

THE INJURY-IN-FACT BARRIER TO INITIATIVE PROPONENT STANDING: How Article III Might Prevent Federal Courts from Enforcing Direct Democracy

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I. PROPOSITION 8 SETS THE STAGE

In August of 2010, Judge Vaughn Walker of the U.S. District Court for the Northern District of California invalidated California's Proposition 8.¹ In his decision, Judge Walker declared that the measure violated the due process and equal protection clauses of the Fourteenth Amendment.² The initiative amended the California constitution by codifying the definition of marriage as a union between one man and one woman.³ Judge Walker's opinion included extensive and detailed factual findings,⁴ and—in a victory for marriage equality advocates—concluded both that marriage was a fundamental right protected under due process and equal protection and that there was no legitimate or compelling reason to deny this right to couples because of their sexual orientation.⁵ Despite the civil rights implications of this ruling, much of the subsequent legal discussion and litigation focused on standing.⁶

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1. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010) *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) *cert. granted*, 12-144, 2012 WL 3134429 (U.S. Dec. 7, 2012).

2. *Id.*; U.S. CONST. amend. XIV.

3. "Only marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5.

4. *See generally* Perry, 704 F. Supp. 2d 921.

5. Perry, 704 F. Supp. 2d at 991–95.

6. *See, e.g.*, Maura Dolan and Lee Romney, *Prop. 8 Hangs by a Legal Thread*, L.A. TIMES (Aug. 13, 2010), <http://articles.latimes.com/2010/aug/13/local/la-me-0813-gay-marriage-california-20100813> ("[T]he [Proposition 8] case could be brought to an end by the strict legal rules about who is allowed to pursue a dispute in federal court."); Warren Richley, *Judge: Prop. 8 Backers Might Not Have Legal Standing to Appeal*, CHRISTIAN SCIENCE MONITOR (Aug. 13, 2010), <http://www.csmonitor.com/USA/Justice/2010/0813/Judge-Prop.-8-backers-might-not>

None of the government officials named as defendants in the litigation chose to defend the law.⁷ As a result, the official proponents of the initiative⁸ were allowed to intervene to defend the amendment.⁹ The state of California declined to challenge Judge Walker's ruling, leaving the proponents as the only remaining defendants on appeal.¹⁰ Therefore, the Ninth Circuit Court of Appeals had to resolve the threshold issue of whether the proponents, in the absence of any of the original defendants, had standing to appeal.¹¹ The court was convinced—and all litigants agreed—that the proponents' standing depended on California law.¹² Consequently, the Ninth Circuit panel certified the following question to the California Supreme Court:

Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative when the public officials charged with that duty refuse to do so.¹³

The certified question posited two legal theories under which initiative proponents potentially could have standing to defend their ballot initiatives in federal court. Under the first theory, state law could vest initiative proponents with a particularized interest in the validity of their measures,

have-legal-standing-to-appeal (“[I]f the state chooses not to appeal, ‘proponents may have difficulty demonstrating [legal] standing.’”).

7. *Perry*, 704 F. Supp. 2d at 928. Then-California Attorney General Jerry Brown was adamantly opposed to the measure and openly conceded its unconstitutionality. 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>.

8. The official proponents were five individuals and the advocacy group Protectmarriage.Com-Yes on 8, A Project of California Renewal. *Perry*, 704 F. Supp. 2d at 921.

9. *Id.* at 928.

10. *Perry v. Schwarzenegger*, 628 F.3d 1191, 1195 (9th Cir. 2011), *certified question accepted* (Feb. 16, 2011), *certified question answered sub nom.* *Perry v. Brown*, 265 P.3d 1002 (2011) [hereinafter *Perry II*].

11. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986) (“[A]n intervenor’s right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.”).

12. *Perry II*, 628 F.3d at 1196. This conclusion was based, in large part, on language from *Arizonans for Official English v. Arizona*, in which the Supreme Court expressed doubts about the ability of initiative proponents to pursue appellate review in the absence of state law “appointing initiative sponsors as agents of the people . . . to defend, in lieu of public officials, the constitutionality of initiatives made law of the [s]tate.” 520 U.S. 43, 65 (1997).

13. *Perry II*, 628 F.3d at 1193.

thereby allowing proponents to assert a personal stake in the outcome of the litigation. Under the second theory, state law essentially could delegate the authority to assert the *state's* interest in defending its laws. Here, initiative proponents would not have a *personal* stake in the outcome of the litigation. Instead, proponents would have authority to represent the state under certain circumstances, such as when government officials fail to zealously defend voter-approved measures or decline to carry out this duty at all.

The California Supreme Court resolved this issue in favor of the Proposition 8 proponents. The court concluded that under California law, official initiative proponents are authorized to assert the state's interest in voter-approved measures when the government officials charged with that duty decline to act.¹⁴ Because the court resolved the issue under the delegation theory, it declined to address the first theory posited by the certified question—whether state law vests initiative proponents with a particularized interest in the validity of their ballot measures.¹⁵ However, the court noted that the role of state law in creating particularized interests that are sufficient to confer federal standing is “more complex than the role played by state law when the official proponent is authorized by state law to assert the state's interest in the validity of the initiative.”¹⁶

Subsequently, the Ninth Circuit adopted the California Supreme Court's ruling and determined that California law conferred standing upon initiative proponents under a delegation theory.¹⁷ The court reasoned that “[a]ll a federal court need determine is that the state has suffered a harm sufficient to confer standing and that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm.”¹⁸ A state has standing to defend its laws against constitutional challenges.¹⁹ Under the delegation theory, it is within the state's discretion to select those parties authorized to assert its interest.²⁰ The Ninth Circuit—again following the California Supreme Court's lead—declined to address whether proponents could have a particularized interest in the outcome of the litigation.²¹

14. Perry v. Brown, 265 P.3d 1002, 1007 (Cal. 2011).

15. *Id.* at 1015.

16. *Id.* at 1014.

17. Perry v. Brown, 671 F.3d 1052, 1072–73 (9th Cir. 2012) *cert. granted*, 12-144, 2012 WL 3134429 (U.S. Dec. 7, 2012) [hereinafter *Brown II*].

18. *Id.* at 1072.

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

20. *Brown II*, 671 F.3d at 1071.

21. *Id.* at 1074 (“The exclusive basis of our holding that Proponents possess Article III standing is their authority to assert the interests of the State of California, rather than any

This article addresses the “more complex”²² question of whether states can ever statutorily vest initiative proponents with a particularized interest in the validity of their ballot measures that is sufficient to confer federal standing. In Part II, I provide a brief overview of federal standing and discuss the purposes of the doctrine. In Part III, I address whether state law can vest proponents with a particularized interest in their approved initiatives, mostly in the context of the ongoing Proposition 8 litigation. I conclude that state law cannot create an interest in the general validity of an initiative that is sufficient to satisfy Article III. I also discuss problems with the delegation theory of initiative proponent standing and why proponents might never have federal standing absent a showing that they, personally, have suffered some concrete or particularized harm. Ultimately, I conclude that the federal courts may be ill-equipped to enforce state direct democracy systems.

II. A BRIEF OVERVIEW OF STANDING

A. *Standing and the Separation of Powers*

When a litigant wants his claim adjudicated in a federal court, the litigant first must demonstrate that the court has the constitutional authority to hear the case. The jurisdiction of federal courts is governed by Article III of the United States Constitution, which limits the role of the judiciary to resolving “cases and controversies.”²³ Federal standing derives from this language and limits those who may properly bring a claim in a federal court.²⁴ Standing is a jurisdictional doctrine that confines federal courts to resolving disputes in a manner consistent with the separation of powers.²⁵ The doctrine limits both the jurisdiction of federal courts and the manner in which that jurisdiction is exercised.²⁶

authority that they might have to assert particularized interests of their *own*.”) (emphasis in original).

22. *Brown*, 265 P.3d at 1014.

23. U.S. CONST. art. III, § 2, cl. 1; *see also* *Allen v. Wright*, 468 U.S. 737, 750 (1984) (explaining that “[t]he case-or-controversy doctrine[] state[s] fundamental limits on federal judicial power in our system of government”).

24. *See, e.g.*, *Flast v. Cohen*, 392 U.S. 83, 94–98 (1968).

25. *Id.* at 97; *see also* *Allen*, 468 U.S. at 752 (“[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.”).

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

To this end, the courts use standing to serve three main goals.²⁷ First, standing assures that federal courts only hear cases “possessing sufficient concrete adversity to make them susceptible of judicial resolution.”²⁸ Federal courts will not weigh in on cases in which there is no genuine dispute between the parties. Second, standing operates as a form of judicial self-restraint²⁹ by directing the courts to avoid questions that are more properly assigned to political resolution.³⁰ Thus, the courts usually pass over cases in which a grievance is shared by a large segment of the population on the theory that generalized grievances are better remedied by legislative action. Third, standing helps to enforce the separation of powers by preventing the use of citizen suits as a means to assert judicial control over the executive branch.³¹ Justice Scalia articulated this concern in *Lujan v. Defenders of Wildlife*,³² warning that without the limits imposed by Article III the federal courts constantly would be reviewing the wisdom of executive decisions and actions.³³

Lujan echoed the reasoning from almost twenty years earlier in *Schlesinger v. Reservists Committee to Stop the War*,³⁴ in which the Court denied standing to citizens who challenged the Reserve membership of certain congressmen as contravening the Incompatibility Clause.³⁵ The *Schlesinger* Court explained that entertaining such a suit “would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and Legislature and open the Judiciary to an arguable charge of providing ‘government by injunction.’”³⁶ Therefore, the principle of separation of powers and concerns about the proper role of the judiciary—especially in relation to the elected branches—operate as a backdrop to the standing requirements prescribed by the Supreme Court.

27. Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 459 (2008).

28. *Id.*

29. *See, e.g.*, *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970).

30. *Id.*; *see also Allen*, 468 U.S. at 751 (“Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as . . . the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches.”).

31. Elliott, *supra* note 27.

32. 504 U.S. 555 (1992).

33. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

34. 418 U.S. 208 (1974).

35. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 209 (1974). The Incompatibility Clause states: “No Senator or Representative shall, during the Time for which he was elected . . . be a Member of either House during his Continuance in Office.” U.S. CONST. art. I, § 6, cl. 2.

36. *Schlesinger*, 418 U.S. at 222.

B. The Injury-in-Fact Requirement

Standing has not always been defined with clarity or applied with consistency.³⁷ However, one principle to which the Court has firmly adhered is that in order to invoke the jurisdiction of federal courts, litigants must allege some concrete injury that is causally related to the challenged action.³⁸ The Court in *Valley Forge Christian College v. Americans United for Separation of Church & State*³⁹ explained that “[t]he requirement of actual injury . . . serves several of the implicit policies embodied in Article III.”⁴⁰ Because court decisions can have profound effects on litigants, those wishing to invoke federal jurisdiction must show that they are injured in order to obtain judicial resolution.⁴¹ Furthermore, anytime a court adjudicates the validity of a law, it comes into conflict with the other coequal branches of government. To avoid these types of collisions—and the countermajoritarian difficulties⁴² that arise whenever unelected judges invalidate the laws, decisions, or actions of the representative branches—federal courts only rule on constitutional issues when raised by someone whose interests are sufficient to justify judicial intervention.⁴³

Standing combines constitutional limitations on federal court jurisdiction and court-imposed restraints—or “prudential considerations”⁴⁴—that help weed out cases that raise separation-of-powers concerns, despite the existence of an injured party.⁴⁵ These prudential considerations include the general rule barring litigants from asserting the rights of third parties.⁴⁶ All of these considerations reflect elements of justiciability.⁴⁷ However,

37. The Supreme Court admitted this much in *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982).

38. See, e.g., *Allen v. Wright*, 468 U.S. 737, 751 (1984) (“[S]tanding . . . has a core component derived directly from the Constitution. A [party] must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct.”); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973).

39. 454 U.S. 464 (1982).

40. *Id.* at 472 (citations omitted).

41. *Id.* at 473.

42. This term was coined by Yale law professor Alexander Bickel and describes the problem of an unelected judiciary overturning laws enacted by the representative branches and that reflect the popular will. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986).

43. *Valley Forge*, 454 U.S. at 474.

44. *Id.* at 471.

45. *Id.* at 474 (quoting *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975)) (“[E]ven if a [party] has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating ‘abstract questions of wide public significance.’”).

46. See *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

47. Justiciability is “[t]he quality or state of being appropriate or suitable for adjudication by a court.” BLACK’S LAW DICTIONARY 943 (9th ed. 2009).

standing to litigate must not be confused with the justiciability of the underlying issue. When standing is at issue, the question is not whether the underlying claim is justiciable. Rather, it is whether a particular litigant is the proper party to invoke the jurisdiction of the federal courts to resolve the claim.⁴⁸ Thus, the emphasis of standing is on whether the party invoking federal jurisdiction has a sufficient interest in the outcome of the litigation.⁴⁹

Whether a litigant has alleged an interest sufficient to satisfy Article III is judged by the standard set forth in *Lujan*, in which the Supreme Court articulated three elements that a party seeking to invoke the jurisdiction of a federal court must demonstrate. According to the Court:

[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.⁵⁰

Thus, a mere interest in an issue is insufficient to satisfy Article III. Instead, a litigant must demonstrate that he will be harmed *personally* as a result of the challenged law or action. Justice Scalia—who authored the Court’s opinion in *Lujan*—observed that if standing were only concerned with the adverseness of the parties, then advocacy organizations like the National Association for the Advancement of Colored People (NAACP) or the American Civil Liberties Union (ACLU) arguably would be the best parties in constitutional litigation.⁵¹ However, standing doctrine prevents these types of organizations from litigating as real parties in interest⁵² and instead requires that these organizations attach themselves to a person who has a concrete and particularized interest at stake.⁵³ It is insufficient merely to

48. *Flash v. Cohen*, 392 U.S. 83, 99–100 (1968).

49. *Id.* at 101; *see also Warth*, 422 U.S. at 498–99.

50. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

51. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891 (1983).

52. A real party in interest is the party actually possessing the substantive legal right and who generally benefits from the outcome of litigation. BLACK’S LAW DICTIONARY 1232 (9th ed. 2009).

53. Scalia, *supra* note 51, at 891–92; *see also* Heather Elliott, *Congress’s Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 174 (2011) (noting that some scholars argue that

demonstrate an interest in a topic or to identify an injury. Article III requires that the party seeking judicial relief be among the injured.⁵⁴

C. *Particularized Injuries and Generalized Grievances*

The requirement that an injury be concrete and particularized excludes cases in which a party only asserts an interest that is generally held by the public. To satisfy Article III, the alleged injury must be *personal*. This requirement has deep roots in standing law. In the 1922 case *Fairchild v. Hughes*,⁵⁵ the Court denied standing to a plaintiff who challenged the ratification of the Nineteenth Amendment because the plaintiff asserted “only the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys be not wasted.”⁵⁶ Fifteen years later, in *Ex parte Levitt*,⁵⁷ the Court dismissed a challenge to the appointment of Justice Black because the plaintiff did not allege an interest apart from that of an average citizen.⁵⁸ The Court stated that it was an “established principle” that in order for a party to invoke federal jurisdiction, he or she must demonstrate more than a “general interest common to all members of the public.”⁵⁹

Thus, in *United States v. Richardson*,⁶⁰ the Court denied standing to a taxpayer who challenged the failure of the Central Intelligence Agency (CIA) to publish certain expenditures as required by law.⁶¹ The plaintiff essentially claimed that, as a taxpayer, he had an interest in the proper use of funds and application of the law. The Court rejected this argument and explained:

While we can hardly dispute that this respondent has a genuine interest in the use of funds and that his interest may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer, he is in danger of suffering any particular injury as a result of the operation of this statute.⁶²

standing “is essential in reducing the power of all interest groups to use litigation to force courts down doctrinal paths favorable to their agendas.”).

54. *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972).

55. 258 U.S. 126 (1922).

56. *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922).

57. 302 U.S. 633 (1937).

58. *Ex parte Levitt*, 302 U.S. 633, 636 (1937).

59. *Id.*

60. 418 U.S. 166 (1974).

61. *United States v. Richardson*, 418 U.S. 166, 166 (1974).

62. *Id.* at 177.

The plaintiff may have had a stronger case had he alleged that he was personally affected by the CIA's actions in a distinct way. The plaintiff only asserted an interest as a taxpayer in the general use of funds. Therefore, nothing distinguished his injury from the injury inflicted upon society at large. This type of generalized grievance is too abstract by Article III standards.⁶³

The concrete and particularized requirements also exclude parties that merely allege a philosophical or ideological interest in a subject. In this respect, standing prevents federal courts from vindicating value interests.⁶⁴ Such abstract questions involving policy preferences are properly decided in the political arena. For example, in *Diamond v. Charles*,⁶⁵ the Court denied standing to an Illinois physician who sought to defend a state abortion law.⁶⁶ The physician's alleged interest was as a conscientious objector to abortions.⁶⁷ Here, it was not the Court's place to rule on which values society should adopt. If the plaintiff in *Diamond* wanted his values vindicated, it was his prerogative to persuade the public and lobby the representative branches of government.

The problems associated with generalized grievances and value interests converge in suits in which the litigant alleges only an interest in the observance and proper application of the law.⁶⁸ As the Court explained in *Valley Forge*, the "assertion of a right to a particular kind of [g]overnment conduct . . . cannot alone satisfy the requirements of Art. III without draining those requirements of meaning."⁶⁹ If a grievance is widely held and implicates philosophical or ideological value interests, then no single person is harmed to a greater extent than the next. In these situations, a litigant will fail to satisfy the injury-in-fact requirement of Article III, and federal courts will leave the resolution of the issue to the representative branches.

This dynamic plays out in cases like *Lance v. Coffman*,⁷⁰ in which the Court denied standing to Colorado residents challenging a judicially imposed redistricting plan in violation of the Elections Clause.⁷¹ The only

63. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974).

64. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982).

65. 476 U.S. 54 (1986).

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

67. *Id.* at 57.

68. *Valley Forge*, 418 U.S. at 482.

69. *Id.* at 483.

70. 549 U.S. 437 (2007).

71. The Elections Clause reads in relevant part: "The Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. CONST. art. I, § 4, cl. 1.

injury alleged by the plaintiffs was that the law had not been followed.⁷² This type of injury, the Court reasoned, “is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.”⁷³ The Court used similar reasoning to deny standing in cases in which a plaintiff challenged the decision of a state not to prosecute under its criminal statutes⁷⁴ and those in which a citizen sought permission to defend a legal framework that the state—in its prosecutorial discretion—declined to uphold.⁷⁵

This line of case law reveals that federalism concerns operate in the background of standing determinations whenever federal courts are conscripted to rule on the constitutionality of state laws or actions.⁷⁶ Indeed, federalism and separation-of-powers concerns go hand in hand.⁷⁷ Article III, therefore, protects states from federal intrusion just as it protects the executive and legislative branches of the federal government from undue judicial interference.⁷⁸

D. *Limits on Creating Particularized Interests Legislatively*

Congress and the states can legislate to create legal rights that, when invaded, may result in an actual injury sufficient to confer standing.⁷⁹ For example, under the Administrative Procedures Act (APA) anyone who is “adversely affected or aggrieved” by an agency action may sue.⁸⁰ However,

72. *Lance v. Coffman*, 549 U.S. 437, 442 (2007).

73. *Id.*

74. *See, e.g., Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (“[A] citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.”).

75. *See, e.g., Diamond v. Charles*, 476 U.S. 54, 106 (1986) (“Diamond’s attempt to maintain the litigation is . . . simply an effort to compel the State to enact a code in accord with Diamond’s interests.”).

76. “The concerns for state autonomy that deny private individuals the right to compel a State to enforce its laws apply with even greater force to an attempt by a private individual to compel a State to create and retain the legal framework within which individual enforcement decisions are to be made. . . . [T]he power to create and enforce a legal code . . . is one of the quintessential functions of a State.” *Id.*

77. Federalism, after all, is another structural check on the power of the federal government. *See THE FEDERALIST NO. 51*, at 357 (James Madison) (Benjamin Fletcher Wright ed., 1961).

78. Furthermore, federalism can be read into separation of powers through the Guarantee Clause, which reads: “The United States shall guarantee to every State in this Union a Republican Form of Government.” U.S. CONST. art. IV, § 4. A federal court may be less likely to confer standing if allowing a party to pursue a claim in federal court would blur the lines between the executive, legislative, and judicial departments of a particular state.

79. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975).

80. 5 U.S.C. § 702 (2006).

the ability of legislatures to expand the categories of interests that may confer standing is still limited by the core requirements of Article III.⁸¹ Although legislatures may expand the categories of injury that can support standing, they cannot legislate around Article III by disposing of the requirement that a litigant seeking review must have suffered a concrete and particularized injury.⁸² Under the APA, then, a citizen who disagrees with an agency policy cannot challenge that policy in court absent a showing that he suffered an actual injury.⁸³

Thus, in *Lujan*, the petitioners lacked standing—despite Congress’s creation of a procedural right to judicial review through the APA—because no petitioner could demonstrate a concrete injury.⁸⁴ Petitioners challenged decisions by the Secretaries of Interior and Commerce not to apply certain endangered species protections to areas outside the United States.⁸⁵ To support standing, petitioners alleged that they had a desire to visit certain wildlife areas and that the challenged agency action would deny them the opportunity to see certain endangered animals.⁸⁶ The court declined to confer standing, reasoning that the petitioners’ claims were not concrete enough to satisfy Article III.⁸⁷

Discussing the fact that Congress had created a procedural right to judicial review under the APA, the *Lujan* Court explained that there is no reason to make the basis of Article III standing depend on the source of the right.⁸⁸ Congress cannot discard through legislation the fundamental standing requirements implicit in Article III anymore than the courts can disregard them on their own.⁸⁹ Again citing separation-of-powers concerns, the Court reasoned that:

If the concrete injury requirement has the separation-of-powers significance we have always said, [then t]o permit Congress to convert the undifferentiated public interest in executive officers’

81. Scalia, *supra* note 51, at 886 (“[T]here is a limit upon even the power of Congress to convert generalized benefits into legal rights—and that is the limitation imposed by the so-called ‘core’ requirements of standing.”).

82. *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972); *see also Elliott, supra* note 53, at 187 (explaining that *Lujan* plausibly stands for the proposition “that Congress can only identify injuries that the Court would agree are concrete and can only elevate to *de jure* status injuries that the Court would already recognize as *de facto*”) (emphasis added).

83. Or, in the words of the APA, that he was “adversely affected or aggrieved.” 5 U.S.C. § 702 (2006).

84. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

85. *Id.* at 558.

86. *Id.* at 556.

87. *Id.* at 571.

88. *Id.* at 576.

89. *Id.*

compliance with the law into an “individual right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to “take Care that the Laws be faithfully executed.”⁹⁰

Therefore, not even Congress can take a generalized grievance and convert it into a particularized injury. A procedural right to judicial review without a corresponding concrete injury is insufficient to invoke federal jurisdiction.

III. INITIATIVE PROPONENT STANDING

A. *Alleged Sources of Particularized Interests*

Given the convoluted nature of standing law, it is unsurprising that the California Supreme Court and the Ninth Circuit chose, instead, to confer standing on the Proposition 8 proponents through a delegation theory. After all, it appears unlikely that a state could vest initiative proponents with a concrete and particularized interest in the general validity of their ballot measures. A general interest in the existence or non-existence of a certain law is not a concrete injury—it is a policy preference. Courts have never considered a purely ideological interest in the adoption, application, enforcement, or defense of a particular public policy to be sufficient to confer Article III standing.⁹¹ Disputes over policy preferences are the exclusive province of the political process and should be resolved at the ballot box, not in the courts.

The injury suffered by Proposition 8 proponents—namely, the interest in the existence or non-existence of a law—is shared equally by all citizens who support the measure. This type of harm is more akin to a generalized grievance than a particularized injury. In order for proponents to have standing under a particularized interest theory, they must demonstrate some further injury that distinguishes them from every other citizen who may have voted in favor of the initiative. There are three readily apparent yet fatally flawed ways in which initiative proponents attempt to differentiate themselves from the greater population.

90. *Id.* at 577.

91. *See, e.g.,* *Diamond v. Charles*, 476 U.S. 54, 66–67 (1986).

1. Labor and Resources

One characteristic that distinguishes official initiative proponents from the population at large is that proponents put forth the time, labor, and resources necessary to place their measures on the ballot and to secure their passage. The Proposition 8 proponents relied heavily on this theory to show that they possessed a particularized interest.⁹² However, the history of *Arizonans for Official English v. Arizona*⁹³ indicates that the labor and resources expended by proponents in advocating for their initiatives are insufficient to satisfy the requirements of Article III.⁹⁴

The district court in that case determined that the official backers of the challenged law lacked standing to defend the measure in federal court.⁹⁵ *Arizonans for Official English* (AOE)—the sponsor of the initiative—argued that the labor and resources expended in the campaign elevated its interest above that of the average citizen.⁹⁶ The district court rejected this argument and concluded that these expenditures did not elevate AOE’s interest to an Article III-sufficient level of particularization.⁹⁷ On appeal, the Ninth Circuit reversed by analogizing the issue to legislative standing.⁹⁸ The court reasoned that initiative proponents operate in a quasi-legislative capacity⁹⁹ and therefore have standing to defend their measures in much the same way as elected legislators, under certain circumstances, can intervene to defend legislation.¹⁰⁰ Thus, the Ninth Circuit did not disturb the district court’s determination that labor and resources were insufficient to distinguish proponents from the general population.

92. ProtectMarriage.com drafted the language of Proposition 8, executed the proper forms, collected the requisite signatures to qualify the measure for the ballot, drafted the arguments in favor of the initiative, and expended roughly \$40,000,000 campaigning for its adoption. *See* Defendants, Intervenors, and Appellants’ Opening Brief, *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011) (No. S189476), 2011 WL 1370877, at *4–7.

93. 520 U.S. 43 (1997).

94. *Compare* *Yniguez v. Mofford*, 130 F.R.D. 410, 414 (D. Ariz. 1990), *with* *Yniguez v. Arizona*, 939 F.2d 727, 732 (9th Cir. 1991), *and* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66, 71 (1997).

95. *Yniguez v. Mofford*, 130 F.R.D. 410, 414 (D. Ariz. 1990), *aff’d in part, rev’d in part sub nom.* *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991).

96. *Id.*

97. *Id.* (“The only particularized injury allegedly suffered by [AOE] is that the court’s declaration of [the measure’s] unconstitutionality has rendered ‘for naught’ the substantial labors and resources it committed to the promotion of the initiative [We do] not believe such an impairment to [AOE’s] institutional interests is sufficient to meet . . . Article III’s fundamental injury-in-fact requirement”).

98. *Yniguez v. Arizona*, 939 F.2d 727, 732 (9th Cir. 1991).

99. *Id.*

100. *See, e.g., Karcher v. May*, 484 U.S. 72 (1987).

The Supreme Court ultimately dismissed *Arizonans for Official English* on other grounds.¹⁰¹ However, the Court expressed “grave doubts” about whether AOE had standing to defend its initiative on appeal.¹⁰² The Court said that the concrete injury to AOE’s members was not apparent.¹⁰³ Although not essential to the Court’s holding, these statements nevertheless indicate that as a general matter initiative proponents lack a particularized interest in the validity of their measures, especially when that interest is based on labor and resources or on a special interest in the subject matter.

Further, expenditure of labor and resources is not unique to official initiative proponents. Any interested citizen can spend time and money advocating for particular policies or ballot measures. Yet, in the case of Proposition 8, the proponents do not argue that all people who spend time and money in support of a measure are thereafter proper parties to defend the measure against legal challenges. Rather, the Proposition 8 proponents argue that they are proper defenders because they are the *official* proponents of the initiative.¹⁰⁴ But because the ability to spend time and money promoting an initiative is not reserved uniquely to official proponents, it hardly serves as a basis for a particularized interest. Stated differently, all persons¹⁰⁵ have the same right to spend their time and money to advocate for policies with which they agree.

Additionally, initiative proponents lack a legally cognizable interest in the labor and resources spent on advocacy. This is evident from the relief sought in legal challenges to initiatives. The requested relief is declaratory or injunctive—that is, the parties either want the measure invalidated or upheld. Parties in initiative challenges do not seek monetary damages. Indeed, in the Proposition 8 litigation the proponents made no demand for compensatory damages based on the value of their labor and resources.¹⁰⁶ Nor is there a legal right to recover the value of labor and resources when the measure upon which they were spent is later ruled unconstitutional. Accordingly, labor and resources fail to provide a sufficient basis for a particularized interest in the validity of an initiative.

101. By the time the case reached the Supreme Court, the plaintiff no longer worked for the State of Arizona. The case was dismissed as moot. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997).

102. *Id.* at 66.

103. *Id.*

104. Defendants, Intervenors, and Appellants’ Opening Brief, *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011) (No. S189476), 2011 WL 1370877, at *16–17.

105. Indeed, a person can spend time and money to support a policy even if that person is not a qualified elector.

106. See Defendant-Intervenors-Appellants’ Opening Brief, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No. 11-16577), 2011 WL 6117216, at *54.

2. Conferral of the Right to Participate in Direct Democracy

Another way that initiative proponents try to differentiate themselves from the general public is by arguing that they have exercised the right, granted to them by the state, to propose and enact legislation through direct democracy.¹⁰⁷ Having undergone the process of proposing, advocating for, and passing an initiative—the argument goes—this right would be nullified if the elected branches could veto the laws by remaining passive in legal challenges to the measure. The Proposition 8 proponents argued this before the Ninth Circuit.¹⁰⁸ However, this argument is flawed for several reasons.

Precedent tells us that the standing inquiry does not hinge on the source of the purported interest.¹⁰⁹ Although state law is informative in identifying the interest, whether a litigant has indeed suffered a concrete and particularized injury is a matter of federal constitutional law.¹¹⁰ State or federal law cannot single-handedly confer standing where it would otherwise not exist. The *Lujan* requirements establish a floor:¹¹¹ any law that purportedly confers standing will be unsuccessful if the individuals who seek judicial review based on that law cannot satisfy *Lujan*'s three-part test.¹¹²

In the case of Proposition 8, the government's decision not to appeal Judge Walker's ruling does not necessarily impair proponents' ability to exercise their right to engage in direct democracy. A post-enactment judicial determination that the measure is unconstitutional does not impair the ability of proponents to propose, promote, and vote on initiatives. Although the California governor and legislature have no authority to veto voter-approved initiatives,¹¹³ a right to enact laws through the initiative process does not shield these laws from judicial review. After all, courts frequently invalidate measures enacted by elected representatives without those branches claiming that the court—by executing its constitutional

107. Defendants, Intervenors, and Appellants' Opening Brief, *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011) (No. S189476), 2011 WL 1370877, at *32.

108. See *Perry v. Schwarzenegger*, 628 F.3d 1191, 1197 (9th Cir. 2011), *certified question accepted* (Feb. 16, 2011), *certified question answered sub nom.* *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011).

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

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

111. See *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (“[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.”); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (“In no event . . . may Congress abrogate the [Article] III minima”); Elliott, *supra* note 53, at 186.

112. See *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 554 (2012).

113. CAL. CONST. art. II, § 10.

function of judicial review¹¹⁴—has invaded their rights to enact legislation. Instead, this is viewed as the normal operation of the separation of powers.

Nor is it accurate to characterize the refusal to defend a law as a veto. There are several differences between a veto and the executive's discretionary disregard of a law that the executive deems unconstitutional.¹¹⁵ For example, a veto is much broader because it can be exercised for any reason, including political strategy or personal disagreement.¹¹⁶ In theory, however, an executive's decision to disregard or refuse to defend a law must derive from the belief that the law is unconstitutional.¹¹⁷ Furthermore, vetoes are final and preclude a law from ever taking effect.¹¹⁸ Accordingly, no one can enforce a vetoed bill. Disregarding or refusing to defend a law, in contrast, has a more narrow effect because it does not bind successors who may consider the law constitutional.¹¹⁹ Additionally, an executive that disregards or refuses to defend a law may be removed and replaced through impeachment and election—including recall in states, such as California,¹²⁰ that have adopted the practice.¹²¹ Thus, the decision not to defend a law that is believed to be unconstitutional is not equivalent to a veto “[b]ecause the veto power and [e]xecutive [d]isregard apply at separate stages, have dramatically different scopes, and have distinct effects.”¹²²

Furthermore, even if choosing not to defend the law constitutes an indirect veto of the popular will, then allowing proponents to defend where the executive has elected not to is arguably an improper judicial veto of executive discretion.¹²³ The Proposition 8 proponents argue that by not defending the measure, the governor and attorney general are doing indirectly what they cannot do directly—veto a voter-approved initiative.¹²⁴

114. See generally *Marbury v. Madison*, 5 U.S. 137 (1803).

115. See Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1633–34 (2008).

116. *Id.* at 1633.

117. See generally *id.*

118. *Id.* at 1634.

119. *Id.*

120. CAL CONST. art. II, §§ 13–19.

121. Prakash, *supra* note 115, at 1634.

122. *Id.* at 1635.

123. See *Marbury v. Madison*, 5 U.S. 137, 166 (1803) (“Where the head of a department acts in a case, in which executive discretion is to be exercised . . . any application to a court to control, in any respect, his conduct, would be rejected without hesitation.”). For a discussion of why it may be beneficial for the democratic process to allow executives to refuse to defend initiatives, see Jeremy Zeitlin, *Whose Constitution Is It Anyway? The Executive's Discretion to Defend Initiatives Amending the California Constitution*, 39 HASTINGS CONST. L.Q. 327 (2011).

124. *Perry v. Schwarzenegger*, 628 F.3d 1191, 1197 (9th Cir. 2011), *certified question accepted* (Feb. 16, 2011), *certified question answered sub nom.* *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011).

But by that same logic, if the federal courts were to allow the proponents to defend the law in lieu of the state officials, the court essentially would be accomplishing indirectly what it cannot do directly—veto the discretion of the executive in matters that are not ministerial in nature.¹²⁵ Two separation-of-powers violations do not make a right. Instead, it may be more appropriate to let the political process act as a check on executive discretion. If the people dislike their elected officials' decision to forfeit a zealous defense, then the people can vote these officials out of office.

It is also misleading to claim that a failure to confer federal standing on initiative proponents allows the executive to indirectly veto the will of the people. Proponents still could seek relief in state courts. State courts can impose standing requirements that differ from those that control federal proceedings,¹²⁶ thereby conferring standing where federal courts could not.¹²⁷ Thus, proponents could defend their initiatives in state court so long as their state's standing requirements are more lenient than those required by Article III.¹²⁸

Therefore, unless initiative proponents can distinguish themselves from the average citizen who supported a measure—and do so in a manner that elevates their interest to an Article III-sufficient level of particularization—the mere fact that state law may grant them the right to participate in direct democracy does not, alone, confer federal standing. A right without a corresponding particularized injury is Article III-deficient.¹²⁹ Initiative proponents simply lack a particularized interest in the general validity of their measures. The interest of initiative proponents is not significantly different from that of the average citizen who supported the measure or wants it to remain in effect. An alleged injury must affect the litigant in a personalized way. In the case of Proposition 8, overturning the law has the same effect on the proponents as it does on the average citizen who supported and voted for the measure, and all citizens share a common interest in having their elected officials zealously defend state law.

125. See *Marbury*, 5 U.S. at 141.

126. *City of Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983).

127. See *Perry v. Brown*, 671 F.3d 1052, 1073 (9th Cir. 2012) *cert. granted*, 12-144, 2012 WL 3134429 (U.S. Dec. 7, 2012).

128. This is the case in California. See *Jasmine Networks, Inc. v. Superior Court*, 180 Cal. App. 4th 980, 991 (2009) (refusing to interpret section 367 of the California Code of Civil Procedure as imposing federal-style standing requirements).

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

3. Interest in the Substantive Application of the Law

A third way in which initiative proponents could seek federal standing is by showing that they will suffer a concrete and particularized injury if the law is not enforced. Under this theory, the injury does not derive from interference with the right to propose and enact ballot initiatives. Instead, the injury occurs when some benefit that the new law conferred upon the proponents is revoked upon the law's invalidation. This theory depends highly on the substance of the law and whether it confers some tangible benefit on the proponents. Furthermore, this theory is not uniquely applicable to initiative proponents. Presumably, any person who can demonstrate that the invalidation of the law would revoke a tangible benefit could have proper standing to defend the measure.

The weaknesses of this theory are played out in the *Diamond* case, in which a private citizen attempted to defend an Illinois abortion statute.¹³⁰ The Illinois statute increased abortion regulations and instituted criminal penalties for physicians who performed certain procedures.¹³¹ The law was challenged on constitutional grounds and invalidated in the district court, and the state declined to appeal the adverse ruling.¹³² Thereafter, Diamond—a local pediatrician—sought to defend the law in lieu of the government.¹³³ Diamond pointed to his status as a physician and his conscientious objection to abortion in order to demonstrate that he had proper standing.¹³⁴

The Supreme Court determined that Diamond lacked proper standing because his conscientious objection to abortion and his status as a physician did not sufficiently establish a concrete and particularized injury.¹³⁵ Unlike physicians who performed abortions and thus were subject to criminal sanctions under the law, Diamond's conduct was not implicated by the statute.¹³⁶ The Court reasoned that “a private party whose own conduct is neither implicated nor threatened by a . . . statute has no judicially cognizable interest in the statute's defense.”¹³⁷ Ultimately, Diamond's rights remained unaffected whether the statute was enforced or overturned. Thus, his status as a physician did not give him a direct stake in the outcome of the litigation.

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

131. *Id.* at 56.

132. *Id.* at 58–60.

133. *Id.* at 61.

134. *Id.* at 57–58.

135. *Id.* at 64–67.

136. *Id.* at 56.

137. *Id.*

With respect to Diamond's conscientious objection, the Court reiterated that the judiciary cannot be called upon to vindicate value interests.¹³⁸ Diamond's special interest in the subject was not concrete and particularized by Article III standards. Disagreement over proper public policy, "however sharp and acrimonious," does not confer Article III standing.¹³⁹ The Court also highlighted the state autonomy concerns at play, explaining that "Diamond's attempt to maintain the litigation is . . . simply an effort to compel the State to enact a code in accord with [his] interests."¹⁴⁰

The Proposition 8 proponents encounter these same problems. The conduct of the proponents—who are presumably heterosexual—is unaffected by the existence or nonexistence of the marriage amendment. Proponents could legally marry in California before the measure was enacted, they could legally marry during the time it was in force, and they can legally marry now. In the phraseology of the *Diamond* Court, proponents' conduct is "neither implicated nor threatened"¹⁴¹ by the law.¹⁴²

Furthermore, even if the courts agreed that same-sex marriages would affect heterosexual marriages, *Lujan* still requires that the specific parties to the litigation be among the affected or injured.¹⁴³ Thus, it would be insufficient for the Proposition 8 proponents to claim a generalized or theoretical injury to heterosexual marriages. Instead, these proponents would need to allege facts demonstrating that *their* marriages would be adversely affected or that *they specifically* would be less likely to marry if the law also recognized the legitimacy of same-sex marriages. The proponents did not, however, allege that their marriages would suffer as a result of government recognition of same-sex marriages. Thus, even if it were accepted as true that same-sex marriages would adversely affect heterosexual marriages,¹⁴⁴ the Proposition 8 proponents still do not have a concrete and particularized interest in the law's enforcement.

Ultimately, the Proposition 8 proponents are in a position similar to the physician in *Diamond*. Their conscientious objection to same-sex marriages

138. *Id.* at 67.

139. *Id.* at 62.

140. *Id.* at 65.

141. *Id.* at 56.

142. See Elliott, *supra* note 53, at 179 ("The Prop 8 proponents are not themselves bound by the district court's injunction, which prevents California state and local officials from denying marriage to gay couples but binds no private actors.").

143. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).

144. Both the district court and the Ninth Circuit rejected this proposition.

cannot satisfy the requirement of Article III, and they lack a concrete and particularized interest in the substantive enforcement of the law.

B. State Law and the Questionable Nature of the Delegation Theory

When Proposition 8 reached the Ninth Circuit, the court concluded that the proponents' standing depended on California state law. However, state law likely cannot create a judicially cognizable interest for initiative proponents in the existence or non-existence of their ballot measures.¹⁴⁵ After an initiative is approved, the proponents' interest is virtually indistinguishable from that of the average citizen who supported the measure.¹⁴⁶ Thus, proponents only have a generalized interest in the existence of their measures—an interest that lacks the concreteness and particularization required by Article III.¹⁴⁷

If proponents could demonstrate that invalidating a measure will deny them some tangible benefit or protection, then their interest may rise to the requisite level of particularization.¹⁴⁸ However, this type of interest exists separately from a state law expressly conferring standing. If a litigant can demonstrate a concrete and particularized interest in the enforcement of a measure, then any state law conferring standing under those circumstances would do nothing more than codify the *Lujan* test.

Therefore, state efforts to legislatively confer upon initiative proponents a particularized interest in the validity of their measures may be futile. For example, in response to the Proposition 8 litigation, Arizona passed Senate Bill 1210, which purports to confer proper standing on initiative proponents whose ballot initiatives are challenged in court.¹⁴⁹ However, this law does little to address the problems that were encountered in the Proposition 8 litigation. Although this law may assure that initiative proponents can intervene in state court proceedings, initiative proponents still must demonstrate a concrete and particularized interest if the case is brought in federal court. If initiative proponents can demonstrate this type of interest, then they would have Article III standing with or without the Arizona law. If they cannot demonstrate a concrete and particularized interest, however, then the Arizona law will be ineffective in operation.

145. See *supra* Part III.A.1.

146. See *supra* Part III.A.1.

147. See *supra* Part III.A.1.

148. For example, the *Diamond* Court indicated that a physician who could demonstrate that abortion regulations have a direct financial impact on his business could potentially have proper standing. *Diamond v. Charles*, 476 U.S. 54, 65–66 (1986).

149. S.B. 1210, 50th Leg., 2d Reg. Sess. (Ariz. 2012).

The only way that the Arizona law could be read to confer standing on initiative proponents who would otherwise not satisfy the *Lujan* test is if the law delegates to them the *state's* interest in the validity of its laws. This is the law in California according to its supreme court.¹⁵⁰ Thus, the effectiveness of the Arizona law may depend on how the Arizona Supreme Court interprets the source of the purportedly conferred standing if or when the question reaches it.¹⁵¹ If the Arizona Supreme Court determines that the state legislature intended to vest initiative proponents with a particularized interest in the validity of their ballot initiatives, then the law likely will not address the problems encountered in the Proposition 8 cases. However, if the court determines that the legislature delegated the state's authority to defend voter-enacted initiatives to the proponents who sponsored them, then it is more likely that federal courts will recognize the standing of these proponents.

However, it is not entirely clear whether this type of delegation—which appears to be based on agency principles—is sufficient to confer federal standing. Although the Ninth Circuit accepted the delegation theory in the Proposition 8 litigation,¹⁵² the U.S. Supreme Court has yet to rule on the matter.¹⁵³ Furthermore, the Court's language in *Arizonans for Official English* reveals some skepticism of this theory.¹⁵⁴ The Court doubted the standing of initiative proponents, stating that “[proponents] are not elected representatives, *and* we are aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona. . . .”¹⁵⁵ Written in the conjunctive, this observation by the Court may indicate that both conditions must be satisfied in order for a party to have proper standing to assert the state's interest. That is, the party must be an elected or accountable representative *and* have legal authorization to defend the law.

This view is consistent with the ruling in *Karcher v. May*,¹⁵⁶ in which the Court denied standing to defend a law to two members of the New Jersey

150. *Perry v. Brown*, 265 P.3d 1002, 1007 (Cal. 2011).

151. *See Elliott*, *supra* note 53, at 189 (citing *United States v. Morrison*, 529 U.S. 598, 614 (2000)) (“[I]f Congress finds factually that an injury-in-fact exists, that ‘does not necessarily make it so.’ The question is ultimately one for the Court to decide.”).

152. *Perry v. Brown*, 671 F.3d 1052, 1071–72 (9th Cir. 2012) *cert. granted*, 12-144, 2012 WL 3134429 (U.S. Dec. 7, 2012).

153. On December 7, 2012, the U.S. Supreme Court granted certiorari in the Proposition 8 litigation. In addition to whether Proposition 8 violates the Fourteenth Amendment, the Court directed the parties to brief the question of whether proponents have Article III standing. *Hollingsworth v. Perry*, 12-144, 2012 WL 3134429 (U.S. Dec. 7, 2012).

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

155. *Id.* (emphasis added).

156. 484 U.S. 72 (1987).

legislature.¹⁵⁷ There, the representatives had proper standing in earlier challenges because, at that time, the representatives held leadership positions in the legislature and New Jersey law authorized the legislative leadership to represent the interests of the state in legal challenges.¹⁵⁸ However, by the time the case reached the U.S. Supreme Court, these representatives lost their leadership positions and therefore lacked proper standing to represent the state in court.¹⁵⁹ Thus, being an elected representative does not, alone, confer standing to represent the state's interest. A party must also have express authority to do so.

Taken together, *Karcher* and *Arizonans for Official English* could stand for the proposition that delegation requires a litigant to be accountable to the people *and* have express authorization under state law to defend its interests in court. After all, if express authorization, alone, were dispositive, then it would have been unnecessary for the *Arizonans for Official English* Court to observe that proponents were not elected representatives. However, *Karcher* did not address whether holding a public office is a necessary condition, and the Court in *Arizonans for Official English* ultimately declined to pursue the issue.

There may be good reason to require both conditions, though. The problems that standing is intended to address¹⁶⁰ arguably are still present when initiative proponents defend their enacted measures in court regardless of how that right is conferred. In the context of Proposition 8, the proponents still lack a concrete and particularized interest in the outcome of the litigation, and their presence in the suit allows federal courts to circumvent the discretion of the legislative and executive branches, which chose not to appeal the district court's ruling.

Furthermore, the proponents do not truly represent the state's interests. When accountable state representatives decide whether to defend a law or appeal an adverse ruling, those representatives balance a wide range of interests, including the wisdom of using limited state resources to defend cases that have dubious chances of success. Initiative proponents, on the other hand, are typically self-interested and issue-specific actors who do not balance the totality of state interests when making litigation decisions. Therefore, this type of delegation improperly places the state's interest in

157. *Karcher v. May*, 484 U.S. 72, 77 (1987).

158. *Id.*

159. *Id.* at 77–78.

160. Namely, assuring that litigants have a direct stake in the outcome of litigation, avoiding adjudication of generalized grievances better left to political resolution, and preventing the use of citizen-suits to effectuate judicial oversight of executive and legislative discretion. *See supra* Part II.

the hands of parties who are unqualified to balance the full range of those interests. These concerns, alone, may speak only to the wisdom of delegation and not to its legality.¹⁶¹ However, these considerations may have more legal relevance when viewed together with the fact that many of the problems that Article III standing is supposed to address persist whenever initiative proponents are allowed to defend their enacted measures in lieu of public officials.

Nor has the Supreme Court recognized this type of delegation in the past. The closest approximation to a conferral of standing on delegation grounds is the Court's recognition of standing in *qui tam* actions.¹⁶² Take, for example, the False Claims Act (FCA),¹⁶³ which penalizes those who knowingly present false or fraudulent claims to the federal government.¹⁶⁴ The FCA authorizes private citizens to enforce its provisions on behalf of the United States.¹⁶⁵ If successful, the private citizen—or relator—receives a portion of the recovered penalty as a bounty.¹⁶⁶ At first glance, this may seem analogous to the type of delegation that the Ninth Circuit upheld in *Perry*. However, there are important distinctions between *qui tam* actions and the agency-type delegation at issue whenever initiative proponents seek to defend their measures in lieu of public officials.

First, the FCA does not delegate authority to represent the federal government's interest in the litigation, but rather vests the relator with his own personal interest in the litigation.¹⁶⁷ Under the delegation theory adopted by the Ninth Circuit, however, initiative proponents do not have a personal interest in the litigation. Instead, proponents represent the state's interest in the matter, much like a principal–agent relationship. With respect to the FCA, though, the Court based standing on the assignee–assignor relationship.¹⁶⁸ Thus, instead of representing the government's interest in the suit, FCA relators have been assigned a portion of the government's damages claim.¹⁶⁹

161. Although delegating a public duty to private citizens arguably could raise concerns under the Guarantee Clause. U.S. CONST. art. IV, § 4.

162. A *qui tam* action is one in which a statute authorizes a private party to sue for collection of a penalty owed to the government. BLACK'S LAW DICTIONARY 1368 (9th ed. 2009).

163. 31 U.S.C. §§ 3729–30 (2006).

164. *Id.* § 3729(a)(1)(A).

165. *Id.* § 3730(b)(1).

166. *Id.* § 3730(d).

167. *Id.* § 3730(b); *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000).

168. *Vt. Agency of Natural Res.*, 529 U.S. at 773.

169. *Id.*

Second, standing based on the assignee–assignor relationship is likely limited to claims for damages. The assignee–assignor relationship, by definition, contemplates the assignment of a property interest.¹⁷⁰ Additionally, the remedy in *qui tam* actions¹⁷¹ and in other cases in which standing is based on the assignee–assignor relationship is damages.¹⁷² In initiative challenges, the desired remedy is injunctive or declaratory. Accordingly, the assignee–assignor analogy is an imperfect fit in this context.

Finally, in upholding standing based on the assignee–assignor relationship, particularly *qui tam* actions, the Court has emphasized the historical recognition of such suits in both England and America.¹⁷³ There is not a similar tradition of delegating to private citizens the authority to defend state laws in lieu of public officials. Again, the assignee–assignor analogy likely cannot be stretched to confer standing on initiative proponents in cases like *Perry*. Therefore, conferring standing in similar initiative challenges under a delegation theory might be improper.

IV. CONCLUSION

Under modern standing law, initiative proponents likely lack standing to defend their ballot measures in federal court because they do not have a concrete and particularized interest in the general validity of the law.¹⁷⁴ This type of interest is more akin to generalized grievances and value interests, which are traditionally directed to the political process for resolution. Although the Ninth Circuit was willing to recognize standing on a delegation theory,¹⁷⁵ it is unclear whether a state could delegate the authority to represent the public interest to private citizens without encountering the same problems that the injury-in-fact test is intended to address.¹⁷⁶

Initiative proponents argue that without standing to defend their measures in federal courts, their right to participate in direct democracy is jeopardized whenever public officials decline to defend voter-approved

170. BLACK'S LAW DICTIONARY 136, 138 (9th ed. 2009).

171. *See* *Vt. Agency of Natural Res.*, 529 U.S. at 773.

172. *See* *Sprint Commc'ns Co., v. APCC Servs., Inc.*, 554 U.S. 269, 271 (2008).

173. *Id.* at 275–85; *Vt. Agency of Natural Res.*, 529 U.S. at 774–77.

174. *See supra* Part III.A.

175. *Perry v. Brown*, 671 F.3d 1052, 1072–73 (9th Cir. 2012) *cert. granted*, 12-144, 2012 WL 3134429 (U.S. Dec. 7, 2012).

176. *See supra* Part III.B.

laws against constitutional challenges.¹⁷⁷ But initiative and referenda have no federal counterparts. Direct democracy in the United States exists only at the state level. It may be the case, then, that our federal court system is ill-equipped to enforce state-level direct democracy. Of course, initiative proponents are free to seek relief in their state's courts, which are not bound by the jurisdictional requirements of Article III.¹⁷⁸ However, when citizens propose and enact state legislation that raises federal constitutional issues, they run the risk of being shut out of the judicial process if challenges are brought in or removed to federal court. Perhaps this is a sign that when states erect direct democracy systems that arguably are in tension with the type of republican government that operates at the federal level, private citizens should legislate with caution.

177. See, e.g., *Perry v. Schwarzenegger*, 628 F.3d 1191, 1197 (9th Cir. 2011), *certified question accepted* (Feb. 16, 2011), *certified question answered sub nom.* *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011).

178. *City of Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983).