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THE DUTY TO DEFEND AND FEDERAL COURT STANDING: RESOLVING A COLLISION COURSE

*T. PATRICK CORDOVA**

In June 2013, the Supreme Court issued two highly anticipated rulings on same-sex marriage: *Hollingsworth v. Perry*[1] and *United States v. Windsor*.[2] The decisions generated a great deal of attention, most of which focused on their practical impact on lesbian, gay, bisexual, and transgender (LGBT) rights: *Hollingsworth* restored same-sex marriage in California while *Windsor* invalidated the section of the Defense of Marriage Act that defined marriage for purposes of federal law as that between one man and one woman.[3]

Yet *Windsor* and *Hollingsworth* represent far more than civil rights victories; they are "blockbusters in the underdeveloped field of [federal] appellate standing."[4] In particular, both cases confronted the impact on standing of a government lawyer's decision not to defend the constitutionality of a duly enacted law. In that regard, *Hollingsworth* stands for the proposition that when a state chooses not to defend the constitutionality of a successful ballot initiative, the initiative's proponents cannot demonstrate Article III standing as the state's agents.[5] *Windsor* holds that the United States' agreement with a plaintiff as to the unconstitutionality of a federal

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1. 133 S. Ct. 2652 (2013).

2. *Id.* at 2675.

3. *See, e.g.*, Andrew Cohen, *Prop 8 Ruling Gives California Same-Sex Marriage, and Other States an Opening*, ATLANTIC (June 26, 2013), http://www.theatlantic.com/national/archive/2013/06/prop-8-ruling-gives-california-same-sex-marriage-and-other-states-an-opening/277241; Cheryl Wetzstein, *Supreme Court Hands Double Win to Gay-Marriage Backers*, WASH. TIMES (June 26, 2013), http://www.washingtontimes.com/news/2013/jun/26/court-strikes-down-federal-anti-gay-marriage-law.

4. Ryan W. Scott, *Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases*, 89 IND. L.J. 67, 68 (2014).

5. *See Hollingsworth*, 133 S. Ct. at 2656.

statute does not necessarily deprive a case of Article III standing.[6] Yet *Windsor* identifies an additional hurdle in the non-defense scenario—that the justiciability concerns flowing from the lack of adversity may necessitate countervailing considerations, such as the presence of amici ready and able to defend the law, to satisfy prudential standing limitations.[7]

Refusing to defend duly enacted laws in federal court may, therefore, render appellate judicial review unavailable. Consequently, these holdings enable government lawyers to "nullify" laws with which they disagree.[8] In other words, the Supreme Court has created an "Attorney General Veto."[9] This state of affairs has left many (understandably) uneasy, as the ability of a government official to nullify the political preferences of constituents by preventing judicial review is contrary to judicial supremacy and undermines the separation of powers.[10] Because "with great power comes great responsibility,"[11] more must be expected of government lawyers faced with the decision whether to defend the constitutionality of their jurisdiction's laws. This Note offers a solution: the "reasonable probability" standard, which requires a government lawyer to defend a duly enacted law if there is a reasonable probability that, if he or she fails to do so, no other party would have standing to defend the law on appeal, such that the controversy would be deprived of judicial review.

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6. *Windsor*, 133 S. Ct. at 2685–86.

7. *Id.* at 2687.

8. Scott L. Kafker & David A. Russcol, *Standing at a Constitutional Divide: Redefining State and Federal Requirements for Initiatives After* Hollingsworth v. Perry, 71 WASH. & LEE L. REV. 229, 229 (2014); Kyle La Rose, Note, *The Injury-in-Fact Barrier to Initiative Proponent Standing: How Article III Might Prevent Federal Courts from Enforcing Direct Democracy*, 44 ARIZ. ST. L.J. 1717, 1731 (2012).

9. *See* Jeremy R. Girton, Note, *The Attorney General Veto*, 114 COLUM. L. REV. 1783, 1790–92 (2014); Orin Kerr, *Walter Dellinger on the Decision Not to Defend DOMA*, VOLOKH CONSPIRACY (Feb. 23, 2011, 11:45 PM), http://volokh.com/2011/02/23/walter-dellinger-on-the-decision-not-to-defend-doma.

10. *See* Paul Waldman, *Why the Prop. 8 Decision Should Make Liberals Uneasy*, AM. PROSPECT (June 27, 2013), http://prospect.org/article/why-prop-8-decision-should-make-liberals-uneasy; Linda Greenhouse, Opinion, *Standing and Delivering*, N.Y. TIMES: OPINIONATOR (Dec. 12, 2012, 9:00 PM), http://opinionator.blogs.nytimes.com/2012/12/12/standing-and-delivering; *Do State Attorneys General Have a Duty to Defend State Laws?*, FEDERALIST SOC'Y (Apr. 4, 2014), http://www.fed-soc.org/multimedia/detail/do-state-attorneys-general-have-a-duty-to-defend-state-laws-podcast (statement of Professor Neal E. Devins).

11. Withrow v. Williams, 507 U.S. 680, 716 (1993) (Scalia, J., concurring in part and dissenting in part); *see also* STAN LEE & STEVE DITKO, AMAZING FANTASY NO. 15: SPIDER-MAN! 11 (1962) ("[W]ith great power there must also come—great responsibility!").

Part I introduces the duty to defend by documenting its evolution at the federal level and by offering a brief overview of the diversity of standards and approaches to the duty at the state level. Part II tells the story of *Hollingsworth* and *Windsor*, from the enactment of the challenged laws to the Supreme Court's grants of certiorari. Part III reviews the doctrines of Article III standing and prudential standing and, applying these doctrines, explains *Hollingsworth* and *Windsor*'s jurisdictional holdings. Part IV details two nightmare scenarios made possible by *Hollingsworth* and *Windsor*; in each, the government lawyer is the only party with Article III and/or prudential standing to defend a duly enacted law in constitutional litigation—his or her failure to do so, then, precludes appellate judicial review, threatening judicial supremacy and allowing the Executive Branch lawyer to exercise an "Attorney General Veto." Part V introduces the "reasonable probability" standard as a solution to the Attorney General Veto problem; and concludes by considering and responding to likely objections to the standard.

I.
THE DUTY TO DEFEND

A. The Basic Framework

Article II of the Federal Constitution vests the Executive with the duty not only "to preserve, protect, and defend the Constitution as the supreme law of the land"[12] but also to "take Care that the Laws be faithfully executed."[13] The duty to defend the constitutionality of duly enacted laws is viewed as incidental to the duty to faithfully execute them.[14] A conflict arises between these two duties when the president—or any other government lawyer or officeholder sworn to uphold the Constitution[15]—is faced with defend-

12. Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 972 (1983) (citing U.S. CONST. art II, § 1, cl. 8; *id.* art. VI, cl. 2).

13. U.S. CONST. art. II, § 3.

14. *See* Note, *supra* note 13, at 970; Chrysanthe Gussis, Note, *The Constitution, the White House, and the Military HIV Ban: A New Threshold for Presidential Non-Defense of Statutes*, 30 U. MICH. J.L. REFORM 591, 601 (1997); Tony Mauro, *Duty to Defend? Not Always*, NAT'L L.J. (Oct. 25, 2010), http://www.nationallawjournal.com/id=1202473803028.

15. Virtually every officeholder in the United States is duty-bound to defend and uphold the Constitution by his or her oath of office. *See, e.g.*, CAL. CONST. art. XX, § 3 ("I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States. . . ."); 5 U.S.C. § 3331 (2012) (requiring elected and appointed officials to swear to support and defend the Constitution). Indeed, every lawyer is so bound by his or her oath of admission to the bar. *See, e.g.*,

ing a duly enacted law that he or she deems unconstitutional.[16] Whether the President (or government lawyer) should *sometimes*, *always*, or *never* defend such laws regardless of his or her legal conclusion[17] on the merits has been the subject of much debate.

While some commentators have vigorously contended that government lawyers should always[18] or never[19] defend laws they deem unconstitutional, a context-driven approach most "closely accords with the stated position and actual practice of the Executive Branch."[20] Indeed, "the Constitution is best interpreted not as providing a unitary answer across contexts, but as requiring the President to make sometimes difficult evaluations that depend on the specific statutory provision and the circumstances surrounding its enactment."[21] At the federal level, this circumstance-specific ap-

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TENN. SUP. CT. R. 6(4) ("I, _____, do solemnly swear or affirm that I will support the Constitution of the United States. . . .").

16. *See* John Ashcroft, Att'y Gen. of the United States, Address at the Federalist Society 20th Anniversary Gala (Nov. 14, 2002), http://www.justice.gov/archive/ag/speeches/2002/111402finalfederalistsociety.htm.

17. Unlike a law for which he or she has constitutional doubts, it is clear that a government lawyer may *not* fail to defend a law on the basis of a policy disagreement. *See The Respect for Marriage Act: Assessing the Impact of DOMA on American Families: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 315 (2011) (statement of Edward Whelan, President, Ethics & Public Policy Center) ("[I]t is essential to distinguish between laws that an administration opposes or disfavors on policy grounds only and laws that it regards as unconstitutional. When a President opposes a law on mere policy grounds, he is nonetheless obliged to defend it. . . ."); *see also* John E. Harris, *Holes in the Defense: Evaluating the North Carolina Attorney General's Duty to Defend and the Responses of Other Government Actors*, 92 N.C. L. REV. 2027, 2037 (2014) ("[O]ther considerations, such as policy or political preferences, should be left out of the analysis.").

18. *See, e.g.*, Curt Levey, Opinion, *An Attorney General's Job Is to Defend the Law—No Exceptions*, FOX NEWS (Feb. 25, 2014), http://www.foxnews.com/opinion/2014/02/25/attorney-general-job-is-to-defend-law-no-exceptions.html; Jay Sekulow, *A President Is Not Above the Law*, AM. CTR. FOR L. & JUST. (June 8, 2011), http://aclj.org/traditional-marriage/a-president-is-not-above-the-law.

19. *See, e.g.*, Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507 (2012); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008); Ilya Somin, *Do Presidents Have a Duty to Defend the Constitutionality of Laws They Believe to Be Unconstitutional?*, VOLOKH CONSPIRACY (Feb. 23, 2011, 11:45 PM), http://volokh.com/2011/02/23/do-presidents-have-a-duty-to-defend-the-constitutionality-of-laws-they-believe-to-be-unconstitutional.

20. Scott, *supra* note 4, at 85.

21. Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 L. & CONTEMP. PROBS. 7, 10 (2000); *see* Carlos A. Ball, *When May a President Refuse to Defend a Statute? The Obama Administration and DOMA*, 106 NW. U. L. REV. COLLOQUY 77, 78 (2011) ("In determining whether to defend a statute, the President and his advisers should reject categorical positions about his constitu-

proach manifests in two recognized exceptions to the duty to defend: when the law raises separation of powers concerns,[22] and when there is otherwise not a "reasonable basis" for defending the law's constitutionality.[23] A few examples will help to illuminate these categories.

B. Statutes Creating Separation of Powers Concerns

The first category of cases in which the failure to defend is considered acceptable is when the challenged law arguably violates the separation of powers. The Executive and Legislative branches may occasionally find themselves in dispute as to their relative power in the constitutional design.[24] When such a dispute occurs in the context of the validity of a statute, the President's lawyers defend the

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tional authority in this area and instead pursue a context-driven approach. . . ."); *see also* Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1212 (2012) (arguing that the duty to defend is not a "monolithic concept, a fixed obligation of the Executive Branch that always arises in exactly the same way and carries with it exactly the same responsibilities").

22. *See* Seth P. Waxman, Essay, *Defending Congress*, 79 N.C. L. REV. 1073, 1084 (2001). "The President may have more latitude to refuse to defend provisions that encroach on the President's constitutional powers than to refuse to defend statutes on other grounds because 'it is well understood that the best way to reach a constitutional equilibrium in this area is for each branch to vigorously enforce its own interests.'" Gussis, *supra* note 14, at 606 n.68 (quoting John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 389 n.44 (1993)).

23. *See* Scott, *supra* note 4, at 85. The standard embedded in this second exception has evolved over time. In the 1970s, the Ford administration spoke of a "patently unconstitutional" standard. *See Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 94th Cong. 6 (1976) (statement of Rex Lee, Assistant Att'y Gen. of the United States). In the 1980s, the Reagan administration adopted a "clearly unconstitutional" standard. *See* Press Release, William French Smith, Att'y Gen. of the United States (May 6, 1982) (on file with N.Y.U. Ann. Surv. Am L.) ("[T]he Department of Justice has the responsibility to defend acts of Congress unless they . . . are clearly unconstitutional. . . ."). In the 1990s, Clinton administration officials argued that non-defense was permissible when "no professionally respectable argument c[ould] be made in defense of [a] statute." Drew S. Days, III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 KY. L.J. 485, 499–500 n.71 (1994). In 2011, the Obama administration announced it would no longer defend the Defense of Marriage Act as no "reasonable argument c[ould] be made in [its] defense," while noting that "the Department does not consider every plausible argument to be a 'reasonable' one." Letter from Eric H. Holder, Jr., Att'y Gen. of the United States, to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

24. *See, e.g.*, Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015); *see also* Waxman, *supra* note 22, at 1084 (noting that such disputes are "not surprising").

"President's powers and prerogatives," which may be consistent with invalidating the statute.[25] Otherwise, if a statute, for example, called for Congress to assume power as Commander in Chief of the Army and Navy—almost certainly a violation of the Commander in Chief Clause[26]—the President would be forced to defend the unconstitutional cessation of his or her own powers. *United States v. Lovett* and *INS v. Chadha*, *infra*, are consistent with, albeit less extreme applications of, this principle.

United States v. Lovett[27] concerned the Urgent Deficiency Appropriations Act, which included a rider barring three named executive branch employees from receiving salaries.[28] President Roosevelt signed the Act "because it appropriate[d] funds which were essential to carry on the activities of almost every agency of Government," but refused to defend it, voicing concerns that it constituted an unconstitutional bill of attainder.[29] When the named employees challenged the provision in the Court of Claims,[30] the House of Representatives authorized special counsel to defend the statute as amicus curiae.[31] The Court of Claims struck down the statute as a bill of attainder, at which point the Solicitor General—despite the administration's substantive agreement with the court's decision—filed a certiorari petition "because of the Government's belief that important constitutional issues [we]re involved . . . and because *amici curiae*" had "no independent means of access to the

25. Waxman, *supra* note 22, at 1084.

26. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States. . . ." U.S. CONST. art. II, § 2.

27. 328 U.S. 303 (1946).

28. Urgent Deficiency Appropriations Act, ch. 218, § 304, 57 Stat. 431, 450 (1943). The concern of some Members of Congress that the named officials were communist sympathizers appears to have motivated the rider. *See* John Hart Ely, United States v. Lovett*: Litigating the Separation of Powers*, 10 HARV. C.R.-C.L. L. REV. 1, 2–4 (1975).

29. Franklin Delano Roosevelt, Statement of the President Condemning Rider Prohibiting Federal Employment of Three Named Individuals (Sept. 14, 1943), *reprinted in* 1943 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 385–86 (Samuel I. Rosenman ed., 1950). Indeed, a majority of U.S. Senators *also* believed that the statute was unconstitutional, yet voted for enactment "because it was a rider to a necessary appropriations bill and after several conferences the House refused to recede." *Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 94th Cong. 6 (1976) (statement of Rex Lee, Assistant Att'y Gen. of the United States). *See* 89 CONG. REC. 6694 (1943) (This "seems . . . to have been the impetuosity of the [House of Representatives] in passing this bill of attainder.") (statement of Sen. Alben W. Barkley).

30. *See* Lovett v. United States, 66 F. Supp. 142, 143–44 (Ct. Cl. 1945).

31. *Lovett*, 328 U.S. at 306.

Court."[32] The Supreme Court eventually upheld the judgment of the Court of Claims.[33] Notably, "no Justice suggested that the President had overstepped his authority, or even acted improperly, by refusing to defend the statute."[34] Akin to the Commander in Chief example *supra*, it would have been inappropriate, or odd, to require President Roosevelt to defend a statute that unconstitutionally granted power to Congress at the Executive Branch's expense.

Likely the most famous example of presidential non-defense is *INS v. Chadha*.[35] In the 1950s, Congress passed the Immigration and Nationality Act, which vested the Attorney General with the authority, subject to the veto of either House of Congress, to suspend deportation proceedings and grant permanent residence to aliens.[36] Pursuant to the Act, the Attorney General suspended deportation proceedings in the case of Jighar Chadha, at which point the House exercised its statutorily granted veto power, and the Immigration and Naturalization Service (INS)—having decided it lacked the authority to rule on the constitutionality of Congress' directive[37]—accordingly processed Chadha's deportation.[38] On appeal to the Ninth Circuit, the INS joined Chadha in arguing that the deportation order was invalid as the product of an unconstitutional legislative veto;[39] the House and Senate, on the other hand, each authorized intervention as amicus curiae to defend the statute.[40] The Ninth Circuit struck down the statute, handing the INS an adverse judgment with which it substantively agreed.[41] After the

32. Brief for Petitioner, United States v. Lovett, 328 U.S. 303 (1946) (No. 809), *in* 24 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 41, 53 (Philip B. Kurland & Gerhard Casper eds., 1975).

33. *See Lovett*, 328 U.S. at 315–16.

34. Gussis, *supra* note 15, at 607–08

35. 462 U.S. 919 (1983); Simon P. Hansen, Comment, *Whose Defense Is It Anyway? Redefining the Role of the Legislative Branch in the Defense of Federal Statutes*, 62 EMORY L.J. 1159, 1170 (2013).

36. Immigration and Nationality Act, ch. 477, § 244, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2012)). Prior to *Chadha*, "nearly every President refused to abide by such provisions on the ground that they were unconstitutional." Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 267 (1994) (citing E. Donald Elliott, INS v. Chadha*: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125).

37. Aziz Z. Huq, *Enforcing (but Not Defending) 'Unconstitutional' Laws*, 98 VA. L. REV. 1001, 1019 (2012).

38. *Chadha*, 462 U.S. at 924–27.

39. *See* Chadha v. INS, 634 F.2d 408, 411 (9th Cir. 1981).

40. *See* S. Res. 40, 97th Cong. (1981); H.R. Res. 49, 97th Cong. (1981).

41. *See Chadha*, 634 F.2d at 435–36.

INS appealed,[42] the Supreme Court upheld the Ninth Circuit's ruling invalidating the statute.[43] Again, the President acted consistently with his own prerogatives—seeking to maintain the power to suspend deportation hearings and grant permanent residence to aliens—rather than advocating for the diminution and transfer of his own power (in the form of the one-house veto provision) to Congress.

C. Statutes Lacking a "Reasonable Basis" for Defense

When a statute lacks a "reasonable basis" for defense, the relevant tension is no longer between the Executive and Legislative Branches, but instead, the Executive and Judicial Branches. The government lawyer "has an obligation to honor the important doctrine of stare decisis and a duty to respect the rulings of the [c]ourt[s]."[44] In other words, the government lawyer's continued defense of a statute in the face of clearly contrary precedent undermines the principles of stare decisis and judicial supremacy.[45] For example, immediately after the Supreme Court announced that same-sex couples were constitutionally entitled to the freedom to marry,[46] many state attorneys immediately ceased defending state laws that defined marriage as between one man and one woman.[47] *Metro Broadcasting, Inc. v. FCC*[48] and *United States v. Dickerson*,[49] major constitutional rulings in their own right, are illustrative of this category of cases.

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42. *See* Brief for Appellant-Respondent, INS v. Chadha, 462 U.S. 919 (1983) (Nos. 80–1832, 80–2170, 80–2171), 1982 WL 607268, at *6 (arguing that the statute "encroaches upon the powers of the Executive in administrating the Immigration and Nationality Act").

43. *Chadha*, 462 U.S. at 928.

44. Waxman, *supra* note 22, at 1085–86.

45. While it is true that government lawyers occasionally ask the courts to reconsider constitutional precedent, "[t]hese are isolated exceptions . . . that prove the general rule." *Id.* at 1087. One high-profile is example was Solicitor General Perlman's request of the Supreme Court to reconsider *Plessy v. Ferguson*, 163 U.S. 537 (1896) in 1950. *See* Brief for the United States at 12, 23–66, Henderson v. United States, 339 U.S. 816, 823 (1950) (No. 25).

46. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

47. *See* Nora Kelly & Brian Resnick, *What Are States with Same-Sex Marriage Bans Doing Now?*, ATLANTIC (June 26, 2015), http://www.theatlantic.com/politics/archive/2015/06/what-are-states-with-same-sex-marriage-bans-doing-now/448503 (cataloging responses of state governments in which same-sex marriage bans were in place at the time of *Obergefell*).

48. 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 226–27 (1995).

49. 530 U.S. 428 (2000).

In *Metro Broadcasting*, the Supreme Court was faced with deciding the constitutionality of the Federal Communication Commission's (FCC) minority preference policy for the awarding of broadcast licenses.[50] The H.W. Bush Justice Department—despite pleas from the FCC Chairman to the contrary[51]—refused to defend the statute, having independently concluded that the minority preferences were unconstitutional,[52] a position it took as amicus curiae supporting Metro Broadcasting.[53] While the Bush Administration concluded that the minority preferences violated the equal protection component of the Fifth Amendment, "few observers would have contended that no colorable argument for the statute's constitutionality could have been advanced."[54] What is particularly "odd" and "unique" about *Metro Broadcasting* is that the same president whose Justice Department refused to defend the Act had signed the legislation containing the provision in question, yet never publicly—in a signing statement or elsewhere—questioned its constitutionality.[55] The Supreme Court eventually held that the FCC's policies were not unconstitutional, a ruling it overturned five years later in *Adarand Constructors, Inc. v. Peña*.[56]

The next example of presidential non-defense is notable in that the law was repealed before any legal challenge necessitating defense could be mounted. In 1996, Congress passed a defense authorization bill containing a rider mandating the discharge of all

50. *Metro Broadcasting*, 497 U.S. at 552.

51. *See* Letter from Alfred C. Sikes, Chairman, Fed. Commc'ns, to Dick Thornburgh, Att'y Gen. of the United States (Jan 12, 1990) (on file with N.Y.U. ANN. SURV. AM. L.).

52. *See* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 295–96 (1994). The Solicitor General, however, permitted the FCC to independently represent itself before the Court. *See* Brief for Federal Communic'ns Comm'n, Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (No. 89–453), 1990 WL 513123.

53. *See* Brief for the United States as Amicus Curiae Supporting Petitioners, Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (No. 89–453), 1989 WL 1126975. Then Deputy Solicitor General John Roberts authored the brief, which would later be thought to "offer a rare glimpse" into his perspective on civil rights as a Supreme Court nominee. *See* Jo Becker, *Work on Rights Might Illuminate Roberts's Views*, WASH. POST (Sept. 8, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/07/AR2005090702394_pf.html.

54. Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1203 (2012).

55. Marty Lederman, *John Roberts and the SG's Refusal to Defend Federal Statutes in* Metro Broadcasting v. FCC, BALKINIZATION (Sept. 8, 2005), http://balkin.blogspot.com/2005/09/john-roberts-and-sgs-refusal-to-defend.html.

56. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 226–27 (1995), *overruling* Metro Broad., Inc., v. FCC, 497 U.S. 547, 552 (1990).

HIV-positive service members.[57] President Clinton—despite calling the legislation "blatantly discriminatory" and concluding that it was unconstitutional as failing to further any "legitimate governmental purpose"[58]—signed the bill because "he considered the $265 billion in funding for military defense programs vital to national security and troop morale."[59] President Clinton then gave his "full support" to efforts to legislatively repeal the provision,[60] and also instructed the Attorney General to decline to defend any legal challenge to the statute.[61] The Clinton Administration did, however, choose to enforce the ban, in part because doing so "w[ould] create the condition under which a lawsuit might appropriately be brought on behalf of the potentially affected military men and women."[62]

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57. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104–106, § 567, 110 Stat. 186, 328, *repealed by* Act of Apr. 26, 1996, Pub. L. No. 104–134, § 2707, 110 Stat. 1321, 1321–30.

58. Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 32 WEEKLY COMP. PRES. DOC., *supra* note 59, at 260–261. It is not clear precisely what standard the Clinton administration invoked in concluding that the statute was indefensible; the Office of Legal Counsel only orally advised the President on the matter. *See* Letter from Andrew Fois, Assistant Att'y Gen. of the United States, to Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary (Mar. 22, 1996) (on file with N.Y.U. ANN. SURV. AM. L.). Some have argued that the provision was not, contrary to the President's conclusion, violative of the Equal Protection Clause. *See, e.g.*, H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 U. CHI. L. REV. 365, 383 (1998) ("[I]t seems doubtful that a court would have concluded that 'there was no conceivable state of facts justifying Section 567's discrimination.") (internal quotation marks omitted)).

59. Gussis, *supra* note 14, at 597 (citing Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 32 WEEKLY COMP. PRES. DOC. 260, 260–61 (Feb. 10, 1996)). President Clinton had vetoed a previous version of the defense authorization bill, in part over concerns that the discharge provision was unconstitutional. *See* Message to the House of Representatives Returning Without Approval the National Defense Authorization Act for Fiscal Year 1996, 31 WEEKLY COMP. PRES. DOC. 2233, 2234 (Dec. 28, 1995).

60. Memorandum on Benefits for Military Personnel Subject to Involuntary Separation, 32 WEEKLY COMP. PRES. DOC. 228, 228 (Feb. 9, 1996). These efforts were eventually successful, as Congress voted to repeal the discharge provision only months later. *See* Philip Shenon, *Mandate that H.I.V. Troops Be Discharged Is Set for Repeal*, N.Y. TIMES (Apr. 25, 1996), http://www.nytimes.com/1996/04/25/us/mandate-that-hiv-troops-be-discharged-is-set-for-repeal.html.

61. Alison Mitchell, *President Finds a Way to Fight Mandate to Oust H.I.V. Troops*, N.Y. TIMES, Feb. 10, 1996, at A1.

62. White House Press Briefing by Counsel to the President Jack Quinn and Assistant Att'y Gen. Walter Dellinger (Feb. 9, 1996), http://clinton6.nara.gov/1996/02/1996-02-09-quinn-and-dellinger-briefing-on-hiv-provision.html (statement of Jack Quinn).

Finally, in 1998, the Fourth Circuit in *United States v. Dickerson* held that a provision of the Omnibus Crime Control and Safe Streets Act of 1968[63]—providing that confessions obtained in violation of *Miranda v. Arizona*[64] were nevertheless admissible evidence in a federal criminal trial—was constitutional.[65] On the criminal defendant's appeal to the Supreme Court, the Solicitor General refused to defend the statute,[66] and instead argued that the statute was unconstitutional, positing at oral argument that "section 3501 . . . cannot be reconciled with *Miranda*."[67] In other words, the Clinton Administration concluded that the challenged statute was inconsistent with existing Supreme Court precedent, namely, *Miranda*. The Justice Department's position, while not eliciting any mention from the Court, induced a congressional battle of the briefs; the House Bipartisan Legal Advisory Group[68] and ten Republican U.S. Senators[69] filed briefs in the Supreme Court urging affirmance of the Fourth Circuit's ruling,[70] while the House Democratic Leadership filed a brief in support of the petitioner, Mr. Dickerson.[71] In 2000, the Supreme Court reversed the Fourth Circuit, finding the statute unconstitutional.[72]

D. Duty to Defend in the States

How attorneys at the state level respond to the duty to defend is relevant to the topic of this Note because both prudential and

63. Pub. L. No. 90–351, § 701(a), 82 Stat. 210–11 (codified as amended at 18 U.S.C. §§ 3501–02 (2012) (invalidated by Dickerson v. United States, 530 U.S. 428 (2000)).

64. 384 U.S. 436 (1966).

65. 166 F.3d 667, 672 (4th Cir. 1998), *rev'd*, 530 U.S. 428 (2000).

66. *See* Brief for the United States, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99–5525), 2000 WL 141075.

67. Oral Argument at 20:21, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99–5525), https://www.oyez.org/cases/1999/99-5525.

68. *See* Brief for the Bipartisan Legal Advisory Group of the United States House of Representatives as Amicus Curiae Supporting Respondent, Dickerson v. United States, 538 U.S. 428 (2000) (No. 99–5525), 2000 WL 271995.

69. *See* Brief for Senator Orrin G. Hatch et al. as Amici Curiae Supporting Respondent, Dickerson v. United States, 538 U.S. 428 (2000) (No. 99–5525), 2000 WL 272002 at *1.

70. *See* Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering* Miranda, 149 U. PA. L. REV. 251, 265 n.70 (2000).

71. *See* Brief for the House Democratic Leadership as Amicus Curiae Supporting Petitioner, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99-5525), 2000 WL 126192.

72. *Dickerson*, 530 at 444.

Article III standing requirements apply whenever a state law is challenged in federal court.[73]

Despite the abundance of attention on the Federal Executive's duty to defend, "there is virtually no scholarly literature on the question of *state* executives and decisions not to defend *state* statutes following an independent determination of unconstitutionality."[74] The dearth of scholarly attention is a consequence of the great diversity in approaches to the duty to defend across states—itself a product of an "absence of clear law and the abundance of politics"[75]—making any broad conclusions difficult to reach.[76] This section will provide a brief glimpse into these varied approaches.

State government lawyers have offered a variety of standards that must be satisfied before declining to defend a duly enacted law: if the issue has been decided by a court of controlling jurisdiction;[77] if the law is "blatantly unconstitutional . . . as a matter of objective law";[78] if the law is "discriminatory";[79] if the Supreme Court "gives the final word";[80] or if "controlling precedent so overwhelmingly shows . . . that no good-faith argument can be made in

73. *See, e.g.*, Hollingsworth v. Perry, 133 S. Ct. 2652, 2667 (2013) ("[S]tanding in federal court is a question of federal law, not state law.").

74. Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 217 (2014).

75. Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 142 YALE L.J. 2100, 2103 (2015).

76. Shaw, *supra* note 74, at 217.

77. *Do State Attorneys General Have a Duty to Defend State Laws?*, *supra* note 10 (statement of John W. Suthers, Attorney General, State of Colorado); *see also* Michael A. Cardozo, *The Conflicting Ethical, Legal, and Public Policy Obligations of the Government's Chief Legal Officer,* 22 PROF. LAW., no. 3, 2014, at 4, 11 (Mr. Cardozo is the former Corporation Counsel for the City of New York.).

78. Video Recording, *Dereliction of Duty: State Attorneys General Failing to Defend Marriage Laws in Court*, HERITAGE FOUND. (Mar. 14, 2013), http://www.heritage.org/events/2014/03/dereliction-of-duty (statement of Ken Cuccinelli, Former Attorney General, Commonwealth of Virginia).

79. Juliet Eilperin, *Pa. Attorney General Says She Won't Defend State's Gay Marriage Ban*, WASH. POST (July 11, 2013), https://www.washingtonpost.com/news/post-politics/wp/2013/07/11/sources-pa-attorney-general-wont-defend-states-gay-marriage-ban/ (The Pennsylvania Attorney General "was obligated to drop the case 'because [she] endorse[s] equality and anti-discrimination laws.'").

80. Letter from J.B. Van Hollen, Att'y Gen., Dep't of Justice, State of Wis., to David D. Haynes, Editorial Page Editor, Milwaukee Journal Sentinel (June 17, 2014), http://www.thewheelerreport.com/wheeler_docs/files/0617doj.pdf.

its defense."[81] By contrast, some government lawyers have vowed to *always* defend duly enacted laws.[82]

States have also employed different approaches—designed to ensure that laws receive faithful legal defenses—when a government lawyer ordinarily charged with defending the relevant law chooses not to do so. Some states have turned to outside counsel,[83] while others have authorized the state legislature[84] or state agencies[85] to intervene to take on the defense.

Government lawyers have also sometimes chosen a middle ground—to argue both sides of an issue.[86] In *Susan B. Anthony List*

81. Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 IND. L.J. 513, 515 (2015) (Indiana Attorney General).

82. *E.g.*, IDAHO ATTORNEY GENERAL WASDEN WILL CONTINUE TO DEFEND STATE'S GAY MARRIAGE BAN (Boise State Public Radio 2014).

83. *See* Brett Barrouquere, *Kentucky Gay Marriage Appeal Will Be Handled by Ashland Firm Under $100K Contract*, COURIER-J. (Mar. 13, 2014), http://www.courier-journal.com/story/news/local/2014/03/13/kentucky-gay-marriage-appeal-will-be-handled-ashland-firm-under-100k-contract/6388039/; Laura Vozzella, *Cuccinelli Won't Defend School Take-Over Law Championed by McDonnell*, WASH. POST (Sept. 3, 2013), https://www.washingtonpost.com/local/virginia-politics/cuccinelli-wont-defend-school-take-over-law-championed-by-mcdonnell/2013/09/03/af8469b8-14fb-11e3-880b-7503237cc69d_story.html.

84. *See* Karcher v. May, 487 U.S. 72, 75 (1987) (New Jersey).

85. *See, e.g.*, Delchamps, Inc. v. Ala. State Milk Control Bd., 324 F. Supp. 117, 118 (M.D. Ala. 1971) (leaving the Alabama Milk Control Board to defend the constitutionality of the Alabama Milk Control Act after the Attorney General refused to do so); *Arkansas AG: Martin's Office to Defend Voter ID*, BAXTER BULL. (Sept. 24, 2014), http://www.baxterbulletin.com/story/news/local/2014/09/24/arkansas-ag-martins-office-defend-voter/16188715/ (leaving the defense of a voter identification law to the Arkansas Secretary of State); Salvador Rizzo, *Chris Christie's Administration Declines to Defend Gun Laws in Court Battle*, STAR LEDGER (Dec. 30, 2013), http://www.nj.com/politics/index.ssf/2013/12/chris_christies_administration_declines_to_defend_gun_laws_in_court_battle.html (recounting how after Governor Christie refused to defend certain gun laws in New Jersey state court, a local district attorney assumed responsibility for defending the laws); VIRGINIA'S NEW ATTORNEY GENERAL WILL NOT DEFEND GAY-MARRIAGE BAN (National Public Radio 2014) (noting that several Virginia county clerks had stepped in to defend the Commonwealth's same-sex marriage prohibition); Amy Worden, *Kane Won't Defend Controversial Gun Law*, PHILA. INQUIRER (Dec. 6, 2014), http://articles.philly.com/2014-12-06/news/56761407_1_kane-new-law-renee-martin ("The attorney general determined it would be more efficient and in the best interest of the commonwealth for the Office of General Counsel to handle this matter.").

86. This strategy was pioneered by then-Solicitor General Robert Bork, who, in *Buckley v. Valeo*, 424 U.S. 1 (1976), was faced with defending the constitutionality of parts of the Federal Election Campaign Act he deemed unconstitutional. *Rex E. Lee Conference on the Office of the Solicitor General of the United States*, 2003 BYU L. REV. 1, 32 (2003). Bork filed two briefs in the Supreme Court: one on behalf of the United States as a party vigorously defending the statute, and another on behalf of the United States as amicus curiae attacking the statute. *Id.* at 32–33.

v. Driehaus,[87] the Ohio Attorney General submitted a respondent's brief defending the statute at issue and, at oral argument, offered an "unadulterated defense."[88] However, because the Attorney General had concluded that the statute was likely unconstitutional, his office retained pro bono counsel to submit a second brief, as amicus curiae, to alert the Court to his concerns.[89]

II.
WINDSOR AND HOLLINGSWORTH

In June 2013, the Supreme Court issued rulings in two cases, both historic victories for the LGBT rights movement:[90] *United States v. Windsor*[91] and *Hollingsworth v. Perry*.[92] In addition to their impact on LGBT civil rights, these decisions have raised complex issues with regards to federal court standing in the context of the duty to defend.[93] This Part introduces these cases, from passage of the relevant laws to the Supreme Court's grants of certiorari.

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87. 134 S. Ct. 2334 (2014).

88. Marty Lederman, *Commentary: The Return of the Robert Bork "Dueling Briefs" Strategy:* Buckley v. Valeo*,* Susan B. Anthony List*, and Ohio Attorney General DeWine*, SCOTUSBLOG (Mar. 17, 2014, 11:42 AM), http://www.scotusblog.com/2014/03/commentary-the-return-of-the-robert-bork-dueling-briefs-strategy-buckley-v-valeo-susan-b-anthony-list-and-ohio-attorney-general-dewine/; Brief for Respondent, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014) (No. 13-193), 2014 WL 1260424.

89. *See* Brief for Ohio Attorney General Michael DeWine as Amicus Curiae Supporting Neither Party, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014) (No. 13-193), 2014 WL 880938. The Ohio Attorney General was later quoted as suggesting that the dual brief strategy "certainly is rare, and it should be rare." Adam Liptak, *In Ohio, a Law Bans Lying in Elections. Justices and Jesters Alike Get a Say*, N.Y. TIMES, Mar. 25, 2014, at A16.

90. These rulings are, of course, no longer the most historic American LGBT legal rights victories post-*Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (recognizing a constitutional right to same-sex marriage).

91. 133 S. Ct. 2675 (2013).

92. *Id.* at 2652.

93. *See, e.g.*, Ilya Somin, *Right, Left and the Standing Issues in the Gay Marriage Cases*, VOLOKH CONSPIRACY (June 26, 2013, 2:18 PM), http://volokh.com/2013/06/26/right-left-and-the-standing-issues-in-the-gay-marriage-cases.

A. United States v. Windsor

In 1996, Congress overwhelmingly[94] passed the Defense of Marriage Act (DOMA),[95] Section Three of which defined marriage for the purposes of federal law as "a legal union between one man and one woman as husband and wife."[96] A decade later, Edith Windsor and Thea Spyer, a lesbian couple from New York, were married.[97] When Spyer died in 2009, leaving her entire estate to Windsor,[98] Windsor sought to avail herself of the spousal deduction from federal estate taxes[99] but was unable to do so because, pursuant to DOMA, she was not married to Spyer within the meaning of the United States Code.[100] Windsor brought suit against the United States in federal district court seeking an estate tax refund by contending that DOMA violated the Fifth Amendment.[101]

While Windsor's lawsuit was pending, Attorney General Holder announced that the United States would no longer defend the constitutionality of DOMA in court.[102] The Obama administration had previously defended DOMA in litigation across the country. Unlike in those cases, however, *Windsor* was filed in a jurisdiction not sub-

94. DOMA passed in the House by a vote of 342 (yea) to 67 (nay) to 2 (present) to 22 (not voting), 142 CONG. REC. H7505–06 (daily ed. July 12, 1996), and in the Senate by a vote of 85 (yea) to 14 (nay) to 1 (not voting), 142 CONG. REC. S10129–01 (daily ed. Sept. 10, 1996).

95. Pub. L. No. 104–199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012) and 28 U.S.C. § 1738C (2012)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013). Congress appears to have been motivated to act in response to gay rights litigation in Hawaii. *See* H.R. REP. NO. 104–664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906. In 1990, three same-sex couples sought, yet were denied, marriage licenses pursuant to a state statute defining marriage as between one man and one woman. *See* Hetali Lodaya, *DOMA History: How Did Such a Discriminatory Law Ever Pass?*, POL'Y MIC (June 26, 2013), http://mic.com/articles/51207/doma-history-how-did-such-a-discriminatory-law-ever-pass#.OnRB8bD6a. The couples challenged the constitutionality of the statutory scheme, and in an historic ruling, the Hawaii Supreme Court held that excluding same sex couples from marriage constituted discrimination for which the State was required to demonstrate a compelling interest to survive constitutional attack. *See* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993).

96. 1 U.S.C. § 7 (2012).

97. *Windsor*, 133 S. Ct. at 2683.

98. *Id.*

99. *See* 26 U.S.C. § 2056(a) (2012).

100. *Windsor*, 133 S. Ct. at 2683.

101. *See* Complaint, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10-CV-8435), 2010 WL 5647015.

102. *See* Letter from Eric H. Holder, Jr., Att'y Gen., to Cong., *supra* note 24. The Attorney General is required, pursuant to 28 U.S.C. § 530D(a)(1)(B)(ii) (2012), to notify Congress in any instance in which he or she decides not to defend the constitutionality of a federal statute.

ject to circuit court precedent holding that classifications based on sexual orientation were subject only to rational basis review.[103] President Obama was thus free to conclude "that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny."[104] With that standard in mind, the President determined that no "reasonable arguments" could be made that DOMA was constitutional, such that the statute's defense, but not enforcement, would be abandoned.[105] The announcement was celebrated by the Left as a major civil rights victory.[106] Yet many conservative commentators lambasted the decision as an outrageous power grab.[107] Soon thereafter, the Biparti-

103. The applicable level of scrutiny for analyzing a legal classification under the Equal Protection Clause depends on the basis of the classification. *See generally* Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121 (1989). Suspect classifications (e.g., race, national origin) are subject to strict scrutiny; the law must be necessary to achieve a compelling government interest. Fisher v. Univ. of Tex. 136 S. Ct. 2198, 2208 (2016). Quasi-suspect classifications (e.g., sex) must survive intermediate scrutiny; the law must be substantially related to an important government interest. United States v. Virginia, 518 U.S. 515, 533 (1996). All other classifications, however, are "presumed to be valid" and will be sustained so long as they are "rationally related to a legitimate government interest." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985). By late 2012, eleven circuits (not including the Second)—and arguably, although not definitely, the Supreme Court, Romer v. Evans, 517 U.S. 620, 631–32 (1996)—had held that classifications on the basis of sexual orientation only warranted rational basis scrutiny. *E.g.*, Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989).

104. Letter from Eric H. Holder, Jr., Att'y Gen., to Cong., *supra* note 24.

105. *Id.*

106. *See, e.g.*, Press Release, Human Rights Campaign, Administration Drops Defense of Discriminatory DOMA Law (Feb. 23, 2011), http://www.hrc.org/press/administration-drops-defense-of-discriminatory-doma-law (praising the President's "move as [a] rare and extraordinary step for same-sex couples and their families"); Doug Mataconis, *Is It Proper for President Obama to Decline to Appeal the DOMA Cases?*, OUTSIDE THE BELTWAY (Feb. 25, 2011), http://www.outsidethebeltway.com/is-it-proper-for-president-obama-to-decline-to-appeal-the-doma-cases/ ("[I]t is clear that the Obama Administration's decision here was both appropriate and correct."); *Obama White House Backs Repeal of DOMA, Groups Respond*, WINDY CITY TIMES (July 20, 2011), http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=32863 (quoting then-Senator John Kerry as saying: "President Obama has made it clear his Administration will continue to lead as no Administration has done before in the effort to end discrimination against gay Americans.").

107. *See, e.g.*, Paul Bedard, *Newt Gingrich: Obama Could Be Impeached Over Gay Marriage Reversal*, U.S. NEWS & WORLD REP. (Feb. 25, 2011, 3:50 PM), http://www.usnews.com/news/blogs/washington-whispers/2011/02/25/newt-gingrich-obama-could-be-impeached-over-gay-marriage-reversal (quoting former House Speaker Newt Gingrich as encouraging the House of Representatives to impeach the Presi-

san Legal Advisory Group of the House of Representatives ("BLAG"), then consisting of three Republican and two Democrats,[108] voted to intervene to defend DOMA.[109]

A federal district court,[110] followed by a three-judge panel of the Second Circuit,[111] found DOMA unconstitutional, with the United States (and the BLAG) appealing each judgment. In late 2012, the Supreme Court granted certiorari, while directing the parties to brief and argue, in addition to the merits, "whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case; and whether [the BLAG] has Article III standing in this case."[112]

B. Hollingsworth v. Perry

In May 2008, the California Supreme Court ruled that the California Constitution guaranteed the right to marry to same-sex couples.[113] Six months later, a majority of California voters[114] ap-

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dent for his decision no longer to defend DOMA); Richard Epstein, *Dumb on DOMA*, RICOCHET (Feb. 24, 2011), https://ricochet.com/archives/dumb-on-doma/ ("[T]he DOJ's invocation of a history of discrimination against gays and lesbians and a call for a level of heightened scrutiny is not the way in which this question should be resolved."); Curt Levey, *Defense of Marriage, ObamaCare and Kagan*, COMMITTEE FOR JUST. BLOG (Feb. 23, 2011, 4:58 PM), http://committeeforjustice.blogspot.com/2011/02/doma-obamacare-and-kagan.html ("The President's refusal to defend DOMA, a federal statute enacted by overwhelming margins . . . flies in the face of Justice Department policy and principles of democratic government.").

108. Jennifer Steinhauer, *House Republicans Move to Uphold Marriage Act*, N.Y. TIMES, Mar. 5, 2011, at A16.

109. Molly K. Hopper, *House Leaders Vote to Intervene in DOMA Defense*, HILL (Mar. 9, 2011, 10:43 PM), http://thehill.com/blogs/blog-briefing-room/news/148521-house-leaders-vote-to-intervene-in-doma-defense. The district court granted intervention as an interested party, but denied the BLAG's motion to intervene by unconditional right because the Justice Department was already representing the United States. *See* Windsor v. United States, 797 F. Supp. 2d 320, 325 (S.D.N.Y. 2011).

110. Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

111. Windsor v. United States, 699 F.3d 169 (2d Cir. 2012).

112. United States v. Windsor, 133 S. Ct. 786, 787 (2012).

113. *In re* Marriage Cases, 183 P.3d 384, 453 (Cal. 2008). The ruling was "denounced" by conservative groups who immediately promised to support a state ballot initiative to amend the California Constitution to overrule the court. Adam Liptak, *California Supreme Court Overturns a Ban on Gay Marriage*, N.Y. TIMES (May 16, 2008), http://www.nytimes.com/2008/05/16/us/16marriage.html.

114. Proposition 8 passed with just over fifty-two percent of the vote. Tamara Audi, Justin Scheck & Christopher Lawton, *California Votes for Prop 8*, WALL ST. J. (Nov. 5, 2008), http://www.wsj.com/articles/SB122586056759900673.

proved Proposition 8, a statewide ballot initiative that overruled the California Supreme Court's ruling by amending the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."[115]

Soon after Proposition 8's passage, two same-sex couples filed suit in federal district court against various California officials responsible for enforcing the enacted marriage ban, challenging the amendment under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[116] The Governor,[117] the Attorney General,[118] and each of their successors[119] refused to defend, yet continued to enforce, the amendment. As a result, the original proponents of the ballot measure sought and were granted the right to intervene in the district court proceedings.[120] The district court thereafter found Proposition 8 unconstitutional.[121]

The ballot proponents alone[122] appealed to the Ninth Circuit, which in turn certified to the California Supreme Court the question whether the proponents "possess[ed] either a particularized interest in the initiative's validity or the authority to assert the state's interest in the initiative's validity."[123] The California Supreme Court addressed only the latter—whether the proponents

115. CAL. CONST. art. I, § 7.5.

116. *See* Complaint at 3, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-CV-02292-VRW), 2009 WL 1490740. A parallel proceeding challenged Proposition 8 in California state court on procedural grounds; in *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009), the California Supreme Court rejected that challenge, finding Proposition 8 to have been properly enacted under California law.

117. Maura Dolan, *Schwarzenegger Decides Against Defending Prop. 8 in Federal Court*, L.A. TIMES (June 18, 2009), http://articles.latimes.com/2009/jun/18/local/me-gay-marriage18.

118. Bob Egelko, *Brown Asks State High Court to Overturn Prop. 8*, S.F. CHRON. (Dec. 20, 2008), http://www.sfgate.com/news/article/Brown-asks-state-high-court-to-overturn-Prop-8-3179666.php.

119. Aaron Glantz, *Kamala Harris Won't Defend Prop. 8*, BAY CITIZEN (Dec. 2, 2010, 11:58 AM), https://www.baycitizen.org/blogs/pulse-of-the-bay/kamala-harris-wont-defend-prop-8. Jerry Brown, California Attorney General at the time the *Hollingsworth* case was filed, became Governor Schwarzenegger's successor, whereupon he continued to refuse to defend Proposition 8. *See* Chris Megerian, *Prop. 8 Battle Gives Jerry Brown Link to His Father*, L.A. TIMES (June 28, 2013), http://www.latimes.com/local/political/la-me-pc-california-jerry-brown-proposition-8-20130628-story.html.

120. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010).

121. *Id.* at 1004.

122. Perry v. Schwarzenegger, 628 F.3d 1191, 1195 (9th Cir. 2011) ("Proponents appealed the district court order, but the named officials did not.").

123. *Id.* at 1193.

had authority to assert the state's interest—and answered in the affirmative.[124] In turn, the Ninth Circuit concluded that the proponents had standing to appeal the lower court's judgment,[125] yet ultimately affirmed the lower court's decision on the merits.[126]

In 2012, the Supreme Court granted certiorari, while directing the parties to brief and argue "[w]hether [the ballot proponents] have standing under Article III, § 2, of the Constitution . . . ."[127]

III.
JURISDICTIONAL LIMITATIONS ON FEDERAL COURTS

In granting certiorari in *Hollingsworth* and in *Windsor*, the Supreme Court requested additional briefing on whether the parties seeking review had standing to do so.[128] This Part will provide an overview of two types of federal court standing[129]—Article III and prudential—and explain how the Court determined that the ballot proponents in *Hollingsworth* lacked Article III standing to defend Proposition 8, and how the United States, despite substantive agreement with plaintiff on the merits, satisfied both Article III and prudential standing requirements in *Windsor*.

A. Article III Standing

Article III of the Constitution limits the power of the federal judiciary to deciding only "Cases" or "Controversies."[130] "One essential aspect of this requirement is that any p[arty] invoking the

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

125. Perry v. Brown, 671 F.3d 1052, 1070–71 (9th Cir. 2012).

126. *Id.* at 1076, 1095.

127. Hollingsworth v. Perry, 133 S. Ct. 786 (2012) (granting certiorari).

128. *Id.*; United States v. Windsor, 133 S. Ct. 786, 787 (2012).

129. Article III and prudential standing only apply to the federal courts. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("[T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or . . . a federal statute."). Whether the failure to defend a duly enacted statute would deprive an action of *state* appellate jurisdiction is beyond the scope of this article. For a helpful discussion of standing in state courts, see John DiManno, *Beyond Taxpayers' Suits: Public Interest Standing in the States*, 41 CONN. L. REV. 639 (2008).

130. The "cases" or "controversies" limitation is a "bedrock requirement," Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982), and the "mo[st] fundamental" principle "to the judiciary's proper role in our system of government." Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976).

power of a federal court must demonstrate standing to do so."[131] Article III standing "serves to identify those disputes which are appropriately resolved through the judicial process,"[132] which is thereby prevented "from being used to usurp the powers of the political branches."[133] Standing must persist "through all stages of litigation"[134]—it must be satisfied not only by plaintiffs appearing in courts of first instance, but also by appellants seeking review.[135]

Demonstrating Article III standing requires, among other things,[136] the party seeking relief "to have suffered an injury in fact that is both (a) concrete and particularized and (b) actual or imminent"[137] as opposed to a mere "generalized grievance."[138] Drawing a meaningful distinction between injuries that are judicially cognizable within this framework and those that are not has proven difficult.[139] For example, the invasion of an individual's aesthetic desire to view species in the wild is judicially cognizable,[140] while "generalized harm to the forest or the environment" is not.[141] A taxpayer's

131. Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013) (citing U.S. CONST. art III, § 2). Other Article III, Section 2 doctrines include ripeness, mootness, "and the restriction on hearing political questions." F. Andrew Hessick, *Standing in Diversity*, 65 ALA. L. REV. 417, 419 n.7 (2013) (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006)).

132. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

133. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013). Some have argued that current standing doctrines sometime fail to serve this purpose. *See, e.g.*, Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 297–300 (1988).

134. Already, L.L.C. v. Nike, Inc., 133 S. Ct. 721, 726 (2013).

135. Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997) (citing Diamond v. Charles, 476 U.S. 54, 56 (1986)). "The standing to appeal requirements closely parallel those the Court has identified for standing to sue." Joan Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts*, 38 GA. L. REV. 813, 840 (2004).

136. In addition to the requirement of establishing a judicially cognizable injury, the party seeking a judicial determination (i.e., a plaintiff or appellant) must demonstrate that the injury is caused by, or is fairly traceable to, the defendant (or appellee), and that a favorable judicial decision will redress that injury. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180–81 (2000).

137. U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 65 (D.D.C. 2015) (citing United States v. Windsor, 133 S. Ct. 2675, 2685–86 (2013)).

138. United States v. Richardson, 418 U.S. 166, 176–77 (1974).

139. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with consistency in all of the various cases decided by this Court which have discussed it.").

140. Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

141. Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009).

injury from the government's expenditures on textbooks for parochial schools is judicially cognizable,[142] while an American citizen's lack of information about CIA activities is not.[143]

Standing was satisfied at the trial court level in both the *Hollingsworth* and *Windsor* cases as, among other things, both sets of plaintiffs suffered from judicially cognizable injuries: Perry had been denied the official sanction of marriage;[144] Windsor was required to pay estate taxes.[145]

In *Hollingsworth*, the officeholders responsible for enforcing the enacted proposition chose not to appeal the district court's ruling. The parties seeking appellate review, and thus bearing the burden of establishing standing at that juncture,[146] were the sponsors of the ballot initiative. Those sponsors attempted to establish standing by "asserting both their own independent interest in the law's validity and the state's enforceability interest."[147]

As to their "independent interest," the Court ruled that the proponents' "only interest was to vindicate the constitutional validity of a generally applicable California law."[148] In other words, the proponents' only injury was that of any other Californian who wished for his or her state's laws to be upheld, a merely generalized injury.

Thus, the ballot proponents argued in the alternative that they were California's agents, and thereby able to derive standing from the state's injury of having suffered a ruling that its law was unconstitutional.[149] Because states have a cognizable interest in the continued enforceability of their laws, they suffer an injury worthy of

142. Flast v. Cohen, 392 U.S. 83, 85, 102–03, 106 (1968).

143. *Richardson*, 418 U.S. at 176–77.

144. Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013). There were four parties in *Hollingsworth*—two same-sex couples—but "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 52 n.2 (2006) (citing Forum for Acad. & Institutional Rights, Inc. v. Rumsfeld, 390 F.3d 219, 228 n.7 (3d Cir. 2004)).

145. United States v. Windsor, 133 S. Ct. 2675, 2685 (2013). "[A] taxpayer has standing to challenge the collection of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer." Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 599 (2007) (emphasis omitted).

146. *See* FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990) (quoting McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936) and Warth v. Seldin, 422 U.S. 490, 518 (1975)).

147. Girton, *supra* note 9, at 1790.

148. *Hollingsworth*, 133 S. Ct. at 2662.

149. *Id.* at 2663.

standing upon a judicial declaration that a state law is unconstitutional.[150] Further, states may designate agents to represent that interest in federal court.[151] The Supreme Court disagreed with the ballot proponents; while states can designate officials to represent their interests on appeal, the Court had never, and would not, recognize the standing of a *private* party to do so.[152] The Court noted that, unlike state officials, the ballot proponents were missing "an essential element of agency[:] . . . the principal's right to control the agent's actions."[153] And unlike state officials, the ballot proponents were unelected; there were no provisions for their removal, nor were they accountable to anyone (i.e., the state's constituency) for the legal arguments they chose to assert.[154]

As the appellants were unable to establish Article III standing on either theory, the Supreme Court, and the Ninth Circuit, did not have jurisdiction to consider the case, and the appeal was dismissed.[155]

In *Windsor*, however, the United States was able to demonstrate Article III standing, because the rulings from which it appealed imposed a concrete injury—the requirement of issuing a refund to Windsor.[156] The Court likened the United States' injury in *Windsor* to the INS's in *Chadha*, *supra*: "the INS was sufficiently aggrieved by the Court of Appeals decision" because it was thereby "prohibit[ed] . . . from taking action it otherwise would take."[157] In other words, because the INS had lost in the Ninth Circuit, it was precluded from deporting Chadha, which it otherwise would have done. Similarly, the United States was, by nature of the adverse ruling, prohibited from taking the action of denying Windsor's estate tax refund claim, which *it* otherwise would have done. In the *Windsor* Court's view, this was sufficient to "preserve a justiciable dispute."[158]

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150. *See* Maine v. Taylor, 477 U.S. 131, 137 (1986).

151. Poindexter v. Greenhow, 114 U.S. 270, 288 (1885).

152. *See Hollingsworth*, 133 S. Ct. at 2662–68.

153. *Id.* at 2666 (quoting 1 RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. f (2005)).

154. *Id.* at 2666–67.

155. *Id.* at 2668.

156. *See* United States v. Windsor, 133 S. Ct. 2675, 2686 (2013) ("That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not.").

157. *Id.* (internal quotation marks omitted) (quoting INS v. Chadha, 462 U.S. 919, 930 (1983)).

158. *See id.*

B. Prudential Standing

Prudential standing is a doctrine of "flexible 'rule[s] . . . of federal appellate practice.'"[159] Without these limitations, "courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."[160] Among other things,[161] prudential standing demands a "real, earnest, and vital controversy" as opposed to a "friendly, non-adversary, proceeding" which may arise when "a party beaten in the legislature [attempts] to transfer to the courts an inquiry as to the constitutionality of the legislative act."[162] Importantly, "[u]nlike Article III requirements . . . the relevant prudential factors that [may] counsel against hearing [a] case are subject to 'countervailing considerations [that] may outweigh the concerns underlying the usual reluctance to exert judicial power.'"[163]

In *Windsor*, the risk of a "friendly, non-adversary, proceeding" created by "[t]he Executive's agreement with Windsor's legal argument" was outweighed by several of these considerations.[164] First, "adversarial presentation of the issues [wa]s assured by the participation of *amici curiae* [here, the BLAG] prepared to defend with vigor the constitutionality of the legislative act."[165] Second, extensive litigation would have ensued—"in cases involving the whole of

159. *Id.* (quoting Deposit Guar. Nat. Bank v. Roper, 445 U.S. 326, 333 (1980)).

160. Warth v. Seldin, 422 U.S. 490, 500 (1975) (citing Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 222 (1974)).

161. Other prudential standing doctrines include the limitation on third-party standing, *see, e.g.*, Craig v. Boren, 429 U.S. 190, 194–97 (1976), and the zone of interest test, *see, e.g.*, Bennett v. Spear, 520 U.S. 154, 162–63 (1997).

162. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (internal quotation marks omitted) (quoting Chi. & Grand Truck Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892)).

163. United States v. Windsor, 133 S. Ct. 2675, 2687 (2013) (quoting Warth v. Seldin, 422 U.S. 490, 500–01 (1975)).

164. That the United States satisfied both Article III and prudential standing meant "the Court [did not] need [to] decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority." *Id.* at 2688. Justice Alito, in dissent, did reach this question, and answered in the affirmative. *See id.* at 2712 (Alito, J., dissenting). Justice Scalia also reached this question in dissent, but answered in the negative. *See id.* at 2703–05 (Scalia, J., dissenting). The *Hollingsworth* Court, by contrast, never reached prudential standing; there was no reason to do so, as the case had already been found to lack Article III standing.

165. *Id.* at 2687.

DOMA's sweep involving over 1,000 federal statutes and a myriad of federal regulations"—had the Court chosen not to rule on the merits, meaning that the "[r]ights and privileges of hundreds of thousands of persons would be adversely affected, pending a case in which all prudential concerns about justiciability are absent."[166]

With both Article III and prudential standing satisfied, the court had jurisdiction to consider the case, and proceeded to rule on the merits of Edie Windsor's claim.[167]

IV.
THE PROBLEMATIC CONSEQUENCES OF *WINDSOR* AND *PERRY*'S HOLDINGS: THE NIGHTMARE SCENARIO

Windsor and *Hollingsworth*, through their developments of the Article III and prudential standing doctrines, created the possibility for government lawyers, by choosing not to defend the constitutionality of their jurisdiction's laws, to deprive federal appellate courts of the power to engage in judicial review.

This Part proceeds first to examine how this phenomenon might manifest, the so-called "Nightmare Scenario." It then explains how depriving federal appellate courts of judicial review threatens judicial supremacy, an important element of the constitutional design. Finally, this Part considers the practical and legal challenges that would prevent the legislature from defending the challenged law when the Executive branch fails to do so.

A. The Nightmare Scenario[168]

i. Post-*Hollingsworth*

Consider this realistic hypothetical: It is 2016, and voters in the State of Florida,[169] fed up with politics as usual, propose and enact a ballot initiative to amend the Florida Constitution to impose back-

166. *Id.* at 2688.

167. *See id.* at 2689.

168. The nightmare scenario of federal courts being deprived of jurisdiction over the question of a law's constitutionality has gained both popular and scholarly attention. *E.g.*, Cardozo, *supra* note 77, at 30; Erwin Chemerinsky, Opinion, *Prop 8. Deserved a Defense*, L.A. TIMES (June 28, 2013), http://articles.latimes.com/2013/jun/28/opinion/la-oe-chemerinsky-proposition-8-initiatives-20130628; Bob Egelko, *Did Toppling Prop. 8 Undercut Initiative Process?*, S.F. GATE. (June 30, 2013, 12:29 PM), http://www.sfgate.com/politics/article/Did-toppling-Prop-8-undercut-initiative-process-4630002.php.

169. Florida is one of twenty-four states with an initiative process. *See* M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC 11–12 (2003).

ground checks on all firearm purchases. A gun-show vendor files suit in federal district court in Miami, challenging the constitutionality of the initiative on Second Amendment grounds.[170] The Governor[171] and Attorney General,[172] both ardent supporters of the Second Amendment, only nominally defend the law. When the district court rules against the initiative, those same officials decline to appeal. After *Hollingsworth*, what can be done to ensure a single district court cannot overrule the will of millions of Florida voters without further judicial review?

ii. Post-*Windsor*

Also in 2016, Congress enacts legislation mandating background checks for gun sales in Washington, DC.[173] A gun-show vendor challenges the constitutionality of the statute in DC District Court and wins.[174] By the time the District Court strikes down the legislation, a new president has been elected—one who believes background checks violate the Constitution. The new president's administration continues to enforce the legislation. However, upon appeal to the D.C. Circuit, the President's administration joins the plaintiff in challenging the law. Given the much narrower sweep of the legislation in comparison to DOMA, the "countervailing" considerations may be insufficient, unlike in *Windsor*, to overcome the prudential standing requirement of adverseness.[175] The D.C. Cir-

170. The gun-show vendor would almost certainly have a judicially cognizable injury to satisfy the standing inquiry—the requirement of background checks would decrease business (the whole point of the measure) and may cost him or her time and administrative resources.

171. *See* Marc Caputo, *NRA Endorses Rick Scott*, TAMPA BAY TIMES (Sept. 18, 2014, 9:38 AM), http://www.tampabay.com/blogs/the-buzz-florida-politics/nra-endorses-rick-scott/2198286 ("Governor Scott rejects expanded licensing and registration schemes, and so-called 'universal background checks.'").

172. *See* Marion P. Hammer, *Florida Attorney General Pam Bondi Is a True Second Amendment Supporter*, NAT'L RIFLE ASS'N INST. FOR LEGIS. ACTION (Jan. 30, 2013), https://www.nraila.org/articles/20130130/alert-florida-attorney-general-pam-bondi-is-a-true-second-amendment-supporter.

173. Pursuant to the District Clause of the Federal Constitution, Article I, Section 8, Clause 17, Congress has "continuing plenary power over all subjects affecting the District." Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 168 (1991).

174. Washington, D.C. is no stranger to challenges to the constitutionality of gun rights restrictions. *See* District of Columbia v. Heller, 554 U.S. 570 (2008).

175. The other countervailing factor—amici willing and able to defend the law—is probably omnipresent; the Supreme Court has a practice of appointing amici to argue positions that no party to the case supports. *See* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 466 (2009). *See also* Brian P. Goldman, Note,

cuit, not to mention the Supreme Court, is deprived of standing to hear the appeal, which is an "untenable" state of affairs.[176]

Having two different presidents is by no means a necessary condition for this particular result. Allowing a single federal district court to decide the constitutionality of a federal statute could be achieved, for example, if a president refused to defend the statute after having signed it himself or herself (perhaps having voiced constitutional objections in a signing statement thereto)[177] or even if the president *never* signs the law, with its enactment occurring through the override of a presidential veto.[178]

iii. Judicial Supremacy

What is it about these scenarios that is threatening, disturbing, or legally wrong? The answer is that depriving the judiciary of the last word on constitutional interpretation is directly contrary to a concept fundamental to the separation of powers: judicial supremacy.

The principle of judicial supremacy provides "that the executive must treat the courts' constitutional interpretations as authoritative" and "call[s] for the political branches to conform their conduct to the rules, including the reasoning, of judicial decisions, particularly those of the Supreme Court."[179] In other words, when a law "is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.' "[180]

Judicial supremacy does not altogether prohibit the states or federal political branches from making constitutional determina-

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Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?, 63 STAN. L. REV. 907 (2011).

176. *Cf.* Glenn Kessler & Ed O'Keefe, *Administration Is Expected to Appeal 'Don't Ask' Injunction*, WASH. POST (Oct. 14, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/10/13/AR2010101307092.html (statement of Professor Walter Dellinger describing the "untenable" result of one district judge setting the law in a case that has not reached the Supreme Court).

177. The practice of challenging the constitutionality of a duly enacted statute through a signing statement is an increasingly popular, yet exceedingly controversial, practice. *See* Charlie Savage, *Bush Challenges Hundreds of Laws*, BOS. GLOBE (Apr. 30, 2006), http://www.boston.com/news/nation/washington/articles/2006/04/30/bush_challenges_hundreds_of_laws.

178. U.S. CONST. art. 1, § 7, cl. 3.

179. Meltzer, *supra* note 54, at 1188.

180. Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); *accord* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

tions.[181] To the contrary, "the process of constitutional interpretation *benefits* from the thoughtful participation of the elected representatives of the people in the public dialogue about the meaning of the Constitution."[182] Thus, it is well accepted that the federal executive may, for example, engage in a variety of interpretative tasks,[183] such as reviewing the constitutionality of proposed litigation,[184] or considering the constitutional challenges posed by national security actions.[185] And when Congress enacts legislation, "it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."[186]

In fact, not only are states and the other federal branches permitted to engage in constitutional interpretation, they may in some instances do so exclusively.[187] But in those situations in which the "judiciary is limited, properly, in its ability to enforce the Constitution . . . by Article III's requirements of jurisdiction and jus-

181. *See* Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1694–97 (2011) (*citing* John Marshall, Speech Delivered in the House of Representatives of the United States, on the Resolutions of the Hon. Edward Livingston, Relative to Thomas Nash, Alias Jonathan Robbins (1800), *in* 4 THE PAPERS OF JOHN MARSHALL VOLUME IV: CORRESPONDENCE AND PAPERS, JANUARY 1799-OCTOBER 1800, at 103 (Charles T. Cullen & Leslie Tobias eds, 1984)) ("A variety of legal questions must present themselves in the performance of every part of executive duty, but these questions are not therefore to be decided in court.").

182. Johnsen, *supra* note 21, at 11-12.

183. Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1268 (1996). The executive is to carry out its interpretive responsibility with "great deference" to, "and respect for," Congress. Memorandum from Walter Dellinger, Assistant Att'y Gen. of the United States, to Abner J. Mikva, White House Counsel (Nov. 2, 1994). In a similar vein, "[t]he Solicitor General's willingness to presume and defend the constitutionality of Acts of Congress is an assertion of due regard for the constitutional functions of the Legislature as a co-equal branch of government." Dalena Marcott, Note, *The Duty to Defend: What Is in the Best Interests of the World's Most Powerful Client*, 92 GEO. L.J. 1309, 1320 (2004).

184. *See* Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 711–12 (2005).

185. *See, e.g.*, Charlie Savage, *How 4 Federal Lawyers Paved the Way to Kill Osama bin Laden*, N.Y. TIMES (Oct. 28, 2015), https://www.nytimes.com/2015/10/29/us/politics/obama-legal-authorization-osama-bin-laden-raid.html?_r=0 (describing how executive branch lawyers confronted constitutional challenges in justifying the campaign to assassinate Osama bin Laden).

186. City of Boerne v. Flores, 521 U.S. 507, 535 (1997).

187. *See* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451 (2010) (noting that the opinions of the Office of Legal Counsel in the Department of Justice often represent the final word in constitutional interpretation of executive action because the issues are "unlikely ever to come before a court in justiciable form").

ticiability" the non-judicial branch's "obligation to ensure, to the full extent of its ability, that constitutional requirements are respected is heightened."[188] If, instead, "executive officers were to adopt a policy of ignoring or attacking Acts of Congress whenever they believed them to be in conflict with the provisions of the Constitution, their conduct in office could jeopardize the equilibrium established within our constitutional system."[189]

It is perfectly suitable, then, for executive actors to exercise constitutional interpretation when the federal courts have been constitutionally or prudentially precluded from doing so. But those actors must not be the *source* of the limitations on the federal courts' role to undertake judicial review. In other words, those responsible for defending duly enacted laws would be abusing their duty to engage in constitutional interpretation if doing so were a means, based upon the law as voiced in *Windsor* and in *Hollingsworth*, of precluding judicial review.[190]

This threat to judicial supremacy has not gone unnoticed. As the Court in *Windsor* observed:

> [I]f the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's.[191]

Similarly, the dissenters in *Hollingsworth* understood that the Court's decision would undermine the ballot initiative process, and prevent the judiciary from asserting its proper role, when necessary, to restrain the political branches:

> The doctrine [of justiciability] is meant to ensure that courts are responsible and constrained in their power, but the Court's

188. The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 180 (1996).

189. The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 56 (1980).

190. While not the subject of this paper, the challenges to judicial supremacy of the executive's decision not to *enforce* a law he or she deems unconstitutional are even more consequential; without enforcement, a case might not be brought even in the first instance, as few parties will be injured by a dormant statute. *See* Parker Rider-Longmaid, Comment, *Take Care That the Laws Be Faithfully Litigated*, 161 U. PA. L. REV. 291, 307 (2012) (explaining that a President's decision to enforce but not defend a law invites judicial action while preventing facial challenges for lack of a case or controversy).

191. United States v. Windsor, 133 S. Ct. 2675, 2688 (2013).

> opinion today means that a single district court can make a decision with far-reaching effects that cannot be reviewed.[192]

B. Can the Legislature Be the Savior?

The nightmare scenario seems nightmarish, but isn't there a *deus ex machina* lying in wait? If the executive branch lawyer responsible for defending the law chooses not to do so, may the legislature (or legislators) step in, and in so doing, satisfy the Article III and prudential standing requirements necessary to keep the legal challenge alive? There are three players who could potentially come to a law's aid: Congress, Members of Congress, and state legislatures.

i. Congress

Several commentators have, without explanation, simply assumed that Congress would have independent standing to defend the constitutionality of a duly-enacted law.[193] The strongest argument for that conclusion comes from *INS v. Chadha*, in which the Court wrote: "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."[194] Yet this statement must be read in context.

First, Congress was merely an intervenor in *Chadha*, defending the statute in question alongside the INS. The INS was able to demonstrate Article III standing because it "would have deported

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192. Hollingsworth v. Perry, 133 S. Ct. 2652, 2674 (2013) (Kennedy, J., dissenting).

193. *See* Jube Shiver, Jr., *Justice Dept. Won't Defend 'Must Carry' Cable Rule*, L.A. TIMES (Nov. 6, 1992), http://articles.latimes.com/print/1992-11-06/business/fi-1371_1_cable-operators; Gerard V. Bradley, *Obama's Unreasonable Abandonment of DOMA*, PUB. DISCOURSE (Feb. 28, 2011), http://www.thepublicdiscourse.com/2011/02/2804/; William C. Duncan, *Obama Tells DOJ to Take a Dive on DOMA Cases*, NAT'L REV. (Feb. 23, 2011, 1:19 PM), http://www.nationalreview.com/corner/260500/obama-tells-doj-take-dive-doma-cases-william-c-duncan; Maggie Gallagher, *President Obama on DOMA*, NAT'L REV. (Feb. 23, 2011, 1:40 PM), http://www.nationalreview.com/corner/260505/president-obama-doma-maggie-gallagher.
Others have argued that Congress, regardless of its ability to demonstrate standing, is not constitutionally authorized to intervene to defend its handiwork. *See* Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 573 (2014); James W. Cobb, Note, *By "Complicated and Indirect" Means: Congressional Defense of Statutes and the Separation of Powers*, 73 GEO. WASH. L. REV. 205, 208 (2004).

194. 462 U.S. 919, 940 (1983) (citing Cheng Fan Kwok v. INS, 392 U.S. 206, 210 n.9 (1968)).

Chadha absent the Court of Appeals' judgment."[195] Yet the Supreme Court has never resolved an existing circuit split on whether an intervenor must demonstrate Article III standing *independent* of the proper party, in that case the INS.[196] Indeed, a majority of the Circuits deciding this issue have concluded that intervenors need *not* independently demonstrate Article III standing if another party with which they are aligned has already done so.[197] Thus, it is quite possible that the Supreme Court was not necessarily suggesting that Congress had Article III standing to defend the statute in the United States' stead, but that it was a proper intervenor, permitted to defend the statute *so long as* the United States remained as a proper party able to independently demonstrate Article III standing.

Second, even if the Court *was* suggesting that Congress had Article III standing, *Chadha* was a unique case. In *Chadha*, Congress had an independent, judicially cognizable injury: the statute in question, authorizing a one-house veto, directly affected Congress's interests as a governing body.[198] Losing in the Ninth Circuit deprived Congress of its power to exercise a one-house veto, a concrete injury. In the regular course, by contrast, where the challenged statute does not independently confer additional powers unto Congress, Congress's purported injury would be the mere invalidation of its handwork.

Even assuming, *arguendo*, that Congress could demonstrate Article III appellate standing based simply upon a lower court ruling that its enacted legislation was unconstitutional, it may not be a player that can be politically relied upon.

The Senate Legal Counsel's Office, designed "to serve the institution of Congress rather than the partisan interest of one party or another,"[199] is only authorized to act upon receiving the consent of

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195. *Id.* at 939.

196. *See* Juliet Johnson Karastelev, Note, *On the Outside Seeking In: Must Intervenors Demonstrate Standing to Join a Lawsuit?*, 52 DUKE L.J. 455, 464–68 (2002).

197. *See* San Juan Cty. v. United States, 503 F.3d 1163, 1172 (10th Cir. 2007); Ruiz v. Estelle, 161 F.3d 814, 830 (5th Cir. 1998); Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989); United States v. Bd. of Sch. Comm'rs of City of Indianapolis, Ind., 466 F.2d 573, 577 (7th Cir. 1972). *But see* Mausolf v. Babbitt, 85 F.3d 1295, 1300 (8th Cir. 1996); Bldg. & Constr. Trades Dep't v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994); Associated Builders & Contractors v. Perry, 16 F.3d 688, 690 (6th Cir. 1994).

198. Matthew I. Hall, *How Congress Could Defend DOMA in Court (and Why the BLAG Cannot)*, 92 STAN. L. REV. ONLINE 92, 102 (2013).

199. S. REP. NO. 95-170, at 84 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4300.

two thirds of the Senate Joint Leadership Group,[200] a body composed of four members of the majority party, and three members of the minority party.[201] This requirement "serves to protect the interests of the minority party,"[202] or, in other words, "ensures a minority party 'veto.'"[203] And even assuming authorization by the Senate Joint Leadership Group, participation in any legal proceeding also requires a resolution of the full Senate,[204] which is subject to filibuster by any one Senator.[205] Thus the presence of a single senator who is of the same political party as, and/or in substantive agreement with, the president vis-à-vis the statute's constitutionality may jeopardize the Senate's intervention.

Like the Senate Counsel, the House Counsel participates in litigation on behalf of the entire body, but unlike the Senate counsel, its authority to act necessitates only a majority vote of the Bipartisan Legal Advisory Group ("BLAG").[206] Because the BLAG is composed of the Speaker, Majority Leader, Majority Whip, Minority Leader, and Minority Whip,[207] the House Counsel is far more—if not solely—responsive to the majority.[208] Thus the leadership of the majority party in the House, if not in partisan unity and/or substantive agreement with the president, may easily authorize defense over the dissent of the minority party and its leadership.

Yet majorities change.[209] In *Karcher v. May*, the New Jersey State Legislature enacted, over a gubernatorial veto, legislation pro-

200. *See* 2 U.S.C. § 288a(b) (2012).

201. *See Id.* § 288b(a).

202. S. REP. NO. 95-170, at 86.

203. Grove & Devins, *supra* note 6, at 613.

204. 2 U.S.C. §§ 288b(b), (c), 288e(a) (2012).

205. STANDING RULES OF THE SENATE, R. XXII (2), *reprinted in* S. DOC. NO. 106–15, at 15–16 (2000).

206. *See* Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 944 (2012); Brief of the Speaker and Leadership Group of the House of Representatives as Amici Curiae, Morrison v. Olson, 487 U.S. 654 (1988) (No. 87–1279), 1988 WL 1031594, at *2 n.2.

207. MARTIN O. JAMES, CONGRESSIONAL OVERSIGHT 122 (Susan Boriotti et al. eds., 2002).

208. Congressman Robert Kastenmeier once described the House Counsel as "the majority counsel." 136 CONG. REC. 5002 (1990). Indeed, upon its establishment in the 1970s, "[t]hat the office would be responsible to the Speaker of the House, the leader of the majority party, was not contested." Rebecca Mae Salokar, *Legal Counsel for Congress: Protecting Institutional Interests*, *in* 20 CONGRESS & THE PRESIDENCY 131, 148 (1993).

209. On the other hand, partisan unity between Congress and the President has, over time, become less frequent, such that divided government is now "the norm"; at least one of the two Houses of Congress was controlled by a party other than the President's between 1955 and 2000, or seventy-four percent of the time.

viding for the observance of a moment of silence at the beginning of every public school day.[210] After the Governor and Attorney General, both Republicans, refused to defend the statute from an Establishment Clause challenge, the Speaker of the Assembly and President of the Senate, both Democrats, sought and obtained permission to defend the statute on behalf of the legislature.[211] But between losing in the Third Circuit and appealing to the Supreme Court, the Speaker and President lost their posts as presiding officers upon changes in partisan control of their chambers.[212] Their successors withdrew the appeal, which deprived the Supreme Court of appellate jurisdiction over the matter.[213]

ii. Individual Members of Congress

Given the political and legal difficulties facing Congress's ability to defend its handiwork, might individual legislators be able to save the day?

The Supreme Court has twice recognized Article III standing in the context of a legislator's challenge to the constitutionality of legislative actions. Yet the Court has never ruled on whether an individual member or members could have standing to *defend* a statute. In *Powell v. McCormack*, the Court determined that a Member of Congress's constitutional challenge to his exclusion from the House of Representatives constituted an Article III case or controversy.[214] In *Coleman v. Miller*, twenty Kansas state senators had standing to challenge the constitutionality of procedures used in ratifying the Child Labor Amendment.[215] When a resolution to ratify the Amendment came to a vote in the Kansas Senate, twenty senators were in support, and twenty—the eventual plaintiffs—were opposed.[216] The Lieutenant Governor cast a tie breaking vote in support of ratification—arguably in violation of the constitutional amendment procedures set forth in Article V—such that the senators who opposed the Amendment were injured; their votes would ordinarily have been sufficient to defeat ratification, but instead were "virtually held for naught."[217]

Daryl J. Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2330–31 (2006).

210. Karcher v. May, 484 U.S. 72, 74 (1987).

211. *Id.* at 75.

212. *Id.* at 76.

213. *See id.*

214. Powell v. McCormack, 395 U.S. 486 (1969).

215. Coleman v. Miller, 307 U.S. 433 (1939).

216. *Id.* at 436.

217. *Id.* at 438.

Raines v. Byrd has since greatly constricted the scope of individual legislator standing.[218] In *Raines*, six current and former members of the House and Senate challenged the constitutionality of the Line Item Veto Act,[219] which authorized the President to "cancel" spending and tax measures after enactment.[220] The plaintiffs argued that the Act injured them, in so far as it "dilute[d] their Article I voting power."[221] The Court disagreed.

The *Raines* Court read *Coleman* narrowly, as standing "at most . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."[222] Similarly, *Powell* was limited to cases in which members are "singled out for specifically unfavorable treatment as opposed to other Members of their respective bodies" and not to "institutional injur[ies] . . . which necessarily damage[ ] all Members of Congress and both Houses of Congress equally."[223] Thus, because the votes of the Members were not sufficient to defeat the legislation, and because the alleged vote dilution injury was visited upon the institution of Congress, not the Members individually or personally, the Court concluded that the *Byrd* plaintiffs lacked Article III standing.[224]

It seems unlikely, therefore, that individual legislators would have standing to defend a challenged law from constitutional attack. *Coleman* will be distinguishable unless (a) more than a majority of both Houses—"whose votes would have been sufficient to . . . enact . . . a specific legislative act"—bring the suit, *and* (b) the legislation has "not gone into effect."[225] It is arguable that so long as the Executive *enforces* the challenged law, it has "gone into effect" within the meaning of *Coleman*. *Powell* will be difficult to invoke as well; it seems unlikely that much legislation will individually or personally affect the litigant Member or Members rather than Congress as a whole.

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218. *See* Raines v. Byrd, 521 U.S. 811 (1997).

219. *See* Line Item Veto Act, Pub. L. No. 104–130, § 1021(a), 110 Stat. 1200, *invalidated by* Clinton v. City of New York, 524 U.S. 417 (1998).

220. RICHARD H. FALLON, JR., ET AL., HART AND WESCHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 131 (7th ed. 2015).

221. Raines v. Byrd, 521 U.S. 811, 811 (1997).

222. *Id.* at 823.

223. *Id.* at 821–22.

224. *See id.* at 829–30.

225. *Id.* at 823.

iii. State Legislatures

Contrary to congressional standing, *Karcher v. May*, *supra*, suggests that state legislative defense *is* a legally permissible alternative to executive defense, so long as the "state law is clear—and where legislative actors authorized to defend by state law choose to do so for the duration of litigation."[226] In other words, state legislatures may defend the constitutionality of state laws from constitutional attack if (a) they are legally authorized to do so, and (b) they exercise that authority.

As to the first requirement, some states have authorized their state legislatures to defend state laws from constitutional attack.[227] But other states have either failed to grant such authority or have expressly prohibited their state legislatures from do so.[228]

As to the second requirement, that the legislature actually exercises the authority it has been granted, many of the political factors that militate against defense at the federal level may plague state legislatures as well. As in *Karcher*, defense may hinge upon which party controls the legislative chamber, which is subject to change in any election.

State legislatures may be *particularly* hesitant to defend laws enacted by ballot initiative. Not only are these initiatives often opposed by deep-pocketed interest groups with which the legislators may seek to align themselves,[229] in many cases the obstinacy of the legislators to enact the law is the precise reason it was proposed as a state ballot initiative in the first instance.[230] For example, voters have repeatedly turned to the initiative system to enact term limits when self-interested legislators have refused to do so.[231] In cases

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226. Shaw, *supra* note 74, at 248.

227. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-1841 (2010); IND. CODE ANN. §§ 2-3-9-2 to 2-3-9-3 (2012); N.C. GEN. STAT. § 1-72.2 (2014).

228. *See, e.g.*, Planned Parenthood v. Ehlmann, 137 F.3d 573, 578 (8th Cir. 1998) (rejecting the Missouri legislature's attempt to intervene to defend a statute, as doing so was not authorized by law); Op. Tenn. Att'y Gen. No. 81–470 (1981), 1981 WL 169418, at *1 ("[T]here exists no authorization for the General Assembly or the speakers of either house to employ legal counsel to defend the constitutionality of a statute where the Attorney General declines to defend said statute.").

229. *See, e.g.*, Lee Drutman, *NRA's Allegiances Reach Deep into Congress*, SUNLIGHT FOUND. (Dec. 18, 2012, 5:22 PM), http://sunlightfoundation.com/blog/2012/12/18/nra-and-congress/ (documenting the NRA's political spending which "highlight[s] the primary obstacle to quick action on gun control").

230. *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013) (Kennedy, J., dissenting).

231. *See* KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS 161–62 (2009).

like these, relying upon legislators to protect the initiative system is tantamount to allowing the fox to guard the henhouse.

V.
TOWARD A MEANINGFUL SOLUTION

At a 2009 meeting of the National Association of Attorneys General, former Colorado Attorney General Gale Norton[232] suggested that the standard government lawyers use in determining whether to defend their jurisdictions' laws in constitutional litigation should vary based upon the circumstances.[233]

Secretary Norton is correct; and while officials have adhered to different tests in deciding whether to defend laws they deem unconstitutional, *supra*, a threshold inquiry should precede these tests: whether there is a "reasonable probability" that, in refusing to the defend the duly enacted law, the lawyer charged with doing so will deprive the constitutional challenge of federal appellate judicial review.

This Part proceeds first to explain the reasonable probability standard, and then to demonstrate how it solves the "Attorney General Veto" problem. Finally, this Part suggests, and responds to, likely objections to the standard.

A. The Test Explained

Pursuant to this newly articulated standard, a government lawyer must defend a law he or she deems unconstitutional if there is a reasonable probability that, if he or she fails to do so, the controversy will be deprived of federal appellate review, that is, the dispute will no longer be justiciable because Article III and/or prudential standing are absent.

In order to faithfully apply this standard, the government lawyer must consider all of the facts and circumstances relevant to an Article III and prudential standing inquiry. The government lawyer, for example, should pose and answer the following questions: Are amici ready and willing to defend the law? Is the law's breadth such that great (if not irreparable) harm will be done if the reviewing

232. Ms. Norton also served as Secretary of the Interior under President George W. Bush. *About Gale A. Norton*, NORTON REG. STRATEGIES, http://nortonregs.com/about.html (last visited Mar. 1, 2016).

233. *See* Video Recording, *2009 Ethics Update*, NAT'L ASS'N OF ATT'Y GENS. SUMMER MEETING (Sept. 21, 2009), http://media.law.columbia.edu/stateag/ethicsupdate090921.html (statement of Gale A. Norton, Former Attorney General, State of Colorado).

court fails to reach the merits of the claim? Does the state legislature (or Congress) have a concrete injury apart from its general interest in having its handiwork upheld? Will the litigation span more than one election cycle, such that legislative defense may become insuperable upon a change in partisan control of one or both chambers? Will a ballot initiative's proponents be willing to defend the constitutionality of the resulting law? If so, do those proponents have a judicially cognizable injury aside from asserting the state's interest in having its laws upheld?[234]

Clearly, the reasonable probability standard requires rigorous legal analysis and much foresight. Yet determining the reasonable probability of legal outcomes is a task familiar to executive branch lawyers—it is at the heart of the *Brady* obligation imposed on criminal prosecutors.[235] In *Brady v. Maryland*, the Supreme Court announced that, as an element of Due Process, prosecutors are required to disclose all "materially exculpatory" evidence to criminal defendants before trial.[236] "Materiality" has been defined as a "*reasonable probability* that the suppressed evidence"—had it been disclosed to the defense—"would have produced a different verdict."[237]

Thus, *Brady* requires prosecutors to engage in "anticipatory hindsight review"[238] by determining *ex ante* whether there is a reasonable probability that the trial would have come out differently *ex post* had they disclosed the relevant exculpatory evidence.[239] In other words, prosecutors are duty bound to determine the impact of disclosure on a trial's result "before any evidence has been adduced or the defense strategy [has been] divulged at trial."[240]

The government lawyer applying the reasonable probability standard faces a similar inquiry. At the time of choosing whether to defend the law, *ex ante*, she must predict whether the controversy

234. This list is, of course, merely exemplary, not exhaustive.

235. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that suppression by the prosecution of evidence material either to guilt or to punishment of the defendant violates due process).

236. *Id.* The *Brady* doctrine covers not only evidence of factual innocence but also impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 (1985); Giglio v. United States, 405 U.S. 150, 154–55 (1972).

237. Strickler v. Greene, 527 U.S. 263, 281–82 (1999) (emphasis added).

238. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1610 (2006).

239. Alafair S. Burke, *Commentary:* Brady's *Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 CASE W. RES. L. REV. 575, 576 (2007).

240. *See* Daniel S. Medwed, Brady's *Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1542 (2010).

will remain justiciable on appeal, *ex post*, regardless of his or her participation.

B. Applying the Standard

The primary value of the reasonable probability standard is its impact on the "Attorney General Veto" problem. This is best illustrated by applying the reasonable probability standard to the nightmare scenarios set forth *supra*, and demonstrating the likely results.

i. The Nightmare Scenario Post-*Hollingsworth* Redux

The post-*Hollingsworth* nightmare scenario involved a Florida constitutional amendment requiring gun-show vendors to administer criminal background checks on firearm sales. The Governor and Attorney General refused to defend the law, citing their belief that it violated the Second Amendment.

Had the Governor and Attorney General faithfully applied the reasonable probability standard, they would have concluded that there *was* a reasonable probability that their failure to defend would deprive the controversy of Article III standing upon review of a decision striking down the amendment.

First, *Hollingsworth* instructs that ballot proponents may not assert the interests of the state in demonstrating Article III standing.[241] Second, the state legislature may not be counted on to defend the statute—that the provision was enacted as a state constitutional amendment, rather than a statute, likely reflected the obstinacy of the legislature,[242] perhaps because of the strength of the gun lobby.[243] Third, the standing of any individual legislator to defend a state's law is legally disfavored.[244] Finally, private citizens would be hard-pressed to establish standing independently; one could imagine a Florida citizen arguing that the challenged law decreases the likelihood that he or she will be the victim of gun vio-

241. *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013).

242. *Cf. Id.* (Kennedy, J., dissenting) (explaining that the initiative system is used "to control and to bypass public officials—the same officials who would not defend the initiative").

243. *See* Samantha Lachman, *GOP-Controlled State Legislatures Passing Wave of Bills Expanding Gun Rights*, HUFFINGTON POST (Mar. 17, 2015), http://www.huffingtonpost.com/2015/03/17/gun-rights-bills-_n_6886564.html.

244. *See* Raines v. Byrd, 521 U.S. 811, 821 (1997).

lence, but that is far too speculative to constitute a judicially cognizable injury worthy of Article III standing.[245]

Thus, the Governor and/or Attorney General would, pursuant to the reasonable probability standard, be forced to defend the law, and appellate judicial review would be restored.

ii. The Nightmare Scenario Post-*Windsor* Redux

The post-*Windsor* scenario concerned a similar background check regime imposed by Congress upon the District of Columbia. By the time the District Court strikes down the legislation, a newly elected President who is hostile to gun control measures vows to enforce, but not to defend, the statute.

Had the President faithfully applied the reasonable probability standard, he or she would have concluded that there *was* a reasonable probability that his or her substantive agreement with the plaintiff, and thus non-defense of the statute, would deprive the controversy of prudential standing, and thus of appellate judicial review.

Windsor stands for the proposition that because adverseness is an element of *prudential* standing, it can be overcome by countervailing interests.[246] The two relevant countervailing interests in *Windsor* were the presence of amici "prepared to defend [the law] with vigor," and the extensive litigation that would ensue if the court were not to reach the merits.[247] Admittedly, a challenge to the constitutionality of background checks would quite likely, as in *Windsor*, attract amici to defend the law.[248] But unlike *Windsor*, this is not a provision by which the "[r]ights and privileges of hundreds of thousands of persons would be adversely affected" *sans* judicial review on the merits. Unlike DOMA, which applied across the country to *any* same sex couple seeking the federal benefits of marriage, this provision only affects the "[r]ights and privileges" of gun-show vendors and consumers in a single city. There is a *very* reason-

245. *Cf.* City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (finding the possibility of a Los Angeles citizen being harmed by the use of a chokehold by a Los Angeles police officer to be too speculative to constitute standing to enjoin the practice).

246. United States v. Windsor, 133 S. Ct. 2675, 2687 (2013).

247. *Id.* at 2687–88.

248. *Cf.* Ben Winograd, *Amicus Briefs for D.C. Available in Guns Case*, SCOTUSBLOG (Jan. 12, 2008, 10:59 AM), http://www.scotusblog.com/2008/01/amicus-briefs-for-dc-available-in-guns-case/ (listing nineteen amicus briefs in support of the petitioner (in favor of gun control) in District of Columbia v. Heller, 554 U.S. 570 (2008)).

able probability that, by failing to defend the statute, the President would deprive the controversy of federal appellate review.

With this in mind, a President complying with the standard would, pursuant to the reasonable probability standard, be forced to defend the law, restoring the possibility of judicial review.

C. The Value of the Standard in Non-Defense

As demonstrated through the application of the reasonable probability standard to the nightmare scenarios *supra*, faithful application of, and compliance with, the standard solves the "Attorney General Veto" problem.

Of course, some government lawyers may refuse to comply with or even apply the standard. When that's the case, the standard still has value, as it holds accountable lawyers who choose not to defend laws in the face of, and without regard for, the likely impact on standing. There is no more plausible deniability of the consequences, simply a voluntary decision to proceed despite the reasonably probable result being the deprivation of federal appellate review. In other words, the existence of the standard forces the government lawyer to internalize the consequences of a conscious disregard for the impact of his or her actions on judicial review, and the separation of powers.

D. Likely Objections and Responses

The reasonable probability standard solves the problem of executive nullification of duly enacted laws by employing an analysis familiar to government lawyers. Yet critics may challenge the standard on numerous grounds, including that it is an exception that swallows the rule, will result in less than zealous advocacy by government lawyers, is inert as externally unenforceable, is difficult to apply; and is unnecessary given existing external pressures on government lawyers to defend their jurisdictions' laws. These objections, and responses, are considered in turn.

i. The Exception That Swallows the Rule

Based upon the application of the standard to the nightmare scenario *supra*, it may seem as if government lawyers will *always* be required to defend laws they've concluded are unconstitutional. That, however, is inaccurate. Notwithstanding *Hollingsworth* and *Windsor*, there are many instances in which applying the standard will permit the government lawyer not to defend the challenged law

if he or she so chooses. Two examples, both from the abortion rights context, will help to demonstrate this concept.

a. The Exception to the Rule Post-*Hollingsworth*

In 2016, Oregon[249] voters enact a ballot measure amending the Oregon Constitution to "make[ ] it a crime to stand on a public road or sidewalk within thirty-five feet of any abortion clinic in the state."[250] The goal of the amendment is to establish a "buffer zone" to "protect patients from harassment [and] violence and intimidation at abortion clinics."[251]

Several individuals who regularly protest and/or communicate with patients while standing within the buffer zone challenge the law in federal district court in Portland, arguing that the prohibition abridges their First Amendment right to free speech. The protesters quite likely have standing to bring the suit—their conduct subjects them to the threat of criminal prosecution under the statute.[252]

After applying the reasonable probability standard, the publicly "pro-life" Governor and Attorney General of Oregon refuse to

249. Oregon is one of twenty-four states with an initiative process to amend the State Constitution. *See* M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC 11–12 (2003). It is not unreasonable to assume that Oregon voters would enact such a provision at the statewide level; not only are abortion rights currently in vogue, *see* Lydia Saad, *Americans Choose "Pro-Choice" for First Time in Seven Years*, GALLUP (May 29, 2015), http://www.gallup.com/poll/183434/americans-choose-pro-choice-first-time-seven-years.aspx, but Oregon is one of the ten most liberal states in the country. Frank Newport, *Mississippi, Alabama and Louisiana Most Conservative States*, GALLUP (Feb. 6, 2015), http://www.gallup.com/poll/181505/mississippi-alabama-louisiana-conservative-states.aspx.

250. Amy Howe, *Court Strikes Down Abortion Clinic "Buffer Zone": In Plain English*, SCOTUSBLOG (June 27, 2014, 5:22 PM), http://www.scotusblog.com/2014/06/court-strikes-down-abortion-clinic-buffer-zone-in-plain-english. This scenario is based on McCullen v. Coakley, 134 S. Ct. 2518 (2014), in which the Supreme Court struck down a Massachusetts statute imposing criminal penalties on those who violated the so-called "buffer zone." Since *McCullen*, the Commonwealth of Massachusetts has sought to more narrowly tailor its prohibition in an effort to comply with the Supreme Court's decision. *See After Abortion Ruling, Mass. Pushes to Replace Buffer Zone Law*, NAT'L PUB. RADIO (July 18, 2014), http://www.npr.org/2014/07/18/332584617/after-abortion-ruling-massachusetts-pushes-retooled-buffer-zone.

251. *Cf.* Laura Bassett, *Abortion Clinic Buffer Zones Crumble Around the Country*, HUFFINGTON POST (July 9, 2014), http://www.huffingtonpost.com/2014/07/09/abortion-clinic-buffer-zo_n_5571516.html.

252. *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014) (finding the possibility of administrative review and criminal prosecution to constitute a judicially cognizable injury).

defend the law; they accurately determine that other parties almost certainly will have standing to defend the law in their absence—pregnant women seeking care from the clinics around which the protesters congregate. Indeed, the burdens on accessing reproductive healthcare (here, the protestors' conduct, which the amendment seeks to proscribe) are precisely how women have gained access to the federal courts to challenge legislation restricting their right to reproductive choice.[253]

b. The Exception to the Rule Post-*Windsor*

In 2016, Congress enacts the Weldon Amendment, withdrawing certain federal funding from states and municipalities that discriminate against healthcare providers for refusing to "provide, pay for, provide coverage of, or refer for abortions."[254] The State of California, in turn, enacts statute requiring certain healthcare providers, at the threat of losing their licenses, to provide medical services "for any condition in which the p[atient] is in danger of loss of life, or serious injury or illness."[255] As California's statutory regime—which contains no exception for abortion services—subjects healthcare providers in violation thereof to the possibility of loss of licensure, it arguably discriminates against healthcare providers within the meaning of the Weldon Amendment, exposing the state to potential deprivation of federal funding.[256]

The State of California files suit in federal district court, challenging the Weldon Amendment as in excess of Congress's spending power;[257] the State would almost certainly have standing in the first instance—it suffers from being deprived federal funding to which it would otherwise be entitled.[258]

After losing in federal district court, the Obama administration appeals the judgment to the Ninth Circuit. President Obama, oft

253. *See* Margaret G. Farrell, *Revisiting* Roe v. Wade*: Substance and Process in the Abortion Debate*, 68 IND. L.J. 269, 285–87 (1993) (discussing theories of standing for plaintiffs challenging abortion rights restrictions).

254. Consolidated Appropriations Act of 2005, Pub. L. No. 108–447, § 508(d), 118 Stat. 2809, 3163.

255. CAL. HEALTH & SAFETY CODE § 1317(a) (West 2005).

256. *Cf.* California *ex rel.* Lockyer v. United States, 450 F.3d 436, 440–41 (9th Cir. 2006).

257. *Cf. id.* at 439.

258. Not only do financial injuries "almost always meet the definition of an injury in fact," Wis. Carry, Inc. v. City of Milwaukee, 35 F. Supp. 3d 1031, 1035 (E.D. Wis. 2014), states as sovereigns are "entitled to special solicitude in . . . standing analysis." Massachusetts v. EPA, 549 U.S. 497, 520 (2007).

described as pro-choice,[259] vows to enforce, but no longer to defend, the Weldon Amendment. His decision would be consistent with the reasonable probability standard: The United States retains an Article III injury, as in *Windsor*, because the district court's ruling that the Weldon Amendment is unconstitutional means that the Treasury is required to discharge funds to the State of California that, pursuant to the Amendment, would otherwise have been withheld.[260]

And while the Executive's substantive agreement with the State of California creates a prudential standing concern for lack of adversity, both of *Windsor*'s countervailing factors would likely be present. First, *many* amici would almost certainly line up to defend the statute.[261] Second, "extensive" litigation might ensue if the Court chose not to decide the case on the merits. The Weldon Amendment, unlike DOMA in *Windsor,* is not a definitional provision in-

259. *E.g.*, Steven Ertelt, *Planned Parenthood: Obama the Most Pro-Abortion President Ever*, LIFE NEWS (Apr. 23, 2013, 12:10 PM), http://www.lifenews.com/2013/04/23/planned-parenthood-obama-the-most-pro-abortion-president-ever/ ("Planned Parenthood essentially says there has never been a better pro-abortion champion in the White House as President than Obama."); Tracy Weitz, *What President Obama Should Say on the 40th Anniversary of* Roe v. Wade, HUFFINGTON POST (Jan. 22, 2013, 4:49 PM), http://www.huffingtonpost.com/tracy-weitz/roe-v-wade-40th-anniversary_b_2528847.html (calling President Obama "a 'pro-choice' President").

260. *Cf.* United States v. Windsor, 133 S. Ct. 2675, 2686 (2013) ("That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not.").

261. The plethora of amicus briefs filed in cases concerning abortion rights has most recently been demonstrated with regards to *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 499 (2015). *See, e.g.*, Marcia Brown, *University Affiliates Submit Amicus Briefs in Supreme Court Abortion Case*, DAILY PRINCETONIAN (Mar. 2, 2016), http://dailyprincetonian.com/article/2016/03/university-affiliates-submit-amicus-briefs-in-supreme-court-abortion-case. Indeed, a majority of the Bipartisan Legal Advisory Group—a sufficient number to authorize Congressional intervention in litigation—have been described as "pro-life," meaning that the BLAG, just as in *Windsor*, could be "prepared to defend with vigor the constitutionality of the legislative act." *See* Steven Ertelt, *House Elects Pro-Life Congressman Paul Ryan as Speaker, Pro-Life Groups Offer Congratulations*, LIFE NEWS (Oct. 29, 2015, 11:03 AM), http://www.lifenews.com/2015/10/29/house-elects-pro-life-congressman-paul-ryan-as-speaker-pro-life-groups-offer-congratulations/ (Speaker Paul Ryan); Steven Ertelt, *Pro-Life Rep. Kevin McCarthy Elected Republican House Majority Leader Replacing Cantor*, LIFE NEWS (June 19, 2014, 3:44 PM), http://www.lifenews.com/2014/06/19/pro-life-rep-kevin-mccarthy-elected-republican-house-majority-leader-replacing-cantor/ (Majority Leader Kevin McCarthy); Penny Starr, *Scalise: 'Missing Ingredient' in Effort to Defund Planned Parenthood Is a Pro-Life President*, CYBERCAST NEWS SERV. (Jan 22, 2016, 5:14 PM), http://cnsnews.com/news/article/penny-starr/scalise-missing-ingredient-effort-defund-planned-parenthood-pro-life (Majority Whip Steve Scalise).

corporated into a multitude of U.S. Code sections. But failing to reach the merits on a challenge to the Weldon Amendment *will* affect the rights and privileges of hundreds of thousands of individuals–physicians operating all across America, of which there are almost one million.[262]

There are plenty of examples, then, in which the reasonable probability test, if properly applied, does not preclude the government lawyer from choosing not to defend a law he or she deems unconstitutional.

ii. Inducing A Less Than Zealous Defense

One of the likely consequences (and indeed the intent) of the reasonable probability standard is that government lawyers will be compelled to defend laws in instances in which they might otherwise decline to do so. An expected criticism, then, is that by forcing less-than-committed government lawyers into court, the standard undermines one of the purposes underlying standing—that litigants in the judicial process be zealous advocates.[263]

As an initial matter, it is no longer clear how important zealous advocacy is as a principle underlying standing; had it been, one would imagine *Hollingsworth* coming out differently—the most certain way of ensuring a zealous defense of Proposition 8 would have been to recognize that the ballot proponents had standing to appeal.[264]

Zealous advocacy is also not merely an *option* for lawyers, it is a *requirement* of ethical and professional legal practice.[265] This objection thus untenably presumes that government lawyers will violate the rules of professional conduct.

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262. *Total Professionally Active Physicians*, THE HENRY J. KAISER FAM. FOUND. (Jan. 2016), http://kff.org/other/state-indicator/total-active-physicians.

263. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 101 (1968); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 624 (2004).

264. *See* Vikram David Amar, *Standing Up for Direct Democracy: Who Can Be Empowered Under Article III to Defend Initiatives in Federal Court?*, 48 U.C. DAVIS L. REV. 473, 481 (2014) (arguing that, if anything, the ballot proponents in *Hollingsworth* may have been *over*-zealous, "driven in their tactical litigation decisions by an ideological purity or zeal that did not exist among the electorate that passed the measure").

265. *See* MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2008) ("A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); Sylvia Stevens, *Whither Zeal?*, OR. ST. BAR BULL. (July 2005), https://www.osbar.org/publications/bulletin/05jul/barcounsel.html ("I suspect, if asked to describe in one word the primary responsibility of lawyers, most of us would say it is zealousness.").

Most importantly, this critique ignores a fundamental aspect of government legal practice—that government lawyers are repeat players. "Judges . . . get to know government lawyers (as repeat players) better and expect more of them by way of competence, candor, civility, credibility, and consistency."[266] Because of how frequently they appear, government lawyers "know that they will need the Court's support in the future. As such, they must prepare for the future; they must concern themselves with it always; and they must zealously protect their reputations."[267]

Failing to advocate zealously in front of a tribunal is precisely the type of conduct that would deprive a government lawyer, as a repeat player, of his or her standing and reputation in front of the court. In *Log Cabin Republicans v. United States*, a political organization challenged the constitutionality of "Don't Ask, Don't Tell," the policy on gay, lesbian, and bisexual military service.[268] The district court, in ruling for the plaintiffs, excoriated the government's lawyers for "call[ing] no witnesses, put[ting] on no affirmative case, and only enter[ing] into evidence the legislative history of the Act."[269] And the government lawyers' performance received harsh criticism from outside the courtroom as well.[270]

Given the government lawyer's unique position as a repeat player before the courts, the possibility of being reprimanded as were the lawyers in *Log Cabin Republicans* is a strong deterrent force against abdication of the duty of zealous advocacy.

iii. An Unenforceable Rule

Because the reasonable probability standard is an internally imposed rule, not an externally enforceable requirement, critics may argue that it is toothless and ineffectual. But internal rules are valu-

266. Patricia M. Wald, *"For the United States": Government Lawyers in Court*, 61 LAW & CONTEMP. PROBS. 107, 128 (1998).

267. RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT 35–36 (2014). *But see* Joel B. Grossman et al., *Do the "Haves" Still Come Out Ahead?*, 33 L. & SOC'Y REV. 803, 803 (1999) ("Repeat players have low stakes in the outcome of any particular case and have the resources to pursue their long term interests.").

268. 716 F. Supp. 2d 884 (C.D. Cal. 2010).

269. *Id.* at 928.

270. *See, e.g.*, Hans A. von Spakovsky, *Don't Ask, I'll Just Tell You What the Law Should Be:* Log Cabin Republicans v. United States, HERITAGE FOUND. (Sept. 10, 2010), http://thf_media.s3.amazonaws.com/2010/pdf/wm3011.pdf5, 2016) (accusing the government lawyers of "throw[i]n[g]" the case); Ed Whelan, *Yesterday's Anti-DADT Ruling*, NAT'L REV. (Sept. 10, 2010, 11:22 AM), http://www.nationalreview.com/bench-memos/246208/yesterdays-anti-dadt-ruling-ed-whelan (calling the lack of defense a "dereliction of duty").

able in establishing norms of practice, regardless of external enforceability. Indeed, the law is replete with examples of unenforceable rules that nevertheless guide government lawyers in fulfilling their duties. Two cases, both from the criminal grand jury context, are illustrative of the role non-enforceable standards play in influencing norms of practice.

First, in *United States v. Williams*, a criminal defendant argued that United States Attorneys should be required to disclose any and all exculpatory material to the grand jury in the course of seeking an indictment.[271] The Supreme Court refused to impose such a requirement to its supervisory authority over the federal courts.[272] Yet the United States Attorneys' Manual—both at the time of *Williams* and still today—instructs Assistant United States Attorneys to disclose to the grand jury "substantial evidence that directly negates the guilt of a subject of the investigation" when the prosecutor is personally aware of such evidence.[273] Thus, government lawyers have adopted an internal standard of legal conduct even in the absence of an externally (here judicially) imposed rule.[274]

Second, the Federal Rules of Criminal Procedure prohibit prosecutors from "disclos[ing] . . . matter[s] occurring before the grand jury."[275] The Rule is thought to serve multiple purposes, such as ensuring that those who face, but are exonerated by, the grand jury do not bear the burden of public ridicule from having been accused by the government of committing a crime.[276] Disclosures in violation of the Rule are particularly difficult to prove, making the Rule largely unenforceable, "because often those most knowledgeable about the source of the leak—people in the media—are not

271. 504 U.S. 36 (1992).

272. *Id.* at 46–47, 54–55.

273. U.S. Department Dep't of Justice, UNITED STATES ATTORNEYS' MANUAL § 9-11.233 (1997).

274. *Cf.* Eric Citron, *Cases and Controversies: Not Your Typical Grand Jury Investigation*, SCOTUSBLOG (Nov. 25, 2014, 3:00 PM), http://www.scotusblog.com/2014/11/cases-and-controversies-not-your-typical-grand-jury-investigation.

275. FED. R. CRIM. P. 6(e)(2)(B)(vi).

276. Other purposes of the grand jury secrecy rule include "(1) prevent[ing] the escape of those whose indictment may be contemplated; (2) insur[ing] the utmost freedom to the grand jury in its deliberations; (3) prevent[ing] subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it," and "(4) encourag[ing] free and untrammeled disclosures by persons who have information with respect to the commission of crimes." Douglas Oil Co. v. Petrol Stops. Nw., 441 U.S. 211, 219 n.10 (1979).

compelled to disclose *their* sources."[277] Given the inability to, or at least great difficulty, in enforcing the Rule, it is best understood as "articulating a norm that will be . . . internalized by investigative personnel,"[278] including government lawyers.

The same can easily be said for the reasonable probability standard. True, it will not be externally enforceable, but as a norm of behavior, the standard may very well impact the functioning of government lawyers, over time becoming an essential component of the obligations of their practice.

iv. The Difficulty of Applying the Standard

Another potential critique of the standard is that it may be difficult for government lawyers to apply. The *Brady* test, which (as discussed *supra*) resembles the reasonable probability standard herein developed, has been similarly criticized.[279] In *Kyles v. Whitney*, however, the Supreme Court summarily dismissed this argument, noting that "prosecutor[s] would still be forced to make judgment calls" regardless of the standard employed.[280]

Admittedly, the Article III and prudential standing doctrines are not particularly coherent.[281] Yet the parties for whom this inquiry matters—for whom the reasonable probability standard has been designed—are those who would have already determined that the law in question is unconstitutional, such that they would other-

277. RONALD J. ALLEN ET AL., CRIMINAL PROCEDURE: ADJUDICATION AND RIGHT TO COUNSEL 1000–01 (2011). Sometimes, however, the source of the leak can be identified; in the grand jury investigation of President Clinton, a leak to the New York Times led to an internal Justice Department investigation which identified Charles G. Bakaly, III, then Counselor to the Independent Counsel, as the source. *In re* Sealed Case No. 99-3091, 192 F.3d 995 (D.C. Cir. 1999). Mr. Bakaly was later tried for, and acquitted of, contempt for denying that he was the source of the leaked material. Gary Fields, *Starr Assistant Is Not Guilty of Contempt*, WALL ST. J., Oct. 9, 2000, at A26.

278. RONALD JAY ALLEN ET AL., *supra* note 277, at 1001; *accord* Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339 (1999).

279. *See* Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 162–79 (2012); Christopher Deal, Note, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury*, 82 N.Y.U. L. REV. 1780, 1795–809 (2007).

280. 514 U.S. 419, 439 (1995).

281. *See* Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970) ("Generalizations about standing to sue are largely worthless as such."); Poe v. Ullman, 367 U.S. 497, 508 (1961) ("Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification."); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) ("The structure of standing in the federal courts has long been criticized as incoherent.").

wise not defend it.[282] These lawyers must have first engaged in rigorous constitutional analysis of the underlying claim, which will *itself* be difficult.[283] It seems difficult to imagine that lawyers who are able to conclude that a statute exceeds Congress's commerce power, or fails intermediate scrutiny, or is a bill of attainder, would be unable to render an analysis as to the likely impact on standing of their decision not to defend the challenged law.

And to the extent government lawyers have difficulty in applying the standard, there is a simple solution: defend the law.

v. The Standard Is Unnecessary

As documented above, the Obama administration's decision no longer to defend DOMA was met with much academic and political criticism. It might be argued that external pressures are sufficient to compel government lawyers to defend statutes when it is prudent for them to do so. Two factors militate against such a conclusion.

First, the external attention and scrutiny dedicated to the *Windsor* and *Hollingsworth* cases are not replicable for every case in which a government lawyer refuses to defend the law at issue. Those cases were remarkable. Proposition 8 was enacted in the most populous state in the country after its proponents and opponents spent more than $100 million combined on its enactment campaign.[284] And *Windsor* has been described as a "landmark" case,[285] a "major ruling,"[286] and an "historic opinion[ ]."[287] Academic, political and

282. If a lawyer has decided to defend the law regardless of the merits of the underlying claim, there is no need for the reasonable probability standard.

283. *See* IT IS A CONSTITUTION WE ARE EXPOUNDING: COLLECTIVE WRITINGS ON INTERPRETING OUR FOUNDING DOCUMENT 12 (Karl Thompson & Pamela Harris, eds., American Constitution Society for Law and Policy 2009) ("[C]onstitutional interpretation is frequently difficult."); JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 149–51 (2002) (noting the difficulty of ascertaining legislative intent where relevant for determining the constitutionality of Congress's enactments).

284. Reid Wilson, *The Most Expensive Ballot Initiatives*, WASH. POST., May 17, 2014, https://www.washingtonpost.com/blogs/govbeat/wp/2014/05/17/the-most-expensive-ballot-initiatives.

285. Editorial, *The Expanding Power of U.S. v. Windsor*, N.Y. TIMES, Jan. 27, 2014, at A18.

286. Adam Liptak, *Supreme Court Bolsters Gay Marriage with Two Major Rulings*, N.Y. TIMES, June 27, 2013, at A1.

287. Garrett Epps, *Kennedy's Marriage Ruling Is About Gay Rights, Not State Rights*, THE ATLANTIC (June 26, 2013), http://www.theatlantic.com/national/archive/2013/06/kennedys-marriage-ruling-is-about-gay-rights-not-states-rights/277251.

social pressure, therefore, simply cannot be relied upon in the regular course.

Second, this argument ignores the significant pressure exerted in the *other* direction, encouraging the government lawyer *not* to defend an unpopular law. In the weeks leading up to the announcement of the President's decision, the Human Rights Campaign sought to mobilize its more than one million members to encourage President Obama to cease defending DOMA.[288] Indeed, one of the virtues of the reasonable probability standard is that it offers political cover to government lawyers charged with defending unpopular laws. In the face of such pressure, the government lawyer is emboldened to respond that the reasonable probability standard compels him or her to maintain the legal defense regardless of his or her agreement as to the merits.

VI.
CONCLUSION

In 2013, the Supreme Court made history, not only in expanding rights for LGBT people, but also by continuing to develop the standing doctrines that limit federal court jurisdiction. These rulings, *Windsor* and *Hollingsworth*, may render appellate judicial review more difficult to achieve in the context of duly enacted laws that the government lawyer chooses not to defend. This in turn threatens judicial supremacy, a cornerstone of the separation of powers, and thus of American democracy.

One solution is to add a threshold inquiry to the government lawyer's decision whether to defend a potentially unconstitutional law—whether there is a reasonable probability that, if he or she fails to do so, no party will have standing to defend the law, such that the controversy will be deprived of judicial review. The consequence is that government lawyers will be far less likely to exercise the "Attorney General Veto," thus preserving judicial supremacy.

Much also depends on how, and to what extent, the standing doctrines evolve over time. While the *Windsor* court did not decide whether Congress has Article III standing to defend the constitutionality of federal laws,[289] at least one current member of the Court, Justice Alito, concluded that, in at least some circumstances,

288. *See* Press Release, *HRC Urges President Obama to Support Marriage Equality for All Americans*, HUMAN RIGHTS CAMPAIGN (Jan. 13, 2011), http://www.hrc.org/press/hrc-urges-president-obama-to-support-marriage-equality-for-all-americans.

289. United States v. Windsor, 133 S. Ct. 2675, 2688 (2013).

it does.[290] If, in a future case, the Court adopts Justice Alito's reasoning, and Congress may assert standing to defend its handiwork when the Executive fails to do so, the importance of executive defense in the first instance—at least for the purposes of preserving a justiciable controversy—will diminish substantially. That is, the likelihood that the reasonable probability standard will be satisfied will increase with precedent establishing that Congress has standing to defend its own laws.

Not only is Article III standing in flux, so too is prudential standing. In 2014, the Supreme Court in *Lexmark International, Inc. v. Static Control Components, Inc.*[291] suggested that the bar on generalized grievances—previously thought to be an element of prudential standing[292]—was an Article III requirement. Thus, after *Lexmark*, a party seeking to defend a law and whose injury is merely generalized, not particularized, may no longer look to the "countervailing considerations" that *Windsor* noted as having the potential to overcome a lack of prudential standing. This, then, makes the reasonable probability standard *more* difficult to achieve, counseling toward government lawyers more consistently defending their jurisdictions' laws.

Ultimately, as the law continues to develop, only time will tell if government lawyers will exercise the great responsibility that their newly acquired (and perhaps only fleeting) great power demands of them.

290. *See id.* at 2714 (Alito, J., dissenting) ("[I]n the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so.").

291. Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 n.3 (2014).

292. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474–75 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 499–500 (1975)). While never as overt as in *Lexmark*, that the bar on generalized grievances was a requirement of Article III, rather than prudential standing preceded *Lexmark*. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (listing "particularized," the antonym of generalized, as a requirement of an Article III injury in fact).