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## Standing at a Constitutional Divide: Redefining State and Federal Requirements for Initiatives After *Hollingsworth v. Perry*

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# Standing at a Constitutional Divide: Redefining State and Federal Requirements for Initiatives After *Hollingsworth v. Perry*

Scott L. Kafker\*

David A. Russcol\*\*

## *Abstract*

*In Hollingsworth v. Perry, the Supreme Court denied standing to proponents of the California initiative prohibiting same-sex marriage, who wished to appeal a federal district court judge's decision declaring the initiative unconstitutional. As suggested by the dissent, Hollingsworth has severe consequences for the twenty-four states in which the people can bypass elected officials and legislate directly through the initiative. The Supreme Court has established a clear constitutional divide between state and federal standing requirements for initiatives. Whereas states provide generous standing to proponents so officials do not exclusively control the defense of the people's initiative process, the Supreme Court has instead narrowed the defense of initiatives in federal court to state officials or state agents.*

*As federal litigation is virtually certain on most important initiatives, the Hollingsworth approach to standing distorts the initiative process, allowing government officials to nullify initiatives by refusing to defend them in federal court. They may do so for political as well as legal reasons, raising significant concerns for initiative drafters across the political spectrum. The federal standing doctrine creates an uneven playing field in which, often, no one is entitled to defend an initiative in federal*

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*court if officials refuse. A decision invalidating a measure thus becomes unappealable.*

*This Article analyzes state and federal approaches and proposes multiple methods to resolve the standing gap exposed by Hollingsworth. First, a special attorney could be appointed to represent the state if government officials decline to defend a measure. Second, states could deputize proponents as state agents and fill in the elements found missing in Hollingsworth. Third, states could set bounties for defending an initiative, analogous to a qui tam action. Fourth, proponents could be given a financial stake by assessing a filing fee, refundable if they successfully defend their initiatives. Finally, states could follow the strategy accepted in *United States v. Windsor* by compelling officials to take the ministerial actions necessary to appeal a measure's invalidation even if they believed it unconstitutional.*

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I. Introduction

The United States Supreme Court’s decision in *Hollingsworth v. Perry*,<sup>1</sup> holding that the proponents of the California initiative prohibiting same-sex marriage lacked standing to appeal a federal district court ruling declaring the initiative unconstitutional,<sup>2</sup> demonstrates the unsettled state of standing law regarding initiatives, its deep fissures and divides, and even its gaping holes. *Hollingsworth* reveals not only the divisions within the Supreme Court regarding Article III standing requirements,<sup>3</sup> but also the very different federal and

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1. 133 S. Ct. 2652 (2013). For simplicity, we refer to the Supreme Court’s decision as *Hollingsworth* and the California Supreme Court’s opinion in the same case as *Perry*.

2. *See id.* at 2668 (“Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal.”).

3. *See id.* at 2662–64 (finding that petitioners failed to present a particularized injury and rejecting the argument that petitioners had, through their unique relationship to the measure, authority to represent state interests in court); *id.* at 2668–70 (Kennedy, J., dissenting) (finding that the petitioners had authority, under state law and through their special relationship to the initiative measure, to represent state interests and therefore had standing at

state conceptions of standing for initiatives and the resulting distortion of the initiative process.<sup>4</sup> In those states where statutes or constitutional amendments, or both measures, may be initiated and passed directly by the people, state courts have interpreted their laws to provide generous standing to both petitioner-proponents<sup>5</sup> and opponents of initiatives.<sup>6</sup> The Supreme Court, in contrast, has narrowly construed Article III's standing requirements, especially for initiative petitioners.<sup>7</sup> Thus, those who have invoked the power to change the state constitution or laws through the initiative, and likely defended their efforts in state court, may find their route to the federal courthouse obstructed or blocked altogether.

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the appellate level).

4. Compare *id.* at 2662–63 (majority opinion) (rejecting the argument that proponents of initiative measures have a unique relationship to the measure that allows them to defend it in federal litigation), and *id.* at 2670–71 (Kennedy, J., dissenting) (relying on the purpose and history of the initiative system to justify the California Supreme Court's ruling that proponents of the initiative measure had adequate authority to represent the state and its interests), with *Perry v. Brown*, 265 P.3d 1002, 1006 (Cal. 2011) (finding that, because the initiative process is designed to allow the people of the state to amend the state constitution or enact statutes when public officials decline to do so, proponents of initiative measures have authority to represent the state in litigation concerning the initiative).

5. For clarity, we use the terms “proponents” and “petitioners” to indicate the individuals or group designated as the official sponsors of the initiative petition under state law; these individuals may be the initial few signers of the petition or a political committee established to promote the petition. See, e.g., ALASKA STAT. § 15.45.030(3) (2013) (detailing the necessary components of the application, including the designation of an initiative committee consisting of three of the official sponsors of the bill); CAL. ELEC. CODE § 9001(a) (2013) (labeling those voters requesting title and summary from the attorney general as “proponents”); OR. REV. STAT. § 250.045(6) (2013) (“The cover of an initiative or referendum petition shall designate the name and residence address of not more than three persons as chief petitioners.”). In contrast, we use “supporters” to refer to those who are in favor of an initiative's passage or defense but do not have the special status of official sponsors. As state laws typically do not differentiate in the same way among the various individuals or groups who are against an initiative, we apply the term “opponents” to anyone seeking to challenge an initiative in court.

6. See *infra* Part IV.A (noting that state judges typically allow actions to proceed where the state legislature authorizes private enforcement of public rights, regardless of any constitutional standing requirements).

7. See *infra* Part V (discussing the “injury in fact” standing requirement of federal courts).

This Article addresses pre- and post-election standing in state court by petitioners, other supporters of initiatives, and opponents of initiatives.<sup>8</sup> On the federal side, it responds to *Hollingsworth*, which has raised more questions than it answers regarding Article III standing.<sup>9</sup> This Article seeks to define state and federal standing requirements in a way that fulfills the purpose of the initiative process—to bypass indifferent or recalcitrant government officials;<sup>10</sup> to prevent one-sided litigation by providing both defenders and opponents comparable rights to argue and appeal constitutional and other legal questions; and to respect the latest pronouncement by the Supreme Court concerning Article III requirements. Although the Supreme Court majority appeared unconcerned about the constitutional crevasse it created on standing for initiatives,<sup>11</sup> we propose several possible paths across or around the divide, recognizing that some are riskier than others.<sup>12</sup>

## II. *The Stand-off on Standing Revealed by Hollingsworth v. Perry*

As previously stated, the state–federal constitutional divide on standing in the initiative context, and the resulting problems, are starkly revealed by the decision of the California Supreme Court and the majority and dissenting opinions in the U.S. Supreme Court in the Proposition 8 litigation. After the California Supreme Court found in 2008 that existing laws limiting the official designation of marriage to opposite-sex couples violated the Equal Protection Clause of the California Constitution,<sup>13</sup> an initiative petition was drafted to amend the state constitution.<sup>14</sup> That initiative petition, which would be

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8. *Infra* Part V.

9. *Infra* Part VI.

10. *Infra* Part VI.

11. *Infra* Part V.

12. *Infra* Part VI.B.

13. See *In re Marriage Cases*, 183 P.3d 384, 451–52 (Cal. 2008) (limiting marriage to same-sex couples is unconstitutional), *superseded by constitutional amendment as stated in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

14. See *Proposition 8: Official Title and Summary*, in CALIFORNIA GENERAL ELECTION, NOVEMBER 4, 2008: OFFICIAL VOTER INFORMATION GUIDE 54 (2008), <http://vig.cdn.sos.ca.gov/2008/general/title-sum/pdf/prop8-title-summary.pdf>

known as Proposition 8, provided: “Only marriage between a man and a woman is valid and recognized in California.”<sup>15</sup> The California Supreme Court thereafter rejected various procedural and substantive challenges to the constitutionality of Proposition 8 under California law.<sup>16</sup> Two same-sex couples wishing to marry then brought suit in federal court, claiming that Proposition 8 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution.<sup>17</sup> The defendants named in the complaint were the Governor of California, the Attorney General of California, and other state and local officials responsible for overseeing marriage in California.<sup>18</sup> All of these officials declined to defend the law.<sup>19</sup> The official proponents of the initiative were, however, allowed to intervene to defend the law in the district court.<sup>20</sup> After a trial on the merits, the district court declared Proposition 8 unconstitutional and permanently enjoined California officials from enforcing the law.<sup>21</sup> The California officials chose not to

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(summarizing Proposition 8 as an initiative constitutional amendment that eliminates the right of same-sex couples to marry in California).

15. *Id.*; see also *Perry v. Brown*, 265 P.3d 1002, 1007–08 (Cal. 2011) (discussing the development of Proposition 8).

16. See *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009) (rejecting the argument that Proposition 8 is an impermissible constitutional revision that violates the separation of powers doctrine and is invalid under an “inalienable rights” theory and also concluding that it may only be altered by California voters).

17. See *Perry*, 265 P.3d at 1007–08 (detailing the procedural history of the case and noting that plaintiffs’ complaint “alleged that Proposition 8 violates the due process and equal protection clauses of the federal Constitution”).

18. *Id.* at 1008.

19. See *id.* (“In their answers, the named defendants other than the Attorney General refused to take a position on the merits of plaintiffs’ constitutional challenge and declined to defend the validity of Proposition 8. The answer filed by the Attorney General also declined to defend the initiative . . .”).

20. See *id.* (noting the district court’s recognition of the standing of proponents of initiative measures).

21. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003–04 (N.D. Cal. 2010) (concluding that Proposition 8 “prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis,” and because it is unconstitutional, the official defendants are prohibited from applying or enforcing it).

appeal,<sup>22</sup> and when the petitioners did, the Ninth Circuit Court of Appeals certified a question to the California Supreme Court:

Whether under Article II, Section 8 of the California Constitution or otherwise 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 defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.<sup>23</sup>

The California Supreme Court responded in the affirmative, declaring:

[B]ecause the initiative process is specifically intended to enable the people to amend the state Constitution or to enact statutes when current government officials have declined to adopt (and often have publicly opposed) the measure in question, the voters who have successfully adopted an initiative measure may reasonably harbor a legitimate concern that the public officials who ordinarily defend a challenged state law in court may not, in the case of an initiative measure, always undertake such a defense with vigor or with the objectives and interests of those voters paramount in mind. As a consequence, California courts have routinely permitted the official proponents of an initiative to intervene or appear as real parties in interest to defend a challenged voter-approved initiative measure in order "to guard the people's right to exercise initiative power" or, in other words, to enable such proponents to assert *the people's*, and hence *the state's*, interest in defending the validity of the initiative measure.<sup>24</sup>

The California Supreme Court stated that proponents have "a unique role in the initiative process"<sup>25</sup> and have "a unique relationship to the voter-approved measure that makes them especially likely to be reliable and vigorous advocates for the

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22. See *Perry v. Schwarzenegger*, 628 F.3d 1191, 1195 (9th Cir. 2011) ("Proponents appealed the district order, but the named official defendants did not.").

23. *Id.* at 1193.

24. *Perry v. Brown*, 265 P.3d 1002, 1006 (Cal. 2011) (quoting *Bldg. Indus. Ass'n v. City of Camarillo*, 41 Cal. 3d 810, 822 (1986)).

25. *Id.* at 1024.

measure and to be so viewed by those whose votes secured the initiative's enactment into law."<sup>26</sup> The court advised that by allowing official proponents to assert the state's interest, the state

(1) assures voters who supported the measure and enacted it into law that any residual hostility or indifference of current public officials to the substance of the initiative measure will not prevent a full and robust defense of the measure to be mounted in court on the people's behalf, and (2) ensures a court faced with the responsibility of reviewing and resolving a legal challenge to an initiative measure that it is aware of and addresses the full range of legal arguments that reasonably may be proffered in the measure's defense.<sup>27</sup>

Accordingly, the court held:

In a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.<sup>28</sup>

The Ninth Circuit, heavily relying on the analysis of the California Supreme Court, agreed and held that such authorization was sufficient to create Article III standing.<sup>29</sup> The Supreme Court, in a majority opinion by Chief Justice Roberts, reversed.<sup>30</sup>

The majority started from the premise that Article III of the U.S. Constitution limits the judicial power of federal courts to resolving cases and controversies.<sup>31</sup> As part of the case or

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26. *Id.*

27. *Id.* at 1006.

28. *Id.* at 1007.

29. *See Perry v. Brown*, 671 F.3d 1052, 1070–73 (9th Cir. 2012) (examining the standing of proponents and noting that their role in asserting the state's interest is comparable to the role normally held by the public officials who declined to defend the law).

30. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

31. *See id.* at 2659 (“[P]etitioners . . . ask us to decide whether the Equal Protection Clause ‘prohibits . . . California from defining marriage as the union of a man and a woman.’ [We] have authority . . . to answer such questions only if necessary to do so in the course of deciding an actual ‘case’ or

controversy requirement, a litigant must demonstrate standing.<sup>32</sup> As further interpreted by the Supreme Court, standing under Article III requires the “litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision.”<sup>33</sup> Such standing must be maintained “throughout all stages of litigation.”<sup>34</sup> Therefore, appellants must satisfy standing requirements, just as plaintiffs filing in the first instance are required to do.<sup>35</sup>

In *Hollingsworth*, it was undisputed that the couples seeking to marry had standing when they initiated the litigation in the district court, as Proposition 8 precluded them from marrying.<sup>36</sup> There was also no question that the State of California suffered an injury cognizable under Article III when the district court concluded that a provision of its constitution was invalid under federal law.<sup>37</sup> The issue, then, was whether the official proponents had standing to appeal the district court’s decision when the California officials declined to do so, either because they had suffered concrete injury themselves or because they could litigate on the state’s behalf.<sup>38</sup> The Court concluded that the proponents could not establish standing on either theory.<sup>39</sup>

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‘controversy.’”(citation omitted)).

32. *See id.* (“For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue. That party must also have ‘standing’ . . .”).

33. *Id.* at 2661 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

34. *Id.*

35. *See id.* (“[S]tanding ‘must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.’” (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997))).

36. *See id.* at 2662 (explaining that respondents had standing in district court because their desire to marry and obtain an “official sanction” from the state was prohibited by Proposition 8).

37. *See id.* at 2664 (“No one doubts that a State has a cognizable interest ‘in the continued enforceability’ of its laws that is harmed by a judicial decision declaring a state law unconstitutional.” (citing *Maine v. Taylor*, 477 U.S. 131, 137 (1986))).

38. *See id.* at 2662–64 (discussing the proponents’ argument that they hold a unique role in the enforcement of the law, allowing them to act on behalf of the state).

39. *See id.* at 2664 (explaining that the proponents have not suffered an injury in fact and therefore also have no right to assert the state’s interest); *id.*

As to injury in fact, the Court reasoned that once the initiative passed, the official proponents had no special role and “no ‘direct stake’ in the outcome of their appeal.”<sup>40</sup> Rather, “[t]heir only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.”<sup>41</sup> As individuals, they therefore had no greater interest in the case than any other member of the public.<sup>42</sup>

The Court also rejected the California Supreme Court’s analysis that the proponents were authorized to assert the state’s interest, concluding that they were not state officials or agents of the people entitled to defend the state’s interest in the legality of its laws.<sup>43</sup> The Court emphasized that it had “never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to” and “decline[d] to do so for the first time here.”<sup>44</sup> The Court relied on the current Restatement of Agency to distinguish the authority the petitioners had from the responsibility of an agent.<sup>45</sup> As “petitioners answer to no one,” there is no process for their removal, and they owe no fiduciary obligation to the people of California, they are not agents.<sup>46</sup> The decision also made reference to the fact that the proponents had not claimed to represent the state in the district court, as well as the California Supreme Court’s failure to use the talismanic words of agency,<sup>47</sup>

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at 2666–67 (discussing the lack of any agency relationship between the proponents and the state).

40. *Id.* at 2662.

41. *Id.*

42. *See id.* (denying proponents’ special interest claim because they held a unique role in Proposition 8’s enactment but not its enforcement, and therefore they have “no ‘personal stake’ in defending its enforcement that is distinguishable from the general interest of every citizen of California” (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992))).

43. *See id.* at 2666–67.

44. *Id.* at 2668.

45. *See id.* at 2666 (“An essential element of agency is the principal’s right to control the agent’s actions.’ Yet, petitioners answer to no one; they decide for themselves, with no review, what arguments to make and how to make them.” (quoting 1 RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. f (2005))).

46. *See id.* at 2666–67 (discussing various reasons why the proponents may not claim to act as agents of the state for purposes of this litigation).

47. *See id.* (noting that neither the state court nor the Ninth Circuit described petitioners as “agents of the people” or of the state and that when

but it is unclear whether either of these factors were key elements for the Court's holding. The majority's agency test is discussed in more detail in Part VI.

Justice Kennedy, joined by Justices Thomas, Alito, and Sotomayor, issued a caustic dissent.<sup>48</sup> The dissenters pointedly stated that "Article III does not require California, when deciding who may appear in court to defend an initiative on its behalf, to comply with the Restatement of Agency or with this Court's view on how a State should make its laws or structure its government."<sup>49</sup> Rather, the state is empowered to define the status and authority of who may defend its laws against a constitutional challenge, including an initiative's proponents.<sup>50</sup> Recognizing those powers, the dissent declared that "a proponent has the authority to appear in court and assert the State's interest in defending an enacted initiative when the public officials charged with that duty refuse to do so."<sup>51</sup> The state's determination, the dissenters declared, "is binding on this Court. And that definition is fully sufficient to establish the standing and adversity that are requisites for justiciability under Article III of the United States Constitution."<sup>52</sup>

The dissenters also complimented and incorporated much of the reasoning of the California Supreme Court, stressing its analysis of the purposes of the initiative process itself<sup>53</sup> and the unique status and relationship of the proponents to the initiatives they propose.<sup>54</sup> In contrast, the dissenters emphasized that the

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facing the Ninth Circuit, petitioners argued not for agency status, but for a unique status based on their "*interests as official proponents*").

48. *Id.* at 2668–75 (Kennedy, J., dissenting).

49. *Id.* at 2668.

50. *See id.* (finding California's definition of proponents' authority to defend a challenged initiative to be binding on the federal courts).

51. *Id.*

52. *Id.*

53. *See id.* (noting that the California Supreme Court felt a proponent's authority to assert the state's interest in defending an initiative measure where officials fail to do so is "essential to the integrity of [California's] initiative process"); *id.* at 2670–71 ("The very object of the initiative system is to establish a lawmaking process that does not depend upon state officials. In California, the popular initiative is necessary to implement 'the theory that all power of government ultimately resides in the people.'" (quoting *Perry v. Brown*, 265 P.3d 1002, 1016 (Cal. 2011))).

54. *See id.* at 2668–70 (reiterating the Supreme Court of California's

majority's "reasoning does not take into account the fundamental principles or the practical dynamics of the initiative system in California, which uses this mechanism to control and to bypass public officials—the same officials who would not defend the initiative, an injury the Court now leaves unremedied."<sup>55</sup> The dissenters were also concerned about the significant implications for the twenty-six other states that have authorized the initiative or referendum.<sup>56</sup>

The dissenters identified other troubling consequences of the majority decision. They wrote: "A prime purpose of justiciability is to ensure vigorous advocacy, yet the Court insists upon litigation conducted by state officials whose preference is to lose the case."<sup>57</sup> Additionally, a doctrine designed to limit judicial power and to allow disputes of public policy to be resolved by the political process rather than the courts has instead empowered a single federal district court to declare unconstitutional a law initiated and passed by the people of a state, and if that decision is challenged, not "to allow a State's authorized representatives to defend" the people's initiative.<sup>58</sup> At oral argument, Justice Kennedy referred to this phenomenon as a "one-way ratchet" whereby the court's injury in fact requirement would mean that only one side could appeal an adverse decision on the validity of an initiative.<sup>59</sup> If opponents scored a victory in any district

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reasons for holding that proponents have a special relationship to the initiative measure and therefore have standing, including proponents' knowledge and understanding of the law as well as their stake in the outcome of the initiative).

55. *Id.* at 2668.

56. *Id.* Twenty-four of these states have an initiative process; two use only the referendum, which allows voters to approve or reject laws passed by the legislature but does not permit them to draft the laws that are put to a vote. See M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC 11–12 (2003) (defining initiatives and referendums and comparing the availability of these measures in each state).

57. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2674 (2013).

58. *See id.* ("[R]ather than honor the principle that justiciability exists to allow disputes of public policy to be resolved by the political process rather than the courts, here the Court refuses to allow a State's authorized representative to defend the outcome of a democratic election." (citing *Allen v. Wright*, 468 U.S. 737, 750–52 (1984))).

59. *See* Transcript of Oral Argument at 29–30, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-144.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144.pdf) ("[T]his is a one-way ratchet as it favors the State and allows governors and other constitutional officers in

court,<sup>60</sup> no appeal could be taken to the court of appeals; a win at the court of appeals could not be reviewed by the Supreme Court.<sup>61</sup>

The one-way ratchet seems to be a significant problem and may explain the concern expressed across the political spectrum with the *Hollingsworth* decision, even by the strongest proponents of same-sex marriage, including former San Francisco Mayor and current California Lieutenant Governor Gavin Newsom.<sup>62</sup> Mr. Newsom asked rhetorically, “What if . . . voters pass a progressive proposition and a conservative Republican governor or attorney general refuses to defend it against legal challenges?”<sup>63</sup> There are a number of initiatives, championed by both liberals and conservatives, that depend heavily, if not exclusively, on a defense by the government, as the government alone can satisfy the injury in fact requirement on the defense side.<sup>64</sup> Initiatives designed to protect the environment,<sup>65</sup> defend

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different States to thwart the initiative process.”).

60. Indeed, in a state like California that encompasses multiple judicial districts, different groups of plaintiffs might sue statewide officials in any or all district courts, needing to secure only one favorable ruling to achieve their goal.

61. *Supra* note 35 and accompanying text; *see also Hollingsworth*, 133 S. Ct. at 2668 (“Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal.”).

62. *See* Tamara Audi, *Worries Swirl over California’s Initiatives*, WALL ST. J., July 1, 2013, at A3 (discussing the concerns of activists and government officials that the *Hollingsworth* decision weakens the power of voters to enact laws through then initiative system).

63. *Id.*

64. *Cf.* Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 559–78 (2012) [hereinafter Elliott, *Standing Lessons*] (providing examples of issues that often prove difficult to defend due to standing, including environmental rights, civil rights, same-sex marriage, and health care). Initiatives falling in this category likely include abortion bans, marijuana decriminalization, and gambling legalization, as well as same-sex marriage measures. *See* Scott L. Kafker & David A. Russcol, *The Eye of a Constitutional Storm: Pre-Election Review by the State Judiciary of Initiative Amendments to State Constitutions*, 2012 MICH. ST. L. REV. 1279, 1280 (2012) (“Turbulent societal issues . . . are being decided through initiative petitions to amend state constitutions.” (citing G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 160–61 (1998))).

65. *Cf.* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–64 (1992) (finding that plaintiffs lacked standing to challenge agency action because, while it was possible that certain agency-funded projects threatened the listed species, they

animal rights,<sup>66</sup> enforce nondiscrimination in the private sector through tax policy,<sup>67</sup> preclude vouchers for public school students, limit abortion rights, or, as in *Hollingsworth*, define marriage as between a man and a woman, have all been passed by very different political forces.<sup>68</sup> For all of these initiatives, there are obvious plaintiffs—companies emitting pollutants in environmental cases, animal owners in animal rights cases, attendees of private schools, pregnant women, same-sex couples—but often no obvious private defendants. If government officials can simply decide not to defend the initiative, government officials are being given a veto over the initiative process itself.<sup>69</sup> As no one can defend the litigation if the government refuses to do so, one side is allowed to control the outcome.<sup>70</sup> Even though all the usual principles of standing are satisfied if the government chooses to defend the initiative (in other words, the case presents legal issues appropriate for resolution in court, there is adversity of interest, and the plaintiffs and the state would each be concretely injured by an

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failed to show how such harm would produce any injury to the plaintiffs themselves).

66. Cf. Elliott, *Standing Lessons*, *supra* note 64, at 584 (explaining that because an endangered species is not a legal person whose harm is cognizable in court, those suing to protect such species must argue that they depend on the species for research, recreation, or aesthetic enjoyment (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563–64 (1992))).

67. Cf. *Allen v. Wright*, 468 U.S. 737, 752–61 (1984) (finding that holding the Internal Revenue Service accountable for its legal obligation to enforce nondiscrimination policies does not, in itself, provide standing when petitioners have suffered no personal injury from the discriminatory treatment).

68. Cf. Elliott, *Standing Lessons*, *supra* note 64, at 552–53, 562 (noting that while most critics of the standing doctrine are liberals attempting to protect the environment or vindicate civil rights, conservative plaintiffs in recent cases found themselves barred by the standing doctrine as well).

69. See *Perry v. Brown*, 265 P.3d 1002, 1006–07 (Cal. 2011) (finding that because state officials do not have the authority to directly veto an initiative measure, they may not attempt to effectively veto such measures by denying initiative proponents the authority to defend the law); see also *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2671 (2013) (Kennedy, J., dissenting) (explaining that providing a “*de facto* veto” to government officials would undermine the initiative system).

70. See *Perry*, 265 P.3d at 1024 (“The initiative power would be significantly impaired if there were no one to assert the state’s interest in the validity of the measure when elected officials decline to defend it in court or to appeal a judgment invalidating the measure.”).

unfavorable decision), particularized injury standing requirements allow only one side to argue and control the outcome.<sup>71</sup> This is true even though the majority of people voted for just the opposite position.<sup>72</sup> Government officials are being allowed to substitute their judgment for the judgment of the people themselves regarding the defense of the initiative, even though the initiative is premised on a rejection of such deference to government officials.<sup>73</sup> The people's only recourse is to vote out their elected officials,<sup>74</sup> but there are some proposals (such as term limits) that *any* set of elected officials is likely to oppose.<sup>75</sup> And in any case, the initiative process is based on the idea that the people do not have to act through government officials but can act directly.<sup>76</sup>

In sum, the initiative process raises issues that are difficult to resolve within the traditional standing inquiry, and the *Hollingsworth* approach is deeply problematic, causing significant constitutional division and confusion. In response, this Article seeks to lay out sensible standing rules for proponents and opponents of initiatives, in state and federal courts, pre- and post-

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71. See *Hollingsworth*, 133 S. Ct. at 2668–69, 2671, 2674–75 (Kennedy, J., dissenting) (explaining that, where the California Supreme Court upheld the initiative process to ensure “vigorous advocacy,” the majority’s opinion limits the ability of the state’s authorized representatives to defend the initiative).

72. See Erwin Chemerinsky, *Prop. 8 Deserved a Defense*, L.A. TIMES (June 28, 2013), <http://articles.latimes.com/2013/jun/28/opinion/la-oe-chemerinsky-proposition-8-initiatives-20130628> (last visited Nov. 10, 2013) (“The state was certainly within its rights to refuse to defend a law that officials believed to be unconstitutional . . . . But Proposition 8’s supporters were left understandably upset. A majority of Californians had voted to ban gay marriage . . . and now the state would no longer defend the law.”) (on file with the Washington and Lee Law Review).

73. See *Perry*, 265 P.3d at 1006 (discussing the purpose of the initiative system and its intention “to enable the people to amend the state Constitution or to enact statutes when current government officials have declined to adopt . . . the measure in question”).

74. See *Doyle v. Secretary of the Commonwealth*, 858 N.E.2d 1090, 1096 (Mass. 2006) (“Those [officials] who now seek to avoid their lawful obligations [in the initiative process] . . . ultimately will have to answer to the people who elected them.”).

75. See KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS* 161–62 (2009) (discussing the growing popularity of term limit initiatives and the refusal of most legislatures to adopt such reforms).

76. See *supra* note 73.

election. To do so, we must start with a better understanding of the background and role of initiatives under state and federal law.

### *III. The Initiative: Its History, Purpose, and Place in State and Federal Constitutional Law*

The initiative was first introduced by the Populist and Progressive movements of the late nineteenth and early twentieth centuries in response to political corruption, the outsized influence of railroads and other corporations, and a widespread belief that the people had lost control of the political process.<sup>77</sup> Currently, the constitutions of twenty-four states provide the people with the power to pass statutes or constitutional amendments—or both—through the initiative process.<sup>78</sup>

The inherent right of the people to reform their own governments is fundamental in American political history.<sup>79</sup> It has been a key tenet of American constitutional law, especially emphasized in state constitutions.<sup>80</sup> For example, the

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77. See Kafker & Russcol, *supra* note 64, at 1283 (“[The initiative system] was championed by Populists and Progressives of the early twentieth century as a remedy for political corruption, the influence of big business, and the perceived inability or unwillingness of legislators to represent the interests of the body politics.” (citing Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL’Y 295, 304 (2008))); David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative Referendum Process*, 66 U. COLO. L. REV. 13, 16 (1995) (discussing the history of the initiative); Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1039–44 (2001) (detailing the history of the Populist and Progressive movements and their influence on modern initiative reform).

78. See WATERS, *supra* note 56, at 12 (comparing the types of initiative processes available in each state and comparing states with direct and indirect initiative amendments, direct and indirect initiative statutes, and popular referendum). Of these, six have only a statutory initiative; three allow only initiated constitutional amendments; and fifteen permit both. *Id.*

79. See Kafker & Russcol, *supra* note 64, at 1286 (“The inherent right of the people to reform their own governments is a fundamental aspect of American political thought and action, especially at the state level.”).

80. See *id.* (noting that the right of the people to reform their government was “the battle cry of the American Revolution and a historic emphasis in state constitutions”).

Massachusetts Constitution has provided since 1780 that “the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.”<sup>81</sup> Government officials, “whether legislative, executive, or judicial, are . . . at all times accountable to them.”<sup>82</sup>

Not surprisingly, in an era when constitutional conventions are nonexistent at the federal level and exceedingly rare in the states and there is a widespread perception that government is unresponsive to the concerns of ordinary people, the initiative is popular and powerful.<sup>83</sup> The initiative is widely utilized to effect statutory and constitutional change in the states. From 2006 to 2012, there were 155 initiative statutes and 104 initiative constitutional amendments on state ballots, about forty percent of which passed.<sup>84</sup> Many of the most controversial issues of our

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81. MASS. CONST. art. VII.

82. *Id.* art. V.

83. See John Dinan, *State Constitutional Developments in 2012*, in COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 3, 4 (2013), [http://knowledgecenter.csg.org/drupal/system/files/dinan\\_2013\\_1.pdf](http://knowledgecenter.csg.org/drupal/system/files/dinan_2013_1.pdf) (providing the number of initiatives and conventions since 2008); Kafker & Russcol, *supra* note 64, at 1285–86 (“Even in states such as California, where widespread use of the initiative process has led to what *The Economist* and the state’s own former Chief Justice refer to as a dysfunctional democracy, the initiative retains its powerful place in political life.”); Magleby, *supra* note 77, at 26–31 (illustrating the increased use of initiatives in the last several decades); cf. MILLER, *supra* note 75, at 70–71 (“In the states where it is strongest, the initiative process has become no less than a fourth branch of government . . .”).

84. Dinan, *supra* note 83, at 4 tbl. A; John Dinan, *State Constitutional Developments in 2009*, in COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 3, 5 tbl. A (2010), [http://knowledgecenter.csg.org/drupal/system/files/01\\_Cr.pdf](http://knowledgecenter.csg.org/drupal/system/files/01_Cr.pdf); INITIATIVE AND REFERENDUM INSTITUTE, INITIATIVE USE 2 (2013), [http://iandrinstitute.org/IRI%20Initiative%20Use%20\(2013-1\).pdf](http://iandrinstitute.org/IRI%20Initiative%20Use%20(2013-1).pdf); see also *2006 Ballot Measures*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/2006\\_ballot\\_measures](http://ballotpedia.org/wiki/index.php/2006_ballot_measures) (last visited Oct. 13, 2013) (listing the state ballot measures in 2006) (on file with the Washington and Lee Law Review); *2007 Ballot Measures*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/2007\\_ballot\\_measures](http://ballotpedia.org/wiki/index.php/2007_ballot_measures) (last visited Oct. 13, 2013) (listing the state ballot measures in 2007) (on file with the Washington and Lee Law Review); *2008 Ballot Measures*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/2008\\_ballot\\_measures](http://ballotpedia.org/wiki/index.php/2008_ballot_measures) (last visited Oct. 13, 2013) (listing the state ballot measures in 2008) (on file with the Washington and Lee Law Review); *2009 Ballot Measures*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/2009\\_ballot\\_measures](http://ballotpedia.org/wiki/index.php/2009_ballot_measures) (last visited Oct. 13, 2013) (listing the state ballot measures in 2009) (on file with the Washington

time—including abortion regulation, casino gambling, collective bargaining rights, election reform, same-sex marriage, health care, drug legalization or decriminalization, and renewable energy—are being decided through the initiative process.<sup>85</sup> Despite its significant problems, which are well-reviewed in the literature<sup>86</sup> but beyond the scope of this Article, the initiative process is an important prerogative of the people; they have no intention of giving up their right to voice and impose their views and direct constitutional change.<sup>87</sup>

The initiative process is, however, a distinct creation of state constitutional law with no federal pedigree or counterpart.<sup>88</sup> There is no means for direct popular constitutional or statutory changes specified in the U.S. Constitution.<sup>89</sup> Indeed, the Framers of the federal Constitution expressed great skepticism regarding direct democracy. As James Madison explained in *The Federalist*

and Lee Law Review); *2010 Ballot Measures*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/2010\\_ballot\\_measures](http://ballotpedia.org/wiki/index.php/2010_ballot_measures) (last visited Oct. 13, 2013) (listing the state ballot measures in 2010) (on file with the Washington and Lee Law Review); *2011 Ballot Measures*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/2011\\_ballot\\_measures](http://ballotpedia.org/wiki/index.php/2011_ballot_measures) (last visited Oct. 13, 2013) (listing the state ballot measures in 2011) (on file with the Washington and Lee Law Review); *2012 Ballot Measures*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/2012\\_ballot\\_measures](http://ballotpedia.org/wiki/index.php/2012_ballot_measures) (last visited Oct. 13, 2013) (listing the state ballot measures in 2012) (on file with the Washington and Lee Law Review).

85. See Kafker & Russcol, *supra* note 64, at 1280.

86. See, e.g., Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 294 (2007) (“Time and again, initiatives are used to disadvantage minorities: racial minorities, language minorities, sexual orientation minorities, political minorities.”); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1507–08 (1990) (explaining the tension that exists between direct democracy and judicial review); Hans A. Linde, *When Initiative Lawmaking Is Not “Republican Government”: The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 19–20 (1993); Magleby, *supra* note 77, at 18 (“[P]olitical reforms, like the initiative and popular referendum, do not always live up to the promises of their proponents, and the arguments for letting the voters decide need to be critically examined.”).

87. See Kafker & Russcol, *supra* note 64, at 1285–86 (arguing that the initiative process is unlikely to be abolished or restricted despite criticism).

88. Cf. Magleby, *supra* note 77, at 42–43 (“The United States is one of only five democracies which has never held a national referendum, but interest in a national initiative grew during the 1970s . . .”).

89. See U.S. CONST. art. V (providing the means by which the Constitution can be amended); Eule, *supra* note 86, at 1529 (explaining that “[t]he people would enjoy no direct role under Article V”).

No. 63: “[T]here are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn.”<sup>90</sup> Other Framers, such as Edmund Randolph and Elbridge Gerry, were even more damning, referring to the “follies of democracy” and calling popular rule “the worst of all political evils.”<sup>91</sup>

Despite the Framers’ concerns about direct democracy, the state initiative process has survived federal constitutional challenges for over a century.<sup>92</sup> In *Pacific States Telephone & Telegraph Co. v. Oregon*,<sup>93</sup> the Court rejected a challenge claiming that the initiative was inconsistent with the Constitution’s guarantee that states have a “Republican Form of Government,” holding instead that the enforcement of this provision was a political question for Congress.<sup>94</sup> As a result, direct democracy in the states in the form of the initiative does not in and of itself violate the federal Constitution.<sup>95</sup>

Direct democracy’s role in the federal system remains, however, a source of significant contention. As one scholar has noted: “In order for the federal constitutional dialogue to work, its debate over rights must include the voices of people. One of the great contributions of state constitutions to our system is the place they provide for these voices.”<sup>96</sup> The initiative’s critics,

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90. THE FEDERALIST NO. 63, at 384 (James Madison) (Clinton Rossiter ed., 1961).

91. Eule, *supra* note 86, at 1523 n.79.

92. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013) (noting “California’s sovereign right to maintain an initiative process”); *id.* at 2675 (Kennedy, J., dissenting) (“The essence of democracy is that the right to make law rests in the people and flows to the government . . . . Freedom resides first in the people without need of a grant from government. The California initiative process embodies these principles and has done so for over a century.”).

93. 223 U.S. 118 (1912).

94. See *id.* at 141–43, 149–51.

95. See *Hollingsworth*, 133 S. Ct. at 2667 (“Nor do we question California’s sovereign right to maintain an initiative process . . . .”); *Pac. States Tel. & Tel. Co.*, 223 U.S. at 149–51. *But see* Chemerinsky, *supra* note 86, at 301–04 (arguing that the Supreme Court’s resolution of the issue is incorrect); Linde, *supra* note 86, at 20–21 (discussing the independent obligation of state courts and officials to enforce the Republican Government clause).

96. Harry L. Witte, *Rights, Revolution, and the Paradox of*

however, consider it out of place in Madison's deliberative republic.<sup>97</sup> The *Hollingsworth* majority made no effort to account for or accommodate the initiative's distinct attributes, allowing it to sink or swim like a state fresh-water fish swimming in a federal salt-water sea.<sup>98</sup>

There is, nonetheless, one great commonality of state and federal experience with the initiative process: initiative petitions generate an enormous amount of litigation in both the state and federal courts.<sup>99</sup> As the dissenters in *Hollingsworth* explained, "185 of the 455 initiatives approved in Arizona, California, Colorado, Oregon, and Washington between 1900 and 2008 were challenged in court."<sup>100</sup> State and federal legal challenges are the rule, not the exception.<sup>101</sup> As explained above, the initiatives address controversial and important social issues that engage the passions of advocacy groups; when these advocacy groups are defeated at the polls, their litigators can be expected to raise numerous state and federal constitutional questions in court.<sup>102</sup>

The initiative provisions in state constitutions contain stringent limitations and procedures.<sup>103</sup> These constitutional controls reflect decisions by the framers of the state constitutions and the people themselves that the initiative process must be

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*Constitutionalism: The Processes of Constitutional Change in Pennsylvania*, 3 WIDENER J. PUB. L. 383, 475 (1993).

97. See Linde, *supra* note 86, at 23–24, 32–34 (providing Madison's explanation of republican government and its benefits over popular democracy).

98. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) ("[O]nce Proposition 8 was approved by the voters, the measure became 'a duly enacted constitutional amendment or statute' . . . [and] [p]etitioners have no role—special or otherwise—in the enforcement of Proposition 8.").

99. See MILLER, *supra* note 75, at 104–12 (providing initiative litigation data from the 1900s to the 1990s for the five strongest initiative states).

100. *Hollingsworth*, 133 S. Ct. at 2671 (2013) (Kennedy, J., dissenting) (citing MILLER, *supra* note 75, at 106).

101. See MILLER, *supra* note 75, at 104–05 (noting the "remarkable level of litigation" that has arisen in response to initiatives).

102. See *id.* at 108–09, 115–22 (explaining the controversial nature of many initiatives and the issues opponents bring before courts when challenging these initiatives).

103. See Kafker & Russcol, *supra* note 64, at 1287–88, 1290–94, 1306, 1310–14 (explaining procedural and subject matter limitations in the initiative process as well as single subject limitations).

properly channeled.<sup>104</sup> There are numerous legal requirements—including signature counts, accurate and impartial ballot summaries, and single-subject limitations—that are designed to ensure that initiatives have the necessary support to be placed on the ballot and voters can make informed choices on comprehensible proposals.<sup>105</sup> Some initiative provisions also exclude certain subject matter from the initiative process, such as freedom of religion and the independence of courts, acknowledging that certain rights are not appropriately addressed by direct democracy initiatives.<sup>106</sup>

The state judiciary has not shied away from deciding the legal issues raised in the initiative process, despite the inherently political nature of the process itself.<sup>107</sup> State courts have actively enforced the numerous initiative requirements, recognizing their role and responsibility as ultimate guardians of the people's right to initiate statutory and constitutional change within the existing state constitutional order.<sup>108</sup> They have recognized that at the pre-election stage they are tasked with resolving legal disputes among the proponents, opponents, and government actors involved in the implementation of the initiative.<sup>109</sup> Although not

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104. *See id.* at 1287–88 (“These requirements and limitations reflect decisions by the framers of the state constitutions and the people themselves that certain procedures must be followed to ensure that the initiative process functions as it was designed.”).

105. *See id.* at 1290–92, 1306–07 (explaining some of the legal requirements states have imposed on their initiative process and the purposes of these constraints); *cf.* James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendum*, 64 NOTRE DAME L. REV. 298, 315–16 (1989).

106. *See* Kafker & Russcol, *supra* note 64, at 1313 (“Article 48 of the Massachusetts Constitution precludes initiative provisions related to freedom of religion, religious practices, or religious institutions, and those related to judicial appointment, tenure and compensation, or the reversal of a particular judicial decision.”).

107. *See* MILLER, *supra* note 75, at 101–04 (explaining the judiciary's involvement in different aspects of the initiative process); Kafker & Russcol, *supra* note 64, at 1289 (“The state judiciary is the ultimate guardian of the procedural and substantive provisions of state constitutions, including the initiative provisions.”).

108. *See supra* note 107 and accompanying text.

109. Gordon & Magleby, *supra* note 105, at 315; Kafker & Russcol, *supra* note 64, at 1289.

the final authority on federal constitutional questions, they must often address those issues as well.<sup>110</sup>

Although the federal courts have very rarely taken up pre-election disputes, they are active participants in the initiative process once a proposal has passed.<sup>111</sup> They have had a prominent role in striking down discriminatory initiatives.<sup>112</sup> For example, the Supreme Court has overturned initiatives driven by anti-gay bias and racial prejudice.<sup>113</sup> Federal courts have also overturned initiatives violating First Amendment rights,<sup>114</sup> the due process and equal protection guarantees of the Fourteenth Amendment,<sup>115</sup> and rights of criminal defendants such as the

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110. See Kafker & Russcol, *supra* note 64, at 1289 (“The state judiciary cannot therefore just leave federal constitutional problems in the initiative process to the federal judiciary. At the same time, they are not the ultimate expositors of the meaning of the federal Constitution.”).

111. See MILLER, *supra* note 75, at 109–11 (summarizing federal court involvement in initiative litigation); Gordon & Magleby, *supra* note 105, at 304–11, 319 (“Arguably, pre-election review of a measure’s substantive validity involves issuing an advisory opinion, violates ripeness requirements and the policy of avoiding unnecessary constitutional questions, and is an unwarranted judicial intrusion into a legislative process.”); 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, 1250–59 (1997) (illustrating increased federal court involvement in California post-election initiative challenges).

112. See MILLER, *supra* note 75, at 115–17 (illustrating how the Equal Protection Clause was the second most common reason for courts invalidating initiatives).

113. See *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (concluding that a Colorado initiative was unconstitutional because it attempted to make homosexuals “unequal to everyone else”); *Reitman v. Mulkey*, 387 U.S. 369, 380–81 (1967) (affirming the invalidation of a California initiative because it authorized “racial discrimination in the housing market”).

114. See, e.g., *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (finding that a California initiative mandating a blanket primary, in which each voter’s ballot includes every candidate regardless of party affiliation, violated political parties’ First Amendment right of association); *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968) (finding an Arkansas initiative that prohibited the teaching of evolution in state schools to be a violation of First Amendment).

115. See, e.g., *Oyama v. California*, 332 U.S. 633, 647 (1948) (finding that the “Alien Land Law denies ineligible aliens the equal protection of the laws, and that failure to apply any limitations period to escheat actions under that law takes property without due process of law”); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535–36 (1925) (finding an Oregon initiative requiring all children to attend public schools violated the Fourteenth Amendment).

right to remain silent.<sup>116</sup> Federal courts have rejected numerous challenges as well.<sup>117</sup>

Standing rules, of course, govern who can engage in these numerous disputes and in what capacity they can participate.<sup>118</sup> Standing may also determine at what stage and in what court—trial or appellate, federal or state—the winner may be determined, and, finally, who that winner may be regardless of the ultimate merits.<sup>119</sup> Given the importance of what is at stake in the initiative process, these standing rules matter considerably. As will be discussed below, the state and federal courts' decisions on standing reflect not just their conception of the principles of justiciability, but also the purpose and place of the initiative process in their respective constitutional schemes.

#### *IV. Standing in State Court*

##### *A. General Principles*

Standing in state courts is governed by a different set of constraints and considerations than those limiting and guiding the federal courts. First and foremost, the states are not bound by Article III.<sup>120</sup> This is true regardless of whether the state court is considering a state or federal question.<sup>121</sup> This is particularly

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116. See *Griffin v. California*, 380 U.S. 609, 615 (1965) (“We . . . hold that the Fifth Amendment . . . forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt.”).

117. See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 454 (2008) (denying facial challenge to Washington initiative modifying primary voting system); *Lockyer v. Andrade*, 538 U.S. 63, 76–77 (2003) (rejecting claim that state sentence under California’s Career Criminal Punishment Act was a constitutional violation); *Crawford v. Bd. of Educ. of L.A.*, 458 U.S. 527, 545 (1982) (rejecting claim that voter initiative reducing busing of minority students was constitutional violation); *Bates v. Jones*, 131 F.3d 843, 847 (9th Cir. 1997) (holding that California initiative limiting terms for state legislators was not constitutional violation).

118. *Supra* notes 31–35 and accompanying text.

119. *Supra* notes 31–76 and accompanying text.

120. See *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“We have recognized often that the constraints of Article III do not apply to state courts . . .”).

121. See *id.* (“[T]he state courts are not bound by the limitations of a case or

important because most state constitutions do not contain standing provisions comparable to Article III's case and controversy requirement.<sup>122</sup> And given that state constitutions are more readily amended, including by the initiative in eighteen states,<sup>123</sup> general principles of standing can be relaxed or altered when necessary.<sup>124</sup>

Although state courts tend to be attuned to separation of powers concerns, they have generally upheld standing whenever the legislature or initiative process has provided for it.<sup>125</sup> State judges typically have not found a state constitutional standing requirement, injury in fact or otherwise, that overrides a grant of standing by the legislature or by the people acting through the initiative.<sup>126</sup> Thus, at least when statutes authorize private

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controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute.”).

122. See, e.g., *Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 693–94 (Mich. 2010) (explaining the standing requirements in Michigan's constitution and their differences from federal standing requirements); *Kellas v. Dep't of Corr.*, 145 P.3d 139, 142–43 (Or. 2006) (“The Oregon Constitution contains no ‘cases’ or ‘controversies’ provision.”); cf. *Grossman v. Dean*, 80 P.3d 952, 959 (Colo. App. 2003) (“Although federal decisions may be considered for guidance, we are ultimately governed here by state principles of standing, rather than the federal principles created by Article III of the United States Constitution . . . .”); *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994) (“[T]he doctrine of standing certainly exists in Florida, but not in the rigid sense employed in the federal system.”).

123. See WATERS, *supra* note 56, at 12 (noting that eighteen states allow constitutional amendment initiatives).

124. See *Waterford Sch. Dist. v. State Bd. of Educ.*, 296 N.W.2d 328, 330–31 (Mich. Ct. App. 1980) (applying initiative amendment that went beyond common law and statutes in expanding standing in taxpayer actions).

125. See, e.g., *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 829 (Mo. 1990) (“The statute authorizing injunctive relief permits ‘any citizen’ to bring the action. . . . Plaintiffs are not required to show any particular harm.”); *City of Middletown v. Ferguson*, 495 N.E.2d 380, 384 (Ohio 1986) (“Appellants claim the city has no standing because its rights have not been adversely affected by the ordinance. . . . We believe that appellants have overlooked the fact that standing may also be conferred by statute.”); *Ellis v. Roberts*, 725 P.2d 886, 889 (Or. 1986) (applying standing statute written so broadly that “any registered voter—and probably others,” over a million people, would have standing).

126. See, e.g., *Waterford Sch. Dist.*, 296 N.W.2d at 330–31 (upholding initiative meant to lessen standing requirement in taxpayer suits); *City of Middletown*, 495 N.E.2d at 384 (upholding statutory grant of standing to challenge initiative).

enforcement of public rights by taxpayers, citizens, or private attorneys general, state courts have permitted such actions to proceed.<sup>127</sup> Those states that have enforced injury in fact requirements comparable to Article III have usually done so in the absence of express legislative provisions for standing.<sup>128</sup> Finally, the state courts have retained the authority to overlook standing problems in unusual cases, which arise frequently in the initiative context.<sup>129</sup>

The state courts in initiative states combine these standing principles with a firm commitment to carrying out the fundamental purpose of the initiative process.<sup>130</sup> These courts protect the people's right to use that process to direct statutory and constitutional change in the face of government indifference or opposition.<sup>131</sup> They have not left the defense of initiative

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127. See, e.g., CAL. CIV. PROC. CODE § 526a (West 2013) (recognizing taxpayer standing); *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5, 17 (Cal. Ct. App. 2001) (“In particular, there are two related rules of standing applicable in state court actions that are contrary to the rules in federal court—the right to maintain an action as a taxpayer . . . and the right to maintain an action as a citizen.”); *Colo. State Civil Serv. Emp. Ass’n v. Love*, 448 P.2d 624, 627 (Colo. 1968) (holding that petitioners, as taxpayers, had standing to “challenge statutory provisions which involve reorganization of [Colorado’s] state government”). See generally John DiManno, Note, *Beyond Taxpayers’ Suits: Public Interest Standing in the States*, 41 CONN. L. REV. 639 (2008).

128. Cf. *City of Middletown*, 495 N.E.2d at 384 (“Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends on whether the party has alleged a personal stake in the outcome . . .”).

129. See, e.g., *Grossman v. Dean*, 80 P.3d 952, 959 (Colo. App. 2003) (finding that plaintiff, as House Minority Leader and sponsor of the bill in question, had standing to pursue action for declaratory judgment with respect to that bill); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1081 (Ohio 1999) (noting that federal standing analysis applies in “the vast majority of cases” but that “the federal decisions in this area are not binding upon this court, and we are free to dispense with the requirement for injury where the public interest so demands”).

130. See, e.g., *Perry v. Brown*, 265 P.3d 1002, 1024 (Cal. 2011) (“[P]articipation by the official initiative proponents enhances both the substantive fairness and completeness of the judicial evaluation of the initiative’s validity and the appearance of procedural fairness that is essential if a court decision adjudicating the validity of a voter-approved initiative measure is to be perceived as legitimate . . .”).

131. See *id.* (explaining that standing for the official proponents of an initiative “often is essential to ensure that the interests and perspective of the voters who approved the measure are not consciously or unconsciously subordinated to other public interests that may be championed by elected

statutes to government officials alone, even in the absence of express provisions regarding the defense of initiatives after passage.<sup>132</sup>

*B. Standing in the Initiative Process: Pre-election Standing  
Expressly Provided by Statute*

The laws governing the initiative process in each state often anticipate challenges by proponents and opponents of the initiative, providing guidance on where, when, and by whom such challenges may be brought.<sup>133</sup> Other states rely on generally applicable election statutes, alone or in combination with initiative-specific provisions, to define standing regarding initiatives.<sup>134</sup> Where standing is expressly provided either to

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officials”).

132. *See* *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 912–14 (Alaska 2000) (determining that proponents of initiative had standing because “when the people of a state have reserved the power of direct legislation, those who take responsibility for that direct legislation may have a sufficient interest” to satisfy standing requirements). *See also Perry*, 265 P.3d at 1018

[S]ince the adoption of the initiative power a century ago, decisions of both this court and the Courts of Appeal have repeatedly and uniformly permitted the official proponents of initiative measures to participate as parties . . . in both preelection and postelection litigation challenging the initiative measure they have sponsored.

*Sportsmen for I-143 v. Mont. Fifteenth Judicial Dist. Court*, 40 P.3d 400, 403 (Mont. 2002) (“[T]he Sportsmen’s Groups were the authors, sponsors, active supporters and defenders of I-143. Accordingly, we conclude that the Sportsmen’s Groups have a direct, substantial, legally protectable interest in the instant action challenging the interpretation of I-143, and, as such, they are entitled to intervene as a matter of right.”).

133. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 12-921, 19-122 (2013) (providing standing to proponents of ballot initiatives in both post-election and pre-election actions); MO. REV. STAT. § 116.200 (2013) (providing “any citizen” standing to challenge, in Cole County court, secretary of state’s certification of initiative petition as valid or invalid); NEB. REV. STAT. §§ 32-1410(3), 32-1412 (2012) (providing that “any resident” can challenge, in Lancaster County, a refusal by the secretary of state to place an initiative on the ballot); OKLA. STAT. tit. 34, §§ 8, 10, 18 (2013) (setting out process for ballot initiatives and providing that if any state official has failed to perform a duty in relation to the initiative process, “any elector may petition the district court, without cost to him, where any such officer has his official residence”).

134. *See, e.g.*, MICH. COMP. LAWS § 168.479 (2013) (providing standing to “[a]ny person or persons, feeling themselves aggrieved”); OR. REV. STAT. §§ 246.910, 250.044, 250.085, 250.131 (2013) (providing broad standing

proponents or to any voter, person, or citizen, the courts have generally<sup>135</sup> steadfastly respected the grant of standing.<sup>136</sup> This is consistent with the state courts' respectful deference to the

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requirements for election challenges, such as any "person adversely affected" and "[a]ny elector dissatisfied with a ballot title").

135. We are aware of only one state, Idaho, where the courts have refused to accept a legislative grant of standing in pre-election litigation. *See Noh v. Cenarrusa*, 53 P.3d 1217, 1218–19 (Idaho 2002) (denying petitioners' pre-election initiative challenge for lack of standing despite legislative grant to "any qualified elector"). However, although the *Noh* case discussed standing, later cases made clear that the Idaho Supreme Court was motivated by an overriding concern for having the people's voices heard at the ballot box before the courts would intervene. *See City of Boise v. Keep the Commandments Coal.*, 141 P.3d 1123, 1125–26 (Idaho 2006) (finding that allowing pre-election challenge to ballot initiative "may prevent the voters from articulating a view by the ballot that could be instructive to the legislative authority, whichever way the votes are cast"); *Davidson v. Wright*, 151 P.3d 812, 816–17 (Idaho 2006) (explaining that pre-election challenges to ballot initiatives are only appropriate when "the procedures for placing the initiative on the ballot were not followed"). The core holding of *Noh* and its progeny was therefore based on ripeness—a concern for *when* a case would be heard rather than *who* could bring it. *See Noh*, 53 P.3d at 1219, 1222 (concluding that, before an initiative was voted on, "[a]ny injury suffered is speculative" and that there would be a "justiciable controversy" only "if the initiative passes"). Two years earlier, the same court had stretched to find voter standing in a post-election challenge to a term limits initiative, holding that the opponents had demonstrated a distinct injury "different from the injury suffered by any other Idaho citizen" because the term limit provision "adversely impacts only those registered voters who oppose the term limits pledge," while supporters of term limits were not injured. *Van Valkenburgh v. Citizens for Term Limits*, 15 P.3d 1129, 1133 (Idaho 2000). That court continues to cite *Van Valkenburgh* as good law. *See Wasden v. State Bd. of Land Comm'rs*, 280 P.3d 693, 697 (Idaho 2012) (citing *Van Valkenburgh* to explain Idaho's standing doctrine).

136. *See, e.g., In re Proposed Initiative Measure No. 20*, 774 So. 2d 397, 402 (Miss. 2000) ("As qualified electors and taxpayers of the State of Mississippi, the appellees in this case had standing to assert their claims questioning the sufficiency of Initiative Measure No. 20."), *overruled on other grounds by* *Speed v. Hosemann*, 68 So. 3d 1278 (Miss. 2011); *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 829 (Mo. 1990) ("The statute authorizing injunctive relief permits 'any citizen' to bring the action. . . . Plaintiffs are not required to show any particular harm."); *State ex rel. Wenzel v. Murray*, 585 P.2d 633, 638 (Mont. 1978) ("The relator as a taxpayer, property owner and elector, has standing to sue to prevent the waste of public monies . . ."); *Ellis v. Roberts*, 725 P.2d 886, 889 (Or. 1986) ("[The statute] requires only that a person be 'adversely affected' before he can bring an action challenging an election ruling of the Secretary of State. In effect, this means that any registered voter—and probably others, as well—can file an action."). *But cf. In re Initiative Petition No. 363*, 927 P.2d 558, 565 (Okla. 1996) (mentioning standing issues in discussion noting lack of justiciability of particular substantive claims).

legislative standing provisions in other areas, including those allowing taxpayer or private attorney general suits.<sup>137</sup>

This deference to the legislature is considered consistent with, and not contrary to, the separation of powers, as the legislature has expressly provided for legal challenges and determined who has standing to bring those challenges.<sup>138</sup> On the state side, deference to the legislature's broad authorization of standing is not considered as interfering with executive branch decision-making; this heightened federal concern, discussed in Part V, is foreign to state standing law.<sup>139</sup> Also, unlike federal courts, which have limited jurisdiction only as permitted by Article III, state courts have general jurisdiction unless otherwise limited.<sup>140</sup> Finally, these generous statutory standing rules allow the people to participate as fully as possible in the people's process for initiating legislative or constitutional change.

### *C. Pre-election Standing for Proponents Absent Express Standing Provision*

In many states, nothing in the state constitution or laws explicitly confers standing for pre-election disputes, even for petitioners.<sup>141</sup> Prior to passage, however, they are the primary

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137. Cf. Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1277–78 (1961) (explaining the history of the taxpayer suit and the recent judicial trend of “favoring them”); Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1406–07 (1988) (describing the historical significance of standing doctrines that provide general standing to the population in order to further a particular policy goal).

138. See *supra* note 136.

139. *Infra* Part V.

140. See, e.g., *Allen v. Wright*, 468 U.S. 737, 750–52 (1984); *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994) (“Florida’s circuit courts . . . have authority over any matter not expressly denied them by the constitution or applicable statutes. Accordingly, the doctrine of standing certainly exists in Florida, but not in the rigid sense employed in the federal system.”); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1081 (Ohio 1999) (“[T]he federal decisions in this area are not binding upon this court, and we are free to dispense with the requirement for injury where the public interest so demands.”).

141. For instance, in Nevada, the statute governing initiative challenges is written in the passive voice, stating when and in what courts initiatives “may be

actors in the initiative process, asserting their statutory and constitutional rights to propel the process forward.<sup>142</sup> They therefore have special authority concerning the initiative,<sup>143</sup> an authority that must include defending the initiative against legal challenge while the pre-election process plays out. Their full participation is particularly necessary in the face of government indifference and opposition, which are expected parts of the initiative process.<sup>144</sup> Their standing rights in the early stages are necessarily implied by the very structure of the initiative process itself, even in the absence of express statutory standing.<sup>145</sup> Given their defined role as parties to the initiative process, there is universal recognition, at least pre-election, that they have standing whenever judicial review is permitted.<sup>146</sup> Even the Roberts majority does not seem to doubt proponents' special role and concrete pre-election interest in defending the initiative.<sup>147</sup>

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challenged," but not specifying who may bring such challenges. NEV. REV. STAT. § 295.061 (2012). The Nevada Supreme Court has applied the provision broadly, entertaining challenges by "interested persons and Nevada registered voters," *Personhood Nev. v. Bristol*, 245 P.3d 572, 573 (Nev. 2010); "numerous business entities," *Rogers v. Heller*, 18 P.3d 1034, 1036 (Nev. 2001); and a "political action committee," *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 293 P.3d 874, 877 (Nev. 2013).

142. *Perry v. Brown*, 265 P.3d 1002, 1016 (Cal. 2011).

143. *See, e.g.*, MASS CONST. art. LXXXI, § 3 (stating that proponents may make limited amendments to initiatives in some circumstances); CAL. ELEC. CODE § 9032 (West 2013) (providing that only proponents may file petitions); *id.* § 9067 (providing that proponents have priority in submitting arguments for voter guide); OR. REV. STAT. § 250.045(5) (2013) (providing that the "chief petitioner" may amend the initiative in certain circumstances).

144. *See* MILLER, *supra* note 75, at 23–28; Kafker & Russcol, *supra* note 64, at 1283, 1300–03 (describing an "unresponsive government" and an intentionally noncompliant legislature as expected parts of the initiative system).

145. *Perry*, 265 P.3d at 1020–21, 1023–24.

146. *Cf. id.* at 1017 (referencing the relevant sections of the California Elections Code, which grant to the official proponents myriad powers and responsibilities).

147. *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2012) (confirming that petitioners were "official proponents" entitled to the exclusive right to file an initiative with election officials and to control arguments that would appear in ballot pamphlets in favor of the initiative).

*D. Pre-election Standing for Other Supporters*

Supporters who are not official proponents fall into a different category. Absent express statutory recognition, it is not clear why they should have standing or the mandatory right to intervene.<sup>148</sup> They have not accepted or been granted the official responsibilities or authority of petitioners.<sup>149</sup> Proponents should have the necessary constitutional or statutory status, as well as the knowledge and incentives, to defend the initiative, with or without the assistance of other supporters.<sup>150</sup> Allowing standing for all supporters creates a danger of a chaotic cacophony of litigants.<sup>151</sup> Absent legislative requirements to that effect, such indiscriminate standing should be avoided.

Instead, the standards of permissive intervention allow the courts to ensure all voices are heard within a manageable process.<sup>152</sup> The rules governing such intervention are often similar to Federal Rule of Civil Procedure 24(b), which allows “anyone” to intervene in an action if he or she “has a claim or defense that shares with the main action a common question of law or fact.”<sup>153</sup> The court, however, has discretion to allow or deny intervention and specifically may balance a would-be intervenor’s interests against the potential for delay or prejudice to the rights of the parties.<sup>154</sup> This discretion enables the court to allow a

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148. See *Alaskans for a Common Language v. Kritz*, 3 P.3d 906, 916 (Alaska 2000) (denying that nonofficial proponents have any interest “greater than a generalized interest of a political nature”).

149. See *id.* at 914 (“The record fails to show . . . that [unofficial proponent’s] directors, officers, or incorporators were sponsors of the initiative . . .”).

150. See *id.* at 912–14 (discussing the “sufficient interest” that proponents must have to justify intervention); *Perry v. Brown*, 265 P.3d 1022, 1022–24 (Cal. 2011) (same).

151. See *Alaskans for a Common Language*, 3 P.3d at 914, 916 (warning against the procedural difficulties of considering every point of view offered by the “interested” public).

152. See *id.* at 916 (implying that the absence of such standards may invite “undue delay and prejudice”).

153. FED. R. CIV. P. 24(b)(1)(B); see also, e.g., *Alaskans for a Common Language*, 3 P.3d at 916 n.45 (“[A]ny person who has an interest in the matter in litigation may, by leave of court, intervene.” (citing ALASKA CIV. R. 24(b))); OR. R. CIV. P. 33(B)).

154. See FED. R. CIV. P. 24(b)(3) (“In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication . . .”).

range of participation: when supporters would add something material to the proceedings, they may be made parties by intervention; otherwise, they may be limited to providing assistance to the existing parties or to filing amicus briefs.<sup>155</sup> The proponents, opponents, and government officials together ensure robust advocacy and a justiciable controversy. To the extent that the court finds other supporters' voices relevant or helpful, they may be heard as well.<sup>156</sup> In the absence of a statute or constitutional provision to the contrary, it is not critical to the initiative process that supporters be given a greater right to join in the proceedings beyond permissive intervention.

#### *E. Pre-Election Standing of Opponents*

Generally, the standing of opponents is defined broadly by statute.<sup>157</sup> Although their rights may differ statutorily from proponents,<sup>158</sup> they also have an important role in ensuring that government officials perform their numerous responsibilities overseeing the initiative process—including reviewing signature counts, providing fair and impartial ballot summaries, and excluding initiatives regarding prohibited subject matter.<sup>159</sup> As the initiative process is guided by the idea that government officials cannot always be relied on to do the people's business, opponents must have an ability to force government action as

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155. See *Alaskans for a Common Language v. Kritz*, 3 P.3d 906, 916 (Alaska 2000) (“We recognize that ‘additional parties are always the source of additional questions, briefs, objections, arguments and motions, [and] where no new issues are presented, the most effective and expeditious way to participate is by a brief amicus curiae and not by intervention.’” (quoting *State v. Weidner*, 684 P.2d 103, 114 (Alaska 1984))).

156. *State v. Weidner*, 684 P.2d 103, 114 (Alaska 1984).

157. See, e.g., MISS. CODE ANN. § 23-17-13 (2013) (asserting that “any person” may appeal ballot title and summary); MO. REV. STAT. §116.200(1) (2012) (asserting that “any citizen” can challenge sufficiency or insufficiency of petition); NEB. REV. STAT. § 32-1412(1)–(2) (2012) (using “any resident”); OKLA. STAT. tit. 34, § 8(B) (2013) (using “any citizen or citizens of the state”).

158. See *Schrempp v. Munro*, 809 P.2d 1381, 1384–85 (Wash. 1991) (discussing differing rights of proponents and opponents in the initiative process).

159. Cf. *Kafker & Russcol*, *supra* note 64, at 1294–1316 (discussing government officials' responsibilities during the initiative process).

well.<sup>160</sup> Accordingly, mandamus and similar proceedings allow opponents to bring legal issues before the courts pre-election in many states.<sup>161</sup> Mandamus itself applies when executive officials fail to perform express ministerial responsibilities,<sup>162</sup> but some states have provided for more robust judicial review of particular decisions, such as the wording of ballot titles and summaries.<sup>163</sup> In these areas, officials may have room to impact the voters' reception of an initiative, but the state courts act to ensure that the officials do not improperly influence the result by misleading the electorate.<sup>164</sup> Even if courts require some showing of injury for opponent standing, they apply the principle much more liberally than federal courts. State courts have diminished standing requirements for opponents by finding an injury to individual voters in avoiding misleading or illegal uses of the initiative, or an interest by individual taxpayers in avoiding the expenditure of tax money on holding an election for a potentially invalid measure.<sup>165</sup> Thus, to the extent that state courts will hear pre-

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160. See Miller, *supra* note 77, at 1039–44 (asserting the importance of the opponents to an initiative's voices).

161. See, e.g., *McFadden v. Jordan*, 196 P.2d 787, 788–90 (Cal. 1948) (“[T]he measure may not properly be submitted to the electorate until . . . the writ [of mandamus] sought by the petitioner should issue. Mandamus is a proper remedy.”).

162. See Jeremy Zeitlin, Note, *Whose Constitution Is It Anyway? The Executives' Discretion to Defend Initiatives Amending the California Constitution*, 39 HASTINGS CONST. L.Q. 327, 336 (2011) (“Indeed the most venerable of all American opinions, *Marbury v. Madison*, held that a court may only issue a writ of mandamus to compel action . . .”).

163. See, e.g., COLO. REV. STAT. § 1-40-107 (2013) (“If the motion claims that the title and submission clause set by the title board are unfair . . .”).

164. See Josh Goodman, *Fate of Ballot Measures Often Depends on the Wording*, STATELINE (Mar. 9, 2012), <http://www.pewstates.org/projects/stateline/headlines/fate-of-ballot-measures-often-depends-on-the-wording-85899377387> (last visited Aug. 21, 2013) (discussing numerous examples of state legislatures creating misleading wording in an effort to affect the outcome of the initiative's vote) (on file with the Washington and Lee Law Review); see also Fairness & Accountability in Ins. Reform v. Greene, 886 P.2d 1338, 1346–49 (Ariz. 1994) (distinguishing between a truly neutral explanation of an initiative on the ballot and an explanation that is “fair” but nonetheless argumentative); *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984) (holding that ballot summary that addresses only one of three included provisions is “fatally misleading”); *In re Initiative Petition No. 360*, 879 P.2d 810, 820 (Okla. 1994) (holding that ballot title was misleading and thus in error).

165. See, e.g., *Tax Equity Alliance for Mass. v. Comm'r of Revenue*, 516 N.E.

election challenges to initiatives,<sup>166</sup> they typically impose as few restrictions on standing for opponents as they impose on proponents.<sup>167</sup> Standing has been generously, and we believe appropriately, allowed to ensure a level playing field in the initiative process.

### *F. Post-Election Standing for Petitioners*

As explained above, Article III requirements do not apply to state courts.<sup>168</sup> There is more deference to the legislature, a greater willingness to authorize private enforcement of public rights, and almost no tendency to treat injury in fact requirements as the overriding consideration.<sup>169</sup> So how should these state standing principles apply post-election?

Although express provisions addressing post-passage defense of initiatives—particularly who can step in when the government declines to defend an initiative—have not generally been included in the state laws governing initiatives prior to *Hollingsworth*,<sup>170</sup> they should be included prospectively for a number of reasons. First and foremost, without such provisions, proponents are

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2d 152, 154–55 (Mass. 1987) (“Certainly the individual plaintiffs as citizens and qualified voters have standing to raise a challenge to the use of the initiative process.”); *State ex rel. Wenzel v. Murray*, 585 P.2d 633, 638 (Mont. 1978) (“The relator as a taxpayer, property owner and elector, has standing to sue to prevent the waste of public monies . . .”).

166. See Gordon & Magleby, *supra* note 105, at 302–17 (discussing parameters and limitations of appropriate pre-election review).

167. See *supra* note 157.

168. See *supra* Part IV.A.

169. See *supra* Part IV.A–B (delineating the restrictions and freedoms facing state courts in hearing initiative challenges).

170. *But see* ARIZ. REV. STAT. § 12-921(A) (2013) (explicitly conferring standing and a right to intervene on official initiative proponents). This statute was passed as a response to the emergence of the standing issue in the Proposition 8 litigation. See CTR. FOR ARIZ. POLICY, FAMILY ISSUE FACT SHEET: NO. 2012-05 (Jan. 2012), <http://blog.azpolicy.org/wp-content/uploads/f12-05-RightofIntervention-Initiative-Referendum.pdf> (confirming that Arizona Section 12-921(A) was proposed and passed as a direct response to the California situation created by Proposition 8). At least one initiative has also explicitly granted standing to proponents. See *Van Valkenburgh v. Citizens for Term Limits*, 15 P.3d 1129, 1132 (Idaho 2000) (interpreting initiative petition that explicitly conferred standing on proponents).

unlikely to satisfy strict Article III standing requirements in federal court if state officials ordinarily expected to defend the state's laws decide to drop the defense.<sup>171</sup> Second, under state constitutional law, there is great deference to express authorization of standing,<sup>172</sup> so post-passage defense provisions should be respected by the state courts. Third, it is not an unexpected problem for government officials to decline to defend controversial initiatives.<sup>173</sup> There is no reason not to anticipate and address the problem.

If such post-election defense rights are not expressly provided, what rights should private parties, including proponents, have to defend an initiative in state courts? As explained by the California Supreme Court, proponents have a unique relationship to the initiative.<sup>174</sup> They have proposed, funded, and defended the initiative against legal challenges.<sup>175</sup> They have successfully reached out to the people.<sup>176</sup> They have often done so in the face of opposition or indifference from state officials.<sup>177</sup> So what should their status be post-passage? We conclude, as have the few state courts to directly consider the issue, that they should at least have the right to intervene.<sup>178</sup> We

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171. See *infra* Part V (discussing proponents' standing in federal court).

172. See *supra* Part IV.B.

173. See *Perry v. Brown*, 265 P.3d 1002, 1005, 1022–23 (Cal. 2011) (referencing instances when government officials have declined to defend controversial initiatives); Zeitlin, *supra* note 162, at 340–43, 352–54 (same); see also Juliet Eilperin, *State Officials Balk at Defending Laws They Deem Unconstitutional*, WASH. POST (July 18, 2013), [http://www.washingtonpost.com/politics/state-officials-balk-at-defending-laws-they-deem-unconstitutional/2013/07/18/14cf86ce-ee2b-11e2-9008-61e94a7ea20d\\_story.html](http://www.washingtonpost.com/politics/state-officials-balk-at-defending-laws-they-deem-unconstitutional/2013/07/18/14cf86ce-ee2b-11e2-9008-61e94a7ea20d_story.html) (last visited Oct. 20, 2013) (suggesting that officials are declining to defend controversial laws more frequently than ever before) (on file with the Washington and Lee Law Review); cf. Maggie Clark, *Attorneys General Prepare to Defend Controversial Laws*, STATELINE (May 17, 2013), <http://www.pewstates.org/projects/stateline/headlines/attorneys-general-prepare-to-defend-controversial-laws-85899476891> (last visited Oct. 20, 2013) (noting that legislators in Arkansas and Montana are considering bills that would provide the legislature with express standing rights when the attorney general declines to defend their state's law in court) (on file with the Washington and Lee Law Review).

174. *Perry*, 265 P.3d at 1024.

175. *Id.* at 1015.

176. *Id.* at 1013.

177. *Id.* at 1008.

178. See *id.* at 1023–24 (giving proponents the right to intervene); Alaskans

also conclude that they should have standing to defend the initiative if the government declines to defend it.

An excellent introduction into the issues regarding post-passage intervention for petitioners appears in *Alaskans for a Common Language v. Kritz*,<sup>179</sup> a case relied on by the California Supreme Court and the dissenters in *Hollingsworth*.<sup>180</sup> According to Alaska's initiative laws, an application must be signed by 100 sponsors and include three sponsors to be designated an initiative committee to represent the sponsors and subscribers.<sup>181</sup> In the Alaska case, two organizations, one of which (Alaskans for a Common Language) had been formed by sponsors of the initiative serving on the initiative committee, sought to intervene to defend the constitutionality of an initiative petition that had passed requiring the adoption of English as the official language in the state.<sup>182</sup> Prior to passage of the initiative, the attorney general's office had raised questions regarding the constitutionality of the initiative but recommended that the initiative be certified and placed on the ballot.<sup>183</sup> After passage, the attorney general's office agreed to defend the initiative.<sup>184</sup> The Governor, who was a

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for a Common Language v. Kritz, 3 P.2d 906 (Alaska 2000) (same); Sportsmen for I-143 v. Mont. Fifteenth Judicial Dist. Court, 40 P.3d 400 (Mont. 2002) (same).

179. 3 P.3d 906 (Alaska 2000).

180. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2670 (2013) (Kennedy, J., dissenting); *Perry v. Brown*, 265 P.3d 1002, 1031–33 (Cal. 2011).

181. See *Alaskans for a Common Language*, 3 P.3d at 909 n.2 (citing to Article I of the Alaska Constitution and Section X of Alaska Statutes).

182. See *id.* at 909–10 (“After the superior court consolidated the two cases, *Alaskans for a Common Language* and *U.S. English* moved to intervene . . .”). Because two members of the initiative committee were officers and members of *Alaskans for a Common Language*, the court treated the group as their representative rather than analyzing its standing in its own right. See *id.* at 912–13, 915–16 n.43 (“Because we decide that *Alaskans for a Common Language* has a right to participate as a party to represent the interests of [two officers and members], we do not need to decide whether the organization, standing alone, could intervene to represent the broader interest of its Alaskan membership.”).

183. See *id.* at 909 (“[The Attorney General's office] noted that . . . the proposed Alaska initiative [could be found] unconstitutional, but . . . concluded that the outcome was not so certain that certification should be denied.”).

184. *Id.* at 910.

named defendant, had personally and publicly opposed the measure, calling it “unnecessary, unfair and unfortunate.”<sup>185</sup>

After a state trial court denied intervention to the two organizations, the Alaska Supreme Court reversed in part, concluding that the sponsors of the initiative, including Alaskans for a Common Language, had the right to intervene under Alaska’s rule regarding intervention as of right.<sup>186</sup> According to Alaska Rule of Civil Procedure 24(a), intervention as of right shall be allowed

when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.<sup>187</sup>

The Alaska rule tracks the language of Federal Rule of Civil Procedure 24(a).<sup>188</sup>

The court reasoned that “[i]f the initiative were declared unconstitutional . . . the efforts of [the sponsors] . . . would be frustrated.”<sup>189</sup> As those sponsors “used the process of direct legislation to enact a law that the executive branch questioned and opposed,” they also had legitimate reasons for “wanting to guarantee that the initiative is defended zealously” and “trying to ensure that the credibility of institutional arguments in favor of the initiative is not diminished by the previous comments from the executive branch.”<sup>190</sup> The court also noted that the attorney

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185. *Id.*

186. *See id.* at 916 (“Therefore, Alaskans for a Common Language meets the requirements for associational standing . . .”). The court did, however, affirm the denial of intervention as to a national group that provided funding and support but was not a sponsor of the initiative, as the standards for permissive intervention applied to this decision, and the trial court did not abuse its discretion. *Id.* at 916. (“Because the superior court concluded that U.S. English failed to raise any new issues, we hold that the superior court did not abuse its discretion when it denied U.S. English permissive intervention but allowed it to participate as an *amicus curiae*.”).

187. ALASKA R. CIV. P. 24(a).

188. FED. R. CIV. P. 24(a).

189. *Alaskans for a Common Language v. Kritz*, 3 P.3d 906, 913 (Alaska 2000).

190. *Id.* at 914.

general's office did not oppose intervention, recognizing that the sponsors "had an interest, that [they were] uniquely qualified to raise arguments about the intent of the initiative, and that [they] might offer a different perspective that should be heard by the court."<sup>191</sup>

The court also addressed the issue of adequate representation of interests, concluding that it would "presume that the Attorney General's office would not fail to defend the constitutionality of the initiative energetically . . . and . . . that the governor would not interfere," but finding that there was, nonetheless, a sufficient appearance of adversity on the part of the government to justify intervention on the part of the sponsors.<sup>192</sup> The court explained: "Every strategic decision made by the Attorney General's Office in defending the legislation might be publicly questioned and second-guessed by the initiative's sympathizers. That this suspicion may be unfounded does not make it less inevitable."<sup>193</sup> The court concluded that "a sponsor's direct interest in legislation enacted through the initiative process and the concomitant need to avoid the appearance of adversity will ordinarily preclude courts from denying intervention as of right to a sponsoring group."<sup>194</sup> A similar result, with less explicit analysis, was reached by the Montana Supreme Court in an analogous case.<sup>195</sup> And the

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191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *See generally* Sportsmen for I-143 v. Mont. Fifteenth Judicial Dist. Court, 40 P.3d 400 (Mont. 2002). The Montana initiative proposed a prohibition of the shooting of alternative livestock for a fee. *Id.* at 401. After passage of the initiative, alternative game farmers challenged the initiative, and the sportsmen's groups, who were "the authors, sponsors, active supporters and defenders" of the initiative, sought intervention. *Id.* A district court denied intervention, concluding that the sportsmen's groups "did not have a legally protectable interest in either the property (alternative livestock) or the lawful business transactions." *Id.* at 402. The Montana Supreme Court reversed, summarily concluding that "the [s]portsmen's [g]roups have a direct, substantial, legally protectable interest in the instant action . . . and, as such, they are entitled to intervene as a matter of right." *Id.* at 402. The court also concluded that the sportsmen's groups demonstrated that their interests were not adequately represented by an existing party, the Department of Fish, Wildlife and Parks. *Id.* at 402. The court simply concluded that the sportsmen's groups "who actively drafted and supported [the initiative] may be in the best

California Supreme Court in its Proposition 8 decision, though not relying on intervention as of right, approved of the Alaska and Montana precedents and endorsed the California courts' "uniform practice" of allowing proponents to participate as parties in litigation challenging initiatives.<sup>196</sup>

We conclude that the intervention as of right approach adopted by the Alaska Supreme Court is well-considered and should be the default rule for proponents in state courts who seek to intervene to defend an initiative after its passage. Their extensive "efforts" as official sponsors, supporters, and defenders provide them with an interest in the initiative—an interest that, at least under state law, may be considered distinct from that of the general public and of other supporters, even after passage.<sup>197</sup> Although there is a presumption of adequate government representation, in the initiative context that presumption should be dispelled by even the appearance of adversity of interest by the government.<sup>198</sup> The initiative process is driven too strongly by

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position to defend their interpretation of the resulting legislation." *Id.*

196. *Perry v. Brown*, 265 P.3d 1002, 1023 (Cal. 2011).

197. *See Alaskans for a Common Language v. Kritz*, 3 P.3d 906, 913 (Alaska 2000) ("This heightened, constitutionally based, and statutorily bolstered interest is a direct, substantial and significantly protectable interest." (internal quotation and citation omitted)). It is unclear whether federal courts would consider this interest sufficient to justify intervention as of right because the courts have split on whether or not the bar for such intervention is identical to the injury requirement for Article III standing. *See Diamond v. Charles*, 476 U.S. 54, 68 n.21 (1986) ("The Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing."); *Prete v. Bradbury*, 438 F.3d 949, 955 n.8 (9th Cir. 2006) (describing the diverse positions the Courts of Appeals have taken on the standing issue). Federal courts do not consider this interest to rise to the level justifying independent standing under Article III. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662–63 (2013) ("We have repeatedly held that . . . a generalized grievance, no matter how sincere, is insufficient to confer standing." (internal quotation and citation omitted)).

198. *See Alaskans for a Common Language*, 3 P.3d at 913–14 ("[Presumption of adequate government representation] may be rebutted and inadequate representation may be proved by a showing of collusion, adversity of interest, possible nonfeasance, or incompetence."). As with the impartiality of courts, even the appearance of bias or conflict of interest undermines public confidence in the initiative process. *See In re Murchison*, 349 U.S. 133, 136 (1955) ("[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954))); *Commonwealth v. Morgan RV Resorts, LLC*, 992 N.E.2d 369, 375 (Mass. App. Ct. 2013) ("In order to preserve and protect the integrity of the judiciary and the

concerns about the indifference and opposition of government officials to be left completely in those same hands to defend. Otherwise, the purpose of the initiative process, and the public's confidence in government itself, is undermined. Finally, allowing intervention as of right by proponents recognizes that they bring distinct knowledge and different perspectives to bear about the initiative's language and purpose, information which may be valuable to the court as it addresses the legal challenges.<sup>199</sup> As the California Supreme Court stated, intervention by proponents

finds support in numerous cases in which official initiative proponents advanced many of the most substantial legal theories that were raised in support of the challenged measure and were discussed in this court's opinion . . . . These decisions highlight the different perspectives regarding the validity or proper interpretation of a voter-approved initiative measure often held by the official proponents of the initiative measure and by the voters who enacted the measure into law, as contrasted with those held by the elected officials who ordinarily defend challenged state laws.<sup>200</sup>

We agree with these courts that, when state officials mount a defense, proponents should be permitted to intervene as of right.

*G. Standing for Petitioners If Government Officials Decline to Defend the Initiative*

The next issue is whether petitioner-proponents should have independent standing in state courts, in addition to the rights of an intervenor, when the government declines to defend the initiative either at trial or on appeal and there is no express provision in the initiative regarding who should defend it post-

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judicial process, and the necessary public confidence in both, even the appearance of partiality must be avoided.”). *See generally* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned"*, 14 *GEO. J. LEGAL ETHICS* 55 (2000). Just as judges should recuse themselves whenever their impartiality is even open to question, courts should permit proponents to participate whenever there is any uncertainty whether the state will undertake a vigorous defense.

199. *See Alaskans for a Common Language*, 3 P.3d at 914 (“[Proponent] was uniquely qualified to raise arguments about the intent of the initiative, and it might offer a different perspective that should be heard by the court.”).

200. *Perry v. Brown*, 265 P.3d 1002, 1023–24 (Cal. 2011).

passage. Leaving aside Article III requirements, which bind only the federal courts and are discussed below, we conclude that in states that have adopted the initiative process, state constitutional law and standing principles should be understood to provide for such standing, even absent express authorization.

The reasons why petitioner-proponents should have state court standing to defend initiatives post-passage are well articulated by the California Supreme Court and the dissenters in *Hollingsworth* and have been discussed previously in this Article,<sup>201</sup> so they have been summarized only briefly here. Suffice it to say that the constitutionality of the people's initiative is entitled to a defense, and the proponents are uniquely positioned to provide such a defense when state officials decline to do so.<sup>202</sup> If state officials can determine the legality and effect of an initiative by refusing to defend or enforce it, the fundamental purpose of the initiative process to direct change opposed by government officials is defeated.<sup>203</sup> The question then becomes whether there are other countervailing and overriding considerations in a particular state's constitutional law that preclude petitioners from having standing.

In our opinion, the answer depends on whether state courts impose their own injury in fact requirement in the absence of express statutory or constitutional authorization to sue. Among the most interesting and provocative discussions of this issue, outside of the initiative context, is *Lansing Schools Education Association v. Lansing Board of Education*.<sup>204</sup> The issue presented was whether teachers had standing to sue a school board for failing to enforce a statutory duty to expel students who had physically assaulted the teachers.<sup>205</sup> The statute did not explicitly provide the teachers with authority to sue.<sup>206</sup> They nonetheless

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201. *Supra* notes 174–78 and accompanying text.

202. *See Perry*, 265 P.3d at 1024–25 (“[T]he official proponents of an initiative measure have a unique relationship to the voter-approved measure that makes them especially likely to be reliable and vigorous advocates . . .”).

203. *See id.* at 1006–07 (“[C]ourts have routinely permitted the official proponents . . . to intervene . . . to enable such proponents to assert *the people's*, and hence *the state's*, interest . . .”).

204. 792 N.W.2d 686 (Mich. 2010).

205. *Id.* at 688.

206. *Id.* at 700.

sought a writ of mandamus, and declaratory and injunctive relief.<sup>207</sup>

Relying on the absence of a cases or controversies requirement in the Michigan Constitution and the “broader power held by state courts” in general, the majority held that the teachers had standing to sue under the state’s “limited, prudential [standing] doctrine that was intended to ensure sincere and vigorous advocacy by litigants.”<sup>208</sup> According to this doctrine, “a litigant has standing whenever there is a legal cause of action.”<sup>209</sup> When no such action is provided by law, then a court should, in its discretion, determine if “the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.”<sup>210</sup>

An impassioned dissent argued that the Michigan Constitution’s separation of powers provision called for an injury in fact test, at least in the absence of statutory standing.<sup>211</sup> It also cited twenty-three other states that employed an injury in fact approach comparable to the federal standard.<sup>212</sup> Although the dissent in the *Lansing* case is correct to point out that a number of states employ an injury in fact test absent express statutory authority to sue, such a test has generally not been used in the context of initiatives in state court; all or almost all of the other states cited by the dissent either do not have the initiative or permit broader standing in situations like initiative suits than the federal courts would allow.<sup>213</sup> The prudential concerns

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207. *Id.* at 689.

208. *Id.* at 692–94, 699 (internal quotations omitted).

209. *Id.* at 699.

210. *Id.*

211. *See id.* at 723–31 (Corrigan, J., dissenting) (“First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest.”).

212. *Id.* at 735 n.32 (citing comparable approaches in Alabama, Alaska, Arizona, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Mississippi, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, Wyoming, Illinois, Kansas, and Virginia).

213. *See Chi. Bar Ass’n v. Ill. State Bd. of Elections*, 641 N.E.2d 525, 527 (Ill. 1994) (providing broader standing than would federal courts); *id.* at 531–32 (Harrison, J., dissenting) (same); *In re Initiative Petition No. 384*, 164 P.3d 125, 127 (Okla. 2007) (same); *Wyo. Nat’l Abortion Rights League v. Karpan*, 881 P.2d

referenced by the majority in the Michigan case are also not implicated in the initiative context.<sup>214</sup> In the initiative context, a lawsuit has been brought by the opponents of the initiative; the government could defend but has chosen not to, and as a result, the needs of sincere and vigorous advocacy require a defense, which the petitioners are in a unique position to provide.<sup>215</sup> The overall statutory and constitutional scheme and purpose of the initiative process also supports standing for proponents.<sup>216</sup>

The remaining question is whether state separation of powers concerns regarding respect for other branches of government are implicated by conferring standing absent express authorization. Here we are not dealing with an act of the legislature, but of the people themselves. Standing is being conferred to defend the act of the people.<sup>217</sup> The legislature's interests are not implicated; indeed, some courts have referred to the people acting through the initiative as a coordinate or even superior legislative branch of the government.<sup>218</sup> In this context,

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281, 285 (Wyo. 1994) (same); WATERS, *supra* note 56, at 12 (listing initiative states); *see also* Kanaly v. State *ex rel.* Janklow, 368 N.W.2d 819, 827 (S.D. 1985) (concerning taxpayer standing); Gregory v. Shurtleff, 299 P.3d 1098, 1104–06 (Utah 2013) (citing cases from seven other states applying some form of taxpayer/citizen standing or expanded standing for cases of great public importance); Maxfield v. State, 294 P.3d 895, 899–900 (Wyo. 2013) (noting relaxed justiciability requirements in cases of public importance).

214. Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 692–95 (Mich. 2010).

215. Perry v. Brown, 265 P.3d 1002, 1024–25 (Cal. 2011).

216. *Supra* notes 208–10 and accompanying text.

217. *See supra* note 24 and accompanying text.

218. *See* Queen Creek Land & Cattle Corp. v. Yavapai Cnty. Bd. of Supervisors, 501 P.2d 391, 393 (Ariz. 1972) (“[T]he constitutional reservation of initiative and referendum powers establishes the electorate as a coordinate source of legislation with the constituted legislative bodies.”); Rooney v. Kulongoski, 902 P.2d 1143, 1151 (Or. 1995) (“The people, when carrying out their responsibilities under the initiative and referendum process, are a part of the Legislative Department of government.”); Utah Power & Light Co. v. Provo City, 74 P.2d 1191, 1205 (Utah 1937) (Larson, J., concurring) (“[B]y the initiative process [under the Utah Constitution] the people [are] a legislative body coequal in power and with superior advantages to the Legislature . . . .”); Wyo. Nat’l Abortion Rights League v. Karpan, 881 P.2d 281, 285 (Wyo. 1984)

[T]he power of the electorate to enact laws through the initiative is of ‘equal dignity’ to the power of the legislature to adopt statutes . . . . In Wyoming, a measure adopted through the initiative process enjoys a superior status because it is not subject to veto and, while it may be

the legislative power, as exercised by the people, is being enhanced, not diminished.

A more difficult question relates to respect for the executive branch's decision not to defend the law.<sup>219</sup> Executive officials typically possess significant discretion in interpreting and applying the laws, including whether and how to defend state laws in court.<sup>220</sup> A decision conferring standing on petitioners means, however, that the executive department's enforcement decision is no longer conclusive on the defense and, therefore, no longer conclusive on the constitutionality of the law. By conferring standing on the petitioners, the courts thereby ensure that the executive branch's exercise of discretion does not become an unreviewable determination that the initiative is invalid.<sup>221</sup> This, we conclude, is appropriate from a separation of powers perspective, because, as Professor Sunstein has explained, the faithful execution of the laws is "a duty, not a license."<sup>222</sup> The executive branch does not have a constitutional right to render a constitutional law ineffective through nonenforcement.<sup>223</sup> And in

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amended at any time, it cannot be repealed by the legislature within two years of its effective date.

(citations omitted).

219. See Zeitlin, *supra* note 162, at 328–31 (weighing the import of the executive's discretion when balanced against the right of the people).

220. See *id.* at 330–31 (noting broad executive discretion to interpret, apply, and defend state laws); *Clerk of Superior Ct. for Middlesex Cnty. v. Treasurer & Receiver Gen.*, 437 N.E.2d 158, 63 (Mass. 1982) ("[The Attorney General] may decline to pursue litigation which in his opinion will not further the interests of the Commonwealth and the public.").

221. See Zeitlin, *supra* note 162, at 331 (urging that the role of the courts is to restrict the executive); *Perry v. Brown*, 265 P.3d 1002, 1006–07 (Cal. 2011) (same).

222. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1471 (1988); see also Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1628–48 (2008) (arguing that the executive is under a duty to avoid constitutional harm).

223. See Sunstein, *supra* note 222, at 1471 ("[T]he 'Take Care' clause [does] . . . not authorize the executive branch to violate the law through insufficient action any more than . . . through overzealous enforcement."); cf. Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 212 (1992) ("[T]he Take Care Clause confers a duty insofar as it imposes on the President both a responsibility to be faithful to law and an obligation to enforce the law as it has been enacted, rather than as he would have wished it to be."). *But see* Zeitlin, *supra* note 162, at 348–51

an important sense, allowing petitioners to defend the law respects rather than disrespects the executive branch's enforcement decision, as the executive branch is not coerced into providing a defense that it believes to be unjustifiable and frivolous.<sup>224</sup> The recent strategy of the federal government in handling litigation over the Defense of Marriage Act suggests that it is possible to accommodate the prerogative of executive officials to decline to defend laws they believe truly unconstitutional, as well as the interests of petitioners in defending the initiatives they proposed.<sup>225</sup> In sum, separation of powers concerns rooted in the proper role of the judiciary and respect for other branches of government, as well as the proper role of the judiciary, support standing for petitioners if state officials will not provide a defense.

#### *H. Post-election Standing of Opponents and Supporters*

On the other hand, absent express statutory authority to the contrary, after the passage of an initiative, ordinary standing rules (including any injury in fact requirements) should apply to opponents and supporters of petitions who were not official proponents of the initiative. Any successful initiative of any significance will adversely affect at least some opponents, who will therefore be able to satisfy normal injury requirements.<sup>226</sup> There will thus not be any difficulty identifying suitable plaintiffs to challenge an initiative.<sup>227</sup> Defense of the initiative will also be adequately provided, if not by government officials, then by

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(offering examples of deliberate subversion of the people's will by the executive for nonconstitutional reasons).

224. Zeitlin, *supra* note 162, at 336–45, 351–55 (offering examples of officials who did not desire to defend their own laws).

225. See *infra* Part VI.B.5 (describing the Obama Administration's approach to the *Windsor* case).

226. See *supra* notes 68–69 and accompanying text (discussing one-way ratchet problems and particular initiatives where there are obvious plaintiffs but no defendants other than government officials).

227. See *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 886 (Cal. 2011) (deciding that the plaintiffs had standing, the court wrote that “federal courts have reiterated that injury in fact is not a substantial or insurmountable hurdle; as then Judge Alito put it: ‘Injury-in-fact is not Mount Everest.’” (citing *Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005))).

proponents, who have the unique relationship and official status required to have standing to defend the initiative.<sup>228</sup> Once there are appropriate parties representing each side, others who support or oppose the initiative can participate either through permissive intervention or as amici curiae.<sup>229</sup>

The principles we have described should ensure vigorous advocacy on both sides of initiative litigation. With these standards in mind for state standing, we turn to the difficult issue of Article III standing, and the problems left unresolved by *Hollingsworth v. Perry*.

### V. Federal Court Standing Under Article III

As we cross the constitutional divide into federal standing, the landscape begins to change dramatically. Although the state and federal courts start from the same basic premise that the purpose of standing is to limit courts to “questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process,”<sup>230</sup> from there, their paths substantially diverge. As interpreted by the Supreme Court since the 1970s, Article III’s case or controversy requirement generally limits standing in federal court to litigants who have suffered an injury in fact.<sup>231</sup> Unlike in most state courts, this is an overriding consideration; the court does not demonstrate the same type of deference to the legislature’s express provision of standing, especially in the public law context.<sup>232</sup> The Supreme Court, led by Justice Scalia on this issue, has a heightened

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228. See *supra* Part IV.B–C.

229. See *supra* Part IV.F.

230. *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

231. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 738–40 (1972) (discussing the types of injury, for example, economic harm, necessary to establish standing); *Ass’n of Data Processing Servs. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (stating that standing, which is dependent on the case and controversy test, must look to a person “aggrieved” by agency action); Sunstein, *supra* note 222, at 1445 (claiming that the Court no longer uses a legal interest test, but rather a factual inquiry into the existence of harm).

232. See Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 479–80 (2008) (describing Supreme Court’s rejection of a “private attorney general” approach).

sensitivity to congressional interference with the Executive Branch.<sup>233</sup> At the same time, the Court has allowed certain types of private actions on the government's behalf to proceed, such as *qui tam* and informers' actions, apparently believing that such private actions either satisfy or do not require injury in fact and do not raise separation of powers concerns.<sup>234</sup> The Court's application of all these federal standing principles in the context of state initiatives is especially complicated and jarring, as the Court is not addressing an act of Congress but an initiative of the people of a particular state.<sup>235</sup> The key question is whom the state can authorize to defend that initiative,<sup>236</sup> a decision that should merit federal deference.<sup>237</sup> In *Hollingsworth* we can see the

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233. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (claiming that the concrete injury requirement acts as a safeguard for the separation of powers and therefore prohibits Congress from converting an undifferentiated public interest in executive officers' compliance into an individual right, as it would transfer the President's power to the courts); see also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 886, 894–96 (1983) (explaining how the law of standing requires distinctive harm and restricts courts to their assigned role of protecting minority rather than majority interests; absent such standing “there is no reason to remove the matter from the political process and place it in the courts”); Elliott, *supra* note 232, at 463, 492–96 (stating that the Court has suggested that standing acts as a “bulwark” against congressional overreaching).

234. See Heather Elliott, *Congress' Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 195–98 (2011) (discussing the False Claims Act and its authorization of private citizens, called *qui tam* relators, to enforce its requirements on behalf of the United States); cf. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1406–09 (1988) (discussing history of informers' actions).

235. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2673 (2013) (Kennedy, J., dissenting) (discussing the holding in *Arizonans for Official English v. Arizona* and whether official proponents authorized by state law to assert the state's interest in the validity of a challenged state initiative would have standing in a federal lawsuit).

236. See *id.* at 2664–65 (majority opinion) (stating that a federal court must determine if the party seeking to invoke the jurisdiction of the court is authorized by the state to represent the state's interest); see also *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (discussing the constitutionality of state law that authorizes state legislators to represent the state's interests).

237. See *Hollingsworth*, 133 S. Ct. at 2665, 2674–75 (Kennedy, J., dissenting) (emphasizing the state's role as a sovereign and the people's inherent right to govern themselves).

tensions, upheaval, and reverberations of these clashing state and federal tectonics.<sup>238</sup>

Much has been written, and most of it critical, about the Supreme Court's Article III injury in fact requirement.<sup>239</sup> Regardless, and most relevant for the purposes of this Article, controlling Supreme Court precedent holds that the "plaintiff must have suffered an 'injury in fact'—an invasion of a legally-protected interest which is . . . concrete and particularized."<sup>240</sup> This injury in fact requirement applies both to the standing to sue and the standing to appeal.<sup>241</sup> The requirement also applies to intervenors who seek to "step into the shoes of the original party."<sup>242</sup>

The injury in fact requirement means that a

plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's

238. See *id.* at 2674 ("The California Supreme Court, not this Court, expresses concern for vigorous representation; the California Supreme Court, not this Court, recognizes the necessity to avoid conflicts of interest; the California Supreme Court, not this Court, comprehends the real interest at stake in this litigation . . .").

239. See, e.g., Elliott, *supra* note 232, at 460–517 (depicting the ways in which the standing doctrine is expected to serve several functions for which it is ill-founded); Sunstein, *supra* note 222, at 1434, 1448, 1461, 1474 (stating that standing limitations are often justified by policies that have little or nothing to do with standing); Sunstein, *supra* note 223, at 166, 177 (stating that *Lujan's* invalidation of a congressional grant of standing is a misinterpretation of the Constitution); Elliott, *supra* note 234, at 168–77 (describing the various problems associated with the standing doctrine, for example, the doctrine's confusing and unpredictable nature).

240. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Also "there must be a causal connection between the injury and the conduct complained of . . ." and it must be likely that a favorable decision would redress the injury (redressability). *Id.* at 560–61.

241. See *Arizonans for Official English*, 520 U.S. at 64 ("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." (citing *Diamond v. Charles*, 476 U.S. 54, 61 (1986))); see also 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) ("The standing to appeal requirements closely parallel those the Court has identified for standing to sue (injury, causation and redressability).").

242. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997); see also *Diamond v. Charles*, 476 U.S. 54, 63–64 (1986) (discussing *Diamond's* ability as an intervening defendant to seek review).

interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.<sup>243</sup>

This is true even if the statute creating the plaintiff's cause of action expressly provides that "any person" may commence a civil suit.<sup>244</sup> The Court has also rejected taxpayer standing except in the rarest of situations.<sup>245</sup>

The Court considers the injury in fact requirement, overriding even express legislative authorization to sue, necessary to avoid separation of powers problems:

To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."<sup>246</sup>

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243. *Lujan*, 504 U.S. at 573–574; *see also* *Flast v. Cohen*, 392 U.S. 83, 119–20 (1968) (Harlan, J., dissenting) ("The interests [represented by the plaintiffs], and the rights they espouse, are bereft of any personal or proprietary coloration. They are, as litigants, indistinguishable from any group selected at random from among the general population . . .").

244. *Lujan*, 504 U.S. at 571–72; *see also* *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972) (stating that Congress "may have been of the opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in . . . granting the license" (citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 642, 698 (1940))); *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."); *Elliott*, *supra* note 232, at 479 ("The Court has rejected a general federal concept of a pure 'private attorney general,' who pursues lawbreakers through the courts solely from an interest in seeking the law obeyed.").

245. *See* *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 599–607 (2007) (discussing and limiting the taxpayer standing found in *Flast v. Cohen*); *see also* *Elliott*, *supra* note 232, at 480, 480 n.101, and cases cited therein (claiming that the Court has rejected "taxpayer" standing because permitting one taxpayer to challenge the uses to which her tax payments have been put would open the courts to endless challenges by all taxpayers).

246. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1991) (quoting U.S. CONST. art. II, § 3).

This approach, again, has been heavily criticized.<sup>247</sup> Application of these separation of powers principles to standing on appeal is even more problematic: “Doctrines limiting standing to appeal from lower court decisions do not keep cases out of the judicial bailiwick . . . . Thus, when it comes to appeals from lower courts to intermediate appellate courts or to the Supreme Court, separation of powers concerns are not part of the equation.”<sup>248</sup>

There are also well-recognized exceptions to the injury in fact requirement, most notably *qui tam* and informer actions.<sup>249</sup> In a *qui tam* action, a private citizen is given the right to bring suits against violators of criminal law and is allowed to retain a share of the resulting damages or fines.<sup>250</sup> In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,<sup>251</sup> the Court upheld the *qui tam* provisions in the False Claims Act that allowed private citizens to sue on behalf of the United States for fraud against the government, even though they had suffered no direct harm themselves.<sup>252</sup> The *Stevens* Court ultimately relied on the theory that the relator, who had no direct interest in the alleged false claims other than the statutory right to litigate, was a partial assignee of the government’s claim for damages.<sup>253</sup> Likewise, in an informer action, a person can bring suit for the

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247. See *Lujan*, 504 U.S. at 602 (Blackmun, J., dissenting) (“[T]he principal effect of foreclosing judicial enforcement of [administrative] procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress . . . .”); see also Sunstein, *supra* note 222, at 1471–72 (“The ‘take Care’ clause and concerns of separation of powers argue in favor of rather than against a judicial role when statutory beneficiaries challenge agency behavior as legally inadequate.”); Elliott, *supra* note 232, at 464, 493–96 (discussing the sharp disagreement over what separation of powers requires).

248. Steinman, *supra* note 241, at 845.

249. See Sunstein, *supra* note 223, at 175 (“Under the *qui tam* action, a citizen—who might well be a stranger—is permitted to bring suits against offenders of the law.”).

250. See *id.* (“The purpose of this action is to give citizens a right to bring civil suits to help in the enforcement of the federal criminal law.”); see also Elliott, *supra* note 234, at 195–98 (explaining how the False Claims Act authorizes private citizens, *qui tam* relators, to enforce its requirements on behalf of the United States).

251. 529 U.S. 765 (2000).

252. *Id.* at 771–78; Elliott, *supra* note 232, at 495.

253. See *Stevens*, 529 U.S. at 770, 773 (“[A]dequate basis for the relator’s suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor.”).

enforcement of public duties and receive a financial reward.<sup>254</sup> According to the Supreme Court: “Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country since the foundation of our government.”<sup>255</sup>

How the *qui tam* and informer exceptions square with the general injury in fact rule is not all that clear.<sup>256</sup> Private individuals are being allowed to sue on behalf of the government when they are not otherwise differently positioned than anyone else.<sup>257</sup> In *Lujan v. Defenders of Wildlife*<sup>258</sup>—the key case setting out the present test for standing—Justice Scalia, who would later author the Court’s opinion in *Stevens*, dismissed the issue with a one liner: “Nor, finally, is it the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government’s benefit, by providing a cash bounty for the victorious plaintiff.”<sup>259</sup> If Congress can satisfy the injury in fact requirement by simply allowing any sort of bounty or financial reward to any victorious plaintiff, the requirement appears relatively easily satisfied.<sup>260</sup> Yet separation of powers concerns would still remain. As the commentators have pointed out, informer actions allow private parties to enlist the courts to supervise government officials, and providing a bounty would likely encourage more lawsuits.<sup>261</sup> And as to *qui tam*

254. *See id.* at 774–78 (noting the history of statutes that allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves).

255. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943) (citing *Marvin v. Trout*, 199 U.S. 212, 225 (1905)).

256. *See Elliott, supra* note 234, at 197–98 (speculating as to the ways in which the Court would confront an informer’s suit under the application of contemporary standing).

257. *See id.* at 198 (describing informers’ actions, which essentially create “private prosecutors” and allow plaintiffs to share in the bounty of resulting damages).

258. 504 U.S. 555 (1992).

259. *Id.* at 572–73.

260. *See Sunstein, supra* note 223, at 232–34 (noting that *qui tam* action and the informers’ action both support the notion that standing applies when the plaintiff has a concrete interest in the form of a bounty).

261. *See Elliott, supra* note 234, at 204 (stating that the bounty makes lawsuits more attractive (citing J. Randy Beck, *The False Claims Act and the*

actions, the choice of “whom to prosecute for defrauding the government seems as much or more at the heart of the executive function” as deciding who may be sued for damaging the environment in *Lujan*.<sup>262</sup> Moreover, government officials dissatisfied with the outcome of the political or administrative process might be tempted to bring intragovernmental disputes to the courts.<sup>263</sup>

Applying these federal standing principles to state initiatives is even more complicated. The court must not only consider general federal standing principles but other important federalism concerns as well. The federal separation of legislative, executive and judicial powers is not incorporated through the Due Process Clause of the Fourteenth Amendment, and is therefore not strictly applied to how the states structure their government.<sup>264</sup> Federalism also requires deference to such structuring decisions by the states.<sup>265</sup> That deference includes respect for states that have authorized the initiative,<sup>266</sup> and respect for state decision-making regarding who is authorized to defend the initiative in court.<sup>267</sup>

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*English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 549 (2000)).

262. Elliott, *supra* note 232, at 495 (citing *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 209 (2000) (Scalia, J., dissenting)).

263. See *Raines v. Byrd*, 521 U.S. 811, 831–34 (1997) (Souter, J., concurring) (instructing the Court to exercise restraint in disputes that only involve officials, “and the official interests of those, who serve in the branches of the National Government” given the distance these cases pose from the traditional common law suits at the core of the case-or-controversy requirement).

264. See *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (plurality opinion) (“[T]he concept of separation of powers embodied in the United States Constitution is not mandatory in state governments.”); *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 225 (1908) (“[W]hen, as here, a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned.”).

265. See *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) (“How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.”); see also ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 240 (2009) (“The federal Constitution does not mandate a specific separation or distribution of powers for the states.”).

266. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013) (explaining California’s sovereign right to maintain an initiative process).

267. See *Karcher v. May*, 484 U.S. 72, 82 (1987) (accepting New Jersey law as permitting the state legislature to defend state laws).

With all these key principles in mind, we return briefly to *Hollingsworth* for an evaluation of their application. The standing of the plaintiff same-sex couples was not an issue.<sup>268</sup> The majority and dissent also agreed that the state had standing to defend an initiative against constitutional challenge, as the Supreme Court has consistently recognized that the invalidation of a state statute is an injury to the state that satisfies the standing requirements.<sup>269</sup> Thus, if the state chose to defend the case, there would be no question of its justiciability in federal court.<sup>270</sup> The difficulties arose once the state chose not to defend the initiative.<sup>271</sup>

In deciding that only state officials or official state agents could defend the initiative, the majority in *Hollingsworth* focused on its ordinary injury in fact and separation of powers concerns, treating the state initiative the same as if it were a statute passed by Congress.<sup>272</sup> It made no allowances for the purposes and peculiarities of initiatives or the different conception of separation of powers applicable to the states.<sup>273</sup> It appeared to disregard federalism principles more generally, imposing its own agency test on the states for the determination of who could defend initiative statutes or amendments in federal court.<sup>274</sup> It also limited the defense of the initiative to government officials who may not want to defend it, thereby defeating the objective of vigorous advocacy at the heart of all standing jurisprudence.<sup>275</sup>

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268. See *supra* note 36 and accompanying text.

269. See *supra* note 37 and accompanying text.

270. See *Hollingsworth*, 133 S. Ct. at 2664 (“To vindicate that interest or any other, a State must be able to designate agents to represent it in federal court.”).

271. See *supra* notes 38–44 and accompanying text.

272. See *supra* notes 43–46 and accompanying text.

273. See *Hollingsworth*, 133 S. Ct. at 2662–63, 2667–68 (explaining that no matter how committed the petitioners may be to upholding Proposition 8, Article III standing cannot be placed in the hands of concerned bystanders).

274. See *id.* at 2666–67 (stating that California’s state-conferred right falls short of meeting federal requirements because it fails to follow the Restatement (Third) of Agency (citing RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f (2005))); see also *id.* at 2670–71 (Kennedy, J., dissenting) (describing valid reasons why California might find a conventional agency relationship inconsistent with the initiative process).

275. See *id.* at 2674 (noting the irony in the Court’s insistence upon litigation conducted by state officials, despite those officials’ preference to lose).

Finally, it failed to confront exceptions such as *qui tam* and informer actions.<sup>276</sup>

In contrast, the dissent incorporated these considerations into its decision. It recognized that the initiative is designed to allow the people to direct change in the face of recalcitrant government officials and notes that it contradicts the very purpose of the initiative—to give government officials the power to defeat the initiative by refusing to defend it.<sup>277</sup> Applying federalism principles more generally, it concluded that the primary issue is not justiciability in federal court or injury in fact, but who has the authority to defend a state initiative, and that is a question for which federal courts owe great deference to the states.<sup>278</sup> As the dissent stated:

It is for California, not this Court, to determine whether and to what extent the Election Code provisions are instructive and relevant in determining the authority of proponents to assert the State's interest in postenactment judicial proceedings. And it is likewise not for this Court to say that a State must determine the substance and meaning of its laws by statute, or by judicial decision, or by a combination of the two.<sup>279</sup>

It further recognized that the majority's approach is in tension with other cases in which the Court has permitted individuals to assert claims on behalf of the government or others, including *qui tam* actions.<sup>280</sup>

Both the majority and the dissent focused on the judiciary's proper role in a democracy.<sup>281</sup> The majority's concern was to “prevent the judicial process from being used to usurp the powers

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276. *See id.* at 2665 (majority opinion) (attempting to distinguish *qui tam* standing in a parenthetical).

277. *Id.* at 2668–70, 2674–75.

278. *Id.* at 2668–70, 2675.

279. *Id.* at 2669.

280. *See id.* at 2673–74 (listing a range of cases in which the Court, despite a lack of an agency relationship, nonetheless permitted a party to assert the interests of another).

281. *See id.* at 2659, 2661, 2667 (majority opinion) (discussing the judicial power of federal courts to decide actual cases or controversies); *id.* at 2674–75 (Kennedy, J., dissenting) (claiming that the Court's opinion means that a single district court can make a decision with far-reaching effects without review); *see also* *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (discussing the “proper—and properly limited—role of the courts in a democratic society”).

of the political branches,”<sup>282</sup> which again seems to ignore that the initiative is different.<sup>283</sup> Initiatives are passed by the people themselves, not the legislature, and the executive branch has no veto rights over initiatives in state constitutions.<sup>284</sup> The dissent, in contrast, stressed that in a democracy “the right to make law rests in the people and flows to the government, not the other way around,” and that the majority’s standing decision reverses the process, greatly empowering government officials to overturn initiatives of the people by depriving them of a defense.<sup>285</sup>

The dissent seems to have the better of the argument regarding the judiciary’s proper role. Although the Supreme Court has not been bothered by the possibility that nobody would ever have standing to raise or defend a particular claim against the government, this is because, in the absence of such a suit, the political process as usual will control: “Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.”<sup>286</sup> But here the political process through the initiative has been thwarted by the inaction of government officials and the standing doctrine of the federal courts.<sup>287</sup> This seems to be a problem of a different kind. The appellant is seeking enforcement of “the political resolution as it is expressed in law.”<sup>288</sup> Here arguments “that invoke the primacy of the democratic process call for judicial involvement.”<sup>289</sup> Also, under the majority’s approach, the

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282. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (quoting *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1146 (2013)).

283. *See supra* notes 217–18 and accompanying text.

284. *Id.*; *see also* Zeitlin, *supra* note 162 (suggesting that the executive branch may not exercise such excessive discretion as to leave its invalidation of the initiative unreviewable).

285. *Hollingsworth*, 133 S. Ct. at 2675 (Kennedy, J., dissenting).

286. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974); *see Elliott, supra* 232, at 481 (“The Court has also rejected concerns, raised by lower courts, that if standing is denied ‘then as a practical matter no one can [sue].’”).

287. *See Hollingsworth*, 133 S. Ct. at 2675 (Kennedy, J., dissenting) (stating that the Court’s decision frustrates the ability of the people to exercise their sovereign right to govern themselves).

288. Sunstein, *supra* note 222, at 1472.

289. *Id.*

judiciary is involved only to protect the interests of one side: those, including state officials, who would prefer the initiative be wiped off the books.<sup>290</sup>

Although it is our belief that the dissent and not the majority decision is correct, reconsidering *Hollingsworth* is not the overall purpose of the Article. Rather, our intention is to work out the case's problems and, more importantly, to propose solutions to those problems within its defined parameters. We believe that is possible pursuant to the agency approach left open by the majority, and also that there may still be openings in the traditional standing doctrine. We therefore return to the agency requirements described by the majority in *Hollingsworth*, and how they can be transformed into workable standing requirements that respect and incorporate both state and federal standing practices and principles.

## VI. *The Interplay of Federal and State Standing in the Aftermath of Hollingsworth*

### A. *Agency and Standing Requirements Post-Hollingsworth*

In rejecting the California Supreme Court's view that the Proposition 8 petitioners were authorized to defend the state initiative, the majority in *Hollingsworth* drew distinctions between authority and agency and then narrowly defined the type of state agents that would be allowed to defend state initiatives.<sup>291</sup> The Court held fast to its fundamental distinction that public officials have standing to defend the legality of laws while private parties ordinarily only have standing to defend against particularized harm to themselves arising out of the application of those laws.<sup>292</sup> This section addresses those

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290. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2674–75 (2013) (Kennedy, J., dissenting) (noting that the Court, despite the importance of vigorous advocacy in the judicial system, has permitted state officials with no intention of defending initiative to control litigation).

291. See *id.* at 2666–67 (majority opinion) (stating that because the “petitioners answer to no one,” and “decide for themselves, with no review, what arguments to make,” the most basic features of an agency relationship are missing).

292. See *id.* at 2667–68 (claiming that states cannot bypass the established

requirements and proposes five alternatives in response, recognizing that some of the proposals remain somewhat risky propositions unless the Court does some rethinking.

The agency or authority issue was based on the following principle:

To vindicate [its interests, including its interests in defending the constitutionality of its laws], a State must be able to designate agents to represent it in federal court. That agent is typically the State's attorney general. But state law may provide for other officials to speak for the State in federal court . . . .<sup>293</sup>

In *Karcher v. May*,<sup>294</sup> the key precedent for this argument, New Jersey law apparently<sup>295</sup> authorized the presiding officers of each house of the state legislature to represent the state's interests on behalf of the legislature.<sup>296</sup> The *Karcher* Court respected this designation and would have granted standing to these officers, but nonetheless the Court dismissed the case because Karcher and Orechio, his counterpart in the state senate, were no longer presiding officers, and their successors did not wish to appeal.<sup>297</sup>

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standard against generalized grievances by “issuing to private parties who otherwise lack standing a ticket to the federal courthouse”).

293. *Id.* at 2664; *see also* *Poindexter v. Greenhow*, 114 U.S. 270, 288 (1885) (“The State is a political corporate body [that] can act only through agents . . .”).

294. 484 U.S. 72 (1987).

295. The *Karcher* Court did not identify any state statute providing this authorization. *Id.* at 82. The only authority cited to substantiate the legislators' standing was a single case in which the New Jersey Supreme Court permitted Karcher and Orechio to intervene and join the state attorney general in defending a reapportionment statute. *See In re Forsythe*, 450 A.2d 499, 500 (N.J. 1982) (confirming the Court's approval of the Speaker of the General Assembly and the President of the Senate's standing to intervene as parties in defending the validity of the enactment). Of course, being permitted to intervene is not the same thing as being granted independent authority to litigate. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986) (“Although intervenors are considered parties entitled . . . to seek review by this Court, an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.”).

296. *See Karcher*, 484 U.S. at 82 (“Since the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals, we need not vacate the judgments below for lack of a proper defendant-appellant.”).

297. *See id.* at 77–81 (explaining that when a public officer is a party to an

The *Hollingsworth* Court interpreted *Karcher* as standing only for the proposition that state officials besides the attorney general could be designated as the state's agent for defending a statute in court.<sup>298</sup> "The point of *Karcher* is not that a State could authorize *private parties* to represent its interests; *Karcher* and *Orechio* were permitted to proceed only because they were state officers, acting in an official capacity."<sup>299</sup> Once they no longer held office, they lost their standing as state agents.<sup>300</sup>

The Court also addressed dicta in its decision in *Arizonans for Official English v. Arizona*.<sup>301</sup> In that case, after a federal district judge declared a ballot initiative unconstitutional and the governor announced she would not appeal, the principal sponsor of the initiative sought to do so; the Ninth Circuit then held the sponsor had standing.<sup>302</sup> An article in the initiative granted standing to "any person residing in Arizona to sue in state court to enforce the [initiative]."<sup>303</sup> The Supreme Court in *Arizonans for Official English* dismissed the case as moot on other grounds but addressed the standing issue in passing.<sup>304</sup> After describing the holding in *Karcher*, the Court wrote that the sponsors are

not elected representatives, and we are aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of the initiatives made law of the State. Nor has this Court ever identified initiative proponents as Article-III-qualified defenders of the measures they advocated.<sup>305</sup>

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appeal in an official capacity and subsequently ceases to hold office, the public officer's successor is automatically substituted as a party (citing FED. R. APP. P. 43(c)(1))).

298. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664–65 (2013) (stating that *Karcher* and *Orechio* were able to intervene in the lawsuit solely because of their positions as state officers).

299. *Id.* at 2665.

300. *Id.*

301. 520 U.S. 43 (1997).

302. *Id.* at 49, 55, 57–58 (discussing the Ninth Circuit's rationale that because the Arizona Legislature would have standing to defend the constitutionality of a state statute, *Arizonans for Official English*, by analogy, should have standing as a principal sponsor of the ballot).

303. *Id.* at 58.

304. *Id.* at 64–67.

305. *Id.* at 65 (emphasis omitted).

Applying these precedents in *Hollingsworth*, the U.S. Supreme Court stated that the California Supreme Court did not find that the petitioners were agents of the people, nor had the petitioners argued below that they were agents of the people.<sup>306</sup> The Court explained that the petitioners are “plainly not agents of the state . . . [because] the most basic features of an agency relationship are missing here. Agency requires more than mere authorization to assert a particular interest.”<sup>307</sup> The Court then turned to the most recent Restatement of Agency to define those features: the principal’s right to control the agent’s action, the principal’s ability to remove or replace the agent, and a fiduciary duty to the principal.<sup>308</sup> The Court then compared the petitioners to the California Attorney General and other public officials, who are elected at regular intervals and take an oath of office.<sup>309</sup> Finding these elements lacking, the majority refused to allow the proponents to act as agents for the state.<sup>310</sup>

*B. Four Alternatives to Satisfy Hollingsworth, and One to Make It Irrelevant*

There are certain advantages to the majority approach. It requires the people, and therefore the state, to articulate by law or specify in each initiative exactly how the initiative should be defended after its passage.<sup>311</sup> There is no need to rely upon elaborate after-the-fact justification by state courts to decipher who has authority to defend a state law.<sup>312</sup>

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306. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666 (2013) (stating that the California Supreme Court only addressed whether petitioners had the ability to assert the State’s interest in defense of Proposition 8).

307. *Id.*

308. *Id.* (citing RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f (2005)).

309. See *id.* at 2666–67 (noting that unlike California’s attorney general, the petitioners have an unelected appointment for an unspecified period of time as defenders of the initiative and are not required to take an oath of office).

310. See *id.* at 2667 (“Neither the California Supreme Court nor the Ninth Circuit ever described the proponents as agents of the State, and they plainly do not qualify as such.”).

311. See *Hollingsworth*, 133 S. Ct. at 2664 (confirming that a state may designate agents to represent it in federal court through specific state law).

312. Compare *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662–63 (2013) (concluding that the California Constitution gives proponents a unique role only

If the distrust of public officials underlying the origins of the initiative extends to the post-passage defense of the initiative in court, there is good reason for the initiative to express and address that concern, especially after *Hollingsworth*. Although the majority's approach imposes strict requirements on litigants other than those government officials ordinarily expected to defend state laws, it does provide a road map, albeit one filled with some giant pitfalls, for access to the federal courthouse.<sup>313</sup> As the Court intimated that a litigant could conceivably possess standing on behalf of the state or pursuant to a *Lujan* analysis,<sup>314</sup> we attempt to lay out paths under both theories. We also suggest a possible way to bypass the standing problem entirely.

### 1. Special State Attorney

The only certain path through *Hollingsworth*, as Dean Chemerinsky and others have suggested, is for the initiative or the laws generally governing initiatives to require "that a special attorney for the state be appointed in each instance that the government elects not to defend an initiative."<sup>315</sup> This special attorney would not be representing petitioners' interests, but rather the interest of the state, and therefore the people, in the legality of its laws.<sup>316</sup> This special state attorney would have standing under *Hollingsworth* because he or she would fulfill the

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in the process of enacting the law, not in the enforcement of the law), *with Perry v. Brown*, 265 P.3d 1002, 1142–52 (Cal. 2011) (determining that Article II, Section 8 of the California Constitution, as well as certain provisions of the Elections Code, implicitly authorize the official proponents of an initiative measure to intervene in a judicial proceeding in order to assert the state's interest in the initiative's validity).

313. See *Hollingsworth*, 133 S. Ct. at 2659–68 (providing an analysis of the ways in which private parties may or may not participate in a federal action in order to defend the constitutionality of a state statute when state officials have chosen not to).

314. See *id.* at 2661 (stating that standing can rest on whether there was a concrete and particularized injury).

315. Chemerinsky, *supra* note 72.

316. See *id.* ("Because the attorney, even if not a state employee, would be appointed by the state, he or she would be representing the state and therefore have standing.").

Restatement requirements to be an agent of the state.<sup>317</sup> “Such a process would be well within the bounds of established law, since states get to decide for themselves who will represent them in court.”<sup>318</sup> The people themselves can make this choice through the initiative process, or they can persuade their legislators to do so;<sup>319</sup> it need not be left to the discretion of state executive officials.

In order to satisfy *Hollingsworth’s* strict requirements for Article III standing, the process and standards for the selection or removal and replacement—or both—of the special state attorney should be set out directly in each initiative or in the laws governing initiatives.<sup>320</sup> An oath should also be required of the special state attorney as it is for other state officials.<sup>321</sup> The special state attorney need not, however, be a public employee. Special attorneys general are periodically appointed when the offices of the attorneys general are conflicted or unwilling to defend a state actor or state action.<sup>322</sup> Even though they are usually private lawyers, not public officials, they are representing the state.<sup>323</sup>

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317. *See id.* (stating that this appointment is well within the state’s prerogative and is in keeping with the decision in *Hollingsworth*); *see also* *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666–67 (2013) (describing the agency status of public officials and its solidification of their standing).

318. Chemerinsky, *supra* note 72.

319. *Cf.* ARIZ. REV. STAT. § 12-921(A) (2012) (granting standing and the right of intervention to official initiative proponents).

320. *See Hollingsworth*, 133 S. Ct. at 2666–67 (noting that state law did not provide for selection or removal of petitioners).

321. *See id.* at 2667 (stating that petitioners “are free to pursue a purely ideological commitment to the law’s constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities”); *cf.* U.S. CONST. art. VI, cl. 3 (“[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.”).

322. *See* Chemerinsky, *supra* note 72 (noting that states appoint special attorneys in instances “when there is a conflict of interest”).

323. *Id.*

## 2. Proponents as Agents of the People

An alternative approach, but one facing greater obstacles under *Hollingsworth*, is to designate petitioners explicitly as the state's (or the people's) agents. Some advocacy groups, such as the Howard Jarvis Taxpayers Association, were mulling such a solution immediately after the issuance of the Supreme Court's decision.<sup>324</sup> The *Hollingsworth* majority, however, is clearly uncomfortable with this agency approach because it collapses the Court's clear distinction between public and private injury, where the state can defend the legality of its laws, while private parties are only allowed to defend against particularized harm they suffer when the laws are enforced.<sup>325</sup> The Restatement approach to agency, designed for individual relationships among private parties, also translates awkwardly to the much more amorphous relationship between initiative proponents and the people as a whole.<sup>326</sup>

That said, a legislative or initiative provision could be drafted to respond to the Court's strict requirements. Such a provision must, of course, expressly designate proponents as agents of the people for the purpose of defending the initiative statute, should government officials decline to do so.<sup>327</sup> But the law must also address the more particular requirements imposed by the *Hollingsworth* majority. To ensure the petitioners' faithful defense of the law, the initiative should require that they take an oath to defend the constitutionality of the law, and post a defense bond.<sup>328</sup> The bond would be designed to ensure that the

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324. See Audi, *supra* note 62, at A3 (stating that the Howard Jarvis Taxpayers Association "is looking into building a 'left-right coalition' to see if there is a way to fix the problem—possibly through another ballot initiative that would define ballot proponents as agents of the state").

325. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667–68 (2013).

326. See *id.* at 2671–72 (Kennedy, J., dissenting) (describing reasons why California "might conclude that a conventional agency relationship is inconsistent with the history, design, and purpose of the initiative process," and noting confusion on who the principal in the agency relationship would be).

327. Compare *id.* at 2666 (majority opinion) (noting that the California Supreme Court "never described petitioners as 'agents of the people'" of California), with *supra* Part VI.A (stating that the agency authority issue was based on a state vindicating its interests by being able "to designate agents to represent it in federal court").

328. Compare *Hollingsworth*, 133 S. Ct. at 2667 ("Unlike California's elected

petitioners carry out their fiduciary duty to defend the initiative competently and with the utmost care.<sup>329</sup> It could also limit frivolous appeals and dilatory litigation tactics.<sup>330</sup> The amount could be set by the legislature with these objectives in mind. Oversight of the proponents' defense must also be established.<sup>331</sup> A post-election defense oversight committee, consisting of supporters of the initiative from throughout the state other than the individual petitioners, might be required.<sup>332</sup> In principle, under *Hollingsworth* a carefully constructed agency approach may be devised so that the petitioners could represent the state's interests in federal court. Of course, because *Hollingsworth* does not purport to lay out all elements necessary to establish standing in a situation like this, there is always the risk that the Court could impose some new, as-yet-unelucidated requirement that would not be met.<sup>333</sup>

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officials, they have taken no oath of office.”), *with supra* Part VI.B.1 (“An oath should be required of the special state attorney as it is for other state officials.”).

329. *Cf.* Clerk of Superior Court of Middlesex Cnty. v. Treasurer & Receiver Gen., 437 N.E.2d 158, 159 (Mass. 1982) (discussing statutory bond requirement imposed on court clerks “to ensure the faithful performance of official duties”); City of Cambridge v. Foster, 81 N.E. 278, 279 (Mass. 1907) (discussing statutory bond requirements imposed on constables).

330. *Cf.* Hampshire Vill. Assocs. v. Dist. Court of Hampshire, 408 N.E.2d 830, 833 (Mass. 1980) (discussing use of statutory appeal bonds in landlord-tenant disputes to deter frivolous appeals); Paro v. Longwood Hosp., 369 N.E.2d 985, 987, 989–90 (Mass. 1977) (upholding legislature’s imposition of \$2,000 bond, with certain exceptions, to deter frivolous medical malpractice claims).

331. *Compare* Hollingsworth v. Perry, 133 S. Ct. 2652, 2666 (2013) (“[P]etitioners answer to no one.”), *with supra* Part VI.A (explaining that an agency relationship fails because there would be no control over the agent).

332. *Compare* Hollingsworth, 133 S. Ct. at 2667 (“No provision provides for their removal.”), *with supra* Part VI.A (looking to the Restatement of Agency to highlight the importance of the principal having removal power over the agent). There are precedents for such representative or oversight committees. *See* ALASKA STAT. § 15.45.030 (2012) (requiring appointment of initiative committee of three sponsors who represent the sponsors and subscribers in all matters regarding the initiative); *cf.* OR. REV. STAT. §§ 250.137–250.149 (2012) (establishing citizens review committees to, among other things, draft unbiased arguments in favor of and against initiative measures).

333. *Cf.* Hollingsworth, 133 S. Ct. at 2666–67.

3. *Defender's Bounty: Pushing the Qui Tam and Informer's Actions to the Limits*

In light of the unclear requirements for petitioners to be considered proper state agents, we also propose two paths for them to satisfy the traditional Article III standing test in their own right. A somewhat questionable option would be to include in the initiative or the laws governing initiatives a monetary bounty for the successful defense of an initiative when the government has declined to defend it.<sup>334</sup> This qui tam-like approach has at least some precedent for it. Arguably, as in a qui tam or informer's action, the private party is seeking a reward for acting in the state's interest (here, successfully defending the constitutionality of the statute when the government erroneously declined to provide such a defense).<sup>335</sup> The litigant also has a financial stake in the outcome beyond attorney's fees.<sup>336</sup> The bounty, at least in theory, provides a particularized interest, albeit to anyone willing to invest in a defense of the initiative.<sup>337</sup>

As this is a state law, there is also no concern about the congressional overreaching that heightens the Supreme Court's separation of powers concerns.<sup>338</sup> The court is confronting state, not federal, action, as well as action by the people as a whole, not a particular branch of government.<sup>339</sup> It is therefore difficult to

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334. See Elliott, *supra* note 234, at 200–04 (discussing the constitutionality and practicality of cash bounties); Sunstein, *supra* note 223, at 232–34 (discussing cash bounties for private citizens in suits brought against private and executive defendants).

335. See *supra* notes 249–63 and accompanying text.

336. Compare Sunstein, *supra* note 223, at 233 (“[T]he existence of a cash bounty gives the plaintiff the equivalent of a personal stake in the outcome.”), with *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) (“Obviously, however, a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself.”).

337. See Sunstein, *supra* note 223, at 223–24 (“[A] bounty would build directly on the qui tam and informers’ actions, and it should not raise a constitutional problem in the aftermath of *Lujan*.”).

338. *Lujan*, 504 U.S. at 577; see also Elliott, *supra* note 232, at 463 (discussing Supreme Court’s concerns regarding congressional overreaching).

339. See *Raines v. Byrd*, 521 U.S. 811, 833 (1991) (Souter, J., concurring) (“[R]espect for the separation of powers requires the Judicial Branch to exercise restraint in deciding constitutional issues by resolving those implicating the

discern what separation of powers issues regarding the different branches of government are implicated. Because there would clearly be a justiciable case or controversy if the state decided to defend it, it is not the type of political dispute inappropriate for resolution in the courts.<sup>340</sup> All this being said, the *Hollingsworth* majority has gone out of its way to distinguish and dismiss qui tam actions as historical anomalies to injury in fact requirements.<sup>341</sup> Although the Court in *Stevens* wrote approvingly about the historical pedigree of the informer's action, such a bounty has not been tested against the modern standing doctrine; it is unclear that the "assignee" rationale of *Stevens* would apply to this situation.<sup>342</sup> The general thrust of *Hollingsworth* is to reject private suits to defend the constitutionality of statutes absent particularized harm, and a bounty is not a remedy for harm caused by the statute itself, which the Court appears to require.<sup>343</sup>

#### 4. Refundable Filing Fees: Letting Proponents Buy a Stake in the Initiative

In our next proposal, the state would charge a filing or similar fee before an initiative is adopted, which would be refunded to the petitioners if they successfully defended the initiative in court. Some states already charge a filing fee or deposit that may be refunded if the petition qualifies for the ballot, no doubt to discourage frivolous petitions.<sup>344</sup> In the same vein, legislators or initiative drafters would introduce a fee,

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powers of the three branches of Government as a 'last resort.'").

340. Cf. Elliott, *supra* note 232, at 512 (discussing an example of the Supreme Court properly exercising its Article III powers to address the merits of a case where the "excellence of argument and adversarial presentation of issues" is assured).

341. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2665 (2013) (distinguishing cases involving qui tam actions).

342. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943) (discussing the long history of informer's actions). *But see* *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 777 n.7 (2000) (characterizing this footnote as dictum).

343. *Hollingsworth*, 133 S. Ct. at 2667.

344. See WATERS, *supra* note 56, at 15 (listing the five states that require a deposit, refundable when the completed petition has been filed).

perhaps \$1,000, to be paid to the state at some point before the initiative could be placed on the ballot. If the initiative passed and required a successful legal defense in which the proponents participated, at least a portion of the fee would be paid back to the petitioners.<sup>345</sup> They would assert their right to defend the initiative—and recover the fee—by filing a claim with the state identifying the litigation in which the initiative had been challenged, which the state would pay only upon the favorable conclusion of the suit. This refund provision might be limited to situations in which government officials declined to defend the initiative, or it could be drafted to apply where the proponents were acting as intervenors or amici as well.

The legal significance of the refundable filing fee is as follows. The petitioners would retain a property right in reimbursement of the filing fee that is contingent on their successful defense of the initiative in court. On the same day as *Hollingsworth*, the Supreme Court reaffirmed that a claim for money is the quintessential injury for standing purposes: in *United States v. Windsor*,<sup>346</sup> it held that the plaintiff's "ongoing claim for funds that the [government] refuses to pay . . . establishes a controversy sufficient for Article III jurisdiction."<sup>347</sup> Therefore, this arrangement sets up an interest cognizable under Article III that would be determined by the success or failure of the initiative in the courts.<sup>348</sup> To put the proposal in *Lujan* terms,

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345. We envision that only some of the money would be refunded for a successful defense for two reasons. First, it is not just possible but likely that a controversial initiative would be subject to multiple challenges, possibly at different times and in different courts. See Kafker & Russcol, *supra* note 64, at 1293 (discussing various potential challenges to initiatives). If the petitioners received a full refund after successfully defending a state court suit, any claim to federal court standing might be eliminated. See *United States v. Windsor*, 133 S. Ct. 2675, 2686 (2013) ("It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling."). Second, courts often invalidate part but not all of an initiative. See MILLER, *supra* note 75, at 105 (stating that courts struck down in whole or in part 44% of initiatives that faced post-election challenges in the leading five states). To provide clarity and avoid possible discretionary complications, we propose that a fixed portion of the fee would be refunded whenever, at the conclusion of a lawsuit, any part of the initiative was upheld.

346. 133 S. Ct. 2675 (2013).

347. *Id.* at 2686.

348. See *id.* at 2685 (indicating that failure to obtain a refund allegedly required by law is a concrete injury).

the proponents suffer an injury in fact caused by the state if they are unable to recover the filing fee due to the state's unwillingness or inability to defend the legality of their initiative.<sup>349</sup> And this injury is redressable because victory on the merits results in a monetary payment to the petitioners and continued viability of the contingent right to the rest of the fee.<sup>350</sup>

Because the claim for a refund is a state-conferred property right, it is not merely a byproduct of litigation.<sup>351</sup> Even though the petitioners' interest in a few hundred dollars is tangential to—and probably insignificant compared with—the ideological reasons for pursuing and defending an initiative, the standing inquiry is completely separate from the merits of the underlying claims.<sup>352</sup> This proposal should, therefore, give the proponents a sufficient stake to confer Article III standing.

Although a large filing fee would be open to criticism as antidemocratic given the purposes of the initiative, it would certainly be reasonable for a state to seek to defray some of the significant costs of processing and holding elections on initiative petitions.<sup>353</sup> And, as a practical matter, any individuals or organizations capable of shepherding a petition through the signature-gathering and campaigning processes would be able to

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349. See *id.* at 2685 (noting that the Executive decided not to defend § 3 of the Defense of Marriage Act “while continuing to deny refunds”).

350. Cf. *id.* at 2686 (“The judgment in question orders the United States to pay Windsor the refund she seeks.”).

351. See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772–74 (2000) (concluding that the alleged injury in fact was not merely a byproduct of litigation, allowing the respondent to assert a cognizable claim).

352. See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (“We have allowed important interests to be vindicated by plaintiffs with [little] at stake . . . . [A]n identifiable trifle is enough for standing to fight out a question of principle . . . .” (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968))). The federal courts continue to apply this principle. See, e.g., *Katz v. Pershing, LLC*, 672 F.3d 64, 76 (1st Cir. 2012) (applying the standard set out in *SCRAP*); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) (“The slightness of their burden also is not dispositive.”).

353. See Kafker & Russcol, *supra* note 64, at 1320 n.342 (discussing examples of estimated costs “of \$15 million to conduct election for invalid initiative” and \$1.75 million “to determine sufficiency of petition and signature”).

afford a fee in the hundreds, or even thousands, of dollars.<sup>354</sup> Unlike the bounty proposal, the money at stake would have an independent origin and significance apart from the litigation.<sup>355</sup> This idea is also distinct from the *qui tam* and informer's suits, which the Court seems to construe narrowly.<sup>356</sup> The state, by taking the filing fee but not defending the initiative, is inflicting not only a political injury—which the *Hollingsworth* Court found insufficient<sup>357</sup>—but now also a monetary one. This should establish the proponents' standing under the principles expressed in *Hollingsworth* and *Windsor*.<sup>358</sup>

#### 5. Breaking the One-Way Ratchet: Staging an Intervention Through Windsor

Questions regarding petitioners' standing become moot, however, if another party with standing, such as the State, remains in the case.<sup>359</sup> Proponents need not satisfy Article III standing requirements independently in such a situation because they can “ride ‘piggyback’ on the State’s undoubted standing” as long as the State remains a party to the litigation.<sup>360</sup>

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354. See *id.* at 1284 (“It takes a considerable amount of money, typically in the millions of dollars, to secure the large number of signatures necessary to qualify an initiative for the ballot. Well-funded interest groups therefore play an outsized role in the initiative process.”).

355. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) (“[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit.”).

356. See *Hollingsworth*, 133 S. Ct. at 2665 (distinguishing *qui tam* and informer's suits).

357. See *id.* (indicating that plaintiffs need injury of their own for standing).

358. *Id.* at 2667–68; *United States v. Windsor*, 133 S. Ct. 2675, 2684–89 (2013).

359. See *Clinton v. City of New York*, 524 U.S. 417, 431 n.19 (1998) (“Because both the City of New York and the healthcare appellees have standing, we need not consider whether the appellee unions also have standing to sue.”); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (indicating that, because at least one appellee had standing, the Court “therefore need not consider the standing issue as to the [other appellees]”); Elliott, *supra* note 234, at 204 n.278 (“[T]he Court has regularly allowed parties without standing to participate in lawsuits so long as they have the same interest as a party that does have standing.”).

360. *Diamond v. Charles*, 476 U.S. 54, 64 (1986).

*Hollingsworth* would have been decided on the merits, except that state officials refused to remain in the case.<sup>361</sup> This raises the question whether, and to what extent, initiative laws can compel state officials to appeal and prevent another *Hollingsworth*. Officials, such as attorneys general who are often directly elected, possess independent discretion and authority and have sworn to uphold the Constitution.<sup>362</sup> It would raise serious separation of powers and even ethical concerns to force them to continue litigating in defense of laws they consider unredeemably unconstitutional.<sup>363</sup>

The Obama Administration's course in the *Windsor* case provides a potential way out of this conundrum, albeit one that the Supreme Court criticized. In the *Windsor* litigation, the Department of Justice took all the formal steps required to litigate the validity of the Defense of Marriage Act, such as filing a notice of appeal and ultimately a petition for certiorari, but within its papers it consistently argued that the statute was *not* valid, leaving it to attorneys representing the House of Representatives as intervenor to defend it on the merits.<sup>364</sup> The Supreme Court expressed skepticism of this approach but ultimately held that the federal government had Article III standing.<sup>365</sup> The Court concluded that the "United States retains a stake sufficient to support Article III jurisdiction on appeal and in proceedings before the Court," even though it agreed with the judgment against it.<sup>366</sup> It also emphasized that this approach avoided a different separation of powers problem:

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361. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) (indicating that the State of California had standing, which would have allowed the case to proceed to the merits had it remained in the case).

362. See Zeitlin, *supra* note 162, at 336–40 (discussing the discretion of the attorney general to defend an initiative in court).

363. Cf. *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013) ("When the Executive makes a principled determination that a statute is unconstitutional, it faces a difficult choice.").

364. See *id.* at 2683–84 (explaining that the "Attorney General of the United States notified the Speaker of the House of Representatives that the Department of Justice would no longer defend the constitutionality of DOMA's § 3"); *id.* at 2699 (Scalia, J., dissenting) (stating that the Solicitor General's brief asked the Court to affirm the judgment of the court of appeals).

365. See *id.* at 2686 (majority opinion) ("For these reasons, the prudential and Article III requirements are met here.").

366. *Id.* It is not clear from the *Windsor* decision exactly what retained

[I]f the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's.<sup>367</sup>

Finally, the Court concluded that "the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree" were not present, as a "sharp adversarial presentation" was assured by the participation of the House's lawyers, and "precedential guidance" was required for the lower courts.<sup>368</sup>

Similarly, a state statute or initiative could oblige the attorney general or other officials to take at least the formal, ministerial actions required to enable a defense of the initiative. When the officials charged with defending Proposition 8 declined to file a notice of appeal of the district court's judgment, supporters of the measure sought a writ of mandamus, which the state courts denied because there was no clear legal duty to do so.<sup>369</sup> That decision was correct under then-applicable law, but if such a duty were created, the state would remain a party, and proponents could be heard regardless of whether they met Article

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interest by the government constitutes a "stake sufficient" to satisfy Article III standing when the government agrees with the plaintiff. *Id.* The Court stressed the government's economic interest in the unpaid refund sought by Windsor, but it also relied on *INS v. Chadha*, 462 U.S. 919 (1983), where no such economic interest was present. See *Windsor*, 133 S. Ct. at 2686 (referring to *Chadha* as a comparable case). In *Chadha*, where the Executive agreed with a lower court's decision barring it from deporting Chadha over the objections of one House of Congress, the Court found that the INS was "sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take", regardless of whether the agency welcomed the judgment." *Id.* (quoting *Chadha*, 462 U.S. at 930) (citations omitted). How strictly the Court will apply this retained interest requirement for Article III standing remains to be seen.

367. *Windsor*, 133 S. Ct. at 2688.

368. *Id.*

369. See Zeitlin, *supra* note 162, at 327 n.2 ("The petition for review denied."); see also Bob Egelko, *Court Won't Force State to Defend Proposition 8*, S.F. CHRON. (Sept. 3, 2010), <http://www.sfgate.com/news/article/Court-won-t-force-state-to-defend-Prop-8-3176159.php> (last visited Aug. 23, 2013) (noting that the court dismissed the petition without comment) (on file with the Washington and Lee Law Review).

III requirements.<sup>370</sup> On the other hand, this narrow duty would not invade the discretion of officials to refuse to defend laws they believed to violate the Constitution. As in *Windsor*, they could file the papers necessary to appeal, but argue on the merits that the lower court's decision was correct.<sup>371</sup> This use of the *Windsor* paradigm would address the one-way ratchet problem by ensuring that government officials who were opponents of the initiative could not insulate a decision from review by refusing to appeal. It would also address the separation of powers concern raised by the Supreme Court—that courts, not other branches of government, should have the ultimate responsibility for determining the constitutionality of statutes.<sup>372</sup> As for the prudential considerations raised by the Court, a sharp adversarial presentation is all but assured in the initiative context, and this seemed to be the main focus of the *Windsor* Court's qualms.<sup>373</sup>

Of course, this path is not foolproof. The Court cautioned that “unusual and urgent circumstances” of judicial economy led the Court to decide *Windsor* on the merits.<sup>374</sup> The Court emphasized the nationwide effects and broad scope of the law at issue in describing the potential for expensive and uncertain litigation across the country if it dismissed based on standing.<sup>375</sup>

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370. See *Diamond v. Charles*, 476 U.S. 54, 62–64 (1986) (“[A] State has standing to defend the constitutionality of its statute . . . [and] [h]ad the State sought review . . . an intervening defendant . . . would be entitled to seek review.”)

371. See *supra* note 364 and accompanying text.

372. See *Windsor*, 133 S. Ct. at 2688 (discussing separation of powers).

373. See *id.* at 2687–89 (“BLAG’s sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree.”).

374. *Id.* at 2688–89

[T]here is no suggestion here that it is appropriate for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal. The integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise.

375. See *id.* at 2688

Were this Court to hold that prudential rules require it to dismiss the case . . . extensive litigation would ensue. The district courts in 94 districts throughout the Nation would be without precedential guidance not only in tax refund suits but also in cases involving the

Particularly for an initiative that might impact only a subset of the citizens of a single state, federal courts might not sense the same urgency and importance and might decline to accept petitioners' standing on prudential grounds.<sup>376</sup> Going around the chasm is thus no more certain than our proposed paths across it.

### VII. Conclusion

The initiative looms large in state constitutional law. The people are given the direct right and means to pass constitutional amendments and statutes despite the opposition or indifference of government officials. As a result, both progressives and conservatives have recognized the value of the initiative process in achieving their objectives, and have vigorously utilized it to their advantage.<sup>377</sup> State standing requirements also respect and promote the people's process, allowing proponents and opponents broad pre-election standing, usually expressly authorized by statute.<sup>378</sup> The state courts have also interpreted the initiative laws to provide petitioners post-election intervention and standing rights when government officials decline to defend the initiative.<sup>379</sup> The state courts consider this post-passage standing by petitioners to be necessary to ensure that the people's rights in the initiative process are defended against government interference.<sup>380</sup>

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whole of DOMA's sweep involving over 1,000 federal statutes and a myriad of federal regulations . . . . Rights and privileges of hundreds of thousands of persons would be adversely affected, pending a case in which all prudential concerns about justiciability are absent . . . . [T]he cost in judicial resources and expense of litigation for all persons adversely affected would be immense.

376. *See id.* ("The Court's conclusion that this petition may be heard on the merits does not imply that no difficulties would ensue if this were a common practice in ordinary cases.")

377. *See supra* notes 64–76 and accompanying text (providing examples of initiatives supported by both conservatives and progressives).

378. *See supra* Part IV.A–C (discussing general principles of standing in state courts and pre-election standing in the initiative process with and without express standing provisions).

379. *See supra* Part IV.F–G (discussing post-election standing for petitioners when government officials decline to defend).

380. *See supra* Part IV.F–G (stating that "the constitutionality of the people's initiative is entitled to a defense").

Across the constitutional divide, the federal courts have a very different attitude. After passage, initiatives are treated like any other law, to be defended, if at all, by the government officials who are ordinarily required to do so, even though the very purpose of the initiative is to avoid dependence on those officials.<sup>381</sup> The state has freedom to designate what state officers can defend the law, but very strict limits are imposed on other purported agents of the state.<sup>382</sup> The Supreme Court has never given private parties, including proponents, standing to defend the legality of the initiative unless they have a particularized injury at stake.<sup>383</sup> This is true even if the initiative is thereby left undefended.<sup>384</sup>

As both state and federal litigation is almost a certainty on important initiatives, these very different conceptions of standing have the potential to grossly distort or even destroy the initiative process. If government officials can render an initiative inoperable by refusing to defend it in federal court after passage, government officials, and not the people, ultimately control the initiative process.<sup>385</sup> Many initiatives across the political spectrum have obvious private party plaintiffs while they have no obvious private party defendants who can claim a particularized interest in the measure's defense as required by the Supreme Court. Therefore, litigation over the initiatives is essentially assured, but the defense of the litigation may be eliminated if government officials side with the plaintiffs.<sup>386</sup> Such initiatives include those calling for increased environmental protection over industry, the elimination of vouchers for private schools, the imposition of tax penalties for discriminatory practices, restrictions on abortion measures, and limitations on marriage.<sup>387</sup>

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381. See *supra* notes 77–106 and accompanying text (discussing the nature and purposes ballot initiatives).

382. See *supra* notes 141–47 and accompanying text (discussing authority to defend initiatives).

383. See *supra* Part V.

384. See *supra* Part V.

385. See *supra* Part V; Chemerinsky, *supra* note 72.

386. See Chemerinsky, *supra* note 72 (“[I]t . . . should not be possible for a few government officials to negate ballot measures they disagree with simply by refusing to defend them.”).

387. See *supra* notes 64–68 and accompanying text.

Instead of these issues being decided by the ballot box, or on the merits in the courtroom, federal standing requirements can be decisive.<sup>388</sup> Important principles of standing and federalism—ensuring vigorous advocacy, allowing political decisions to be made in the political process, respecting state sovereignty, and limiting the federal courts—are all undermined.<sup>389</sup>

Fortunately, there are narrow pathways still left open through this constitutional divide over standing. The simplest and most straightforward is for a special state attorney to be expressly designated in initiatives or other initiative legislation as an official defender of an initiative when the government officials ordinarily expected to defend the legality of the state's laws decline to do so.<sup>390</sup> To comply with *Hollingsworth*, the process for the selection and removal of the special state attorney should be specified, as well as oaths requiring the attorney to defend the constitutionality of the initiative and other state laws.<sup>391</sup> As official agents of the state, representing the state's interest in the legality of the initiative, the special state attorneys should surely satisfy federal standing requirements, regardless of whether they are public employees.<sup>392</sup> Their express designation is also consistent with the statutory approach to standing common in the states to define who can sue prior to an initiative's passage.<sup>393</sup> It avoids the need for elaborate post hoc justification of who should be allowed to defend the statute.<sup>394</sup> At least after *Hollingsworth*, drafters of initiatives are well advised to define who can defend them if they do not have confidence in the government officials ordinarily expected to do so.

There are other alternatives through the constitutional divide as well, at least for sherpa-like drafters of state initiatives willing to take riskier routes through the crevasses of *Hollingsworth*. Petitioners could be expressly defined in the initiative or legislation governing initiatives as post-passage

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388. See *supra* notes 69–76 and accompanying text.

389. *Id.*

390. See *supra* Part VI.B.1.

391. See *supra* notes 312–14 and accompanying text.

392. See *supra* notes 319–22 and accompanying text.

393. See *supra* Part III.B (discussing standing in the pre-election initiative process).

394. See *supra* Part VI.B.1.

agents of the people for the purpose of defending the initiative when the government declines to do so.<sup>395</sup> The initiative, or the laws governing initiatives in general, could expressly require them to take an oath and post a bond to ensure their careful and competent discharge of their responsibilities to defend the initiative against legal challenges.<sup>396</sup> A defense oversight committee, consisting of state-wide supporters of the initiative other than the petitioners, could also be given the power to replace the petitioners as defenders of the people's interest.<sup>397</sup> These requirements address the particular concerns set out in *Hollingsworth*, if not its unease about anyone but government officials having the right to defend the legality of a statute.

A third alternative, albeit a somewhat shaky one given the Supreme Court's attempts to dismiss and distinguish *qui tam* actions as historic anomalies, is to create a bounty to be paid for the successful defense of an initiative when the government has declined to defend it.<sup>398</sup> A fourth possibility, distinguishable from *qui tam* and informer's actions, would allow proponents to recover a portion of a previously paid filing fee if they successfully defend the initiative in court.<sup>399</sup> This would give a monetary interest to the petitioners that should be considered cognizable under Article III.<sup>400</sup> And finally, it may be possible to circumvent the issue by retracing the path taken in *Windsor*—having the state appeal without defending on the merits—although the Supreme Court has indicated that the *Windsor* route may be closed if the Court would rather not decide a given case.<sup>401</sup>

In sum, the current constitutional impasse over initiative standing is untenable. It serves neither the purposes of the initiative process nor the principles of standing and federalism.<sup>402</sup>

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395. See *supra* Part VI.B.2.

396. See *supra* notes 328–30 and accompanying text.

397. See *supra* notes 331–33 and accompanying text.

398. See *supra* Part VI.B.3.

399. See *supra* Part VI.B.4.

400. See *supra* Part VI.B.4 (indicating that “petitioners would retain a property right in reimbursement of the filing fee,” and a claim for money is an injury for standing purposes).

401. See *supra* Part VI.B.5.

402. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2673–74 (2013) (Kennedy, J., dissenting) (stating that the Court's opinion disrespects the political process

It disadvantages conservatives and progressives alike, and should be of concern to all sides.<sup>403</sup> It is now the responsibility of lawmakers and the drafters of initiatives, and then ultimately of the U.S. Supreme Court, to choose among the proposed routes around the precipice and across the standing divide.

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in California and reflects a misunderstanding of the initiative process and the principles of Article III).

403. See *supra* notes 64–76 and accompanying text; cf. Elliott, *supra* note 64, at 558–79 (discussing the effect standing has on litigation brought by both liberals and conservatives).