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## Standing (in) for the Government

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# Standing (in) for the Government

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Seth Davis, *Standing Doctrine's State Action Problem*, 91 *Notre Dame L. Rev.* \_\_ (forthcoming 2015), available at SSRN.



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Eugene Diamond, a pediatrician, took it upon himself to protect and uphold the constitutionality of Illinois's Abortion Law of 1975, which, among other things, imposed criminal liability on doctors who performed certain abortions. Diamond himself was not affected by the law, as he did not perform abortions. Indeed, he wanted to prevent them.

In 1983, when the Northern District of Illinois enjoined enforcement of parts of the law as unconstitutional, the State of Illinois declined to defend the law any further, leaving only Diamond to defend the law on appeal. After losing the appeal, Diamond petitioned the Supreme Court to let him defend the constitutionality of the law, asserting his right to defend as "a doctor, a father, and a protector of the unborn." But in *Diamond v. Charles*, the Supreme Court concluded that Diamond had no such right to defend, calling Diamond's actions "simply an effort to compel the State to enact a code in accord with Diamond's interests."

In his excellent article, *Standing Doctrine's State Action Problem*, Seth Davis addresses when a party such as Diamond can assert a state's interest in a lawsuit under Article III of the Constitution, which limits lawsuits to "Cases" or "Controversies" between parties who meet requirements such as standing, ripeness and lack of mootness. The question of who can assert the state's interests arose again recently in *Hollingsworth v. Perry*, which involved an amendment to the California Constitution, voted on by citizens of California directly through the state's referendum system, banning same-sex marriage. As in *Diamond*, the proponents of the amendment sought to defend its constitutionality on appeal when the State of California declined to do so. The Supreme Court concluded that the proponents lacked standing. Relying upon principles of agency, the Court concluded that the proponents cannot stand in for the state because the state could not exercise control over the proponents' actions. In dissent, Justice Kennedy noted the irony of insisting on state control of the proponents when the whole point of the California referendum system is to allow citizens to bypass state control of the legislative process and to propose laws directly to the people.

Davis's key insight is that the issue of whether a private party has standing to assert a state or federal interest should not rest upon principles of agency. Instead, whether a person can assert a governmental interest should focus on "a principle of constitutional accountability concerned with 'the arbitrary exercise of the powers of government.'" (P. 2.) Here, Davis agrees with the Supreme Court's view that Article III justiciability limitations like standing are designed to protect separation of powers, insofar as they prevent the shielding of the co-equal branches from accountability.

But Davis goes further to argue that this principle of constitutional accountability implicates the Due Process

Clauses, somewhere scholars have not looked. In Davis's persuasive view, a primary concern where a party seeks to invoke a governmental interest is that the party will impair the interests of third parties not before the court. Due process provides the legal and conceptual framework to address the problem expressed in a case such as *Diamond*—that a private party invoking state interests may be seeking to “enact a code” for its own interests, to the detriment of others.

Davis builds on his insight to develop a framework for determining when a party may assert the interests of the state or the federal government, based on the type of state interest asserted (corporate, institutional, administrative, and substitute) and the protections available to prevent arbitrary or abusive lawsuits (constitutional, statutory, regulatory, and professional). He also distinguishes the interests of the United States from the interests of individual states, who have much more discretion in permitting parties to assert their interests. In contrast to the Court in *Hollingsworth*, Davis's framework “does not require legislatures to limit the power of government standing to only traditional government employees and common law agents of the state.” (PP. 3, 25.) Instead, a party may assert the state interests “where there are sufficient protections . . . for the rights of defendants and third parties who may be harmed by arbitrary litigation on the government's behalf.” (PP. 3, 34.)

Davis wisely limits his article to the issue of standing to assert governmental interests. But his insight—that state standing should be understood as a doctrine that implicates constitutional accountability—has far-reaching implications. As I have argued, as well as others, private suits for private remedies also raise due process concerns about the interests of third parties. Accordingly, in some situations an uninjured party, such as a class action attorney, should have standing to assert the interests of those injured when the injured parties cannot protect their own interests. That class action attorney is no different from the state when, asserting what Davis calls a “substitute” interest, it brings a *parens patriae* lawsuit to vindicate the rights of those injured. In fact, all lawsuits have this quality insofar as they implicate issues of law and fact that affect nonparties. Thus, the “interplay of the first three articles of the Constitution and the Due Process Clause” (P. 25), which Davis argues should inform government standing, arguably underlies the Article III standing concerns in all contexts, effectively turning every lawsuit into delegation of enforcement power which may raise due process concerns.

To his credit, Davis acknowledges this possibility in noting, for example, that “the link between the day-in-court right and standing are apparent.” But he points out that private and governmental contexts differ in important ways that should not be ignored. (P. 33 & n.224.) For example, states can make law while private parties cannot, much to the chagrin of Eugene Diamond. Indeed, the brilliance of the article stems not only from Davis's creative insight about due process, but from his meticulous attention to the important differences of seemingly similar situations.

These far-reaching implications demonstrate the force and insight of Davis's article. Davis rather modestly notes that his framework does not “transform all hard standing cases into easy ones,” but only “makes it possible to have a sensible normative debate.” (P. 8.) But Davis gives short shrift to his contribution, which clarifies a notoriously difficult subject and allows one to see the issues implicated by government standing in the correct way. That is why I like this article lots.

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