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## *HOLLINGSWORTH V. PERRY* STANDING OVER CONSTITUTIONAL RIGHTS

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### INTRODUCTION

One might expect that a Supreme Court decision addressing the constitutionality of a citizen initiative that bars marriage between same-sex couples would yield a predictable political division among both the Justices and Court commentators. Liberal Justices and commentators, one might conjecture, would want the Court to recognize a fundamental constitutional right to marriage equality, while conservative Justices and commentators would prefer the issue be left to the political process. The Supreme Court's recent decision in *Hollingsworth v. Perry* reflected no such tidy outcome, however. The majority opinion addressing California's Proposition 8 ("Prop 8"), which amended the state's constitution to exclude same-sex couples from legally recognized marriage, sidestepped the substantive issue through a procedural maneuver. Rather than reach the merits, the Court held that the official proponents of Prop 8, who had defended its constitutionality both in the district court and on appeal, lacked standing to appeal the district court's opinion invalidating the initiative. The Court's decision left marriage equality as the rule in California (although not elsewhere). Liberal Justices Breyer, Ginsburg, and Kagan joined Chief Justice Roberts's majority opinion, as did Justice Scalia, while conservative Justices Thomas and Alito, and liberal Justice Sotomayor, joined Justice Kennedy's vigorous dissent. Some liberal commentators who favor marriage equality applauded the Court's decision.<sup>2</sup>

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<sup>2</sup> See, e.g., Suzanne Goldberg, *A One-Two Punch to the Nation's Most Prominent Anti-gay Laws*, SCOTUSBLOG (June 26, 2013), <http://www.scotusblog.com/2013/06/a-one->

It is of course not possible to know exactly what motivated each of the Justices in *Hollingsworth*. But standing is a doctrine that the Court has notoriously manipulated to reach desired results on the merits.<sup>3</sup> Commentators have widely speculated that the liberal Justices who sided with the majority preferred not to reach the merits either because they believed there were insufficient votes to find Prop 8 unconstitutional,<sup>4</sup> or because they believed such a decision might be politically premature and therefore counterproductive, as it might prompt a backlash.<sup>5</sup> Some proponents of marriage equality were quietly relieved by the Court's refusal to address the merits, since it allowed the district court's invalidation of Prop 8 to stand without risking an adverse Supreme Court decision that would be binding on all states.<sup>6</sup>

Regardless of the Justices' motivations, it is important to remember that, historically, limitations on standing have reflected a conservative impulse to close the doors of the federal courts to rights claimants and to expand the power of the political branches, especially the Executive branch.<sup>7</sup> Justice

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two-punch-to-the-nations-most-prominent-antigay-laws/; Nan Hunter, *Commentary on Marriage Decisions by Matt Coles*, HUNTER OF JUSTICE (June 26, 2013), <http://hunterofjustice.com/2013/06/commentary-on-marriage-decisions-by-matt-coles.html> (commentary by Matt Coles, Deputy Legal Director of the ACLU, asserting, "The majority opinion in *Perry* is not an indefensible duck of the marriage issue.").

<sup>3</sup> See Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1452 (1995) ("Doctrinal inconsistencies in the Supreme Court's law of standing are now so commonplace that they have become relatively uninteresting. And the insight that the Court manipulates the law of standing to advance judicial policy preferences has become more fatuous than scandalous.").

<sup>4</sup> See, e.g., Hunter, *supra* note 2 (commentary by Matt Coles, Deputy Legal Director of the ACLU, suggesting that liberal Justices' votes on the standing issue in *Perry* indicate "there weren't five votes to take down Prop. 8").

<sup>5</sup> See, e.g., Geoffrey Stone, *Justice Ginsburg, Roe v. Wade and Same-Sex Marriage*, HUFFINGTON POST, THE BLOG (May 12, 2013), [http://www.huffingtonpost.com/geoffrey-r-stone/justice-ginsburg-roe-v-wa\\_b\\_3264307.html](http://www.huffingtonpost.com/geoffrey-r-stone/justice-ginsburg-roe-v-wa_b_3264307.html) (suggesting that Justice's Ginsburg's view that *Roe v. Wade* went "too far, too fast" might foreshadow her view of how to rule on marriage equality).

<sup>6</sup> See, e.g., Mike Sacks et al., *Supreme Court Rules On Prop 8, Lets Gay Marriage Resume In California*, HUFFINGTON POST (June 26, 2013) (observing that, as Chief Justice Roberts read aloud the Court's decision in *Perry*, "Some of the same-sex couples who shed tears during Kennedy's DOMA opinion continued to hold hands and nod their heads in agreement with Roberts. One woman, sitting with her partner, put her hand over her mouth as Roberts declared the defendants lacked legal standing, and therefore Proposition 8 would be tossed out.").

<sup>7</sup> See Erwin Chemerinsky, *Is The Rehnquist Court Really That Conservative?: An Analysis Of The 1991-92 Term*, 26 CREIGHTON L. REV. 987, 996 (1993) ("Conservatives have sought to constrict access to the federal judiciary both to advance federalism concerns and also as a way of decreasing protection of constitutional rights. Liberals want to ensure access to the federal courts to protect individual liberties and civil rights."); *infra* text

Roberts's majority opinion in *Hollingsworth* reinforces, and even tightens, the Court's already cramped view of standing.<sup>8</sup> Moreover, the failure of the Court's four liberal Justices and Justice Kennedy to disregard politics and affirmatively declare Prop 8 unconstitutional leaves same-sex couples in the vast majority of states unable to exercise the rights that California couples now enjoy. In these respects, *Hollingsworth* is not a victory for constitutional rights.

### I. THE LOWER COURT PROCEEDINGS IN PERRY

The same-sex couples who challenged Prop 8 in federal court named various state officials, including Governor Arnold Schwarzenegger and Attorney General Jerry Brown, as defendants.<sup>9</sup> These state officials answered the complaint, but they either refused to take a position on the law or agreed that the initiative was unconstitutional.<sup>10</sup> All of the named defendants declined to defend Prop 8.<sup>11</sup> Thereafter, the official proponents of the initiative under the California Election Code ("proponents") moved to intervene to defend Prop 8. The district court orally granted the motion at a hearing, noting that neither the plaintiffs nor any of the named defendants had objected to it.<sup>12</sup> The district court then held a trial, at which only the proponents presented witnesses and offered legal arguments in defense of the initiative.<sup>13</sup> After the trial, the district court issued a detailed opinion holding Prop 8 unconstitutional.<sup>14</sup>

The question of Article III standing appears to have been raised only

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accompanying notes 77–85; see also Laura A. Cisneros, *Standing Doctrine, Judicial Technique, And The Gradual Shift From Rights-Based Constitutionalism To Executive-Centered Constitutionalism*, 59 CASE W. RES. 1089, 1100 (2009) ("The Warren Court took aggressive steps to increase public access to the federal court system, especially where plaintiffs had charged government actors — be they of the local, state, or federal variety — with violations of the law. For this reason, the Warren Court did all that it could to keep the standing bar low.")\*

<sup>8</sup> Adam Liptak has suggested that Chief Justice Roberts, while appearing to exercise judicial restraint, has deliberately moved the Court rightward in a "canny," calculated fashion, using carefully planted language in seemingly modest opinions as support for subsequent bold and "deeply polarizing" decisions. Adam Liptak, *Roberts Pulls Supreme Court to the Right Step by Step*, N.Y. Times (June 27, 2013), available at <http://www.nytimes.com/2013/06/28/us/politics/roberts-plays-a-long-game.html>. If Liptak is right, *Hollingsworth* may prove to be a decision that, while garnering liberal votes today, the Chief Justice uses to make a more obviously conservative move in the future.

<sup>9</sup> 265 P.3d 1002, 1128–29 (Cal. 2011).

<sup>10</sup> *Id.* at 1129.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

when the state officials chose not to appeal the district court's decision. On appeal, the Ninth Circuit first considered whether it had jurisdiction to hear the appeal,<sup>15</sup> asking proponents to address "why this appeal should not be dismissed for lack of Article III standing."<sup>16</sup> The Ninth Circuit then certified to the California Supreme Court the question whether,

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.<sup>17</sup>

The California Supreme Court responded that the official proponents were authorized under California law to represent the interests of the state of California in defending Prop 8's constitutionality.<sup>18</sup> In a detailed opinion, the court recounted California's long history of recognizing official proponents as proper parties to defend citizen initiatives. The court explained that granting proponents this authority was crucial to insuring the integrity and meaningfulness of the initiative process, which it explained had originated as a progressive response to public dissatisfaction with the state's elected officials. The court noted that, under California law, proponents possessed standing to represent the interest of the people regardless of whether state officials were also defending the law, but it stressed the special importance of recognizing proponents' standing when state officials declined to do so.

The Ninth Circuit deferred to the California Supreme Court's decision in determining that federal standing requirements were met. It stated, "All 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."<sup>19</sup> The Ninth Circuit further found, "It is [the states'] prerogative, as independent sovereigns, to decide for themselves who may assert their interests and under what circumstances, and to bestow that authority accordingly." The court relied in part on *Karcher v. May*,<sup>20</sup> which held that the Speaker of the New Jersey General Assembly and the President of the

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<sup>15</sup> Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

<sup>16</sup> Perry v. Schwarzenegger, Civ. No. 10-16696, slip op. at 2 (9th Cir. Aug. 16, 2010).

<sup>17</sup> 671 F.3d at 1070.

<sup>18</sup> Perry v. Brown, 265 P.3d 1002, 1007 (Cal. 2011).

<sup>19</sup> Perry v. Brown, 671 F.3d at 1072.

<sup>20</sup> 484 U.S. 72 (1987).

state's Senate, appearing on behalf of the New Jersey legislature, could properly represent the State of New Jersey in litigation because "the New Jersey Legislature had authority under state law to represent the State's interests."<sup>21</sup>

Having found that it could properly address the merits, the Ninth Circuit struck down Prop 8, but on different and narrower grounds than those of the district court. The California Supreme Court had previously interpreted the state constitution to require legal recognition of same-sex marriages.<sup>22</sup> Relying on the United States Supreme Court's decision in *Romer v. Evans*,<sup>23</sup> the Ninth Circuit found that Prop 8 impermissibly withdrew an existing right (the right to marry) from one group (same-sex couples) but not others, based solely on "a majority's private disapproval of [gays and lesbians] and their relationships."<sup>24</sup> Because most states have never recognized the right of same-sex couples to marry, this decision was essentially limited in its impact to the state of California.

## II. THE UNITED STATES SUPREME COURT: *HOLLINGSWORTH V. PERRY*

### A. *The Majority Opinion*

The Supreme Court granted certiorari to review both the Ninth Circuit's decision on the merits and its determination of the standing question.<sup>25</sup> Because it found that proponents lacked standing to appeal, however, the Court never reached the merits. The Supreme Court mentioned without comment the district court's decision to allow the proponents to intervene to defend the law.<sup>26</sup> Instead, like the Ninth Circuit, the Court focused on whether the proponents had standing to appeal the district court's invalidation of Prop 8. The Court found that, since the district court had not ordered the proponents "to do or refrain from doing anything," the proponents' interest in defending the constitutionality of a generally applicable state law did not amount the required "direct stake" in the outcome of appeal.<sup>27</sup> The Court also found that the proponents' unique role in the initiative process did not endow them with an individualized interest in defending Prop 8. Rather, the Court found, this role gave the proponents an interest only in seeing that the initiative process was properly carried out.

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<sup>21</sup> *Id.* at 82 (citing *In re Forsythe*, 450 A.2d 499, 500 (N.J. 1982)).

<sup>22</sup> *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

<sup>23</sup> 517 U.S. 620 (1996).

<sup>24</sup> 671 F.3d at 1095.

<sup>25</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013).

<sup>26</sup> *Id.* at 2660.

<sup>27</sup> *Id.* at 2662.

Once the voters had approved Prop 8, the proponents' interest in defending its enforcement was indistinguishable from "the general interest of every citizen of California."<sup>28</sup>

The Court was likewise unimpressed with proponents' argument that state law authorized them to assert California's interest in defending Prop 8 and that they therefore need not show a personal interest in vindicating the measure. The Court found that, while states may appoint certain state officials as "agents" to represent them in federal court, proponents did not constitute such officials. The Court thus distinguished *Karcher v. May*, where the Supreme Court recognized Article III standing because New Jersey law provided that the Speaker and President of the state legislature could intervene in their official capacities to defend a state statute.

The Court also relied on dicta in *Arizonans for Official English v. Arizona*<sup>29</sup> to suggest that initiative sponsors could only have standing to defend an initiative's constitutionality if state law expressly appointed them as "agents" of the state.<sup>30</sup> Although the California Supreme Court had elaborated extensively on the long history of and rationale for allowing initiative proponents to represent the people's interest under California state law, the majority was unsatisfied with that court's declaration that the proponents thus possessed "the authority to assert the State's interest in the initiative's validity."<sup>31</sup> Despite this authority, the Court asserted, the proponents were "plainly not agents of the State — 'formal' or otherwise," and their interest in the litigation was too generalized to meet the requirements of standing under Article III.<sup>32</sup> Article III requires a "personal, particularized injury," which the proponents here lacked.<sup>33</sup>

### B. Justice Kennedy's Dissenting Opinion

Justice Kennedy, joined by Justices Thomas, Alito, and Sotomayor, dissented. While the majority saw the California Supreme Court's opinion—and the Ninth Circuit's deference to it—as an improper attempt to give unqualified private parties a "ticket to the federal courthouse,"<sup>34</sup> Justice Kennedy maintained that "[p]roper resolution of the justiciability question requires . . . a threshold determination of state law."<sup>35</sup> Kennedy viewed the

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<sup>28</sup> *Id.* at 2663.

<sup>29</sup> 520 U.S. 43 (1997).

<sup>30</sup> *Hollingsworth*, 133 S. Ct. at 2663 (citing *Arizonans*, 520 U.S. at 65).

<sup>31</sup> *Id.* at 2660 (quoting *Perry*, 628 F.3d at 1193; *Perry*, 265 P.3d at 1007) (internal quotation marks omitted).

<sup>32</sup> *Id.* at 2666.

<sup>33</sup> *Id.* at 2667.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 2668 (Kennedy, J., dissenting).

California Supreme Court's answer to this determination—its defining of proponents' powers—as binding on the Court.<sup>36</sup>

Not only did Justice Kennedy view the California Supreme Court's determination as binding, but he agreed substantively with the court's conclusion that official proponents were logical parties to represent the state's interests in defending an initiative. He noted, "Proponents' authority under state law is not a contrivance. It is not a fictional construct."<sup>37</sup> He found proponents' commitment to the case "substantial," their knowledge of the purpose and operation of the initiative significant, and their stake in the outcome sufficient "to provide zealous advocacy."<sup>38</sup>

Justice Kennedy disagreed with the majority that a formal agency relationship is necessary to satisfy Article III standing requirements,<sup>39</sup> and he gave reasons why California might want to eschew a formal agency relationship.<sup>40</sup> Moreover, Justice Kennedy emphasized that the initiative process furthers democratic principles. "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."<sup>41</sup> Kennedy maintained that the Court's standing ruling frustrated the people's decision to "exercise[] their own inherent sovereign right to govern themselves."<sup>42</sup>

### III. A CRITICAL LOOK AT *HOLLINGSWORTH V. PERRY*

#### A. *A Further Narrowing of Standing Doctrine*

The Supreme Court's denial of proponents' standing left several difficult and important questions perfunctorily addressed or wholly unexplored. One significant question that the Court failed to consider is whether there is a difference between the interests of the "People" and the interests of the "State" when state officials refuse to defend a duly passed initiative. In California's process that resulted in Prop 8, the legislature played no part in enacting the initiative. Therefore, unlike in *Karcher v. May*, the public could not count on the legislature to defend the initiative the public had passed. If proponents' standing were not recognized, the

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 2670.

<sup>38</sup> *Id.* at 2669.

<sup>39</sup> *Id.* at 2672–74.

<sup>40</sup> *Id.* at 2671 (state may wish to limit its association with proponents to the narrow context of litigation; avoid bearing the cost of proponents' legal fees; and avoid the "odd conflict" of having one formal agent defend the law while others attack its validity in the same litigation).

<sup>41</sup> *Id.* at 2675.

<sup>42</sup> *Id.*

named executive officials could essentially stymie the public's will and deny it any possible federal court remedy simply by refusing to defend the law. On the other hand, to recognize proponents' standing in such a case means that two parties—the state officials on the one hand, and the official proponents on the other—will simultaneously assert conflicting interests, all supposedly on behalf of the state. Suzanne Goldberg has argued that this result is intolerable.<sup>43</sup> Moreover, she argues, the problem is not solved by asserting that the proponents represent the interests of the “People,” as distinct from the “state,” because the California Supreme Court itself made clear that to advance the People's interests is to advance the state's interests.

The idea that a state could have different, conflicting interests that could be asserted by different parties is not without precedent in state law, however. In fact, although the California Supreme Court did refer to the “state's” interest and the “People's” interest interchangeably, it also expressly recognized that the state's interests are often multi-dimensional. Likewise, the United States Supreme Court has not found the idea of conflicting official positions on behalf of the “state” troubling. In *Karcher*, the Supreme Court recognized that, in the context of a statute enacted by a state legislature, a state could remedy executive branch officials' refusal to defend the law by authorizing certain legislative members to do so. At the same time, the Court has said that it is perfectly proper for executive branch officials to decline to defend a law. Thus, the Court has contemplated one branch—a state legislature—arguing for constitutionality while another—the state's executive officials—takes the opposite position. This phenomenon, while arguably odd, recognizes that a “state” consists of separate branches with sometimes overlapping authority. In the case of citizen initiatives, the public operates as yet another “branch” of government whose interests (which may be described as those of the “People”) may not align with state interests as viewed by the legislative and executive branches.<sup>44</sup>

Although *Karcher* addressed state legislators'—rather than initiative proponents'—authority to defend a law that the state's executive branch refuses to defend, the Court's refusal to acknowledge its similarities to the Prop 8 situation seems disingenuous. In both cases, there was clear state law authorizing alternative parties to defend a law when the state's executive

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<sup>43</sup> Suzanne Goldberg, *Article III Double-Dipping: Proposition 8's Sponsors, BLAG, and the Government's Interest*, 161 U. PA. L. REV. ONLINE 164, 170 (2013).

<sup>44</sup> *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011). Justice Kennedy might go further to say that the “People's” interest is not only independent of, but takes precedence over, that of the governmental branches, whose power derives from the people. See *Hollingsworth v. Perry*, 133 S. Ct. at 2671, 2675 (Kennedy, J., dissenting).

officials refuse to do so.<sup>45</sup> The Court emphasized that in *Karcher* the individuals authorized by state law to defend a statute were state officials (the President and Speaker of the New Jersey legislature), not private parties. The Court found it “significant” that, when the two individuals who had originally held those seats lost those positions, the Supreme Court had held they also lost their authority to defend the statute.<sup>46</sup> But New Jersey law had clearly authorized the *President* and *Speaker*, not these particular individuals, to defend the law. It is unsurprising that, once they no longer occupied those positions, the individuals were no longer entitled under New Jersey law to represent the state. No similar loss of official status occurred to the Prop 8 proponents. The California Supreme Court found that California initiative proponents do possess the authority to defend an initiative’s constitutionality should the sued state officials decline to do so. An initiative need only ever be defended on the merits once the initiative has become law and the initiative process is complete. Thus, in the California Supreme Court’s view, proponents in this case had not lost their status as the initiative’s official proponents or their authority to defend the law merely because the initiative process had ended.

The majority attempted to circumvent this point by reading *Karcher* to forbid *any private parties* to represent the state’s interest. The Court noted, legislators “Karcher and Orechio were permitted to proceed only because they were state officers, acting in an official capacity.”<sup>47</sup> The sentence’s passive voice leaves its precise point unclear, however: permitted by whom? If the Court is making a point only about what *New Jersey* permitted, the statement is unsurprising and would not seem to foreclose the possibility that another state might recognize a different delegation of authority, especially with respect to a citizen initiative.

If instead the Court meant that Article III permits only a state’s delegations of authority to state officials and not to private parties, it does not explain why that is so. After all, if the initiative proponents in *Perry* lost any particularized interest in defending the initiative once it became law,<sup>48</sup> the legislators in *Karcher* likewise could demonstrate no greater interest in enforcing the law in question once it became law than any other legislator or citizen of New Jersey.<sup>49</sup> Conversely, if state-granted authority to defend

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<sup>45</sup> In *Perry*, this authority was not expressly granted by statute or the state constitution, but the California Supreme Court could not have been more emphatic in affirming proponents’ power under state law to defend the constitutionality of initiatives. See 265 P.3d at 1015–1026.

<sup>46</sup> *Hollingsworth*, 133 S. Ct. at 2657.

<sup>47</sup> *Id.* at 2665.

<sup>48</sup> *Id.* at 2659.

<sup>49</sup> Suzanne B. Goldberg, *Private Parties, Legislators, and the Government’s Mantle: On Intervention and Article III Standing* 1–43 (2012), (Columbia Law Sch. Pub. Law &

the state or people's interest is sufficient to give a state official the requisite "ongoing interest" to satisfy Article III,<sup>50</sup> it is hard to imagine why the same authority should not similarly suffice for private parties such as initiative proponents.

The Court's answer to this may lie in its emphasis that state officials, unlike initiative proponents, hold an agency relationship with the state under traditional agency law.<sup>51</sup> The Court seems to suggest that this agency relationship creates a more specific and sharper interest, perhaps because of the consequences flowing to an agent who fails to meet his or her legal responsibilities.<sup>52</sup> This explanation is not fully satisfactory, however, given the discretion vested in state officials to decide whether or not to defend a law. In *Karcher*, for example, the state legislators may have been authorized under state law to defend a statute's constitutionality, but they certainly were not required to do so.<sup>53</sup> Although the Court is correct that legislators who fail to do so must contend with the public's potential reaction through the electoral process, this does not explain why initiative proponents who affirmatively choose to defend a law and are clearly strongly interested in seeing the law upheld somehow have a weaker interest than a state official.

Perhaps, instead, the Court's point is that proponents' interest, however strongly felt, is not sufficiently tied to the *state*.<sup>54</sup> The Court warned that initiative proponents' independent status means they are freer than state officials to make whatever arguments they choose, "without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities."<sup>55</sup> Again, however, it is not clear why this should be relevant to whether a case or controversy exists

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Legal Theory Working Paper Grp., Paper No. 12-325, 2012) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2193601](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193601) (discussing grant of intervention in *Perry* and questioning whether initiative proponents should be granted intervention of right to defend the constitutionality of initiatives) (hereinafter Goldberg, *Government's Mantle*).

<sup>50</sup> The traditional standing inquiry focuses on whether the plaintiff has demonstrated an "injury in fact." Defendants need not make this showing, of course, but the Court has found that they must "have an ongoing interest in the dispute, so that the case features that concrete adverseness which sharpens the presentation of the issues." *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (internal quotation marks omitted).

<sup>51</sup> For its agency argument, the Court relied heavily on an amicus brief that presented this agency argument. Brief for Walter Dellinger, et al. as Amici Curiae Supporting Respondents, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 768643; see also *Hollingsworth*, 133 S. Ct. at 2657–58 (citing Dellinger brief).

<sup>52</sup> See *Hollingsworth*, 133 S. Ct. at 2666 ("petitioners answer to no one").

<sup>53</sup> See *Karcher*, 484 U.S. at 80; see also *Perry*, 265 P.3d at 528–29 (discussing state officials' discretion in determining whether to defend a law).

<sup>54</sup> See Goldberg, *Government's Mantle*, *supra* note 47, at 35.

<sup>55</sup> *Hollingsworth*, 133 S. Ct. at 2667.

under Article III. If the state is satisfied that the party in question will adequately represent its interests, what constitutional purpose is served in second-guessing that conclusion?

Whatever the reasons for it, the Court in *Hollingsworth* seems to hold that a private party who does not possess formal agency status can never adequately represent a state's interest, regardless of whether the state believes it can do so. This importation of agency concepts into standing doctrine is a significant and new elaboration of what Article III requires when a state law is challenged as unconstitutional, and it serves to further narrow the ability of citizens to meet Article III standing.<sup>56</sup>

As concerned as the Supreme Court in *Hollingsworth* was with proponents' standing to appeal, it never addressed their standing to defend the law in district court in the first place. The Supreme Court appeared to assume that an Article III case or controversy existed there,<sup>57</sup> but it did not explain why. The district court had granted intervention of right,<sup>58</sup> but the question of federal standing is a separate inquiry that must be satisfied before a federal court can exercise jurisdiction.<sup>59</sup> If the proponents lacked a sufficiently particularized interest to defend the initiative on appeal, it is not evident why they possessed such an interest at the district court level. And while intervenors may not separately have to meet standing requirements if another defendant already does,<sup>60</sup> here the proponents were effectively the sole parties defending the law not only on appeal but also in the district court.

The Court may have concluded that a case or controversy existed, regardless of the proponents' standing, because the state officials continued to enforce Prop 8 throughout the litigation, even though they refused to defend the law.<sup>61</sup> *INS v. Chadha* provides support for the idea that an Article III case or controversy exists so long as the Executive continues to enforce a challenged law, even if it agrees that the law is unconstitutional.<sup>62</sup> However, in *Chadha* the Court did concede that "prudential, as opposed to Article III, concerns" rendered important the lower court's identification of an

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<sup>56</sup> Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163 (1992) (noting Court's trend, led by Justice Scalia, toward tightening Article III standing requirements); see also *Hollingsworth*, 133 S. Ct. at 2672–73 (Kennedy, J., dissenting) (criticizing Court's reliance on formal agency principles).

<sup>57</sup> See *Hollingsworth*, 133 S. Ct. at 2660.

<sup>58</sup> See *id.* at 2670; see also Goldberg, *Government's Mantle*, *supra* note 47, at 14–15 (discussing grant of intervention in *Perry* and questioning whether initiative proponents should be granted intervention of right to defend the constitutionality of initiatives).

<sup>59</sup> Goldberg, *Government's Mantle*, *supra* note 47, at 18–19.

<sup>60</sup> *Id.*

<sup>61</sup> *Hollingsworth*, 133 S. Ct. at 2660.

<sup>62</sup> 462 U.S. 919, 938–40 (1983).

alternative party—in this case both houses of Congress—to defend the statute’s validity.<sup>63</sup> Whether characterized as a prudential or constitutional concern, the Executive branch’s agreement that a law is unconstitutional and its refusal to present any legal defense whatsoever<sup>64</sup> should raise serious concerns to a Court that has emphasized so strongly the importance of “adverseness” in constitutional litigation.<sup>65</sup> “[F]ederal courts will not entertain friendly suits, or those which are feigned or collusive in nature.”<sup>66</sup> If continued enforcement is alone sufficient to establish standing, state officials who object to a state law on policy grounds could essentially conspire with plaintiffs to seek its invalidation by enforcing the law, while otherwise agreeing with plaintiffs that it was unconstitutional and refusing to present a defense. This seems to be precisely the kind of “friendly suit” that the case or controversy requirement was meant to prohibit.

The state officials’ refusal to defend the law at the trial court level is thus a sufficiently significant issue that the Court should have addressed it in *Hollingsworth*.<sup>67</sup> This is particularly so since the Court viewed the proponents, unlike Congress in *Chadha*, as lacking the requisite authority to defend the initiative. The Court should have at least addressed the difficult question of how a state could simultaneously side with plaintiffs on the substantive legal questions and be sufficiently adverse. Recognizing the proponents’ authority to represent the people’s interest in defending a duly enacted initiative would have been one way out of this thicket.<sup>68</sup>

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<sup>63</sup> *Id.* at 940.

<sup>64</sup> *See Perry*, 265 P.3d at 1130 (noting that “Proponents were the only party in the district court to present witnesses and legal argument in defense of the challenged initiative measure”). *Cf. Chadha*, 462 U.S. at 930–31, 931 n.6 (stating that INS did not lose “aggrieved party” status required for appeal merely because the Executive might agree that the statute in question was unconstitutional, but noting separate requirement that an appeal “present a justiciable case or controversy under Art. III,” a requirement met in this case “because of the presence of the two Houses of Congress as adverse parties”).

<sup>65</sup> *Flast v. Cohen*, 392 U.S. 83, 101 (1968); *Baker v. Carr*, 369 U.S. 186, 204 (1962).

<sup>66</sup> *Flast*, 392 U.S. at 100 (1968) (citations omitted).

<sup>67</sup> *Cf. Erwin Chemerinsky*, Op-Ed, *Prop. 8 Deserved a Defense*, L.A. Times (June 28, 2013), available at <http://www.latimes.com/news/opinion/commentary/la-oe-chemerinsky-proposition-8-initiatives-20130628,0,3109622.story> (agreeing with Court’s standing analysis but expressing concern about allowing “a few officials to nullify an initiative by not defending it” and suggesting reforms).

<sup>68</sup> The Supreme Court’s decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), may provide another clue as to the Court’s lack of concern about adverseness. In *Windsor*, the Court addressed the merits of a challenge to a provision of the federal Defense of Marriage Act (DOMA) despite the fact that the Obama Administration agreed that the statute was unconstitutional. The Court found that “a controversy sufficient for Article III jurisdiction” existed because the Administration nevertheless refused to grant plaintiff Edie Windsor the monetary relief she sought. *See id.* at 2686. Justice Scalia’s dissenting opinion in that case remarked on the majority’s striking disregard of the once paramount

Viewed in the specific context of Prop 8, Chief Justice Roberts's decision in *Hollingsworth* seems somewhat mystifying. The Chief Justice, joined by Justice Scalia, appears to go out of his way to prevent a duly enacted citizen initiative from being defended in federal court. The Court's standing decisions since the 1970s have justified demanding criteria for standing as necessary to protect the political branches from encroachment by the judiciary.<sup>69</sup> The Court repeated this admonition in *Hollingsworth*.<sup>70</sup> Yet here, the Court's narrow interpretation of standing doctrine facilitated the judicial invalidation of a law adopted through the political process. The Court's continued insistence on separation of powers rationales to support its cramped standing doctrine thus seems out of place in *Hollingsworth*.<sup>71</sup> It is important to look beyond the facts of the case, however, and to recognize that the decision is consistent with the Court's general trend of limiting citizens' access to the federal courts in order to protect the power of the political branches, especially the Executive branch.<sup>72</sup> This trend has largely been harmful to rights claimants. Beginning with the Burger Court, and continuing through the Rehnquist and Roberts Courts, standing has come to serve a rigid gatekeeping function that often undermines citizens' ability to challenge oppressive governmental action and vindicate constitutional rights.

Historically, standing demanded only that the plaintiff possess a legal cause of action; it was neither necessary nor sufficient to identify a particularized injury.<sup>73</sup> Under Warren Court precedents, Article III's "case

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requirement of adverseness. *Id.* at 2701 (Scalia, J., dissenting). In *Windsor*, the Bipartisan Legal Advisory Group (BLAG) did mount a defense of DOMA, but the Court oddly failed to address the question of BLAG's standing. *See id.* at 2688 ("the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority").

<sup>69</sup> *See infra* text accompanying notes 81–85.

<sup>70</sup> *Hollingsworth*, 133 S. Ct. at 2661 (stating that "that the doctrine of standing "serves to prevent the judicial process from being used to usurp the powers of the political branches" (internal quotation marks omitted)).

<sup>71</sup> *See id.* at 2674 (Kennedy, J., dissenting) (discussing "irony" that, "rather than recognize that justiciability exists to allow disputes of public policy to be resolved by the political process rather than the courts, here the Court refuses to allow a State's authorized representatives to defend the outcome of a democratic election").\*

<sup>72</sup> Justice Scalia's dissenting opinion in *Windsor* reflects the generally conservative impulse to protect and enhance the power of the Executive. Despite what one imagines would be his strong disagreement with the Obama administration's position on DOMA, Justice Scalia reaffirmed his belief in the President's power to determine that a statute is unconstitutional, without judicial interference. 133 S. Ct. at 2702 (Scalia, J., dissenting) ("If what we say is true some Presidential determinations that statutes are unconstitutional will not be subject to our review. That is as it should be.")\*.

<sup>73</sup> Sunstein, *supra* note 54, at 177–78, 182 (arguing that early English and American practices support simple test for standing, namely that "people have standing if the law has

or controversy” requirement was understood as requiring that the plaintiff have suffered an injury,<sup>74</sup> but the needed injury was still understood to be a “legal wrong” rather than calling for a factual inquiry independent of law.<sup>75</sup> Moreover, the primary focus of this inquiry into the plaintiff’s “injury” was to ensure adverseness. As the Warren Court explained in *Baker v. Carr*, “the gist of the question of standing” is whether the claimant has “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”<sup>76</sup> The Warren Court specifically rejected the idea that standing implicates the separation of powers.<sup>77</sup>

The Burger Court ushered in two significant shifts in standing doctrine that served to limit constitutional claimants’ access to the federal courts: the first was a change in what constituted a sufficient “injury” for standing purposes; the second was to ground standing emphatically in separation of powers principles. The Burger Court inaugurated the first major shift in standing doctrine by presenting the existence of an “injury” as a question of fact, not law.<sup>78</sup> This modification, Cass Sunstein argues, was not just new but disingenuous. “[The Burger] Court, and its successors (the *Lujan [v. Defenders of Wildlife]* Court among them), seem to assume that whether there is an ‘injury’ can be answered . . . as if the [question] depended on some brute fact, not on evaluation, and not on law. But this is false.”<sup>79</sup> Describing the inquiry as factual disguises the normative judgments that inevitably underlie the Court’s conclusions as to what counts as an

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granted them a right to bring suit”). The Warren Court later expanded standing to encompass not only the objects of regulation but also its beneficiaries. *Id.* at 183 (“The shift in this . . . period began when courts interpreted the ‘legal wrong’ test to allow many people affected by government decisions — including beneficiaries of regulatory programs — to bring suit to challenge government action.”).

<sup>74</sup> The Court did not, however, use the term “injury in fact,” a phrase first employed in 1970. *Id.* at 169.

<sup>75</sup> David M. Driesen, *Standing For Nothing: The Paradox Of Demanding Concrete Context For Formalist Adjudication*, 89 Cornell L. Rev. 808, 816 (2004); Sunstein, *supra* note 54, at 184.

<sup>76</sup> 369 U.S. at 204; *see also Flast*, 392 U.S. at 99 (quoting *Baker*, 369 at 204).

<sup>77</sup> *See Flast*, 392 U.S. at 99–101 (“The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. . . . In terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.”\*).

<sup>78</sup> Sunstein, *supra* note 54, at 185–86.

<sup>79</sup> *Id.* at 188–89.

“injury.”<sup>80</sup> The Burger Court further narrowed the “injury in fact” requirement to demand that this injury be (1) caused by the defendant and (2) likely to be redressed by a court decision in the claimant’s favor.<sup>81</sup>

Beyond the requirement of injury in fact, the Court—in an about-face from *Flast*—began to speak of standing as motivated by separation of powers concerns.<sup>82</sup> In particular, the Court sought to use standing to bar lawsuits it saw as challenging Executive branch power.<sup>83</sup> In *Allen v. Wright*, for example, the Court declared that the causation and redressibility requirements were necessary to foreclose an expansion of challenges to governmental action that would ultimately render the federal courts “virtually continuing monitors of the wisdom and soundness of Executive action.”<sup>84</sup> In *Lujan v. Defenders of Wildlife*, the Court emphasized that “[v]indicating the *public* interest (including the public interest in government observance of the Constitution and laws) is the function of Congress and the Chief Executive” rather than the Court.<sup>85</sup> Moreover, the Court went on, such a public interest could not be converted into an individual right through a legislative grant of standing, because such a legislative grant would yield the same, dangerous expansion of judicial power.<sup>86</sup>

The Burger Court, followed by the Rehnquist and Roberts Courts, so successfully solidified the link between standing and Article III that it is

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<sup>80</sup> As Sunstein argues, an African American claimant challenging a tax deduction to a segregated school, or an environmentalist objecting to the destruction of a pristine area, believes herself to have suffered a real injury. To deny this is to “import our own, value-laden ideas about what things ought to count. We are not simply describing some fact about the world.”*Id.* at 189; *see also* Cisneros, *supra* note 5, at 1113 (describing significant change in how Burger Court described the required injury).

<sup>81</sup> *See, e.g.* *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976); Driesen, *supra* note 74, at 817.

<sup>82</sup> *Allen*, 468 U.S. at 752 (1984) (“The law of Art. III standing is built on a single basic idea – the idea of separation of powers.”). *But see id.* at 766 (Brennan, J., dissenting) (“Once again, the Court uses standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits. And once again, the Court does so by waxing eloquent on considerations that provide little justification for the decision at hand. This time, however, the Court focuses on the idea of separation of powers, as if the mere incantation of that phrase provides an obvious solution to the difficult questions presented by these cases.” (citations and quotation marks omitted)).

<sup>83</sup> Cisneros, *supra* note 5, at 1124; *see also* Sunstein, *supra* note 54, at 213 (“*Lujan* seems to be built in key part on the idea that citizen standing — like other legislative interference with the President’s power to execute the law is unacceptable under Article II. Indeed, many of the recent standing cases might be thought to be Article II cases masquerading under the guise of Article III.”).

<sup>84</sup> *Allen*, 468 U.S. at 760.

<sup>85</sup> 504 U.S. 555, 576–77 (1992).

<sup>86</sup> *Id.* at 577.

easy to forget how recent—and far from self-evident—this linkage is.<sup>87</sup> “Article III contains no explicit constitutional requirement of ‘standing’ or ‘personal stake.’ Nor does it ever refer to ‘injury in fact.’”<sup>88</sup> Just as the now familiar three-part test for standing<sup>89</sup> is not self-evidently compelled by the Constitution, neither is the idea that standing exists to enforce separation of powers principles.<sup>90</sup> Injury in fact and separation of powers are concepts that are not clearly related to each other, let alone to standing.<sup>91</sup> The Burger, Rehnquist, and Roberts Courts have used standing doctrine to roll back the rights-protective decisions of the Warren Court and empower the Executive Branch under the seemingly neutral guise of procedural decisionmaking.<sup>92</sup> Notwithstanding its odd posture, *Hollingsworth* not only applies, but builds upon, this dubious legacy.

### B. A Lost Opportunity to Establish Equality

Because a majority of the Supreme Court agreed that the amendment’s proponent’s lacked standing to appeal, the Court did not address the merits of the case. However, it is interesting to speculate why the Justices lined up as they did on the standing question, and what their position on the merits of the case may have been.

Two conservative Justices would have proceeded to the merits. It is safe to assume that both Justices Thomas and Alito would have voted to uphold Prop 8. It is likewise not unreasonable to imagine that Justice Sotomayor was prepared to find Prop 8 unconstitutional. Many court watchers, however, had speculated that Justice Kennedy, who authored the strong dissent rejecting the Court’s standing dodge, would be the one pressing for a procedural way out.<sup>93</sup> Justice Kennedy’s confused opinion for the majority

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<sup>87</sup> See Driesen, *supra* note 74, at 823 (“this separation of powers rationale aims to explain why the Court reads Article III to require standing”); see also Cisneros, *supra* note 5, at 1110–11 (describing shift under which Court began to “tether its in-house rules of standing to Article III, elevating the inquiry from a prudential analysis to a constitutional one”\*)).

<sup>88</sup> Sunstein, *supra* note 54, at 168.

<sup>89</sup> This test requires that a plaintiff show injury-in-fact, causation, and redressibility. *Hollingsworth*, 133 S. Ct. at 2661.

<sup>90</sup> See Cisneros, *supra* note 5, at 1117; see also Sunstein, *supra* note 54, at 216–17.

<sup>91</sup> See Driesen, *supra* note 74, at 825 (“The question of improper (judicial) interference (with the legislative and executive branches) properly focuses upon the merits, the political question doctrine, and questions of equitable discretion, not upon injuries to parties.”\*)).

<sup>92</sup> Cisneros, *supra* note 5, at 1124; Chemerinsky, *supra* note 7, at 996–97 (1993); *Allen*, 468 U.S. at 766 (Brennan, J., dissenting).

<sup>93</sup> See, e.g., James Oliphant, *Supreme Court Rulings on Gay Marriage: A Liberal Result Wrapped in Conservative Values*, *The National Journal* (June 27, 2013) available at <http://www.nationaljournal.com/domesticpolicy/supreme-court-rulings-on-gay-marriage-a->

in *United States v. Windsor* finding DOMA's section 3 unconstitutional does not yield definitive insight into how Justice Kennedy would have decided the merits of *Hollingsworth*. On the one hand, the opinion reverberates with indignation at the injustices bans on same-sex marriages impose<sup>94</sup> and suggests that these injustices are never permissible under the federal Constitution.<sup>95</sup> Justice Scalia, for one, saw the majority opinion as a thinly disguised step toward ultimate recognition of same-sex couples' constitutional right to marry.<sup>96</sup> On the other hand, Justice Kennedy took pains to emphasize the states' prerogative to define marriage and to remind the public that its opinion and holding are confined to those same-sex marriages that—so far—only a handful of states recognize as lawful.<sup>97</sup> This suggests a respect for federalism and a desire to proceed in an incremental fashion, calling into question whether Justice Kennedy would have found it prudent to set a precedent that would invalidate the bans that the vast majority of states still enforce.

Justice Ginsburg's likely intentions are less opaque. It is not surprising that she would want to avoid the merits in *Hollingsworth*. Justice Ginsburg has not made a secret of her reservations about *Roe v. Wade*'s establishment of a constitutional right to abortion. Although she supports a woman's right to choose to end her pregnancy, Justice Ginsburg believed that *Roe* circumvented a tide of political reform in the states, prompting counter-productive political "backlash."<sup>98</sup> It is questionable whether abortion reform

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liberal-result-wrapped-in-conservative-values-20130626("Oddly enough, Kennedy dissented from the decision to punt the case on California's Proposition 8"); Alexander Abad-Santos, *The Atlantic Wire*, *First Word from the Supreme Court on Prop 8: The Justices Are Hedging* (Mar. 26, 2013) available at <http://www.theatlanticwire.com/national/2013/03/supreme-court-prop-8-arguments/63535/> (suggesting "that the key justice, Anthony Kennedy, may push for the Court to dismiss Prop. 8 or hand it back to the lower courts of California, wary of 'uncharted waters' in potentially redefining marriage in America").

<sup>94</sup> See, e.g., *Windsor*, 133 S. Ct. at 2692 (stating that the Court must decide whether section 3 of DOMA and its "resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment"); *id.* at 2694 (DOMA's differentiation among married couples "demeans the (same-sex) couple, whose moral and sexual choices the Constitution protects" and "humiliates tens of thousands of children now being raised by same-sex couples"\*).

<sup>95</sup> See e.g., *id.* at 2693 ("DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.").

<sup>96</sup> *Id.* at 2710 (Scalia, J., dissenting) ("no one should be fooled; it is just a matter of listening and waiting for the other shoe").

<sup>97</sup> *Windsor*, 133 S. Ct. at 2690, 2691, 2693, 2695–96.

<sup>98</sup> Emily Bazelon, *Backlash Whiplash*, *Slate* (May 4, 2013), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/05/justice\\_ginsburg\\_and\\_roe\\_v\\_wade\\_caution\\_for\\_gay\\_marriage.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/05/justice_ginsburg_and_roe_v_wade_caution_for_gay_marriage.html).

would have continued in the absence of *Roe*, and whether such reform would have quieted opposition to abortion rights.<sup>99</sup> But Justice Ginsburg's view of *Roe* as politically premature strongly suggests that she would regard a decision establishing the right of same-sex couples to marry as similarly "too much, too soon."<sup>100</sup> Justices Breyer and Kagan may well have shared Justice Ginsburg's reluctance to wade into the roiling public debate over marriage equality.

Justice Ginsburg is often described as the leader of the current Court's liberal wing.<sup>101</sup> Her hesitation to reach the merits of Prop 8's constitutionality is therefore a sign of how far right the Court has moved. As a final exercise in speculation, we can imagine how a liberal Justice in the mold of the Warren Court would have decided *Hollingsworth*. First, this archetypal liberal Justice would likely have recognized the proponents' standing, and not just as a vehicle for reaching the merits. As discussed above, it has typically been a conservative position to foreclose access to courts through procedural vehicles such as standing. Indeed, besides California, two state supreme courts (Alaska and Montana) known for issuing liberal opinions<sup>102</sup> have also ruled fairly recently that official initiative proponents possess the authority to defend the constitutionality of citizen initiatives.<sup>103</sup>

Assuming our liberal Justice persuaded four others to join her in proceeding to the merits, she would next have urged her colleagues to declare, without shame or reluctance, that Prop 8 violates same-sex couples' rights to equal protection and substantive due process.<sup>104</sup> Our Justice would have recognized that, when fundamental constitutional rights are at stake, it is the United State Supreme Court's responsibility to step in to protect these rights from majoritarian oppression. It is not surprising that the Court prefers to issue opinions on controversial issues only after it has a solid

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<sup>99</sup> See, e.g., Geoffrey R. Stone, *Justice Ginsburg, Roe v. Wade, and Same-Sex Marriage*, THE HUFFINGTON POST, THE BLOG (May 12, 2013), [http://www.huffingtonpost.com/geoffrey-r-stone/justice-ginsburg-roe-v-wa\\_b\\_3264307.html](http://www.huffingtonpost.com/geoffrey-r-stone/justice-ginsburg-roe-v-wa_b_3264307.html) (describing and disputing Justice Ginsburg's account).

<sup>100</sup> See *id.*; Bazelon, *supra* note 97.

<sup>101</sup> See, e.g., Jeffrey Toobin, *Heavyweight*, The New Yorker, Mar. 11, 2013, at 40.

<sup>102</sup> See Kenneth Kirk, *Alaska: Conservative State, Liberal Judiciary*, Americans United for Life (2007), available at <http://www.aul.org/docs/statecourts/AK.pdf>; Rob Natelson, *The Montana Supreme Court Ballot Issue Jurisprudence: "Liberal, Si — Conservative, No!"*, Montana Policy Institute (Mar. 8, 2013), available at <http://www.montanapolicy.org/2013/03/rob-natelson-the-montana-supreme-court-ballot-issue-jurisprudence-liberal-si-conservative-no/>.

<sup>103</sup> See *Sportsmen for I-143 v. Fifteenth Jud. Ct.*, 40 P.3d 400 (Mont. 2002); *Alaskans for a Common Language Inc. v. Kritz*, 3 P.3d 906 (Alaska 2000).

<sup>104</sup> See *Sportsmen for I-143 v. Fifteenth Jud. Ct.*, 40 P.3d 400 (Mont. 2002); *Alaskans for a Common Language Inc. v. Kritz*, 3 P.3d 906 (Alaska 2000).

sense of how the political winds are blowing. But such hesitation amounts to a shirking of one of the Court's most important responsibilities. *Roe v. Wade*, while not as controversial in 1973 as often portrayed,<sup>105</sup> did preempt political resolutions of the abortion issue. Because of this, women in states like North Dakota, Alabama, and Mississippi have benefited from forty years of access to safe, legal abortions, access that these states would never have provided on their own initiative. Today, same-sex couples in most states must hope for political reform or await the Court's next move. If the Court fails to act, couples in the most conservative states could be waiting for a long time.

#### CONCLUSION

In the giddy aftermath of the DOMA and Prop 8 decisions, it was tempting for supporters of marriage equality to breathe a sigh of relief at the Court's opinion in *Perry v. Hollingsworth*. But the decision ought at least to give us pause. *Hollingsworth* produced a thorough "mish-mash" of conservatives and liberals on the standing question.<sup>106</sup> It may be that each Justice would have reached his or her decision regardless of the merits looming on the other side of this procedural hurdle. Certainly Justice Scalia has been consistent—and remained so in both *Perry* and *Windsor*—in preferring to keep access to federal courts tightly controlled.<sup>107</sup> But it is likely that at least some Justices, as well commentators, were influenced by their eagerness for or fear of having the Court reach the merits.

It is understandable that Justices, litigators, and scholars who believe in the right to marriage equality were loathe to see the Court take up this issue too soon and thereby risk an adverse decision that could set back recognition of a federal right.<sup>108</sup> At the same time, it is important to recognize the Court's decision on the procedural question for what it is. The Court sacrificed a liberal commitment to broader citizen access to the federal court for pragmatic purposes, reinforcing and lending legitimacy to the conservative trend of tightening Article III standing requirements. The precedent *Perry* establishes could negatively affect citizens' ability to

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<sup>105</sup> See Stone, *supra* note 98. The decision in *Roe* was 7–2 and was joined by then Chief Justice Burger. See 410 U.S. 113 (1973).

<sup>106</sup> See Oliphant, *supra* note 92.

<sup>107</sup> Sunstein, *supra* note 54 (tracing Justice Scalia's position on standing to a law review article written when he was a law professor).

<sup>108</sup> See, e.g., Jesse McKinley, *Bush v. Gore Foes Join to Fight Gay Marriage Ban*, N.Y. Times (May 27, 2009), available at [http://www.nytimes.com/2009/05/28/us/28marriage.html?pagewanted=1&\\_r=0](http://www.nytimes.com/2009/05/28/us/28marriage.html?pagewanted=1&_r=0) (quoting Jennifer C. Pizer, marriage project director for Lambda Legal, calling the case "risky and premature").

defend progressive laws that establish or enhance, rather than constrict, rights.<sup>109</sup> It also reinforces existing limitations upon citizens' ability to challenge laws that violate important rights or that harm the environment or other public resources.<sup>110</sup> In the meantime, we must not forget that innumerable gay couples across the country who desire marriage are still waiting for formal, and equal, state recognition of their relationships.

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<sup>109</sup> Citizen initiatives have arguably not lived up to the progressive principles they were meant to vindicate. See Thomas E. Cronin, *The Paradoxes and Politics of Citizen Initiatives*, 34 Willamette L. Rev. 733, 734–35 (1998) (noting paradox that, while citizen initiatives were meant to curb the power of special interests, historical proponents of initiatives “would be appalled by how some of today’s single-interest groups in practice have stirred racial, ethnic, religious, and class antagonisms, rather than rallied the citizens around unifying progressive policies”). Whether the initiative system needs reform or even elimination is a separate question from whether, if a state’s citizens choose to retain such a system, the state is entitled to ensure that adopted initiatives are defended in court. See *id.* at 734 (describing continuing broad public support for citizen initiatives both in initiative states and nationally).

<sup>110</sup> See, e.g., *Lujan*, 504 U.S. 555; see also Sunstein, *supra* note 54.