Standing Outside of Article III

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ABSTRACT

The Supreme Court has repeatedly insisted that standing doctrine is a "bedrock" requirement only of Article III. Accordingly, both jurists and scholars have assumed that the standing of the executive branch and the legislature, like that of other parties, depends solely on Article III. But I argue that these commentators have overlooked a basic constitutional principle: Federal institutions must have affirmative authority for their actions, including the power to bring suit or appeal in federal court. Article III defines the federal "judicial Power" and does not purport to confer any authority on the executive branch or the legislature. Executive and legislative standing must instead stem from the provisions conferring power on those institutions—principally, Article II and Article I. This basic insight has important implications. I argue that the Take Care Clause of Article II both explains the breadth and also defines the limits of executive standing. The executive has standing only insofar as it has an Article II power and duty to enforce and defend federal law on behalf of the federal government. The Take Care Clause does not, however, confer standing when the executive no longer asserts that law enforcement interest—when it declines to defend a federal law. Article I, for its part, does not confer any power on Congress to enforce or defend federal laws in court. Accordingly, contrary to the assumption of many scholars, Congress lacks standing to represent the United States in place of the executive. The Supreme Court has entirely overlooked these questions of institutional power in considering issues of executive or legislative standing, including most recently in the litigation over the Defense of Marriage Act. Article III cannot confer power on the executive or the legislature that Article II or Article I denies.

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I. Introduction

Standing doctrine has often been described as a "bedrock" requirement of Article III.[1] Accordingly, jurists and scholars have repeatedly asserted (or assumed) that the standing of Congress and the executive branch, like all other actors before the court, depends only on Article III.[2] For example, in *United States v. Windsor*,[3] the Supreme Court held that the executive had "Article III standing" to appeal a lower court decision invalidating the Defense of Marriage Act (DOMA), even though the executive declined to defend DOMA and, in fact, had sought the lower court ruling striking down the law.[4] Although the dissenting opinions sharply disagreed with that conclusion, no Justice doubted that the executive standing issue was governed entirely by Article III.[5] Likewise, while the Court did not

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[1] *See* U.S. CONST. art. III, § 2, cl. 1; McConnell v. Fed. Election Comm'n, 540 U.S. 93, 225 (2003) ("One element of the 'bedrock' case-or-controversy requirement is … standing to sue.") (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)).

[2] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2686 (2013) (holding that the executive branch had Article III standing to appeal a lower court decision invalidating the Defense of Marriage Act); Newdow v. U.S. Congress, 313 F.3d 495, 497-98 (9th Cir. 2002) (holding that the Senate lacked Article III standing to defend a statute that added the words "under God" to the Pledge of Allegiance); Suzanne B. Goldberg, *Article III Double-Dipping: Proposition 8's Sponsors, BLAG, and the Government's Interest*, 161 U. PA. L. REV. ONLINE 164, 166 (2013) (contending that the House of Representatives in *Windsor* lacked "Article III standing" to defend the Defense of Marriage Act); Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1578-79 (2012) (arguing that the House in *Windsor* must "establish Article III standing"); Calvin Massey, *State Standing After* Massachusetts v. EPA, 61 FLA. L. REV. 249, 261 (2009) (arguing that when the executive enforces federal law, it satisfies Article III standing requirements); Arthur F. Greenbaum, *Government Participation in Private Litigation*, 21 ARIZ. ST. L.J. 853, 909 (1989) ("Where Congress has authorized the Executive to sue, the Executive has an interest that satisfies article III"); Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 300-01 (2005) (asserting that "the 'cases' and 'controversies' that make up the judicial power conferred by Article III include … public actions brought by public authorities").

[3] 133 S. Ct. 2675, 2688-89 (2013).

[4] United States v. Windsor, 133 S. Ct. 2675, 2686 (2013) ("[T]he United States retains a stake sufficient to support Article III jurisdiction on appeal.").

[5] Justice Scalia's dissenting opinion, on behalf of himself and Chief Justice Roberts and Justice Thomas, contended that the case lacked the requisite Article III "adverseness" because the plaintiff and the executive branch agreed that DOMA was invalid. *See id.* 2700-01 (2013) (Scalia, J., dissenting) ("Article III requires not just a plaintiff (or appellant) who has standing to complain but an opposing party"); *see also id.* at 2711-12 (Alito, J., dissenting) (asserting that the Court would "render an advisory opinion, in violation of Article III's dictates" if it heard the appeal at the executive's request).

formally rule on the House of Representative's standing to appeal in *Windsor*, the Justices assumed that the House's standing would depend only on an analysis of Article III.[6]

I argue, however, that the standing of the executive branch and the legislature cannot be determined solely by Article III. This assertion rests on a basic constitutional principle: Federal institutions must have affirmative authority for their actions. That is no less true with respect to the power to file suit or appeal in federal court. Article III defines the federal "judicial Power" and does not purport to confer any power on the executive or the legislature. Executive and legislative standing must instead stem from the provisions conferring power on those institutions—principally, Article II and Article I.

This insight has important implications. First, Article II both explains the breadth and also defines the limits of executive standing. In sharp contrast to private parties,[7] the executive may bring suit to enforce or defend federal law, absent a showing of concrete injury.[8] The executive's broad standing arises out of its duty to "take Care that the Laws be faithfully executed."[9] The Take Care Clause requires the executive to protect the federal government's interests in the enforcement and continued enforceability of its laws—in part by bringing suit and defending federal laws in court. To accommodate

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[6] The Court directed the parties to address whether the House had "Article III standing," United States v. Windsor, 133 S. Ct. 786, 787 (2012), but ultimately declined to decide the issue, since it found that the executive had standing. *See* United States v. Windsor, 133 S. Ct. 2675, 2688 (2013). But Justice Scalia and Justice Alito debated the House's Article III standing to appeal. *Compare id.* at 2711-14, 2712 n.1 (Alito, J., dissenting) (concluding that the House had "Article III standing" because the lower court decision striking down the law "impair[ed] Congress' legislative power" and thereby "injured" the House); *with id.* at 2703-04 (Scalia, J., dissenting) (asserting that the "impairment of a branch's powers alone" does not "confer[] standing"); *see also infra* Part IV(A).

[7] A private party must demonstrate a concrete injury that was caused by the defendant and that can be redressed by the requested relief. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). A private party cannot sue simply to enforce federal law. FEC v. Akins, 524 U.S. 11, 23-24 (1998) (a plaintiff may not assert an "injury to the interest in seeing that the law is obeyed"); Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992).

[8] *See* United States v. Raines, 362 U.S. 17, 27 (1960) (upholding executive standing to enforce civil rights); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies–And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 667 (2006) ("In suits by the government, courts characteristically make no inquiry into injury."); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 627 (2005) ("Federal courts regularly adjudicate government enforcement actions that would lack 'injury in fact' if brought by private plaintiffs."); *infra* Part II(B) (discussing executive standing to enforce).

[9] U.S. CONST. art. II.

the executive's Article II duties, the federal courts treat such executive actions as Article III "cases" and "controversies."

But, crucially, the Take Care Clause not only expands but also constrains executive standing. This insight connects the standing inquiry to the ongoing debate over the executive's "duty to defend" federal laws that the President views as invalid.[10] The executive has standing *only* when it asserts the federal government's interests in the enforcement and continued enforceability of federal law. Accordingly, when the executive no longer seeks to protect that law enforcement interest—when (as in *Windsor*) the executive refuses to defend a federal law—it no longer has an Article II power to invoke federal jurisdiction. In such non-defense cases, the executive seeks further review simply to obtain a higher court resolution of a constitutional question. Although the executive may have strong political and institutional reasons to seek such a judicial decision, no provision of Article II (or any other part of the Constitution) gives the executive branch standing to obtain a judicial settlement of a constitutional question. Absent such affirmative power, the executive lacks Article III standing.

Likewise, the power of the federal legislature to bring suit cannot be determined by reference to Article III alone but depends on the constitutional provisions conferring power on Congress —primarily, Article I. Building on prior work,[11] I argue that the Constitution does not give Congress the power to assert in court the federal government's interests in the enforcement or defense of federal law. Absent such affirmative power, Congress also lacks Article III standing. Article III cannot confer on the executive or the legislature a power that Article II or Article I denies.

These constitutional restrictions on executive and legislative standing have strong normative underpinnings. As political scientists have demonstrated, both the executive branch and Congress have

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[10] *Compare, e.g.*, Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1235 (2012) (arguing that "the executive branch should enforce and defend statutes … even when it views them as wrongheaded [and] discriminatory"), *with* Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 509 (2012) (arguing that the President should neither enforce nor defend laws that he views as unconstitutional); Dalena Marcott, *The Duty to Defend: What is in the Best Interests of the World's Most Powerful Client?* 92 Geo. L.J. 1309 (2004) (urging that "the duty to defend should not extend to statutes the Executive considers unconstitutional").

[11] *See* Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. __ (2014) (draft on file with author).

considerable incentives to refer controversial constitutional questions to the judiciary.[12] Constraining the standing of the political branches helps protect the courts from becoming substitute fora for matters that could be, but were not, resolved through the political process. At the same time, these standing restrictions help protect individual liberty. Neither the executive nor the legislature should be permitted to subject an individual (like Edith Windsor) to suit or to further rounds of appeals simply because it may be politically convenient to obtain a judicial resolution of a legal question.

These non-Article III principles have significant implications for legal scholarship and case law on Article III standing. First, this analysis undermines the assumption of jurists, scholars, and the executive branch itself that the executive has complete discretion to enforce a law and then refuse to defend it—thereby teeing up the issue for Supreme Court review.[13] I demonstrate that the executive lacks standing to seek Supreme Court (or other appellate) review, when it declines to defend a law. This analysis also shows, contrary to the assumption of many scholars,[14] that Congress lacks standing to represent the United States in place of the executive, even in defense of federal law.

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[12] *See infra* Parts III(C), IV(B).

[13] *See* Presidential Authority To Decline To Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 201 (1994) ("[T]he President may base his decision to comply (or decline to comply) [with a statute] in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch."); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 47, 51 (2000) (arguing that the President should enforce a law, if that is the only way to "create[] the opportunity for" Supreme Court review); Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1078 n.14 (2001) ("[T]he practice of 'enforce but decline to defend' … allows the Executive Branch to make its views known to the Court, and ordinarily places before the Court the opportunity to resolve the constitutional dispute between the other two branches."); *infra* Part V(A).

[14] *See, e.g.*, Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 916-17, 952 (2012) ("propos[ing] that Congress take a more active role in federal litigation," including in defense of laws); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 874 & n.260 (2001) (Congress "has the right to defend [a] statute" when the executive fails to do so). Notably, not all of these scholars discuss congressional standing and may only mean that Congress may appear as amicus curiae. But some scholars have argued that Congress has standing to defend federal laws as the representative of the federal government. *See, e.g.*, Brianne Gorod, *Defending Executive Non-Defense & the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1248 (2012) (arguing that congressional defense does not "raise[] the thorny problem of legislator standing" because "when Congress defends a statute in the Executive's stead, it is not acting for itself but instead for the United States"); Part IV(A).

At the outset, however, I offer two qualifications. First, I focus on executive and legislative *standing*—that is, whether those institutions have the constitutional authority to take a case to an Article III court. Thus, for example, I argue that the executive lacks standing to appeal unless it defends a federal law. But I do not claim that the executive has a duty to defend federal laws when another party invokes federal jurisdiction (at trial or on appeal), nor do I attempt to determine whether the executive has a duty to enforce some (or all) federal laws. Those are important Article II questions, but they are not questions of standing.

Second, I do not mean to suggest that executive and legislative standing has nothing to do with Article III. After all, Article III defines the scope of the federal judicial Power and, just as the legislature and executive are bound by Articles I and II, the federal judiciary may act only within the constraints of Article III. My contention is that the scope of the judicial Power—specifically, the courts' power to hear "cases" or "controversies" involving the enforcement and defense of federal law—is necessarily informed (indeed, substantially clarified) by the broader structural Constitution.

The argument proceeds as follows. Parts II and III explain how Article II both defines and constrains executive standing. The executive's power to bring suit or appeal is tied to its Article II duty to enforce and defend federal law on behalf of the federal government—a reality that calls into question the executive's standing in contexts when it declines to defend a law. Part IV argues that the structural Constitution prohibits Congress from delegating to itself the power to represent the United States in court. Finally, Part V asserts that there would likely be few, if any, negative ramifications if the judiciary enforced these limitations on executive and legislative standing. The executive would face considerable political pressure to defend federal laws on behalf of the United States, so the government would rarely (if ever) be left without a representative in court. At the same time, judicial enforcement of these restrictions would limit the power of Congress or the executive to refer to the judiciary constitutional questions "that they cannot or would rather not address" themselves.[15]

[15] Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993) (arguing that "elected officials consciously invite the judiciary to resolve" controversial issues); *see infra* Part III(C), IV(B).

II. Executive Standing under Article II

Although the Supreme Court mentioned Article II in two important standing decisions,[16] the Court has subsequently insisted that standing doctrine is a bedrock requirement only of Article III. Writing for the Court in *Steel Company v. Citizens for a Better Environment*,[17] Justice Scalia denied that standing doctrine is based on a concern about the "Executive's power to 'take Care that the Laws be faithfully executed.'"[18] Justice Scalia declared: "The courts must stay within their constitutionally prescribed sphere of action, whether or not exceeding that sphere will harm one of the other two branches.… [S]tanding jurisprudence,… though it may sometimes have an impact on Presidential powers, derives from Article III and not Article II."[19]

Windsor further underscores the Court's focus on Article III. At the oral argument in *Windsor*, several Justices raised questions about the executive's Article II power to enforce a law that the President views as unconstitutional (like the Defense of Marriage Act), and then refuse to defend it in court.[20] For example, Chief Justice Roberts suggested that the President should have the "courage of his convictions" and simply refuse to execute the law, "rather than saying, oh, we'll wait 'til the Supreme Court tells us we have no choice."[21]

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[16] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3."); Allen v. Wright, 468 U.S. 737, 756-57, 761 (1984) (separation of powers and equitable principles "counsel[] against recognizing standing" in a suit requesting broad injunctive relief against a federal agency, because "[t]he Constitution … assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed'").

[17] 523 U.S. 83 (1998).

[18] *Id.* at 102 n.4, 109-10. In *Steel Company*, the Court held that an environmental group lacked standing to seek penalties for past violations of a federal statute, because the money would be paid to the U.S. Treasury, not to the plaintiff, and thus would not redress any injury to the plaintiff. *See id.* at 106-07.

[19] *Id.* at 102 n.4.

[20] The Attorney General announced this enforce-but-not-defend approach in a letter to Congress. *See* Letter from Attorney General Eric H. Holder to John A. Boehner, Speaker, House of Representatives, Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html [hereinafter Holder, Letter] (stating that the executive adopted this approach after the President concluded that DOMA violated equal protection principles); *infra* Part III(B).

[21] Transcript of Oral Argument at 12, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12–307) (statement of Chief Justice Roberts).

Likewise, Justice Kennedy found it "very troubling" that the President was enforcing a law that he viewed as unconstitutional but refusing to defend it in court.[22] These Article II concerns were, however, absent from the *Windsor* opinions. In the opinion for the Court, Justice Kennedy found that the executive branch had Article III standing to appeal, despite its decision not to defend DOMA.[23] Likewise, Justice Scalia's dissenting opinion made no mention of Article II.[24] Apparently, in the Supreme Court's view, even the executive branch's own standing "derives from Article III and not Article II."[25]

The Justices' view of executive standing accords with the consensus among scholars. Scholars have not examined executive standing in depth. But to the extent that commentators have considered the issue, they have assumed—virtually without exception—that executive standing is, like the standing of all other plaintiffs, governed by Article III.[26] I argue, however, that executive standing depends in large part on the powers and duties in Article II.

A. The Article II Foundations of Executive Standing

My argument rests on a basic principle of federal constitutional law: Federal institutions—in sharp contrast to private parties, states, or localities—must have affirmative authority for their actions, including the power to bring suit in federal court.[27] Article III defines the federal "judicial Power" and does not purport to confer any authority

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[22] *Id.* at 21-22 (statement of Justice Kennedy) (comparing the practice of enforcing-but-not-defending a law to the "questionable" practice of a President signing a law but issuing a signing statement declaring that the law is unconstitutional).

[23] United States v. Windsor, 133 S. Ct. 2675, 2686 (2013).

[24] *See supra* note 5 (noting that Justice Scalia focused on the lack of Article III "adverseness"); Part III(B)(i).

[25] Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102 n.4 (1998).

[26] *See supra* note 2 (listing sources). There are two exceptions. In prior work, Professor Edward Hartnett and I (separately) asserted that executive standing to bring criminal or civil enforcement actions depends on Article II. *See* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PENN. J. CONST. L. 781, 794 (2009); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking For Answers In All The Wrong Places*, 97 MICH. L. REV. 2239, 2256 (1999). But both Professor Hartnett's essay and my own prior work focused on the restrictions on private party standing to enforce federal law. This Article focuses on the scope and limits of executive standing.

[27] *See* U.S. CONST. amend X; New York v. United States, 505 U.S. 144, 155 (1992) (stating that "no one disputes the proposition that '[t]he Constitution created a Federal Government of limited powers,'" and noting that the Tenth Amendment makes this principle "explicit") (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

on the executive.[28] Affirmative authority for executive standing must be found in Article II.

An Article II foundation for executive standing seems particularly likely, given that the executive's well-recognized standing to enforce and defend federal law cannot be explained by any "bedrock" principles of Article III. The executive may assert the federal government's sovereign interests in the enforcement and continued enforceability of its laws, without satisfying the injury, causation, or redressability requirements that the judiciary applies to all other actors.[29]

No provision of Article II expressly authorizes the executive branch to bring suit in federal court. Much of Article II is concerned with administrative, foreign policy, or military matters, such as the Appointment and Treaty Clauses.[30] The most likely source for executive standing is the Take Care Clause, which imposes on the President a duty to "take Care that the Laws be faithfully executed."[31] As described further below, in order to fulfill this faithful execution duty, the executive must enforce and defend federal law in court. To accommodate the executive's Article II responsibilities, the federal judiciary treats executive enforcement and defense actions as "cases" and "controversies" under Article III.[32]

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[28] *See* U.S. CONST. art. III, § 1.

[29] *See* Jonathan R. Siegel, *Congress's Power to Authorize Suits Against the States*, 68 GEO. WASH. L. REV. 44, 67-68 (1999) ("The courts do not require the government, as they would a private party, to demonstrate that it has suffered an injury in fact."); *supra* notes 7-8 and accompanying text; *infra* Part II(B),(C). The Court has applied the injury-in-fact, causation, and redressability test to state government plaintiffs that seek to enforce federal law. Massachusetts v. EPA, 549 U.S. 497, 520, 521-26 (2007). States, however, have broad standing to assert their sovereign interest in the enforcement and continued enforceability of *state* law. *See infra* notes 67-69 and accompanying text.

[30] *See* U.S. CONST. art. II, § 2 (conferring on the President the power to appoint executive and judicial officers, make treaties, issue pardons, seek opinions in writing from department heads, and to serve as the "commander in chief" of the armed forces); U.S. CONST. art. II, § 3 (authorizing the President to "receive ambassadors and other public ministers"). Article II also gives the President a role in advising Congress on the "state of the union" and suggesting legislation. U.S. CONST. art. II, § 3.

[31] U.S. CONST. art. II. One could potentially infer the power to bring suit from the provision vesting the "executive power" in the President. *See* U.S. CONST. art. II, § 1. But even assuming that the Vesting Clause could be so construed, any such "executive power" would be qualified by the President's duty to faithfully execute the laws. Accordingly, I refer to the Take Care Clause as the source of executive standing.

[32] *Cf.* Clinton v. Jones, 520 U.S. 681, 701 (1997) ("'[T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.'") (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996)).

B. Standing to Enforce Federal Law

In order to punish and deter violations of federal law, the executive must have the power to bring suit against alleged violators.[33] The executive generally cannot, consistent with the requirements of due process, simply impose criminal or civil penalties; there must be judicial review (at least after the fact).[34] The executive must therefore rely on the courts "for the enforcement of coercive sanctions."[35] In short, to carry out its duty to faithfully execute the laws, the executive needs to have standing to bring criminal and civil enforcement actions.

It is therefore unsurprising that the Supreme Court has consistently recognized the executive branch's standing to enforce federal law. Indeed, the Court has never denied executive standing when it had statutory authorization.[36] For example, in *United States v. Raines*,[37] the executive brought suit under the Civil Rights Act of 1957, alleging that certain local election officials discriminated on the basis of race in registering voters.[38] Although the local officials argued that Congress lacked the power "to authorize the United States to bring this action in support of private constitutional rights,"[39] the Supreme Court upheld executive standing, stating that it was

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[33] *See* United States v. Valenzuela-Bernal, 458 U.S. 858, 863 (1982) (observing that a criminal prosecution is "one example of the Executive's effort to discharge [its] responsibility" to faithfully execute the laws); Buckley v. Valeo, 424 U.S. 1, 138 (1976) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"); Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2303-04 (2006) ("[T]he Take Care Clause contemplates a presidential responsibility to carry out the legislative mandate.").

[34] *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.'") (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

[35] Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965).

[36] *See* Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Drydock Co., 514 U.S. 122, 129-30, 133-34 (1995) (holding that an agency official lacked standing, absent statutory authorization, but stating that "Congress *could* have conferred standing … without infringing Article III of the Constitution"); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 473 (1995) (courts have long assumed that the executive may bring suit if it has statutory authority).

[37] 362 U.S. 17 (1960).

[38] *Id.* at 19-20; 42 U.S.C. § 1971(a), (c).

[39] *Raines*, 362 U.S. at 27.

"perfectly competent for Congress to authorize the United States to be the guardian of that public interest."[40]

The Supreme Court has also occasionally upheld executive standing to enforce federal law when it lacked explicit statutory authorization. For example, in *In re Debs*,[41] the Court concluded that the executive had standing to enjoin the Pullman railroad strike, which allegedly violated various federal statutes.[42] The Court declared that the federal government's "obligation[] … to promote the interest of all and to prevent the wrongdoing of one … is often of itself sufficient to give it a standing in court."[43]

Since *Debs*, jurists and scholars have at times debated the scope of the executive's power to enforce federal law, absent statutory authority.[44] I do not seek to enter that debate; as a practical matter the executive has broad statutory standing to bring enforcement actions.[45] My focus is instead on a subject that scholars have not carefully examined—the nature and scope of the executive's constitutional standing to enforce federal law.

First, I want to underscore an important limit on executive standing. The executive has broad standing only to assert the *federal government*'s sovereign interest in the enforcement of its laws. Accordingly, in *Debs* and *Raines* (and similar cases), the Court discussed the standing of the "government" or the "United States," not

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[40] *Id.* at 27; *see* United States v. Mississippi, 380 U.S. 128, 136-37 (1965) (upholding executive standing to protect voting rights given the "express congressional authorization" for the suit).

[41] In re Debs, 158 U.S. 564 (1895), *overruled on other grounds by* Bloom v. State of Ill., 391 U.S. 194, 195-96, 209-11 (1968).

[42] *Id.* at 570, 599-600 (upholding executive standing to prevent interference with the transport of U.S. mail). For an account of the events leading up to *Debs*, see OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 53-74 (1993).

[43] *Id.* at 584.

[44] *Compare* Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in* Parens Patrie, 92 NW. U. L. REV. 111 (1997) (arguing that the executive branch has implied power to enforce the Fourteenth Amendment), *with* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 11 (1993) (contending that the executive has only a limited power to "protect and defend the personnel, property, and instrumentalities of the United States from harm"); *see also* United States v. City of Philadelphia, 644 F.2d 187, 201 (3d Cir. 1980) (holding that "the United States may not sue [a local police department] to enjoin violations of individuals' fourteenth amendment rights without specific statutory authority").

[45] Indeed, Congress has at times stepped in to augment the executive's statutory authority, when courts held that it lacked standing. *See* Pub. L. No. 96-247, § 3, 94 Stat. 349, 350 (1980) (conferring standing to protect the constitutional rights of prisoners); *see also* City of Philadelphia, 644 F.2d at 201-02 & n.22 (discussing this legislation).

the executive.[46] The Supreme Court has never held that the executive has standing to assert an institutional interest in the enforcement of federal law or (relatedly) in protecting any other duties or powers conferred by Article II.[47] This limitation follows from the language of the Take Care Clause, which requires the executive to faithfully execute the laws, not to protect the interests or concerns of the executive. The interests of the executive may not be coextensive with those of the United States.

The Supreme Court recognized this limitation on executive standing (albeit only in dicta) in *Raines v. Byrd*,[48] when it held that six legislators lacked standing to challenge the Line Item Veto Act based on an alleged "institutional injury."[49] The Court emphasized that in past "confrontations between one or both Houses of Congress and the Executive Branch," involving the President's removal power, the pocket veto, and the legislative veto, "no suit was brought on the basis of claimed injury to official authority or power."[50] Instead, the issues were brought to the judiciary by "plaintiff[s] with traditional Article III standing."[51] This "historical practice" cuts against any claim of "institutional injury" by either the executive branch or the legislature.[52] The executive has standing to assert the interests of the federal government, not the executive.

This limitation underscores the way in which executive standing depends on the intersection of Article II and Article III. The executive has standing to perform Article II duties that it cannot perform except through the Article III courts. The executive generally cannot, consistent with due process principles, enforce federal law

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[46] United States v. Raines, 362 U.S. 17, 27 (1960) (holding that Congress may "authorize the United States" to enforce civil rights laws); In re Debs, 158 U.S. 564, 583-84 (1895) (stating that "the government has such an interest … as enables it to appear as party plaintiff"); *see* Sanitary Dist. of Chicago v. United States, 266 U.S. 405, 423, 425-26 (1925) ("[t]he United States … has a standing in this suit not only to remove obstruction to interstate and foreign commerce, … but also to carry out treaty obligations").

[47] In fact, the Court has suggested precisely the opposite: the executive lacks standing to protect its institutional interests. *See* Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Drydock Co., 514 U.S. 122, 129-30 (1995) (doubting that the "mere existence and impairment of [an executive official's] governmental interest" could alone "ever suffice" for standing purposes).

[48] 521 U.S. 811 (1997).

[49] *See id.* at 814, 817, 821, 829-830. The legislators alleged that the President's power to veto specific parts of legislation would "dilute[] their Article I voting power." *Id.* at 817.

[50] *Id.* at 826, 826-28.

[51] *Id.* at 827.

[52] *Id.* at 826, 826-28 (stating that "historical practice" cut against a finding of standing).

against individuals except through the courts. Nor, as discussed below, can the executive protect the continued enforceability of federal law absent standing to defend those laws in court. By contrast, the executive can protect its institutional interests against congressional interference without resort to the courts; the President can, for example, veto or (if enacted) refuse to enforce measures that interfere with presidential prerogatives. The executive must go through the judiciary only to protect the federal government's interest in the enforcement of its laws against third parties. For that reason, the federal courts treat such executive enforcement and defense actions as Article III "cases" or "controversies."

Second, and conversely, I also want to underscore the breadth of executive standing—even when the executive serves only as the representative of the federal government. The executive has the constitutional authority to enforce *any* federal law. Accordingly, the executive branch may bring suit against any person for any legal violation. That is a tremendous discretionary power—one that creates the potential for discriminatory or simply arbitrary enforcement.[53] As then-Attorney General (and later Supreme Court Justice) Robert Jackson stated:

> If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people he thinks he should get, rather than pick cases that need to be prosecuted.…. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or personally obnoxious to or in the way of the prosecutor himself.[54]

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[53] *See* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1686-97 (2004) (arguing that courts should review enforcement decisions to "prevent[] arbitrary agency decisionmaking"); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 20 (1998) (asserting that "[t]he deficiency of prosecutorial discretion lies not in its existence, but in the randomness and arbitrariness of its application"); Kenneth Culp Davis, *Administrative Powers of Supervising, Advising, Declaring and Informally Adjudicating*, 63 HARV. L. REV. 193, 218-25 (1949) (expressing concerns about "administrative arbitrariness").

[54] Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 5 (1940).

I emphasize the concerns raised by scholars in the enforcement context for two (related) reasons. First, as discussed below, the executive exercises similarly broad (and largely overlooked) discretion in the defense context—to intervene in and appeal any case involving a constitutional challenge to a federal law. Second, many scholars advocate a "congressional counsel" that would have the same broad discretion to intervene in any suit to (at least) defend federal law. Although there may be reasons to limit executive discretion to invoke the federal judicial Power, I argue (in Part IV) that there is little basis for transferring such discretionary power to Congress.

That seems particularly true, given that the primary check on executive discretion is Congress.[55] Congress can, for example, check the executive through oversight hearings,[56] statutes that set enforcement priorities,[57] or the appropriations power.[58] Furthermore, in egregious cases, Congress can impeach and remove executive officials, including the Attorney General or the President, for a failure to faithfully execute the law.[59] It is not clear who would oversee a "congressional counsel" that had the power to represent the United States in court.

C. Standing To Defend Federal Law

The defense of federal statutes is, like enforcement, a central part of the faithful execution of the law. To enforce any law in federal court, the executive must be prepared to defend that law against constitutional challenge. For example, in *United States v. Raines*, the local officials not only contested executive standing but also alleged that the Civil Rights Act of 1957 was an invalid exercise of Congress's

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[55] Executive enforcement decisions are also subject to some internal executive controls, *see* Michael A. Simons, *Prosecutorial Discretion and Prosecutorial Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 960 n.303 (2000) (noting that the Executive Office of U.S. Attorneys conducts reviews to ensure that field offices "comply[] with Department policies and procedures"), and a very limited form of judicial review, *see* Wayte v. United States, 470 U.S. 598, 608 (1985) (the executive may not punish an individual for "exercis[ing] … protected statutory and constitutional rights").

[56] *See* Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 791 (1999) (noting that legislators can use oversight hearings to check executive enforcement practices).

[57] *See* Heckler v. Chaney, 470 U.S. 821, 833 (1985) (noting that "Congress may limit an agency's exercise of enforcement power" by statute).

[58] *See* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 418 (1982) (noting this use of the appropriation power).

[59] *See* U.S. CONST. art. I, § 2, cl. 5, art. I, § 3, cl. 6.

enforcement power under the Fifteenth Amendment.[60] To continue the enforcement action, the executive had to defeat that constitutional challenge.[61]

Other cases commence as suits for a declaratory judgment in order to avert the future enforcement of federal law.[62] When a private party initiates the lawsuit, the executive need not, of course, demonstrate standing in the trial court. But the executive must have standing to appeal.[63] For example, in *Gonzales v. Raich*,[64] two women brought suit against the Attorney General to "prohibit[] the enforcement of the federal Controlled Substances Act" in cases involving the possession of home-grown marijuana.[65] When the Ninth Circuit struck down the statute as applied in such cases, the executive had standing to seek further review to ensure the continued enforceability of that federal law.[66]

Although the Supreme Court has not addressed executive standing in a case where it defended the constitutionality of a law (non-defense cases are discussed below), the Court has recognized these principles in the context of state law.[67] In *Maine v. Taylor*,[68] the Court held that a State had standing to appeal a lower court decision invalidating a state law (even though the State had not initiated the

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[60] *See* 362 U.S. 17, 20 (1960).

[61] The lower court held that the Civil Rights Act of 1957 exceeded Congress's enforcement power under the Fifteenth Amendment. On appeal by the executive, the Supreme Court reversed. *See id.* at 24-26.

[62] Under the Court's current standing jurisprudence, the enforcement must be "imminent." *See* Clapper v. Amnesty Intern., 133 S. Ct. 1138, 1142, 1147-1148 (2013).

[63] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (the "party invoking federal jurisdiction bears the burden of establishing" the elements of standing).

[64] Gonzales v. Raich, 545 U.S. 1 (2005).

[65] *Id.* at 7-8.

[66] *Id.* at 7-9 (observing that the executive sought review of the Ninth Circuit's decision). The Court rejected the commerce clause challenge. *Id.* at 25-26, 31-33.

[67] *See* Diamond v. Charles, 476 U.S. 54, 62 (1986) ("[A] State has standing to defend the constitutionality of its statute."). There may, of course, be differences between federal and state standing. For example, state legislatures may have broader standing than the federal legislature. Although I argue that Congress may not represent the federal government in court, *see infra* Part IV, state legislatures may assert their states' sovereign interests. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997) ("[S]tate legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests."). But that is simply a question of *which institutions* may assert the government's interest in the continued enforceability of its laws. The state and federal governments are quite analogous insofar as they assert a sovereign interest in defending their laws.

[68] 477 U.S. 131 (1986).

lower court action), on the ground that "a State clearly has a legitimate interest in the continued enforceability of its own statutes."[69] Likewise, the executive branch has standing to assert the federal government's interest in the "continued enforceability" of its laws.

By statute, the executive even has standing to defend federal laws that it does not enforce. Under 28 U.S.C. § 2403, the executive may intervene in any federal court action in which a litigant challenges the constitutionality of a federal statute. Upon intervening, the executive may exercise "all the rights of a party," including the right to present evidence and to appeal, "to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."[70] The executive has relied on § 2403 to defend and appeal lower court decisions invalidating, for example, the civil enforcement provisions of the Violence Against Women Act as well as countless provisions that purport to abrogate state sovereign immunity in private suits.[71]

Some commentators have suggested that if the executive has standing to defend laws that it does not execute, then there must be no necessary connection between constitutional defense and law execution. Accordingly, other actors, including Congress, may intervene in defense of federal laws—despite the fact that Congress has no role in law enforcement.[72] But that argument overlooks both

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[69] *Id.* at 137. In *Maine v. Taylor*, the federal government criminally prosecuted a defendant for violating a federal statute that prohibited, among other things, the importation of fish or wildlife "'in violation of any law or regulation of any State.'" *Id.* at 132-33. When a lower federal court held the relevant state law invalid (and, thus, an improper basis for the prosecution), the federal government did not seek further review. *Id.* at 133. Only Maine took the case to the Supreme Court. *See id.* at 136-37.

[70] 28 U.S.C. § 2403(a). The law requires courts to notify the Attorney General about any constitutional challenge and to give the "United States" an opportunity to intervene. *Id.*

[71] *See, e.g.*, United States v. Georgia, 546 U.S. 151, 155-56 (2006) (noting that the federal government intervened and appealed "to defend the constitutionality of [the] abrogation of state sovereign immunity" in Title II of the Americans with Disabilities Act); United States v. Morrison, 529 U.S. 598, 601-02, 604 (2000) (observing that the government intervened and appealed "to defend [the] constitutionality" of the statutory provision creating "a federal civil remedy for the victims of gender-motivated violence").

[72] *See infra* notes 198-202 and accompanying text (responding to scholarly arguments that "enforcement" is separate from "defense"). For example, during the *Windsor* litigation, the House of Representatives pointed to executive standing under § 2403 as support for its own standing to defend federal laws, despite the fact that it has no role in law enforcement. *See* Brief on Jurisdiction for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, at 15, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12–307) (emphasizing that the executive may intervene even when it has "no enforcement role").

the Article II basis and the nature of executive standing. The executive has standing to protect the federal government's interest in the continued *enforceability* of its laws. By directing the President to "take Care that the Laws *be* faithfully executed,"[73] Article II seems to authorize executive standing to protect that government interest, even if the executive itself will not be doing the enforcing.[74] By contrast, as discussed in Part IV, Congress has no similar constitutional license to assert the government's interests in court.

Notably, this intervention power significantly expands the executive's discretion to invoke federal jurisdiction in defense cases. As a matter of practice (if not constitutional compulsion), in suits against the government, if the executive decides to defend a federal statute, it appeals *every* lower court order striking down that law.[75] By contrast, the executive is far more selective about the cases in which it intervenes and appeals under § 2403.[76] This broad discretionary power raises many of the concerns that Justice Jackson pointed to in the context of enforcement actions. The executive could intervene in and appeal cases for discriminatory, arbitrary, or purely political reasons, subjecting only some litigants to further judicial process. Indeed, given the executive branch's success rate in the courts of appeals and the Supreme Court, influential litigants have a strong incentive to lobby for federal intervention.[77]

Such a discretionary power may be justifiable for the reasons that Justice Jackson offered in support of executive enforcement discretion. Justice Jackson suggested that we allow executive officials to exercise broad discretion, not because we are confident that they will always act appropriately, but because the federal government

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[73] U.S. CONST. art. II (emphasis added).

[74] Such a construction of the Take Care Clause seems at least sufficiently permissible that Congress could conclude that executive intervention is a "necessary" and "proper" means of protecting the government's interests. *See* U.S. Const. art. I, § 8, cl. 18.

[75] *See* The Attorney General's Duty to Defend the Constitutionality of Statutes, 5 U.S. Op. Off. Legal Counsel 25, 25-26 (1981) (asserting that the executive has a "duty to defend" every statute, unless it infringes on executive power or is clearly invalid).

[76] *See* Drew S. Days, III, *No Striped Pants and Morning Coat: The Solicitor General in the State and Lower Federal Courts*, 11 GA. ST. U. L. REV. 645, 654-55 (1995) (discussing how the Solicitor General's office exercises its discretion to intervene).

[77] For a discussion of the government's litigation advantage, see Herbert M. Kritzer, *The Government Gorilla: Why Does Government Come out Ahead in Appellate Courts?*, in IN LITIGATION, DO THE "HAVES" STILL COME OUT AHEAD? 342, 342-70 (Herbert M. Kritzer & Susan Silbey eds., 2003).

needs a representative in court to prosecute violations of federal law.[78] Likewise, when the intervention statute was enacted in 1937, Congress concluded that the government needed a representative in court to defend federal laws—at that time, New Deal legislation that was repeatedly challenged in private litigation.[79]

My goal, however, is not to defend the current scope of executive standing. Congress should perhaps, by statute, curtail executive discretion to invoke federal jurisdiction in both the enforcement and the defense contexts. I offer this survey to show the constitutional scope of executive standing. The executive has standing to perform Article II duties that it cannot perform except through the Article III courts. The Take Care Clause generally imposes on the executive a duty to enforce and to protect the enforcement of federal laws on behalf of the federal government. The executive cannot protect that interest—that is, it cannot ensure that federal laws are enforced against third parties—without resort to the judiciary. By contrast, as described below, the Take Care Clause does not authorize executive standing in non-defense cases, when it no longer asserts that law enforcement interest, and no provision of the Constitution grants Congress the power to represent the United States in court.

III. Article II and Executive Non-Defense

The executive's refusal to defend the law in *Windsor* and other prominent cases has drawn considerable attention to executive standing in non-defense cases.[80] But the discussion thus far has occurred in a vacuum—without much consideration of why the

[78] Jackson, *supra* note 54, at 3 (asserting that "it seems necessary that such a power to prosecute be lodged somewhere").

[79] At the time, there were reports of "collusive suits" (often between shareholders and corporations) brought solely to attack New Deal legislation. *See Legislation: The Judiciary Act of 1937*, 51 HARV. L. REV. 148, 148-49 (1937); *Legislation: Revision of Procedure in Constitutional Litigation: The Act of 1937*, 38 COLUM. L. REV. 153, 153-54 (1938) (noting the concern about collusive suits and Congress's view that private parties often lacked "the financial means to handle constitutional litigation adequately"). Soon after the passage of the law, the government sought to intervene in and appeal a lower court ruling in a "collusive suit." *See United States v. Johnson*, 319 U.S. 302, 302-05 (1943) (holding that a landlord and tenant conspired to challenge federal rent controls).

[80] *See infra* Part III(B)(ii) (discussing executive appeals in prominent non-defense cases). The executive has likewise refused to defend—and, in fact, has sought the invalidation of—a number of other federal statutes in recent decades. *See* Devins & Prakash, *supra* note 10, at 561 (reporting that, from December 1975 until May 2011, the executive declined to defend at least seventy-five federal laws).

executive *typically* has standing in federal court. In part for that reason, as *Windsor* illustrates, scholars and jurists have treated executive standing as an issue that can be answered solely be reference to Article III. But as this Article demonstrates, executive standing depends in large part on the powers and duties conferred by Article II.

Drawing on this analysis, I argue that the Take Care Clause defines both the scope and the limits of executive standing. The executive has standing to appeal a decision invalidating a federal law only if it has an Article II power and duty to enforce (or protect the enforcement of) that law. In that event, the executive has standing ―as it typically does―to assert the federal government's interest in the continued enforceability of the law against third parties. The executive lacks standing, however, when it no longer asserts that law enforcement interest―that is, when it asks a court to strike down a federal law. In the latter scenario, the executive seeks only a higher court resolution of a difficult constitutional question. Although the executive may have strong political and institutional reasons to seek such a judicial decision, no provision of Article II (or any other part of the Constitution) gives the executive branch standing to obtain a judicial settlement of a constitutional question. In fact, there are strong normative reasons to deny executive standing in this context.

A. Article II Power as a Preliminary Question

To have standing to appeal, the executive must have the Article II power to assert the federal government's interest in the continued enforceability of the federal law at issue―even if the President deems the law unconstitutional. Under certain theories of Article II, the executive lacks such power in at least some cases. For example, Professor Raoul Berger argued that the President has a duty *not* to enforce a law that infringes on executive power.[81] Other scholars, including Professors Gary Lawson, Neal Devins, and Sai Prakash, assert that the executive has a duty not to enforce *any* law that the President considers invalid,[82] arguing that the executive must instead "defend and execute [its view of] the Constitution."[83]

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[81] *See, e.g.*, RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 306-09 (1974) (arguing that the President has "a right and a duty to protect his own constitutional functions from congressional impairment").

[82] *See* Devins & Prakash, *supra* note 10, at 509 (arguing that the President should not enforce or defend laws that he deems invalid); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1303

The Supreme Court has failed to grapple with this preliminary question of institutional power. *Windsor* offers an illustration. Although Justice Kennedy suggested at the *Windsor* argument that the executive branch lacked the Article II power to enforce the Defense of Marriage Act once the President concluded that it was unconstitutional,[84] his opinion for the Court made no mention of Article II. Instead, the Court held that the executive had Article III standing to appeal the lower court decision striking down DOMA. But if the executive lacks the Article II power to enforce a law, then it clearly lacks Article III standing to appeal. Under that view, the executive branch may not, consistent with Article II, take any action that prolongs the enforcement of the law—and thus plainly cannot assert in court the federal government's interest in the continued enforceability of the law. Article III cannot confer on the executive a power that Article II denies.[85]

B. Standing (Only) To Defend Federal Law

Other theories of Article II would enable the executive to assert the federal government's interest in the continued enforceability of a federal statute, even when the President has doubts about the constitutionality of the law—or even firmly believes that the law is invalid. In fact, some scholars, including Professors Edward Corwin and Eugene Gressman, have asserted that the executive branch must enforce virtually all, if not every, federal statute.[86] Under this view,

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(1996) (asserting that if "the President determines that a statute is unconstitutional," he must refuse to enforce that law); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 221-22 (1994) (arguing that the President "may decline to execute acts of Congress on constitutional grounds").

[83] Saikrishna Bangalore Prakash, *The Executive's Duty To Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1627 (2008); *see also* John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 369-70 (1998) (**"**The President cannot faithfully execute both the Constitution and [what he views as an invalid] statute.").

[84] *See* Transcript of Oral Argument at 21, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12–307) (statement of Justice Kennedy) (asking "why does [the President] enforce" DOMA, given his determination that the law is unconstitutional).

[85] None of this is to suggest that the federal government lacks an interest in the continued enforceability of the law—only that the executive lacks the affirmative power to assert that interest. If Congress disagrees with an executive non-enforcement decision, it has various ways (appropriations, oversight hearings, and political pressure) to contest the executive's failure to enforce or to appeal. *See supra* notes 56-59 and accompanying text.

[86] *See* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, at 71-72 (5th rev. ed. 1984) (arguing that the President's "obligation to 'take care that the laws be

"once a statute has been duly enacted, whether over [the President's] protest or with his approval, he must promote its enforcement by all the powers constitutionally at his disposal unless and until enforcement is prevented by regular judicial process."[87] Other scholars reject this categorical approach but agree that the President must enforce at least some laws that he views as invalid.[88]

In standing terms, if the executive has an Article II duty to enforce a given federal statute, then it has not only the power but the *duty* to protect the federal government's sovereign interest in the continued enforceability of that federal law. This Article II duty imposes two important requirements on the executive. The executive must not only appeal a decision striking down the law but also defend that law in federal court.

1. Executive Standing and the "Duty to Defend"

Scholars have often overlooked the fact that the executive's enforcement obligation carries with it a duty to defend.[89] But this point follows from the fact that the executive has standing to file suit

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faithfully executed'" requires him to enforce every "duly enacted" law); CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE 143-49, 153 (1998) (urging that the executive must enforce virtually every law); BERGER, *supra* note 81, at 306-09 (arguing that the Take Care Clause requires the executive to enforce every law, unless it infringes on executive power); Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381, 382 (1986) ("[O]nce a bill has passed through all the constitutional forms of enactment …, the President has no option under article II but to enforce the measure faithfully"); Arthur S. Miller, *The President and the Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 398 (1987) ("[o]nce Congress enacts a statute" the executive is "duty bound to enforce it").

[87] CORWIN, *supra* note 86, at 72.

[88] *See, e.g.*, David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 63, 89-90 (arguing for a limited non-enforcement power but also asserting that the executive should enforce some laws despite the President's constitutional concerns); Aziz Huq, *Enforcing (But Not Defending) "Unconstitutional" Laws*, 98 VA. L. REV. 1001, 1007 (2012) (arguing that the executive should, at least presumptively, decline to enforce laws that interfere with executive power but enforce laws that infringe on individual rights); Johnsen, *supra* note 13, at 12-14 (presidents may decline to enforce some laws but should not "disregard laws routinely based solely on their own constitutional views").

[89] *See, e.g.*, Gressman, *supra* note 86, at 383 n. 17 (asserting that although the executive must enforce every federal law, "the Executive can refuse to defend" a statute in court); *infra* Part V (discussing scholarship that likewise treats enforcement as separate from defense). In fact, I have found only one article advocating, on constitutional grounds, a strong "duty to defend." *See* Arthur S. Miller & Jefferey H. Bowman, *Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem*, 40 OHIO ST. L.J. 51, 72 (1979) ("Execution means enforcement and defense.").

and appeal—not on its own behalf but as the representative of the United States. The government's interest is the continued enforceability of its law against third parties; the executive need not go through the judiciary to protect any other interest. Accordingly, as the representative of the government, the only relief that the executive may seek from the judiciary is a decision upholding the federal law.

Notably, contrary to the suggestion of some commentators, this "duty to defend" does not come from Article III.[90] For example, in *Windsor*, Justice Scalia argued that the executive lacked Article III standing to appeal, because its agreement with the plaintiff's constitutional challenge deprived the case of the requisite Article III "adversity."[91] Although there may be some sort of adversity requirement in Article III,[92] any such requirement could not extend to the legal arguments that the parties make in their briefs and other filings to the court. Otherwise, a defendant could defeat a plaintiff's case simply by not mounting any defense. But, as Professor Henry Monaghan has pointed out, it is well-established that Article III courts have the power to issue default judgments against defendants who fail to appear and in other contexts in which the parties do not dispute the legal contentions of the other side.[93]

Such an adverse-legal-argument requirement would be particularly problematic in government litigation. *INS v. Chadha*[94] nicely illustrates this point. *Chadha* involved the pending deportation

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[90] *See* Miller & Bowman, *supra* note 89, at 74-75 (arguing that when the executive branch agrees with the private party, there is "a breakdown of the adversary system" and doubting that such a suit qualifies as an "article III case or controversy").

[91] *See* United States v. Windsor, 133 S. Ct. 2675, 2700-01 (2013) (Scalia, J., dissenting) ("Article III requires not just a plaintiff (or appellant) who has standing to complain but an opposing party.…The question here … is whether there is any controversy (which requires contradiction) between the United States and Ms. Windsor. There is not.").

[92] For a powerful argument that Article III requires at least some adversity between the parties, see Martin H. Redish & Adrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 546-48, 563-88 (2006). The cases discussed here satisfy any such adversity requirement: the executive's enforcement of the law harms the private party. For example, in *INS v. Chadha*, 462 U.S. 919 (1983), the executive was threatening to deport Jagdish Chada pursuant to a one-house legislative veto.

[93] Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1373-74 (1973) (arguing that the need for "an adversary presentation" of the legal issues "hardly seems to be one of constitutional dimension…. [W]itness, for example, default judgments, guilty pleas, [and] naturalization … proceedings"). Notably, the *Windsor* Court likewise appeared to conclude that the need for "adverse" legal arguments was at most a prudential requirement. *See infra* note 147.

[94] 462 U.S. 919 (1983).

of an undocumented immigrant (Jagdish Chadha).[95] The Attorney General had decided to suspend Chadha's deportation and allow him to remain in the country, but the House of Representatives (through the one-house legislative veto) overruled that decision and directed that he be deported.[96] When Chadha sought review in the Ninth Circuit, the executive joined him in urging the court to strike down the statute authorizing the legislative veto.[97]

Appearing as amicus,[98] counsel for the House of Representatives argued that the court of appeals lacked jurisdiction because there was no adversity between the parties.[99] The Ninth Circuit, however, found that the parties were "adverse" in an important sense: the executive branch planned to enforce the House's order and deport Chadha.[100] The court rejected the claim that the executive's legal position could prevent Chadha from seeking Article III court review of that decision. The court emphasized that if it "dismissed the appeal for lack of adversity, we would implicitly approve the untenable result that all agencies could insulate unconstitutional orders and procedures from appellate review simply by agreeing that what they did was unconstitutional."[101]

The executive's duty to defend does not stem from Article III but from the powers and duties conferred by Article II. If the executive has an Article II duty to enforce a law, then it must assert in court the federal government's interest in the continued enforceability of that law. Indeed, absent a duty to defend, the executive would in no meaningful sense be enforcing (or promoting the enforcement of) that federal law.

2. No Standing to Seek a Supreme Court Settlement

The above analysis suggests why the executive lacks standing to appeal in non-defense cases. In the cases discussed below, the

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[95] *Id.* at 923.
[96] *Id.* at 925-28.
[97] *See* Chadha v. Immigration and Naturalization Service, 634 F.2d 408, 411 (9th Cir. 1980).
[98] The House and the Senate initially appeared in *Chadha* as amici curiae. *See id.* (stating that, because the executive declined to defend the law, "the court requested both the House of Representatives and the Senate to file briefs as amici curiae"). They intervened after the court of appeals invalidated the legislative veto.
[99] *See id.* at 419.
[100] *Id*.
[101] *Id.* at 420 ("Where, as here, the agency fully intends to enforce its order, it would be a perversion of the judicial process to dismiss the appeal").

lower courts (at the executive's behest) struck down the relevant federal law or otherwise ruled in favor of the plaintiff. On appeal, the executive asserted that it was "aggrieved" because the lower court decisions prevented it from enforcing a federal law. Accordingly, the executive alleged that it had standing to assert the federal government's interest in the continued enforceability of the law. But that is not the interest that the executive sought to protect on appeal. The executive did not ask the appellate courts to uphold the law but instead urged them to strike it down. It appears that the executive's primary goal was not to protect the government's interests, but instead to obtain a higher court resolution of a contentious constitutional question.

United States v. *Lovett*[102] involved an appropriations rider that barred the executive branch from paying (and thus effectively "fired") three named federal officials, who were believed to have ties to communist organizations—"Goodwin B. Watson, William E. Dodd … and Robert Morss Lovett."[103] When the employees filed suit in the Court of Claims to challenge their termination and recover their unpaid salaries, the Franklin Roosevelt administration joined them in arguing that the rider was unconstitutional.[104] The executive asserted that the measure was not only a bill of attainder but also an infringement on the President's Article II removal power (because Congress had itself "fired" three executive officials, without impeaching them).[105] A Special Counsel appointed by the House of Representatives appeared as amicus curiae to defend the law.[106] The Court of Claims later issued a judgment in favor of the plaintiffs but did so without clearly ruling on the constitutional issues.[107]

The Solicitor General then filed a certiorari petition, asserting that the Court should grant review to determine the "liability of the

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[102] 328 U.S. 303 (1946).

[103] Urgent Deficiency Appropriation Act of 1943, § 304, 57 Stat. 431, 450 (1943) ("No part of any appropriation … shall be used, after November 15, 1943, to pay any part of the salary … of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett…."); *see* United States v. Lovett, 328 U.S. 303, 308 (1946) (noting the House of Representatives' concern at that time about "'subversives'" in the government).

[104] *See* Lovett v. United States, 66 F. Supp. 142, 143 (Ct. Cl. 1945).

[105] *See* John Hart Ely, United States v. Lovett*: Litigating the Separation of Powers*, 10 HARV. C.R.-C.L. L. REV. 1, 16-17 (1975) (discussing the lower court "lines of attack").

[106] *See* 89 CONG. REC. 10,882 (1943) (authorizing the appointment of counsel).

[107] *See Lovett*, 66 F. Supp. at 148 (declining to decide whether the rider "is constitutional ….The plaintiffs are entitled to recover in either event").

United States" to the three employees.[108] But the Solicitor General also informed the Justices that the executive was "still of the view that the [rider] is unconstitutional" and urged the Court to strike it down.[109] Accordingly, the executive's goal in seeking Supreme Court review was clearly not to enforce the rider and avoid paying the employees (who, in its view, deserved their salaries).[110] Instead, as Professor John Hart Ely suggested, the executive likely "wanted Supreme Court review" in order to secure "a judicial halt … to legislative tampering with the removal power."[111] If so, the Supreme Court ultimately gave the executive only a partial victory. The Court granted review and held the rider unconstitutional, but did so on bill of attainder grounds without commenting on the removal question.[112]

INS v. Chadha[113] grew out of a long-running dispute between the executive and legislative branches over the legislative veto.[114] Although Congress began adding such provisions to legislation in the 1930s, the number of legislative vetoes skyrocketed in the 1970s.[115] Presidents Jimmy Carter and Ronald Reagan repeatedly objected to the provisions and even threatened to disregard some legislative vetoes

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[108] Petition for Writs of Certiorari to the Court of Claims, United States v. Lovett, 328 U.S. 303 (1946) (No. 809), *in* 44 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 13 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS] ("Although this Department is still of the view that the [rider] is unconstitutional, we … file this petition for certiorari so the question as to the liability of the United States may be brought to this Court.").

[109] *Id*.

[110] Indeed, the executive initially considered ignoring the rider (and allowing the employees to remain at their jobs), but ultimately decided that enforcement was the "most direct way" to "force a constitutional adjudication." Ely, *supra* note 105, at 4-5.

[111] Ely, *supra* note 105, at 21-22. The Solicitor General's petition for certiorari supports this account. Petition for Writs of Certiorari to the Court of Claims, United States v. Lovett, 328 U.S. 303 (1946) (No. 809), *in* 44 LANDMARK BRIEFS, *supra* note 108, at 12-13 (asserting that "'the opinion of the court' below was in error in holding that [the rider] had not terminated the respondents' services but had merely prohibited disbursing agencies from paying their salaries" and generally focusing on the removal issue).

[112] United States v. Lovett, 328 U.S. 303, 315-16, 318 (1946).

[113] 462 U.S. 919 (1983).

[114] *See* BARBARA HINKSON CRAIG, *CHADHA*: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE 36 (1988) (noting that presidents took "exception to legislative vetoes ever since their 'invention' in the early 1930s"); *see also* Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, LAW & CONTEMP. PROBS., Autumn 1993, at 277-85 (asserting that although presidents often objected to legislative vetoes, they also acquiesced in or even advocated veto provisions to secure more delegated authority from Congress).

[115] CRAIG, *supra* note 114, at 36 (noting the dramatic increase in the 1970s).

of administrative action.[116] But the Presidents found that they could not get many bills through Congress, without acquiescing in at least some legislative vetoes.[117] Accordingly, the executive opted to fight the veto in the courts.[118]

According to political scientist Professor Barbara Craig, the Department of Justice "viewed *Chadha* as a promising case for attacking the legislative veto."[119] Thus, when the Ninth Circuit struck down the measure as applied in deportation cases,[120] the executive sought further review in the Supreme Court. Both the Senate and the House of Representatives, who had appeared as amici curiae in the Ninth Circuit (and later intervened),[121] challenged the executive's standing to appeal a lower court decision with which it agreed.[122] The Solicitor General responded that the executive was sufficiently "aggrieved" for purposes of appeal, because the lower court had "order[ed] the Attorney General to 'cease and desist from taking any steps to deport'" Chadha.[123] The Solicitor General further stated:

> Because the constitutional question in this case involves a conflict between the Executive and Legislative Branches, it

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[116] *See* President Jimmy Carter, Legislative Vetoes: Message to Congress (June 21, 1978), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER 1978, at 1147, 1149 (arguing that "legislative veto provisions are unconstitutional" and asserting that his administration would not consider them "legally binding"); President Ronald Reagan, Statement on Signing the Union Station Redevelopment Act of 1981 (Dec. 29, 1981), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN 1981, at 1207 (objecting to a legislative veto "on constitutional grounds" and stating that his agency would not regard it as legally binding).

[117] *See* CRAIG, *supra* note 114, at 109, 129, 158 (stating that "confrontational tactics" ultimately proved "politically unrealistic or administratively unpalatable").

[118] The *Chadha* litigation began under President Carter and continued into the Reagan administration.

[119] CRAIG, *supra* note 114, at 88.

[120] Chadha v. Immigration and Naturalization Service, 634 F.2d 408, 411, 435-36 (9th Cir. 1980).

[121] *See supra* note 98.

[122] *See* Motion of Appellee United States Senate to Dismiss, at 3, INS v. Chadha, 462 U.S. 919 (1983) (Nos. 80–1832, 80–2170 and 80–2171) (**"**mov[ing] to dismiss this appeal on the ground that it is brought by a party that prevailed in the court of appeals"); Motion of Appellee United States House of Representatives to Dismiss, at 4, INS v. Chadha, 462 U.S. 919 (1983) (Nos. 80–1832, 80–2170 and 80–2171) ("[T]he INS is one of the prevailing and non-aggrieved parties below.… The INS therefore has no standing to invoke this Court's appellate jurisdiction.").

[123] Reply Brief for the Appellant at 3, INS v. Chadha, 462 U.S. 919 (1983) (No. 80-1832) (the INS was "an 'aggrieved party' within the common sense meaning of the term: it is subject to an order … prohibiting it from taking action that it otherwise would take").

> is particularly important that it be resolved by the Judicial Branch. Accordingly, the course that the INS chose to follow—to enforce the statute, in order to ensure a judicial resolution of the controversy … was not merely permissible under the circumstances, but was a responsible and wholly appropriate response [to the one-house veto].[124]

As Professor Craig observes, the executive's goal in *Chadha* was not to protect the continued enforceability of the veto provision. Instead, the executive sought a "Supreme Court 'stamp of approval'" of the Ninth Circuit decision invalidating the veto.[125] Indeed, "[e]ven more important … was the possibility that the Supreme Court might rule more broadly, thus calling many, if not all, of the other legislative veto provisions in laws into question."[126] Ultimately, the Court obliged, permitting the executive's appeal, and issuing a sweeping decision that effectively invalidated every legislative veto.[127]

Windsor involved a challenge to the Defense of Marriage Act, which prohibited the federal government from recognizing same-sex marriages for purposes of federal law.[128] President Obama declared his opposition to DOMA during the 2008 campaign and, once in office, urged Congress to repeal the law.[129] But Congress took little action in response to these requests. Finally, in February 2011, Attorney General Eric Holder notified Congress that the executive branch would cease defense of DOMA but would continue to enforce it "unless and until Congress repeals [the law] or the judicial branch renders a definitive verdict against the law's constitutionality."[130] "This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims."[131]

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[124] *Id.* at 6, 14 (emphasizing that the executive was arguing "against the constitutionality of a statute that … infringe[d] upon the prerogatives of the Executive Branch").
[125] CRAIG, *supra* note 114, at 167.
[126] *Id.*
[127] *See* INS v. Chadha, 462 U.S. 919, 939-40, 953-54, 959 (1983); *see also id.* at 967 (White, J., dissenting) ("Today the Court not only invalidates [the veto provision] of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.'").
[128] *See* United States v. Windsor, 133 S. Ct. 2675, 2682 (2013); 1 U.S.C. § 7 (defining "marriage" as a union between a man and a woman).
[129] *See* MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 126, 142 (2013).
[130] Holder, Letter, *supra* note 20.
[131] *Id.*

Despite the Attorney General's assertion, however, the executive did not enforce DOMA in every case. For example, the executive opted not to apply the law in bankruptcy and some immigration proceedings.[132] But the executive did enforce the law in Edith Windsor's case, requiring her to pay over $360,000 in federal estate taxes that she would not have had to pay if the government recognized her same-sex marriage.[133] Windsor brought suit in federal district court to challenge DOMA on equal protection grounds, seeking a declaration that DOMA was unconstitutional and a refund of the tax.[134] The executive branch joined her in arguing that the law was unconstitutional and urged the district court to "grant Plaintiff's motion for summary judgment."[135]

After the lower courts ruled in Windsor's favor,[136] the executive sought Supreme Court review. When the Court directed the parties to address the issue of executive standing,[137] the Solicitor General argued that the executive had standing to assert an injury to the government.[138] "The United States may properly invoke this Court's jurisdiction because the judgments of the courts below

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[132] *See* KLARMAN, *supra* note 129, at 162-63 (observing that the executive suspended the deportation of some individuals whose same-sex marriages were recognized by state law); Chris Geidner, *U.S. Trustee Withdraws Appeal of Gay Couple's Bankruptcy Court DOMA Victory*, METRO WEEKLY, July 7, 2011, *available at* http://www.metroweekly.com/poliglot/2011/07/us-trustee-withdraws-appeal-of.html (noting that the executive stopped enforcing DOMA in bankruptcy cases).

[133] *See* United States v. Windsor, 133 S. Ct. 2675, 2682 (2013).

[134] Windsor v. United States, 833 F.Supp.2d 394, 397 (S.D.N.Y. 2012).

[135] Defendant United States' Memorandum of Law in Response to Plaintiff's Motion for Summary Judgment and Intervenor's Motion to Dismiss, Windsor v. United States, 833 F.Supp.2d 394 (S.D.N.Y. 2012) (No. 10-CV-8435) (BSJ) (JCF), 2011 WL 3754396 (arguing that "DOMA fails heightened scrutiny, and this Court should … grant Plaintiff's motion for summary judgment").

[136] *See* Windsor v. United States, 699 F.3d 169, 185, 188 (2d Cir. 2012) (concluding that intermediate scrutiny applies to classifications based on sexual orientation and invalidating DOMA under that standard); Windsor v. United States, 833 F.Supp.2d 394, 402 (S.D.N.Y. 2012) (holding that "DOMA's section 3 does not pass constitutional muster" even under rational basis scrutiny).

[137] *See* United States v. Windsor, 133 S. Ct. 786, 787 (2012) (directing the parties to address "[w]hether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction"). The Court also appointed Professor Vicki Jackson to argue, as amicus, that the Court lacked jurisdiction.

[138] Brief for the United States on Jurisdictional Questions, at 6, 133 S. Ct. 2675 (2013) (No. 12–307).

preclude enforcement of a federal statute and require payment of federal Treasury funds to plaintiff."[139]

The executive did not, however, seek Supreme Court review to protect the continued enforceability of DOMA or to avoid paying Edith Windsor. The Solicitor General said as much in his certiorari petitions, declaring that "[a]lthough the Executive Branch agrees with the court of appeals' determination that [DOMA] is unconstitutional, we respectfully seek … review so that the question may be authoritatively decided by this Court."[140] As in *Lovett* and *Chadha*, the executive wanted a "definitive judicial ruling that [the law was] unconstitutional."[141] The Supreme Court obliged, granting the executive's petition and holding that DOMA violated "basic due process and equal protection principles."[142]

In the above cases, the executive appealed the lower court decisions, not to protect the federal government's interests, but instead to obtain a Supreme Court resolution of a constitutional question. But neither the Take Care Clause nor any other constitutional provision gives the executive the power to ask for the Court's view on a legal question—a point made clear by the Justices' rejection of President George Washington's request for a legal opinion on his Neutrality Proclamation.[143] The executive lacks the Article II power—and thus

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[139] *Id.* ("The United States may properly invoke this Court's jurisdiction because the judgments of the courts below preclude enforcement of a federal statute and require payment of federal Treasury funds to plaintiff. The United States thus satisfies … the Article III requirement that it be 'injured' by a lower court's decision.").

[140] Petition for a Writ of Certiorari at 12-13, Department of Health and Human Services v. Commonwealth of Masachussetts/Office of Personnel Management v. Gill; Petition for a Writ of Certiorari Before Judgment at 12, Office of Personnel Management v. Golinski (asserting that "the question of [DOMA's] constitutionality raises important questions of federal law that … should be[] settled by this Court."); *see* Petition for a Writ of Certiorari Before Judgment at 10, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307) (urging the Court to grant certiorari for the reasons stated in the *Gill* and *Golinski* petitions).

[141] Petition for a Writ of Certiorari at 12, Department of Health and Human Services v. Commonwealth of Masachussetts/Office of Personnel Management v. Gill ("[T]he President has instructed Executive departments and agencies to … enforce [DOMA] until there is a definitive judicial ruling that [it] is unconstitutional.").

[142] See United States v. Windsor, 133 S. Ct. 2675, 2686, 2693, 2695-96 (2013) (holding that DOMA "violates basic due process and equal protection principles" insofar as it prohibits the federal recognition of marriages that are valid under state law).

[143] *See* Letter from Justices of the Supreme Court to George Washington (Aug. 8, 1793), in 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 755 (Maeva Marcus ed., 1998) ("The Lines of Separation drawn by the Constitution … afford strong arguments against the Propriety of our extrajudicially

lacks Article III standing—to invoke federal jurisdiction simply to request "a definitive verdict" on the validity of a federal law.[144]

The Supreme Court has entirely overlooked these Article II principles. The Court in *Chadha* and *Windsor* permitted the executive to seek further review, because of the federal government's interest in the continued enforceability of its laws. (The Court in *Lovett* did not even question the executive's authority to appeal.) Thus, the *Chadha* Court emphasized that the executive planned to "comply with the House action ordering deportation of Chadha" and was "aggrieved" by the lower court decision preventing it from enforcing that order.[145] Likewise, the *Windsor* Court declared that the "United States retains a stake sufficient to support Article III jurisdiction on appeal," because the lower court judgment "orders the United States to pay money that it would not disburse but for the court's order."[146] The Court declared: "That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury."[147]

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deciding … questions…; especially as the Power given by the Constitution to the President of calling on the Heads of Departments for opinions, seems to have been purposely as well as expressly limited to executive Departments."). As the Justices suggested, their interpretation is reinforced by the Opinion Clause of Article II, which expressly authorizes the President to seek opinions from executive officials. *See* U.S. Const. art. II, § 2 ("[The President] may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices."). Professor Akhil Amar has argued that this provision was designed to preclude the President from seeking the advice of the judiciary. *See* Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 647, 656 (1996).

[144] Holder, Letter, *supra* note 20.

[145] INS v. Chadha, 462 U.S. 919, 930-31 (1983). Like the parties, the Court focused on its appellate jurisdiction under then-applicable statutes. *See id.* In *Windsor*, the Court concluded that although the *Chadha* Court did not mention Article III, "the words of *Chadha* make clear its holding that the refusal of the Executive to provide the relief sought suffices to preserve a justiciable dispute as required by Article III." United States v. Windsor, 133 S. Ct. 2675, 2686 (2013).

[146] Windsor, 133 S. Ct. at 2686 ("[T]he United States retains a stake sufficient to support Article III jurisdiction…. The judgment in question orders the United States to pay Windsor the refund she seeks…. The Government of the United States has a valid legal argument that it is injured even if the Executive disagrees with … DOMA.").

[147] *Id.* at 2686. Although the Court stated that the executive's failure to defend DOMA "introduce[d] a complication," the only complication was a possible lack of "adversity" between the parties. *Id.* at 2685, 2687. The Court then resolved that issue by declaring adversity to be a prudential, rather than an Article III, requirement. Those "prudential concerns" were overcome by the presence of the House, which was defending DOMA. *See id.* at 2687-88 (noting the House's "sharp adversarial presentation of the issues").

But the executive was not in those cases seeking to redress an injury to the government. If it were, the executive had a duty not only to appeal but also to seek a Supreme Court ruling upholding the law. Instead, in each case, the executive wanted a Supreme Court resolution of a constitutional question. The executive, however, has no greater right than any other member of society to a Supreme Court "stamp of approval."

C. The Normative Case for Limiting Executive Standing

This constitutional restriction on executive standing has strong normative underpinnings. Once one considers the reasons that the executive seeks Supreme Court review in non-defense cases, there is little basis for allowing executive standing. In fact, the denial of standing helps protect both individual liberty and the federal judiciary.

At the outset, it is important to recognize that the executive's approach in *Lovett*, *Chadha*, and *Windsor* accords with general executive policies toward the enforcement and defense of federal law—as reflected in opinions issued by the Office of Legal Counsel (OLC).[148] Although the executive asserts that it has a duty to enforce and defend most federal laws, it also argues that the Take Care Clause does not require it do so in every case. The executive contends that it may decline to enforce or defend any law that, in its view, is clearly invalid or infringes on executive power.[149] Moreover, in determining whether to enforce (or continue enforcing) a law, the executive has emphasized the importance of securing judicial—particularly Supreme Court—review.[150] An influential OLC memorandum states that "[t]he Supreme Court plays a special role in resolving disputes about the

[148] The OLC provides advice to the executive branch "on all constitutional questions." *See* U.S. Department of Justice: Office of Legal Counsel, *available at* http://www.justice.gov/olc.

[149] *See supra* note 75.

[150] The DOJ has declared that the executive will enforce a law, even one that it views as unconstitutional, if such enforcement is the only way to secure judicial review. *See* Presidential Authority To Decline To Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 201 (1994). Conversely, the executive will refuse to enforce a law (such as one infringing on executive power) if that is the only way to create a justiciable case. *See id.*; The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 55, 57 (1980) (asserting that the executive can "best preserve our constitutional system by refusing to honor" a limitation on presidential power if that is the only way to ensure judicial review).

constitutionality of enactments."[151] Accordingly, "the President may base his decision to comply (or decline to comply)" with a federal statute "in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch."[152]

Although the executive's emphasis on judicial review may be surprising (given that it seems to *reduce* executive power), the executive has strong political and institutional incentives to facilitate judicial resolution of constitutional questions. As political scientists have observed, the President is well-positioned to use the federal judiciary to advance his constitutional vision.[153] The President not only plays a central role in selecting federal judges[154] but also "[t]hrough control over the Justice Department … can exercise significant influence over … what arguments are presented" to the courts.[155] Moreover, the President may find that when he faces a hostile or divided Congress, the judiciary is more receptive to his constitutional views.[156] *Chadha* and *Windsor* illustrate this point. Although Presidents Carter and Reagan fought the legislative veto in the political process, they found that they could not defeat the powerful pro-veto forces in Congress, absent judicial intervention. Likewise, although President Obama advocated the legislative repeal of DOMA, he had far more success when he took the matter to the courts.

The political and institutional interests of the executive branch also explain the emphasis on Supreme Court review. The Solicitor General is in charge of virtually all federal litigation in the Supreme Court.[157] Thus, as former Solicitor General Drew Days put it, "[o]nce cases reach the Supreme Court, the Solicitor General plays an

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[151] Presidential Authority To Decline To Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200-01 (1994).
[152] *Id.* at 201.
[153] *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 5 (2007) (arguing that "[t]hrough much of American history, presidents have found it in their interest to defer to the Court and encourage it to take an active role in defining the Constitution and resolving constitutional controversies").
[154] *See* U.S. CONST. art. II, § 2, cl. 2; SHELDON GOLDMAN, PICKING FEDERAL JUDGES 6 (1997) ("[T]he placement of the power of judicial selection with the powers of the president [in Article II] rather than those of Congress suggests that the executive branch is a principal player in the appointment process.").
[155] WHITTINGTON, *supra* note 153, at 196.
[156] *See* Mark A. Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25*, 88 OR. L. REV. 95, 102 (2009) (the judiciary can be "a vital presidential ally against a recalcitrant Congress").
[157] See 28 U.S.C. § 518(a); FEC v. NRA Political Victory Fund, 513 U.S. 88, 93 (1994).

important role in the development of American law" and can have a substantial "impact upon the establishment of constitutional and other principles."[158] This institutional position gives the Department of Justice a strong incentive to seek a Supreme Court resolution of constitutional questions. Likewise, the President has a substantial interest in a Supreme Court ruling. Given our strong national culture of judicial supremacy (in which political actors and citizens defer to the Court's constitutional judgments), a Supreme Court settlement of a constitutional question would not only bind lower courts but would also likely be seen as authoritative by Congress and future Presidents.[159]

These political and institutional interests help explain the executive branch's appeals in *Lovett*, *Chadha*, and *Windsor*. The executive in each case not only wanted a judicial resolution of the constitutional issue but a *Supreme Court settlement* of the issue. Thus, the Roosevelt administration in *Lovett* sought (unsuccessfully) a "judicial halt … to legislative tampering with the removal power";[160] the Carter and Reagan administrations looked to the Court in *Chadha* to eliminate a political tool that had proven to be a thorn in the side of many Presidents; and the Obama administration asked the Court to do what it could not through the legislative process: repeal DOMA. In a world of judicial supremacy, a Supreme Court ruling is about as good as a repeal.

But it is important to keep in mind that, under the executive branch's own construction of Article II, it does not need the Supreme Court to "halt" the enforcement of federal laws. Nor does the executive branch need a Supreme Court decision to ensure a nationwide settlement of a constitutional question. The executive

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[158] Drew S. Days, III, *Executive Branch Advocate v. Officer of the Court: The Solicitor General's Ethical Dilemma*, 22 NOVA L. REV. 677, 680 (1998).

[159] *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE 14 (2009) (arguing that the "American people have decided to cede … to the Justices" the power to make determinations on constitutional questions); WHITTINGTON, *supra* note 153, at 5 ("Through much of American history, presidents have found it in their interest to defer to the Court.... The strategic calculations of political leaders lay the political foundations for judicial supremacy."); Neal Devins, *The Majoritarian Rehnquist Court?*, 67 LAW & CONTEMP. PROBS. 63, 70 (2004) ("Today's Congress … rarely casts doubt on … the Court's power to authoritatively interpret the Constitution."); Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 147 (2010) ("[T]he modern Congress typically treats the Court as the exclusive authority over constitutional issues.").

[160] Ely, *supra* note 105, at 21.

branch believes that it has the power to refuse to enforce a law that it views as clearly unconstitutional (as the executive did in each of these cases).[161] Thus, for example, the Carter and Reagan administrations could have ignored every legislative veto (as they threatened to do on occasion),[162] and the Obama administration could have spared many people the negative effects of DOMA by refusing to enforce it in *every* case beginning in February 2011.[163] But such open "confrontation" would have been politically costly.[164] Accordingly, the executive referred the constitutional question to the judiciary—not to protect the federal government's interest in the continued enforceability of a federal law, nor because that was the only means of ensuring a uniform settlement of federal law, but because it was politically more palatable to have the matter resolved by the courts.

There are good reasons to deny executive standing to seek such a Supreme Court settlement. First, such political and institutional

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[161] *See supra* notes 75, 149. The executive clearly could decline to enforce a federal law once a lower court ruled in favor of the private litigant. For example, the Roosevelt administration could have paid the employees in *Lovett* as soon as the Court of Claims ruled in their favor. Moreover, precisely because of the targeted nature of that law (it applied only to those three employees), such a result would have ensured the uniform enforcement of that federal law. Thus, the Roosevelt administration did not need Supreme Court review—even assuming that the executive lacks power to circumvent an appropriations statute. For a sample of the scholarly debate over that issue, compare Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1352 (1988) (arguing that "[e]ven where the President believes that Congress has transgressed the Constitution … , the President has no constitutional authority to draw funds from the Treasury"), with J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1196-97 (arguing that the President may use "unappropriated spending" to carry out a "textually demonstrable duty or prerogative of the President under article II").

[162] *See supra* note 116 and accompanying text.

[163] The executive might have needed appropriated funds to pay health and other benefits to the same-sex spouses of federal employees. But as Professor Aziz Huq has observed, given the breadth of appropriations statutes, it seems likely that the executive could have found funds to pay those individuals. *See* Huq, *supra* note 88, at 1026-27 (emphasizing that agencies typically have broad discretion in using their lump-sum appropriations).

[164] CRAIG, *supra* note 114, at 109, 129. Such confrontation would be politically costly in part because it would distract from other presidential priorities. Moreover, many members of Congress may be opposed to unilateral decisions by the executive not to enforce federal laws—even when the members agree with the President's view that a given law is unconstitutional. Notably, although Democrats in Congress supported the executive's decision not to defend DOMA, they did not suggest that the President take the further step of refusing to enforce the law. *See, e.g.*, 157 Cong. Rec. S1754 (daily ed. Mar. 16, 2011) (statement of Sen. Patrick Leahy, D-Vt) ("applaud[ing] President Obama and Attorney General Holder for making the right decision" in refusing to defend DOMA, but noting that "the administration is still enforcing DOMA elsewhere, because it is the law of the land. It is now time for leaders in Congress to change that law.")

concerns cannot justify the intrusion on individual liberty. As we have seen, the executive generally has broad discretion to invoke the federal judicial Power—and thereby subject individuals to judicial process—when it asserts the federal government's interests in the enforcement and continued enforceability of federal law. Although this discretion may be justified when the executive has an Article II duty to protect the government's sovereign interests, there is little basis for infringing on individual liberty when the executive's primary goal is to avoid political controversy.

Chadha underscores the importance of limiting executive standing in non-defense cases. Although the executive asserted that it was not "legally bound" to enforce legislative vetoes (as Presidents Carter and Reagan repeatedly informed Congress),[165] the executive did plan to enforce the deportation order against Chadha—presumably because it "viewed *Chadha* as a promising case for attacking the legislative veto."[166] It is important to keep in mind the stakes for Jagdish Chadha. If the Supreme Court had upheld the legislative veto (as many scholars at the time believed it should),[167] then the executive branch *could have deported Chadha* pursuant to the one-house order, even though the executive itself viewed the deportation as both unwise and unconstitutional, and even though Chadha had obtained one federal court ruling in his favor.[168] Political convenience cannot justify such a threat to individual liberty.

Second, restricting executive standing would also protect the federal judiciary. Standing doctrine and other justiciability tests are designed in large measure to protect the federal courts from becoming substitute fora for matters that could be, but were not, resolved

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[165] *See supra* note 116.

[166] CRAIG, *supra* note 114, at 88.

[167] *See* Bernard Schwartz, *The Legislative Veto and the Constitution: A Reexamination*, 46 GEO. WASH. L. REV. 351, 351 (1978) (stating that, in the late 1970s, most scholars believed that the veto was constitutional). Furthermore, some lower courts had upheld the legislative veto. *See, e.g.*, Atkins v. United States, 556 F.2d 1028, 1033, 1071 (Ct. Cl. 1977) (upholding the legislative veto in the Salary Act, which permitted presidential recommendations for a judicial salary increase to go into effect unless vetoed).

[168] The executive branch might ultimately have declined to enforce the one-house order. But in the litigation, the executive insisted that it would enforce the order, absent a judicial ruling directing otherwise. *See* INS v. Chadha, 462 U.S. 919, 939-40 (1983). Notably, there is another way Chadha might have escaped deportation. Chadha married an American citizen, so he might have been able to apply for permanent residency on that basis. *See* CRAIG, *supra* note 114, at 140. But according to the Ninth Circuit, there was no guarantee that Chadha would obtain residency that way. *See* Chadha v. Immigration and Naturalization Service, 634 F.2d 408, 417 n.6 (9th Cir. 1980).

through the political process.[169] As the Supreme Court stated in *United States v. Richardson*:[170]

> [T]hat the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the 'ground rules' established by the Congress …. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls.[171]

Notably, the *Richardson* Court did not say that litigants would be confined to the political process only if they would succeed there. Instead, the Court declared that "[s]low, cumbersome, and *unresponsive* though the traditional electoral process may be thought at times," that is often the sole method by which citizens may seek redress of their grievances.[172] Surely this message applies no less to the President and other executive officials, who have far greater access to the political process than any private citizen. When the executive is "not satisfied with the 'ground rules' established by the Congress," it has a "right to assert [its] views in the political forum." The executive branch does not have an unqualified right to seek from the "judicial branch … a definitive verdict against [a] law's constitutionality."[173]

IV. Congress's (Lack of) Standing under Article I

Many scholars have suggested that Congress should be permitted to represent the federal government, at least in defense of federal law, when the executive branch is derelict in its duties. But these commentators have largely overlooked the fact that, like the executive branch, Congress must have affirmative constitutional

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[169] *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982) ("Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of 'standing' would be quite unnecessary."); *see also* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1003-07 (2002) (emphasizing how justiciability tests, including the prohibition on advisory opinions, help protect "the judiciary's credibility and reputation" by limiting its role in political and constitutional controversies).

[170] 418 U.S. 166 (1974).

[171] *Id.* at 179.

[172] *Id.* (emphasis added).

[173] Holder, Letter, *supra* note 20.

authority to invoke federal jurisdiction. The power of Congress to bring suit or appeal in federal court does not, of course, come from Article III. Instead, the scope and limits of congressional standing necessarily depend on a construction of the provisions conferring power on Congress—principally, Article I.[174] I argue that the Constitution does not confer on Congress (or the House or Senate) the power to enforce or defend federal law. Congress should not be permitted to exercise the discretion that necessarily accompanies standing to represent the United States in court.

A. The Structural Case Against Legislative Standing

There is currently no "congressional counsel."[175] In the 1970s, the House of Representatives established an Office of General Counsel, which "provid[es] legal assistance and representation to the House."[176] In 1978, Congress also created an Office of Senate Legal Counsel,[177] which has the authority to participate in litigation "in the name of the Senate" or its subdivisions.[178] Congress does not, however, appear to have granted standing to either the House or the Senate to represent the United States.

That may explain why in *Windsor*, no Justice considered whether the House had standing to assert the government's interest in the continued enforceability of DOMA. Although the majority opted not to rule on the House's standing,[179] Justices Alito and Scalia

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[174] *See* U.S. CONST. art. I, § 1 (vesting in Congress "[a]ll legislative powers herein granted"); *infra* note 185 (discussing other provisions that give Congress power).

[175] For a discussion of the development of the House and Senate counsel (and the failed effort to create a congressional counsel), see Grove & Devins, *supra* note 11.

[176] House Rule II.8, *available at* http://www.rules.house.gov ("There is established an Office of General Counsel for the purpose of providing legal assistance and representation to the House…. [The counsel] shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships.").

[177] *See* Pub. L. No. 95-521, §§ 701-17, 92 Stat. 1824, 1875-85.

[178] 2 U.S.C. § 288e(a) ("When directed to do so [by Senate resolution], the Counsel shall intervene or appear as amicus curiae in the name of the Senate, or in the name of an officer, committee, [or] subcommittee … of the Senate in any legal action … in which the powers and responsibilities of Congress … are placed in issue."). Notably, the statute reflects Congress's own assumption that the standing of the Senate depends only upon Article III. *See id.* (stating that the Senate counsel "shall be authorized to intervene only if standing to intervene exists under …. article III of the Constitution").

[179] The Court decided that such a ruling was unnecessary, since it concluded (incorrectly, in my view) that the executive had standing to seek Supreme Court review. United States v. Windsor, 133 S. Ct. 2675, 2688 (2013).

debated whether the House had "Article III standing" to appeal the lower court decision striking down DOMA.[180] Justice Alito insisted that the House did have standing, reasoning that the lower court decision "impair[ed] Congress' legislative power" and thereby "injured" the House,[181] while Justice Scalia, in turn, denied that the House could assert such an "institutional" injury.[182] Thus, the Justices debated the House's standing to protect its institutional interests, rather than the (well-recognized) interests of the federal government.

It is doubtful that Congress (or the House or Senate) would have standing to assert an institutional injury. As we have seen, the Supreme Court has never allowed the executive branch to assert such an injury and strongly suggested in *Raines v. Byrd* that neither the executive nor the legislature may assert an "institutional" interest in court.[183] For now, however, I bracket that issue (as well as any concerns about the statutory authority of the House or Senate counsel) and consider the question scholars have raised: whether Congress *could* create some kind of "congressional counsel" with standing to represent the federal government in court.[184]

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[180] *See* United States v. Windsor, 133 S. Ct. 2675, 2712 n.1 (2013) (Alito, J., dissenting) (stating that "[o]ur precedents make clear that … BLAG must demonstrate … Article III standing" to appeal). The "BLAG" is the Bipartisan Legal Advisory Group, which directs the House counsel's actions. *See supra* note 176.

[181] *Id.* at 2711-13, 2714 (asserting that "because legislating is Congress' central function, any impairment of that function is a … grievous injury" and that "in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress … has standing to defend the undefended statute").

[182] *See* United States v. Windsor, 133 S. Ct. 2675, 2703-04 (2013) (Scalia, J., dissenting) (asserting that the "impairment of a branch's powers alone" does not "confer[] standing to commence litigation").

[183] 521 U.S. 811, 814, 817, 821, 829-830 (1997) (holding that six legislators lacked standing to assert an "institutional injury" caused by the Line-Item Veto Act). Notably, the Court in *Raines* "attach[ed] some importance" to the fact that the legislators' challenge was not approved by their respective chambers, and that the House and Senate counsel opposed the suit. *Id.* at 829-30. But the Court expressly declined to decide whether the legislators could have brought the challenge with their chambers' support. At a minimum, the Court's reasoning casts doubt on any claim of "institutional injury."

[184] *See, e.g.*, Gorod, *supra* note 14, at 1248 (arguing that Congress has standing to defend statutes on behalf of the United States); Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-but-Not-Defend Problem*, 81 FORDHAM L. REV. 577, 595-97 (2012) (arguing that "Congress could pass a statute authorizing the Senate or House Counsel, or counsel representing both houses jointly, to litigate … on behalf of the United States"). Notably, I assert that a prohibition on congressional standing can be inferred from specific provisions of the Constitution: the provisions specifying the mechanisms by which Congress may influence law implementation—the Senate's role in appointments, impeachment, and statutory

No provision of the Constitution appears to give Congress the power to bring suit to enforce or defend federal law.[185] Instead, the Constitution carefully separates the enactment of federal law from its execution, specifying only three respects in which any part of Congress may play a role in law implementation.[186] First, the Senate has the power to confirm (or reject) high-ranking executive officers nominated by the President.[187] Second, Congress may specify the duties of executive officials through laws enacted via bicameralism and presentment.[188] Finally, Congress has the power to remove executive officers through impeachment.[189] Congress may not, however, confer upon itself the power to execute federal law.

The Supreme Court has "strictly enforced" this structural principle separating law enactment from implementation.[190] For

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enactment. I thereby rely on a well-established interpretive canon: expressio unius est exclusio alterius (the express mention of one thing excludes others). *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 927-29 (1992) (discussing this canon). I do not assert that congressional standing simply violates general separation of powers principles. For a powerful critique of such theories, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011) (arguing that "the Constitution adopts *no freestanding principle of separation of powers*" that should be judicially enforced).

[185] Congress's power is defined primarily by Article I. But other provisions of the Constitution also confer power on Congress. *See, e.g.*, U.S. CONST. art. IV, § 3 (empowering Congress to "dispose of and make all needful rules and regulations respecting the territory or other property" of the United States); U.S. CONST. amend. XIII, amend. XIV, § 5, amend XV, § 2 (together conferring on Congress the "power to enforce … by appropriate legislation" the Reconstruction Amendments). These provisions all appear to give Congress additional legislative power. None seems to give Congress any direct role in executing federal law (through litigation or otherwise).

[186] This strict separation of legislative and executive powers was a reaction to negative experiences with the constitutional structures of Britain, the state governments, and the Articles of Confederation. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1717 (2012); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations*, 1787-1801, 115 YALE L.J. 1256, 1273 (2006).

[187] U.S. CONST. art. II, § 2, cl. 2.

[188] *See* U.S. CONST. art. I, § 7, cl. 2.

[189] *See* U.S. CONST. art. I, § 2, cl. 5, art. I, § 3, cl. 6.

[190] John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 648-49 (1996) (observing that the Court has "strictly enforced the principle that Congress cannot directly participate in the implementation of Congress's own laws"); *see* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 114 (1994) (similarly noting that the Court consistently invalidates statutes in which "Congress attempted to give itself a degree of ongoing authority over the administration of the laws").

example, in *Bowsher v. Synar*[191] and *MWAA v. Citizens for Abatement of Aircraft Noise*,[192] the Court emphasized that "agents of Congress" may not exercise executive or administrative functions.[193] Nor may Congress control those implementing federal law—outside the appointment, statutory, and removal mechanisms specified in the Constitution. In *Buckley v. Valeo*,[194] the Court held that Congress may not "vest in itself, or in its officers, the authority to appoint officers of the United States" and thus invalidated provisions of the Federal Election Campaign Act that permitted members of Congress to select FEC commissioners.[195] In *Chadha*, the Court struck down the one-house legislative veto, concluding that Congress may direct the executive's implementation of federal law only through statutes enacted via bicameralism and presentment.[196] Finally, in *Bowsher*, the Court concluded that impeachment was the exclusive mechanism by which Congress could remove executive officials, stating that "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws."[197]

The enforcement and defense of federal statutes are key components of the execution of federal law. That is why the executive branch has standing to assert the federal government's interests in court. As we have seen, in order to faithfully execute federal law, consistent with due process principles, the executive must often bring criminal and civil enforcement actions against alleged violators. The executive also has an obligation to defend most (if not all) federal laws to ensure the continued enforceability of those laws. Congress, by contrast, has no similar constitutional license (akin to the Take Care Clause) to enforce or defend federal statutory commands in court. Accordingly, there is no basis for such congressional standing.

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[191] 478 U.S. 714 (1986).
[192] 501 U.S. 252 (1991).
[193] Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252, 255, 276 (1991) (invalidating a statute that gave a "Board of Review" staffed by members of Congress "veto power" over certain administrative decisions and stating that "[i]f the power is executive, the Constitution does not permit an agent of Congress to exercise it"); *see* Bowsher v. Synar, 478 U.S. 714, 736 (1986) (invalidating the Balanced Budget and Emergency Deficit Control Act insofar as it granted the Comptroller General, an agent of Congress, executive functions).
[194] 424 U.S. 1 (1976).
[195] *See id.* at 126-27, 135.
[196] *See* 462 U.S. 919, 953-54, 959 (1983).
[197] 478 U.S. 714, 722, 723, 736 (1986).

Some readers may object to my treatment of enforcement and defense as two sides of the same coin—both as part of law "execution." In fact, a few scholars have recently asserted that the defense of federal statutes is *not* an executive function—or at least that it is not a sufficiently "core" executive function as to preclude the involvement of Congress.[198] Under this view, even if Congress lacks the Article I power to *enforce* laws through criminal or civil enforcement actions, it may still *defend* those laws in court. Thus, one commentator writes that "[d]efending [a] law … does not focus on the operation of the law and generally will not affect its operation at all.… [T]he Executive simply provides the court with its understanding of what the Constitution requires and why the law at issue is consistent with it."[199] Accordingly, when the executive declines to defend a law, "someone else can explain to the court why the statute should be upheld."[200]

Whether or not one can analytically separate "defense" from "execution" for some purposes, such an argument is insufficient in the context of legislative *standing*. Standing is not simply the privilege to go to court and make legal arguments. That role can be performed by amici curiae once a case is already before a court. Standing is the authority to invoke a court's jurisdiction and thereby submit others to judicial process (at trial or on appeal).

Furthermore, this argument overlooks why the executive branch itself has standing to defend federal laws and thus to appeal decisions invalidating those laws. The executive branch does not have standing simply to offer its views on a constitutional question (or to seek a Supreme Court resolution of that question). The executive has standing because, absent an appeal, the law can no longer be enforced against (at least) the parties to that case. Thus, the executive had standing in *Gonzales v. Raich* to protect the continued enforceability of the Controlled Substances Act in cases involving home-grown marijuana.[201] Likewise, in the state sovereign immunity cases, the

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[198] *See* Gorod, *supra* note 14, at 1248 (arguing that "defending a law in court" is not "the same as executing the law"); *see also* Greene, *supra* note 184, at 592 (asserting that, if Congress seeks a declaratory judgment on the constitutionality of a law, Congress is not "controlling the execution of law"). Justice Alito seemed to make a similar assumption in *Windsor*. *See infra* note 205.

[199] Gorod, *supra* note 14, at 1219-20.

[200] *Id.* at 1220-21 (noting that "the law remains in operation" as long as the executive continues to enforce the law).

[201] *See supra* notes 64-66 and accompanying text.

executive intervened to protect the power of private citizens to enforce federal statutory commands against unconsenting states.[202] In sum, the executive has standing because it generally has an Article II power and duty to protect the federal government's interests in the enforcement and continued enforceability of federal law.

Accordingly, for Congress to have similar standing to defend federal law, it must also have affirmative authority to assert the federal government's interest in the continued enforceability of its laws. But no provision of Article I or any other part of the Constitution appears to give Congress any such affirmative authority. On the contrary, the constitutional text and structure seem to preclude Congress from asserting *any* direct role in law execution.

The Supreme Court overlooked these structural concerns entirely in *Chadha*, when it permitted the House and Senate counsel to intervene in defense of the statute authorizing the legislative veto.[203] Notably, the *Chadha* Court did *not* hold that the House or the Senate had Article III standing to appeal the Ninth Circuit decision invalidating the law—either on behalf of the federal government or otherwise.[204] The Court did not need to address that issue, because it held (incorrectly, in my view) that the executive could appeal the lower court ruling.

But some scholars and jurists, including Justice Alito in *Windsor*,[205] have construed *Chadha* to permit congressional standing to defend federal laws because of the following assertion: "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."[206] As Professor Neal Devins and I have detailed elsewhere, however, there is no such history. Prior to *Chadha*, members of Congress had occasionally participated as amici

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[202] *See supra* notes 70-71 and accompanying text.
[203] 462 U.S. 919, 939-40 (1983).
[204] The Court was focused on adversity. The Court found that the presence of the House and Senate counsel overcame any "prudential" concerns raised by the executive's agreement with Chadha's constitutional arguments. *See id.*
[205] *See* United States v. Windsor, 133 S. Ct. 2675, 2714 & n.3 (2013) (Alito, J., dissenting) (asserting that any contention that "the Constitution confers on the President alone the authority to defend federal law in litigation" is "contrary to the Court's holding in *Chadha*" and that *Buckley* "is not to the contrary. The Court's statements there concerned enforcement, not defense"); Gorod, *supra* note 14, at 1249.
[206] *Chadha*, 462 U.S. at 940.

curiae to defend federal laws.[207] For example, the House of Representatives appointed a Special Counsel to appear as amicus in defense of the rider in *Lovett*.[208] But the Court did not authorize intervention by any component of Congress until *Chadha*. Given the lack of historical support for the Court's assertion,[209] and the fact that the Court did not even hold that the House or the Senate had standing to appeal, this one-sentence declaration in *Chadha* provides scant support for congressional standing to represent the federal government in court.

Notably, a denial of congressional standing does not prevent Congress from objecting to the manner in which the executive represents the federal government's interests. Congress may raise its concerns in a variety of ways—through public criticism, oversight hearings, the appropriations power, and (at the extreme) impeachment.[210] That political process may not always lead to results that satisfy all members of Congress. Nevertheless, "[s]low, cumbersome, and unresponsive though [the political] process may be thought at times,"[211] those are the mechanisms by which the Constitution allows Congress to do battle with a recalcitrant executive. The Constitution does not grant Congress the affirmative authority to *replace* the executive as the government's representative in court.

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[207] *See* Grove & Devins, *supra* note 11 (discussing the participation of members of Congress as amici curiae in legal disputes over the pocket veto, the removal power, and the rider in *Lovett*).

[208] *See* 89 CONG. REC. 10,882 (1943). Indeed, that is one of the reasons the Solicitor General filed the certiorari petition in *Lovett*; as amicus, the Special Counsel could not appeal the Court of Claims' decision. *See* Petition for Writs of Certiorari to the Court of Claims, United States v. Lovett, 328 U.S. 303 (1946) (No. 809), *in* 44 LANDMARK BRIEFS, *supra* note 108, at 12-13. Of course, I argue that the executive also lacked standing to seek review in *Lovett*, given its refusal to defend the rider.

[209] Notably, the Court did not supply a basis for its assertion of a "long" history of congressional defense of statutes. The Court cited only two cases—*Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968), and *United States v. Lovett*, 328 U.S. 303 (1946). The first case did not involve Congress at all; instead, the Court invited *private counsel* to appear as amicus curiae to present an alternative interpretation of the statutory provision at issue, because the INS agreed with the construction of the deportee. *See Cheng Fan Kwok* v. INS, 392 U.S. at 210 n. 9. In *Lovett*, of course, the House participated only as amicus.

[210] *See supra* notes 56-59 and accompanying text (discussing congressional oversight); Grove & Devins, *supra* note 11 (discussing the power of the House and the Senate to conduct investigations of the executive).

[211] United States v. Richardson, 418 U.S. 166, 179 (1974).

B. The Normative Case Against Legislative Standing

There are strong reasons to prohibit Congress from transferring to itself the power to represent the federal government in court. Even if Congress had statutory standing only to *defend* federal laws, it would have immense discretion. No one (to my knowledge) contends that a congressional counsel would have a "duty to defend" every law, or to appeal every lower court decision invalidating a law. Indeed, given the number of federal laws that are subject to constitutional challenge, any such duty would make a congressional counsel infeasible—unless Congress created a second "Department of Justice" for the legislative branch. Instead, advocates of congressional defense envision a counsel that would step in only when, in the view of Congress, the executive branch was derelict in its duties—by, for example, refusing to defend a law or offering what legislators perceive as a less-than-enthusiastic defense.[212]

But absent a duty to defend in every case, the congressional counsel would have immense discretion to invoke federal jurisdiction—akin to the discretion exercised by the executive under the intervention statute, 28 U.S.C. § 2403.[213] Such a discretionary power raises many of the same concerns as executive discretion. First, like the executive branch, Congress has strong incentives to refer controversial constitutional questions to the judiciary.[214] For example,

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[212] *See supra* note 14 and accompanying text; *see also* Rebecca M. Salokar, *Legal Counsel for Congress: Protecting Institutional Interests*, 20 CONGRESS & THE PRESIDENCY 131, 147 (1993) (observing that the House and Senate counsel have sometimes participated in litigation, even when the executive defended the federal law, if they perceived that the executive was "equivocating in its support" of the statute).

[213] Indeed, in the early DOMA litigation, the House attempted to rely on that law as a basis for intervention. The district rejected that claim on statutory grounds. *See* Windsor v. United States, 797 F.Supp.2d 320, 323 (S.D.N.Y. 2011) (concluding that the House's intervention was not "authorized by 28 U.S.C. § 2403(a)" because the statute only applies when the United States or an agency is not "already a party to the litigation").

[214] Congress may, like the President, seek to advance a political agenda through the judiciary, *see* Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 512–13, 516–17 (2002) (discussing the efforts of the Republican Party in the nineteenth century to use the judiciary to advance a pro-business agenda); Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 116 (2000) (arguing that political leaders will empower the judiciary if they believe "the judiciary in general and the supreme court in particular are likely to produce decisions that . . . reflect their ideological preferences"), or defer controversial questions to the courts, *see* Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports*

the *Windsor* decision relieved not only the executive branch but also members of Congress (who believed that DOMA was unconstitutional and inflicting considerable harm on same-sex couples) from further seeking repeal of the law.[215] Moreover, the Supreme Court's invalidation of DOMA also took political pressure off other members of Congress, who might not have supported a law repealing DOMA, but also did not want to expend political capital protecting an (increasingly unpopular) statute.[216] Accordingly, there is good reason to believe that Congress, like the executive branch, would exercise its discretion to "invite the judiciary to resolve those political controversies that they cannot or would rather not address" themselves.[217]

Second, this restriction on congressional standing protects not only the judiciary but also individual liberty.[218] If Congress could represent the federal government in court (even if its role were limited to the defense of federal statutes), Congress would have the discretion

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for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583, 584 (2005) ("The establishment and maintenance of judicial review is a way of delegating some kinds of political decisions to a relatively politically insulated institution.").

[215] *See* Kathleen Hennessey, *Democrats File Amicus Brief Challenging Defense of Marriage Act*, L.A. TIMES, Nov. 3, 2011 (observing that 133 House Democrats filed briefs in the DOMA litigation arguing that the law was invalid). A group of Democratic Senators introduced a bill to repeal DOMA. *See* 157 Cong. Rec. S1754 (daily ed. Mar. 16, 2011) (statement of Sen. Patrick Leahy, D-Vt) (advocating repeal); 157 Cong. Rec. S1754 (daily ed. Mar. 16, 2011) (statement of Sen. Diane Feinstein, D-CA) (arguing that "under DOMA, the Federal government does not treat people equally or fairly").

[216] *See* KLARMAN, *supra* note 129, at 161 (noting that by March 2011, polls showed that Americans opposed DOMA 51-34% and increasingly supported same-sex marriage and asserting that because of this changing political landscape, "the overall Republican response to the administration's [non-defense of] DOMA was far more muted than it likely would have been just a couple of years earlier"); John Parkinson, *House Dems Tweet Jubilation, GOP Silent After DOMA Struck Down*, ABC NEWS (June 26, 2013), *available at* http://abcnews.go.com/blogs/politics/2013/06/house-dems-tweet-rxn-to-doma-gop-silent/ (describing the reaction of congressional Republicans to *Windsor* as "muted"); Jake Sherman and Ginger Gibson, *GOP leadership on DOMA: It's up to the states*, POLITICO (June 26, 2013) (although some Republicans criticized the *Windsor* decision, Republican leaders sought to end the "same-sex marriage fight … on Capitol Hill," because "the political dynamics of gay rights and gay marriage are shifting").

[217] Graber, *Nonmajoritarian Difficulty*, *supra* note 15, at 36.

[218] This analysis accords with those who emphasize that the separation of powers should be construed so as to protect individual liberty. *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1539-40 (1991); David A. Strauss, *Article III Courts and the Constitutional Structure*, 65 IND. L.J. 307, 309-10 (1990).

to pick and choose which laws it would defend and, more importantly, which cases it would appeal—and thus which individuals it would subject to further judicial process. For example, when the House of Representatives appointed counsel to defend DOMA, Speaker John Boehner made clear that the House would not intervene in or appeal every case.[219] "[E]ffectively defending [DOMA] does not require the House to intervene in every case, especially when doing so would be prohibitively expensive."[220]

As we have seen in the context of the executive branch, such discretion raises serious concerns about the arbitrary exercise of power. As Justice Jackson observed, when a government official "can choose his cases, it follows that he can choose" his opponents.[221] Therein lies a "most dangerous power": the power to "pick people" the official "thinks he should get," rather than the cases that need to be litigated.[222] Congress could decide to appeal (or not appeal) a lower court decision for nefarious reasons—because the opposing party is "unpopular with the predominant or governing group, … attached to the wrong political views, or personally obnoxious" to members of Congress.[223]

I am not suggesting that the House of Representatives was in fact motivated by any improper purpose in pursing the *Windsor* case rather than other appeals. The constitutional concern is not with the exercise of discretion in any particular case but with the risk created by (largely unchecked) discretion. Nor is it far-fetched to think that Congress might use broad discretionary power in improper ways. The facts underlying both *Lovett* and *Chadha* illustrate this point. In the 1940s, the House of Representatives was on a crusade to ferret out suspected communists from the federal government. One representative alleged that as many as thirty-nine "crackpot, radical bureaucrats" had infiltrated the government,[224] and after a hearing conducted only by the House, three were singled out for

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[219] *See* Chris Geidner, *U.S. Trustee Withdraws Appeal of Gay Couple's Bankruptcy Court DOMA Victory*, METRO WEEKLY, July 7, 2011, *available at* http://www.metroweekly.com/poliglot/2011/07/ us-trustee-withdraws-appeal-of.html (noting the House's decision not to appeal a bankruptcy decision invalidating DOMA).

[220] John Schwartz, *A California Bankruptcy Court Rejects U.S. Law Barring Same-Sex Marriage*, N.Y. TIMES, June 15, 2011, at A18.

[221] Jackson, *supra* note 54, at 5.

[222] *Id*.

[223] *Id.*

[224] 89 Cong. Rec. 479 (1943) (statement of Rep. Martin Dies, D-Tex.)

dismissal—"Goodwin B. Watson, William E. Dodd, … and Robert Morss Lovett."[225] In the 1970s, members of Congress were concerned that the executive branch was overly generous in granting suspensions of deportation and began to use the legislative veto more aggressively to overrule such suspensions.[226] In 1975, a House subcommittee concluded, "after reviewing 340 cases," that Jagdish Chadha and five other undocumented immigrants "did not meet [the] statutory requirements" for suspension of deportation.[227] To this day, it is unclear why the House singled out Chadha and the others.[228]

Although there may be good reasons to restrict executive discretion to enforce federal law or to intervene in defense of federal law, I believe there is little basis for transferring that same discretionary power to Congress. Indeed, the constitutional separation between legislative and executive powers seems to have been designed in large part to prevent Congress from exercising such discretionary power. As James Madison stated in *Federalist 47*, "[w]hen the legislative and executive powers are united in the same person or body, … there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner."[229]

V. Implications of the Limits on Executive and Legislative Standing

Executive and legislative standing both depend on and are substantially constrained by Article II and Article I. This analysis has important implications for constitutional scholarship, particularly the ongoing debate over the executive's "duty to defend" federal statutes, and for federal litigation on behalf of the United States.

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[225] Urgent Deficiency Appropriation Act of 1943, § 304, 57 Stat. 431, 450 (1943); *see* United States v. Lovett, 328 U.S. 303, 308 (1946) (noting "the House of Representatives' feeling" that "'subversives' were occupying influential positions in the Government").

[226] *See* CRAIG, *supra* note 114, at 20-21, 23-24 (observing that the number of legislative vetoes in this context increased considerably in the 1960s and 1970s).

[227] 121 Cong. Rec. 40800 (1975) (statement of Rep. Joshua Eilberg, D-Pa) ("It was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution did not meet [the] statutory requirements").

[228] *See* CRAIG, *supra* note 114, at 23-24 (observing that "no one then, or now, knows for sure what the reasoning was" behind the veto).

[229] THE FEDERALIST NO. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961).

A. The (Overlooked) Connection Between Defense and Execution

Many of the scholarly assumptions about executive and legislative standing depend upon the widespread view that the enforcement of federal statutes can be analytically separated from the defense of those statutes in court. Thus, even scholars who strongly dispute the scope of the executive's "duty to enforce" federal laws agree that there is no "duty to defend."[230] For example, although Professor Gressman insisted that "the President has no option under article II" but to faithfully execute *every* federal law, he also asserted that the executive always retains "the privilege of refusing to defend" a law in court.[231] Professor Dawn Johnsen advocates a less categorical approach to enforcement but asserts that the executive should enforce most federal laws, particularly if that is the only way to "create the opportunity for … Supreme Court" review.[232] Professor Johnsen, however, also views defense as different. "A decision not to defend a law raises vital questions of judgment, but not of potential constitutional transgression."[233] Finally, Professors Devins and Prakash, who argue that the executive has a duty *not* to enforce any law that the President views as unconstitutional, assert that (at a minimum) the executive branch has a duty not to defend such a law.[234] The executive's enforcement, they assert, will tee up the issue for judicial—and, ultimately, Supreme Court—review.[235] "[T]here simply is no duty to defend federal statutes the President believes are unconstitutional."[236]

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[230] My review of the literature revealed that only two scholars (in one article) have argued that the executive's duty to enforce also requires it to defend a law. *See supra* note 89.

[231] Gressman, *supra* note 86, at 382, 383 n. 17. Professor Gressman took a different position as a litigator. He served as counsel for the House of Representatives in *Chadha* and argued that both the Ninth Circuit and the Supreme Court lacked jurisdiction over the case. *See* Motion of Appellee United States House of Representatives to Dismiss, at 4, 25, INS v. Chadha, 462 U.S. 919 (1983); CRAIG, *supra* note 114, at 102-04.

[232] *See* Johnsen, *supra* note 13, at 10, 12, 51 (arguing against "routine nonenforcement").

[233] Dawn Johnsen, *The Obama Administration's Decision to Defend Constitutional Equality Rather than the Defense of Marriage Act*, 81 FORDHAM L. REV. 599, 610 (2012).

[234] *See* Devins & Prakash, *supra* note 10, at 509.

[235] *Id.* at 510, 572 ("If one of the benefits of the current regime is that the courts, particularly the Supreme Court, ultimately decide the constitutionality of legislation, that benefit is no less present in an enforce-but-not-defend regime.").

[236] *Id.* at 509; *see also* Waxman, *supra* note 13, at 1078 n.14 ("Whatever objections one might make under the Take Care Clause to a practice of nonenforcement, those concerns are virtually nonexistent in the nondefense context").

Although the executive may have some discretion to decline to defend a law when another litigant invokes federal jurisdiction,[237] the executive has no such discretion when it seeks to invoke the federal judicial Power. As I have demonstrated, the executive has standing to appear in court on behalf of the United States—to assert the government's interest in the enforcement and continued enforceability of its laws. But the executive lacks standing when it fails to protect that interest—when it refuses to defend a law and instead seeks the law's invalidation.

Notably, the executive has never asserted an alternative basis for executive standing in non-defense cases. The executive has consistently claimed that it has standing to assert the injury to the United States caused by the lower court's invalidation of a federal law. Thus, in *Lovett*, the Solicitor General sought Supreme Court review to determine "the liability of the United States" to the three employees.[238] In *Chadha*, the Solicitor General contended that the executive was "aggrieved," because the Ninth Circuit "order[ed] the Attorney General to 'cease and desist from taking any steps to deport'" Chadha.[239] And, in *Windsor*, the Solicitor General claimed that "[t]he United States may properly invoke this Court's jurisdiction because the judgments of the courts below preclude enforcement of a federal statute."[240] But if the executive invokes federal jurisdiction on behalf of the United States, then it has standing only to redress the injury to the United States. The executive must ask the appellate court to uphold the federal law. In short, in order to have standing to appeal, the executive has a duty to defend.

The same assumption that "enforcement" can be separated from "defense" has also contributed to the widespread view that Congress has standing to defend federal laws on behalf of the United States.[241] But the interest of the federal government is the continued

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[237] As discussed, I do not address this issue, which is separate from any question of executive standing. Notably, any such refusal to defend would not deprive the court of Article III jurisdiction. *See supra* Part III(B)(i).

[238] Petition for Writs of Certiorari to the Court of Claims, United States v. Lovett, 328 U.S. 303 (1946) (No. 809), *in* 44 44 LANDMARK BRIEFS, *supra* note 108, at 13.

[239] Reply Brief for the Appellant at 3, INS v. Chadha, 462 U.S. 919 (1983) (No. 80-1832).

[240] Brief for the United States on Jurisdictional Questions, at 6, 133 S. Ct. 2675 (2013) (No. 12–307) ("The United States thus satisfies … the Article III requirement that it be 'injured,' by a lower court's decision.").

[241] *See supra* notes 198-200 and accompanying text.

enforceability of the relevant law. Congress lacks the affirmative power to assert that interest in court and, accordingly, lacks Article III standing.

B. Practical Implications: Standing for the United States

My arguments, of course, raise an important question. I contend that the executive lacks standing to appeal when it refuses to defend a law, and that Congress may not appeal in the executive's stead. I will also assume, for present purposes, that Congress may not create an "independent counsel" with standing to appeal on behalf of the United States (although that is of course a debatable assumption).[242] At a minimum, there currently is no such counsel who might step in to defend a law in place of the executive. That seems to leave a void: Who, if anyone, will represent the interests of the United States, when its laws are struck down by a lower court?

I do not, however, believe that there would be such a void if the judiciary enforced these standing restrictions on the executive branch and the legislature. The executive would face immense political pressure to appeal and to defend federal laws on behalf of the United States. Both Congress and the President benefit from Supreme Court settlement of constitutional questions. That is in part because (as social scientists have shown) any nationwide resolution of a legal question serves an important coordinating function; politicians and citizens benefit from knowing the rules of the game—even when they disagree with the "rules" chosen by the Supreme Court.[243] The

[242] The Supreme Court upheld the use of an independent counsel to prosecute violations of federal law—albeit only after concluding that the counsel was subject to some oversight and control by members of the executive branch. *See* Morrison v. Olson, 487 U.S. 654, 660-61, 696 (1988). That decision suggests that Congress might create some type of independent counsel to defend federal laws. For now, I bracket that question. For present purposes, I simply note that Congress's power to delegate executive standing to represent the United States depends on not only Article III but also Article II.

[243] Various scholars have emphasized the coordinating function of judicial decisions. *See*, *e.g.*, ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 108 (2009) (asserting that "[i]f the constitution is vague …. [c]onstitutional review provides focal points for enforcement"); Geoffrey Garrett & Barry R. Weingast, *Ideas, Interests, and Institutions: Constructing the European Community's Internal Market*, *in* IDEAS AND FOREIGN POLICY 173, 197-98 (Judith Goldstein & Robert O. Keohane eds., 1993) (explaining how European courts help nations identify and monitor treaty violations). For discussions of the Supreme Court's settlement function, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1385 (1997) (emphasizing the

executive also benefits for a practical reason. It is both expensive and administratively cumbersome if some lower courts strike down a law, thereby prohibiting the executive from enforcing the law in certain parts of the country, while the executive continues to enforce the law elsewhere. Accordingly, the executive has a strong incentive to seek a nationally uniform ruling from the Supreme Court.

In theory, of course, the executive could itself provide that nationwide settlement. As discussed, the executive claims that it has the constitutional authority to refuse to enforce a federal law throughout the country, when the President concludes that the law is invalid. But such unilateral action would be politically costly.[244] Those political costs help explain why the Carter, Reagan, and Obama administrations opted to fight the legislative veto and DOMA in the courts, rather than refusing to execute those laws nationwide. Accordingly, I believe that the executive would generally seek a Supreme Court resolution of a constitutional question—even though it would have standing to do so only if it defended the law. Such an approach would enable the executive to obtain the benefits of a uniform settlement of federal law, without having to take political responsibility for providing that settlement itself.

Such constitutional defense would come at a cost. First, the executive could face criticism if it defended a law that was not only (in the President's view) unconstitutional but also unpopular. For example, the Obama administration drew the ire of many supporters, particularly in the gay community, when it defended DOMA during the President's first two years in office.[245] Second, in any case involving executive power (like *Lovett* and *Chadha*), the executive would presumably prefer to inform the Justices about the President's constitutional concerns—and thereby attempt to shape the future development of constitutional law in a way that favors the executive.[246] But standing restrictions are *designed* to prevent litigants from invoking federal jurisdiction for any reason. Private litigants

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Court's role "as the authoritative settler of constitutional meaning"); Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 943-44 (2013) (asserting that, within the judiciary, "only the Supreme Court can provide a definitive and nationally uniform resolution of federal law").

[244] For a discussion of the political costs, see *supra* note 164.

[245] *See* KLARMAN, *supra* note 129, at 141.

[246] The Solicitor General's views often hold great sway with the Justices. *See* Stephen S. Meinhold & Steven A. Shull, *Policy Congruence Between the President and the Solicitor General*, 51 POL. RES. Q. 527, 527 & n.1 (1998).

must demonstrate a concrete injury before they may raise their concerns in court. The executive must assert an injury to the United States—an injury to its interest in the enforcement and continued enforceability of federal law. The Take Care Clause may, of course, further limit executive standing. Under some theories, Article II *prohibits* the executive from protecting the enforcement of a law that the President deems invalid. But neither the Take Care Clause nor any other constitutional provision expands executive standing beyond its power and duty to represent the government. The executive may invoke the judicial Power only to defend federal laws, not to seek their invalidation.

Some scholars have suggested that the executive might not mount an adequate defense if the President views a law as unconstitutional.[247] But this argument overlooks the institutional culture and traditions of the Department of Justice. The DOJ often defends laws that the President deems invalid. For example, the George W. Bush administration successfully defended campaign finance legislation that, in the President's view, "present[ed] serious constitutional concerns."[248] DOJ lawyers must present the position of the government—whatever the President's (or their own personal) views about the issue.[249] The DOMA litigation illustrates this point. Some of the same attorneys who defended DOMA during the Bush and early Obama administrations continued to represent the government after the executive switched sides—and helped to prepare the government briefs urging the courts to strike down the law.[250]

Admittedly, the executive may decline to defend a federal law in at least some cases and thus, under the theory presented here, would lack standing to appeal. In that event, the federal government would have no representative in court to argue for the continued

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[247] *See* Devins & Prakash, *supra* note 10, at 572 (suggesting that the Solicitor General might offer "a tepid defense of a law"); Peter L. Strauss, *The President and Choices Not To Enforce*, 63 LAW & CONTEMP. PROBS. 107, 119-20 (2000) (doubting that the executive would defend a law "with enthusiasm").

[248] President George W. Bush, Statement on Signing the Bipartisan Campaign Reform Act of 2002 (*March 27, 2002*), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE W. BUSH 2002, at 503; McConnell v. Federal Election Com'n, 540 U.S. 93, 223-24 (2003). The government's victory in *McConnell* was, of course, partially reversed by Citizens United v. Federal Election Com'n, 558 U.S. 310 (2010).

[249] I base this assertion on my experience as a DOJ appellate litigator. *See also* Meltzer, *supra* note 10, at 1224-25 (making a similar observation).

[250] *See* United States v. Windsor, 133 S. Ct. 2675 (2013); Smelt v. County of Orange, 447 F.3d 673 (9th Cir. 2006) (together, showing attorney August Flentje stayed on the case).

enforceability of that law.[251] For several reasons, however, I do not believe that such a result would be troublesome, particularly if it were limited to only a handful of cases. First, if Supreme Court review is desirable, the issue could likely still reach the Court; if a lower court upheld the law, a private litigant could seek Supreme Court review. For example, some lower courts had upheld the legislative veto (and given the academic consensus in favor of the veto at that time, more were likely to do so).[252] The executive did not need to appeal Chadha's case to obtain a Supreme Court resolution of the legislative veto question; the executive subjected Chadha to further judicial process because it "viewed *Chadha* as a promising case for attacking the legislative veto."[253] Second, in the event that the executive refused to defend a law and *every* lower court agreed with that position and held the law unconstitutional, it is not clear why the matter would warrant Supreme Court review. In the DOMA litigation, once the Obama administration argued that the law violated equal protection principles, every lower federal court to consider the issue struck down the law.[254] Given that judicial consensus, the executive surely had a strong basis to stop enforcing DOMA nationwide—and thereby end the harm that the statute was causing individuals like Edith Windsor. Although the executive wanted the Supreme Court to provide that nationwide settlement, the executive could have (and arguably should have) provided that settlement itself.

Finally, judicial enforcement of the restrictions on executive and legislative standing would help protect individual liberty. A denial of executive standing to appeal would mean that a citizen would no longer be subject to a law that, in the view of a lower court, violated her constitutional rights. Thus, the employees in *Lovett* could have recouped their salaries sooner; Jagdish Chadha would have been spared the threat of deportation years earlier; and Edith Windsor would have enjoyed the fruits of a lower court victory that validated her commitment to her same-sex spouse. In each case, the executive's appeal, at a minimum, delayed (and could have overruled) those lower court victories against the government. Although the federal

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[251] Again, this argument assumes that Congress could not appoint an independent counsel to represent the United States. *See supra* note 242 and accompanying text.
[252] *See supra* note 167 and accompanying text.
[253] CRAIG, *supra* note 114, at 88.
[254] *See, e.g.*, Massachusetts v. U.S. Dept. of Health and Human Services, 682 F.3d 1, 17 (1st Cir. 2012); *supra* note 136 (noting the lower court rulings in *Windsor*).

government has an important interest in the continued enforceability of its laws, surely private citizens have an equally substantial interest in the vindication of their constitutional rights—sooner, rather than later.

VI. Conclusion

Executive and legislative standing cannot be determined by Article III alone but instead depend in large part on the provisions conferring power on those institutions—principally, Article II and Article I. This basic insight clarifies many questions about institutional standing. The Constitution does not grant Congress any power to represent the United States in federal court, and instead directs the executive branch to "take Care that the Laws be faithfully executed."[255] But the Take Care Clause does not give the executive branch an unqualified right to invoke the judicial Power. The executive has standing to assert the federal government's interests in the enforcement and continued enforceability of its laws. No provision of the Constitution, however, confers on the executive the power to invoke federal jurisdiction when it declines to defend a federal law. The executive lacks the affirmative power—and thus lacks Article III standing—to seek from the Supreme Court "a definitive verdict against [a] law's constitutionality."[256]

[255] U.S. CONST. art. II.
[256] Holder, Letter, *supra* note 20.