

Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases

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INTRODUCTION

For supporters and opponents of same-sex marriage, the Supreme Court's same-sex marriage cases, *United States v. Windsor*¹ and *Hollingsworth v. Perry*,² must have felt anticlimactic. In December 2012, when the Court agreed to consider equal protection challenges to federal and state laws that deny recognition to same-sex marriages,³ the cases were heralded as blockbusters that would place the Supreme Court "at the center of the nation's debate over whether gay couples have the same fundamental right to marry as heterosexuals."⁴ Advocates on both sides cheered the Court's decision and predicted a "sweeping" victory on the merits.⁵

Perhaps we should rename them the "appellate standing cases." From the outset, the Court signaled that, in addition to the merits, it would also address the kind of dry, procedural questions that put activists and journalists to sleep: whether the petitioners in each case had Article III standing to bring an appeal.⁶ That threshold question arose in both cases because executive officials chose to enforce laws against same-sex marriage but not to defend them against constitutional attack. At oral arguments in March 2013, the Court disappointed many observers by dedicating more than one third of its time to questions about standing and jurisdiction.⁷ By the time the Court announced its decisions in June 2013, standing had taken center stage. In *Perry*, the Court by a 5–4 margin dismissed the appeal

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1. 133 S. Ct. 2675 (2013).

2. 133 S. Ct. 2652 (2013).

3. See *Hollingsworth v. Perry*, 133 S. Ct. 786, 786 (2012); *United States v. Windsor*, 133 S. Ct. 786, 787 (2012); Petition for a Writ of Certiorari Before Judgment at i, *Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

4. Robert Barnes, *Court Accepts Gay Marriage Cases*, WASH. POST, Dec. 8, 2012, at A01 (noting that the cases raised the "possibility of a groundbreaking constitutional decision" or "narrower rulings on a subject that continues to divide the American public").

5. See Rebekah Metzler, *Supporters, Opponents Cheer Supreme Court Decision to Hear Gay Marriage Cases*, U.S. NEWS & WORLD REPORT (Dec. 7, 2012), <http://www.usnews.com/news/articles/2012/12/07/supporters-opponents-cheer-supreme-court-decision-to-hear-gay-marriage-cases>.

6. *Perry*, 133 S. Ct. at 786 (directing briefing on the petitioners' standing to appeal under Article III); *Windsor*, 133 S. Ct. at 787 (same).

7. See Transcript of Oral Argument, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) [hereinafter *Perry* Arg. Tr.] (approximately 25% of argument time dedicated to jurisdiction); Transcript of Oral Argument, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter *Windsor* Arg. Tr.] (approximately 45% of argument time dedicated to jurisdiction); *Judge Not?*, ECONOMIST DEMOCRACY AM. BLOG (Mar. 27, 2013, 2:34 PM), <http://www.economist.com/blogs/democracyinamerica/2013/03/gay-marriage-and-supreme-court> ("Some of the crowd who queued for five days to witness the hearing must have been disappointed by the focus on process.").

entirely, holding that the private citizens who served as official sponsors of Proposition 8, the ballot initiative that banned same-sex marriage in California, lacked standing to appeal.⁸ In *Windsor*, the Court reached the merits, issuing a fairly narrow, federalism-infused ruling invalidating section 3 of the Federal Defense of Marriage Act (DOMA).⁹ But first, the Justices dedicated more than a dozen pages of discussion to jurisdictional questions, concluding by a 6–3 margin that jurisdiction was proper when the Executive Branch sought to appeal despite agreeing with the judgment of the lower courts on every issue.¹⁰ Whatever their legacy as civil rights decisions, the marriage cases are blockbusters in the underdeveloped field of appellate standing.

This Essay offers a mostly critical assessment of the Court’s reasoning on the standing questions in both *Perry* and *Windsor*. Yet it also considers the implications of the decisions for executive “non-defense” of federal law—the controversial power of the Executive to enforce a law while refusing to defend it in court against a constitutional challenge—and finds reasons for cautious optimism. The Essay advances two basic claims, one descriptive and one normative.

First, the marriage cases significantly reshaped the law of Article III standing to appeal, notwithstanding the Court’s efforts to ground its decisions in prior precedent. In *Windsor*, the Court broke sharply with previous decisions by recharacterizing “adverseness,” the principle that the parties to a case or controversy must have opposing interests, as a mere prudential concern rather than a constitutional requirement. In *Perry*, the Court announced new and fairly strict requirements for laws that purport to assign responsibility for defending state laws to anyone other than executive officials. Those deviations from the Court’s precedent ought to fuel speculation that the Justices were anxious to avoid a sweeping constitutional ruling on same-sex marriage, and that they used standing to accomplish this goal.

Second, despite its novelty, the appellate standing regime inaugurated in the marriage cases should, on balance, benefit all three branches of government in constitutional litigation. The Court’s decision in *Windsor* preserved the executive power to enforce but not defend laws that the Executive deems unconstitutional. That power, if used sparingly, can accord greater respect to Congress than unilateral non-enforcement and thereby avoid unnecessary interbranch conflict. The Court also consolidated judicial power in executive non-defense cases by clearing away jurisdictional hurdles to appellate review. That is a positive development in light of the important error-correction functions performed by appellate courts. Justice Scalia was wrong to accuse the Court of a judicial “power grab.” Granting the parties standing *to appeal* in a case like *Windsor* does not expand judicial power when the district court—which unquestionably has standing—will ensure that the Judicial Department will have the final word anyway.

To be sure, the Court’s new appellate standing rules also carry serious risks. In the past, the Executive’s reluctance to enforce but not defend laws may have

8. *Perry*, 133 S. Ct. at 2659.

9. *Windsor*, 133 S. Ct. at 2689–96.

10. *See id.* at 2684–88; *id.* at 2698–2705 (Scalia, J., dissenting); *id.* at 2711–14 (Alito, J., dissenting) (concluding that the BLAG had standing to appeal, but the United States did not).

reflected doubts about the practice's viability. The Court's endorsement will dispel those concerns, making it sorely tempting for future Presidents to refuse to defend all manner of politically controversial laws. Overuse of the non-defense power risks weakening the Executive's credibility and converting the courts into a ready source of political cover. Nonetheless, at this early stage, there is reason for cautious optimism about the implications of *Windsor* and *Perry* for the separation of powers.

I. THE MARRIAGE CASES' NEW RULES FOR ARTICLE III STANDING ON APPEAL

The marriage cases made significant changes to the law of Article III standing on appeal. *Windsor* reconceptualized "adverseness" as a matter of prudential standing, rather than an aspect of the constitutional case-or-controversy requirement, while *Perry* announced new Article III limits on laws that assign responsibility for defending state law to anyone other than executive officials. Although the Court purported to ground its decisions in precedent, both outcomes required considerable stretching of previous case law.

A. Adverseness and Prudential Standing in Windsor

In *Windsor*, the surviving spouse in a same-sex marriage sued the United States, challenging the constitutionality of section 3 of DOMA and seeking a refund of \$363,053 in estate taxes that she paid following her wife's death.¹¹ While the case was pending in federal district court, the Attorney General announced that the Executive Branch would no longer defend section 3 of DOMA from constitutional challenge, although it would continue to enforce the statute.¹² In fact, the Executive Branch joined the attack on the statute, filing a downright peculiar "Motion to Dismiss" in which it urged the court to "not dismiss" the complaint.¹³ To defend the statute, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives intervened in the case as an interested party.¹⁴ The district court agreed with the plaintiff and the government, entering a judgment striking down section 3 of DOMA and ordering the government to refund the plaintiff's tax payment.¹⁵

Despite obtaining the result it desired in the district court, the United States appealed to the Second Circuit, which affirmed,¹⁶ and sought further review from the U.S. Supreme Court. Under Article III of the Constitution, a federal court may

11. *Id.* at 2683 (majority opinion).

12. *Id.* at 2683–84; *see also* Letter from Eric H. Holder, Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives, on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), [hereinafter Holder Letter], available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

13. *Windsor*, 133 S. Ct. at 2699 n.1 (Scalia, J., dissenting); *Windsor* Arg. Tr., *supra* note 7, at 49–50. Upon learning of that motion, Justice Kennedy remarked, "That—that would give you intellectual whiplash." *Windsor* Arg. Tr., *supra* note 7, at 50.

14. *Windsor*, 133 S. Ct. at 2684.

15. *Id.*

16. *Id.*

exercise jurisdiction only over “cases” or “controversies.”¹⁷ The Supreme Court has interpreted this limitation as requiring the plaintiff to have suffered an “injury in fact,” traceable to the defendant and redressable through a favorable decision.¹⁸ In the district court, the injury was obvious: the plaintiff invoked the court’s jurisdiction seeking a substantial tax refund.¹⁹ But on appeal, it was not clear that any live “controversy” remained. Although the United States filed the appeal, it was in essence a “prevailing party” in the district court because, like the plaintiff, it sought “no redress from the judgment entered against it.”²⁰

By a 5–4 margin, in an opinion by Justice Kennedy, the Court held that the United States had standing to appeal.²¹ The Court’s crucial doctrinal maneuver relied on a longstanding distinction between “Article III standing,” which enforces the Constitution’s case-or-controversy requirement,²² and “prudential standing,” a set of judicially self-imposed limits.²³ The Court reasoned that the United States could satisfy Article III’s standing requirements on appeal because the government was injured by the district court’s order to pay money and that injury could be redressed on appeal.²⁴ The fact that the government chose not to comply with the district court’s judgment, despite agreeing with it, apparently was critical, as the Court maintained that “[i]t would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court’s ruling.”²⁵

The Court acknowledged that the Executive’s “unusual position”²⁶ created a risk that instead of a “real, earnest and vital controversy,” the Court would face a “friendly, non-adversary[] proceeding.”²⁷ But it categorized this risk as irrelevant to Article III, implicating only prudential concerns.²⁸ The distinction is critical because prudential standing principles may be outweighed by other considerations or overridden by Congress, whereas Article III standing is an irreducible limit on the power of federal courts.²⁹

17. U.S. CONST. art. III, § 2.

18. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

19. *Windsor*, 133 S. Ct. at 2684–85.

20. *Id.* at 2685.

21. *Id.* at 2684–88. In a separate dissent, Justice Alito concluded that the United States lacked standing to appeal, but that BLAG enjoyed standing to appeal on behalf of the House of Representatives. *Id.* at 2711–14 (Alito, J., dissenting). Three other Justices disagreed, concluding that BLAG lacked standing as well. *Id.* at 2703–05 (Scalia, J., dissenting).

22. U.S. CONST. art. III, § 2 (providing that the judicial power of the United States extends only to certain kinds of “Cases” and “Controversies”).

23. *Windsor*, 133 S. Ct. at 2685, 2687.

24. *Id.* at 2686 (reasoning that the fact that the Executive Branch “may welcome this order . . . does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not”).

25. *Id.*

26. *Id.* at 2687.

27. *Id.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (internal quotation marks omitted)).

28. *Id.* at 2687.

29. *See* *Warth v. Seldin*, 422 U.S. 490, 500–01 (1975) (discussing the distinction between prudential and Article III standing).

Having framed the question as a balance between competing prudential concerns, the Court held that exercising jurisdiction was appropriate based on two factors. First, BLAG’s participation as *amicus curiae* ensured a “sharp adversarial presentation” of the “substantial argument for the constitutionality of § 3 of DOMA.”³⁰ Second, dismissal of the appeal would result in years of litigation as district courts around the country issued conflicting judgments and awaited a definitive ruling from the Supreme Court.³¹ The Court cautioned that “difficulties” may arise “if this were a common practice in ordinary cases,” but expressed concern that a contrary rule would mean “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.”³² By the same token, the Court warned of “grave challenges to the separation of powers” when the Executive can “nullify Congress’ enactment solely on its own initiative and without any determination from the Court.”³³

The most striking aspect of the standing holding in *Windsor* is the Court’s threshold determination that “adverseness” is merely a matter of prudential standing. Never in the history of the distinction between Article III and prudential standing had the Court categorized adverseness that way. Prudential standing traditionally refers to a handful of well-known limits on federal jurisdiction (such as third-party standing and the “zone of interests” requirement),³⁴ and until *Windsor* adverseness had never made the list. To the contrary, the Court frequently had described adverseness as a central *purpose* or *component* of the Article III injury-in-fact requirement,³⁵ alongside other purposes like the separation of powers and

30. *Windsor*, 133 S. Ct. at 2687–88.

31. *Id.* at 2688.

32. *Id.*

33. *Id.*

34. *See* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–12 (2004) (discussing rules against third-party standing, generalized grievances, claims by plaintiffs outside the law’s “zone of interests,” and claims involving domestic relations, but acknowledging that “we have not exhaustively defined the prudential dimensions of standing doctrine”). No prominent treatise on federal courts has described non-adverseness as an aspect of prudential standing. *See, e.g.*, 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3531, at 16 (3d ed. 2008 & Supp. 2013) (noting several limits, with no discussion of adverseness, but acknowledging that “the doctrines have changed continually”); EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* § 19.1(b), at 919 (9th ed. 2007) (listing several “generally recognized” considerations, with no mention of adverseness).

35. *See, e.g.*, *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (stating that Article III requires a “continuing interest in the dispute” on the part of the “opposing party,” to ensure “that the case features that concrete adverseness which sharpens the presentation of issues” (internal quotation marks omitted)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 (1986); *City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983); *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 382–83 (1980); *United States v. Richardson*, 418 U.S. 166, 176–80 (1974); *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *Baker v. Carr*, 369 U.S. 186, 204 (1962). Those cases, presumably, were the basis for the dissent’s insistence that “adverseness between the parties” is a “quite separate Article III requirement” in addition to

judicial restraint.³⁶ When “both litigants desire precisely the same result” on appeal, the Court had repeatedly held, there is “no case or controversy within the meaning of Art. III of the Constitution.”³⁷ Even Justice Kennedy, who authored the majority opinion in *Windsor*, previously had written that Article III limits, not merely prudential considerations, bar the Court from hearing appeals by a party that prevailed in the lower courts.³⁸ Unsurprisingly, given that history, in *Windsor* neither the United States,³⁹ nor the plaintiff,⁴⁰ nor any private-party amicus before the Court⁴¹ suggested that adverseness was merely a matter of prudential standing.⁴² Although Justice Scalia’s dissent contains its share of excesses (as discussed below), he did not exaggerate in accusing the majority of a “breathtaking revolution in our Article III jurisprudence” on this score.⁴³

The Court acknowledged that prevailing parties generally have no right to appeal, but pointed to two previous decisions, *Deposit Guaranty National Bank of Jackson, Mississippi v. Roper*⁴⁴ and *Camreta v. Greene*,⁴⁵ as evidence that this rule

injury, traceability, and redressability. *See Windsor*, 133 S. Ct. at 2701–03 (Scalia, J., dissenting). Non-adverseness, it should be noted, also has been cited as a justification for some prudential-standing limits. *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 555–57 (1996) (third-party standing); *Sec’y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984) (same).

36. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 752 (1984).

37. *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971) (per curiam); *see also GTE Sylvania*, 445 U.S. at 383; *Muskrat v. United States*, 219 U.S. 346, 361 (1911).

38. *Camreta*, 131 S. Ct. at 2037 (Kennedy, J., dissenting) (“The rule against hearing appeals or accepting petitions for certiorari by prevailing parties is related to the Article III prohibition against issuing advisory opinions.”); *see id.* at 2040 (faulting the majority for an “erroneous and unbounded exception to an essential principle of judicial restraint”).

39. *See* Brief for the United States on the Jurisdictional Questions at 7, 11–12, 25, *Windsor*, 133 S. Ct. 2675 (No. 12-307) (arguing that “Article III adverseness” was present, although also contending that *INS v. Chadha*, 462 U.S. 919 (1983), treated the lack of disagreement between parties as prudential, an argument discussed *infra* notes 51–58 and accompanying text).

40. *See* Brief on the Jurisdictional Questions for Respondent Edith Schlain Windsor at 21, 26–27, 31–35, *Windsor*, 133 S. Ct. 2675 (No. 12-307).

41. The only party before the Court to rely on that distinction was BLAG, in urging that the United States *lacked* standing. *See* Brief on Jurisdiction for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 35–36, *Windsor*, 133 S. Ct. 2675 (No. 12-307). Amici on the jurisdictional questions did not. *See* Brief of Constitutional Law Scholars as Amici Curiae in Support of Petitioner (Jurisdictional Questions) at 25, *Windsor*, 133 S. Ct. 2675 (No. 12-307); Motion for Leave to File and Amici Curiae of Former Attorneys General Edwin Meese III and John Ashcroft on Jurisdiction and in Support of None of the Parties at 3–10, *Windsor*, 133 S. Ct. 2675 (No. 12-307); Brief for Amici Curiae Former Senior Justice Department Officials and Former Counsels to the President on Jurisdiction at 18–20, *Windsor*, 133 S. Ct. 2675 (No. 12-307) [hereinafter Former Justice Officials’ Br. in *Windsor*]; Brief of Amicus Curiae the Honorable John K. Olson in Support of Respondent Addressing Jurisdiction at 12–14, *Windsor*, 133 S. Ct. 2675 (No. 12-307).

42. *See* Reply Brief for Court-Appointed Amica Curiae on Jurisdiction, *Windsor*, 133 S. Ct. 2675 (No. 12-307) (never addressing the distinction).

43. *Windsor*, 133 S. Ct. at 2702 (Scalia, J., dissenting).

44. 445 U.S. 326 (1980).

is a matter of prudential rather than Article III standing.⁴⁶ In fact, the portions of those opinions quoted by the Court related to statutory standing and certiorari practice, not prudential standing.⁴⁷ More fundamentally, both cases involved appellants who received a favorable lower-court judgment but lost on some discrete and important issue, in a manner that caused them continuing injury. In *Roper*, a named plaintiff whose individual claim was satisfied sought to appeal from the denial of class certification;⁴⁸ in *Greene*, government officials who prevailed on qualified immunity sought to appeal from a determination that they violated the Constitution.⁴⁹ There was thus crisp adverseness as to the issues actually being litigated on appeal. Indeed, the Court in *Greene* considered that fact essential to its jurisdiction under Article III, stating unequivocally that the Article III case-or-controversy requirement means that “the opposing party . . . must have an ongoing interest in the dispute, so that the case features ‘that concrete adverseness which sharpens the presentation of issues.’”⁵⁰ In *Windsor* the Court said exactly the opposite, holding that Article III permits an appeal by the government even if it obtains precisely the result it wants on every issue below.

Before *Windsor*, the only hint that adverseness might be merely a matter of prudential standing appeared in a single sentence in *INS v. Chadha*,⁵¹ another case in which the Executive refused to defend a law against constitutional attack. There the Court considered whether a federal court of appeals had jurisdiction to review a challenge to an immigration statute that the United States conceded was unconstitutional. The Court indicated that “there may be prudential, as opposed to Art. III, concerns about sanctioning the adjudication of these cases in the absence of any participant supporting the validity of [the law],” but concluded that the court of appeals had “properly dispelled any such concerns” by accepting briefs from the House and Senate.⁵²

The unusual posture of *Chadha*, however, readily distinguished that case from *Windsor*. Most cases that come before a federal court of appeals originate in federal district court, where a plaintiff must initially satisfy Article III standing requirements. In such cases, distinctive questions about *appellate* standing may arise, even if jurisdiction was clearly proper in the district court.⁵³ In *Chadha*, by contrast, the case originated in an Article I administrative proceeding, and an

45. 131 S. Ct. 2020 (2011).

46. *Windsor*, 133 S. Ct. at 2687.

47. *See Greene*, 131 S. Ct. at 2029–30 (describing rules of “federal appellate practice” related to the conservation of judicial resources, not prudential standing); *Roper*, 445 U.S. at 333–34 (distinguishing between Article III standing and the “collateral judgment” rule, an issue of statutory standing under 28 U.S.C. § 1291). Remarkably, the Court in *Windsor* quoted a key passage from *Roper* but omitted the words “collateral to the judgment” from the opinion. *Windsor*, 133 S. Ct. at 2687.

48. *Roper*, 445 U.S. at 332–33; *see Greene*, 131 S. Ct. at 2039 (Kennedy, J., dissenting) (explaining that the appellant in *Roper* suffered a continuing injury from the court’s allegedly erroneous procedural ruling).

49. *Greene*, 131 S. Ct. at 2028.

50. *Id.* at 2028 (quoting *City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983)).

51. 462 U.S. 919 (1983).

52. *Id.* at 940.

53. Both *Windsor* and *Perry* fit that description because both cases originated in federal district court.

aggrieved party subject to a deportation order sought direct review in the U.S. Court of Appeals for the Ninth Circuit. Because the court of appeals in *Chadha* was the first Article III court to hear the case, it faced the kind of *initial* standing questions usually confronted by district courts. As a matter of Article III standing, the agency's order to deport the party seeking review easily satisfied the requirement of a personal injury.⁵⁴ Thus, in context, the Court's statement that adverseness raised merely "prudential" concerns—a statement focused solely on the court of appeals⁵⁵—is best understood as affirming the constitutional power of federal courts that initially hear a case to enter judgment even in the absence of adverseness. That statement should not be surprising, given the federal courts' longstanding practice of entering default judgments and consent orders when no adverse party defends against a suit.⁵⁶

Indeed, in the thirty years following *Chadha*, the Court's suggestion that adverseness raises merely prudential concerns was almost entirely ignored by courts and commentators. Before *Windsor*, not a single court or treatise had relied upon *Chadha*'s distinction between constitutional and prudential standing.⁵⁷ So far as my research has disclosed, it had been cited only once, in a footnote in a student law review note.⁵⁸

None of this necessarily means that the prudential-balancing framework adopted in *Windsor* is undesirable as a matter of policy or indefensible as a matter of constitutional interpretation.⁵⁹ To the contrary, as discussed below, preserving the executive option to enforce but not defend laws is consonant with the Department of Justice's longstanding practice, and on balance may reduce interbranch conflict. But make no mistake—the holding of *Windsor* depended on a sharp break with prior precedent on the boundary between Article III and prudential standing.

54. *See id.* at 928, 936, 939–40.

55. By the time the case reached the Supreme Court, the House and Senate were party-appellants in their own right, again leaving no doubt about injury or adverseness. *See id.* at 928, 930 n.5, 939.

56. WRIGHT ET AL., *supra* note 34, § 3530, at 695–96 (noting the power of federal courts to enter default judgments, to accept guilty pleas in criminal cases, and to enter consent decrees despite the lack of "any dispute as to facts or remedy").

57. *See, e.g., id.* at 705 (calling *Chadha* a "good illustration of the reasons for finding a case or controversy" when executive officials agree that a law is unconstitutional but continue to enforce it, with no discussion of prudential standing); GRESSMAN ET AL., *supra* note 34, § 2.5, at 86–87 (discussing *Chadha*'s implications for statutory standing under 28 U.S.C. § 1254(1), but not relying on any distinction between constitutional and prudential standing). Only one court before *Windsor* had even considered that distinction, and it concluded that a lack of adverseness renders a case non-justiciable. *See State ex rel. City of Crestwood v. Lohman*, 895 S.W.2d 22, 30–32 (Mo. Ct. App. 1994). It declined to hold, as a concurring judge proposed, that the lack of adverseness raised merely prudential, rather than constitutional, concerns. *See id.* at 34 (Stith, J., concurring) (citing *Chadha*, 462 U.S. at 940).

58. *See Note, Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 994 n.86 (1983).

59. *See* 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, 842–43 (2004) (arguing that "unbundling standing to appeal from Article III would be defensible and would have some advantages").

B. New Restrictions on Who Can Speak for States in Perry

In *Perry*, two same-sex couples filed suit in federal district court challenging the constitutionality of Proposition 8, a statewide ballot initiative that prohibited same-sex marriage in California.⁶⁰ State executive officials declined to defend the law, but the district court permitted the official sponsors of the initiative (“the sponsors”) to intervene as defendants.⁶¹ When the district court sided with the plaintiffs, enjoining enforcement of Proposition 8, state officials declined to appeal.⁶² Instead, the sponsors appealed to the U.S. Court of Appeals for the Ninth Circuit.⁶³ After certifying a question to the California Supreme Court concerning the authority of initiative sponsors under state law,⁶⁴ a panel of the Ninth Circuit unanimously held that the sponsors had standing.⁶⁵

The Supreme Court disagreed, holding that the sponsors lacked Article III standing to appeal.⁶⁶ The sponsors conceded, and the Court unanimously agreed, that they lacked standing based on their own injuries.⁶⁷ Instead, they contended that they had standing to appeal on behalf of the State. Under California law, the sponsors of any initiative are authorized “to appear and assert the state’s interest in the initiative’s validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.”⁶⁸ According to the California Supreme Court, that authority derives from the “unique role” that official sponsors play in the initiative process, including collecting signatures, drafting the official statement, and paying relevant fees.⁶⁹

Based on earlier cases, that seemed like a credible basis for standing. The Court had repeatedly held that a judgment enjoining the enforcement of state law inflicts an injury on the State, meaning that *someone* has standing to appeal on the State’s

60. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660 (2013).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011) (certifying question); *Perry v. Brown*, 265 P.3d 1002, 1007 (Cal. 2011) (responding to certified question).

65. *Perry v. Brown*, 671 F.3d 1052, 1070–71 (9th Cir. 2012). The panel also issued a divided judgment affirming the district court on the merits. *Id.* at 1096.

66. *Hollingsworth v. Perry*, 133 S. Ct. at 2668. The Court dismissed the case for lack of jurisdiction and vacated the Ninth Circuit’s judgment, but left the district court’s order intact. *Id.*

67. *Id.* at 2661–63; *id.* at 2668–69 (Kennedy, J., dissenting) (focusing on the injury to California, not to the sponsors themselves). The initiative sponsors were four individuals and an organization called “ProtectMarriage.com—Yes on 8, A Project of California Renewal.” Petition for Writ of Certiorari at ii, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (No. 12-144). Although they supported Proposition 8 and wished to defend it, the Court has repeatedly rejected Article III “citizen standing” based on generalized grievances about government. *Hollingsworth v. Perry*, 133 S. Ct. at 2662.

68. *Perry v. Brown*, 265 P.3d at 1007; *see id.* at 1024.

69. *Hollingsworth v. Perry*, 133 S. Ct. at 2669–70. However textually dubious in light of the state election code, the California Supreme Court’s interpretation of state law was explicit, emphatic, and authoritative. *See id.* at 2670 (noting that the California Supreme Court repeated that language “more than a half-dozen times and in no uncertain terms”).

behalf to an Article III court.⁷⁰ Although state law typically assigns that responsibility to an executive official like a state attorney general, nothing in the Constitution requires that arrangement.⁷¹ In *Karcher v. May*,⁷² the leaders of both houses of the New Jersey legislature intervened as defendants after the state attorney general refused to defend a state statute against a constitutional challenge.⁷³ When the district court struck down the statute, the legislative leaders appealed.⁷⁴ The Supreme Court held that Article III standing was proper because state law, as embodied in state-court decisions, authorized the leaders “to represent the State’s interests in both the District Court and the Court of Appeals.”⁷⁵ Later in *Arizonans for Official English v. Arizona*⁷⁶ the Court expressed, in dictum, “grave doubts” about the standing of initiative sponsors in Arizona to appeal from a judgment striking down the law they sponsored.⁷⁷ But the Court stressed the absence of authorization under state law, noting that “we are aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.”⁷⁸ Thus, the initiative sponsors in *Perry* had reason for optimism. They maintained that, consistent with state law, they essentially had stepped into the shoes of the state attorney general and had standing to bring an appeal on behalf of the State.

The Court rejected that theory, but only after announcing two new Article III restrictions on who can file an appeal on behalf of a State.⁷⁹ First, the Court read

70. See, e.g., *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (“Had the State of Illinois invoked this Court’s appellate jurisdiction . . . the ‘case’ or ‘controversy’ requirement would have been met, for a State has standing to defend the constitutionality of its statute.”). An official named as a defendant and bound by a declaratory judgment and injunction, for example, unquestionably has Article III standing to appeal. *Horne v. Flores*, 129 S. Ct. 2579, 2592 (2009).

71. See *Hollingsworth v. Perry*, 133 S. Ct. at 2664.

72. 484 U.S. 72 (1987).

73. *Id.* at 75.

74. *Id.* at 75–76.

75. *Id.* at 81–82 (refusing to vacate the court of appeals’ decision because it is “wrong as a matter of New Jersey law” to suggest that the presiding officers cannot represent the legislature in litigation). Although that passage does not expressly discuss “standing,” the Court’s rejection of mootness arguments in the following paragraph makes clear that the Court considered Article III objections to the jurisdiction of the court of appeals. See *id.* at 82–83.

76. 520 U.S. 43 (1997).

77. *Id.* at 65–66.

78. *Id.* at 65 (reiterating that, under *Karcher*, state legislators have standing to appeal “if state law authorizes legislators to represent the State’s interests”). The Court also noted that the sponsors “are not elected representatives” and that it had never held that initiative proponents are “Article-III-qualified defenders of the measures they advocated.” But the sponsors in that case argued that they had standing to assert the State’s interest even in the absence of any state-law authorization to do so, asserting “a quasi-legislative interest in defending the constitutionality of the measure they successfully sponsored,” and “the funds and effort they expended to achieve adoption of” the measure. *Id.* The sponsors in *Perry*, by contrast, relied on an express authorization under state law. See *supra* notes 68–69 and accompanying text.

79. Chief Justice Roberts wrote the opinion for the Court, joined by Justices Scalia, Ginsburg, Breyer, and Kagan.

Karcher as imposing an Article III requirement that lawsuits and appeals on behalf of states may be brought only by “state officers, acting in an official capacity,” and not by “private parties.”⁸⁰ Second, the Court extracted from dicta in *Arizonans for Official English* an Article III requirement that lawsuits and appeals on behalf of states may be brought only by parties with a formal agency relationship to the State, including a fiduciary obligation and a right of control.⁸¹ Both restrictions depended on aggressive and questionable extensions of the Court’s previous decisions.

According to the first restriction, only “state officers” may initiate a federal-court lawsuit or appeal on behalf of a State, not private parties.⁸² The Court claimed to find “compelling precedent” for that rule in *Karcher*,⁸³ but its reading of the case was strained. In *Karcher*, the Court held that the leaders of the state legislature initially had Article III standing to appeal because state law authorized them “to represent the State’s interests.”⁸⁴ Shortly after the court of appeals issued its judgment, however, the leaders were voted out of office, and their successors in the legislature declined to appeal to the U.S. Supreme Court.⁸⁵ The Court issued a narrow holding: it lacked jurisdiction because the officials had been substituted out of the case under Federal Rule of Appellate Procedure 43(c)(1), and were no longer “parties” within the meaning of 28 U.S.C. § 1254(2).⁸⁶ Accordingly, as a basis for a new Article III “private party” restriction, *Karcher* is doubly inadequate. Far from suggesting that state officials are the *only* people constitutionally permitted to appeal on behalf of a State, the Court simply noted that the legislators were officials who had intervened in their official capacity, and that they could not continue the suit in any other capacity.⁸⁷ Moreover, the holding in *Karcher* was grounded in statutory jurisdiction under § 1254(2), with no discussion of Article III’s case-or-controversy requirement.⁸⁸

80. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2665 (2013) (emphasis in original).

81. *See Perry*, 133 S. Ct. at 2666–67.

82. *Id.* at 2665 (emphasizing that the sponsors “hold no office and have always participated in this litigation solely as private parties”).

83. *Id.* at 2657. The majority also discussed *Diamond v. Charles*, 476 U.S. 54 (1986), in which the Court held that a doctor who intervened as a defendant in the district court lacked standing to appeal when the State declined to do so. *Id.* at 63–67. The doctor was a private party with only a generalized interest in the case, and he made no claim that state law specifically authorized him to appear in court and to defend the state’s interests on appeal. *See id.* at 64–67. Although the State filed a letter with the U.S. Supreme Court declaring its position in litigation “essentially co-terminous” with the doctor’s, the Court deemed that “mere expression of interest” insufficient to create an Article III case or controversy. *Id.* at 61–64.

84. *Karcher v. May*, 484 U.S. 72, 81–82 (1987).

85. *Id.* at 76–78.

86. *Id.* at 81–83.

87. *See id.* at 78–81 (concluding that “intervention as presiding legislative officers does not entitle them to appeal in their other individual and professional capacities” and carefully inspecting the trial court record to confirm that they initially intervened only in an official capacity).

88. *See id.* at 77–81 (mentioning that the power of federal courts is circumscribed “by Article III of the Constitution and by the federal statutes enacted thereunder,” but proceeding to discuss only statutory jurisdiction).

According to the second restriction, Article III bars any person from initiating a federal court action or appeal on behalf of a State without “the basic features of an agency relationship” with the State.⁸⁹ Specifically, the Court held that a person acting on behalf of the State must (1) be subject to “the principal’s right to control the agent’s actions,”⁹⁰ (2) owe a fiduciary obligation to the principal that includes sensitivity to “resource constraints” and “public opinion,”⁹¹ and (3) enjoy a complete indemnification by the State against an award of attorney fees.⁹² None of those requirements was evident from the Court’s previous standing decisions. It would take a heroic reading of the single reference to “agents of the people of Arizona” in dictum in *Arizonans for Official English*⁹³ to superimpose the whole of the *Restatement (Third) of Agency* onto Article III. Credit instead goes to Walter Dellinger, the Duke law professor and former Assistant Attorney General whose influential brief on standing was cited by the Justices at oral argument and in the majority opinion.⁹⁴

To be sure, the Court’s previous standing cases did not foreclose the detailed restrictions announced in *Perry*. But the common understanding, reflected in the Ninth Circuit’s unanimous opinion, was that states have the “prerogative, as independent sovereigns, to decide for themselves who may assert their interests.”⁹⁵ That understanding was based, in part, on the long history of actions and appeals brought on behalf of States by private parties with no formal agency relationship.

The most prominent example, discussed briefly by the Court in *Perry*, is the *qui tam* action. Since the first Congress, *qui tam* suits have authorized private persons (“relators” or “informers”) to bring a civil action on the behalf of a State (or the United States) and to collect a portion of the proceeds as a kind of bounty.⁹⁶

89. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666–67 (2013) (citing 1 RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f (2006)).

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

91. *Id.* at 2667.

92. *Id.*

93. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997).

94. *See Perry*, 133 S. Ct. at 2667 (“[T]he proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however and to whatever extent they choose to defend it.” (quoting Brief for Walter Dellinger as Amicus Curiae in Support of Respondents on the Issue of Standing at 23, *Perry*, 133 U.S. 2652 (No. 12-144))); *Perry* Arg. Tr., *supra* note 7, at 10–11 (statement by Justice Breyer that “the Dellinger brief . . . is making a strong argument”).

95. *Perry v. Brown*, 671 F.3d 1052, 1071 (9th Cir. 2012); *cf.* Vikram Amar, *Revisiting Standing: Proposition 8 in the Ninth Circuit*, JURIST (Feb. 16, 2012), <http://jurist.org/forum/2012/02/vikram-amar-marriage-standing.php> (arguing that state law that “explicitly deputizes a particular proponent of [a ballot] initiative as the party entrusted to defend the constitutionality of the law” would have standing, but concluding that California voters could not have intended that kind of deputization in Proposition 8 because the California Supreme Court had not yet clarified the powers of initiative sponsors).

96. *See, e.g.*, 31 U.S.C. § 3730(b)(1) (2006) (*qui tam* action under the False Claims Act); *see also* *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774–78 (2000) (describing history of *qui tam* actions in the United States); Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381, 387 & n.37; Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*,

Relators in *qui tam* cases need not have suffered any personal injury, need not be government officials, and need not have any formal agency relationship,⁹⁷ yet the Supreme Court has held that *qui tam* relators enjoy Article III standing to sue on the government's behalf.⁹⁸ The Court brushed aside that history in a parenthetical, calling *qui tam* suits "readily distinguishable"⁹⁹ because they involve "a partial assignment of the Government's damages claim and a 'well nigh conclusive' tradition" in English and American courts.¹⁰⁰

To my mind, a better example is the long history of private criminal prosecution in America during the eighteenth and nineteenth centuries. For over a century, the law of many states authorized private parties to initiate criminal prosecutions in the State's name to redress injuries to the State as sovereign.¹⁰¹ Private prosecutors need not have suffered any personal injury, were not public officials, and had no formal agency relationship with the State. Yet they routinely filed court actions on behalf of the State to enforce the criminal law, as authorized by state procedures. Although Article III courts may not have exercised jurisdiction over private criminal prosecutions,¹⁰² other federal courts and many state courts

38 AM. U. L. REV. 275, 296–303 (1989); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 600–01 (2005).

97. See, e.g., 31 U.S.C. § 3730(b)(1) (authorizing suit by any "private person").

98. *Vt. Agency*, 529 U.S. at 774.

99. *Perry*, 133 S. Ct. at 2665.

100. *Id.* (quoting *Vt. Agency*, 529 U.S. at 777). The Court apparently reasoned that, whereas *qui tam* suits involve claims for money damages and relators stand to benefit personally, initiative sponsors seeking to defend state law from constitutional attack have no personal stake in the case. See Kyle La Rose, Comment, *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, 1739 (2012). But in upholding the standing of *qui tam* relators, the Court expressly rejected the argument that the relator's potential "bounty" could satisfy Article III, noting that it would not redress any personal injury to the relator. *Vt. Agency*, 529 U.S. at 772 (reasoning that, although a relator stands to gain from a victory in the case, the same could be said of "someone who has placed a wager upon the outcome").

101. See *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184, 2188–89 (2010) (Roberts, C.J., dissenting from dismissal as improvidently granted) (discussing the long history of private prosecution conducted "on behalf of the sovereign" in England and America); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 127–28 (1998) (Stevens, J., concurring in the judgment) (same); JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 3–39 (1980); ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880*, at 1–2 (1989); Morrison, *supra* note 96, at 601–02. Private prosecutions continue in some form in many states. See John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 529–40 (1994); Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 423 (2009); Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85, 103–07 (1992).

102. Compare Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 700–01 (2004) (contending that only territorial and D.C. courts entertained private criminal prosecutions in the federal system), with Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069, 1083 n.84 (1990) (arguing that private prosecution of

did.¹⁰³ At a minimum, the widespread practice of private criminal prosecution is in tension with the Court's suggestion that actions brought by private parties on behalf of a State are not "historically viewed as capable of resolution through the judicial process."¹⁰⁴

None of this is to suggest that *Perry*'s new restrictions for suits on behalf of a State somehow contravened clear precedent. The standing of ballot initiative sponsors was an issue of first impression for the Court, and *qui tam* suits and private criminal prosecutions are hardly dispositive in light of their long historical pedigree. Nor does it suggest that the Court's requirements are unwise as a matter of policy. Insisting on an official capacity and an agency relationship can guard against "rogue" sponsors who act in their own interests, rather than that of the State. The point, instead, is that the restrictions announced in *Perry* required aggressive extensions of the Court's previous decisions and run contrary to a common understanding that states are free to decide for themselves who asserts their interests.

The abrupt changes to the law of Article III standing in *Windsor* and *Perry* ought to fuel speculation that the Justices' reasoning was colored by concern about the merits. The charge that judges' decisions on standing are driven by their views of the merits is frequently leveled,¹⁰⁵ but there is special reason to think that it happened here. The marriage cases attracted intense public attention. Before they were decided, many commentators predicted—and some urged—that the Court

federal common-law crimes may have occurred in the Court's early years). The lack of private prosecutions in Article III courts did not stem from standing requirements, but from choices made by Congress. One was a requirement of public prosecution for all federal crimes. See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93; *United States v. Murphy*, 41 U.S. 203, 209 (1842); *Woolhandler & Nelson*, *supra*, at 697; *Dangel*, *supra*, at 1083. Another was the Supreme Court's asymmetrical appellate jurisdiction in federal-question cases, see Judiciary Act of 1789 § 25, which made it impossible for States to appeal from state-court decisions erroneously accepting a federal-law defense.

103. The Circuit Court for the District of Columbia, for example, routinely exercised jurisdiction over private criminal prosecutions brought in the name of the United States. See, e.g., *United States v. Birch*, 24 F. Cas. 1147 (C.C.D.C. 1809) (No. 14,595); *United States v. Dulany*, 25 F. Cas. 923 (C.C.D.C. 1809) (No. 15,000); *United States v. Lyles*, 26 F. Cas. 1024 (C.C.D.C. 1806) (No. 15,645); *United States v. Sandford*, 27 F. Cas. 952 (C.C.D.C. 1806) (No. 16,221); *Virginia v. Dulany*, 28 F. Cas. 1223 (C.C.D.C. 1802) (No. 16,958). That court was organized under Article I, see Act of Feb. 27, 1801, ch. 15, § 3, 2 Stat. 103, 105–06, but its judges apparently believed themselves to be governed by the Article III, see *United States v. More*, 7 U.S. (3 Cranch) 159, 160 n.2 (1805) (describing the court's holding that D.C. judges enjoyed Article III's salary protections).

104. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)); see *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) ("We have always taken [the case-or-controversy requirement] to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.").

105. WRIGHT ET AL., *supra* note 34, § 3531, at 17–19 (noting that "many exasperated courts and commentators" believe that "standing doctrine is no more than a convenient tool to avoid uncomfortable issues or to disguise a surreptitious ruling on the merits"); see also F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 304–06 (2008); Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 650 (1985); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–43 (1999).

might prefer a middle-ground outcome to a sweeping constitutional ruling that would require same-sex marriage in every state.¹⁰⁶ That remains a leading realpolitik explanation for the split decision.¹⁰⁷ The fact that the decisions broke new ground and substantially reformulated appellate standing rules tends to reinforce that account.

II. EXECUTIVE NON-DEFENSE OF FEDERAL LAW AFTER THE MARRIAGE CASES

Despite its novelty, there is reason for cautious optimism about the new appellate standing regime announced in *Perry* and *Windsor*. From a separation-of-powers perspective, the most important consequence of the decisions is the preservation and strengthening of the Executive's power to enforce but not defend federal laws that it deems unconstitutional. Used sparingly, that power can reduce interbranch friction and benefit both the Executive and the courts. The key risk going forward is that the Court's endorsement will tempt the Executive to overuse the non-defense option, to the detriment of all three branches.

A. Executive Non-Defense: The Case for Optimism

1. The Executive Branch

For the Executive Branch, *Windsor* represented a crucial test of the power to enforce laws while refusing to defend them from constitutional challenge. The Executive has frequently claimed that power,¹⁰⁸ although it has exercised it

106. See, e.g., Michael McConnell, *The Constitution and Same-Sex Marriage*, WALL ST. J., Mar. 22, 2013, at A15 (warning that the Court "endangers its own legitimacy" when it seeks to resolve divisive moral-legal questions, and urging the Court "to resolve these cases without setting a precedent either way"); Emily Bazelon, *How the Supreme Court Should Rule on Gay Marriage*, SLATE (Mar. 4, 2013, 4:11 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/03/supreme_court_s_prop_8_case_the_justices_should_choose_a_modest_approach.html (urging the Court to take "medium-sized steps" rather than holding that gay marriage is constitutionally required in all states).

107. See Michael McConnell & Jeffrey Rosen, *Town Hall Debate: McConnell and Rosen on the Same-Sex Marriage Decisions*, CONST. DAILY (June 26, 2013), <http://blog.constitutioncenter.org/2013/06/town-hall-debate-mcconnell-and-rosen-on-the-same-sex-marriage-decisions> (attributing the narrow result in part to Justice Kennedy's unwillingness to hold that the Constitution requires same-sex marriage in all states); Kermit Roosevelt, *The Supreme Court's Gay Marriage Decisions Are Modest Steps Towards Greater Equality*, PENN LAW (June 26, 2013), <https://www.law.upenn.edu/live/news/2703-prof-kermit-roosevelt-the-supreme-courts-gay> (calling *Perry* "the most modest and incremental decision it could have rendered without going against the cause of same-sex marriage"); see also Jason Farago, *Did the Supreme Court's Liberals Balk at a More Pro-Gay Prop 8 Ruling?*, GUARDIAN.COM (June 28, 2013, 3:10 PM), <http://www.theguardian.com/world/2013/jun/28/us-supreme-court-doma-fate-america>; Noah Feldman, *Supreme Court Prolongs Gay-Marriage Struggle*, BLOOMBERG (June 26, 2013, 12:22 PM), <http://www.bloomberg.com/news/2013-06-26/supreme-court-prolongs-gay-marriage-struggle.html>.

108. Memorandum from Walter Dellinger, Assistant Att'y Gen., to Abner J. Mikva, White House Counsel ¶ 5 (Nov. 2, 1994) [hereinafter Dellinger Memorandum], available at <http://www.justice.gov/olc/nonexecut.htm>; see also Holder Letter, *supra* note 12.

sparingly. Enforcement and non-defense allows a private party injured by an act of Congress to challenge the law in court, effectively submitting the disagreement to the judiciary. The rationale reflects, in part, the “desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch,” rather than effectively invalidating the law through unilateral executive non-enforcement.¹⁰⁹

Few scholars appreciate how close the marriage cases came to effectively nullifying the power to enforce but not defend.¹¹⁰ In *Windsor*, three Justices concluded that no one had standing to appeal from the district court’s order declaring section 3 of DOMA unconstitutional. Had their view prevailed, the United States would lack standing to appeal whenever it agreed with the judgment below and did not seek redress of any injury.¹¹¹ The same logic would bar appeals by a prevailing plaintiff. In addition, Congress would lack standing to appeal because striking down a law or otherwise impairing a branch’s power does not inflict an Article III injury.¹¹² As a result, successful constitutional challenges to laws that the Executive declines to defend would be stranded in district court.

That would have frustrated the effectiveness of the executive non-defense power. Decisions of federal district courts are not binding precedent, even in the same district or before the same judge.¹¹³ To elevate the case to the appellate courts, a district court would first need to reject the challenge, giving the plaintiff standing to appeal. To proceed to the Supreme Court, a court of appeals would need to reject the challenge as well. Thus, under the dissenters’ approach, the success of enforce-but-do-not-defend would have been uneven. Rather than securing a definitive judicial tiebreaker in cases where the President and Congress disagree about the constitutionality of a law,¹¹⁴ the Executive may only have been able to rack up a series of non-binding district court judgments agreeing with its position. Review by appellate courts would be unpredictable and, ironically, the stronger the Executive’s interpretation of the Constitution, the more likely district courts would agree and thereby foreclose further review.

But the threat to the executive non-defense power was even more serious. For the three dissenters, even the district court acted inappropriately in *Windsor* by

109. Dellinger Memorandum, *supra* note 108, ¶ 5; see Aziz Z. Huq, *Enforcing (But Not Defending) ‘Unconstitutional’ Laws*, 98 VA. L. REV. 1001, 1069 (2012) (“The creation and preservation of a justiciable controversy is a goal routinely stipulated in official defenses of enforcement-litigation gaps.”).

110. An amicus brief filed by former Justice Department officials was the only filing before the Court to explicitly discuss that possibility. See Former Justice Officials’ Br. in *Windsor*, *supra* note 41, at 23 (warning that if the Court held that it lacked jurisdiction, “the Executive would effectively be required to abandon the infrequently used but important practice”).

111. See *United States v. Windsor*, 133 S. Ct. 2675, 2698–703 (2013) (Scalia, J., dissenting). Justice Alito concurred with that view, but would have held that the Court had jurisdiction based on BLAG’s standing. See *id.* at 2711–12 (Alito, J., dissenting).

112. *Id.* at 2704 (Scalia, J., dissenting).

113. See, e.g., *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) (citing 18 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 134.02[1][d], at 134–26 (3d ed. 2011)).

114. See Dellinger Memorandum, *supra* note 108, ¶ 5 (decision to enforce may reflect in part the possibility that “the Supreme Court” can review the issue).

“referee[ing] this friendly scrimmage.”¹¹⁵ Although not doubting the district court’s jurisdiction, they argued that when the Executive chooses to enforce a law but concedes its unconstitutionality, “the litigation should end in an order or a consent decree enjoining enforcement.”¹¹⁶ Rather than writing an opinion and adjudicating the constitutional issue on the merits—which the dissenters considered inappropriate due to the lack of adverseness—the district court should simply enter an order to remedy the plaintiff’s injury. Some scholars have expressed a similar view. Michael McConnell argues that “the moment” state officials declined to defend Proposition 8 in *Perry*, the district court “should have issued a default judgment in favor of the two couples who were plaintiffs, allowing them to marry and dismissing the case.”¹¹⁷ Similarly, Vikram Amar contends that the district court had a justiciable case or controversy “for the limited purpose of granting a default judgment, but not for purposes of holding a trial to adjudicate the merits of the plaintiffs’ claims.”¹¹⁸ It is not clear whether the dissenters believe that district courts *must* take that action to comply with Article III, or merely *should* do so in the sound exercise of their discretion, but the effect would have been the same.

Had the dissenters prevailed on that score, *Windsor* would have effectively gutted the executive power to enforce but not defend. If district courts should do nothing more than enter simple orders or consent decrees, then the plaintiffs (and acquiescing Executive) would always prevail in district court and would be unable to appeal. Indeed, with no opinion adjudicating the merits, no court would ever consider the constitutional challenge.¹¹⁹ Enforcement and non-defense would be pointless, incapable of securing any form of judicial review. At the same time, it would be costly. Because district courts ordinarily have power to grant relief only to the parties before them,¹²⁰ and an immediate default order would rule out

115. *Windsor*, 133 S. Ct. at 2702 (Scalia, J., dissenting).

116. *Id.*

117. McConnell & Rosen, *supra* note 107; *see also* Huq, *supra* note 109, at 1029–30 (speculating that dismissal or a default judgment might be constitutionally required if Congress did not intervene to defend a statute).

118. Vikram David Amar, *Precisely What Will, or Should, Happen to Same-Sex Marriage in California if the Supreme Court Finds in Hollingsworth v. Perry That the Proposition 8 Sponsors Lack Standing?*, JUSTIA (Apr. 11, 2013), <http://verdict.justia.com/2013/04/11/precisely-what-will-or-should-happen-to-same-sex-marriage-in-california-if-the-supreme-court-finds-in-hollingsworth-v-perry-that-the-proposition-8-sponsors-lack-standing>.

119. Stacy Pepper, *The Defenseless Marriage Act: The Legitimacy of President Obama’s Refusal to Defend DOMA § 3*, 24 STAN. L. & POL’Y REV. 1, 25–26 (2013) (explaining that a default judgment would deprive the district court of an opportunity to resolve the merits of the constitutional challenge).

120. *See* *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 478 (1995) (“[W]e neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants.”); *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 96 F.3d 1390, 1394 (Fed. Cir. 1996) (“Courts do not write legislation for members of the public at large; they frame decrees and judgments binding on the parties before them.”). This is not to deny that district courts sometimes enter broad injunctions that purport to dictate defendants’ actions with respect to third parties, as the district court did in *Perry*. But ordinarily a defendant can appeal to a court capable of announcing binding precedent, or will

procedural devices like class actions, a single judgment would not compel the Executive to cease all enforcement of the challenged law. The Executive would be left to “defend” a multiplicity of suits, and injured plaintiffs would be compelled to file actions *seriatim*, with no discernible benefit for anyone.

That would have been unfortunate, and the outcome in *Windsor* should be greeted with cautious optimism. That assessment begins from the conventional (but by no means universal) premise that, in unusual circumstances, it is appropriate for the Executive to facilitate judicial review by enforcing but refusing to defend a challenged law. A lengthy defense of that position is beyond the scope of this Essay, but here is a greatly abbreviated version. The Executive has a responsibility to interpret the Constitution in performing its functions (constitutional “departmentalism”),¹²¹ but it should carry out that responsibility with humility, according respect to the opinions of other branches.¹²² Thus, the Executive should indulge a strong presumption that acts of Congress are constitutional and ordinarily should enforce and defend them. In rare circumstances,¹²³ however, when Congress and the Executive disagree about the constitutionality of a law, enforcement and non-defense permits the judiciary to weigh in as a kind of tiebreaker. That is sometimes desirable. Although refusing to defend a statute may create friction with Congress,¹²⁴ unilateral non-enforcement risks even greater friction and more drastic and costly forms of retaliation.¹²⁵

choose voluntarily to comply rather than face further litigation in which the defendant will lose because of issue preclusion. In the dissenters’ view, neither the plaintiff nor the government would have standing to appeal, and future plaintiffs could not benefit from the district-court judgment because offensive issue preclusion is unavailable against the government. *United States v. Mendoza*, 464 U.S. 154, 162 (1984) (holding that “nonmutual offensive collateral estoppel simply does not apply against the government”).

121. See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 918, 924–25 (1990); Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-But-Not-Defend Problem*, 81 FORDHAM L. REV. 577, 579 (2012); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1268 (1996); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 778–79 (2002).

122. See Dellinger Memorandum, *supra* note 108, ¶¶ 3–4; David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-enforcement Power*, 63 L. & CONTEMP. PROBS. 61, 90, 92 (2000); Greene, *supra* note 121, at 581; Dawn E. Johnsen, *Presidential Non-enforcement of Constitutionally Objectionable Statutes*, 63 L. & CONTEMP. PROBS. 7, 17 (2000).

123. See Dawn Johnsen, *The Obama Administration’s Decision to Defend Constitutional Equality Rather Than the Defense of Marriage Act*, 81 FORDHAM L. REV. 599, 603–04 (2012); Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1198–1206 (2012) (describing several “clusters” of cases in which the Executive historically has declined to defend, including statutes for which no colorable defense can be advanced and statutes that infringe on the Executive’s authority).

124. Meltzer, *supra* note 123, at 1220.

125. Greene, *supra* note 121, at 581, 591; Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 960–62 (2012); Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as Counterweight?*, 54 U. PITT. L. REV. 63, 84–93 (1992).

I refer to this constitutional baseline as “conventional” not because of any scholarly consensus—readers committed to robust versions of departmentalism emphatically reject it¹²⁶—but because it closely accords with the stated position and actual practice of the Executive Branch.¹²⁷ For more than seventy years, when confronted with an act of Congress it believes is unconstitutional, the Executive on occasion has deemed it preferable to commit the issue to the judiciary rather than unilaterally refusing to enforce the statute. For two categories of cases, that practice is particularly well-established: laws that impinge upon executive power, and laws for which no reasonable constitutional argument can be advanced. Indeed, Congress itself seems comfortable with non-defense in some circumstances, demanding notice from the Executive Branch when it declines to enforce or defend federal laws,¹²⁸ and routinely extracting only a qualified promise to defend federal laws from Justice Department officials at their Senate confirmation hearings.¹²⁹ Even if the interbranch confrontation prompted by non-enforcement is not, in Justice Scalia’s phrase, an “[u]nimaginable evil,”¹³⁰ it may be a greater evil, and it is certainly an avoidable evil. Permanently taking that option off the table would have been unfortunate.

Happily, the marriage cases preserved the power to enforce but not defend. The cases not only endorsed the exercise of appellate jurisdiction despite the lack of traditional adverseness, but expressly acknowledged the “difficult choice” the Executive faces after determining that a duly enacted law is unconstitutional.¹³¹ For the Executive Branch, the result must have come as a relief.

126. See, e.g., Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 570 (2012) (arguing that the President has a constitutional duty *not* to defend statutes he deems unconstitutional); Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008) (same); Michael B. Rappaport, *The Unconstitutionality of “Signing and Not-Enforcing,”* 16 WM. & MARY BILL RTS. J. 113, 122–23, 129 (2007) (same).

127. See Former Justice Officials’ Br. in *Windsor*, *supra* note 41, at 5–17 (describing the Justice Department’s practices and views concerning executive non-defense).

128. See 28 U.S.C. § 530D(a)(1)(A)–(B).

129. Meltzer, *supra* note 123, at 1218–20; see also, e.g., *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee to Be Associate Attorney General of the United States and Elena Kagan to Be Solicitor General of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 47 (2009) (statement of Elena Kagan) (“Traditionally, outside of a very narrow band of cases involving the separation of powers, the Solicitor General has defended any Federal statute in support of which any reasonable argument can be made.”); *Confirmation Hearing on the Nomination of Paul D. Clement To Be Solicitor General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 6 (2005) (statement of Paul D. Clement) (“[O]utside a narrow band of cases implicating the President’s Article II authority, the [Solicitor General’s] office will defend the constitutionality of the acts of Congress as long as reasonable arguments can be made in the statute’s defense.”).

130. *United States v. Windsor*, 133 S. Ct. 2675, 2704 (2013) (Scalia, J., dissenting) (“Our system is *designed* for confrontation.”)(emphasis in original).

131. See *id.* at 2687–89.

2. The Judiciary

The judiciary also stands to gain by preserving the executive power to enforce but not defend. A contrary ruling would have sidelined the courts in a category of cases where, in the ordinary course of litigation, Article III courts would have had power to resolve constitutional questions. And contrary to Justice Scalia's claims in dissent, the marriage cases' new standing rules do not represent a judicial "power grab." Rather than seizing fresh power for the judiciary, the decisions help to consolidate judicial power in constitutional litigation.

In *Windsor*, the Court altered Article III standing rules to permit the government to appeal after it successfully urges a district court to strike down a law.¹³² That change by design makes it easier for the Supreme Court and federal appellate courts to weigh in on unsettled constitutional questions. The Court defended that result in part on efficiency grounds, noting that an immediate appeal by the "winners" in district court can elevate an issue more quickly, more directly, and with less investment of judicial resources than awaiting a future case in which a losing plaintiff files an appeal.¹³³ But it also invoked the separation of powers, arguing that a contrary rule would undermine 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" and reiterating that "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹³⁴

For Justice Scalia in dissent, that reasoning amounted to a "jaw-dropping" act of self-aggrandizement by the judicial branch.¹³⁵ He accused the majority of imposing "black-robed supremacy" in the place of democratic self-rule, of breaching a "barrier against judges' intrusion into [the People]'s lives," and of a conception of "judicial power" better suited to foreign courts than American courts.¹³⁶ Although some passages focused on the Supreme Court,¹³⁷ the dissent's major theme was overreach by the judiciary as a whole: "an assertion of judicial supremacy" over Congress and the Executive.¹³⁸

That line of criticism is misguided. Denying the government standing *to appeal* in a case like *Windsor* is hardly an act of judicial modesty. As the dissent acknowledged, the district court had proper Article III jurisdiction based on the plaintiff's claim of injury.¹³⁹ Once a district court has considered the merits of a

132. *See id.* at 2685–89.

133. *Id.* at 2688.

134. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

135. *Id.* at 2698 (Scalia, J., dissenting).

136. *Id.*

137. *See id.* at 2697–98 (majority opinion "aggrandizes" the "power of this Court to pronounce the law" based on "an exalted conception of the role of this institution in America"); *id.* at 2698 (majority "envisions a Supreme Court standing (or rather enthroned) at the apex of government"); *id.* at 2699, 2702–03 (judicial review not only is not "the 'primary role' of this Court" but "is not a separate, free-standing role *at all*" (emphasis in original)).

138. *Id.* at 2698.

139. *See id.* at 2700, 2702 (arguing that "the suit should have ended" in the district court "in an order or a consent decree enjoining enforcement").

claim, declared an act of Congress unconstitutional, and entered an order enjoining its enforcement, the Judicial Branch already is thrust into the fray, and some infringement on other branches of government is inevitable. Further review by the Supreme Court or appellate courts might result in a reversal that upholds the law, but dismissing the government's appeal for lack of standing would do nothing to extract the judiciary from the controversy.

The outcome in *Perry* powerfully illustrates the point. By dismissing the appeal and vacating the Ninth Circuit's decision, the Supreme Court ensured that no appellate judges could weigh in on the constitutional challenge to Proposition 8. But the district court's order remained intact, and that judgment alone proved sufficient to strike down a controversial but popularly enacted state law. The federal Judicial Branch conclusively resolved the constitutional challenge, even if the Supreme Court did not.

Thus, the new standing rules in *Windsor* are better understood as consolidating, rather than expanding, judicial power in constitutional litigation. The majority reasoned that a decision on the merits by the Supreme Court would carry several advantages: promoting uniformity, avoiding prolonged litigation, conserving judicial and party resources, and providing clear guidance to lower courts.¹⁴⁰ That assessment may sound self-congratulatory,¹⁴¹ but it closely tracks the widely recognized functions performed by appellate courts. One key purpose of appellate review is the development of law by announcing, clarifying, and harmonizing governing legal rules.¹⁴² That function is particularly important for the Supreme Court, which has a special charge to safeguard the uniformity and supremacy of federal law.¹⁴³ Appellate courts also can help to reduce the overall costs of adjudication, particularly when recurring issues affect many cases.¹⁴⁴ In addition, the Court might well have mentioned error correction, another important function performed by appellate courts.¹⁴⁵ Appellate review in the federal system is premised on the assumption that district court judges sometimes make errors, but that the number of errors can be reduced by affording a panel of multiple judges an opportunity to review a narrow set of claims and ample time to deliberate.¹⁴⁶ That

140. *Id.* at 2688 (majority opinion).

141. *Cf. id.* at 2698 (Scalia, J., dissenting) (criticizing the majority's vision of "a Supreme Court standing (or rather enthroned) at the apex of government").

142. PAUL D. CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, JUSTICE ON APPEAL 2–3 (1976); *see also* Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 424–25 (2013) (describing law development as one of the functions "consistently . . . offered" by scholars and judges describing appellate courts).

143. *See infra* note 168 and accompanying text (discussing the "essential functions" thesis concerning the jurisdiction of the Article III courts).

144. *Cf.* Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 425 (1995) (arguing that, by harmonizing the law through error correction, appellate review can capture "consequentialist advantages" through cost savings, even if a higher court resolves conflicts "on its own initiative").

145. Levy, *supra* note 142, at 424–25, 427.

146. *See United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984) (en banc) (because appellate courts need not hear evidence and find facts, they can follow a "collaborative, deliberative process" that "reduces the risk of judicial error on questions of law").

kind of accuracy is no less valuable in constitutional litigation than in other contexts.¹⁴⁷

In short, the Court deemed appellate review desirable in *Windsor* for the same reasons that appellate review is desirable in other contexts. It sought not to expand judicial power at the expense of other branches, but to consolidate that power and to deploy it more effectively in the interests of uniformity, efficiency, and accuracy. Because both the Executive and the courts stand to benefit from the Court's decision to preserve the executive non-defense option, there is reason for optimism in the wake of the marriage cases.

B. Executive Non-Defense: The Case for Caution

At the same time, there is reason for caution. The Executive's longstanding reluctance to use the power to enforce but not defend may be attributable, in part, to doubts about its lawfulness.¹⁴⁸ In addition, before *Windsor*, the Executive could not have been confident that it could seek appellate and Supreme Court review when it "prevailed" in the district court following a decision not to defend. Lingering concerns about the validity and effectiveness of the non-defense option may have tempered the Executive's enthusiasm for it.

The marriage cases could drastically change that calculus. The Court's explicit endorsement of executive non-defense, and its sensitivity to "the difficulty the Executive faces" when it determines that an act of Congress is unconstitutional,¹⁴⁹ should dispel concerns about judicial resistance to the practice. At the same time, the Court has armed the Executive with an unprecedented power to appeal from decisions in which it obtained precisely the result it wanted. That kind of sweeping victory may tempt executive officials to enforce but not defend laws with far greater frequency.

The temptation will be powerful considering the increasing scrutiny of executive litigation decisions by political activists, new media, and interest groups. As the Obama administration vividly learned during its initial defense of DOMA,

147. The Court's eagerness in *Windsor* to move constitutional cases up the appellate ladder may seem to be in tension with its common practice, in evaluating petitions for certiorari, to allow issues to "percolate" in the lower courts. *See Arizona v. Evans*, 514 U.S. 1, 23–24 n.1 (1995) (Ginsburg, J., dissenting) (arguing that "periods of 'percolation'" when new legal problems arise "may yield a better informed and more enduring final pronouncement by this Court"); John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982) ("[E]xperience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process."). But historically the Court has not followed that practice in cases where a lower court strikes down a federal or state law as unconstitutional. As recently as 1988, Congress made "percolation" impossible by assigning the Supreme Court mandatory appellate jurisdiction in such cases, and the Court still considers them some of the strongest candidates for certiorari. GRESSMAN ET AL., *supra* note 34, § 4.12, at 264 ("Where the decision below holds a federal statute unconstitutional . . . certiorari is usually granted because of the obvious importance of the case.").

148. *See supra* note 126 and accompanying text (collecting scholarship arguing that, by enforcing but not defending federal law, the Executive violates the Constitution).

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

defending a controversial law may carry substantial political costs.¹⁵⁰ Abandoning defense of a law, on the other hand, allows the Executive to deflect that criticism and use the courts as political cover. The President can please constituents and interest groups who dislike a law by publicly condemning it as unconstitutional. At the same time, he can assure supporters of the law that the courts ultimately will decide the issue, shifting blame to the judiciary. In concept, electing to enforce but not defend a law is an act of humility and respect for other branches. In practice, however, the decision may be tainted by more crass political calculations. Many federal laws infuriate partisans on one side or the other—on affirmative action, partial-birth abortion, campaign finance, gun control, school choice, etc.—and future Presidents may see the non-defense option as a way out of a political jam. The marriage cases will make that option more tempting.

For several reasons, that development would be damaging. First, regular non-defense by the Executive would threaten the stability of federal law. As Daniel Meltzer has argued, it would be undesirable to create a “regime in which each administration views itself as having significant latitude to refuse to enforce and defend acts of Congress.”¹⁵¹ Frequent vacillation by the Executive in litigation—spurred by a new President’s different views about constitutional law or the appropriate circumstances for non-enforcement and non-defense—would destabilize federal law and threaten the interests of private parties who act in reliance on existing constitutional judgments.

Second, frequent decisions not to defend could undermine the Executive’s credibility in litigation, to the detriment of all three branches. Today, attorneys for the Executive Branch enjoy institutional advantages that make them exceptionally effective adversaries. They are repeat players who can cultivate a strong reputation and familiarity with the courts,¹⁵² they have ready access to expert regulatory agencies, and they are often career government attorneys with years of valuable experience.¹⁵³ As a result, the Office of the Solicitor General is widely regarded as

150. See Josh Gerstein, *DOMA Move Helps President Obama with Gays*, POLITICO (Mar. 1, 2011, 4:20 AM), <http://www.politico.com/news/stories/0311/50388.html> (noting that the decision not to defend DOMA “has dramatically warmed [President Obama’s] relationship with gay and lesbian activists—clearing the way for the president and Democrats to fundraise aggressively in the gay community” following two years in which “[s]ome gay Democratic donors organized boycotts,” while “[o]thers picketed fundraisers Obama headlined, and even heckled him at public events”).

151. Meltzer, *supra* note 123, at 1228 (emphasis omitted); *id.* at 1228–30 (predicting that different administrations will have “sharply different views” about the proper occasions for non-enforcement and about constitutional law).

152. REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 31 (1992) (calling the Solicitor General “the definitive Repeat Player[.]”); Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1493 (2008). *But see* Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505, 506–07, 522–23 (1998) (challenging conventional wisdom by finding that the Executive Branch succeeds in the Supreme Court because of its litigation experience, rather than other qualities).

153. See Thomas W. Merrill, *High-Level, “Tenured” Lawyers*, 61 LAW & CONTEMP. PROBS. 83, 83–87 (1998).

“the best advocate there is” before the U.S. Supreme Court,¹⁵⁴ and lawyers for the Department of Justice generally enjoy a strong reputation in the lower courts.¹⁵⁵ Non-defense and flip-flopping by the Executive, however, could forfeit some of those institutional advantages as courts become skeptical of executive officials’ motives. It could also leave Congress without a vigorous defense, since counsel for intervenors or amicus curiae often lack the Executive’s institutional advantages.¹⁵⁶ And the courts, which depend on the quality and integrity of the adversarial process, would be harmed by a gap in the quality of advocacy in constitutional cases.¹⁵⁷

Third, frequent non-defense of federal laws may afford the Executive with troubling new opportunities for strategic litigation behavior. The Court in *Windsor* sought to clear away standing obstacles on appeal to protect “the Supreme Court’s primary role in determining the constitutionality of [the] law.”¹⁵⁸ But nothing in *Windsor* requires executive officials to seek immediate review from the Supreme Court upon “prevailing” in a district court. Executive officials are also free, for example, to engage in strategic delays (e.g., “the Court isn’t ready yet, so let’s wait until next Term, or for a change in personnel”), the cherry-picking of forums (e.g., “the Fifth Circuit might reverse and uphold the law, so let’s appeal only in the Ninth Circuit”), or the selection of a favorable vehicle (e.g., “let’s hold off for a more appealing plaintiff”). Counsel for BLAG accused the Executive of engaging in some of those tactics in the DOMA litigation,¹⁵⁹ and the accusation should not come as a surprise. The Office of the Solicitor General already considers those factors in weighing possible appeals and petitions for certiorari to *defend* a law

154. Richard J. Lazarus, *The Power of Persuasion Before and Within the Supreme Court: Reflections on NEPA’s Zero for Seventeen Record at the High Court*, 2012 U. ILL. L. REV. 213, 243; see Timothy R. Johnson, James F. Spriggs II & Paul J. Wahlbeck, *Oral Advocacy Before the United States Supreme Court: Does It Affect the Justices’ Decisions?*, 85 WASH. U. L. REV. 457, 469 (2007) (“[I]t is generally agreed that the nation’s best appellate advocates often work for this office and become among the most experienced attorneys to appear before the Court.”).

155. Frost, *supra* note 125, at 917. I served as a Bristow Fellow in the Solicitor General’s office in 2006–2007, and I certainly share that assessment based on my experience there and my subsequent practice as a member of the Supreme Court bar.

156. Sometimes intervenors and amici can retain top-flight counsel to defend an act of Congress, as BLAG did by hiring former Solicitor General Paul Clement to appear before the Supreme Court in *Windsor*. But that kind of coup is not always possible, especially at the trial-court level where, as Clement observed at oral argument, counsel has the crucial responsibility of developing a record. *Windsor* Arg. Tr., *supra* note 7, at 40 (argument of Paul Clement) (arguing that “party status is critical” because “[o]nly a party can take a deposition”).

157. Cf. Meltzer, *supra* note 123, at 1211 (arguing that a brief on behalf of Congress “might not fully register with the courts” when the Department of Justice and the plaintiffs both contend is unconstitutional).

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

159. See *Windsor* Arg. Tr., *supra* note 7, at 50 (argument of Paul Clement) (“[W]e saw in this case certain appeals were expedited, certain appeals weren’t. They did not serve the interest of defending the statute, they served the distinct interest of the Executive.”).

from constitutional attack,¹⁶⁰ and sophisticated public interest litigators make similar calculations.

Dicta in *Windsor* appear to heighten the risk of strategic litigation behavior by suggesting that the Executive enjoys an unprecedented degree of control over the appellate docket when it elects to enforce but not defend. Although the Court held that the judgment against the United States satisfied Article III, the Court insisted that “[i]t would be a different case if the Executive had taken the further step of paying Windsor the refund.”¹⁶¹ The implication is that, if the judgment had been paid, neither the United States nor the private-party plaintiff would have standing to appeal. That dictum suggests that the Executive could short-circuit any appeal, and thereby exert complete control over appeals from district court “victories,” simply by satisfying the judgment and paying off the private-party plaintiff whose claim it supported but wished to delay for strategic reasons. Coupled with the Executive’s ability to settle claims and thereby discourage a private-party appeal whenever the United States suffers a “defeat” in the district court, the Executive could enjoy a near monopoly on the profile of cases that reaches the appellate level when it elects to enforce but not defend.¹⁶² That would be a marked contrast to the Executive’s strategic options in other settings, which are constrained by criminal defendants, regulated businesses, interest groups, and other private parties who may choose to appeal in a case the Executive considers strategically suboptimal. If, as *Windsor* suggests, the Executive would enjoy an unusual degree of control over the appellate docket whenever it elects not to defend federal law, there is every reason to believe it will use that power strategically.¹⁶³ No doubt Justice Scalia was alluding to that risk in dissent when he urged that an Article III bar was necessary as “insulation from Executive contrivance.”¹⁶⁴

160. Barbara D. Underwood, *Facts on the Ground and Federalism in the Air: The Solicitor General’s Effort to Defend Federal Statutes During the Federalism Revival*, 21 ST. JOHN’S J. LEGAL COMMENT. 473, 474–76 (2007); see also Lazarus, *supra* note 154, at 244.

161. *Windsor*, 133 S. Ct. at 2686.

162. In theory, Congress or some group of legislators could intervene and attempt to appeal as well. But it is not at all clear after *Windsor* that Congress would have standing to do so, and even assuming standing is proper, Congress’s participation faces various practical hurdles and “depend[s] upon the political vicissitudes of the moment.” Meltzer, *supra* note 123, at 1211–13 (arguing that “congressional pinch-hitting will often not be a full substitute for defense by the executive”).

163. My previous research has discussed other contexts in which the President and Congress seek indirectly to influence the behavior of the Supreme Court and individual Justices. See David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453 (2007) (senior status); David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869 (2008) (appointment and confirmation of Supreme Court Justices); David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute,”* 83 WASH. U. L.Q. 1397 (2005) (pensions and other retirement incentives). A monopoly over appeals would give the Executive a much more direct form control over the Court’s docket.

164. *Windsor*, 133 S. Ct. at 2702 (Scalia, J., dissenting); see *id.* at 2700 (arguing that the government’s appeal was a “contrivance” designed solely to secure nationwide precedent).

Alert to those risks, the Court in *Windsor* insisted in dictum that it did not mean to endorse Executive non-defense of laws as a “routine exercise.”¹⁶⁵ But the Court’s reasoning on the standing issues may speak louder than its notes of caution. Although concerned about extending the non-defense practice to ordinary cases, the Court deemed those concerns outweighed by two factors that made this case “not routine”: the participation of amicus curiae to defend the statute, and the need for swift and uniform resolution of the issue to avoid years of litigation, confusion, and continuing injury.¹⁶⁶ Yet those factors are hardly extraordinary in litigation challenging the constitutionality of a federal statute. Virtually any law popular enough to win approval by Congress enjoys enough support that some amicus will be willing to file a brief in its defense.¹⁶⁷ And because federal law is binding in all U.S. district courts and circuits, challenges to federal law regularly raise concerns about disuniformity, prolonged litigation, and a lack of clear guidance. Indeed, safeguarding the uniformity of federal law is so central to the role of the Supreme Court that some scholars maintain the withdrawal of the Court’s appellate jurisdiction would unconstitutionally interfere with its “essential functions.”¹⁶⁸ As a consequence, the Court may have difficulty following through on its promise to restrict appellate jurisdiction if Executive non-defense becomes routine.

CONCLUSION

As a referendum on same-sex marriage, *Perry* and *Windsor* may have disappointed activists on both sides with a middle-ground holding. As Article III standing decisions, however, the marriage cases were blockbusters. Both decisions significantly reshaped the law of standing on appeal, breaking new ground and in some instances breaking sharply with past precedent. Yet there is reason for cautious optimism about the consequences of the decisions for the separation of powers. By endorsing and strengthening the executive power to enforce but not defend federal laws, the Court preserved an option that promises to reduce interbranch conflict. The major risk is that executive officials will be powerfully

165. *Id.* at 2689 (majority opinion) (“The integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise.”); *see id.* at 2688 (stressing that the holding “does not imply that no difficulties would ensue if this were a common practice in ordinary cases”); *id.* at 2689 (disavowing any suggestion “that it is appropriate for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal”).

166. *Id.* at 2687–89.

167. In *Windsor* alone, the Court received briefs from thirty-one amici defending section 3 of DOMA on the merits.

168. *See, e.g.*, U.S. CONST. art. III, § 2; Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364–65 (1953) (articulating the argument that the Supreme Court must retain enough appellate jurisdiction to perform its “essential role . . . in the constitutional plan”); Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 935 (1982) (arguing that, in light of the Supremacy Clause, the Supreme Court’s “essential functions” are the enforcement of uniformity and supremacy).

tempted to use that power as a matter of routine when called upon to enforce politically controversial laws.

Given the unique and explosive context in which *Windsor* was decided, the Court may soon retreat from some aspects of the decision. It retains some leverage under the auspices of prudential standing to defend itself against aggressive litigation tactics by executive officials. The Executive, too, may move cautiously in the aftermath of the decision to avoid provoking appellate courts and to preserve its options. The legacy of the marriage cases, over the long term, may have little to do with marriage and much to do with the separation of powers.