STANDING DOCTRINE'S STATE ACTION PROBLEM

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ABSTRACT

Something surprising happened in the 2013 marriage equality cases that did not involve striking down the Defense of Marriage Act. The Supreme Court discovered standing doctrine's state action problem. In standing doctrine, as elsewhere, the law distinguishes private from governmental action. There are, simply put, different standing rules for state actors than for private litigants. How should the law sort state actors from private litigants for the purposes of standing? In Hollingsworth v. Perry*, the Court held that Article III limits government standing to common law agents who owe fiduciary duties to the state. The* Perry *Court's apparent concern was the risk of abuse of the power to stand for the government in federal court. This Article critiques the Court's newfound agency rule, offering an alternative way to address standing's state action problem.*

The reasons for limiting who may stand for the government in court have to do with keeping government power constitutionally accountable, not with Article III's case or controversy requirement. This constitutional accountability principle sounds in due process and the separation of powers. Abuse of the power of government standing offends constitutional principles that protect life, liberty, and property against arbitrary enforcement. These principles cannot be applied mechanically because due process also supports a right to one's day in court and a system of remedies to right wrongs. Focusing upon constitutional accountability provides a framework for identifying when standing presents a constitutionally troublesome risk of abuse of government power and determining who may exercise that power under what circumstances. Constitutional accountability presumptively requires public control over government standing. This presumption may be overcome where private law, procedural controls, or auxiliary mechanisms are adequate to ensure private litigants do not abuse their power to stand for the government. The adequacy of these constraints on enforcement discretion in any particular case depends upon the government interest at stake. Thus, the solution to standing's state action problem varies with different government interests and the limits in place to reduce the risk of abuse of the power of government standing.

Introduction

Standing doctrine has a state action problem. There are different standing rules for state actors than for private litigants. Standing doctrine requires private litigants to show a concrete, imminent, and personal injury-in-fact traceable to the defendant and redressable by a judicial remedy.[1] Yet the doctrine does not require the same showing from government litigants. A government litigant may litigate "generalized grievances" and need not show a personal injury-in-fact to have standing.[2] In some cases, however, standing rules impose an "additional hurdle" to government claimants.[3] These different standing rules create standing's state action problem. The doctrine must sort state actors from private litigants to determine which standing rules apply. In state action doctrine, we recognize that the distinction between state actors and private parties is not self-evident.[4] Standing's state action

1 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

2 *See, e.g.*, United States v. Raines, 362 U.S. 17, 27 (1960) (holding that Congress may authorize United States to vindicate "public interest in the due observance of all the constitutional guarantees"); 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, 2240, 2251 (1999) (explaining that United States litigates generalized grievances when prosecuting crimes in federal courts).

3 *See* Massachusetts v. EPA, 549 U.S. 497, 538 (2007) (Roberts, C.J., dissenting) (discussing state standing); *infra* Section I.A (same).

4 *See, e.g.*, Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69, 95 (1967) (calling doctrine a "conceptual disaster area"); Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503, 505 (1985) (discussing "incoherence of the state action doctrine"); Christian Turner, *State Action Problems*, 65 Fla. L. Rev. 281, 284 (2013) (discussing doctrine's "conflicting intuitions"). *But see* Lillian BeVier & John Harrison, *The State Action Principle and its Critics*, 96 Va. L. Rev. 1767 (2010) (canvassing and responding to criticisms).

problem has gone unnoticed by comparison,[5] and the doctrine does not solve it.

The 2013 marriage equality cases brought standing's state action problem into sharp focus. In both *United States v. Windsor*[6] and *Hollingsworth v. Perry*,[7] individuals challenged laws that denied marriage equality. In both cases executive officials refused to defend the laws against constitutional challenge. And in both cases other litigants sought to defend the laws on appeal. In *Windsor*, the Court permitted the "federal government to bifurcate its standing"[8] between the executive branch, which had constitutional standing, though it refused to defend the Defense of Marriage Act, and a group of Congressmen who provided the "substantial argument for the constitutionality" of DOMA necessary for prudential standing.[9] In *Perry*, by contrast, the Court held that Article III prohibits states from bifurcating their standing by delegating the authority to defend a state constitutional amendment, in this case California's Proposition 8, to its private proponents. Citing the *Restatement (Third) of Agency*, the Court reasoned that Proposition 8's proponents lacked standing because "[u]nlike California's attorney general," they "answer[ed] to no one" and thus were "plainly not agents of the State."[10] Something more than the meaning of Article III's "judicial Power" is at stake when the Court finds it necessary to incorporate the *Restatement (Third) of*

5 Scholars have pored over private standing. And some have considered government standing. *See, e.g.*, Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311 (2014) [hereinafter Grove, *Standing*]; Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781 (2009) [hereinafter Grove, *Nondelegation*]; Hartnett, *supra* note 2, at 2245; Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995); Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in* Parens Patriae, 92 NW. U. L. REV. 111 (1997). But we do not have a systematic appraisal of standing's attempt, made apparent by *Hollingsworth v. Perry*, to identify public "officials" entitled to stand for the government. *See* 133 S. Ct. 2652, 2664 (2013). In *Implied Public Rights of Action*, I explored judicially implied rights of action in favor of governments. *See* Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1 (2014). That work assumed a traditional state actor, for example a public attorney general, would stand for the state. This Article interrogates that assumption in the wake of *Perry*'s adoption of a fiduciary rule for government standing. *See* 133 S. Ct. at 2664–65.

6 133 S. Ct. 2675 (2013).

7 133 S. Ct. 2652 (2013).

8 Suzanne B. Goldberg, *Article III Double-Dipping: Proposition 8's Sponsors, BLAG, and the Government's Interest*, 161 U. PA. L. REV. ONLINE 164, 172 (2013) (arguing that it is far from "clear that Article III . . . permit[s] the federal government to bifurcate its standing for purposes of having federal courts resolve policy disputes between the executive and legislative branches").

9 *Windsor*, 133 S. Ct. at 2687. Though the Court did not hold that the Congressmen had standing in their own right, it relied upon them for the arguments necessary to reach the merits. *See id.*

10 *Perry*, 133 S. Ct. at 2666.

Agency into standing law. Put simply, Article III cannot solve standing's state action problem because Article III did not create it.[11]

To understand government standing, this Article shifts the focus from Article III to a principle of constitutional accountability concerned with "the arbitrary exercise of the powers of government."[12] It argues that the solution to standing's state action problem depends upon the government interest at stake and the limits in place to reduce the risk of abuse of the power of government standing.

For all its failings, state action doctrine reflects a fundamental principle of our constitutional system: any exercise of governmental power must be legally accountable.[13] This principle of constitutional accountability follows from the Due Process Clauses, which demand that government actions be based upon public reasons rather than raw preferences,[14] and the separation of powers, which precludes delegations of authority that shield those wielding government power from constitutional accountability. The constitutional accountability principle limits "outsourc[ing] . . . decisional authority to private parties—authority that binds other private parties in the government's name."[15] Neither courts nor scholars have explored the link between constitutional accountability and standing. Yet focusing upon it makes sense of standing's state action problem. The problem is to identify which instances of standing trigger constitutional accountability concerns and to limit government standing so as to address these constitutional concerns.

This Article argues that standing to litigate government interests on the government's behalf triggers constitutional accountability concerns but that, contra *Perry*, the Constitution does not require legislatures to limit the power of government standing to only traditional government employees and common law agents of the state. Traditional state actors may stand for the government because they are subject to constitutional, statutory, regulatory, and professional constraints designed to ensure that they will exercise the power of government standing for public reasons. Formally private litigants may stand for the government where there are sufficient protections, short of

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11 Article III defines the range of judicially cognizable government interests and supports other justiciability considerations, including adversity, the sufficiency of the record for decision, and avoidance of unnecessary judicial intervention into a political dispute. *See* Flast v. Cohen, 392 U.S. 83, 97 (1968). This Article leaves those considerations untouched.

12 Daniels v. Williams, 474 U.S. 327, 331 (1986) (quoting Hurtado v. California, 110 U.S. 516, 527 (1884)).

13 Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1373 (2003).

14 *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (explaining that exercise of government power may not be based upon "purely personal and arbitrary power").

15 Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV. 507, 511 (2011); *see also* Kimberly N. Brown, *"We the People," Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347, 1350 (2013) (arguing that the "federal government cannot outsource its powers without putting mechanisms in place for rendering contractors accountable to the people and to the President").

denying standing outright, for the rights of defendants and third parties who may be harmed by arbitrary litigation on the government's behalf.

It is an especially apt moment to explore the link between government standing and constitutional accountability. The Court's 2013 marriage equality cases crystallized the problem: in going beyond Article III to invoke the *Restatement (Third) of Agency*, the *Perry* Court unwittingly made clear that government standing concerns much more than the Article III case or controversy requirement. It concerns limits on who may exercise government power. The Court's recent decision in *DOT v. Association of American Railroads* underscored the potential separation-of-powers and due process limits on delegations of lawmaking authority,[16] and Justice Alito's concurrence suggested these limits apply as well to a "citizen suit to enforce existing law."[17] Standing's state action problem, in short, concerns the limits on who may wield the power of government standing.

This Article's analysis of that problem unfolds as follows. Part I describes standing doctrine's different rules for government and private standing, which create standing's state action problem. It then focuses upon the Court's decisions in *Windsor* and *Perry* to show that Article III cannot identify when standing involves a government power or determine which actors may exercise the power of government standing.

Part II identifies when standing involves a government power by considering the interests a litigant aims to stand for in court.[18] Standing involves a government power when it authorizes a litigant to act on a government's behalf to vindicate a government interest. There are four types of government interests: *corporate* interests, which involve a government's property and contract rights; *institutional* interests, which concern the authority to govern and intergovernmental immunities; *administrative* interests in prosecuting crimes and enforcing regulations through civil actions; and *substitute* interests in vindicating the private rights of citizens on their behalf.[19]

Difficult cases arise where a litigant seeks judicial action that would vindicate a public right but does not claim standing to act on the government's behalf. In some cases there is a private right to a remedy that will also vindicate a public right.[20] In other cases there are public rights against government action and private standing is necessary to ensure a remedial system

16 135 S. Ct. 1225, 1234 (2015).

17 *Id.* at 1237 (Alito, J., concurring).

18 Conceptually, private standing, like government standing, involves the power to put "judicial machinery in motion." Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149, 197–98 (1935). It does not follow, however, that private standing and government standing are synonymous. *See infra* Section II.A.

19 Davis, *supra* note 5, at 17–22.

20 *See, e.g.*, Bond v. United States, 131 S. Ct. 2355, 2364–65 (2011) (holding criminal defendant can raise Tenth Amendment as defense to prosecution); *see id.* at 2367 (Ginsburg, J., concurring) (explaining that due process required standing to vindicate Tenth Amendment).

that keeps government accountable to law.[21] Standing does not delegate the public power to enforce the law where it satisfies the government's obligation to provide remedies to redress personal wrongs and to keep government accountable, even if the litigant's action would vindicate a public right. Both the right to a personal remedy and the demand for a system of remedies that holds government to the law sound in due process and constitutional structure. As Chief Justice John Marshall put it in *Marbury v. Madison*, "[t]he very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives . . . injury."[22] Though not "unyielding,"[23] this principle helps distinguish private from government standing.

The other difficult class of cases involves litigants who seek to vindicate legislatively created private rights that are functionally indistinguishable from government interests. One important example is a citizen suit provision authorizing a private litigant to sue regulated parties to vindicate a government's administrative interest in enforcing the law.[24] To evaluate standing in these cases, it is necessary to make a normative judgment based upon the breadth and depth of enforcement discretion that standing would entail. Where private standing to enforce the law would entail sweeping enforcement discretion to burden liberty and property interests, it raises constitutional accountability concerns.

Part III develops this Article's framework to determine who may stand for the government and under what circumstances. This framework looks not simply to Article III of the Constitution, but also to a structural concern with constitutional accountability. Article I and Article II both protect against delegations of government power that are not constitutionally accountable.[25] Constitutional accountability matters because it protects legal rights. Governments may use their sweeping standing to enforce the law arbitrarily against opposing parties or to litigate arbitrarily the rights of third parties. Restrictions on who may stand for the government are rooted in

21 *See* FEC v. Akins, 524 U.S. 11, 24 (1998) (holding that Congress may authorize citizens to litigate "widely shared" injuries against federal agencies).

22 5 U.S. (1 Cranch) 137, 163 (1803).

23 Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1736 (1991).

24 *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 183–84 (2000).

25 Article I's nondelegation doctrine applies to delegations of legislative power to private parties. Carter v. Carter Coal Co., 298 U.S. 238, 311–12 (1936). Article II's Appointments Clause aims to limit the arbitrary exercise of government power by making officers of the United States accountable to the President. *See* Weiss v. United States, 510 U.S. 163, 186 (1994) (Souter, J., concurring). Similarly, the separation of powers prevents delegations that encroach upon the Article II executive power. *See* Morrison v. Olson, 487 U.S. 654, 692–93 (1988). Article II cannot account, however, for standing doctrine's limitations on a state legislature's authority to authorize private litigants to stand for the state in federal court.

protecting the due process rights of opposing parties and third parties from the arbitrary exercise of government power.

Due process precludes a litigant from hauling another before a forum where it would be "unreasonable" for the court to assert personal jurisdiction.[26] It prohibits "bias[ed]" adjudication by requiring "an impartial and disinterested tribunal."[27] It prohibits vague criminal statutes that give the police leeway to engage in "arbitrary enforcement."[28] It precludes "arbitrary punishments" through excessive punitive damages awards.[29] It limits the privatization of government regulation.[30] And it explains why standing doctrine addresses the risk that a litigant would abuse the power of standing.[31]

Limits on standing also concern the individual right to one's day in court, which sounds in due process as much as in Article III. A litigant may abuse third-party standing by arbitrarily litigating the rights of others. One due process problem arises from inadequate representation of absent parties' rights. When a private party sues, the doctrine has recognized this due process concern.[32] When a government actor sues, by contrast, the doctrine has been a muddle. Another due process problem might be termed the "right not to sue,"[33] or the right to determine whether one's rights will be vindicated in court. These due process concerns have appeared in the backdrop of government standing decisions.[34] But neither courts nor commentators have explored how due process might limit who may represent the government when it seeks to espouse the rights of its citizens.

There are four tools, short of denying standing outright, the doctrine may use to satisfy the demand of constitutional accountability when government interests are the basis of standing. One is public control: government

26 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985).

27 Marshall v. Jerrico, Inc., 446 U.S. 238, 242–43 (1980).

28 Kolender v. Lawson, 461 U.S. 352, 358 (1983).

29 Philip Morris USA v. Williams, 549 U.S. 346, 352 (2007) (quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2002)).

30 *Carter*, 298 U.S. at 311–12.

31 One of this Article's concerns, the problem of arbitrary enforcement, is considered by Grove, *Nondelegation*, *supra* note 5, at 820–27, which argues that Article II protects individual liberty by prohibiting Congress from authorizing private litigants to bring administrative claims, and by Evan Caminker, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341, 359 (1989), which rejects the argument that qui tam standing violates "due process norms." Unlike prior commentary, this Article systematically explores the link between government standing and constitutional accountability by considering state standing as well as standing for the United States, identifying when standing involves a government power and how it threatens the due process rights of opposing parties and third parties, and explaining how the power of government standing varies among the four types of government interests.

32 *See* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 306 (1979).

33 Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 599 (2015).

34 *See, e.g.*, Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 132 (1995).

standing might be limited to litigants who are directly accountable to the electorate or indirectly accountable through public officials who oversee them. Another is private law, which may provide a claim against a litigant who abuses her power to stand for the government. A third type is procedural controls on how a litigant may exercise her enforcement discretion. Fourth, there are auxiliary mechanisms that may ensure the court considers third parties' interests in government suits.

There is no shortage of dicta for the proposition that public control is the only way to satisfy constitutional accountability when government interests are at stake.[35] There is wisdom in these dicta, which find some, though not dispositive, support in historical practice. But this Article resists the conclusion that only traditional executive officials may stand for a government in federal court. It argues there are three problems with this view. First, it wrongly lumps all government interests together and fails to acknowledge that the constitutional accountability concerns vary depending upon which government interest is at stake. Second, it is inexplicably inconsistent with the rules regarding constitutional accountability everywhere else in federal public law. Neither due process, Article I, nor Article II absolutely prohibit private parties from wielding government power. If there is a special rule only for government standing, then it must stem from Article III, but Article III cannot bear that weight. Third, there are important differences between state and federal government standing. Standing for the states and standing for the United States differ because the separation of powers mandates executive control of litigation on behalf of the United States in some cases where due process and Article III alone would not require public control.

This Article offers a different framework than the exclusive public control view. Constitutional accountability presumptively requires public control over government standing. In the absence of state law to the contrary, this presumption is overcome more readily in cases involving state standing than those involving the United States' standing. The presumption is weakest in a case involving a government's institutional interests, particularly where the litigant seeks only to defend a government's action, because institutional standing poses the least significant threat to due process interests. The presumption is strongest in cases involving a government's administrative interests, which support sweeping enforcement discretion and do not depend upon a showing of an injury to individuals. Where a government's corporate interests are at stake, the presumption may be overcome where private law constraints on abusive litigation adequately deter arbitrary enforcement. In substitute cases, the legislature may not authorize private litigants to sue unless it has created mechanisms to police the adequacy of representation.

Part IV of this Article evaluates the constitutional accountability approach to government standing. The most serious objection sounds in federalism; linking standing with constitutional accountability seems inconsistent with the black letter rule that federal standing law does not constrain

35 *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 140 (1976) (per curiam).

state courts.[36] To the extent that due process limits the legislature's authority to assign government standing, then federal law imposes some standing requirements on state courts. Part IV argues that the constitutional accountability approach provides a sensible framework for thinking about government standing in state courts. It explains that states have significant latitude to assign standing to enforce state-created, as opposed to federal, rights.[37] Part IV concludes by addressing other objections.

Properly understood, limits on government standing play a prophylactic role in a "scheme of ordered liberty."[38] This Article's approach clarifies the competing values at issue in disputes about government standing, reclaims remedial concerns for standing doctrine, and identifies a sensible place for federal courts in the design of public enforcement. Recasting government standing doctrine in these structural terms does not strip politics and ideology from judicial craft. Nor does it transform all the hard standing cases into easy ones. Rather, it offers an alternative way of talking about government standing that, unlike the Court's injury-in-fact requirement and a simple distinction between government "officials" and private "litigants," makes it possible to have a sensible normative debate.[39]

I. THE PROBLEM

There are two types of state action problems. One is addressed by state action doctrine and concerns whether the Constitution should apply to a defendant who claims to be a private actor.[40] The other concerns an individual or institution who claims to wield state power where it is not clear they have valid authority to do so. Government standing has a state action prob-

36 *See* Lansing Schs. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 693 (Mich. 2010) (holding that Michigan constitution does not track federal standing requirements). *But see* ACLU of N.M. v. City of Albuquerque, 188 P.3d 1222, 1227 (N.M. 2008) ("[O]ur state courts have long been guided by the traditional federal standing analysis.").

37 Under this Article's framework, for instance, express constitutional guarantees of remedies give state courts greater flexibility to conclude that standing does not entail government power but fulfills the government's obligation to provide a system of redress. *See* Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 999 app.1 (2012) (listing forty-one states that have right to remedy or open court provisions in constitution).

38 Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969).

39 That's all. But that's enough. *See* Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 907 (2009) (discussing "pervasive fantasy that we can escape the need for normative argument, controversial assumptions, and human judgment").

40 State action doctrine distinguishes state action, which is subject to constitutional constraint, from private action, which isn't. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001). Whenever "legal obligations would be enforced through the official power of . . . courts" there is state action in the sense that judicial action is state action. Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991). Courts do not, however, treat every private enforcement action as state action. The closest the Court came to doing so was *Shelley v. Kraemer*, 334 U.S. 1 (1948), and it has never read that case for all it may be worth.

lem in this second sense. This Part describes the standing rules that create standing's state action problem. It then discusses the Court's standing decisions in the 2013 marriage equality cases, showing that Article III cannot alone make sense of standing's state action problem.

A. The Differences Between Government Standing and Private Standing

1. Sweeping Interests and Special Solicitude

According to the Supreme Court, standing doctrine is "built on a single basic idea—the idea of separation of powers."[41] In theory, standing limits Article III courts to judicial business by requiring private litigants to show a concrete, imminent, and personal injury-in-fact traceable to the defendant and redressable by a judicial remedy.[42] Standing doctrine's focus upon injuries-in-fact creates a conceptual conundrum when a government claims a right to judicial relief. After all, "There is no such thing as the State."[43] It cannot be struck. It cannot be jailed. It cannot feel disappointment, or frustration, or pain. It is therefore more accurate (and useful) to speak of government interests rather than injuries-in-fact when considering government standing.

Government litigants have judicially cognizable interests even when they have not suffered concrete and personal injuries-in-fact. As a result, governments have standing where a private litigant, who must allege an injury-in-fact, would not. For instance, the United States needs no injury-in-fact to have standing to enforce federal law,[44] and may sue to "see[ ] that the law is obeyed."[45] A state has standing to vindicate its "sovereign power . . . to create and enforce a legal code" and to protect public health and welfare.[46] Unlike a private party, therefore, the United States or a state may litigate a "generalized grievance."[47] Thus, governments' judicially cognizable interests are sweeping and need not depend upon an injury-in-fact.

In particular, there are four types of interests that governments may litigate. The first type is *corporate* interests. Like private corporations, governments have standing as property owners and parties to contracts and may

41 Allen v. Wright, 468 U.S. 737, 752 (1984).

42 Lujan v. Defs. of Wildlife, 504 U.S. 555, 573–74 (1992).

43 W.H. Auden, *September 1, 1939*, *in* CHARLES OSBORNE, W.H. AUDEN: THE LIFE OF A POET 194 (1979).

44 *See* Hartnett, *supra* note 2, at 2251.

45 Grove, *Nondelegation*, supra note 5, at 782 (quoting FEC v. Akins, 524 U.S. 11, 24 (1998)) ("[A]lthough Congress may, consistent with Article III, authorize the Executive Branch to assert the abstract 'injury to the interest in seeing that the law is obeyed,' Congress may not confer similarly broad standing on private parties." (quoting *Akins*, 524 U.S. at 24)); *see id.* at 794 ("Congress may, consistent with Article III, authorize the Executive Branch to see that the law is obeyed." (citing United States v. Raines, 362 U.S. 17, 27 (1960))).

46 Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601, 607 (1982).

47 *Raines*, 362 U.S. at 27.

enforce their corporate interests. Under current doctrine, it is unclear how much authority the legislature has to authorize enforcement of corporate interests by anyone other than an executive official, such as the Attorney General.[48] Standing to litigate *institutional* interests has also defied Article III analysis. Institutional interests consist of a government's interests as a political, rather than a corporate, institution. Controversy abounds when a formally private litigant seeks to litigate an institutional interest.[49] The state action problem has also arisen where the government's *administrative* interests in enforcing the law and deterring violations are at stake. These administrative interests would seem to be "public rights" that only public officials may litigate,[50] yet it is not hard to identify cases that involve administrative interests where, nevertheless, standing is uncontroversial under the Court's injury-in-fact test.[51] The state action problem becomes even more perplexing where a litigant seeks to vindicate a government's *substitute* interests in litigating its citizens' private rights.[52] Perhaps most perplexing is that federal courts have treated state agencies as private associations in order to find standing where a state agency would otherwise lack it.[53]

Standing doctrine shows "special solicitude" when government interests are at stake.[54] For example, federal courts may relax standing doctrine's causation and redressability requirements for governments. In *Massachusetts v. EPA*, the Court granted standing to Massachusetts to sue the Environmental

48 *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 n.8 (2000).

49 The Court only recently made clear that a criminal defendant has standing to raise a Tenth Amendment challenge to a federal law under which she is being prosecuted. Bond v. United States, 131 S. Ct. 2355, 2365 (2011). Whether this rule applies where a private litigant is not the subject of an enforcement action remains an open question, *cf.* Nance v. EPA, 645 F.2d 701, 716 (9th Cir. 1981), and scholars have questioned whether there should be private standing to litigate institutional interests, *see* Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1440 (2013).

50 *See infra* Section III.A.

51 *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 432–33 (1964).

52 Federal courts have struggled to identify when a litigant has valid authority to stand for a government in substitute litigation. *Compare, e.g.*, Bd. of Educ. v. Ill. State Bd. of Educ., 810 F.2d 707, 712 & n.7 (7th Cir. 1987) (holding that state school board was not state actor for purposes of *parens patriae* substitute standing in suit alleging race discrimination by local school board), *with id.* at 713 (Cudahy, J., dissenting) (arguing that majority had set "dangerous precedent for frustrating federal anti-discrimination statutes and the fourteenth amendment"). For other recent examples, see *Thiebaut v. Colorado Springs Utilities*, 455 F. App'x 795, 801 (10th Cir. 2011), and *Cheng v. WinCo Foods LLC*, No. 14-CV-0483-JST, 2014 WL 2735796, at *10 (N.D. Cal. June 11, 2014).

53 *See, e.g.*, Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977); State of Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Connecticut, 706 F. Supp. 2d 266, 283 (D. Conn. 2010).

54 Massachusetts v. EPA, 549 U.S. 497, 520 (2007).

Protection Agency for refusing to address greenhouse gas emissions,[55] citing the sort of probabilistic injury that rarely suffices for private standing.[56]

2. Judicial Disfavor

Standing doctrine disfavors "private attorney general" litigation of generalized grievances in which a private party's interest is "in proper application of the Constitution and laws."[57] In *Lujan v. Defenders of Wildlife*, the Court held that Article III prohibits Congress from authorizing a private litigant to vindicate the national public interest in seeing that the law is enforced.[58] And even where a private litigant plausibly claims a personal interest, the Court may deem it a nonjusticiable generalized grievance if the interest appears too abstract.[59] Public attorneys general—that is, litigants deemed proper representatives of the government's interest—are not so limited.

At the same time, however, standing doctrine occasionally imposes *additional* hurdles when a state actor sues, evincing a special concern for the abuse of government power. For example, a private association may espouse the rights of its members without alleging an independent interest,[60] but a state cannot sue on its citizens' behalf without an interest "apart from the interests of particular private parties."[61] Moreover, while the United States needs express statutory authorization to have standing to vindicate its citizens' civil rights,[62] private organizations' representative standing may be implied.[63] Thus, whether the question is judicial solicitude or judicial disfavor for governments, standing doctrine must distinguish government from private interests and state actors from private litigants.

B. Article III and Standing's State Action Problem

The Court's decisions in the 2013 marriage equality cases show that Article III cannot by itself distinguish government from private interests or identify who may exercise the power of government standing.

1. *United States v. Windsor*

In *Windsor*, the Court held that the Defense of Marriage Act, which defined "marriage" for purposes of federal law to exclude same-sex mar-

55 *Id.* at 521–23.

56 *See* Jonathan Remy Nash, *Standing's Expected Value*, 111 MICH. L. REV. 1283, 1285 (2013).

57 Lujan v. Defs. of Wildlife, 504 U.S. 555, 573–74 (1992).

58 *Id.* at 573.

59 *See, e.g.*, Whitmore v. Arkansas, 495 U.S. 149, 164 (1990).

60 *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333 (1977).

61 Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982).

62 *See* United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980).

63 *See* United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc., 517 U.S. 544, 557 (1996).

riages, violated the Fifth Amendment Due Process Clause.[64] In the normal course, the Department of Justice would have defended DOMA against constitutional challenge. The DOJ, however, declined to defend DOMA, though the United States remained liable to Edith Windsor for a tax refund under the district court's judgment striking down the statute.[65] Instead of the DOJ, the Bipartisan Legal Advisory Group (BLAG), a small group of members of the House of Representatives, defended DOMA on appeal. The Court held that the United States' liability under the district court's judgment sufficed for constitutional standing and that BLAG's "substantial" defense of DOMA provided the adversity required for prudential standing.[66] This holding was unusual. Federal courts are usually reticent to permit Congress, much less the House alone or a group of House members, to take on the task of vindicating federal law.[67] To be sure, the Court found it "need not decide whether BLAG would have standing" in its own right.[68] But *Windsor* stands for a prudential rule that where congressional representatives present a "capable defense" of a law the executive enforces but refuses to defend, the Court may proceed to the merits.[69]

2. *Hollingsworth v. Perry*

In *Perry*, by contrast, the Court did not proceed to the merits of marriage equality. *Perry* concerned the constitutionality of Proposition 8, a ballot initiative that California voters adopted to define "marriage [as] between a man and a woman."[70] Two same-sex couples sued state officials to enjoin implementation of Proposition 8, arguing it violated their rights to due process and equal protection. California's governor and attorney general, like the President and DOJ in *Windsor*, refused to defend the law. The district court permitted Proposition 8's proponents to intervene, and ultimately struck down the law.[71] The Ninth Circuit held that Proposition 8's proponents had standing on appeal, and affirmed on the merits.[72] There was no doubt that California had authorized Proposition 8's proponents to defend the state law, because the California Supreme Court had held that the state constitution and election code implicitly did so.[73]

In theory, the California Supreme Court's holding could have been the end of the standing question. But the U.S. Supreme Court held that Proposi-

64 United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

65 *See id.* at 2684.

66 *Id.* at 2687.

67 *See, e.g.*, Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571 (2014).

68 *Windsor*, 133 S. Ct. at 2688.

69 *Id.* at 2689.

70 Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013) (quoting CAL. CONST. art. I, § 7.5).

71 *See id.* at 2660.

72 *See id.*

73 *See* Perry v. Brown, 265 P.3d 1002 (Cal. 2011).

tion 8's proponents lacked standing to appeal.[74] The "fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary," the Court explained, because "standing in federal court is a question of federal law, not state law."[75]

The Court in *Perry* was forced to rove far beyond Article III to conclude that Proposition 8's proponents lacked standing. Citing the *Restatement (Third) of Agency*, the Court reasoned that Proposition 8's proponents lacked standing because they were not common law agents of the state.[76] The absence of a fiduciary relationship, the *Perry* Court explained, created too great a risk that Proposition 8's proponents would abuse their litigation authority.[77]

Thus Article III alone did not solve the state action problem, leading the Court to grapple for a solution in agency law. As I have argued elsewhere, defining government power in fiduciary terms has significant conceptual, doctrinal, and practical problems.[78] Conceptually, the *Perry* Court left unclear in which ways standing for the state must involve a fiduciary relationship. At times it seemed to envision a fiduciary relationship between the litigant and the people.[79] At others it seemed to say that a litigant must be a fiduciary for elected officials in order to stand for the government.[80] As a doctrinal matter, the *Perry* Court's newfound agency rule is inconsistent with precedent. Private attorneys may have standing to prosecute criminal contempt charges even though they are not common law agents of the court, political officials, or "We the People."[81] Qui tam relators are not common law agents of the state, but the *Perry* Court purported to leave this long-recognized "private attorney general" mechanism untouched.[82] As a practical matter, the Court's agency rule calls into question settled enforcement regimes and leaves legislatures uncertain about their flexibility to design new ones.

Following *Perry*, neither the United States nor a state may "issu[e] to private parties who otherwise lack standing a ticket to the federal courthouse."[83] At the same time, however, the United States or a state may authorize "officials to speak [for them] in federal court" even though the officials would otherwise lack standing.[84] This distinction begs the question. Under California law, didn't Proposition 8's proponents hold a limited

74 *See Perry*, 133 S. Ct. at 2659.

75 *See id.* at 2667.

76 *See id.* at 2666–67.

77 *See id.*

78 *See* Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145 (2014).

79 *See Perry*, 133 S. Ct. at 2667.

80 *See id.* at 2666.

81 *See id.* at 2673 (Kennedy, J., dissenting) (citing FED. R. CRIM. P. 42(a)(2); Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 807 (1987)).

82 *See id.* at 2665 (majority opinion).

83 *Id.* at 2667.

84 *Id.* at 2664.

"office" tasked with defending the ballot initiative if the attorney general would not? Alternatively, isn't office-holding irrelevant where a litigant claims standing based upon legislative authorization but not legislative office?[85] *Perry*'s answers to these questions are wholly unconvincing, and its Article III approach to standing's state action problem leaves one puzzled as to why standing might be a device to curtail the use and abuse of government power.[86]

II. STANDING AS A GOVERNMENT POWER

Article III can tell us when a government has an interest that gives it standing in court. It cannot, however, tell us how to distinguish between private standing and government standing in difficult cases. Nor can it tell us who may stand for the government, which, after all, cannot stand for itself. This Part identifies when standing involves a government power. Standing involves a government power when a government interest is at stake, the litigant seeks judicial action that would vindicate that interest, and the litigant seeks that judicial action on the government's behalf. This Part rejects the view that all private standing involves government power and the view that all

85 *Id.* at 2672 (Kennedy, J., dissenting) ("[P]roponents' authority under California law is not contingent on officeholder status . . . .").

86 It is possible to reconcile *Windsor* and *Perry* in formalist terms. In *Windsor*, there was an Article III injury to the United States, which owed Windsor a tax refund under the district court's judgment, while in *Perry*, there was no Article III injury because Proposition 8's proponents' only interest was ideological. But if, as *Perry* would have it, the purpose of standing doctrine is to avoid "an active political debate," *Perry*, 133 S. Ct. at 2659, then the Court erred in recognizing government standing in *Windsor*.

It is also possible to see *Windsor* and *Perry* in terms of raw politics. The Court—and in particular some members of its so-called "liberal" wing—gave "a little something" to each side of the debate about gay marriage by striking down DOMA while leaving the definition of marriage to the states. *Cf.* Trevor Burrus, *A Tactful Move Toward Marriage Equality: How the Supreme Court Will Give Both Sides a Victory in the Gay Marriage Cases*, THE BLAZE (Apr. 1, 2013), http://www.cato.org/publications/commentary/tactful-move-toward-marriage-equality-how-supreme-court-will-give-both-sides. Perhaps some members of the Court thought it prudent to wait a little longer to recognize a right to marriage equality, which the Court did in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Notwithstanding these alternative explanations of the divergent standing decisions, *Windsor* and *Perry* helpfully frame standing's state action problem. *Perry*, after all, confronted the problem head-on and made new law in trying to solve it.

This Article offers an internal critique of government standing doctrine. Of course, "[i]t is a commonplace that the Justices of the Supreme Court routinely manipulate standing doctrine to promote their ideological goals [and] . . . that seeking to make sense of standing doctrine is a fool's errand." Richard H. Fallon, Jr., *How to Make Sense of Supreme Court Standing Cases—A Plea for the Right Kind of Realism*, 23 WM. & MARY BILL RTS. J. 105, 105 (2014). But, as Richard Fallon has argued, it is possible to "make[ ] sense [of the law] in its own terms" while taking into account the "insights of social science" and "parsing . . . opinions" to describe legal doctrine based upon "the kinds of facts that actually drive legal decisions." *Id.* at 106–07. As he notes with respect to *Perry*, "California's attempted assignment of its interests in defending Proposition 8 . . . fits into previously established doctrinal patterns in complex ways." *Id.* at 122. This Article makes sense of that complexity.

standing to vindicate public rights involves government power. Both views are inconsistent with standing doctrine, due process, and a democratic vision in which the courts are open to redress wrongs and to hold government accountable to law.

A. Private Standing and Government Powers

Identifying when standing entails a government power is often easy. There's no doubt, for example, when a litigant's complaint premises standing solely upon legislative authorization to vindicate government interests on the government's behalf. Since the late 1960s, however, there has been a "vast increase in private enforcement actions under federal law,"[87] and the definitional status of many of these actions is a matter of "deep" disagreement among legal commentators.[88]

Critics of state action doctrine have argued there is no meaningful distinction between government power and private power. As Morris Cohen long ago pointed out with respect to private property, behind every private right looms the power of the state that enforces it.[89] The critics are correct that private standing is as much a power to invoke the judicial process as government standing is. It does not follow, however, that private standing and government standing are synonymous.

Part I already described an important functional distinction between private and government standing under current doctrine. Government standing entails significant enforcement discretion. The range of judicially cognizable government interests includes an interest in enforcing the law, an interest in preserving the "sovereign power . . . to create . . . a legal code," and an interest in the "health and well-being" of the citizenry.[90] Private standing does not entail enforcement discretion of this breadth and depth because, unlike governments, private litigants must show a concrete and personal injury-in-fact. Abuse of the sweeping power of government standing is, in general, more likely than abuse of the power of private standing to foster sweepingly unjust policies.

Distinguishing between government standing, which may entail broad and deep discretion to enforce the law, and private standing, which is comparatively constrained by the injury-in-fact requirement, is useful but incomplete. An organization's standing to litigate on behalf of its members, as well as a class plaintiff's standing to represent a class, may create sweeping

87 Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 647 (2013).

88 *See id.* at 639.

89 Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927) (describing "property as sovereign power compelling service and obedience"); *see also* Chemerinsky, *supra* note 4, at 505.

90 Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601, 607 (1982).

enforcement discretion, but neither is understood to involve government power.[91]

Why the distinction between government standing and the standing of organizations and class action plaintiffs? The answer is suggested by a perplexing series of cases involving state actors suing as private organizations. Private organizations, the Court has held, have associational standing to sue on behalf of their members who have suffered injuries-in-fact, as long as the suit is germane to the organization's purposes and the participation of the individual members is not necessary to provide relief.[92] What's perplexing is that the Court developed this rule for private standing in a case involving a state agency, not a private organization. In *Hunt v. Washington State Apple Advertising Commission*, the Court held that a state agency could sue on behalf of the state's apple growers and dealers.[93] The defendants understandably argued that the Commission was not a private association with associational standing, but rather was a state agency that lacked a judicially cognizable government interest.[94] The Court conceded that the Commission was a state agency but nevertheless treated it as a private association in order to find it had standing to "prosecut[e] . . . this kind of litigation" on behalf of "a specialized segment of the State's economic community."[95] *Hunt* involved a state agency but not state standing because the suit was on behalf of private parties who had suffered injuries-in-fact, not on the state's behalf.

Scholars have made sense of state action doctrine in precisely these terms. Gillian Metzger argues that the "characteristic of acting on behalf of government is what makes . . . private delegations particularly threatening to the principle of constitutionally-constrained government."[96] Similarly, Lillian BeVier and John Harrison argue that state action doctrine "reflects a vision of the Constitution" in which state actors, unlike private parties, "may not seek to maximize their own welfare" but instead "must always act on behalf of their citizen principals."[97] Understood in these terms, standing is a government power when it authorizes the litigant to act on behalf of the government to vindicate government interests.

This distinction between government standing and private standing finds support in a familiar principle that has been given short shrift in mod-

91 *But see* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 152 (2003) ("[T]he class action . . . has emerged not simply as a procedural supplement to preexisting law but, rather, as an institutional rival to the ordinary process of lawmaking itself.").

92 Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977).

93 *Id.* at 344.

94 *Id.* at 341.

95 *Id.* at 344 ("The Commission, while admittedly a state agency, for all practical purposes, performs the functions of a traditional trade association representing the Washington apple industry."); *see also* Office of Prot. & Advocacy for Pers. with Disabilities v. Connecticut, 706 F. Supp. 2d 266, 280–83 (D. Conn. 2010) (providing recent example of standing decision based upon treating state agency as private organization under *Hunt*).

96 Metzger, *supra* note 13, at 1462.

97 BeVier & Harrison, *supra* note 4, at 1767, 1796.

ern standing law. The principle is that a right implies a remedy. This principle sounds in due process and is deeply rooted in our tradition of ordered liberty, as John Goldberg and Tracy Thomas have argued.[98] Citing Blackstone (who in turn relied upon John Locke), Chief Justice John Marshall celebrated the right-remedy principle in *Marbury v. Madison*, explaining that "the very essence of civil liberty" requires government to recognize a remedy "for the violation of a vested legal right."[99] Nineteenth-century due process case law recognized the right to a remedy. In *Missouri Pacific Railway Co. v. Humes*, the Court explained that "[i]t is the duty of every State to provide, in the administration of justice, for the redress of private wrongs."[100] As Goldberg has described, *Humes*'s dictum echoed the Court's holding in *Poindexter v. Greenhow* that due process supports a right to redress: "'No one,' the Court held, 'would contend that a law of a State, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law.'"[101] Drawing upon this principle, the Court's seminal decision in *Texas & Pacific Railway Co. v. Rigsby* held that the "especial" beneficiaries of a federal statute had standing under the common law to sue for harms they suffered from statutory violations.[102] In *Bivens*, the Court held that the Constitution implies a damages remedy where, as Justice John Marshall Harlan put it in his concurrence, it is "damages or nothing."[103]

In these cases private standing "empowers" a rights-holder in order to place the "decision to complain about an alleged wrong . . . uniquely with the victim."[104] Where a right implies a remedy, private standing is categorically different from "criminal prosecutions and administrative proceedings."[105] By empowering a private party to litigate on her own behalf, private standing

98 *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 527 (2005); Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633 (2004).

99 5 U.S. (1 Cranch) 137, 163 (1805); *see* Goldberg, *supra* note 98, at 545.

100 115 U.S. 512, 521 (1885).

101 Goldberg, *supra* note 98, at 570 (quoting Poindexter v. Greenhow, 114 U.S. 270, 303 (1884)).

102 241 U.S. 33, 39 (1916).

103 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 409–10 (1971) (Harlan, J., concurring).

104 Goldberg, *supra* note 98, at 601.

105 *Id.* at 602. This account of the remedial implications of due process, though controversial, is sound. It is controversial because the current Court disfavors implied private rights of action, *see* Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009), and because it is in tension with the Court's statements that the Constitution does not create affirmative rights, *see* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 189–90 (1989). The account is sound, however, because it does not depend upon due process guaranteeing a right to a remedy in every case. Instead, the due process guarantee of a system adequate to redress wrongs (unlike, for example, the right to demand that the state prosecute another person) leaves government with "substantial discretion in shaping" the enforcement system. Goldberg, *supra* note 98, at 595. This Part argues simply that standing doctrine's

helps satisfy the state's public responsibility to provide private remedies, and thus public reason and private preferences are congruent.

Private standing also helps hold government constitutionally accountable. As Richard Fallon and Daniel Meltzer argued in an influential article, constitutional accountability "demands a system of constitutional remedies adequate to keep government generally within the bounds of law."[106] Standing law can support—or undermine—this remedial system. Consider *City of Los Angeles v. Lyons*, in which the Court denied an African-American man who had been choked by police standing to seek injunctive relief against the police department's policies on chokeholds.[107] As Fallon has argued, the denial of standing in *Lyons* amounted to the denial of remedies necessary to keep government constitutionally accountable.[108]

To treat private standing as simply government power gives short shrift to its role in realizing rights to remedies and ensuring constitutional accountability. The right to a remedy reflects a vision of "broad citizen access to our federal courts."[109] Private standing allows citizens to pursue legal redress on their own behalf. Though the right-remedy idea traces its "pedigree" to a concern with "non-arbitrary treatment" that is "independent of democracy," the demand that courts be open has come to reflect a "pervasive concern that courts, as structures of governance themselves, need the participatory parity of litigants to legitimate the judgments rendered."[110]

B. Government Powers and Public Rights

Standing's distinction between state actors and private litigants seeks to put public reasons and private preferences in their proper places within the litigation system. Litigants may put judicial machinery in motion for public reasons or out of private preferences. Both have their place in a scheme of ordered liberty. Private standing entails the power to stand for one's private preferences in court. Government standing, by contrast, is a power to act for the government to vindicate its public interests. Three important doctrinal consequences follow from the conclusion that standing involves a government power when a litigant seeks to vindicate a government interest on the government's behalf.[111]

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distinction between private standing and government power makes sense insofar as private standing fulfills the government's duty to provide an adequate system of redress.

106 Fallon & Meltzer, *supra* note 23, at 1778–79.

107 461 U.S. 95, 96 (1983).

108 Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 74–75 (1984).

109 Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 2 (2010) (discussing vision of private enforcement behind creation of Federal Rules of Civil Procedure).

110 Resnik, *supra* note 37, at 972.

111 Under Federal Rule of Civil Procedure 17(a), the government is a real party in interest when a private litigant sues on its behalf. *See* United States *ex rel.* Eisenstein v. City of New York, 556 U.S. 928, 934 (2009). Rule 17 also requires a litigant to have the capacity

First, standing to request remedies that would vindicate public rights is not always synonymous with government power.[112] The Court's standing decision in *Bond v. United States* provides an example of a private right to a remedy that vindicates public rights—in this case the states' institutional interests under the Tenth Amendment.[113] In *Bond*, the Court held that a criminal defendant has standing to raise the Tenth Amendment as a defense to a federal prosecution.[114] Criticizing *Bond*, Aziz Huq has argued that standing to vindicate a government's institutional interests involves an exclusive (or, at least, nearly exclusive) government power under Article III.[115] On that view, the policies underlying Article III prohibit courts from recognizing private standing that would vindicate institutional interests.

Looking beyond Article III to due process explains why *Bond*'s standing did not involve a government power. In her concurring opinion, Justice Ruth Bader Ginsburg reasoned that due process guarantees a "personal right not to be convicted under a constitutionally invalid law" and demands that a criminal defendant have a remedy to protect her personal right.[116] Because Bond could claim that her private right required a private remedy, standing did not present a constitutionally troubling conflict between private and public interests.

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to sue, *see* FED. R. CIV. P. 17(b), which is a personal qualification to come into court separate from a right of action for relief. *See, e.g.*, Moore v. Matthew's Book Co., 597 F.2d 645, 647 (8th Cir. 1979). There may be some overlap between capacity and standing in government suits but as a formal matter only standing concerns the court's jurisdiction. *See, e.g.*, Gonzalez-Jimenez de Ruiz v. United States, 231 F. Supp. 2d 1187, 1196 (M.D. Fla. 2002) ("Capacity to sue differs from standing, as capacity to sue 'speaks to a party's legal qualification, such as legal age, that determines one's ability to sue or be sued.'").

112 Whether standing to vindicate public rights is an exclusively government power is a distinct question from whether only traditional state actors may be authorized to litigate public rights on the government's behalf. *See* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 698 (2004) ("It is theoretically possible, of course, for a legal system to view criminal prosecutions as actions by the public to vindicate public rights while simultaneously allowing victims or other private individuals to conduct the prosecution on behalf of the public."). Part III addresses the second question.

113 131 S. Ct. 2355, 2359–60 (2011).

114 *See id.* at 2359. When the case reached the Court for the second time, it held that the Chemical Weapons Convention Implementing Act did not reach Bond's alleged conduct, which involved "an amateur attempt by a jilted wife to injure her husband's lover [and] . . . ended up causing only a minor thumb burn readily treated by rinsing with water." Bond v. United States, 134 S. Ct. 2077, 2083 (2014).

115 *See* Huq, *supra* note 49, at 1440 (arguing that "individual litigants should be categorically barred from obtaining relief based on the disparagement of governance structures held in common even if they have been hauled into court in the first instance as a civil or a criminal defendant," except in cases where they "assert a due process-like interest isomorphic with Article III of the Constitution").

116 *Bond*, 131 S. Ct. at 2367 (Ginsburg, J., concurring) (citing Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1331–33 (2000)); North Carolina v. Pearce, 395 U.S. 711, 739 (1969) (Black, J., concurring in part and dissenting in part); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3.

Second, private standing to vindicate public rights *against* the government is necessary to keep government accountable to law and does not involve a delegation of the power of government standing. Many voting rights cases against state governments fit within this category.[117] Private standing to seek judicial review of federal agency action may also involve public rights but not the power of government standing. That is the best way to understand *FEC v. Akins*.[118] In that case the Court held that voters could sue to vindicate an "informational" injury where the Federal Election Commission concluded that the American Israel Public Affairs Committee did not have to disclose its membership, contributions, and expenditures under the Federal Election Commission Act.[119] The Court granted standing, concluding that "where a harm is concrete, though widely shared, [there is an] 'injury in fact.'"[120] In other words, a public right may support standing to hold government officials to the rule of law.[121]

Bond and *Akins* make sense in terms of remedies and constitutional accountability. It would be strange to describe litigation of citizens' rights against government as a government power. By contrast, litigation of public rights on behalf of a government involves government power.

Third, in some cases Congress has created private rights of action against regulated parties that should be treated as public rights of action to sue on behalf of the government. One example is the citizen suit provision at issue in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[122] In that case, the Court held that an environmental group had standing under the Clean Water Act to sue an alleged polluter even though "there had been 'no demonstrated proof of harm to the environment.'"[123] Justice Antonin Scalia, writing in dissent, was correct that there was no immediate and tangible injury-in-fact to the plaintiffs.[124] Nevertheless, the Court held that the plaintiffs' "reasonable concerns" about environmental harms gave them standing to sue for damages on behalf of the United States because the

117 *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666 (2001); Saul Zipkin, *Democratic Standing*, 26 J.L. & POL. 179, 197 (2011).

118 524 U.S. 11 (1998).

119 *Id.* at 13–14.

120 *Id.* at 24.

121 *See* Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221, 279 (2008) ("Had the *Akins* Court not seized on the lack of information to find standing . . . no plaintiff could sue to enforce the FECA in federal court . . . ."). It might be objected, however, that private standing to sue federal executive agencies runs afoul of Article II, where there is no private injury-in-fact, on the theory that private suits to enforce federal law against the executive interfere with the President's power to execute the laws. As discussed below, *infra* note 168, I am not persuaded by this objection, but this Article's analysis does not aim to add to the existing debate about this Article II theory about private standing.

122 528 U.S. 167 (2000).

123 *Id.* at 199 (Scalia, J., dissenting) (quoting Friends of the Earth, Inc., v. Laidlaw Envtl. Servs. (TOC), Inc., 956 F. Supp. 588, 602 (D.S.C. 1997)).

124 *See id.* (majority opinion).

threat of damages would deter future pollution.[125] This suit, though based upon a private right of action, should be understood as involving formally private litigants standing for the government's administrative interest in enforcing the law against regulated parties. Unlike a suit *against* a federal agency, a suit *on behalf of* an agency against regulated parties poses a threat to due process protected rights. *Laidlaw* was wrongly decided under the rule the Court announced in *Hollingsworth v. Perry* because the Clean Water Act did not create a "fiduciary" relationship between citizen litigants and the state.[126] But, as Part III argues, the Constitution does not limit government standing solely to "fiduciaries" of the state. Instead, the Constitution requires that government standing be structured to keep government power constitutionally accountable.

III. Government Standing and Constitutional Accountability

The point is so fundamental as to be easily missed: the Constitution requires that government power—including the power of government standing—be "structurally accountable to the people."[127] Across a wide array of doctrines, "the Constitution requires all government action to be justified by reference to some public value."[128] The Constitution may enforce this requirement directly by requiring review of specific government actions or prophylactically by ensuring structures that reduce the risk of abuse of government power. Government standing is just such a prophylactic doctrine. Thus, government standing concerns much more than the Article III case-or-controversy requirement as measured by injuries-in-fact.

There is a strong argument that public control is the only way to satisfy constitutional accountability for government standing no matter the government interest at stake. This Part, however, argues that this view has three problems. First, the constitutional concerns vary across the four types of government interests. Second, a flat prohibition upon private enforcement of government interests is inconsistent with the rules regarding constitutional accountability everywhere else in public law. Third, the exclusive public control view conflates standing for the states and standing for the United States even though the Constitution does not require the states to adopt Article II's requirements for their executive branches. In lieu of the exclusive public control view, this Part argues for a presumption in favor of public control, which can be overcome depending upon the government interest at stake and the safeguards in place to reduce the risk of abuse of government standing.

The argument proceeds in four Sections. Section III.A sketches the exclusive public control view. Section III.B argues that Article III cannot sus-

125 *Id.* at 183–84.

126 *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2664–67 (2013).

127 Brown, *supra* note 15, at 1350.

128 Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1692 (1984).

tain a special rule—applicable only to standing—absolutely prohibiting private litigants from exercising government power. Section III.C discusses the underlying constitutional rights that create the demand that government standing be constitutionally accountable. Section III.D shows how to keep government standing constitutionally accountable by developing a framework for determining who may stand for the states and the United States in corporate, institutional, substitute, and administrative suits.

A. Exclusive Public Control

In *Buckley v. Valeo*, the U.S. Supreme Court stated the exclusive public control view, opining that only "Officers of the United States" may "conduct[ ] civil litigation in the courts of the United States for vindicating public rights."[129] This statement is obviously overbroad; state officials, after all, may litigate public rights in federal court. But the view has oft been repeated. In *Lujan*, for example, the Court stated that "individual rights," which will support private standing, "do not mean public rights."[130] Similarly, in *Schenck v. Pro-Choice Network of Western New York*, the Court stated that "a plaintiff customarily alleges violations of private rights, while 'public safety' expresses a public right enforced by the government."[131]

The strongest support for the view that only executive officials may stand for a government comes from history. Ann Woolhandler and Caleb Nelson have argued that, though the practice of eighteenth- and nineteenth-century courts may not "compel[ ] acceptance of the modern Supreme Court's vision of standing," it does support "the requirements of public control over public rights and private control over private rights."[132] Quoting Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts, they argue that the "general rule" in the Early Republic was "[u]ndoubtedly" that "it is for the public officers exclusively to apply [for judicial relief], where public rights are to be subserved."[133]

As Woolhandler and Nelson point out, the practice in public nuisance cases underscores that private litigants did not have general standing to

129 424 U.S. 1, 140 (1976) (opining that the "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights . . . may be discharged only by persons who are 'Officers of the United States'").

130 Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992).

131 519 U.S. 357, 376 (1997).

132 Woolhandler & Nelson, *supra* note 112, at 691, 695. Woolhandler's and Nelson's nuanced historical account concludes by observing that "standing doctrine implicates not only Article III but also a variety of other constitutional concerns, including the relationships among all three branches of the federal government, the relationship between the federal government and the states, and the demands of due process." *Id.* at 732. In developing a framework for government standing doctrine that looks to due process and constitutional accountability, I have drawn upon and benefitted from Woolhandler's and Nelson's important suggestion that standing reflects a "variety of . . . constitutional concerns" including due process. *Id.*

133 *Id.* at 709 (quoting *In re* Wellington, 33 Mass. (16 Pick.) 87, 104 (1834)).

enforce the law.[134] Public nuisances were unreasonable interferences with a property right shared in common by the public. Executive officials could prosecute actions to abate public nuisances and punish those responsible.[135] A person who suffered "special damage" could sue on her own behalf, but an uninjured party had no standing under the common law to prosecute an action to redress the public wrong.[136]

In addition to history, there is a strong functional argument for exclusive public control of government standing. The wide range of judicially cognizable government interests means that those who stand for the government have significant discretion to burden the constitutional rights of opposing parties and third parties not before the court. Limiting government standing to executive officials would address these constitutional concerns. After all, executive officials are state actors subject directly to constitutional constraints under the state action doctrine. Moreover, they may be held politically accountable for their decisions, directly through elections or indirectly through the elected officials who appointed them. Nonconstitutional rules and norms limit their enforcement discretion. In the usual course, government attorneys are salaried employees who do not have personal financial interests at stake in any particular enforcement action. Internal agency controls, not to mention government ethics standards, constitutional rights, and a sense of public responsibility, bear upon a public attorney general's litigation decisions. Accordingly, we expect that elected officials and traditional government employees will "look to the public good, not private gain" and enforce the law based upon public reasons, not for "selfish reasons or arbitrarily."[137] When they do not, there are legal and political remedies against them.

B. Article III and Private Delegations

This Article argues, however, that the Constitution does not limit government standing to executive officials in all cases. The requirement of constitutional accountability for government power may be satisfied in more than one way.

Both the states and the United States regularly delegate substantial authority to private actors. These private delegations are an accepted and often celebrated feature of modern government.[138] More important, most private delegations are constitutional.

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134 *Id.* at 700.

135 *See, e.g.*, State *ex rel.* Williams v. Karston, 187 S.W.2d 327, 329 (Ark. 1945) (discussing common law and Attorney General's standing to sue); Woolhandler & Nelson, *supra* note 112, at 700.

136 City of Georgetown v. Alexandria Canal Co., 37 U.S. (12 Pet.) 91, 97 (1838).

137 Ass'n of Am. R.Rs. v. DOT, 721 F.3d 666, 675 (D.C. Cir. 2013), *rev'd and remanded on other grounds sub nom.* DOT v. Ass'n of Am. R.R., 135 S. Ct. 1225 (2015).

138 *See generally* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000).

Article I provides that "[a]ll legislative Powers herein granted shall be vested in . . . Congress."[139] The Court has interpreted this vesting clause to prohibit Congress from delegating its legislative powers to other state actors or to private parties.[140] This nondelegation doctrine constrains only the most sweeping delegations of lawmaking authority, however, requiring simply that Congress provide an intelligible principle to guide a delegate's lawmaking discretion.[141] Almost any congressional guidance suffices.[142]

Under current doctrine, moreover, Article II permits private delegations. Article II vests the executive power in the President, obliges her to take care to execute the laws, and gives her the power to appoint "Superior Officers."[143] Delegations of executive power to private persons might violate the separation of powers by depriving the executive branch of control of law execution or otherwise disrupting the balance of power among the branches.[144] And yet we have private associations setting regulatory standards for industries,[145] self-regulatory organizations enforcing administrative regulations,[146] private third parties monitoring regulated parties for compliance with federal standards,[147] privately run prisons incarcerating individuals on the United States' behalf,[148] and so on, with federal courts countenancing significant delegations of powers to implement the law beyond traditional executive officials.[149]

Due process also limits private delegations, but leaves legislatures with substantial discretion to privatize government functions. *Carter v. Carter Coal Co.*, the foundational private nondelegation case, held that Congress violated the Due Process Clause of the Fifth Amendment by delegating to coal producers and miners the power to make wage and hour laws.[150] When Congress later reenacted the statute, this time tasking an agency with adopting the standards, the Court held the delegation was constitutional because Con-

139 U.S. CONST. art. I, § 1.

140 Carter v. Carter Coal Co., 298 U.S. 238 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

141 J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

142 *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943) (holding that charge to act in "public interest" satisfied nondelegation doctrine).

143 U.S. CONST. art. II, §§ 1–3.

144 *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 496 (2010) (holding that "two levels of protection from removal for those who nonetheless exercise significant executive power" violates separation of powers); Morrison v. Olson, 487 U.S. 654, 695 (1988) (considering whether statute delegating federal prosecutorial authority to special independent counsel "disrupt[ed] the proper balance" between branches).

145 Lesley K. McAllister, *Harnessing Private Regulation*, 3 MICH. J. ENVTL. & ADMIN. L. 61, 89 (2014) (noting "over 9,500 private standards [have] been incorporated by reference into federal regulation").

146 *Id.* at 92–93.

147 *Id.*

148 Minneci v. Pollard, 132 S. Ct. 617 (2012).

149 *See, e.g.*, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940).

150 298 U.S. 238 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

gress had not "delegated its legislative authority to the industry."[151] Thus, the Court set an outer limit on "clearly arbitrary" delegations of lawmaking authority to private parties.[152]

If private delegations of lawmaking and administrative power are sometimes constitutional, then it is hard to understand why delegations of government standing to private parties would always be unconstitutional, unless Article III mandates a special rule just for standing. Article III expressly provides for jurisdiction over "controversies" involving states or the United States and distinguishes jurisdiction over "controversies" involving only "citizens."[153] It does not, however, specify who may stand for the government in judicially cognizable cases or controversies.

The argument that Article III does not require exclusive public control is partly historical. As we have seen, early American courts were wary of recognizing private power to litigate government interests under the common law. History also shows, however, that the legislature could authorize private litigants to stand for the government even if the common law did not. Private litigants could prosecute crimes in the District of Columbia and the territories,[154] suggesting, at a minimum, that Article I, Article II, and the Due Process Clause were not perceived to prohibit private enforcement of the United States' interest in enforcing the laws.[155] The practice of qui tam litigation, in turn, suggests that Article III courts could entertain government suits brought by formally private plaintiffs. When the legislature specially provided for it, a private relator could sue on behalf of the government to enforce the law, with the relator retaining part of the recovery as a bounty. During the Founding era Congress enacted several qui tam statutes, a prac-

151 *Sunshine Anthracite Coal Co.*, 310 U.S. at 399.

152 *Carter Coal*, 298 U.S. at 311. In *DOT v. Association of American Railroads*, the Court considered a private nondelegation challenge but limited its decision to holding that Amtrak was a governmental, not a private, entity and remanded the case to the lower courts for further consideration of due process limits on congressional delegation of regulatory authority. *See* 135 S. Ct. 1225, 1234 (2015).

153 U.S. CONST. art. III, § 2.

154 *See* Ryan W. Scott, *Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases*, 89 IND. L.J. 67, 80 n.103 (2014) (citing as examples United States v. Birch, 24 F. Cas. 1147 (C.C.D.C. 1809) (No. 14,595); United States v. Dulany, 25 F. Cas. 923 (C.C.D.C. 1809) (No. 15,000); United States v. Lyles, 26 F. Cas. 1024 (C.C.D.C. 1806) (No. 15,645); United States v. Sandford, 27 F. Cas. 952 (C.C.D.C. 1806) (No. 16,221); and Virginia v. Dulany, 28 F. Cas. 1223 (C.C.D.C. 1802) (No. 16,959)).

155 Congress did not, however, authorize private prosecutions in Article III courts, instead directing district attorneys to stand for the United States in criminal cases. *See* Woolhandler & Nelson, *supra* note 112, at 699. The exclusive use of public prosecutors in Article III courts may have reflected an understanding that private prosecutions did not present a justiciable case or controversy. Or it may have reflected merely a policy choice. *Cf.* Scott, *supra* note 154, at 80 (arguing "widespread practice of private criminal prosecution" suggests private standing for government interests presents a justiciable case or controversy).

tice that has continued into the modern day.[156] Federal courts have long recognized standing under these statutes.[157]

Thus, the history cannot sustain an absolute Article III ban on private standing for government interests. When the legislature had not authorized it, as in the case of public nuisance law, a court would not empower a private litigant to enforce the law on the government's behalf. By contrast, when the legislature had authorized private litigants to stand for the government, as in the case of qui tam, Article III courts would accept jurisdiction. Perhaps the most important historical lesson is that the distinction between "public officials" and "private litigants" is not self-defining. The distinction was not so sharp at the Founding (or for some time thereafter) as we like to think it is today. As Nicholas Parrillo has recently described, for much of the nation's history the federal and state governments relied upon bounties and other financial incentives to encourage even formally public officials to enforce the laws.[158] Ultimately, policymakers concluded this system created too great a risk of arbitrary enforcement, which prompted the shift to salaried public enforcers.[159] The image of the disinterested Attorney General, as contrasted with the interested private litigant, is a familiar one, but its familiarity belies a complex history of legislative experiments to address the constitutional concern about arbitrary enforcement.

The best Article III argument for limiting state standing to traditional executive officials is functional: if Congress or the state legislatures authorized any citizen to stand for the government in any case, there would be an explosion in suits filed on behalf of governments and thus an unconstitutional expansion of the federal judiciary's role. The *Perry* Court raised the litigation-explosion concern,[160] but the facts of *Perry* did not pose the problem and the agency law solution *Perry* adopted is unnecessary to solve it. *Perry* did not pose the problem because it involved the *defense* of a state law by a "small, identifiable group" who had made a "substantial" commitment and had a "unique role" in the enactment of the law.[161] If the case had involved private standing to *sue* on behalf of a state, an Article III argument about a sweeping expansion of judicial power might have been plausible. Even granting the theoretical concern, however, it is unnecessary to incorporate the *Restatement (Third) of Agency* into standing law in order to address it. Not all government interests present the problem, and, more important, the requirement of constitutional accountability more than addresses it.

156 *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1408 (1988).

157 *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2665 (2013).

158 NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT 1780–940 (2013).

159 *See id.*

160 *Perry*, 133 S. Ct. at 2667 (2013).

161 *Id.* at 2668–69 (Kennedy, J., dissenting) (quoting Perry v. Brown, 265 P.3d 1002, 1024 (Cal. 2011)).

C. Explaining Why Government Standing Must Be Constitutionally Accountable

Standing is a structural doctrine loosely tied to constitutional text, original meaning, and history. Government standing, this Section argues, is about the interplay of the first three Articles of the Constitution and the Due Process Clauses, not just Article III.[162] Reading due process norms and structural principles together is not unfamiliar. Rebecca Brown in particular has rethought the separation of powers in due process terms, arguing that "individual liberty [is] an important value in resolving structural issues."[163] This Section argues that government standing must be constitutionally accountable because of the threats it poses to the rights of opposing parties and third parties not before the court.

1. Constitutional Structure

The Court has interpreted Article III to prohibit legislatures from placing the power to litigate for the government with litigants who would be "free to pursue a purely ideological commitment."[164] The concern that a litigant will use public power for private ends is an important one, but placing it solely in Article III is both imprecise and unconvincing. After all, Article III requires only that private litigants show an injury-in-fact to have standing to sue, and plaintiffs with Article III injuries may litigate for ideological reasons.[165]

Article III might be read together with Article II to find a limit on standing rooted in constitutional accountability. Article II vests the "executive Power" in the President, gives the President the power to appoint "Officers of the United States", and obliges the President to "take Care that the Laws be faithfully executed."[166] Together these clauses "protect all individuals from government overreaching" by making the President accountable for executing the law.[167]

Tara Leigh Grove has looked to the Take Care Clause to argue that standing is an Article II nondelegation doctrine.[168] She argues that Article II

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162 *See* Jack M. Balkin, *The American Constitution as "Our Law"*, 25 YALE J.L. & HUMAN. 113, 129–30 (2013) ("Structural arguments are . . . arguments about how different parts of the Constitution should work together, and thus play their appropriate role in a larger scheme.").

163 Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991).

164 *Perry*, 133 S. Ct. at 2667 (2013).

165 *See* Mark V. Tushnet, *The "Case or Controversy" Controversy: The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1700–09 (1979).

166 U.S. CONST. art. II, §§ 1–3.

167 Krent, *supra* note 15, at 531; *see also id.* (explaining that in absence of "centralized control over law enforcement . . . governmental authority might be exercised for private, self-interested ends").

168 Grove, *Nondelegation*, *supra* note 5, at 781. Grove's account is an alternative to the conventional Article II account of standing doctrine, which argues that private standing to seek judicial review of agency action violates Article II unless the plaintiff has suffered an

prohibits Congress from creating sweeping "private prosecutorial discretion" to litigate the United States' administrative interests.[169] This nondelegation principle limits private plaintiffs from arbitrarily burdening the property and liberty rights of private defendants.[170] Grove's elegant and powerful theory thus sounds in Article II but depends upon concerns about individual rights and arbitrary enforcement.[171]

Constitutional concerns about protecting individual rights from arbitrary enforcement sound not simply in Article II or Article III, but also in due process. Gillian Metzger explains that "allowing exercises of government power outside of constitutional constraints" violates the Due Process Clauses' "prohibition on arbitrary government action"; in other words, due process reflects a structural constitutional commitment to keeping government power constitutionally accountable.[172] Looking beyond Articles II and III to due process jurisprudence helps specify the contours of constitutional accountability. Article III, as Part I discussed, cannot by itself determine who may stand for the government in federal court. Neither can Article II. For instance, Article II, which concerns federal executive power, does not address the logically and doctrinally distinct problem in *Hollingsworth v. Perry*, namely, whether there are limitations on the authority of the states to delegate the power to stand for the state in federal court to parties outside the state executive branch. And Article II cannot explain why a traditional state actor—a state attorney general, for example—has standing to enforce federal law. Moreover, the Article II approach focuses upon private standing to litigate the federal government's administrative interests and does not address who may stand for the United States and the states in all types of government suits, including corporate, institutional, and substitute suits. As this Article

injury-in-fact. Justice Scalia, among others, has argued that when Congress authorizes an "ideological" plaintiff to seek judicial review of federal agency action, it encroaches upon the President's "executive power" to enforce and administer the law. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). The problems with the conventional Article II account are well known and need no lengthy recitation. A litigant with an injury-in-fact can interfere with executive policymaking as readily as one without it. Whether a litigant has an injury-in-fact has nothing to do with whether judicial review encroaches upon a constitutionally protected zone of presidential prerogative. *See* Cass R. Sunstein, *Article II Revisionism*, 92 MICH. L. REV. 131, 136 (1993) ("If suits against the executive by people with individuated interests do not violate Article II—as everyone agrees—it is hard to see why the same suits violate Article II merely because of the absence of an individuated interest.").

169 Grove, *Nondelegation*, *supra* note 5, at 790–91; *see also* Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1808 (1993) (looking to Article II to argue that "[e]mploying private attorneys general to combat the risk of under-enforcement also creates the risks of overenforcement and arbitrary rule").

170 *See* Grove, *Nondelegation*, *supra* note 5, at 788–90.

171 Grove explains that the executive branch's prosecutorial "duties are nondelegable" only when cases "implicate private liberty." *Id.* at 790–91; *see also id.* at 824 (noting that the "Article II nondelegation principle appears to be a logical extension of other constitutional rules that seek to protect private liberty against arbitrary encroachment").

172 Metzger, *supra* note 13, at 1461.

argues, the constitutional concerns vary across the four government interests. To see why, it is necessary to explore the due process foundations of the constitutional accountability principle.

2. Due Process

Just as due process is a "potential limit on the private exercise of regulatory power,"[173] it is also a potential limit on the private exercise of the power of government standing. Due process prohibits a deprivation of life, liberty, or property except in accordance with law.[174] The Founders linked this due process guarantee with structural values. Nathan Chapman and Michael McConnell explain that early court decisions applying due process to legislative acts "were consistently based on [a combined] . . . separation-of-powers and due process logic."[175] On this logic, "[l]egislative acts violated due process [when] . . . they exercised judicial power or abrogated common law procedural protections."[176] Thus, a due process violation could inhere in an improperly structured delegation of authority.[177] A similar structural link between due process and delegation, Ann Woolhandler has argued, existed from the Reconstruction until the New Deal.[178] In this vein, in *Yick Wo v. Hopkins* the Court struck down under the Due Process Clause a standardless delegation of authority to city officials, who were free to discriminate against Chinese-Americans when deciding whether to grant permits to operate laundries.[179] Liberal democracies demand that government action be based upon public reasons, not raw preferences, or what *Yick Wo* called "the play and action of purely personal and arbitrary power."[180] Eventually this under-

173 Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 933 (2014); *see* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

174 Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1890 (2014). Scholars debate whether the Founders intended more than this procedural guarantee. *Compare* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 221–44 (2d ed. 1997) (arguing that due process means procedures alone), *with* Louise Weinberg, *An Almost Archaeological Dig: Finding a Surprisingly Rich Early Understanding of Substantive Due Process*, 27 CONST. COMMENT. 163 (2010) (arguing that the Fifth Amendment Due Process Clause encompassed substance), *and* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 415 (2010) (arguing that the Fifth Amendment encompassed only procedure but that the Fourteenth Amendment encompassed procedure and substance).

175 Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1677–78 (2012).

176 *Id.* at 1677.

177 *See id.* at 1724.

178 Ann Woolhandler, *Delegation and Due Process: The Historical Connection*, 2008 SUP. CT. REV. 223, 225–26.

179 118 U.S. 356, 369–70 (1886); *see* Woolhandler, *supra* note 178, at 240 (noting conceptual connection between tax-assessment and rate-regulation cases and *Yick Wo*).

180 *Yick Wo*, 118 U.S. at 370.

standing of due process expanded to include substantive review of legislative action.[181]

According to the Court's contemporary gloss, the Due Process Clauses aim at a "scheme of ordered liberty" and a "fair and enlightened system of justice" that are "rooted in the traditions and conscience of our people."[182] These traditions recognize "the basic unfairness of depriving citizens of life, liberty, or property, through the application . . . of arbitrary coercion."[183]

a. Arbitrary Enforcement

This concern with arbitrary coercion arises across an array of due process doctrines that impose limits upon substantive law and enforcement design, including the private nondelegation doctrine already discussed[184] and doctrines that address criminal law and procedure as well as civil procedure and remedies.

i. Criminal Law and Procedure

In *Oyler v. Boles*, the Court held that due process precludes a prosecutor from prosecuting an individual based upon "an unjustifiable standard such as race, religion, or other arbitrary classification."[185] Selective prosecution may violate due process where the prosecutor singles out a defendant for his exercise of another constitutionally protected right, such as the right to free speech,[186] where there is evidence of arbitrary prosecutorial policies,[187] or where a prosecutor makes a charging decision out of personal vindictiveness.[188] Indeed, even the "potential for vindictiveness" may violate due process.[189]

Due process does not, however, entail reasonableness review of every prosecutorial decision. Federal courts are reluctant to police prosecutorial discretion in the ordinary course, reasoning "that the courts are not to inter-

181 *See* Woolhandler, *supra* note 178, at 247–55.

182 Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969).

183 BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 587 (1996) (Breyer, J., concurring).

184 *Supra* notes 150–52 and accompanying text.

185 368 U.S. 448, 456 (1962).

186 *See, e.g.*, United States v. Falk, 479 F.2d 616, 621–22 (7th Cir. 1973) (discussing evidence that "Assistant United States Attorney had told [defendant's] attorney" that "defendant's draft-counseling activity was one of the reasons why the prosecution for nonpossession of draft cards was brought"); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After* United States v. Armstrong, 34 AM. CRIM. L. REV. 1071, 1108–09 (1997) (discussing *Falk*).

187 *See* United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1987) (discussing evidence that prosecutor had described enforcement "policy . . . brought on by the 'arrogance on the part of blacks'" in jurisdiction); Poulin, *supra* note 186, at 1109 (discussing *Gordon*).

188 Blackledge v. Perry, 417 U.S. 21, 27–28 (1974).

189 *Id.* at 28.

fere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."[190] In *United States v. Armstrong*, the Court held that if the prosecutor has probable cause to charge, the decision to do so (or not) "generally rests entirely in his discretion."[191] It thus falls to structural constraints on prosecutorial discretion and subconstitutional law prophylactically to address the risk of arbitrary enforcement by public prosecutors.

Some structural checks on arbitrary prosecutions stem from the Due Process Clause itself. The Court's void-for-vagueness cases explain that a constitutional concern with arbitrary enforcement is "basic,"[192] deeply rooted,[193] and cuts across the usual conceptual division between structure and rights. In *Kolender v. Lawson*, the Court located the void-for-vagueness doctrine in due process, requiring legislatures to notify an "ordinary" person "what conduct is prohibited" and to discourage "arbitrary and discriminatory enforcement."[194] At the same time, the Court reasoned that the doctrine does not focus upon actual notice to individuals, but rather upon the structural requirement "that a legislature establish minimal guidelines to govern law enforcement."[195] Without sufficient structural constraints, the Court explained, there is a constitutionally unacceptable risk that policemen, prosecutors, and jurors will enforce the law based upon "their personal predilections"[196] rather than public reasons.[197]

ii. Civil Procedure and Remedies

The due process concern for arbitrary enforcement appears not only in criminal procedure, but also in the law of civil remedies. In *Marshall v. Jerrico, Inc.*, for example, the Court considered whether, under the Due Process Clause, there was an "impermissible risk of bias" in the Fair Labor Standards

190 United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965); *see* Rebecca Krauss, Note, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 11 (2009) (explaining that *Cox* contains a "widely cited" statement of doctrine).

191 517 U.S. 456, 464 (1996) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

192 Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

193 *See* Kolender v. Lawson, 461 U.S. 352, 357–58 & n.7 (1983) (citing United States v. Reese, 92 U.S. 214, 221 (1875) (locating void-for-vagueness doctrine in separation of powers)) (discussing "roots" of void-for-vagueness doctrine).

194 *Id.* at 357.

195 *Id.* at 358 (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

196 *Id.* (quoting *Smith*, 415 U.S. at 575).

197 The constitutional concern for arbitrary enforcement also recurs across a wide array of other criminal procedure rules, including the Fourth Amendment, the right to a jury trial, and the writ of habeas corpus. *See, e.g.*, Payton v. New York, 445 U.S. 573, 616–17 (1980) (White, J., dissenting) (Fourth Amendment); Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968) (jury trial); Douglas A. Berman, *Making the Framers' Case, and a Modern Case, for Jury Involvement in Habeas Adjudication*, 71 OHIO ST. L.J. 887, 897 (2010) (habeas corpus).

Act's enforcement scheme.[198] Under the FLSA, civil penalty awards went to the coffers of the Department of Labor, the agency tasked with enforcing the Act. Due process prohibits, the Court had earlier held, biased adjudication by requiring "an impartial and disinterested tribunal."[199] This prophylactic rule, the Court explained, mitigates the risk of actual bias in a particular proceeding.[200] But, the Court found, the risk of bias in *Jerrico* did not offend due process because it was "exceptionally remote," not least because no agency official's salary depended upon civil penalties.[201] Though making clear that prosecutors are not subject to "strict requirements of neutrality," the Court also explained that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions" under the Due Process Clause.[202]

Fuentes v. Shevin provides an example of an enforcement scheme with fatal constitutional flaws.[203] Florida and Pennsylvania had authorized private citizens to order state agents to seize personal property based upon nothing more than an ex parte application claiming a right to the property and the posting of a security bond.[204] Merchants in both states used this authority to seize stoves, stereos, beds, tables, and the like from consumers who had purchased goods under installment sales contracts.[205] The Court struck down the enforcement scheme, holding that a state may not permit "[p]rivate parties, serving their own private advantage, . . . unilaterally [to] invoke state power to replevy goods from another" without a "fair prior hearing."[206]

Due process, the Court has held, limits the size of punitive damage awards so that they "are not imposed in an arbitrary manner."[207] Here, as elsewhere, the Due Process Clause draws a distinction between public reasons and raw preferences in the enforcement of law, requiring "[e]xacting" judicial review to reduce the risk of a deprivation of property based upon a "decisionmaker's caprice."[208] Farther afield, but still instructive, are the due process restrictions upon personal jurisdiction, which require that the defen-

198 446 U.S. 238, 239 (1980).

199 *Id.* at 242.

200 *See id.*

201 *Id.* at 250.

202 *Id.* at 249–50 (citing 28 U.S.C. § 528 (1976 ed., Supp. III) (precluding federal prosecutor with personal interest from participating in case)).

203 407 U.S. 67 (1972).

204 *Id.* at 69–70.

205 *Id.* at 70–71.

206 *Id.* at 93, 96–97.

207 Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994); *see* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

208 *Campbell*, 538 U.S. at 418 (quoting Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001)).

dant have "sufficient contacts or ties with the state of the forum to make it reasonable and just" for the plaintiff to haul her into court there.[209]

b. The Right to One's Day in Court

Due process protects not only defendants in enforcement actions, but also third parties whose rights may be at issue in the case. The Supreme Court has described a "deep-rooted historic tradition that everyone should have his own day in court."[210] This tradition treats a right of action as a "constitutionally recognized property interest" protected by due process.[211]

By recognizing a property interest in a right of action, due process jurisprudence protects an "individual litigant's autonomy in deciding whether to pursue her claim and if so, how best to conduct that litigation."[212] This property interest includes both the right to sue and the "right not to sue,"[213] which, taken together, form the right to determine whether one's rights will be vindicated in court. This due process concern has surfaced in the backdrop of government standing decisions. For example, in *Director, Office of Workers' Compensation Programs, Department of Labor v. Newport News Shipbuilding & Dry Dock Co.*, the Court explained that "[a]gencies do not automatically have standing to sue for actions that frustrate the purposes of their statutes."[214] The Interior Department, for instance, does not have standing "to bring a suit for assault when [a] camper [in a national park] declines to do so" even though the Department manages the national park system.[215]

Like any other property right, the day-in-court right does not guarantee a rights-holder absolute control.[216] Indeed, the contours of the day-in-court

209 Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945). Personal jurisdiction doctrine can be understood to apply where an enforcement action "would arbitrarily [invoke] governmental power in light of the individual interests at stake." Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 574 (2007).

210 Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008) (quoting Richards v. Jefferson Cty., 517 U.S. 793, 798 (1996)).

211 Tulsa Prof'l Collection Servs. v. Pope, 485 U.S. 478, 485 (1988) (stating there is "[l]ittle doubt" that a right of action is a form of property); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985).

212 Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1574 (2007); *see also* Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1092 (2012) (describing right of action as property bundle including remedy to which plaintiff is entitled as well as "right to control the action" and "right to avoid tortious conduct altogether").

213 Williams, *supra* note 33, at 599; *see also* Maximilian A. Grant, *The Right Not to Sue: A First Amendment Rationale for Opting Out of Mandatory Class Actions*, 63 U. CHI. L. REV. 239 (1996).

214 514 U.S. 122, 132 (1995).

215 *Id.*

216 *See* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 233 (1992) ("[T]he American system of adjudication has historically recognized classes of cases in which individuals did not have a strong claim to participate at all."); *see generally* Joseph William Singer, *Democratic Estates: Property Law in a Free and Demo-*

right remain a matter of debate, particularly in negative-value and small claims cases where individual litigation is impracticable.[217] The "dominant" understanding requires courts to consider the due process right to one's day in court, but permits them "to trade off losses in litigant control against social gains (in particular, reductions in the expense of litigation)."[218]

Even where the Constitution does not guarantee litigant autonomy, it protects a "right to adequate representation" when one's rights are litigated.[219] The foundational modern precedent is *Hansberry v. Lee*, which held that a class action may bind absent class members without violating the Due Process Clause if the members' interests were "in fact adequately represented by parties who [were] present [in the class action]."[220]

Various procedural rules implement the day-in-court right. Among the most important are preclusion rules. Generally, a litigant may litigate issues and claims without regard to "a judgment to which she was not a party."[221] But she may be precluded from doing so where another litigant adequately represented her interests in prior litigation.[222] Where a private litigant brings a class action, Federal Rule of Civil Procedure 23 aims to protect the day-in-court right through procedural safeguards. Rule 23(a), for example, precludes certification unless the court determines the class plaintiff will be a fair and adequate representative of the class.[223] Rule 23(g), in turn, requires the court to assess whether class counsel will adequately litigate the class's claims.[224] Rule 23(b)(3)'s requirements of notice and opt-out also protect a due process "right to sue."[225]

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cratic Society, 94 CORNELL L. REV. 1009 (2009) (explaining that property rights are not absolute).

217 *Compare, e.g.*, Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 580 (2011) (arguing that "day-in-court right" is "flexible" and "accommodates competing concerns at its core"), *and* Campos, *supra* note 212, at 1087 (arguing that "litigant autonomy is self-defeating in the mass tort context"), *with* Redish & Larsen, *supra* note 212, at 1575 (arguing for robust "litigant autonomy" based upon due process and First Amendment right to free expression and contending that only "compelling" justification can justify denial of autonomy).

218 Jay Tidmarsh, *Superiority as Unity*, 107 NW. U. L. REV. 565, 567 (2013).

219 Epstein v. MCA, Inc., 179 F.3d 641, 648 (9th Cir. 1999); *see also* Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 970–71 (1993).

220 311 U.S. 32, 42–43 (1940); *see* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (explaining that a "named plaintiff [must] at all times adequately represent the interests of the absent class members").

221 Taylor v. Sturgell, 553 U.S. 880, 898 (2008).

222 *See* Richards v. Jefferson Cty., 517 U.S. 793, 798 (1996) (discussing due process guarantee and permissible grounds for issue or claim preclusion).

223 FED. R. CIV. P. 23(a); *see* David Marcus, *Making Adequacy More Adequate*, 88 TEX. L. REV. 137, 138 (2010) ("Adequate representation, which Rule 23(a)(4) requires as a prerequisite to certification, is thus the constitutional prerequisite for the empowered modern class action.").

224 FED. R. CIV. P. 23(g).

225 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011) (citing *Phillips Petroleum Co.*, 472 U.S. at 812).

Against this backdrop, the link between the day-in-court right and standing are apparent. The Court has justified the rule against third-party standing by invoking litigant autonomy: the rights-holder may "not wish to assert" her rights.[226] Lea Brilmayer has argued standing protects litigant autonomy, which she calls "self-determination," and addresses "fairness problems that would arise if an ideological challenger" were to inadequately represent "someone else's . . . rights."[227] By limiting standing to those who have suffered an injury-in-fact, the doctrine (in theory) mitigates the due process problem of inadequate representation. The Court's private standing decisions are consistent with this reasoning, frequently labeling private parties without injuries-in-fact as "concerned bystanders"[228] seeking to litigate someone else's rights.[229]

D. Keeping Government Standing Constitutionally Accountable

Government standing threatens individual rights to liberty and property, which gives rise to the demand that those who stand for the government in

226 Singleton v. Wulff, 428 U.S. 106, 113–14 (1976).

227 Brilmayer, *supra* note 32, at 306, 308, 310; *see also* Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1666 (2007) ("[S]tanding protects people's ability to individually determine the best use of their rights."). Noting that the "analogy to class actions is particularly apt," Tushnet argues the solution is not an "elaborate" standing doctrine but rather "auxiliary devices"—like the Rule 23 procedures—to "enhance the representativeness of the [litigating] process." Tushnet, *supra* note 165, at 1716, 1717 n.77. For consideration of the use of auxiliary devices, see *infra* notes 277–82 and accompanying text.

228 Diamond v. Charles, 476 U.S. 54, 62 (1986) (quoting United States v. SCRAP, 412 U.S. 669, 687 (1973)).

229 Due process concerns about the rights of defendants and third parties are also present when a private litigant claims standing to litigate in federal court. Why, then, does the doctrine distinguish government and private standing? When a private party sues, standing doctrine protects the rights of defendants and third parties by limiting what counts as a judicially cognizable interest. By contrast, when a litigant claims standing on the government's behalf, the doctrine limits who may stand for the government; as this Article argues, there must be mechanisms in place to address the risk of abuse of government power.

It may be that standing law tolerates a greater risk of abusive litigation in cases involving private standing than in those where the litigant claims standing to litigate on the government's behalf. But that should not surprise. As Erwin Chemerinsky has explained, even "eliminating the concept of state action would not mean that private parties always would be held to the same institutional standards as the government" because "[o]ften there might be justifications for private behavior that would not sanction governmental conduct." Chemerinsky, *supra* note 4, at 506. When it comes to private standing, as Part II explained, the countervailing justifications have to do with the demand for a system of open courts that places some decisions "to complain about an alleged wrong . . . uniquely with the victim." Goldberg, *supra* note 98, at 601. When it comes to government standing, as I have argued in detail elsewhere, these countervailing justifications do not exist: governments do not have rights to remedies and someone suing on the government's behalf cannot claim a constitutional entitlement to vindicate her private interests in court. *See* Davis, *supra* note 5, at 14–15 (explaining that governments, unlike private parties, do not have rights to remedies).

court be constitutionally accountable. Constitutional accountability may be satisfied through nonconstitutional constraints on actors wielding government power, including public control, private law, procedural controls on enforcement discretion, and auxiliary mechanisms to force consideration of third parties' interests. This Section explains which constraints are necessary for the different types of government suits. It distinguishes between standing for a state and standing for the United States because Article II is best read to require executive branch control as a way of ensuring constitutional accountability in some cases involving the federal government's interests.

1. The Basic Framework

In place of the exclusive public control view, this subsection takes as its starting point the four different government interests. The fundamental insight is that the constitutional concerns apply differently in the four types of government suits and, therefore, the constraints on government standing should be different depending upon which government interest is at stake.

a. Standing for a State

State executive officials may stand for the state in federal court. State law determines who may stand for a state in the first instance because states have the authority to structure their own governments under our system of federalism. The authority of a state to "define[ ] itself as a sovereign" includes the authority to "prescribe the qualifications of its officers and the manner in which they shall be chosen."[230] Federal law, of course, may limit this authority, but federal courts are generally reluctant to presume a limitation on how a state structures its government.[231]

State law has the first but not the final say on who may stand for the state in federal court. Though states need not follow Articles I or II when structuring their governments, litigants who wield the power of state standing in federal court must be constitutionally accountable.

The primary constitutional limit on a state legislature's discretion to delegate the power of state standing is the Due Process Clause. Due process constraints on delegation are not absolute, however.[232] In specifying how much constraint on private delegations of government standing is necessary to satisfy constitutional accountability, it is useful to look to procedural due process jurisprudence. In *Mathews v. Eldridge*, the Court laid out a three-factor balancing test to determine how much process is due when an individual claims a threat to her due process protected rights.[233] First, the court considers "the private interest that will be affected by the official action."[234] Next, it

230 Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quoting Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 161 (1892)).

231 *See id.* at 470.

232 *See supra* notes 150–52 and accompanying text.

233 424 U.S. 319 (1976).

234 *Id.* at 335.

looks to "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."[235] Finally, the court must weigh "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[236] Thus, due process permits substantial legislative flexibility while requiring constitutional accountability.

b. Standing for the United States

Article II, statutes, and historical practice support the authority of executive branch officials, most importantly the Attorney General, to stand for the United States. Several statutes provide the Attorney General with standing for the United States both to enforce federal laws and to defend them.[237] The most important statute provides that "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States . . . is a party, or is interested . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."[238] Federal courts have interpreted this statute to require statutory authorization before someone other than a DOJ attorney may litigate on behalf of the United States.[239] A private litigant must, therefore, show that Congress has authorized her to "conduct . . . litigation" on the United States' behalf in order to have standing to do so.[240]

Is there an absolute prohibition on a congressional assignment of the United States' standing to private litigants? If so, its textual hook would be Article II. Courts and commentators have offered two types of Article II arguments that would require public control over the standing of the United States in all cases. The first is based upon the Appointments Clause, which gives the President the power to appoint principal "Officers" and directs Congress to decide whether the President, heads of departments, or courts may

235 *Id.*

236 *Id.*

237 *See* 28 U.S.C. § 518 (2012) (empowering Attorney General and Solicitor General to stand for United States in Supreme Court litigation); *id.* § 519 (providing that the Attorney General's office has standing to litigate for United States except where otherwise provided by law); *id.* § 2403 (permitting the Attorney General to intervene on behalf of United States in cases where constitutionality of federal statutes is at stake).

238 *Id.* § 516.

239 *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 56 n.8 (D.D.C. 1973). Courts have not, however, interpreted the statute to prohibit judicial implication of public rights of action where the Attorney General, or a federal agency with statutory authority to conduct litigation, sues. The constitutional distinction between traditional executive officials, who may request an implied public right of action, and nontraditional private litigants seeking to stand for the government, who require express statutory authorization, lies in the principle of constitutional accountability. Unlike private litigants, traditional executive officials are directly constitutionally accountable and are subject to electoral and other forms of public control.

240 *See* 28 U.S.C. § 516.

have power to appoint "inferior Officers."[241] In *Buckley v. Valeo*, the Court suggested that the Appointments Clause prohibits private litigants from standing for the United States: only "Officers of the United States," it opined, may litigate "public rights" in the federal courts.[242] But the lower courts have almost universally rejected *Buckley*'s dictum,[243] reasoning that the Appointments Clause (as well as the implied presidential removal power[244]) applies only to "Officers" and not to individuals who exercise "occasional and intermittent" power under federal law to act on behalf of the United States.[245] This Article has nothing to add that debate.

It does, however, add another way to understand a second type of Article II argument for exclusive public control of the United States' standing. This argument stems from Article II's Take Care Clause and the separation of powers. Its lodestar is *Morrison v. Olson*, in which the Court upheld the Ethics in Government Act's creation of a special independent prosecutor tasked with investigating and prosecuting wrongs by high-ranking government officials.[246] The Court reasoned that the Act had not "disrupt[ed] the proper balance" between the branches because the executive retained a measure of control over the independent counsel, including through a for-cause removal provision.[247] *Morrison* suggests that a nontraditional litigant may have standing to litigate the United States' interests depending upon the depth and breadth of her enforcement discretion and the degree of retained executive control.[248] My aim is not to rehearse the debate about how much control *Morrison* requires but rather to add a crucial insight that's been miss-

241 U.S. CONST. art. II, § 2, cl. 2.

242 424 U.S. 1, 140 (1976) (opining that "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights . . . may be discharged only by persons who are 'Officers of the United States' " (quoting U.S. CONST., art. II, § 2, cl. 2)).

243 *See* Robin Kundis Craig, *Will Separation of Powers Challenges "Take Care" of Environmental Citizen Suits? Article II, Injury-in-Fact, Private "Enforcers," and Lessons from* Qui Tam *Litigation*, 72 U. COLO. L. REV. 93, 140–41 (2001). The appointment of "inferior Officers," of course, can be vested in the federal courts, *see* U.S. CONST. art. 2, § 2, cl. 2, which suggests another way to address the Appointments Clause problem, *cf.* Caminker, *supra* note 31, at 377 ("Congress can choose to vest the power to appoint inferior officers in Federal judges . . . ."). For a discussion of the distinction between principal and inferior officers, see *Edmond v. United States*, 520 U.S. 651, 661 (1997).

244 *See* Myers v. United States, 272 U.S. 52, 119 (1926).

245 *See* Auffmordt v. Hedden, 137 U.S. 310, 327–28 (1890) (quoting United States v. Germaine, 99 U.S. 508, 512 (1878)).

246 487 U.S. 654 (1988).

247 *Id.* at 695 (quoting Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977)).

248 *Cf.* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1442–45 (2000) (discussing *Morrison*). *But cf.* Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 527 (2005) (arguing that "if the president exercises ultimate control over popular actions—by retaining authority to discontinue them—the grant of executive power poses no constitutional difficulty to the creation of popular actions").

ing from that debate: the answer depends upon which government interest is at stake.

2. Distinguishing Among the Four Government Interests

a. Corporate Interests

Like a private corporation, a government has property and contractual interests. Corporate suits present a constitutional accountability concern because they involve litigation against a defendant with property and liberty interests. One example is qui tam litigation under the False Claims Act (FCA). A common complaint is that qui tam plaintiffs are politically unaccountable repeat players who haul private defendants into federal court under the FCA for frivolous or vexatious reasons.[249] The complaint is easily overstated, however. Where the government interest looks like a private injury, recognizing standing is not likely to raise significant due process concerns because the litigant's discretion is necessarily circumscribed to redressing specific claims arising from contract, from "torts to real or personal property, and from frauds, deceits, and other [bilateral] wrongs."[250] The power to litigate corporate interests is not sweeping. It extends no further than the power to litigate a personal wrong against the government.

i. States

The presumption in favor of public control should be overcome in corporate suits where private law addresses the risk of arbitrary enforcement. Assignment of a private party's contract and property interests is a familiar feature of private standing. In *Sprint Communications Co. v. APCC Services, Inc.*, the Court held that the assignee of a legal claim for money has standing to litigate the claim,[251] even where the litigant has duty to return "all proceeds of the litigation."[252] It explained that there is a long historical tradition, beginning in the seventeenth century, that an assignee with legal title has standing to sue on the claim.[253] Today, the Court went on, it is commonplace for federal courts to "entertain suits which will result in relief for parties that are not themselves directly bringing suit," giving examples of suits by trustees, guardians ad litem, receivers, and executors.[254] When the Court

249 *See* Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control* Qui Tam *Litigation Under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233, 1237 (2008).

250 Myriam E. Gilles, *Representational Standing:* U.S. ex rel. Stevens *and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 343–44 (2001) (quoting 4 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 1275 (Spencer W. Symons ed., 5th ed. 1941)).

251 554 U.S. 269, 271 (2008).

252 *Id.* at 298 (Roberts, C.J., dissenting).

253 *Id.* at 275–76 (majority opinion).

254 *Id.* at 287–88. *But see id.* at 302 (Roberts, C.J., dissenting) ("We have never

recognizes private standing based upon contractual assignment, it relies upon private law constraints to limit the assignee's enforcement discretion.

Private law can help assure accountability in cases involving a state's corporate interests. Where a private litigant abuses the limited power to litigate a state's corporate interests, she may be subject to suits for abuse of process and vexatious litigation.[255] In other words, private law remedies may substitute for direct constitutional constraints. One of the most instructive examples of ensuring constitutional accountability through private law emerged through the evolution of the *Bivens* doctrine, which holds that federal courts may imply private rights to damages remedies directly from the Constitution in some cases.[256] In *Minneci v. Pollard*, a prisoner at a privately operated federal prison sued the private operators for damages under *Bivens* for alleged violations of the Eighth Amendment.[257] The Court refused to imply a federal remedy after concluding that the plaintiff could sue the private operators under state tort law. It explained that the common law provided an "'alternative, existing process' capable of protecting the constitutional interests at stake."[258] In *Minneci*, private law ensured constitutional accountability.[259]

ii. United States

As *Minneci* holds, private law can ensure constitutional accountability when a private party acts on the United States' behalf. Similarly, private law constraints may apply when a litigant stands for the United States' interests in corporate suits. The familiar example is qui tam litigation under the FCA, which makes persons who defraud the federal treasury liable for damages and authorizes both the DOJ and private litigants to sue on behalf of the United States.[260] To encourage private suits, the statute permits a private relator to retain a portion of the recovery.[261] A private litigant filing an FCA suit may not serve the complaint on the defendant before notifying the DOJ, which has sixty days to review the complaint and material evidence.[262] If the DOJ decides to do so, it may take over the litigation, and the private relator

approved federal-court jurisdiction over a claim where the entire relief requested will run to a party not before the court.").

255 *E.g.*, Kollodge v. State, 757 P.2d 1024, 1026 (Alaska 1988).

256 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971).

257 Minneci v. Pollard, 132 S. Ct. 617 (2012).

258 *Id.* at 623 (quoting Wilkie v. Robbins 551 U.S. 537, 550 (2007)).

259 To the extent there is evidence that the threat of tort liability does not sufficiently deter arbitrary enforcement in cases involving corporate interests, a court might deny standing unless there are procedural controls on the litigant's enforcement discretion. The federal False Claims Act, which authorizes a private relator to stand for the United States' corporate interests, provides a familiar example of such controls. *See* 31 U.S.C. § 3730 (2012).

260 *Id.* § 3730.

261 *Id.* § 3730(d).

262 *Id.* § 3730(b).

cannot direct the DOJ's decisions.[263] The DOJ may also intervene for good cause after a private relator files the complaint and can veto a dismissal of the suit.[264] In *Stevens*, the Court held that a private relator suing under the FCA has Article III standing but did not decide whether the scheme violates Article II.[265]

Defendants in FCA actions may use the threat of private law liability to deter arbitrary enforcement; for example, defendants sued by private relators may counterclaim for malicious prosecution.[266] They also may have causes of action for libel, defamation, and abuse of process, as long as the relator's claims are false.[267] The difficult question is whether Article II requires more than the threat of tort suits to keep FCA relators constitutionally accountable.

The debate about the FCA's constitutionality is not usually framed this way. Instead, courts begin with *Morrison v. Olson*. They agree that the FCA does not give the executive branch as much control over initiating litigation as the independent counsel statute at issue in *Morrison*.[268] Then they either distinguish *Morrison* because it involved criminal prosecution and conclude the FCA is constitutional or apply *Morrison* and hold the FCA violates Article II.[269]

This Article's approach is more nuanced. On the one hand, it rejects the notion that constitutional accountability concerns are significant only in criminal prosecutions. Judges who have thought the FCA's qui tam provision unconstitutional are right to worry where "unaccountable, self-interested relators are put in charge of vindicating [public] rights."[270] On the other hand, it is wrong to equate the authority to vindicate a government's corporate interests with the authority to litigate an administrative interest. Moreover, it is wrong to judge the FCA's constitutionality without assessing whether private law and the FCA's procedural constraints adequately safeguard defendants from arbitrary enforcement. If the FCA's "most severe violation[ ] of the separation of powers principles embedded in the Take Care

263 *Id.* § 3730(c).

264 *Id.* §§ 3730(a), (d).

265 Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 n.8 (2000).

266 United States *ex rel.* Head v. Kane Co., 668 F. Supp. 2d 146, 153–54 (D.D.C. 2009) (counterclaim available, though not timely until court has held defendant not liable under FCA).

267 *See* United States *ex rel.* Miller v. Bill Harbert Int'l Constr., Inc., 505 F. Supp. 2d 20, 27–28 (D.D.C. 2007).

268 *See, e.g.*, Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 754–55 (5th Cir. 2001); United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 751–53 (9th Cir. 1993); *see also* United States *ex rel.* Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148, 1155 (2d Cir. 1993) (holding that FCA gives the executive branch "substantial control" over litigation).

269 *Compare, e.g.*, *Riley*, 252 F.3d at 754–55 (concluding *Morrison* "is inapplicable" because "relators are simply civil litigants"), *with id.* at 766 (Smith, J., dissenting) (concluding that FCA is unconstitutional because it "contains not a single one of the control mechanisms that the *Morrison* court found [in the independent counsel statute]").

270 *Id.* at 766 (Smith, J., dissenting).

Clause" is that it creates a threat of arbitrary enforcement,[271] then it follows that the Act's constitutionality must be judged by reference to *all* the constraints on a private relator's enforcement discretion.

On this view, Congress may assign the enforcement of the United States' corporate interests to a private litigant where private law and other controls limit the risk of arbitrary enforcement. This approach finds support in recent empirical studies that suggest the risk of arbitrary enforcement by qui tam relators is overblown. Based upon an analysis of 4,000 qui tam cases, David Engstrom found that law firms that specialize in relator suits "enjoy[ ] higher litigation success rates and surfac[e] larger frauds compared to less experienced firms."[272] Moreover, repeat plaintiffs win less but obtain "substantially larger sums" than one-off relators.[273] Both findings suggest that the qui tam device has fostered private enforcement by expert players who, rather than bring speculative and arbitrary actions, identify and remedy substantial fraud against the United States.[274]

b. Institutional Interests

Unlike corporate suits against private defendants, most institutional litigation involving the state action problem has arisen when a formally private actor claims authority to defend government action against a private lawsuit. *Perry* is an example. There is no direct sense in which a private actor's defense of a government's institutional interests presents a risk of an unconstitutional burden upon liberty or property. While a government has institutional interests in its authority to govern and its intergovernmental immunities, it does not have an individual due process right when the validity of its actions is at stake.

Instead, due process concerns in institutional suits are indirect. It is not that institutional standing empowers a litigant to select enforcement targets arbitrarily, except in the very rare case where a government has standing to wield its institutional interests as a sword against private defendants. Nor will an institutional suit impact unrepresented private rights by directly precluding follow-on claims. Rather, the concern is that a judgment in an institutional suit will crowd out or otherwise dilute unrepresented private rights. In *Arizona v. United States*, for instance, the federal judicial system proceeded first to the Obama Administration's challenge to Arizona's "hand me your papers, please" immigration policy, rather than focusing upon private challenges under the Fourth and Fourteenth Amendments.[275] In some cases institutional suits may establish unfavorable precedent. Imagine, for example, that the State of Pennsylvania had brought, and lost, a Tenth Amend-

271 *Id.*

272 David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from* Qui Tam *Litigation*, 112 COLUM. L. REV. 1244, 1249 (2012).

273 *Id.* at 1250.

274 *Id.* at 1249–50.

275 *See* Arizona v. United States, 132 S. Ct. 2492 (2012). I thank Michael Olivas for a conversation that prompted this point.

ment challenge to the Chemical Weapons Convention Implementing Act before Carol Anne Bond raised her Tenth Amendment defense in *Bond v. United States*.[276] These concerns demand that a court ensure that those who stand for a government's institutional interests are likely to be capable advocates.

i. States

Public control is presumptively required in institutional suits, but the presumption may be overcome where the legislature limits standing to litigants likely to be capable advocates and the use of auxiliary procedures such as amicus participation ensures adequate consideration of the interests of unrepresented third parties. Justice Kennedy's dissenting opinion in *Perry* supports this approach. Kennedy would have held that Proposition 8's proponents had standing to defend the "right" of the people of California "to make law."[277] The California Supreme Court, after all, had held that Proposition 8's proponents had authority to stand for the state. To deny standing, the California Supreme Court reasoned, would undermine the ballot initiative process by leaving the defense of an initiative solely in the hands of elected officials—the very officials whose control a ballot initiative is designed to avoid.[278]

Pointing to the California Supreme Court's decision, Justice Kennedy emphasized inherent limitations on the proponents' enforcement discretion and the many signs they would be capable advocates of the state's institutional interests. Their enforcement discretion was limited by their size, singular focus upon Proposition 8's defense, and transparency to the public. As Kennedy explained, the "official proponents [were] a small, identifiable group" whose "identities [were] public" and "commitment [was] substantial."[279] They were "especially likely to be reliable and vigorous advocates for the measure and to be so viewed by those whose votes secured the initiative's enactment," given their "unique role" in securing the initiative, their unique "stake in the outcome" of the litigation, and their unique "understand[ing] [of] the purpose and operation" of Proposition 8.[280]

These limitations on discretion and indicia of capable advocacy are necessary, but not sufficient, to address concerns about unrepresented third parties. A government's institutional standing presents broad-ranging questions of government structure that may impact an array of private and public interests. Auxiliary procedures provide a solution to the problems of widespread and overlapping claims of public and private right in institutional cases.[281] While recognizing standing to litigate institutional claims, the federal courts

276 *See* Bond v. United States, 131 S. Ct. 2355, 2363–64 (2011).

277 Hollingsworth v. Perry, 133 S. Ct. 2652, 2675 (2013) (Kennedy, J., dissenting).

278 Perry v. Brown, 265 P.3d 1002, 1007 (Cal. 2011).

279 *Perry*, 133 S. Ct. at 2669.

280 *Id.* at 2669–70 (quoting *Perry*, 265 P.3d at 1024).

281 *See* Tushnet, *supra* note 165, at 1716 (discussing use of "auxiliary devices" as alternative to injury analysis for standing).

do, and should, invite broad participation through amici briefing or intervention. Conscientious docket management also can play an important role where the sequencing and consolidation of cases is necessary to allow consideration of the multifarious interests at stake in institutional litigation.

ii. United States

The standing problem in *Windsor* was solved by the "capable" advocacy of a group of congressional representatives.[282] But what if the Court had addressed it as California tried to address the same problem in *Perry*, that is, by authorizing a private litigant to defend the government's institutional interests in the validity of its laws? Brianne Gorod has argued that "where neither branch is willing to defend [a federal] statute, the courts should appoint lawyers to . . . represent the United States."[283] After all, she points out, "the prospect of private counsel representing the United States . . . is hardly unprecedented," as qui tam shows.[284] The fundamental concern is that "the United States' laws should be . . . defended well," and carefully selected private counsel can do that.[285] The separation of powers should not be a bar to private litigation because, Gorod argues, the executive branch "may not always be able to serve as a simple agent" for the United States, whose institutional interests may be best served by private counsel.[286] On this view, Article III does not prohibit private defense of the United States' laws.

Still, Article II may require what Article III alone does not: executive control of institutional standing for the United States. Article II's Take Care Clause obliges the President to "take Care that the Laws be faithfully executed," creating a duty that supports executive standing to defend federal laws.[287] This duty might in turn imply an exclusive executive responsibility to litigate institutional cases.[288]

The Court has not, however, treated executive branch authority to defend federal law as exclusive. Instead, both *Windsor* and *INS v. Chadha* cut against reading the Take Care Clause as an exclusive grant of standing to the executive in institutional suits. *Chadha* concerned the constitutionality of the legislative veto in an immigration matter and relied in part upon intervention by both houses of Congress in concluding the case was justiciable not-

282 United States v. Windsor, 133 S. Ct. 2675, 2689 (2013).

283 Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1251 (2012).

284 *Id.* at 1254.

285 *Id.* at 1254–55.

286 *Id.* at 1255.

287 Grove, *Standing*, *supra* note 5, at 1331–32 (quoting U.S. CONST. art. II, § 3).

288 *Cf. id.* at 1368 (offering powerful argument that "Congress may not appeal in the executive's stead" when executive branch refuses to defend federal law, but "bracket[ing] the question whether Congress could create" an "'independent counsel' who might step in to defend a law in place of the executive").

withstanding the executive's argument the veto was unconstitutional.[289] Though *Windsor* and *Chadha* do not establish congressional standing to defend federal law, they do strongly suggest that the executive's duty to defend the United States' institutional interests is not exclusive.[290]

This Article's framework shows that there are not compelling rights-based reasons for concluding that only the executive branch may defend the United States' institutional interests. To the extent that the separation of powers is not an end in and of itself, but rather a means to protecting liberty and property rights, the argument for limiting institutional standing solely to the DOJ is not particularly convincing. Such a limit is not necessary to ensure to capable advocacy and adequate consideration of third parties' interests in institutional suits.

Even so, there is a strong formal argument for executive exclusivity. In particular, there are strong formal reasons to think a "divided self" has no standing in court.[291] By statute, the executive branch has the right to intervene "for presentation of evidence" and "for argument on the question of constitutionality" in any action "wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question."[292] There is a growing literature debating whether this statutory right reflects the executive branch's exclusive duty to defend federal laws.[293] If the executive branch has a duty always to defend the United States' laws, then it is doubtful that a private litigant may simultaneously stand for the United States' institutional interests where the executive branch stands for (or at least should stand for) those same interests.

c. Substitute Interests

Litigation of a government's substitute interests triggers concerns about the day-in-court right in all cases and concerns about arbitrary enforcement in those cases where a defendant's liberty and property interests are at stake. The concern about arbitrary enforcement in substitute cases is less significant than the same concern in administrative cases. When a government sues to vindicate the private rights of its citizens, it must show an injury to those rights.[294] This requirement necessarily limits the government's enforcement

289 462 U.S. 919, 940 (1983).

290 *But cf. infra* notes 355–58 and accompanying text (arguing there may be reasons to deny congressional standing for United States even where private standing is permissible).

291 *See* Michael Herz, United States v. United States*: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 894 (1990).

292 28 U.S.C. § 2403(a) (2012).

293 *See, e.g.*, Gorod, *supra* note 283, at 1217–20 (discussing and ultimately rejecting exclusivity view).

294 This limitation follows from the definition of substitute interests, which includes only those cases in which a government invokes its *parens patriae* authority to vindicate the private rights of its citizens. In those cases, the government seeks a recovery for injuries to individuals, though it is required to allege its own interest separate from the interest of any particular individual. New York v. Seneci, 817 F.2d 1015, 1017 (2d Cir. 1987). In other

discretion. In administrative suits, by contrast, the government litigant does not need to show an injury to private rights, but may establish standing based upon the government's general interest in enforcing the law. This subsection focuses upon the necessary protections for the day-in-court right in substitute suits, leaving to the next subsection a discussion of the problem of arbitrary enforcement.

The Court has been solicitous of state substitute suits, holding that a state may sue in *parens patriae* to address problems it would otherwise address through police power regulations.[295] By contrast, the doctrine has been wary of implying substitute rights of action in favor of the United States.[296] Because neither Congress nor the courts have created a procedural system to police the adequacy of representation, "substitute litigation may wrest control of private rights from an individual beneficiary without the procedures that protect a beneficiary's right to her day in court."[297] First, a substitute suit may preclude subsequent private litigation based upon the same rights.[298] Second, a substitute suit may violate the right to decide whether one's rights will be vindicated in court, or what Ryan Williams has called the "right not to sue."[299]

There are many solutions to this type of problem, including policing of the adequacy of representation at the front end through, as in the case of Rule 23 class actions, judicial inquiry, notice, and opt-out rules, or at the back end through preclusion doctrine.[300] Government standing doctrine may also play a role in addressing this due process concern, including by limiting who may stand for the government in *parens patriae* litigation.

i. States

In other work I have argued that federal courts do not have general authority to empower traditional executive officials to bring substitute suits. The argument against a generous implication doctrine is partly doctrinal: federal courts do not have general common law powers.[301] The argument is also partly concerned with due process. Where Congress has authorized substitute suits and provided procedures to police the adequacy of representa-

work I have explained that this separate-interest requirement is largely meaningless in cases where the government is aggregating private claims. I therefore distinguish between *parens patriae* suits that involve only public rights, such as actions to enjoin interstate nuisances, and actions that may not be maintained absent injuries to private rights, such as state substitute suits to vindicate citizens' employment law rights. Only the latter involve substitute standing. *See* Davis, *supra* note 5, at 23–24.

295 Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982).

296 *See, e.g.*, United States v. Solomon, 563 F.2d 1121, 1129 (4th Cir. 1977).

297 Davis, *supra* note 5, at 41; *see* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 548 (2012).

298 *See* City of Tacoma v. Taxpayers, 357 U.S. 320, 340–41 (1958).

299 Williams, *supra* note 33, at 604.

300 Lemos, *supra* note 297, at 548.

301 *See* City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981).

tion, the courts have no warrant to deny standing. But where Congress has been unclear about the existence or scope of substitute standing, the courts should deny standing, particularly in the absence of "specific rules" that "delineat[e]" the scope of potential liability, "establish[ ] who is bound by the action," and "prevent[ ] duplicative recoveries."[302]

There is, however, an active debate about how significantly substitute suits threaten due process. Margaret Lemos has argued that the threat is serious, particularly because of the preclusive effect of judgments in substitute suits,[303] while Prentiss Cox has argued that the due process concerns are minimal, because existing statutory regimes adequately "align public enforcement with private rights" and judgments in substitute suits do not always preclude private litigation.[304] But even if the concerns are minimal in some cases when a traditional executive official stands for the state, surely the picture changes when a private litigant seeks to aggregate claims on the state's behalf.

Courts should presume that private litigants may not bring substitute suits on a government's behalf unless there are procedural controls to ensure adequate representation. This presumption follows from a comparison of substitute standing with class actions. Both present the familiar due process problems of aggregate litigation. The class action device is ringed round with procedural protections, including requirements that both the class plaintiff and class counsel be adequate representatives. Thus, there is already a mechanism for private litigants to aggregate claims consistent with due process. If the legislature needs to assign to a private litigant the government's power to aggregate claims through substitute standing, it should have to provide some mechanism to protect a rights-holder's interest in adequate representation.

Though the cases have not gone quite that far, they have required specific authorization before a nontraditional litigant may stand for the state in a substitute suit. There are two types of cases in which the problem has arisen. In the first type, a private litigant claims that it has a unique relationship with the state that impliedly authorizes it to exercise the state's *parens patriae* power.[305] In the second type, a state actor, but not the state attorney general or a state agency with general litigation authority, claims *parens patriae* standing.[306] In both types of cases, federal courts deny *parens patriae* standing for

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

303 *See* Lemos, *supra* note 297, at 488.

304 Prentiss Cox, *Public Enforcement Compensation and Private Rights* 1 (Minn. Legal Studies, Research Paper No. 14-36, Oct. 1, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2503999.

305 The most interesting cases involve hospitals claiming standing as quasi-public actors. *See, e.g.*, Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 436 (3d Cir. 2000); Stamford Hosp. v. Vega, 674 A.2d 821, 828–29 (Conn. 1996).

306 *See, e.g.*, Meek v. Martinez, 724 F. Supp. 888, 901 (S.D. Fla. 1989).

lack of specific statutory authorization,[307] even though they have generously implied substitute standing for state attorneys general who have general authority to litigate on behalf of the state.

The more difficult cases arise where the state is the named party in a *parens patriae* suit but the attorney general has delegated litigation authority to private counsel. This arrangement has become common; in an era where the Supreme Court has cut back on class actions, public-private partnerships can make up the enforcement gap by combining the expertise and resources of private counsel with the standing of a state to aggregate claims.[308] State law usually constrains these arrangements, requiring specific authorization and continuing public control over the private counsel's litigation decisions.[309] In the absence of these limits, the demand for constitutional accountability might require dismissing a state's substitute suit where the state has functionally (though not formally) delegated its *parens patriae* power.

ii. United States

Similar concerns apply when standing depends upon the United States' substitute interests. An important and overlooked example involves federal Indian law, which has a qui tam scheme permitting private litigants to rely upon the United States' standing to sue on behalf of Indians. Under fundamental principles of federal Indian law, the United States is a trustee for Indians and may stand on their behalf in federal court.[310] Under federal Indian law's qui tam scheme, a private litigant may claim the United States' trust responsibility as the basis for standing in a suit to vindicate Indians' interests.[311] *United States ex rel. Hall v. Tribal Development Corp.*, which was litigated as a qui tam action, provides a good example of federal courts' failure to grapple with the distinctions between substitute and other government

307 *See, e.g.*, Thiebaut v. Colo. Springs Utils., 455 F. App'x 795, 801 (10th Cir. 2011); *Allegheny General*, 228 F.3d at 437; Bd. of Educ. of Peoria v. Ill. State Bd. of Educ., 810 F.2d 707, 712 & n.7 (7th Cir. 1987).

308 *See, e.g.*, Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 630 (2012).

309 *See id.* at 669 (citing Cty. of Santa Clara v. Superior Court, 235 P.3d 21, 36 (Cal. 2010)).

310 Seminole Nation v. United States, 316 U.S. 286, 296–297 (1942).

311 Until recently, federal Indian law had two qui tam provisions. Section 81 of Title 25, which has since been amended to remove the qui tam provision, 25 U.S.C. § 81 (1994); 25 U.S.C. § 81 (2000), permitted "any person" to sue "in the name of the United States" for violations of requirements regarding encumbering Tribal real property and to keep one half of the recovery. *See* United States *ex rel.* Hall v. Tribal Dev. Corp., 49 F.3d 1208, 1210 n.1 (7th Cir. 1995) (quoting pre-amendment qui tam provision). Section 201 of Title 25, which remains on the books, permits an "informer" to sue for "[a]ll penalties which shall accrue" under various provisions of Title 25, which protects the rights of Indian Tribes and individuals, and to retain half of the recovery. 25 U.S.C. § 201 (2012); *see* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n.4 (1943) (citing 25 U.S.C. § 201 approvingly).

interests.[312] In *Hall*, three non-Indians sued as qui tam relators to void contracts entered into by the Menominee Indian Tribe and a tribal development corporation. The Seventh Circuit reasoned that the standing question was an easy one in light of other circuit precedent upholding qui tam standing to vindicate the United States' corporate interests under the False Claims Act.[313] "Once we accept the premise that the United States is the real plaintiff in a *qui tam* action," the court of appeals explained, "it stands to reason that challenges to the standing of the government's representative are beside the point."[314] Because the United States clearly had a judicially cognizable government interest as a trustee for Indians, the non-Indian plaintiffs clearly had standing to sue.[315]

Put differently, the Seventh Circuit held that non-Indians could sue on behalf of the United States in a substitute capacity to protect the Menominee's interests from the Menonimees themselves and, in so doing, to take half of any recovery. This holding cannot be sustained by pointing to relator standing under the FCA, which, after all, vindicates the United States' corporate interests in property and contract. *Hall* makes the distinction plain, although the Seventh Circuit plainly failed to see it: substitute suits involve the interests of third parties not before the court and thus trigger due process concerns about the day-in-court right. The problem in *Hall* was also obvious: the private relators' suit challenged the Menominee Tribe's actions and thus was in direct conflict with the Menominees' interests as they understood them.

This Article's framework makes clear that *Hall* was wrongly decided. Federal courts are wary of substitute standing when Congress has not expressly authorized it.[316] But even where Congress has authorized a substitute suit, a private litigant should not have standing to vindicate another private party's rights in the United States' name if there are no due process safeguards.

d. Administrative Interests

In the typical administrative case a regulated party faces an enforcement action by the government. Her property and liberty interests are at stake. Tara Grove has explained the threats to individual liberty and property from administrative standing in memorable terms: "If a private plaintiff had the discretion to sue any person, anywhere in the country, for any violation of law, she . . . would have . . . the power to target the defendants of her choice."[317] Standing doctrine addresses the inherent risks by limiting who may litigate a government's administrative interests.

312 *See* 49 F.3d 1208.

313 *Id.* at 1213.

314 *Id.*

315 *See id.* at 1214.

316 *See, e.g.*, United States v. City of Philadelphia, 644 F.2d 187, 199, 201 (3d Cir. 1980) (refusing to imply substitute standing in favor of United States).

317 Grove, *Nondelegation*, *supra* note 5, at 823.

i. States

The litigation of administrative interests—particularly the sweeping interest in enforcing the law—has generated much debate about the metes and bounds of Article III. The constitutional accountability approach clarifies the debate. States may have judicially cognizable administrative interests under federal law where Congress has given state governments a role in implementing federal regulatory schemes. In an administrative suit, the power of government standing is brought to bear against the liberty or property of a private defendant, which creates a risk of arbitrary enforcement.[318] When it comes to formal state actors, our constitutional tradition has addressed the due process concern in administrative cases through a combination of constitutional rights, procedural controls, and political constraints. These controls are sufficient to ensure constitutional accountability and a federal court may recognize both express and implied rights of action when a traditional state actor seeks to enforce administrative interests.[319] But a court should presume that a private litigant not subject directly to the Constitution may not stand for the state in administrative suits unless the legislature has clearly authorized it and imposed public controls on the litigant's enforcement discretion.

Permitting private litigants free reign to enforce the law on a state's behalf presents a significant "risk of an erroneous deprivation" of the due process right against arbitrary enforcement.[320] At the same time, "there [are] obvious advantage[s] to allowing others to act on behalf of the government" in administrative suits, particularly where there is a "shortage of [public enforcement] resources."[321] Congress often balances these competing concerns by creating public control over private attorneys general.

One example is executive oversight, as under the FCA. Article II and the separation of powers may mandate executive oversight in administrative cases, even where the party suing is a state government. After all, state suits to enforce administrative interests under federal law are similar to citizen suits, insofar as both implement federal regulatory law. In other words, in administrative suits a state has some latitude to determine who will represent it, but the state's representative may need to be subject to some public control by the federal executive.

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318 *See id.* at 784 ("[S]tanding doctrine protects individual liberty by shielding private parties from arbitrary exercises of private prosecutorial discretion.").

319 Davis, *supra* note 5, at 53–62.

320 *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (explaining that courts in procedural due process cases must consider "private interest" affected and "risk of an erroneous deprivation of such interest").

321 Erwin Chemerinsky, *Controlling Fraud Against the Government: The Need for Decentralized Enforcement*, 58 NOTRE DAME L. REV. 995, 1006 (1983); *cf. Mathews*, 424 U.S. at 335 (considering government's interest in existing procedures and costs of "additional or substitute procedural requirement[s]").

ii. United States

Standing doctrine might limit the threat of arbitrary enforcement in administrative suits by restricting what counts as a judicially cognizable administrative interest. It might, for example, require the U.S. Attorney General to show that someone, even if not the United States, has been injured before bringing a prosecution. The doctrine has not done so for good reason. Public enforcement of federal law by formal state actors plays an important part in ensuring the rule of law.

Private enforcement may also play an important role, but formally private litigants are not subject to the same institutional checks as formal state actors. One remedy for overbroad grants of private enforcement discretion is to strike down the legislative grant of standing.

The challenge, of course, is to identify when private enforcement of government interests raises such serious constitutional concerns that a court should hold the delegation invalid. Meeting that challenge requires distinguishing among the four types of government interests. The recent debates about standing under the federal false-marking statute are a good example of the problem of treating all government suits the same. Until 2011, the false-marking statute provided that "[a]ny person may sue" to enforce a prohibition upon deceptively marking an unpatented product as if it were patented, with half the penalty going to a successful plaintiff and the other half to the United States.[322] After the Federal Circuit held that the statutorily prescribed $500 penalty applied per article,[323] private plaintiffs flocked to file false-marking suits, including a $5.4 trillion suit against Solo Cup for allegedly falsely marking twenty-one billion plastic cups.[324] Defendants argued that the plaintiffs could not sue on behalf of the United States because the false-marking statute did not provide for public control of their enforcement discretion. The federal courts almost unanimously rejected this argument, analogizing the false-marking statute to the FCA, which the Court held in *Vermont Agency of Natural Resources v. United States ex rel. Stevens* validly created qui tam standing under Article III.[325] But the FCA presented a different question in *Vermont Agency*, namely, whether Congress could authorize private enforcement of the United States' corporate interests, which involve specific contract and property interests and cannot give rise to a $5.4 trillion damages claims for violation of the United States' administrative interests.[326] Courts that treated the constitutionality of the false-marking enforcement

322 35 U.S.C. § 292(b) (2006); *see* Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 329, § 16(b)(1)–(3) (2011) (amending 35 U.S.C. § 292(b)).

323 Forest Grp., Inc. v. Bon Tool Co., 590 F.3d 1295, 1301 (Fed. Cir. 2009).

324 Pequignot v. Solo Cup Co., 608 F.3d 1356 (Fed. Cir. 2010).

325 Luka v. Procter & Gamble Co., 785 F. Supp. 2d 712, 719 (N.D. Ill. 2011) (citing Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens 529 U.S. 765, 773–74 (2000)). Federal courts distinguished *Morrison v. Olson* as concerned with criminal prosecutions and therefore upheld the enforcement scheme under Article II as well. *See id.*

326 *See supra* text accompanying note 250.

scheme as an easy question showed no awareness of the uniquely vexing constitutional concern about arbitrary enforcement in administrative suits.

Focusing upon this concern allows for sensible distinctions between constitutional and unconstitutional citizen suit provisions. Recall, for example, the citizen suit provision at issue in *Laidlaw*.[327] The *Laidlaw* Court held that an environmental group had standing under the CWA's citizen suit provision to sue an alleged polluter even though "there had been 'no demonstrated proof of harm to the environment.'"[328] Justice Scalia's dissent was right that there was no immediate and tangible injury-in-fact to the group's members. Nevertheless, the Court reasoned that the group's "reasonable concerns" permitted them to sue for damages on behalf of the United States.[329]

If *Perry*'s right, then *Laidlaw*'s wrong. The CWA does not create a fiduciary relationship between the United States and citizen litigants.[330] But the citizen suit in *Laidlaw* was constitutional under this Article's framework. The plaintiffs' interest in deterring future harm to themselves, as Sergio Campos has argued, might be thought of as a due process value worthy of equal consideration alongside other constitutional concerns.[331] And the Court explained that the citizen suit did not pose "grave implications for democratic governance" because of executive checks on private enforcement.[332] For one, the executive could "undertak[e] its own [enforcement] action" and thus "foreclose a citizen suit."[333] For another, the executive had a right to intervene in a citizen suit and to inform the court of its view of the dispute.[334] *Laidlaw* thus supports a presumption that Congress may not assign the United States' administrative interests to a private litigant unless it does so clearly and imposes public control on the scope and exercise of enforcement discretion.

Thus, this Article's framework transforms the debate about the constitutionality of permitting private litigants to stand for the United States in administrative suits. First, it forces us to distinguish two different types of citizen suits. As Part II discussed, citizen suits *against* federal agencies ensure, rather than undermine, constitutional accountability. The agency does not have a due process right at stake in these suits. Citizen suits against agencies present due process concerns only when, as in the case of some institutional suits, adjudication of the claim will practically impact another party's prop-

327 528 U.S. 167 (2000).

328 *Id.* at 199 (Scalia, J., dissenting) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 956 F. Supp. 588, 602 (D.S.C. 1997)).

329 *Id.* at 183 (majority opinion).

330 *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2667 (2013) (denying standing because "petitioners owe" no "fiduciary obligation" to California, given that they are "free to pursue a purely ideological commitment" to the lawsuit).

331 Campos, *supra* note 212, at 1092.

332 *Laidlaw*, 528 U.S. at 188 n.4 (quoting *Laidlaw*, 528 U.S. at 202 (Scalia, J., dissenting)).

333 *Id.* (citing 33 U.S.C. § 1365(b)(1)(B) (1994)).

334 *Id.* (citing 33 U.S.C. § 1365(c)(2)).

erty or liberty.[335] In these cases, as in institutional suits, auxiliary mechanisms address the constitutional concern about third party interests.

Second, under this Article's framework, the starting point isn't simply whether only "public officials" may litigate "public rights." Rather, it is whether recognizing standing would result in a "clearly arbitrary" burden upon due process protected rights.[336] Public control is but one safeguard against arbitrary enforcement. It is presumptively required, particularly in administrative suits, both as a matter of due process and Article II. Using the injury-in-fact requirement as the lodestar for implementing Article II, as Justice Scalia, its most fierce judicial advocate, has done,[337] is both too narrow and too sweeping. It is too narrow because injuries-in-fact are often easy to allege, even in cases that arguably encroach upon the executive's "discretion to decide" whether to enforce federal regulatory law.[338] It is too sweeping because it lumps all suits involving government interests together even though they present different constitutional concerns.

IV. Evaluating the Constitutional Accountability Approach to Government Standing

Thus re-envisioned, standing's state action problem does not have a single solution. This Part evaluates the constitutional accountability approach by considering some of its implications and addressing the important objections.

A. Applications

1. Defendant Standing

Thus far this Article has treated plaintiff standing and defendant standing together. Defending a government interest may not, however, present the same threat to opposing parties' and third parties' rights as initiating a government suit. Consider the contrast between a typical institutional suit such as *Perry*, in which a private litigant seeks to defend a law, and a typical administrative suit such as *Laidlaw*, in which a private litigant sues another on

335 Consider, for example, a citizen action to force an agency to enforce the law against another private party. *See* Grove, *Nondelegation*, *supra* note 5, at 829–30.

336 *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

337 *Laidlaw*, 528 U.S. at 209–10 (Scalia, J., dissenting).

338 *Id.* at 210 (arguing that Article II prohibits citizen suit schemes in which "[e]lected officials are entirely deprived of their discretion to decide that a given violation should not be the object of suit at all"). In *J.I. Case & Co. v. Borak*, for example, the Court implied a private right of action from the Exchange Act's prohibition on fraudulent proxy solicitations, on the theory that private enforcement is a "most effective weapon" and a "necessary supplement" to enforcement by the Securities and Exchange Commission. 377 U.S. 426, 432 (1964). This implied private right of action can easily be understood as the delegation of government enforcement power even though a shareholder in a derivative suit clearly has an Article III injury-in-fact. Rosenblatt v. Nw. Airlines, Inc., 435 F.2d 1121, 1124 (2d Cir. 1970).

the United States' behalf. The threat of arbitrary enforcement when a private litigant initiates an administrative suit is direct, while there is no obvious threat to due process rights when a private litigant defends government action.

Defendant standing is a tangled doctrine, with federal courts sometimes opining that a defendant does not need standing under Article III.[339] In the mine run of cases, of course, defendants have standing because plaintiffs seek a judgment that would injure their interests.[340] But in some cases—*Perry* being an obvious example—an adverse judgment would injure someone other than the litigant who seeks defendant standing. In an important pre-*Perry* article, Matthew Hall argued that a state should be free to authorize a private litigant to defend its laws in federal court.[341]

Practically speaking, a distinction between initiating and defending on the government's behalf would matter most for institutional suits. There are vanishingly few, if any, real world examples where a private litigant claims standing to defend a government's corporate, substitute, or administrative interests. The question, then, is whether the legislature may authorize a private litigant to defend a government's institutional interests whenever it wants, as long as it does so clearly. Perhaps deliberate legislative authorization itself satisfies constitutional accountability where a private litigant is defending a statute on behalf of a government, which does not have due process protected liberty or property rights at stake.

Institutional litigation may, however, impact private rights. Thus, the distinction between initiating a government suit and defending a government's action is not as sharp as it first appears. Requiring the legislature to ensure that a private litigant will be a capable advocate of the government's position, as Justice Kennedy's dissent in *Perry* would have done, is not a significant burden.[342] Given the possibility that a judgment in an institutional suit will practically impair private rights, a federal court should require not only legislative authorization, but also a showing that a private litigant will mount a capable defense of the government's institutional interest and that auxiliary procedures will permit adequate consideration of third parties' interests.

2. Standing to Appeal

Government standing doctrine might draw a distinction between standing at trial and standing to appeal, recognizing private standing to appeal on the government's behalf more readily than private standing to litigate for the government at trial. Litigants must have standing to appeal a judgment no less than to initiate a suit in the district court. In *Diamond v. Charles*, for example, the Court denied standing to appeal to a private litigant who

339 *See* Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1557 (2012).

340 *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 618–19 (1989).

341 Hall, *supra* note 339, at 1583–84.

342 *See supra* note 279 and accompanying text.

sought to defend a state law against constitutional challenge.[343] Though the litigant had intervened in the district court, the state had not specifically authorized him to appeal on its behalf; indeed, the state's attorney general declined to appeal the judgment.[344] *Diamond* was rightly decided under this Article's framework. It might be objected, however, that standing to appeal, like standing to defend, does not pose the same constitutional problem as standing to initiate a lawsuit. But appealing a judgment *is* initiating a suit in the appellate court.

Indeed, standing to appeal on the government's behalf could arguably threaten individual rights directly in particular cases. In *Perry*, for example, the plaintiffs won their challenge to Proposition 8 in the district court.[345] Permitting Proposition 8's proponents to appeal on the state's behalf put that victory, and the plaintiffs' constitutional rights, in jeopardy. On that view, this Article is wrong to suggest that a private litigant's defense of a government's institutional interests differs from private litigation of other government interests.[346] This objection is powerful. But there is a more powerful response. Plaintiffs do not have an individual right to a wrong constitutional judgment. Nor, though perhaps the question is closer, do they have a due process right to a state executive's decision not to defend the state's law.[347]

3. Criminal Prosecution

Looming over the discussion of administrative suits is the question whether private criminal prosecutions comport with due process. On the one hand, there are examples of private prosecution from American history.[348] Moreover, in *Young v. United States ex rel. Vuitton et Fils S.A.*, the Court held that a district court has discretion to appoint a private attorney to prosecute a contempt action.[349] On the other hand, our understanding of the prosecutor's role as a disinterested servant of justice suggests private prosecutorial discretion could violate due process.[350] In *Young*, for instance, the Court reasoned

343 476 U.S. 54, 68 (1986).

344 *Id.* at 61.

345 *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010) ("Proposition 8 is unconstitutional under both the Due Process and Equal Protection Clauses . . . .").

346 *See supra* subsection III.D.2.b.

347 The question is closer because one might argue that popular lawmaking regarding civil rights is constitutionally permissible only where there is a functional executive override. *Cf.* Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 36–37 (1993) (arguing popular lawmaking concerning civil rights may violate Guarantee Clause); *see also* Fred O. Smith, Jr., *Due Process, Republicanism, and Direct Democracy*, 89 N.Y.U. L. REV. 582, 593 (2014) (arguing that popular lawmaking concerning civil rights runs afoul of procedural due process).

348 *See, e.g.*, Roger Roots, *Are Cops Constitutional?*, 11 SETON HALL CONST. L.J. 685, 689–90 (2001).

349 481 U.S. 787, 793 (1987).

350 *See* Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 SUP. CT. ECON. REV. 77, 95–96 (2010).

that a private attorney could not prosecute contempt in the name of the United States if that attorney had a personal interest in the underlying case.[351] *Young*'s reasoning suggests an additional constraint in criminal cases, namely the requirement that a private prosecutor be actually disinterested, which goes further than the limits this Article discusses for civil suits that vindicate administrative interests. Additional restraints on private standing in criminal prosecutions reflect the longstanding distinction between criminal prosecutions and civil suits and the direct and unique threats to liberty and life that most criminal prosecutions pose.[352]

It is possible to argue that only standing by traditional state actors, such as the U.S. Attorney General, and private standing in criminal prosecutions present constitutionally cognizable concerns about arbitrary enforcement. On that view, this Article has been too concerned about private litigation of government interests in civil cases. But this objection fails for two reasons. First, it makes too much of the distinction between criminal and civil enforcement; the Court has explained that due process also limits public officials from arbitrarily bringing civil enforcement actions.[353] Second, it makes too little of the requirement of constitutional accountability for all exercises of government power. A delegation of the power of government standing may "*itself* violate[ ] the Constitution because it fails to ensure a sufficient level of constitutional accountability."[354]

4. Legislative Standing

Thus far, I have bracketed the problem of legislative standing, which concerns when legislators have standing to sue in an official capacity. In the main, legislative standing is orthogonal to the question this Article considers, namely, who may stand for the United States or a state. Most cases involving legislative standing present a different problem, which is whether a legislator has judicially cognizable interests in her office or whether the legislature as an institution has its own judicially cognizable interests distinct from those of the United States or a state.[355] But in some cases, a legislator may claim standing to sue on behalf of the United States or a state. Because legislators are traditional state actors subject to electoral discipline, this Article might seem to endorse broad legislative standing to sue on behalf of the government. It does not. Legislative standing to represent the government presents unique questions arising from the separation of powers, which may limit legislators from executing the law, and the political question doctrine,

351 *Young*, 481 U.S. at 809.

352 *See* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 781–82 (1997) (discussing distinction between criminal punishment and nonpunitive civil remedies).

353 *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 249 (1980).

354 Metzger, *supra* note 13, at 1461.

355 *See* Raines v. Byrd, 521 U.S. 811, 821 (1997) (citing Coleman v. Miller, 307 U.S. 433 (1939)) (discussing institutional injuries to legislators).

which may require a court to stay its hand where legislators and executive officials are at odds over law enforcement.[356]

This Article does not address the questions that legislative standing raises. There is, however, an important point of contact between standing's state action problem and legislative standing. If Congress were to retain control over a private litigant it authorized to represent the United States, the limits on congressional control of law execution would become relevant. Congress may violate the Appointments Clause by playing a role in appointing officers itself or by delegating significant executive authority to individuals who are not appointed as officers but should be.[357] This concern about congressional aggrandizement does not apply, however, to qui tam statutes and citizen suit provisions where a private litigant who is beyond congressional control seeks to stand for the United States.

5. Preclusion

Where a private litigant stands for the United States or a state, the resulting judgment may preclude subsequent litigation by a traditional executive official.[358] Res judicata may, for example, preclude a federal agency from relitigating an enforcement action where a state agency has already litigated the action on the federal government's behalf, as sometimes occurs in cooperative federalism schemes.[359] Similarly, private litigation of a government's claim may preclude subsequent litigation by executive officials. Federal courts have, however, called preclusion in this scenario a "daring analytical leap"[360] because "[g]enerally, 'individual litigation . . . does not preclude relitigation by the government.'"[361] But that is because private individuals

356 Grove & Devins, *supra* note 67, at 626–30.

357 *See* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 277 (1991) (holding that members of Congress could not serve on board that reviewed management of airports in Washington, D.C. area); Buckley v. Valeo, 424 U.S. 1, 130 (1976) (holding that Congress may not appoint officers itself).

358 *See* Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 655 (2005) (noting "preclusion principles that would foreclose follow-on litigation after the first private (or public) attorney general suit has been litigated"). If the legislature purports to authorize private standing but to permit the executive branch to relitigate the same claim, then a court might disregard the limit on preclusion as a matter of constitutional due process. *Cf. id.* ("Repeatedly subjecting a single defendant to liability for the same harm to the same public interest could well raise constitutional difficulties sounding principally in due process."). *But cf.* Woolhandler & Nelson, *supra* note 112, at 724 ("[I]f a loss by the private individual would not bar relitigation of the polity's right by others, then that right is not really at stake in such a way as to form the basis for a case.").

359 *See, e.g.*, Harmon Indus., Inc. v. Browner, 191 F.3d 894, 904 (8th Cir. 1999); United States v. ITT Rayonier, Inc., 627 F.2d 996, 1002 (9th Cir. 1980).

360 Kerr-McGee Chem. Corp. v. Hartigan, 816 F.2d 1177, 1180 & n.4 (7th Cir. 1987) (quoting United States v. East Baton Rouge Par. Sch. Bd., 594 F.2d 56, 58 (5th Cir. 1979)).

361 *Id.* at 1180 (alteration in original) (quoting 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4458.1 (2d ed. 1986)).

may not litigate on the government's behalf unless they are authorized and because private litigation need not involve government interests.[362] Where, for example, a government is in privity with private litigants and seeks to relitigate private rights they have already litigated, the government's action is precluded.[363] By parity of reasoning, private litigants authorized to stand for the government may obtain (or lose) a judgment that precludes subsequent suits by executive officials.[364]

B. Objections

1. Federalism

The most powerful objection to this Article's approach sounds in federalism. Standing grounded in Article III does not apply in state courts.[365] Standing rules grounded in the Due Process Clause would. Federalism may be a reason to reject a theory of standing that sounds in constitutional accountability.

Constraining government standing based upon a requirement of constitutional accountability rooted in due process is less objectionable to the extent that state law already restricts delegation of law enforcement authority to private parties. Importantly, "[i]t is generally acknowledged among the states that delegations to private parties violate state constitutions."[366] State law may invalidate delegations that federal due process would permit; for instance, many states do not permit the delegation of state authority to *federal* officials, who are politically accountable.[367] Some state courts closely police delegations of enforcement authority to unelected public officials in order to ensure that they are subject to adequate controls.[368] It is thus far from clear that applying due process limits would significantly change most states' standing laws.[369]

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362 *See id.* at 1180–81 (holding that subsequent state litigation is not precluded where state advanced its own interests, which prior private litigation did not involve).

363 Leon v. IDX Sys. Corp., 464 F.3d 951, 961–63 (9th Cir. 2006).

364 *See* United States *ex. rel.* Eisenstein v. City of New York, 556 U.S. 928, 936 (2009) (noting that United States may be bound to judgment in qui tam action under FCA).

365 *See* James W. Doggett, Note, "*Trickle Down" Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing Be Imported Into State Constitutional Law?*, 108 COLUM. L. REV. 839, 840–41 (2008).

366 Calvin R. Massey, *The Non-Delegation Doctrine and Private Parties*, 17 GREEN BAG 2D 157, 165 (2014).

367 *See id.* at 166.

368 *See, e.g.*, State v. Robertson, 924 P.2d 889, 894 (Utah 1996).

369 Some states have adopted standing law consistent with this Article's analysis. *See, e.g.*, Duncan v. New Hampshire, 102 A.3d 913 (N.H. 2014) (rejecting grant of citizen standing as impermissible delegation). To be sure, many states recognize "public right" standing more generously than the Court's injury-in-fact test or treat standing law as prudential. *E.g.*, Trs. for Alaska v. State, 736 P.2d 324 (Alaska 1987). Here too, however, it is not clear that due process analysis always would lead to significant changes in state law. For example, under Ohio standing law, a citizen may bring a "public-right action" in the "rare and extraordinary case where the challenged statute operates directly and broadly to divest the

To be sure, state courts often grant standing to challenge government action where the Article III injury requirement would deny it, particularly in citizen suits against the government.[370] This Article's framework would not alter those state standing rules. Properly understood, standing in suits that challenge unlawful government action is not a government power, but rather part of a system of remedies that holds government constitutionally accountable.[371] And, therefore, this Article's framework for government standing does not call for rolling back private standing to enforce individual rights against state governments.[372]

Nevertheless, to the extent due process would entail changes to state standing law regarding private attorney general actions against private defendants, it raises serious federalism concerns. But any changes need not track federal standing law jot-for-jot. In particular, there is an important distinction under this Article's framework between enforcement of federal rights and enforcement of state rights. As Part III discusses, more federal executive control may be required for the enforcement of federal law as a result of Article II's vesting of the executive power in the President and its charge that "he shall take care that the laws be faithfully executed."[373] This requirement would apply to the enforcement of federal rights in state court, but would not limit state courts when enforcing state-created rights.[374] In cases involving state rights, due process and constitutional accountability permit legislatures substantial flexibility in designing government standing.

Consider a concrete example of legislative balancing of private attorney general standing, which may be necessary for adequate enforcement of the law, with the constitutional demand for limits on the discretion of those who enforce the law on the government's behalf. California enacted the Labor Code Private Attorneys General Act (PAG Act) to address resource constraints on public enforcement.[375] The PAG Act authorizes "an aggrieved employee" to sue her employer for violations of the Labor Code, and allows the plaintiff to keep twenty-five percent of the recovery while leaving seventy-

court[ ] of judicial power." Brown v. Columbus City Schs. Bd. of Educ., No. 08AP-1067, 2009 WL 1911904, at *3 (Ohio Ct. App. June 30, 2009) (summarizing case law).

370 *See, e.g.*, White v. Davis, 533 P.2d 222, 226–27 (Cal. 1975).

371 *See supra* notes 117–20 and accompanying text.

372 *Cf.* Christopher R. Leslie, *Standing in the Way of Equality: How States Use Standing Doctrine to Insulate Sodomy Laws from Constitutional Attack*, 2001 WIS. L. REV. 29, 66 (criticizing state courts for importing federal standing rules to deny remedies in challenges to sodomy laws).

373 U.S. CONST. art. II, § 3.

374 For discussion of the question whether state courts must employ Article III case-or-controversy doctrine when adjudicating federal questions, see William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 265 (1990) (arguing they must). This Article would impose a federal constitutional limit on state standing law grounded in the structural requirement of constitutional accountability for government power, not in Article III itself.

375 Dunlap v. Superior Court, 47 Cal. Rptr. 3d 614, 617 (Ct. App. 2006).

five percent to the state.[376] The Act creates private standing to vindicate the state's administrative interests as a necessary "supplement" to enforcement by the Labor and Workforce Development Agency (LWDA), which cannot pursue every Labor Code violation.[377] As originally enacted, the PAG Act posed a constitutional accountability problem to the extent it did not "discourage" private litigants from using private attorney general standing to file "frivolous lawsuits" seeking "steep penalties for [violations of] . . . 'relatively obscure' Labor Code sections."[378] But as amended, the Act limits an employee's enforcement discretion. Among other provisions, the amended Act imposes procedural controls on private enforcement: an employee must give pre-filing notice to the LWDA, which can bring its own enforcement action and thus preclude private litigation; moreover, the Act requires pre-filing notice to the employer, which has an opportunity to cure "less serious Labor Code violations."[379] These amendments were enacted to "protect[ ] businesses from shakedown lawsuits."[380] Under this Article's framework, these safeguards against arbitrary enforcement satisfy due process.

States also have more flexibility in defining private rights to remedies under state law than Congress does under the Federal Constitution. State courts have primary authority to determine when state rights demand private remedies and to define when standing involves a government power under state law. The vast majority of states have express constitutional guarantees that the courts shall be open to provide remedies for rights.[381] The Federal

376 CAL. LAB. CODE §§ 2699(a), (i) (West 2015).

377 Erich Shiners, *Chapter 221: A Necessary but Incomplete Revision of the Labor Code Private Attorneys General Act*, 36 MCGEORGE L. REV. 877, 878–79 (2005).

378 *Id.* at 877, 881.

379 *Id.* at 887 (citing CAL. LAB. CODE §§ 2699.3 (West. Supp. 2004)).

380 *Dunlap*, 47 Cal. Rptr. 3d at 619 (quoting Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 1809 (2003–2004 Reg. Sess.), as amended July 27, 2004 5–6 (Cal. 2004)). The PAG Act might be understood to authorize a private attorney general to litigate the state's substitute interests, given that one aggrieved employee's decision to sue under the Act may preclude another employee from bringing a follow-on suit. *See* Iskanian v. CLS Transp. Los Angeles, LLC, 327 P.3d 129, 147 (Cal. 2014). On that understanding, the PAG Act, like other statutes that delegate the government's substitute standing, has a potential due process problem that can only be solved by some mechanism designed to ensure adequate representation of absent parties' private rights. But the Act is better understood as vindicating the state's administrative interest in enforcing the law rather than as substituting government standing for individual employees' enforcement of their private rights. As the California Supreme Court has explained, "The act authorizes a representative action only for the purpose of seeking statutory penalties for Labor Code violations[,] . . . and an action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'" *Id.* (quoting People v. Pac. Land Research Co., 569 P.2d 125, 129 (Cal. 1977)). In other words, "[t]he civil penalties recovered on behalf of the state under the [PAG Act] are distinct from the statutory damages to which employees may be entitled in their individual capacities." *Id.*; *see also id.* at 151 (explaining that litigation under PAG Act "is not a dispute between an employer and an employee arising out of their contractual relationship" and that "it is a dispute between an employer and the *state*").

381 Resnik, *supra* note 37, at 924 n.15 & app.1.

Constitution does not expressly guarantee remedies for rights, instead incorporating the right-remedy principle as a matter of due process. All else being equal, state courts have broader authority than federal courts to recognize private rights to remedies as a basis for private standing under state law.

2. Standing Minimalism

A second objection is that the constitutional accountability approach requires standing doctrine to do too much. Even if standing doctrine is not simply political theatre masquerading as law,[382] a fair sense of history counsels caution in thinking that standing doctrine can reliably implement contested ideas of due process and the separation of powers.

Given the inevitable normative disagreement, perhaps standing should take a "barebones approach" that "insist[s] only on real adversity between plaintiff and defendant, and a plaintiff capable of generating a reasonably good, 'concrete' record for decision."[383] Standing doctrine, the argument goes, is simply not well-equipped to address difficult questions of institutional design.[384]

Standing minimalism is a powerful challenge. It would largely, perhaps entirely, eliminate doctrinal distinctions between private and government standing. The purely pragmatic response is that the public-private divide is too deeply set in the foundation of public law to be dug out and tossed aside. The more sympathetic response is that a barebones approach to standing's state action problem would simply shift how the law addresses it.

The primary advantage of linking government standing and constitutional accountability is that it hones in on what makes government standing difficult and the competing values at stake in defining and limiting the power of government standing. Rather than fruitlessly search for the always elusive injury-in-fact, the analysis focuses upon whether, and to what extent, concerns about remedying wrongs, arbitrary enforcement, and the right to one's day in court create constitutional constraints on the design of private and public enforcement.

Properly conceived, standing is well-situated to address—prophylactically and only partially—the risk of abuse of government power. The doctrine cannot ferret out arbitrary bias or inadequate representation in every case, but it can identify categories of cases where there is (more or less) concern about keeping those who stand for the government constitutionally accountable in order to protect liberty and property interests. It is com-

382 *See* Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 647–54 (2010) ("[O]ur evidence shows that standing preferences are distinguishable from merits preferences."). *But see* Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–43 (1999) ("[J]udges provide access to the courts to individuals who seek to further the political and ideological agendas of judges.").

383 Tushnet, *supra* note 165, at 1706.

384 Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 637 (1985).

monly argued that prophylactic rules are illegitimate because they are overinclusive, *Miranda v. Arizona*[385] being the famous example.[386] This is not the place to erect a defense of prophylactic rules, save to say that the criticism is both descriptively inaccurate and normatively unsound. Descriptively, a great many constitutional doctrines are "prophylactic" in that they arguably overprotect a right.[387] Courts adopt these doctrines based upon judgments about their own, and other institutions', competence. Normatively, "because courts frequently cannot determine with much certainty whether or not a constitutional violation has occurred in a given case," they appropriately "develop prophylactic rules safeguarding constitutional rights."[388] Restrictions on government standing are just such a prophylactic doctrine.

CONCLUSION

This Article's framework aims at a more nuanced approach to government standing than the *Perry* Court's fiduciary rule, which restricts who may litigate government interests to common law fiduciaries of the state. Difficulties distinguishing state from private actors are ubiquitous in public law, particularly in an era of privatization of public regulation.[389] Developments in standing jurisprudence have brought standing's state action problem into sharp focus, as has renewed interest in the state action[390] and private nondelegation[391] doctrines. Scholars have pored over private standing and considered government standing, but have not explored how standing law should distinguish state actors entitled to stand for the state from private litigants who are not. By grounding the distinction in constitutional accountability, this Article has reclaimed the right-remedy principle for standing analysis and shown that striking down a private delegation of government standing based upon injury-in-fact analysis or the *Restatement (Third) of Agency* is not always required by the Constitution.

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385 384 U.S. 436 (1966).

386 Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 1 (2001) ("Constitutional law scholars have long observed that many doctrinal rules established by courts to protect constitutional rights seem to 'overprotect' those rights, in the sense that they give greater protection to individuals than those rights, as abstractly understood, seem to require.").

387 *See, e.g.*, David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) ("'[P]rophylactic' rules are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law.").

388 Caminker, *supra* note 386, at 2.

389 *See, e.g.*, Freeman, *supra* note 137, at 543; Metzger, *supra* note 13, at 1367; Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717 (2010); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003).

390 *See, e.g.*, John L. Watts, *Tyranny by Proxy: State Action and the Private Use of Deadly Force*, 89 NOTRE DAME L. REV. 1237 (2014).

391 DOT v. Ass'n of Am. R.Rs., 135 S. Ct. 1225 (2015).