
Standing Up for Direct Democracy: Who Can Be Empowered Under Article III to Defend Initiatives in Federal Court?

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*This Article analyzes whether and under what circumstances private citizens, especially those who qualify initiatives for the ballot by drafting the measures and gathering and presenting the requisite signatures (initiative proponents), should be permitted to defend those initiatives in federal court, consistent with Article III of the federal Constitution, when elected representatives ordinarily to be relied upon to defend state laws decline to defend. Professor Amar's analysis seeks to balance the legitimate instinct of federal courts to keep their assertions of jurisdiction within constitutional bounds, on the one hand, and the need for the people of states that want to make use of initiatives to find ways to prevent elected officials (a distrust of whom is often part of the motivation behind an initiative) from effectively killing initiatives by failing to defend in federal court, on the other. Drawing on the essential rationale underlying the initiative device and theoretical and pragmatic foundations of federal constitutional standing doctrine, Professor Amar argues that the key question in cases involving standing by initiative proponents is not, as the Supreme Court suggested in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), whether the people of a state have "control" over the proponents, but rather whether the people can be said to have "assented" to the proponents as representatives of the electorate. He thus concludes that the Supreme Court reached the right result in the *Hollingsworth* dispute, but for the wrong reasons.*

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INTRODUCTION

American constitutional democracy now has more than a century of experience on which to assess the modern initiative device, and the Progressive movement of which it was an outgrowth. Beginning with South Dakota in 1898, close to two dozen states (almost all of them west of the Mississippi) have incorporated the initiative and/or referendum into their state constitutions.¹ Today, many states — including California, Washington, Oregon, and Colorado — transact some of their most important and high-profile legislative business via direct democracy.

There is a wealth of scholarship analyzing the interface between state law direct democracy devices and the U.S. Constitution. Yet most of it has focused on relatively few aspects of the federal Constitution. In particular, there has been significant work done on the interplay between direct democracy and: (1) Article IV's Republican Guarantee Clause; (2) the First Amendment's freedoms of speech and petition; and (3) the Fourteenth Amendment's commands of due process and equal protection.²

In this Article, I explore a question of recent and ongoing importance concerning the way state law initiatives interact with another important aspect of the U.S. Constitution: Article III's requirement that federal courts limit themselves to resolving only "cases" and "controversies." In particular, I examine whether and when official proponents (i.e., drafters/signature presenters)³ of initiatives should be allowed to defend those initiatives against constitutional challenges in federal court when the elected representatives who ordinarily defend state laws against

¹ PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPTIONS, AND COMPARISONS* 1-2, 10 (1998).

² See, e.g., Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994) (arguing that the Republican Government Clause in Article IV reaffirms the basic principles of sovereignty and does not necessarily foreclose direct democracy); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990) (examining the interplay between majoritarian democracy and judicial review); Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363 (2011) (discussing political process theory and equal protection principles as applied to direct democracy in the context of same-sex marriage).

³ One could imagine different ways to define "proponents," so as to include persons who contributed or expended significant monies to qualify or enact a measure. This Article focuses on drafters/signature presenters in part because they were involved in the recent, high-profile standing dispute in *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013), and also because the arguments in favor of allowing drafters/signature presenters standing in federal court seem stronger than the arguments in favor of contributors/expenders.

constitutional attack — most commonly the Attorney General and Governor — decline to defend. I argue, using California’s Proposition 8 (a constitutional amendment banning same-sex marriage) as a case study, that although states can (and should) empower initiative proponents to defend in federal court when elected representatives decline to do so, there are important constitutional limits that federal courts ought to enforce regarding the circumstances under which proponents ought to be permitted federal standing to defend.

I. BACKGROUND

When enacted initiatives are challenged in federal litigation as violative of federal law, elected state governors and attorneys general ordinarily do defend the plebiscite measures, even when the elected officials are themselves politically opposed to the substance of the measures.⁴ For this reason, the question whether initiative proponents have standing to defend in federal court, in the stead of regular elected officials, does not arise very often.⁵ But in the exceptional instance where an attorney general and governor decline to defend, the initiative involved is likely to be particularly politically salient and its non-defense is likely to be particularly troubling for those who embrace direct democracy as a sensible and necessary element of self-governance.⁶ What should be the right approach in these unusual circumstances? The Supreme Court addressed the issue in its important ruling last summer in *Hollingsworth v. Perry*.⁷ In that lawsuit, proponents of Proposition 8 (the California initiative amending the

⁴ See, e.g., *Strauss v. Horton*, 46 Cal. 4th 364, 465-70 (2009) (providing an example of a measure opposed but defended by the Attorney General and recognizing the duty of participants in legal challenges to decide cases based on the law rather than on politics).

⁵ A related question, implicated by the arguments discussed in this Article, might arise with some frequency — namely whether proponents can participate alongside regular elected officials in defending a measure when proponents feel that the regular officials’ defense is ineffective. If “participation” means simply offering alternative legal arguments and definitions in the form of amicus briefs, the problem is minor. But sometimes the main “parties” to litigation can make strategic concessions as to law or fact that are binding in the court and that determine the fate of the lawsuit. Allowing proponents to control or influence these aspects of a defense raises the same kinds of questions as does the proponents’ participation when regular officials simply decline to defend.

⁶ Sometimes, perhaps as in *Hollingsworth*, the political support in favor of an enacted initiative is so fleeting that during the course of the litigation majority support for the measure dissipates, making non-defense by regular officials less politically costly for them and perhaps making non-defense more populist than it might seem.

⁷ *Hollingsworth*, 133 S. Ct. at 2668.

state constitution to forbid recognition of same-sex marriage) sought to undo U.S. District Court Judge Vaughn Walker's ruling, made after a two-week-long trial, that the initiative runs afoul of the Fourteenth Amendment of the U.S. Constitution. The United States Court of Appeals for the Ninth Circuit in *Perry v. Brown*,⁸ following the expressed views of the California Supreme Court in *Perry v. Brown*,⁹ had decided that the proponents were appropriate parties in the dispute — that the persons trying to preserve Proposition 8 enjoyed “standing” under the U.S. Constitution to defend the initiative measure in federal court. But the U.S. Supreme Court, disagreeing with both the Ninth Circuit and the California Supreme Court, concluded that the proponents did not enjoy standing.¹⁰

The stakes were high for backers of the same-sex–marriage equality movement. Because the Supreme Court determined, in essence, that no defendant (other than the Attorney General and Governor, who both declined to defend the initiative in the trial and appellate courts) enjoyed standing to defend Proposition 8, the Court had no choice but to dismiss the proponents' appeal inasmuch as no valid “case or controversy” under Article III of the Constitution was present.¹¹ Accordingly, the Court was not able (or forced, depending on how one looks at things) to decide whether same-sex marriage is a national constitutional right. And that meant, in practical terms, that Proposition 8 would die an awkward death and that same-sex marriage would become a reality in California. But the larger, nationwide same-sex marriage question would, for the moment, remain unresolved.

Avoiding resolution of this big question, if only for a few years, was probably more than acceptable to a majority of Justices; if one looks at *Hollingsworth* in conjunction with the other same-sex marriage case decided the same day, *United States v. Windsor*¹² — where the Court invalidated part of the federal Defense of Marriage Act¹³ — the desire of the Justices to buy some time before taking on the big question of a national right to same-sex marriage seems reasonably clear.¹⁴ And the

⁸ 671 F.3d 1052, 1064 (9th Cir. 2012).

⁹ 52 Cal. 4th 1116, 1127 (2011).

¹⁰ *Hollingsworth*, 133 S. Ct. at 2668.

¹¹ *Id.* at 2662.

¹² 133 S. Ct. 2675, 2696 (2013).

¹³ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2012)).

¹⁴ The Court was understandably reluctant to rule overtly on this big question because a clear ruling on the merits, in either direction, was fraught with peril. The Court may not have had five members ready to proclaim a national right when roughly

doctrine of standing, provided that it is invoked coherently and carefully, is a common and useful tool at the Court's disposal to deflect national resolution of questions that are properly saved for another day. For these reasons, sophisticated observers of the same-sex marriage wars should not have been surprised to see the *Hollingsworth* case resolved on standing grounds.

But using the doctrine of standing to regulate the time and place in which fractious national constitutional disputes like same-sex marriage are resolved presents its own costs and risks. As the California Supreme Court stated in 2011, "denying the official initiative proponents the authority to step in to assert the state's interest in the validity of the measure" might effectively confer improper power onto "the Governor [or] the Attorney General . . . to veto or invalidate an initiative measure

three-quarters (thirty-eight) of the States at that time did not recognize same-sex marriages. Nina Totenberg, *Supreme Court Extends Gay-Marriage Rights with Two Rulings*, NPR (June 26, 2013, 4:23 PM), <http://www.npr.org/2013/06/26/195956196/supreme-court-extends-gay-marriage-rights-with-two-rulings>. At the time of *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967), the case striking down Virginia's ban on interracial marriage, only sixteen (or less than one-third) of the states prohibited marriage across races. And in *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003), the case in which a divided Court invalidated Texas' attempt to criminally punish someone for engaging in homosexual conduct, the Court noted that only a handful of states at that time actively prosecuted persons for similar conduct. Even the momentous equality ruling in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), did not call into question the laws of more than twenty or so states that mandated educational segregation in the mid-1950s. Thus, as bold as the Supreme Court has been in protecting liberty and equality rights, past practice does not suggest the likely proclamation of a national right here, when conditions are so fluid in the States.

But that fluidity also cuts against a ruling flatly rejecting a national right to same-sex marriage. Because conditions are changing so quickly (witness the number of states that decided to legalize same-sex marriage in just the few months since the Supreme Court heard oral arguments in the Proposition 8 dispute), the number of states embracing gay marriage could, even in the absence of additional litigation, increase over the next few years from twelve to something in the range of thirty or more. *Same-Sex Marriage Fast Facts*, CNN, <http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts> (last updated Nov. 7, 2014, 12:40 PM). So there may not have been five members of the Court who wanted to deny a same-sex marriage right claim altogether in 2013, because doing so would make it harder (on account of *stare decisis*) for the Court to recognize a national right in the coming years, should a majority of Justices want to take that step.

In short, the Court probably had no desire to wade into the same-sex marriage thicket while the issue was percolating so actively in legislatures and lower courts, and the only reason the Court granted review in the Defense of Marriage Act ("DOMA") and Proposition 8 cases was that lower federal courts invalidated these prominent enactments. That is to say, had lower courts upheld DOMA and Proposition 8, the Justices would have been content to deny review. Having been essentially forced to take cases before the Justices really wanted to weigh in at all, the Court tried to resolve less, rather than more.

that has been approved by the voters.”¹⁵ In short, the court observed, “it is essential to the integrity of the initiative process . . . that there be someone to assert the state’s interest in an initiative’s validity on behalf of the people when the public officials who normally assert that interest decline to do so.”¹⁶

My primary assertion in this Article is that the U.S. Supreme Court properly concluded that Proposition 8 proponents lack standing, but that the Court reached this conclusion for the wrong reasons and in ways that might do unnecessary damage to the initiative device in the future. To see all this, we must explore the competing arguments in detail.

Hollingsworth was not the first time the Court had touched on the issue of proponent standing in federal court. The Justices examined this topic in some depth in 1997, in *Arizonans for Official English v. Arizona*,¹⁷ a lawsuit involving a constitutional challenge to an Arizona initiative making English the official language of that state. By the time that case was ready to be resolved at the Supreme Court level, the only litigants still willing to defend the initiative against constitutional attack were the proponents of the measure; the state officials charged with enforcing the state law were content to live with the lower court ruling striking the measure down.

The Court ultimately dismissed the case on the ground that it had become “moot” because the plaintiff — a state employee challenging the initiative’s effect on the way she was forced to do her job — had left the State’s employ after the case was filed and thus was no longer affected by the initiative.¹⁸ But before the Court held the dispute to be moot, the Justices unanimously rendered the following view on the question of the standing of the initiative proponents to defend the measure in federal court:

We have recognized [in a case from New Jersey] 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. [The Arizona initiative proponents], however, are not elected representatives, and we are aware of no Arizona law appointing initiative proponents as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the

¹⁵ *Perry v. Brown*, 52 Cal. 4th 1116, 1126-27 (2011).

¹⁶ *Id.* at 1126.

¹⁷ 520 U.S. 43, 64-67 (1997).

¹⁸ *Id.* at 64-80.

State. Nor has this Court ever identified initiative proponents as Article-III-qualified defenders of the measures they advocated.

....

We thus have grave doubts about whether [the initiative proponents] have standing under Article III [of the Constitution].¹⁹

Although this language was not necessary to the Court's ultimate resolution of the Arizona case (and thus was "dicta"), the breadth, force and unanimity of the Court's statement would seem to portend problems for private persons who step into federal court to defend an initiative when elected officials refuse to do so.

At first blush, the Supreme Court's framing of the issue, which analogizes initiative-proponent standing to legislative standing, makes sense; both kinds of standing permit the originators of legislation to defend their own work-product when the executive branch declines to do so. Indeed, as the remarks of the California Supreme Court quoted earlier suggest,²⁰ initiative-proponent standing is even more sensible and necessary than is legislator standing. In those states that have it, the initiative device exists because of a concern that elected public officials sometimes do not act in ways that are faithful to the people's interests and desires such that direct democracy is needed. And while most initiatives are a response to inaction (or unpopular action) by the legislative branch, there is no reason to think that the distrust of elected officials that is embodied in the initiative device does not also carry over to elected executive officials like governors and attorneys general. (Consider, for example, an initiative limiting the terms of all elected officials, including executive officials. An Attorney General's decision not to defend such a measure would rightly raise public ire.) Thus, allowing initiatives to die because elected officials decline to defend them in court is in significant tension with the reasons for having the initiative device in the first place.

Yet allowing initiative-proponent standing poses serious problems that permitting legislator standing does not. Most fundamentally, the fact that voters adopted an initiative measure that the proponents wrote and offered does not mean that the electorate decided — or intended — that these proponents should speak or act for the voters in any representative capacity.

¹⁹ *Id.* at 65-66.

²⁰ *See supra* notes 15-16 and accompanying text.

This distinction is critical, for several reasons. First, there is a difference between the person (or group) who drafts and proposes a law and the institution or body that is empowered to enact a proposal into law. It is noteworthy that in the legislator-standing context, the standing that is permitted is the standing of *elected leaders* of the legislative body, who speak not for themselves as individual lawmakers, but rather on behalf of the entire lawmaking body. By contrast, the individual members of the legislature who may have been involved in — or even central to — the proposing, drafting, or lobbying with respect to a bill generally do not enjoy standing to defend the measure. As important as these members might have been in bringing the law about, they are not (and do not speak for) the entire lawmaking body whose votes made the proposal law.

In the context of an initiative, the proponents are the persons who proposed the measure and offered it to the enacting body for approval. But millions of voters comprise the body whose action made the initiative proposal law. Thus, the issue of who should be recognized as speaking for the voters is much harder than the issue of who may be recognized as speaking on behalf of the legislature. A legislature's acknowledged leaders, chosen through established procedures, have an obvious claim to represent that body, whereas initiative proponents, who are more akin to individual legislators who draft a measure, would seem to have a weaker claim to represent anyone but themselves. Most crucially, initiative proponents, without more, have no clear basis for asserting that the electorate has authorized or appointed them to litigate on the people's behalf.

Second, and related, because initiative proponents have no ongoing tie to the electorate, voters cannot keep them in line. Unlike legislators, proponents have no incentive to act in ways that reflect either the wishes of the people at the time a measure was adopted or the wishes of the people at a later time when litigation ensues. A law sometimes remains on the books long after the political support that generated it has diminished. Allowing the proponents of initiatives to defend the constitutionality of a law, which the current generation of voters believes should be struck down, raises profound questions of democratic legitimacy.

In this vein, it bears noting that initiative proponents may be driven in their tactical litigation decisions by an ideological purity or zeal that did not exist among the electorate that passed the measure. And again, there is no way for the people who actually adopted the initiative to force the proponents to moderate the positions asserted by the proponents in a lawsuit to better reflect the will of the enacting

electorate. Legislative leaders, by contrast, are generally electorally accountable to the legislative membership. They risk losing their leadership posts if they stray too far from the median legislative preference, which is in turn generally tethered to the voting public. Of course, voters and legislators are not — and should not be — motivated by single issues in their voting patterns. But notwithstanding the complexities here, American constitutionalism presumes some electoral accountability for those who owe their public office to a proximate decision by the electors themselves.

Third, there may be no clear structure within initiative-proponent groups or organizations to easily enable the identification of authoritative spokespersons for the initiative. Sometimes an initiative proponent is a single individual,²¹ but there is nothing in the initiative process that prevents proponents of an initiative from being a group made up of multiple persons with no acknowledged leader, or an organization whose internal processes for picking a leader may be non-transparent, non-democratic, or even non-existent.²² By comparison, each legislature has rules (often prescribed by a constitution) for electing the leaders who will represent the chambers of the body. (I do recognize here that legislatures are not ideal litigants insofar as disputes that might arise between the leaders of the two branches of a bicameral legislature about how to conduct litigation are not easily resolved. That is one reason why our democratic system of government ordinarily relies on the executive branch, which tends to have a more unitary, pyramid-like structure, to conduct litigation on behalf of the state.)

The problems created by the lack of clear hierarchy within proponent groups take on increased importance when constitutional challenges to an initiative occur several years after the measure's adoption. Constitutional case law and the membership of high courts may have changed in the interim period to create plausible grounds for challenge that might not have existed before. During the interim period, the group or coalition proposing the initiative may have splintered, dissolved, or evolved. What once might have been a more coherent voice may now be multiple, inconsistent voices.

For these interconnected reasons, initiative proponents may lack credibility and, indeed, may be rogue actors whose current views,

²¹ Consider, for example, the recent (and ultimately unsuccessful) effort by Silicon Valley billionaire Tim Draper to qualify a measure that would ask the voters to approve splitting California into six separate states. *About, SIX CALIFORNIAS*, <http://www.sixcalifornias.com/about> (last visited Sept. 28, 2014).

²² These problems might be even greater were we to include contributors/expenders within the definition of proponents.

sentiments, and desires bear little relation to those of the electorate that adopted the initiative in question, much less the electorate that exists at the time litigation is conducted.

All of this raises a dilemma. We do not want to undermine “the integrity of the initiative process” by giving regular elected officials — those persons whom the initiative device is supposed to check — the power to “veto or invalidate an initiative measure that has been approved by the voters.”²³ But we also do not want to undermine the legitimate democratic accountability interests around which Article III standing doctrine has been built.

Some observers may view this as a false dilemma insofar as federal courts are charged and directed by the Constitution’s Supremacy Clause with safeguarding federal law, and thus should strictly maintain Article III limitations without being too concerned about any resulting effects on direct democracy.²⁴ That, in fact, seems to reflect the attitude of the majority of the Supreme Court in *Hollingsworth*.²⁵

But this perspective ignores that the Tenth Amendment,²⁶ the Republican Guarantee Clause,²⁷ and federalism — also parts of the Constitution alongside the Supremacy Clause and Article III — generally allow and encourage states to have and experiment with direct democracy devices so long as those devices are majoritarian.²⁸ In other words, as part of the larger federal constitutional system, federal courts are charged with safeguarding state-maintained direct democracy. So if there are ways to harmonize the integrity of direct democracy and Article III concerns, federal courts must find and follow them.

The central question is thus whether the need for someone to be able to defend initiatives when elected officials (perhaps for improper reasons) decline to defend can be reconciled with the concerns catalogued above concerning initiative-proponent standing. In taking up this inquiry, I begin by highlighting a point that many persons involved in the discussion about proponent standing may not always fully appreciate: The issue of federal court standing is ultimately a federal question and that means not simply, as I just mentioned, that

²³ See *Perry v. Brown*, 52 Cal. 4th 1116, 1126 (2011).

²⁴ See U.S. CONST. art. III; U.S. CONST. art. VI, cl. 2.

²⁵ *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013).

²⁶ U.S. CONST. amend. X.

²⁷ U.S. CONST. art. IV, § 4.

²⁸ See generally William T. Mayton, *Direct Democracy, Federalism & the Guarantee Clause*, 2 GREEN BAG 2D 269 (1999) (arguing that the Guarantee Clause grants a federal right to states to choose among various forms of majoritarian government as long as the state acts peaceably).

federal courts have the final say as to federal standing, but also, more importantly, that federal courts are prohibited from implementing state law when that law would impose on federal courts to do things that are not appropriate for federal courts to do within our federal system of separated powers.

To put the point more practically, state-law authorization of proponents to sue in federal court might be necessary to federal standing — as the Supreme Court, in the Arizona case,²⁹ intimated — but simple authorization by a state should not be sufficient. State courts can, of course, open their doors to initiative proponents as widely as the state judges choose, but that choice can never force federal judges to accept initiative proponents as full parties in federal court if federal standing policy and constitutional doctrine dictate otherwise.³⁰ Even if some deference is afforded to states and state law, the notion advanced by the California Supreme Court 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”³¹ is accurate only in part, at least if we are talking about defending a challenged state law in federal court. Not all exercises of the state’s power “to determine who is authorized to assert the state’s own interest” will suffice to satisfy the requirements of federal court standing.

On the other hand, we need not read Article III unnecessarily broadly to create an otherwise avoidable conflict with proponent standing. Precisely what requisites of Article III should suffice to permit proponent standing to defend in federal court? The first requirement, which comes directly from well-established federal standing doctrine, is that the authorization created by state law to press the interests of the people not be conferred too diffusely.³² The Supreme Court has made clear that prudence counsels against adjudicating the generalized claims of persons whose injuries are “shared by a large number of citizens in a substantially equal measure.”³³ This prudential barrier ordinarily prevents taxpayers from suing in federal court in their taxpayer capacity alone,³⁴ and the reasons for disfavoring generalized grievors as plaintiffs

²⁹ *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65-66 (1997).

³⁰ *See, e.g., DeFunis v. Odegaard*, 416 U.S. 312, 316, 319 (1974) (highlighting the different rules for justiciability in state and federal courts).

³¹ *Perry v. Brown*, 52 Cal. 4th 1116, 1135 (2011) (emphasis omitted).

³² *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992) (rejecting the idea that legislature can authorize citizenry generally to sue to ensure governmental compliance with law).

³³ *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 80 (1978).

³⁴ *See, e.g., Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442-45

challenging an enactment also argue against allowing generalized grievers to defend a measure. As the Supreme Court observed in the Arizona case, “[s]tanding to sue or defend [and not just standing to sue] is an aspect of the case-or-controversy requirement.”³⁵

This means, among other things, that a state cannot designate every voter as its agent for purposes of defending state laws in federal court. The California Supreme Court, for example, avoided deciding whether California law would permit persons or entities other than initiative proponents to defend on behalf of the voters when elected officials decline to do so.³⁶ But elsewhere in its 2011 ruling, it analogized the authority initiative proponents enjoy to represent the voters to its so-called “private attorney general doctrine, [under which] private individuals are permitted to act in support of the public interest by bringing lawsuits to enforce state constitutional or statutory provisions in circumstances in which enforcement by public officials may not be sufficient.”³⁷ I have little doubt that if a private attorney general were to file suit in federal court (say, by virtue of diversity jurisdiction) to enforce California interests (say, against another State), he would be required to establish a particularized injury and other federal standing requirements, and could not be afforded federal standing on the simple ground that he was the agent of the State of California.³⁸ Just as Congress cannot eliminate the federal standing requirement of “injury in fact,”³⁹ neither can states.

Second, even if the state law authorization is sufficiently particularized to avoid the generalized grievance barrier, the individuals whom state law authorizes to represent the voters must be “agents of the people.”⁴⁰ Refer back to the crucial Supreme Court language excerpted above from the Arizona initiative case: After contrasting initiative proponents with elected legislative leaders, the Court distinguished between state law that “authorizes” legislators and state law that “appoint[s]” initiative proponents to affirmatively make them

(2011) (explaining that taxpayers do not have standing in federal court as a general rule because injuries received as a taxpayers are likely too conjectural and speculative).

³⁵ *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997).

³⁶ *Perry v. Brown*, 52 Cal. 4th at 1162.

³⁷ *Id.* at 1160.

³⁸ See, e.g., Brief for Walter Dellinger as Amicus Curiae in Support of Respondents on the Issue of Standing at 9-11, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) [hereinafter Brief for Walter Dellinger] (explaining how taxpayers must have a specific injury to have Article III standing).

³⁹ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992).

⁴⁰ *Arizonans for Official English*, 520 U.S. at 65.

“agents.”⁴¹ “Authorizing” already elected legislative leaders should not pose as much of a problem as “appointing” persons who have not in any other capacity been chosen — either directly or indirectly — as representatives or agents by the electorate.

What does “agency” mean in this setting? This is where the recent Supreme Court ruling in *Hollingsworth* makes its big mark, and where, I believe, it goes off the tracks. The gist of the Court’s analysis went like this:

[The proponents] are plainly not agents of the State — “formal” or otherwise . . . [because] the most basic features of an agency relationship are missing here. Agency requires more than mere authorization to assert a particular interest. “An essential element of agency is the principal’s right to control the agent’s actions.” Yet petitioners answer to no one; they decide for themselves, with no review, what arguments to make and how to make them. Unlike California’s attorney general, they are not elected at regular intervals — or elected at all. No provision provides for their removal. As one *amicus* explains, “the proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however and to whatever extent they choose to defend it.”⁴²

The focal point of the Court’s analysis was whether, under traditional principles of agency law, the voters of California — the principals — could be said to “control” their putative agents, the proponents.⁴³ But conventional agency principles of “control” cannot — please forgive the pun — control here because traditionally accepted conceptions of a principal’s dominion over an agent do not and cannot fully explain the relationship between voters and persons who without question legitimately serve as voters’ agents, such as governors and attorneys general.

Let me be clear: I have no disagreement with the idea that incorporation of some form of common law agency is appropriate here.

⁴¹ *See id.*

⁴² *Hollingsworth*, 133 at 2666-67 (citations omitted). The Court also went on to cite the lack of a clear fiduciary relationship between the voters and the proponents as another element of agency that was missing. But had the lack of a fiduciary relationship been the key factor, the appropriate recourse would have been to remand the case to see whether state law in fact created such a fiduciary obligation; the California Supreme Court neither mentioned nor rejected one in its most recent elaboration of the special role proponents play under state law in *Perry v. Brown*.

⁴³ *Id.* at 2666.

As the amicus brief relied on by the *Hollingsworth* Court observed, a “rule that a state may delegate representation of its own interests only to actual agents is necessary to keep the federal judiciary within its constitutionally prescribed role . . . and also promotes the Constitution’s structural concern with government accountability.”⁴⁴ And control by the principal over the agent may be a *part* of the analysis; it is easier to credit an agency relationship when the principal can easily and efficiently control or countermand the actions of the agent. Time limits on the duration of the agency and more detailed delineation of the precise charge of the agent and the procedures to be used by the agent also help. Control in this context obviously promotes democratic values of the kind discussed above concerning legislative standing. Thus, there may be some situations in which state law simply places no meaningful limits on initiative proponents such that they cannot be credited as agents.

But the Court’s reliance on control alone, as the dispositive factor, is misguided in a few important respects. First, it fails to acknowledge that you cannot easily import jot for jot the notion of “control” from the private law agency context into the governmental agency setting. The common-law principles of agency hold that “[a] relationship is not one of agency . . . unless . . . the principal has the right throughout the duration of the relationship to control the agent’s acts.”⁴⁵ But by this definition, even ordinary elected officials whom we take for granted as being the agents of the state would not qualify. The Court points out that, unlike the proponents, California’s Attorney General is “elected at regular intervals” and may be subject to “removal.”⁴⁶ But surely a state attorney general would be an agent of the State entitled to represent the interests of the state in federal court even if he were limited to a single term and not subject to the power of recall (as he is not in many states).⁴⁷ And this remains so even though Attorneys General in most states are, like most elected officials, not bound by “instructions” by the electorate during their terms in office — even though private agents are compelled to follow specific instructions of the principal. To be sure, the prospect of reelection might create some modicum of voter control but, as just observed, not all officials can (or do) stand for reelection —

⁴⁴ Brief for Walter Dellinger, *supra* note 38, at 6.

⁴⁵ RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006).

⁴⁶ *Hollingsworth*, 133 S. Ct. at 2666-67.

⁴⁷ Nor, as the dissenters point out, can the Attorney General be distinguished from initiative proponents on the ground that he is the State itself and thus does need to satisfy the definition of an agent of the State. “If there is to be a principal, then, it must be the people of California, as the ultimate sovereign in the State.” *Id.* at 2671 (Kennedy, J., joined by Thomas, Alito & Sotomayor, JJ., dissenting).

and yet no one would doubt that these elected officials are nonetheless agents of the state.

Moreover, it is not entirely clear that initiative proponents are not removable. Whether or not the voters could officially *recall* proponents, certainly the voters could disempower the office by passing another initiative saying that the proponents of the prior initiative are no longer empowered to act as the people's agents. And yet this theoretical option should not affect whether we should allow them to litigate on behalf of the people in federal court in the first place.

And there is another sense in which proponents are subject to control; the Attorney General or Governor, by deciding to defend the initiative measure or to undertake a good-faith settlement of the litigation after it has been filed can, in theory, oust the proponents of their authority. The California Supreme Court was careful to hold only that proponents enjoy state constitutional authorization when the elected officials ordinarily counted on to defend decline to do so.⁴⁸

Just as a theory focused on control proves too much, it solves too little. As the Court understands control, the requirement of control would seem to effectively foreclose almost all non-regular public officials from defending initiatives. An outcome in which no one other than elected, regular public officials may defend seems inadequately attentive to the forces that generate direct democracy and the skepticism that voters might understandably harbor about ordinary government officials when it comes to initiatives.

To understand this, we need examine the options that the "control theory" (as I shall label the Court's approach) leaves open to states that wish to ensure that initiatives are adequately defended when Attorneys General and Governors decline. As the amicus brief laying out the control theory adopted by the Court explains, one option is for the state to authorize initiative proponents to bring suit against a state attorney general in *state* court, after an initiative is passed, to seek a binding determination that the initiative is constitutional.⁴⁹ Or the state could require the Attorney General to file a declaratory judgment action in

⁴⁸ *Perry v. Brown*, 52 Cal. 4th 1116, 1127 (2011); *cf.* *Vt. Agency of Nat'l Res. v. United States ex rel. Stevens*, 529 U.S. 765, 769-70 (2000) (explaining that, in *qui tam* actions, government may take control of litigation even though relators had standing). To be sure, because the California Supreme Court did not answer many important questions implicated by its ruling, precisely how initiative proponents might interact with an Attorney General or Governor who is defending may be a complicated matter. But there is no suggestion in California law that an Attorney General who is defending on the merits does not get to make stipulations, concessions, and settlements.

⁴⁹ Brief for Walter Dellinger, *supra* note 38, at 30-31.

state court to resolve the initiative's legality.⁵⁰ Maybe so, but neither of these state court proceedings, without more, would obligate the Attorney General to defend in any *federal* challenge brought to the initiative and would thus not ensure that the initiative would not be effectively nullified for lack of a vigorous defense.

In addition, a state could require the Attorney General to defend the constitutionality of all challenged state initiatives and appeal any adverse rulings.⁵¹ I agree that this should be an option, but it is one with significant downsides. First, it might require a state constitutional amendment in many places. And more fundamentally, it presupposes that there is no difference between an attorney general and a specially selected agent of the people who has an interest in defending not all laws, but one or more particular enactments for which the people felt they needed to resort to direct democracy in order to enact. There are many settings in which democratic ideals call for specially convened, single-task bodies rather than regularized, repeat-player government officials. Juries are one such institution. So, too, is a constitutional "convention" assembled for the purposes of proposing or ratifying amendments to a constitution.⁵² In these settings, federalism properly allows states to experiment (within broad majoritarian limits imposed by the Republican Guarantee Clause) to find their own solutions that give voice to the people's distrust of regular elected officials. To the extent that the control theory approach would limit states that want to have an initiative device to regulating and then relying on elected attorneys general only, I question whether such a narrow window for direct democracy accommodation is warranted by federal standing principles.

One way to appreciate the downside of a control theory approach is to ask how California's Proposition 11⁵³ — which was enacted the same

⁵⁰ *Id.* at 31.

⁵¹ *Id.*

⁵² See, e.g., U.S. CONST. art. V ("Congress . . . shall call a Convention for proposing Amendments.").

⁵³ Ballot Pamp., Gen. Elec. (Nov. 4, 2008), text of Prop. 11, pp. 137-40. The measure provides in relevant part:

The [citizen] commission has the sole legal standing to defend any action regarding a certified final map, and shall inform the Legislature if it determines that funds or other resources provided for the operation of the commission are not adequate. The Legislature shall provide adequate funding to defend any action regarding a certified map. The commission has sole authority to determine whether the Attorney General or other legal counsel retained by the commission shall assist in the defense of a certified final map.

day as Proposition 8 and which created and empowered a citizen commission to draw, *and defend in court*, electoral district lines — would fare. Proposition 11 does not fall within any of the control theory's identified safe harbor approaches states could pursue, and yet I see no problem with it. And Proposition 11 is just one example of an initiative that authorizes someone other than regular elected officials to defend a challenged initiative.⁵⁴

All of this brings us to one last option: A state could create an “independent office responsible for defending initiatives in cases in which the Attorney General declines to do so.”⁵⁵ This is a very interesting option and one on which Professors Garrett and McCubbins have done extensive and creative work, identifying and analyzing the structure, composition, and operation of such independent initiative defense offices.⁵⁶ I agree that this option would satisfy Article III, but I would remind that this option would appear to contradict the very concept of control advanced by the Court and by proponents of a control theory. If an initiative's proponents cannot be agents of the voters because the proponents are not controlled by the state (or anyone else), then why is not the lack of control a similar problem for the “independent” office created? Is not lack of control exactly what is connoted by the term “independent”?

And notice (importantly) that even if the Garrett/McCubbins' approach were to suffice under the *Hollingsworth* Court's vision of Article III (putting aside the internal inconsistency within the control theory's explication), the question arises whether the voters should *have* to adopt something as comprehensive and regularized as an independent agency. Many citizens might reasonably fear that such an agency will morph into yet another bureaucratic morass that will either become captured by various interest groups, consume undue public resources, or both. The people of a state may prefer instead to have no single agency defend all undefended initiatives, but rather to deputize proponents of a particular initiative to defend the measure that is near and dear to their heart and then fade back into the woodwork when that

Id. at 138. For the full text of Proposition 11, see DEBRA BOWEN, CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE 137-40 (Aug. 11, 2008), available at <http://vig.cdn.sos.ca.gov/2008/general/pdf-guide/vig-nov-2008-principal.pdf>.

⁵⁴ See generally Elizabeth Garrett & Mathew D. McCubbins, *The Dual Path Initiative Framework*, 80 S. CAL. L. REV. 299, 300-03 (2007) (proposing reforms including the addition of independent agencies for purposes of implementation and defense of initiatives).

⁵⁵ Brief for Walter Dellinger, *supra* note 38, at 32.

⁵⁶ Garrett & McCubbins, *supra* note 54, at 303.

particular task is completed. And, as argued above, the control theory does not explain why, in a system of federalism that promotes experimentation and diversity, states should not be free to choose a more streamlined, specially convened, single-task body rather than a full-blown, repeat-player governmental office.

II. ASSENT RATHER THAN CONTROL AS THE KEY FACTOR: A STRUCTURAL DUE PROCESS TAKE ON STANDING

Ultimately, I agree with the Court that there is an intuitive difference between an Independent Counsel created by law (or the state Attorney General, for that matter), on the one hand, and the Proposition 8 proponents, on the other. But for me the difference does not have to do with control so much as it does with how (and whether) the agents were chosen by the principal (the people) at the outset. (That is also why I draw a line between Proposition 11 and Proposition 8.) In other words, before one ever gets to the issue of control under the common law of agency, one needs to find an expression of assent by the people to the creation of the agency relationship in the first place. The source of law on which the *Hollingsworth* majority leans most heavily is the Restatement of Agency,⁵⁷ which observes that “[u]nder the common-law definition, agency is a consensual relationship. The definition requires that an agent-to-be and a principal-to-be consent to their association with each other.”⁵⁸ In the same vein, the Restatement emphasizes that “[a]gency . . . arises [only] when . . . a “principal” . . . manifests assent to . . . an “agent” . . . [who] shall act on the principal’s behalf”⁵⁹

Since, as the Supreme Court noted in the Arizona case, initiative proponents are the agents of, if anyone, the people, it follows that the people must manifest assent to the proponents that they shall act on the people’s behalf.⁶⁰ That is, the people of a state have to say or do something that, in context, reflects their choice to select a proponent of an initiative as their agent before the proponent can satisfy the agency concept and be entitled to represent the people in federal court.

Some readers may think it might be prudent and make good democratic policy sense to have formal agency appointment and assent by the people before proponents can be granted standing, but still ask where, precisely, is the requirement of assent grounded in the principles

⁵⁷ See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666-67 (2013).

⁵⁸ RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. d (2006).

⁵⁹ *Id.* § 1.01.

⁶⁰ See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997).

of standing doctrine themselves? This is an important question and one not explored by the Supreme Court or any of the briefs before it. I derive the assent requirement directly from the representational nature of proponent standing, particularly in this setting, and the related general requirement of assent before representational standing can be maintained in analogous settings. Remember, initiative proponent standing is not urged under the theory that the proponents have a stake that separates them from the rest of the electorate and gives them a particularized basis for being in court (and while the California Supreme Court called them the most “logical” persons to speak for the people, it did not say that proponents have a particularized interest post-enactment).⁶¹ Rather, it is that the proponents are good representatives of the electorate and in that sense are an appropriate substitute for the ordinary government representatives (who themselves go through formal election or appointment processes before they are entitled to speak in court on behalf of the electorate). Even the California Supreme Court, which thinks proponent standing should be permitted, said that one of the main purposes of proponent standing is to assure the people that their will can be defended.⁶² But if the point is to protect the people’s will, then we need to know what their will is with respect to the proponents. This notion that the agent must be formally empowered by the principal runs through a number of third-party standing settings similar to proponent standing that the Court has encountered.

Take, for example, associational standing, the idea that associations and similar organizations can represent the interests of their members in court, even if the injury complained of is affecting only the individual members and not the association as an entity.⁶³ The power these associative agents enjoy to represent the rights of third parties (the members themselves) depends upon the members having affirmatively decided and registered their decision to *join* the association in the first place. As put by Justice Thurgood Marshall for the Supreme Court in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*⁶⁴ (stressing this relationship of consent between the members and the association reflected by the decision of members to join): “[T]he doctrine of associational standing recognizes that the primary reason people join an organization is often

⁶¹ Perry v. Brown, 52 Cal. 4th 1116, 1126 (2011).

⁶² *Id.* at 1125-26.

⁶³ See, e.g., Warth v. Seldin, 422 U.S. 490, 511 (1975) (stating that an association may have standing to address injuries to itself and assert the rights of its members).

⁶⁴ 477 U.S. 274, 290 (1986).

to create an effective vehicle for vindicating interests that they share with others.”⁶⁵ For this reason, an association that cannot identify formal members who are being injured cannot not be said to represent the legal interest of individuals with whom the association happens to claim some ideological commonality; this is why environmental organizations in order to have standing, need to show specific impact on specific members.⁶⁶ And even under certain circumstances where a member might be bound or precluded by his association’s prior litigation of a matter on his behalf, a non-member would not, absent some extraordinary exception, ever be bound by the association’s litigation of claims on his behalf simply because he shares some common viewpoints. Membership — and the volitional act of joining — is key.

This theory of representational standing has been applied outside of traditional associations. The theory has even been applied to some situations in which individuals do not have much of a choice but to join the organization in question, such as government lobbying agencies, unions, and state bar associations.⁶⁷ Importantly, though, in each of these settings, the members of each organization (even if compelled to participate in order to receive some other benefit such as union wages or the ability to practice law) participate in the selection of the individuals who make decisions on behalf of the organization. This is true of state bars, unions, and those government entities the Supreme Court has held partake of associational standing.⁶⁸

And if we return to the closest analogy to proponent standing, the one with which we began — legislative standing — formal assent by the principals to the creation of an agency relationship has been key. When legislative leaders are permitted to defend legislation in federal court, they are entitled to do so only when the legislative body in question has formally installed them as leaders who are accountable to the body, and in turn to the voters. Individuals who might have been key drafters or players in the legislative process cannot on that basis step in on behalf of the legislation and the legislature to defend. As the Supreme Court has made clear, the power to defend comes with the office, and with the

⁶⁵ *Id.*

⁶⁶ *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

⁶⁷ *See Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343-45 (1977).

⁶⁸ *See id.* It is important to note here that the assent has to precede the representation by the agent. If the legislature passes a new law providing for initiatives, or a court announces a new rule, people can be said to authorize representatives in the future. But neither the legislature nor a court can alter whether people in the past actually approved or joined.

empowerment of that office by explicit action of the majority of legislators (either in a prior statute or an ad hoc delegation).⁶⁹

Thus, in *Karcher v. May*, the Supreme Court concluded that the legislative leaders lacked authority to pursue their appeal because they were no longer in office.⁷⁰ Their power to represent the state in the lower courts to defend a challenged law when elected executive officials declined to defend, the Court reasoned, depended explicitly on those legislative leaders having been selected and authorized by their respective legislative bodies.⁷¹ And once they lost their leadership posts as the case proceeded up the appellate ladder, they lost their standing to speak for the state and its legislative branch.⁷² Relatedly, it is only because the lower courts rendered their decisions at a time when these leaders did occupy elected leadership positions, and had been specifically empowered by the members of the legislature to represent that body, that the rulings of the lower courts were preserved.⁷³ Once assent from the legislative body was removed, the legislators in question could no longer have a claim to be its agent.

So it is not enough that state law authorizes someone to represent the interests of the people in federal court. For federal standing principles to be satisfied, only those persons as to whom state law complies with the basic agency concept of assent by the principal can defend on behalf of the electorate when a federal court is asked to repudiate the people's actions by potentially misinterpreting or invalidating their legislative enactments.

Moving from theoretical and doctrinal foundations to functional operation, why does it make sense, in these kinds of representational third-party standing settings, to insist on such formalities? As the Court has explained, limits on standing in this realm derive, in part, from concerns of the interests of the actual parties in interest, including the need to "avoid[] . . . the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them."⁷⁴

⁶⁹ *Karcher v. May*, 484 U.S. 72, 81 (1987).

⁷⁰ *Id.* at 81.

⁷¹ *Id.* at 78-81.

⁷² *Id.* at 81 ("[The Speaker of the New Jersey General Assembly and the President of the New Jersey Senate] participated in this lawsuit in their official capacities as presiding officers of the New Jersey Legislature, but since they no longer hold those offices, they lack authority to pursue this appeal on behalf of the legislature.").

⁷³ *Id.* at 82 (finding that lower court rulings remained intact because legislative leaders did represent the legislature at that time).

⁷⁴ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 n.7 (2004) (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 80 (1978)).

In this regard, it is helpful to separate out two different effects that a federal court resolving the merits of a case might have on the interests of third parties not actually present in court. First, a case can (perhaps in part because of bad legal representation) generate bad law that, when enshrined at the highest levels of the federal judicial pyramid, creates bad precedent for any other party who ever wishes to undo it. Second, a case can formally bind persons who are considered to be actually represented in the case to the point where such persons are prevented from relitigating the matters that have been adjudicated, even if they could convince the court that its legal precedent should be revisited. This formal barrier to relitigation — known as preclusion — is both more forceful and less biting than its cousin, the idea of adherence to precedent. Preclusion is more absolute than precedent, but it applies only if the precluded party was actually represented in the earlier case. Third-party standing settings implicate both doctrines. Often, when a party has a cognizable injury for which he is seeking redress, he is simply invoking laws that were designed to protect others as a basis for demonstrating that the law has been violated. In this situation, precedent but not preclusion will apply; the third parties whose rights and interests are being invoked could themselves assert those rights, and they would not be precluded, by the results of the prior litigation, from asserting the rights directly.

But in the context of some associational standing, including when a party purports to speak for the electorate — whether that party is an initiative proponent, an authorized leader of the legislature, or an executive branch official — there is a high likelihood that he formally binds those whom he purports to represent. And if the people (or other of their agents) try to relitigate the matter, they will be barred not just by bad precedent that is made, but by preclusion. It is in these settings — where preclusion as well as precedent will be implicated — where prior assent is most important.⁷⁵

Nor is this concern for the interests of represented voters far-fetched in this setting. Indeed, the Proposition 8 case itself illustrates how

⁷⁵ There is an obvious analogy to class action practice here, where absent members of a class will be bound by preclusion. This is why they generally have a right to opt out (or not opt in). There are some representational or virtual standing settings — e.g., so-called “next friend” standing — where assent seems not required, but instead a “close relationship” between the first and third parties will suffice. *See, e.g., Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004) (discussing the “close relationship” test in the context of third-parties); *Whitmore v. Arkansas*, 495 U.S. 149, 152 (1990) (discussing “next friend” standing in the context of a “close relationship” between a priest and a condemned inmate). But in these settings the person whose rights will be litigated (and who will presumably be bound by the judgment) is incapable of voicing assent.

unelected, unaccountable, potentially unrepresentative proponents can take litigation positions very different from those that would have been taken by elected and accountable agents. In particular, compare the fixation the Proposition 8 proponents have with the link between marriage and procreation — the basis they attempted to use to defend Proposition 8 — with the arguments made by then-Attorney General Jerry Brown to the California Supreme Court in 2008 when he, in good faith, attempted to defend the statutory predecessor to Proposition 8, which also banned same-sex marriage. In that proceeding, Attorney General Brown did not invoke procreation as the basis of defense, but instead — and much more plausibly — invoked history, tradition, and the longstanding statutory definition of marriage to argue that incremental change is a rational prerogative of the legislative branches.⁷⁶ At the U.S. Supreme Court oral argument in *Hollingsworth* in 2013, some of the Justices were candid about saying these caution-based arguments were really the best ones to defend the measure.⁷⁷ Moreover, the Proposition 8 proponents did not try to harmonize Proposition 8 with all of California's other laws, which the elected Attorney General or Governor would likely have done.

Bad representation leads, of course, to an increased probability that the result will not fully reflect the interests of the people involved. And it leads to another problem — interference with democratic accountability. If a federal court strikes down an initiative as violative of, say, the Fourteenth Amendment and that initiative is defended on the merits not by elected officials but rather only by proponents whom the voters never knew and never selected, whom can the voters blame? The proponents themselves — who might not have been effective representatives, but who also have no ongoing interest in keeping the people happy? The Attorney General or Governor — who failed to defend, but who can point out that the measure did not go undefended? The federal courts — for their “activism” in thwarting the will of the electorate? The people of the United States — for adopting the Fourteenth Amendment?

Requiring agency and assent should at least cause the people to focus at the front end on whom they want to be their advocate in the event that the Attorney General and Governor decline to defend, and to make an informed decision in this regard. If voters pick agents who, in

⁷⁶ *In re Marriage Cases*, 43 Cal. 4th 757, 849, 852-53 (2008) (describing the Attorney General's argument “that the separation-of-powers doctrine precludes a court from modifying the traditional definition of marriage”).

⁷⁷ See Transcript of Oral Argument at 55-56, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (Nos. 12-144), 2013 WL 1212745 (questions by Justices Alito and Scalia).

hindsight, appear to have underperformed, then voters will know better next time. But if agents are assigned to the electorate without its assent, the people may not own the responsibility that properly belongs to them and instead may wrongly blame federal courts for a disappointing outcome. Given the closeness of the Proposition 8 vote itself (52%–48%),⁷⁸ it is not implausible to think that a voter focus on the proponents — and whether they should be made agents of the people — could have led to a different ballot result.

And avoiding unfair blame underlies much of federalism, which in turn is one of the pillars of standing doctrine.⁷⁹ Oftentimes, federalism accountability is discussed in circumstances in which the federal government may be said to be actively inserting itself into state processes. But just as the federal government should not be able to impose upon states in a way that blurs accountability, states also should not be able to involve the federal government — and in particular the federal courts — in a way that increases the chances that the feds will needlessly be blamed. The seminal Supreme Court case of *Michigan v. Long*⁸⁰ is a prime example. *Long* imposed a plain-statement requirement on state courts to make clear when their rulings were based on independent and adequate state law grounds rather than on federal law principles.⁸¹ This requirement, like the requirement of assent by the people I advocate here, is designed in significant part to prevent federal courts from getting blamed for the invalidation of state laws when the real responsibility for invalidation traces to decisions made by state institutions.⁸²

Of course, keeping lines of accountability clear is not the only important norm that federalism promotes. Federalism also values state flexibility and state innovation,⁸³ Sometimes the people will feel the need to empower persons to act as their agents who are not the regular officials who stand for reelection or those who have career-long incentives to keep the people happy. Indeed, the initiative device itself

⁷⁸ See DEBRA BOWEN, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 7, 15 (Dec. 13, 2008), available at http://www.sos.ca.gov/elections/sov/2008-general/sov_complete.pdf.

⁷⁹ See, e.g., Heather Elliott, *Federalism Standing*, 65 ALA. L. REV. 435 (2013) (arguing that standing is intended in significant part to promote federalism values).

⁸⁰ 463 U.S. 1032 (1983).

⁸¹ *Id.* at 1041.

⁸² See *id.* at 1042.

⁸³ See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It 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 country.”).

is born of distrust of such regular elected officials, even though in some respects those officials may be the most accountable. In this context in particular, as the California Supreme Court has noted:

[T]he voters who have successfully adopted an initiative measure may reasonably harbor a legitimate concern that public officials who ordinarily defend a challenged state law in court may not, in the case of an initiative measure, always undertake such a defense with vigor or with the objectives and interests of those voters paramount in mind.⁸⁴

For this reason, voters may prefer to vest the power to defend in someone other than ordinary public officials. For example voters may wish to create an Independent Counsel agent who will not be beholden to ordinary officials, but who also may not be re-electable and thus accountable in a straightforward way to the people. But although an Independent Counsel may blur lines of accountability somewhat, as was true in the context of the federal Independent Counsel provided for by the Ethics in Government Act of 1978,⁸⁵ when the Independent Counsel position or person is chosen by the people themselves, at least there is accountability that comes from people owning the decision as to the structure and possible occupants of the position. As troubling as the Ethics in Government Act was, imagine how much worse things would have been if there had been no formal appointment by the people or any of their authorized agents in the creation and filling of the Office of the Independent Counsel. Imagine instead that a court (without the benefit of a statute) had simply “authorized” an independent counsel to speak on behalf of the people of the United States and bind them in federal court. That is why the Article II Appointments Clause claims raised in *Morrison v. Olson*⁸⁶ posed important questions about whether there had been a valid creation of agency in the first place.⁸⁷

III. DUE PROCESS FOR THE PROPONENTS THEMSELVES

But is the kind of “agency/assent of the people” approach I advocate here fair to initiative proponents and the initiative process itself? I think so. It is not by any means impossible for initiative drafters to place into their initiatives language that formally and explicitly appoints a particular set of individual or entities, or a process to deputize some

⁸⁴ Perry v. Brown, 52 Cal. 4th 1116, 1125 (2011).

⁸⁵ Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

⁸⁶ 487 U.S. 654, 670 (1988).

⁸⁷ See *id.* at 670-77.

individuals or entities, to represent the electorate in the event that the initiative is passed and then challenged. Indeed one initiative, Proposition 11 (creating and empowering a citizen commission to draw and defend electoral district lines), that California adopted the same day it passed Proposition 8, did just that.⁸⁸

To be sure, the drafters and supporters of any particular initiative might feel treated unjustly if the Supreme Court were to reject initiative-proponent standing under the rule I propose since, at the time the initiative was passed, such a requirement of agency and assent might not have been apparent to everyone. But that kind of generic unfairness occurs whenever the law evolves and new judicial tests and doctrines are formulated and applied to the case at hand. This phenomenon is really a byproduct of our system of constitutional adjudication, in which federal courts are limited to resolving actual cases and controversies.

Thus, as long as the new tests and doctrines that are being fashioned make general sense as a matter of vindicating constitutional values and principles going forward, there is no requirement (and, indeed, perhaps no judicial power) to carve out an exception for the litigants in a given case who did not see (and perhaps could not easily have seen) the doctrinal clarification coming.

IV. THE APPROACH IN ACTION: RETURNING TO THE PROPOSITION 8 DISPUTE

While any principled approach to the question of initiative proponent standing in federal court should not be crafted around any particular initiative or federal lawsuit, the general approach just described can be understood more fully by applying it to the Proposition 8 litigation that has been waged in the federal courts for the last four years. As noted and discussed earlier, the California Supreme Court issued a ruling in November 2011 (which was then relied upon by the U.S. Court of Appeals for the Ninth Circuit) holding that when the public officials who ordinarily defend a challenged state law decline to do so, the official proponents of a voter-approved ballot measure are, under the California constitution and election laws, “authorized to assert the state’s interest in the validity of the initiative [enabling them to defend the constitutionality of the initiative] and to appeal a judgment invalidating the measure.”⁸⁹

⁸⁸ See *supra* notes 63–64 and accompanying text.

⁸⁹ *Perry v. Brown*, 52 Cal. 4th at 1139.

Let us assume for the moment that this authorization is sufficiently cabined to a manageable number of specially empowered individuals so as not to implicate any concern about a generalized grievance. In this regard, I note that the California Supreme Court declined to determine whether “the official proponents of an initiative measure possess a particularized interest in the initiative’s validity”⁹⁰ that might be cognizable in federal court, because the California Justices believed federal standing could rest adequately on the proponents’ authorized assertion of the state’s interest itself.⁹¹ But the California Supreme Court did indicate that the proponents were specially situated with respect to the measure they proposed; while the court declined to say whether other (non-proponent) individuals could defend on behalf of the state when neither elected officials nor proponents chose to do so, the court also called the proponents the “most obvious and logical persons to assert the state’s interest.”⁹² But even if this authorization is sufficiently focused, can we say it satisfies the relevant requirements of agency?

In the context of Proposition 8, I would conclude not. For starters, it is beyond dispute that the voters never affirmatively picked Proposition 8 proponents, or anyone else for that matter, to be their agents should the Governor and Attorney General decline to defend; the voters voted on the measure, not the people who brought it to them. But might not assent be inferred by the fact that the people did not *reject* the proponents and their agents against a backdrop of state law in which the California Supreme Court now tells us that proponents are in fact allowed under state law to represent the electorate? Cannot assent come about, in certain circumstances, from silent action (in this case, adoption of the initiative without any express reservation about the agency thus created)? And do not federal courts defer to state courts on the meaning and applicability of state law?

These, I think, are the key questions. And it is true that assent for agency purposes can sometimes arise from inaction. The Restatement notes that, for purposes of agency, “[s]ilence may constitute a manifestation [of assent] when, in light of all the circumstances, a reasonable person would express dissent to the inference that other persons will draw from silence.”⁹³ In other words, silence can suggest assent when reasonable people would understand the default rule to be assent and that opting out of that default would require affirmative

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 1126.

⁹³ RESTATEMENT (THIRD) OF AGENCY § 1.03 cmt. b (2006).

action. But could reasonable Californians know, in 2008, that the California default rule was that proponent agency is created whenever an initiative (that might be challenged and undefended by ordinary officials) is enacted? I do not think so.

Although the California Supreme Court observed in its 2011 ruling that there were a number of earlier cases in which proponents seem to have been permitted to participate to defend initiatives, very few of those rulings involved executive branch non-defense and virtually none of them explicitly addressed proponent standing in a way that put voters on notice.⁹⁴ Instead, such prior cases were more in the nature of what the U.S. Supreme Court has called “drive-by” jurisdictional rulings,⁹⁵ where the jurisdictional issues were never really looked at and resolved in any careful and authoritative way. Such decisions that permit parties to participate but do not explore the issue of whether they should be allowed to are entitled to no precedential weight. And even the California Supreme Court admitted in its 2011 ruling that: “This court . . . has not previously had occasion fully to explain the basis upon which an official initiative proponent’s ability to participate as a party in such litigation rests.”⁹⁶ Indeed, this observation — that no prior case had comprehensively explored the issue of proponent authorization — was repeated by the California Supreme Court, in one form or another, about a half dozen times in its *Perry* opinion.⁹⁷

As Professor Marty Lederman observes:

It is not at all obvious that in those past intervention cases the California courts gave serious consideration to whether the intervenors had state-law authority to appear on behalf of the state, let alone to control the litigation on the state’s behalf over the objection of the state executive officials who ordinarily make such decisions, such as the California Attorney General.⁹⁸

⁹⁴ *Perry v. Brown*, 52 Cal. 4th at 1125.

⁹⁵ See, e.g., *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998) (“We have often said that drive-by jurisdictional rulings of this sort . . . have no precedential effect.”).

⁹⁶ *Perry v. Brown*, 52 Cal. 4th at 1125.

⁹⁷ E.g., *id.* at 1144. (“[I]n most of these cases the official initiative proponent’s participation as a formal party — either as an intervener or as a real party in interest — was not challenged and, as a consequence, this court’s prior decisions (with the exception of the Building Industry Assn. decision discussed below) have not had occasion to analyze the question of the official proponent’s authority to so participate.”).

⁹⁸ Marty Lederman, *Understanding Standing: The Court’s Article III Questions in the Same-Sex Marriage Cases (VI)*, SCOTUSBLOG (Jan. 21, 2013, 6:52 AM), <http://www.scotusblog.com/2013/01/understanding-standing-the-courts-article-iii-questions-in->

For these reasons, Professor David Cruz rightly concludes:

Ordinary principles of statutory and constitutional interpretation . . . 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. *The court's ruling thus is better understood not as an interpretation of state law but as a common-law holding, an interpolation, or a judicial construction, a rule the court chose to adopt to give effect to the values reflected in the California constitution and the state Election Code — "to guard the people's right to exercise the initiative power."*⁹⁹

And here is another reason voters in California in 2008 could not reasonably understand that their silent enactment of Proposition 8 would create agency on the part of the proponents. Article II, section 12 of the state constitution provides that "[n]o amendment to the Constitution . . . by the Legislature or by initiative, that names any individual to hold any office . . . may . . . have any effect."¹⁰⁰ To the extent that the identities of Proposition 8's proponents were known or knowable to the voters, and to the extent that a proponent-agent might be considered an officeholder, the electorate might have thought this provision prevented the creation of any agency. The California Supreme Court never mentioned this provision in its 2011 ruling and — based on its observation that proponents have not necessarily become "de facto public officials"¹⁰¹ — might very well conclude that although proponents are authorized to represent the state, they do not "hold office" for purposes of this provision. But certainly the existence of this language in the state constitution could influence what reasonable voters could expect — in the event that they were diligent and far-sighted enough to think about the question of proponent agency at all.

It is possible that, going forward, in light of the California Supreme Court's 2011 ruling, voters in California should know, and take account of, the fact that when they approve an initiative, they are, in addition to adopting whatever policy is embodied in the initiative, effectively appointing certain persons to be their agents for certain limited

the-same-sex-marriage-cases-vi.

⁹⁹ David B. Cruz, *CA Supreme Court's Disappointing Standing Decision*, CRUZ LINES (Nov. 17, 2011, 11:55 PM), http://cruz-lines.blogspot.com/2011_11_01_archive.html (emphasis added).

¹⁰⁰ CAL. CONST. art. II, § 12.

¹⁰¹ *Perry v. Brown*, 52 Cal. 4th at 1159.

purposes in court.¹⁰² But nothing the California Supreme Court did or could say in 2011 could change the fact that there was no manifestation of assent by the people in 2008. Because state law clarity was certainly not in place when Proposition 8 itself was passed in 2008 (and I note here that it was passed by a slim margin),¹⁰³ one could easily conclude that the requirements of federal standing were not necessarily met by the proponents in the Proposition 8 setting itself. The voters of California in 2008 cannot be said to have appointed persons whom the voters did not even know were being appointed at that time.¹⁰⁴

What about the possibility that the California Supreme Court, itself an agent of the people, is appointing the proponents as additional agents for the people? Agents can and do appoint sub-agents; that is how Congress and the President appoint agents like the Attorney General and she, in turn, can appoint underlings.¹⁰⁵ As the Restatement of the Law of Agency observes: “[A] principal may empower an agent to

¹⁰² In this regard, I note that the California Supreme Court ruling *might* not suffice even going forward because it did not answer some of the key logistical questions about the length of time a proponent has power to defend the initiative. Nor did the court provide specific input or guidance on a number of other key questions, including: (1) How is litigation to be financed in situations where proponents defend in lieu of public officials? (2) How is conflict to be managed between elected officials who do defend an initiative and proponents who want to intervene to defend it as well? (3) What role, if any, does the legislature have in providing solutions to the problems listed above and others that may arise?

¹⁰³ See BOWEN, *supra* note 78, at 7.

¹⁰⁴ It may be relevant to note that the United State Supreme Court seems reluctant to infer agency in these settings. In *Raines v. Byrd*, for example, individual U.S. Senators sued to challenge the so-called Line-Item Veto Act on behalf of Congress as a whole on the ground that the law “alter[ed] the constitutional balance of powers between the Legislative and Executive Branches” *Raines v. Byrd*, 521 U.S. 811, 816 (1997). There, the Supreme Court did not discuss, much less embrace, the idea that each individual Senator or House member had been made the agent for his chamber in defending Congress’s rights, even though the Act provided that “[a]ny Member of Congress . . . may bring an action . . . for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution.” Line Item Veto Act of 1996, Pub. L. No. 104-130, § 2(a), 110 Stat. 1200, 1211. Indeed, the Court — notwithstanding this provision — “attach[ed] some importance to the fact that [the suing members of the House and Senate] have not been authorized to represent their respective Houses of Congress in this action” *Raines*, 521 U.S. at 829. *Raines* illustrates that the mention of a right to sue in court is not equivalent to the creation of an agency relationship for purposes of defending the rights of the legislative branch.

¹⁰⁵ U.S. CONST. art. II, § 2, cl. 2 (“Congress may by Law vest the Appointment of such inferior Officers, as they think proper . . . in the Heads of Departments.”); 28 U.S.C. § 503 (2013) (“The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States.”).

appoint another agent to act on the principal's behalf."¹⁰⁶ But the power of agents to validly appoint sub-agents depends on the initial scope of the agency. The President and Congress (and in some instances federal courts) are permitted to appoint sub-agents only because the initial scope of agency — the U.S. Constitution — authorizes various agents to appoint sub-agents in various ways and for various purposes.¹⁰⁷ I have found no provision of the California Constitution that could easily be read to confer onto the state courts the power to appoint agents for the people of the state.

Article III empowers federal institutions (courts) but also provides a role for the states to create interests and agents for the vindication of those interests. Principled federalism means respecting the need for federal institutions to do their jobs when they are conferred authority, but it also means not unduly imposing upon states that have properly accommodated federal judicial interests.

¹⁰⁶ RESTATEMENT (THIRD) OF AGENCY § 3.15 cmt. b (2006).

¹⁰⁷ See, e.g., U.S. CONST. art. II, § 2, cl. 2 (giving the President power to nominate and, with the advice and consent of the Senate, to appoint "Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States" and providing that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, . . . in the Heads of Departments.").