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WHO HAS STANDING?

WHY THE SUPREME COURT'S HOLDING IN HOLLINGSWORTH V. PERRY EMPOWERS POLITICIANS AT THE EXPENSE OF CITIZENS

OMAR SUBAT*

INTRODUCTION

Imagine the following scenario: after years of ambiguity on the issue, citizens from the state of Westoria have become fed up. Imagine that a majority of Westoria state citizens want to implement legislation that would legalize gay marriage throughout the state. Imagine that several citizen groups have lobbied for this type of law for many years, but to no avail. Unsatisfied by the lack of action of their state representatives, the citizens decide to take measures into their own hands. Imagine that a citizens group called “Westorians for Marriage Equality” attempt to legalize gay marriage by amending Westoria’s State Constitution through a valid state ballot initiative. Imagine that the group is successful in securing the required amount of citizen signatures to get the measure on the 2014 ballot, and that the measure passes with 52% of Westoria’s electorate.

Imagine that shortly thereafter, an organization called “Westorians for Marriage Protection” sue the Governor and Attorney General of Westoria in U.S. Federal Court, arguing that the new law violates the United States Constitution. Imagine that the Governor and Attorney General of Westoria agree with “Westorians for Marriage Protection” and refuse to defend the law on the merits in court; as a consequence the court then allows the sponsors of the initiative, “Westorians for Marriage Equality” to intervene and subsequently holds that the sponsors are authorized to assert the state’s interest. Imagine that the District Court then went on to hold that the law did violate the United States Constitution and invalidated the law. After

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this decision, the sponsors appeal and the matter reaches the U.S. Supreme Court. Rather than deciding the substantive merits of the law, the Court dismisses the case on the ground that the sponsors of the initiative did not have the requisite federal standing necessary to be able to assert the state's interest in an appeal. The Court's refusal to hear the merits of the gay marriage law renders the District Court's decision invalidating the law as the final ruling.

Westoria's state executives helped invalidate a ballot initiative that was voted on and passed by a majority of Westoria's citizens by refusing to defend the initiative and the state's interest in it. This hypothetical is similar to what occurred in California in the aftermath of the controversial ballot measure Proposition 8. The United States Supreme Court in *Hollingsworth v. Perry* held that initiative proponents do not have standing to appeal in Federal Court, even when the state actors that are named as plaintiffs refused to defend the state law and despite the fact that California's highest court held that the initiative proponents could assert the state's interest. The holding is troubling in that it has given state executives the ability to undo valid ballot initiatives by simply refusing to defend the initiatives in court. California law does not allow for the governor to veto initiatives passed by voters, but the Supreme Court's holding has equipped future governors in California with this power, albeit indirectly. The initiative power has existed in California for over 100 years, and the *Hollingsworth* decision has made this process much more vulnerable.

This Note's proposal would require a special attorney for the state to be appointed by the state's highest court any time the state chief executive or attorney general refuse to defend a duly enacted ballot initiative. This proposal will ensure that any law enacted through a ballot initiative will be given a full defense on its merits. And once such a defense is made, the law will still have to endure a test of constitutionality by the Court, which will protect against the threat of a majority of citizens enacting unconstitutional laws that oppress minorities.

Part II of this Note details the California Initiative process's history and the advantages and disadvantages of the process. Part II also describes the history and purpose of Proposition 8 while detailing the lawsuits that arose immediately after the ballot initiative passed. Part III of this Note discusses the Supreme Court's analysis of whether initiative proponents have federal standing to appeal and also the arguments that the initiative proponents and their opponents made before the Court. Part III also discusses the federal

case law with respect to standing, as well as the implications of the Court's jurisdictional holding and its potential effects on states that utilize the initiative process. Part IV of this Note outlines and critiques solutions that have been suggested by some scholars and commentators. Finally, this Note concludes with a proposed solution, which satisfies the federal requirements for standing and also enables the initiative proponents to have a full, comprehensive defense. The proposed solution would require a special attorney for the state to be appointed by a state's highest court any time the state executive responsible for defending a valid initiative refuses to do so.

To truly understand the complexity of the aftermath of Proposition 8, it is necessary to understand the unique quality and character of the initiative process as a policy-making instrument and how it led to the creation of Proposition 8.

II. BACKGROUND

A. *The California Initiative Process*

In 1910, "Progressive Era" candidate Hiram Johnson won the California gubernatorial election in California, becoming the state's 23rd governor.¹ Johnson and his fellow progressives were concerned about the influence of moneyed interests in the state capitol.² Almost immediately, Johnson and a new state legislature comprised of like-minded progressives brought sweeping changes to the state. Perhaps the most critical was the adoption of the citizen's initiative process,³ making California the tenth state in the country to adopt it.⁴ The initiative process gave voters the ability to enact legislation directly through a ballot proposition. Californians immediately made use of this new power in 1914 by eliminating the poll tax, which was used as a means of restricting eligible voters.

There are now 24 states that have a form of the ballot initiative as a

¹ *Social Studies Fact Cards California Governors*, FACT CARDS, <http://factcards.califa.org/gov/hwjohanson.html> (last visited Nov. 12, 2015).

² J. Fred Silva, *The California Initiative Process: Background and Perspective*, PUBLIC POLICY INSTITUTE OF CALIFORNIA, 1 (Nov. 2000), http://www.ppic.org/content/pubs/op/OP_1100FSOP.pdf.

³ *California*, IRI INITIATIVE AND REFERENDUM INSTITUTE AT THE UNIVERSITY OF SOUTHERN CALIFORNIA (2014), <http://www.iandrinstitute.org/California.htm>.

⁴ *The Initiative Process in California*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (Oct. 2013), http://www.ppic.org/main/publication_show.asp?i=1072.

component of the state's law-making procedure.⁵ And in the last 20 years, California's ballot initiative process has been among the most active in the country; voters have used it to cut and increase taxes, abolish affirmative action, impose term limits, legalize medical marijuana, and authorize embryonic stem cell research.⁶ However, like Proposition 8 itself, the initiative process has been extremely controversial. There are some who believe that the process has been an important policy-making instrument that effectively imposes the will of the electorate when government actors refuse to do so. But there are critics who believe the initiative process no longer works effectively in that the moneyed interests that the initiative process was designed to stop have now "taken over the very process meant to limit their power."⁷

Proponents of the initiative process have argued that by empowering citizens to make law directly, the process has alleviated voter frustration and apathy.⁸ They argue that citizens should have the ability to exercise political power, even if that means circumventing the legislature and executive. Proponents have also argued that voter initiatives can serve as an important check on state legislatures and can also serve as counterweights to the power and influence of professional lobbyists.⁹ They contend that government officials too often ignore the will of ordinary citizens and argue that the initiative process serves the purpose of making sure that the policies of the state reflect the views of the electorate.¹⁰ Perhaps most importantly, Californians believe that voters make better public policy decisions than their elected officials do. In recent surveys, 72% of those surveyed were in favor of the initiative process being used as a tool for citizens to change public policy.¹¹

Critics of the initiative process argue that voters are not always the best judges of complex public policy matters, which can lead to poorly written,

⁵ SILVA, *supra* note 2.

⁶ *Initiative Process*, WHAT'S NEXT CALIFORNIA, <http://www.nextca.org/topics/entry/initiative-process> (last visited Nov. 12, 2015).

⁷ *Id.*

⁸ *Lesson 3: Pros and Cons of the Initiative Process*, CLASSROOM LAW PROJECT, 2 (2006), http://www.classroomlaw.org/files/posts-pages/resources/youth_summits/06-Lesson03.pdf.

⁹ *Id.*

¹⁰ See WHAT'S NEXT CALIFORNIA, *supra* note 6 (explaining the views of proponents to the initiative process in California).

¹¹ *Just the Facts: The Initiative Process In California*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (Oct. 2013), http://www.ppic.org/main/publication_show.asp?i=1072.

dysfunctional laws.¹² They also argue that the initiative process can make state legislatures less responsible. For example, in California many observers blamed the state's budget crisis on a series of voter initiatives that appropriated spending while prohibiting tax increases.¹³ Perhaps even more troubling is the fact that some have described California's initiative process as an "initiative industrial complex."¹⁴ This is because the initiative process is a much larger and complicated process than it once was. Today there are a great number of companies providing services like "signature gathering, legal services, and campaign consulting that are now integral and apparently essential to the process."¹⁵ This is supported by the fact that since 2000, over \$2 billion has been spent on initiatives, with more than \$1 billion being spent in the last three election cycles.¹⁶

Critics concede that initiatives can express the majority's will, but that often times that will lead to threats to individual or minority rights.¹⁷ Founding Father James Madison expressed concern over this in Federalist Paper #10, arguing that a representative democracy is preferable to a direct democracy because of the threat of the majority imposing its will on the minority. He wrote: "A pure democracy can admit no cure for the mischiefs of faction. A common passion or interest will be felt by a majority, and there is nothing to check the inducements to sacrifice the weaker party. Hence it is that democracies have been found incompatible with personal security or the rights of property."¹⁸

Madison's fear of direct democracy oppressing minorities is still appropriate today. This was evident by the events that preceded the passage of Proposition 8, along with the fallout that followed its passage.

¹² CLASSROOM LAW PROJECT, *supra* note 8.

¹³ *Id.* (explaining the criticisms of the initiative process); John G. Matsusaka, *Have Voter Initiatives Paralyzed the California Budget?*, UNIVERSITY OF SOUTHERN CALIFORNIA & INITIATIVE & REFERENDUM INSTITUTE, 1 (Nov. 2003).

¹⁴ SILVA, *supra* note 2, at 1.

¹⁵ *Id.*

¹⁶ *Election 2010 to Shatter Spending Records as Republicans Benefit from Late Cash Surge*, COMMUNICATIONS (Oct. 27, 2010), <http://www.opensecrets.org/news/2010/10/election-2010-to-shatter-spending-r/>.

¹⁷ CLASSROOM LAW PROJECT, *supra* note 8.

¹⁸ James Madison, *The Utility of the Union as a Safeguard against Domestic Faction and Insurrection*, THE FEDERALIST NO. 10 (Nov. 22, 1787), available at <http://www.constitution.org/fed/federa10.htm>.

B. Proposition 8

The road to Proposition 8 began with the now defunct Proposition 22. Proposition 22 was a statute passed by California citizens in the spring of 2000. The law stated that only marriage between a man and a woman would be recognized as valid in the state of California.¹⁹ Four years later San Francisco Mayor Gavin Newsom ignored the law and directed the San Francisco county clerk to revise the forms and documents for marriage licenses, so that licenses could be granted to same-sex couples.²⁰ The clerk revised the forms and documents and two days later the City of San Francisco was issuing marriage licenses to same-sex couples.²¹ Shortly thereafter, California Attorney General Bill Lockyer filed a petition seeking an official writ of mandate²² that the City's actions were unlawful and that it required intervention.²³ In turn, the City filed a petition seeking an official writ of mandate that laws that limited marriage to opposite-sex couples violated the California Constitution. Eventually, all the cases were consolidated and decided by the California Supreme Court in a case called *In Re Marriage Cases*.²⁴ The Court ruled that Proposition 22 was an unconstitutional law, holding that the law's "failure to designate the official relationship of same-sex couples as marriage" violated the Equal Protection Clause of the California Constitution.²⁵

The Court's holding did not deter opponents of same-sex marriage. They essentially re-wrote Proposition 22 with Proposition 8. The language of both Propositions is the same; however, Proposition 8 was put on the ballot as a Constitutional Amendment, whereas Proposition 22 was an ordinary statute.²⁶ The passage of Proposition 8 would amend the

¹⁹ *Analysis by the Legislative Analyst, LIMIT ON MARRIAGES. INITIATIVE STATUTE, available at* <http://primary2000.sos.ca.gov/VoterGuide/Propositions/22text.htm>.

²⁰ *In re Marriage Cases*, 43 Cal. 4th 757, 778 (Cal. 2008).

²¹ *Id.*

²² Bill Lockyer and three residents of California filed petitions for writs of mandate, and requests for injunctive relief, alleging that the actions of city officials in issuing marriage licenses to same-sex couples and solemnizing and registering the marriages of such same-sex couples were unlawful. Original Petition at 2, *Lockyer v. City and Cty. of San Francisco*, 43 Cal. 4th 737 (2008), *available at* <http://www.utexas.edu/law/journals/tlr/sources/Volume%2091/Issue%207/Metzger/metzger.fn080.lockyer.pdf>

²³ *Id.* at 3.

²⁴ *In re Marriage Cases*, 43 Cal. 4th at 780.

²⁵ *Id.* at 857.

²⁶ Conor O'Mahoney, *If a Constitution Is Easy to Amend, Can Judges Be Less Restrained? Rights, Social Change, and Proposition 8*, HARV. HUM. RTS. J., 210-11 (2014).

California Constitution and would overturn the holding of *In Re Marriage Cases*. On November 4, 2008 Proposition 8 was enacted with 52.24% of the vote.²⁷ Within a few weeks of Proposition 8's passage three lawsuits were filed and consolidated into one action called *Strauss v. Horton*, questioning whether the law violated the California Constitution.²⁸ On May 26, 2009, California's Supreme Court upheld Proposition 8 and held that the Constitutional Amendment did not violate state constitutional rights but instead carved out "a narrow exception applicable only to the designation of the term 'marriage', but not to any other of 'the core set of basic substantive legal rights and attributes traditionally associated with marriage.'"²⁹ Essentially, the California Supreme Court held that Proposition 8, by limiting same-sex couples to civil unions, did not curtail any of the substantive legal rights of these same-sex couples, and was therefore constitutional under California's constitution.

C. Perry v. Schwarzenegger becomes Hollingsworth v. Perry

Since Proposition 8 was upheld in state court, proponents of same-sex marriage looked for a remedy in Federal court. Lesbian couple Kristin Perry and Sandra Stier sued Governor Arnold Schwarzenegger, Attorney General Jerry Brown, and two county clerks after their marriage license was denied because they were a same-sex couple. They alleged that Proposition 8 deprived them "of due process and of equal protection of the laws contrary to the Fourteenth Amendment."³⁰ Attorney General Brown refused to defend the law as he agreed with the plaintiff's contention that the new law was unconstitutional.³¹ Governor Schwarzenegger also refused to defend the law, but wanted the court to "resolve the merits of the action expeditiously."³²

Schwarzenegger's and Brown's refusal to defend Proposition 8 is not the

²⁷ *Just the Facts: Proposition 8*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (Dec. 2008), available at http://www.ppic.org/content/pubs/jtf/JTF_Prop8JTF.pdf.

²⁸ Bob Egelko, *State High Court Interested in Prop. 8 Suits*, SF GATE (November 14, 2008), <http://www.sfgate.com/bayarea/article/State-high-court-interested-in-Prop-8-suits-3185778.php>.

²⁹ *Strauss v. Horton*, 46 Cal. 4th 364, 390 (Cal. 2009) (quoting *In re Marriage Cases*, 43 Cal. 4th at 781).

³⁰ *Perry v. Brown*, 52 Cal. 4th 1116, 1129 (Cal. 2011).

³¹ Maura Dolan and Carol J. Williams, *Jerry Brown again says Prop. 8 should be struck down*, L.A. TIMES (June 13, 2009), <http://articles.latimes.com/2009/jun/13/local/me-gay-marriage13>.

³² 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>.

only example of state actors declining to defend a state's gay marriage ban. In June of 2013, Pennsylvania's Attorney General Kathleen Kane also refused to defend the state in a federal lawsuit that challenged the constitutionality of Pennsylvania's same-sex marriage ban.³³ Kane reasoned that that the law did not conform to the U.S. Constitution and the Pennsylvania state Constitution, so she could not ethically defend the law.³⁴ President Obama and Attorney General Eric Holder took a similar action with respect to the litigation of the Defense of Marriage Act, a federal law passed by Congress in 1996. They concluded that the Obama administration could not defend a federal statute that defined marriage as only between a man and a woman.³⁵ However, Attorney General Holder's decision was not as problematic as the state executives in *Hollingsworth* because Republicans in the House of Representatives were allowed to intervene and hire counsel to defend DOMA.³⁶ In January of 2014, Virginia's Attorney General Mark Herring announced that he believed Virginia's ban on gay marriage was unconstitutional and declared that he will no longer defend it in federal lawsuits.³⁷ And like California, Virginia's gay marriage ban was a constitutional amendment adopted by Virginia voters through a ballot initiative. These examples highlight the fact that this issue is not exclusive to California.

The state executive's refusal to defend Proposition 8 left a giant void in the litigation, as there was no remaining defendant willing to defend Proposition 8 and the state's interest. The group that was the official proponent of Proposition 8, ProtectMarriage.com led by State Senator

³³ It can be argued that Kane's decision is a bit different than the decision of Governor Schwarzenegger and Attorney General Brown. Kane made her decision after the Supreme Court decided the *Windsor* case, finding that a federal ban on same-sex marriage violated the U.S. Constitution. Press Release, *Attorney General Kane will not defend DOMA* (July 11, 2013), https://www.attorneygeneral.gov/Media_and_Resources/Press_Releases/Press_Release/?pid=913#.

³⁴ *Id.* ("I cannot ethically defend the constitutionality of Pennsylvania's version of DOMA as I believe it to be wholly unconstitutional.")

³⁵ Press Release, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, U.S. Department of Justice (Feb. 23, 2011), <http://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act>; *Obama: DOMA Unconstitutional, DOJ Should Stop Defending In Court*, HUFFINGTON POST (last updated May 25, 2011), http://www.huffingtonpost.com/2011/02/23/obama-doma-unconstitutional_n_827134.html.

³⁶ Jennifer Bendery, *DOMA: House Republicans Poised To Spend \$3 Million on Legal Defense*, The Huffington Post (Jan. 15, 2013), http://www.huffingtonpost.com/2013/01/15/doma-republicans_n_2479666.html

³⁷ Defendant's Notice of Change in Legal Position, *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014).

Dennis Hollingsworth attempted to fill that void,³⁸ and the Court allowed the group to stand in the place of the state officials who refused to defend Proposition 8. After a lengthy trial, District Court Judge Walker held that Proposition 8 was unconstitutional as it violated the Equal Protection Clause of the Fourteenth Amendment.³⁹ Judge Walker reasoned, “Moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians. . . Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite sex-couples.”⁴⁰ Judge Walker concluded that Proposition 8 disadvantaged gays and lesbians without any rational justification; the law was invalidated as it violated the Equal Protection Clause.⁴¹

Proposition 8’s sponsors attempted to appeal the decision. There was considerable doubt whether they had the requisite standing to appeal a Federal court decision.⁴² The Ninth Circuit Court of Appeals was uncertain whether California law gives private groups the standing to appeal, so it certified a question to the California Supreme Court asking whether the sponsors of an initiative have “the authority to assert the state’s interest in the initiative’s validity, [given that] officials charged with that duty refused to do so.”⁴³ The judges on the Ninth Circuit Court of Appeals expressed concern that if sponsors of an initiative could not appeal, then the Governor could, “effectively veto the initiative by refusing to defend it or appeal a judgment invalidating it.”⁴⁴ The judges also stated that California’s initiative process “would appear to be ill-served” by such a result.⁴⁵

The California Supreme Court heard oral arguments on the question and concluded that “when public officials who ordinarily defend a challenged state law or appeal a judgment invalidating the law decline to do so. . . the

³⁸ *Summary of Proponents’ Reply Brief in Hollingsworth v. Perry*, ALLIANCE DEFENDING FREEDOM, <http://www.adfmedia.org/files/HollingsworthReplyBriefSummary.pdf>.

³⁹ *Perry v. Brown*, 52 Cal. 4th 1116, 1130, 265 P.3d 1002, 1009 (2011).

⁴⁰ *Id.* at 135 NOTE:*****this pin cite doesn’t make sense. The cite above has to be wrong because the pin cite doesn’t exist and also the quote is not in the above cited *Perry v. Brown* case, at least with that cite.

⁴¹ *Id.*

⁴² Matthew S. Bajko, *Judge doubts anti-gay groups can appeal Prop 8*, THE BAY AREA REPORTER (August 12, 2010), <http://ebar.com/news/article.php?sec=news&article=4994>.

⁴³ Order Certifying a Question to the Supreme Court of California, *Perry v. Schwarzenegger*, No. 10-16696, 3:09-cv-02292-VRW (Jan. 4, 2011); Carol J. Williams, *Panel asks California high-court for guidance on Gay-marriage ban*, THE LOS ANGELES TIMES, (Jan. 5, 2011), <http://articles.latimes.com/2011/jan/05/local/la-me-0105-prop8-ruling-20110105>.

⁴⁴ Williams, *supra* note 43.

⁴⁵ *Id.*

official proponents of a voter-approved initiative measure are authorized to assert the state's interest in the initiative's validity, enabling the proponents to defend the constitutionality of the initiative and to appeal a judgment invalidating the initiative."⁴⁶ The Court looked to past practice, concluding that participation by official proponents of initiatives in California had been uniformly permitted. Initiative proponents had participated as parties and interveners in a number of state lawsuits. The Supreme Court held that "[s]uch participation has routinely been permitted without any inquiry into or showing that the proponent's own property, liberty, or personal legally protected interests. . . would be specially affected by invalidation of the measure."⁴⁷

On February 7, 2012, the Ninth Circuit Court of Appeals affirmed the District Court's holding that Proposition 8 was unconstitutional by a vote of 2-1.⁴⁸ The majority opinion was written by Judge Reinhardt, and he concluded that "Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples."⁴⁹ Reinhardt concluded that The Constitution of the United States did not allow for these types of laws. The interveners appealed and the stage was set for a final battle at the U.S. Supreme Court.

III. THE SUPREME COURT AND ARTICLE III STANDING

A. *The Supreme Court's Jurisdictional Holding*

After the Ninth Circuit Court of Appeals affirmed the District Court's holding, the proponents of Proposition 8 appealed.⁵⁰ On December 7, 2012, the Supreme Court granted certiorari and ordered the parties to write briefs on whether the proponents of Proposition 8 had standing under Article III

⁴⁶ *Perry*, 52 Cal. 4th at 1165.

⁴⁷ *Id.* at 1125.

⁴⁸ *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012) *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); Robert Barnes, *California Proposition 8 same-sex marriage ban ruled unconstitutional*, WASHINGTON POST (Feb. 7, 2012), http://articles.washingtonpost.com/2012-02-07/politics/35445860_1_gay-couples-judge-n-randy-smith-limit-marriage.

⁴⁹ *Perry*, 671 F.3d at 1063.

⁵⁰ *U.S. Supreme Court Asked to Hear Prop. 8 Case*, AMERICAN FOUNDATION FOR EQUAL RIGHTS (July 31, 2012), <http://www.afer.org/blog/u-s-supreme-court-asked-to-hear-prop-8-case/>.

of the Constitution.⁵¹ On March 26, 2013, the Court heard oral arguments on the issue of standing. Charles Cooper⁵² represented the proponents of Proposition 8 and he conceded that the Court had never granted standing to proponents of a ballot initiative before. However, he argued that this case was unique because California's State Constitution provides that the official proponents have the authority and responsibility to defend the validity of that initiative, particularly when public officials decline to defend the state's interest, and that this principle was unanimously affirmed by the California Supreme Court.⁵³ Cooper said that there is no question that California has standing, and argued that when its public officials decline to defend the state's interest, the State is within its authority to grant the official proponents with the authority to do so.⁵⁴ Cooper also argued that the issue is not whether the proponents have an injury but whether there is an injury to the State.⁵⁵ Cooper was attempting to differentiate between the Federal standing requirements and the state requirements of standing. Cooper recognized that the major obstacle for the proponents was the fact that the Supreme Court sets the standing criteria it wants to provide or deny access to federal courts. Cooper understood that the initiative proponents themselves clearly had no direct injury. But by focusing the Court to look at the injury to California, it appears that Cooper was attempting to get the Court to view the initiative proponents not as an interested party, but as a replacement for the State officials who declined to defend Proposition 8. Cooper then argued the merits of Proposition 8.⁵⁶

Theodore Olson⁵⁷ represented the plaintiffs, and he argued that California could not create Article III Federal Court standing by

⁵¹ Certiorari Granted, *Hollingsworth v. Perry*, 12-144 (Dec. 7, 2012), available at http://www.supremecourt.gov/orders/courtorders/120712zr_3f14.pdf.

⁵² Charles Cooper is an appellate attorney working in Washington D.C. He was an Assistant Attorney General in the Department of Justice during President Reagan's administration.

⁵³ Transcript of Oral Arguments, *Hollingsworth*, 133 S. Ct. at 5.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 6-12. Cooper argued that the State of California and its citizens had a legitimate interest in marriage and responsible procreation.

⁵⁷ Theodore Olson is an American lawyer who served as United States Solicitor General from June 2001 to July 2004. He also successfully represented George W. Bush in the Supreme Court case *Bush v. Gore*. In *Hollingsworth*, Olson joined with David Boies, who was his opposing counsel in *Bush v. Gore*, to bring this federal lawsuit. See *Theodore Olson*, PROJECT GUTENBERG SELF-PUBLISHING PRESS, http://self.gutenberg.org/articles/theodore_olson (last visited Nov. 12, 2015).

designating whoever it wanted to defend the state in connection with a ballot.⁵⁸ He argued that since proponents of the ballot were not officers of the state, that they had no fiduciary duty to the state and were not bound by the ethical standards of an officer of the State. Essentially, Olsen was telling the Court that the initiative proponents do not take an oath to uphold the Constitution of the United States or California's Constitution. And as a consequence, that they are not obligated to serve the interests of their constituency; rather their only interest is the passage of Proposition 8. He argued that allowing the proponents to represent the State would lead to potential conflicts of interest because the proponents were not officers of the state, and were not bound by the ethical standards of an officer of the state. He suggested that the proponents could incur enormous legal fees on behalf of the state in spite of the fact that the state did not want to litigate the case.⁵⁹ Justice Alito expressed concern over potentially empowering state officials with the ability to undo initiatives they did not like by simply refusing to defend it, considering that the initiative process exists to circumvent these very same officials.⁶⁰ Olson then argued that Proposition 8 violated the 14th amendment.⁶¹

On July 26, 2013, The Supreme Court rendered a 5-4 decision holding that the proponents of Proposition 8 did not have Article III standing to appeal in Federal court.⁶² The majority opinion, written by Chief Justice Roberts, held that federal courts only have the authority to decide cases where there is an "actual controversy," which meant that the complaining party must have suffered a "concrete and particularized injury" that could be redressed by action from the court. Roberts wrote that one essential aspect of the standing requirement is that any person invoking the power of a federal court must show a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision.⁶³ It held that the proponents of Proposition 8 had only a generalized grievance, which is not sufficient to trigger Article

⁵⁸ Transcript of Oral Argument, *supra* note 53 at 34.

⁵⁹ *Id.* at 35

⁶⁰ *Id.* at 32-33.

⁶¹ *Id.* at 36. Olsen argued that Proposition 8 is a measure that walled off the institution of marriage, which is not a right possessed by society. He argued that an individual's right to get married is a personal right that is a part of the right of privacy, association, and liberty. He argued that Proposition 8 violated both the Due Process and Equal Protection clause of the US Constitution.

⁶² *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668.

⁶³ *Id.* at 2661.

III standing.⁶⁴ A generalized grievance is essentially an injury that is widely shared in an undifferentiated way with many people. An example would be a taxpayer suing the Federal government because he or she believes the tax to be onerous. The Court also held that the proponents of Proposition 8 could not invoke the standing afforded to them by the State of California because a “litigant must assert his/her own rights and cannot claim relief through intervention of a third party.”⁶⁵ The Court held that the Court of Appeals did not have jurisdiction to reach a decision in the case, leaving the District Court’s ruling as the final ruling in the case. Roberts wrote that neither sponsorship of the ballot initiative nor the state high court’s ruling gave Proposition 8 proponents the “personal and tangible harm” and “direct stake in the outcome” required by Article III.⁶⁶

Chief Justice Roberts directly addressed the California Supreme Court’s ruling that state law authorized the proponents to defend Proposition 8, writing that it is California’s sovereign right to maintain an initiative process, and it is the state’s right to allow initiative proponents to defend their initiatives in California courts, where Article III does not apply. But the Chief Justice wrote “standing in federal court is a question of federal law, not state law.”⁶⁷ The fact that California ruled that the initiative proponents have standing to seek relief for a generalized grievance was not enough to override the federal court’s settled law to the contrary.⁶⁸ The Court did not discuss the underlying substantive merits of Proposition 8.⁶⁹

Justice Kennedy dissented, contending that in this case, assessing standing required a determination of state law, namely how California defines and elaborates the status and authority of initiative proponents. Because of this, Kennedy contended that the Supreme Court should defer to the states in defining what parties have standing. He was of the opinion that since California law allows a third party to assert the state’s interest when state officials refuse to do so, that the California Supreme Court’s decision upholding the proponents’ standing is binding since⁷⁰ it was specifically authorized. Kennedy concluded that Article III of the

⁶⁴ *Id.* at 2662-63.

⁶⁵ *Id.* at 2670.

⁶⁶ *Id.* at 2666.

⁶⁷ *Id.* at 2667.

⁶⁸ *Id.*

⁶⁹ *Id.* at 2667-68.

⁷⁰ *Id.* at 2673 (Kennedy, J., dissenting).

Constitution did not interfere with a state's right to allow proponents to support an initiative in a federal appellate court. He concluded that the majority's decision did not take into account the particularities of California's initiative system. He wrote: "The very object of the initiative system is to establish a lawmaking process that does not depend upon state officials."⁷¹ Justice Kennedy was concerned that "giving the governor and attorney general this de facto veto will erode one of the cornerstones of the state's governmental structure."⁷²

B. What is Article III Standing?

In *Warth v. Seldin*, the Supreme Court stated that standing is essentially "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."⁷³ There are three requirements of standing. First, to have standing in federal court, plaintiff must have suffered or imminently will suffer injury. This was made clear in the case of *Massachusetts v. Mellon*.⁷⁴ In 1921, Congress enacted The Maternity Act, which provided grants to states and established programs aimed at protecting infants and their mothers. Congress was to pay for these programs through its taxing power. The Commonwealth of Massachusetts sued the Secretary of the U.S. Treasury, to stop these federal expenditures.⁷⁵ The Supreme Court rejected the claims on the basis that the Commonwealth did not suffer a particularized harm. The Court held that plaintiff must show that it has sustained or is immediately in danger of sustaining some direct injury as the result of a statute's enforcement, and not merely that the party suffers in some indefinite way that is common with people generally.⁷⁶ This "injury" has to be recognizable to the court and must also be imminent.⁷⁷

Second, to have standing in federal court, there must be a causal connection between the injury and the conduct that is the source of the complaint. This principle was broadly enforced in 2007 in *Massachusetts*

⁷¹ *Id.* at 2670.

⁷² *Id.* at 2671 (Kennedy, J., dissenting).

⁷³ *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

⁷⁴ *Commonwealth v. Mellon*, 262 U.S. 447 (1923).

⁷⁵ *Id.* at 478-79.

⁷⁶ *Id.* at 488.

⁷⁷ Josephine Mason Ellis and Evan Tsen Lee, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 171 (2012)

v. EPA.⁷⁸ Massachusetts sued the Environmental Protection Agency to force the federal agency to regulate greenhouse gases, such as carbon dioxide, as pollutants.⁷⁹ The Commonwealth of Massachusetts alleged that the Environmental Protection Agency was required under Congress's Clean Air Act to regulate such gases. Massachusetts alleged that the EPA's failure to regulate these gases led to Massachusetts losing land off their coast due to rising sea levels. The Court agreed with Massachusetts, holding that global warming enhanced by the EPA's refusal to regulate carbon dioxide emissions satisfied the element of causation for Massachusetts's alleged injury of loss of coastland.⁸⁰

Third, to have standing in Federal court, there must be redressability in that a favorable court decision would redress the injury. This is necessary to insure that speculative claims are not brought before federal courts. This requirement was crystallized in the case of *Lujan v. Defenders of Wildlife*.⁸¹ A group of environmental organizations sued the United States Secretary of the Interior because the Secretary of the Interior limited the scope of the Environmental Species Act to purely within the United States. The organizations wanted the ESA to apply internationally as well. The Supreme Court held that these groups of environmental organizations lacked standing to challenge federal regulations because plaintiffs failed to present a concrete and discernible injury that could be redressed by courts.⁸² The Court held that the group lacked standing under the Endangered Species Act, because the threat of a species' extinction alone did not establish a concrete injury to the group.

The standing issues of *Hollingsworth v. Perry* are atypical. The proponents of Proposition 8 were not in the litigation under a theory of injury tied to causation. They were merely filling a void that was left unfilled by the California Governor and Attorney General, who unquestionably had standing under federal law. The Court has addressed cases with difficult standing issues before.

⁷⁸ *Massachusetts v. E.P.A.*, 549 U.S. 497, 498 (2007).

⁷⁹ *Id.* at 497.

⁸⁰ *Id.* at 521.

⁸¹ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

⁸² *Id.* at 571.

C. Prior Standing Precedent

A case that shares some similarities with *Hollingsworth v. Perry* is *Arizonans for Official English v. Arizona*.⁸³ Arizona's Proposition 106, which mandated that state employees could speak only English while on the job, was a ballot initiative that passed with 50.5% of the vote.⁸⁴ A state employee sued the Governor of Arizona alleging that the new law violated the employee's First Amendment rights. The District Court agreed with the state employee, holding that Proposition 106 violated the free speech clause of the First Amendment. The Governor announced that she would not appeal.⁸⁵ As a consequence, the sponsors of Proposition 106, Arizonans for Official English Committee (AOE) and its chairman Park, attempted to intervene in the litigation. The District Court denied the motion, and AOE and Park appealed. The 9th Circuit Court of Appeals concluded that AOE and Park did in fact meet standing requirements under Article III of the Federal Constitution, but upheld the District Court's ruling on the unconstitutionality of Proposition 106.⁸⁶

By the time the case got to the Supreme Court, the state employee who originally sued had resigned from her position, rendering the case moot. But the Court did comment on AOE and Park's appellate standing. Justice Ginsburg wrote, "Grave doubts exist as to the standing of petitioners AOE and Park to pursue appellate review under Article III's case or controversy requirement. Standing to defend on appeal in the place of an original defendant demands that the litigant possess "a direct stake in the outcome."⁸⁷ She held that AOE's and Park's argument that as initiative proponents they had a legislative interest in defending the measure was "dubious because they are not elected state legislatures, authorized by state law to represent the State's interests."⁸⁸ This language Justice Ginsburg invoked is from *Karcher v. May*, which also shares similarities with *Hollingsworth*.

In *Karcher*, the New Jersey legislature passed a statute that provided for

⁸³ *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

⁸⁴ Linda Greenhouse, *Supreme Court Roundup; Appeal to Save English-Only Law Fails*, THE NEW YORK TIMES (January 12, 1999), <http://www.nytimes.com/1999/01/12/us/supreme-court-roundup-appeal-to-save-english-only-law-fails.html?pagewanted=all>.

⁸⁵ *Arizonans*, 520 U.S. at 55.

⁸⁶ *Id.* at 43-44.

⁸⁷ *Id.* at 44.

⁸⁸ *Id.* at 45.

a moment of silence in public schools. A state citizen filed suit in Federal Court challenging the constitutionality of the statute. The named plaintiffs were the Governor and Attorney General of New Jersey. Like *Hollingsworth*, both state actors refused to defend the law. Two members of the New Jersey state legislature attempted to intervene to defend the statute and the District Court granted the motion. The District Court then invalidated the law on First Amendment grounds. The interveners appealed, but at the time of their filing, both were no longer members of the state legislature. Their replacements in the legislature shared the sentiments of the Governor and Attorney General and refused to defend the law. The Supreme Court ultimately held that the interveners no longer had standing to appeal because the capacity for standing was retained by the positions held, not by the individuals who once held those positions.

D. Implications and the Future of the Initiative Process

Hollingsworth is distinguishable from both *Karcher and Arizonans* in that the Supreme Court of California expressly held that the proponents of Proposition 8 were essentially agents of the state, authorized to assert the state's interest on appeal. And although the Chief Justice's jurisdictional holding is consistent with precedent, it also puts future ballot measures in a precarious position. In an Op-Ed for *The Los Angeles Times*, constitutional law scholar Erwin Chemerinsky agreed with the majority's decision to dismiss the case as it "followed well-established law with regard to standing in federal court."⁸⁹ However, he stated, "the long-term implications of the ruling are disturbing."⁹⁰ His concern is similar to the dissenting Justices in *Hollingsworth*, who understood that the initiative process existed to give voters the ability to adopt laws when elected officials refuse to implement the will of the electorate. Chemerinsky writes: "Allowing a few officials to nullify an initiative by not defending it is inconsistent with the very reason for allowing initiatives in the first place."⁹¹

California Lieutenant Governor Gavin Newsom, who as mayor of San Francisco oversaw an administration that married thousands of gay

⁸⁹ Erwin Chemerinsky, *Prop. 8 deserved a defense*, THE LOS ANGELES TIMES (June 28, 2013), <http://www.latimes.com/news/nationworld/nation/la-oe-chemerinsky-proposition-8-initiatives-20130628,0,4935427.story#axzz2irMCyVGy>.

⁹⁰ *Id.*

⁹¹ *Id.*

couples, also expressed concern over the Court's holding. In an interview with the *Wall Street Journal*, Newsom said: "You'd be hard pressed to find someone more enthusiastic about the outcome of the Supreme Court decision. But I do think the decision raises legitimate questions that are very problematic in the future."⁹² Charles Moran, an openly gay political consultant and chairman of the California Log Cabin Republicans, shared Newsome's sentiment: "This could have long-term impacts on elective politics. . .Anytime somebody has a statewide ballot initiative I think there's a new question that has to be asked: Will this pass the smell test of the Attorney General and the Governor."⁹³ Attorney Harold Johnson of the Pacific Legal Foundation said that the Supreme Court has "empowered the political class and diluted the people's right to participate in government."⁹⁴

E. Enforcing Discriminatory Laws

These questions are not just relevant to California, but also to the other 25 states that use an initiative or popular referendum. However, there is a dimension to Proposition 8 that is lacking in most laws passed by ballot initiative. And that is the fact that Proposition 8 was considered by many to be unjust and immoral as it makes a legal distinction between opposite-sex marriage and same-sex marriage. And it is understandable that some state actors refuse to support and implement such laws. It is somewhat analogous to the Fugitive Slave Act of 1850, and the Northern states refusal to enforce it within its jurisdiction.⁹⁵ The Act imposed a duty on citizens to assist federal marshals in the capturing and prosecution of runaway slaves, and the Northern states and their elected officials often refused to enforce the law and many times took great measures to curb the law's effect.⁹⁶

It is a reminder of the duty that public officials have after they take an

⁹² Tamara Audi, *Worries Swirl Over California's Initiatives*, THE WALL STREET JOURNAL (July 1, 2013), <http://www.wsj.com/articles/SB10001424127887323689204578575992886711294>.

⁹³ *Id.*

⁹⁴ Bob Egelko, *Did toppling Prop. 8 undercut initiative process?* THE SAN FRANCISCO GATE (June 30, 2013), <http://www.sfgate.com/politics/article/Did-toppling-Prop-8-undercut-initiative-process-4630002.php>.

⁹⁵ The Fugitive Slave Act of 1850, _____ available at http://avalon.law.yale.edu/19th_century/fugitive.asp.

⁹⁶ Adam Goodheart, *How Slavery Really Ended in America*, THE NEW YORK TIMES MAGAZINE (Apr. 1, 2011), http://www.nytimes.com/2011/04/03/magazine/mag-03CivilWar-t.html?pagewanted=2&_r=2.

oath to uphold the Constitution. It is why some say that California's elected officials were within their rights not to defend a law that the officials personally found to be unconstitutional.⁹⁷ That is the critical distinction in considering the interests of state officials compared to the interests of initiative proponents. The proponents of the initiative have one narrow interest: turning its proposed law into binding authority that is ultimately held to be constitutional. The initiative proponents lack the fiduciary duty to the citizens of California that state officials have. Chief Justice Roberts wrote in the majority opinion of *Hollingsworth* that because initiative proponents lack a fiduciary duty to the citizens of California "they are free to pursue a purely ideological commitment to the law's constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities."⁹⁸ Initiative proponents do not have to deal with the practical repercussions of the law's enactment nor do they have to consider whether the law will conflict with other state laws. And unlike state executives, initiative proponents do not have to take an oath to uphold the Constitution and are not accountable to electorate in the next election.

Yet the Supreme Court's holding is still troubling in that it has given state actors a dependable script to follow if they disagree with ballot measures, particularly measures that are polarizing and controversial. It is unlikely that a state executive would refuse to defend a ballot measure that is highly popular and passes with a supermajority of the electorate. But with respect to hotly contested ballot measures, the Supreme Court's holding can become problematic. Some have argued that it has empowered the politicians while stripping the citizenry of their right to participate in government law-making directly. They argue that a legally enacted ballot measure was denied a defense because of an interpretation of standing that gave only the challengers the right to be heard. Somehow these conflicting notions on the constitutionality of laws vis-à-vis state actors must be reconciled with the purpose of the ballot initiative system.

⁹⁷ Chemerinsky, *supra* note 89.

⁹⁸ *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013).₂

IV. RECONCILIATION

A. Possible Solutions

The Supreme Court's holding that Proposition 8 proponents do not have the requisite Article III standing to appeal an initiative has created a problem that, if left unsolved, may severely undermine the initiative process. Many alternate routes to defend initiatives have been proposed by various legal scholars. Walter Dellinger, a former Justice Department official, suggested that a state could require its attorney general to defend all voter-approved initiatives.⁹⁹

Vikram Amar, a law professor at the University of California Davis, suggested that a formal designation of a measure's sponsors as its legal defenders within the ballot measure itself would be a viable solution. However, Mr. Amar's suggestion does not resolve the public interest concerns that come with giving proponents of an initiative the right to assert the state's interest in Federal court. Initiative proponents tend to be focused solely on their interest, without regard to the Constitution of the State and Federal government, and also without concern to the potential consequences the law would serve upon its constituency. Amar's suggestion also ignores the fact that the Supreme Court expressly held that standing could not be conferred by a third party. Since the Court held that even California's Supreme Court could not confer standing on the proponents, it is difficult to imagine that a formal designation within the ballot measure would overcome this hurdle. The lack of a proponent's fiduciary duty to the constituency of a state coupled with the Court's views on what constitutes an Article III case or controversy would ultimately doom such a measure.

B. The Solution

The Note proposes a solution that addresses the weaknesses that the solutions mentioned above fail to do. This Note recommends that either California citizens or members of the state legislature propose a new law. This law would require that a ballot measure's proponents should be allowed to petition the state's highest court for a special attorney to be appointed any time a state's elected officials—Governor or Attorney General—refuses to defend a ballot initiative. With this proposed solution,

⁹⁹ Egelko, *supra* note 94.

it will still be the state of California defending the initiative, albeit through a Special Attorney of the state. This practice is within the state's authority as Special Attorneys are often appointed when the Attorney General is investigating a case where he or she might have a conflict of interest. This practice also satisfies the Supreme Court's requirement for federal appellate standing because the special attorney would be considered a legitimate agent of the state, one that could assert the state's interest. If the Court holds that the law is unconstitutional, at least it will have come to such a decision based on the substantive issues with the law and not merely by the possible lack of standing of its proponents.

It is necessary to limit the power of the court to select such a special prosecutor because it would be a waste of resources and time to have a special prosecutor appointed to defend a law that has already been addressed by the U.S. Supreme Court. For example, if a state passes a ballot initiative that serves as a complete ban on abortions, a special prosecutor should not be appointed to defend such a law because that issue has already been addressed unequivocally by the U.S. Supreme Court in *Roe v. Wade*.¹⁰⁰ To ensure that a special prosecutor is selected only for legitimate ballot measures, this Note's proposed law would require that the sponsors of the initiative make a preliminary showing to the state's highest court that the ballot measure did not violate Federal or state law. This "preliminary showing" is analogous to the requirement of showing that there is a substantial likelihood of success on the merits of a case when a party is trying to obtain a preliminary injunction.¹⁰¹ Once such a showing is made, the state's highest court would then appoint a Special Attorney of the state to defend the ballot measure. Having this limit would ensure that courts would not be burdened by ballot measures that were clearly unconstitutional.

This Note's solution is modeled somewhat after Title VI of the Ethics in Government Act of 1978.¹⁰² Title VI of the act allowed for a special prosecutor to be appointed by a panel of three judges from the Circuit Court of Appeals. This special prosecutor was appointed to investigate wrongdoing at the federal level, and was granted all the power of the Department of Justice. States have used special prosecutors in high-profile

¹⁰⁰ *Roe v. Wade*, 410 U.S. 113, 155 (1973).

¹⁰¹ *See, e.g., Munaf v. Geren*, 553 U.S. 674, 690 (2008).

¹⁰² Pub. L. No. 95-521, 92 Stat. 1862.

criminal cases, such as the George Zimmerman trial and the 2004 death of a Chicago citizen that involved the nephew of then-Mayor Richard Daley. Special prosecutors have been used in California as well. They have appointed by the state Attorney General to investigate official corruption and law enforcement misconduct.¹⁰³

V. CONCLUSION

If this Note's proposed law existed at the time the Proposition 8 litigation began, the Supreme Court likely would have decided the merits of the Proposition 8 sending a message to the country about how the Court regarded the constitutionality of state laws that distinguish between opposite-sex and same-sex marriage. This likely would have sparked more lawsuits within states that currently ban same-sex marriage. If this Note's proposed law existed, the citizens who voted for Proposition 8 would have seen the law given a complete and full defense, and the state of California and the country would have been much better served.

The initiative process was created to give citizens the ability to affect public policy and make law directly. The process has existed in California for over 100 years, and Californians have used the policy-making instrument to substantially alter the way their state functions. If a ballot measure's constitutionality is in question, then that question should be resolved by courts directly. Giving state executives the ability to undo an initiative by failing to defend it or by refusing to appeal a decision that invalidated it undermines the purpose of initiatives. This "back-door veto" would be a tool that would be very tempting for state executives to use. What if state executives refused to defend an initiative that put limits on their power? We might soon find out, and that is why states with initiatives must make new laws that address this problem directly.

¹⁰³ Ali Winston, *Is It Time for a Special Prosecutor?*, EAST BAY EXPRESS (May 16, 2012), <http://www.eastbayexpress.com/oakland/is-it-time-for-a-special-prosecutor/Content?oid=3204051>.