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INTRODUCTION

On June 26, 2015, the Supreme Court announced for the first time in *Obergefell v. Hodges* that individuals have a fundamental right to marry the person of their choice, regardless of their sex or the sex of their partner.[2] But *Obergefell* did not appear out of thin air; rather, it was preceded by two groundbreaking decisions in 2013 concerning the definition of marriage in America. The first, *United States v. Windsor*, struck down the provision of the federal Defense of Marriage Act (DOMA),[3] which defined marriage under federal law as the union of one man and one woman.[4] *Windsor* invited further litigation in the lower federal courts as different groups and individuals challenged various state prohibitions against same-sex marriage, but the Court finally settled the issue in *Obergefell*. However, while *Windsor* and *Obergefell* settled the issue of a nationwide right to same-sex marriage, *Windsor*'s companion case, *Hollingsworth v. Perry*,[5] left open a significant question that has the potential to impact a large number of U.S. citizens.

In *Hollingsworth*, the Court declined to address the merits of California's ban on same-sex marriage, enacted by state citizens through the controversial Proposition 8 ballot initiative.[6] Pursuant to California law, state citizens proposed an amendment to the state constitution.[7] Approved by voters in 2008, Proposition 8 banned same-sex marriage in California, but was subsequently held unconstitutional by the district court for the Northern District of California in *Perry v. Schwarzenegger*.[8] State executive officials, who opposed the amendment, declined to defend Proposition 8.[9] The groups who proposed the initiative

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[2] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015).

[3] United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).

[4] Defense of Marriage Act (DOMA) § 3, 1 U.S.C. § 7 (2012), *invalidated in part by Windsor*, 133 S. Ct. 2675.

[5] Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

[6] *Id.* at 2661, 2668.

[7] *See* CAL. CONST. art. II, § 8; CAL. ELEC. CODE §§ 9000–18 (LEXIS through Chapter 807 of the 2015 Legislative Session) (describing the process governing initiative proposals).

[8] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 994–95 (N.D. Cal. 2010).

[9] *Hollingsworth*, 133 S. Ct. at 2660.

attempted to step in,[10] but the Supreme Court held in *Hollingsworth* that these proponents had no standing to defend the amendment.[11]

Currently, voters in twenty-four states have the ability to amend their state constitutions or pass new laws through ballot initiatives proposed by citizens,[12] and all states but Delaware allow voters to accept or reject constitutional amendments proposed by the legislature.[13] These proposals may seek to accomplish a wide range of objectives, from efforts to secure the "personal right to hunt, fish, and harvest wildlife"[14] to such topics as education reform, gun control, abortion, and environmental reform.[15] For any number of reasons, the state's executive branch may not support these objectives. The Court's decision in *Hollingsworth* allows state officials who disagree with a duly-enacted amendment or law to effectively veto the amendment by refusing to defend it in court.

This Note proposes that states that value the initiative and referendum devices should recognize the threat posed to the integrity of those processes by the *Hollingsworth* decision and should take steps to ensure that federal courts are able to reach the merits of these cases. Part I.A explains the doctrine of Article III standing, while Part I.B defines the two principal methods of amending state constitutions—namely, ballot initiatives and legislative referenda. Part II explores the convergence of these two subjects in *Hollingsworth*, discussing the difficulties posed by the majority's decision and the practical problems that state constitutional amendment processes now face. Finally, Part III proposes that states should adopt legislation that specifically enables designated agents or proponents to defend amendments and laws approved by voters when the executive branch declines to do so. This measure will protect the integrity of the initiative and referendum, ensuring that state constitutions remain adaptable to the ever-changing political landscape in America.

I. STANDING, INITIATIVES, AND REFERENDA: A PRIMER

A. The Basics of Article III Standing

Broadly speaking, standing is a party's ability to appear in court and be heard. Standing is of particular importance in federal court, as Article III requires that a "case or controvers[y]" must exist before a federal district court may take up a

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[10] *Id.*

[11] *Id.* at 2663.

[12] M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC 11–12 (2003).

[13] Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL'Y 295, 301–02 n.23 (2008).

[14] KY. CONST. § 255A. This amendment was proposed by the Kentucky legislature and passed by the voters in 2012. John Cheves, *Constitutional Amendment to Protect Hunting and Fishing Passes Easily*, KENTUCKY.COM (Nov. 6, 2012), http://www.kentucky.com/2012/11/06/2398379_constitutional-amendment-to-protect.html?rh=1.

[15] WATERS, *supra* note 12, at 481, 481–520.

case.[16] Standing must be present at all levels of a proceeding, from trial to final appeal.[17] Outside of this constitutional limitation, standing has historically been grounded in the doctrine of separation of powers and the need for judicial economy.[18] A further justification for the doctrine is that "only plaintiffs raising concrete grievances have sufficient interest to press their claims in the adversary process."[19] The sometimes strict requirements of standing have been widely criticized by both liberals and conservatives, who allege that "[t]he Court . . . advance[s] substantive interests under the guise of procedure."[20] Indeed, the Court's formulation and precise language of the standing elements often changes from case to case.[21] Nevertheless, lower federal courts continue to enforce the standing requirements developed over time by the Court.

The Supreme Court has articulated a three-part conjunctive test for standing. Litigants must demonstrate (1) an injury, (2) that is fairly traceable to the opposing party's conduct, and (3) that is likely to be redressed by a favorable decision.[22] Typically, issues of standing arise at the trial level, when a plaintiff is unable to demonstrate one of these three elements. Once a district court renders a decision, the burden then shifts to the losing party to show standing to appeal.[23] If by the time the appeal is taken the losing party lacks one of the three standing elements, there is no longer any case or controversy before the appellate court, and the case will be dismissed.[24] *Hollingsworth v. Perry*, discussed below, is a specific application of this "defensive standing" problem.[25]

Beginning with the first element, a litigant must demonstrate an "injury in fact" that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[26] The injury must be a "personal and tangible harm," not merely a harm that the litigant is connected to tangentially.[27] Next, the injury must be "fairly traceable" to the defendant's conduct; stated otherwise, the defendant must have caused the injury.[28] Finally, even if a litigant demonstrates injury and causation, a

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[16] U.S. CONST. art. III, § 2, cl. 1.

[17] *Hollingsworth*, 133 S. Ct. at 2661 (citing Already, LLC v. Nike, Inc., 133 S. Ct. 721, 726 (2013)).

[18] Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013); Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1194 (2014).

[19] Re, *supra* note 18, at 1194.

[20] *Id.* at 1195.

[21] *Id.* at 1194–95.

[22] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

[23] *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997).

[24] *Id.* at 64.

[25] "Defensive standing" refers to the requirement that the defendant in a given case must have a direct stake in outcome of the case at all stages. In the context of initiatives and referenda, the defensive standing problem arises when the government, the defendant in the trial court, does not pursue an appeal, and other persons or groups attempt to step into the shoes of the government for appeal purposes.

[26] *Lujan*, 504 U.S. at 560 (citations and quotation marks omitted).

[27] Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013).

[28] *Lujan*, 504 U.S. at 560.

decision in favor of the litigant must be likely to remedy the suffered injury.[29] The importance of this element, called redressability, turns on the type of relief sought. If the litigant seeks a remedy for a past harm, redressability is typically easy to show. For instance, a plaintiff injured in a car accident caused by a negligent defendant demonstrates redressability by showing that a judgment in her favor will pay her medical bills, property damage, lost wages, or pain and suffering. However, if a litigant seeks an injunction against current or future conduct, the injury must be pled with enough specificity to show that harm will likely occur in the future unless the court orders the conduct to cease.[30]

Normally, litigants must assert their own injury, as well as causation and redressability, to demonstrate Article III standing. However, in certain situations, parties are allowed to assert the injuries and interests of others. Known as third-party standing, this arrangement is allowed when the interests of the injured party and the party seeking standing are sufficiently aligned and it would be difficult or impractical for the injured parties to bring suit on their own behalf.[31] For instance, trade unions and other organizations have standing to bring suit on behalf of their members.[32] Members of a clearly defined and similarly aggrieved class also have standing to assert the injuries of all class members, in addition to their own interests.[33] A class action lawsuit is the prototypical form of third-party standing, but the Court has allowed suits based on this theory to go forward in a number of other situations.[34] The third-party standing doctrine is important in the initiative and referendum context, because the *Hollingsworth* proponents attempted to assert the interests of the state as well as their own.[35] Before these issues are explored, however, a more detailed exploration of ballot initiatives and legislative referenda is necessary.

B. The Tools of Direct Democracy: Initiatives and Referenda

Unlike their federal counterpart, state constitutions are easily amended, and such amendments are ratified rather frequently across the country.[36] A total of

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[29] *Id.* at 561.

[30] *See* City of Los Angeles v. Lyons, 461 U.S. 95, 106–07, 111–12 (1983).

[31] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 83–91 (4th ed. 2011).

[32] Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 342–44, 346 (1977).

[33] *See* Barrows v. Jackson, 346 U.S. 249, 258 (1953) (finding that petitioner, sued for breach of a racially restrictive covenant, had standing to represent the rights of African-Americans against whom the covenant was directed).

[34] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 195 (1976) (holding that a beer distributor can challenge alcohol sales laws that discriminate on basis of sex); Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (finding that a doctor convicted under statute prohibiting prescription of contraceptives can assert constitutional rights of patients).

[35] Hollingsworth v. Perry, 133 S. Ct. 2652, 2663 (2013).

[36] Krislov & Katz, *supra* note 13, at 298, 304 n.34. As of 2012, the current versions of all U.S. state constitutions had been amended 7378 times. John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 ALB. L. REV. 2105, 2106 (2013).

forty-nine states allow or require voters to approve state constitutional amendments, Delaware being the lone outlier.[37] Typically, this is done through the legislative referendum, whereby state legislators propose constitutional amendments or statutes, which are then submitted to the voters for approval or rejection.[38] Twenty-four states take direct democracy a step further, and allow state citizens or organizations to submit proposals for new laws or amendments.[39] This device, the ballot initiative, requires the citizen-sponsor of the legislation, known as the proponent, to gather a sufficient number of signatures on a petition before the proposal will be placed on the ballot.[40]

In the typical initiative process, a citizen or group of citizens, who wish to bring about some policy change, submit a preliminary proposal to a specified state agency.[41] This proposal is reviewed by state officials to ensure that it meets all the state procedural requirements, and is given an official title.[42] Next, the proponents petition individual citizens, attempting to collect the required number of signatures in their jurisdiction.[43] This number varies from state to state, but is generally eight percent or ten percent of the total votes cast in the most recent gubernatorial election.[44] Once a sufficient number of signatures is gathered, the proposal is placed on the ballot for voter approval.[45] Most states allowing the initiative only require a majority vote for enactment or ratification.[46]

The referendum process is simpler, requiring only two basic steps. First, an amendment is proposed in the legislature.[47] Once the proposal makes it out of committee, it comes up for a vote before the entire legislative body.[48] Here, states are split as to whether a simple majority or supermajority is required for the proposal to move forward.[49] The second step, voter approval, is identical to the final step in the initiative process. Not surprisingly, because of the simplicity and widespread nature of the referendum, it has historically been the most popular method of constitutional change in the states, accounting for approximately ninety

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[37] Krislov & Katz, *supra* note 13, at 301 n.23. Krislov & Katz identify seven different schemes in which citizens are directly involved in enacting new laws or amendments. *Id.* at 302. However, each of these schemes falls into one of two broad categories: proposals drafted by the legislature (referenda), and proposals drafted by citizens or groups (initiatives). *See id.* For the purposes of analyzing standing to defend in the wake of *Hollingsworth*, these categories are sufficiently distinct.

[38] *Id.* at 302.

[39] WATERS, *supra* note 12, at 11–12.

[40] Krislov & Katz, *supra* note 13, at 303.

[41] *Id.* at 310.

[42] *Id.* at 310–11.

[43] *Id.* at 311–12.

[44] *See id.* at 313.

[45] *Id.* at 316.

[46] *See id.* at 317.

[47] *See id.* at 304.

[48] *See id.* at 318–19.

[49] *See id.* at 319.

percent of state constitutional amendment proposals.[50] However, the use of initiatives for constitutional and statutory change has increased in recent years,[51] being used to advance both conservative and liberal causes.[52]

These methods of amending state constitutions and enacting new laws, especially the ballot initiative, have received a fair share of criticism. Particularly, there is concern that when "voters . . . pass laws directly without open deliberation in a legislative forum,"[53] the majority could infringe upon minority rights.[54] Indeed, voters have enacted laws restricting personal liberties, such as the ability to obtain a same-sex marriage or for immigrants to receive welfare benefits.[55] Additionally, many states with the initiative "prevent elected representatives from amending or repealing laws enacted by popular vote."[56] Finally, state courts seem reluctant to invalidate initiatives, especially those enacting constitutional amendments; some scholars have suggested that such measures are not receiving the judicial attention they deserve.[57]

Despite this criticism, initiatives and referenda remain overwhelmingly important devices of legal and constitutional change. Particularly, constitutions define the rules of the political game, the rights of the people, and their relationships with one another and with the government. At the state level, constitutions may accomplish a host of other objectives, such as setting out the permissible structure of local government and specifying how state schools are funded.[58] While constitutions are "semi-permanent institutions," they must also "balance the efficiency created by their constancy with the need to adapt to changing circumstances."[59] Twenty-four states have chosen to give their citizens a direct method to determine which adaptations must be made, and nearly all states give voters a voice in deciding these important issues.[60] Furthermore, these devices are frequently used. In a seven-year span, state voters ratified 655 legislative amendment proposals; in 2004 alone, voters considered sixty-two ballot initiatives.[61] The initiative and referendum are important political tools, and should

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[50] G. Alan Tarr & Robert F. Williams, Foreword, *Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1092 (2005).

[51] *See* Krislov & Katz, *supra* note 13, at 307.

[52] Scott L. Kafker & David A. Russcol, *Standing at a Constitutional Divide: Redefining State and Federal Requirements for Initiatives After* Hollingsworth v. Perry, 71 WASH. & LEE L. REV. 229, 299 (2014).

[53] Fred O. Smith, Jr., *Due Process, Republicanism, and Direct Democracy*, 89 N.Y.U. L. REV. 582, 584 (2014).

[54] *Id.* at 596–97.

[55] *Id.* at 585.

[56] *Id.* at 584–85.

[57] *See* Krislov & Katz, *supra* note 13, at 321–25 (discussing state judicial decisions concerning state constitutional amendments and surveying arguments for and against heightened judicial scrutiny for initiatives).

[58] *See generally* KY. CONST. §§ 156a–158, 183–189.

[59] Krislov & Katz, *supra* note 13, at 327.

[60] WATERS, *supra* note 12, at 11–12.

[61] Tarr & Williams, *supra* note 50, at 1092, 1102.

therefore be taken seriously by the states that choose to implement them. However, the Supreme Court's recent decision in *Hollingsworth v. Perry* poses a significant threat to the effectiveness of these processes, especially the initiative.

II. THE INTERSECTION OF STANDING AND DIRECT DEMOCRACY: *HOLLINGSWORTH V. PERRY*

As outlined above, the initiative and referendum offer attractive, popular, and fairly simple means for citizens to have a direct measure of influence in government. *Hollingsworth v. Perry*, the 2013 Supreme Court case finding that the Proposition 8 proponents lacked standing, presents an obstacle to the effectiveness of this process when it is used to bypass the executive branch. But *Hollingsworth* was preceded by two significant cases dealing with similar standing issues. The first, *Karcher v. May*, arose after the New Jersey Attorney General refused to defend a statute requiring schools to hold a minute of silence at the beginning of each day.[62] The challenged law was not enacted via initiative or referendum, but rather by the legislature after it overrode the governor's veto.[63] Alan Karcher and Carmen Orechio, leaders of the New Jersey General Assembly and Senate, defended the law in district court after the state Attorney General declined to do so.[64] The district court struck down the law as unconstitutional.[65] After this ruling was affirmed by the Third Circuit Court of Appeals, but before a notice of appeal was filed with the Supreme Court, Karcher and Orechio were removed as party leaders in their respective chambers.[66] The new party leaders declined to continue the case, but Karcher and Orechio sought to appeal to the Supreme Court.[67]

Denying standing, the Court held that "[their] intervention as presiding legislative officers does not entitle them to appeal in their other individual and professional capacities."[68] Once Karcher and Orechio lost their roles as party leaders, they no longer had standing to continue the appeal.[69] Importantly, however, the Court did not foreclose the possibility that an individual legislator would have standing to continue the appeal; rather, it remained silent on this issue.[70] Of course, *Karcher* did not deal with a law passed through either an initiative or referendum. But by declining to answer the question of individual legislator standing, the Court left this possibility open. As shown below, this notion is significant for securing the continuing viability of the referendum device.

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[62] Karcher v. May, 484 U.S. 72, 74–75 (1987).
[63] *Id.* at 74.
[64] *See id.* at 75.
[65] *Id.*
[66] *See id.* at 76.
[67] *Id.*
[68] *Id.* at 78.
[69] *Id.*
[70] *See id.* at 81.

A second case, *Arizonans for Official English v. Arizona*, dealt directly with standing issues in a challenge to a ballot initiative.[71] In 1988, Arizonans amended their state constitution through a ballot initiative to establish English as the official language of the state.[72] Challenged as overbroad, the district court struck down the amendment.[73] Afterwards, the governor declared that she would not appeal the district court's ruling, and the initiative's official proponents, Arizonans for Official English (AOE), sought to intervene.[74] Finding that AOE lacked standing to appeal, the Court wrote, "An intervenor cannot step into the shoes of the original party unless the intervenor independently 'fulfills the requirements of Article III.'"[75] The Court noted that AOE was not authorized under Arizona law to defend their measure, and that no member of AOE asserted a "concrete injury" sufficient for third party standing by the organization.[76] However, this assessment of AOE's lack of defensive standing was dicta; the Court held that the case was moot because the original plaintiff had resigned from her employment with the state.[77]

These two cases, along with the previous discussion of the initiative and referendum, provide sufficient context to analyze the *Hollingsworth* case. In response to a 2008 California Supreme Court ruling that the state's definition of marriage between one man and one woman violated the state constitution's equal protection clause,[78] voters approved Proposition 8, amending the state constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."[79] Under the California Constitution and California Elections Code, individuals or groups may propose constitutional amendments and force their inclusion on the ballot once a sufficient number of signatures has been gathered on a petition.[80] In the case of Proposition 8, opponents of same-sex marriage successfully circulated petitions, allowing California voters to approve the measure.[81]

After its enactment, same-sex couples brought suit in federal court, alleging violations of their due process and equal protection rights.[82] The governor, attorney general, and other named defendants in the suit refused to defend the newly enacted amendment, so the district court allowed the official proponents of

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[71] Arizonans for Official English v. Arizona, 520 U.S. 43 (1997).

[72] *Id.* at 49.

[73] *Id.* at 55.

[74] *Id.* at 55–56.

[75] *Id.* at 65 (quoting Diamond v. Charles, 476 U.S. 54, 68 (1986)).

[76] *Id.* at 65–66.

[77] *Id.* at 66–67.

[78] *See In re* Marriage Cases, 183 P.3d 384, 402 (Cal. 2008).

[79] CAL. CONST. art. I, § 7.5, *invalidated by* Perry v. Schwarzenegger, No. 3:09-CV-02292 (N.D. Cal. filed Aug. 4, 2010); CAL. ELEC. CODE §§ 9000–18 (LEXIS through Chapter 807 of the 2015 Legislative Session) (describing the process governing initiative proposals).

[80] CAL. CONST. art. II, § 8.

[81] Lisa Leff, *Prop 8 To The Supreme Court? California Gay Marriage Ban Backers Look Ahead*, HUFFINGTON POST (Aug. 5, 2012, 5:12 AM), http://www.huffingtonpost.com/2012/06/05/prop-8-to-the-supreme-court_n_1571509.html.

[82] Hollingsworth v. Perry, 133 S. Ct. 2652, 2260 (2013).

Proposition 8 to intervene.[83] After the district court found Proposition 8 unconstitutional,[84] the proponents sought to appeal to the Ninth Circuit.[85] Before ruling on the merits, the Ninth Circuit certified a question to the California Supreme Court, asking whether ballot initiative proponents have standing under California law to defend the measure when public officials decline to do so.[86] In *Perry v. Brown*, the California Supreme Court held that the proponents were "authorized under California law to appear and assert the state's interest in the initiative's validity."[87] Based on the California Supreme Court's answer, the Ninth Circuit reached the merits of the challenge to Proposition 8, affirming the district court and finding the amendment unconstitutional on equal protection grounds.[88] The proponents appealed once again, and the United States Supreme Court granted certiorari, asking the parties to address the issue of Article III standing in addition to the merits of the case.[89]

Writing for a five-justice majority, Chief Justice Roberts pointed out that the "petitioners had no 'direct stake' in the outcome of their appeal," seeking only to defend the constitutionality of a state law.[90] Such a desire, the Court held, was only a "generalized grievance" insufficient to satisfy Article III's standing requirement.[91] The proponents did have a special role in collecting signatures, submitting their proposal, and arguing for its inclusion on the ballot.[92] But once Proposition 8 was enacted as a constitutional amendment, the proponents were no longer situated any differently than the rest of California's citizens.[93] Furthermore, the Court held that the petitioners could not assert the State's interests as their own through third-party standing because the petitioners themselves suffered no "injury in fact."[94] According to the Court, "mere authorization" by the state to represent its interests was simply not sufficient.[95] Nor was the California Supreme Court's answer to the Ninth Circuit's certified question sufficient for the Court, who characterized the proponent's interest in defending Proposition 8 as only "generalized."[96] Finally, the

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[83] *Id.*

[84] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

[85] *Hollingsworth*, 133 S. Ct. at 2260.

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

[87] Perry v. Brown, 265 P.3d 1002, 1007 (Cal. 2011).

[88] Perry v. Brown, 671 F.3d 1052, 1095, 1096 (9th Cir. 2012).

[89] *Hollingsworth*, 133 S. Ct. at 2661.

[90] *Id.* at 2662.

[91] *See id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992)).

[92] *See id.*

[93] *Id.* at 2663.

[94] *Id.* at 2664. The Court based this aspect of its holding on *Diamond v. Charles*, 476 U.S. 54 (1986). In *Diamond*, an abortion opponent was unable to demonstrate standing to pursue the Seventh Circuit's injunction against an Illinois abortion law when the state declined to do so, even with a letter from the state attorney general saying that the individual and the state asserted the same interests, because the petitioner could not demonstrate any injury in fact of his own. *See id.* at 65.

[95] *Hollingsworth*, 133 S. Ct. at 2665.

[96] *Id.* at 2666 ("[T]he authority . . . [the proponents] enjoy is simply the authority to participate as parties in a court action to asset legal arguments in defense of the state's interest in the validity of the

Court noted that "the most basic features of an agency relationship [were] missing," including the principal's power to control or remove the agent, the fiduciary duties owed by the agent, and reimbursement of the agent's expenses by the principal.[97]

In dissent, Justice Kennedy (joined by Justices Thomas, Alito, and Sotomayor) began by pointing out that the California Supreme Court's determination of state law is binding upon the U.S. Supreme Court.[98] Therefore, when the California court ruled that the Proposition 8 proponents were authorized under the California Elections Code to assert the state's interest, the Court should not second-guess that court's interpretation of California statutes.[99] Furthermore, the dissent noted that the formal requirements of an agency relationship are ill-equipped for the unique situation of a ballot initiative, given the uncertainty as to who the principal is and how they would exercise control.[100] Finally, unlike the majority, the dissent emphasized policy considerations, pointing out that the majority's decision undermines the "prime purpose of justiciability," namely "to ensure vigorous advocacy" by the party who has the best incentives to litigate.[101]

The Court's holding in *Hollingsworth* undermines the effectiveness of the initiative and referendum processes in several ways. These devices, especially the ballot initiative, are intended to place a measure of democratic power in the hands of the people. In many cases, as in *Hollingsworth*, the popularly enacted law or amendment is contrary to the wishes of the state's elected officials.[102] When all goes as planned, the referendum and initiative operate as a bypass around the executive veto power or around a legislature that declines to take up or pass new legislation. But under *Hollingsworth*, when that new law is challenged and state officials refuse to defend it, the government effectively uses a veto that state law does not authorize. The people are denied a power that they rightfully possess, and the government exercises a power that it does not have.[103] The *Hollingsworth* decision is also not in accord with the separation of powers justification for the standing doctrine. If the Court had reached the merits of Proposition 8, it would have either upheld a law duly enacted by California voters or struck down a measure infringing upon a fundamental right of a minority.[104] This is not a step

initiative measure. That interest is by definition a generalized one." (internal citations and quotation marks omitted)).

[97] *Id.* at 2666–67.

[98] *Id.* at 2668 (Kennedy, J., dissenting).

[99] *Id.* at 2669–70.

[100] *Id.* at 2671.

[101] *Id.* at 2674.

[102] For instance, leaders in the Colorado state legislature opposed the use of a ballot initiative to legalize the possession and recreational use of marijuana. Ivan Moreno, *Colorado Lawmakers Warn About Constitutional Hazards of Marijuana Legalization*, DAILY CAMERA (Sep. 05, 2012, 11:03 PM), http://www.dailycamera.com/state-west-news/ci_21477445/colorado-lawmakers-warn-about-constitutional-hazards-marijuana-legalization.

[103] *See* Kafker & Russcol, *supra* note 52, at 300.

[104] Joshua Abbotoy, *A "[Non]essential Limit on Our Power": Standing Doctrine and Judicial Restraint in* Hollingsworth v. Perry, *133 S.Ct. 2652 (2013)*, 37 HARV. J.L. & PUB. POL'Y 363, 372 (2014).

outside the role of the judiciary, which has had the power to review acts of the legislature since *Marbury v. Madison*.[105]

Aside from these democratic concerns, the *Hollingsworth* decision also has a practical effect on the development of judicial precedent. Federal courts are now unable to reach the merits of cases involving important constitutional issues. This stunts the growth of the common law as demonstrated by two hypotheticals. Suppose that a state's voters enact through the ballot initiative process a law that the state's executive officials oppose for political reasons, and that the law is challenged on federal constitutional grounds by a person whom the law harms. In this first scenario, further suppose that the law is objectively unconstitutional; that is to say, if the Supreme Court were to rule on the merits of the law, it would be unanimously struck down. Here, if the government officials refuse to defend the law, it will be invalidated, because under *Hollingsworth* no one else can demonstrate Article III standing. In this case, the correct outcome is reached (an unconstitutional law is unenforceable), but the reviewing courts are unable to rule on the merits, preventing them from generating potentially important precedent. This is essentially what happened in *Hollingsworth*; had the Supreme Court been able to rule on the merits of Proposition 8, the same-sex marriage debate would have been significantly tempered.[106] Instead, lower federal courts across the country spent three years hearing challenges to various marriage laws, until the Court finally settled the matter in *Obergefell*. One of the purposes of the standing doctrine is the promotion of judicial economy, but in this specific application, judicial economy was harmed rather than promoted.

Perhaps even more concerning are the consequences when government officials decline to defend an objectively constitutional initiative. In this hypothetical, the law in question is challenged, and the government refuses to appear in court to defend it. Here, this refusal could result in a default judgment in favor of the challengers. The district court might also make an incorrect ruling on the merits, striking down the initiative. If the government declines to appeal this ruling, and no one else has standing to do so, the law will remain invalidated. In either case, a duly enacted and otherwise constitutional law is taken off the books because government leaders were politically opposed to the will of the people who enacted the measure. These hypotheticals demonstrate the effective veto power the *Hollingsworth* decision gives state government leaders and the larger democratic concerns raised by *Hollingsworth*.

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[105] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173–74 (1803).

[106] This scenario also sets up a rather perverse incentive for officials to continue to enforce laws with which they disagree so that the cases against these laws do not become moot. This is essentially what happened in both *Hollingsworth* and *Windsor*. State and federal officials enforced Proposition 8 and DOMA even though they disagreed with the laws, ensuring the cases remained justiciable, but declined to actually defend on the merits, hoping that the laws would be invalidated for lack of defensive standing. *See* Sergio J. Campos, *Class Actions and Justiciability*, 66 FLA. L. REV. 553, 614 (2014).

III. OVERCOMING THE *HOLLINGSWORTH* STANDING OBSTACLE

The effectiveness of initiatives and referenda largely turns on whether there is a mechanism for those laws to be tested on their merits. These devices are often used as a bypass around gridlocked legislatures and obstructionist executives. If the executive is able to exercise effective veto power by simply ordering the state attorney general not to pursue an appeal, the initiative and referenda will decline in their usefulness. Seeing this futility, citizens and legislators might become wary of proposing amendments in the first place, stunting the ability of state constitutions to adapt to societal changes. While *Hollingsworth* does significantly frustrate these important democratic and political objectives, all is not lost. At least three viable solutions to the *Hollingsworth* standing obstacle exist: special state attorneys, explicit delegation of agency authority, and monetary incentives.[107]

One possible option to overcome the standing obstacle would be appointing a special state attorney to act as an agent of the state on a case-by-case basis. This would almost certainly satisfy the shortcomings of the *Hollingsworth* petitioners, as the special attorney would be hired as an agent of the state, and not asserting his or her own interests.[108] This process would also be familiar to the states, as special attorneys are routinely appointed in cases where full-time government lawyers have a conflict of interest. While states might find this solution easy to administer, the uncertainty comes in deciding who will be the special attorney. Presumably, the provision and appointment process for selecting the special attorney would be defined by statute. However, the same special attorney could not represent the state in every constitutional challenge in perpetuity, so there would be some element of choice in this decision. But who gets to decide? Executive branch officials, who at this point must necessarily have declined to defend the law, might have perverse incentives to appoint a special attorney who would not be the best-equipped person for the job. Sponsoring legislators or official proponents could also play a role in the appointment process, but the added number of persons and groups, each with their own particularized interests, might make it hard to reach a consensus.

A second option would be the explicit designation of the official proponents as agents of the state for the purposes of defending their enacted proposal. Essentially, the persons or groups advocating for the measure, and therefore those with the best incentive to defend it, would stand in the shoes of the state for this specific case. This could also be accomplished by statute, and would eliminate the element of choice inherent in the special state attorney solution. However, this solution rests

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[107] Some scholars have recently suggested an additional possibility, that the Court recognize a categorical exception to the standing requirement for sponsors of ballot initiatives. Matthew A. Melone & George A. Nation III, *"Standing" on Formality:* Hollingsworth v. Perry *and the Efficacy of Direct Democracy in the United States*, 29 BYU J. PUB. L. 25, 80–81 (2014). Such an exception would certainly be the simplest solution to the defensive standing problem; however, the purpose of this Note is to suggest proactive solutions for state legislatures to implement. Additionally, the viability of such an argument is suspect given the Court's recent hostility to proponent standing in *Windsor*.

[108] Kafker & Russcol, *supra* note 52, at 287–88.

on more tenuous grounds, given the language of *Hollingsworth*. While agency would be established by statute, "[t]he *Hollingsworth* majority . . . is clearly uncomfortable with this agency approach because it collapses the Court's clear distinction between public and private injury."[109] In this scenario, the proponents would still not be suffering any injury unique to themselves. To remedy this problem, scholars have proposed additional requirements for official proponents to satisfy. They could be required to swear an oath, further solidifying the fiduciary nature of their relationship with the state.[110] Proponents could also be required to post an appeal bond, giving them a financial stake in the outcome of the case.[111] Additionally, a key element of agency law is the principal's ability to control the agent.[112] The state would need to have some oversight of the proponents during the litigation,[113] with the possibility of removal and replacement for misfeasance. Designating the official proponent of an initiative as the state's agent also does not solve the *Hollingsworth* standing problem when a referendum is challenged. But in *Karcher*, the Court left open the possibility that legislators, especially those in leadership roles, could have standing to defend enacted legislation.[114] The statute could have a provision codifying this principle in the case of a referendum first proposed in the legislature.

Certain monetary incentives, such as a defender's bounty or a refundable filing fee, could also be required of those seeking to defend an initiative or referendum.[115] In *qui tam* actions, such as federal whistleblower cases, private plaintiffs are given a bounty for successfully prosecuting a claim alongside the government.[116] These plaintiffs, called "relators or informers," "need not have suffered any personal injury, need not be government officials, and need not have any formal agency relationship" with the government, but still have standing.[117] In theory, the potential for a similar monetary reward upon successful defense of the statute would give proponents a stake in the outcome. The *Hollingsworth* majority, however, seemed to question whether a *qui tam*-like bounty would be sufficient, especially given the fact that the injury would not actually stem from the challenged statute itself.[118] Perhaps a better alternative would be requiring initiative proponents to pay a filing fee before the initiative is placed on the ballot,

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[109] *Id.* at 289.

[110] *See id.* at 289–90.

[111] *See id.*

[112] *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW. INST. 2006).

[113] Kafker & Russcol, *supra* note 52, at 290.

[114] Karcher v. May, 484 U.S. 72, 81 (1987).

[115] Kafker & Russcol, *supra* note 52, at 291.

[116] *See* 31 U.S.C. § 3730(d) (2006). *See generally* Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 PUB. CONT. L.J. 813 (2012); Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543 (1990).

[117] Ryan W. Scott, *Standing to Appeal and Executive Non-Defense of Federal Law After* the Marriage Cases, 89 IND. L.J. 67, 78–79 (2014).

[118] Hollingsworth v. Perry, 133 S. Ct. 2652, 2665 (2013).

refundable upon the successful defense of the initiative.[119] This would give the proponents a direct financial stake tied to the challenged law itself, not merely a reward for winning the case.[120] Financial harm is the prototypical injury for standing purposes. A preemptive filing fee would seem to satisfy all three elements of Article III standing, and would also be a viable option.[121] This would also incentivize proponents to think carefully before proposing legally questionable amendments. It is difficult to say with any certainty what filing fee amount, if any, would satisfy the Court. A sum that would be seen as clearly more than nominal, but not so burdensome as to discourage new proposals would be optimal.[122]

Of these possibilities, which is preferable? For several reasons, a statutory delegation of agency to the official proponent of a ballot initiative or the legislative sponsor of a public referendum, combined with the posting of a refundable filing fee in ballot initiative cases, is the best approach to overcoming the *Hollingsworth* standing obstacle. At a basic level, this would be relatively simple to administer and would avoid the potential controversy that might result if the executive branch has some leeway in choosing the special attorney or agent. Additionally, *Hollingsworth* seems to make room for an explicit statutory grant of agency authority. In *Arizonans for Official English v. Arizona*, the Court stated in dicta: "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 initiatives made law of the State."[123] The *Hollingsworth* Court cited *Arizonans for Official English* as support for its finding that the decision of the California Supreme Court did not vest the Proposition 8 proponents with standing,[124] but did not comment on whether the hypothetical law described in *Arizonans for Official English* would suffice in this type of case. Combined with the Court's emphasis on the lack of a formal agency relationship between the proponents and the state, the majority opinion's silence seems inviting to a state wishing to fill in these empty spaces. A statute that grants explicit agency authority to initiative proponents would seem to erase, or at least mitigate, these shortcomings in the *Hollingsworth* petitioners' case.

Proponent standing also ensures that the party with the best incentive to litigate is the party that appears in court. If executive branch officials were required by law to defend even those measures with which they disagree, they would certainly do so to avoid being held in contempt. But beyond mere appearance in court, there is no good way to ensure that state officials put forth a full defense. And while a special state attorney might be insulated from the political climate of the executive branch, the officials who disagree with the law would still be in charge of hiring the person to defend it. When the interests of the voters, the proponents, and the executive do

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[119] Kafker & Russcol, *supra* note 52, at 292.

[120] *Id.* at 293–94.

[121] *Id.* at 293.

[122] Kafker and Russcol propose a $1,000 fee. *Id.* at 292–93.

[123] Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997).

[124] Hollingsworth v. Perry, 133 S. Ct. 2652, 2666 (2013) (citing *Arizonans for Official English*, 520 U.S. at 65).

not align, designation of the proponents would avoid the incentives problem altogether. Because the process would be set out ahead of time, the executive branch would play no role in the selection of the party who appears in court. Rather, the executive would act in a purely ministerial role, certifying that proponents have met the statutory requirements to have their proposals placed on the ballot. The proponents, who fostered the amendment from conception, to petition or legislative proposal, and finally to vote would simply be allowed to see the process through to the end. This system would also give politicians deniability when a popularly-enacted law turns out to be not so popular. The governor or attorney general can point to the proponents and the political process, avoiding at least some potential backlash.

Finally, at least one state has already pursued a similar course of action. Arizona, a state that allows laws to be enacted through initiative or referendum, passed Senate Bill 1210 in 2012, giving standing to official proponents and sponsoring legislators.[125] This legislation was in direct response to the Proposition 8 controversy and the *Hollingsworth* decision.[126] The statute provides that when "the constitutionality . . . of a law that was enacted through an initiative is at issue, the official initiative proponent . . . that wishes to defend the law shall have the right to intervene as a party and is deemed to have proper standing in the matter."[127] When a law enacted through a referendum is challenged, "the legislator who was the first prime sponsor of the referendum" is granted the same rights of standing and intervention, provided he or she wishes to do so.[128] Unless a party raises an objection that a "proposed intervenor does not have a good faith intention to defend the law," intervention must be allowed.[129]

Arizona's statute provides a succinct and rather straightforward solution to the *Hollingsworth* standing obstacle. The advocate of a proposed law or constitutional amendment has the right to intervene in every case, leaving no discretion to the reviewing court. However, Arizona's law is not above criticism. First, proponents or sponsoring legislators have the right to intervene in any case, at any time, not just on appeal. An additional party at the trial level, who may have different motivations and concerns than the executive branch, creates the potential for confusion and the proliferation of issues unnecessary to the initial determination of the questioned law's constitutionality. Second, in the case of a referendum, it is unclear what happens if both the executive branch and the legislative sponsor

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[125] ARIZ. REV. STAT. § 12-921 (LEXIS through 2015 1st Reg. Sess., all acts except chapters 10, 208, 230, 247, 253, 262 and 265).

[126] *An Act Amending Title 12, Chapter 7, Ariz. Revised Statutes, by Adding Article 6.1; Relating to the Right of Intervention: Hearing on S.B. 1210 Before the Ariz. H.R. Comm. on Judiciary*, 50th Leg., 2d Reg. Sess. (Ariz. 2012) [hereinafter *Hearing on S.B. 1210*] (statement of Sen. Andy Biggs, sponsor of bill) (Westlaw).

[127] § 12-921(A) (LEXIS).

[128] § 12-921(B) (LEXIS).

[129] § 12-921(C) (LEXIS).

decline to defend on appeal.[130] Finally, the statute gives courts no guidance as to how a "good faith intention" is to be determined,[131] although it is unlikely that an initiative proponent or referendum sponsor will seek to invalidate a law of their own making. Whether these possible deficiencies are problematic or fatal to the statute is unclear; as of the time this Note was published, the Arizona statute has yet to be challenged or cited in an appellate court opinion.

Taking into account state concerns in protecting the initiative and referendum processes, the possible room in *Hollingsworth* to accomplish proponent standing, and the deficiencies in the Arizona bill, what would a state statute authorizing standing look like? First, the statute must state in clear and unequivocal language that the official proponents of ballot initiatives are agents of the state government for the purposes of defending their enacted proposal, should the state itself decline to do so. The drafters should also include specific provisions mirroring the Restatement (Third) of Agency, given the *Hollingsworth* majority's focus on the lack of formality in the state–proponent relationship. The state should be able to control the conduct of the proponent to a reasonable degree and to remove the proponent in narrowly defined circumstances (for instance, when the opponent is sanctioned by the court for fraudulent or dilatory litigation tactics). The proponent must also owe fiduciary duties to the state. Finally, states should amend the statutes setting out their initiative process to require the posting of a modest filing fee upon the submission of the initiative proposal, a portion of which would be refundable upon the successful defense of the enacted initiative. Combined, these actions should be sufficient under *Hollingsworth* to grant proponent standing in initiative cases.

In challenges to referenda, the solution is much simpler, to a point. In *Karcher*, the Court did not foreclose the possibility that legislators could, in some circumstances, have standing to defend legislation.[132] This question was similarly unanswered in *Hollingsworth*.[133] However, by the time the law in *Karcher* was challenged, the legislative party leaders who presided when the law was passed were no longer in leadership roles, and therefore the Court held that they had no standing for their former positions.[134] A state drafting its own standing statute would be wise to codify the principles of *Karcher* as a failsafe if it in fact wanted sponsoring legislators to have standing to defend their enacted referenda. Of course, legislators should be exempt from any provisions requiring a refundable filing fee, as it would be impractical to require a lawmaker to pay a fee each time he or she proposed a new constitutional amendment. States might also want former legislators or outside interest groups to stand in for the state when referenda are

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[130] The legislative history of the statute does suggest that a legislator, who sponsored the referendum in question, but retired before it was constitutionally challenged, may still intervene. *Hearing on S.B. 1210*, *supra* note 126.

[131] § 12-921(C) (LEXIS).

[132] Karcher v. May, 484 U.S. 72, 79–81 (1987).

[133] Hollingsworth v. Perry, 133 S. Ct. 2652, 2664–65 (2013).

[134] *Karcher*, 484 U.S. at 81.

challenged. However, given that neither of these parties would have a formal relationship with the state, nor have a financial interest in the amendment itself, the state's ability to establish standing in these situations is tenuous at best.

CONCLUSION

The ballot initiative and legislative referendum are devices of great significance in the United States' scheme of federalism. The federal Constitution is rigid and amendments are rare. But state constitutions are designed to be more fluid, adapting to changing societal circumstances. Initiatives and referenda are the primary methods by which this change is accomplished. They are also powerful means through which state citizens have a direct input in the laws that control their daily lives. Nearly every person in the United States is or could be affected in some way by a state constitutional amendment that was enacted by initiative or referendum. Furthermore, the initiative and referendum are used to accomplish a wide range of policy objectives, including finance, taxation, and rights-related goals.[135] Some rights-related amendments increase personal liberties beyond the guarantees of the U.S. Constitution, while others seek to rein in "expansive state court decisions," as was the case in *Hollingsworth*.[136]

States that value these political devices should respond to *Hollingsworth* in a way that preserves these institutions. However, the doctrine of standing is currently a stumbling block in the path of this goal. Standing lies at the very heart of federal court jurisprudence and derives its basis from our nation's founding document. Throughout its history, the Supreme Court has been wary to relax these standards, even when there are compelling policy reasons to do so. Given this reluctance, there may not be a solution to the *Hollingsworth* standing obstacle; admittedly, the Court has never found standing for ballot initiative proponents seeking to defend their proposals after enactment.[137] Even if states desire initiative and referendum proponents to have standing, "standing in federal court is a question of federal law, not state law . . . the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override [the Supreme Court's] settled law to the contrary."[138] But a close reading of the majority opinion in *Hollingsworth* does provide some helpful hints.

The thrust of the Court's displeasure with the position of the Proposition 8 proponents can be boiled down to two essential elements: the proponents had no relationship with the state sufficient to assert the state's interest, and the proponents suffered no distinct injury of their own. The solution proposed above attempts to remedy both of these shortcomings. An express delegation of agency by statute would clearly define the nature of the relationship between initiative

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[135] *See* Dinan, *supra* note 36, at 2108.

[136] *See supra* text accompanying notes 14–15; *cf.* Dinan, *supra* note 36, at 2106–09 (discussing rights-related state constitutional amendments, including "citizen-initiated amendments").

[137] Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997).

[138] *Hollingsworth*, 133 S. Ct. at 2667.

proponents and the state, and would incorporate Restatement agency principles. In theory, such an arrangement would satisfy the Court's concern about the lack of congruence between the positions of the state and the proponents. Requiring a filing fee at the time of submission for ballot initiative proposals, refundable upon the successful defense of the enacted proposal, would vest in the proponents a financial stake in the outcome of the case, one that arose before the case began. Combined, these remedies should be enough to assuage the Court's concerns, and satisfy the Article III standing requirements.

This solution is necessarily speculative in nature; currently, only Arizona has attempted anything of the sort, and its statute has yet to be subjected to judicial scrutiny.[139] It may simply be the case that states cannot overcome *Hollingsworth*. That would be highly unfortunate, considering the importance of the ballot initiative and legislative referendum to the direct democracy the states have increasingly embraced. Removing the *Hollingsworth* standing obstacle will allow federal courts to reach the merits of these important cases, giving finality to both litigants and the public at large, and promote judicial economy. Hopefully, states will recognize the threat posed to this aspect of self-governance, and act swiftly to protect it.

[139] The Court has, however, recently heard arguments in *Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2015), a case addressing "[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm . . . by authorizing a private right of action based upon a bare violation of a federal statute." Petition for a Writ of Certiorari at i, *Spokeo, Inc. v. Robins*, (No. 13-1339) (*petition for cert. granted* Apr. 27, 2015). This case should shed some light on a legislature's ability to confer Article III standing. However, based upon the current formulation of the question presented, this case should not directly address a state's ability to confer Article III standing in a challenge to state law.

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