people of California,<sup>350</sup> this does not mean that a party can walk into court and claim the sovereign’s view of a federal constitutional challenge to their act. The sovereign’s views are not static. They are not frozen by the passage of a constitutional amendment. The Framers recognized that the people’s views would evolve over time in response to public deliberation.<sup>351</sup> 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”?<sup>352</sup> How are they to “abide by [the sovereign’s] decision whether to settle a matter”?<sup>353</sup> Did the people of California remain committed to Proposition 8 after hearing the emotional testimony of same-sex couples or were they unmoved? Did they learn something from the many experts who testified in the case? Did they change their minds about the wisdom of Proposition 8 after reading the Ninth Circuit’s opinion? We obviously have no way of knowing the answers to these questions, and neither did the proponents of Proposition 8. There is simply no way to consult your client when your client is a sovereign people. Litigation is a dispute resolution mechanism that includes the possibility of settlement. Without real clients on both sides of the “v.” it becomes something else entirely.<sup>354</sup>

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<sup>350</sup> I leave this issue to the side, but Professor Glen Staszewski makes a compelling argument 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, 32-39 (discussing the structural flaws in ballot initiatives). *But see* *City of Eastlake v. Forest City Enters., 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 . . .”).

<sup>351</sup> THE FEDERALIST No. 10, *supra* note 18, at 48 (James Madison) (discussing the propensity of men to form different opinions based on fallible reason and differing passions).

<sup>352</sup> MODEL RULES OF PROF’L CONDUCT r.1.2 (AM. BAR ASS’N 2015).

<sup>353</sup> *Id.*

<sup>354</sup> Similar concerns drive procedures to ensure that lawyers and representatives in class actions “adequately represent the interests of the many people who will not participate directly in the proceeding and any settlement.” Michael D. Sant’Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2056 (2012).

b. *The California Supreme Court's Interpretation of California Law Was Not Credible*

Although no party may speak for the sovereign, the people are not without agents to work on their behalf. At both the state and federal level executive officials are charged with ensuring that the laws are faithfully executed. Why not permit the proponents of Proposition 8 to defend the initiative based on the California Supreme Court's suggestion that the people of California had given the proponents a similar power?

Although the California Supreme Court grounded its holding (in part) in the California Constitution, there are reasons to doubt that the California Constitution and Elections Code conferred anything like a "take care" power upon the proponents of Proposition 8. First, there is no textual basis in the California Constitution for assigning the power to defend state constitutional provisions passed through ballot initiatives to their proponents. Article II, section 8 of the California Constitution sets forth the procedures for "the electors to propose statutes and amendments to the Constitution and to adopt or reject them."<sup>355</sup> It does not mention the "proponents" of an initiative measure at all. The official proponents are mentioned in the California Elections Code enacted by the California State Legislature, but the Elections Code says nothing about any role for the proponents post-enactment.<sup>356</sup>

Moreover, the California Supreme Court did not purport to find such a power in the California Constitution. Rather, it reasoned (somewhat convolutedly) that:

[I]n light of the nature and purpose of the initiative process embodied in article II, section 8 of the California Constitution . . . and the unique role of initiative proponents . . . as recognized by numerous provisions of the Elections Code, it would clearly constitute an abuse of discretion . . . to deny the official proponents of an initiative the opportunity . . . to assert the people's and hence the state's interest in the validity of the measure . . . . In other words, because it is essential to the integrity of the initiative process . . . that there be someone to assert the state's interest in an initiative's validity . . . when . . . public officials . . . decline to do so, and because the official proponents of an initiative . . . are the most obvious and logical persons to assert the state's interest in the initiative's validity on behalf of the voters . . . we conclude that California law

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<sup>355</sup> CAL. CONST. art. II, § 8.

<sup>356</sup> The relevant provisions give "the proponents the direct responsibility to manage and control the ballot-qualifying and petition-filing process," and authorize "proponents to control the arguments in favor of the initiative that appear in the official voter information guide published by the Secretary of State." *Perry v. Brown*, 265 P.3d 1002, 1024 (Cal. 2011) (citing CAL. ELEC. CODE §§ 9607, 9608, 9609, 9032, 9064, 9065(d), 9069, 9601 (West 2003)).

authorizes the official proponents . . . to appear in the proceeding to assert the state's interest in the initiative's validity . . .<sup>357</sup>

Thus, one way to read the United States Supreme Court's opinion is that it simply could not believe the California Supreme Court if it claimed that the people of California had delegated the power to defend citizen initiatives to their proponents. This makes sense from the perspective of popular sovereignty. Given how clearly the people of California have delegated "take care" power to executive officials,<sup>358</sup> it is hard to believe they delegated a similar power to proponents in Article II, section 8 of the California Constitution sub silentio. In light of the importance of making judgments about sovereign interests, it seems reasonable to require a clear constitutional commitment when assigning the power to a non-traditional party. This, the California Supreme Court could not produce.

To be sure, the Supreme Court should defer to the California Supreme Court's interpretation of California law. But the Supreme Court might have said that the state court had not identified a state constitutional provision delegating "take care" power to the proponents.<sup>359</sup> Without such a constitutional power, the proponents had to establish their own personal standing to appeal the federal district court's order.

c. "*Hollingsworth II*"

Suppose the people of California amended their constitution to provide that, either generally or with respect to specific ballot initiative, "the proponents of the initiative shall take care that the initiative is faithfully executed"—would the Supreme Court recognize their standing to defend the law in lieu of state executive officials?

Such a constitutional amendment should be enough to grant proponents standing to defend their initiative. Although the proponents would not be electorally accountable or removable, they might not take an oath of office, and their perspective would be much narrower than any state executive official, it would be hard for the Court to deny that such a constitutional command creates an agency relationship akin to that of other governmental officials. If this is true, then it suggests that the Supreme Court in *Hollingsworth* was merely describing common attributes, rather than essential requirements, of sovereign agents. Sovereign agents are made by clear constitutional commands giving them duties and responsibilities.

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<sup>357</sup> *Id.* at 1006.

<sup>358</sup> See *supra* note 348 (giving examples of the clear delegation of "take care" power in the California Constitution).

<sup>359</sup> Moreover, because the Constitution separates sovereignty from the states as well as the federal government, this may not be entirely a state law issue.

The more difficult question is whether and how the Court would deploy its injury-in-fact test.<sup>360</sup> In both *Windsor* and *Hollingsworth* the Court placed great emphasis on whether the party seeking judicial review was ordered to do or refrain from doing something. The executive in *Windsor* had standing because the lower court had ordered it to refund the estate taxes,<sup>361</sup> and the proponents in *Hollingsworth* did not have standing because the court had not ordered them to do anything.<sup>362</sup> Even if the California Constitution commanded the proponents to “take care that the initiative is faithfully executed,” a court order commanding clerks to issue marriage licenses would not order the proponents to do or refrain from doing anything. But this is too narrow a view of “take care” duties. Ensuring the faithful execution of the law involves more than enforcing the law, even if that is perhaps the most important part of it. Not every law passed by Congress has a public right of action enforced by the Executive Branch,<sup>363</sup> yet surely the President must ensure that these too are “faithfully executed.”

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In sum, the Court was right to prohibit the proponents of Proposition 8 from representing California. Government officials who represent sovereign interests do so based on the people’s constitutional command that they ensure that the laws are faithfully executed. Notwithstanding the California Supreme Court’s opinion (and whatever its precise holding), there is no reason to believe that the people of California had charged proponents of citizen initiatives with this awesome power. Yet it is entirely within their power to do so.

### 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.<sup>364</sup> Moreover, in

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<sup>360</sup> See *supra* Section II.A (discussing the Supreme Court’s standing doctrine that requires any litigant requesting relief to demonstrate real and tangible harm and an actual controversy).

<sup>361</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2686 (2013) (finding that an order to refund tax money is “as real and immediate as an order directing an individual to pay a tax”).

<sup>362</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2656 (2013) (finding that the mere “interest to vindicate the constitutional validity of a . . . law” is not sufficient to confer standing).

<sup>363</sup> See *supra* note 191.

<sup>364</sup> Gorod, *supra* note 5, 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 5, at 582 (“Since the President (and his DOJ) are unavailable to defend the constitutionality of a statute the

*Hollingsworth, Arizonans for Official English*, and *Karcher*, the Supreme Court approved the representation of state interests by state legislative officers in lieu of the state executive.<sup>365</sup> Specifically, the Court 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.”<sup>366</sup> Indeed, *Karcher* has probably done more than any other opinion to encourage non-executive parties to grasp at the mantle of sovereignty.

It should now be clear that the legislature is in no better position than any other party to defend laws based on the sovereign’s or government’s interest: no government official has the power to speak for the sovereign people, there is no single, unqualified government interest, and the executive does not create a vacancy for another party to fulfill when it declines to defend a law based on what it believes the Take Care Clause requires.<sup>367</sup> Therefore, the Court erred in *Karcher* when it recognized the standing of the New Jersey Legislature “to represent the State’s interests” in lieu of the Governor without identifying the Legislature’s own “take care” duty or an independent basis for standing.<sup>368</sup> Moreover, there are additional constitutional obstacles at the federal level and in some states that make it more, not less difficult for the legislature to step into the shoes of the executive to defend a law. First, legislative standing to “take care” creates a delegation problem in a system of separated powers.<sup>369</sup> Second, legislative appointment of counsel to represent sovereign interests would likely violate the federal Appointments Clause.<sup>370</sup>

### 1. The Separation of Powers Problem

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.<sup>371</sup> That is, while “generally speaking the legislature

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President has decided neither to enforce nor to defend, it makes sense to permit Congress to seek a declaratory judgment as to the statute’s constitutionality.”); 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).

<sup>365</sup> See *supra* notes 290-96296 and accompanying text.

<sup>366</sup> *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (citing *Karcher v. May*, 484 U.S. 72, 82 (1987)); see also *Hollingsworth*, 133 S. Ct. at 2657 (examining the Supreme Court’s decision in *Karcher*, in which state legislators lost standing after losing their leadership positions).

<sup>367</sup> See *supra* Part II (explaining that popular sovereignty denies government officials the power to speak for the sovereign in constitutional disputes, but that the executive has standing to enforce and defend laws based on its “take care” duties).

<sup>368</sup> *Karcher v. May*, 484 U.S. 72, 82 (1987).

<sup>369</sup> See *infra* Section III.C.1.

<sup>370</sup> See *infra* Section III.C.2.

<sup>371</sup> See Greene, *supra* note 5, at 582.

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 . . .<sup>372</sup> Accordingly, at least where the executive decides not to defend a law, Greene suggests that we should view enforcement as "multi-branch in nature . . ."<sup>373</sup>

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 responsibility to itself. The examples cited by Greene all involve distinct responsibilities assigned by the Constitution to a particular branch, rather than inter-branch hand-offs of assigned powers.<sup>374</sup> The Court does not let Congress delegate its core legislative powers to the executive<sup>375</sup> and recognizes limits on Congress's power to supervise the executive.<sup>376</sup> Surely, we should be wary of allowing Congress to usurp one of the President's core responsibilities.

To the extent the Constitution provides for overlapping powers, it does so to provide each branch with checks on the choices of the others, not to provide for shared constitutional duties.<sup>377</sup> The Senate has the power to confirm or reject presidential nominees, but not to choose them.<sup>378</sup> The President has the power to propose legislation, but not to enact it; and to veto proposed

<sup>372</sup> *Id.* at 591.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) ("The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.")

<sup>376</sup> See *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) ("[T]he powers vested in the Comptroller General under § 251 violate the command of the Constitution that the Congress play no direct role in the execution of the laws."); *INS v. Chadha*, 462 U.S. 919, 957-58 (1983) ("To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded.")

<sup>377</sup> Indeed, the Framers specifically rejected a plural executive. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 93 (1994). These distinct roles in a common process serve an important accountability function. As Hamilton explained in the context of appointments: "The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate, aggravated by the consideration of their having counteracted the good intentions of the executive." THE FEDERALIST NO. 77, *supra* note 18, at 388 (Alexander Hamilton).

<sup>378</sup> U.S. CONST. art. II, § 2, cl. 3 (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 . . .").



legislation, but not to rewrite it.<sup>379</sup> Congress has the power to override the President's veto, but not to change it.<sup>380</sup> Allowing Congress to exercise the President's "take care" responsibilities would be just as unprecedented.<sup>381</sup>

## 2. The Appointments Clause Problem

Congressional designation of its own agent to represent the United States also might conflict with the Appointments Clause.<sup>382</sup> The Framers granted the President the power, with the advice and consent of the Senate to appoint all "Officers of the United States."<sup>383</sup> 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[,] but not in Congress."<sup>384</sup> The Constitution nowhere contemplates congressional appointments of officers to represent the United States,<sup>385</sup> and the Court has held that executive officers may not be subject to congressional appointment or removal.<sup>386</sup> A lawyer charged with defending a law of the United States is likely either a principal or inferior officer of the United States.<sup>387</sup> Thus, the

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<sup>379</sup> See *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.").

<sup>380</sup> U.S. CONST. art. I, § 7, cl. 2 (defining the process by which legislation is presented to the President, including details of a Congressional override of a Presidential veto).

<sup>381</sup> The Court has not shied away from beating back congressional attempts to assert executive power in other contexts. See, e.g., *Bowsher*, 478 U.S. at 736 (striking down the Gramm-Rudman-Hollings Act as a congressional encroachment on executive power); *Chadha*, 462 U.S. at 959 (striking down the legislative veto as a congressional encroachment of executive power).

<sup>382</sup> U.S. CONST. art. II, § 2, cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 135 (1976) (holding 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").

<sup>383</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>384</sup> *Id.*

<sup>385</sup> 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 *Branches of Government*, USA.GOV, <http://www.usa.gov/Agencies/Federal/Legislative.shtml> [<http://perma.cc/4XNF-BJGD>].

<sup>386</sup> *Bowsher*, 478 U.S. at 726 ("[W]e conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment.").

<sup>387</sup> "The line between 'inferior' and 'principal' officers is . . . far from clear," *Morrison v. Olson*, 487 U.S. 654, 671 (1988), but such counsel would likely be one or the other. See *id.* (finding that independent counsel charged with investigating and prosecuting certain high-ranking Government officials for violations of federal laws was at least an "inferior officer"); *Buckley*, 424 U.S. at 140 ("[R]esponsibility for conducting civil litigation in the courts of the United States for vindicating public rights . . . may be discharged only by persons who are 'Officers of the United States' within the language of that section.").

Appointments Clause suggests that Congress may not appoint itself or its agent to represent the United States.<sup>388</sup> To the extent that the interests of the United States must be defended, the executive must do the defending.

### 3. What's Left of Legislative Standing?

Therefore, legislative standing depends on whether the legislature has its own basis for standing, rather than whether it can represent the sovereign, the government, or step into the shoes of the executive. 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.<sup>389</sup> The executive's failure to produce the officer or documents 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 congressional standing to appeal. There is a debate, beyond the scope of this Article, about whether Congress is injured by an executive decision not to enforce or defend a law, with or without a judicial declaration that the law is unconstitutional.<sup>390</sup> Given the malleability of the injury-in-fact test it may be impossible to reach a consensus on this question.<sup>391</sup> But what should be clear from this Article is that Congress cannot step into the shoes of the executive and claim to represent either the sovereign or the government in the executive's stead.

## CONCLUSION

The Framers' transformation of popular sovereignty shaped the governmental institutions and political culture of the new American republic. Although the Court's long campaign to assert judicial supremacy over constitutional interpretation has made significant headway in recent decades,<sup>392</sup> the Court cannot escape the long shadow cast by the Framers' choice to

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<sup>388</sup> U.S. CONST. art. I, § 6, cl. 2 (“[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”).

<sup>389</sup> See Grove & Devins, *supra* note 5, at 630-32.

<sup>390</sup> See *supra* note 6 and accompanying text (discussing whether the legislature may sue the executive for not enforcing the law).

<sup>391</sup> Compare Fletcher, *supra* note 130, at 231 (“If we put to one side people who lie about their states of mind, we should concede that anyone who claims to be injured is, in fact, injured if she can prove the allegations of her complaint.”), with Lujan v. Defs. of Wildlife, 504 U.S. 555, 562 (1992) (“When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed.”). I take up this thorny question in Michael Sant'Ambrogio, *Legislative Exhaustion* (unpublished manuscript) (on file with author) (discussing whether Congress should have standing to sue the Executive for failing to execute the law in Congress's preferred manner).

<sup>392</sup> See KRAMER, *supra* note 17, at 227-30 (discussing the history of and nearly complete eradication of challenges to the Supreme Court's supremacy over constitutional law).

separate sovereignty from the government. The problem for the Court is most acute when it comes to the representation of sovereign interests in constitutional disputes. Whatever one thinks of popular sovereignty's continuing value as a legal fiction, the worst use of it would be to allow parties to claim the people's voice in pursuit of their own ideological interests. Executive officials who enforce and defend laws have Article III standing to do so based on the sovereign's command that they "take Care that the Laws be faithfully executed," rather than any power to speak for the sovereign or the government as a whole. 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. There are no empty executive shoes for another party to fill. Therefore, the Court should stop encouraging parties without similar constitutional obligations to assert claims on behalf of a State's interest in the defense or enforcement of its law. Put simply, no party may wear the sovereign's crown.

