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Standing in for the State: Defending Ballot Initiatives in Federal Court Challenges

I. INTRODUCTION

Recent case law effectively obliterates the defensibility of voter-enacted initiative measures that are challenged in federal court and that executive officials refuse to defend. The new requirements imposed by the Supreme Court not only exclude proponents of a given initiative from defending the initiative but also preclude almost all others who would defend it. This unique process of lawmaking allows the people to vote directly on issues and so it is, by definition, democracy at its finest. However, current law threatens its continued benefits.

The Supreme Court's opinion in *Hollingsworth v. Perry*¹ violates what should be an important principle in federal decision-making: state sovereignty outweighs a bare desire for uniformity in federal law. The Supreme Court violated this principle when it decided that the initiative proponents could not represent the State of California unless they were agents of the state. The Court's only legitimate justification seemed to be a desire to preserve uniformity in the federal law.² Though the Court framed the case in the context of federal standing, California's approval of the proponents' authority to step into the state's shoes was a question of state law as the decision only truly affected California and similar states. No valid federal interests were seriously implicated. By overruling the California Supreme Court on this issue, the Supreme Court severely undermined California's status as a separate sovereign.

The repercussions of this federal overreaching are severe, extending beyond the problem of undefended public initiatives. Thus, as the Supreme Court created the problem, the Supreme Court should mend the doctrine by allowing states to appoint their own defenders, even in federal court, as long as the state's intent is clearly communicated. While other remedies might allow for initiatives to be defended in some situations, those remedies are

1. 133 S. Ct. 2652 (2013).

2. *See infra* note 109 (addressing the possibility that the Court was merely delaying a sweeping decision on same-sex marriage).

potentially flawed and provide an unnecessarily low level of protection to states and citizen initiatives. A change in the doctrine would allow for a much-needed bolstering of citizen initiatives and would restore a proper balance to the federalism system.

This Comment describes both the need for doctrinal changes and the direction such changes should take. Part II outlines the role of ballot initiatives in past and present American society, discussing their boon to the democratic process. Part III establishes a framework for the issues involved, with a discussion of the federal standing doctrine and cases leading up to *Hollingsworth v. Perry*. It then analyzes *Hollingsworth* in depth and reveals how ballot initiatives may soon become things of the past. Part IV argues that, based on federalism principles of state autonomy in deciding state issues, *Hollingsworth* is flawed and the only viable solution is for the Supreme Court to fix the law. Part V concludes.

II. THE SIGNIFICANCE OF BALLOT INITIATIVES

The public initiative process began in the early twentieth century in reaction to state legislatures' unresponsiveness to the people's will.³ In California, "the progressive movement . . . that introduced the initiative power into [its] Constitution grew out of dissatisfaction with the then-governing public officials and a widespread belief that the people had lost control of the political process."⁴ Twenty-four states have now adopted the ballot initiative as a form of lawmaking.⁵ The people of those states proposed 2,421 initiatives from 1904 to 2012, and 984 were eventually approved and enacted into law.⁶

3. See *Perry v. Brown*, 265 P.3d 1002, 1016 (Cal. 2011).

4. *Id.* (citing *Strauss v. Horton*, 207 P.3d 48, 84–85 (Cal. 2009); *Indep. Energy Producers Ass'n v. McPherson*, 136 P.3d 178, 191–93 (Cal. 2006)).

5. *Overview of Initiative Use, 1900–2012*, INITIATIVE & REFERENDUM INST. AT UNIV. OF S. CAL. (Jan. 2013), <http://www.iandrinstitute.org/IRI%20Initiative%20Use%20%282013-1%29.pdf> [hereinafter *INITIATIVE & REFERENDUM INST.*]; see also *Ballot Initiative Primer*, CITIZENS IN CHARGE, <http://www.citizensincharge.org/learn/primer> (last visited Mar. 24, 2015).

6. INITIATIVE & REFERENDUM INST., *supra* note 5 (detailing how the initiative process has played a particularly important role in the following states: Oregon (363 total proposed), California (352), Colorado (218), North Dakota (183), and Arizona (174)); see also Gavin Broady, *Prop 8 Standing Ruling Shakes up Citizen Lawmaking*, LAW 360 (June 26, 2013, 7:42 PM), <http://www.law360.com/articles/453181/prop-8-standing-ruling-shakes-up-citizen-lawmaking> (naming California's initiative process "the most extensive citizen lawmaking platform" in the country and predicting that "[t]he impact [there] will be especially profound").

According to Justice Kennedy, “the popular initiative is necessary to implement ‘the theory that all power of government ultimately resides in the people.’”⁷ Public initiatives are nonpartisan in nature,⁸ so conservatives, liberals, and libertarians are similarly likely to benefit from them. They are simply a method of lawmaking available to all people, regardless of their ideology, and their destruction would harm people of all political persuasions.⁹ The initiative process is the most directly democratic form of lawmaking, and any

7. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2670 (2013) (Kennedy, J., dissenting) (quoting *Perry*, 265 P.3d at 1016) (referring to California’s ideals according to its Constitution); see also *Hollingsworth*, 133 S. Ct. at 2675 (“The essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around. Freedom resides first in the people without need of a grant from government. The California initiative process embodies these principles and has done so for over a century.”).

8. For example, a number of laws both banning and reinstating the death penalty were proposed in a number of states prior to 2002. Additionally, eleven laws were proposed to facilitate marijuana use (in addition to one that would ban it) in a number of states during that time. *Statewide Initiatives Since 1904-2000*, INITIATIVE & REFERENDUM INST. AT UNIV. OF S. CAL., <http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Historical/Statewide%20Initiatives%201904-2000.pdf> (last visited Mar. 24, 2015).

9. See *Perry*, 265 P.3d at 1005 (noting that the question of whether initiative proponents could assert the state’s interest in an initiative’s defense is a “fundamental procedural issue that may arise with respect to *any* initiative measure, *without regard to its subject matter*,” and listing other politically neutral scenarios that could arise) (second emphasis added); Erwin Chemerinsky, Op-Ed., *Prop. 8 Deserved a Defense: The State Shouldn’t Abandon Measures Passed by Voters*, L.A. TIMES, June 28, 2013, <http://articles.latimes.com/2013/jun/28/opinion/la-oc-chemerinsky-proposition-8-initiatives-20130628> (“I vehemently opposed Proposition 8, but I believe it deserved its defense in court. California needs a mechanism to make that possible. . . . [T]he long-term implications of the ruling are disturbing.”); Doug Mataconis, *Prop. 8, DOMA, and Standing in the Supreme Court*, OUTSIDE THE BELTWAY (June 28, 2013), <http://www.outsidethebeltway.com/prop-8-doma-and-standing-in-the-supreme-court/> (quoting pundits that express concern on both sides of the Proposition 8 political debate and pointing out that “[t]his [standing issue] is an issue that has, interestingly, raised concerns both on the left and the right.”); Alison Frankel, *Gay Marriage, Voters’ Rights and the Thorny Prop 8 Standing Problem*, REUTERS (Mar. 27, 2013), <http://blogs.reuters.com/alison-frankel/2013/03/27/gay-marriage-voters-rights-and-the-thorny-prop-8-standing-problem/?print=1&r=> (acknowledging that a ruling denying standing to the proponents “would . . . implicate some difficult issues”). But see Spandan Chakrabarti, *The Fate of Prop 8: Why a Dismissal on “Standing” is Good for Marriage Equality*, THE PEOPLE’S VIEW (Mar. 26, 2013), <http://www.thepeoplesview.net/2013/03/the-fate-of-prop-8-why-dismissal-on.html> (arguing that standing would not be a problem in the future for liberals, even if proponents of liberal initiatives were not granted standing); Kevin Drum, *The Supreme Court’s Ruling on Prop. 8 is a Problem, but Probably Not That Big a Problem*, MOTHER JONES (June 28, 2013, 3:04 PM), <http://www.motherjones.com/kevin-drum/2013/06/supreme-courts-ruling-prop-8-problem-probably-not-big-problem> (arguing that Proposition 8 was an exception to the norm that people usually have standing to sue).

nullification of the process—especially without the people’s consent—is cause for concern.

III. FEDERAL STANDING AND BALLOT INITIATIVES

The recent Supreme Court case *Hollingsworth v. Perry*¹⁰ dramatically impaired the vitality of ballot initiatives. The Court determined who has standing to appeal federal decisions on behalf of a state. Now, if state officials refuse to defend them, public initiatives are left vulnerable and defenseless because almost no others are legally qualified to do so.

Federal standing doctrine arises from Article III, section 2 of the U.S. Constitution, which extends federal jurisdiction only to cases and controversies.¹¹ “Cases and controversies,” as interpreted in *Lujan v. Defenders of Wildlife*,¹² mean that parties to a case must meet three elements as a “constitutional minimum”¹³: The parties (1) “must have suffered an ‘injury in fact,’”¹⁴ (2) “there must be a causal connection between the injury and the conduct complained of,”¹⁵ and (3) “it must be ‘likely’ . . . that the injury will be ‘redressed by a favorable decision.’”¹⁶ It is well established that “a State has standing to defend the constitutionality of its [laws].”¹⁷ Therefore, when state ballot initiatives are challenged in federal court, the state and its officials undoubtedly meet the *Lujan* requirements for standing to defend the state’s laws in court.¹⁸

The remaining question, however, is whether anyone other than officials of the state can also have standing to defend state laws.

10. 133 S. Ct. 2652.

11. U.S. CONST. art. III, § 2 (extending judicial power to all cases and controversies).

12. 504 U.S. 555 (1992).

13. *Id.* at 560.

14. *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 756 (1984)).

15. *Id.* (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).

16. *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

17. *Perry v. Brown*, 671 F.3d 1052, 1074 (9th Cir. 2012) (alteration in original) (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)).

18. A wealth of case law also addresses third-party standing and other prudential doctrines. However, these doctrines are irrelevant for purposes of this Comment because this Comment simply argues that others should be able to stand in place of the state (rather than as third parties). Under this argument, the “others” are no longer separated from the state but actually *become* representatives of the state. Because the state is deemed to have federal standing in these cases, these “others” are automatically granted standing.

A. Pre-Hollingsworth Jurisprudence

Although the issue of whether state supreme courts could delegate authority to represent the state was not clearly decided until *Hollingsworth*¹⁹ in 2013, pre-*Hollingsworth* cases suggested that state courts might possess this authority. Two cases—*Karcher v. May*²⁰ and *Arizonans for Official English v. Arizona*²¹—stand out in particular.

1. *Karcher v. May*

In *Karcher v. May*, the Supreme Court held that presiding officers in the New Jersey state legislature had standing so long as the state supreme court granted them authority to “represent the State’s interests.”²² In *Karcher*, the state court had conditioned this delegation of authority on the officers’ holding leadership positions, so when the legislators lost their leadership positions, and consequently lost the blessing of the state court, the Supreme Court denied them standing.²³ The Supreme Court relied on this “state law,” as declared by the New Jersey high court, to determine whether these non-executive officers could stand in place of the state.²⁴

2. *Arizonans for Official English v. Arizona*

More recently, the Supreme Court again hinted that state endorsement may be dispositive for those seeking to represent the state’s interests in *Arizonans for Official English v. Arizona*.²⁵ When state officials refused to appeal a decision rendering a part of the state’s constitution—which had been enacted through initiative—unconstitutional, proponents of the ballot initiative attempted to represent the state’s interest. The Supreme Court ruled that the case was moot, and hence did not reach the merits or the question of standing, but expressed “grave doubts” as to whether proponents would have had standing.²⁶ The reason for these doubts, though, is

19. 133 S. Ct. 2652 (2013).

20. 484 U.S. 72 (1987).

21. 520 U.S. 43 (1997).

22. 484 U.S. at 82.

23. *Id.* at 83.

24. *Id.* at 82–83.

25. 520 U.S. at 65.

26. *Id.* at 66.

instructive. The Court noted, *inter alia*, that it was “aware of no *Arizona law* appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.”²⁷ This statement, while admittedly only dictum, suggested that the opinion of state law would be a substantial factor in determining whether proponents had standing.

B. Hollingsworth v. Perry

Despite the pre-2013 leanings toward deferring to state decisions, the Court’s recent holding in *Hollingsworth v. Perry*²⁸ completely reversed course. The Court required that those purporting to represent the state be formal agents of the state according to the Restatement of Agency,²⁹ thus ruling out initiative proponents from ever representing the state and preventing state supreme courts from exercising their sole discretion in the matter.

1. Proposition 8: Journey to the Supreme Court

Certain members of the organization ProtectMarriage.com brought the now-famous Proposition 8 before California voters in 2008.³⁰ The initiative, which would make man-woman marriage the only recognizable and valid form of marriage under California’s Constitution,³¹ was passed into law by 52.3% of California’s electorate.³² After being upheld as constitutional by the California Supreme Court,³³ two same-sex couples challenged the constitutional amendment in federal court under 42 U.S.C. Section 1983, alleging that the amendment violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.³⁴ After the

27. *Id.* at 65 (emphasis added).

28. 133 S. Ct. 2652 (2013).

29. *Id.* at 2666–67.

30. Proposition 8’s journey began long before 2008. It was preceded in 2000 by the enactment of a similar proposition (22) forbidding same-sex marriage under statutory law. Proposition 22 was rejected as unconstitutional by the California Supreme Court on May 15, 2008, which spurred Proposition 8. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

31. Letter from ProtectMarriage.com to Initiative Coordinator, Office of the Cal. Att’y Gen. (Oct. 1, 2007) (on file with author) (“Only marriage between a man and a woman is valid or recognized in California.”).

32. *Approval Percentages of Initiatives Voted into Law*, CAL. SEC’Y OF STATE, available at <http://elections.cdn.sos.ca.gov/ballot-measures/pdf/approval-percentages-initiatives.pdf>.

33. *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009).

34. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928–30 (N.D. Cal. 2010).

named defendants—including the governor and state attorney general—refused to defend the constitutional amendment,³⁵ the federal district court allowed the initiative’s proponents to intervene.³⁶ The district court ultimately held that Proposition 8 was unconstitutional,³⁷ and the proponents appealed the judgment to the Ninth Circuit Court of Appeals.³⁸

Before the Ninth Circuit could reach the merits of the case, it needed to decide whether the proponents had federal standing to represent the State of California. Consequently, the court certified a question to the California Supreme Court, asking whether the proponents had “the authority to assert the State’s interest,” or, alternatively, whether the proponents had a “particularized interest in the initiative’s validity.”³⁹ The California court answered the first question in the affirmative and thus saw no need to address the second question.⁴⁰

Both courts made it clear that this certified question in no way meant that the California Supreme Court was deciding whether the proponents had federal standing.⁴¹ However, they both agreed that

35. The named defendants were “California’s Governor, Attorney General and Director and Deputy Director of Public Health and the Alameda County Clerk-Recorder and the Los Angeles County Registrar-Recorder/County Clerk.” The Attorney General opined that the law was unconstitutional, while the other defendants refused to take a position on the matter. *Id.* at 928.

36. *Id.*

37. *Id.* at 1003.

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

39. *Perry v. Brown*, 265 P.3d 1002, 1005 (Cal. 2011). The Court stated the following:

As posed by the Ninth Circuit, the question to be decided is “[w]hether 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.”

Id. (alteration in original).

40. *Id.* at 1015, 1033 (“[W]e conclude, for the reasons discussed above, that when the public officials who ordinarily defend a challenged state law or appeal a judgment invalidating the law decline to do so, under article II, section 8 of the California Constitution and the relevant provisions of the Elections Code, the 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.”).

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

while the question was one of state law, such state questions are “*antecedent to determining federal standing*.”⁴² Thus, while clearly denying that California “has any ‘power directly to enlarge or contract federal jurisdiction’”⁴³ or to “decide any issue of federal law,”⁴⁴ both the Ninth Circuit and the California Supreme Court agreed that the California Supreme Court could authoritatively declare that the proponents had “authority to assert the state’s interests”⁴⁵—even in federal court. Accordingly, the Ninth Circuit Court of Appeals relied on the California Supreme Court’s answer to its certified question in deciding that the proponents had Article III standing to “assert the state’s interest . . . and to appeal [the] judgment.”⁴⁶ The Ninth Circuit then affirmed the district court’s decision, holding that Proposition 8 was unconstitutional.⁴⁷

2. The Supreme Court’s new standard: No standing unless official agents of the state

On June 26, 2013, the Supreme Court issued two landmark same-sex marriage opinions: *Hollingsworth v. Perry*⁴⁸ and *United States v. Windsor*.⁴⁹ Rather than ruling on the merits in *Hollingsworth*, however, the Court denied the case for lack of jurisdiction.⁵⁰ The Court held that because the proponents had no “‘particularized’ interest” of their own⁵¹ and were not “agents of the State,”⁵² they therefore lacked standing.⁵³

The Supreme Court was clear in declaring that those who would represent the state in federal courts must be formal agents of the state according to the requirements found in the Restatement of

42. *Id.* (emphasis added).

43. *Id.* (quoting *Duchek v. Jacobi*, 646 F.2d 415, 419 (9th Cir. 1981)).

44. *Perry*, 265 P.3d at 1011.

45. *Id.* at 1005.

46. *Perry*, 671 F.3d at 1075.

47. *Id.* at 1096.

48. 133 S. Ct. 2652 (2013).

49. 133 S. Ct. 2675 (2013).

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

51. *Id.* at 2663 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). “[T]he plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is . . . concrete and particularized.” *Lujan*, 504 U.S. at 560.

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

53. U.S. CONST. art. III, § 2 (judicial power extending to all cases and controversies).

Agency.⁵⁴ In order to be a formal agent of the state, the Court established, one must answer to the state and have fiduciary duties to the state, among other requirements.⁵⁵ The Court noted that neither the California Supreme Court nor the Ninth Circuit Court of Appeals described the proponents as “agents of the people,” and therefore the most the proponents could do was to “argue in defense of Proposition 8” rather than stand in California’s place as parties to the case.⁵⁶ While agency in some form had been alluded to as a possible requirement in at least one prior case,⁵⁷ *Hollingsworth* was the first instance where the Restatement’s standard was set as a minimum requirement for those representing a state in federal court.

This new requirement constrains the range of options available to state courts in designating who may represent the state’s interests. It implies that a state high court’s declaration is neither sufficient by itself nor the final word in deciding who may represent the state in federal court. Thus it seriously undermines the landmark case of *Erie v. Tompkins*⁵⁸ and rejects the leanings—found in prior precedent⁵⁹—toward allowing state law to dictate who may represent the state.⁶⁰ The question of who may represent the state is a state question, so the decision tramples on the states’ authority to make their own laws free of federal intrusion. Consequently, it leaves citizen initiatives defenseless by denying federal standing to initiative proponents and most other would-be defenders of initiatives. This legal dilemma is alarming and calls for an immediate remedy.⁶¹

54. *Hollingsworth*, 133 S. Ct. at 2666–67.

55. *Id.* at 2657–58 (“Petitioners are not subject to the control of any principal, and they owe no fiduciary obligation to anyone. As one *amicus* puts it, ‘the proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however and to whatever extent they choose to defend it.’”); RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”).

56. *Hollingsworth*, 133 S. Ct. at 2666 (internal quotation marks omitted).

57. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (The Court was “aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.”).

58. 304 U.S. 64 (1938); see *infra* Part IV.A.2.

59. See *Arizonans*, 520 U.S. at 65; *Karcher v. May*, 484 U.S. 72, 82 (1987).

60. See *supra* Parts III.A.1–2.

61. There are a number of proposed or theoretical solutions. The advantages and limitations of these proposals are discussed below. *Infra* Parts IV.C.1–5.

C. Post-Hollingsworth: The End of Public Initiatives?

Hollingsworth eliminates much of the hope citizens might have had that laws enacted through public initiatives will endure. According to *Hollingsworth*, even express delegations of power by a state supreme court are insufficient to allow others to defend initiatives in place of the state, if those “others” are not official agents of the state under the Restatement of Agency.⁶² Thus, proponents of initiatives, such as those in *Hollingsworth*, will never be able to defend initiatives unless they find a way to double as official agents of the state. On its face, this does not seem overly fatal to the future of initiatives—after all, formal officials of the state are still allowed to defend the law under the new legal standard. However, trusting in this remedy will be misguided, because this “solution” will not result in initiatives being properly defended.

An assurance that a given initiative will last only as long as the state executive agrees with it is weak indeed. Justice Kennedy expressed this frustration in his dissenting *Hollingsworth* opinion: “[The initiative’s] purpose is undermined if the very officials the initiative process seeks to circumvent are the only parties who can defend an enacted initiative when it is challenged in a legal proceeding.”⁶³ State public officials were the very ones who were not defending the law in *Hollingsworth*, and the initiative process was originally created to bypass such nonresponsive public officials.⁶⁴ Therefore, some (and possibly many) public officials will not be willing, or at least not eager, to defend an initiative in court. At some point in time there is bound to be a state executive who disagrees with and is consequently unwilling to defend almost any initiative-made law; when that point is reached, all that is needed to nullify the law is one lawsuit by one negatively affected citizen. With the resultant crumbling of public confidence in the initiative’s durability, the motivation for citizens to seek this source of lawmaking will be diminished and will likely lead to its eventual disuse. Justice Kennedy agreed: “Giving the Governor and attorney general this *de facto* veto will erode one of the cornerstones of the State’s governmental

62. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

63. *Hollingsworth*, 133 S. Ct. 2652, 2671 (2013) (Kennedy, J., dissenting).

64. *Perry v. Brown*, 265 P.3d 1002, 1016 (Cal. 2011).

structure.”⁶⁵ While state courts theoretically could begin ordering executive officials to defend every law, this development is unlikely to take place and, even if implemented, would produce an undesirable outcome.⁶⁶ It would be unfortunate to allow for the demise of such a democratic lawmaking process.

IV. SAVING THE BALLOT INITIATIVE AND STATE SOVEREIGNTY

The true solution to the initiative-defense problem ultimately depends on the Supreme Court changing its jurisprudence. Recognizing that the question of who can represent a state in federal court is truly a state, not federal, question of law leads to a principle that should guide the Supreme Court and lower federal courts: state sovereignty outweighs simply maintaining uniformity in federal law. *Hollingsworth* violated this principle, thus failing to give proper deference to California’s sovereignty. By so doing, *Hollingsworth* has impacted the continued viability and strength of the ballot initiative process. The Supreme Court should mend this doctrine by deferring to states when states delegate the authority to represent the state’s interest in court.

A. Deciding Who Can Represent the State is a State Law Question

In ruling on state court decisions in the context of federal law, occasionally federal courts are confronted with an issue that touches on constitutionally mandated areas (e.g., Article III standing) but is not an essential part of that mandated area (e.g., the issue of “who is the state?”). In such a setting, the mere desire of federal courts to establish uniformity in federal jurisprudence, combined with nothing more, does not justify them in overruling an unambiguous state high court decision of state law, where the ruling would significantly impinge on that state’s status as a separate sovereign. This guiding principle should direct federal courts when walking along the

65. *Hollingsworth*, 133 S. Ct. at 2671 (Kennedy, J., dissenting); see *State Executive Nondefense or “Failure to Defend,”* COLUM. L. SCH. NAT’L ST. ATT’YS GEN. PROGRAM, <http://web.law.columbia.edu/attorneys-general/ag-101-brief-introduction-world-attorneys-general/state-attorney-general-nondefense> (last visited Mar. 24, 2015) (referring to numerous examples of state attorneys general refusing to defend a variety of laws since *Hollingsworth*).

66. Erwin Chemerinsky and Walter Dellinger propose that states enact laws requiring that an official be appointed in these cases. However, there seems to be no indication of states moving toward enacting such laws and, aside from preventative limitations in their proposals, states should not have to be limited to these narrow solutions. See *infra* Parts IV.C.1–2, 5.

“division-of-powers line;” otherwise, they can very easily exert undue control over states.

1. Rationale behind the guiding principle

The guiding principle, detailed above, should influence federal decisions because it is supported by precedent and sound public policy. As a starting point, the U.S. Supreme Court undoubtedly has the authority to review state court judgments, but that review only encompasses issues of federal law⁶⁷ and certain state law issues where state law contradicts federal law.⁶⁸ For the most part, state questions of law are left untouched by federal review; indeed, state sovereignty depends on this strict division of powers. If federal courts began overruling state law without bounds, eventually state law would become indistinguishable from federal law and each state would no longer be sovereign in its own sphere. Taken to the extreme, there would come to be no meaningful legal distinction between the fifty states, as all state law would be merged into federal law, resulting in an all-powerful centralized government.⁶⁹ Thus, any impingement by federal courts on state law, however slight its impact or great its justification, has at least some negative effect on state sovereignty. This invasion of state authority stifles the creative genius that can otherwise develop through state experimentation. Consequently, *significant* impingements on state law should be met with careful skepticism.

67. See 28 U.S.C. § 1257 (2006) (restricting the Supreme Court’s power to review state cases to only three situations where state decisions concern federal law); see also *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass’n*, 426 U.S. 482, 488 (1976) (“We are, of course, bound to accept the interpretation of [State] law by the highest court of the State.”); Peter Jeremy Smith, *The Anticommandeering Principle and Congress’s Power to Direct State Judicial Action: Congress’s Power to Compel State Courts to Answer Certified Questions of State Law*, 31 CONN. L. REV. 649, 683 (1999).

68. See, e.g., U.S. CONST. art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”); see also *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958) (holding that the Constitution trumps state law and states are bound by U.S. Supreme Court decisions).

69. See Richard A. Epstein & Mario Loyola, *Saving Federalism*, 20 NAT’L AFF., Summer 2014, at 3 (arguing that Patrick Henry’s forecast of a “great consolidation of Government” “became a reality” during the last century).

The range of federal reasons for infringing on state law runs the gamut from desiring to establish uniformity in federal law to preserving important constitutional requirements. Some of these are justifiable, while others are not. On the one end, federal courts seek to create order, simplicity, and a clear standard for lower courts. While this pursuit is important, its significance pales in comparison to preserving constitutional requirements. Its limited significance usually should not justify overruling state law, especially when the ruling would significantly impinge on state law. In other words, in situations where a federal decision on state law makes no substantial difference to the preservation of the federal court's authority but significantly and negatively affects state autonomy, federal courts should defer to state court decisions.⁷⁰

2. Federalism as a foundation: Why respect state law?

Federalism principles support the guiding principle because they clarify why the federal courts should respect state courts. In the landmark case *Erie v. Tompkins*,⁷¹ the Court set forth that federal courts are to apply state law, and state court interpretations of that law, when cases involve substantive questions of state law.⁷² When the question is not entirely substantive and is in tension with federal interests, federal courts can still apply the state law unless it would work an “untoward alteration of the federal scheme.”⁷³ Only when federal and state *rules* are in conflict do federal courts hold state rules to a higher standard or overrule them altogether.⁷⁴

70. Ironically, the likely desire for “order, simplicity, and a clear standard” could still have been preserved in *Hollingsworth* while also respecting state sovereignty, as discussed *infra* Part IV.A.4.b.

71. 304 U.S. 64 (1938).

72. “While *Erie* doctrine typically applies to issues arising in diversity suits, it is also applicable to ‘questions of state law arising in a nondiversity case,’ like *Hollingsworth*.” Glenn S. Koppel, “Standing” in the Shadow of *Erie*: Federalism in the Balance in *Hollingsworth v. Perry* 2 n.2 (Aug. 2013) (unpublished manuscript), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=glenn_koppel (quoting RICHARD H. FALLON, JR. ET AL., HART & WECHLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 563 (6th ed. 2009)).

73. *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 426 (1996) (“The dispositive question, therefore, is whether federal courts can give effect to the substantive thrust of § 5501(c) without untoward alteration of the federal scheme for the trial and decision of civil cases.”).

74. *Hanna v. Plumer*, 380 U.S. 460, 473–74 (1965).

Furthermore, case law clearly illustrates that the federal government does not have power to command the state to enforce federal law.⁷⁵ This suggests a certain respect for state autonomy, at least in some contexts. In *New York v. United States*⁷⁶ and *Printz v. United States*,⁷⁷ the Court held that the federal government was not allowed to force states to enforce federal legislation.⁷⁸ Nor was Congress allowed to dictate to a state where to establish its capital.⁷⁹ Even assuming the Supreme Court was allowed constitutionally implied powers over states by virtue of some kind of “necessary and proper” clause power, as Congress has been granted,⁸⁰ the Supreme Court would not be able to command states to act in a certain way outside the realm of federal law.

3. Sovereign immunity cases support the guiding principle

State sovereign immunity cases, decided under the Eleventh Amendment, have provided an interesting doctrinal setting to determine the extent of states’ power to define “who is the state” in the context of federal law. These cases both support the guiding principle and illustrate how it would be implemented. Sovereign immunity cases involve both federal and state issues: federal, in that the Eleventh Amendment provides states with immunity from most suits unless that immunity is waived;⁸¹ and state, in that states should be able to define their own identities as a matter of state law.

75. *Perry v. Brown*, 671 F.3d 1052, 1072 (9th Cir. 2012) (“It is not for a federal court to tell a state who may appear on its behalf any more than it is for Congress to direct state law-enforcement officers to administer a federal regulatory scheme, to command a state to take ownership of waste generated within its borders, or to dictate where a state shall locate its capital.”) (citations omitted).

76. 505 U.S. 144 (1992).

77. 521 U.S. 898 (1997).

78. *Printz*, 521 U.S. at 935 (“We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State’s officers directly.”); *New York*, 505 U.S. at 188 (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”).

79. *Coyle v. Smith*, 221 U.S. 559, 579–80 (1911).

80. U.S. CONST. art. I, § 8, cl. 1, 18 (“The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”). *McCulloch v. Maryland* expounded on this, holding that the clause “purport[s] to enlarge, not to diminish the powers vested in the government.” 17 U.S. 316, 420 (1819).

81. U.S. CONST. amend. XI.

In *Lincoln County v. Luning*,⁸² the Supreme Court held that a county in Nevada could not claim state immunity because the county was not “the state.”⁸³ In so holding, the Court relied primarily on the Nevada Constitution and state court decisions.⁸⁴ The Court emphasized that “the liability of counties . . . to suit is declared by the [Nevada] constitution itself,” and that “this liability . . . has been affirmed by the supreme court of Nevada” in three cases.⁸⁵ These statements show trusting deference to state law for the question of “who is the state.”

Almost a century later, in *Mt. Healthy City School District Board of Education v. Doyle*,⁸⁶ the Supreme Court created a new standard which asked whether political subdivisions are “arm[s] of the State” and held that a school board was not “the State” for sovereign immunity purposes because it was “more like a county or city than . . . an arm of the State.”⁸⁷ The Court’s rationale was telling: it looked solely to Ohio state law in making its decision.⁸⁸ “[U]nder Ohio law,” it reasoned, “the ‘State’ does not include ‘political subdivisions,’ and ‘political subdivisions’ do include local school districts.”⁸⁹ All other considerations—whether they weighed for or against the school board—were also rooted in Ohio state law.⁹⁰

The Court further revised this doctrine in later years, nearly granting immunity in one case, *Pennhurst State School & Hospital v. Halderman*,⁹¹ and outright denying it in another, *Hess v. Port*

82. 133 U.S. 529 (1890).

83. *Id.* at 530–31.

84. *Id.* at 530–32.

85. *Id.* at 530–31.

86. 429 U.S. 274, 280 (1977).

87. *Id.* at 280–81. Interestingly, the determination that counties could not be considered part of the state for Eleventh Amendment purposes depended on *Lincoln*, 133 U.S. at 130, and *Moor v. County of Alameda*, 411 U.S. 693, 717–21 (1973). As discussed previously, *Lincoln* relied heavily on the Nevada Constitution and court decisions in making its determination. 133 U.S. at 130–31. *Moor* did not directly support the principle. 411 U.S. at 717 (merely stating that “this Court has recognized that a political subdivision of a State, unless it is simply ‘the arm or *alter ego* of the State,’ is a citizen of the State for diversity purposes”).

88. *Mt. Healthy*, 429 U.S. at 280–81.

89. *Id.* at 280 (quoting OHIO REV. CODE ANN. § 2743.01 (Page Supp. 1975)).

90. *Id.* at 280–81.

91. 465 U.S. 89, 123–24 (1984). “Given that the actions of the county commissioners and mental-health administrators are dependent on funding from the State, it may be that relief granted against these county officials . . . effectively runs against the State.” *Id.* at 124 n.34.

*Authority Trans-Hudson Corp.*⁹² In *Pennhurst*, the Court refused to allow a suit against county officials to proceed but only discussed the federal question in a footnote and used state grounds to resolve the issue.⁹³ Generally, it noted, relief against “officials of a county . . . is barred if the relief obtained runs against the state.”⁹⁴ It commented that the county there might be entitled to immunity on federal, in addition to state, grounds, since the county officials depended on funding from the state⁹⁵—specifically, Pennsylvania’s state statute.⁹⁶ Thus, the Court looked to the state law to imply that, while counties are not typically protected by the Eleventh Amendment, they *should* be protected if not doing so would negatively affect state funds.

Finally, in *Hess*, the case was “more complex” because the two states’ law was ambiguous, suggesting that both immunity and non-immunity was appropriate.⁹⁷ At issue was whether a port authority—a bi-state entity created by New Jersey, New York, and Congress under the Compact Clause⁹⁸—would be entitled to immunity.⁹⁹ The Court stated its general approach concerning these types of entities, which presumed that they do “not qualify for . . . immunity unless there is good reason to believe that the States structured [it] to enable it to enjoy the special constitutional protection of the States themselves.”¹⁰⁰ The states’ statements were conflicting here: while “[t]he compact and its implementing legislation [did] not type [it] as a state agency,” state courts had “repeatedly . . . typed [it] an agency of the States rather than a municipal unit or local district.”¹⁰¹ Faced with this inconsistency, the Court was guided by the Eleventh Amendment’s reasons for being and whether there was “good reason to believe” that “the States and Congress designed [the entity] to enjoy . . . immunity.”¹⁰² The Court went on to analyze the entity and

92. 513 U.S. 30, 48–53 (1994).

93. *Pennhurst*, 465 U.S. at 123–24.

94. *Id.* at 123 n.34.

95. *Id.*

96. *Id.* at 124.

97. *Hess*, 513 U.S. at 44.

98. U.S. CONST. art. I, § 10, cl. 3.

99. *Hess*, 513 U.S. at 35.

100. *Id.* at 43–44 (internal quotation marks omitted).

101. *Id.* at 44–45.

102. *Id.* at 47.

how it had been set up in that light, ultimately concluding that the port authority was not immune under the Eleventh Amendment.¹⁰³

These decisions are generally well-aligned with the guiding principle in that they deferred to the state to determine the most fundamental question of state law (i.e., “who is the state”). Notably, the question of “who is the state” in these cases was not merely tangential to the constitutional question of whether state sovereignty was warranted; rather, it lay close to its core. Even still, the Supreme Court consistently deferred to the state in making its decisions instead of presuming that all the answers rested with the Court. Despite this would-be excuse for overlooking state interests, these cases show that state considerations truly matter.

Lincoln is a straightforward example of how federal courts’ deference to states does not necessarily tread on the federal constitutional sphere. In *Mt. Healthy*, the Court’s heavy emphasis on state law further underscored this principle. It does not appear that the state of Ohio had argued one side over another, or that any Ohio courts had opined on the matter. Therefore, the Court looked to what it could—state statutory law—to determine whether the board was more like an arm of the state or a county.

The *Pennhurst* decision also supports the guiding principle. Though not a firm holding, the Court in *Pennhurst* at least revealed its reasoning that harming the state through county officials militates in favor of granting sovereign immunity, which reasoning was based on the *state* law providing counties with state funds. Finally, the *Hess* analysis should prove instructive. Where the state itself is conflicted in defining “who is the state,” federal courts should look to the underlying reasons for the constitutional provision. While those policy reasons will likely differ from those in *Hess* in a non-sovereign immunity case, courts can similarly look to state law in making their determinations. For example, in the federal standing context, of primary importance is protecting the one actually injured.¹⁰⁴ States certainly have standing to defend the constitutionality of their own laws,¹⁰⁵ and in determining whether others can stand in the place of the state, federal courts should look to state law, as was done in *Hess*. Thus, the Supreme Court’s decisions in these cases do not impinge

103. *Id.* at 49–53.

104. *See supra* notes 11–16 and accompanying text.

105. *Supra* note 17.

on state sovereignty despite ample opportunity to do so and consequently provide strong support for the guiding principle.

4. *The principle's violation in Hollingsworth v. Perry*

Hollingsworth, on the other hand, violated the guiding principle. Whether California could grant authority to proponents to step into the state's shoes was a question of state law—though in the context of a federal standing question—which, when overruled by the Supreme Court, seriously undermined California's status as a separate sovereign. The Court should have allowed such an important interest to outweigh the desire for uniform outcomes.

a. *The issue of who represented California was not an essential constitutional question.* The Court noted legitimate separation of powers concerns when discussing why the proponents had not suffered a “particularized injury” and thus did not personally have Article III standing.¹⁰⁶ After all, granting standing to any individual based on personal interest alone could transform the courts into more of a political, rather than judicial, branch.¹⁰⁷ However, this concern was not applicable to the Court's rejection of the proponents' second attempted avenue into Article III standing. The proponents essentially argued that because California has standing and because the California Supreme Court approved them as representatives of California, the proponents should not be denied standing. Despite this, the proponents were rejected for lack of standing because they did not represent the State of California. However, the only constitutional question (whether California had suffered a particularized injury) was clearly answered in the affirmative. The separate issue (whether the proponents represented California) was not compelled under Article III of the Constitution. Although it indeed touched on the main question—it being a subset of that question—it was not similarly mandated as a federal constitutional question. It was distinctively a state question. After all, the only reason state attorneys general (or other executive officers) are allowed standing to appear on behalf of the state is because the state authorized them to represent the state's interests. Whether

106. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

107. *Id.* (noting that by limiting itself to disputes that are “capable of resolution through the judicial process.” . . . [I]t ensures that we act *as judges*, and do not engage in policymaking properly left to elected representatives”) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

through election, appointment, or by judicial decree, then, it follows that the state can authorize whomever it chooses to represent its interests.

The sovereign immunity cases discussed above¹⁰⁸ provide further support for granting deference to state decisions that are not constitutional at their core. Those cases established that the Supreme Court looks to state law *even where* determining “who is the state” is closely tied to the central constitutional question at hand. In sovereign immunity cases, determining “who is the state” consumes almost the entire analysis; in federal standing cases, it is but a subset of the larger constitutional question. Thus, as the question of “who is the state” in *Hollingsworth* was only loosely tied to the constitutional question of standing, deference to California should have been freely granted in that case.

b. The Court was motivated by nothing more than a mere desire to maintain uniformity in federal jurisprudence. Although the *Hollingsworth* Court appeared to be concerned with a number of considerations in trumping state law, it seems that it was in reality motivated solely by a desire to maintain uniformity in the law.¹⁰⁹ In holding that the proponents lacked standing, the Court expressed concern that persons representing a state might not have a fiduciary duty to the state.¹¹⁰ However, as between federal courts and actual states, the states seem to be in a better position to decide whether this fiduciary duty should be determinative. After all, states are inherently interested in their own best interests, while it is questionable whether the same is true of federal courts. The state is ultimately responsible for its own decision (however wise or foolish it may be) and has to live with the consequences of that decision, while

108. *Supra* Part IV.A.3.

109. The Court might also have been motivated by a desire to “punt” on issuing a sweeping same-sex marriage decision, but this reason is construed as invalid in this Comment. *See, e.g., Hollingsworth*, 133 S. Ct. at 2674 (Kennedy, J., dissenting) (“Of course, the Court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject. But it is shortsighted to misconstrue principles of justiciability to avoid that subject.”); Brett LoGiurato, *Supreme Court Punts on Prop 8—Gay Marriage Becomes Legal in California*, BUS. INSIDER, <http://www.businessinsider.com/prop-8-supreme-court-ruling-gay-marriage-2013-6> (June 26, 2013, 10:28 AM) (“The Supreme Court . . . punted on a sweeping decision on California’s Proposition 8, effectively making gay marriage legal in California.”). The only valid reason, as discussed in this Part, seems to be a desire to maintain uniformity in the law.

110. *Hollingsworth*, 133 S. Ct. at 2657–58.

the consequences of federal courts' decisions of state law are at least somewhat externalized from those courts. Even assuming the Court was motivated by genuine concern, it is doubtful whether it was more fit to the task than the state itself. It seems the California high court is better able to judge the best interests of California than the Supreme Court could do in a broad generalization for all fifty states. Consequently, a federal court's claim that it is able to act in a state's best interests should be highly suspect. In other words, although states cannot determine federal law, states should be able to decide who represents them, and federal courts should respect those decisions.

As acting in the state's best interest does not seem to be a valid rationale for the Supreme Court's reaching into state law, there are few other legs the Court has to stand on. The issue was not compelled by Article III standing requirements since the Court's analysis thereunder did not need to go further than to declare whether California suffered a particularized injury. As for defining *who* California is, the Court's analysis was not compelled; California had answered the question, and the Court should have deferred thereto. The possibilities thus reduce to one likely motivation: in deciding that the proponents cannot represent the state unless they are agents of the state—which in effect overruled California's decision to the contrary—the only real federal justification was to preserve uniformity in the federal law. While not stated explicitly, this conclusion is readily deducible. After all, the Court could have allowed each state to be bound by the agency law in its respective state but instead chose to crystalize the Restatement of Agency as the new standard for all fifty states.

This desire for uniformity is an understandable one, as uniformity in federal law could foreseeably give clear direction to lower courts and make for easier, more efficient decision-making. Indeed, allowing each state to independently decide "who is the state" for standing purposes makes for a certain amount of unpredictability in the federal law. However, while perhaps being less conducive to uniform *outcomes*, allowing states to decide state questions where there is no substantial intrusion on federal interests could still serve as a uniform *principle* to guide lower courts. The Court could have had it both ways by adopting the guiding principle while still respecting California's sovereignty.

c. The ruling significantly impinged on California's status as a separate sovereign. However arguable the previous points may be, it is patently clear that the holding significantly impinged on California's status as a separate sovereign independent from the federal government. The California Supreme Court took a stance in the name of the state and the U.S. Supreme Court flatly rejected that stance. Granted, the Supremacy Clause¹¹¹ and its interpretation¹¹² allow for certain types of superiority over state sovereignty, but the guiding principle posits that such domineering should not be allowed where there is no sufficient reason to do so. State sovereignty is, after all, no small matter. The Eleventh Amendment and its jurisprudence, for example, "emphasize[] the integrity retained by each State in our federal system," and "accord[] the States the respect owed them as members of the federation."¹¹³ Any intrusion on this sphere should at least be justified by more than mere convenience. The implications of this federal overreaching are severe, extending beyond the problem of undefended public initiatives and tipping the scales of federalism unfavorably against the states.

5. Ambiguous Wording: An Alternative Basis for Deciding Hollingsworth

Although the Supreme Court violated the guiding principle in *Hollingsworth*, there was a potentially legitimate basis on which it could have denied standing to the proponents. After all, it is arguable whether the California Supreme Court declared clearly enough the state's desire to confer authority to represent the state's interests. Conferring the power to represent the state is a serious matter for a state court and should only be allowed by federal courts when it is completely clear that such a conferral is intended by the state. There should be a presumption of *non*-conferral to third

111. U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.").

112. *Cooper v. Aaron*, 358 U.S. 1, 18–20 (1958) (holding that federal law trumps state law and states are bound by U.S. Supreme Court decisions).

113. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39–40 (1994) (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

parties, rebuttable only by unmistakable wording from the state high court or legislature indicating intent to confer. Once the intent to confer is clearly expressed, however, federal courts should defer to the states in determining this question, which is “antecedent to determining federal standing.”¹¹⁴

In *Hollingsworth*, the California court seemed careful in its wording, indicating that the proponents could “assert” the state’s interest but never using the word “represent” as included in the proponents’ authority to appeal the judgment. The court seemed to recognize a difference between the two words’ meanings since it used “represent” in reference to many other cases and situations¹¹⁵ and even in reference to the proponents’ intervention at the district court level.¹¹⁶ The court used “assert” almost exclusively in reference to the proponents’ authority to appeal a state court decision,¹¹⁷ though it did use the word four times in reference to other cases and hypothetical situations.¹¹⁸ This careful usage suggests that, although the verb “to assert” is arguably interchangeable with “to represent,” the court did not unmistakably intend to confer the authority to represent California. After all, the words are not perfectly synonymous; for example, amicus curiae can *assert* a party’s interest but not officially *represent* it—representing the interest is reserved solely to the parties in the case.¹¹⁹

Under this reasoning, the Ninth Circuit Court of Appeals failed to elicit a clear response and to adequately overcome the presumption of non-conferral. In its certified question to the California Supreme Court, it posed the question with “assert,” not “represent,” wording, which set the question on a track to ambiguity.¹²⁰ When the state court answered accordingly, the Ninth Circuit seemed to transform the state’s “assert” wording into

114. *Perry v. Brown*, 671 F.3d 1052, 1074 (9th Cir. 2012).

115. For example, the court noted that in *Karcher v. May*, 484 U.S. 72, 82 (1987), legislative officers could “*represent* the state’s interest in defending a challenged state law.” *Perry v. Brown*, 265 P.3d 1002, 1012 (Cal. 2011) (emphasis added).

116. *Perry*, 265 P.3d at 1008.

117. The court used the word “assert” (or some derivative of it) over eighty times in reference to the initiative proponents alone. *Id.* at 1002–33.

118. *Id.* at 1024 n.19, 1024–26.

119. *See id.* at 1025.

120. *Id.* at 1008.

“represent” wording, using the latter term much more frequently than the former.¹²¹

Therefore, the United States Supreme Court should have certified a more specific question to the California Supreme Court. As it failed to do this, it should have, at a minimum, based its decision on the failure of California to clearly delegate, rather than on a blanket rule forever prohibiting delegations of the kind. Such a move could have saved the Court from the “shortsighted” holding that “misconstrue[d] principles of justiciability.”¹²² Whether this decision was motivated by “cauti[on] [in] entering . . . [the] most difficult subject” of same-sex marriage,¹²³ a desire to preserve uniform outcomes, or some other justification, any gains hardly seem worth the heavy blow dealt to the standing doctrine and state sovereignty.

B. The Supreme Court Should Mend its Doctrine

The solution to the problem at issue is conceptually quite simple. As concerning initiative-made law that is challenged in federal court, the Supreme Court should defer to the state when the state has clearly declared who may represent the state’s interests in federal court rather than mandating a national standard on all states. This would allow the Court to undo its violation of the guiding principle, which violation currently significantly impinges on state sovereignty while being justified only by a simple desire for uniformity in federal jurisprudence. Such a change in the doctrine would not cause any significant harm to federal courts but would undo significant harm to the states.

As a practical matter, this doctrinal change will not come easily. After all, lower courts will continue to follow the *Hollingsworth* precedent until it is overturned by the Supreme Court; this will serve as a wall barring change at both the district and appellate levels of federal court. Thus, only through risky appeals and petitions for writ of certiorari will initiative proponents be able to effect this change in the law. Nevertheless, such attempts would be worth the effort because this change in the doctrine would allow for a much-needed

121. *Perry v. Brown*, 671 F.3d 1052, 1064, 1072–73 (9th Cir. 2012).

122. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2674 (2013) (Kennedy, J., dissenting).

123. *Id.*

bolstering of citizen initiatives and restore balance to the federalism system.

C. Other Proposed Remedies and Why the Guiding Principle is Still Needed

Since the *Hollingsworth* decision, a number of ideas have surfaced for solving the newfound problem of how to defend ballot initiatives when state officials refuse to do so. These solutions include proposed state legislation that creates an independent office or a specific government official tasked with defending ballot initiatives, and allowing state legislators to represent the state. The guiding principle would certainly not work *against* most of these proposals, but none of them are sufficient without the principle's implementation.

1. Enact laws enabling the state to appoint a special attorney

Constitutional law professor Erwin Chemerinsky proposes that states with ballot initiatives should change their laws to ensure that initiatives will always have a fair defense when they would otherwise go undefended by the state. Under his solution, these states should enact laws requiring the state to appoint a "special attorney" to represent the state when the state officials who would ordinarily defend the initiative refuse to do so.¹²⁴ "[S]ince states get to decide for themselves who will represent them in court," he argues, this solution would pass legal muster.¹²⁵ After all, the attorney appointed by the state would be representing the state, even if the attorney were "not a state employee."¹²⁶ His point is that because states have standing to defend their laws that are challenged in court, and because states can choose who represents those interests, an appointment would confer on the special attorney Article III standing, at least for these limited purposes and circumstances. Implied in his proposal is that the proponents in *Hollingsworth* were not adequately appointed by the state to act as the state, because, as he interprets *Hollingsworth*, the Supreme Court does not allow

124. Chemerinsky, *supra* note 9.

125. *Id.*

126. *Id.*

“supporters of a law” to defend the law when the government declines to do so.¹²⁷

Professor Chemerinsky’s proposal takes a step in the right direction in solving this dilemma, but it suffers from two major flaws. First, to put it bluntly, his proposal would not work unless the Supreme Court changes its doctrine as outlined above. He asserts that the special attorney could represent the state, even if the attorney were “not a state employee;”¹²⁸ however, under the current doctrine only formal agents of the state can represent the state. His proposal assumes that the state can freely appoint people to represent the state but *Hollingsworth* shows that exactly the opposite is true: indeed, *Hollingsworth* establishes that the state is *not* completely free to appoint at will, as the California Supreme Court’s statement was apparently insufficient to grant authority. It is unclear whether a state statute would significantly change this. For example, Justice Sotomayor questioned, during *Hollingsworth* oral arguments, why the California Supreme Court’s declaration that the “ballot initiators have now become [the appointed] body” was not “viewed as an appointment process” similar to the one proposed by Chemerinsky.¹²⁹ Without implementation of the guiding principle, which is necessary to grant states their due freedom, it is unlikely that his plan would work.

Second, his proposal assumes that special attorneys cannot be appointed if they are “supporters of a law” that is not being defended.¹³⁰ This interesting requirement would not only prevent those who would arguably defend the law most vigorously from doing so but would also encourage those with interests adverse to the law to “defend” it weakly. Even if this unwieldy political bias test were workable, the outcomes would not be desirable.

127. *Id.*

128. *Id.*

129. Transcript of Oral Argument at 34, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

130. Chemerinsky, *supra* note 9.

2. Enact laws enabling the state to appoint an independent office

Walter Dellinger submitted a proposal, similar to Chemerinsky's, in his *Hollingsworth* amicus brief.¹³¹ Dellinger suggests that states "create an independent office responsible for defending initiatives in cases in which the Attorney General declines to do so."¹³² Under this plan, the state might appoint officers who would be subject to the state's control (e.g., subject to "removal for cause by the Governor or Attorney General").¹³³ It is unclear whether this independent office, and the officers defending the law, would be in operation continuously or would only be activated when needed.

The main flaw in Dellinger's proposal is that it requires the state to go to unnecessarily great lengths to solve the dilemma. A state should not be required to create an entirely new office just to appoint a representative of a state law. It seems that, once created, the office would be in operation continuously. As challenged initiative-made laws do not seem to go undefended by the state attorney general very often, the office would create high operation costs for a very small and infrequent benefit. It is unlikely that such a wasteful setup would be popular among state constituents, so it is highly unlikely it would be implemented as a general solution.

3. State legislators could represent the state

Another potential solution lies in state legislators' ability to represent the state's interests on appeal. In *Karcher v. May*,¹³⁴ presiding officers in the New Jersey state legislature attempted to represent New Jersey's interests on federal appeal. They were eventually denied standing, but only after losing the state's pronouncement of their authority to represent the state's interests, which came after the officers lost their presiding officer statuses.¹³⁵ Thus, it seems that if similar legislative officers gained (and maintained) the state supreme court's blessing, they would have Article III standing to represent an initiative on federal appeal. This

131. Brief for Walter Dellinger as Amicus Curiae Supporting Respondents on the Issue of Standing at 30–32, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144). Dellinger also outlined four other potential solutions in addition to this one. *Id.*

132. *Id.* at 32.

133. *Id.*

134. 484 U.S. 72 (1987).

135. *Id.* at 82; *see also supra* Part III.A.1.

scenario is very similar to the facts in *Hollingsworth*, the main difference being that the appointed representatives are actual officials of the state.

While presiding officers of a state legislature may theoretically be able to defend initiative-made law, this option would most likely not work in practice. State legislatures generally do not support citizen initiatives, which is precisely why citizens attempt to circumvent legislatures in voting on initiatives.¹³⁶ With such an adverse interest in most cases, legislators would likely not have a strong incentive to defend the law. Also, as in *Karcher*, a legislative officer's status in a presiding position seems highly subject to change, especially during the drawn-out periods of time that cases can remain pending on appeal. Since challenges to standing can be raised *sua sponte* or by any party at any point in litigation,¹³⁷ this seems to be a feeble solution at best. Any virtues of the solution do not sufficiently reduce the infringement on state sovereignty to justify preventing better alternatives for states.

4. *Do nothing*

A fourth solution, inferred from the *Hollingsworth* decision, would be to essentially do nothing. Under this argument, the political process will take care of itself because the people have the power to “vote out” any executive officials, such as governors or attorneys general, for failing to defend the law that the people implemented. After replacing the disfavored officials with popular ones, the people could reinstate the law (if changed on appeal) through their new representatives or through another public initiative, or even through another lawsuit. Thus, the people would have the final say if an executive official's decision to not defend the law were an unpopular one.

If this “solution” were to work, it would rely on the successful implementation of an extremely difficult, multi-step, strategic process that would require extensive coordination efforts. Even with

136. *See supra* Part II.

137. *See* *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (explaining the Supreme Court's obligation “to examine standing *sua sponte* where standing has erroneously been assumed below,” but not “simply to reach an issue for which standing has been *denied* below”); *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 47–48 (D.C. Cir. 1999) (noting the appellate court's requirement to “examine [standing] on [its] own motion” regardless of whether any parties object).

a strong statewide consensus that the law should be reinstated, the low chances of success pitted against the extraordinary amount of effort required would stifle most of the public's enthusiasm to even try. In Proposition 8's case, the people of California had already voted twice for traditional marriage before the law was eventually reversed by the federal district court.¹³⁸ Even if California citizens had wanted to reinstate the law following *Hollingsworth*, their motivation to do so had probably been stifled by that point. Rather than suppress state sovereignty by only allowing for such a non-workable solution, federal courts should recognize that when the state declares who may represent it, that is the final word.

5. Why the proposed solutions are insufficient

The guiding principle allows for a wide variety of creative solutions to the undefended-initiative problem. Even assuming that this Comment's predictions are wrong regarding the workability of the first three proposed solutions, the guiding principle has room for these, in addition to anything else individual states can imagine. States should be free to experiment with these and other solutions as they see fit, despite their imperfections. By implementing the guiding principle in federal jurisprudence, any policy problems would be localized to the individual states rather than inflicted on the entire nation.

V. CONCLUSION

The ballot initiative is a valuable method of democratic lawmaking in many states, but its viability has been threatened through the Supreme Court's recent decision, *Hollingsworth v. Perry*. Now, initiative measures that are challenged in federal court and that executive officials refuse to defend are left essentially defenseless. The true solution to the dilemma ultimately depends on the Supreme Court changing its jurisprudence to provide for a proper balance between state and federal interests. More specifically, the Supreme Court should mend the doctrine by deferring to the state's delegation of authority to represent its interest in court. Such a change would significantly benefit states without significantly harming the federal system. It would also protect the essential

138. *See supra* notes 30–34 and accompanying text.

elements of public initiatives, thus preserving an important facilitator of democracy.

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