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No Legs to Stand On: Article III Injury and Official Proponents of State Voter Initiatives

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ABSTRACT

The U.S. Supreme Court's decision in *Hollingsworth v. Perry*—which held that the official proponents of California's Proposition 8 did not have standing to appeal an adverse district court judgment—deals a heavy blow to voter-enacted legislation in the twenty-four states that make use of voter initiative processes. Challenges to voter-enacted legislation are increasingly being brought in federal courts, and federal courts are more likely to invalidate such legislation than a state's own courts. In the wake of *Hollingsworth*, official proponents of state voter initiatives will be left with no legs to stand on whenever state government officials decline to appeal an adverse federal district court judgment. Since current Article III standing doctrine does not provide strong support for official proponents to successfully show standing in a future case, *Hollingsworth* should be overruled and replaced by a standard that is more charitable to state voter initiative processes. The purposes underlying standing doctrine support a new test for official proponent standing that is more accommodating to attempts by state legislatures to authorize official proponents to represent state interests in federal court.

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INTRODUCTION

One of the cornerstones of American democracy is the idea that the power of the government ultimately rests with the people. As Justice Kennedy wrote in his dissenting opinion in *Hollingsworth v. Perry*,[1] "[t]he essence of democracy is that the right to make law rests in the people and flows to the government."[2] In twenty-four U.S. states, the people themselves have the right to amend their state constitutions or pass legislation through voter initiatives.[3] Many of these states trace their initiative processes back to the Progressive Era reforms of the 1890s and early 1900s,[4] and in some states the initiative process is one of the most fundamental aspects of state government.[5]

The U.S. Supreme Court case *Hollingsworth v. Perry* involved a challenge to a voter-enacted amendment to the California Constitution.[6] Two same-sex couples seeking to marry brought a suit in federal district court in California challenging Proposition 8, which defined marriage in that state as only "between a man and a woman."[7] The named defendants—government officials responsible for enforcing the constitutional provision—refused to defend the proposition, so the district court allowed the official proponents of Proposition 8 to intervene as defendants.[8] When the district court found Proposition 8 unconstitutional, the government defendants declined to appeal the judgment, but the official proponents immediately appealed to the Ninth Circuit.[9] The Ninth Circuit affirmed the district court's judgment,[10] and the Supreme Court granted the proponents' petition for a writ of certiorari.[11]

The Supreme Court held that the proponents did not have standing to appeal the district court's ruling finding Proposition 8 unconstitutional.[12] The

1. 133 S. Ct. 2652 (2013).
2. *Id.* at 2675 (Kennedy, J., dissenting).
3. *State I&R*, INITIATIVE & REFERENDUM INST., http://www.iandrinstitute.org/statewide_i%26r.htm (last visited Mar. 21, 2015).
4. *Id.*
5. *See* Perry v. Brown, 265 P.3d 1002, 1016 (Cal. 2011) (stating that the initiative system in California is "one of the most precious rights of [California's] democratic process" (quoting Associated Home Builders, Inc. v. City of Livermore, 557 P.2d 473, 477 (Cal. 1976) (en banc))).
6. *Hollingsworth*, 133 S. Ct. at 2659.
7. CAL. CONST. art. I, § 7.5, *declared unconstitutional by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010); *see also Perry*, 704 F. Supp. 2d at 927.
8. *See Perry*, 704 F. Supp. 2d at 928.
9. *See* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).
10. *Id.* at 1064.
11. Hollingsworth v. Perry, 133 S. Ct. 786 (2012).
12. Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013).

Court found, first, that the proponents did not have standing in their individual capacities because they had not personally suffered a "concrete and particularized injury," and second, that they did not have standing to defend the constitutionality of state law on behalf of the State of California.[13] The majority couched this holding in broad language that could be used to deny standing in a similar case to official proponents from any of the states that recognize voter initiatives. As such, the opinion strikes a heavy blow to voter initiative processes by denying official proponents the ability to appeal adverse judgments in federal district courts.

This Comment situates the *Hollingsworth* opinion within Article III standing case law to show that this strict, literal reading of standing requirements cannot be reconciled with the relaxation of standing requirements in other areas. Part I develops a narrative of the history of standing doctrine, from its beginnings as a prudential docket management tool to its current status as a threshold constitutional requirement for Article III adjudication. Part I continues by surveying the case law on standing with a particular view towards doctrines that might be used to justify a finding that official proponents have standing to defend state voter initiatives. In particular, I examine when and to what extent standing may be conferred by statute, when government officials can assert standing to present arguments on behalf of the people or the state, and when legislators have standing to assert the interests of legislative bodies. I also examine the four primary purposes behind the standing requirement: (1) lightening federal court dockets, (2) optimizing judicial decision making by allowing courts to decide only issues with concrete factual contexts that are vigorously argued by interested parties, (3) protecting the interests of those individuals most affected by the challenged conduct, and (4) foreclosing the possibility that others will manipulate the courts into deciding issues that are more appropriately resolved in the political branches.[14]

Part II outlines the opinions in *Hollingsworth v. Perry*. This Part shows how the majority opinion does not further any of the primary purposes of the standing requirement, aside from having an incidental effect on court dockets by keeping contentious constitutional issues out of the courts. This suggests that some members of the Court used strict adherence to standing requirements to avoid reaching the difficult issue presented in *Hollingsworth*. To illustrate this point, Part II briefly compares the *Hollingsworth* decision to the holding on

13. *Id.* at 2661–63, 2668.
14. *See* sources cited *infra* note 52; *see also infra* Part I.C.

standing in *United States v. Windsor*,[15] decided the same day. Comparing these cases demonstrates the Court's inconsistency in applying standing doctrine. This Part concludes by examining whether official proponents will be able to establish standing in their own right under alternate standing theories. Each of these theories—namely, statutory standing, standing in a representative capacity, and legislative standing—requires further action by either a state legislature or the courts, and the latter two theories are unlikely to support a finding that proponents have standing under current standing doctrine. Therefore, the holding in *Hollingsworth* should be reworked to make it more realistic that proponents will be able to establish standing in future cases.

Finally, Part III explores alternatives for reworking the federal standing review of state attempts to authorize proponents and other parties to assert the state's interests in federal court. After touching on principles of federalism, I examine several different frameworks for characterizing and giving constitutional significance to state law. Of the three alternatives—independent federal review, full deference to state courts, or a hybrid approach—the hybrid approach is the best suited for taking account of the states' different needs for organizing their governments while also protecting the federal interests behind standing doctrine. Under the hybrid approach, I argue that the Court should adopt new, more accommodating criteria for determining whether official proponents have been authorized to assert a state's interests. These criteria should be informed by the functions of standing doctrine—namely, ensuring that parties will advocate vigorously and give a thorough presentation of the issues. Only this hybrid approach will ensure that states can provide for an adequate defense of voter initiatives in federal court.

I. STANDING DOCTRINE AND ITS INTRICACIES

A. Constitutional Origins and Historical Development of Standing Doctrine

Under Article III of the U.S. Constitution, federal courts only have jurisdiction to consider actual "[c]ases" or "[c]ontroversies."[16] As a result, the case or controversy threshold showing is a constitutional prerequisite to a federal court entertaining the merits of a case.[17] The Supreme Court has read Article III to include several justiciability requirements that limit the cases properly before the

15. 133 S. Ct. 2675 (2013).
16. U.S. CONST. art. III, § 2, cl. 1.
17. *E.g.*, Warth v. Seldin, 422 U.S. 490, 498 (1975).

federal judiciary to "those disputes which are appropriately resolved through the judicial process."[18] One of these requirements is the doctrine of standing.[19]

The precursor to the modern standing requirement emerged in the early 1920s as a doctrine of judicial self-restraint, designed to allow federal courts to manage their dockets by avoiding the unnecessary decision of constitutional issues.[20] This self-restraint was also reinforced by a desire on the part of liberal justices to curb the Court's increasing use of substantive due process[21] to invalidate progressive legislation.[22] Thus, from the beginning, the ideas behind standing doctrine have been deployed as a means of avoiding deeply contentious constitutional questions.

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

19. *See* Allen v. Wright, 468 U.S. 737, 750 (1984) (asserting that the standing requirement "is perhaps the most important of these [justiciability] doctrines"). Other Article III justiciability requirements include the mootness, ripeness, and political question doctrines. *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006).

20. *See* Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 637–38 (2010); Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 19–22 (2010). *But see* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1425–36 (1988) (arguing that modern standing doctrine has conceptual predecessors dating back to the Court's *jus tertii* cases of the early 19th century, which addressed the ability of claimants to assert the rights of third parties, and that "[e]quity doctrine provided the link that allowed *jus tertii* cases to become transformed into the modern standing doctrine with its focus on injury and direct causation"). Early cases dismissing the claimant's suit for failure to state a case or controversy include *Fairchild v. Hughes*, 258 U.S. 126 (1922), and *Massachusetts v. Mellon*, 262 U.S. 447 (1923). Some courts and commentators have viewed these early cases as laying out a prudential doctrine rather than a constitutionally mandated rule. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 92 n.6 (1968) ("The prevailing view of the commentators is that [*Massachusetts v. Mellon*] announced only a nonconstitutional rule of self-restraint."); Pushaw, *supra*, at 19. For a discussion of the difference between constitutional and prudential justiciability requirements, see *infra* Part I.B.

21. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 53 (1905) (noting that the "general right to make a contract in relation to [one's] business is part of the liberty of the individual protected by the [Due Process Clause of the] 14th Amendment of the Federal Constitution" and holding that a statute limiting the number of hours bakery employees could work "necessarily interferes with the right of contract between the employer and employees").

22. *See* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 458–59 (1996) ("[FDR Supreme Court appointees] embraced the Brandeisian strategy of invoking justiciability to shield progressive legislation from conservative substantive due process challenges."); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 179 (1992) ("[T]he principal early architects of . . . standing limits were Justices Brandeis and Frankfurter. Their goal was to insulate progressive New Deal legislation from frequent judicial attack."); Winter, *supra* note 20, at 1454–57. *But see* Ho & Ross, *supra* note 20, at 634–38 (pointing out that many of the Court's early decisions on standing were unanimous, thus undermining the argument that standing was developed solely by liberal justices to insulate legislation from conservative attack).

These concepts of judicial self-restraint were eventually explicitly referred to as "standing" doctrine in 1939 in Justice Frankfurter's concurring opinion in *Coleman v. Miller*.[23] In this opinion, Justice Frankfurter refashioned standing doctrine into a requirement mandated by Article III, rather than as a prudential tool used to avoid deciding constitutional questions.[24] According to Justice Frankfurter, a claimant only had standing to invoke the power of the federal courts when he could show that he had "personally suffered an injury to a legal right recognized by the Constitution, a federal statute, or the common law."[25] In later opinions, Justice Frankfurter emphasized that his view of standing as an Article III requirement reflected the constitutional separation of powers design and the importance of "adequate presentation of issues by clashing interests" to effective judicial decision making.[26] Justice Frankfurter's framing provided the foundation for modern justiciability doctrines.

In the following decades, the Warren Court recognized new types of constitutional and statutory injuries that satisfied the injury-to-a-legal-right test laid out by Justice Frankfurter.[27] For example, in *Flast v. Cohen*,[28] the Court distinguished a long line of cases holding that federal taxpayers do not have standing to bring generalized grievances challenging government expenditures, ultimately finding that the claimants had standing to challenge the use of federal funds to provide textbooks to parochial schools.[29] This relaxation of standing requirements coincided with the rise of public interest litigation, with the result that the Court increasingly recognized standing for claimants who could show only indirect injuries to their legal rights.[30] Finally, the Court eliminated the injury-to-a-legal-right test altogether in favor of a test that inquired whether the claimant had suffered an injury in fact.[31] Thus, the Warren Court attacked the executive's perceived underenforcement of federal law by making it much easier for claimants to establish standing to enforce liberal federal legislation.[32]

23. 307 U.S. 433, 464–68 (1939) (Frankfurter, J., concurring).
24. *See id.* at 460; Pushaw, *supra* note 22, at 459–63.
25. Pushaw, *supra* note 20, at 22 (quoting *Coleman*, 307 U.S. at 460 (Frankfurter, J., concurring)) (internal quotation marks omitted).
26. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 151 (1951) (Frankfurter, J., concurring).
27. *See* Pushaw, *supra* note 22, at 464; Pushaw, *supra* note 20, at 27.
28. 392 U.S. 83 (1968).
29. *Id.* at 104–06.
30. *See* Ho & Ross, *supra* note 20, at 647.
31. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970). The Court reasoned that the injury-to-a-legal-right test goes to the merits of the claim, and therefore is inappropriate to consider before deciding whether the claimant has satisfied standing. *Id.* at 153.
32. *See* Pushaw, *supra* note 20, at 33; *see also* Sunstein, *supra* note 22, at 183–86 (arguing that the Court supported enforcement litigation as a means to counteract political pressure on agencies

Responding to the relaxation of standing doctrine under the Warren Court, the more conservative Burger Court tightened standing requirements.[33] The Court applied the injury-in-fact requirement more stringently than the Warren Court, requiring that the injury be both "distinct and palpable"[34] and "actual or imminent, not conjectural or hypothetical."[35] Moreover, the Burger Court added two additional standing requirements—causation and redressability—to give the Court additional flexibility to avoid deciding constitutional issues.[36] Thus, throughout the entire history of the development of standing doctrine, the Court has used these concepts to control the types of cases that come before the Court, either expanding or constricting jurisdiction according to the ideological alignment of the justices.

B. Modern Standing Requirements

1. Constitutionally Mandated Requirements

The Burger Court's restrictive interpretation of standing requirements forms the basis of modern standing doctrine. The Court imposes three requirements on parties invoking the power of the federal courts: (1) the claimant must have suffered an injury-in-fact (2) that is "fairly" traceable to the challenged action[37] and (3) that is "likely" to be redressed by the requested relief.[38] These requirements fall on every party to a lawsuit and they must be continuously satisfied throughout every stage of the lawsuit.[39]

2. "Prudential" Limitations

In addition to the constitutional requirements, the Court has established prudential requirements for standing that are not mandated by the Constitution. These limitations are usually created in order to promote the broader purposes

from the industries they were meant to regulate, and asserting that the Court basically made up the injury-in-fact test).

33. *See* Pushaw, *supra* note 20, at 34.
34. Warth v. Seldin, 422 U.S. 490, 501 (1975).
35. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (quoting Whitmore v. Arkansas, 461 U.S. 149, 155 (1990)) (internal quotation marks omitted).
36. *See* Pushaw, *supra* note 20, at 38–43 (arguing that these requirements require the Court to make "discretionary and subjective judgments about probabilities," and asserting that the Court has relaxed these requirements "when it wanted to reach the merits to achieve a conservative substantive result," as in *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59 (1978)).
37. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976).
38. *Id.* at 38.
39. Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997).

underlying standing doctrine.[40] Because these requirements are not constitutionally required, the Court is free to create exceptions to these prudential limitations.[41] Moreover, Congress can create its own exceptions to these limitations—or, presumably, do away with them entirely—through appropriate legislation.[42]

One such prudential requirement is the rule barring a party from asserting a "generalized grievance" about the proper application of the laws.[43] A generalized grievance is one based on an injury that is "undifferentiated and 'common to all members of the public.'"[44] The typical generalized grievance is a complaint about the "proper application of the Constitution and laws," without any additional more specific or particularized injury-in-fact.[45] A claimant who attempts to assert standing in his capacity as a concerned taxpayer or citizen is likely to have his suit dismissed on the basis of this rule.[46] These types of claims, according to the Court, are "more appropriately addressed in the representative branches."[47]

In earlier cases, the Court seemed to recognize that a claimant asserting a generalized grievance has actually suffered an injury-in-fact. The Court nonetheless denied standing in these cases on the ground that refusing to entertain generalized grievances promotes the constitutional design of separation of powers.[48] Thus, the early cases suggest that Congress could create standing for claimants to bring generalized grievances in appropriate circumstances. The Court in *Lujan v. Defenders of Wildlife* held, however, that "a plaintiff raising only a generally available grievance about government . . . does not state an Article III

40. *See infra* Part I.C.
41. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983).
42. *See id.*
43. Allen v. Wright, 468 U.S. 737, 751 (1984).
44. United States v. Richardson, 418 U.S. 166, 177 (1974) (quoting *Ex parte* Levitt, 302 U.S. 633, 634 (1937)). To put it differently, when the claimant is injured in exactly the same manner and to the same extent as every other member of the public, the claim is not suitable for judicial resolution.
45. Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992).
46. *See, e.g.*, *Richardson*, 418 U.S. 166.
47. *Allen*, 468 U.S. at 751.
48. *See, e.g.*, *Richardson*, 418 U.S. at 188–89 (Powell, J., concurring) ("[A]llowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. . . . [T]he argument that the Court should allow unrestricted taxpayer or citizen standing underestimates the ability of the representative branches of the Federal Government to respond to . . . citizen pressure . . . .").

case or controversy."[49] This suggests that the limitation on bringing generalized grievances is constitutional rather than prudential in nature.[50]

This confusion about the source of the limitation against generalized grievances is also common to other prudential standing doctrines.[51] Inconsistency in this area reveals fundamental differences within the judiciary about the proper role of standing as a means to promote the separation of powers in the federal governmental system.

C. Functions of Standing

Standing serves at least four important functions.[52] First, it allows federal courts to manage their dockets by quickly disposing of cases that are inappropriate for judicial resolution.[53] Where there is no genuine dispute that requires adjudication, a court can dispose of the suit and conserve judicial resources.[54]

Second, it facilitates improved judicial decision making. By requiring the parties to show an injury-in-fact, the courts ensure (1) that the parties are strongly motivated and will therefore advocate vigorously for their interests[55]

49. *Lujan*, 504 U.S. at 573–74. In reaching this result, the Court found that the claimants could not bring suit under a provision of the Endangered Species Act which purported to allow "any person [to] commence a civil suit on his own behalf . . . to enjoin any person . . . who is alleged to be in violation of any provision of this chapter . . . ." 16 U.S.C. § 1540(g)(1) (2012).

50. *See* Fed. Election Comm'n v. Akins, 524 U.S. 11, 23 (1998) (acknowledging that the Court has sometimes treated the limitation against bringing generalized grievances as prudential and sometimes treated it as a constitutional limitation).

51. Courts have also been inconsistent in describing the rule against asserting the rights of third parties—*jus tertii*—as a prudential limitation. *Compare* Craig v. Boren, 429 U.S. 190, 193 (1976) ("[O]ur decisions have settled that limitations on a litigant's assertion of jus tertii are not constitutionally mandated, but rather stem from a salutary 'rule of self-restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative." (citing Barrows v. Jackson, 346 U.S. 249, 255, 257 (1953)), *with* Barrows v. Jackson, 346 U.S. 249, 255 (1953) (stating that the prudential rule against asserting the rights of third parties has "not always [been] clearly distinguished from the constitutional limitation" on standing). *See also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 128 (6th ed. 2009).

52. *See, e.g.*, FALLON ET AL., *supra* note 51, at 114–15 (articulating five separate purposes of standing doctrine which largely track the second, third, and fourth functions presented in this Comment); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 468–501 (2008) (subdividing the purposes of standing into a "concrete-adversity" function, a "pro-democracy" function, and an "anticonscription" function).

53. *See* Pushaw, *supra* note 20, at 19–22.

54. *See id.*

55. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 517 (2007); Flast v. Cohen, 392 U.S. 83, 101 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962). *But see* Elliott, *supra* note 52, at 474 (noting that standing doctrine does not *guarantee* effective advocacy, since "someone who undoubtedly has standing may well do a poor job of arguing his case"); Scalia, *supra* note 41, at 891 (arguing that standing doctrine is "ill designed" to ensure that the parties will be energetic adversaries, since often the best

and (2) that the legal issues are presented to the court in the form of concrete facts that provide a specific context for judicial review.[56] When the parties are able to effectively present the factual context of the dispute before the court, the court can make an informed decision with "a realistic appreciation of the consequences of judicial action."[57] It also allows the court to tailor its remedy to provide no more relief than is required to address the claimant's injury.[58]

Third, standing doctrine protects the interests of those individuals who will be most directly affected by the challenged conduct. The Court recognizes that "[t]he exercise of judicial power" has profound effects on the "lives, liberty, and property of those to whom it extends."[59] Therefore, standing doctrine is designed to ensure that those who will be most affected by a judicial ruling will have an opportunity to control the course of litigation and present their arguments directly to the courts.[60] If the courts did not limit control over the course of litigation to those who have a direct stake in the outcome, then "the judicial process [would become] no more than a vehicle for the vindication of the value interests of concerned bystanders."[61] In that event, ideological litigants would be able to manipulate the order in which cases come before the federal courts, thereby generating incremental precedents in order to make a given ultimate outcome more likely.[62] This manipulation could have severe consequences for those who are more directly affected by the challenged conduct.

Finally, standing requirements maintain the separation of powers contemplated by the Constitution. Specifically, standing doctrine helps to prevent the courts from infringing on the constitutional domains of the legislative and executive branches. The theory behind this purpose of standing is that the courts must respect the provinces of the coequal branches, lest "general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch" erode the democratic character of American

advocates are "national organizations such as the NAACP or the American Civil Liberties Union," yet these groups often cannot satisfy the injury-in-fact requirement).

56. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974).

57. *Valley Forge*, 454 U.S. at 472.

58. *Schlesinger*, 418 U.S. at 222.

59. *Valley Forge*, 454 U.S. at 473.

60. *See* Diamond v. Charles, 476 U.S. 54, 62 (1986); Sierra Club v. Morton, 405 U.S. 727, 740 (1972).

61. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973).

62. Maxwell L. Stearns, *Standing Back From the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1351 (1995).

government.[63] Moreover, judicial restraint maintains public confidence in the federal courts.[64] With respect to the legislative branch, standing rules such as the limitation against hearing generalized grievances bar the courts from deciding issues that are more appropriately resolved through legislation.[65] With respect to the executive branch, requiring parties to show standing prevents bystanders with purely ideological interests from bringing claims alleging that the laws are not being properly enforced.[66] This maintains the constitutional balance of powers, which assigns to the executive the duty to "take Care that the Laws be faithfully executed."[67]

D. The Right to Appeal and Differences in Standing Inquiry on Appeal

The Court has made clear that standing requirements also apply to parties seeking to appeal a decision below.[68] Therefore, the appealing party has to show that he was injured by the lower court judgment.[69] In the typical case, this is an easy undertaking—if the plaintiff did not receive all the relief he requested, then his original injury serves to satisfy the standing requirement; if the defendant lost below and the lower court issued an award of damages or an injunction against the defendant, then this adverse judgment has injured the defendant, satisfying Article III's requirements.[70] In cases involving an intervenor-defendant, however, the lower court may order relief only against the original defendant and not the intervenor-defendant.[71] Therefore, if the intervenor-defendant chooses to appeal a lower court ruling against the original defendant, it may be difficult for

63. United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).
64. *See, e.g.*, *id.*
65. *See supra* notes 44–47 and accompanying text.
66. *See* Elliott, *supra* note 52, at 493–94.
67. U.S. CONST. art. II, § 3; *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) (noting that, without standing doctrine, nothing prevents citizens from invoking the power of the courts and turning them into "'virtually continuing monitors of the wisdom and soundness of Executive action'" (quoting Allen v. Wright, 468 U.S. 737, 760 (1984))).
68. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997) ("The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance. . . . An intervenor cannot step into the shoes of the original party unless the intervenor independently fulfills the requirements of Article III." (quoting Diamond v. Charles, 476 U.S. 54, 68 (1986)) (internal quotation marks omitted)).
69. Joan Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts*, 38 GA. L. REV. 813, 840 (2004).
70. *Id.* at 880; *see also id.* at 838–40 (explaining that appellants going before an appellate court are essentially claiming that errors in the lower court have injured them, necessitating further legal redress).
71. The Proposition 8 official proponents were intervenor-defendants in the trial court. *See infra* Part II.B.

the intervenor-defendant to show that he was injured by the lower court judgment because it will usually not be directly adverse to his interests.

Many participants have come to take the availability of appeal for granted,[72] and this has been reflected in Congress's broad statutory grants of appellate jurisdiction.[73] Indeed, appeals serve important functions in the American judicial system. Primarily, appeals serve to correct errors in the lower courts, and the prospect of review also helps motivate lower courts to avoid errors in the first place.[74] As a result of this error-correction mechanism, losing litigants are more likely to accept judicial results and the public is more likely to maintain confidence in the system.[75] Finally, appellate review presents an opportunity for high courts to clarify legal standards and harmonize disparate local rulings.[76] To ensure that these benefits are realized to the maximum extent, "[t]he important purposes served by appeals should be reflected in the standing to appeal doctrine that we mold and embrace."[77]

E. Special Cases

A number of doctrines have emerged that deal with special issues of standing. The scope of these doctrines has varied substantially as overall standing doctrine has developed, sometimes restricting and at other times broadening the classes of entities entitled to bring suits. Each of these doctrines could be applied to support arguments that would allow official proponents of state voter initiatives to establish standing in a federal court.

72. Steinman, *supra* note 69, at 849.

73. *See, e.g.*, 28 U.S.C. § 1291 (2012) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court."); 28 U.S.C. § 1292 (2012) (providing for appellate jurisdiction over a limited subset of interlocutory orders); 28 U.S.C. § 1254 (2012) (giving the Supreme Court jurisdiction over all cases in the courts of appeals); 28 U.S.C. § 1257 (2012) (giving the Supreme Court jurisdiction over final judgments rendered by the states' highest courts involving designated questions of federal law); *see also* Steinman, *supra* note 70, at 848–49.

74. Steinman, *supra* note 69, at 849.

75. *Id.*

76. For example, an important purpose of Article III, which situates the U.S. Supreme Court at the top of the state and federal judicial systems, is to "permit the Supreme Court to unify federal law." FALLON ET AL., *supra* note 51, at 473; *see also* THE FEDERALIST NO. 82, at 491–92 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

77. Steinman, *supra* note 69, at 850.

1. Statutory Standing

A party may demonstrate Article III injury by showing that Congress has conferred a legal right upon him that has been abridged by the challenged conduct.[78] But Congress's ability to create standing in this manner for individuals to enforce its legislation is not unlimited; Congress may only "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate" to show an injury-in-fact.[79] In other words, Congress can define new categories of concrete injuries, but it cannot eliminate the requirement that the claimant must demonstrate that he has suffered an injury-in-fact.[80] Nonetheless, the Court has upheld statutory standing in a number of cases.[81] Indeed, some commentators have suggested that whether the Court will uphold a grant of statutory standing depends on Congress's formalistic incantation of particular phrasing in the statute.[82]

2. Representative Capacity

A party may be able to show that he has the official capacity to assert standing on behalf of the state or the people.[83] Under the Federal Rules of Civil Procedure, a court looks to the law of the state in which the court is located to decide whether the party is authorized to sue or be sued in a representative capacity.[84] Although this doctrine normally allows state officials such as the attorney general to assert the state's interests in court, other representatives of the state have been allowed to do so as well. For example, in *Karcher v. May*, the presiding officers of the New Jersey Legislature were permitted to intervene in

78. Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).
79. Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992).
80. *Id.*
81. *E.g.*, Massachusetts v. EPA, 549 U.S. 497, 526 (2007); Fed. Election Comm'n v. Akins, 524 U.S. 11, 26 (1998).
82. *See* FALLON ET AL., *supra* note 51, at 144 (suggesting that cases such as *Federal Election Commission v. Akins* can be interpreted to imply that "barriers to congressionally authorized citizen standing . . . can nearly always be surmounted by a properly drafted statute"); *see also Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment) ("In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . . In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.").
83. *See, e.g.*, Karcher v. May, 484 U.S. 72, 77–78, 81 (1987) (acknowledging that the current presiding officers of a state legislature would be authorized to assert standing in their official capacities to pursue an appeal on behalf of the legislature, but holding that, after losing their official status as presiding officers, the appellants could no longer assert standing in this capacity).
84. FED. R. CIV. P. 17(b)(3).

federal district court to defend a New Jersey statute against constitutional attack.[85] The U.S. Supreme Court acknowledged that a New Jersey Supreme Court case established their right under New Jersey law to assert the state legislature's interests in federal court,[86] but this right lasted only as long as the officers held their official positions.[87]

3. Legislative Standing

Finally, at least one case has held that a legislature has standing to defend a statute when the agency charged with enforcing the statute refuses to defend it in the litigation. In *INS v. Chadha*,[88] the Court plainly stated that "Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."[89] One commentator has argued that this case has been interpreted narrowly to apply only to situations where Congress "seeks to defend a power granted to it by a statute."[90] The current validity of this precedent appears to be under dispute among the Court justices.[91]

85. *Karcher*, 484 U.S. at 74–75.
86. *Id.* at 82 (citing *In re* Forsythe, 450 A.2d 499, 500 (N.J. 1982)).
87. *Id.* at 81.
88. 462 U.S. 919 (1983).
89. *Id.* at 940.
90. Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1548–49 (2012). Hall relies on *Raines v. Byrd*, 521 U.S. 811 (1997), for his argument that *Chadha* has been narrowly interpreted. Hall, *supra*, at 1548–49. But *Raines* dealt with the standing of congressmen *as plaintiffs* to challenge the Line Item Veto Act on the grounds that it unconstitutionally expanded the President's veto power; *Raines* said nothing about Congress's standing to *defend* one of its own enactments in a suit challenging that legislation's legality. *Compare Chadha*, 462 U.S. at 939–40 (noting that Congress was a proper party to defend a provision of the Immigration and Nationality Act (INA) against constitutional attack, and that it was proper for Congress to appeal from a circuit court's decision holding that provision unconstitutional, given that the Immigration and Naturalization Service—as the government agency charged with defending the INA in court—agreed with the court of appeals that the INA was unconstitutional), *with Raines*, 521 U.S. at 829–30 (holding that the congressmen plaintiffs did not have standing to challenge the Line Item Veto Act, and noting that both Houses of Congress actively opposed the plaintiffs' suit). The Court in *Raines* engages in no discussion of *Chadha*'s holding—it merely uses the factual context in *Chadha* as the basis for a counterfactual hypothetical.
91. Justice Alito recently argued in *United States v. Windsor*, 133 S. Ct. 2675 (2013), that *Chadha* should give Congress standing to defend the Defense of Marriage Act from constitutional attack. 133 S. Ct. at 2712–14 (Alito, J., dissenting). Justice Scalia argued that *Chadha* cannot give Congress the power to invoke federal jurisdiction, since this would "increase[] the power of the most dangerous branch" and allow Congress to "hale the Executive before the courts . . . to correct [any] perceived inadequacy in the execution of its laws." *Id.* at 2703 (Scalia, J., dissenting). Scalia

II. *HOLLINGSWORTH V. PERRY*: UNDERMINING STATE VOTER INITIATIVES

A. Proposition 8 and the State Court Challenges

On June 2, 2008, the California Secretary of State certified that Proposition 8 had met all the requirements for inclusion on the November 4, 2008 election ballot.[92] The Proposition would amend the California Constitution to ban same-sex marriage.[93] On election day, Proposition 8 passed by a fifty-two percent majority vote.[94] As a result, a new provision was added to the California Constitution stating that "[o]nly marriage between a man and a woman is valid or recognized in California."[95] The next day, a number of same-sex couples filed three separate petitions in the Supreme Court of California arguing, inter alia, that Proposition 8 was an unconstitutional revision of the California Constitution and that it violated separation of powers.[96] The Supreme Court of California rejected these arguments and held Proposition 8 valid under California law.[97]

B. The Lower Federal Court Decisions

The *Hollingsworth v. Perry* case began in the District Court for the Northern District of California.[98] The plaintiffs—two same-sex couples living in California and seeking to marry—brought suit under 42 U.S.C. § 1983 seeking a declaratory judgment that Proposition 8 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution,

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further argues that disputes between Congress and the executive should be resolved, not by recourse to the judiciary, but through the other tools that Congress has at its disposal to compel executive action, such as "refusing to confirm Presidential appointees [or] the elimination of funding." *Id.* at 2704–05.

92. Complaint at 6, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-2292). For a discussion of the legal battles over same-sex marriage in California leading up to the submission of Proposition 8, see *In re Marriage Cases*, 183 P.3d 384, 397–405, 407–09 (Cal. 2008). The court in *In re Marriage Cases* ruled that California *statutes* which denied marriage to same-sex couples were unconstitutional under the California Constitution equal protection clause. *Id.* at 402. That decision thus left open the question whether Californians could alter *the Constitution itself* to deny this right to same-sex couples. *See* Strauss v. Horton, 207 P.3d 48, 60 (Cal. 2009).

93. Complaint, *supra* note 92, at 6.

94. *Id.*

95. CAL CONST. art. I, § 7.5, *declared unconstitutional by Perry*, 704 F. Supp. 2d 921.

96. *See Strauss*, 207 P.3d at 68–69.

97. *Id.* at 114, 116.

98. *See* Complaint, *supra* note 92.

along with an injunction against the enforcement of the proposition.[99] The complaint named as defendants Governor Arnold Schwarzenegger, Attorney General Edmund Brown, Jr., and other state and local officials charged with enforcing Proposition 8.[100] In answer to the complaint, Governor Schwarzenegger essentially declined to take a position, "encourag[ing] the [c]ourt to resolve the merits of [the] action expeditiously" by "grant[ing] any and all relief the [c]ourt determines to be just and proper."[101] The Attorney General went one step further, admitting that Proposition 8 was unconstitutional on its face and emphasizing his duty to uphold the United States Constitution as the supreme law of the land.[102] Nonetheless, the officials continued to enforce the law.[103]

Six days after the plaintiffs filed their complaint—before the defendants even filed their answers—the official proponents moved to intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24(a).[104] The motion to intervene was unopposed, and the district court granted the motion with little comment.[105] After a bench trial, the district court found that Proposition 8 was unconstitutional under both the Due Process and Equal Protection Clauses and permanently enjoined the state and local officials from enforcing it.[106] The defendant officials declined to appeal the decision, but the proponents appealed immediately to the Court of Appeals for the Ninth Circuit.[107]

The Ninth Circuit ordered the parties to address the proponents' standing to appeal in their briefs.[108] In their opening brief, the proponents advanced two theories of standing: first, that they were authorized under California state law to act as agents of the people in defending the constitutionality of an initiative

99. *Id.* at 10.
100. *Id.* at 3.
101. The Administration's Answer to Complaint at 2, 9, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-2292). The other defendants, with the exception of Attorney General Brown, likewise declined to defend the constitutionality of Proposition 8. *See Perry*, 704 F. Supp. 2d at 928.
102. Answer of Attorney General Edmund G. Brown Jr. at 2, *Perry*, 704 F. Supp. 2d 921 (No. 09-2292).
103. *Id.* at 8.
104. *See* Proposed Intervenors' Notice of Motion and Motion to Intervene, *Perry*, 704 F. Supp. 2d 921 (No. 09-2292). Rule 24(a) provides that "[o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the . . . transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." FED. R. CIV. P. 24(a).
105. Order Granting Motion to Intervene at 2–3, *Perry*, 704 F. Supp. 2d 921 (No. 09-2292).
106. *Perry*, 704 F. Supp. 2d at 1004.
107. *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2660 (2013).
108. *See* Perry v. Brown, 671 F.3d 1052, 1070 (9th Cir. 2012).

they had sponsored;[109] and second, that California law vested official proponents with a "particularized interest in defending an initiative."[110] The plaintiff-appellees agreed that the question of whether the proponents had standing depended on California law.[111] The Ninth Circuit—finding a lack of authoritative state precedent on this issue—certified a question to the Supreme Court of California, asking

> [w]hether under . . . California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to . . . appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.[112]

The California Supreme Court, in a unanimous decision, found that the proponents had standing to appeal the district court's decision.[113] The court noted that "[t]he primary purpose of the initiative [process] was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt."[114] California legislative and executive officials do not have the power to veto or invalidate any measure passed by a majority of voters; therefore, the court concluded that it would be illogical to allow these authorities to achieve this result indirectly by failing to provide some other party with the authority to step in and defend the initiative in court when those officials refused to do so.[115] Since article II, section 8 of the California Constitution and various sections of the Elections Code gave official proponents special rights and responsibilities throughout the initiative process,[116] the court concluded that those proponents "are the most obvious and logical persons to assert the state's interest in the

109. Defendant-Intervenors-Appellants' Opening Brief at 19–22, *Perry*, 671 F.3d 1052 (No. 10-16696); *see also supra* notes 83–87 and accompanying text.

110. Defendant-Intervenors-Appellants' Opening Brief, *supra* note 109, at 22–24.

111. *See* Defendant-Intervenors-Appellants' Reply Brief at 8, *Perry*, 671 F.3d 1052 (No. 10-16696) ("Plaintiffs concede [that] Proponents' standing to assert the State's interest in the validity of the initiative they have sponsored 'rises or falls' on whether California law has authorized them to do so." (quoting Brief for Appellees at 30–31, *Perry*, 671 F.3d 1052 (No. 10-16696))).

112. Perry v. Schwarzenegger, 628 F.3d 1191, 1193 (9th Cir. 2011).

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

114. *Id.* at 1016.

115. *Id.* at 1007.

116. For example, proponents have the responsibility of gathering the required number of signatures to place an initiative on the ballot, CAL. ELEC. CODE §§ 9607–09 (West 2003), and proponents have the right to determine which arguments in favor of the initiative will be printed in ballot pamphlets, CAL. ELEC. CODE §§ 9601, 9605(d), 9609 (West 2003).

initiative's validity."[117] As a result, the court found that official proponents have the right to assert the state's interest in defending the validity of an initiative when the officials ordinarily tasked with defending the measure or appealing an adverse judgment decline to do.[118] The court declined to address whether California law gave proponents a particularized interest in an initiative's validity.[119]

Following the California Supreme Court's lead, the Ninth Circuit held that the proponents had standing to appeal the district court's decision.[120] The court emphasized that states have the "prerogative, as independent sovereigns, to decide for themselves who may assert their interests,"[121] and that "[p]rinciples of federalism require . . . federal courts [to] respect such decisions."[122] Treating the California Supreme Court determination as conclusive,[123] the Ninth Circuit found "that the state has suffered a harm sufficient to confer standing and that the [proponents are] authorized by the state to represent its interest in remedying that harm."[124] After addressing the standing question, the court affirmed the district court's decision on the merits.[125] The proponents petitioned for certiorari, and the Supreme Court granted the petition, specifically directing the parties to address the question of standing in their briefs.[126]

C. The Supreme Court Opinion

Chief Justice Roberts, writing for the majority, found that the proponents had failed to establish standing to appeal the district court's decision.[127] First, the Court held that the proponents did not have a "direct stake in the outcome of the case,"[128] and that they could assert no more than "a generalized

117. *Perry*, 265 P.3d at 1006.
118. *Id.* at 1007. In finding that the proponents were authorized to assert the state's interest, the California Supreme Court also noted that "all parties agree . . . that if the official proponents do have authority under California law to assert the state's interest in such a case, then under federal law the proponents would have standing in a federal proceeding to defend the initiative and to appeal a judgment invalidating it." *Id.* at 1014.
119. *Id.* at 1015.
120. Perry v. Brown, 671 F.3d 1052, 1064 (9th Cir. 2012).
121. *Id.* at 1071.
122. *Id.*
123. *Id.* at 1072.
124. *Id.* at 1072, 1075.
125. *Id.* at 1096 (holding Proposition 8 unconstitutional).
126. Hollingsworth v. Perry, 133 S. Ct. 786 (2012).
127. Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013).
128. *Id.* at 2662 (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997)) (internal citation marks omitted).

grievance . . . [about the] proper application of the Constitution and laws."[129] The majority also rejected the argument that California law authorized the proponents to assert the interests of the people.[130] In order to represent the interests of the state, the Court held, proponents must be "state officers, acting in an official capacity"[131] or "agents of the people."[132] Because the proponents do not hold public office, the Court determined that they were not state officers.[133] Likewise, the proponents were not "agents of the people," given that their relationship with the state did not have the indicia of an agency relationship.[134] Since the Court found that the proponents did not have standing to appeal the district court's decision, the Ninth Circuit was without jurisdiction to consider the appeal.[135] The Court therefore vacated the circuit court's decision and remanded with instructions to dismiss the appeal.[136]

Responding to the dissenters' criticism that the decision undermined the purpose of state voter initiatives,[137] the majority emphasized that the question of standing in federal courts is a matter of federal law.[138] The Court pointed to the importance of standing doctrine in ensuring that the judicial power is not used to "usurp the powers of the political branches"[139] by "engag[ing] in policymaking properly left to elected representatives."[140]

Despite this apparent adherence to the mandates of Article III justiciability requirements, the majority's holding that the Proposition 8 proponents did not have standing does nothing to further the purposes underlying standing doctrine. The decision does not further the purpose of improving judicial decision making, since the Proposition 8 case came before the Court with a fully developed factual record regarding the plaintiffs' inability to marry in California,

129. *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992)) (internal citation marks omitted).
130. *Id.* at 2667.
131. *Id.* at 2665.
132. *Id.* at 2666 (quoting *Arizonans for Official English*, 520 U.S. at 65).
133. *Id.* at 2665.
134. *Id.* at 2666. For example, an agency relationship requires the right on the part of the principal to control the agent's actions. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f (2006). Likewise, an agent owes a fiduciary duty to his principal, *id.* § 1.01, cmt. e, and a principal must indemnify the agent against expenses incurred in defending against actions brought by third parties, *id.* § 8.14 cmt. d. Finding that none of these conditions were present in the relationship between California and the proponents, the Court found that the proponents had no authority to assert the interests of the state. *See Hollingsworth,* 133 S. Ct. at 2667.
135. *Hollingsworth*, 133 S. Ct. at 2668.
136. *Id.*
137. *See id.* at 2675 (Kennedy, J., dissenting).
138. *Id.* at 2667 (majority opinion).
139. *Id.* at 2661 (quoting Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013)).
140. *Id.* at 2659.

and since the proponents were the party best situated to provide vigorous, well-informed advocacy in defense of the proposition.[141] This holding does not protect the interests of those injured parties who are most affected by the challenged law—the two same-sex couples who brought this suit are among the class that is most affected by Proposition 8, and nothing prevented them from invoking the jurisdiction of the federal courts. In fact, since the Supreme Court's decision pertains only to the standing of initiative proponents (who would necessarily be acting as defendants in a suit challenging a state voter initiative), it has no effect on the ability of private plaintiffs to bring a suit challenging a state voter initiative.

Moreover, the decision does nothing to ensure that federal separation of powers concerns are avoided, since the decision concerns the power of California's executive officials to enforce the laws, not the federal executive's power. States may have different separation of powers schemes than the federal government, and the reasons for those particular schemes could also be different; therefore, this rationale is not applicable to cases challenging state laws.[142] In these situations, a federal court should give deference to state court resolutions of the separation of powers issues.[143] In this case, the California Supreme Court had already determined that allowing proponents to defend the constitutionality of initiatives was actually *necessary* to California's separation of powers principles.[144] The only potential justification for this holding based on the functions of standing doctrine is that this decision has an incidental effect on the courts' ability to manage their own dockets by avoiding judicial resolution of contentious constitutional issues.

D. *United States v. Windsor*: Illustrating the Contradictions of Standing Doctrine in the Roberts Court

The Supreme Court's decision in *United States v. Windsor*[145] clearly demonstrates that the Court was disingenuous when it insisted on strictly applying standing doctrine in *Hollingsworth*. The plaintiff in *Windsor* was a woman who

141. *See id.* at 2669 (Kennedy, J., dissenting) (noting that official proponents in California "know and understand the purpose and operation of the proposed law" as a consequence of their involvement in collecting petitions for the initiative, and that they have a stake in the continued validity and enforcement of their initiative after its passage due to the substantial investments of time and effort that go into the enactment process).
142. Hall, *supra* note 90, at 1569–70.
143. *Id.*
144. Perry v. Brown, 265 P.3d 1002, 1006–07, 1030 (Cal. 2011).
145. 133 S. Ct. 2675 (2013).

had been lawfully married to another woman in Ontario, Canada, in 2007.[146] The plaintiff's spouse died in 2009 and left her entire estate to the plaintiff, but section 3 of the Defense of Marriage Act prevented her from qualifying for the marital exemption from the federal estate tax.[147] As a result, the plaintiff paid $363,053 in estate taxes, and she subsequently brought a refund suit in federal district court contending that section 3 was unconstitutional.[148]

While the suit was pending, the Department of Justice announced that it would not defend section 3's constitutionality yet would continue executive enforcement of section 3.[149] The Bipartisan Legal Advisory Group of the House of Representatives was allowed to intervene in the litigation in place of the U.S. Attorney General to defend the constitutionality of section 3. The district court found section 3 unconstitutional and ordered the United States to pay Windsor's tax refund.[150] Despite the court's holding that section 3 was unconstitutional—a position with which the executive branch agreed—the Department of Justice appealed the decision seeking an affirmance.[151] This was a bald attempt by the executive to have the issue resolved by the Supreme Court, where the decision would have nationwide effect. Nonetheless, the Supreme Court found that the government was injured by the district court order requiring the Treasury to pay Windsor's tax refund; therefore, the injury-in-fact requirement was met.[152] The Court went on to find that the government had standing to appeal.[153]

This decision, like *Hollingsworth*, does not further the purposes underlying standing doctrine. There is no adverseness between the parties, since the plaintiff and the government as defendant both seek the same result. Therefore,

146. *Id.* at 2683. The plaintiff resided in New York, where her Ontario marriage was deemed valid under state law. *Id.*

147. *Id.* Section 3 provides that, for purposes of interpreting federal legislation and administrative rulings and regulations, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012)), *declared unconstitutional by Windsor*, 133 S. Ct. 2675.

148. 133 S. Ct. at 2683.

149. *Id.* at 2683–84.

150. *Id.* at 2684.

151. *See id.*

152. *Id.* at 2686.

153. *Id.* at 2688. The *Windsor* Court did not hold that the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) had standing to defend section 3 or to appeal the district court's decision; the Court specifically declined to reach those questions. *Id.* Justice Alito, the only justice to explicitly compare the standing of BLAG in *Windsor* and the standing of the proponents in *Hollingsworth*, thought that both BLAG and the proponents had standing in their respective cases but thought that whether BLAG had standing was a "significantly closer question" than whether the proponents had standing. *Id.* at 2712 (Alito, J., dissenting).

there is a risk that the parties will not thoroughly present all arguments on both sides of the issue, impacting the Court's ability to make a thoughtful decision. Moreover, this decision upsets the separation of powers between Congress and the executive—in *Windsor*, the Department of Justice manipulated standing doctrine to seek a decision from the Supreme Court that would have nationwide precedential effect, thus conscripting the judiciary to invalidate duly enacted congressional legislation at the behest of the executive. *Windsor* creates a dangerous precedent which would allow the executive to collude with private parties and engineer judicial invalidations of legislative enactments.

Compared to *Hollingsworth*, where the proponents made persuasive arguments to support their contention that they had satisfied the requirements for federal standing, *Windsor* seems like an easy case. Both constitutional and prudential Article III concerns pointed towards the conclusion that the executive did not have standing to appeal to the Supreme Court. The fact that the government was required to pay the plaintiff a tax refund was the only fact that weighed in favor of finding standing requirements satisfied. Although this technically satisfied Article III's injury-in-fact requirement, any observer could see that the refusal to pay the tax refund was clearly a manipulation of standing requirements, since the government agreed that the plaintiff was entitled to the refund. But the majority in *Windsor* seized on this fact to justify a ruling on the merits.[154] These cases provide strong evidence to support what many critics have been saying for decades—that "the Justices manipulate[] [standing] doctrines to rationalize their politically preferred results."[155] *Hollingsworth* and *Windsor*, when compared side-by-side, show that the Court is still using standing to avoid deciding contentious issues.[156]

154. *See supra* note 152 and accompanying text.

155. Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1743 (1999); *cf.* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 275–311 (1997) (reporting findings from numerous studies that support the "attitudinal model" of judicial review, which theorizes that judges' moral and political views are a strong predictor for decisionmaking, especially in cases presenting difficult legal questions); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1056–58 (1995) (arguing that a judge is more likely to make decisions based on her personal convictions in cases that present issues that are critical to her ideology).

156. On October 6, 2014, the Court continued its policy of avoiding the question whether bans on same-sex marriage are allowable under the U.S. Constitution by denying certiorari without comment to seven petitions seeking review of circuit court decisions striking down such bans. *See* Herbert v. Kitchen, 135 S. Ct. 265 (2014); Smith v. Bishop, 135 S. Ct. 271 (2014); Rainey v. Bostic, 135 S. Ct. 286 (2014); Schaefer v. Bostic, 135 S. Ct. 308 (2014); McQuigg v. Bostic, 135 S. Ct. 314 (2014); Bogan v. Baskin, 135 S. Ct. 316 (2014); Walker v. Wolf, 135 S. Ct. 316 (2014). But on January 16, 2015, the Court granted certiorari in a series of consolidated cases

E. Implications for Constitutional Challenges to Voter Initiatives: Alternatives for Establishing Standing

1. Implications of *Hollingsworth v. Perry*

The Supreme Court's use of standing doctrine to keep official proponents from assuming a more active role in defending state voter initiatives in the federal courts could have dire consequences. A recent study found that about 41 percent of the initiatives adopted between 1904 and 2008 in the five most active states for adopting voter initiatives[157] were challenged in court.[158] In California, these challenges are increasingly brought in federal court,[159] and federal judges tend to invalidate state voter initiatives significantly more frequently than their state court counterparts.[160] In each case where a federal court invalidates a voter initiative, official proponents will have to overcome *Hollingsworth*'s stringent standing threshold in order to appeal an adverse judgment if the state government declines to do so.

There are at least four possible avenues that official proponents could take to establish standing to appeal an adverse judgment in a federal district court: (1) establishing standing through a traditional injury-in-fact inquiry, (2) arguing that standing is conferred by statute, (3) appearing in a representative capacity to

from the Sixth Circuit upholding states' bans on same-sex marriage. *See* Obergefell v. Hodges, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3607 (U.S. Jan. 16, 2015) (No. 14-556).

157. These states are California, Oregon, Washington, Colorado, and Arizona. KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS 51 (2009).

158. *Id.* at 106 tbl.4.1.

159. Although only about 10 percent of challenges to voter initiatives were brought in federal court between 1910 and 1989, this figure jumped to 50 percent in the 1990s. *Id.* at 111. This trend was mirrored in the other leading initiative states. *Id.*

160. In the five leading initiative states, federal judges invalidate—either in whole or in part—55 percent of the voter-adopted initiatives challenged in federal court, *id.* at 110 fig.4.2, compared with a 39 percent invalidation rate in state court challenges, *id.* at 112 fig.4.3. *See also* Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOY. L.A. L. REV. 1239, 1250–54 (1998) (discussing state court and federal court challenges to voter initiatives in California between 1964 and 1996). One explanation for this increased likelihood of invalidation when challenges come before a federal judge is that Article III judges are less politically accountable than state judges. *See* MILLER, *supra* note 157, at 110 (pointing out that, whereas judges in many states are elected, federal judges are appointed by the President to life tenures); *see also* FALLON ET AL., *supra* note 51, at 280–81 (noting that elections of state judges have recently become more "politicized"). *But see* Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1097–99 (2010) (arguing that the implementation of judicial elections in many states in the 1840s and 1850s was meant to supplant executive and legislative control over the judiciary in those states and to ensure more aggressive judicial review of legislative overspending and corruption).

assert the interests of the state, and (4) arguing for quasi-legislative standing. There are also two other measures that official proponents might take: (1) inserting provisions into proposed voter initiatives to ensure that a federal court invalidation of the initiative would be appealable or (2) suing state government officials to compel them to appeal the decision. Although some of these options may have some chance of success, a vast majority of these alternatives appear to give official proponents little recourse.

2. Showing Individualized Injury

An official proponent—or some other interested third party—may be able to establish standing in his individual capacity through the traditional Article III injury-in-fact test. Depending on the subject matter of the initiative, individuals may be able to demonstrate some concrete and personal injury, independent of any status as an official proponent, as a result of the initiative being deemed unconstitutional. For example, if a federal court invalidated a proposition that placed limits on the state legislature's ability to pass a tax increase, a concerned citizen might be able to argue that the invalidation of the proposition will lead to increased taxes in the future, which would cause him to suffer an economic injury in the form of a greater tax liability.[161] If the decision involved an initiative that established greater environmental protections, a citizen might argue that its invalidation would endanger natural resources and diminish his enjoyment of the outdoors.[162]

A study of the voter initiatives adopted between 1904 and 2008 in the five most active states for adopting voter initiatives shows a breakdown of the subject

161. *See, e.g.*, Massachusetts v. Mellon, 262 U.S. 447, 486 (1923) ("The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate."); Crampton v. Zabriskie, 101 U.S. 601, 609 (1879) (upholding the right of municipal taxpayers to challenge municipal fiscal decisions). *But see, e.g.*, *Mellon*, 262 U.S. at 487 (affirming the dismissal of a suit brought by a *federal* taxpayer challenging a congressional appropriations measure, on the grounds that her injury "is shared with millions of others, is comparatively minute and indeterminable, and the effect [of the challenged act] upon future taxation . . . [is] so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity").

162. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181–83 (2000) (finding that the plaintiffs had asserted an injury-in-fact by showing that their recreational and aesthetic enjoyment of the area around a river was lessened by the defendant's discharge of mercury and other pollutants into the river); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) (rejecting a motion to dismiss on standing grounds where the plaintiffs asserted an injury to their enjoyment of natural resources in the area where they attended school).

matters of these initiatives.[163] The initiative subject matters that are most likely to be invalidated when challenged in court are, in descending order, (1) education, (2) political and governmental reforms, (3) crime, (4) tax measures, (5) environmental protections, and (6) health and welfare.[164] Standing doctrine is complicated, and it may be easier for citizens to establish standing to defend one type of initiative than to defend another. For example, federal courts have often held that municipal taxpayers asserting economic injury in the form of greater tax liabilities have established standing,[165] but the Supreme Court has firmly rejected standing for state taxpayers based on the same injury.[166] Similarly, federal courts recognize standing for citizens asserting injury from environmental damage,[167] but only if they use the area that will actually be impacted rather than "an area roughly in the vicinity of it."[168] It is difficult to perceive a clear rationale behind the differing results in these cases, but the obvious takeaway is that some official proponents will be able to demonstrate injury-in-fact while others will not, irrespective of the actual importance or merits of the initiative itself.

3. Statutory Right to Appeal an Adverse Decision

If states wish to take measures to ensure that their voter initiative proponents will have standing in a case similar to *Hollingsworth*, the state legislature might recognize an affirmative interest vested in official proponents in the continued validity of their adopted initiatives. Any incursion into this statutory interest—namely, invalidation of the initiative by a federal court—might supply the requisite injury necessary to support standing.[169]

163. MILLER, *supra* note 157, at 114 tbl.4.2; *see also* Kenneth P. Miller, The Role of Courts in the Initiative Process: A Search for Standards (Dep't of Political Sci., Univ. of Cal. at Berkeley, Working Paper, 1999), *available at* http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20Studies/Miller%20-%20Courts%20and%20I&R%20IRI.pdf.

164. MILLER, *supra* note 157, at 114. Excluded from this list are initiatives that relate to economic regulations, since the number of initiatives falling into this category has sharply declined since the 1930s. *Id.* at 113.

165. *See* cases cited *supra* note 161.

166. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342–46 (2006); Doremus v. Bd. of Educ., 342 U.S. 429, 433–34 (1952).

167. *See* cases cited *supra* note 162.

168. Lujan v. Defenders of Wildlife, 504 U.S. 555, 566 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 886 (1990)) (internal quotation marks omitted).

169. *Cf.* Havens Realty Corp. v. Coleman, 455 U.S. 363, 372–74 (1982) (finding that the Fair Housing Act of 1968, 42 U.S.C. § 3604 (2012), conferred an affirmative right on renters or purchasers of housing not to be denied truthful information on the basis of their race, and that a private landlord's invasion of this right supplied the requisite injury to support the plaintiff's standing); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972) (holding that two tenants

Although the Proposition 8 proponents argued that California election law had created such a right in their brief before the Ninth Circuit,[170] the U.S. Supreme Court squarely rejected this argument on the ground that the proponents did not "possess any official authority . . . to directly enforce the initiative measure in question."[171] This language suggests that, in order to give proponents a legally cognizable interest in the validity of their voter initiatives, state law would have to give those proponents a quasi-prosecutorial status. Although the state may be willing to place proponents in such a role for certain initiatives, it seems unlikely that a state legislature would be willing to allow this across the board for all voter initiatives.

Moreover, it is not entirely clear that a state legislature could create statutory standing to sue in federal court even if it wanted to. In order for a statutory conferral of standing to have effect in the federal courts, it may be necessary for Congress—rather than the state legislature—to be the entity to take this measure.[172] Finally, Congress—and, by extension, state legislatures—face numerous obstacles to successfully establishing statutory standing, not least of which is judicial hostility toward legislative attempts to use legislation to override denials of standing under the injury-in-fact test.[173] In sum, the prospect of statutory standing seems inadequate to ensure that official proponents are able to defend their initiative in federal court.

4. Establishing Agency Through State Laws

If statutory standing proves to be an unsatisfactory mechanism for ensuring that official proponents can establish standing in federal courts, state legislatures can attempt to meet *Hollingsworth*'s stringent test for giving proponents the authority to assert the interests of the state. Since the Court in *Hollingsworth* found insufficient the California Supreme Court's unambiguous assertion that the proponents were authorized to assert California's interest in

had standing under the Civil Rights Act of 1968, 42 U.S.C. § 3610 (2012), to sue their landlord for discriminating against minority rental applicants).

170. Defendant-Intervenors-Appellants' Opening Brief at 22–24, Perry v. Brown, 671 F.3d 1052 (2012) (No. 10-16696), 2010 WL 3762119. But when the California Supreme Court considered this argument, it declined to resolve the question. Perry v. Brown, 265 P.3d 1002, 1015 (Cal. 2011).

171. Hollingsworth v. Perry, 133 S. Ct. 2652, 2663 (2013) (quoting *Perry,* 265 P.3d at 1029) (internal quotation marks omitted).

172. *See Perry*, 265 P.3d at 1014–15 (explaining that simply because a state confers standing on a party to bring or defend a suit in state court, this is not automatically sufficient to confer standing in federal court).

173. *See* Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 182–94 (2011).

defending voter initiatives, it is difficult to imagine what would be required for the Court to accept a state's authorization. The Court seemed to insinuate that proponents would satisfy Article III's requirements if they were authorized to act as agents of the state.[174] As Justice Kennedy noted in dissent, however, there are many good reasons why a state would not want to make official proponents its agents.[175] The most important objection is that giving state officials the authority to direct the actions of the proponents—a necessary condition of a principal-agent relationship[176]—would essentially allow those officials to order the proponents not to defend the initiative, completely defeating the purpose of the initiative system. States could attempt to structure their relationship with proponents so that a de jure agency relationship existed while leaving proponents free to use discretion in deciding how to litigate the case. Although examining just what this relationship might look like is outside the scope of this Comment, it is possible that this arrangement would pass muster with the Supreme Court; however, the Court may also look at this arrangement as an attempt to skirt the requirements of Article III standing and hold that the mere appearances of an agency relationship are insufficient.

There is a chance that, if a state's legislature rather than its courts made a clear and unequivocal endorsement of proponents' standing in federal court, the Supreme Court would not require the proponents to show that they were agents of the state. Since there was no such clear statement in *Hollingsworth*, however, and since the Court did not provide any hints that this would be an acceptable means of meeting Article III's requirements, it is unclear whether this would be enough. For the most part, the holding in *Hollingsworth* seems to lead to the practical conclusion that proponents must look for another way to secure standing to defend initiatives in federal court.

5. Legislative Standing

Proponents could try to argue that, as quasi-legislators, they have legislative standing to defend the constitutionality of a voter initiative. But this approach is largely foreclosed by the Court's opinion in *Arizonans for Official*

174. *See Hollingsworth*, 133 S. Ct. at 2666–67.

175. *Id.* at 2670–72 (Kennedy, J., dissenting) (listing, among other problems, the challenge of creating a mechanism for actually holding the proponents accountable, the state's likely desire to avoid paying the proponents' legal fees, and the state's unwillingness to have the proponents' legal views associated with the administration).

176. *See id.* at 2670–71; *cf.* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f (2006) (emphasizing that, in an agency relationship, the principal has the ability to control the agent's actions).

English v. Arizona.[177] In that case, an Arizona voter initiative was found unconstitutional in federal district court.[178] After the governor announced that she would not pursue an appeal, the sponsors of the initiative moved to intervene for the purpose of appealing the district court's judgment.[179] When the case reached the Supreme Court, the initiative sponsors argued that they satisfied Article III's standing requirements because they had a "quasi-legislative interest in defending the constitutionality of the measure they successfully sponsored."[180] The Supreme Court rejected this argument, finding that the sponsors were not elected representatives and were not authorized under Arizona law to assert the interests of the state.[181] The Court went on to express "grave doubts" whether the sponsors had standing to pursue an appeal but ultimately abstained from deciding this question and ruled on other grounds.[182]

Although the Court did not actually decide the issue, this holding seems to serve as a strong indication that the Court is unreceptive to arguments that official proponents can establish standing to defend an initiative as quasi-legislators. This conclusion is strengthened by the fact that the Court reaffirmed much of this language in *Hollingsworth*.[183] Given this recent development, and coupled with continued disagreement over the validity of legislative standing altogether,[184] official proponents will probably not be successful under a legislative standing theory in the foreseeable future.

6. Initiative Provisions

Since any attempt at establishing standing under Article III doctrines seems a risky strategy at best, many proponents have been turning to other solutions to ensure that they will be able to defend their initiatives in the event of a future lawsuit. Nearly 25 percent of proposed initiatives since the *Hollingsworth* ruling include provisions within the initiative itself for securing a non-government party to defend the law in federal court.[185] These proposals adopt a variety of different means to try to satisfy *Hollingsworth*'s standard for representative capacity—some purport to establish proponents as "agents of the

177. 520 U.S. 43 (1997).
178. *Id.* at 55.
179. *Id.* at 55–56.
180. *Id.* at 65.
181. *Id.*
182. *Id.* at 66, 80.
183. Hollingsworth v. Perry, 133 S. Ct. 2652, 2665–66 (2013).
184. *See supra* note 91 and accompanying text.
185. Maura Dolan, *In Prop 8 Ruling's Wake, Initiative Sponsors Take Protective Steps*, L.A. TIMES (Mar. 8, 2014), http://www.latimes.com/local/la-me-prop8-impact-20140309-story.html.

state," whereas others specify that the proponents shall take an oath of office to defend the initiative.[186] Other initiatives seek to require the attorney general to hire and compensate outside counsel to try the case should the attorney general refuse to do so.[187]

While creative, these provisions are not foolproof. The new provisions themselves may be subject to attack in state and federal courts. Moreover, a federal court might find that even these provisions do not meet the *Hollingsworth* standard for establishing authority to assert the state's interest. Whether or not this will prove to be an effective solution to the problem created by *Hollingsworth* is yet to be seen.

7. Suing State Officials

Finally, proponents or their supporters could attempt to sue the state officials and force them to defend initiatives against attack or appeal an adverse judgment. After the district court in *Perry v. Schwarzenegger* struck down Proposition 8, the Pacific Justice Institute filed a lawsuit in state court seeking an order requiring California's governor and attorney general to appeal the district court's ruling.[188] But this suit was dismissed without a hearing in the appeals court,[189] and the California Supreme Court denied review without comment.[190]

Given how unlikely each of these alternatives seems, the Supreme Court needs to change its view on state representative standing so that voter initiatives can still play a role in the federal system. This is the only way to reliably ensure that states will be able to defend their voter initiatives from attack in federal court.

III. CREATING A NEW STANDARD OF REVIEW FOR ISSUES OF REPRESENTATIVE CAPACITY UNDER STATE LAW

A. Principles of Federalism

The United States government is organized as a federal system, with the fifty states united under a central federal government while retaining

186. *Id.*
187. *Id.*
188. Beckley v. Schwarzenegger, No. C065920 (Cal. Ct. App. Sept. 1, 2010).
189. *Id.*
190. Beckley v. Schwarzenegger, No. S186072 (Cal. Sept. 8, 2010); *see* Bob Egelko, *High Court Won't Order State to Defend Prop. 8*, SFGATE (Sept. 9, 2010, 4:00 AM), http://www.sfgate.com/news/article/High-court-won-t-order-state-to-defend-Prop-8-3253475.php.

sovereignty within their respective territories.[191] The Constitution provides special protection for the autonomy of the states against federal encroachment.[192] Although the states maintain sovereign authority over all affairs within their respective territories that have not been preempted by federal law,[193] they enjoy a particularly strong claim to autonomy with respect to the structure of their own governments.[194]

State autonomy serves several important purposes.[195] First, independent and autonomous state governments can serve as a check against abuses of power

191. *See* BLACK'S LAW DICTIONARY 727 (10th ed. 2014) (defining a "federal" system as one comprised of "associated governments with a vertical division of governments into national and regional components having different responsibilities"); *see also* Younger v. Harris, 401 U.S. 37, 44 (1971) ("[T]he entire country is made up of a Union of separate state governments, and . . . the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.").

192. *E.g.*, U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *see also* Printz v. United States, 521 U.S. 898, 918–19 (1997) (providing other examples of constitutional provisions that provide protections for state sovereignty); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938) ("'[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States . . . . Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.'" (quoting Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting))). In addition to textual protections, the Constitution's structure also provides an implicit protection for state sovereignty by confining federal authority to those powers specifically enumerated in the Constitution. *See, e.g.*, U.S. CONST. art. I, § 8; *id.* art. III, § 2; *see also Printz*, 521 U.S. at 918–19 (explaining how the Constitution's structure "established a system of 'dual sovereignty'" (quoting Gregory v. Ashcroft, 501 U.S. 452, 457 (1991))); THE FEDERALIST NO. 39, *supra* note 76, at 245 (James Madison) ("[The national government's] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."); *see generally* Casey L. Westover, *Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy*, 88 MARQ. L. REV. 693, 719–38 (2005) (discussing the Rehnquist Court's expansion of state sovereignty based on structural arguments).

193. U.S. CONST. amend. X; *see also* THE FEDERALIST NO. 45, *supra* note 76, at 292–93 (James Madison) ("The powers reserved to the several States shall extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.").

194. *See Gregory*, 501 U.S. at 460 (holding that a Missouri statute mandating retirement for most state judges at age seventy did not violate the Age Discrimination in Employment Act, and noting that the Missouri statute concerns "a decision of the most fundamental sort for a sovereign entity[:] Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign").

195. *See generally* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988).

by the federal government.[196] For example, the states can use litigation to challenge denials of federal benefits and defend against federal challenges to affirmative action programs, or they can lobby Congress or administrative agencies for legislative or regulatory reform.[197] Second, state governments are more accessible to citizens, giving a greater number of people an opportunity to actively participate in the democratic process.[198] Relatedly, the federal system "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society."[199] Finally, states may serve as testing grounds for innovative social or economic experiments.[200]

State voter initiatives play an essential role in serving each of these purposes. Through voter initiatives, state citizens are able to secure rights and benefits that are not guaranteed by the federal government.[201] They also provide a means for states to pass experimental laws that serve as a solution to developing societal challenges, and these legislative experiments may influence other states' or the federal government's efforts to tackle these same issues. Furthermore, by giving citizens the opportunity to directly propose new legislation and constitutional amendments, voter initiatives also provide an unparalleled mechanism for citizen participation in government. These mechanisms allow states and local communities to pass laws that are tailored to the peculiar needs

196. *See, e.g.*, *Gregory*, 501 U.S. at 458 ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); THE FEDERALIST NO. 28, *supra* note 76, at 181 (Alexander Hamilton) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. . . . If [the people's] rights are invaded by either, they can make use of the other as the instrument of redress."); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

197. *See* Merritt, *supra* note 194, at 5–6.

198. *Id.* at 7–8.

199. *Gregory*, 501 U.S. at 458.

200. The federal government benefits from state experimentation with social and economic policy. *See* Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) ("One of federalism's chief virtues . . . is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))).

201. On the other hand, voter initiatives are sometimes used to restrict individual freedoms, as was the case with Proposition 8. *Cf.* Romer v. Evans, 517 U.S. 620, 623–24 (1996) (describing "Amendment 2," a Colorado voter referendum that amended the Colorado Constitution to prevent the State or any of its political subdivisions from enacting any law or policy that afforded "any minority status, quota preferences, protected status or claim of discrimination" to any person on the basis of her "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" (quoting COLO. CONST. art. 2, § 30b, *declared unconstitutional by Romer*, 517 U.S. 620)).

of their constituents. Finally, voter initiatives play a unique role by allowing state citizens to pass laws that government officials would be unlikely to support. For example, voter initiatives may limit a state's ability to levy new taxes or increase expenditures, constrain the powers of state officials, or provide rights or benefits to politically powerless or unpopular groups. But voter initiatives can only serve these functions to the extent that federal authority does not restrain their use by the states.

B. The Constitutional Significance of State Law

In some situations, federal courts will be called on to "characteriz[e] the significance or meaning of state law for constitutional law purposes."[202] One of the clearest examples is when a person claims that he has been deprived of property without due process, in violation of the Fourteenth Amendment[203]—a question of federal constitutional law. But "[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[204] Therefore, in order to decide whether a state has deprived a person of property without due process of law, a federal court must first decide as a threshold matter whether state law has conferred an entitlement on that person amounting to a property interest within the meaning of the Constitution.[205] This type of threshold question also arises when a claimant raises a claim under the Contract Clause[206] or argues that the government has violated the Takings Clause of the Fifth Amendment.[207]

202. Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1935 (2003).

203. U.S. CONST. amend. XIV, § 1.

204. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).

205. *See, e.g.*, Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" (quoting U.S. CONST. amend XIV, § 1)); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) ("Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." (quoting *Roth*, 408 U.S. at 577, and Perry v. Sindermann, 408 U.S. 593, 602 (1972))); *see also* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 886–88 (2000).

206. The Contract Clause forbids states from "pass[ing] any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1. When a claimant asserts that a state has passed a law that impairs a contractual obligation, courts first ask whether a contractual relationship existed. *See, e.g.*, Gen. Motors Corp. v. Romein, 503 U.S. 181, 186 (1992).

207. The Takings Clause provides: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. As with a due process claim alleging deprivation of

As explained in an influential article by Thomas Merrill, a federal court can choose from among three approaches in deciding whether state law confers a property interest that will be recognized under the Constitution.[208] First, the federal court could interpret the language of the Constitution to distill a core of property rights belonging to all persons, regardless of whether these rights are also recognized under state law.[209] Second, the federal court could determine that the Constitution protects the same types of property recognized under state law and to the same extent that the state protects that property, thereby completely deferring to state law definitions of property.[210] Third, the court could engage in an intermediate approach, which Merrill calls the "patterning-definition" approach.[211] Under this method, the federal court "first establishes federal criteria that a protected [property] interest must satisfy to merit federal [constitutional] protection, and then examines state law to determine if such an interest has been created."[212] In other words, the federal court would defer to state law pronouncements about the nature and substance of the entitlement, but it would not defer to the state court's label of the entitlement as a property right or necessarily accept the state's conclusion that this entitlement was subject to due process protection.[213]

property, the threshold question is whether state law conferred a property interest on the claimant within the meaning of the Constitution. *See, e.g.*, Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160–62 (1980).

208. Merrill, *supra* note 205, at 942–54; *see also* FALLON ET AL., *supra* note 51, at 484–85.

209. *See* Merrill, *supra* note 205, at 943–49. Merrill notes that, in the context of property rights, *Roth* and earlier decisions have already rejected this approach. *Id.* at 943–44 ("The *Roth* axiom that property rights are created not by the Constitution but by state law and other independent sources has far too much gravitational force for the Court to repudiate it entirely."). But the Court does sometimes use this approach in deciding whether or not a person has been deprived of liberty without due process. *See, e.g.*, Meachum v. Fano, 427 U.S. 215 (1976); *cf.* Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989) ("Protected liberty interests 'may arise from two sources—the Due Process Clause itself and the laws of the States.'" (quoting Hewitt v. Helms, 459 U.S. 460, 466 (1983))).

210. *See* Merrill, *supra* note 205, at 949–51.

211. *Id.* at 952–54.

212. FALLON ET AL., *supra* note 51, at 484–85; *see also* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) ("Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." (quoting *Roth*, 408 U.S. at 577, and Perry v. Sindermann, 408 U.S. 593, 602 (1972))); Merrill, *supra* note 205, at 952–54.

213. *See* United States v. Craft, 535 U.S. 274, 278–79 (2002) ("In looking to state law, we must be careful to consider the substance of the rights state law provides, not merely the labels the State gives these rights or the conclusions it draws from them."); Merrill, *supra* note 205, at 952.

The Court in *Hollingsworth v. Perry*[214] was essentially called on to decide the relevance, for federal standing purposes, of California's decision to authorize official proponents "to defend the constitutionality of [a voter] initiative and to appeal a judgment invalidating the initiative" when "the public officials who ordinarily defend a challenged state law or appeal a judgment invalidating the law decline to do so."[215] Thus, the Court faced a characterization decision of the type described in the preceding paragraphs. The Court opted to follow the third decisionmaking approach—it accepted the California Supreme Court's construction of the California Constitution and election laws at face value,[216] but it found that that construction did not satisfy Article III's requirements for authorizing a party to make arguments on behalf of the state.[217] Despite the majority's expressed good intentions,[218] this ruling dealt a significant blow to California's ability to uphold laws passed through voter-initiative processes.

C. Choosing the Appropriate Standard of Review

Admittedly, the Supreme Court faced a difficult decision in *Hollingsworth*. The Court was tasked with creating a standard that would mold the Article III standing requirements to accommodate the unique procedural status of a lawsuit attacking the constitutionality of a state voter initiative that the state government declined to defend. But the Court simply declined to think critically about how standing doctrine should operate in such a case and rigidly applied modern standing requirements to a situation for which they were ill suited.

As a preliminary matter, the Court was right to adopt an intermediate patterning-definition approach. This approach best balances competing state and federal interests. The best way to illustrate this assertion is to explain why the other two approaches are not appropriate. The first approach—which would treat the issue as a purely federal law question[219]—would fail to respect

214. 133 S. Ct. 2652 (2013).
215. Perry v. Brown, 265 P.3d 1002, 1033 (Cal. 2011).
216. *Hollingsworth*, 133 S. Ct. at 2667 ("Nor do we question . . . the right of initiative proponents to defend their initiatives in California courts, where Article III does not apply.").
217. *Id.* at 2665–66 (holding that, in order to appeal an adverse judgment and make arguments on behalf of the State of California, the proponents had to be "state officers, acting in an official capacity" or "agents of the people").
218. *See id.* at 2667 ("Nor do we question California's sovereign right to maintain an initiative process . . . .").
219. A standard falling within the first category approach, in the context of the *Hollingsworth* case, might simply provide that official proponents may never assert standing to represent the interests of the state, regardless of what state law says on the question.

the states' rights to structure their own governments.[220] It does not make sense for federal law to completely control the question of whether the state has authorized a litigant to make arguments on its behalf. Likewise, the second approach—which would treat the state law decision on whether to authorize the proponents to assert the state's interest as conclusive—does not adequately defer to the federal interests behind Article III standing doctrine. If there were no federal limitations on a state's distribution of authority to assert its interests in federal court, the state could appoint anyone to defend the initiative.[221] This could put parties before the court that would give a poor presentation of the factual and legal issues, diminishing the effectiveness of judicial decision making. It may also have the effect of undermining public confidence in the judiciary.

The intermediate approach is best able to balance these competing concerns by giving credence to state law while still protecting the federal interests underlying standing doctrine.[222] But the majority in *Hollingsworth* erred by creating federal criteria for standing that were much too strict for the context. Since states likely will not want to make official proponents either agents or elected officials of the state, the majority created a de facto first-category approach that would, in practice, prevent all official proponents from representing the interests of the state.

Since the Court should attempt to preserve the essential functions of standing in creating the relevant federal criteria, the Court should have looked to the purposes that standing doctrine was meant to serve and tailored its criteria around those elements. In cases like *Hollingsworth*, however, most of the purposes underlying standing doctrine are not implicated. Article III's concern with separation of powers is irrelevant in these cases, since the standing of official proponents to assert the interests of a state government does not implicate federal separation of powers concerns. Because states may have separation of powers schemes that are quite different from the federal model,[223] the standing criteria in cases like *Hollingsworth* need not consider these issues. Furthermore, there is no need to worry about preserving access to the courts for those most impacted by the voter initiatives—since the official proponents will always be defending these actions, the question whether they have standing to appeal will have no effect on a plaintiff's ability to bring a claim before the courts. But standing doctrine should still be concerned with the need to bring zealous

220. *See supra* note 193 and accompanying text.
221. *See* Transcript of Oral Argument at 5–7, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144).
222. *See* Merrill, *supra* note 205, at 952–54.
223. *See supra* notes 142–44 and accompanying text.

advocates before the Court who will present the issues fully and vigorously. Therefore, the Article III criteria should center around the state representatives' ability to present a strong case.

Crafting a standard of review that would protect this interest would not be difficult. The Court could simply ask whether the state's authorization laws ensure that the representative will have sufficient resources and incentives to make strong arguments. In *Hollingsworth*, the official proponents would meet these standards.[224] California's election law would ensure that the proponents who drafted and advocated for the proposition before its passage and invested countless hours into petitioning and campaigning for the measure would be the ones presenting a defense of the initiative before the Court. Common sense makes clear that there likely is no better party to represent the state in such a case. Under these standards, the Court would be able to give full attention on the merits to these cases wherever it was due.

CONCLUSION

While the majority in *Hollingsworth v. Perry* may not have intended to undermine state initiative processes, it has certainly done so. The majority created a rule whereby official proponents may never be able to show standing to appeal the invalidation of a state voter initiative whenever the state refuses to appeal in its own capacity. This poses serious implications for federalism and the sovereign power of states to structure their own systems of government. It also has extreme adverse effects on federal litigation involving challenges to voter initiatives. This Comment has explored some potential alternative routes through which official proponents might be able to assert their right to defend their initiatives from constitutional attack. None of these alternatives, however, provides a reliable means for proponents to successfully assert standing in a case involving a challenge to a state voter initiative. Accordingly, *Hollingsworth* should be overturned, and the Court should instead give greater deference to state definitions of the rights and powers of official proponents.

224. *See supra* note 141 and accompanying text.