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The Rise of Legislative Intervention, the Fall of the Duty to Defend, and the Problems Therein for the State Attorneys General

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The Legal & Political Importance of the State Attorney General

SEM-1 LAW 696[1]

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Table of Contents

I. INTRODUCTION **3**

II. HISTORY OF STATE LEGISLATURE STANDING & THE RISE OF THE DECLINATION TO DEFEND **4**

III. DEFERENCE SHOULD BE AFFORDED TO STATE LAW THAT IDENTIFIES WHO CAN REPRESENT THE STATES **16**

IV. WHAT THE STATE APPROACHES ARE & WHAT THE STATE APPROACHES SHOULD BE **20**

A. Affording Deference, States Take a Different View. 21
1. Arizona's Approach 21
2. Virginia's Approach 23
3. Pennsylvania's Approach 24

B. States Should Reject Legislative Standing in Favor of an Executive's Strong Duty to Defend 26
1. Removing State Legislature Standing in Favor of a Strong Duty to Defend is Correct as a Matter of Separation of Powers Law 27
2. Removing State Legislature Standing Solves Remedy and Proper Party Problems 35
3. Removing State Legislature Standing Improves Legitimacy and Increases Democratic Accountability 36
4. States' Experiences Reinforce the Argument that a Clear Delineation of Power is Good for the Rule of Law, but Leave Open the Door for Future Research 40

V. CONCLUSION **42**

I. INTRODUCTION

As more and more of our nation's political debates become thrust into the courts more parties have sought ways to take part in the contest.[2] In particular, state legislators have sought to take advantage of the increased number of opportunities to joust over legal and political issues, resulting in increased appearances before the court in recent years.[3]

Ironically, the shift to the courts has also produced an uptick in state attorneys general *refusing* to defend state laws in the same timeframe.[4] Under a variety of rationales – some constitutional, some legal, some political – state attorneys general have rejected a duty to defend, even when that duty is codified by statute.[5]

The two phenomena are not unrelated. Both stem from the same increased emphasis on state law being a battleground for national political fights. And as the states' current experience demonstrates, state attorneys general commonly point to the fact that other parties can defend state law when they decline to defend.[6]

And while state attorneys general may welcome the ability to exercise what is essentially a veto power over constitutional law, that power is problematic. From a formalist perspective the problem is that no state attorney general possesses the power to veto state law. From a pragmatic perspective a lack of clarity over who enforces state law presents issues with finality and electoral accountability. From a state attorney general's perspective this might not seem like a problem at all – at least in the short term. But in the long term, the consistent constitutional practice of not

[2] *See generally*, ROBERT KAGAN, ADVERSARIAL LEGALISM, 261-64 (Harv. U. Press, 2d ed. 2019).
[3] *See, e.g.,* Berger v. N.C. Conf. of the NAACP, 142 S.Ct. 2191 (2022); Va. House of Delegates v. Bethune-Hill, 139 S.Ct. 1945 (2019).
[4] Neal Devins & Saikrishna B. Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J., 2100, 2137-43 (2015) (describing the increased number of duty to defend cases after 2008).
[5] *Id.* at 2103.
[6] *Id.* at 2149.

defending state law could hurt the legitimacy of the office as an institution, and have negative spillover effects into other powers the attorney general does want to exercise.

This paper argues that only when states take an approach that both instills the attorney general with the duty to defend while simultaneously eliminating the legislature's ability to intervene will the attorney general feel required to defend state law. This approach is right as a matter of separation of powers – permitting the *legislative* branch to *execute* the law blurs the lines between the branches of government. Furthermore, a strong duty to defend both eliminates potential remedy problems and bolsters the rule of law.

The paper proceeds as follows. Part II illustrates the rise of state legislative standing and the declination to defend on the part of the state attorney general. Part III argues that decisions about who has the authority to execute state law are fundamentally matters of state constitutional law, and not federal civil procedure. Finally, Part IV-A presents some of the approaches states take to allocating who has the duty (or right) to defend state law, while Part IV-B presents various arguments for an approach that both installs the attorney general with the duty to defend, while removing the legislature's ability to defend (or intervene to defend) state law.

II. HISTORY OF STATE LEGISLATURE STANDING & THE RISE OF THE DECLINATION TO DEFEND

Before discussing state legislature standing it's important to note two nuances of what this paper means by *standing*. The first nuance describes the difference between what is required for standing to vindicate public rights versus private rights. The second nuance describes the difference between constitutional and prudential standing.

First, public rights are rights that belong to the politic.[7] Public rights include access to public interests and compliance with regulatory law.[8] Simply put, they are rights that "are not measured strictly by private loss," but rather on "vindicating the claims of the public."[9] On the other hand, private rights are those held by the individuals themselves.[10] Law that vindicates private rights is focused on individual rather than public compensation.[11] These types of rights are vindicated by tort law, property law, and the like. For example, when one litigates a personal injury claim they are invoking their individual right not to harmed – not a broader right shared by society, like the right to have a state without an established religion.

Second is the distinction between the different types of standing. Standing is a category of justiciability just like ripeness, mootness, and the bar on advisory opinions.[12] Standing itself is divided between constitutional or "Article III" standing, and prudential standing.[13] As set forth in the seminal case of *Lujan v. Defenders of Wildlife*, Article III standing has three parts: an injury that is 1) concrete, particularized and actual, not conjectural or hypothetical; 2) fairly traceable to the defendant's conduct, and 3) redressable by a favorable decision.[14] This stems from the court's belief that the judiciary should only decide actual cases and controversies, and that expanding the judicial role to matters beyond cases and controversies would create separation of powers concerns.[15]

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[7] Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine*, 102 Mich. L. Rev. 689, 693 (2004).
[8] *Id.*
[9] *Id.*
[10] *Id.* at 693-94.
[11] *Id.* at 694.
[12] 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 3529 (3d ed. 2023).
[13] *Id.* at § 3531.
[14] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).
[15] WRIGHT & MILLER, *supra* note 12, at § 3531.3.

Prudential standing on the other hand includes limits on the ability of plaintiffs to advance the rights of others, or limits on recognizing injuries that are shared by most citizens.[16] These limits include the bar on deriving standing from another's claims, and the prohibition on taxpayer standing.[17]

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Turning to the history, the roots of constitutional standing doctrine are subject to much academic debate.[18] But most scholars agree that the modern view of standing as a constitutional doctrine began with the 1923 decision of *Frothingham v. Mellon*.[19] While *Frothingham* did not speak of standing in the modern *Lujan* sense, it did reject a claim from taxpayers for not being concrete – the Court found that there was no direct injury.[20]

During the same period the Court decided *Coleman v. Miller*[21]– the first foray into the standing of state legislators. In 1924 Congress proposed the Child Labor Amendment to the Constitution.[22] The Kansas Legislature initially rejected it, passing a resolution against adoption in 1925.[23] But the issue was not over. In 1937, a resolution was introduced seeking to ratify the amendment.[24] In the state senate the vote was split, twenty votes to twenty votes.[25] The Lieutenant Governor, as the presiding officer cast the tying vote in favor.[26] Afterwards, the resolution was

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[16] *Id.* at § 3531.
[17] *Id.*
[18] *Compare* Woolhander & Nelson, *supra* note 7, *with* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163 (1992).
[19] WRIGHT & MILLER, *supra* note 12, at § 3531.1.
[20] Frothingham v. Mellon, 267 U.S. 447 (1923).
[21] 307 U.S. 433 (1939).
[22] *Id.* at 435.
[23] *Id.*
[24] *Id.* at 435-36.
[25] *Id.* at 436.
[26] *Id.*

adopted by the Kansas House of Representatives – meaning that Kansas would support the amendment.[27]

What does this have to do with state standing? Twenty-one senators (and a handful of house members) who thought the Lieutenant Governor could not cast the deciding vote on the resolution sought to enjoin the legislative officers and the Secretary of State from finalizing the resolution.[28] That effort failed before the Kansas Supreme Court.[29] But before the U.S. Supreme Court, issues of standing were central.

Chief Justice Hughes delivered the opinion of the court, which Justices Stone and Reed joined. He held that the legislators did have standing.[30] While the Chief Justice recognized that *Coleman* concerned aspects of state law, he held that because Article V issues were central to the case, it presented "exclusively federal questions and not state questions."[31] The Court presented two reasons for so holding. First, it reasoned that the Court did have jurisdiction over the federal question.[32] It found that it was not a political question, but a justiciable one.

But importantly for the concern here, Chief Justice Hughes held that the State Senators had standing to bring the suit.[33] While the Court considered analogizing State Senators to mere taxpayers, and holding that State Senators had no individual standing, they rejected that argument.[34] Instead Chief Justice Hughes held that the legislators had a sufficient interest in the controversy to have standing.[35]

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[27] *Id.*
[28] *Id.*
[29] *See* Coleman v. Miller, 71 P.2d 518 (Kan. 1937).
[30] *Coleman*, 307 U.S. at 438.
[31] *Id.*
[32] *Id.*
[33] *Id*. at 442-45.
[34] *Id*. at 446.
[35] *Id.*

Justice Frankfurter, joined by Justices Roberts, Black and Douglas, disagreed. Justice Frankfurter found that the state senators lacked standing and were rather akin to any other Kansan who would have brought the suit.[36] He reasoned that allowing the senators to have standing here would necessarily require the court to hear any case that had a generalized grievance. Furthermore, Justice Frankfurter would have found that the state senators' interest was not a constitutional one.[37] Rather he held that one who was merely the self-constituted spokesman of a constitutional point of view does not give anyone special standing.[38] He would have found the *Coleman* dispute to be an interparliamentary one – not an Article III case or controversy.[39] And relying on the tradition of judicial abstention in this area, he held that the court should "leave intra-parliamentary controversies to parliaments and outside the scrutiny of law courts."[40]

As astute readers might have noticed, *Coleman*'s patchwork of opinions leaves open the question of what its holding on standing actually was. Two votes were for Chief Justice Hughes' opinion to affirm on the merits.[41] But then four justices concur but would dismiss for lack of standing.[42] And there were two dissenters, who would reverse on the merits. Assuming, as most future courts would,[43] that Justice Reed joined the opinion of Chief Justice Hughes, and assuming that the dissenters who did not discuss standing found there to be standing, *Coleman* would stand

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[36] *Id.* at 460-61 (Frankfurter, J., concurring).
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* (citing Ashby v. White, 2 Ld.Raym. 938 (1703)).
[41] *See* Arizona State Legislature v. Arizona Independent Redistricting Comm'n, 576 U.S. 787, 857 (2015) (Scalia, J., dissenting) ("The opinion discussing and finding standing, and going on to affirm the Kansas Supreme Court, was written by Chief Justice Hughes and announced by Justice Stone").
[42] *Coleman*, 307 U.S. at 460 ("It is the view of Mr. Justice Roberts, Mr. Justice Black, Mr. Justice Douglas and myself that the petitioners have no standing in this Court").
[43] *See generally, Arizona State Legislature*, 576 U.S. 787. *See also*, Raines v. Byrd, 521 U.S. 811 (1997) (referring to Coleman as if there were five votes on the merits).

for legislature standing. But in the words of Justice Scalia, that's "a pretty shaky foundation for a significant precedential ruling."[44]

Coleman laid dormant for sixty years until the court addressed its holding in *Raines v. Byrd*.[45] In a discussion of whether members of the *federal* House of Representatives had standing to challenge the line-item veto bill (on the grounds that the efficacy of their vote would be diminished), the court rejected an expansive reading of *Coleman*.[46] Chief Justice Rehnquist wrote that, at most *Coleman* stands "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."[47]

But *Raines* also rejected a "drastic expansion" of *Coleman* that would have expanded its acknowledgment of standing when there is vote nullification to standing when there is no more than a diminution in vote effectiveness. [48] And even further, *Raines* (in dicta) seems to suggest that there were other ways aggrieved parties could distinguish *Coleman*.[49]

But the court in *Arizona State Legislature v. Arizona Independent Redistricting Commission* did not take *Raines* up on that proposition. Rather *Arizona State Legislature* held that because the votes of the legislature were effectively nullified by transferring the redistricting responsibilities to the independent redistricting commission (and because the legislature had authorized itself to take the action) the legislature had Article III standing.[50] Simply put, because

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[44] *Arizona State Legislature*, 576 U.S. at 857.
[45] 521 U.S. 811 (1997).
[46] *Id.* at 824.
[47] *Id.*
[48] *Id.* at 826.
[49] *Id.* at 829-30.
[50] *Arizona State Legislature*, 576 U.S. at 793.

there was a constitutional question, and because the state legislature had satisfied the Article III standing requirements, the Court established that the state legislature had standing.[51]

While Chief Justice Roberts dissented on the merits – contending that "the legislature" does not mean "the people"[52]– Justice Scalia addressed the more fundamental issue: standing.[53] Justice Scalia reasoned that Article III Standing is "is built on a single basic idea — the idea of separation of powers."[54] With that in mind he pointed out that the court has "never passed on a separation-of-powers question raised directly by a governmental subunit's complaint" but rather "always resolved those questions in the context of a private lawsuit in which the claim or defense depends on the constitutional validity of action by one of the governmental subunits that has caused a private party concrete harm."[55]

Justice Scalia also addressed *Coleman* head on. Justice Scalia suggested that the opinion "may stand for nothing" because there at most was a "majority for standing but no majority opinion explaining why."[56] And even further Justice Scalia's dissent made the additional point *Raines* was wrong to contend that the framers would find federal judicial intrusion into a state's chosen separation of powers acceptable.[57] He noted that if anything, the Framers would want there to be more limitations on the federal judiciary's intrusions on the branches of the state governments, not less.[58]

Justice Scalia's dissent is significant for two reasons. First, in a period where the court has shifted in his direction after his death, his dissent could lay the roadmap forward for justices who

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[51] *Id*. at 803-04.
[52] *Id.* at 824-25 (Roberts, C.J., dissenting).
[53] *Id.* at 854 (Scalia, J., dissenting).
[54] *Id.* at 855.
[55] *Id.*
[56] *Id.* at 857.
[57] *Id.* at 858-59.
[58] *Id.* at 859.

share his views. His insistence on deciding the case on the standing question could also be attractive to the growing bloc of justices who seem to look favorably upon a more conservative jurisprudence.[59] Second, it might note a shift amongst Republican-appointed justices away from federal supremacy in this area to increased deference to the states. Justice Scalia disavowed Chief Justice Rehnquist's *Raines dicta* that federal standing jurisprudence trumped state law.[60] The court has put these ideas to the test twice in the last five years.

In 2019, the Court again addressed the issue of state legislature standing, this time in *Virginia House of Delegates v. Bethune-Hill*.[61] There the Virginia State Attorney General elected not to appeal the Commonwealth's newly drawn electoral districts.[62] But the House of Delegates did.[63] The question presented to the U.S. Supreme Court was whether the House had standing.

The Court held that the House of Delegates did not have standing as representative of the commonwealth, nor as litigants in their own capacity. First, the Court held that Virginia state law vests the representation of the commonwealth's interests in the Attorney General alone.[64] Turning to the House's standing in its own right, the Court found that a legislative body did not have a cognizable injury in having a law it passed be held to be unconstitutional.[65] Furthermore, unlike *Coleman* and *Arizona State Legislature* where the injury was a permanent deprivation of the

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[59] This is not to mean conservative in the sense that the justices seek to achieve a conservative outcome, but conservative in the sense they seek to adjudicate a case on the narrowest grounds possible. *See, e.g.*, Haaland v. Brackeen, 599 U.S. 255, 333 (2023) (Kavanaugh, J., concurring) (noting that the court left the Equal Protection Clause issue open and instead decided the case on standing grounds); Acheson Hotels, LLC v. Laufer, No. 22-429 (U.S. Dec. 5, 2023) (acknowledging Court can decide jurisdictional issues in any order it chooses, but deciding to vacate on mootness grounds instead of deciding standing issue).

[60] *Arizona State Legislature*, 579 U.S. at 859 ("Quite to the contrary, I think they would be all the more averse to unprecedented judicial meddling by federal courts with the branches of their state governments").

[61] 139 S.Ct. 1945 (2019).

[62] *Id*. at 1950.

[63] *Id.*

[64] *Id*. at 1951 ("authority and responsibility for representing the State's interests in civil litigation, Virginia law prescribes, rest exclusively with the State's Attorney General…").

[65] *Id.* at 1953 (there is no support "for the notion that one House of a bicameral legislature, resting solely on its role in the legislative process, may appeal on its own behalf a judgment invalidating a state enactment").

legislature's power, the House has an ongoing role in redistricting legislation – giving it the ability to remedy its own injury.[66]

These cases bring us to *Berger v. North Carolina State Conference of the NAACP*.[67] In *Berger*, the State Legislature sought to intervene to defend North Carolina's voter ID law.[68] They claimed that the state Attorney General had previously criticized the law, and only offered up a tepid defense of the law before the courts. The State Legislature, they argued, could intervene under a state law provision that allows the legislature "to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution."[69]

Writing for the majority, Justice Gorsuch evaluated the motion to intervene under rule 24(a)(2) of the Federal Rules of Civil Procedure.[70] He found that the General Assembly had a right to intervene inasmuch as North Carolina law specifically authorizes participation by legislative leaders on behalf of the state.[71] And turning to the "adequate representation" prong of 24(a)(2), Justice Gorsuch found that the commonality of multiple state parties in litigation and the North Carolina's explicit authorization of the representation meant that the interests of the legislature were not adequately represented by the executive.[72] Both in the analysis on the right to intervene and on adequacy of representation, the court applied a heavy dose of deference to the state legislature. Instead of applying a presumption that the executive already adequately represents a law, *Berger* presumes that a state's decision to allow multiple parties to represent its interests

[66] *Id*. at 1954.
[67] 142 S.Ct. 2191 (2022).
[68] *Id.* at 2198.
[69] *Id.* (citing N.C. Gen. Stat. Ann. §1-72.2 (b)).
[70] *Id.* at 2200.
[71] *Id.* at 2202. (finding dispositive that "North Carolina has expressly authorized the legislative leaders to defend the State's practical interests in litigation of this sort").
[72] *Id.* at 2203.

means that one party cannot adequately represent them all.[73] Or in the alternative it suggests that a state may have multiple interests in litigation, and that permitting different state institutions to represent those interests is permissible if a state elects to do so.[74]

Notably, *Berger* relies heavily on principles of federalism. As Justice Gorsuch notes:

> Appropriate respect for these realities suggests that federal courts should rarely question that a State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law. To hold otherwise would not only evince disrespect for a State's chosen means of diffusing its sovereign powers among various branches and officials. It would not only risk turning a deaf federal ear to voices the State has deemed crucial to understanding the full range of its interests.[75]

Simply put, *Berger* permits state legislature standing or intervention on federalism grounds. North Carolina chose to permit the legislature to fill in the executive role, and *Berger* respects that choice.

Justice Sotomayor dissented in *Berger*. Although she agreed that "states may organize themselves in a variety of ways" she would only permit one party to represent a state's interest. Justice Sotomayor also took issue with the "the Court's conclusion that state law can dictate what counts as 'adequate' representation."[76] That concern also lays claim to federalism concerns, with the dissent contending that "out of respect for federalism, if nothing else, we should not interpret state law to hijack federal courts' ability to manage litigation involving States."[77]

It's also worth briefly sketching out the history of state attorneys general declining to defend. Devins and Prakash only identify three refusals to defend before 1980.[78] And while they identified a slight uptick between 1980 and 2007, Devins and Prakash note that 2008 was really

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[73] *Id.* at 2203-04.
[74] *Id.* at 2201.
[75] *Id.*
[76] *Id.* at 2211 (Sotomayor, J., dissenting).
[77] *Id.* (citing Virginia Office for Protection and Advocacy v. Stewart, 563 U.S. 247, 272 (2011) (Roberts, C.J., dissenting)).
[78] Author has run their stated procedures for finding cases, *see* Devins & Prakash, *supra* note 4, at 2136-37 n.141, and has achieved the same result.

the tipping point.[79] In fact they noted in 2015 that fifty-seven percent of all declinations to defend had taken place after 2008. That count is bolstered by at least twelve refusals to defend since 2015[80] (fourteen if you include Puerto Rico and the Northern Mariana Islands). Add in statements by candidates for state attorney general[81] that they will not defend laws that are unconstitutional and it is clear that the practice of declining to defend is not going away.

Prakash and Devins reason that the spike in cases in 2008 is primarily due to a political need to avoid litigation positions that conflict with a state attorney general's political base.[82] Naturally, as they note, it follows that controversy around the duty to defend seems to be centered in states where one party does not have a stronghold on the state's politics.[83] In a similar vein, Paul Nolette supposes that uptick is due to an increased focus on adhering to a national agenda set by the Democratic and Republican state attorneys general associations.[84] Regardless of reason, it is apparent that states attorney general have discovered that there is a benefit to ignoring the duty to defend.

So where does that leave the doctrine of State Legislature Standing? It remains unclear. As the inimitable Wright and Miller note, while "the question of standing ordinarily is treated as a

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[79] Devins & Prakash, *supra* note 4, at 2137-2143.
[80] This survey was completed using the search techniques described at Devins & Prakash, *supra* note 4, at 2136-37 n.141, since 2015. Like Devins & Prakash I omitted cases where there was a declination to defend for reasons other than the constitutionality of the law in question, such as when the Attorney General has refused to defend public employees under state law. *See, e.g.*, Gramiccioni v. Dep't of L. & Safety, 235 A.3d 129 (N.J. 2020). While this admittedly might leave room for error, like Devins & Prakash, I am "confident that – no matter what measure is used – there" is a continued rise in state attorneys general declining to defend state law. *Supra* note 4, at 2136-37 n.141.
[81] Will Doran, *As State Attorneys General get More Political, NC's 2024 race looms large*, WRAL NEWS (Nov. 26 2023, 8:21 AM), https://www.wral.com/story/as-attorneys-general-get-more-political-nc-s-2024-race-looms-large/21162166/ (noting both Republican and Democratic candidates have said they will not defend laws "they believe to obviously violate people's constitutional rights").
[82] Devins & Prakash, *supra* note 4, at 2140.
[83] *Id.* at 2141.
[84] PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA, 201-02 (Univ. Press of Kan., 2015).

federal question…special circumstances may warrant greater deference to state law."[85] Defining those special circumstances is the hard part. In one reading of *Berger* and *Bethune-Hill*, state law does matter. The part of *Bethune-Hill* that disallows legislature standing on behalf of the state suggests that state law does in fact matter. Justice Ginsburg explicitly deferred to the state on matters of who represents the state.[86] And Justice Gorsuch reaffirms that aspect in *Berger*.[87]

But another reading of *Bethune-Hill* is that meeting the Article III standing requirements that every other party would have to meet is sufficient for a state legislature to establish standing. While *Bethune-Hill* acknowledges that a vesting of the ability to represent the state would be *sufficient* for standing,[88] it also suggests, by going through the Article III inquiry, that the state legislature would have standing if it was able to establish injury in fact as an independent body.[89] And *Berger*, acknowledging that the state did vest the legislature with the ability to defend,[90] did not reach the issue of whether an independent injury would suffice to intervene.

Then what is to be made of the *Coleman* quandary that Justice Scalia identified in his *Arizona State Legislature* dissent.[91] Does *Coleman* establish that the legislators did in fact have standing? If it does not, how much does that discount cases like *Arizona* that rely upon it? All of these questions are currently left open by the Court's jurisprudence.

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[85] WRIGHT & MILLER, *supra* note 12, at §3531.14.
[86] *Bethune-Hill*, 139 S.Ct. at 1951 (quoting Hollingsworth v. Perry, 570 U.S. 693, 710 (2013)) (affording deference and holding that "a State must be able to designate agents to represent it in federal court").
[87] *Berger*, 142 S.Ct. at 2197 (quoting *Bethune-Hill*, 139 S.Ct. at 1952, for the proposition that, "the State may choose to mount a legal defense of the named official defendants and speak with a single voice, often through an attorney general" but that the State may choose to select different regimes).
[88] *See Bethune-Hill*, 139 S.Ct. at 1951-52.
[89] *Id.* at 1953.
[90] *Berger*, 142 S.Ct. at 2202.
[91] *See generally*, *Arizona State Legislature,* 579 U.S. at 854 (Scalia, J., dissenting).

III. DEFERENCE SHOULD BE AFFORDED TO STATE LAW THAT IDENTIFIES WHO CAN REPRESENT THE STATES

But while the state of state legislature standing is unclear, this paper first argues that who decides the matter should not be. This is because state legislature standing is a *state* issue – not federal. While some accounts contend that courts do in fact defer to states,[92] others reason that the decision is one of federal law.[93] But questions of what branch of state government has what power should be questions of state law – not federal law. That approach plays proper constitutional respect to states internal separation of power and instills modesty in the federal judicial role.

First, questions of whether the state legislature has standing are fundamentally different from those facing typical parties. An "average" party must comply with *Lujan*'s injury threshold and Article III's justiciability requirements.[94] Those requirements are in place to satisfy the judiciary's concerns about intervening in other branches of government – concerns about *horizontal* federalism.[95] And those requirements do just that. They ensure that the Judiciary does not act as the final arbiter of political disagreements, but rather as the arbiter of distinct cases between parties.[96]

But when the party is a state branch of government additional concerns come into play: concerns about *vertical* federalism. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government," where each sovereign must respect decisions made by the other notwithstanding the Supremacy Clause.[97] When the

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[92] *See, e.g.,* David Thompson, Berger v. North Carolina State Conference of the NAACP*: A Victory for Federalism and State Autonomy*, 2022 HARV. J.L. & PUB. POL'Y PER CURIAM 22.

[93] *See, e.g.,* WRIGHT & MILLER, *surpa* note 12, at §3531.14 (noting that *Hollingsworth* failed to provide any persuasive response to Justice Kennedy's repeated reliance on the structure of California initiative law, but that nonetheless "standing in federal court is a question of federal law, not state law").

[94] *See, e.g.,* Transunion LLC v. Ramirez, 141 S.Ct. 2190, 2203 (2021).

[95] *Id.* (quoting Raines v. Byrd, 521 U.S. 811, 820 (1997)).

[96] *See* John G. Roberts Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1224 (1993).

[97] Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

federal judiciary decides questions of state standing, it is effectively creating federal common law for state separation of powers jurisprudence. When a court accepts that a state branch party can enforce or defend a law, the court is accepting that a party has been vested with an executive power of that state, without deferring to the state's choice in the matter. That decision is forbidden to the federal judiciary.[98]

Those concerns are exactly the ones laid out by Justice Gorsuch in *Berger*. Federal courts respect for "States' "plan[s] for the distribution of governmental powers" also serves important national interests."[99] States can serve as a better "balance" to federal interests when they structure their republican form of government as they wish.[100] And of course, doing so allows states to operate as laboratories of democracy.[101]

But *Berger*'s fundamental concern is that when a federal court intervenes in a state constitutional issue, that federal court is choosing who can defend state law. However, "that choice belongs to the sovereign state."[102]

The first part of *Bethune-Hill* and *Cameron* back up that holding. *Bethune-Hill* acknowledges that Virginia could have permitted the House to defend state law.[103] But Virginia did no such thing – the house had no standing.[104] And *Cameron* followed that logic, holding that Kentucky's choice to instill two officials with the power to defend law was their choice alone.[105]

[98] *See* BP P.L.C. v. Mayor and City Council of Baltimore, 141 S.Ct. 1532, 1540 (2021) (noting that *Murdock v. Memphis*, 20 Wall. 590 (1875), held that the federal judiciary can only review matters of federal law arising out of state judgments).
[99] *Berger*, 142 S.Ct. at 2201 (quoting Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 615 n.13 (1974)).
[100] *Id.* (quoting Bond v. United States, 564 U.S. 211, 221 (2011)).
[101] *Id.* (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).
[102] *Id.* at 2202 (quoting *Bethune-Hill*, 139 S.Ct. at 1952 (2019)). *But see* Lumen N. Mulligan, *Self-Intervention*, 94 U. COLO L. REV. 987, 1033-34 (2023) (arguing that the Supreme Court got *Berger* wrong as a matter of North Carolina law, and that the Court lacks the power to even opine on state law).
[103] *See Bethune-Hill*, 139 S.Ct. at 1951.
[104] *Id.* at 1952.
[105] Cameron v. EMW Women's Surgical Cent., 595 U.S. 267, 277-78 (2022).

And various circuits have treated state sovereignty as a matter of state law. For example, the Eighth Circuit rejected Missouri state legislators' motion to intervene when the Attorney General declined to defend.[106] And in the wake of the 2020 election, when Wisconsin legislators intervened in a suit against the state's post-Covid-19 election regime, the Seventh Circuit certified the question to the Wisconsin Supreme Court – even under the demands of elections-related motions practice.[107]

Nevertheless, some scholars contend that the State law on separation of powers does not control federal standing.[108] Ann Woolhandler and Julia Mahoney argue that federal courts have had a tradition of rejecting states' characterizations of their laws when doing so would insulate state officials from suit.[109] For example, they point to *Ex Parte Young* as an example of the Court rejecting the state's characterization that the Minnesota Attorney General was the State, and thus immune under the Eleventh Amendment.[110] Even further, they contend that the fact that the Court has limited States' power to bring sovereignty-based claims or claims derived from a state official's injury in its original jurisdiction docket, as further proof that it is acceptable to ignore state's descriptions of its own government.[111]

The Court has followed similar lines of argument as well, while deciding that proponents of a proposition lacked standing to defend a California ballot initiative in *Hollingsworth v. Perry*.[112] There the Court chose to rely on federal agency jurisprudence[113] instead of the California

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[106] *See* Planned Parenthood of Mid-Mo. and E. Kan. v. Ehlmann, 137 F.3d 573 (8th Cir. 1998).
[107] *See* Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639 (7th Cir. 2020).
[108] *See, e.g.,* Ann Woolhandler & Julia D. Mahoney, *State Standing After* Biden v. Nebraska, 30-31 (Va. Pub. L. & Legal Theory Rsch. Paper No. 2023-53, Sep. 19, 2023).
[109] *Id.*
[110] *Id.* (quoting *Ex Parte* Young, 209 U.S. 123 (1908)).
[111] *Id.* (quoting Smith v. Indiana, 191 U.S. 138, 148-49 (1903)).
[112] 570 U.S. 693 (2013).
[113] *Id.* at 713.

Supreme Court's express holding that the proponents were the State for standing purposes.[114] At bottom, the court found that the proponents, even though they asserted the state's interest, were private parties, and thus lacked standing under federal law.[115]

Both approaches lack merit. We start with the Woolhandler and Mahoney approach. That reliance on historical practice is misplaced for two reasons. First, it's not clear that historical, yet incorrect legal analysis is persuasive – especially on constitutional issues. After all, "when it comes to the interpretation of the Constitution… [the court] place[s] a high value on having the matter settled right."[116] Second, as for the Court's diminishing emphasis on its original jurisdiction docket, that phenomenon is best explained by the Court's emphasis on its role as a court of last resort – not its willingness to intervene in state affairs.[117]

As for *Hollingsworth*, Justice Kennedy's dissent is emblematic of an approach that properly respects the states' sovereign interests. His approach starts from first principles of federalism: that states may structure themselves as they see fit, so long as they ensure a republican form of government.[118] Thus it follows that courts are "bound by a state court's construction of a state statute."[119] And that cannot be more true than when it is a state's constitution – the very essence of a state's organized sovereignty – that the court is expounding upon.

[114] Perry v. Brown, 265 P.3d 1002, 1007 (Cal. 2011) ("the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity…").
[115] *Hollingsworth*, 570 U.S. at 709-10. It's worth noting that the Court seems to impose a type of clear statement rule in *Hollingsworth*, finding that a party that is found to have the state's interest is not the same as the State, but that a finding that a party was an agent of the State would suffice. *Id.*
[116] Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2262 (2022) (internal quotation omitted) (quoting Martin v. Hunter's Lessee, 1Wheat. 304, 326 (1816) (opinion of Story, J.)).
[117] *See generally*, Texas v. California, 141 S.Ct. 1469 (Alito, J., dissenting from denial of leave to amend) (describing the history of the Court's shrinking original jurisdiction docket).
[118] *See Hollingsworth*, 570 U.S., at 717 (Kennedy, J., dissenting).
[119] *Id*. at 718 (quoting Wisconsin v. Mitchell, 508 U.S. 476, 483 (1993)).

The majority's intervention in *Hollingsworth* has no answer for Justice Kennedy's concern for federalism.[120] And even if the *Hollingsworth* majority did have an answer to the federalism difficulties presented by their holding, it's hard to imagine an answer that would ignore the California Supreme Court's own understanding of California law, while respecting "the near-limitless sovereignty of each State to design its governing structure as it sees fit."[121]

At bottom, a court's imposition of federal standing law on the states decides who in the state is vested with the power to execute the laws. The merits of how states decide to do that are up for debate – and will be the subject of the rest of this paper. But as Justice Ginsburg put it in *Bethune-Hill*: the choice belongs to the state.[122]

IV. WHAT THE STATE APPROACHES ARE & WHAT THE STATE APPROACHES SHOULD BE

Establishing that state legislative standing is a state issue, we turn to *how* states should structure the execution of their laws. I begin in Part A by describing some state's different approaches to enforcement and defense. In Part B, I discuss the merits of a two-pronged approach that 1) removes state legislative standing and 2) enshrines the attorney general with the sole authority to defend state law and propose that this approach will create a culture in which the state attorney general has a strong duty to defend.

[120] *See* WRIGHT & MILLER, supra note 12 at §3531.14 ("The Court failed to provide any persuasive response to Justice Kennedy's repeated reliance on the structure of California initiative law").
[121] Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291, 327 (2014) (Scalia, J., concurring in judgment).
[122] *Bethune-Hill*, 139 S.Ct. at 1952.

A. Affording Deference, States Take a Different View.

To demonstrate the different approaches that states take, this section will discuss the approaches of three states. First, Arizona, which has a separation of powers clause in its state constitution, but which permits state legislature standing and intervention. Next, Virginia, that vests litigation exclusively in the commonwealth's attorney general and which has strong case law to support its separation of powers clause. Finally, I conclude with a discussion of Pennsylvania's approach, which stems from state constitutional law cases and a strong statutory duty to defend.

1. Arizona's Approach

The State of Arizona has two bodies of law that affect who can enforce and defend the state's laws. One, the state's law on standing. And two, the state's body of law arising out of the Separation of Powers Article of the Arizona Constitution.[123] The two bodies of law are intertwined and permit *some* legislative standing.

Arizona law first looks to federal law. Arizona's cases in this area rely on both *Raines* and *Coleman* in adopting *Coleman*'s vote-nullification theory.[124] For example, in *Forty-Seventh Legislature v. Napolitano*, the Supreme Court of Arizona addressed standing in a legislative suit against the governor's use of an item veto.[125] The Court found that the legislature had standing because their vote had been "nullified."[126] The legislature brought the case on behalf of the entire body – not in the individual capacity as legislators – and thus, the legislature had standing.

However, the Supreme Court of Arizona has rejected state legislature standing when legislators bring suit individually. For example, in *Bennett v. Napolitano*, the Supreme Court of

[123] ARIZ. CONST. art. III
[124] *See Coleman*, 307 U.S. at 438.
[125] 143 P.3d 1023 (Ariz. 2006).
[126] *Id.* at 1027-28.

Arizona heavily relied on *Raines*, in holding that the four legislators that brought the suit against the governor did not have standing.[127] Although the Court acknowledged that they were not bound by federal law, they nonetheless adopted the federal approach.[128]

In terms of intervening, the President of the State Senate and the Speaker of the State House of Representatives (and the Attorney General) can intervene under state law when a statute's constitutionality is challenged.[129] However, federal courts have still applied Rule 24 when evaluating the intervenors' motion.[130] Applying Rule 24, the District of Arizona has repeatedly found that although state law expressly permits intervention, federal rules do not.[131] But state courts seem to have a different understanding of Arizona Civil Procedure. State Courts treat A.R.S. §12-1841 as establishing that the Attorney General, the Speaker of the House, and the President of the Senate can intervene as a matter of right.[132]

Also of note is that Arizona permits intra-branch litigation. Most notably in *Brnovich v. Democratic National Committee*, the Attorney General and Secretary of State ended up on

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[127] 81 P.3d 311 (Ariz. 2003).

[128] *Id*. at 316 (quoting Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. In Arizona, 712 P.2d 914, 919 (Ariz. 1985)). That decision to adopt the federal approach is questionable under methods of constitutional interpretation typically used by the Arizona courts when there is a federal analog, and where Arizona law deviates from that analog. As Justice Bolick has observed, Arizona's constitutional framers had over 100 years of American constitutional history at their disposal when drafting the state constitution. *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 927 (Ariz. 2019) (Bolick, J., concurring). It follows that when the state has made a choice to use different language, the court "must presume it was intended to have a different meaning from its federal counterpart and determine how the different language affects the constitutional provision's meaning." *Id.* at 928 (citing *Turken v. Gordon*, 224 P.3d 158, 162 (Ariz. 2010); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 256 (2012)). In this context Arizona's choice to add language about the separation of powers would seem to require separate analysis from that used in the federal context.

[129] ARIZ. REV. STAT. ANN. § 12-1841 (2010)

[130] *See* Miracle v. Hobbs, 333 F.R.D. 151, 154-55 (D.Ariz. 2019) (acknowledging ARIZ. REV. STAT. ANN. §12-1841, but denying intervention of Speaker of the House and President of the Senate under FED. R. CIV. P. 24). *See also*, Arizonans for Fair Elections v. Hobbs, 335 F.R.D. 269, 273 (D.Ariz. 2020) (same).

[131] *Ibid*.

[132] *See* State *ex rel.* Woods v. Block, 942 P.2d 428, 433 (Ariz. 1997) (holding that ARIZ. REV. STAT. ANN. §12-1841 gives the Attorney General the "unquestioned right to participate" in litigation involving the constitutionality of an Arizona statute); *See also, Planned Parenthood Arizona, Inc. v. American Ass'n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 198 (Ariz. Ct. App. 2011) (holding that the Speaker of the House has the ability to intervene as of right).

opposite sides of litigation concerning Arizona's mail-in voting laws.[133] That scenario was permissible under Arizona and federal law.[134]

At bottom, Arizona's defense and intervention scheme is concerned primarily with ensuring adversariness in constitutional cases. The scheme allows for single members of the legislative branch to intervene in those cases, while imposing a *Coleman*-like nullification test for other cases.

2. **Virginia's Approach**

Likewise, Virginia has not one but two separation of powers provisions in its state constitution.[135] But the commonwealth has the "whole power" doctrine to enforce the separation of powers guarantee.[136] The "whole power" doctrine has roots in the founding-era understanding of the separation of powers.[137] Under the doctrine there is an unconstitutional exercise of power if the department exercises the "whole power" of another.[138] But the exercise of another power "to a limited extent" is acceptable.[139]

In terms of defending and executing the law Virginia has made it simple. The Attorney General is given the exclusive power to "render and perform" legal services in civil matters for the Commonwealth.[140] And while a special counsel could be substituted for the Attorney General, that substitution is limited to when the Attorney General requests the substitution, where representation

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[133] 141 S.Ct. 2321 (2021).
[134] *Id.* at 2336.
[135] VA. CONST. art. I, §5, art. III, §1.
[136] Winchester & S.R. Co. v. Commonwealth, 55 S.E. 692, 694 (Va. 1906).
[137] Douglas Laycock, *Legislators on Executive-Branch Boards are Unconstitutional, Period*, 28 WM. & MARY B. OF RIGHTS J. 1, 6 (2019) (noting that the "whole power" language in the Virginia Constitution seems to stem from Federalist No. 47).
[138] *Winchester*, 55 S.E. at 694.
[139] *Id.*
[140] VA. CODE ANN. §2.2-507 (West 2020).

is uneconomical, or where the Attorney General is unable to provide representation (for example where there is a conflict of interest).[141] As such, the history of legislative intervention and defense is quite limited. As *Bethune-Hill* notes,[142] the legislature was able to only cite one case that permitted the legislature to intervene: *Vesilind v. Virginia State Board of Elections*.[143] That case "does not bear the weight the House" puts on it, because the House intervened *alongside* the Attorney General.[144] And in any event, the fact that the *Vesilind* court did not directly address standing,[145] when coupled with the explicit text of Virginia law hardly suggests that legislative intervention is generally permissible.

In sum, Virginia's approach is simple: the Attorney General has the exclusive power to defend the Commonwealth's laws.

3. **Pennsylvania's Approach**

Finally, we turn to another commonwealth, Pennsylvania. Like Virginia, Pennsylvania instills in the Attorney General a statutory duty to defend.[146] In fact that duty to defend can be traced back the founding era, where the attorney general had both the power to oppose the governor and provide (even contrary) legal advice to state officials.[147] And like Arizona, Pennsylvania

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[141] VA. CODE ANN. §2.2-510 (West 2019).
[142] *Bethune-Hill*, 139 S.Ct. at 1952.
[143] 813 S.E. 2d 739 (Va. 2018).
[144] *Bethune-Hill*, 139 S.Ct. at 1952.
[145] *See generally*, *Vesilind*, 813 S.E. at 748-53.
[146] 71 PA. STAT. AND CONS. STAT. ANN. §732-204(c) (West (1981)) ("The Attorney General shall represent the Commonwealth and all Commonwealth agencies…").
[147] Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 IND. L.J. 513, 517 (2015) (quoting Emily Myers, *Origin & Development of the Office*, *in* STATE ATTORNEYS GENERAL POWERS & RESPONSIBILITIES 4-9 (Emily Myers ed., 3d ed. 2013)).

permits the Attorney General to intervene as a matter of right – with the explicit purpose of ensuring defense in constitutional cases.[148]

On the other hand, the legislature has a limited ability to intervene and defend. Like other states, Pennsylvania has adopted the *Coleman-Raines* line of reasoning, that standing is only appropriate when a "legislator's direct and substantial interest in his or her ability to participate in the voting process is negatively impacted," or when "he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator."[149] Thus it follows that "a legislator lacks standing where he or she has an indirect and less substantial interest in conduct outside the legislative forum which is unrelated to the voting or approval process."[150]

Markham v. Wolf illustrates the Pennsylvania regime in practice. Citizen-plaintiffs sought to challenge the Governor's executive order.[151] The Attorney General defended the order, but the Senate Majority Caucus sought to intervene on the theory that the executive order violated the separation of powers doctrine – in essence, it was an exercise of legislative power.[152] The Supreme Court of Pennsylvania denied the motion for two reasons. First, the Court found that under *Coleman-Raines*, and similar Pennsylvania cases, the legislators had not suffered an injury to their ability to legislate.[153] The governor's issuance of an executive order placed no roadblock on the legislature's ability to legislate.[154] Second, the Court found that permitting the legislative branch to sue under the separation of powers doctrine, "would entitle legislators to challenge virtually

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[148] *Id. See also,* PA. R. APP. P. 521 ("the Attorney General may be heard on the question of the constitutionality of the statute involved without formal intervention"); PA. R. APP. P. 521 (b) note, (subsection (b) is "intended to place the Commonwealth in a position to obtain review in the Supreme Court of Pennsylvania or the Supreme Court of the United States of an adverse decision on the constitutional question").
[149] Markham v. Wolf, 136 A.3d 134, 145 (Pa. 2016) (citing Wilt v. Beal, 363 A.2d 876 (Pa. 1976) and Fumo v. City of Philadelphia, 972 A.2d 487 (Pa. 2009)).
[150] *Id.*
[151] *Id.* at 136-37.
[152] *Id.* at 137.
[153] *Id.* at 145.
[154] *Id.*

every interpretive executive order or action (or inaction)."[155] That scenario, with no limiting principle would lead to a host of its own separation of powers concerns.[156]

Pennsylvania thus applies a middle approach, permitting *legislative* standing where there is a *legislative* injury to a *legislator*. Beyond that, the legislature is barred from bringing suit or intervening.

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In conclusion, the standing of state legislatures in Arizona, Virginia, and Pennsylvania illustrates the various paths the states (and commonwealths) have taken in separating the executive and legislative powers – true "laboratories of democracy."[157] In Part B, we turn to what approach is the most meritorious.

B. States Should Reject Legislative Standing in Favor of an Executive's Strong Duty to Defend

Just because states *can* permit their legislative branches to appear on behalf of the state does not mean that they *should*. In fact, the rise in prominence of State Legislatures attempting to intervene is correlated to another state constitutional phenomenon: the abdication of the duty to defend of state attorney generals.[158] As scholarship has noted it is quite popular for state attorneys general to refuses to defend politically inconvenient laws on the ground that they think that they are unconstitutional.[159] And in many states the state legislature's ability to defend or intervene in defense of laws that the state attorney general refuses to defend provides the state attorney general

[155] *Id.*
[156] *Id.*
[157] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
[158] *See* Lumen N. Mulligan, *Self-Intervention*, 94 U.Colo L. Rev 987, 994-97 (2023) (collecting examples of state legislative intervention).
[159] *See generally,* Devins & Prakash, *supra* note 4.

with a legal and political offramp from having to defend laws that might be politically or otherwise inconvenient. That is a problem. It both mangles the separation of powers and has a host of negative policy implications.

The solution is to eliminate state legislative standing while bestowing the state attorney general with the sole duty to defend. As I elaborate below, that solution is both correct as a matter of separation of powers law, provides policy benefits, and has proven to work in states that already have a similar system in place.[160]

Admittedly this is not a "quick fix" policy solution that will "solve" the various problems associated with state attorneys general who refuse to defend state law. But by attacking both sides of the declination to defend, states can start to turn the tide in their constitutional culture that could lead to a strong duty to defend ingrained in a state's constitutionalism.

1. Removing State Legislature Standing in Favor of a Strong Duty to Defend is Correct as a Matter of Separation of Powers Law

Eliminating state legislature standing in favor of a strong duty to defend is correct as a matter of separation of powers. For one, permitting state legislature standing necessarily means that the legislature is executing the law. And two, that execution improperly asserts the executive power – violating the state constitution of any state with a separation of powers clause.

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[160] It is also worth briefly discussing the how to eliminate state legislative standing. It seems likely if not guaranteed, that asking the legislature to remove their own standing, would be a dead end. Legislatures seem to appreciate having the ability to wage their battles in the courts. After all, it allows them to fight a battle against the executive, which can be politically lucrative.

But there are other ways to eliminate state legislative standing. The most obvious route is through the courts. In states where there is a separation of powers provision in the state constitution it is reasonable to see the ending termination of state legislative standing through the courts for the reasons below. Under either a functionalist or originalist view of a state constitution, there should be the opportunity, both logistically and jurisprudentially, to hold that a separation of powers clause bars state legislatures from executing the law. And in many states, there is also the possibility of using the initiative process and bypassing the legislature in that manner. *See* John Dinan, *Constitutional Amendment Processes in the 50 States*, STATE COURT REPORT (Nov. 13, 2023), https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states (noting that seventeen states permit constitutional amendments through the initiative process).

First, standing in defense of a law (and/or intervening to do so) is *executing* the law. The executive power in states may look different depending on the structure of the executive branch.[161] But at its core the executive function is to enforce and defend the law. Both of those functions can be viewed as subsets of the duty to execute the law.[162] As Justice Wilson put it at the founding era, the executive "had authority, not to make, or alter, or dispense with the laws, but to execute and act [upon] the laws, which were established."[163] In essence they are two sides of a sword. The enforcement side is the positive exercise of the executive power; the defense side is the negative exercise of the executive power.

The public versus private rights distinction reinforces this view. As noted in Part II, the essence of a private wrong is that it is an infringement on "private or civil rights belonging to *individuals*."[164] Cases involving public wrongs "secure to the *public* the benefits of society."[165] Thus, while private wrong actions are available to everyone, public law actions are only available to the department charged with defending and enforcing the law on behalf of the public.[166] Because actions taken up by the legislature that defend the constitutionality of a statute aim to secure that law for the benefit of society, and not any one individual, the legislatures' actions are exercising the executive power, consequently disrupting the separation of powers.[167]

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[161] *E.g.*, *compare*, ARIZ. CONST. ART. V, §1 (stating that the executive branch "shall consist of the governor, lieutenant governor, secretary of state, attorney general, state treasurer and superintendent of public instruction"), *with* OR. CONST. ART. V, §1 (stating that the executive power is vested in the governor while remaining silent as to the existence of any other constitutional executive officer).

[162] *See* Zoeller, *supra* note 147; *See also,* Note, *Executive Discretion and the Congressional Defense of Statutes*, 53 YALE L.J. 970, 973 (inferring that enforcement and defense are part of the take care clause).

[163] 1 THE WORKS OF JAMES WILSON 440 (Robert G. McCloskey ed., 1967). *Cf.* Mulligan, *supra* note 158, at 1029.

[164] 3 WILLIAM BLACKSTONE, COMMENTARIES, *2.

[165] 4 WILLIAM BLACKSTONE, COMMENTARIES, *7.

[166] Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1134 (11th Cir. 2021) (Newson, K., J., concurring) (citing Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 743-52).

[167] It seems that state legislature standing would be wholly unconstitutional under a view of standing that is grounded in Article II (or a state constitutional analog). *See Sierra* 996 F.3d at 1115 (describing how Article II might limit standing of non-executive branch plaintiffs whose case is premised on remedying a public wrong); *See also generally,* Tara L. Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781 (2009) (arguing that the existence of the Take Care Clause bars those not part of the executive branch from having standing

Second, it follows that if the duty to defend is part of the executive power, then it is improperly wielded by the legislative branch when the legislature (or a part thereof) intervenes to defend a law. Thus, states with separation of powers clauses should support ending legislative standing as a matter of constitutional structure.

Virginia and Arizona's approaches to the separation of powers issues here provide a helpful illustration.

Virginia's approach gets separation of powers principles correct because it both promotes the duty to defend while also eliminating state legislature standing. While the whole power doctrine does provide a baseline for the separation of powers,[168] the main benefits of the Virginia approach come from their vesting of the Attorney General with the power to render and perform legal services.[169]

First, the Virginia regime ensures the delineation of executive and legislative power. As noted, Virginia law permits the Attorney General, who resides in the executive branch[170] the ability to render and perform, or in other words, execute the law. That provision necessarily keeps any whiff of the executive power out of the hands of the legislature – just see *Bethune-Hill*.[171]

Second, the Virginia regime is structured in a way that eliminates any non-delegation issues. Because Virginia instills execution power almost exclusively in the Attorney General, it

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to sue under a public wrong theory). After all, in the states, there is even a stronger presumption of separation of powers than in the federal constitution. If a state were to adopt a view of standing that was grounded in the executive branch, it would have to follow that the state legislature would not have standing absent a constitutional provision to the contrary. This view would also imply that if the state attorney general has *constitutional* law execution power, then other state executive officials, save for the governor, would also lack standing to bring suit on behalf of the public.

[168] Under Virginia constitutional law, the whole power doctrine permits a strong argument to be made that state legislative standing is unconstitutional. But states should nonetheless clarify, either statutorily as Virginia has, or, preferably, constitutionally, that the Attorney General *alone* has the inherent ability to enforce the law as the second piece of a puzzle that will help solve that problems that arise when the duty can defend is allowed to be passed around.

[169] VA. CODE ANN. §2.2-507 (West 2020).

[170] VA. CONST. Art. V, §15.

[171] *Bethune-Hill*, 139 S.Ct. at 1951.

follows that the Attorney General would not be able to delegate that power to another branch. Admittedly, the Virginia courts have once deviated from the enforcement of that provision in *Veslind*. Given the statute confines the duty to defend to the State Attorney General amidst the backdrop of a strong tradition of separation of powers, future Virginia courts will likely be cautious about allowing legislative intervention again.

On the other hand, an Arizona-type approach misunderstands the separation of powers – even though Arizona, like Virginia, has an explicit separation of powers amendment.[172] Arizona's decision to permit its legislative parties to intervene to defend a statute raises three separation of powers issues.

First, Arizona's approach permits the legislature to defend the very law they enacted – consolidating the legislative and executive power. Numerous scholars[173] and jurists[174] have decried that consolidation when it takes place in the executive branch. Those problems persist when the powers are consolidated in the legislative branch.

Any consolidation of two branches in one is a problem under the separation of powers. While they may differ in how they practice the separation of powers, American governments formed under separation of powers principles, *i.e.,* almost all state governments, share the common

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[172] *See* ARIZ. CONST. art. III.

[173] *See, e.g.*, Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1464-66 (2015); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 341-42 (2002).

[174] *See, e.g.*, Jarkesy v. SEC, 34 F.4th 446, 460 (5th Cir. 2022) (noting the separation of powers problems that arise when "a person or entity other than Congress exercises legislative power"); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) (same).

practice in separating out power into executive, legislative, and judicial branches.[175] Some forty states even went as far as to enshrine the separation of powers in their state constitution.[176]

That shared heritage stems from arguments in Federalist No. 47. Quoting Montesquieu in defense of the separation of powers, Madison wrote, "[w]hen the legislative and executive powers are united in the same person or body… there can be no liberty, because apprehensions may arise lest [the same] monarch or senate should [enact] tyrannical laws to [execute] them in a tyrannical manner."[177] And while Madison adopted a flexible position, permissive of some power sharing, many states adopted the *anti*-federalist position: a strict version of the separation of powers.[178] Although the Court as of late has been much more concerned with the executive assuming the legislative power, the problem is still the same. Consolidating the executive and legislative is a violation of the separation of powers and of any state constitution modeled on Madison's original design.

And in states where the Attorney General defers their ability to defend to the legislature, the Attorney General is also delegating *sub silentio* that power – a surefire violation of the nondelegation doctrine if the state has adopted one.[179] Again, although the nondelegation doctrine is traditionally raised when the legislature is the one delegating the power, the logic behind the doctrine remains the same: that the branches themselves do not have the power to delegate their powers to other branches – even if they wish to. It makes no difference if that delegation takes the

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[175] *See generally,* James Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1191-1201 (1999) (cataloging the various interpretations of the separation of powers amongst the states, but including every state in the analysis).
[176] JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION, 194 (2022).
[177] THE FEDERALIST NO. 47 (James Madison).
[178] Rossi, *supra* note 175, at 1223-25.
[179] *See generally,* Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619 (2018).

form of the legislature telling the executive to create a code of competition[180] or if it takes the form of the Attorney General abdicating the duty to defend to the legislature.

Finally, Arizona's approach implicitly gives the State Attorney General a quasi-veto power. As Girton notes, the state attorney general's refusal to defend establishes a new form of veto power.[181] That power traditionally belongs to the governor and can only be exercised before a bill becomes law. Ignoring the problems with the facts that in this scenario, the attorney general is the one giving themselves the veto power – the attorney general veto ignores the constitutional design that allows the executive branch to voice their opinion on the proposed law through the governor's approval or veto of the bill, not by the Attorney General *after* the bill has been duly enacted into law.

The original understanding and purpose of the federal Take Care Clause in the founding era reinforces this view.[182] As scholars have noted, the founders envisioned a constitutional system dissimilar from the English model that permitted the king to suspend laws.[183] That vision, embodied in the Take Care Clause,[184] instead promotes the view that once a law is duly enacted it is law that must be enforced.

It is no wonder then, that scholars who do not share a concern with the declination to defend are forced to accept the premise that the attorney general is in fact making a determinative decision on a law's constitutionality.[185] That position instead rests on the argument that the attorney general

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[180] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[181] Jeremy R. Girton, *The Attorney General Veto*, 114 COLUM. L. REV. 1783, 1816-17 (2014).
[182] Admittedly, the persuasive authority of the *federal* founders' view might be less so in the state context than it would be in the federal context. After all, the federal constitution imposes nothing more on the states than to create republican form of government. *See* U.S. CONST. art. IV, §4. However, in states that have either an original understanding of the separation of powers, or who have "copy-and-pasted" constitutional text from the federal document, the founding era understanding, including the Federalist Papers, should have persuasive authority.
[183] Zoeller, *supra* note 147, at 518-19.
[184] *Id.*
[185] *See* Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 235-37 (2014).

(and others who might defend state law) has a "comparative institutional competence" which renders them with the ability to decide the constitutionality of laws.[186] Putting aside the strong formalist arguments against such a position, the argument is flawed on its own terms. For one, the insistence that the agencies closest to the law at issue are better equipped to understand its constitutionality misunderstands one of the benefits of having a state attorney general: an independent legal counsel. That independence provides the state with both a unified and a cohesive view of its position and can help provide a cool legal conscience to an agency in the executive passionate about its programming. While those agencies might have a better understanding of the public policy, they do not have a better understanding of the state's *legal* strategy.[187]

Admittedly in this scenario, adopting Arizona's approach and permitting the state legislature to intervene to defend that state law does solve part of the problem. Allowing the law to be defended by the legislature serves as a workaround of the state attorney general's quasi-veto. At the end of the day, the law still gets defended.

But this sort of workaround is best to be avoided for three reasons. First, as Girton also notes, elections have consequences.[188] And when that is tied up with the constitutional defense of a statute, that could create a scenario like the one in *Karcher*, where an attempted defense is aborted after the legislature changes hands to a new party.[189] Just as controversies over the duty to defend are more likely to occur in so-called "purple" states where there is no "trifecta" of both houses of

[186] *Id.* at 264-65.
[187] Thomas Fisher, *Sex, Guns, Climate Change, and More: Why our Republic Need Independent State Attorneys General*, 99 IND. L.J. 1, 11-12 (2023). *Cf.* Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1717-21 (2009) (illustrating the coordination problems that arise with co-executive power sharing).
[188] Girton, *surpa* note 180, at 1819.
[189] *Id.* (citing *Karcher v. May*, 484 U.S. 72, 76-77 (1987)).

the legislature and the executive, so is the likelihood of a legislature abandoning a defense after an election.[190]

Two, as discussed below, there are democratic accountability problems with this clouded approach. That's even more so under Arizona's approach where the Speaker of the House or President of the Senate *alone* can intervene on behalf of the state. In essence, a legislator elected by roughly 235,000 people,[191] can represent a state of over seven million.[192]

Finally, Zoeller raises the possibility that abdication of the duty to defend could still be considered by courts evaluating the constitutionality of a statute in a case where the defense is taken up by others.[193] Accordingly, even in a scenario in which the attorney general approves of the legislature's defense of the statute, their veto could still be seen as a disapproval of the disputed statute's constitutionality.[194]

And even if a state does not have a separation of powers clause, other constitutional provisions could be useful in limiting defense and standing to the executive branch. First, any vesting clause, especially those that are explicit about which powers reside in which branch, provides strong support that the ability to defend should be limited to the executive branch.[195] And if the core of the executive's power is execution of the laws, any non-cursory reading of a vesting clause must, at minimum, include the enforcement and defense of the laws.

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[190] *See* Devins & Prakash, *supra* note 4, at 2015.
[191] *Official Legislative Map: Demographic and Competitive Data Analysis*, ARIZ. IND. REDISTRICTING COMM'N, https://redistricting-irc-az.hub.arcgis.com/pages/official-maps (noting that the 2020 census population of the legislative districts ranges between 225,474 and 246,674 people).
[192] *Arizona: State Profile*, U.S. CENSUS BUREAU, https://data.census.gov/profile/Arizona?g=040XX00US04 (noting that Arizona population at 2020 census was 7,151,502).
[193] Zoeller, *supra* note 147, at 540 (quoting *Gavett v. Alexander*, 477 F.Supp. 1035, 1044 (D.D.C. 1979)).
[194] *Id.*
[195] *Cf.* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1181-89 (1992) (describing the view that the text of the federal vesting clauses compels the view that the President is the sole recipient of the executive power).

Second, while further removed from the circumstances here, the purpose of both the ex post facto and bill of attainder provisions commonly found in state constitutions is to deny the legislature the ability to control the outcomes of certain cases.[196] While the founders were more concerned with the legislature assuming the judicial power than the executive,[197] the logic remains the same: a separation of powers structure divests the legislature of the ability to act in certain cases.[198] In turn, the standing to defend is left to the executive – in the states' case, the state attorney general.

2. Removing State Legislature Standing Solves Remedy and Proper Party Problems

Leaving constitutional defense to the Attorney General and prohibiting it to the legislature also will allow the judiciary to avoid problems in issuing an unenforceable decision. As Woolhandler and Mahoney note, legislatures are not proper defendants because they cannot redress plaintiff's injuries, nor can a court enter a binding decree against the legislature as a party.[199] If a plaintiff seeks injunctive relief against "the state" from enforcing the law, the legislature is not the proper party to sue. After all, the legislature is not the one enforcing the law– the attorney general is.

Consider this example. Assume the laws of the mythical state of Tecumseh permit the Speaker of the House to intervene to defend the constitutionality of a law prohibiting the use of widgets after a citizen sues to enjoin the law. The District Court agrees to enjoin the law. But who

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[196] Woolhandler & Mahoney, *supra* note 108, at 22.
[197] *Id.* (citing Note (John Hart Ely), *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 343-48 (1962) and noting that the authority it relies on "particularly emphasizes legislatures' assuming judicial authority").
[198] The strict delineation of power can also be seen in states that have incompatibility clauses which bar members of the executive branch from serving in the legislature. Such a constitutional bar can be seen as evidence of the "delicate and precarious" balance in the allocation of power. Steven G. Calabresi & Joan L. Larsen, *One Person One Office: Separation of Powers or Separation of Personnel*, 79 CORNELL L. REV. 1045, 1120-21 (1994).
[199] *Id.* at 28.

exactly is the court to enjoin? The court could enjoin the Speaker of the House, but such an injunction would be pointless – the Speaker has neither the power nor the capability to enforce the prohibition as just a member of the legislature. The court could enjoin the Attorney General, but then the court would be enjoining a party not before the court, in turn raising questions about the district court's authority.[200]

Furthermore, a court will run into problems attempting to issue a decree for similar reasons.[201] If a plaintiff sues and wins a decree from the court, the court will run into difficulties enforcing a decree against a party that was not before the court. Woolhandler and Mahoney reason that if the executive was before the court in defense, they would be held in contempt if they ignored the decree.[202] But it would make no sense to hold the legislature in contempt if the executive refused to comply. Symptomatic of the fact that legislatures are not meant to exercise the executive power, courts (and plaintiffs) will find it difficult to effectuate remedies against the executive when the legislative branch is the one defending the law in open court.

3. Removing State Legislature Standing Improves Legitimacy and Increases Democratic Accountability

Rejecting state legislative standing also has numerous policy benefits. First, prohibiting state legislative standing will enhance democratic accountability. If the state attorney general is the official accountable electorally for executing the law, but then the legislature is the one who executes the law, voters are left with the conundrum of who to penalize (or reward) electorally.

[200] *See* Arizona v. Biden, 40 F.4th 375, 395-96 (6th Cir. 2022) (Sutton, C.J., concurring) (expressing skepticism that district courts' equitable power extends beyond the parties in a specific case).
[201] Woolhandler & Mahoney, *supra* note 108, at 28-29.
[202] *Id.* at 28.

Hamilton makes this point in Federalist No. 70 about the divided executive, but the argument maps on to the divided execution of the laws as well. When two parties, here the state's attorney general and the state legislature, are tasked with the same role, that shared responsibility "tends to conceal faults and destroy responsibility."[203] For example, in a state like Arizona where the legislative leaders can intervene to defend a statute's constitutionality,[204] one could imagine that a voter would be confused how to incorporate that into their electoral decision making.[205] Should the voter consider how well they think the legislator will defend laws? Or how the candidate for attorney general interprets the constitution? Another benefit of a Virginia-type fully delineated duty to defend is that for better or for worse, voters know exactly who enforces and defends the law and can incorporate that knowledge into their electoral decision-making.

While many commentators have argued that this sort of Hamiltonian argument has not been borne out to be true in practice,[206] any counterargument relying upon the states' experience ignores the difference between the divided executive and the concurrent executive. While the states have undoubtedly found success (or at least avoided ruin) with a multi-headed executive, the states have consistently divided up power amongst executive officers.[207] They have generally not allowed for multiple officers to concurrently exercise the same power.[208] So although the states have divided the executive into multiple "powers" they have avoided some of Hamilton's worries in Federalist Seventy by insuring that multiple officers do not concurrently exercise the law. But permitting the

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[203] THE FEDERALIST NO. 70 (Alexander Hamilton).
[204] ARIZ. REV. STAT. ANN. § 12-1841 (2010).
[205] *See* Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1705-1712 (2009) (arguing that a co-executive system will lead to lower voter turnout and higher levels of voter satisfaction).
[206] Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1403-04 (2008).
[207] *Id.* at 1405.
[208] *Id.*

legislature and the state attorney general to execute the law does not avoid those worries. Instead, the fact that they hold the *same* power serves as a cloak to both their faults.[209]

This power sharing arrangement is further problematic because no party – here the state attorney general and the state legislature – has an incentive to halt it. Both the state attorney general and legislature have an incentive to keep their ability to defend.[210] The ability to defend a law is undoubtedly a power worth holding on to. And both have an incentive to blur the bounds of where and when that power starts and stops, so that they can easily deflect responsibility if blame needs to be assigned for not defending a law – which all the while makes it harder for the electorate to reward or punish come Election Day.[211] The only way to guarantee clear democratic accountability is to ensure that the state attorney general has the duty to defend, and that duty is exclusively theirs.

Removing state legislature standing in favor of a stronger duty to defend will also lend legitimacy to the state attorney general. While the state attorneys general should not model themselves after the federal attorney general without considering the different constitutional roles each office has, the federal model of placing a higher priority on being an officer of the court than on political outcomes could increase the legitimacy of the institution of the state attorney general. As most scholarship on the office has noted, the focus by the state attorneys general on politics (and on higher office) has given the office a reputation for being primarily a political actor.[212] But if the state adopts a regime in which it is harder for the attorney general to decline to defend, that could promote the practice of consistent defense of state law, in turn enhancing the legitimacy of the office in other actors' eyes.

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[209] THE FEDERALIST NO. 70 (Alexander Hamilton).
[210] *See* Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1714-15 (2008).
[211] *Id.* at 1715.
[212] Devins & Prakash, *supra* note 4, at 2104 (citing Colin Provost, *When is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS 597, 604 (2009)).

In contrast, even a system like Arizona's in which state legislators ensure an adversarial proceeding, the defense will be ineffective – at least as compared to a state attorney's general office. Arizona's attorney general can draw on the reserves of attorneys and institutional knowledge of not just his or her office, but of the various agencies that make up the executive branch.[213] The state legislature, even equipped with the best institutional knowledge that money can buy, will not be able to provide the state with a consistent and uniform application of the law. The legislature is simply free to ignore the constraints that come with the state attorney general's office as an institution.[214] That is even more true when the law is defended by private entities, who are "free to pursue a purely ideological commitment to the law's constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities."[215]

Another side effect of moving away from state legislative standing is that it will also improve the legitimacy of the courts. Litigation between branches ultimately involves the most politically charged issues – at least one department of the government disagrees with another. In a dispute between the legislature and executive, that places a lot of political weight on the third branch: the judiciary. The judiciary, already forced into deciding more and more politically controversial cases,[216] would benefit from not deciding cases between states political branches. That slight shift in case matters will decrease the amount of fodder for blame on the judiciary for deciding consequential matters that should be left to the political branches.[217]

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[213] Zoeller, *supra* note 147, at 540.
[214] *Id.*
[215] *Hollingsworth*, 570 U.S. at 714.
[216] Woolhandler & Mahoney, *supra* note 108, at 34.
[217] *Id.*

Finally, there are the various ways in which permitting state legislative defense disturbs finality. First, permitting state legislatures to intervene disturbs finality. As seen in the various redistricting cases like *Berger* and *Bethune-Hill*, permitting the state legislature to intervene prolongs litigation by inorganically creating a case or controversy. Without the intervention of the state legislature, redistricting would end when the state redistricting process was complete, allowing the immediate election to be contested under the completed maps – an important detail in the election space where candidates and parties need to know the geographic boundaries of each office.[218]

Relatedly, a state legislature defense and state attorney general refusal to defend type scheme also leaves regulated parties in limbo.[219] The unpredictability that stems from questions of whether a state attorney general will or will not enforce the law undermines the confidence of regulated entities – leaving them in the dark to make business decisions. Even if a business would have costs associated with the regulation, they would still know what those costs would be. But when an attorney general declines to defend, the parties regulated must read between the lines of a state attorney general's discretion and pay attention to prevailing political winds. Those burdens have additional costs and create uncertainty.

4. States' Experiences Reinforce the Argument that a Clear Delineation of Power is Good for the Rule of Law, but Leave Open the Door for Future Research

[218] *Cf.* Purcell v. Gonzalez, 549 U.S. 1, 5-6 (2006).

[219] One only need look at the variety of amorphous standards that various state attorneys general have employed as a rubric to decide when they will defend state law. *See* Zoeller, *supra* note 147, at 524-25 n.77 (collecting examples of standards, ranging from a refusal to defend if the law is "unconstitutional in the most clear and compelling circumstances," to defense unless the "invalidity" of the statute is apparent). If "vague laws invite arbitrary power," *Sessions v. Dimaya*, 138 S.Ct. 1204, 1223 (2018) (Gorsuch, J., concurring in part and concurring in the judgment), it is hard to imagine what stems from vague standards issued in press releases.

Virginia, as noted in part IV-A, has roughly adopted the approach advocated here: leaving the execution of the laws to the State Attorney General, and away from the legislature. The commonwealth's experience with that approach reinforces the above arguments. For one, only twice has the Virginia Attorney General declined to defend.[220]

The relative rarity of the declination to defend in Virginia should be surprising. As Prakash and Devins note, Virginia is the type of state in which one would expect there to be duty to defend issues.[221] In fact, since 1992, there have only been four years each of Republican and Democratic trifectas – fertile grounds for an attorney general to hesitate defending state law.[222] With a consistent divided government, there are plenty of occasions to abdicate defense of state law, but at attorney general did so only twice.

Pennsylvania on the other hand illustrates the necessity of attacking the problem from both ends. For example in 2014 former Pennsylvania Attorney General Kathleen Kane refused to defend the commonwealth's law that permitted suits against municipalities to challenge their gun ordinances.[223] In refusing to do so, she explicitly cited provisions of Pennsylvania law that permit other officers to defend state law, even in a state where the attorney general is charged with defending state law.[224] The practice of state attorneys general relying on others ability to defend[225]

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[220] *See* Devins & Prakash, *supra* note 4, at 2015 (Appendix II: State Attorneys General Refusals to Defend). I would also note that in one of the cases, *School Bd. of City of Norfolk v. Opportunity Ed. Inst.*, 88 Va. Cir. 317, (2014), it is unclear whether the Attorney General refused to defend, or rather failed to appear. *See Id.* at 4 n.2 ("Neither the Attorney General in office in 2013, the year this action was first filed, nor the present incumbent has appeared in this action").

[221] Devins & Prakash, *supra* note 4, at 2106.

[222] *See Party Control of Virginia State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Virginia_state_government.

[223] Marc Levy, *Kane Won't Defend NRA-Backed Pa. Law on Firearms Rules*, HERALD MAIL (Dec. 5, 2014, 4:53 PM), https://www.heraldmailmedia.com/story/news/local/2014/12/05/kane-wont-defend-nra-backed-pa-law-on-firearms-rules/45015743/

[224] *Id.*

[225] *See, e.g.*, *id.* (letting governor defend); Michael Phillis & Michael Linhorst, Christie Administration Opts Out of Defending State's Handgun Law, NORTHJERSEY.COM (Jan. 2, 2014, 11:41 PM), http://www.northjersey.com/news/christie -administration-opts-out-of-defending-state-s-gun-laws-in-second-case-1.670969 [http://perma.cc/CM69-RPEA] (letting local prosecutor defend).

demonstrates the need to not only charge the attorney general with defending the law – as Pennsylvania did – but also to ensure that the state's constitutional norms clearly delineate the separation and execution of powers. Only with both can a state ensure that their laws are defended by a proper party.

Even so, more research should be done to evaluate the reasons attorneys general refuse to defend state law, and perhaps more importantly, if and when they choose to defend laws that their political base finds disagreeable. Only with a complete view of the attorney general's decision making can we understand which constitutional and statutory structures help best promote the duty to defend. While permitting state legislative defense in place of the duty to defend is unquestionably wrong under separation of powers norms, future work should inquire into whether there are specific policies that help promote the normative view expressed here. Simply put, more time must be spent in the laboratory of democracy.

V. CONCLUSION

As Alexander Hamilton wrote in Federalist No. 70 the sharing of power tends to conceal faults.[226] States are free to do with that advice as they please. But adhering to the original understanding of the separation of powers has more than just a normative benefit. It also eliminates a host of accountability and remedy issues that arise out of permitting the legislature and state attorney general to share power. In sum, removing legislative standing and insisting on the duty to defend is not a cure-all for state attorneys general who seek to reap the political benefits of refusing to defend state law. But straining from the separation of powers roots of states' constitutional law can only serve to exasperate the problem.

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[226] THE FEDERALIST NO. 70 (Alexander Hamilton).