REJECTING SOVEREIGN IMMUNITY IN PUBLIC LAW LITIGATION

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INTRODUCTION

Constitutional cause litigation often produces far-reaching procedural innovations, as courts figure out how to incorporate substantively unique cases into existing judicial structures.[1] In the litigation over marriage equality and the validity of laws prohibiting or declining to recognize same-sex marriages, one procedural complication and innovation has involved defendant standing—who can defend litigation challenging the constitutionality of state and federal rules, both at the trial level and on appeal from an adverse judgment.

One example is *Perry v. Brown*, a challenge to the constitutionality of California's Proposition 8, a voter-enacted ban on same sex marriage.[2] Plaintiffs named the governor, attorney general, and several other executive branch officers as defendants. When all the named defendants declined to defend Prop. 8's constitutionality, the district court allowed the initiative's proponents to intervene to defend the law.[3]

The problem arose when the district court invalidated the marriage limitation and permanently enjoined enforcement of the ban; the named officer-defendants declined to appeal the judgment, raising the question whether the initiative's supporters, although proper intervenors in the trial court, had standing to initiate litigation at the appellate level. The Ninth Circuit ordered briefing on the issue, then certified to the California Supreme Court the question of whether the initiative's proponents enjoyed particular special interests under state law that they could protect in litigation, including on appeal.[4]

The California Supreme Court concluded that the initiative's proponents had authority under state constitutional and statutory law to litigate on behalf of the government and to assert California's interests in the validity

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1. *Cf.* Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 60 (arguing that concern for racial injustice and state institutional failure shaped the Warren Court's decisions in a range of areas).

2. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

3. *Id.* at 1068.

4. *Id.* at 1070 (citing Perry v. Schwarzenegger (*Perry V*), 628 F.3d 1191, 1193 (9th Cir. 2011)).

of state law where elected officials declined to do so.[5] The Ninth Circuit accepted the state court's answer and permitted the sponsors to appeal the judgment.[6]

A second example involves challenges to the constitutionality of section 3 of the Defense of Marriage Act (DOMA), which, for purposes of all federal law, defines marriage as consisting only of a "legal union between one man and one woman as husband and wife" and spouse as "a person of the opposite sex who is a husband or a wife."[7] In 2011, the Department of Justice decided that non-recognition of same-sex marriage warranted heightened scrutiny, which, in DOJ's view, DOMA-influenced federal law could not survive. Attorney General Eric Holder notified Speaker of the House John Boehner of this new litigation posture, and of DOJ's unwillingness to defend DOMA in several district court cases in which standard of scrutiny was an open question.[8] Boehner then convened the Bipartisan Legal Advisory Group (BLAG), which retained outside counsel and intervened in several district court actions to provide a vigorous constitutional defense.[9]

The question that has been litigated and discussed is whether these substitute defendants should have standing to intervene in the litigation, at trial and on appeal, in the face of the refusal of the relevant named executive officers to do so. Matthew Hall's thoughtful and thorough article in the *Fordham Law Review* mines these issues, creating the first direct analytical framework for deciding whether someone has standing to be a defendant in a case (including pursuing the case on appeal from an adverse judgment), independent of the standing of plaintiffs.[10] Descriptively, Hall is correct in labeling this a matter of standing because that is how courts treat it, and his framework and analysis is beneficial to courts when viewing this as a justiciability issue. Hall is also correct that the constitutional authority of someone to defend should be considered independent of the constitutional right of the plaintiff to sue. He establishes a faithful Article III analysis that also ensures that laws can be vigorously defended.[11] This is an important goal, given the public benefit of removing hurdles to

5. Perry v. Brown (*Perry VII*), 265 P.3d 1002, 1025 (Cal. 2011).

6. *Perry*, 671 F.3d at 1070–75.

7. 1 U.S.C. § 7 (2006). More precisely, these lawsuits challenge all provisions of the United States Code affected by DOMA's limited definition of marriage and spouse. *See* Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 509 n.4 (2012).

8. Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker of the U.S. House of Reps. (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

9. Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1564–66 (2012); *see, e.g.*, Revelis v. Napolitano, No. 11 C 1991, 2012 WL 28765, at *8–9 (N.D. Ill. Jan. 5, 2012); Windsor v. United States, 797 F. Supp. 2d 320, 323–25 (S.D.N.Y. 2011).

10. *See generally* Hall, *supra* note 9.

11. *Id.* at 1575–84.

litigation and ensuring vigorous defense of the constitutionality of federal and state law.[12]

This response Essay argues that this dispute ought not really be about standing, in the sense of Article III's requirement of a case or controversy between interested adverse parties with a personal stake in the outcome of the case. We speak about it as standing only because of the questionable doctrine of sovereign immunity (of both the state and federal governments), under which the government entity cannot be sued *eo nomine* (by name) in federal court. Sovereign immunity forces plaintiffs to sue executive branch officers responsible for enforcing a given law. This, in turn, presents defendant standing questions when, as in the marriage equality cases, someone seeks to defend the law at trial and on appeal when the named responsible officer refuses to defend or defends on less than favorable grounds.

The argument here is that we can and should reject sovereign immunity of the federal or state governments, removing a doctrine that is inconsistent with the constitutional and political structure of the United States.[13] Instead, plaintiffs should be able to sue the government (or relevant government department or agency) by name when seeking to enjoin the enforcement of unconstitutional laws, thus bringing the case caption in line with reality. By eliminating the need to identify individual defendants, we remove the issue from the rubric of Article III and standing. The government is the named defendant with a stake in the outcome of litigation and that provides the adverseness that Article III demands.

I. SOVEREIGN IMMUNITY AND INDIVIDUAL OFFICER LITIGATION

The conversation about standing (at trial and on appeal) and intervention in the marriage equality cases, which prompted Hall's article, results from the prevailing regime of sovereign immunity, under which a sovereign cannot be sued in its own name absent consent.[14]

Sovereign immunity originates in monarchies, where the root power of government has been placed in the hands of one, divinely decreed person. It has been criticized as theoretically inconsistent with republican government where, at the theoretical level, the people are sovereign and the source of lawful authority, government acts on the people's behalf, and the expectation is that government should be accountable to the people for its conduct.[15] Steve Gey labeled this "ultimate sovereignty" and argued that

12. *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, 832 (2004) (describing the values served by allowing persons to litigate and appeal).

13. *See* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 (2001) ("Sovereign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law.").

14. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1–2 (1963).

15. *See* U.S. CONST. amend X; Alden v. Maine, 527 U.S. 706, 783–85 (1999) (Souter, J., dissenting); JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 152 (2002); Chemerinsky, *supra* note 13, at 1201–02; Lauren K.

"no government is truly 'sovereign' in the ultimate sense because all governments must obtain their authority from those who consent to the exercise of that authority over them"—in other words, the people.[16] Sovereignty "cannot be found in America in the form classically imagined,"[17] where authority is divided among three branches and not derived from, or vested in, any one branch.

Immunity is a necessary product of notions of royal divinity; the dignity of the prince and the affront to royal dignity that comes with hailing the sovereign into court without his consent. It "represent[s] a view of the sovereign as divinely commissioned, and of the citizen as lacking power and agency," which means that it "fit[s] poorly with both American self-understanding and the founding generation's belief in democratic accountability."[18] Moreover, it is incoherent to ascribe dignity to a legal entity or for it to suffer an affront to that dignity.

Nevertheless, the U.S. Supreme Court has imported sovereign immunity to the state and federal governments as entities, protecting them from all private lawsuits. This has been explicit at the state level, initially driven by the text of the Eleventh Amendment,[19] but broadened to include immunity from suits by any private individual, regardless of source of law, court, and plaintiff's citizenship.[20] Chief Justice Marshall identified sovereign immunity for the federal government as "universally received opinion."[21] This immunity is complete. Although the Court unfortunately speaks loosely of sovereign immunity as prohibiting actions against states for damages,[22] the doctrinal reality is that neither a state government nor federal government can ever be the named defendant (absent waiver or abrogation, neither of which is present in constitutional litigation), regardless of the relief sought.

State sovereign immunity is even more questionable as applied to lawsuits under federal law or in federal court. The essence of sovereignty is the power to make the legal rules that bind actors, and the rationale for sovereign immunity is that it is logically impossible for an individual to have and enforce a right against the authority that makes the legal rule on which the right depends.[23] Gey labeled this "immediate sovereignty"—the power to "issue commands and have them obeyed."[24] States are not immediately sovereign as to the Federal Constitution or federal law because

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Robel, *Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L.J. 543, 550–51, 554 (2003).

16. Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1626–27 (2002).

17. NOONAN, *supra* note 15, at 152.

18. Robel, *supra* note 15, at 553; *see also* Chemerinsky, *supra* note 13, at 1201–02.

19. *Alden*, 527 U.S. at 713; *see* U.S. CONST. amend. XI (eliminating federal jurisdiction over suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State").

20. *Alden*, 527 U.S. at 713–14.

21. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411–12 (1821).

22. *E.g.*, Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1333 (2012).

23. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907); Robel, *supra* note 15, at 550.

24. Gey, *supra* note 16, at 1631.

they do not issue those legal commands; they derive from the federal government (or from the people acting through the federal government). Whatever the merits of the sovereign immunity of states from suit under their own laws, it should be inapplicable when the state is sued under laws that derive immediately from an entity other than the state.[25]

Interestingly, but often overlooked, the bar to suing states over the constitutional validity of state law (as in *Perry*) comes not directly from state sovereign immunity but indirectly from statutory interpretation influenced by immunity. The vehicle for challenging the constitutionality of state laws is 42 U.S.C. § 1983, which provides individuals with an equitable action against "every person" who, under color of state law, violates federal law, as by attempting to enforce an unconstitutional law.[26] A state is not a person for section 1983 purposes, an interpretation driven by sovereign immunity and the absence of a clear statement or legislative history showing congressional intent to override sovereign immunity.[27]

But judicial interpretation of a federal statute remains subject either to judicial overturning or congressional override. Under current state sovereign immunity doctrine, Congress may abrogate immunity through appropriate enforcement legislation enacted pursuant to its powers under section 5 of the Fourteenth Amendment.[28] Section 1983, which authorizes private remedial actions against conduct that itself violates section 1 of the Fourteenth Amendment (including the incorporated Bill of Rights), has been recognized as appropriate legislation through which Congress may constitutionally subject a state to suit.[29] Congress thus could enable litigation directly against states simply by amending section 1983 to define "person" to include states.

At least as to constitutional claims, the answer to sovereign immunity has been to redirect litigation to the executive branch officers responsible for enforcing a law alleged to be constitutionally invalid. The plaintiff names the officer as defendant in an action seeking an injunction or other prospective relief prohibiting continued or future enforcement of the invalid law; that officer will be subject to the judicial command not to violate the Constitution going forward and to contempt for violating the order. The Court explicitly recognized this litigation approach as to state officers in *Ex parte Young*,[30] has affirmed it as an essential limitation on sovereign

25. *Alden*, 527 U.S. at 797–98 (Souter, J., dissenting); Gey, *supra* note 16, at 1658.

26. 42 U.S.C. § 1983 (2006).

27. Will v. Mich. Dep't of State Police, 491 U.S. 58, 64–67 (1989); Quern v. Jordan, 440 U.S. 332, 340–43 (1979).

28. U.S. CONST. amend. XIV, § 5 (granting Congress power to enforce the other provisions of the Fourteenth Amendment).

29. United States v. Georgia, 546 U.S. 151, 158–59 (2006); *see also* Howard M. Wasserman, *Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure*, 25 CARDOZO L. REV. 793, 837–38 (2003).

30. 209 U.S. 123 (1908).

immunity,[31] and has implicitly accepted the theory with respect to injunctive actions against federal executive officers.[32]

This doctrinal landscape explains the procedural posture of much of the marriage equality litigation. *Perry* named as defendants, among other executive officers, then-Governor Arnold Schwarzenegger and then-Attorney General Jerry Brown; Brown then replaced Schwarzengger as defendant-Governor and Kamala Harris replaced Brown as defendant-Attorney General. Similarly, one DOMA lawsuit challenged the refusal by the U.S. Citizenship and Immigration Services (an agency of the Department of Homeland Security) to grant a petition allowing a male non-citizen married (in Iowa) to a male U.S. citizen to apply for lawful permanent residence status; the suit named Secretary of Homeland Security Janet Napolitano, along with Attorney General Eric Holder, who heads DOJ, the federal department charged with enforcing federal statutes.[33]

The individual officer suit workaround is explained (and often derided) as a legal fiction, but one accepted as necessary to preserve sovereign immunity while also ensuring governmental accountability, constitutional compliance, and vindication of individual liberty.[34] The core fiction is that the individual officer, not the government, is the true party in interest and the injunction does not run against the state, at least so long as the injunction simply compels adherence to federal law and does not limit state control over its treasury.[35] A second fiction is that the injunction runs only against the individual officer, even though it also binds that individual's successor-in-office who was never a party to the original action. Thus, had *Perry* been resolved before Jerry Brown became governor, the injunction entered against Schwarzenegger would have continued in force against Brown.

In fact, the availability of individual officer suits is not a legal fiction but an inherent component of sovereignty and sovereign immunity. Under English common law, while the king could not be sued *eo nomine* given divine right and royal dignity, his ministers and officers were subject to a full range of prerogative writs in the courts of law and chancery, including injunctions.[36] Requiring the suit to run against the governor or attorney, rather than California or the United States, simply imports this into the sovereignty of republican governments. Moreover, as John Harrison has argued, *Ex parte Young* itself was well grounded in common law and English sovereign immunity.[37] *Young* was, at bottom, an anti-injunction suit, one of the core actions available in equity: the potential defendant in a

31. *See, e.g.*, Va. Office for Prot. & Advocacy v. Stewart (*VOPA*), 131 S. Ct. 1632, 1638 (2011).

32. Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 811 n.2 (2010).

33. Revelis v. Napolitano, No. 11 C 1991, 2012 WL 28765, at *1 (N.D. Ill. Jan. 5, 2012).

34. *VOPA*, 131 S. Ct. at 1638; Gey, *supra* note 16, at 1654.

35. *VOPA*, 131 S. Ct. at 1638.

36. Jaffe, *supra* note 14, at 1–2.

37. *See generally* John Harrison, Ex Parte *Young*, 60 STAN. L. REV. 989 (2008).

threatened action at law (a criminal prosecution for violating state laws governing railroad rates) brought an action in equity, asserting as his claim what would be a defense in the action at law (the unconstitutionality of the state law) and requesting an injunction barring prosecution of the action in law (enforcement of the state laws).[38] Sovereign immunity is not implicated in such a case, because the sovereign is not immune from the assertion of a defense in an action at law.

It is tempting to simply accept sovereign immunity because, as John Jeffries argues, it "almost never matters."[39] Private plaintiffs can sue state or federal officers for injunctions and damages and the federal government can sue state governments (in their own names) for violations of federal law.[40] Sovereign immunity does not relieve the government or its officers of the duty to comply with the Federal Constitution and it does not, as a general matter, prevent constitutional enforcement; it "simply makes enforcement more difficult for private individuals."[41] As the marriage equality cases demonstrate, plaintiffs will have a chance to make their constitutional arguments to the federal court and future enforcement of a constitutionally infirm law will be halted.

But this relies on a faulty premise. It begins as if sovereign immunity, softened by the inherent workaround of only mildly inconvenient individual officer suits, must be our default. In other words, sovereign immunity is "no big deal" because other enforcement mechanisms remain.

When we acknowledge the inconsistency between sovereign immunity as applied to a legal entity and republican government, however, the default changes. If we are concerned with the "dignity" of a person (i.e., a king) whose ultimate authority is deemed divinely conferred, the inconvenience or increased complexity of individual litigation perhaps is acceptable in the balance. But ultimate authority in a republican system does not rest with the legal entity of the government body, so there is no "dignity" to protect. The increased inconvenience and enforcement complexity needlessly burdens the process of constitutional litigation without any countervailing dignitary benefit.

It is clear to everyone—including government officials themselves—that even a suit for an anti-enforcement injunction is one against the government.[42] Although not subject by name to the injunction, it is the government that will be limited in its future enforcement conduct and thus in its sovereign authority. If the governor is enjoined from enforcing the state prohibition on same-sex marriage, then the State of California is enjoined from enforcing that prohibition. If the Secretary of Homeland

38. *Id.* at 997–98.

39. John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49 (1998).

40. Alden v. Maine, 527 U.S. 706, 754–57 (1999).

41. Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEX. L. REV. 1551, 1561 (2003) (reviewing NOONAN, *supra* note 15).

42. Jaffe, *supra* note 14, at 39.

Security is enjoined from enforcing the DOMA-dictated limitation on recognizing same-sex marriages in immigration matters, the DHS—and thus the United States—is enjoined from making certain decisions about the status of married persons. This demonstrates the largely symbolic nature of sovereign immunity (at least in actions not directly seeking monetary remedies), which achieves little beyond making constitutional litigation more analytically and procedurally complex.

Moreover, the DOMA cases demonstrate that naming the entity in a constitutional action is not an unbearable burden. Consider *Windsor v. United States*, an action by a spouse-executor to recover more than $360,000 in taxes that would have been waived if federal law recognized her valid New York same-sex marriage.[43] The United States was the named defendant in that case because the government has formally waived sovereign immunity in civil actions seeking refunds of taxes erroneously or unlawfully collected, including, as in *Windsor*, when the tax was collected in violation of the Constitution.[44] It is difficult to see why the same, simple captioning procedure should not work in all constitutional injunction cases. Federal law should not be concerned with how or how competently the state defends itself; the burden is on the state if it fails to designate someone to defend it or empowers someone who does a poor job.

II. STANDING AND SOVEREIGN IMMUNITY

Hall is correct that Article III requires an interested defendant. The named officer-defendants in the marriage equality cases (themselves or through the governmental department charged with defending them) have declined to defend the constitutionality of the prohibitions or have chosen to do so in a way likely to result in the laws being invalidated in court.[45] Were Governor Brown or Secretary Napolitano truly the real party in interest in their respective cases, either could take a confession of judgment against them or otherwise proceed in a way that ensures a non-reviewable judgment in favor of the plaintiffs and a court order barring enforcement of the laws.

Unlike the named officer-defendants, the individuals and groups seeking to enter these cases are not directly affected by any judgment or injunction. This is why Hall and the federal courts are forced to speak of this in terms of standing and intervention. An Article III case or controversy does not exist if the new defending party is neither responsible for the unconstitutional conduct (because they were not enforcing an unconstitutional law) nor subject to the ultimate injunction barring enforcement (because they are not responsible for future enforcement). Put simply, an affected party is no longer defending the case.[46]

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43. 797 F. Supp. 2d 320, 322 (S.D.N.Y. 2011).

44. *Id.*; *see* 28 U.S.C. § 1346(a)(1) (2006).

45. Perry v. Brown, 671 F.3d 1052, 1068 (9th Cir. 2012); Revelis v. Napolitano, No. 11 C 1991, 2012 WL 28765, at *2 (N.D. Ill. Jan. 5, 2012); *Windsor*, 797 F. Supp. 2d at 322; Hall, *supra* note 9, at 1541.

46. Hall, *supra* note 9, at 1551.

In reality, of course, both Napolitano and Brown are *nomine* stand-ins for legal entities that themselves cannot be sued *eo nomine* only because of sovereign immunity; the entities are the real interested defendants. The scramble of individuals and groups trying to get into these cases—Congress, BLAG, state legislators, county officials, private advocacy groups, popular initiative sponsors—are only seeking to substitute as *nomine* stand-ins.

The standing concerns disappear if we stop demanding stand-ins and let actions proceed against the entity in its own name. A government entity is unquestionably an interested defendant in litigation challenging the constitutionality of that entity's laws. The State of California has an interest in the challenge to Prop. 8, and the United States has an interest in the challenges to DOMA. If either entity is named as a defendant, we have a dispute between adverse and interested parties who will be restricted by the judgment and have their conduct regulated by an injunction. We therefore are ensured a party with standing to defend and to appeal any adverse judgment.

III. WHO REPRESENTS GOVERNMENT?

Eliminating sovereign immunity as a part of U.S. law eliminates the standing issue that Hall addresses in his article. The *Perry* plaintiffs simply could have named the State of California (recognized as a person under section 1983) as defendant; the DOMA plaintiffs could have named the United States, or the Department of Homeland Security, Department of Treasury, or any other federal agency that refused, in light of DOMA, to recognize a valid same-sex marriage. The entity defendant has standing to defend and to pursue the case throughout the Article III judiciary—they would be adversely affected by a judgment and subject to any relief obtained, they have an interest in the outcome, and they have an incentive to litigate vigorously.

Of course, a legal entity only acts through its officers. We thus still must consider what happens when the officers charged by law with litigating the government's position decline to defend the laws or adopt a less than favorable legal defense. Even if government is sued in its own name, we still face the procedural complication that has arisen in the marriage equality cases.

What has changed is the nature of the problem. BLAG or the Prop. 8 sponsors are seeking permission to litigate the government's interests, not their own. Rather than asking the standing question of who is sufficiently interested in the case to be a defendant or appellant, we now ask who gets to represent, defend, and make arguments as, and on behalf of, the interested named government entity. That is, in a system of divided authority, who is the government?

Importantly, however, this is not an Article III or constitutional standing question. Because there is a case or controversy between the plaintiffs and the named defendant government entity whose law is being challenged, the Constitution should not care who speaks for the government in this

litigation. This instead becomes a sub-constitutional question of how a particular republican government elects to structure itself (within constitutional parameters) and how it elects to divide powers among the several branches and between government officers and members of the public. It is a question of how government will defend its laws in court and who will litigate on its behalf. To the extent a government makes bad choices in whom it authorizes to defend it or in how its interests will be defended, the federal courts do not save litigants from bad representation or bad litigation strategy.

A state should have virtually unlimited power to identify those authorized to represent it and to provide a constitutional defense on its behalf. This could include a potentially competing range of executive branch officers, legislators, citizens, and citizen groups; the state also could establish hierarchy or order of power to represent. This remains a pure question of state law and state legislative discretion (limited perhaps only by the Guarantee Clause[47]); federal courts must defer to state legislative choices and, when necessary, use certification to have the state supreme court resolve disputed questions as to who represents the state in a given case. The federal court must abide by the state court determination of state law. Unlike standing, there should be no federal constitutional overlay.[48] Federal law should not be concerned with how the state government defends itself.

It is telling that this is how the Ninth Circuit and the California Supreme Court resolved the certified question in *Perry*. The Ninth Circuit asked the California Supreme Court to address whether the initiative sponsors had particular interests under state law that it could protect in litigation. In answering the certified question, the state court focused instead on the sponsors' authority under the state constitution and state statutory law to defend the validity of popularly enacted laws on behalf of California itself. The power to effectively become the state was a necessary and inherent incident of direct democracy and the power of citizens to create state law directly; without it, elected officials could undermine the initiative process and render popularly enacted laws nullities by refusing to enforce or defend.[49] The state court discussed but expressly declined to resolve whether the sponsors held any personal or special interests or rights as a group, apart from the state's interests.[50] When the case returned to federal court, the Ninth Circuit accepted the state court's conclusion and recognized the sponsor's power to appeal on behalf of the state.[51]

The federal court's unqualified acceptance of the state court determination suggests that it understood that the sponsors were not really

47. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

48. *Cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 572–73 (1992) (considering Article III standing requirements even when the plaintiff was statutorily authorized to sue).

49. *Perry VII*, 265 P.3d 1002, 1024–25 (Cal. 2011).

50. *Id.* at 1014–15.

51. Perry v. Brown, 671 F.3d 1052, 1074–75 (9th Cir. 2012).

litigating on their own behalf (which would necessitate a showing of personal stake) but on behalf of the State of California, the real party in interest that does have a personal stake. Because the individuals were not truly representing their own interests, there was no need to consider whether they satisfied Article III's standing requirements in their own right.

At the federal level, Congress has done much the same. Under federal law, DOJ is charged with representing the United States in court and with defending all federal laws.[52] Federal law also requires the attorney general to notify Congress when DOJ has decided not to defend a law.[53] Notification allows Congress to authorize others, such as the Office of Senate Legal Counsel or BLAG, to step in to defend and argue the validity of the law as the purported representative of the United States.[54]

Once allowed to defend the government's interests, that party defends for all purposes. In *Windsor*, when BLAG sought to intervene as a defendant, DOJ argued that BLAG's intervention should be limited only to arguing in support of DOMA's constitutionality under rational basis review (which DOJ no longer would do), while DOJ would retain the authority to lead the government defense, particularly on matters of procedure.[55] The court rejected that argument, however, concluding that BLAG was permitted to intervene as a full party defendant, able to make all substantive and procedural arguments and decisions it sees fit.[56]

The struggle is to control who gets to be the United States in this litigation, a choice left to Congress (subject, perhaps, only to the President's authority to "take Care that the Laws be faithfully executed"[57]). Congress must ensure that someone is identified and empowered by law to represent the United States, but the fault lies with Congress if it fails to do so completely or thoughtfully enough, or if the designated defender fails to perform competently. In fact, DOMA reveals such a failure—Congress never granted BLAG statutory authority to litigate federal constitutional interests.[58] The issue has not been pushed in court, however, so Congress has not been disadvantaged by its legislative mistake.

One might object that entity litigation, and the possibility of competing actors seeking to litigate on behalf of the entity, makes it more difficult for government to speak with a single voice in court. This objection merits several responses.

First, the burden for ensuring one voice rests with the political branches to establish clear and specific rules and processes for determining who speaks for the government, how, when, and in what order. Federal courts

52. 28 U.S.C. § 516 (2006).

53. *Id.* § 530(d).

54. 2 U.S.C. §§ 288a–288n (2006); *see also* Windsor v. United States, 797 F. Supp. 2d 320, 323 n.2 (S.D.N.Y. 2011).

55. *Windsor*, 797 F. Supp. 2d at 324–25.

56. *Id.*

57. U.S. CONST. art. II, § 3. *See generally* Devins & Prakash, *supra* note 7.

58. Hall, *supra* note 12, at 1578–79; *see Windsor*, 797 F. Supp. 2d at 323 n.2 (stating that no federal statute authorizes the House or any subpart of the House to intervene to defend the constitutionality of a federal statute).

must then defer to those statutory rules. Second, there may, in fact, be a benefit to having multiple voices in litigation. In a system of separated powers, power is divided among multiple branches, departments, and actors who may disagree on what the "governmental" position should be. Courts benefit from that disagreement and from hearing all competing positions, which may help them resolve the case more accurately through the adversary process.[59] Third, this approach is both democracy and litigation reinforcing. If the executive officer primarily responsible for representing the government in its constitutional defense chooses not to do so, she must make and announce that choice publicly and she must deal with any popular fallout at the ballot box. At the state level, where all executive branch officers often are independently elected, this may have real teeth. At the same time, the legislature can ensure that the government is always fully represented and able to defend its position in court by designating multiple actors who can step into the breach in a case of non-defense or under-defense.

CONCLUSION

As a doctrinal matter, eliminating sovereign immunity and switching to entity litigation can be achieved fairly easily. No constitutional amendment is necessary, since the Constitution says nothing of the federal government having sovereign immunity.[60] Immunity derives from the Supreme Court's understanding of "universally received opinion," an understanding that the Court could reject. Broad state sovereign immunity is similarly a product of judicial interpretation rather than constitutional text, which the Court also can alter by decision.[61] Moreover, states could be made subject to suit on constitutional claims simply by recognizing that a state is a person for purposes of section 1983, either by the Court overturning two of its prior decisions[62] or by Congress amending section 1983.[63] These changes also render *Ex parte Young* superfluous; there is no need for that workaround doctrine allowing suits against responsible executive officers if the entity can be sued directly and by name, bringing the case caption in line with reality.

Rejecting state sovereign immunity still leaves the Eleventh Amendment, which textually bars suits against states by citizens of other states in federal court.[64] But once we eliminate ideas of state sovereign immunity, two understandings of the Amendment's language remain, neither a significant hurdle to enabling people to sue states for constitutional injunctions. Under

59. Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 919–20 (2012) (discussing the benefits of Congress speaking on its own behalf in federal constitutional litigation).

60. Chemerinsky, *supra* note 13, at 1205.

61. *Id.* at 1205, 1224.

62. Will v. Mich. Dep't of State Police, 491 U.S. 58, 64–67 (1989); Quern v. Jordan, 440 U.S. 332, 340–43 (1979).

63. *See supra* notes 28–29 and accompanying text.

64. U.S. CONST. amend. XI.

the "diversity" interpretation, the Eleventh Amendment only prohibits diversity actions between a state and citizen of another state, but not federal question actions, such as the federal constitutional claims at issue in *Perry*.[65] Under the "plain language" approach, the Eleventh Amendment bars all claims against a state by a citizen of another state, including those based on federal law,[66] meaning that a citizen of another state cannot sue a state to enjoin an unconstitutional law. While a small number of constitutional claims unfortunately may be barred, the majority of constitutional challenges to state laws are brought by citizens of that state.

Without question, the argument presented here has never been the law in the United States, although it has much to recommend it as a matter of "political theory and plain justice."[67] It is a legal position much to be hoped for, not only in light of the already expressed criticisms of sovereign immunity, but also in light of the complexity of individual-defendant litigation and the confusion that arises when an individual defendant refuses to defend. Entity-centered litigation, without sovereign immunity, is more consistent with the American concept of popular sovereignty. It also is procedurally simpler and better able to handle procedural anomalies, such as those that have arisen in the marriage equality cases.

65. Alden v. Maine, 527 U.S. 706, 760 (1999) (Souter, J., dissenting) (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996)).

66. Chemerinsky, *supra* note 13, at 1205–06; Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1368 (1989).

67. Young, *supra* note 41, at 1567.