Standing in the Age of Citizen Revolt: Legislative Standing, Direct Democracy, and the Supreme Court

Frank M. Dickerson, III
Reid M. Bolton

Available at: https://works.bepress.com/frank_dickerson/1/
One of the most interesting questions raised by California’s Proposition 8 is the question of standing for ballot-initiative supporters in defensive litigation. This Article addresses the question raised in the Proposition 8 case and the issue of standing for ballot initiative supporters to defend their initiative on appeal more generally. It suggests that such standing for ballot-initiative sponsors is consistent with both prior Supreme Court precedent and the Constitutional and prudential concerns underlying the doctrine of standing.

The long and convoluted history of California’s Proposition 8 is emblematic of the current state of our political system. This ballot initiative—amending the California constitution to include the provision that “only marriage between a man and a woman is valid or recognized in California”—passed by a narrow margin when California voters went to the polls in 2008. Yet this vote was only the beginning of the legal wrangling over the issue of same-sex marriage in California. Litigation commenced less than twenty-four hours after the measure was approved, when multiple parties (various cities and a same-sex couple) requested an “immediate stay or injunctive relief” to prevent

---

1 Law Clerks to the Honorable Frank H. Easterbrook, Chief Judge of the United States Court of Appeals for the Seventh Judicial Circuit.

1 The final vote was 52.3% in favor and 47.7% against. See California Secretary of State Certification of 2008 Election Results, online at http://www.sos.ca.gov/elections/sov/2008_general/
the enforcement of Proposition 8. Eventually, the California Supreme Court found that the amendment was valid under California law. However, even before the state court could release its opinion, new plaintiffs challenged Proposition 8 in federal court as a violation of their rights under the 14th Amendment. In this new federal litigation, the district court found in plaintiff’s favor and held that the amendment did not survive rational basis review, which then led to the unique set of events that give rise to this article.

Ordinarily, parties to a lawsuit appeal an adverse final judgment where significant legal issues are to be resolved. However, the defendant in the case—the state of California—decided not to appeal the district court’s order, thus letting the judgment remain undisturbed after the district court’s decision. Unhappy with the state’s decision to abandon the case, several other defendant-intervenors, particularly ProtectMarriage.com, the group which had sponsored the ballot initiative in the first place, acted as its chief supporter throughout the

---

5 Perry v. Schwarzenegger, No. 3:09-cv-02292 (N.D. Cal. 2010)
7 They had been allowed to intervene under Rule 24(a) of the Fed. R. Civ. P. See Perry v. Schwarzenegger, Motion to Intervene, No. 09-cv-2292 (June 30, 2009).
election, and intervened on behalf of the amendment at trial, requested leave to appeal the lower court’s decision to the Ninth Circuit Court of Appeals.8

The district court was skeptical that these intervenors could establish sufficient interest in the outcome of the litigation to merit the privilege of acting as the main litigant on appeal—in other words, the court doubted that the intervenors could show standing. Thus, we reach the odd scenario of preventing the citizens who worked to pass this referendum and who defended it in the District Court from appealing the decision against the amendment despite approval from voters in the general election.

This paper is a tale of two trends in the political institutions of the United States. The first trend is the increasing use of ballot initiatives and referenda such as Proposition 8 in state elections. These electoral devices short-circuit the traditional legislative process for passing laws by placing specific proposals in front of all registered voters within the relevant jurisdiction. The first decade of the 21st century witnessed the largest number of ballot initiatives in this country’s history, with over 350 initiatives on state ballots. This bonanza of ballot

---

initiatives is the culmination of continuous growth in referenda over the last half century.\textsuperscript{9}

The second trend is the increasing use of courts to challenge the public policy decisions of political opponents. Where one of the political parties has controlled the executive or legislative branches of state and federal government, interest-groups from the opposing party have on a regular basis not only worked to prevent new regulations or laws from being enacted in those branches, but have also conducted rear-guard actions in court in order to challenge these regulations on various, often Constitutional, grounds. This trend has been accelerating for some time.\textsuperscript{10} As the administrative state has grown, more and more unhappy plaintiffs have petitioned the federal courts for redress.\textsuperscript{11}

The explanation for both of these trends is not complicated. The increased preference for ballot-initiatives is due to both the perception and reality that political deadlock and ideological intransigence prevent many legislative goals from being achieved by interested parties. As a result, political advocates have

\textsuperscript{9} See The Initiative & Referendum Institute, IRI Report on Initiative Use, 1904-2009 (2010), online at http://www.iandrinstitute.org/

\textsuperscript{10} See, e.g. Christopher J. Hering, Playing a Leading Role: How Recent Cases are Thrusting the Arizona Courts into the State’s Budget Drama, 52 Ariz. L. Rev. 173 (2010) (discussing increase in interest-group challenges to the Arizona budget).

\textsuperscript{11} One recent example of this trend involves the Nantucket Island wind-turbine project, where federal lawsuits are being filed despite 10 years of agency review and state court judicial decisions in the project’s favor. See, e.g., Nelson Sigelman, “Martha’s Vineyard fishermen file federal lawsuit to stop Cape Wind”, The Martha’s Vineyard Times (July 8, 2010), available at http://www.mvtimes.com/marthas-vineyard/article.php?id=1487.
turned to alternative venues for pursuing their objectives—with ballot initiatives being one popular mechanism. The same can be said for the popularity of court challenges to policies enacted by the popularly elected representatives of the people. By petitioning for relief from the unelected, life-tenured members of the federal judiciary, political interest groups hope to achieve what would be impossible without compromise in the other two branches.

Yet the judicial branch has not accepted its expanded role in politics without a fight. Federal courts were not created to grant every litigant with a perceived injury the right to present her case before a federal judge. Indeed, Article III of the U.S. Constitution is rife with restrictions, both implicit and explicit, that constrain the types of cases that are within Federal court jurisdiction. Standing, the constraint that potentially forecloses ProtectMarriage.com’s appeal, is derived from the requirement that all litigants present an actual “Case” or “Controversy.”

This theory of standing was developed by the Supreme Court in order to keep political struggles out of the courthouse. Standing filters out, among others, those litigants who do not actually have a tangible injury, or those disputes where the court could not actually provide a remedy to the litigant.

---

12 U.S. Const. Art. III s. 2.
Because most challenges to public policy by unhappy political interest groups do not reflect an actual injury (other than ideological acrimony), standing requirements typically can prevent these challenges from working their way through the judicial system.  

Which brings us back to the issue of the Proposition 8 supporters. Do they have standing to defend their referendum? Because the state decided not to appeal, the proposition supporters cannot “piggyback” on the government’s appeal and must instead stand on the basis of their own grievance. The ballot-initiative intervenors have suggested that they do have standing through a grant of authority through state statute. The district court and many distinguished scholars suggest that they do not.

In contrast to those positions, this article argues that the intervenors do indeed have standing, not because of any state statute but because of the special status that citizens assume after an initiative they have championed becomes law. By looking at the previous decisions of the Supreme Court with respect to standing, and more importantly, the themes that the Court has identified as

---


supporting its decisions, we argue that ballot-initiative supporters—or at least a ballot initiative’s main sponsor—have sufficient standing to continue to defend their laws, whether or not the state itself wishes to support them. Indeed, although the Supreme Court has expressed “grave doubt” about whether intervenors such as these would have standing,18 this Article argues that if the Court were ever to actually decide the issue on the merits, it would find standing based on its previous jurisprudence of when standing is appropriate.

The rest of this paper proceeds as follows. In Part I, we discuss the key Court decisions with respect to standing, and particularly focus on those cases that developed the theories of “legislative standing” and “taxpayer standing.” In Part II, we discuss the broad themes that the Court has used to justify its holdings with respect to both of these categories of standing. Finally, in Part III, we take a closer look at state ballot initiatives and how the justifications for finding a lack of standing fall flat in cases where ballot-initiative sponsors wish to defend their initiative.

I. Background: The Theory of Standing

Before arguing that a referendum sponsor should have standing to protect its interests in Part III, this section provides the broad outlines of the standing

doctrine’s origins and elements. In particular, it discusses the two cases that highlight the variety of ways that standing can allow or prevent cases from coming to court. In addition, it explores the Court’s discussion of two specialized doctrines of standing: legislative standing and taxpayer standing. This background provides the foundation for a deeper understanding of the justifications for depriving some litigants of their day in court.

A. The Origins of Standing

Despite common assumption, the origins of the standing doctrine are not lost to the mists of time. In fact, standing is of relatively recent provenance. The modern concern with standing under Article III can be traced to the rise of the administrative state. Prior to the growth in federal (and state) administrative power, a litigant with a constitutional claim would allege that an official committed some kind of tort, the official would claim immunity by authorization, and the litigant would respond that the purported immunity was invalid on constitutional grounds. Yet as the scope of legal interests expanded beyond tortious conduct with the rise of the administrative state, the question of standing became increasingly important. The Court’s imposition of the three

---

19 See Vining, Legal Identity: The Coming of Age of Public Law 55 (1978) (“The word ‘standing’ . . . does not appear to have been commonly used until the middle of [the twentieth] century.”)
standing requirements—injury in fact, causation, and redressability—were simply a shorthand method of ferreting out whether standing existed and the litigant had a claim or was merely an indignant bystander.21

While the standing requirement is now a “fixed star”22 in the constitutional constellation, the interpretation of the three factors has varied greatly. The broad understanding of standing reached its zenith in the middle of the 20th Century, with the Court’s decision in United States v. SCRAP.23 The plaintiffs in SCRAP identified themselves as “an unincorporated association formed by five law students” whose “primary purpose [was] to enhance the quality of the human environment for its members and for all citizens.”24 SCRAP challenged a decision by the Interstate Commerce Commission to decline to suspend a 2.5% surcharge on railroad freight rates, arguing that “the rate structure would discourage the use of ‘recyclable’ materials, and promote the use of new raw materials that compete with scrap, thereby adversely affecting the environment by encouraging unwanted mining, lumbering, and other extractive activities.”25

24 Id. at 678 (internal quotations omitted).
25 Id. at 676.
SCRAP argued for standing by claiming that “each of its members suffered economic, recreational, and aesthetic harm directly as a result of the adverse environmental impact of the railroad freight structure,” specifically causing its members “to pay more for finished products” and adversely affecting the use of the natural areas surrounding “the Washington Metropolitan area . . . for camping hiking, fishing, sightseeing, and other recreational (and) aesthetic purposes.”26 In other words, the “injury in fact” alleged was the increased possibility of pollution due to the rate hike.27

Although this seems to be a tenuous injury, the Court indicated that standing would exist where “the alleged injury was to an interest arguably within the zone of interests to be protected or regulated by the statutes that the agencies were claimed to have violated” and that “all persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here.”28 But the fact that numerous people could claim injury based on this “attenuated line of causation” did not mean that the students lacked standing.29 While the Court

26 Id.
27 Id. at 688 (“a general rate increase would allegedly cause increased use of non-recyclable commodities as opposed to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area.”)
28 Id. at 687.
29 Id. at 688.
recognized that “pleadings must be more than an ingenious academic exercise in
the conceivable,” it concluded that any challenge to standing here would require
resolution at summary judgment, requiring the defendant to show that the
“sham allegations” raised no issue of material fact.\textsuperscript{30} SCRAP’s interpretation of
the standing requirements was breathtakingly broad.

Twenty years later, the Supreme Court narrowed this broad interpretation
of standing requirements in \textit{Lujan v. Defenders of Wildlife}.\textsuperscript{31} \textit{Lujan}
concerned a new
regulation restricting the consultation provisions of the Endangered Species
Act.\textsuperscript{32} As a consequence of the new regulations, the provisions would apply only
to the actions within the United States or in international waters.\textsuperscript{33} The plaintiffs
filed suit to block the new regulations, alleging that they would increase the rate
of extinction of threatened and endangered species abroad.\textsuperscript{34}

In discussing the plaintiff’s standing to sue, the Court interpreted the
injury-in-fact element to require “concrete and particularized” injury that is
“actual or imminent, not conjectural or hypothetical.”\textsuperscript{35} Causation required a
connection that is “fairly traceable to the challenged action of the defendant.”\textsuperscript{36}

Redressability required that the plaintiff show that it is “likely, as opposed to

\textsuperscript{30} \textit{Id.} at 688–89.
\textsuperscript{31} 504 U.S. 555 (1992).
\textsuperscript{32} \textit{Id.} at 558.
\textsuperscript{33} \textit{Id.} at 559.
\textsuperscript{34} \textit{Id.} at 562.
\textsuperscript{35} \textit{Id.} (internal quotations and citations omitted).
\textsuperscript{36} \textit{Id.}
merely speculative, that the injury will be redressed with a favorable decision.”37

The Court’s interpretation of each of these elements was far more restrictive than its interpretation in SCRAP.

While the plaintiffs in Lujan tried to show an injury in fact by asserting that they intended to travel to the endangered habitats (and had done so in the past),38 the affidavits did not allege any definite plans to return to the identified foreign countries in the future.39 The Court found this to be the fatal flaw in the plaintiffs’ argument, as showing the intent to return “some day” is not enough to show that the alleged injury was either actual or imminent.40

The Court also rejected three additional standing theories proposed by the plaintiffs, namely the “ecosystem nexus,”41 “animal nexus,” and “vocational nexus”42 theories. The Court rejected each of these theories, noting that the only applicable question was whether the individual had a cognizable injury in fact and each of these theories allowed standing without a concrete injury.43 The Court concluded that there was no perceptible harm to the plaintiffs, noting that

37 Id. at 561 (internal quotations and citations omitted).
38 Id. at 563–64.
39 Id. at 564.
40 Id.
41 Id. at 566–67 (noting that this theory would recognize an injury to any person who uses any part of a continuous ecosystem adversely affected by a funded activity has standing even if the activity is located a great distance away).
42 Id. at 566–67 (noting that this theory would recognize an injury to anyone interested in seeing the endangered animal in question anywhere or anyone who had a professional interest in the endangered animal had suffered).
43 Id. at 566.
“it goes . . . into pure speculation and fantasy[ ] to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species, with which he has no more specific connection.”

As a consequence, the Court held that the plaintiffs could not show an injury in fact, and thus lacked standing for the purposes of the Article III case or controversy requirement.

Following *Lujan*, the Court has had several opportunities to fine-tune its understanding of the standing doctrine and identified several exceptions to typical standing requirements. First, in *Massachusetts v. EPA*, the Court found that states had standing to sue the EPA even if the controversy did not meet the “normal standards for redressability and immediacy” because of the significant risks and unique relationship between a state and its citizens. Similarly, in *Sprint v. Sprint Communications Co., L.P. v. APCC Serv., Inc.*, the Court allowed for an assignee to bring a claim on behalf of other parties despite the fact that he had not been injured and was not expected to receive any of the award (even if he prevailed on the claim). Finally, in *Vermont Agency v. United States ex rel. Stevens*, the Court unanimously recognized that qui tam litigants have standing to sue on

---

44 Id. at 567.
45 Id.
46 127 S. Ct. 1438 (2007)
47 Id. at 1453.
behalf of the government even though the government is the only party that can show injury in fact. In each of these cases, the Court recognized that the strict requirements of standing are sufficient but not necessary. In particular, the Court noted that exceptions to standing do exist, either where tradition has always allowed such suits (e.g. qui tam actions), or where the entity bringing the complaint can legitimately represent the interests of third parties.

B. Legislative Standing

The first specialized theory of standing is the right of legislators to sue for relief in court either where they have been deprived of their vote or their vote’s effect has been somehow diminished.\(^{50}\) The foremost cases that describe the limits for legislative standing are \textit{Coleman v. Miller}\(^{51}\) and \textit{Raines v. Byrd}.\(^{52}\) In \textit{Coleman}, a group of Kansas senators and representatives challenged the outcome of a state senate vote on the proposed Federal Child Labor Amendment. More specifically, the Kansas senate was deadlocked on the amendment with a 20-20 vote, and the Lieutenant Governor cast an affirmative vote to break the tie. The losing senators challenged this result in court, alleging that the Lieutenant

\(^{50}\) Legislative standing goes to the “institutional injury” that has taken place. It is distinguishable from instances where an individual legislator is deprived of their individual vote by being excluded from the chambers. See, e.g., \textit{Powell v. McCormack}, 395 U.S. 486 (1969).

\(^{51}\) 307 U.S. 433 (1939).

\(^{52}\) 521 U.S. 811 (1997).
Governor did not have the power to cast the deciding vote, and thus the amendment was unfairly approved.\(^{53}\)

The Court, in assessing standing, noted that “the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification.”\(^{54}\) As a consequence, the court concluded that the “senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes.”\(^{55}\) The Court distinguished this basis for standing from “the right possessed by every citizen ‘to require that the government be administered according to law and that the public moneys not be wasted,’” which “did not entitle a private citizen to bring such a suit as the one in question in the federal courts.”\(^{56}\) In essence, the reason for standing was that the legislator’s vote had been “negated by outside action” beyond its control.\(^{57}\)

Almost sixty years after Coleman, a similar situation came before the Court in Raines v. Byrd, when several U.S. senators and representatives challenged the Line Item Veto Act, alleging that it was unconstitutional. The Act provided that “[a]ny Member of Congress or any individual adversely affected by [this Act]
may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the grounds that any provision of this part violates the Constitution.”\footnote{Raines, 521 U.S. at 815–16.} However, the Court did not follow its previous holding in Coleman, instead looking to the more recent Lujan decision and its narrower requirement of concrete and particularized individual injury.

Specifically, the senators claimed that the present harm was to the power of the Senate itself, rather than to any senator individually. The Court then addressed Coleman, stressing that in Coleman, “if [the] legislators . . . were correct on the merits, then their votes not to ratify the amendment were deprived of all validity.”\footnote{Id. at 822.} In the case of the Line Item Veto Act, to the contrary, the legislators “simply lost their vote.”\footnote{Id. at 824.} While the court noted that “there would be nothing irrational about a system that granted standing in these cases,”\footnote{Id. at 824.} the Court was unwilling to extend Coleman to allow a challenge to the “abstract dilution of institutional legislative power” alleged by the Raines plaintiffs.

In ruling against the plaintiffs in Raines, the Court did not foreclose all potential standing for aggrieved legislators. Instead, it left a narrow opportunity for future legislators by distinguishing the current case from Coleman:
It is obvious, then, that our holding in Coleman stands...for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative act goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.\textsuperscript{61}

While the Court did not explain when this situation would take place, it left the door open to future challenges.

\textbf{C. Taxpayer Standing}

A final specialized form of standing relevant in this instance is taxpayer standing, which allows a federal taxpayer to challenge unlawful or unconstitutional action taken through the taxing and spending power of Article I. Taxpayer standing has a mixed history in the Supreme Court, its popularity waxing and waning as the ideological makeup of the Court has changed. In \textit{Frothingham v. Mellon},\textsuperscript{62} the first case to squarely address the issue of taxpayer standing, the plaintiff challenged the Maternity Act of 1921, alleging that it violated the Tenth Amendment and therefore constituted an unconstitutional taking of her property without due process of law.\textsuperscript{63}

The court did not address the merits of the law, but rather concluded that simply paying taxes was not a sufficient ground for standing to challenge a law of general applicability. The Court concluded that allowing taxpayer standing

\textsuperscript{62} 262 U.S. 447 (1923).
\textsuperscript{63} \textit{Id.} at 483.
would be unworkable and would allow the judiciary to review acts of Congress before “some direct injury” is “suffered or threatened, presenting a justiciable issue.”64 Ultimately, the Court feared that allowing taxpayer standing would put the court in a position where it would not “decide a judicial controversy, but [ ] assume a position of authority over the governmental acts of another and coequal department.”65

The Court changed tack in Flast v. Cohen,66 where it lowered the bar to taxpayer standing in cases concerning the Establishment and Free Exercise Clauses of the First Amendment.67 The plaintiffs in Flast challenged the Elementary and Secondary Education Act of 1965, which, among other things, provided for federal funds to finance instruction and purchase books for use in religious schools.68 The Court distinguished Frothingham as turning on “pure policy considerations” dismissing the constitutionally based separation of powers argument.69 The Court further noted that questions as to “whether a particular person is a proper party to maintain an action” are not related to separation of powers concerns, and that “the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an

64 Id. at 488.
65 Id. at 489.
66 392 U.S. 83.
67 Id. at 85.,
68 Id. at 85–86.
69 Id. at 93.
adversary context and in a form historically viewed as capable of judicial
resolution.\textsuperscript{70}

The \textit{Flast} majority therefore held that courts should “look to the
substantive issues . . . to determine whether there is a logical nexus between the
status asserted and the claim sought to be adjudicated.”\textsuperscript{71} In the taxpayer context,
it would require “establish[ing] a logical link between [federal taxpayer] status
and the type of legislative enactment attacked” and “show[ing] that the
challenged enactment exceeds specific constitutional limitations imposed upon
the exercise of the congressional taxing and spending power and not simply that
the enactment is generally beyond the powers delegated to Congress by Art. I, §
8.”\textsuperscript{72} The Court found that the first requirement was obviously satisfied in this
case. The second requirement was satisfied because the First Amendment
provides a specific constitutional limitation on the power of Congress to tax and
spend, while the Due Process Clause, invoked in \textit{Frothingham}, did not protect a
citizen from an increase in tax liability.\textsuperscript{73} The Court did not specify which other
sections of the Constitution contain specific limitations, noting that such
conclusions “can be determined only in the context of future cases.”\textsuperscript{74}

\textsuperscript{70} \textit{Id} at 100–01.
\textsuperscript{71} \textit{Id}. at 102.
\textsuperscript{72} \textit{Id}. at 102–03.
\textsuperscript{73} \textit{Id}. at 104–05.
\textsuperscript{74} \textit{Id}. at 105.
Although *Flast* has remained good law over the last four decades, no other case has allowed for taxpayer standing outside of the Establishment Clause.\(^{75}\) In fact, the Supreme Court further narrowed the already narrow taxpayer standing doctrine in *Hein v. Freedom From Religion Foundation*.\(^{76}\) *Hein* concerned a taxpayer challenge to expenditures through the White House Office of Faith-Based and Community Initiatives within the Executive Office of the President, an office designed to expedite community-group access to available federal funds, including faith-based community-groups.\(^{77}\) Congress did not enact any law specifically appropriating money to the Office, thus the Office distributed money out of the “general Executive Branch appropriations.”\(^{78}\) The Court construed *Flast* as limiting “taxpayer standing to challenges directed only [at] exercises of congressional power under the Taxing and Spending Clause.”\(^{79}\) The Court cited a litany of cases indicating that taxpayer standing was confined to the Establishment clause. Excluded were cases where taxpayers raised challenges

\(^{75}\) See *Hein*, 551 U.S. 587, 610 (collecting cases where Court rejected taxpayer standing). Note however, that the Supreme Court does currently have a case under consideration that raises taxpayer standing issues. See *Arizona Christian School Tuition Organization v. Winn*, No. 09-991 (argued Nov. 3, 2010).

\(^{76}\) 551 U.S. 587 (2007).

\(^{77}\) *Id.* at 594. The Office was created by executive order. Exec. Order No. 13199, 3 C.F.R. 752 (2001 Comp.).

\(^{78}\) *Hein*, 551 U.S. at 595.

\(^{79}\) *Id.* at 604 (internal quotations omitted) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 479 (1982)).
under the Free Exercise Clause, the Statement and Account Clause, the Incompatibility Clause, and the Commerce Clause. The Court also noted that it had limited challenges to purely executive expenditures. In short, the Court rejected taxpayer standing as inconsistent with Article III under almost all circumstances without rejecting it entirely (and thus avoiding the difficult issue of whether to overrule Flast).

Justice Scalia, joined by Justice Thomas, in a strongly worded concurrence, argued that the plurality opinion should have simply repudiated Flast, rather than continue “the creation of utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently.” The concurrence concluded, in a sentiment that appears to express the ultimate direction of taxpayer standing, that “a taxpayer’s purely psychological displeasure that his funds are being spent in an allegedly unlawful manner” is never “sufficiently concrete and particularized to support Article III standing.”

---

80 Hein, 551 U.S. at 609–10 (citing Tilton v. Richardson, 403 U.S. 672 (1971)).
81 Hein, 551 U.S. at 610 (citing United States v. Richardson, 418 U.S. 166 (1974)).
82 Hein, 551 U.S. at 610 (citing Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974)).
83 Hein, 551 U.S. at 610 (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006)).
84 Hein, 551 U.S. at 610 (citing Valley Forge, 454 U.S. at 479–82).
85 Hein, 551 U.S. at 618 (Scalia, J., concurring).
At the end of the day, Flast was left “beat[en] to a pulp,” “weakened, denigrated, more incomprehensible than ever, and somehow technically alive.”\textsuperscript{86}

\*
\*
\*

The above discussion reveals several patterns about the Court’s standing doctrine. First, the Court has implemented increasingly stringent requirements for standing over time. The SCRAP students would never make it into federal court in 2010. Second, the Court is skeptical of specialized versions of standing and has ensured that those theories allow standing in very few cases. Third, even though the Court is skeptical of specialized theories, it refuses to eliminate legislative and taxpayer standing. While a minority of the Court is willing to overrule Coleman and Flast, the majority sees value in allowing these theories to remain in place.

II. The Justifications Behind the Court’s Standing Doctrine

The Court has, with only a few exceptions, consistently required that litigants show their own injury and has cast aside legislators and taxpayers that want to bring a claim on behalf of their institution (or the electorate). Yet even

\textsuperscript{86} Hein, 551 U.S. 618 (Scalia, J., concurring).
though the Court’s holdings are generally dismissive of standing in taxpayer and legislative standing cases, the more important issue for our purposes is how the Court reached its holding and the justifications it used to reach its decisions. Because ballot-initiative sponsors are a unique class of litigants unlike the types of litigants the Court typically deals with, this paper looks behind the Court’s decisions to understand how the Court would treat these litigants. Therefore, we look to the reasoning that the Court has used to reach its holdings—the first principles, so to speak—and argue that fidelity to these themes supports granting standing to ballot-initiative sponsors.

In this Part, we discuss the key theories and arguments that the Court has used to justify its past decisions. There are two themes that the Court has identified for why standing should not be applicable in legislative and taxpayer standing cases: (1) ensuring the separation of powers between the branches of government; and (2) avoiding the administrability problems created by allowing numerous parties to have standing.

A. Separation of Powers Concerns

The most important justification that the Court has used for its decisions about standing is the idea that granting standing to legislators or taxpayers
would violate the separation of powers principles inherent in our constitutional democracy. This principle has been voiced in virtually all of the standing decisions that the Court has announced. As Justice O’Connor stated in Allen v. Wright, “The law of Art. III standing is built on a single basic idea—the idea of separation of powers.” This idea has served as the guiding principle for the Court and shows up in almost every decision that discusses standing.

For example, with respect to standing in general, the Court has linked the injury-in-fact requirement to the idea that the court should only exercise those powers “strictly judicial in their nature.” As Justice Scalia wrote in Lujan,

If the concrete injury requirement has the separation-of-powers significance we have always said . . . permit[ting] 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,” Art. II, § 3. It would enable the courts, with the permission of Congress, “to assume a position of authority over the governmental acts of another and co-equal department.”

Similarly, the Court held in Massachusetts v. EPA that the Court’s standing doctrine is designed to preclude “citizen suits to vindicate the public’s

---

87 As Justice Scalia noted, the separation of powers principle is not explicitly described in the Constitution. See Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk L. Rev. at 881.
90 Lujan, 504 U.S. at XXX.
nonconcrete interest in the proper administration of the laws.”92 In other words, the Court does not want to entertain arguments that should be directed to the other branches. Thus, the standing requirement prevents courts from aggrandizing their own power or influencing the political discussions taking place between the other two branches of government.

The restrictions on taxpayer standing in particular have been grounded in separation of powers principles. For example, in *Frothingham*, the original standing case, the Court noted that the taxpayer’s claim ultimately boiled down to a request to “assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.”93 The Court did not want to interfere with the executive branch and the legislative branch’s decisions of what laws to pass and which ones to enforce. The subsequent discussions in *Flast* and *Hein* also reinforce the point that the Court’s standing jurisprudence focuses on maintaining a separation of powers. Although the *Flast* decision is now limited to its facts, even that opinion recognized that courts can entertain actions only “consistent with a system of separated powers.”94 The dissent in *Flast* and the majority in *Hein* went further.95

---

92 *Id.* at 517, quoting *Lujan*, 504 U.S. 581 (Kennedy concurring).
93 *Frothingham*, 262 U.S. at 489.
94 *Flast*, 392 U.S. at 97.
95 *See Flast*, 392 U.S. at 130-131 (Harlan dissenting) (“There is every reason to fear that unrestricted public actions might well alter the allocation of authority among the three branches of the Federal Government.”).
In fact, Justice Alito stated that “Flast itself gave too little weight to [separation of power] concerns”96 and “failed to recognize that this doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-à-vis other branches, concrete adverseness or not.”97

With respect to legislative standing, the opinion in Raines expresses the same theme. Chief Justice Rehnquist first cited the bedrock theory in Allen98 and then looked to historical precedent to support his argument that standing does not exist for these legislators. Just as President Johnson in 1867 did not bring (and could not have successfully brought) suit in court against Congress for passing a law that “altered the calculus by which he would nominate someone to his cabinet,99 a single Congresswoman in 2010 could not bring a claim in federal court simply because she believed a new law put more power in the hands of the President. According to Rehnquist, to do otherwise would be to “improperly and unnecessarily plunge [courts] into the bitter political battle being waged between

96 Hein, 551 U.S. at 611.
97 Id., quoting Lewis v Casey, 518 U.S. 343, 353 n.3 (1996). U.S. v. Richardson, 418 U.S. 164, 188 (1974) (Powell concurring) (“Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government.”).
98 “The law of Art. III standing is built on a single basic idea—the idea of separation of powers.”
99 Raines, 521 U.S. at 827 (referring to the Tenure of Office Act).
the President and Congress.” Interestingly, however, nothing in *Raines*
suggests that *Coleman* had been overruled. Instead, the Court noted that
complete nullification of a legislation’s vote could provide standing and used
*Coleman’s* language to distinguish the two cases.101

*Raines* also suggests a second separation of powers argument for the
Court’s standing decisions: a desire to avoid political questions wherever
possible.102 In most taxpayer and legislative standing cases, recognizing the
litigant’s standing would allow the “anti-majoritarian judiciary” to “usurp[] the
policy-making function of the coordinate branches of the federal government.”103

This concern was expressed in *Valley Forge Christian Coll. v. Ams. United for
Separation of Church and State, Inc.*,104 where the Court denied standing in part
because courts are not “merely publicly funded forums for the ventilation of
public grievances” or “judicial versions of college debating forums.”105

100 Id. See also Weiner, *The Law of Legislative Standing*, 54 at Stan. L. Rev. at 218 (noting that *Raines*
combined the equitable discretion and separation of powers issues into the same standing
inquiry)
101 *Raines*, 521 U.S. at 824 n. 7
102 See Una Lee, *Reinterpreting Raines: Legislative Standing to Enforce Congressional Subpoenas*, 98
Georgetown L. J. 1165, 1175 (2010)
103 Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing
Doctrine*, 52 Emory L. J. 771, 785 (2003). See also F. Andrew Hessick, *Standing, Injury in Fact, and
Private Rights*, 93 Cornell L. Rev. 275, 317 (2008) (“The Court has explained that it is the business
of the political branches, and not the judiciary, to resolve abstract or generalized grievances.”);
105 *Valley Forge Christian Coll.*, 454 U.S. at 473-74. See also *Warth v. Seldin*, 422 U.S. 490, 500 (1975
(“Without such limitations-closely related to Art. III concerns but essentially matters of judicial
self-governance-the courts would be called upon to decide abstract questions of wide public
Finally, the scholarship of several Justices describe standing limitations as primarily based on separation of power principles. For example, Justice Scalia has written that a separation of powers is the key interest behind the standing doctrine.\textsuperscript{106} Similarly, Chief Justice Roberts explicitly defended the decision in \textit{Lujan} by referring to the separation-of-power benefits attributable to the denial of standing:

Separation of powers is a zero-sum game. If one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches. . . . The Article III standing requirement that the judiciary act only at the behest of a plaintiff suffering injury-in-fact \cite{Lujan} ensures that the court is carrying out \textit{its} function of deciding a case or controversy, rather than fulfilling the executive’s responsibility of taking care that the laws be faithfully executed.\textsuperscript{107}

Taking all of these statements by the Court and its membership together, standing becomes inextricably connected to the principle of separation of powers. Whether scrutinizing standing generally or taxpayer and legislative standing in particular, the Court has consistently tied its justifications for denying standing to fears about judicial aggrandizement or interfering with the political struggles that take place within (and between) the other two branches.

\textbf{Therefore, this Article’s argument that standing should be extended to significance even though other governmental institutions may be more competent to address the questions . . . .}"

\textsuperscript{106} See Antonin Scalia, \textit{The Doctrine of Standing as an Essential Element of the Separation of Powers}, 17 Suffolk U. L. Rev. 881, 892 (1983) (“My thesis is that the judicial doctrine of standing is a crucial and inseparable element of that principle [separation-of-powers].”).

ballot initiatives must prove that separation-of-powers principles are not implicated. In Part III, we argue that these principles are not violated, both because ballot initiatives are completely independent from the other branches of government, and because there is no risk that the court would be deciding a political question better left to the other branches of government.

B. Generalized Injury and Limitless Challenge Concerns

The second major concern that the court has consistently focused on is the danger of recognizing standing for generalized injuries. Admittedly, this concern is the flip-side of the separation of powers concern. However, the Court has expressly considered this concern in addition to the separation of powers concerns ever since the theory of standing was first developed in *Frothingham*. In that case, Justice Sutherland justified the decision to dismiss the case in part because it was a generalized grievance:

> [Plaintiff’s interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventative powers of a court of equity.]

This interest, also grounded in the “cases” and “controversies” clause in Art. III, is just as important to the court because recognizing generalized grievances

---

108 By granting standing to hear a generalized grievance and creating widely applicable rules, the Court exercises semi-legislative powers.
109 *Frothingham*, 262 U.S. at 487.
would mean that “federal courts would cease to function as courts of law and
would be cast in the role of general complaint bureaus.”

Numerous cases since Frothingham have expressed the fear about
generalized grievances. For example, in Lujan, the Court reviewed the history of
standing cases before stating that “we have consistently held that a plaintiff
raising only a generally available grievance about government . . . does not state
an Article III case or controversy.” This sentiment was also expressed by the
Court in several earlier cases regarding alleged unconstitutional acts by members
of Congress or the Justices themselves. The Court voiced a similar concern in
Richardson, noting that the Founding Fathers did not “intend[] to set up
something in the nature of an Athenian democracy or a New England town
meeting to oversee the conduct of the National Government by means of
lawsuits in federal courts.

Allen also focused on this issue in a challenge by citizens to the way that
taxpayer funds had been allocated amongst segregated and desegregated schools.
The Court denied standing in part based on the fear that this type of injury, even

---

110 Hein, 551 U.S. at 593. Of course, when there is a “concrete” injury against large numbers of
people, then the Court has sometimes found standing. See FEC v. Akins, FEC v. Akins, 524 U.S. 11,
111 Lujan, 504 U.S. at 573.
112 See Ex parte Levitt, 302 U.S. 633 (1937)(“It is not sufficient that he has merely a general interest
common to all members of the public.”); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S.
208 (1974) (rejecting the case on standing grounds where the alleged injury “adversely affected
only the generalized interest of all citizens in constitutional governance).
if it existed, would make all citizens capable of litigating. A favorable holding for the citizens, in addition to making the judicial system deal with political questions (itself a major justification for denying standing), would also make the judicial system unworkable—which was a major concern for the Court. 114

More recently in Raines, the Court was concerned in part by the idea that recognizing such legislative standing would allow any legislator that lost a vote on a particular piece of legislation to bring a grievance to the courts. Such a development could potentially lead to hundreds of generalized suits in federal court each time the House or Senate of any state or the Federal government considered a piece of legislation and subsequently passed it by anything less than a unanimous vote. 115

All of these examples suggest that the Court is mindful of the practical implications of a permissive standing doctrine and the risks associated with extending standing beyond the traditional private-right model. Therefore, any extension of standing doctrine to include ballot-initiative supporters must also ensure that it does not open a pandora’s box of generalized injuries and

114 See Allen, 468 U.S. at 756 (“Recognition of standing in such circumstances would transform the federal courts into ‘no more than a vehicle for the vindication of the value interests of concerned bystanders.’”) quoting SCRAP, 412 U.S. at 687.
115 Raines, 521 U.S. at 828 (noting the numerous instances where politicians could have sued in court if legislative standing extended as far the litigants in that case desired).
demonstrate some sort of concrete and limited injury specific to the people who wish to litigate.

III. Standing in the Age of Citizen Revolt

The discussion up to this point has centered on the Supreme Court’s sometimes byzantine standing jurisprudence. While the Court has been tinkering with its rules for litigants, important legal developments have also taken place outside the Beltway. In particular, the ballot initiative has become a popular way of seeking change in state law. Even more importantly, the ballot initiative is capable of changing policies without ever interacting with the executive and legislative branches of government. This paper therefore argues that the traditional reasons for denying standing—Article III separation-of-power concerns and prudential administrative concerns—are irrelevant for ballot-initiative supporters. Given that these supporters can demonstrate standing—either traditional standing or a form of legislative standing under Coleman and Raines—courts should recognize ballot-initiative sponsor standing to appeal where the state government refuses to appeal adverse judgments against laws passed by the people themselves.
This section opens by discussing the mechanics of ballot initiatives in three representative states: California, Oregon, and Arizona. Next, it discusses the single Supreme Court opinion that considered the issue and refused to consider the merits of ballot-initiative sponsors. It then argues that despite initial skepticism by the Court, referendum supporters should have standing to intervene to defend an initiative where the government has failed to appeal.

A. Ballot Initiative Mechanics

The ballot initiative processes are relatively similar across numerous U.S. states. Almost all states require an individual or organization to be the official sponsor of the initiative. The sponsor must submit the proposed initiative to a state official, generally the Secretary of State or Attorney General, who provides a caption and sometimes a summary of the law. After that, the sponsor must gather a significant number of signatures, after which the proposal will be placed on the ballot.

---

116 Oregon has had the greatest number of ballot initiatives and referenda, with 351. California is second with 329. Arizona is fifth with 171, but has the unique feature of having a Supreme Court decision concerning standing for citizens to sue to enforce an initiative. See The Initiative & Referendum Institute, IRI Report on Initiative Use, 1904-2009 (2010), online at http://www.iandrinstitute.org/
For example, in California, the ballot-initiative sponsor\footnote{Under California law, these sponsors are known as the “proponents” of the initiative. See CAL. ELEC. CODE § 342.} must draft the law, present the law to the Legislative Counsel,\footnote{The Legislative Counsel is a “nonpartisan public agency that drafts legislative proposals, prepares legal opinions, and provides other confidential legal services to the Legislature and others.” See State of California Office of Legislative Counsel, online at http://www.legislativecounsel.ca.gov/portal/site/OLCInternet/.} and obtain the signature of 25 or more electors (i.e. registered voters).\footnote{Statewide Ballot Initiative Guide, available at http://www.sos.ca.gov/elections/ballot-measures/pdf/initiative-guide-081409.pdf} The sponsor may draft the law, or leave the task up to the Legislative Counsel.\footnote{Id.} The sponsor must then submit a request for a title and a summary of the initiative to the Attorney General’s office, along with a $200 deposit that is refunded if the initiative qualifies for the ballot within two years.\footnote{Id.} The Sponsors then have 150 days to circulate the petition and gather the signatures of registered voters equal to 5% of the total votes cast for Governor at the last gubernatorial election (8% of such votes when the initiative amends the constitution).\footnote{Id.} The petition must be submitted at least 131 days before the next statewide election at which it is submitted to voters.\footnote{Id.} If these conditions are met, the initiative is placed on the ballot for the next statewide election, where it is subject to approval by majority vote.\footnote{Id.} In the case of Proposition 8, the ballot sponsors included State Senator Dennis Hollingsworth
and ProtectMarriage.com. Both Hollingsworth and his organization subsequently became defendant-intervenors in the state and federal litigation.125

Oregon operates a system generally similar to California. In Oregon, no more than three Chief Petitioners must draft the text of the law, and file it, along with some supporting documents, with the Secretary of State.126 The Chief Petitioner must then secure 1000 signatures to obtain a title for the initiative from the Attorney General.127 After obtaining a title, the chief petitioner must circulate the petition, and must obtain signatures from 6% of registered voters (as of the most recent election, 82,769) for a statutory initiative or signatures from 8% of voters (110,358) for a constitutional initiative.128 One important difference in Oregon law concerning initiatives, vis-à-vis other states, is that Oregon requires at least one of the original Chief Petitioners to be associated with the petition throughout the filing process. If all of the original Chief Petitioners resign, the initiative must be re-filed.129

Like Oregon and California, Arizona also requires that an individual or organization take responsibility for the initial filing process of any initiative. The

125 See Brief of the Defendant-Intervenor-Appellants, Perry v. Schwarzenegger, No. 10-16696, *10 (Sept. 17, 2010)(declaring that Hollingsworth was one of the “official proponents of Proposition 8”).
127 Id.
128 Id.
129 Id.
initiative sponsor in Arizona must file an application with his name (or the name of the organization and its officers), intention to circulate a petition, and a description of no more than 100 words of the principal provisions of the proposed law or amendment.\textsuperscript{130} They must also file all of the relevant campaign finance paperwork.\textsuperscript{131} After they have completed the necessary paperwork, the initiative sponsor must gather the signature of 10\% of the state electorate for a statutory initiative or 15\% of the state electorate for a constitutional initiative.\textsuperscript{132}

* * *

Two consistent threads run through all of these reform processes. First, all of them act as a short-circuit to the traditional democratic process, bypassing both the legislature and the executive. Second, most of these ballot-initiative processes require an initiative sponsor of some kind, who is legally associated with the initiative, pays the fees, and organizes the signature-gathering efforts. This unique system suggests that the initiative sponsors should have a special status with respect to her initiative. Yet the Supreme Court expressed skepticism about the standing of ballot-initiative supporters in \textit{Arizonans for Official English v.}

\textsuperscript{130} A.R.S. § 19-111
\textsuperscript{131} A.R.S. § 19-111; § 16-902.01
\textsuperscript{132} AZ Constitution, Article I § 1(2).
Arizona, its only discussion of the issue. The next section explores the Court’s analysis in that case.

B. The Court’s Cursory Review of Ballot-Initiative Standing

Although no Supreme Court opinion has ever decided this issue on the merits, the Court in Arizonans considered the issue in dicta. Arizonans concerned a ballot initiative making English the official language of the State of Arizona. The case arose in circumstances virtually identical to the facts of the Proposition 8 litigation. In that case, voters approved of the amendment by a slim margin (50.5% to 49.5%) and litigation in federal court commenced two days later.

In the first round of litigation, the district court found the amendment “fatally overbroad” and unconstitutional. At that point the defendant, the Governor of Arizona, who had previously expressed opposition to the initiative, declined to appeal. Once the government decided not to appeal, the ballot-initiative sponsor, Arizonans for Official English Committee (AOE), and Robert D. Park, chairman of the Committee, attempted to intervene to defend the

---

134 The Court also summarily reversed the Ninth Circuit in another case where the ballot-initiative sponsor was the only party on appeal. However, there was no discussion of the issue in the court below or in the Court’s decision itself. See Don’t Bankrupt Washington Committee v. Continental Illinois National Bank and Trust Co of Chicago, 460 U.S. 1077 (1983).
135 Id. at 48.
136 Id. at 49 n. 1.
137 Id. at 52–55.
initiative on appeal.\textsuperscript{138} The District Court rejected AOE and Park’s intervention, noting that “the interests of voters who favored the initiative were too general to meet traditional standing criteria.”\textsuperscript{139} On appeal, the Ninth Circuit reversed, concluding that AOE would have standing just as, by analogy, the Arizona Legislature would have standing to defend the constitutionality of a state statute.\textsuperscript{140}

The Supreme Court granted the petition for certiorari and vacated the Court of Appeals decision. In its opinion, the Court ordered the district court to dismiss the case, allowing the Arizona Supreme Court to rule definitively on the initiative.\textsuperscript{141} However, before reaching this conclusion, the Court discussed, in dicta, whether or not AOE and Park had standing to pursue their appeal.

In a two-and-a-half paragraph discussion, the Court expressed “grave doubts whether AOE and Park [had] standing under Article III to pursue appellate review,” but declined to “definitively resolve the issue.”\textsuperscript{142} The Court noted (and dismissed) AOE’s principal argument that, as initiative sponsors, they had a “quasi-legislative interest in defending the constitutionality of the

\textsuperscript{138} Id. at 56. The Attorney General also attempted to intervene under 28 U.S.C. § 2403(b), but the court rejected the Attorney General’s intervention, indicating that the Governor “determine[d] that the state’s sovereign interests would be best served by foregoing an appeal.” Arizonans, 520 U.S. at 57 (citing Yniguez v. Mofford, 130 F.R.D. 410, 413 (April 3, 1990)).
\textsuperscript{139} Arizonans, 520 U.S. at 57.
\textsuperscript{140} Id. at 58.
\textsuperscript{141} Id. at 79–80.
\textsuperscript{142} Id.
measure that they successfully sponsored.” The Court concluded that “the requisite concrete injury to AOE members is not apparent” because “AOE’s members were not bound by the [District Court] judgment” for the plaintiff could sue in state court. Interestingly, the Court also noted that “AOE and its members . . . 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 initiatives made law of the State.”

C. The Court Should Recognize Standing for Ballot-Initiative Supporters

Despite the qualified skepticism expressed by the Supreme Court in Arizonans, there is a compelling case for the existence of Article III standing for initiative sponsors to defend approved initiatives validly adopted by voters in court. The Court’s existing precedent in Coleman suggests that a broader conception of standing is appropriate for ballot-initiative sponsors. More important, the concerns that led to restrictions on standing in Frothingham, Raines, and Hein are not present. Simply put, the separation of powers and administrability concerns that form the Court’s core constitutional rationales for

---

143 Id. at 65.
144 Id. at 66.
145 Id.
the restrictions behind the standing doctrine are absent and the Court’s dicta in *Arizonans* is unpersuasive. The Court should recognize the importance of allowing this hybrid litigant into court—at least for the purposes of defensive litigation.

a. **Ballot-Initiative Sponsors have suffered a concrete injury**

Ballot-initiative sponsors are not legislators in the usual sense. They have not been elected to office and are not part of a Congress vested with “legislative Powers.” 146 Yet these individuals are nevertheless responsible for enacting laws or constitutional amendments when their peers vote upon a duly registered ballot-proposal and enact it by majority vote—as occurred in the approval of Proposition 8 by California’s electorate. 147 As the Court noted in *Arizonans*, this role can be characterized as “quasi-legislative.” But what is important for our purposes is that the ballot-initiative sponsor’s legislative characteristics predominate. The *Arizonans* majority’s reliance on the fact that the sponsor was not an elected official is misguided. The fact that the sponsor was not an elected representative is precisely why *Raines* is not controlling. Instead, the Court

---

146 U.S. Const. Art. I, s. 1.
147 See Part III.1 (describing statutory schemes that require specific individuals assume leadership roles in collecting signatures, drafting referendum language and paying associated fees).
should look to whether the sponsor has suffered an injury in fact similar to the one suffered in Coleman.\footnote{Furthermore, the emphasis that the Arizonans opinion placed on AOE’s ability to litigate in state court is immaterial to the question of whether standing is appropriate. In that case (and in the Proposition 8 case), state statutes allegedly gave ballot-initiative sponsors the capability to litigate their claim in state court. This paper argues that the restrictive theory of standing has never been focused on the availability of redress in other courts and such permission should not be used as a basis for preventing the sponsors from bringing the claim in federal court.}

The Supreme Court developed a theory of legislative standing in Coleman that did not focus on the individual’s status. Instead, this theory focused on the expectations of the legislators that their vote be given its proper weight. In Raines, the Court succinctly restated Coleman’s principle, noting that:

It is obvious, then, that our holding in Coleman stands . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.\footnote{Raines, 521 U.S. at 823.}

Thus, ballot-initiative sponsors, such as ProtectMarriage.com, can argue that they have standing because their vote has been effectively nullified. The evidence with respect to Proposition 8 is that various same-sex litigants (who wanted to get married) filed challenges the day after the election (before even the final votes had been tallied) and requested an immediate stay against its implementation.\footnote{See, for example, San Francisco v. Horton, Pet. For Writ of Mandate, 2008 WL 4843812 *5 (Cal. 2008) (requesting that the court grant an immediate stay against implementation)}
While the court in that case denied the temporary stay during litigation, the possibility remains that a stay could have prevented the referendum from ever taking effect in the first place. Furthermore, constructive nullification is possible in every ballot initiative if the government relinquishes its duty to defend the initiative and others are not allowed to stand in its stead. As the Petitioner’s Supreme Court brief in *Arizonans* noted, “If [Arizonans for Official English] does not have standing in this case, then no initiative is safe from collusive suits. All a State would need to do to avoid initiatives it did not like was to refuse to appeal an adverse ruling.” Indeed, this danger is the opposite of separation of powers concern—it reflects the possibility that the current elected representatives in the executive and legislative branches could collude to prevent ideas that reflect the popular will from becoming law. Standing is possible because the situation is analogous to *Coleman*. No political redress is possible before either of the other branches of government, and nullification of the vote is a real possibility. In fact, in cases

---

152 Of course, this argument must assume that the ballot-initiative supporters chances on appeal are greater than zero.
154 Cf. *Raines*; *Lujan*. See also *The New Law of Legislative Standing*, 54 Stan. L. Rev. 205, 218 (2001). In particular, the idea that the subsequent election could allow referendum supporters to punish the executive branch for failing to defend the initiative on appeal is inapposite. Once judgment becomes final, redress for the particular initiative is impossible, particularly in a case like Proposition 8 where a federal judge found the state constitutional amendment in violation of the
where the government refuses to defend an initiative, this constructive nullification is the inevitable consequence.

Even if this constructive nullification is insufficient to create an injury in fact for the purposes of Coleman, the unique position of the ballot-initiative sponsor, as compared to the legislator, provides a reason to consider the failure to defend the law as a concrete injury in fact. Initiative sponsors do not have a direct role in the political system, in the way that legislators do. When the executive fails to defend a law, sponsors can only make their displeasure known at the next election, at which point it may already be too late to ensure that the initiative is defended in court.155

In addition to the fact that there is at least a plausible argument for granting standing to ballot-initiative sponsors, the Court’s traditional justifications for limiting standing also support ballot-initiative sponsors. Granting standing to these individuals would not violate the Court’s first principles—its “prime directive”156—of standing.

---

155 See note 158 and accompanying text.
156 See Prime Directive, MemoryAlpha, (Nov. 2010) (“Starfleet General Order 1, the Prime Directive is the most important law in Starfleet, a law of noninterference. Violation of the Directive is generally considered a felony offense that often carries severe punishment unless sufficient justification can be made for the violation.”) available at http://memory-alpha.org/wiki/Prime_Directive.
b. The Court’s rationales for limiting standing are inapposite for referendum supporters.

i. There are no separation of powers concerns

The primary concern identified by the Supreme Court and commentators to expansion of standing is one of separation of powers. The concern is generally expressed as one of requiring the courts to make judgments best left to legislators or the executive. In areas where the court has allowed a somewhat more relaxed approach to standing, the court tends to stress the inability of the plaintiffs to get redress in any other way. This can be seen from both the legislative standing cases, where the plaintiffs had their lawful votes nullified, and the (limited) taxpayer standing cases, where there was no effective redress to a citizen’s opposition to governmental support of majority religious expression. These precedents suggest that the Supreme Court is willing to recognize standing when there is no other effective way for a party to seek review of governmental action. If recognizing standing does not interfere with any other branch of government, then the Court’s standing requirement should not raise a barrier.

Ballot-initiative sponsors arguably have no redress much like the problem faced by the legislators in Coleman. When a ballot-measure is passed via a popular vote, its enforcement and defense is left to the state government. This can create a significant problem for ballot-initiative sponsors. The initiative is often an expression of the popular will that is at odds with what the legislature
would have voted for (and what the executive would have signed) under the same circumstances. This can produce substantial problems with enforcement. The political branches, unhappy with the requirements forced upon them by the public, may be unwilling to initially enforce or subsequently defend the new policies.

Of course, the refusal to enforce a (non-discretionary) initiative does not provide standing. Yet when a state law (or constitutional amendment) is challenged and the government refuses to defend it, there is no possible redress. Unlike the legislators in *Raines*, the referendum sponsors (and the citizens who voted for it) do not have a remedy available. In *Raines*, the legislators simply lost the vote, and attempted to overturn the results of that loss through litigation. The Court rightly concluded that this was not sufficient to create standing, because the legislators in question did not have any of their institutional power taken away. The issues raised by the legislators were best dealt with through the political process, which is designed to encompass these pursuits, and inevitably produces winners and losers. The courts have no role to play in policing the internal political disputes within and between the coordinate branches.

---

157 See Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suff. U. L. Rev. at 897 (noting that non-enforcement of unpopular laws is a “prime engine of social change” and standing to sue for enforcement would interfere with this mechanism).
The citizen-sponsors of initiatives, on the other hand, do not have strong institutional power vis-à-vis the other branches and are not part of a carefully constructed system of checks and balances. They are far less able than legislators to ensure that their preferences, duly passed into law via initiative, are enforced. They lack the power of the purse, the ability to hold up nominations, and the ability to undermine the agenda of the executive that generally inheres in the legislature. The ballot-initiative sponsor is not an unhappy bystander or a disgruntled legislator—rather, the sponsor has suffered, in effect, the complete suspension of his power to create new laws as entitled by law and adopted by the requisite popular vote. Whether or not the law momentarily takes effect, the government’s ability to abandon the law in the face of any challenge means that the law will always be challenged, and will always be abandoned.

The ballot-initiative sponsor’s only institutional powers are the ability to sponsor more initiatives (which does not solve the problem in the face of determined governmental resistance to their objectives) and to vote the existing government out of office. The futility of requiring a second initiative to compel enforcement of a prior initiative is obvious, but the argument that citizens have the power to elect new representatives more amenable to the referendum has superficial appeal. It is true that the people can elect a government that is more likely to enforce any given initiative. In fact, this is likely the only remedy
available to ensure the enforcement of an initiative that allows for discretionary enforcement. Yet this is not an effective remedy in the context of defending the constitutionality of an initiative that has already been challenged.

First, there is the issue of timing. If the government refuses to defend the initiative, the judgment will be stare decisis before an initiative-friendly government can be elected. In fact, the Court’s suggestion in *Arizonans* that AOE bring the issue in state court ignores the fact that by intervening in the federal litigation, any final adverse ruling is res judicata. If the Court had not remanded with orders to certify but instead simply reversed, AOE could not have gone to state court due to collateral estoppel.158

Second, there is the more general problem with voting for a new government as a remedy. Specifically, there are many issues facing the electorate in any given election, and there is no guarantee that there will be a party that both wants to enforce or defend the initiative and is otherwise consonant with the wishes of the electorate. There is also the possibility that there are crosscutting cleavages, which create support for the initiative within a population generally inclined to support a political party that opposes the

---

158 See *Local 322, Allied Industrial Workers of America, AFL-CIO v. Johnson Controls, Inc.*, Globe Battery Division, 921 F.2d 732 (7th Cir. 1991); *Clair v. Estar*, 148 F.2d 644 (2nd Cir. 1945) (Hand, J.) (finding that where a defendant intervened in a previous case and lost, the defendant cannot litigate the same issue in a claim brought against him due to collateral estoppel). One possible rejoinder is that the ballot-initiative sponsor should not intervene whenever the law is challenged. Yet this tactical decision, while correct under current law, would lead to duplicate litigation.
initiative. These concerns render elections an untenable solution to the problem of ballot-initiative defense.

ii. There are no prudential administrability concerns

The other primary objection raised by the Supreme Court and commentators to the expansion of standing is the possibility of substantially increasing case-loads and risking advisory opinions by allowing plaintiff’s to bring cases based on generalized, rather than specific, grievances. This objection underlies much of the Court’s taxpayer standing jurisprudence.159 Yet ballot-initiative sponsors are not merely taxpayers interested in arguing the merits of an issue in the “rarefied atmosphere of a debating society.”160 They possess a specific and tangible relationship to the law that has been voided. This relationship, developed prior to the election itself and objectively demonstrated by the financial outlay and/or the official signatures provided to the secretary of state, transforms what would otherwise be a taxpayer, into an easily identified litigant that has unique qualifications for stepping into the role of defendant where the government wishes to abandon the defense.161

159 See, e.g., Hein, 551 U.S. at 611-12.
160 Massachusetts, 549 U.S. at 517, quoting Lujan, 504 U.S. at 581 (Kennedy concurring).
161 It is important to distinguish this situation from that of the lobbyist who writes a piece of legislation which is adopted by a legislator and passed in its entirety. The initiative sponsor takes legal responsibility of the initiative throughout the process, unlike the hypothetical lobbyist. Further, the lobbyist’s interests can be defended by the member of congress that enacted the
Limiting the individuals with standing to enforce or defend a ballot initiative on appeal to initiative sponsors resolves the potential administrability problem that the Court is always concerned about. This type of litigation is already rare, and the necessity of standing would (obviously) be limited to ballot initiatives that were not supported by the state, which ensures that standing would exist only in a small number of cases. This number is vanishingly small when contrasted against the fears expressed by the Court in the taxpayer standing cases, where in theory any law could come under attack.

Therefore, any concerns that the Court might have about the limitless nature of ballot-initiative supporters (or litigation) are misguided. There can only be a limited number of ballot-initiative sponsors for any new measure or amendment. Furthermore, where multiple sponsors each have arguments for why it should become the party to the litigation, courts have ample tools for identifying the “lead defendant” and allowing it to act as the representative for the small group of ballot sponsors that all wish to defend the suit.

Finally, there are alternative doctrines that could function to resolve the concern of a flood of initiative related litigation. If the Court is unwilling to limit standing to the initiative sponsor, it could instead require that suits challenging a referendum be treated like other cases of collective civil litigation, as a class legislation. The initiative sponsor’s interests are, by definition in this case, not represented by a legislator.
action under Rule 23 of the Federal Rules of Civil Procedure. Rule 23 provides a framework for dealing with cases where a large number of potential plaintiffs seek the same relief, and so is an ideal model for a case defending an initiative on appeal.\textsuperscript{162}

\textbf{CONCLUSION}

By requiring standing of all litigants, courts achieve significant efficiency savings for the judiciary—preventing abstract challenges to public laws and funneling such challenges to the legislative and executive branches allows courts to save their limited resources for cases that merit attention. However, there are limits to the types of litigants courts should exclude in order to conserve

\textsuperscript{162} The class in an initiative context could be thought of as either a Fed. R. Civ. P. 23(b)(1) or (b)(2) class. Rule 23(b)(1) provides that a class is appropriate is prosecuting separate actions by class members would create a risk of inconsistent judgments that would establish incompatible standards of conduct for the opposing party. This addresses one of the specific concerns underlying the objection to a broad doctrine of standing, namely the potential for multiplicitous lawsuits. Rule 23(b)(2) allows for a class action in cases where the opposing party has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief is an appropriate remedy for the class as a whole. This also be applicable in the initiative context, because the only available remedy would be injunctive in nature (requiring the state to respect the initiative).

The parallels between class actions and our proposed doctrine of standing are not perfect. Class actions are generally concerned with classes of plaintiffs, while our approach will generally involve a class of defendant-appellants, who are attempting to justify an appeal from an adverse judgment. That being said, class action principles enable the courts to identify which party would be best equipped to advance the interest of the class of citizens who are attempting to appeal the adverse ruling on the initiative. Our approach indicates that the actor who will be best positioned to represent the class of wronged citizens is the initiative sponsor. If that proves incorrect, the fair and adequate representation requirement of Rule 23 can protect members of the public who have an interest in the defense of the laws that they themselves enacted.
resources. In denying standing to ballot-initiative supporters, we believe that courts cross the line and confuse the appropriate justifications for limiting taxpayers and legislators from suing for relief with the legitimate purposes that referenda champions are pursuing. In the infrequent instances where ballot initiatives are not supported by the executive or legislative branches of government, courts must step in to ensure that the peoples’ representative at least has the opportunity to have their case heard. The merits of whether an initiative complies with State or Federal laws or violates the Constitution can then be considered on appeal.