

# NOTES

## A REVERSAL OF *PACIFIC STATES* IN ARTICLE III GARB

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### INTRODUCTION

On June 25, 2013, in an ideologically divided 5-4 opinion, the Supreme Court struck down section 4 of the Voting Rights Act—the coverage formula that had determined which jurisdictions were required to seek preclearance of changes to their election laws and redistricting plans.<sup>1</sup> In doing so, the Court issued a sharply worded decision emphasizing the “equal sovereignty” of the

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1. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

states. Writing for the majority, Chief Justice Roberts declared that section 4 represented a “dramatic departure from the principle that all States enjoy equal sovereignty.”<sup>2</sup> Under our constitutional structure, the Chief asserted, “[s]tates retain broad autonomy in structuring their governments.”<sup>3</sup> And, according to the majority, continuing a system where “one State waits nine months or years and expends funds to implement a validly enacted law,” while “its neighbor can typically put the law into effect immediately, through the normal legislative process” conflicts with that “fundamental” constitutional principle.<sup>4</sup>

But what a difference a day can make. The very next day, the Chief came down starkly different when writing for another, more unusually aligned,<sup>5</sup> 5-4 majority. In *Hollingsworth v. Perry*,<sup>6</sup> the Court held that the proponents of California’s popularly enacted ban on same-sex marriage lacked Article III standing to appeal a federal district court’s ruling striking down that ban in the face of state officials’ unwillingness to appeal.<sup>7</sup> While the majority ostensibly did

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2. *Id.* at 2618.

3. *Id.* at 2623.

4. *Id.* at 2624. Given the decision’s relative infancy, we do not yet know how broadly it will be read. In its most extreme form, an “equal sovereignty” test could prohibit the federal government from distinguishing among states in any way. As Justice Ginsburg noted in her *Shelby County* dissent, “[f]ederal statutes that treat States disparately are hardly novelties” such that the Court’s “unprecedented extension of the equal sovereignty principle outside its proper domain—the admission of new States—is capable of much mischief.” *Id.* at 2649 (Ginsburg, J., dissenting). Yet, because the *Shelby County* majority proceeded to consider the government’s justifications for treating states differently, the decision can be read to imply that Congress may differentiate among states when its reasons for doing so are sufficiently strong. *See id.* at 2628-30 (majority opinion) (considering the government’s proffered rationales). Those circuits that have since interpreted *Shelby County* have similarly identified several limitations on the opinion’s reach. *See Mayhew v. Burwell*, 772 F.3d 80, 93-97 (1st Cir. 2014) (noting, among other things, that *Shelby County*’s reach is limited to federal laws that intrude on issues of sensitive areas of state or local policymaking); *Nat’l Collegiate Athletic Ass’n v. Governor of N.J.*, 730 F.3d 208, 237-39 (3d Cir. 2013) (identifying similar, and additional, limitations).

5. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). While the decision in *Shelby County* divided along party lines, the decision in *Perry* broke along less traditional lines. Chief Justice Roberts and Justice Scalia joined three of the court’s more liberal members—Justices Breyer, Ginsburg, and Kagan—to hold that the proponents did not have standing to defend the state’s law. Meanwhile, the remaining more liberal justice, Justice Sotomayor, joined with three of the Court’s Republican appointees—Justices Kennedy, Thomas, and Alito—to argue that the proponents did have standing. *Id.*

6. *Id.*

7. These refusals extended across party lines. Both Governor Arnold Schwarzenegger and then-Attorney General Brown refused to defend the measure—popularly referred to as Proposition 8—in federal court. *See Maura Dolan, Schwarzenegger Decides Against Defending Prop. 8 in Federal Court*, L.A. TIMES (June 18, 2009), <http://articles.latimes.com/2009/jun/18/local/me-gay-marriage18>. Brown went so far as to affirmatively state in his answer to the lawsuit that “the Attorney General admits that Proposition 8 denies same-sex couples the right to civil marriage in California, and that it therefore violates the Fourteenth Amendment to the United States Constitution.” Answer of Attorney General Edmund G. Brown, Jr. at ¶ 7, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-cv-02292-VRW), 2009 WL 1748382. Following Brown’s election as governor, newly elected Attorney General Kamala Harris announced that she,

not “question California’s sovereign right to maintain an initiative process,” the majority nevertheless maintained that the lack of a formal, government-body-sanctioned agency relationship between the law’s proponents and state officials was fatal to the proponents’ efforts to invoke the state’s interest on appeal.<sup>8</sup>

The *Hollingsworth* majority reached this holding despite precedent stating that it is enough, for Article III purposes, that state law permits a state’s *legislative body* to invoke the state’s interest in defending a law against constitutional attack.<sup>9</sup> Indeed, on the basis of that precedent the Ninth Circuit had held that it was California’s “prerogative” as an “independent sovereign[.]” to determine whether ballot proponents should be permitted to invoke the state’s interest—as the California Supreme Court had explicitly interpreted the state’s initiative laws to do.<sup>10</sup> Nevertheless, the *Hollingsworth* majority refused to defer to California’s sovereign choice.<sup>11</sup>

Yet, since 1912, federal courts have declined to question the validity of direct democracy as a method for states to legislate or structure their governments. That year, the Supreme Court held in *Pacific States Telephone & Telegraph Co. v. Oregon*<sup>12</sup> that a constitutional claim that alleges a state violates the Constitution’s Guarantee Clause<sup>13</sup> by using the initiative or referendum presents, by its “very essence,” a non-justiciable political question.<sup>14</sup> Instead, the Court left it up to Congress to determine whether to seat the representatives of a state that chooses to make use of direct democracy.<sup>15</sup> Any other result, the Court wrote in *Pacific States*, would “authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it, and thus overthrow the Constitution.”<sup>16</sup>

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too, would not defend Proposition 8. See Aaron Glantz, *Kamala Harris Won’t Defend Prop. 8*, BAY CITIZEN (Dec. 2, 2010, 11:58 AM), <https://www.baycitizen.org/blogs/pulse-of-the-bay/kamala-harris-wont-defend-prop-8>.

8. *Hollingsworth*, 133 S. Ct. at 2667, 2666-67.

9. See *id.* at 2664 (noting that “state law may provide for other officials to speak for the State in federal court, as New Jersey law did for the State’s presiding legislative officers in *Karcher*”); see also *Karcher v. May*, 484 U.S. 72, 84 (1987) (White, J., concurring) (explaining that the Court’s decision “acknowledged that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court”); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997).

10. See *Perry v. Brown*, 671 F.3d 1052, 1071 (9th Cir. 2012). The California Supreme Court, too, read *Karcher* as “strongly indicat[ing] that a federal court will look to *state law* to determine *whom the state* has authorized to assert *the state’s interest* in the validity of the challenged measure.” See *Perry v. Brown*, 265 P.3d 1002, 1011 (Cal. 2011) (emphasis in original).

11. See *Hollingsworth*, 133 S. Ct. at 2666.

12. 223 U.S. 118 (1912).

13. U.S. CONST. art. IV, § 4.

14. *Pacific States*, 223 U.S. at 151.

15. *Id.* at 147 (quoting *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849)).

16. *Id.* at 142.

A century later, however, the Court has effectively done in *Hollingsworth*, through Article III, what it was unwilling to do through the Guarantee Clause in *Pacific States*. By mandating an agency relationship as a constitutional requirement for standing under Article III, the Court has made a political value judgment about the individuals or entities that should be able to step into the shoes of a state. The Court has decided—*as a constitutional matter*—what type of state government is desirable or, at the very least, what kinds of state actors will be recognized in federal courts. In effect, the Court has displaced the will of California’s voters with its own idea about how state government should be structured. Whatever one thinks about the merits of a state’s ban on same-sex marriage,<sup>17</sup> any student of federalism should be disheartened.

If the Court takes seriously the equal sovereignty principle *Shelby County* so strongly championed a single day earlier, the holding in *Hollingsworth* undoubtedly offends that notion.<sup>18</sup> The Court’s opinion discriminates by dividing states into at least two categories—with major implications for the defense of state laws in federal courts. In those states with a more traditional legislative setup, the legislators who pass a law may step in to defend that law in the place of state executive officials if state law so permits. In those states featuring the direct initiative, by contrast, the people who enact a measure have no method to step in and defend that law when executive officials decline to defend it, even if state law says otherwise.<sup>19</sup> In effect, as has happened in California, executive officials wield a significant veto power over the people despite the fact that direct democracy is *explicitly* intended as a means to bypass the state’s elected officials.

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17. Indeed, although the Court failed to reach the merits in *Hollingsworth*, a mere two years later the Court held that state constitutional bans on same-sex marriage are unconstitutional. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

18. Strikingly, the two opinions appear *back to back* in the Supreme Court reporter, with the dissent in *Shelby County* ending on and the syllabus for *Hollingsworth* beginning on page 2652 of volume 133.

19. Admittedly, under the reasoning of *Hollingsworth* it would likely be possible for the legislature in a state like California to step in if state law also so provided. But for two distinct, yet related, reasons that imperfect solution does not remedy the problem faced by those states that use direct democracy. First, direct democracy is intended to formally and explicitly circumvent both legislative and elected officials, raising doubts that a legislature would be willing to defend a measure, warts and all, that they played no role in enacting. Indeed, many states, like California, do not permit the legislature to amend popularly enacted laws at all. See Bruce E. Cain & Kenneth P. Miller, *The Populist Legacy: Initiatives and the Undermining of Representative Government*, in DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 33, 41 (Larry J. Sabato et al. eds., 2001) (“Initiative constitutional amendments . . . can only be altered by another constitutional amendment.”). Second, in some cases the state legislature may share the policy preferences of state executive officials. In California, for example, the legislature had twice passed a marriage equality bill before the California Supreme Court interpreted the state’s constitution to require the practice. See Jill Tucker, *Schwarzenegger Vetoes Same-Sex Marriage Bill Again*, SFGATE (Oct. 12, 2007, 4:00 AM), <http://www.sfgate.com/bayarea/article/Schwarzenegger-vetoes-same-sex-marriage-bill-again-2497886.php>.

As Justice Kennedy points out in his *Hollingsworth* dissent, the decision is set to have major implications. Twenty-seven states feature some form of direct democracy.<sup>20</sup> And “in light of the frequency with which initiatives’ opponents resort to litigation, the impact of [executive officials’] veto could be substantial.”<sup>21</sup> Anecdotal evidence indicates that the frequency with which executive officials refuse to defend state laws has increased recently. For example, in Illinois, Attorney General Lisa Madigan declined to defend the state’s same-sex marriage ban that had been on the books since 1996.<sup>22</sup> In Minnesota, both the Secretary of State and Attorney General announced that they would not defend a proposed voter ID initiative before it was even placed on the ballot.<sup>23</sup> In Nebraska, after a federal district court invalidated a state abortion-screening law, the state’s Attorney General refused to appeal that decision.<sup>24</sup> Wisconsin’s Governor and Attorney General both declined to defend a state law granting hospital visitation rights to gay couples, arguing that the law was inconsistent with the state’s ban on gay marriage.<sup>25</sup> And state attorneys general have opined that they have an obligation not to defend unconstitutional laws or have outright stated they would vote against particular proposed constitutional amendments.<sup>26</sup>

Regardless of where one falls on the wisdom of California’s same-sex marriage ban, then, the standing question at issue in *Hollingsworth* is set to have major consequences for a host of popularly enacted measures of all ideological

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

21. *Id.* at 2671 (citing KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS* 106 (2009)). *But see* Matthew I. Hall, *Standing of Intervenor Defendants in Public Law Litigation*, 80 *FORDHAM L. REV.* 1539, 1562 (2012) (“The standing to defend of intervenor-defendants . . . becomes a determinative issue in a relatively small number of cases: primarily those in which the intervenor seeks appellate review of a trial court judgment not appealed by the original defendant, or seeks to assert defenses not raised by a party at the trial level.”).

22. *See* Tammy Webber, *Illinois Not Defending Gay Marriage Ban*, *BOSTON GLOBE* (June 22, 2012), <http://www.bostonglobe.com/news/nation/2012/06/21/illinois-prosecutors-refuse-defend-gay-marriage-ban/pApXn5pjXQUaAK5UxHnzyM/story.html>.

23. *See* Jim Ragsdale, *Voter ID Fight Escalates as Ritchie Bows out of Case*, *STAR TRIBUNE* (June 15, 2012, 5:50 AM), <http://www.startribune.com/politics/statelocal/159139005.html>.

24. *See* *Nebraska Attorney General Won’t Defend Abortion-Screening Law*, *FOX NEWS* (Aug. 18, 2010), <http://www.foxnews.com/politics/2010/08/18/nebraska-attorney-general-refuses-defend-states-abortion-screening-law>.

25. *See* John Rony, *Wisconsin’s Walker Refuses to Defend Gay Rights Law*, *REUTERS* (May 18, 2011, 5:30 PM), <http://www.reuters.com/article/2011/05/18/us-wisconsin-gays-idUSTRE74H72J20110518>.

26. *See, e.g.*, Scott Woledge, *N.C.’s Attorney General: Amendment 1 ‘Unclear, Unwise, and Unnecessary’ and ‘Should Be Avoided,’* *DAILY KOS* (Apr. 25, 2012, 11:15 AM), <http://www.dailykos.com/story/2012/04/25/1086327/-NC-s-Attorney-General-Amendment-1-unclear-unwise-and-unnecessary-should-be-avoided> (discussing North Carolina Attorney General’s public declaration he would vote against amendment banning same-sex marriage because it is poorly drafted and “will also result in a significant amount of litigation”).

and political stripes. When measures like these are passed by the people, and when the measure's challengers succeed in striking it down in federal district court, any refusal to appeal by state executive officials will be outcome determinative, regardless of whether a federal appellate court might find the people's measure valid. That the Court has enshrined such an outcome in Article III certainly infringes on states' "broad autonomy in structuring their governments."<sup>27</sup>

This Note proceeds in three parts. Part I first discusses the *Pacific States* decision and its rationale and then proceeds to describe the relevant Supreme Court opinions prior to *Hollingsworth* that bear on the standing issue. Part II then describes the majority and dissenting opinions in *Hollingsworth* and explains why, in essence, the Court has upended the holding of *Pacific States*. Finally, Part III discusses several consequences that will result from the majority's implicit reversal of *Pacific States* in *Hollingsworth*.

### I. SETTING THE SCENE: THE RELEVANT PRECEDENTS

To understand the gravity of the Supreme Court's decision in *Hollingsworth*, it is necessary to discuss the precedents through which the Court analyzed the question before it. *Pacific States*, while not discussed anywhere in the *Hollingsworth* majority or dissent, laid the foundation for direct democracy—and its reasoning has particular resonance in the wake of the *Hollingsworth* majority's holding. That case is discussed first, followed by those cases setting forth the state's authority to determine who may stand in its shoes in federal court.

#### A. *Pacific States: Direct Democracy Legitimized*

Since 1912, federal courts have not questioned the constitutionality of direct democracy at a structural level. That year, in *Pacific States Telephone & Telegraph Co. v. Oregon*,<sup>28</sup> the Supreme Court held that whether methods of direct democracy offended the Federal Constitution's Guarantee Clause was a non-justiciable political question.

The facts are straightforward. Oregon had amended its constitution in 1902 to permit legislation through direct democracy,<sup>29</sup> authorizing both the initiative and the referendum.<sup>30</sup> Via initiative, Oregon's voters subsequently enacted a

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27. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013).

28. 223 U.S. 118 (1912).

29. *Id.* at 133.

30. *Id.* at 134. These two methods differ. The initiative permits the people to directly propose and enact a state statute with absolutely no input from the state legislature. By contrast, the referendum involves the state legislature to some degree; the referendum allows the people to essentially veto a measure that has already been passed by the state legislature. See Cain & Miller, *supra* note 19, at 41.

law that taxed telephone and telegraph companies.<sup>31</sup> One of the corporations subject to that tax, the Pacific States Telephone & Telegraph Company, failed to pay the newly promulgated taxes. In its answer to a state enforcement action to collect those taxes, Pacific States alleged, among other defenses, that Oregon's method of enacting the law conflicted with the Federal Constitution.<sup>32</sup> Specifically, Pacific States argued that "the creation by a state of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character" and, in doing so, violated Article IV of the Constitution which states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."<sup>33</sup>

The Supreme Court held unanimously, however, that it was without jurisdiction to decide the dispute. The Court relied, in part, on a far earlier case—*Luther v. Borden*—to hold that the question was non-justiciable and within the exclusive province of Congress.<sup>34</sup> According to the Court, for Congress to seat the legislators from a particular state Congress must decide "what government is established in the state" and then "whether it is republican or not."<sup>35</sup> Congress's determination is then "binding on every other department of the government," including the judiciary.<sup>36</sup> The Court ultimately dismissed the case, holding that "the issues presented, in their very essence, are, and have long since by this court been, definitively determined to be political and governmental . . . and not, therefore, within the reach of judicial power."<sup>37</sup>

In the wake of *Hollingsworth*, the Court's reasoning in *Pacific States* is particularly relevant. The Court charged that accepting the company's argument—that the Court could decide whether a state government was sufficiently republican under the Guarantee Clause—would pose "anomalous and destructive effects upon both the state and national governments."<sup>38</sup> If any citizen could challenge the actions of his state in federal court on that basis, the judiciary might consistently be asked to "disregard the existence in fact of the state" and could even be forced, as a remedy, "to build by judicial action upon the ru-

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31. *Pacific States*, 223 U.S. at 135.

32. *Id.* at 136.

33. *Id.* at 137 (quoting U.S. CONST. art. IV, § 4).

34. *Id.* at 147. In *Luther*, the Court considered a damages action for trespass that, bizarrely, implicated the basic question of which body constituted the lawful government of Rhode Island. The relevant action took place during the Dorr Rebellion. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 35-37 (1849). During that rebellion, the chartered government of Rhode Island and a group of rebels both claimed that they constituted the official government. Borden, a defendant and the alleged trespasser, was part of the original, chartered government, which had been in existence since independence. *Id.* at 35. The defendants in the case argued that the "acts done by them, charged as trespass, were done under the authority of the charter government." *Pacific States*, 223 U.S. at 143.

35. *Id.* at 147 (quoting *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849)).

36. *Id.*

37. *Id.* at 151.

38. *Id.* at 141.

ins of the previously established government a new one” which would “impl[y] the power [of the court] to control the legislative department of the government of the United States in the recognition of such new government and the admission of representatives therefrom, as well as to strip the executive department of that government of its otherwise lawful and discretionary authority.”<sup>39</sup>

The Court was plainly uncomfortable with substituting its own political judgment for that of Congress or state governments. The idea that the Constitution somehow “authorize[s] the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it,” the Court wrote, “rests upon the assumption that the states are to be guaranteed a government republican in form by destroying the very existence of a government republican in form in the nation.”<sup>40</sup> Instead, the “ultimate power of sovereignty is in the people; and they, in the nature of things, if the government is a free one, must have a right to change their constitution.”<sup>41</sup> According to the Court, whether Congress then chooses to recognize that reorganized state government is, in its “very essence,” a “political and governmental” judgment.<sup>42</sup>

#### B. *Karcher v. May: A State’s Choice of Who May Invoke Its Interests*

Unencumbered by basic, structural constitutional challenges, direct democracy has proliferated since *Pacific States* in those states that have chosen to embrace it. And, when structuring their state governments, several states have made parallel political judgments relating to *who* may exercise the state’s authority in federal court.

The Supreme Court has consistently recognized that a sovereign state, as a litigant, unquestionably meets Article III’s “case and controversy” requirement in federal court because “a State has standing to defend the constitutionality of its statute[s].”<sup>43</sup> The Court has done so without regard to any of the traditional standing considerations, including whether the state faces a concrete and particularized injury in fact.<sup>44</sup> And in *Karcher v. May*<sup>45</sup> a unanimous Court held that state law may affirmatively permit others (in that case members of the state legislature) to invoke the state’s interest in defending state statutes when executive officials decline to do so.

*Karcher* featured a fairly straightforward example of executive non-defense. In 1982, the New Jersey legislature enacted a statute requiring public schools to allow students to observe a moment of silence before the beginning

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39. *Id.* at 142.

40. *Id.*

41. *Id.* at 145.

42. *Id.* at 151.

43. *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

44. *See, e.g., Allen v. Wright*, 468 U.S. 737, 770 (1984).

45. 484 U.S. 72 (1987).

of each school day.<sup>46</sup> New Jersey's Governor had vetoed the measure, but that veto was subsequently overridden by the state legislature.<sup>47</sup> Upon enactment, however, the "New Jersey Attorney General immediately announced that he would not defend the statute if it were challenged" and, unsurprisingly, a lawsuit was filed challenging the statute on Establishment Clause grounds within a month of its effective date.<sup>48</sup>

Because it was clear that none of the named defendants were willing to defend the statute, the Speaker of the New Jersey General Assembly (Alan J. Karcher), and the President of the state senate (Carmen A. Orechio) intervened in the district court and assumed the burden of defending the statute.<sup>49</sup> Following a trial, the district court found the statute unconstitutional and Karcher and May appealed.<sup>50</sup> The Third Circuit affirmed the district court's holding on the merits.<sup>51</sup>

The Supreme Court reversed and found Karcher and Orechio lacked standing. In doing so, however, the Court did not question New Jersey's authority to delegate its interest to its state legislature, generally. Nor did it ask any of the traditional Article III questions as a prerequisite to validating that delegation. Instead, the outcome in *Karcher* turned on the application of the state's delegation to Karcher and Orechio, specifically. The Supreme Court noted that Karcher and Orechio had "lost their posts as presiding legislative officers" after the appellate court had ruled, and that their successors had not sought to continue the appeal.<sup>52</sup> On that basis, the Court found standing wanting because the former officials "lack authority to pursue [the] appeal on behalf of the legislature."<sup>53</sup>

Admittedly, the *Karcher* opinion is somewhat opaque about whether New Jersey could validly permit its legislature to invoke its interest, or whether the Court, instead, simply *assumed* the state to have that power but found that, regardless, the particular petitioners did not satisfy the requirements of the state's law.<sup>54</sup> But Justice White, in his concurrence, appears to acknowledge that hold-

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46. *See id.* at 74.

47. *Id.*

48. *Id.* at 75.

49. *Id.*

50. *Id.* at 75-76.

51. *Id.* at 76; *see also* *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985).

52. *Karcher*, 484 U.S. at 76.

53. *Id.* at 81.

54. In a separate portion of the opinion, after discussing the legislators' lack of standing before the Supreme Court, Justice O'Connor's majority opinion did implicitly hold that New Jersey's conferral of standing to the legislature was permissible such that standing was valid in the court of appeals. The majority refused to vacate the decision below because "the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals" and Karcher and Orechio, at those points, were the leaders of the legislature. *Id.* at 82.

ing.<sup>55</sup> And, in any event, the Court's subsequent cases, including *Hollingsworth*, make this holding explicit.<sup>56</sup> Commentators likewise agree that *Karcher* holds that the state may delegate its interest and confer standing upon another party.<sup>57</sup> Thus, the Court's decision in *Karcher* stands for the proposition that New Jersey could permissibly allow its legislative leaders to invoke the state's interest and establish standing in federal court.

C. *Arizonans for Official English v. Arizona: Suggesting Karcher Could Apply to Direct Democracy*

*Karcher* indicated that states could designate entities beyond the state attorney general or other executive officials to appear in court and defend a state's interest. Yet, other than the implicit reach of its holding in *Karcher*, the Supreme Court's precedent exploring who, beyond state legislative leaders, might invoke the state's interests is limited. Prior to *Hollingsworth*, the Court had only considered the standing of ballot proponents in one case: *Arizonans for Official English v. Arizona*, and only then in dicta. But the Court's suggestion in that case runs directly counter to the outcome in *Hollingsworth*. To appreciate why *Hollingsworth* represents such a dramatic departure from *Pacific States*, an understanding of *Arizonans* is critical.

There, the Court considered an appeal from a Ninth Circuit holding finding overbroad an Arizona ballot proposition declaring English the official language of state government functions and actions. Arizona's Governor, Rose Mofford, had opposed the ballot measure but had pledged to comply with the initiative once passed. Once a federal district court held the measure unconstitutional, however, Governor Mofford announced that she would not appeal that decision.<sup>58</sup> At that point, *Arizonans for Official English* (AOE), the organization that proposed and funded the initiative, and AOE's chairman

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55. *Id.* at 84 (White, J., concurring) (explaining that the Court's decision "acknowledged that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court").

56. *See, e.g.,* *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664 (2013) (noting that "state law may provide for other officials to speak for the State in federal court, as New Jersey law did for the State's presiding legislative officers in *Karcher*"); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) ("We have recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests.").

57. *See, e.g.,* Hall, *supra* note 21, at 1574.

58. The case originally named several parties in addition to the Governor. But the district court held early in the case that those parties were improperly added and should be dismissed. Those parties included: the State of Arizona (due to state sovereign immunity), the Attorney General (due to a lack of power to enforce the provision), and the Director of Administration (who had not threatened any adverse action against the plaintiff under the newly enacted amendment). *Arizonans for Official English*, 520 U.S. at 53-54. Because of this decision, at the time the district court's holding was handed down the Governor remained the only proper government party. *Id.* at 54.

sought to intervene in the case to pursue an appeal.<sup>59</sup> The district court denied the motion, explaining that “[i]f the State lost the opportunity to defend the constitutionality of [the measure] on appeal . . . it was ‘only because Governor Mofford determine[d] that the state’s sovereign interests would be best served by foregoing an appeal.’”<sup>60</sup> The Ninth Circuit, however, reversed. Reasoning by analogy, the court held that AOE had standing because the state’s legislature would have standing to defend an identical measure had it been passed by the legislature.<sup>61</sup> After discussing *Karcher*, the Ninth Circuit concluded that AOE “stands in an analogous position to a state legislature.”<sup>62</sup>

A unanimous Supreme Court reversed, although on a separate ground: mootness. Because the plaintiff had left her state employment before the Ninth Circuit had ruled on the standing issue, the Supreme Court held that the plaintiff’s claim for relief was moot.<sup>63</sup> The Court did consider the standing issue in dicta, however.<sup>64</sup> The Court described AOE’s standing arguments as asserting a “quasi-legislative interest.” And the Court acknowledged that state legislators may defend a particular statute, “consonant with Article III,” if state law provides authority to “represent the State’s interests.”<sup>65</sup> Yet, the Court concluded that, as to AOE it was nevertheless “aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.”<sup>66</sup>

Thus, a straightforward reading of the Court’s unanimous opinion implies that the nature of Arizona’s state law, alone, was outcome determinative on the federal standing question. Professor Matthew Hall concurs with this assessment, reading *Arizonans* as suggesting that “a state law authorizing ballot proposition sponsors to represent the interests of the state would have supported standing, as in *Karcher*, but [that the Court] found no such state law on the books.”<sup>67</sup>

59. *Id.* at 56. Governor Mofford even stated she would have “no objection to . . . the pursuit of an appeal by any other party.” *Id.*

60. *Id.* at 57 (quoting *Yniguez v. Mofford*, 130 F.R.D. 410, 413 (D. Ariz. 1990)).

61. *See Yniguez v. Arizona*, 939 F.2d 727, 733 (9th Cir. 1991).

62. *Id.* at 732, 733.

63. *Arizonans for Official English*, 520 U.S. at 67.

64. The passage is dicta because, although the Court expressed “grave doubts whether [Arizonans for Official English] and [its chairman] have standing under Article III to pursue appellate review,” the Court went on to explain that “[n]evertheless, we need not definitively resolve the issue” because “[w]e may resolve the question whether there remains a live case or controversy with respect to Yniguez’s claim without first determining whether AOE or Park has standing to appeal because the former question, like the latter, goes to the Article III jurisdiction of this Court and the courts below, not to the merits of the case.” *Id.* at 66.

65. *Id.* at 65 (citing *Karcher v. May*, 484 U.S. 72, 82 (1987)).

66. *Id.*

67. Hall, *supra* note 21, at 1583. Howard M. Wasserman, while supporting the conclusion in Hall’s article, argues that the standing issue would (and should) be resolved by eliminating state sovereign immunity so that, regardless of the particular individual mounting a defense, the issue is removed “from the rubric of Article III and standing” such

By contrast, some have argued that *Arizonans* establishes that ballot proponents must also satisfy the traditional Article III requirements—including identifying an injury in fact—in addition to invoking the state’s interest under some provision of state law.<sup>68</sup> This is a misreading of the Court’s decision.<sup>69</sup> A fair reading of the *Arizonans* opinion demonstrates that the discussion of these factors was related to AOE’s assertion of associational standing as an alternative ground for standing. Indeed, following its disposition on AOE’s attempts to invoke the state’s interest in line with *Karcher*, the Court stated that “AOE also asserts representational or associational standing.”<sup>70</sup> Had the Court intended to apply the injury in fact and other standing requirements to an effort to invoke the state’s interest it could have (and likely would have) done so explicitly. Moreover, in *Karcher* itself the Court never suggested that the leaders of New Jersey’s legislature were required to meet those requirements. And, while the Court referred to state law as designating an “agent,” nowhere in the Court’s decision did it imply that such an entity must meet the strictures of the Restatement of Agency.<sup>71</sup> Thus, the best reading of *Arizonans for Official English* is that it suggests state law may establish proponents’ authority to invoke the state’s interest to defend an abandoned measure without a corresponding need to show a particularized injury.

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that “[t]he government is the named defendant with a stake in the outcome of litigation and . . . provid[ing] adverseness that Article III demands.” Howard M. Wasserman, *Rejecting Sovereign Immunity in Public Law Litigation*, 80 FORDHAM L. REV. RES GESTAE 76, 78 (2012).

68. For example, Andrew Kim asserts that the Court’s decision in *Arizonans for Official English* establishes that, in addition to authorization to assert the state’s interests “the question of whether a litigant has Article III standing is *separate* from the inquiry as to whether a state has properly and discernibly conferred its interests to a non-state party.” Andrew Kim, Note, “*Standing*” in the Way of Equality? *The Myth of Proponent Standing and the Jurisdictional Error in Perry v. Brown*, 61 AM. U. L. REV. 1867, 1877 (2012); see also Sara Rappaport, Comment, *California Notwithstanding: Why the Ninth Circuit Erred in Following the California Supreme Court’s Grant of Standing to the Proponents of Proposition 8*, 21 AM. U. J. GENDER SOC. POL’Y & L. 163, 180-81 (2012).

69. As the Court explained, AOE asserted two theories of standing. The first, as discussed, was a version of quasi-legislative standing, which the court rejected because of a lack of authority under state law. In the alternative, AOE asserted associational standing. Although the Court did discuss the need for an injury in fact, that discussion was tied to the associational standing argument, because, as the court explained, “[a]n association has standing to sue or defend in such capacity, however, only if its members would have standing in their own right”—i.e., only if an individual member could establish a concrete and particularized injury. *Arizonans for Official English*, 520 U.S. at 65-66; see also, e.g., *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977). For the purposes of associational standing only, the Court held that the “requisite concrete injury to AOE members is not apparent.” *Arizonans for Official English*, 520 U.S. at 66.

70. *Arizonans for Official English*, 520 U.S. at 65 (emphasis added).

71. Justice Kennedy made this point in his *Hollingsworth* dissent. See *infra* note 117 and accompanying text.

D. *The California Supreme Court and Ninth Circuit Rely on Karcher and Arizonans*

Relying on *Karcher*, the California Supreme Court and the Ninth Circuit read *Arizonans* to hold as much. After the adverse district court ruling, Proposition 8's proponents sought to appeal and, believing it necessary to determine the standing question "in light of *Arizonans for Official English v. Arizona*," the Ninth Circuit certified to the California Supreme Court the question of whether, under California law, the proponents possessed "authority to assert the State's interest in the initiative's validity."<sup>72</sup> The Ninth Circuit opined that if California did "grant the official proponents of an initiative the authority to represent the State's interest in defending a voter-approved initiative when public officials have declined to do so or to appeal a judgment invalidating the initiative, then Proponents would also have standing to appeal on behalf of the State."<sup>73</sup>

A unanimous California Supreme Court also understood that, although standing under Article III presents a federal question, "the United States Supreme Court's decision in *Karcher v. May* . . . strongly indicates that a federal court will look to state law to determine whom the state has authorized to assert the state's interest in the validity of the challenged measure."<sup>74</sup> The state high court agreed that "logic suggests that a state should have the power to determine who is authorized to assert *the state's own interest* in defending a challenged state law."<sup>75</sup>

In resolving the state law question, too, the California Supreme Court drew parallels to legislative standing. The court held that, because there would be no reason to doubt the California legislature's ability to assert the state's interest and defend a statute it passed, "the people are no less entitled to have the state's interest in the validity of a voter-approved initiative asserted on their own behalf when public officials decline to defend the measure."<sup>76</sup> The court read the statutes and constitutional provisions relating to California's initiative process to create this authority,<sup>77</sup> but nevertheless cautioned that the authority remains "extremely narrow and limited" to the initiative context and it "does not imply any authority to act on behalf of the state in other respects."<sup>78</sup>

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

73. *Id.* at 1196.

74. *Perry v. Brown*, 265 P.3d 1002, 1011 (Cal. 2011).

75. *Id.* at 1013.

76. *Id.* at 1028.

77. *Id.* at 1017. Some have criticized the authority read into California's statutory and constitutional provisions as particularly strained. *See, e.g.*, David B. Cruz, *CA Supreme Court's Disappointing Standing Decision*, CRUZ LINES BLOG (Nov. 17, 2011, 11:55 PM), <http://cruz-lines.blogspot.com/2011/11/ca-supreme-courts-disappointing.html> ("Ordinary principles of statutory and constitutional interpretation thus would seem to weigh heavily against [the California Supreme Court's] conclusion today as a matter of interpretation, and the court does not even pretend to try to parse the meaning of the provisions of law on which it claims it is basing its decision.").

78. *Perry*, 265 P.3d at 1029.

With the state law determination in hand, the Ninth Circuit held that Proposition 8's proponents had standing to pursue an appeal. The court acknowledged that it "is for the State of California to decide who may assert its interests in litigation, and we respect its decision by holding that Proposition 8's proponents have standing."<sup>79</sup> In that sense, the Ninth Circuit deferred to *Pacific States'* recognition that the "ultimate power of sovereignty is in the people."<sup>80</sup> And the court explicitly eschewed any requirement that ballot proponents must demonstrate a particularized injury or any other standing requirement typically required of plaintiffs. Instead, the court maintained, "[t]he exclusive basis of our holding that Proponents possess Article III standing is their authority to assert the interests of the State of California, rather than any authority that they might have to assert particularized interests of their *own*."<sup>81</sup> The fact that "the State would suffer an injury" was sufficient, according to the Ninth Circuit, "for Proponents to have Article III standing when state law authorizes them to assert the State's interests."<sup>82</sup>

## II. THE SUPREME COURT IN *HOLLINGSWORTH*: ENTER AGENCY

The ballot proponents' standing victory<sup>83</sup> was short-lived, however. The Supreme Court granted the Proposition 8's proponents' petition for certiorari to review the Ninth Circuit's decision, and *sua sponte* added the standing question to the proponents' question presented.<sup>84</sup> Perhaps in part because the case was granted along with a challenge to the federal Defense of Marriage Act, much of the attention focused on the merits arguments raised in the petition.<sup>85</sup> But the Supreme Court—whether to avoid the merits<sup>86</sup> or genuinely believing there was a procedural problem—had other plans.

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79. *Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012).

80. *Pac. States Tel. & Tel. Co v. Oregon*, 223 U.S. 118, 145 (1912).

81. *Perry*, 671 F.3d at 1074.

82. *Id.*

83. On the merits, the proponents had lost. The Ninth Circuit had struck down Proposition 8 as unconstitutional. *See id.* at 1096.

84. *See Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) (mem.) ("In addition to the question presented by the petition, the parties are directed to brief and argue the following question: Whether petitioners have standing under Article III, § 2 of the Constitution in this case.").

85. *See, e.g., Lyle Dennison, On Same-Sex Marriage, Options Open*, SCOTUSBLOG (Dec. 7, 2012, 5:47 PM), <http://www.scotusblog.com/2012/12/on-same-sex-marriage-options-open>.

86. In his dissent, Justice Kennedy accused the majority of doing just that, stating that, while "the Court must be cautious before entering a realm of controversy," it "is shortsighted to misconstrue principles of justiciability to avoid that subject." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2674 (2013) (Kennedy, J., dissenting). Some commentators have also suggested that this is precisely why the Court decided *Hollingsworth* on procedural grounds. *See, e.g., Lyle Dennison, Analysis: Utah's Options on Same-sex Marriage*, SCOTUSBLOG (Dec. 29, 2013, 8:30 PM), <http://www.scotusblog.com/2013/12/analysis-utahs-options-on-same-sex-marriage/#more-202738> ("[E]veryone involved with the same-sex marriage issue has to

A. *The Majority and Dissent*

In a closely divided 5-4 decision, the Court dismissed the case, holding that the Proposition 8 proponents did not have standing under Article III to appeal.

The initial section of the majority's opinion focused on the proponents' lack of a "particularized injury"—that is, an injury that would affect the proponents' "in a personal and individual way" such that they would "possess a direct stake in the outcome of the case."<sup>87</sup> While the majority conceded that the proponents may have a special role under California law during the "process of enacting the law," it held that once such a law was enacted those proponents "have no role" in its enforcement.<sup>88</sup> Instead, the proponents' role was in no way "distinguishable from the general interest of every citizen of California."<sup>89</sup> To hold otherwise, the majority charged, would place standing "in the hands of 'concerned bystanders, who will use it simply as a vehicle for the vindication of value interests."<sup>90</sup>

Yet, the majority's opinion did not focus solely on the generalized nature of proponents' injury. Nor could it, given that *Karcher* and *Arizonans* appear to indicate that state-delegated authority is sufficient for a party to invoke the state's interest, and enjoy Article III standing, *regardless* of whether they would otherwise meet the typical injury in fact test.<sup>91</sup> Instead, in order to find standing wanting, the majority's innovation was the dramatic, substantive addition it made to the holding in *Karcher* and the dicta in *Arizonans* that was neither discussed in nor foreshadowed by those decisions.

First, in the face of the proponents' argument that they "need no more show a personal injury" than "did the legislative leaders held to have standing

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realize that the Justices could have reached the fundamental question of marriage equality last Term, and deliberately chose not to take it on.").

87. *Hollingsworth*, 133 S. Ct. at 2662 (citations omitted) (internal quotation marks omitted).

88. *Id.* at 2662, 2663.

89. *Id.* at 2663.

90. *Id.* (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)) (internal quotation marks omitted).

91. *See supra* notes 67-74 and accompanying text. The Court does briefly argue in Part III.A of its opinion that even where a litigant seeks to "assert the interests of others," they must nevertheless suffer an injury in fact. *See Hollingsworth*, 133 S. Ct. at 2663-64. Yet the Court focuses entirely on a single case (*Diamond v. Charles*), where state law *did not* confer standing on the individual physician who had intervened at the district court and sought to continue defending an anti-abortion law in the Supreme Court after the state refused to do so. Thus, in the face of no delegation from the state to invoke its interest, the putative defendant was forced to attempt to meet the traditional standing test, which he plainly did not. *See Diamond v. Charles*, 476 U.S. 54, 65 (1986). Indeed, the Supreme Court in *Hollingsworth* goes on to concede that "Petitioners contend that this case is different, because the California Supreme Court has determined that" proponents may invoke the state's interest. *Hollingsworth*, 133 S. Ct. at 2664. Thus, in the final sections of its opinion, attempting to distinguish *Karcher* and *Arizonans*, the Court does not rely on the generalized nature of the proponents' injury. *See id.* at 2664-67 (Parts III.B and III.C).

in *Karcher*,”<sup>92</sup> the majority distinguished *Karcher*. The Court found it important that Karcher and Orechio had intervened in their *official capacities* as state officers. In that sense, the Court argued that “[f]ar from supporting petitioners’ standing . . . *Karcher* is compelling precedent against it.”<sup>93</sup> Despite the fact that *Karcher* neither mentions nor implies any such limitation, the majority argued that it was dispositive not simply that New Jersey had delegated its state interest, but that it had delegated that interest to state “agents” who could “represent it in federal court.”<sup>94</sup> To support that proposition, the majority cited an 1885 case—predating the rise of direct democracy in any state by over a decade<sup>95</sup>—stating a then-truism that the “State is a political corporate body [that] can act only through agents.”<sup>96</sup>

Thus, the majority claimed that the fact that Karcher and Orechio had at one time held a state office was essential to the holding in *Karcher*: “The point of *Karcher*,” the majority contended, “is not that a State could authorize *private parties* to represent its interests,” but, instead that “Karcher and Orechio were permitted to proceed only because they were state officers, acting in an official capacity.”<sup>97</sup>

On this basis, the majority declared that Article III mandates more than mere authorization. And the majority’s subsequent discussion of *Arizonans* made it even clearer that its rationale would require a formal agency relationship between a state like California and anyone that state seeks to invest with its interest. While acknowledging that the Court had stated in *Arizonans* that it was unaware whether any Arizona law appointed “initiative sponsors as agents of the people of Arizona to defend” the law, the *Hollingsworth* majority put talismanic emphasis on the use of the word *agents*.<sup>98</sup> The California Supreme

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92. *Hollingsworth*, 133 S. Ct. at 2664 (quoting petitioners’ reply brief).

93. *Id.*

94. *Id.*

95. Direct democracy did not exist in the United States on a state-wide level until the people of South Dakota adopted the referendum in 1898. See John G. Matsusaka, *The Eclipse of Legislatures: Direct Democracy in the 21st Century*, 124 PUB. CHOICE 157, 159 (2005).

96. *Hollingsworth*, 133 S. Ct. at 2664 (quoting *Poindexter v. Greenhow*, 114 U.S. 270, 288 (1885)). In *Poindexter*, the defendant—the treasurer of Richmond, Virginia—sought to substitute the state as the defendant in an action alleging he had illegally taken plaintiffs’ desk as a payment for unpaid taxes. *Poindexter*, 114 U.S. at 288, 273-74. But the Court held that more than a mere assertion that the “state has adopted his act and exonerated him” was required in order to do so. *Id.* at 288. Instead, the defendant would have to show “a law of the state which constitutes his commission as its agent,” which the Court held he was unable to do. *Id.* Thus, as it has nothing to do with standing, the quote was taken entirely out of context by the majority in *Hollingsworth*. And, even if it was on point, nowhere does the opinion argue that an “agent” of the state must meet certain criteria akin to those set forth in the Restatement of Agency.

97. *Hollingsworth*, 133 S. Ct. at 2665.

98. *Id.* at 2666.

Court and the Ninth Circuit, the majority stated, had “never described petitioners as ‘agents of the people’ or of anyone else.”<sup>99</sup>

The Court went on to consider that question, and concluded that Proposition 8’s proponents “are plainly not agents of the state—‘formal’ or otherwise.”<sup>100</sup> Without any doctrinal justification, the majority imported the Third Restatement of Agency’s definition of an agent into Article III as a constitutional requirement. Pursuant to that definition, the majority noted that an agency relationship “requires more than a mere authorization to assert a particular interest”; it must feature one “essential element”: “‘the principal’s right to control the agent’s actions.’”<sup>101</sup> In finding California’s delegation of the state’s interest to ballot proponents invalid, the majority went on to catalog myriad “basic features of an agency relationship” that were missing: proponents, “answer to no one,” “decide for themselves, with no review, what arguments to make and how to make them,” “are not elected at regular intervals—or elected at all,” have no provision providing “for their removal,” owe no fiduciary duty to California citizens, “have taken no oath of office,” and are “free to pursue a purely ideological commitment to the law’s constitutionality.”<sup>102</sup>

Although it ostensibly claimed it did not “disrespect[]” or “disparage[]” the state’s reasons for “deciding that state law authorized” its ballot proponents to defend Proposition 8,<sup>103</sup> according to the Court, the fact that California had determined that it was wise to forego the restraints implicit in agency relationships in order to achieve whatever benefits direct democracy might bring was fatal for purposes of Article III. The majority also claimed not to “question California’s sovereign right to maintain an initiative process, or the right of initiative proponents to defend their initiatives in California courts, where Article III does not apply.”<sup>104</sup> Yet, for *federal* standing purposes, “no matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary.”<sup>105</sup>

The dissent, understandably, took the majority to task for its newly minted agency test. Despite “a meticulous and unanimous opinion by the Supreme Court of California” deeming proponents’ authority to invoke the state’s interest “essential to the integrity of its initiative process,” Justice Kennedy, joined by Justices Thomas, Alito, and Sotomayor, charged that the majority’s decision ignored a state-law definition that should be “binding on this Court.”<sup>106</sup> The dissent found the state court’s definition of the proponents’ authority “fully

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99. *Id.*

100. *Id.*

101. *Id.* (quoting RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f (2005)).

102. *Id.* at 2666-67.

103. *Id.* at 2667.

104. *Id.*

105. *Id.*

106. *Id.* at 2668 (Kennedy, J., dissenting).

sufficient to establish the standing and adversity that are requisites for justiciability under Article III of the United States Constitution.”<sup>107</sup>

Moreover, Justice Kennedy was clearly troubled that the majority had substituted the political judgment of Californians with its own. In the dissent’s view, “Article III does not require California, when deciding who may appear in court to defend an initiative on its behalf, to comply with the Restatement of Agency or with this Court’s view of how a State should make its laws or structure its government.”<sup>108</sup> And the majority simply ignored the “fundamental principles or the practical dynamics of the initiative system in California, which uses this mechanism to control and to bypass public officials—the same officials who would not defend the initiative, an injury the Court now leaves unremedied.”<sup>109</sup>

Instead, the dissent pointed out that the entire purpose of the initiative is to enact laws divorced from state officials.<sup>110</sup> Thus, what the majority “deem[ed] deficiencies in the proponents’ connection to the State government” the dissent countered were “essential qualifications to defend the initiative system,” as determined by the state court.<sup>111</sup> The state court determined that the California’s lawmaking ability “is undermined if the very officials the initiative process seeks to circumvent are the only parties” able to defend popularly enacted laws—essentially guaranteeing those officials a “*de facto* veto” to “erode one of the cornerstones of the State’s governmental structure.”<sup>112</sup> Indeed, the dissent was left wondering—under the Restatement or otherwise—who could possibly serve as a principal in an agency relationship where the principal is “composed of nearly 40 million residents of a State.”<sup>113</sup>

The dissent dispensed with the majority’s reading of *Karcher* and *Arizonans* in short shrift. *Karcher*, they said, held only that because the petitioners’ leadership positions had been lost they no longer held the legislative post through which they had “the authority to represent the state.”<sup>114</sup> Because the Proposition 8 proponents’ authority was “not contingent on officeholder status,” the dissent concluded they faced no analogous problem.<sup>115</sup> And *Arizonans*, Justice Kennedy asserted, is “consistent with the premises of [his] dissent, not with the rationale of the [majority]’s opinion.”<sup>116</sup> While *Arizonans* had used the word “agents,” “read in context, it is evident that the Court’s intention was not to demand a formal agency relationship in compliance with

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 2670.

111. *Id.*

112. *Id.* at 2671.

113. *Id.*

114. *Id.* at 2672.

115. *Id.*

116. *Id.*

the Restatement” but instead to “use[] the term as shorthand for a party whom ‘state law authorizes’ to ‘represent the State’s interests’ in court.”<sup>117</sup>

Ultimately, the dissent charged the majority with “fail[ing] to grasp or accept the basic premise of the initiative process”: 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,” and that “[f]reedom resides first in the people without need of a grant from government.”<sup>118</sup> The people of the twenty-seven states that have chosen to make use of the initiative and referendum “have exercised their own inherent sovereign right to govern themselves.”<sup>119</sup> Yet the *Hollingsworth* majority stymied that choice. They have instead “nullif[ied], for failure to comply with the Restatement of Agency, a State Supreme Court decision holding that state law authorizes an enacted initiative’s proponents to defend the law if and when the State’s usual legal advocates decline to do so.”<sup>120</sup>

### B. *A Reversal of Pacific States in Article III Garb*

In the wake of *Hollingsworth*, some commentators have suggested that a simple fix is in order: the people of a state could simply write the requisite standing authority into each individual initiative.<sup>121</sup> But those proposing such a solution fully misunderstand the dramatic breadth of the Court’s holding, and how it strips states’ “broad autonomy in structuring their governments.”<sup>122</sup> Even if the people of the state statutorily cloak initiative proponents with the authority to defend an enactment, that authority is irrelevant for *federal standing purposes*.<sup>123</sup> Regardless of how a state, in its sovereign capacity, decides to structure its government, unless a federal court identifies an agency relationship between proponents and the state, any delegation of authority is ineffective under Article III.<sup>124</sup>

In the face of this dramatic holding, it is striking that nowhere in the Court’s decision—or even in the dissent—is *Pacific States* cited. The majority

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117. *Id.* at 2672 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997)).

118. *Id.* at 2675.

119. *Id.*

120. *Id.*

121. See, e.g., William Peacock, *California’s Initiative Process in Crisis: A Simple Fix?* FINDLAW (Aug. 12, 2013, 2:35 PM), [http://blogs.findlaw.com/california\\_case\\_law/2013/08/californias-initiative-process-in-crisis-a-simple-fix.html](http://blogs.findlaw.com/california_case_law/2013/08/californias-initiative-process-in-crisis-a-simple-fix.html) (noting a proposal by Professor Vikram Amar).

122. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013).

123. At risk of restating the obvious: the California Supreme Court had interpreted the state’s general initiative laws to do just this, yet the Supreme Court found that interpretation irrelevant for purposes of Article III.

124. Of course, if proponents could somehow demonstrate an injury in fact that is distinct from the injury of an unenforced law to all of the people of their state, they would be able to establish standing despite the majority’s decision in *Hollingsworth*.

maintains that it does not “question California’s sovereign right to maintain an initiative process, or the right of initiative proponents to defend initiatives in California courts, where Article III does not apply.”<sup>125</sup> Yet its decision, implicitly if not explicitly, does just that. And in doing so, the Court undermines the reasoning and holding of *Pacific States*—the very holding that paved the way a century ago for the people of various states to legislate through the initiative.

First, while a unanimous court in *Pacific States* was reticent to make a constitutional judgment that was, in its “very essence” a “political or governmental” question,<sup>126</sup> the majority in *Hollingsworth* has explicitly made a political value judgment that only certain individuals or entities may step into the shoes of a state. What the Court was unwilling to enshrine as a constitutional mandate in the Guarantee clause, it has instead enshrined as a constitutional requirement in Article III.

In essence, regardless of how states choose to go about “structuring their governments,”<sup>127</sup> the Court has decided—as a constitutional matter—what types of governmental actors will be recognized in federal courts *as the state*. Under *Hollingsworth*, the Federal Constitution now mandates that an agency relationship must exist between the organs of the state and those to whom the state permits to invoke its interest. If the chosen party does not enjoy a traditional agency relationship with the state, it may not invoke the state’s interest to defend an abandoned law—even if the state has decided, for whatever reason, that “such an appearance [is] essential to the integrity of its initiative process.”<sup>128</sup> At base, this is a political decision about how state governments should be structured. The Court’s agency test fails to take into account the political reality that “[w]hen the electorate enacts laws it acts not as a sovereign people but *as a governmental body*.”<sup>129</sup> And, indeed, it is unclear if such a widely dispersed governmental body would ever be able to exercise sufficient control over a chosen party to meet such an agency test.<sup>130</sup>

Second, while the Court in *Pacific States* was hesitant to “authorize the judiciary to substitute its judgment as to a matter purely political for the judgment”<sup>131</sup> of another body, the *Hollingsworth* majority does just that. Except the Court is supplanting the decisions of state governments, rather than those of Congress. Worse still, the Court refuses to be candid about what it is doing. Although the majority asserts that standing doctrine “serves to prevent the judi-

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125. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013).

126. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1912).

127. *Shelby Cnty.*, 133 S. Ct. at 2623.

128. *Hollingsworth*, 133 S. Ct. at 2668 (Kennedy, J., dissenting).

129. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503, 1537-38 (1990) (emphasis added).

130. *See Hollingsworth*, 133 S. Ct. at 2671 (Kennedy, J., dissenting) (“If there is to be a principal, then, it must be the people of California, as the ultimate sovereign in the State. . . . But the Restatement may offer no workable example of an agent representing a principal composed of nearly 40 million residents of a State.”).

131. *Pac. States*, 223 U.S. at 142.

cial process from being used to usurp the powers of the political branches,”<sup>132</sup> the Court’s decision simply substitutes its own judgment for that of the people of California.

According to the Court, states remain free to make their own judgments about who may stand in the shoes of the state in state courts.<sup>133</sup> But those judgments will not be respected in federal court. The Court, through a tortured interpretation of *Karcher* and *Arizonans*, dreamed up an agency requirement heretofore unheard of in standing doctrine<sup>134</sup> to hold that, for federal purposes only, California proponents lack standing. In the face of petitioners’ arguments in *Pacific States*, the Court stated in 1912 that: “We shall not stop to consider the text to point out how absolutely barren it is of support for the contentions sought to be based upon it.”<sup>135</sup> A century later, that same charge could be levied against the majority’s holding in *Hollingsworth*.

Indeed, despite the lip service paid to California’s sovereign right, the majority’s opinion contains sentiments that implicitly suggest the Court is skeptical and suspicious of direct democracy. In cataloging why the proponents’ relationship with the state is deficient, the Court describes proponents as “answer[ing] to no one.”<sup>136</sup> They “decide for themselves, with no review, what arguments to make and how to make them.”<sup>137</sup> They are unelected and are “bound simply by the same ethical constraints that apply to all other parties in a legal proceeding” such that “[t]hey 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 political ramifications for other state priorities.”<sup>138</sup> That the Court is unable to conceive of these features as beneficial or the system as a reasonable one for a state to choose betrays the majority’s political lens.

Third, and perhaps most importantly, while the functional outcome of *Pacific States* was to bolster direct democracy, one might expect the majority’s holding in *Hollingsworth* to do the opposite. The initiative and referendum were initially enacted to circumvent elected officials who were unresponsive to the people,<sup>139</sup> beholden to special interests,<sup>140</sup> or otherwise unable to be

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

133. *Id.* at 2667.

134. *Id.* at 2672 (Kennedy, J., dissenting) (“[T]his Court’s precedents do not indicate that a formal agency relationship is necessary.”).

135. *Pac. States*, 223 U.S. at 142.

136. *Hollingsworth*, 133 S. Ct. at 2666.

137. *Id.*

138. *Id.* at 2666-67 (citation omitted).

139. See Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL’Y REV. 11, 40 (1997) (“Western Progressives sought, above all, to create the means by which ‘the people’ could take back control of their government.”); Andrea Specht, Comment, *The Government We Deserve? Direct Democracy, Outraged Majorities, and the Decline of Judicial Independence*, 4 U. ST. THOMAS L.J. 132, 134 (2006) (“The Progressives sought to

checked by voters.<sup>141</sup> Yet, in effect, the majority's holding gives state executive officials a "*de facto* veto"<sup>142</sup> which, the Ninth Circuit understood, would permit California's Governor to "achieve through a refusal to litigate what he may not do directly."<sup>143</sup>

The danger presented is exactly what took place in California: state executive officials, perhaps emboldened by a legislature that had several times passed bills legalizing same-sex marriage, declined to defend a law with which they disagreed, ultimately eliminating the opportunity for that law to be defended on its merits in federal court. Whatever one thinks about the merits of California's ban on same-sex marriage, that executive officials could so easily thwart the defense of a validly enacted law is troublesome.<sup>144</sup> Simply put, "[t]o permit ballot initiatives to change the law by direct democratic vote, but to have no mechanism by which those initiatives can be defended in court, makes hollow the promise of direct democracy."<sup>145</sup>

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end the growing influence that big business and party bosses exercised over state legislatures and elected officials, and to reclaim politics for the common man.").

140. The particular interests varied from state to state. In California, both the Southern Pacific Railroad Company and labor interests captured political leaders. See Jeremy Zeitlin, Note, *Whose Constitution is it Anyway? The Executives' Discretion to Defend Initiatives Amending the California Constitution*, 39 HASTINGS CONST. L.Q. 327, 333 (2011) (citing GEORGE E. MOWRY, *THE CALIFORNIA PROGRESSIVES* 91 (1963)) ("Facing the omnipotent Southern Pacific on one flank and organized labor on the other, the Progressives turned to the power of the individual citizen in the hopes of dethroning vested interests from California's government."). Elsewhere, reformers in "one-party Republican states" like South Dakota and Colorado used direct democracy to thwart the interests of railroad and utility companies, respectively, that "dominated the state legislature." Persily, *supra* note 139, at 33.

141. In contrast to the Populists, the Progressive movement "sought to use the initiative to enhance the responsiveness, professionalism, competence, and expertise of government" through direct democracy mechanisms intended to check, rather than circumvent, the political process. Cain & Miller, *supra* note 19, at 38.

142. *Hollingsworth*, 133 S. Ct. at 2671 (Kennedy, J., dissenting).

143. *Perry v. Schwarzenegger*, 628 F.3d 1191, 1197 (9th Cir. 2011).

144. *Cf. Perry v. Brown*, 265 P.3d 1002, 1035-36 (Cal. 2011) (Kennard, J., concurring) ("To give those same state officials sole authority to decide whether or not a duly enacted initiative will be defended in court would be inconsistent with the purpose and rationale of the initiative power, because it would allow public officials, through inaction, effectively to annul initiatives they dislike."); Reid M. Bolton & Frank M. Dickerson III, *Reconsidering Arizonans: Proposition 8, Direct Democracy, and the Supreme Court* 35 (Nov. 8, 2010) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1707009](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707009) (The "danger [of state executive nondefense] is the opposite of separation of powers concern—it reflects the possibility that the current elected representatives in the executive and legislative branches could collude to prevent ideas that reflect the popular will from becoming law.").

145. Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 571 (2012).

## III. THE FEDERALISM COSTS OF AGENCY

Because the majority's opinion in *Hollingsworth* conflicts with the holding and rationale of *Pacific States*, it also conflicts with the basic principles of federalism that are implicit in *Pacific States*' respect for the sovereign decisions of the people of each state. The majority's holding discriminates against citizens of those states with direct democracy, presents opportunities for legal gamesmanship, and mischaracterizes proponents' interests as generalized in a way that overstates the consequences that would flow from recognizing the state's delegation of its interest to defend its laws. Each of these consequences flows from the Court's *sub silentio* reversal of *Pacific States*.

A. *Discrimination Among State Citizens' Sovereign Decisions*

As an initial matter, the *Hollingsworth* majority claims to not "question California's sovereign right to maintain an initiative process, or the right of initiative proponents to defend their initiatives in California courts."<sup>146</sup> But the agency test imported into Article III by the majority forces undesirable consequences on the citizens of those states that choose to maintain such a process. If direct democracy is a legitimate method of governing, as *Pacific States* appears to confirm that it is, then importing an agency relationship into Article III, and thus favoring one choice of governmental structure over another, contravenes basic principles of federalism.

One virtue of federalism that the Court has recently emphasized is federalism's liberty-enhancing function. That is, by creating a system of dual sovereigns, the Constitution "establish[ed] two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."<sup>147</sup> By erecting a "distinction between what is truly national and what is truly local,"<sup>148</sup> the Constitution created a careful balance that reserved certain policy decisions for the people to grapple with at the state or local level.<sup>149</sup> Indeed, the Court has long proclaimed that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the coun-

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

147. *Printz v. United States*, 521 U.S. 898, 920 (1997) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

148. *United States v. Morrison*, 529 U.S. 598, 617-18 (2000).

149. The anti-commandeering cases, in particular, express this notion, and caution that "[a]ccountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation." *New York v. United States*, 505 U.S. 144, 169 (1992); see also *Printz*, 521 U.S. at 928 ("It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority.").

try.”<sup>150</sup> One recent Justice has referred to this idea as “[o]ne of federalism’s chief virtues.”<sup>151</sup> And although the “equal sovereignty” principle in *Shelby County*, given the federal interest in protecting citizens’ voting rights, is perhaps an unjustifiably strong version,<sup>152</sup> deference to state’s decisions, as sovereigns, is hardly a novel concept in federal law. The United States Reports are littered with cases reminding federal courts to defer to state decisions, where appropriate.<sup>153</sup> As Justice Brandeis famously warned, the Court, in “prevent[ing] an experiment,” must “be ever on our guard, lest we erect our prejudices into legal principles.”<sup>154</sup>

If the substantive policy choices of a state—within constitutional bounds—normally deserve respect, then the antecedent determination of *how* those policies are to be enacted should command similar deference. Yet the Court’s decision in *Hollingsworth* essentially discriminates against the people of those states that employ the direct initiative. Despite the Court’s sharply worded rhetoric in *Shelby County* one day prior, *Hollingsworth* deprives states of the meaningful choice or the “broad autonomy” they deserve “in structuring their governments.”<sup>155</sup> Instead, the majority’s holding creates a situation in which some states—and more specifically, those states’ citizens’ choices about state governmental design—are preferred over others.

As the Court has pointed out, a plaintiff’s standing in state court has no bearing on that plaintiff’s Article III standing in federal court.<sup>156</sup> True enough. But under *Karcher* federal courts had previously permitted litigants, consistent with Article III, to invoke the state’s interest *in federal court* where permitted by state law and unencumbered by any additional agency test. The Court now considers the operative fact in *Karcher* that New Jersey had delegated its interest to officials with whom the state shared an agency relationship. Yet *Karcher* reads more plainly as premised on the fact that, though state law authorized certain individuals to invoke the state’s interest, *Karcher* and *Orechio* were no longer those individuals. That true holding might more readily apply to a situation in which the specific organization spearheading a particular ballot proposi-

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150. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Although in dissent, this sentiment has since become an almost canonical principle, cited in numerous majority opinions. *See, e.g.*, *Oregon v. Ice*, 555 U.S. 160, 171 (2009); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980).

151. *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting).

152. *See supra* note 4.

153. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (“[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.”); *Ice*, 555 U.S. at 170 (“Beyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status.”); *Sampson v. Murray*, 415 U.S. 61, 83 (1974) (noting that when it acts as employer, the government is “granted the widest latitude in the dispatch of its own internal affairs”) (internal quotation marks and citation omitted).

154. *New State Ice*, 285 U.S. at 311 (Brandeis, J., dissenting).

155. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013).

156. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985).

tion somehow changed during the course of the campaign to enact a law. If the original proponent, who subsequently lost that designation, sought to step in and defend a law after its enactment, under *Karcher* that organization would likewise be barred. But absent from *Karcher* is any discussion of the agency relationship the majority now reads into Article III.

The federalism difficulties with the *Hollingsworth* agency test are readily apparent: it essentially discriminates against the people of those states that employ the initiative. It divides states into at least two categories. In those states with a more traditional legislative setup, if the executive refuses to defend a popularly enacted measure, the legislature may step in to defend that measure if state law so permits. But in those states featuring the direct initiative, by contrast, the people who enact a measure have no method to step in and defend the law when executive officials decline to do so—even if state law provides otherwise and even if the state’s citizenry view popular lawmaking as analogous to legislative lawmaking.

Without an explicit constitutional hook, the *Hollingsworth* agency test is indefensible. The citizens of those states that employ direct democracy now face the possibility that their newly enacted laws will be nullified in federal court. Not because they are ultimately found unconstitutional (for a standing deficiency prevents a decision on the merits on appeal), but instead because they have chosen an illegitimate means, under Article III, for legislating. Essentially, *Hollingsworth* forces states that choose means of popular control to take the bitter of potentially nullified laws with the sweet of the opportunity to directly enact those laws. The Constitution should not demand such a false choice.

### B. *Legal Gamesmanship*

Worse still, the discrepancy between standing in state and federal courts presents an opportunity for a strategic plaintiffs’ attorney to forum shop. The *Hollingsworth* majority claimed not to question “the right of initiative proponents to defend their initiatives in California courts, where Article III does not apply.”<sup>157</sup> In implicitly backing away from the reasoning of *Pacific States*, however, the Court has created new avenues for the gamesmanship inherent in federalism that it has long attempted to eliminate in other areas.<sup>158</sup>

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157. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013).

158. *See, e.g., Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S. Ct. 568, 583 (2013) (creating exception to the *Klaxon* rule to prevent party from escaping contract’s forum selection clause, despite typically permitting plaintiffs to enjoy the “state-law advantages that might accrue” from their venue selection because, “[n]ot only would it be inequitable to allow the plaintiff to fasten its choice of substantive law to the venue transfer, but it would also encourage gamesmanship”); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938) (eliminating idea of “federal common law” because “[i]t made rights enjoyed under the unwritten ‘general law’ vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen”).

Perhaps most problematically, the *Hollingsworth* rule allows opponents of ballot initiatives to potentially insulate favorable district court or circuit court decisions from any appellate review at all—as the outcome of the Proposition 8 litigation itself makes clear.<sup>159</sup> To be sure, opportunities abound for plaintiffs to forum shop. They may choose a particular state or circuit because of favorable law. Or they may attempt to bring their case before a judge who is viewed as sympathetic to their cause. The legal system can tolerate some of these tactics, perhaps, because we assume appellate review is able to correct any advantages or incorrect applications of law. But where such choices create a tactical advantage that changes the ground rules for the litigation entirely, we should be more skeptical.<sup>160</sup> In placing in plaintiffs' hands the determination of whether a defendant, validly invoking the state's interest under state law, can appeal an adverse determination at all, the *Hollingsworth* decision furthers such gamesmanship.

As a practical matter, even if state law affords proponents the right to defend their initiatives in state courts this will provide cold comfort. As defendants, proponents are largely unable to select the forum in which they are sued.<sup>161</sup> Thus, a plaintiff wishing to challenge on federal grounds a state law that was passed by the people will make a strategic decision about where to bring that suit. This is particularly true if plaintiffs know that a state's officials are unlikely to defend a particular law enacted by popular initiative (as they might when officials publically announce their intent to abdicate defense of a law).

If a plaintiff believes a particular federal district court will be amenable to its claims, that plaintiff can maximize its opportunity for success while completely insulating a favorable decision from any appellate review. In effect, the plaintiff gets three bites at the apple. The advantage of this route is that, once a federal district judge strikes down the state's law,<sup>162</sup> the proponents have no

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159. The Ninth Circuit's decision was dismissed for "lack of jurisdiction" and the district court's decision invalidating the same-sex marriage ban was left standing. *See Perry v. Brown*, 725 F.3d 1140, 1141 (9th Cir. 2013).

160. *Cf. Atl. Marine*, 134 S. Ct. at 583 (prohibiting plaintiffs from unilaterally altering the substantive law applicable to a contract lawsuit through venue transfer maneuvering).

161. Of course, defendants could remove a case from state court to federal court under 28 U.S.C. § 1441. But in a case like Proposition 8, diversity is unlikely to exist and, in any event, the defendants hail from the forum state (and *are* the forum state, itself), and will be barred from removing under the forum defendant rule. *See* 28 U.S.C. § 1441(b)(2) (2013). Moreover, the proponent defendants likely will not wish to remove on the basis of federal question jurisdiction if, under the reasoning in *Hollingsworth*, such a procedural move would strip them of standing to defend a measure on appeal.

162. Judges can reach the merits in federal district courts, as Judge Walker did in *Hollingsworth* itself, because proponents can invoke Rule 24 and intervene to mount a defense in federal court where state officials refuse to do so. *See* FED. R. CIV. P. 24(b). Once permitted to intervene, ballot proponents can participate in trial without needing to satisfy standing on their own accord. *See* Hall, *supra* note 21, at 1560-61 (noting that the only "exception to this general rule is that intervenors, whether aligned with plaintiffs or defendants, must independently satisfy Article III standing if they seek to litigate issues

recourse, as they have no standing to appeal under Article III. Even if proponents were somehow to convince a federal appellate court to ignore *Hollingsworth*, the plaintiff could then appeal to the Supreme Court urging summary reversal on standing grounds, which the court could, after all, raise *sua sponte*. By contrast, if the *plaintiffs* lose in district court they *would* have standing to seek review from a circuit court or subsequently the Supreme Court—as they would have to have met the strictures of Article III to have filed and prevailed in district court in the first place.

Alternatively, a plaintiff may believe that state court will be more hospitable to her claims. Such a strategic decision might, of course, come with more relaxed standing requirements which would permit the ballot proponents to mount a defense on appeal irrespective of any executive non-defense. Yet, so long as the case raises a federal question, even if proponents prevail in state courts against the plaintiff's expectations, the plaintiff has the opportunity to appeal to the Supreme Court. And, unlike the defendants, they can obtain a decision on the merits there. In *ASARCO Inc. v. Kadish*,<sup>163</sup> the Court held that a case proceeding in state court raising a federal question can be appealed to the Supreme Court—even if the respondent would be unable to invoke federal jurisdiction.<sup>164</sup>

A plaintiff thus faces multiple opportunities to receive a favorable outcome on the merits of their claims while (potentially) preventing the defendants from appealing an adverse decision. A strategic plaintiff can thus insulate a favorable decision from Supreme Court review—despite its merits. Prior to the federal challenge to Proposition 8 this was, in some ways, the same-sex marriage movement's strategy as cases were brought raising solely state constitutional claims. The crucial difference furthered by the *Hollingsworth* opinion, however, is that the *identical* federal claim is being considered in each forum. Yet, in one forum, proponents can mount a defense while in the other, they cannot. Congress's decision to limit Supreme Court review to cases raising federal questions demonstrates respect for the decisions of a different sovereign. The Court's functional decision to prevent the people of a state from mounting any defense of their laws, based entirely on the plaintiff's choice of forum, shows the opposite.

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beyond those raised by the original parties, or if the case or controversy between the original parties ceases to exist"). State courts, in particular, routinely permit ballot proponents to intervene in defense of challenged laws under rules analogous to Rule 24. *See, e.g.*, *Sportsmen for I-143 v. Mont. Fifteenth Jud. Dist. Court*, 40 P.3d 400, 403 (Mont. 2002) (noting that ballot proponents are generally "entitled to intervene as a matter of right").

163. 490 U.S. 605 (1989).

164. The respondents in *ASARCO* were the initial plaintiffs in state court—and the lawsuit, itself, would have never been possible to bring in federal court. Yet, the Court held that "[a]lthough respondents would not have had standing to commence suit in federal court based on the allegations in the complaint, they are not the party attempting to invoke the federal judicial power" and because "petitioners have standing to invoke the authority of a federal court . . . this dispute now presents a justiciable case or controversy for resolution here." *Id.* at 618.

C. *The State's Grievance Is Not Truly "Generalized"*

Finally, despite the Court's characterization of the proponent defendants' injury as "generalized,"<sup>165</sup> the relevant injury is not truly generalized in the way the Court has previously defined that concept—or at least not if we accept that state law permits proponents to be recognized as the state for standing purposes. Thus, the negative consequences the Court has typically identified as flowing from permitting plaintiffs to invoke generalized grievances will not arise even if the Court were willing to recognize a state's ability to delegate the defense of its laws.

The Court has typically prohibited plaintiffs from raising only "a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws."<sup>166</sup> Indeed, the Court has emphatically stated that standing may not be invoked by mere value preferences, lest the judiciary become "no more than a vehicle for the vindication of the value interests of concerned bystanders."<sup>167</sup> Yet the Court's concern has been related mainly to stepping outside the judiciary's proper role in our tripartite government. Namely, the Court has worried that enlarging the body of cases the judiciary entertains from those in which a party is particularly injured would unnecessarily position the court as the arbiter of purely partisan or political squabbles. The Court has explicitly eschewed exercising "an unconditioned authority to determine the constitutionality of legislative or executive acts"<sup>168</sup> and thus becoming "virtually continuing monitors of the wisdom and soundness of Executive action."<sup>169</sup>

Recognizing the state's authority to authorize ballot proponents to invoke the state's interest when state executive officials refuse to defend a law, however, neither unnecessarily enlarges the docket of the federal courts nor forces those courts to decide cases they would not otherwise have the authority to decide.

First, states have always had standing, as sovereigns, to defend their laws, despite the fact that a state, as an entity, represents a dispersed citizenry.<sup>170</sup> Nor have courts ever demanded that the individual officials who typically defend a

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165. See *supra* notes 87-90 and accompanying text.

166. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992).

167. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973) (but finding standing); see also, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (finding no standing for environmental group in holding that "a mere 'interest in a problem,' no matter how longstanding the interest" is insufficient to confer standing).

168. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982).

169. *Allen v. Wright*, 468 U.S. 737, 760 (1984).

170. See *Diamond v. Charles*, 476 U.S. 54, 62 (1986); ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.3.7 (6th ed. 2012) (describing standing doctrine for suits brought by government entities and noting that "a government certainly has standing to sue to enforce its laws or protect its activities as a sovereign government entity").

state's law in court—like the governor or attorney general—have a *personal* or particularized injury beyond those of other citizens of the state. Thus, if a state is willing to recognize that “the electorate” acts “as a governmental body” when it “enacts laws,”<sup>171</sup> it makes little sense to categorize the injury of ballot proponents who represent the electorate as “generalized” but not demand the same of state officials.

Second, deferring to a state's judgment that ballot proponents should be able to step into the shoes of the state does not pull federal courts into the murky thicket of cases they would not already decide. The court's holding in *Hollingsworth* implicitly suggests, and others have explicitly argued,<sup>172</sup> that allowing a state to delegate its interest permits the state to authorize new litigation by proponents in federal court. These concerns invoke the idea—expressed in *Lujan*—that Congress may not authorize citizen-standing suits by including a provision permitting plaintiffs to enforce federal laws without any individualized injury.<sup>173</sup> But these concerns neglect the very limited nature of the authority a state like California delegates to ballot proponents. Permitting ballot proponents to invoke the state's interest to defend challenged state laws or constitutional provisions in no way broadens standing doctrine or enlarges the jurisdiction or dockets of federal courts. Instead, jurisdiction is limited to those cases in which a defendant—the state—already has rock-solid standing but nevertheless refuses to defend its interest. Unlike granting plaintiffs newly cloaked with a statutory right the standing to sue, the substitution of alternative parties as *defendants* will not increase the number of cases brought in federal court beyond those that would already exist without executive nondefense.<sup>174</sup> This is confirmed by the fact that the Supreme Court did not dismiss the Propo-

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171. Eule, *supra* note 129, at 1537-38.

172. See Walter Dellinger, *No Harm, No Standing*, SLATE (Dec. 11, 2012, 5:24 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/12/the\\_california\\_gay\\_marriage\\_case\\_no\\_one\\_has\\_standing\\_to\\_appeal.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/12/the_california_gay_marriage_case_no_one_has_standing_to_appeal.html) (The “Supreme Court will surely be concerned about how far states can go in authorizing litigation in federal court by citizens who themselves have no legal stake in the matter in dispute.”); see also Brief for Walter Dellinger as Amicus Curiae in Support of Respondents on the Issue of Standing at 14-18, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

173. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992).

174. The California Supreme Court explicitly invoked this limitation in its decision affording the Proposition 8 proponents standing. In comparing the narrow incursion of proponent standing to the more expansive jurisdiction permitted by private attorney general and other statutes in which parties are allowed to invoke the state's interest, the Court explained that:

Indeed, the authority of the official proponents of an initiative to assert the state's interest in the present context is a more modest authority than the authority exercised by private individuals under either the public interest mandate exception or the private attorney general doctrine, because under those doctrines private individuals are authorized to act affirmatively on behalf of the public and institute proceedings to enforce a public right, whereas the authority possessed by the official initiative proponents in the present context is simply a passive, defensive authority to step in to assert the state's interest in the validity of a challenged measure when the initiative has been challenged by others in a judicial proceeding[] and public officials have declined to defend the measure.

*Perry v. Brown*, 265 P.3d 1002, 1030 (Cal. 2011).

sition 8 plaintiff's claim outright—as it should have done had an illegitimate case made its way into federal court.<sup>175</sup> Instead the Court simply vacated the *appellate court's* ruling,<sup>176</sup> the functional consequence of which was to leave the district court's decision on the merits intact.

Third, and relatedly, permitting defendants to defend in the place of state officials does not fabricate a legal conflict from whole cloth—and thus invite federal courts to wade into purely political conflicts. The plaintiffs who challenged Proposition 8 did seek to enforce a recognized legal right in challenging a state law on constitutional grounds. Indeed, the proponents would not have needed to defend the case on appeal had they not. If state officials were willing to stand behind their state law, the Court would not have been stepping outside of its constitutional role in deciding such a case. The state's decision to substitute a different party to mount that defense on the state's behalf does not subvert the federal courts' function. Indeed, in *ASARCO* the Court was previously willing to concede, out of “deference to the States,” that a case remains sufficiently adversarial for the Court to proceed to the merits, even when one of the parties on appeal would not have otherwise met the strictures of Article III.<sup>177</sup>

Ultimately, as the dissent points out, there is “much irony” in the Court's “shortsighted” approach to standing in *Hollingsworth*<sup>178</sup>:

A prime purpose of justiciability is to ensure vigorous advocacy, yet the Court insists upon litigation conducted by state officials whose preference is to lose the case. The doctrine is meant to ensure that courts are responsible and constrained in their power, but the Court's opinion today means that a single district court can make a decision with far-reaching effects that cannot be reviewed. And rather than honor the principle that justiciability exists to allow disputes of public policy to be resolved by the political process rather than the courts, here the Court refuses to allow a State's authorized representatives to defend the outcome of a democratic election.<sup>179</sup>

Moreover, that approach is inimical to the Court's prior acknowledgment in *Pacific States* that the “ultimate power of sovereignty is in the people, and they, in the nature of things, if the government is a free one, must have a right to change their constitution.”<sup>180</sup> To allow such enactments to fall without a full-throated defense in court “makes hollow the promise of direct democracy.”<sup>181</sup>

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175. And as it did in *Lujan*, holding that the appellate court should have granted summary judgment. *Lujan*, 504 U.S. at 578.

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

177. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989).

178. *Hollingsworth*, 133 S. Ct. at 2674 (Kennedy, J., dissenting).

179. *Id.* (citation omitted).

180. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 145 (1912).

181. *Elliott*, *supra* note 145, at 571.

## CONCLUSION

In importing an agency requirement into Article III, the Supreme Court has done in *Hollingsworth* through Article III what it was unwilling to do through the Guarantee Clause in *Pacific States*. By mandating an agency relationship as a constitutional requirement for standing under Article III, the Court has made a political value judgment about the individuals or entities that should be able to step into the shoes of a state. Some states may well choose not to utilize the initiative. But that choice is up to a state to make. When a state does choose to structure its government in such a way, however, federal courts should respect that political choice.

*Hollingsworth* could ultimately serve as a cautionary tale for the Court when it appears to purposely avoid contentious, divisive issues by deciding cases on jurisdictional grounds.<sup>182</sup> Even one of Proposition 8's most visible opponents pointed out the adverse consequences of the Court's decision in *Hollingsworth*. Lieutenant Governor Newsom—who famously married gay couples in San Francisco years before it became legal in the state—wondered in the immediate aftermath of *Hollingsworth* what if “the shoe were on the other foot?”<sup>183</sup> He pointed out that the case created “some legitimate questions on all sides about the power of elected officials to in essence trump and deny the will of the voters.”<sup>184</sup> Although he was “very happy with the decision,” he asked us to “imagine you had overwhelming support for marriage equality and you had a governor and attorney general who didn't support it and refused to defend litigation.”<sup>185</sup>

If *Pacific States* remains good law, and states can choose to make use of direct democracy, such a paradoxical outcome should not be cloaked as a constitutional requirement of Article III. When the people enact a measure directly, they do so as a governing body. Federal courts would be well served to recognize that feature of direct democracy and let a measure's validity stand or fall based on a defense by its proponents: the people themselves.

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182. See, e.g., Richard J. Pierce, *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999). The Court has arguably done so in recent Establishment Clause cases. See, e.g., *Salazar v. Buono*, 559 U.S. 700 (2010) (remanding case for correct preliminary injunction inquiry, thus sidestepping establishment clause challenge to cross on federal land); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (finding prudential standing lacking because California law prevented plaintiff's father from suing for his daughter, thus avoiding establishment clause challenge to the Pledge of Allegiance).

183. Maria La Ganga, *Prop. 8: Lt. Gov. Gavin Newsom Avoids 'Vindication' as He Smiles*, L.A. TIMES (June 26, 2013), <http://articles.latimes.com/2013/jun/26/local/la-me-ln-prop-8-gavin-newsom-20130626>.

184. *Id.*

185. *Id.*

