DON’T ASK, DON’T TELL: HOLLINGSWORTH v. PERRY AND THE CONSTITUTIONAL RIGHT TO SAME-SEX MARRIAGE – THE COURT DIDN’T TELL BY DENYING THE PEOPLE THE RIGHT TO ASK

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Matthew A. Melone* and George A. Nation III**

*The people were in fact, the foundation of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased... [F]irst principles might be resorted to.”*

James Madison

I. **INTRODUCTION**

This article does not debate the merits of whether state law prohibitions to same-sex marriage violate the U.S. Constitution. Instead, our focus is on the fact that the reasoning employed by Supreme Court to avoid ruling on this issue jeopardizes a foundational principle of our society - the United States is a democracy and the People alone are sovereign. This

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† **The Records of the Federal Constitutional Convention of 1787** 46 (Max Ferrand ed., 1947)( responding to a Maryland delegate at the Constitutional Convention who was concerned that the method of amendment set out in the Maryland Constitution was not being followed in the process of adopting the federal Constitution ).
1 Throughout this article when the word “People” is used it refers to a majority of the voters and not to individual persons.
2 The Declaration of Independence states:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. -- That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, -- That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

…[D]o, in the Name, and by the Authority of the good People of these Colonies, solemnly publish and declare, That these united Colonies are, and of Right ought to be Free and Independent States …

**The Declaration of Independence** para. 2, 32 (U.S. 1776) (emphasis added). The original Constitution - Articles I-VII and the first ten Amendments - begins and ends with “The People.”
See U.S. CONST. pmbl. (stating that “[w]e the People … do ordain and establish this Constitution for the United States of America.”); U.S. CONST. amend. X (stating that “[t]he powers not delegated [to government] are reserved … to the people.”). Other provisions of the Bill of Rights also confirm the primacy of the People. For example, Amendment IX states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” See U.S. CONST. amend. IX (establishing that the People are the source of all power – so that government may exercise only those powers explicitly authorized to it by the People). Also Article I states “All legislative powers here in granted…” and clearly it is the People who are the grantors. As illustrated by the opening quote, James Madison, one of the principal architects of the Constitution, recognized the sovereignty of the People and supported direct democracy. His words reflect the ideas that are the foundation upon which our Constitution rests. Again from Madison:

The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments not only as mutual rivals and enemies, but as uncontrolled by a common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone…. THE FEDERALIST NO. 46, at 291 (James Madison) (Clinton Rossiter ed., 2003).

The other principal architect of the Constitution, James Wilson, also clearly recognized the sovereignty of the People:

As to the people, however, in whom the sovereign power resides, the case is widely different, and stands upon widely different principles. From their authority the constitution originates: for their safety and felicity it is established: in their hands it is as clay in the hands of the potter: they have the right to mould, to preserve, to improve, to refine, and to finish it as they please. If so; can it be doubted, that they have the right likewise to change it? A majority of the society is sufficient for this purpose.…

THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. (Lorenzo Press, 1804), available at http://www.constitution.org/jwilson/jwilson.htm. James Wilson and James Madison were the principal architects of the Constitution of 1787. While Madison may be more familiar today, Wilson was one of colonial America’s most eminent men. He was perhaps America’s best and most well-known lawyer. He was a member of the Philadelphia Committee of Detail and wrote the Constitution’s famous first three words: “We the People.” While the word “sovereign” does not appear anywhere in our Constitution, Wilson noted that there was only one place where it might have been properly used and that was before the third word, “People.” See Akhil Reed Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1439 (1987).

The U.S. Supreme Court has also acknowledged the sovereignty of the People. “Under our constitutional assumptions, all power derives from the people, who may delegate it to representative instruments which they create.” City of East Lake v. Forest City Enters., 426 U.S. 668, 672 (1976) (citing James Madison in THE FEDERALIST NO. 39). Previously, the Court had
sovereignty is exercised, in its purest form, through direct democracy mechanisms and it is these mechanisms whose efficacy the Court has diminished.

Due primarily to logistical problems resulting from America’s vast size and scale, representative democracy rather than direct democracy is the most common form of government used. Many States though, have established specific direct democracy procedures in order to facilitate the ability of their citizens to exercise their fundamental right, as Americans, to directly govern themselves. In general, these procedures specify a process that may be used by citizens to directly and independently propose and vote on statutes or state constitutional amendments, or to recall elected officials between elections. Typically, the People engage in direct self-government when they are dissatisfied with the performance of their elected representatives. For example, if the People believe that their elected representatives are overly influenced by special

concluded that the use of direct voting “is a classic demonstration of ‘devotion to democracy.’” James v. Valtierra, 402 U.S. 137, 141 (1971).

3 See Alan Hirsch, Direct Democracy and Civic Maturation, 29 Hastings Const. L.Q. 185, at 188 (noting that the Framers established a representative democracy at the federal level because the country was too large for direct democracy). Hirsch goes on to quote John Adams: “In a large society, inhabiting an extensive country, it is impossible that the whole should assemble to make laws. The first necessary step then is to delegate power ….” Id. (quoting Thomas Cronin, Direct Democracy: The Politics Of Initiatives, Referendum, And Recall 14 (1989)).

Another illustration of the practical necessity for representative democracy occurred on February 4, 1789, when the Electoral College unanimously elected George Washington President. Congress was to make that choice official that March but could not muster a quorum until April due to the new country’s bad roads. See Ron Chernow, Washington: A Life (2010), as reprinted in the Reluctant President. The Smithsonian, Feb. 2011, at 45.

As technology developed that allowed us to overcome these logistical problems our democracy has moved ever closer to the Athenian ideal of pure democracy. See George A. Nation III, We The People The Consent of The Governed In The Twenty-First Century: The People’s Unalienable Right To Make Law, 4 Drexel L. Rev. 319, 321-29 (2012) (arguing that the revolutionary developments in communication technology make it possible for the first time in our history to, at the federal level, overcome the practical and logistical limitations that in the past required a representative democracy).

4 “Petitioning the government and participating in the traditional town meeting were precursors of the modern initiative and referendum. . . .Those innovations were modeled after similar devices used by the Swiss democracy in the 1800’s, and were first used in the United States by South Dakota in 1898.” John Doe #1 et al., v. Reed 130 S.Ct. 2811, 2834 (2010) (Scalia, J., concurring) (quoting S. Piott, Giving Voters A Voice 1-3, 16 (2003)). Today, some 27 states use an initiative or popular referendum system. See M. Waters, Initiative and Referendum Almanac 12 (2003). See also Daniel B. Wood, Election 2012: Ballot Initiatives Reflect Nation’s Mood, The Christian Science Monitor, Oct. 13, 2012, available at http://www.lexisnexis.com.exproxy.lib.lehigh.edu/lnacui2opi/de (stating that “[o]n Nov. 6, voters in 37 states will decide 174 ballot propositions – the most since 2006, but well below the highs of the late 1990’s and early 2000s, when voters were routinely considering more than 2000 initiatives on Election Day”). Hirsch, supra note 3, cites a 1993 national poll of adults conducted by the Los Angeles Times that found that 65 percent favored a system of national referenda.

5 See e.g., Cal. Const. art. 2. See also supra notes 267-70.
interests or political considerations or that they have simply exercised poor judgment then the People may use direct democracy to assert their sovereignty and take corrective action. Direct democracy procedures are the practical manifestation of the fundamental truth underlying our democracy; the People alone are sovereign. Thus, the right to make law belongs to the People. The fact that the People have granted certain legislative powers to Congress and others to State legislatures in no way diminishes the Peoples’ right to make law. If we deny the right of the American People to make law, then we must deny the validity of the Constitution, which is law

6 For example, the People of Michigan were dissatisfied with the state government’s racial discrimination in public employment, public education and public contracting and used directed democracy to amend the State Constitution to prevent the state from discriminating against, or granting preferential treatment, on the basis of race, sex, color ethnicity or national origin. The Court has granted certiorari and oral argument was held on Oct. 15, 2013. See Schuette v. Coalition to Defend Affirmative Action, 133 S.Ct. 1633 (2013); http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-682_1537.pdf. Other states have used direct democracy to address various issues including the recreational use of marijuana, same-sex marriage, budget deficits, physician-assisted suicide, unions, and the death penalty among others. See Wood, supra note 4.

7 See supra note 1.

8 See infra notes 267-309 and accompanying text.

9 “[Our Constitution is] professedly founded upon the power of the people…Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations. ‘We, The People of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.’ Here is a [clear] recognition of popular rights…. THE FEDERALIST NO. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

James Wilson evidenced a similar understanding stating at the Pennsylvania ratifying convention that “supreme… power remains in the people” – a point that he formulated a bit later as follows: The people “never part with the whole” of their “original power” and “they retain the right of recalling what they part with … [T]he citizens of the United States may always say, WE reserve the right to do what we please.” See DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 432, (Jonathan Elliot ed., Ayer Co., reprint ed., 1836) (emphasis added) [hereinafter ELLIOT’S DEBATES]. See AKHIL REED AMAR, THE BILL OF RIGHTS 121 ( Yale Univ. Press 1998 ) stating:

In short, conventional wisdom today misses the close triangular interrelation among the Preamble and the Ninth and Tenth Amendments. The Ninth is said to be about unremunerated individual rights, like personal privacy; the Tenth about federalism; and the Preamble about something else entirely. But look again at these texts. All are at their core about popular sovereignty. All, indeed, explicitly invoke “the people.” In the Preamble, “We the people … do” exercise our right and power of popular sovereignty, and in the Ninth and Tenth “the people” expressly “retain” and “reserve” our “right” and “power” to do it again. If the Ninth is mainly about individual rights, why does it not speak of individual “persons” rather than the collective “the people”? If the Tenth is only about states’ rights, why does it stand back-to-back with the Ninth, and what are its last three words doing there, mirroring the Preamble’s first three? Id.
made ("ordained and established") by the People. Because the People are sovereign under our constitutional order, the People’s exercise of direct self-government cannot be dependent in

10 Professor Amar stated:

In the extraordinarily extended and inclusive ratification process envisioned by the Preamble, Americans regularly found themselves discussing the Preamble itself. At Philadelphia, the earliest draft of the Preamble had come from the quill of Pennsylvania’s James Wilson, and it was Wilson who took the lead in explaining the Preamble’s principles in a series of early and influential ratification speeches. Pennsylvania Anti-Federalists complained that the Philadelphia notables had overreached in proposing an entirely new Constitution rather than a mere modification of the existing Articles of Confederation. In response, Wilson – America’s leading lawyer and one of only six men to have signed both the Declaration of Independence and the Constitution – stressed the significance of popular ratification. “This Constitution, proposed by [the Philadelphia draftsmen], claims no more than a production of the same nature would claim, flowing from a private pen. It is laid before the citizens of the United States, unfettered by restraint … By their fiat, it will become of value and authority; without it, it will never receive the character of authenticity and power. James Madison agreed, as he made clear in a mid-January 1788 New York newspaper essay today known as The Federalist No. 40 – one of a long series of columns that he wrote in partnership with Alexander Hamilton and John Jay under the shared pen name “Publius.” According to Madison/Publius, the Philadelphia draftsmen had merely “proposed a Constitution which is to be of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed. [The proposal] was to be submitted to the people themselves, [and] the disapprobation of this supreme authority would destroy it forever; its approbation blot out antecedent errors and irregularities.” Leading Federalists across the continent reiterated the point in similar language.

With the word fiat, Wilson gently called to mind the opening lines of Genesis. In the beginning, God said, fiat lux, and – behold! – there was light. So, too, when the American people (Publius’s “supreme authority”) said, “We do ordain and establish,” that very statement would do the deed. “Let there be a Constitution” – and there would be one. As the ultimate sovereign of all had once made man in his own image, so now the temporal sovereign of America, the people themselves, would make a constitution in their own image.

All this was breathtakingly novel. In 1787, democratic self-government existed almost nowhere on earth. Kings, emperors, czars, princes, sultans, moguls, feudal lords, and tribal chiefs held sway across the globe. Even England featured a limited monarchy and an entrenched aristocracy alongside a House of Commons that rested on a restricted and uneven electoral base. The vaunted English Constitution that American colonists had grown up admiring prior to the struggle for independence was an imprecise hodgepodge of institutions, enactments, cases, usages, maxims, procedures, and principles that had accreted and evolved over many centuries. This Constitution had never been reduced to a single composite writing and voted on by the British people or even by Parliament.
The ancient world had seen small-scale democracies in various Greek city-states and pre-imperial Rome, but none of these had been founded in fully democratic fashion. In the most famous cases, one man – a celebrated lawgiver such as Athens’s Solon or Sparta’s Lycurgus – had unilaterally ordained his country men’s constitution. Before the American Revolution, no people had ever explicitly voted on their own written constitution.

Nor did the Revolution itself immediately inaugurate popular ordainments and establishments. True, the 1776 Declaration of Independence proclaimed the “self-evident” truth that “Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.” The document went on to assert that “whenever any Form of Government becomes destructive of [its legitimate] Ends, it is the Right of the People to alter and abolish it, and to institute new Government.” Yet the Declaration only imperfectly acted out its bold script. Its fifty-six acclaimed signers never put the document to any sort of popular vote.

Things began to change as the Revolution wore on. In 1780, Massachusetts enacted a new state constitution that had come directly before the voters assembled in their respective townships and won their approval. In 1784, New Hampshire did the same. These local dress rehearsals (for so they seem in retrospect) set the stage for the Preamble’s great act of continental popular sovereignty in the late 1780s.

As Benjamin Franklin and other Americans had achieved famous advances in the natural sciences – in Franklin’s case, the invention of bifocals, the lightning rod, and the Franklin stove – so with the Constitution America could boast a breakthrough in political science. Never before had so many ordinary people been invited to deliberate and vote on the supreme law under which they and their posterity would be governed. James Wilson fairly burst with pride in an oration delivered in Philadelphia to some twenty thousand merrymakers gathered for a grand parade on July 4, 1788. By that date, enough Americans had said “We do” so as to guarantee that the Constitution would go into effect (at least in ten states – the document was still pending in the other three). The “spectacle, which we are assembled to celebrate,” Wilson declared, was “the most dignified one that has yet appeared on our globe,” namely, a people free and enlightened, establishing and ratifying a system of government, which they have previously considered, examined, and approved!

… You have heard of Sparta, of Athens, and of Rome; you have heard of their admired constitutions, and of their high- prized freedom … But did they, in all their pomp and pride of liberty, ever furnish to the astonished world, an exhibition similar to that which we now contemplate? Were their constitutions framed by those, who were appointed for that purpose, by the people? After they were framed, were they submitted to the consideration of the people? Had the people an opportunity of expressing their sentiments concerning them? Were they to stand or fall by the people’s approving or rejecting vote? The great deed was done. The people had taken center stage and enacted their own supreme law.
anyway on the cooperation or approval of elected government officials.\footnote{AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 7-10 (Random House 2005) (notes omitted).} Government officials must answer to the People and not the other way around.\footnote{“They must be told that the ultimate authority, whenever the derivative may be found, resides in the people alone….” THE FEDERALIST No. 46, at 291 (James Madison) (Clinton Rossiter ed. 2003). See also supra note 2.}

However, even laws or state constitutional amendments passed directly by the People, similar to laws passed by the legislature, are subject to judicial review.\footnote{See supra notes 1-10.} If a law or state constitutional amendment violates the federal Constitution then that law or amendment is void.\footnote{See e.g., Coalition to Defend Affirmative Action v. Schuette, 701 F.3d 466 (6th Cir.) (2012) (overturning a Michigan constitutional amendment passed by direct democracy that prohibited discrimination against or in favor of any individual or group on the basis of race, sex, color, ethnicity, or national origin in public employment, public education or public contracting). One effect of the amendment was to prohibit affirmative action in college admissions and this has been challenged under the political process doctrine. The Supreme Court granted certiorari and heard oral argument on Oct. 15, 2013. See supra note 6. See also Romer v. Evans, 517 U.S. 620 (1996) (overturning an anti-homosexual amendment to the Colorado Constitution passed by direct democracy); Hunter v. Erickson, 393 U.S. 385 (1969) (overturning a city charter amendment passed by direct democracy).} Federal courts have the ultimate authority to make that determination.\footnote{“This Constitution, and the laws of the United States which shall be made in pursuance therefor … shall be the supreme law of the land ….”U.S. CONST. art. VI.} In order to have access to the federal courts to challenge or to defend the constitutionality of a law, a party must satisfy the legal requirement of standing.\footnote{See U.S. CONST. art., §§ 1-2 III (giving federal courts final say over federal law).} In general, federal standing requires, \textit{inter alia}, that the party bringing the lawsuit have suffered some specific injury or loss that was caused by the law or conduct being challenged.\footnote{See infra notes 67-70 and accompanying text.}

Standing may become an issue in the context of direct democracy when a trial court decides that a law or state constitutional amendment passed directly by the People is unconstitutional. A party initiating an appeal is also required to have standing.\footnote{See infra notes 71-77 and accompanying text.} A state unquestionably has standing to defend the enforceability of one of its laws.\footnote{See Hollingsworth v. Perry 133 S.Ct. 2652, 2659 (2013) (stating that “[f]or there to be such a case or controversy, it is not enough for the party-invoking the power of the court to have a keen interest in the issue. That party must also have ‘standing,’ which requires among other things, that it have suffered a concrete and particularized injury”).} Usually, the Governor or Attorney General, or some other State official authorized to act for the State brings the appeal on behalf of the State.\footnote{See infra notes 381-87 and accompanying text.} However, a State’s elected governmental officials may refuse
to initiate an appeal to defend a law that was passed via direct democracy.\textsuperscript{21} State officials may refuse to appeal to defend such a law because of the influence of special interests, political considerations, or simply because they disagree with the decision of the voters. In such circumstances the sponsors, who are the individuals that began the direct democracy legislative process by qualifying the proposed law for placement on the ballot - a task that involves significant effort\textsuperscript{22} - will appeal on behalf of the State as representatives of the People of the State. Obviously, this does not guaranty that the law in question will be upheld, but the appeal does guaranty that the accuracy and wisdom of the trial court’s legal analysis will be reviewed by at least one appellate panel of judges.\textsuperscript{23}

Recently, the Supreme Court has erected obstacles to the enforcement of laws passed by direct democracy. In a 5 to 4 decision in \textit{Hollingsworth v. Perry},\textsuperscript{24} the Court held that the sponsors of an initiative have no authority to represent the State when State officials refuse to appeal to defend the initiative and, therefore, have no standing to appeal on behalf of the State.\textsuperscript{25} The Court further held that initiative sponsors have no standing as individuals to appeal because they have suffered not a specific harm but a harm that is similar to that suffered by every other citizen of the State.\textsuperscript{26} The upshot of the Court’s decision is that the sovereign will of the People, expressed in direct lawmaking, can be thwarted by the unreviewable decision of a single unelected trial judge and the inaction of recalcitrant elected officials who, ironically, are elected to serve the People.\textsuperscript{27}

The Court’s decision in \textit{Hollingsworth} had the effect of denying the People of California the right to defend their law. The right to appeal ensures that significant questions of law, such as those involving the proper interpretation of the Constitution, are not left to the sole discretion of an individual trial judge.\textsuperscript{28} An appeal is a review of the proceedings in the trial court by a more experienced appellate court.\textsuperscript{29} Often appeals are heard and decided by a panel of appellate judges

\textsuperscript{21} For example, California’s Governor, attorney general, and various other state and local officials refused to defend Proposition 8 at trial and refused to appeal the District Court’s holding that it was unconstitutional. \textit{See infra} notes 239-45 and accompanying text.
\textsuperscript{22} \textit{See infra} notes 321-26 and accompanying text.
\textsuperscript{23} \textit{See infra} notes 28-36 and accompanying text.
\textsuperscript{24} 133 S.Ct. 2652 (2013).
\textsuperscript{25} \textit{Id.} at 2664-67.
\textsuperscript{26} \textit{Id.} at 2662-63.
\textsuperscript{27} \textit{See infra} notes 405-14 and accompanying text.
\textsuperscript{28} “In the United States, however, legal systems have almost always included a right to appeal. As one appellate judge noted, “[t]he opportunity to take one’s case to a ‘higher court as a matter of right is one of the foundation stones of both our state and federal court systems.”” J. Clarke Kelso, \textit{Special Report on California Appellate Justice: A Report on the California Appellate System}, 45 HASTINGS L.J. 433, 434 (1994)) (citing FRANK M. COFFIN, THE WAYS OF A JUDGE 16 (1980)). \textit{See e.g.}, NEW HAMPSHIRE JUDICIAL BRANCH, http://www.courts.state.nh.us/supreme/ (last visited 11/11/13) (noting that the duties of the state Supreme Court include “correcting errors in trial court proceedings, interpreting case law and statutes and the state and federal constitutions ...”).
\textsuperscript{29} \textit{See supra} note 28.
rather than by an individual judge. The appellate court reviews the trial court transcript and the trial judge’s decision for the purpose of determining whether the trial judge applied the law correctly. A party may also request a second appellate court review, usually by the highest court in the jurisdiction, in this case the U.S. Supreme Court, but a party does not usually have a right to a second appeal. Evidence that a right of first appeal is critical to fair process is found in the fact that virtually all court systems in the United States, state and federal, recognize a right of first appeal. This right functions as a check against errors in judgment or political overreaching by a solitary trial judge. Our system of justice countenances few, if any, situations

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30 See e.g., Coalition to Defend Affirmative Action v. Schuette, 701 F.3d 466 (6th Cir.)(2012). This case was heard by all 16 judges of the Sixth Circuit Court of Appeals.
31 Id.
32 Id.
33 See Gregory M. Dyer and Brendan Judge, Criminal Defendant’s Waiver of the Right to Appeal – An Unacceptable Condition of a Negotiated Sentence or Plea Bargain, 65 NOTRE DAME L. REV. 649 (1990) “The number of jurisdictions in the United States that grant a defendant the right to appeal illustrates the importance of this right. Currently, defendants have some right to appeal in forty-eight states and the District of Columbia as well as in federal courts. Among the states only West Virginia and New Hampshire have not granted appeal as a matter of right.” Id. at 651 n.17 (citing R. STERN, APPELLATE PRACTICE IN THE UNITED STATES 13 (2d ed. 1989)). Since 2004 the New Hampshire Supreme Court, the state’s only appellate court, has accepted the vast majority of appeals from the State’s trial courts. See NEW HAMPSHIRE JUDICIAL BRANCH, http://www.courts.state.nh.us/supreme/ (last visited 11/11/13). With few exceptions, a timely appeal from a final decision of a trial court is automatically accepted by the court. Id. West Virginia has found a state constitutional right to appeal for convicted criminal defendants. See Rhodes v. Leverette 238 S.E. 2d 136, 139 (W. Va. 1977). The Supreme Court has not yet recognized a constitutional right to an appeal even in the case of criminal convictions. See McKane v. Durston 153 U.S. 684, 687 (1894). Nor did the common law recognize an absolute right to appeal. Id. McKane was apparently reaffirmed by the Court in 1983. See Jones v. Barnes, 463 U.S. 745, 751(1983) (stating that “[t]here is, of course, no constitutional right to an appeal … ”). However, Justices Brennan and Marshall in their dissent indicated that they thought that if the issue were to come directly before the Court again then McKane would likely be overruled. Id. at 756 n. 1 (Brennan, Marshall, J. J. dissenting).

These facts notwithstanding, the right to appeal is today universally recognized as an important part of due process of law. “Although its origins are neither constitutional nor ancient, the right has become, in a word, sacrosanct.” Harlon L. Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 YALE L.J. 62, 62 (1985)). See also James E. Lobsenz, A Constitutional Right to Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction, 8 U. PUGET SOUND L. REV. 375 (1985).
34 See e.g., United States v. Dinitz, 424 U.S. 600, 608 (1976) (referring to the possibility of judicial overreaching and citing to United States v. Jorn, 400 U.S. 470,485 (1971) (stating that “[t]hus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendants motion is necessitated by prosecutorial or judicial error.”) For a recent example of possible political overreach by a trial judge See Floyd v. City of New York, 08-Civ. 01034 (S.D. N.Y. Aug. 12, 2013). (holding that New York City must change its
in which a single judge is given unreviewable discretion to interpret the U.S. Constitution.\textsuperscript{35} In essence, the issue is whether the elected officials whom the People are seeking to control via direct democracy should be permitted to use the procedural requirement of standing to deny the People their fundamental right of self-government. Unfortunately, the Court in \textit{Hollingsworth} answered this question in the affirmative.\textsuperscript{36}

\textit{Hollingsworth} had its genesis in a decision by the California Supreme Court holding that the recognition of same-sex marriages was required under the California Constitution.\textsuperscript{37} After that decision, California voters used direct democracy to pass a proposed law known as Proposition 8 that amended the California Constitution to define marriage as an exclusively heterosexual union.\textsuperscript{38} The California Supreme Court upheld Proposition 8 after it was challenged on procedural grounds and, as a result, the \textit{Hollingsworth} case was brought in Federal District Court alleging that Proposition 8 was unconstitutional under the U.S. Constitution.\textsuperscript{39} The defendants named in the suit were the California Governor and Attorney General as well as

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Notwithstanding the risk of judicial overreach or error on appeal, it is still preferable to have an appeal in order to discourage trial judges from political overreach or other error, which is more likely to occur because the trial judge often decides alone and a lower court decision is more likely to go unnoticed when compared to the action of Courts of Appeal or the U.S. Supreme Court.

\textit{See} Jones \textit{v.} Barnes, 463 U.S. at 756 n.1 (Brennan J. dissenting). Justice Brennan made a different but similar point stating: “There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person’s liberty or property, and the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction.” \textit{Id}. (notes omitted).

\textit{See infra} notes 239-59 and accompanying text.

\textit{See infra} notes 239-40 and accompanying text.

\textit{See infra} notes 240-41 and accompanying text.

\textit{See infra} notes 242-43 and accompanying text.
several other elected government officials. The District Court ruled that Proposition 8 was unconstitutional, but California’s elected officials refused to appeal the District Court’s decision. Without an appeal the law would be nullified based solely on the decision of the District Court judge. However, the original sponsors of Proposition 8 did appeal the District Court’s decision to the Ninth Circuit Court of Appeals. The Court of Appeals, concerned about the standing issue, certified a question to the California Supreme Court asking whether under California law the Proposition 8 sponsors had the authority to represent the interests of California in the appeal to defend the law. The California Supreme Court ruled that the sponsors had the authority to represent the State’s interest. As a result, the Ninth Circuit found that the sponsors had standing under federal law and allowed the case to proceed, ultimately ruling on the merits that Proposition 8 was unconstitutional.

The sponsors then petitioned for U.S. Supreme Court review, which was granted. As noted however, the Supreme Court, in a 5-4 decision, refused to reach the merits of the law because it held that the sponsors did not have standing to appeal the District Court’s decision. The Supreme Court vacated the Ninth Circuit’s decision and left the District Court’s decision as the controlling final decision. In essence the Court used the requirement of standing to deny to the sovereign People of California the ability to defend their law. Despite the fact that the California Supreme Court certified that the sponsors had authority under California law to represent the State’s interests in defending its law, the Court based its rejection of representational standing on the fact that the sponsors had never received a special grant of authority from state officials to represent the state of California in the litigation. As noted, the Court also held that the sponsors had no individual standing because they, like all of the citizens of California, had suffered only an unspecified generalized harm from the nullification of the state constitutional amendment.

The Hollingsworth holding does violence to popular sovereignty and direct democracy by subjecting the Peoples’ right to govern themselves and to control their elected officials to the approval of those very same officials. Moreover, its impact is not ameliorated by the fact that the law in question very likely violated the U. S. Constitution. Our purpose here is not to argue the merits of that specific law. The problem with Court’s decision is that the reasoning the Court

40 See infra notes 240-41 and accompanying text.
41 See infra notes 241-42 and accompanying text.
42 This is, in fact, the ultimate result in Hollingsworth. See infra notes 412-14 and accompanying text.
43 See infra notes 241-45 and accompanying text.
44 See infra notes 242-43 and accompanying text.
45 See infra notes 251-54 and accompanying text.
46 See infra notes 244-45 and accompanying text.
47 See infra notes 245-46 and accompanying text.
48 See infra notes 246-57 and accompanying text.
49 See infra notes 259-60 and accompanying text.
50 See infra notes 412-14 and accompanying text.
51 See infra notes 251-59 and accompanying text.
52 See infra notes 246-50 and accompanying text.
53 See infra notes 326-31 and accompanying text.
54 See infra notes 418-21 and accompanying text.
used to avoid ruling on the merits of the case violates fundamental principles of our democracy.\footnote{See infra notes 260-309 and accompanying text.} Worse, \textit{Hollingsworth} has set a precedent that can be applied to any law or constitutional amendment passed by direct democracy regardless of the subject matter.\footnote{See infra notes 418-21 and accompanying text.} Had the Court simply upheld the Ninth Circuit’s decision, or achieved the same result by refusing to review the case, no damage to constitutional principles would have been done. However, the Court’s decision has shifted power from the People to elected state officials in contravention of the fundamental sovereignty of the People.\footnote{See infra notes 260-309 and accompanying text.}

To illustrate, assume that gun-control measures, such as magazine capacity limits or requirements for universal background checks, become law through the use of direct democracy. Under \textit{Hollingsworth}, the validity of this law may be determined solely by a trial court judge.\footnote{See infra notes 405-14 and accompanying text.} For example, if a Second Amendment challenge to the law by gun rights advocates was erroneously upheld by a District Court and elected state officials refused - perhaps due to pressure from, or fear of, the NRA - to defend the law then the law would be nullified without any opportunity for higher court review.\footnote{See infra notes 412-13 and accompanying text.} In this situation, \textit{Hollingsworth} precludes the possibility of higher court review because it holds that only state officials, not citizens in general or the sponsors of the law, have standing to appeal.\footnote{See infra notes 246-59 and accompanying text.} If the sponsors of the law are denied standing then the Peoples’ right to appeal is denied, the trial judge’s constitutional analysis is never reviewed, and the sovereignty of the People is violated.\footnote{See infra notes 267-309 and accompanying text.}

We argue that a categorical exception to traditional standing doctrine should be recognized for the sponsors of proposed laws and constitutional amendments that are passed directly by the voters.\footnote{See infra notes 376-414 and accompanying text.} This exception would grant standing to sponsors to appeal any court decision that limits or nullifies a law or constitutional amendment passed by direct democracy.\footnote{See infra notes 413-14 and accompanying text.} Specifically, we advocate that the sponsors be deemed to have standing to represent the State’s/Peoples’ interest in defending the law.\footnote{See infra notes 405-14 and accompanying text.} The main argument in support of this exception is that it is required by our constitutional order which recognizes only the People as sovereign.\footnote{See infra notes 267-309 and accompanying text.} The holding in \textit{Hollingsworth} violates the sovereignty of the People.\footnote{See infra notes 415-451 and accompanying text.} In addition, and \textit{Hollingsworth} is incompatible with principles of federalism.\footnote{See infra notes 462-69 and accompanying text.} Finally, in light of the Court’s bewildering standing jurisprudence and the fact that the Court has created exceptions when the issues at stake are deemed sufficient, there is no compelling prudential reason not to recognize this exception.\footnote{See infra notes 414 and accompanying text.} Such an exception would be quite unremarkable.
Part II of this article analyzes the development of the rules of standing. It traces the historical origins of the doctrine, discusses the availability of various citizens’ actions in England and in the eighteenth and nineteenth centuries in the United States, and the effect that increased federal government participation in the nation’s economic affairs due to rapid industrialization and the need to enforce the Civil War Amendments had on standing disputes. This part proceeds to discuss the foundational basis for citizen and representational standing and the majority opinion in *Hollingsworth*. Part III provides an overview of direct democracy, discusses its strengths and weaknesses, and analyzes the dissenting opinion in *Hollingsworth*. Part IV critiques the traditional requirements of Article III standing and analyzes such requirements in the context of the unique issues associated with direct democracy. Part V concludes.

II. STANDING

“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and . . . to Controversies to which the United States shall be party . . .”69 The text of the Constitution does not define the terms “cases” or controversies” and whatever limitations these terms place on judicial power has been determined by the judicial branch itself. For a significant part of our history, the courts adjudicated traditional common law claims founded in contract, tort, or property and, consequently, standing issues were infrequently encountered. The growth of the administrative state forced the courts to grapple with legal grievances founded in areas foreign to the common law and, inevitably, the issue of standing became increasingly important. Article III standing “enforces the Constitution’s case-or-controversy requirement.”70 Standing jurisprudence “serves to prevent the judicial process from being used to usurp the powers of political branches.”71 Moreover, standing limitations also

69 U.S. CONST. art.III, § 2, cl 1.
71 Clapper v. Amnesty Int’l USA, 133 S. Ct. 1138, 1146 (2013) (citations omitted). The ripeness doctrine is another manifestation, related to but distinct from standing, of Article III’s cases or controversies requirement. "A claim is not ripe for adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’" Texas v. United States, 523 U.S. 296, 300 (1998) (quoting Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 581 (1985) (quoting 13A C.WRIGHT, ET.AL., FEDERAL PRACTICE AND PROCEDURE 112 (1984))). The doctrine is intended to prevent the courts from adjudicating abstract issues, prematurely rendering decisions, and interfering in administrative actions before such actions have caused concrete harm. See Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967). Mootness is another doctrine related to cases and controversies requirement. This doctrine applies when a judicial decision has been rendered devoid of practical significance or would be purely academic. See DeFunis v. Odegaard, 416 U.S. 312 (1974) (dismissing as moot a claim regarding the denial of admission to law school because the petitioner was admitted during the pendency of the case). Several exceptions are applicable, however. A court will not apply the doctrine, for example, if the dispute will likely recur frequently and the persons affected will unlikely be in a position where a timely judicial remedy can be provided. *Roe v. Wade* is a classic example of this exception. The Court rendered a decision on the merits despite the fact that Roe had already given birth. “The normal 266-day
reflect a regard for the autonomy of those likely to be affected by a judicial decision.\textsuperscript{72} Standing will be maintained only if the injury alleged is concrete, particularized, and actual or imminent, is fairly traceable to the challenged action, and is redressable by a favorable ruling.\textsuperscript{73} Moreover, the fact that denial of standing to a particular party or parties would result in no one with standing to challenge a particular law “is not a reason to find standing.”\textsuperscript{74} Standing jurisprudence has also been informed by prudential considerations such as separation of powers and federalism concerns and whether a sufficiently concrete adversarial position exists to ensure a sharp presentation of the issues.\textsuperscript{75} Prudential considerations, in contrast to the jurisdictional limitations imposed by Article III, are self-imposed limitations on the exercise of federal judicial authority and may be applied with greater flexibility.\textsuperscript{76} However, although standing in its outer dimensions is a prudential concept to be shaped . . . as a matter of human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied.” Roe v. Wade, 410 U.S. 113, (1973 ). See also City of Erie v. Pap’s A.M., 529 U.S. 277 ( 2000 )( holding that a challenge to a Pennsylvania Supreme Court ruling that held that a local ordinance that banned public nudity was unconstitutional was not mooted by the retirement of the person against whom the ordinance was enforced ). Subject matter jurisdiction is another element of the cases or controversies requirement in that only certain types of cases or controversies are subject to federal court jurisdiction. U.S. CONST. Art.III, § 2, cl.1. See also Baker v. Carr, 369 U.S. 186, 198 ( 1962 ). The nonjusticiability doctrine is of a piece with the subject matter jurisdiction requirement except it is rooted in prudential considerations. This doctrine is applied to issues that the courts deem “political questions.” See id. at 210-19. 

\textsuperscript{72} Diamond v. Charles, 476 U.S. 54, 62 ( 1986 ).


\textsuperscript{74} Clapper v. Amnesty Int’l USA, 133 S.Ct. at 1154 ( 2013 ) ( citing to various cases ). Despite this statement, the Court disagreed that the warrantless acquisition of intelligence authorized by the Foreign Intelligence Surveillance Act could not be challenged. See id. at 1154-155. The Court may have been too optimistic in this regard. See Adam Liptak, A Secret Surveillance Program Proves Challengeable in Theory Only, N.Y. TIMES, July 16, 2013, at A11 ( reporting that federal prosecutors have refused to make required disclosures to defendants of information derived from surveillance ).

\textsuperscript{75} Allen v. Wright, 468 U.S. 737, 751 ( 1984 ); Deposit Guarantee Nat’l Bank v. Roper, 445 U.S. 326, 333 ( 1980 ); Baker v. Carr, 369 U.S. 186, 204 ( 1962 ). In United States v. Windsor, the recently decided case that held that the Defense of Marriage Act was unconstitutional, the Court held that standing existed despite the fact that the United States agreed with the position of the respondent, who prevailed in the lower courts. The Court believed that, despite the lack of adversity between the United States and the respondent, a sharp presentation of the issues was assured by the arguments of interveners and amici and, therefore, prudential considerations weighed in favor of standing. See United States v. Windsor, 133 S.Ct. 2675, 2687-88 ( 2013 ). Justice Scalia, however, believed that the lack of adversity between the parties was not a prudential consideration but rather evidence that no controversy existed. Id. at 2699-2702 ( Scalia, J. dissenting ).

\textsuperscript{76} Warth v. Seldin, 422 U.S. 490, 500 ( 1975 ).
sound judicial policy and subject to the control of Congress, at its core it becomes a constitutional question….”  

A. Historical Background

Citizen standing was commonly granted in England at the time of the Constitution’s framing. The writs of mandamus, prohibition, certiorari, and quo warranto as well as informer actions, relator actions, and bills in equity for injunction were means of exercising control over the actions of local officials after the disappearance of centralized control in the aftermath of the revolution of 1688. The King’s Bench asserted jurisdiction “so that no Wrong or Injury, either Publick or Private, can be done, but that it shall be reformed or punished by due Course of Law.”

Writs of mandamus were no longer issued and the other writs and actions were significantly reduced in importance by the middle of the nineteenth century after modern regulatory practices appeared, such as audits, inspections, and appeals procedures following the institution of centralized administrative control in 1835.

Public actions, often prompted by evidence of official corruption or nascent political movements, were also common in the United States during the eighteenth and nineteenth centuries and their frequency correlated with the level of state and local government participation in economic matters after the Civil War. At the federal level, the Marshall Court allowed a citizen suit to go forward in a case that dealt with the issuance of a writ of prohibition to derail a

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78 See Louis L. Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265, 1269-70 (1961); Cass R. Sunstein, What’s Standing after Lujan? Of Citizen Suits, “Injuries”, and Article III, 91 Mich. L. Rev. 163, 171-72 (1992). The writ of mandamus “was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore, it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.” Jaffe, supra note 78, at 1269 (quoting Lord Mansfield in Rex v. Barker, 97 Eng. Rep. 823, 824-25 (K.B. 1762)). Informer actions were actions brought by citizens who, if successful, were entitled to a cash bounty. Relator actions, also termed qui tam actions, were actions brought in the name of the Attorney General by citizens. See Sunstein, supra note 78, at 172. See also Note, The History and Development of Qui Tam, 1972 Wash. U. L. Q. 81 (1951). The revolution of 1688, the “Glorious Revolution,” resulted in the overthrow of King James II and the ascension to the throne of the Dutch William of Orange as King William III. The events of 1688 had far reaching ramifications, including the enactment of a Bill of Rights in 1689, the circumscription of royal powers, and a shift in the balance of power in favor of Parliament. For a description and analysis of the events of 1688 see Edward Vallance, The Glorious Revolution: 1688 – Britain’s Fight for Liberty (2006).
79 Jaffe, supra note 78, at 1269 (quoting Lord Coke in James Bagg’s Case, 77 Eng. Rep. 1271, 1278 (K.B. 1615)).
80 Id. at 1272-75.
81 Id. at 1275-77; Louis L. Jaffe, Taxpayers’ Suits: A Survey and Summary, 69 Yale L. J. 895, 899-900 (1960). Citizen actions and other tools, such as the initiative, referendum, and recall served as checks on the discretion of public officials. Typically, public actions were brought by way of mandamus or injunction and were most prevalent at the municipal level, although they were not uncommon at the state level. Jaffe, supra note 78, at 1275-76.
tax action and the Waite Court likewise allowed a citizen suit seeking the issuance of a writ of mandamus to compel a railroad to operate a railroad line.\textsuperscript{82}

In \textit{Crampton v. Zabriskie}, the Court, allowing a local taxpayer action seeking to enjoin the performance of a contract entered into by the local township in violation of its charter, stated “it would be seen eminently proper for courts of equity to interfere upon the application of the tax-payers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens on property owners.”\textsuperscript{83} Moreover, a number of qui tam actions, permitting citizens to bring suit against private actors for alleged violations of a statutory requirement, were created under statutes that involved import duties, trade with Indian tribes, postal requirements, and the slave trade.\textsuperscript{84} Congress also provided for informers’ actions which provided bounties for successful actions to enforce public duties.\textsuperscript{85}

Rapid industrialization, the post-Civil War need to protect the newly acquired rights of African-Americans, and the Progressive movement increased the federal government’s role in

\textsuperscript{83} 101 U.S. 601, 609 (1879).
\textsuperscript{84} Sunstein, supra note 78, at 175. Standing by individuals to bring suit on behalf of the United States under the qui tam provisions of the False Claims Act, 31 U.S.C. §§ 3729-3733 (2010), was upheld by the Supreme Court in Vermont Agency of Natural Resources v. United States ex. rel. Stevens, 529 U.S. 765 (2000). The Court held that the False Claims Act operates to effect a partial assignment of the government’s damage claim. Consequently, the United States’ injury in fact suffices to confer standing to private plaintiffs. \textit{Id.} at 773-74. However, whether standing is maintained in a qui tam action that does not involve a proprietary claim by the government is an open question. In a recent district court case, the court held that the plaintiffs did not have standing to bring a claim under the False Marking Act. The Act prohibits the marking of goods as patented if, in fact, the goods are not patented and allowed any person to sue for the statutory penalty of $500 per violation. Claims under the False Marking Act had proliferated after the Federal Circuit held that the $500 penalty applies to each article improperly marked. See Forest Group, Inc. v. Bon Tool Company, 590 F. 3d 1295, 1301-03 (Fed. Cir. 2009). The court held that this provision does not confer standing upon private plaintiffs because the government had no proprietary interest to assign but only a sovereign interest which is not assignable. See United States ex. rel. FLFMC, LLC. v. Wham-O, Inc., 2010 U.S. Dist. LEXIS 78253 (W.D. Pa. 2010).

In another recent case, a federal district court held that qui tam provision of the False Marking Act violated the Take Care Clause of Article II because the statute failed to provide the executive branch with sufficient control over the litigation it authorized. See Unique Product Solutions, Ltd. v. Hy-Grade Valve, Inc., 765 F. Supp. 2d 997 (E.D. Oh. 2011). Both judgments were vacated and dismissed as moot as a result of a statute, enacted in 2011 but effective for all cases pending at the time of enactment, that eliminated the qui tam provisions. See FLFMC, LLC. v. Wham-O, Inc., 444 Fed. Appx. 447, 2011 U.S. App. LEXIS 21224 (Fed. Cir. 2011); Unique Product Solutions, Ltd. v. Hy-Grade Valve, 462 Fed. Appx. 967, 2012 U.S. App. LEXIS 1035 (Fed. Cir. 2012).

\textsuperscript{85} Sunstein, supra note 78, at 175.
the economy during the late nineteenth century and early twentieth century. The Supreme Court’s resistance to expansive federal powers over economic matters eventually gave way to the onslaught of New Deal legislation. Consequently, the judiciary was called upon to vindicate claims to legal rights and entitlements that had their genesis in the administrative state and that were unfamiliar to the common law. Because plaintiffs could now make claims to a “legal right . . . founded on a statute which confers a privilege,” standing questions were posed more frequently. The plethora of statutorily created rights and entitlements raised the issue of whether Congress, in addition to the power to create rights within constitutional bounds, had the

86 The federal government’s role in the economy did not progress smoothly. See Lochner v. New York, 198 U.S. 45 (1905) (holding that a New York statute regulating the hours of bakers was an unconstitutional infringement on the right and liberty to contract). The Lochner era is generally considered to have closed with the Court’s decision in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), a decision upholding the constitutionality of Washington state’s minimum wage law and overturning an earlier precedent to the contrary, Adkins v. Children’s Hospital, 261 U.S. 525 (1923). The creation of the Interstate Commerce Commission in 1887 was the genesis of the large federal bureaucracy. The Progressive period was marked by increased regulation of railroads, the institution of occupational licensing, and the enactment of the Sherman Antitrust Act. See generally Lawrence M. Friedman, A History Of American Law 439-466 (2d. ed. 1985).

87 The Court’s narrow view of the federal commerce power came to an end with its decision in the seminal case of N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)( upholding the constitutionality of the National Labor Relations Act of 1935). Any doubts as to the extent of the federal commerce power were laid to rest several years later in Wickard v. Filburn., 317 U.S. 111 (1942) (holding that Congress’ power to regulate interstate commerce includes the power to regulate activity that has an indirect effect on such commerce).

88 Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-38 (1939). The passage of the Administrative Procedure Act in 1946 complicated things further. Ch. 324, 60 Stat. 237 (1946)( codified at 5 U.S.C. §§ 551-59, 701-06 (2010)). Section 10(a) of the Act provides that “[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof.” 5. U.S.C. § 706(1) (2010). Under the Act, a reviewing court shall compel action that an agency unlawfully withheld or unreasonably delayed and set aside agency actions that are arbitrary or capricious, constitute an abuse of discretion, exceed statutory authority, or are procedurally defective. 5 U.S.C. § 706(1)-(2) (2010). However, the Act does not apply to agency actions for which judicial review is precluded by statute or where such actions are committed to agency discretion by law. 5 U.S.C. § 701(a) (2010) The Supreme Court has held that an agency’s decision not to take enforcement action is presumptively immune from judicial review under 5 U.S.C. § 701(a)(2). This presumptive immunity can be overcome by a showing that Congress specifically limited the exercise of an agency’s enforcement powers. Heckler v. Chaney, 470 U.S. 821, 831-33 (1985). The Court also reconciled the seeming inconsistency between § 701(a)(2), which precludes judicial review of agency actions that are committed to the agency’s discretion, and § 706(2)(A), which allows a court to set aside an agency’s action for abuse of discretion, by limiting the application of § 701(a)(2) to situations in which the enabling statute contains no meaningful standard against which to judge the agency’s exercise of discretion. Id. at 830.
power to provide the beneficiaries of such rights with the ability to vindicate those rights in court. The Court, in *Warth v. Seldin*,\(^89\) expounded on the power of Congress to confer standing. The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action . . . . Apart from this minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers. First, the Court has held that when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction . . . . Second, even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties . . . . 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 significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual right . . . . Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.\(^90\)

B. Modern Standing Jurisprudence

In *Frothingham v. Mellon*,\(^91\) a taxpayer brought a challenge to the Federal Maternity Act of 1921 alleging that the statute violated the Tenth Amendment and that the federal expenditures under the statute increased her tax bill in violation of due process.\(^92\) The Court denied the taxpayer standing because the effect of the expenditures on her federal tax liability was "too remote, fluctuating, and uncertain" and that "her interest in moneys of the Treasury" was "shared with millions of others."\(^93\) Instead of a justiciable case or controversy she raised a "matter of public concern" resolvable through the political process.\(^94\) According to the Court, federal judicial power can be invoked by a party upon a showing "not only that the statute is invalid, but that he has sustained some direct injury as a result of its enforcement, and not merely that he

\(^{89}\) 422 U.S. 490 (1975).
\(^{90}\) Id. at 499-501.
\(^{91}\) 262 U.S. 447 (1923).
\(^{92}\) Id. at 486-88. The statute that provided financing to states in order to reduce infant and maternal mortality. *Id.* at 479. In *Bond v. United States*, 131 S.Ct. 2355 (2011), the Court held that the Tenth Amendment raises no peculiar bar to standing. In that case the Court held that a woman charged with violating a federal statute, the Chemical Weapons Implementation Act of 1998, by placing caustic substances on objects that her husband’s mistress would touch had standing to bring a Tenth Amendment challenge to the statute.
\(^{93}\) Frothingham v. Mellon, 262 U.S. at 487.
\(^{94}\) Id. at 487-89.
suffers in some indefinite way in common with people generally.” In *DaimlerChrysler Corp. v. Cuno*, the Court refused to countenance a taxpayer challenge, on Commerce Clause grounds, to property tax relief and a state tax credit granted to the DaimlerChrysler Corporation pursuant to a contract entered into between the corporation and the City of Toledo. Chief Justice Roberts, citing to several precedents, stated that “[t]he foregoing rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers.”

The seminal case of *Flast v. Cohen* represented an exception to the Court’s traditional approach to standing. Pursuant to the Federal Education Act of 1965 funds allocated by the Department of Health, Education and Welfare to state and local governments to assist the poor in obtaining an education ultimately found their way to religious schools in violation, according to the plaintiff, of the Establishment Clause. The Court upheld taxpayer standing in this case because it considered challenges to legislation made pursuant to Congress’s Article I, section 8 power to tax and spend for the general welfare on Establishment Clause grounds appropriate for special treatment. According to the Court, this special treatment is warranted because the framers adopted the Establishment Clause out of fear that “the taxing and spending power would be used to favor one religion over another or to support religion in general.” More will be said about *Flast* subsequently but its utility to taxpayers seeking to challenge federal action has proven to be quite limited. *Flast* is limited both by the nature of challenged action – tax and

95 Id. at 488. The Court distinguished this case from *Crampton v. Zabriskie*, its 1879 decision that let stand a local taxpayer action. According to the Court, local taxpayers’ stake in the local treasury is direct and immediate, unlike federal taxpayers’ interest in the federal treasury. *Id.* at 486. See also *supra* note 83 and accompanying text.

96 547 U.S. 332, 338-39 (2006). The plaintiffs alleged that the state actions in question constituted a violation of the dormant commerce clause, a doctrine that the courts have inferred from the text of Article I, § 8, cl. 3. The explicit grant to Congress of the power to regulate interstate commerce implies a corresponding restriction on states from improperly burdening, or discriminating against, interstate commerce. See generally Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 4 DUKE L.J. 569 (1987). The Court also addressed, in *DaimlerChrysler Corp.*, whether an exception should be made to standing for alleged Commerce Clause violations. See *infra* note 107 and accompanying text.

97 *DaimlerChrysler v. Cuno*, 547 U.S. at 345. The Court did not reach the issue of municipal taxpayer standing, seemingly sanctioned in *Frothingham*, because the plaintiffs failed to identify any municipal action that contributed to any claimed injury. *Id.* at 349.


99 *Id.* at 85.

100 *Id.* at 102-103, 106.

101 *Id.* at 103.

102 See *infra* notes 106-27 and accompanying text. A recent district court held that the plaintiffs had standing to challenge an income tax exemption provided solely to members of the clergy. The provision in question exempts certain rental allowances received by members of the clergy from income. The court did not resort to the *Flast* exception to maintain standing but instead held that the plaintiffs suffered a cognizable hard – discrimination on the basis of religion. See Freedom from Religion Found. V. Lew, 2013 U.S. Dist. LEXIS 166076, at *6-9 (W.D. WI., 2013)
spending legislation – and by the nature of harm alleged – Establishment Clause violations - and is best seen as *sui generis*.

For example, the Court denied standing to a taxpayer who sought to enforce the Accounts Clause contained in Article I, section 9. The taxpayer asserted that Congress’s failure to publish the portion of the federal budget earmarked for the Central Intelligence Agency constituted a violation of the Accounts Clause. The Court limited the *Flast* exception to challenges to

Congress’s power to tax and spend, stated that the issues raised by the taxpayer in this case were best addressed through the political process, and asserted that the lack of a judicial remedy does not leave a citizen powerless. Justice Powell’s concurring opinion criticized *Flast* on separation of powers grounds and maintained that *Flast* would “significantly alter the allocation of power at the national level, with a shift away from a democratic form of government.”

The Court made clear that *Flast* was limited to claims that alleged a violation of Article I, section 8 in a decision rendered that same year when it denied standing for the allegation that membership in the military reserves by a member of Congress violated Article I, section 6 of the Constitution. In a relatively recent case, the application of *Flast* was denied for alleged Commerce Clause violations. According to the Court, “[w]hatever rights plaintiffs have under the Commerce Clause, they are fundamentally unlike the right not to 'not to contribute three pence . . . for the support of any one [religious] establishment.'”

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, at issue was Article IV, section 3, clause 2 of the Constitution, a provision that vests Congress with the "Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States." The Federal Property and Administrative Services Act of 1949 directed federal agencies to inventory the property under their control and permitted surplus property to be transferred to private or public entities. Pursuant to the statute, property was transferred to a college with religious affiliations. The taxpayer alleged that such transfers constituted a violation of the Establishment Clause.

The Court held that the taxpayer lacked standing on two grounds. First, the challenged action was taken pursuant to Article IV, section 3 and not, as *Flast* requires, Article I, section...

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103 United States v. Richardson, 418 U.S. 166 ( 1974 ). Article I, § 9, cl.7 of the Constitution states that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”

104 *Id.* at 167-68, 179.

105 *Id.* at 188 ( Powell, J., concurring ).

106 Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 226-28 ( 1974 ). The relevant constitutional provisions reads, in part: “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the authority of the United States . . . .” U.S. CONST., Art.I, § 6, cl.2.

107 See DaimlerChrysler Corp. v. Cuno, 547 U.S. at 332.

108 *Id.* at 347 ( quoting 2 WRITINGS OF JAMES MADISON 186 ( G.Hunt ed. 1901 )).


110 U.S. CONST., art IV, § 3, cl.2.

The Court further held that standing could not be maintained in this case because the alleged violation was committed by an executive agency and not Congress. Because the statute conferred discretionary authority to the agency, the taxpayer was, in reality, challenging the agency’s action thus falling outside of *Flast*. Echoing Justice Powell’s concurrence in *Richardson*, the Court invoked the doctrine of separation of powers stating that *Marbury v. Madison* created a judicial tool of last resort and that repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches. 114

The Court, however, found *Flast* applicable to agency action in the administration of a specific congressional mandate. In *Bowen v. Kendrick*, the distribution of funds by the Department of Health and Human Services, pursuant to the Adolescent Family Life Act, to provide aid to pregnant youths and adolescent parents was challenged on Establishment Clause grounds. 115 The Court distinguished this case from *Valley Forge Christian College* because the challenge in this case was to a spending action and because the distinction between congressional action and agency action is not relevant when the agency’s action were “at heart a program of disbursement of funds pursuant to Congress’ taxing and spending powers.” 116

A recent case indicates that *Bowen* will be applied narrowly. President Bush created the White House Office of Faith-Based and Community Initiatives by Executive Order in 2001 to assure that charitable community groups, including religious groups, “have the fullest opportunity permitted by law to compete on a level playing field.” 117 President Bush also created several Executive Department Centers in order to ensure that faith-based groups maintained eligibility for federal funding. 118 Both the Office and the Centers were funded by general appropriations set aside for the Executive Branch. 119 The Freedom From Religion Foundation filed suit against the directors of the Office and the Centers alleging that their promotion of religious programs violated the Establishment Clause.

The Court denied standing to the Foundation stating that the test for standing laid down in *Flast* was not met in this case because the Foundation did “not challenge any specific congressional action or appropriation ... nor [sought] to invalidate any congressional enactment of legislatively created program.” 120 In contrast to *Bowen*, the expenditures at issue in this case were funded by general appropriations and made at the discretion of the executive branch and

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113 *Id.* at 480.
114 *Id.* at 473-74 (quoti*ng United States v. Richardson, 418 U.S. at 188 (Powell, J., concurring)).
116 *Id.* at 619-20.
118 *Id.* at 594.
119 *Id.* at 595.
120 *Id.* at 605.
not pursuant to a statutory mandate. \textsuperscript{121} Again the Court resorted to separation of powers rhetoric by stating that it “most emphatically, is not the role of judiciary” to serve as “monitors of the wisdom and soundness of Executive action.”\textsuperscript{122} Justice Scalia believed that the \textit{Flast} test should be discarded because it allowed “psychic injury” to open the door to the court house. \textsuperscript{123}

Most recently, the Court found \textit{Flast} inapplicable to a challenge to a state tax credit scheme. Arizona taxpayers were entitled by statute to tax credits for contributions to School Tuition Organizations. \textsuperscript{124} In \textit{Arizona Christian School Tuition Organization v. Winn}, taxpayers brought an action to enjoin the state of Arizona from issuing tax credits to taxpayers for contributions to religious School Tuition Organizations. \textsuperscript{125} The Court denied the taxpayers standing, holding that the \textit{Flast} test was not met because any subsidies to religious groups as a result of the tax credit were not traceable to government expenditures. Instead, the “contributions result from the decisions of private taxpayers regarding their own funds. . . . While the State, at the outset, affords the opportunity to create and contribute to an STO, the tax credit system is implemented by private action and with no state intervention.”\textsuperscript{126} Justice Scalia, contemptuous of \textit{Flast}, stated that it is “an anomaly in our jurisprudence, irreconcilable with the Article III restrictions on federal judicial power that our opinions have established. I would replace that misguided decision and enforce the Constitution.”\textsuperscript{127}

In short, the courts will not countenance federal or state taxpayer (citizen) standing except within the very narrow confines of the \textit{Flast} exception. The Court has never overruled \textit{Cramption v. Zabriskie} and, therefore, it exists as precedent for local taxpayer standing. \textsuperscript{128} However, it is almost 150 years old and local governments have changed quite a bit in size and complexity since that case was decided. Its precedential value is questionable. \textit{Frothingham} drew a distinction between the remote interests of federal taxpayers in the U.S. treasury and the more

\textsuperscript{121} \textit{Id.} at 607.
\textsuperscript{122} \textit{Id.} at 612 (citing \textit{Allen v. Wright}, 468 U.S., 737, 760 (quoting \textit{Laird v. Tatum}, 408 U.S. 1, 15)).
\textsuperscript{123} \textit{Id.} at 619-20 (Scalia, J., concurring ).
\textsuperscript{125} 131 S.Ct. 1436 (2011 ).
\textsuperscript{126} \textit{Arizona Christian School Tuition Organization v. Winn}, 131 S.Ct. at 1448. This view of the tax credit mechanism appears to be a decision on the merits. If the religious subsidy is provided by private actors then the Establishment clause is not implicated. In a landmark case, the Court ruled that an Ohio school voucher program did not violate the Establishment Clause. Under the voucher program, tuition vouchers for up to $2,250 a year were provided to some parents of students in a particular school district. The vouchers, distributed according to financial need, allowed the parents to choose the educational institution in which to enroll their children. A vast majority of parents that participated in the program enrolled their children in religiously affiliated schools. The court developed a five part test, the Private Choice Test, and ruled that the Ohio program met the test. Two of the tests stressed the private action of the parents and the lack of coercion by the state in steering children toward sectarian institutions. See \textit{Zelman v. Simmons-Harris}, 536 U.S. 639 (2002).
\textsuperscript{127} \textit{Arizona Christian School Tuition Organization v. Winn}, 131 S.Ct. at 1450 (Scalia, J., concurring )
\textsuperscript{128} See supra note 83 and accompanying text.
direct and immediate interest of local taxpayers in the local treasury. The Court, in holding *Frothingham* applicable to state taxpayer actions did not draw any distinctions based on the population of the state in question. It is quite possible that a taxpayer in Idaho has a more immediate and direct interest in state finances than a taxpayer in New York City has in the city’s municipal finances. At best, *Crampton* may support an argument that citizen standing in a local initiative should be maintained.

Two other potentially expansive plaintiff groups, environmental and civil rights claimants, have faced similar standing obstacles. In *Sierra Club v. Morton*, the Sierra Club asserted that the Forest Service’s approval of the development plan by Walt Disney Enterprises that affected part of the Sequoia National Forest violated various federal conservation laws and sought declaratory and injunctive relief. The Sierra Club could not maintain standing as a representative of the public interest. According to the Court, harms to the public interest may be argued in support of a claim but only after standing has been properly established and not to establish standing in the first instance. Because the Sierra Club failed to allege either that it or any of its members would be affected by the proposed development or that its members use the proposed development site, the Court denied it standing.

In contrast, the Court found that the plaintiffs had standing to challenge railroad rates in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*. The plaintiffs alleged that the Interstate Commerce Commission violated the National Environmental Policy Act of 1969 because the Commission failed to include a detailed environmental impact statement with its decision. According to SCRAP and various environmental groups the approved rate structure would discourage the use of recyclable materials thereby impairing their members’ use of natural resources. Unlike the Sierra Club, the plaintiffs made specific allegations that their members used the forests, streams, mountains, and other resources for recreational use.

In *Lujan v. Defenders of Wildlife*, the plaintiffs, organizations dedicated to environmental causes, challenged a regulation issued jointly by the Departments of the Interior and Commerce that required consultation with various agencies when promulgating a list of threatened or endangered species and their habitats only with respect to actions taken in the United States or on the high seas. This regulation superseded a previously issued regulation that extended the consultation obligation to actions taken in foreign nations. Plaintiffs asserted

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129 *See supra* note 95 and accompanying text.
130 405 U.S. 727 (1972).
131 *Id.* at 729-30.
132 *Id.* at 736-38.
133 *Id.* at 735. The Sierra Club and similar organizations have standing to represent their members. *See infra* note 217.
135 *Id.* at 679, 685.
136 *Id.* at 675-76.
137 *Id.* at 684-85.
139 *Id.* at 559.
140 *Id.* at 558.
that the new regulation violated the Endangered Species Act.\(^\text{141}\) The Court denied standing due to the failure of the plaintiffs to show injury in fact and redressability. The plaintiffs made no showing that they had anything more than “someday” intentions to visit foreign habitats in the future and that such intentions were insufficient to support a finding of actual or imminent injury.\(^\text{142}\)

The Court also denied the right of Congress to create an abstract procedural injury that would allow citizens to challenge the observance of procedural requirements that are required by statute. The Endangered Species Act contained a “citizens suit” provision that empowered “any person” to commence a civil suit to enjoin any person, including the United States and any governmental instrumentality or agency who is alleged to be in violation of the statute.\(^\text{143}\)

According to the Court,

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\text{[i]f the concrete injury requirement has the separation of powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest . . . into an “individual right” vindicable by 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.”}\(^\text{144}\)
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Ironically, this statement by the Court - that the duty imposed by the “Take Care” Clause is the President’s “most important constitutional duty - seems to require that a lesser, not greater, barrier to standing is appropriate when that duty is allegedly breached.\(^\text{145}\) In a subsequent case, the Court held that two environmental organizations had standing to seek injunctive relief and the imposition of civil penalties against a private party for violations of the provisions of the Clean Water Act in an action brought under the citizens standing provision of that statute.\(^\text{146}\) The Court distinguished this case from \textit{Lujan} on the ground that members of the plaintiff organizations showed that they were directly impacted by the activities of the defendant.\(^\text{147}\) The Court also held that the plaintiffs had standing to seek civil penalties because of their deterrent effect despite the fact that such penalties were payable to the government.\(^\text{148}\)

\(^{141}\) \textit{Id.} at 558-59.
\(^{142}\) \textit{Id.} at 563-64. Moreover, because the regulation at issue required only consultation with agencies that funded projects, extension of the regulation to actions taken in foreign countries would not remedy the harm alleged by the plaintiffs unless the funding agencies concurred. \textit{Id.} at 564, 568-69. The Court also denied standing for “animal nexus” or “vocational nexus” \textit{Id.} at 567.
\(^{143}\) \textit{Id.} at 571-72.
\(^{144}\) \textit{Id.} at 577.
\(^{145}\) See infra notes 459-60 and accompanying text.
\(^{146}\) Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000). The suit was brought under a provision in the statute that permitted any “person or persons having an interest which is or may be adversely affected” by a violation of any limitation contained in a pollution discharge permit issued by the Environmental Protection Agency or authorized state. \textit{Id.} at 174.
\(^{147}\) \textit{Id.} at 183-84.
\(^{148}\) \textit{Id.} at 185-86. \textit{Havens Realty Corp. v. Coleman}, 455 U.S. 363 (1982), a case decided a decade earlier, can be reconciled with \textit{Lujan}. Section 804(d) of the Fair Housing makes it unlawful to misrepresent to \textit{any person} because of race, color, religion, sex, or national origin that a dwelling is not available for inspection, sale, or rent. \textit{Id.} at 373. One of the issues in that
In *Simon v. Eastern Kentucky Welfare Rights Organization*,\textsuperscript{149} several organizations promoting access to health care by the poor alleged that the I.R.S. violated Internal Revenue Code section 501(c)(3) because it did not condition the tax exemption of two hospitals closely enough to the hospitals’ charitable care for the indigent.\textsuperscript{150} According to the plaintiffs, the I.R.S.’s actions encouraged the hospitals to deny services to the members and clients of the plaintiff organizations.\textsuperscript{151} The Court denied the plaintiffs standing despite its concession that the plaintiffs had, indeed, suffered an injury in fact.\textsuperscript{152}

According to the Court, Article III “still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.”\textsuperscript{153} Whether the tax exemption resulted in the alleged denial of medical service was purely speculative. Correspondingly, whether removal of the exemption would result in the availability of such services was equally speculative because, according to the Court, it was plausible that the hospitals in question would forego the tax exemption and operate unfettered by the restrictions imposed by such exemption.\textsuperscript{154}

The Court similarly denied standing in *Allen v. Wright*.\textsuperscript{155} Discriminatory private schools were denied tax exempt status pursuant to an outstanding I.R.S. ruling. Moreover, private
schools had to comply with established guidelines and procedures for determining whether they, in fact, discriminated on the basis of race.\textsuperscript{156} The plaintiffs alleged that some private schools in desegregating school districts were, in fact, discriminatory and that the I.R.S. failed to assure that its policies were being adopted and implemented.\textsuperscript{157} The plaintiffs alleged two harms. First, the I.R.S.’s conduct amounted to tangible federal financial aid and other support for racially segregated institutions.\textsuperscript{158} The Court held that this injury was not cognizable because the plaintiffs made no allegation that they were personally affected by discriminatory conduct.\textsuperscript{159} Thus, they were merely asserting the right to have the government act in accordance with the law.\textsuperscript{160}

Second, the conduct interfered with school districts’ desegregation efforts by encouraging the operation of segregated private schools.\textsuperscript{161} The Court found that this harm – the diminished opportunity for their children to receive an education in a racially integrated school - to be an injury in fact. Despite the fact that \textit{Brown v. Board of Education} recognized such an injury as one of the most serious injuries recognized by the legal system, the Court, citing \textit{Simon}, denied the plaintiffs standing.

The line of causation between that conduct and desegregation of respondents’ schools is attenuated at best. From the perspective of the IRS, the injury to respondents is highly indirect and "results from the independent action of some third party not before the court." . . . The diminished ability of respondents’ children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents’ communities for withdrawal of those exemptions to make an appreciable difference in public school integration. . . . Moreover, it is entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies.\textsuperscript{162}

\textsuperscript{156} \textit{Id.} at 740-43.
\textsuperscript{157} \textit{Id.} at 744-45.
\textsuperscript{158} \textit{Id.} at 745.
\textsuperscript{159} \textit{Id.} at 753-56.
\textsuperscript{160} \textit{Id.} at 754.
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.} at 757-58 (quoting \textit{Simon v. E. Ky. Welfare Rights Org.}, 426 U. S., at 42). The Court, in a recent case, denied standing to taxpayers that challenged certain state tax breaks on the ground that such tax breaks violated the Commerce Clause. See DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006); \textit{supra} notes 96-97 and accompanying text. In that case, the Court denied standing, in part, due to the fact that the alleged injury, a disproportionate burden of taxation, could not be shown to have emanated from the tax breaks in question because the state legislature could have reacted in a number of ways that would not have resulted in any less tax burden on the plaintiffs. DaimlerChrysler Corp. v. Cuno, 547 U.S. at 344. Moreover, the tax breaks at issue may very well have contributed to increased economic activity in the state and, correspondingly, greater state revenues. \textit{Id.} Although the issue that the Court addressed was whether the plaintiffs had shown an injury in fact, its reasoning was similar to that used in determining whether an injury in fact had the requisite nexus to a challenged government action.
Like *Simon*, the showing of an injury in fact was not a sufficient condition to maintain standing in *Allen* without a showing of the existence of a nexus between the injury in fact and the government violation alleged. The Court, in this case, however, was more explicit about its separation of powers concerns and pointedly noted that the Take Care Clause of Article II, section 3 assigns to the executive branch, not the judiciary, the duty to execute the laws faithfully.\(^{163}\)

C. Standing to Defend the Law

1. Statutes

The refusal of executive authorities to defend legislation frequently leads to the emergence of substitutes eager to defend orphaned measures.\(^ {164}\) In general, would-be defenders of legislation have failed in their efforts due to lack of standing. Standing must exist at all stages of litigation therefore it is irrelevant whether the state declines to defend a measure *ab initio* or whether the decision not to defend occurs at an appellate stage.\(^ {165}\) In its simplest manifestation,

\(^{163}\) *Allen v. Wright*, 468 U.S. at 761. *Asarco, Inc. v. Kadish*, 490 U.S. 605 (1989), continued the *Simon* line of reasoning. In a case of rather unusual procedural posture, the Court granted standing to Arizona taxpayers and a representative of Arizona public school teachers that sought declaratory and injunctive relief against state agencies. The plaintiffs alleged that the state statute under which the agencies leased or sold mineral rights violated federal law. The injury alleged by the plaintiffs was the deprivation of school trust funds and the concomitant increase in taxes caused by such deprivation. *Asarco, Inc. v. Kadish*, 490 U.S. at 614. The Court granted standing to the defendants in the case because the Arizona Supreme Court held for the plaintiffs and, consequently, the defendants had a cognizable injury. *Id.* at 617-18. The United States, in its amicus brief, contended that the case should be dismissed for lack of standing because the plaintiffs would not have satisfied the standing requirements had the case been brought in federal court at its outset. *Id.* at 612. The Court addressed the issue of standing and agreed that the plaintiffs would not have had standing had the case been brought in federal court *ab initio*. *Id.* at 613-14. The Court likened the plaintiffs’ claim to the general taxpayer claims made in *Frothingham*. *Id.* at 613. However, the Court went on to state that, even if the plaintiffs had shown an injury in fact, it was purely speculative whether their prevalence on the merits would have resulted in more money for education because the state may have diverted general appropriations from education to other programs. *Id.* at 614.

\(^{164}\) The refusal to defend legislation may result from financial considerations, the desire to avoid the creation of a negative precedent, or principled objections to the substance of legislation in question. The latter rationale is more common with respect to controversial issues such as abortion or same-sex marriage legislation. Recently, the Virginia and Pennsylvania Attorneys General have indicated that they will not defend state legislation that limits marriage to heterosexual couples. The Pennsylvania statute is likely to be defended by the governor. See Ashby Jones, *Virginia AG Aims to End Ban on Gay Marriages*, WALL ST. J., Jan. 24, 2014, at A3; Trip Gabriel, *Move for Gay Marriage Gets a Lift in Pennsylvania*, N.Y.TIMES, July, 12, 2013, at A12.

the standing issue arises when a citizen, in her individual capacity, seeks to defend a measure. These cases are decided on the standing principles discussed above and pose little difficulty as evidenced by the Court’s decision in *Diamond v. Charles*.

In *Diamond*, a physician sought to defend the constitutionality of an Illinois abortion statute that increased regulation of abortions. Immediately after its enactment, the statute was challenged in a class action by physicians who provided obstetric, gynecologic, and abortion services. Dr. Diamond was permitted to intervene as a party defendant by the federal district court. Ultimately, the district court permanently enjoined the enforcement of several provisions of the statute and the Fourth Circuit affirmed the judgment and also permanently enjoined the enforcement of an additional statutory provision. The state did not seek an appeal of the Fourth Circuit’s decision. Dr. Diamond, however, did appeal. Under the Court’s procedural rules all parties to a court proceeding from whose judgment the appeal is being taken are deemed to be parties in the Court’s proceeding and the state filed a letter with the Court indicating that the state’s interest in the proceeding was coterminous with the position advanced by Dr. Diamond.

The Court distinguished between the status of a person as a party and as an appellant. Despite the fact that, under Court rules, the state was a party to the proceedings only appellant status would confer standing upon the state. Consequently, Dr. Diamond had to establish standing in his own right. The Court stated that “an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court” and that concerns for state autonomy apply with even greater force to attempts by private individuals to compel a state to create or retain a legal framework, a quintessential state function.

Dr. Diamond made several arguments in support of his standing to maintain the action. First, as a pediatrician, he claimed that enforcement of the law would result in fewer abortions thus increasing his patient base. Although loss of actual fees had been held to confer standing on physicians, the Court, citing *Simon v. Eastern Kentucky Welfare Rights Organization*, considered

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166 476 U.S. 54 (1986).
167 *Id.* at 57-58.
168 *Id.* A party has the right to intervene if a statute provides an unconditional right to intervene or if the action may impair or impede the party’s ability to protect its interest. A court may permit intervention if a statute so provides or if the party’s claim or defense shares a common question of fact or law with the main action. See *Fed. R. Civ. P. 24*. Intervention under the federal rules does not require the intervenor to maintain Article III standing provided that such standing is maintained by the main party and provided that the intervenor does not raise new issues to be litigated. See Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1560-61 (2012).
169 *Id.* at 61.
170 *Id.*
171 *Id.*
172 *Id.* at 63-64.
173 Had the state established standing Dr. Diamond would have been entitled to seek review as an intervening defendant. *Id.* at 64. See also supra note 168.
Dr. Diamond’s claim of lost income “unadorned speculation.” Dr. Diamond also asserted that, as a physician, he had standing to litigate the standards of medical practice. The Court deemed his interest in the standards of medical practice as no more than a desire to vindicate value interests, too abstract to substitute for a concrete injury. Dr. Diamond’s further assertion that his standing should be maintained because he had a daughter of childbearing age was also dismissed by the Court because he failed to show that he, and not his daughter, was the proper person to advance this claim. Finally, Dr. Diamond claimed that, if he won on the merits, he would be entitled to attorney fees and, consequently, he had a direct financial stake in the outcome of the dispute. Again citing to *Simon v. Eastern Kentucky Welfare Rights Organization*, the Court held that any liability for attorney fees cannot be fairly traced to the abortion law at issue but is merely a by-product of the suit itself.

In *Whitmore v. Arkansas*, the Court denied standing to a death row inmate who challenged the death sentence imposed by Arkansas on another inmate who voluntarily relinquished his right to appeal the sentence. The appellant asserted that the state’s failure to undertake a mandatory review of the sentence amounted to a violation of his Eighth Amendment rights. The alleged personal injury stemmed from the fact that the state’s actions precluded the inmate’s heinous crime from inclusion in a data base that was used for comparative review of capital crimes and that such failure would detrimentally affect a review of his case. The Court held that such injury was too speculative to invoke jurisdiction. The appellant also contended that as a citizen of Arkansas that he was entitled to the public interest protections of the Eighth Amendment. The Court, citing to several precedents, held that the asserted right to have the government act in accordance with the law is insufficient to maintain standing.

The Court did allow a *jus tertii* claim by a criminal defendant that sought to vindicate the rights of potential jurors against whom race-based peremptory challenges were used to eliminate them from the jury. Although *jus tertii* standing claims are distinct from the claims discussed here, one of the requirements to maintain *jus tertii* claims is injury to the litigant. In *Powers v. Ohio*, the Court held that the litigant had suffered a cognizable injury because the racial discrimination in the jury selection process “casts doubt on the integrity of the judicial process . . .

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175 Id. at 66 ( quoting Simon v. E.Ky.Welfare Rights Org., 426 U.S. at 44 ). What the Court believed was speculative was the possibility that fetuses would survive and then become patients of Dr. Diamond. *Id.*

176 Id. at 66-67.

177 Id. at 67. The Court did not dismiss this claim *per se*. Instead, the Court held that Dr. Diamond failed to provide any factual support for standing as a parent to assure that his daughter was not provided an abortifacient without prior information. *Id.*

178 Id. at 70-71. The Court also held that intervenor status in a lower court, by itself, does not confer standing. *Id.* at 68-69. The Court also stated that only the state has standing to vindicate the rights of unborn fetuses. *Id.* at 67.


180 Id. at 156-57.

181 Id. at 157.

182 Id. at 160 ( citations omitted ). The appellant also asserted “next friend” standing which the Court also denied. See *id.* at 161-62. See *infra* note 217 for a discussion of “next friend” standing.

183 See *infra* note 217 for a discussion of *jus tertii* claims.
and places the fairness of a criminal proceeding in doubt.” \(^\text{184}\) The jurors excluded were not of the same race as the defendant and the defendant did not assert that the jury selection process had resulted in a jury predisposed to convict him. It is difficult to distinguish the above described injury with injuries that result from the government’s failure to obey the law. The Court did seem to believe that the trial of the litigant may be tainted and, as a result of impropriety in jury selection, “irregularity may pervade all of the proceedings that follow.” \(^\text{185}\) The Court believed that a constitutional violation witnessed in open court casts doubt over the obligation of the parties, the jury, and the court itself to adhere to the law throughout the trial. \(^\text{186}\) Arguably, this harm is speculative but, at least to the Court, not too speculative.

2. Initiatives

Citizen defense of an initiative measure, in contrast to a statute, is complicated by the issue of whether the official proponents of an initiative suffer a harm more particularized and concrete than citizens in general and whether representational standing should maintain for citizen defenders. With respect to the question of whether an initiative sponsor has a particularized stake in the enforcement or defense of a duly enacted initiative measure, the Court has responded negatively. At issue in *Continental Illinois National Bank & Trust of Chicago v. Washington* was the constitutionality of a voter initiative that limited the issuance and selling of bonds for the financing of power projects. \(^\text{187}\) Government agencies had entered into a contract for the building of three nuclear power plants and, as part of the agreement, a state political subdivision agreed to issue and sell bonds to finance the costs of the projects. \(^\text{188}\) The Ninth Circuit found that the application of the initiative to the three nuclear power plants substantially impaired the obligations of the parties under the contracts and, therefore, violated the Contracts clause of U.S. Constitution. \(^\text{189}\) The official proponents of the initiative sought, Supreme Court review and the Court summarily dismissed the appeal due to the appellants lack of standing. \(^\text{190}\)

The Court had another occasion to determine whether initiative proponents had standing to defend the measure they had sponsored. Arizona amended its constitution by ballot initiative to declare English as the official language of the state with respect to all government functions and actions. \(^\text{191}\) The amendment also granted standing to any person residing or doing business in the state to bring suit in state court to enforce the amendment. \(^\text{192}\) A state employee brought suit alleging that the amendment violated her First and Fourteenth Amendment rights because she believed she would lose her job if she did not immediately refrain from speaking Spanish in the

\(^{185}\) Id. at 412-13.
\(^{186}\) Id. at 412.
\(^{187}\) 696 F.2d 692, 696-97 (9th Cir. 1983).
\(^{188}\) Id. at 694-96.
\(^{189}\) Id. at 702. Art. I, § 10, Cl. 1 of the Constitution states that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."
\(^{192}\) Id. at 49.
course of her employment duties. The District Court held that the state constitutional amendment violated both the First and Fourteenth Amendments. After the governor announced that the state would not appeal the decision, the initiative’s principal sponsor sought to intervene as a defendant but its post-trial motion was denied by the district court for lack of standing. The Ninth Circuit, however, concluded that the sponsor did have standing to defend the amendment by analogizing the status of an initiative sponsor to the status of the state legislature. The Ninth Circuit affirmed the judgment of the district court.

The Court vacated the decision of the Ninth Circuit and remanded the case to the district court with directions to dismiss the case. The Court’s decision was based on its belief that the case had become moot due to the employee claimant’s change in circumstances. It also objected to the lower courts’ refusal to certify questions regarding the meaning of the amendment to the Arizona Supreme Court. The Court pointedly refrained from ruling on whether the initiative sponsor had standing. However, in dicta the Court expressed “grave doubts” whether the initiative sponsor had a quasi-legislative interest in defending the measure in the absence of a state law that appointed initiative sponsors as agents of the people to defend the constitutionality of a measure in lieu of public officials.

### 3. Legislature Standing

Despite the lack of a definitive holding by the Court on the status of initiative sponsors or proponents, these two situations evidence its antipathy toward the standing of such persons to defend their handiwork. Further evidence in this respect is found by analogy to the Court’s holdings with respect to legislature standing. The Court has not been receptive to suits brought by members of Congress that allege an injury to such members’ lawmaking powers.

In *Raines v. Byrd* several members of Congress claimed that the Line Item Veto Act unconstitutionally rendered their votes on appropriation bills less effective. Despite the fact that the statute expressly conferred standing to any member of Congress that it adversely affected, the Court held that such injury was not cognizable because it was “wholly abstract and widely dispersed.” Echoing *Lujan*, the Court made clear that congressional grants of standing.

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193 *Id.* at 49-51.
194 *Id.* at 55.
195 *Id.* at 55-56.
196 *Id.* at 57-58.
197 *Id.* at 61.
198 *Id.* at 80.
199 *Id.* at 71-72.
200 *Id.* at 75-79.
201 *Id.* at 66.
202 *Id.* at 65-66. The Court also had doubts whether the requirements of representational standing were met. *Id.* See *infra* notes 217-19 and accompanying text for a discussion of representational standing.
sufficient to remove prudential barriers to standing, cannot remove the barriers imposed by Article III.\textsuperscript{205} Justice Souter pointedly invoked the separation of powers rationale for the denial of standing to members of Congress for alleged institutional injuries.\textsuperscript{206} The Court left open the possibility in \textit{Raines} that an injury that amounted to the complete nullification of the legislators’ votes may be cognizable.\textsuperscript{207}

The possibility that standing could be maintained in the event of vote nullification is based on the case of \textit{Coleman v. Miller}, in which the Court held that a group of Kansas state legislators had standing to challenge the casting of the deciding vote by the lieutenant governor regarding the ratification of an amendment to the U.S. Constitution.\textsuperscript{208} It appears that the executive branch’s infidelity to a statute or its refusal to defend a statute could never meet this test because the statute itself is undisturbed. Hence, no legislator’s vote has been nullified. \textit{Coleman} dealt with state legislators and, therefore, did not implicate separation of powers issues. The Court, in \textit{Raines}, did not use this fact as a basis for not overruling \textit{Coleman}. \textit{Coleman} does not stand for the proposition that state legislature standing is somehow easier to maintain on this basis – a point the Court later made clear.\textsuperscript{209} Instead, \textit{Coleman} remains on books as a narrow exception due to vote nullification.\textsuperscript{210} \textit{Coleman} also made clear that legislator standing, predicated in this case on the legislators’ interest in maintaining the effectiveness of their votes, was quite different than citizen standing predicated on the right to require that the law be administered.\textsuperscript{211}

A congressperson’s standing will require an allegation of personal, as opposed to institutional, injury. In \textit{Powell v. McCormack}, the standing of Representative Adam Clayton Powell was based on the injury he alleged from the refusal of other members of Congress to seat him.\textsuperscript{212} The D.C. Circuit, in \textit{Shays v. F.E.C.}, upheld the standing of two members of Congress to challenge the Federal Election Commission’s interpretation of the certain provisions of the McCain-Feingold Act.\textsuperscript{213} The plaintiffs asserted that the Federal Election Commission regulations in question were impermissibly liberal and, as a consequence, they were injured because of the effect that such regulations would have on the behavior of their campaign opponents and donors.\textsuperscript{214} Unlike \textit{Raines}, the plaintiffs did not allege an institutional injury as members of Congress but rather personal injuries as candidates for office.

In \textit{McConnell v. F.E.C.}, various provisions of the McCain-Feingold Act were challenged and, like \textit{Shays}, members of Congress were asserting not injuries to their status as members of Congress but injuries due to their candidacy for office.\textsuperscript{215} The Court denied standing to the plaintiffs to challenge several of the provisions of the statute but such denial was not predicated

\begin{itemize}
\item \textsuperscript{205} \textit{Id.} at 820 n.3.
\item \textsuperscript{206} \textit{Id.} at 833 (Souter, J., concurring).
\item \textsuperscript{207} \textit{Id.} at 823-25.
\item \textsuperscript{208} 307 U.S. 433 (1939)
\item \textsuperscript{209} See infra notes 217-19 and accompanying text.
\item \textsuperscript{210} Justices Alito and Thomas interpreted \textit{Coleman} more broadly in a recent case that struck down the Defense of Marriage Act. See infra notes 230-33 and accompanying text.
\item \textsuperscript{211} \textit{Id.} at 440.
\item \textsuperscript{212} 395 U.S. 486 (1969 ).
\item \textsuperscript{213} \textit{Shays v. F.E.C.}, 414 F. 3d 76 ( D.C. Cir. 2005 ).
\item \textsuperscript{214} \textit{Id.} at 85-93.
\item \textsuperscript{215} 540 U.S. 93 ( 2003 ).
\end{itemize}
Legislators may have standing to challenge executive action in the absence of a particularized individual harm if they undertake the challenge in a representational capacity.\textsuperscript{217} \textit{Raines} made clear that Congress cannot overcome Article III barriers to standing by statutorily conferring standing to all of its members. Therefore, some sort of mechanism that confers institutional authorization on a member or members, be it a committee vote, a vote of an entire chamber, the creation of a body authorized to take action, or a grant of authority to presiding officers is necessary.\textsuperscript{218} In a recent federal district court case a committee of the House of

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\textsuperscript{216} \textit{Id.} at 224-31.

\textsuperscript{217} To a certain extent, representational standing, the ability of a member to represent an institution is reversely analogous to associational standing, the ability of an institution to represent its members. The Court has set forth a three-prong test in order to determine whether an organization, such as a trade union or civil rights organization, has standing to bring suit on behalf of its members: its members would otherwise have standing to sue in their own right; the interests the organization seeks to protect are germane to the organization's purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977). Representational standing is distinguishable from other permissible third party standing situations. For example, \textit{jus tertii} claims are assertions that the rights of the litigant and some absent third party are violated. Three requirements must be met to maintain such claims: the litigant must have suffered an injury in fact; the litigant must have a close relation with the third party; and there must exist some hindrance to the third party's ability to bring her own claim. See Powers v. Ohio, 499 U.S. at 410-11. These claims are disfavored but several factors, including the inability of the third party to adequately represent herself, may cause the courts to allow such claims to proceed. See generally Robert Allen Sedler, \textit{The Assertion of Constitutional Jus Tertii: A Substantive Approach}, 70 CALIF. L.REV. 1308 (1982). “Next friend” standing is permitted if the litigant provides an adequate explanation for the inability of the party in interest to appear on her behalf, such as mental incompetence or other disability and demonstrates a true dedication to the best interests of the person on whose behalf she seeks to litigate. See Whitmore v. Arkansas, 495 U.S. at 163-64. \textit{Parens patriae} actions, actions by a sovereign to vindicate the interests of its citizens, are permitted but only if the sovereign articulates an interest apart from the interests of private parties and the expressed interest must be quasi-sovereign in nature. See Snapp & Sons, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982) (denying standing to the Commonwealth of Puerto Rico to assert claims that private employer violated federal immigration laws to the detriment of its resident workers). \textit{See also} Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253, \textit{cert. denied} 133 S. Ct. 59 (4th Cir., Sept. 8, 2011) (holding that because the Affordable Care Act’s insurance mandate applies only to individuals the Commonwealth of Virginia suffered no injury and, therefore, cannot sue the federal government on behalf of its citizens). Also assignees of claims, including assignees of assignments for collection, have standing to litigate the assigned claims. See Sprint Communications Co., L.P v. APCC Services, Inc., 554 U.S. 269, 275-86 (2008) (discussing the historical precedent for granting standing to assignees).

\textsuperscript{218} A grant of authority to presiding officers of a state legislature was deemed adequate to confer standing. See \textit{infra} notes 234-38 and accompanying text. It is unlikely that a grant of standing to members of Congress based on specific findings of fact of member harm would overcome the
Representatives had standing to enforce a subpoena issued by the committee to a member of the executive branch. However, this case involved an alleged direct harm to a committee of the House – the disregard of a duly issued subpoena – and not the more amorphous harm that results to the institution as a whole from the executive branch’s refusal to enforce or defend legislation or from a court holding that legislation is unconstitutional.

In *INS v. Chadha*, a federal statute that permitted either house of Congress, by resolution, to overrule a decision by the Immigration and Naturalization Service to allow a deportable alien to remain in the United States was held unconstitutional upon challenge by the petitioner alien. The agency agreed with the petitioner’s claim and the Ninth Circuit permitted Congress to intervene and defend the constitutionality of the statute. The Court permitted the intervention and stated that . . . “Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute agrees with plaintiffs that the statute is inapplicable or unconstitutional.” However, the Court held that the petitioner maintained standing in the case despite the fact that he had prevailed in the lower courts and that the INS agreed with his position. Consequently, it was not necessary for Congress to maintain standing in its own right in order to intervene and the Court offered no guidance on whether its statement was predicated on the unusual statutory provision in question – a unicameral legislative veto provision – or whether its statement stood for the broader proposition that Congress has standing to defend any statute that is held to be unconstitutional. Moreover, the Court did not elaborate on how Congress, procedurally, can maintain standing. *INS v. Chadha* was decided prior to *Raines* and the latter case made clear that an individual member of Congress does not have standing to vindicate the institutional interests of the legislative body by a mere statutory grant of standing conferred on all members. How representational standing to defend legislation is enforced remains unclear.

*United States v. Windsor*, the case decided in the Court’s just completed term that struck down the Defense of Marriage Act (DOMA), raised standing issues similar to *Chadha*. The respondent challenged the constitutionality of DOMA after she was assessed an estate tax deficiency. The deficiency arose because the respondent, married under state law to a same-sex partner, was not deemed married for federal estate tax purposes due to the application of obstacles that the Court has erected to congressional standing. Despite the fact that courts review factual findings deferentially, the Court has been resistant to allow the contours of constitutional provisions to be determined by Congress based on its factual findings. See Heather Elliott, *Congress’s Ability to Solve Standing Problems*, 91 B.U.L. Rev. 159, 182-194 (2011) (discussing various precedents that cast doubt on the utility of legislative fact finding to overcome Article III standing obstacles).

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221 Id. at 923-28.
222 Id. at 939.
223 Id. at 930, 939-40.
224 See supra notes 203-07 and accompanying text.
225 133 S. Ct. 2675 (2013).
DOMA. After being notified by the Attorney General that the Department of Justice would not defend the statute’s constitutionality, the Bipartisan Litigation Advisory Group (BLAG) of the House of Representatives petitioned to intervene to defend the statute and was permitted by the district court to intervene as an interested party. The Court held that the petitioner and respondent maintained standing. Consequently, the Court did not need to decide whether BLAG had standing on its own right despite the fact that BLAG’s presence in this case was crucial to its standing holding.

Justices Alito and Thomas, however, believed that BLAG did have standing to defend the statute. They found support for their position in *Coleman* and believed that the Second Circuit’s decision holding the statute unconstitutional was akin to the *Coleman* Court’s decision that vote nullification was sufficient for standing. They distinguished this case from *Raines* on two grounds. First, in *Raines*, unlike the case at hand, the individual members of Congress lacked institutional endorsement to bring the action. Second, in *Raines* the votes of the members who brought the action were not pivotal to defeat or enact the provision in question. In this case, passage by the entire House of Representatives was necessary to enact the statute.

“Accordingly, in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress has both the standing to defend the undefended statute and is a proper party to do so.” Justices Alito and Thomas would maintain the standing of a member of Congress to defend the constitutionality of any statute provided that the member has the institutional imprimatur to do so.

The Court has made clear that state legislators have standing to bring an action in defense of a statute if they are doing so in an official capacity. In *Karcher v. May*, the Court held that because New Jersey law authorized the presiding legislative officers to represent the New Jersey legislature in litigation, the Speaker of the General Assembly and the President of the Senate had standing to defend state legislation. *Karcher* involved a challenge to a statute that permitted public school students in New Jersey to observe a moment of silence.

The statue was enacted over the Governor’s veto and when it was challenged by several parties as violative of the Establishment Clause neither the state Attorney General nor the named defendants, various government bodies and an individual executive official, would defend the statute. After the Third Circuit held the statute unconstitutional, both the Speaker of the General Assembly and the

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226 *Id.* at 2683. Property that passes to a surviving spouse is not subject to the federal estate tax. *See* I.R.C. § 2056 (CCH 2013).


228 *United States v. Windsor*, 133 S.Ct. at 2686.

229 *Id.* at 2688. BLAG’s participation was considered critical by the Court in determining whether the issues could be litigated with an appropriate level of adversity.

230 *Id.* at 2711-14 (Alito, J., concurring in part, dissenting in part).

231 *Id.* at 2713.

232 *Id.* at 2714.

233 *Id.*


235 *Id.* at 74-75.

236 *Id.* at 75.
President of the Senate lost their posts as presiding officers. The Court denied them standing because they no longer had the authority to represent the legislature. That authority now resided with their successors. Under Karcher, if state law authorizes a legislator to act on behalf on the legislative body then that legislator will have standing.

In summary, the Courts have treated citizens seeking to defend a law that a State or the federal government has refused to defend no differently for standing purposes than litigants in other contexts. Absent a showing of a particularized harm, such actions have not fared well. The Court had occasion to revisit the issue of whether citizens in general or specific sponsors have standing to defend a law orphaned by the government in Hollingsworth v. Perry, a case in which California’s constitutional ban on same-sex marriage, enacted by initiative, was challenged.

D. Hollingsworth v. Perry

In 2008, in the aftermath of a California Supreme Court decision that required the recognition of same-sex marriages under the state’s constitution, the voters of California passed a ballot initiative known as Proposition 8 that amended the California constitution to limit marriage to heterosexual unions. After the California Supreme Court rejected a procedural challenge to the amendment, two same-sex couples filed suit in federal district court claiming that Proposition 8 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The named defendants, Governor Arnold Schwarzenegger, Attorney General Jerry Brown, and several other government officials, refused to defend the amendment. The district court allowed the petitioners, the official proponents of the ballot initiative, to intervene as defendants and held that Proposition 8 was unconstitutional. The named defendants chose not to appeal the district court’s decision and, instead, the petitioners appealed to the Ninth Circuit which asked them to address their standing to appeal. The Ninth Circuit also certified a question to the California Supreme Court that inquired whether, under California law, the petitioners had a particularized interest of their own in the initiative’s validity or whether they, as the official proponents of the initiative, were authorized to assert the state’s interest in the measure’s validity. In its response, the California Supreme Court did not address whether the petitioners had a particularized interest in the measure’s validity but stated that they did have the authority under state law to appear and assert the state’s interest in the validity of the initiative.

237 Id. at 76.
238 Id. at 77.
239 Hollingsworth v. Perry, 133 S.Ct. at 2659 (citing to In re Marriage Cases, 43 Cal. 4th 757, 183 P.3d 384 (2008) and CAL. CONST. Art. I, § 7.5). Chief Justice Roberts delivered the opinion of the Court and was joined by Justices Scalia, Ginsburg, Breyer, and Kagan. Justice Kennedy filed a dissenting opinion and was joined by Justices Thomas, Alito, and Sotomayor. Id. at 2668.
240 Id. at 2659-60.
241 Id. at 2660.
242 Id.
243 Id.
244 Id. (citing to Perry v. Brown, 52 Cal. 4th 1116, 1127 (2011)).
Based on this response the Ninth Circuit concluded that the sponsors had standing to defend Proposition 8 and decided on the merits of the case that the initiative was unconstitutional.\textsuperscript{245}

The Court held that the sponsors must seek relief from a personal and individualized injury and possess a “‘direct stake in the outcome’” of the case.\textsuperscript{246} According to the Court, the sponsors had no direct stake in the outcome of their appeal but a generalized grievance that was insufficient to confer standing.\textsuperscript{247} The Court rejected the sponsors’ argument that as official sponsors of Proposition 8 they had a “‘unique, special and distinct role in the initiative process’” that differed from other voters who supported of the measure.\textsuperscript{248} The petitioners’ unique, special, and distinct role, according to Court, existed up until the point that the measure was enacted.\textsuperscript{249} After the measure became law their interest in the enforcement of such law became indistinguishable “from the general interest of every citizen of California.”\textsuperscript{250}

Having dismissed the standing of the petitioners in their own right, the Court then turned to the question of whether the petitioners had standing in a representational capacity – a question that the Ninth Circuit believed was answered affirmatively by California law. The Court, citing \textit{Karcher}, acknowledged that individuals acting in their official capacities could vindicate the state’s interest in litigation.\textsuperscript{251} However, in the Court’s opinion, \textit{Karcher} was not supportive of the petitioners’ position but rather was “compelling precedent against it.”\textsuperscript{252} A state, by necessity, must designate agents to represent it in federal court and, although typically such role is filled by the attorney general, state law may designate other officials to act on its behalf.\textsuperscript{253} According to the Court, \textit{Karcher} stands for the proposition that a state may appoint officers to represent its interests but not private parties.\textsuperscript{254}

The Court quoted language from \textit{Arizonans for Official English} that noted that the initiative sponsors in that case “were ‘not elected representatives, and we [we]re aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend . . . the constitutionality of initiatives . . . .”\textsuperscript{255} The Court went on to state that the California Supreme Court “never described petitioners as ‘agents of the people’ or of anyone else.”\textsuperscript{256} Instead, California law merely authorized the petitioners to assert the state’s interest and this authority “does not mean that the proponents become ‘de facto public officials.’”\textsuperscript{257} The Court proceeded to explain why the petitioners were not formal or de facto agents of the state under traditional

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\item \textsuperscript{245} \textit{Id.} at 2660-61 ( citing to Perry v. Schwarzenegger, 628 F.3d 1191, 1095 ( 9th Cir. 2011 )).
\item \textsuperscript{246} \textit{Id.} at 2682 ( quoting \textit{Arizonans for Official English v. Arizona}, 520 U.S. at 64 ).
\item \textsuperscript{247} \textit{Id.} at 2663.
\item \textsuperscript{248} \textit{Id.} at 2662 ( quoting petitioners’ Reply Brief ).
\item \textsuperscript{249} \textit{Id.} at 2663. As the official proponents of the ballot initiative the petitioners were responsible for collecting the qualifying signatures, had sole authority to file the measure with election officials to put the measure on the ballot, and exercised control over the arguments presented in favor of the measure that would appear in ballot pamphlets. \textit{Id.} at 2602 .
\item \textsuperscript{250} \textit{Id.} at 2666 (quoting \textit{Arizonans for Official English v. Arizona}, 520 U.S. at 65 ).
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agency law principles. For example, the lack of the state’s authority to control the petitioners’ actions during the course of the proceedings, the lack of any fiduciary duty owed by the petitioners to the state or its people, and the lack of any duty of the state to reimburse the petitioners for their legal fees belied an agency relationship between the petitioners and the state.258 The majority also found the precedents cited by the dissent inapposite and, while acknowledging California’s sovereign right to determine for itself the rights of initiative proponents, stated that state law cannot override federal standing requirements.259

It is not clear whether the Court’s opinion is, in effect, a per se denial of standing to anyone other than state officials. The references to Arizonans for Official English and agency law principles seemingly imply that it is possible for private parties to maintain standing if they are appointed agents for the state. However, as a practical matter, if the Court insists that any such appointment come with the traditional indicia of agency status then it is unlikely for initiative proponents to be considered true agents.

III. DIRECT DEMOCRACY

Democracy is government by the People and is based on popular sovereignty and majority rule.260 In a democracy the People are sovereign and they exercise government power either directly or indirectly.261 When direct democracy is used the People exercise their power to govern directly and independently of any elected legislature.262 For example, in many states that use direct democracy a citizen may propose a law or state constitutional amendment and if enough voters - usually several hundred thousand - sign a petition to place the proposal on the ballot all voters will then vote on whether to adopt the proposal.263 If a majority of voters (the People) support the proposal then it becomes law.264 In contrast, in a representative democracy the People exercise their power to govern indirectly through their elected representatives.265 The elected representatives, on behalf of the People, propose and vote on legislation.266

A. The Fundamental Right of the People to Make Law

A central premise of our argument, that sponsors should be granted Article III standing as representatives of the state, is that under our constitutional order the People alone are sovereign

258 Id. at 2666-67.
259 Id. at 2667.
260 See supra notes 1-3 and accompanying text.
261 See supra notes 4-10 and accompanying text.
262 See e.g., City of East Lake v. Forest City Enters., 426 U.S. at 678 (referring to direct democracy as an exercise by the voters of their “traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest.”).
263 See e.g., Cal. Const. art. 2 (providing specific procedures for the use of direct democracy in California) See infra note for a reprint of a portion of this provision.
264 Cal. Const. art. 2
265 See e.g., U.S. Const. art.I. However, all representative governments are mere agents of the People, the sovereign, subject always and in every case to their ultimate authority. See supra notes 4-10 and accompanying text.
266 Id.
and therefore, have a fundamental right to make law whenever they deem it necessary. As a result, direct democracy invokes unique and fundamental issues that demand an exception to traditional standing requirements for initiative sponsors. This section provides a summary of the basis for the Peoples’ unalienable right to make law directly. We have opted to include only summary because in Hollingsworth there is no issue concerning the Peoples’ right to make law because the California Constitution acknowledges the right in Article 2, and provides the specific procedures to be used including the following:

SEC. 8. (a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.
(b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.

Our premise though is broader; the Peoples’ right to make law is not dependent on any specific grant of, or express acknowledgment of, such right in the federal Constitution or in the constitutions of the states. The Peoples’ sovereignty and their right to make law did not spring from the birth of our country, from our Constitution, or from our elected government; rather, they come from the People. The Peoples’ sovereignty must predate the Constitution because the People ordained and established the Constitution. The basis of the Peoples’ sovereignty and concomitant right to make law arises from natural law and became part of our positive law by the Peoples’ act of creating our government by adopting the Constitution. The Declaration of Independence states that all men are created equal and have certain rights that cannot be taken

267 See infra notes 271-309 and accompanying text.
268 See infra notes 405-14 and accompanying text.
269 See CAL. CONST. art. 2.
270 Id. at § 8.
271 See supra notes 2, 9 and 10. Not only was the adoption of the Constitution “law” made by the People, but the People’s ability to amend the Constitution also illustrates their right to make law. See Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 COLUM. L. REV. 457 (1994). See also Hirsch supra note 3, at 194 ( asserting that Article V is not the exclusive method for amendment).
272 See supra notes 2, 9 and 10.
273 The People supported the Declaration of Independence with their allegiance and their lives or our country would have never come into existence. Likewise the People, of their own volition created a new governing document for our country out of whole cloth and scotched the Articles of Confederation without a care as to its specific provisions because the People are sovereign. See supra note 10. Our elected federal government is created by our Constitution which was ordained and established by the People. See supra note 2.
274 See supra note 10.
away or given away. It also states that the People create governments to serve the Peoples’ interest and that governments always exist at the pleasure of the People who may choose to change or abolish their governments whenever they wish. Our Constitution, which creates our federal government, is a creation not of the states but of the People. “We The People … do ordain and establish …”

One argument against direct democracy is that while the People are sovereign, under the Constitution the People’s sovereignty entitles them only to elect a representative government; it does not entitle them to engage directly in governing, including direct citizen lawmaking. This argument places great importance on the distinction between a republic, a form of government in which the People govern indirectly by electing representatives who govern directly, and a democracy, a form of government in which the people govern directly, and assert that the Constitution establishes a republic not a democracy. This point is summed up nicely as follows: “voters don’t decide issues; they decide who will decide issues.” We argue that this definition of sovereignty is far too limited and does not reflect the true status of the People.

A summary of the evidence usually offered in support of limited sovereignty is presented below. First, the Constitution, notwithstanding the Preamble, was not ratified by referendum but in a convention based on the votes of representatives of the People. Second, Article I gives all legislative power to Congress and none is given to the people.

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275 See supra note 2.

276 Id.

277 See supra note 10.


279 See The Federalist No.10, at 76; The Federalist No.14, at 95 (James Madison ) (Clinton Rossiter ed., 2003). In both Madison refers to a republic as a government “in which the scheme of representation takes place”. For a discussion of this issue see Nation, supra note 3, at 372-378.

280 BRAINY QUOTE, available at www.brainyquote.com/quotes/quotes/g/georgewill112828.html (quoting George Will ) (last visited Nov. 16, 2013); Others have also argued essentially that voter input ends with the election. Edmund Burke nicely summarized this position: “Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.” 2 EDMUND BURKE, THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 95 (Boston, Little, Brown & Co., 3d ed. 1869). Richard Brookhiser stated: “[The Federalists] thought that the people should rule at the polls, then let the victors do their best until the next election.” Richard Brookhiser, Editorial, The Father of American Politics, WALL. ST. J., Sept. 11-12, 2010, at A13.

281 See supra notes 2, 9 and 10.

282 See supra note 10.

283 See U.S. CONST. art 1.
People want to make law directly then Constitution must be amended. Third, amendment under Article V is not done by the People. Elected representatives, either federal or state, and not the People must initiate the process of amendment and Congress decides whether ratification is by elected representatives, that is state legislatures, or by convention in the states. Fourth, the Constitution built in separation of powers and checks and balances to prevent elected representatives from accumulating too much power because the People exercise power only on Election Day. Finally, the fact that People have never made federal law in 225 years is evidence that the People do not have the power under the Constitution to make law directly.

The arguments offered in favor of true sovereignty of the People include the following. First, the Founders, including Madison, did not consistently attach significance to the distinction between the terms the “republic” and “democracy”, rather these two terms were most often used as synonyms and in contradistinction to “monarchy” and “aristocracy”. Second, the

284 See e.g., NATIONAL CITIZENS INITIATIVE FOR DEMOCRACY, available at http://www.ncid.us/amendment ( last visited Jan. 6, 2014 ) ( sponsoring a national initiative for democracy that includes a constitutional amendment authorizing citizen lawmaking in every governmental jurisdiction in the United States and concurrent federal legislation called the Citizens Legislative Procedures Act that provides the procedural details.)

285 See U.S. CONST. art. V ( requiring elected government officials to act in order to commence the process ).

286 Id.

287 This argument is in fact partially correct; our government was structured prevent concentration of power, but this was not because the People had limited or temporary sovereignty, but rather because of the moral hazard inherent in any system of representation. See e.g., THE FEDERALIST NO. 46, at 291 (James Madison) (Clinton Rossiter ed., 2003) (referring to the federal and state governments as “mutual rivals and enemies.”); AMAR, supra note 9, at 123 ( stating that “[o]nce again, populism and federalism – liberty and localism – work together; We the People conquer government power by dividing it between the two rival governments, state and federal, a structural scheme textually reaffirmed by the Tenth Amendment.”). Of course, the U.S. Constitution creates a system of checks and balances by dividing government power between three branches of government.

288 This assertion is factually incorrect. See supra note 10 and accompanying text. However, it does raise a valid point as to why the federal people have not exercised this right again. See Nation, supra note 3, at 397 ( noting that after the People adopted the Constitution the country fundamentally changed and there existed for the first time a “federal” People, but no clear procedures were ever established for the federal People to act, thus a statute establishing clear procedures for the exercise of this power would be useful.) See also AMAR, supra note 10, at 11 ( asserting that “[b]y ordaining the federal Constitution, Americans had in practice altered their state constitutions and abolished the Articles of Confederation). “… After ordainment, Americans from consenting states would indeed, ‘form a more perfect Union’ that prohibited unilateral exit” Id. at 21. The Philadelphia delegates chose to use State-law systems to implement many aspects of the new federal government. See id. at 148-159. Cf. U.S. CONST. art V ( setting forth four methods for elected officials to amend the Constitution, but two have never been used, another used only once and the last used in every other case ).

289 See Hirsch, supra note 3, at 200 ( asserting that Madison was not an opponent of direct democracy); AMAR, supra note 10, at 275-81. ( noting that “[a]t the same time that Madison was
Constitution was not adopted by referendum due to logistical problems of the time such as transportation communication and distribution of information and not because the People were not considered truly sovereign. In fact, the ratification of the Constitution was the most democratic process the modern world at that time had ever seen. For example, the usual rules regarding both the qualification and selection of convention delegates were, for the time, very democratic. It's fair to say that by the standards of 1787-88, and in light of the limited ability to hold elections, the Constitution was ratified by the People.

Third, neither Article I nor Article V negates the People’s right to make law directly. Article I states that “all legislative powers here in granted” not “all legislative powers”. Clearly it is the People who are the grantors and although the People delegated to Congress some legislative power they also retained that power for themselves. Sovereignty, including the right to self-government, is unalienable, as the Declaration of Independence reminds us, and thus the People cannot give it away or have it taken away. This fact is also reflected in Amendments IX and X of the Constitution which refer to rights and powers retained by the People. Article V sets forth amendment procedures that apply only to elected government officials and not to the People. This is why Article V requires super majorities for amendment. However, this does not preclude the People from amending the Constitution directly. They can, and a simple majority of the People is sufficient for this purpose. Article V does not say that it is the exclusive way to amend the Constitution. The People created the Constitution and, thus, logic demands that they can amend or abolish it and this was certainly the understanding of the Founders. The ability to change or to abolish government, like the ability to create

drawing his fine linguistic distinction, other leading Federalists were obliterating it, proclaiming that a ‘republican’ government could be either directly or indirectly democratic …. Repeatedly, Federalists explained the central meaning of republican government – especially in discussing the meaning of Article IV’s use of the word ‘Republican’ – by defining republics not in contradistinction to democracies but, rather, in opposition to monarchies and aristocracies.”); Nation, supra note 3, at 372-378 (discussing the issue in the context of Article IV Section IV Guaranty Clause).

See supra note 10.

Id.

Id.

Id.

See U.S. Const. art I.

The People “ordain and establish” the Constitution. See supra note 9.

See supra note 2; Hirsch, supra note 3, at 195 (describing the People as the source of all governmental power and referring to their inalienable right to change their government).

See Amar, supra note 9, at 119-124 (concluding that the Ninth and Tenth Amendments when written “elegantly integrate popular sovereignty with federalism”) (notes omitted).

See Amar, supra note 271, at 457-58 ( positing that “[w]e the People of the United States have a legal right to alter our Government – to change our Constitution – via a majoritarian and populist mechanism akin to a national referendum even though that mechanism is not explicitly specified in Article V.”).

Id. at 503-505.

Id. See also supra note 2 (quoting James Wilson).

See id.
government, is an unalienable right of the People. Fourth, the idea that the People are sovereign only on Election Day is clearly at odds with the understanding of the Founders. This “part time sovereignty” is no sovereignty at all, and is why this understanding is fundamentally wrong.

Finally, the Founders recommended and the People created, in effect, a hybrid democracy, one that allows for both representative democracy and direct democracy. The primary reason for the inclusion of representative democracy was the practical limitations resulting from America’s vast size and large number of citizens. The checks and balances and separation of powers that are built into the Constitution are there to protect the Peoples’ sovereignty from the inherent moral hazard associated with representative government. In the past 225 years the People have in fact made federal law once, when they fortified the Constitution. It is difficult to say with certainty why the People have not exercised their power to make federal law again. Some of the likely reasons include the great logistical difficulties associated with federal direct democracy which resulted in our political traditions developing without the use of federal direct democracy, and the fact that direct democracy is perceived as a threat by elected government officials who tend to do everything in their power to discourage it.

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302 Id.
303 Of course, the People do not give up their sovereignty at the end of Election Day. If they did then the new “sovereign” elected agents could permanently install themselves and eliminate future elections. The power of government is and always remains with the People.
304 See Amar, supra note 278, at 749 (stating that the Constitution envisions the use of both representative and direct democracy).
305 See Hirsch, supra note 3, at 188 (noting that the Framers established a representative democracy at the federal level because the country was too large for direct democracy).
306 See AMAR, supra note 9, at 129-133 (discussing the “agency problem…all permanent government officials…may at times pursue self-interested policies that fail to reflect the views and protect the liberties of ordinary Americans.”).
307 See supra note 10.
308 See supra note 288. See generally Nation, supra note 3 (arguing that these limits may now be overcome by the advancements in communication technology).
309 Some have argued unsuccessfully that Article IV, Section IV’s Guaranty Clause prevents direct democracy. See id. at 372-377 (discussing the faults with this argument); John Fund, Power to the People? How Declasse, WALL ST. J., June 11-12, 2011, at A11 (discussing attempts by various states to restrict or otherwise make the tools of direct democracy more difficult to use). These attempts include court use of the single subject rule to invalidate initiatives found to contain more than one subject, threatening initiative sponsors with personal liability and challenging the very concept of initiative law making under the Constitution’s Guarantee of a Republican Form of Government Clause in Article IV, Section IV. Fund also notes:

Twenty-four states currently allow voters to write their own laws through the initiative process, side-stepping gridlocked legislatures to pass statutes or constitutional amendments. Conservative voters have used the tool to impose term limits and curb racial quotas. At the same time, liberals have used initiatives to pass minimum wage laws and tobacco taxes that were often blocked by legislatures where lobbyists held sway.
B. Representative Democracy and Its Problems

In the United States the primary type of democracy used is representative democracy. Historically, both the country’s large geographic size and its large number of voters made the exclusive use of direct democracy impractical. While a majority of America’s founders saw Athenian direct democracy as the ideal form of government, America’s size meant that the Founders were forced to recommend a hybrid representative democracy. Representative democracy allows a manageable number of individuals, elected by the voters, to meet, exchange information, and deliberate in the exercise of legislative power. Some of the founders, however, supported representative democracy for more sinister reasons, such as a desire to protect slavery, or a desire to perpetuate the aristocracy by ensuring that power was concentrated in the hands of an educated and landed elite. Nevertheless, under the Constitution, the People alone are sovereign, but, for the sake of efficiency, the People chose to allow the day-to-day power to govern to be exercised on their behalf by elected representatives. The representatives have an obligation to vote according to the will of their constituents because the People are sovereign and possess the power to make law and to govern and not just the power to elect representatives. As noted above, the People - not Congress and not state legislatures - made and ordained the Constitution the law of the land. Notwithstanding the benefits of representative democracy, it has several important and inherent problems. These problems include the moral hazard that is part of any agency, the...
ability of special interests to easily and secretly influence representatives, and the weak accountability that results from periodic elections. 314 A full discussion of the problems associated with representative democracy is beyond the scope of this article. However, the following discussion provides a brief overview of such problems. Moral hazard refers to the risk that a representative may act in accordance with her own desires rather than in accordance with the desires of a majority of her constituents. In the political context moral hazard typically manifests itself as either vote selling or paternalism. Vote selling occurs when a representative votes a certain way on proposed legislation not because it is the will of the voters but in return for some personal benefit provided by an interested party. The personal benefit could be in the form of a monetary payment or some sort of political advantage. Paternalism occurs when an elected representative disregards the will of the voters based on the mistaken notion that the representative has the authority to govern independently and thus to vote any way she thinks best, regardless of the desires of a majority of his constituents.

A representative democracy allows special interests to easily and secretly exercise undue influence over elected representatives. 315 It is very difficult for special interests to influence a majority of the voters because there are simply too many voters. However, it is much easier to confidentially influence a relatively small number of representatives. This influence can take the form of vote buying, that is, an offer to elected representatives of some current or future advantage in exchange for their vote. Alternatively, influence may be exercised in the form of a misinformation campaign designed to deceive representatives in order to get them to cast paternalistic votes against the desires of their constituents. The nature of representative government also allows the influence of special interests to be kept secret from voters because the motives behind representatives’ votes are seldom accurately known due to the fact that motives may be easily camouflaged, and because many aspects of the legislative process are opaque. Another problem associated with the influence of special interests is that it sharpens political disagreements and ultimately leads to political gridlock.

In addition to possible moral hazard and the outsized influence of special interests, accountable democracy is also deficient in holding representatives accountable to the voters. 316 Accountability to the voters is the heart of a representative democracy. It distinguishes a representative democracy from an aristocracy. Unfortunately, accountability in a pure representative democracy, such as exists at the federal level, is very weak because it is based on periodic elections. Periodic elections result in week accountability because, even in an election cycle as short as two years, the elected representative may have cast 1000 votes in that time. 317 Voters cannot properly evaluate the representative’s overall voting record and hold such representative accountable in a meaningful way with just one vote cast every two years. Moreover, in order for accountability to be meaningful, basic information about the policy choices made by elected representatives is necessary. Much of this information is not easily

314 See Nation, supra note 3, at 329-345 (discussing these problems).
315 See id. at 336-338 (discussing the influence of special unrests in representative democracy).
316 See id. at 329-336 (discussing the lack of meaningful accountability in representative democracy).
317 See Janice S. Schacter, Digitally Democratizing Congress? Technology and Political Accountability, 89 B.U.L. Rev. 641, 646 (2009)( noting that “[h]ouse members typically made more than 1,000 votes in a two-year term” and discussing reasons why elections may not provide for meaningful accountability).
available and some is not available at all.\footnote{See Nation, \textit{supra} note 3, at 333-336 (discussing poor transparency).} For example, even when voting records are accurately known voters may be unable to discern why the representative voted for or against a proposed bill if the bill contained multiple subjects. Other actions, such as killing a bill in committee so that it never comes to a vote, are simply not a matter of public record. Finally, the inherent risk of moral hazard creates an additional problem for transparency. Representatives may have incentives to obfuscate or camouflage their conduct so that their true motives are not revealed. Arcane and complex legislative procedures often provide the means for such obfuscation.

Accountability has been further weakened because our two-party system has developed to the point where most representative districts are controlled by one of the dominant political parties thereby eliminating any meaningful interparty competition from elections.\footnote{See \textit{e.g.}, Schacter, \textit{supra} note 317, at 646 (noting that: “the political composition of most congressional districts virtually guarantees that one party will hold the seat).} In addition, there are numerous incumbent advantages that discourage or hinder voters from voting out even poorly performing representatives.\footnote{See \textit{id.} at 642-46 (referring to incumbent advantages such as “fundraising advantages seniority and the ability of incumbents to dole out pork and do case work").} Finally, increased voter apathy, due to the aforementioned problems, has further weakened accountability.

\textbf{C. Hybrid Democracy}

As a result of the problems associated with representative democracy, twenty-seven states have established formal procedures to facilitate direct citizen governance to supplement representative democracy.\footnote{“The Court’s decision has implications for the 26 other States that use an initiative or popular referendum system….” Hollingsworth v. Perry, 133 S.Ct. at 2668 ( Kennedy, J., dissenting). \textit{See also} Caroline J. Tolbert and Daniel A. Smith, \textit{Representation and Direct Democracy in the United States}, 42 REPRESENTATION 1 (2006) ( noting that “[o]ver 70 percent of Americans live in a city or a state [that] allows the initiative, a process by which citizens or groups are able to draft new laws or amend their state constitution without the consent of their elected representatives” and noting that 24 states allow the initiative process.).} The tools of direct democracy include the initiative, referendum and recall.\footnote{See \textit{Nation}, \textit{supra} note 3, at 339-342 (discussing the tools of direct democracy and noting that the term “hybrid Democracy was first used by Elizabeth Garrett in \textit{Hybrid Democracy} 73 GEO. WASH. L.REV. 1096, 1097 n. 7 (2005)).} An initiative is usually direct, independent citizen lawmaking. A citizen may propose a law or a constitutional amendment and, if the initiative proponents are able to collect enough voters’ signatures, often a daunting task, then their proposal will be placed on the ballot.\footnote{See \textit{e.g.}, \textit{supra} notes 268-71 and accompanying text ( quoting from California’s constitutional provisions relating to the states’s initiative process ).} If the proposal receives a majority of the votes cast then the proposal becomes law.\footnote{\textit{Id.}}
recall refers to the ability of voters to remove an elected official from office between elections.\textsuperscript{325} The process followed is similar to that for an initiative. The proponents of the recall must collect enough signatures to place the question on the ballot. The elected official is recalled if a majority of votes are cast in favor of the recall. Referendums concern legislation that originates from a formal elected legislative body. The legislation is placed on the ballot by the elected legislature for approval or rejection by the voters. In some states referendums may be required for certain types of proposed legislation - tax increase legislation, for example.\textsuperscript{326}

It is critical that any process established to facilitate the exercise by citizens of their fundamental right to make law be independent of the elected legislature. This is so because the People often use both initiatives and recalls for the express purpose of asserting their sovereignty and exercising direct corrective control over their elected government. Subjecting the Peoples’ right to govern to the cooperation or approval of elected government officials is inconsistent with the purpose of direct democracy. Moreover, it violates our fundamental constitutional order, which recognizes that sovereignty resides exclusively in the People.\textsuperscript{327}

No state relies exclusively on direct democracy for its government. Rather, the states that have established formal procedures for the use direct democracy benefit from using a hybrid democracy, a combination of representative democracy and direct democracy, to set public policy and govern. The importance of direct democracy is not diminished by the fact that representative democracy is the primary form of government because the importance of direct democracy is not determined solely by the frequency of its use. Just as a police officer parked on the side of the highway prevents many people from speeding despite the fact that the officer may issue relatively few speeding citations, the mere fact that the tools of direct democracy are readily available in a state prevents many of the abuses associated with representative government despite the fact that such tools are actually used infrequently.\textsuperscript{328}

The use of direct democracy as a supplement to representative democracy has a synergistic effect that improves the overall quality of government.\textsuperscript{329} Not only may the tools of direct democracy be used to correct the failings of elected representatives; the very fact that these


\textsuperscript{327} See supra notes 1-10 and accompanying text.

\textsuperscript{328} See e.g., Citizens in Charge, http://www.citizensincharge.org/learn/benefits-of-initiatives/better-tax-policy, suggesting that states in which citizens enjoy initiative and referendum rights not only have lower taxes, they also have more tax and spending decisions made at the local level rather than statewide. Furthermore, a recent study by scholars at Wellesley College says that initiative and referendum states have significantly less government waste and better economic performance than do states without initiative and referendum procedures. Id.

\textsuperscript{329} See Nation, supra note 3, at 342-346.
tools might be used has a positive effect on the functioning of representative democracy. The institutions of representative democracy and the representatives themselves function better because of the voters’ ability to easily use direct democracy. The existence of direct democracy mechanisms induces legislators to be more attentive to the views and concerns of the voters.\textsuperscript{330} Moreover, because the tools of direct democracy can be put to use at any time, attention is given to the concerns of the voters more consistently and not merely during the run-up to Election Day. Accountability under a hybrid democracy is better, more consistent, and more meaningful than under a pure representative democracy.

D. Supreme Court Recognition

The Court’s decision in \textit{Hollingsworth} is all the more perplexing because the Court has recognized that the democratic bona fides of direct democracy are superior to those of representative democracy.\textsuperscript{331} The Court has recognized that direct voting reduces the risk of moral hazard on the part of elected representatives, reduces the influence of special interests, and breaks through partisan gridlock. According to the Court, to put it simply, popular sovereignty is more accurately reflected in direct democracy.\textsuperscript{332} Moreover, the Court has referred to the use of direct democracy as an “exercise by the voters of their traditional right… to override the views of their elected representatives as to what serves the public interest.”\textsuperscript{333} The Court has recognized that resolving controversies by direct voting “is a classic demonstration of ‘devotion to democracy’”.\textsuperscript{334} As the court stated in City of Eastlake v. Forrest City Enterprises, “under our constitutional assumptions, all power drives from the people…. [T]he people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.”\textsuperscript{335} In sum, direct democracy procedures have a constitutionally favored position.

\textit{City of Eastlake} concerned a requirement that any change in land-use agreed to by the City Council had to be approved by a popular vote in a referendum.\textsuperscript{336} The State Supreme Court struck down the referendum requirement because it provided no standards to guide the voters in making their decision to support or oppose the proposed change in land-use.\textsuperscript{337} The U. S. Supreme Court however, found that while a delegation of power by the legislature to a regulatory entity is required to be accompanied by discernible standards this does not apply to a referendum requirement because in this case there is no delegation of power to the voters; rather this is a case of power reserved by the People to themselves.\textsuperscript{338} The People are the source of all government power and when they delegate power to the legislature the Peoples’ power is in no way

\textsuperscript{330} See supra notes 326-328 and accompany text.
\textsuperscript{331} See e.g., City of East Lake v. Forest City Enters., 426 U.S. at 679; James v. Valtierra, 402 U.S. at 143.
\textsuperscript{332} City of East Lake v. Forest City Enters., 426 U.S. at 678.
\textsuperscript{333} Id. at 679.
\textsuperscript{334} Id. at 679.
\textsuperscript{335} Id. at 672.
\textsuperscript{336} Id. at 671-73.
\textsuperscript{337} Id. at 671.
\textsuperscript{338} Id. at 678-678.
diminished. The Court seems to have been suffering from temporary amnesia when it decided *Hollingsworth*. 

E. Threats to Direct Democracy

At the state level, the tools of direct democracy have been used with increasing frequency. For example, when Ohio recently attempted to cut back on the collective-bargaining rights of public employees, the tools of direct democracy were seen as a potential remedy by those on both sides of the dispute. Not surprisingly, given that the purpose of direct democracy is to enable the People to exercise power over their elected representatives, the political establishment has often attacked the use of direct democracy. For example, some state officials have challenged successful initiatives in court, threatened initiative sponsors with personal liability, and challenged the very legality of initiative lawmaking under the Guarantee Clause in Article IV, Section IV of the U. S. Constitution. In other cases, such as California’s Proposition 8, discussed in *Hollingsworth* above, state officials have simply refused to defend the validity of laws passed by initiative.

Similar to laws or state constitutional amendments passed by the legislature, laws, including state constitutional amendments, passed by the initiative process are subject to judicial review and are void if they violate the federal Constitution. However, attempts by the political establishment to undermine the tools of direct democracy in order to avoid accountability or to deny to the People their fundamental right of self-government run counter to the very essence of our democracy. As the Supreme Court has noted, the initiative process recognizes the fundamental truth that the only sovereign in our democratic system of government is the People, from whom all governing rights flow. The authority of the People does not require, nor is it dependent upon, the permission of the government. To the contrary, the government obtains its authority from the permission of the People. However, it is important to recognize the fragile nature of direct democracy. Notwithstanding the sovereignty of the People and the constitutionally favored position of direct democracy, the political establishment has many advantages over citizens who attempt to use tools of direct democracy, and the political

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339 See infra notes 415-50 and accompanying text.
342 See supra note 309.
343 Id.
344 See infra notes 239-59 and accompanying text.
345 See Hunter v. Erickson, 393 U.S. 385, 392 (1969) ( stating that “[t]he sovereignty of the people is itself subject to those constitutional limitations that have been duly adopted and remain unrepealed”).
346 See City of East Lake v. Forest City Enters., 426 U.S. at 672 ( quoting that “[u]nder our constitutional assumptions, all power derives from the people…”).
establishment is very eager to control, curtail, minimize, and even eliminate direct democracy.\textsuperscript{347} Unfortunately \textit{Hollingsworth} has given the political establishment even more power to disregard the people.

IV. \textbf{Analysis: Standing Of Initiative Proponents}

The text of Article III does not prohibit sponsors from having standing to defend successful initiatives. In fact, the text appears to allow for general citizen standing. It is the Court’s interpretation of Article III that has prohibited citizen standing, and has created issues regarding the representational standing of sponsors. The Court’s standing jurisprudence is an amalgamation of confusing precedents whose only consistency appears to be that the definition of the harm at issue is outcome-determinative of the standing question. Prudentially, it makes sense that standing is denied to those who suffer diffuse harms if a person with a more particularized harm can seek redress. However, in situations where all those aggrieved are aggrieved in the same manner and to the same extent, then the fact that such persons are numerous should not impose constitutional barriers. As discussed in the section that follows, we believe that all citizens should be able to defend initiatives.

However, if the Court refuses, in light of the existing precedent, to countenance citizen standing then it should create an exception that recognizes that the sponsors of an initiative that has been adopted into law by the People have Article III standing as representatives of the People to defend the law. The interest the sponsors assert is necessarily generalized because it is the state’s (that is, the People’s) interest, but this should not prevent the court from treating the sponsors as if they were state officials, elected and authorized by the passage of the initiative, for the limited purpose of representing the state’s interest in the continued enforcement of its law. Direct democracy implicates unique and fundamental interests. The sovereign will of the People is expressed in their direct lawmaking and our constitutional order demands that the People’s exercise of direct self-government not be dependent in anyway on the cooperation or approval of elected government officials. Doing so violates the sovereignty of the People. In addition, principles of federalism support this exception, and there is no compelling prudential reason not to recognize this exception.

A. Criticism of Standing Jurisprudence

An interpretation of Article III that precludes purely advisory actions by the judiciary but that is cognizant of any proceeding among parties with adverse interests would not seem unreasonable to the average person. The fact that the alleged harm is “shared with millions of others” does not eliminate or diminish the harm believed to be incurred by the aggrieved party. After all, the class action was developed by the law of equity to deal specifically with diffuse harms.\textsuperscript{348} Commonality, not specificity, is the linchpin to the maintenance of a class action lawsuit, as evidenced by the Court’s recent decision in \textit{Wal Mart Stores, Inc. v. Dukes}.\textsuperscript{349}

\footnote{\textsuperscript{347} See \textit{supra} note 309.}
\footnote{\textsuperscript{348} See Richard E. Epstein, \textit{Standing or Spending – The Role of Legal and Equitable Principles}, 4 CHAP. L. REV. 1, 25-27 (2001). Pursuant to FED. R. CIV.P. 23(a)(1)-(2), a party seeking to certify a class must demonstrate, among other requirements, that the class is so numerous that}
Professor Epstein justifies standing limitations by resort to the work of Guido Calabresi and tort law concepts. Persons harmed by an act, a physical blow for example, form concentric circles with the victim at the center. Administrative costs increase, the extent of the harm diminishes, and deterrence is reduced as the victims become further removed from the center of the circle. Consequently, an action brought by the victim serves the objectives of tort law but proceedings instituted by those victims further from the center of the circle are not justified by the marginal benefit they may provide. However, this rationale does not hold when the circle contains only one ring and everyone that is harmed is harmed in the same manner and to the same extent. In such circumstances Professor Epstein noted that “it is not correct to say that ‘no particular person is injured’ . . . . Rather, it is that a great many individuals are all injured by a small but perceptible amount. The task of the courts of equity was to develop rules that allowed the amalgamation of small interests.” The Court’s standing jurisprudence appears to have abandoned this principle entirely.

The Court’s standing decisions have produced results that are highly dependent on the way in which the harm is framed, often insert the issue of causation in its determination of harm, and overindulge in the separation of powers. The harms suffered by the plaintiffs in Sierra Club, Lujan, and SCRAP quite reasonably could have been categorized as an affront to their interests in joinder of all members is impractical and that there are questions of law or fact common to the class. “Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury.’” Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551 (2011) (quoting General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157 (1982)). The derivative lawsuit is a mechanism to provide redress to shareholders for harms inflicted on the corporation. Its most common manifestation is an action to hold the directors or officers of the corporation accountable for harms that they have inflicted on the corporation. This proceeding provides redress to shareholders for harms to the corporation that, due to the inherent conflict of interests involved, are unlikely to be pursued directly by the corporation. Shareholder challenges to executive compensation are commonly the subject of derivative litigation. See Lucian A. Bebchuk, et.al., Managerial Power and Rent Extraction in the Design of Executive Compensation, 69 U. Chi. L. Rev. 751, 779 (2002).

The Court denied certification of the class comprised of approximately 1.5 million current and former female employees of Wal-Mart that alleged Wal-Mart’s pay and promotion practices discriminated on the basis of gender in violation of Title VII of the Civil Rights Act of 1964. The Court found that the alleged violations lacked commonality among the members of the class because the reasons behind the unfavorable employment decisions varied among the members of the class. See Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. at 2554-56.

Guido Calabresi, one the founders of the law and economics school of legal thought, and his works have been influential in legal and academic circles. See e.g., Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972); GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (Yale Univ. Press 1970).

Epstein, supra note 348, at 15-17.

Id. at 16.

Id. at 17-18. To a certain extent this reasoning is analogous to the reasoning used to allow jus tertii claims. See supra note 217 and accompanying text.

Epstein, supra note 348, at 10.
the preservation of the environment. Instead, the results in those cases were dependent upon whether the plaintiffs made use of the natural resources in question.\textsuperscript{355} Similarly, the plaintiffs’ failure to show that they were personally visited with discrimination caused the Court to refuse to recognize an injury due to federal support for racially segregated educational institutions.\textsuperscript{356}

As Professor Sunstein points out by reference to the landmark case of \textit{Regents of the University of California v. Bakke}, a more expansive view of the interests at stake – freedom from government complicity in racial discrimination – does not seem particularly unreasonable.\textsuperscript{357} Bakke, denied admission to the University of California at Davis medical school, alleged that the affirmative action admissions program at the school was unconstitutional.\textsuperscript{358} Under the Simon and Wright line of reasoning, standing would not have been maintained had the Court framed the injury as the denial of admission to the medical school because Bakke could not show that he would have gained admittance but for the affirmative action program. However, categorization of the harm as the denial of an equal opportunity for admission solves the standing issue.\textsuperscript{359} Similarly, the Court did not discuss standing in \textit{Fisher v. University of Texas}, the Court’s most recent affirmative action case.\textsuperscript{360} No showing was made that the plaintiff would have been admitted but for the university’s affirmative action program. Presumably, the harm visited upon her was the loss of the opportunity to be considered on terms that ignored race.

In \textit{Raines}, the Court, distinguishing between the case at hand and Coleman, stated that “[t]here is a vast difference between the level of vote nullification at issue in Coleman and the abstract dilution of institutional legislative power that is alleged here.”\textsuperscript{361} Perhaps there is but it defies logic that the dilution of the power of the institution to which the plaintiff belongs does not visit harm upon the plaintiff. After all, this was not an injury shared by all citizens in common but an injury shared by only 535 members of the Congress. It appears that this logic can be extended to Mr. Bakke and Ms. Fisher. They were not the only applicants that were affected by the schools’ affirmative action programs – every applicant not favored by the admission standards shared the same harm. In \textit{Clapper v Amnesty International USA}, the Court took no cognizance of the chilling effect that surveillance under the Foreign Intelligence Surveillance Act had on communications between the appellants and their clients.\textsuperscript{362} Instead, the Court required them to show that their communications had, in fact, been targeted.\textsuperscript{363} Yet, in \textit{Powers v. Ohio}, the potentiality that improper jury selection would somehow cause jurors, the judge, and the attorneys to fail to carry out their duties properly was enough for the Court to uphold standing.\textsuperscript{364} Perhaps if \textit{Clapper} was decided after Edward Snowden revealed details of the government’s surveillance program the Court would have come to a different conclusion.\textsuperscript{365}

\textsuperscript{355} See supra notes 130-44 and accompanying text.
\textsuperscript{356} See supra notes 155-62 and accompanying text.
\textsuperscript{357} Sunstein, supra note 78, at 203-05.
\textsuperscript{358} Id.
\textsuperscript{359} Id.
\textsuperscript{360} 133 S. Ct. 2411 ( 2013 ).
\textsuperscript{361} Raines v. Byrd, 521 U.S. at 826. See also supra notes 203-07 and accompanying text.
\textsuperscript{362} 133 S.Ct. at 1148-49. See also supra note 74.
\textsuperscript{363} 133 S.Ct. at 1149.
\textsuperscript{365} See e.g., Evan Perry, Snowden Charged in NSA Leaks Case, WALL ST. J., June 22, 2013, at A1.
A narrow framing of the harm also tends to confuse the issue of causation with standing. Standing was denied in Arizona Christian School Tuition Organization because, according to the Court, the spending decisions of the parents and not the government scheme under which such decisions were made caused the alleged harms. The Court also denied standing because the plaintiffs could not show that, in the absence of government action, hospitals would have provided care, private schools would have been integrated, or a father would have paid child support in Simon, Wright, and Linda R.S., respectively. Had the Court chosen to frame the harms more broadly, as it did in Bakke, then the effect of intervening actions by third parties would no longer be relevant—at least with respect to standing.

The confusion caused by the interplay of the definition of harm and the cause of that harm is illustrated by disputes concerning the so-called employer health insurance mandate. The Patient Protection and Affordable Care Act added section 4980H to the Internal Revenue Code. This provision imposes an exaction on certain employers if they do not offer insurance coverage to their employees or offer coverage that is deemed inadequate under the statute and at least one full-time employee is allowed a tax credit or cost-sharing reduction. The Fourth Circuit recently held that Liberty University had standing to challenge the employer mandate and upheld the constitutionality of the employer mandate. The government argued that Liberty University had failed to establish standing because it is speculative whether it would be subject to an assessable payment. The University may provide minimum essential health insurance coverage that satisfies the statute’s affordability criteria thereby precluding the application of the penalty. According to the court,

. . . Liberty need not show that it will be subject to an assessable payment to establish standing if it otherwise alleges facts that establish standing. In this case, in addition to alleging that it ‘could’ be subject to an assessable payment, Liberty alleges that the employer mandate and its ‘attendant burdensome regulations will . . . increase the cost of care’ and ‘directly and negatively affect [it] by increasing the cost of providing health insurance coverage.’. . . [T]o establish standing, Liberty need not prove that the employer mandate will increase its costs of providing health coverage; it need only plausibly allege that it will.

The Obama administration recently has announced that enforcement of the employer mandate, effective January 1, 2014, will not go into effect until 2015. The statute contains no provision for delaying its effective date. The lack of an employer mandate may force an individual who otherwise may have obtained employer coverage to purchase her own insurance.

366 See supra notes 125-27 and accompanying text.
367 See supra notes 150-62 and accompanying text.
368 For a discussion of the interplay between causation and standing see Cass R. Sunstein, Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432, 1461-69 (1988).
370 See I.R.C. § 4980H(a) (CCH 2013).
372 Id. at 25-26.
It appears that the logic of Allen v. Wright would preclude standing on such a theory. The failure of an employer to provide health insurance may not be rectified by the enforcement of the mandate in 2014. Just as a tax exempt hospital may have foregone the tax exemption and continued to provide inadequate charitable care, an employer could choose to forego the provision of insurance and pay the statutory penalty. In Liberty University, the Fourth Circuit merely required a plausible allegation that the government action would result in the harm alleged but did not require proof that it would do so. Why is not plausible that the denial of a tax exemption will cause a tax exempt entity to alter its behavior or that the threat of a penalty will induce an employer to offer insurance to its employees and why must proof of causation be shown in these instances to get a foot in the court house?

B. Representational Standing of Initiative Sponsors

Despite the criticism that is fairly directed at the Court’s standing jurisprudence and that nothing in Article III seems to preclude citizen standing to defend an initiative, the fact remains that citizen standing to defend an initiative is very unlikely under existing precedent. However, we argue that the unique characteristics of initiative law making, most notably that the sovereign (the People) is acting directly, warrants the recognition of an exception that would allow sponsor standing for a law passed by initiative. We do not believe, however, that initiative sponsors should have standing based on the time, effort, or funds they have expended in successfully shepherding an initiative into law. This harm is indistinguishable from the harm suffered by donors to the initiative effort and active participants in grassroots efforts, such as get out the vote drives.

In this respect, initiatives are no different than legislation. Some members of the body politic take a more active role than others in legislative matters, whether through the employment of lobbyists, correspondence with elected representatives, or spending on issue advertisements. The courts have never distinguished citizens from each other on this basis for standing purposes and, frankly, to do so would send an undesirable message. Once a measure is enacted into law, be it through an initiative mechanism or the legislative process, all citizens have an equal interest in the enforcement of the law. Instead, we argue here that sponsors maintain representational standing based on the voters’ approval of the initiative.

Direct democracy is the manifestation of the fundamental right of the People to govern themselves. As noted, states that have established procedures to facilitate direct citizen lawmaking benefit in two main ways. First, direct democracy procedures provide the people with an efficient means to control and correct their representatives. Second, the mere existence of

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374 Two attorneys who played pivotal roles in the constitutional challenge to the Patient Protection and Affordable Care Act’s individual mandate, upheld in Nat’l Fed’n. of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012), have posited that individuals may maintain standing to challenge the delay in the enforcement of the employer mandate due to its effect on individuals that purchase health insurance. They assert that, due to the comprehensive and coordinated nature of the various statutory provisions, the suspension of one provision has deleterious effects on persons subject to other provisions. See David B. Rivkin, Jr. & Lee A. Casey, Op-ed, Why the President’s ObamaCare Maneuver May Backfire, WALL ST. J., July 15, 2013, at A13.

375 “[A]n exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest” City of East Lake v. Forest
direct democracy mechanisms serves as a check on elected officials and fosters greater fidelity to the voters by elected representatives.\textsuperscript{376} The Court, in \textit{Hollingsworth} wrongly concluded that initiative proponents do not have standing to represent the state.\textsuperscript{377} While it is true that initiative proponents are not authorized as formal agents by or on behalf of the elected officials of the state, it does not follow from this that the sponsors are not agents of the state.\textsuperscript{378} Initiative sponsors are appointed as agents of the state directly by the People (by their approval of the initiative) and are answerable directly to the People,\textsuperscript{379} but are not appointed by, nor answerable to the elected officials of the state. This is precisely the point of direct democracy; to give life to the fundamental truth that the People alone are sovereign, and that they are sovereign at all times and not just on Election Day.\textsuperscript{380} The application of traditional standing doctrine to initiative sponsors is in error because it ignores the unique relationship between initiative sponsors and the People/state and undermines the very purpose of direct democracy. A categorical exception to general standing principles should be made for initiative sponsors regardless of whether state officials deputize them to defend the law they championed and the People adopted.

A State has a cognizable interest in the continued enforceability of its laws and is harmed by a judicial decision declaring a state law unconstitutional.\textsuperscript{381} There is no question that a state has Article III standing to challenge a decision by a federal court holding one of its laws unconstitutional.\textsuperscript{382} A state is a non-personal political corporate entity made up of the people of that state. As a result, the state may act only through individuals authorized by the People to represent the state.\textsuperscript{383} This is true in the context of a state appearing in federal court.\textsuperscript{384} A state’s interest in defending a law passed by direct democracy is the same as its interest in defending a law passed by the state legislature.\textsuperscript{385} In both cases it is the interests of the State, that is, the People of the state, which are being defended. However, there is an important distinction between the state defending a law passed by direct democracy and the state defending a law passed by the elected legislature. In the former case, the interests of the elected representatives who normally represent the state are likely to be at odds with the interests of the People who made the law. Recall that direct democracy is used by the People to assert corrective control over their elected representatives.\textsuperscript{386} Unlike laws passed by the state legislature, laws passed by direct democracy often serve as a check on the elected government.\textsuperscript{387} It is this critical difference that

\begin{itemize}
\item \textsuperscript{376} See supra notes 327-30 and accompanying text.
\item \textsuperscript{377} See infra notes 415-51 and accompanying text.
\item \textsuperscript{378} See infra notes 381-95 and accompanying text.
\item \textsuperscript{379} See infra notes 427-51 and accompanying text.
\item \textsuperscript{380} See supra notes 267-308 and accompanying text.
\item \textsuperscript{381} See Main v. Taylor, 477 U.S.131,137 (1986).
\item \textsuperscript{382} Id.
\item \textsuperscript{383} See e.g., Poindexter v. Greenhow, 114 U.S. 270, 288 (1885) ( stating that “[t]he State is a political corporate body [that] can act only through agents”).
\item \textsuperscript{384} Id.
\item \textsuperscript{385} See supra notes 260-66 and accompanying text.
\item \textsuperscript{386} See City of Eastlake v. Forest City Enters., 426 U.S. at 678.
\item \textsuperscript{387} Id.
\end{itemize}
gives rise to the need to recognize an exception to the usual rules regarding who may represent
the state for purposes of Article III standing in the context of a law passed by direct democracy.

Citizen lawmaking is an arduous effort. Procuring the required number of acceptable
signatures necessary to place a proposal on the ballot is an expensive and time-consuming task.
So too is the task of informing voters about the proposal once it is on the ballot.388 However, this
does not change the fact that when the sponsors seek to defend a law passed by initiative they are
asserting a generalized interest on behalf of the citizens of the state.389 It is not the time and
expense of getting the proposal on the ballot that justifies giving the sponsors representational
standing, although such time and expense tend to insure that the sponsors will be effective
advocates of the law.390 Rather representational standing is justified by what happens after the
petition is placed on the ballot. To become law the proposal must receive a majority of the votes
cast. It is the approval of the initiative by the voters, a direct expression of popular sovereignty,
that justifies treating the sponsors of the initiative as empowered and authorized by the
People/State for the limited purpose of representing the Peoples’/State’s interest in the continued
enforceability of its law.

The capacity and the authority of the initiative sponsors are limited by the voters when
they approve the initiative.391 The only capacity and authority that the sponsors have is to assert
the state’s interest in the initiative exactly as it was passed by the People. Moreover, the sponsors
are answerable to the People because, albeit with considerable effort, the voters may propose and
approve a new initiative that either changes the prior initiative or changes the sponsors.392 To put
it another way, the sponsors may be removed from their very limited capacity to represent the
state as easily as any other elected state official.393

In Hollingsworth the majority raised the following objection to granting sponsors
standing: “They are free to pursue a purely ideological commitment to the law’s constitutionality
without the need to take cognizance of resource constraints, changes in public opinion, or
potential ramifications for other state priorities.”394 The problem with this objection is that the

388 See e.g., CTR. FOR GOV’T STUDIES, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH
BRANCH OF GOVERNMENT (2d ed. 2008) (noting the expense of qualifying an initiative for the
ballot).
389 See supra notes 374-75 and accompanying text.
390 “They [sponsors] have a unique relationship to the voter-approved measure that makes them
especially likely to be reliable and vigorous advocates for the measure and to be so viewed by
those whose votes secured the initiatives enactment into law’ ” Hollingsworth v. Perry, 133 S.Ct.
at 2669-70 (Kennedy, J., dissenting) (quoting Perry v. Brown, 265 P.3d at 1024).
391 “Yet petitioners [sponsors] answer to no one; they decide for themselves, with no review,
what arguments to make and how to make them.” Id. at 2670. The Court is incorrect. The
sponsors are strictly limited by the exact terms of the law voted on and enacted by the People.
Moreover, once the sponsors are granted standing, other interested parties may intervene if
necessary to make their arguments. The Court is also incorrect when it stated that the sponsors
are unelected. See id. at 2666. The sponsors were elected by the People simultaneously with the
approval of the initiative.
392 Obviously, the People may adopt another initiative at any time repealing or changing the
previous initiative. See supra notes 260-330 and accompany text.
393 For a discussion of recall procedures see supra notes 324-26 and accompany text.
394 See Hollingsworth v. Perry, 133 S.Ct. at 2667.
majority fails to recognize that the People properly made decisions about resources, public opinion, and other state priorities when they approved the initiative. To allow elected representatives to change or disregard these decisions of the People violates the sovereignty of the People. Finally, as noted by the California Supreme Court, the question of who should bear responsibility for attorneys’ fees related to defending the initiative is entirely distinct from the question of standing. Whether the elected officials of the state choose to provide for reimbursement or not is their decision; of course, if the People disagree with the decision, the People may use the initiative process to establish their desired result.

The majority adhered too closely to hornbook law and the Restatement (Second) of Agency in Hollingsworth. Agencies are ubiquitous in business and most of the law of agency has developed in that context. However, our concern here is not with a typical economic or business agency, rather we are concerned with a political agency, a topic on which the Restatement by its own admission is much less authoritative and useful. Moreover, the Court has mixed up the respective roles of the parties involved. To the Court, the elected state government is the principal and the sponsors must be formally made agents of the government and be authorized by government officials to defend initiative. This makes little sense given that direct democracy in general and the initiative process in particular are both used to circumvent elected officials who decline to effect the public will.

In reality, if we are required to adhere to the principal-agent fiction, then the People as the sovereign are the principal and the elected state government officials as well as the sponsors are agents. The People may appoint any agents they deem necessary to pursue their interests. Of course, appointment by the People requires an election and a majority vote. In the context of an approved initiative that is precisely what has occurred. Whether or not a “formal agency” under the Restatement has been created by the approval of the initiative is simply not a very relevant question. Whether the sponsors are formal agents or agent-like, the sponsors have clearly been appointed and authorized by the People via a direct expression of popular sovereignty to represent the People/State for the limited purpose of defending a law passed by initiative and subsequently found unconstitutional. Given the nature of direct democracy, the

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396 See Hollingsworth v. Perry, 133 S.Ct. at 2666-68.
397 Id. at 2671-72 ( Kennedy, J., dissenting) ( citing the Restatement (Second) Agency p. 2, Scope Note (1957) and noting that the Restatement does not provide special rules applicable to public officers).
398 Id. at 2666-67 ( holding that initiative sponsors are not agents of the State but that a legislator authorized by state law to represent the State’s interest will have standing pursuant to Karcher ).
399 See supra note 375.
400 The dissent in Hollingsworth comes to the same conclusion. See Hollingsworth v. Perry, 133 S.Ct. at 2671-75 ( Kennedy, J., dissenting ) (asserting that if there is to be a principal then it must be the people of California). Professor Amar has come to the same conclusion albeit in a different context. “Under first principles of popular-sovereignty theory and principal-agent law . . . it was improper . . . for mere public servants in either the federal or state governments to prohibit their legal masters, the sovereign citizenry, from floating political opinions and weighing political proposals among themselves.” Akhil Reed Amar, America’s Unwritten Constitution 37 ( Basic Books 2012 ) (emphasis added ).
Court’s refusal to allow standing for the sponsors based on the lack of a formal agency is absurd. The Court erroneously reasons its way to a conclusion that subjects the Peoples’ sovereignty to the control of elected government officials. In so doing, the Court has placed the cart before the horse. The Court seems to have forgotten that the People are sovereign, the state and federal governments are not; elected officials are to do the bidding of the People and not the other way around.\(^\text{402}\)

We do not find the formal agency analogy very useful, because it gets us back to where we started; the interest being advocated by the sponsors is general because that is the very nature of direct democracy. Direct democracy is the People acting directly as the state, independent of elected State officials.\(^\text{403}\) For the purposes of standing, in the case of direct democracy the Court should recognize that the sponsors represent the People of the state for the limited purpose of defending a law passed by initiative.\(^\text{404}\)

C. Article III Standing In the Context of Direct Democracy

\(^\text{402}\) "These gentlemen must here be reminded of their error. They must be told the ultimate authority, wherever the derivative may be found, resides in the people alone…” The Federalist No. 46, at 291 (Madison) (Clinton Rossiter ed. 2003). See also supra note 2.

\(^\text{403}\) See supra notes 321-30 and accompanying text.

\(^\text{404}\) Rather than agency principles, initiative defenses are more analogous the corporate law principles embodied in the derivative lawsuit. The derivative lawsuit is a mechanism to provide redress to shareholders for harms inflicted on the corporation. Its most common manifestation is an action to hold the directors or officers of the corporation accountable for harms that they have inflicted on the corporation. This proceeding provides redress to shareholders for harms to the corporation, due to the inherent conflict of interests involved, are unlikely to be pursued directly by the directors or officers on behalf of the corporation. For example, shareholder challenges to executive compensation are commonly the subject of derivative litigation. See Bebchuk, et. al., supra note 348, at 779. The shareholders must first, with one exception, make a demand on the board to investigate the claim and consider whether further action is appropriate – which in most cases will be answered in the negative. Id. at 870; Randall S. Thomas & Kenneth J. Martin, Litigating Challenges to Executive Pay: An Exercise in Futility?, 79 Wash. U.L.Q. 569, 576-77 (2001). The exception to the demand requirement applies when shareholders establish that making such demand is futile by offering particularized facts that cast reasonable doubt on the independence of the directors and that the board is otherwise not protected by the business judgment rule. See Bebchuk, et al., supra note 348, at 780-81. Voters are akin to shareholders and state officials are the directors or officers whose actions have harmed the interests of the entity, the state. Agency principles may be appropriate in the context of laws passed by the State legislature where the enactment and enforcement of laws all involve elected representatives. In that context, in effect, elected officials are fighting with themselves. In the direct democracy context as noted, elected state officials are more appropriately classified as agents of the People, and the People, as principal, should have a judicial avenue to redress the failure of their elected agents/officials to obey.
Article III standing in the context of direct democracy raises unique issues. Direct democracy is intended to bypass the representative government. By using the tools of direct democracy the People may make laws directly and independently. Under certain idiosyncratic circumstances, the failure to enforce a law passed by initiative may cause harm that is peculiar to a citizen or subset of citizens. In such circumstances standing will maintain. For example, if the refusal by the California authorities to defend Proposition 8 forced an employer to provide some sort of employee benefit to the partner of a homosexual employee due to the now recognized marital status of that employee then the failure to enforce the law could be challenged by such employer.

This challenge is not brought by a citizen as such but by an employer. However, certain types of laws passed by initiative are threatened by the traditional rules of Article III standing and the Court’s holding in Hollingsworth. If a law or constitutional amendment curtails individual rights for the benefit of all members of society, then the usual rules of standing become dysfunctional. Examples of such laws would include: gun control legislation, term limits for political representatives, crime reduction legislation that authorizes police to stop and frisk, environmental legislation such as a prohibition on the use of plastic bags by stores, education reform in the form of the elimination of public school teacher tenure, fiscal reform in the form of the elimination of collective-bargaining rights for public employees, education reform that would eliminate any voucher system or state tax deduction for private school tuition, limitations on the right to an abortion, or fiscal reform that eliminates state tax deductions for certain nonprofit organizations such as hospitals or universities. Under Hollingsworth’s Article III standing analysis all of these laws, and many others, if passed by initiative and subsequently held unenforceable by a federal court would be at the mercy of the states elected government. If the political establishment, for whatever reason, declined to defend these laws then they would be nullified with no further court review. The effect of Hollingsworth on term limits and campaign-finance reform adopted by initiative would be especially pernicious. To require the People to obtain permission or cooperation from elected officials to defend such laws is nonsensical.

In effect, Hollingsworth grants state governments the power to veto any direct democracy results they don’t like as long as a single federal judge is willing to overturn the law. The simple failure of the state government to take any action to defend the law will render it void with no further court review. Hollingsworth has the potential to completely eviscerate the right of the People make law via initiative by making the process dependent on the cooperation of the

405 See supra notes 321-330 and accompanying text.
406 See supra notes 260-66 and accompanying text.
407 See infra notes 408-09 and accompanying text.
408 See supra notes 91-163 and accompanying text.
409 See supra notes 130-42 and accompanying text.
410 “Giving the Governor and attorney general this de facto veto will erode one of the cornerstones of the State’s governmental structure.” Hollingsworth v. Perry, 133 S. Ct. at 2671 (Kennedy, J., dissenting).
411 Id.
412 “The very object of the initiative system is to establish a law-making process that does not depend upon state officials.” ... “The initiatives’ primary purpose, then, was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt.” Id. at 2670. (citations omitted).
elected state government. The elected state government can simply withhold their cooperation 
without giving a reason or even taking a public position on the matter, and the law will simply 
die. It is disingenuous to suggest that the Peoples’ answer to this problem is to be found at the 
ballet box and not the courthouse. Direct democracy is the ballet box.

A more productive approach, we believe, is to recognize that Article III standing in the 
context of direct democracy raises unique issues, and that the benefits provided by the rules 
related to Article III standing and the benefits that flow from direct democracy are both best 
served by recognizing Article III standing in initiative sponsors for the limited purpose of 
defending the enforceability of initiatives that become law. The Court has shown a willingness to 
carve out exceptions to its standing rules in instances where the interests at stake are deemed 
sufficiently important so as to outweigh doctrinal consistency. Direct democracy is certainly 
such an instance. Moreover, the creation of such an exception would not be imprudent because 
such an exception would apply only in the relatively infrequent instances in which state officials 
refuse to defend laws enacted through direct democracy procedures.

D. Hollingsworth Dissent

The dissent in Hollingsworth was written by Justice Kennedy and in it he was joined by 
Justices Thomas, Alito and Sotomayor. According to the dissent the fundamental problem with 
the majority’s opinion is that the majority failed to grasp or failed to accept the basic premise of 
direct democracy and the initiative process. The dissent notes that the basic premise of the 
initiative process is that: “the essence of democracy is that the right to make law rests in the 
people and flows to the government, not the other way around.” It is not clear whether 
majorities’ failure to grasp this basic premise was simply a matter of convenience for the 
majority, to avoid having to deal with the controversial issue of same-sex marriage, or whether

413 “In the end, what the Court fails to grasp or accept is the basic premise of the initiative 
process. And it is this. The essence of democracy is that the right to make law rests in the people 
and flows to the government, not the other way around. Freedom resides first in the people 
without need of a grant from government.” Id. at 2675.
414 Flast created the exception to standing for alleged Establishment clause violations. Based on 
the intent of the framers, the Court discerned a cognizable harm to the citizenry by governmental 
acts of favoritism toward religion. However, under Flast, the cognizable harm is limited to 
congressional taxing and spending decisions. Consequently, the cognizant harm is not the 
violation of the Establishment Clause per se but the direct financial injury in the form of money 
spent in violation of the Establishment Clause. For example, offended sensibilities caused by 
mandatory Bible readings will not open the court house doors. See Doremus v. Board of Ed. of 
Hawthorne, 342 U.S. 429 (1952). See also supra notes 98-127 and accompanying text. Flast is 
all the more remarkable when one considers that the very injury that cannot give rise to standing 
under Frothingham is a necessary condition for the application of the Flast exception. The Court 
created an exception to foundational standing principles in Flast. The very purpose and effect of 
direct democracy justifies an exception to standing limitations for official proponents of 
initiatives. It strains credulity that the Establishment Clause, as grounds for an exception to 
traditional standing limitations, should be sui generis.
415 See Hollingsworth v. Perry, 133 S.Ct. at 2675 (Kennedy, J., dissenting).
416 Id.
their adversity to direct democracy was more fundamental. The most obvious reason for the majority’s refusal to grant standing to the official proponents of the California initiative was its shortsighted desire to avoid having to deal directly with the controversial issue of same-sex marriage.417 In order to avoid ruling on same-sex marriage the Court misapplied basic principles of justiciability and, in the process, did considerable damage not only to California’s initiative system, but potentially to the initiative processes of 26 other states.418

The most prominent and immediate result of the Court’s decision is to allow gay marriage in California. Far from resulting in a travesty of justice this immediate result is at least arguably correct. But, as the dissent points out, this case involves a fundamental procedural issue that may arise with respect to any initiative measure without regard to its subject matter.419 This raises the issue of whether the majority’s opinion was merely a matter of convenience or reflects more sinister motives regarding direct democracy.420 The dissent notes that for the sake of avoiding the short-term discomfort of dealing with a controversial issue the Court has violated the inherent sovereignty of the People and potentially frustrated their fundamental right to govern themselves.421

To avoid ruling on the merits of the case the majority held that the official proponents of the California initiative did not have standing to represent the State’s interest even though state officials refused to appeal. The dissent noted that the requisites for justifiability under Article III were standing and adversity.422 The dissent agreed with the majority that Article III standing is a federal, not a state, question.423 However, Justice Kennedy pointed out that under the precedents of Karcher and Arizonans for Official English the Court must first determine what persons, if any, have authority under state law to represent the State’s interests in federal court.424 The California Supreme Court specifically found that the official proponents of an initiative had this authority.425 According to the dissent, this interpretation should have been given deference by the Court and, given the Court’s precedents, it should have found that the official proponents had standing to bring the appeal.426

The Supreme Court of California noted in its opinion that under California law official proponents are an identifiable group, many of their decisions must be unanimous, and they are relatively few in number.427 In addition, the proponents’ commitment is substantial as evidenced by the great effort they put into obtaining petition signatures, their payment of various monetary fees, and their drafting of arguments for the official ballot pamphlet.428 Finally, they know and understand the purpose and operation of the proposed law.429 Proponents have gone to great

417 Id. at 2674.
418 Id. at 2674-75.
419 Id. at 2671.
420 That is, is the Court becoming hostile to direct democracy?
421 See Hollingsworth v. Perry, 133 S.Ct. at 2675 ( Kennedy, J., dissenting).
422 Id. at 2668.
423 Id.
424 Id. at 2669.
425 Id.
426 Id. at 2669-70.
427 Id.
428 Id.
429 Id.
lengths to convince voters to enact the law and, thus, they have a stake in the outcome of defending the law and the necessary commitment to provide vigorous advocacy.\footnote{Id.} The California Supreme Court stated: “proponents have a unique relationship to the voter approved measure that makes them especially likely to be reliable and vigorous advocates for the measure and to be so viewed by those whose votes secured the initiative’s enactment into law.”\footnote{Id.} The California court concluded that this special relationship makes the proponents “the most obvious and logical private individuals to ably and vigorously defend the validity of the challenged measure on behalf of the interests of the voters who adopted the initiative into law.”\footnote{Id.}

The dissent notes that requiring the official proponents to be formal agents of the state government is completely inconsistent with the history and purpose of the initiative.\footnote{Id.} Justice Kennedy states that the main objective of the initiative system is to allow for law to be made by the People directly without the involvement of State officials.\footnote{Id.} Thus, requiring the official proponents to be agents of state government makes no sense.\footnote{Id.} The dissent notes that the initiative process recognizes that all power of government ultimately resides in the People, and that one of the most precious rights of democratic process is the right of the People to make law directly.\footnote{Id.} If the proponents were to be agents of anyone, they would be agents of the People of California.\footnote{Id.} The dissent points out that the Restatement (Second) of Agency was not intended to address an agency where a principal is composed of nearly 40 million residents of a state.\footnote{Id.} Rather, in this context the word agent properly means a party that state law authorizes to represent the state’s interest in court.\footnote{Id. at 2670-71.} Thus, the official proponents are agents of the state in this context.\footnote{Id.} The dissent also notes that this is consistent with Karcher.\footnote{Id. at 2671.} The majority misapplies Karcher because it fails to grasp the concept of direct democracy. In Karcher, the individuals representing the state had authority because of the official state offices they held. In this case, proponents’ authority under California law is not dependent on their status as official officeholders, their authority comes from being official proponents of the initiative and so is unaffected by the fact that they hold no office in California’s government.\footnote{Id. at 2671-72.}

The dissent also finds the majority’s concern that the proponents are unaccountable to be not well founded.\footnote{Id.} Both elected officials and initiative proponents, the dissent points out, receive their authority to speak for the State of California directly from the People.\footnote{Id.} Moreover, elected officials whom the majority believes are acceptable agents of the State are no more

\begin{footnotes}
\item[430] Id.
\item[431] Id.
\item[432] Id.
\item[433] Id.
\item[434] Id. at 2670-71.
\item[435] Id.
\item[436] Id.
\item[437] Id. at 2671.
\item[438] Id.
\item[439] Id. at 2672.
\item[440] Id.
\item[441] Id.
\item[442] Id.
\item[443] Id. at 2671-72.
\item[444] Id.
\end{footnotes}
subject to ongoing supervision of their principal, the People of the state, than are initiative proponents. Justice Kennedy states: “At most, a Governor or attorney general can be recalled or voted out of office in a subsequent election, but proponents, too, can have their authority terminated or their initiative overridden by a subsequent ballot measure.”

The dissent also points out that the majority’s failure to understand direct democracy makes them seemingly unaware of the irony of their holding and of the damage it may due to direct democracy. The dissent states that: “the initiative’s primary purpose then was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt.” Thus, the Court's holding, which essentially gives state officials a “de facto veto”, is entirely inconsistent with the purpose of the initiative process. Moreover, the majority’s holding is inconsistent with the purpose of justiciability, which is to ensure vigorous advocacy. The Court’s holding insists that state officials whose preference is to lose the case conduct the litigation. In addition, while justiciability is meant to ensure that courts are responsible and constrained in their power, the majority’s holding means that a single district court can make a decision with far-reaching effects that cannot be reviewed. Worse, the majority’s holding results in a dispute of public policy being finally resolved by a lone district court in contravention of the political process. As Justice Kennedy states: “…here the Court refuses to allow a State’s authorized representatives to defend the outcome of a democratic election”. In essence the Court chooses to not respect the sovereignty of the People of California and the California Supreme Court in order to avoid ruling on a controversial issue. The Court’s shortsighted holding may do great long-term damage.

E. Constitutional Allocation of Power

Federal court adjudication of initiative disputes do not raise separation of powers issues. In light of the Court’s own admissions that standing limitations derive from separation of powers concerns, the federal courts should exhibit less reticence to adjudicate initiative issues. Admittedly, these cases may implicate issues of federalism. However, it is arguable that over-reliance on constitutional allocation of power principles, whether separation of powers or federalism, does violence to those very principles. For example, Lujan has probably been the Court’s most forceful statement with respect to separation of powers. “To permit Congress to convert the undifferentiated public interest . . . into an “individual right” vindicable by the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most

445 Id.
446 Id.
447 Id. at 2674.
448 Id. at 2671.
449 Id.
450 Id. at 2674.
451 Id.
452 Id.
453 Id.
454 Id.
455 See supra note 144 and accompanying text.
important constitutional duty, to “take Care that the Laws be faithfully executed.”\footnote{Lujan v. Defenders of Wildlife, 504 U.S. at 577.} Although not entirely free from doubt, it appears that Congress, as an institution, has standing to challenge the executive branch’s failure to execute laws.\footnote{See supra notes 221-33 and accompanying text.} Consequently, Congress has not transferred power, as \textit{Lujan} suggested, from the executive branch to the courts but merely delegated its own power to challenge executive action to its constituents. Moreover, assuming that \textit{Lujan’s} interpretation of citizen standing provisions is apt, could not the refusal by the courts to vindicate such rights be categorized as a transfer of power by the courts from Congress to the President and, if so, why is a transfer of power in that direction more felicitous to the separation of powers?\footnote{Congressional power to create cognizable causes of action can be inferred by the language of the Constitution. Article III vests considerable power in Congress over the judicial branch. Professor Amar argues that it was not coincidental that the judicial branch was listed last among the branches in the text. \textit{See} AMAR, supra note 10, at 207-16. Congress established the structure of the federal court system itself and, given the absence of any judicial self-policing mechanism, Congress is left to police the judicial branch. U.S. CONST., art. I, § 8, cl. 9; art. III, § 1; art. I, § 2, cl.5; art.I, § 3, cl.6. Moreover, although Article III grants the jurisdiction over “all” cases or controversies involving federal law to the courts, it does not do so for “all” other cases enumerated. U.S. CONST., art. III, § 2. Congress could exercise its power under the necessary and proper clause to determine which, if any, of such cases could be heard by the federal courts. U.S. CONST., art.II, § 3 ( emphasis provided ).}  

The Court’s standing jurisprudence may be, in some respects, an abdication of \textit{Marbury v. Madison}. The “Take Care” Clause imposes a duty upon the President – “\textit{he shall take Care that the Laws be faithfully executed.”}\footnote{\textit{Lujan} is difficult to square with the permissibility of \textit{qui tam} actions. \textit{See} supra note 84. These actions essentially empower citizens to function as private attorneys general. Citizens’ stakes in these controversies are often indistinguishable from the interests asserted in general taxpayer claims against the government. In fact, that a bounty exists at all evidences the fact that there may be little intrinsic motivation in the citizenry to pursue such claims. However, standing is congressionally created by whole cloth merely by providing a reward. \textit{See supra} notes 98-100 and accompanying text.} Whatever deference is appropriate to executive branch actions, surely such deference should not carry with it a de facto grant of constitutional authority to violate the law.\footnote{Federalism concerns are most pronounced when the equitable powers of the federal courts are enlisted to prevent a state from administering its own laws. \textit{See e.g.}, City of Los Angeles v. Lyons, 461 U.S. 95, 112 ( 1983 ); Rizzo v. Goode, 423 U.S. 362, 378-81 ( 1976 ); Stefanelli v. Minard, 342 U.S. 117, 120 ( 1951 ).} The Court’s narrow application of the \textit{Flast} exception – congressional spending and taxing decisions only – illustrates the incoherence of the Court’s reliance on separation of powers to avoid adjudication on the merits. According to \textit{Flast}, the Establishment Clause protects an interest important enough to justify an exception to its traditional aversion to taxpayer standing.\footnote{See supra notes 98-100 and accompanying text.} It is difficult to discern a principled reason why such an important interest is often left unprotected against executive action.  

Similarly, the Court’s standing holdings are often difficult to square with principles of federalism.\footnote{Federalism concerns are most pronounced when the equitable powers of the federal courts are enlisted to prevent a state from administering its own laws. \textit{See e.g.}, City of Los Angeles v. Lyons, 461 U.S. 95, 112 ( 1983 ); Rizzo v. Goode, 423 U.S. 362, 378-81 ( 1976 ); Stefanelli v. Minard, 342 U.S. 117, 120 ( 1951 ).} The Supremacy Clause is an express limitation of state powers.\footnote{Whatever deference is appropriate to executive branch actions, surely such deference should not carry with it a de facto grant of constitutional authority to violate the law.}
retained powers reside in the states, such powers do not extend to violations of federal law. The Court has held that standing could be maintained as a result of a state court judgment. In *Asarco, Inc. v. Kadish*, a state court found in favor of the plaintiffs who alleged that certain mineral leases entered into by a state agency violated federal law. The plaintiffs – analogous to taxpayers - would not have maintained standing had the case initially been brought in federal court. However, the petitioners/defendants were challenging a state court judgment against them. Consequently, they had standing in federal court. *Asarco*, therefore, gives a state court final say if it holds that the state did not violate federal law. However, if it holds otherwise, then federal jurisdiction may be invoked. In addition to the anti-regulatory bent of this asymmetry, the irony of this result is undeniable - a state court decision that may itself violate the Supremacy Clause is unreviewable while one that does not is reviewable.

*Hollingsworth* is also inconsistent with federalism principles. The California Supreme Court expressly stated that, under California law, the plaintiffs had the authority to represent the state’s interest in that case. The Court made clear that state law cannot override federal constitutional limitations. However, fealty to federalism principles would have caused the Court to defer to state law if such state law could plausibly co-exist with federal law. The ambiguity of Article III appears to leave ample room for authorized state representatives to maintain federal standing. Rather than seeking comity with state law, the Court labored to find a distinction between an agent of the state and an authorized representative of the state.

It is ironic that the Court’s holding in *Hollingsworth* has the effect of providing state courts with the final say on federal constitutional issues in similar circumstances if it rules that the measure in question is unconstitutional. For example, had the constitutionality of Proposition 8 been decided by the California Supreme Court, standing to litigate the measure before the U.S. Supreme Court would be maintained if the state court held the measure to be constitutional. Same-sex couples denied marital status would have standing to appeal. If, on the other hand, the California court held the measure to be unconstitutional then, absent a defense from the state, the decision is final. The Court is unwilling for a state court to influence federal standing rules but is seemingly comfortable with giving such a court the final word on the meaning of the Fourteenth Amendment. Moreover, the Court’s holding does not remove state influence from federal standing decisions in similar circumstances. Rather than a bright-line rule that would apply in all circumstances, federal standing will be determined *ad hoc*. Thus federal jurisdiction turns either

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463 “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .” U.S. CONST., art. VI, cl.2.
465 Id. at 612-17.
466 Id. at 617-18.
467 Some critics of the Court’s standing decisions claim that this asymmetry favors the targets of regulation over the beneficiaries of regulations and has facilitated the phenomenon of regulatory capture. See Elliott, *supra* note 218, at 172-74.
468 “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .” U.S. CONST., art. VI, cl.2.
469 See *supra* note 258 and accompanying text.
on whether state executive officials decide to defend a measure or on whether a state court decides that a measure is constitutional. This result appears to turn federalism on its head.

Finally, it is possible that the Court will decide a similar issue on the merits. Another state’s constitutional or statutory prohibition on same-sex marriage may reach the Court if either the state’s highest court or a federal circuit court holds the measure unconstitutional and state authorities defend the measure or, conversely, if those courts hold the measure constitutional. If the Court were to hold such a measure constitutional then, unless California authorities have a change of heart, California voters have two options to have the law enforced – elect new executive officials that will enforce the initiative or enact a new initiative. It seems counterintuitive that the uniform application of federal law should turn on the results of state elections.

V. CONCLUSION

Direct democracy procedures are a manifestation of the fact that, in the United States, sovereignty ultimately resides solely with the People. The Court’s holding in Hollingsworth is directly at odds with this fact. The Court resorted to its largely self-created, confusing, and inconsistent standing doctrine to allow the political establishment to usurp the People’s sovereignty. In effect, in certain circumstances the will of the People, expressed through the enactment of an initiative, can be thwarted by the very officials that the initiative process was designed to bypass. Although we believe that nothing in Article III precludes citizens from defending their handiwork, we recognize that the Court, given existing precedents, is unlikely to grant standing to citizens in general. However, we believe that the Court could, and should, create a categorical exception to its standing doctrine to allow the official sponsors of initiatives to maintain standing to defend duly enacted initiative measures. Such an exception would give overt recognition to the unique issues raised by laws enacted through direct democracy procedures, provide fealty to principles of federalism and, most importantly, keep faith with the Constitution’s recognition of the People as the only sovereign.