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Reassessing Standing in *Hollingsworth v. Perry*: The Shareholder Derivative Suit as a Model for Public Interest Litigation

William F. Kelly*

INTRODUCTION

On June 26, 2013, the United States Supreme Court handed down two controversial decisions on the issue of same-sex marriage. In one, *United States v. Windsor*, the Court struck down section 3 of the federal Defense of Marriage Act—which provided that same-sex couples could not be recognized as spouses for purposes of federal law—as a violation of the Fifth Amendment’s Due Process Clause.¹ In the other, *Hollingsworth v. Perry*, the Court refused to hear a constitutional challenge to California’s Proposition 8—which amended the state constitution to define marriage as between a man and a woman—holding that the Proponents of the proposition did not have standing to defend the law in federal court.² Although it was the first of the two cases that the Court adjudicated on the merits, it ultimately will be the latter that will have the more remarkable implications for American governance. Regardless of one’s opinion of the practical short-term results for same-sex marriage in California, the long-term consequences of the Court’s ruling will almost certainly undermine the democratic nature of state governments across the country.

The Court’s refusal to hear the merits of the *Hollingsworth* case might initially appear to be inconsequential and constitute just another procedural ruling. After all, federal courts frequently refuse to hear cases on jurisdictional grounds. But—as this Comment will, in part, attempt to show—the circumstances in *Hollingsworth* are very different, and the decision, though procedural in nature, substantially undercuts the system of

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¹ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

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

checks and balances inherent in the American system of government. In particular, it reveals a gaping hole in the Court's doctrine of standing that, in effect, allows the executive branch of government to disregard the law without legal accountability.

As will be shown in Parts I and II of this Comment, the *Hollingsworth* decision is very troubling to the extent that it allows executive officials to operate outside the confines of the law. No person—neither citizen, legislator, nor governor—is above the law, and the Court should not be interpreting the Constitution to allow such a result. To the extent that the result of *Hollingsworth* seems both a proper application of its recent standing doctrine (as will be shown in Part III) and yet nonetheless unacceptable as a matter of policy, the Court should find itself compelled to reconsider that precedent upon which its decision stands. Perhaps it is time to revisit the constitutional doctrine of standing altogether. It is certainly not without its critics.³ Or maybe the Court needs to reassess the line it draws between constitutional and prudential standing and be willing to recognize additional exceptions to some of its judicially conceived rules. Such exceptions are certainly not without precedent. Part IV of this Comment discusses the shareholder derivative suit as an important example of the Court making an exception to certain standing requirements in corporate law for purposes of furthering important policy objectives. It is therefore suggested that—just as the Court recognizes a standing exception in corporate law for the derivative suit—the Court should recognize an exception in the *Hollingsworth* scenario where it is not just an investor's financial return at stake, but rather the rule of law itself.

I. THE PROBLEM: THE BACKGROUND OF *HOLLINGSWORTH*

In order to fully grasp the significance of the problem posed by the decision, it is important to understand the broader context of *Hollingsworth* and the extensive efforts made by the people of California to adopt a particular piece of legislation.⁴ Under article II, section 8 of the California state constitution, voters

³ Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 3 (2001) (“[D]issatisfaction with the standing doctrine is not new, and has been expressed by many commentators.”); Heather Elliott, *Congress’s Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 171 (2011) (describing the doctrine of standing as “confusing and unpredictable”); see also Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1775 (1999) (describing modern standing law as “extraordinarily complicated” and “impossible to defend as [a] plausible interpretation[] of the Constitution”).

⁴ For a summary of the background of *Hollingsworth*, see HENRY S. NOYES, *THE LAW OF DIRECT DEMOCRACY* xxx–li (2014).

have reserved to themselves the right to an initiative process whereby they can adopt statutes and constitutional amendments through a direct vote by the people.⁵ In November 2000, eight years before Proposition 8, the California voters exercised this power and adopted Proposition 22 as a revision to the state family code.⁶ Entitled the California Defense of Marriage Act, this statutory amendment provided that “[o]nly marriage between a man and a woman is valid or recognized in California.”⁷ In 2004, however, Mayor Gavin Newsom ordered the City of San Francisco to begin issuing same-sex marriage licenses in violation of state law.⁸ This action marked the first instance in a series of disconcerting decisions whereby government officials acted in intentional dereliction of their duties to enforce the laws of the state. In a consolidated suit joining actions filed by both supporters of same-sex marriage seeking to overturn the statute and opponents seeking to enjoin the City of San Francisco from violating the law,⁹ the California superior court determined that the amended statute violated the California Constitution’s equal protection clause.¹⁰ In May 2008, after that case had worked its way through the court system, the California Supreme Court affirmed the superior court’s original ruling and held that

⁵ CAL. CONST. art. II, § 8(a).

⁶ See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010), *aff’d*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated*, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁷ CAL. FAM. CODE § 308.5 (West 2014) *declared unconstitutional by In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

⁸ See Sylvia A. Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 STAN. J. C.R. & C.L. 1, 4 (2007). See generally *In re Coordination Proceeding*, Special Title [Rule 1550(c)], *Marriage Cases*, No. 4365, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005).

⁹ Unlike in federal court, under California precedent, state courts will allow private “citizens who are not personally affected . . . [to] sue to compel performance of a public duty.” *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 690 (Ct. App. 2006); see also *Green v. Obledo*, 624 P.2d 256, 267 (Cal. 1981). But cf. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992) (noting that the Supreme Court generally refuses, under the doctrine of standing, to allow federal courts to hear such cases). The California Supreme Court interestingly allowed the Proposition 22 Legal Defense and Education Fund to enjoin the City of San Francisco from violating the law but denied them standing to maintain a defense of the statute after temporary mandamus relief was granted. *In re Marriage Cases*, 183 P.3d at 406. The opponents of same-sex marriage could therefore compel the city to obey the law but could not defend the law itself in court as it was being challenged by same-sex couples. Because California Attorney General Bill Lockyer maintained a technical defense of the statute, however, there was no serious concern about standing for the case as a whole. *In re Marriage Cases*, 49 Cal. Rptr. 3d at 718. Lockyer’s defense may be described as technical in the sense that he did make a constitutional defense of the statute, but he argued for a very narrow interpretation of it that would simply restrict the term “marriage” but not the concurrent rights to heterosexual couples. See *id.* Nevertheless, in an important sense, Lockyer fulfilled his duty as state attorney general to defend the law in court. This, at minimum, allowed other interested parties to intervene in the case where they could not in *Hollingsworth*.

¹⁰ *In re Coordination Proceeding*, 2005 WL 583129 at *8.

Proposition 22 violated the state constitution.¹¹ Later that year in November 2008, in the very next election following the state court's decision, a majority of California voters adopted Proposition 8, which essentially codified the language of Proposition 22 in the state constitution.¹² This new constitutional amendment provided in article I, section 7.5 (immediately following the equal protection clause in section 7) that "[o]nly marriage between a man and a woman is valid or recognized in California."¹³ Where Proposition 22 had previously only amended a statutory code, Proposition 8 amended the constitution. Consequently, the state court's ruling that Proposition 22 (Family Code section 308.5) violated the constitution no longer applied because the constitution itself now explicitly allowed for it.

In November 2008, a day after the California voters had approved it, proponents of same-sex marriage filed suit challenging the constitutional validity of Proposition 8 even though it purported to amend the state constitution.¹⁴ Notably, though listed as a respondent and tasked with a defense of the law, California Attorney General Jerry Brown joined the petitioners in attacking the validity of Proposition 8. Not only was the Attorney General derelict in his duties to defend the law, but he also went out of his way to file a brief with the court attempting to undermine it.¹⁵ Although the California Supreme Court ultimately upheld the constitutionality of Proposition 8,¹⁶ the Attorney General's refusal to defend the law marked a second instance of serious abuse wherein state authorities refused to enforce the law.¹⁷

After Proposition 8 survived this challenge under the California Constitution, two same-sex couples filed suit in federal district court alleging that the state constitutional amendment—Proposition 8, that is—violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.¹⁸

¹¹ *In re Marriage Cases*, 183 P.3d at 453.

¹² Cal. Proposition 8: 8 Eliminates Right of Same-Sex Couples to Marry 56 (2008), available at http://repository.uchastings.edu/ca_ballot_props/1288.

¹³ CAL. CONST. art. I, § 7.5.

¹⁴ *Strauss v. Horton*, 207 P.3d 48, 59, 61 (Cal. 2009).

¹⁵ See Attorney General's Response to Amicus Curiae Briefs, *Strauss*, 207 P.3d 48 (No. S168047), 2009 WL 853622.

¹⁶ *Strauss*, 207 P.3d at 61 (interpreting the newly amended article 1, section 7.5 very narrowly to require only that the official designation of "marriage" not be applied to the union of same-sex couples; same sex couples could still enjoy all the same substantive rights as an equal protection of the laws except the use of the term *marriage*).

¹⁷ The City of San Francisco is once again forthrightly identified as a petitioner in the case attacking the validity of Proposition 8.

¹⁸ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd*, *Perry*

Seeking to bar enforcement of Proposition 8, the plaintiffs named as defendants California Governor Arnold Schwarzenegger and Attorney General Jerry Brown, among other local municipal authorities.¹⁹ However, herein lies the problem: though in fact named as the proper defendants in the suit, the Governor and Attorney General refused to defend the law in court. The district court itself recognized that “[w]ith the exception of the Attorney General, who concedes that Proposition 8 is unconstitutional, . . . the government defendants refused to take a position on the merits of the plaintiffs’ claims and declined to defend Proposition 8.”²⁰ The very same people charged with defending and enforcing the law under the California Constitution, refused to do so.²¹ Though they may have remained nominal defendants at trial out of legal necessity as a result of being named “defendants” in the plaintiffs’ complaint, it was the official proponents of the initiative (“Proponents”)²² who intervened to provide the actual defense of Proposition 8 in court. Ultimately, after a twelve-day bench trial, the federal district court held in favor of the plaintiffs and found that Proposition 8 violated the Equal Protection Clause of the United States Constitution.²³

Regardless of the substantive outcome, the official state defendants’ failure to defend the state’s constitution at trial

v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated*, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013). The Fourteenth Amendment states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added). Although Proposition 22, Proposition 8, and the restriction of marriage to heterosexual couples was codified in the California State Constitution, it could still be found to violate the United States Constitution and thus be declared void. *See id.* art. VI (“Th[e] Constitution . . . 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.”).

¹⁹ *Perry*, 704 F. Supp. 2d at 928; *see also* Complaint for Declaratory, Injunctive, or Other Relief at 3, *Perry*, 704 F. Supp. 2d 921 (No. CV 09 2292 VRW), 2009 WL 1490740.

²⁰ *Perry*, 704 F. Supp. 2d at 928. Such an admission could also raise significant concerns about the requirement of adversity. *See infra* note 68.

²¹ CAL. CONST. art. V, § 1 (“The Governor shall see that *the law is faithfully executed.*”) (emphasis added); *see also id.* § 13 (“It shall be the duty of the Attorney General to see that the *laws of the State are uniformly and adequately enforced.*”) (emphasis added); CAL. GOV’T CODE § 955.4(b) (West 2015) (“The Attorney General shall defend all actions on claims against the state.”).

²² The official proponents of an initiative are designated under CAL. ELEC. CODE § 9001(a) (West 2015) pursuant to CAL CONST. art. II, § 8. In this case, the Proponents of Proposition 8 included Dennis Hollingsworth, Gail Knight, Martin Gutierrez, Hak-Shing Tam, Mark Jansson, and the organization they formed, ProtectMarriage.Com—Yes On 8, A Project of California Renewal. *Perry*, 704 F. Supp. 2d at 954.

²³ *Perry*, 704 F. Supp. 2d at 1003–04.

raised problematic concerns separate and apart from the standing problem that came up on appeal in *Hollingsworth*. Because the state officials necessarily remained defendants in the suit, the Proponents could legally intervene under the Federal Rules of Civil Procedure,²⁴ but the time and expense of litigation alone might have deterred them from making such a defense.²⁵ In such an event, the law would go unenforced and undefended even at trial, and the plaintiffs could theoretically have won by default.²⁶ Even if parties do decide to intervene, it does not seem right that a private party should be required to defend a state law in court; that is specifically the purpose of government and the task of its elected state officials. It is wrong to require a private party to bear those litigation costs simply because the then governing officials disagree with it. It is a complete and utter deterioration of the rule of law. The only thing worse than requiring a private party to defend such a law²⁷ would be prohibiting that party from defending the law. Such is the premise of this Comment—that it would be a better option to permit a private party to litigate a defense of the law, than to allow the law to remain undefended altogether. Fortunately, this option was available to the Proponents of Proposition 8 *at trial* because the government officials were necessarily named as defendants in the complaint and could not simply withdraw from the case or cease to be parties to the action. The Proponents could therefore intervene in the matter.

On appeal, however, the official defendants' refusal to defend the law becomes much more problematic. Of course, at both trial and on appeal the defendants can—and did—refuse to participate in a strategic legal defense of the law. Unlike at trial, on appeal, the state officials can refuse to even remain party to the action; in other words, they can refuse to appeal the trial court's ruling.²⁸ As intervening defendants, the Proponents attempted to appeal the decision to the Ninth Circuit, but,

²⁴ FED. R. CIV. P. 24. See *infra* notes 73–74 and accompanying text.

²⁵ Ronald K.L. Collins & Robert M. Myers, *The Public Interest Litigant in California: Observations on Taxpayers' Actions*, 10 LOY. L.A. L. REV. 329, 355 (1977) (indicating that the “time, effort, and potential expense of public interest litigation” will discourage private parties from intervening, and the “legal barriers in areas such as standing, remedial relief, and attorneys’ fees” might altogether prohibit it).

²⁶ If the state officials refuse to defend the law—and private parties are either unable or unwilling to intervene—then the law would not be enforced and the legal transgressor would theoretically win in court by default. See FED. R. CIV. P. 55.

²⁷ Of course, no private party is being compelled to defend the law; they could simply allow it to go unenforced, but that responsibility should not fall to private citizens.

²⁸ See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660, 2667–68 (2013) (holding that defendant-intervenors who do not meet the requirements of Article III standing cannot defend a state statute on appeal when state officials refuse to do so).

unfortunately, it is here that the problem of standing became a serious issue. Because the official state defendants named in the complaint decided not to appeal—for though they had technically lost the case and were thereby subjected to an injunction barring the enforcement of Proposition 8, they personally agreed with the lower court’s ruling—the Proponents had to establish independent standing.²⁹ Professor Matthew Hall summarizes well how the situation changes from trial to appeal:

Defendant’s standing took center stage only after entry of judgment, when the intervenor-defendants sought to appeal. After the district court entered judgment for plaintiffs, the government-official defendants took no action, but the intervenor-defendants sought appellate review. The Proposition 8 case thus squarely presented a potentially dispositive issue of defendant standing: namely, whether Article III permitted the sponsors of Proposition 8 to appeal after the government officials responsible for that law’s enforcement themselves declined to appeal the judgment below.³⁰

Before reaching the merits of the intervening defendants’ petition, the Ninth Circuit thus had to find that they had standing to maintain the appeal. In order to adequately address this issue, the Ninth Circuit certified a question to the California Supreme Court inquiring about the Proponents’ particular interest in and relationship to the proposition under state law.³¹ The state court determined that the Proponents served as agents of the state and could therefore assert the state’s interest in defending the law.³² As a consequence, the Ninth Circuit found that the Proponents did have independent standing and could therefore maintain the appeal. On reaching the merits, however, it affirmed the lower court’s ruling and found that Proposition 8 violated the Fourteenth Amendment’s Equal Protection Clause.³³

Frustrated yet again, the Proponents appealed the decision to the United States Supreme Court. In June 2013, the Supreme Court made a final determination of the issue, ruling that the Proponents did not have standing to appeal the case in federal court.³⁴ The Court reasoned that the Proponents had not suffered

²⁹ See *infra* notes 73–74 and accompanying text.

³⁰ Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 *FORDHAM L. REV.* 1539, 1563 (2012) (citations omitted).

³¹ *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011).

³² *Perry v. Brown*, 265 P.3d 1002, 1025 (Cal. 2011) (“Accordingly, we conclude that when the public officials who ordinarily defend a challenged measure decline to do so, article II, section 8 of the California Constitution and the applicable provisions of the Elections Code authorize the official proponents of an initiative measure to intervene or to participate as real parties in interest in a judicial proceeding to assert the state’s interest in the initiative’s validity and to appeal a judgment invalidating the measure.”).

³³ *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012).

³⁴ *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

a personal individualized injury and consequently did not have a direct stake in the outcome of the case sufficient to confer Article III standing.³⁵ Relying on precedent from *Massachusetts v. Mellon* and *Lujan v. Defenders of Wildlife*, the Court determined that their complaint was nothing more than a general grievance which is shared in common with every other citizen and so did not qualify as an individualized injury.³⁶ Borrowing language from another case, the Court declared that the petitioners' "asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."³⁷ Upon this reasoning then, the Court summarily dismissed the possibility of having a citizen step in to defend the law.³⁸

It is the contention of this Comment that the Court should not have so quickly—if at all—dismissed as unconstitutional the idea of allowing a state citizen to defend a law when his or her state officials refuse to do so. Nowhere does the Constitution itself proscribe the raising of commonly held grievances or necessitate that a party assert a particularized injury. Although recently the Court has recognized these requirements as emanating from the Constitution, in reality, their origin was in prudential rather than constitutional doctrine.³⁹ Thus, for the sake of a consistent application of the standing doctrine, as well as the substantial policy considerations discussed below, the Court should return to its original view that these are prudential limitations subject to exception in certain circumstances. As shall be shown in the remainder of this Comment, the Court should have affirmed such an exception in *Hollingsworth*.

In the case itself, the Court went on to address the Proponents' potentially unique interest as "Official Proponents" of the initiative under California law, as well as consider the possibility of their being agents of the state capable of asserting its rights and interests in the law; it found neither of those contentions persuasive and ultimately concluded that the Proponents, as intervening defendants, did not have standing to appeal.⁴⁰ As a result, because the official state defendants refused to appeal the trial court's decision and because the Proponents lacked standing, the Supreme Court vacated the

³⁵ *Id.* at 2662.

³⁶ *Id.* (citing *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992)).

³⁷ *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 754 (1984)).

³⁸ *Id.*

³⁹ See *infra* note 84.

⁴⁰ *Hollingsworth*, 133 S. Ct. at 2662–68.

Ninth Circuit's ruling and dismissed the case, leaving only the collusive judgment of the district court in place.⁴¹

II. THE PROBLEM: UNCORRECTED ABUSE AND THE LITIGATION VETO

As a result of the Court's decision in *Hollingsworth*, the State of California is now left with only a federal district court injunction that—with no binding precedential effect⁴²—purports to enjoin state officials from enforcing section 7.5 of the California Constitution.⁴³ For the same reason that they refused to defend the law in court—namely, they disagreed with it—the Governor and Attorney General advised all county clerks to comply with the district court's injunction and issue same-sex marriage licenses from that point forward.⁴⁴ Therefore, because the very same state officials constitutionally charged with administering the law failed to defend the law in court, a duly enacted constitutional amendment is being undermined and ignored by the state government.⁴⁵ Again, regardless of one's pragmatic assessment of the *Hollingsworth* outcome, that these officials could forthrightly disobey the law, without the people of California having legal recourse or being able to hold their representatives legally accountable, should be very disconcerting. Notwithstanding the fact that the state adopted the initiative system for the express purpose of placing additional political control and governmental checks in the hands of the people,⁴⁶ the Court's decision ultimately did nothing less than allow state

⁴¹ *Id.* at 2668.

⁴² See Benjamin G. Shatz, *Gimme 5: What Every Lawyer Should Know about Stare Decisis*, L.A. COUNTY B. ASS'N. (Apr. 2008), <http://www.lacba.org/showpage.cfm?pageid=9375> (“[T]he decisions of district courts generally have no binding precedential effect.”); see also Stephanie Condon, *Prop. 8 Judges Chide Schwarzenegger, Brown for Not Defending Law*, CBS NEWS (Dec. 6, 2010, 5:25 PM), <http://www.cbsnews.com/news/prop-8-judges-chide-schwarzenegger-brown-for-not-defending-law/> (noting that the plaintiffs counsel conceded to the Ninth Circuit that the district court's “ruling may only technically apply to the two counties where the plaintiffs filed suit”).

⁴³ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010), *aff'd*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated*, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁴⁴ Letter from Kamala D. Harris, Cal. Attorney Gen., to Edmund G. Brown Jr., Cal. Governor 1 (June 3, 2013), *available at* http://gov.ca.gov/docs/AG_Letter.pdf; see also Letter from Tony Agurto, Cal. Assistant Deputy Dir. of Health Info. and Strategic Planning, to Cnty. Clerks and Cnty. Records (June 26, 2013), *available at* http://gov.ca.gov/docs/Letter_to_County_Officials.pdf; *Governor Brown Issues Statement on Historic Proposition 8 Ruling*, CA.GOV (June 26, 2013), <http://gov.ca.gov/news.php?id=18111>.

⁴⁵ CAL. CONST. art. V, § 1 (“The Governor shall see that *the law is faithfully executed.*”) (emphasis added); see also *id.* § 13 (“It shall be the duty of the Attorney General to see that the *laws of the State are uniformly and adequately enforced.*”) (emphasis added).

⁴⁶ *Statewide Initiative Guide 2013/2014*, CAL. SEC'Y STATE, <https://www.sos.ca.gov/elections/ballot-measures/pdf/initiative-guide.pdf>.

officials to circumvent the law. Ninth Circuit Judge Randy Smith—who, along with the other judges serving on the appellate court, found that the Proponents did have standing⁴⁷—explained the problem posed by the state officials' refusal to defend or appeal:

[T]he governor's action and the attorney general's actions have essentially nullified the considerable efforts on behalf of the initiative to be placed on the ballot and obtain passage. . . . We have an attorney general and a governor with no ability to nullify the acts of the people, and then by not appealing they, in fact, do it.⁴⁸

Although the Governor does have the authority to veto a bill passed by the legislature, he or she does not have the power to nullify a voter-approved initiative, an existing law previously codified, or an amendment to the constitution.⁴⁹ Neither does the Attorney General have any such power.⁵⁰ Although it can be argued that they have discretion in enforcing the law, such discretion simply cannot be allowed to reach to such executive nonfeasance as is evident in the *Hollingsworth* case.⁵¹ Yet, in effect, by refusing to defend the law in court, these are exactly the powers the California Governor and Attorney General are assuming. Colorado Attorney General John Suthers writes that “[s]ome attorneys general are wielding the litigation veto for the same reasons a governor might wield a constitutional veto: [t]hey strongly disagree with the law. But in contrast to the president or a governor, there is no constitutional authority for this litigation veto.”⁵²

The state officials' refusal to defend Proposition 8 is certainly dubious as a matter of law, but beyond the questions of mere legality are much broader policy concerns. Suthers continues to describe the long-term consequences of such a systematic abuse of the state's executive power:

Recently, . . . attorneys general in Virginia, Pennsylvania, and California have given in to the temptation to abuse the power entrusted to our position by refusing to defend their states' bans on same-sex marriage in court. Depending on one's view of the laws in

⁴⁷ *Perry v. Brown*, 671 F.3d 1052, 1096–97 (9th Cir. 2012) (Smith, J., concurring in part and dissenting in part), *vacated*, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁴⁸ Condon, *supra* note 42.

⁴⁹ CAL. CONST. art. IV, § 10(a).

⁵⁰ *See id.* art. V, § 13.

⁵¹ *See* John W. Suthers, *A 'Veto' Attorneys General Shouldn't Wield*, WASH. POST (Feb. 2, 2014), http://www.washingtonpost.com/opinions/a-veto-attorneys-general-should-nt-wield/2014/02/02/64082fc8-887e-11e3-a5bd-844629433ba3_story.html (indicating that an attorney general has discretion and may even in good faith not defend a law when binding precedent is “clear” and “unavoidable,” but “[t]hat's not yet the case with state laws banning same-sex marriage”).

⁵² *Id.*

question, such a “litigation veto” may, in the short term, be a terrific thing; an unpopular law is defanged and the attorney general can take credit—indeed, he can be the hero to his political base and keep his political ambitions intact. But in the longer term, this practice corrodes our system of checks and balances, public belief in the power of democracy and ultimately the moral and legal authority on which attorneys general must depend.⁵³

As Suthers points out, the problem of this litigation veto is not just confined to California. Rather, the Court’s decision in *Hollingsworth* has set precedent and sent a message to other states’ executives that they are legally unaccountable for the intentional refusal to perform their official governing duties.⁵⁴ As a result, in addition to California, at least six other state attorneys general in Kentucky,⁵⁵ Oregon,⁵⁶ Nevada,⁵⁷ Virginia,⁵⁸

⁵³ *Id.* at 51. Cf. Andrew DeMillo, *Arkansas Attorney General Supports Gay Marriage, but Will Defend State’s Ban*, HUFF. POST (May 3, 2014, 11:36 AM), http://www.huffingtonpost.com/2014/05/03/arkansas-gay-marriage_n_5259683.html (indicating that though he personally opposes his state’s ban on same-sex marriage, Arkansas Attorney General Dustin McDaniel will nevertheless “zealously defend” his state’s constitution).

⁵⁴ *Hollingsworth*, of course, strictly speaking does not say they are legally unaccountable altogether, but merely restricts standing in federal courts. As a result, however, acquiring a judicial remedy for such a violation becomes much more difficult as the *Hollingsworth* case demonstrates. Furthermore, it must be acknowledged that executive officials such as the Governor and the Attorney General are still politically accountable and can be voted out of office either at the end of their term or through a special recall election. See CAL. CONST. art. II, §§ 13–14. Nevertheless, at the same time, political accountability can be quite unresponsive to particular abuses. See Collins & Myers, *supra* note 25, at 331 (“The net result is that the slow, cumbersome, and sometimes unresponsive electoral process remains the only realistic federal forum available to taxpayers to check legislative and executive abuses.”) (citation omitted); *Taxpayers’ Suits: A Survey and Summary*, 69 YALE L.J. 895, 910 (1960) (“The need for [public interest litigation] arises from the absence of alternative means of correcting illegal practices of government officials which would otherwise be irreparable. One alternative to taxpayers’ suits is, of course, the elective process itself, but the electorate may ignore corruption, illegality, or unconstitutionality which occurred early in the term or which is relatively less eye-catching than the overall record of those in power; elections present package alternatives, often only two in number, and the voters are disabled from expressing their views on each governmental act.”) (citation omitted). *But see* *United States v. Richardson*, 418 U.S. 166, 179 (1974) (“Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.”).

⁵⁵ See *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014) (holding that the state’s ban on same-sex marriage was unconstitutional); see also Brett Barrouquere, *Kentucky Gay Marriage Recognition Put on Hold by Federal Judge*, HUFF. POST (Mar. 19, 2014, 5:59 PM), http://www.huffingtonpost.com/2014/03/19/kentucky-gay-marriage_n_4995364.html (indicating that the Kentucky Attorney General Jack Conway will not appeal the district court’s ruling but that Governor Steve Beshear will step in to appeal by appointing outside counsel).

⁵⁶ See Complaint, *Rummell v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014) (No. 6:13-cv-02256-MC); *Oregon Won’t Defend Gay Marriage Ban in Lawsuit*, USA TODAY (Feb. 21, 2014, 12:44 AM), <http://www.usatoday.com/story/news/nation/2014/02/21/oregon-gay-marriage-ban/5669719/> (stating that Oregon’s Attorney General will not defend the state’s

Pennsylvania,⁵⁹ and Illinois⁶⁰ have all refused to defend their states' laws—not to mention the federal executives' own failure to defend the Defense of Marriage Act.⁶¹ The corrosive abuse to which Suthers alludes is not taking any time in eating away at our system of democracy. Although the Supreme Court had an opportunity to begin correcting this abuse in *Hollingsworth*, its ultimate decision to proscribe the Proponents from litigating a defense of the law only served to exacerbate the problem and allow state executives to flaunt the abdication of their official duties.

Ultimately, the problem exhibited in *Hollingsworth* is not just that the Court was unwilling to allow the Proponents of the initiative to defend the law—though that would have certainly helped solve the problem in this and other cases concerning the enforcement of voter ballot-initiatives. Rather, the Court's decision exemplifies a much broader problem with the standing doctrine as a whole that prevents citizens as a class from holding their government accountable to the law through the judiciary,

ban on same-sex marriage).

⁵⁷ See *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012) (finding that the state's ban on same-sex marriage was *not* unconstitutional); *Nevada Drops Defense of State's Same-Sex Marriage Ban*, FOX NEWS (Feb. 10, 2014), <http://www.foxnews.com/politics/2014/02/10/nevada-drops-defense-state-same-sex-marriage-ban/> (citing the Nevada Governor Brian Sandoval and Attorney General Catherine Masto to claim that they won't defend the state's gay marriage ban on appeal).

⁵⁸ See *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014) (finding that the state's ban on same-sex marriage violates the federal constitution); Steve Szkotak, *Virginia Attorney General Says Gay Marriage Ban is Unconstitutional and Will Not Defend It*, HUFF. POST (Jan. 23, 2014, 7:46 AM), http://www.huffingtonpost.com/2014/01/23/virginia-gay-marriage_n_4650584.html (indicating Virginia Attorney General Mark Herring won't defend the state's ban on same-sex unions and will "join the fight against it").

⁵⁹ See Complaint, *Palladino v. Corbett*, No. 2:13-cv-05641-MAM (2013), 2014 WL 830046 (challenging Pennsylvania's ban on same-sex marriage); Juliet Eilperin, *Pa. Attorney General Says She Won't Defend State's Gay Marriage Ban*, WASH. POST (July 11, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/07/11/sources-pa-attorney-general-wont-defend-states-gay-marriage-ban/> (citing Pennsylvania Attorney General Kathleen Kane as announcing that she will not defend the state's ban on same-sex marriage).

⁶⁰ See *Gray v. Orr*, 4 F. Supp. 3d 984 (N.D. Ill. 2013) (granting a temporary restraining order that prohibits a county clerk from enforcing the state's same-sex marriage ban). It is interesting to note that the court allowed state Attorney General Lisa Madigan to be assigned as a plaintiff in the case. Tammy Webber, *Illinois Gay Marriage: State Prosecutors Refuse to Defend Gay Marriage Ban*, HUFF. POST (Aug. 21, 2012, 5:12 AM), http://www.huffingtonpost.com/2012/06/21/illinois-gay-marriage-sta_0_n_1615170.html (indicating Madigan won't defend the state's same-sex marriage ban in court).

⁶¹ See Niraj Chokshi, *Seven Attorneys General Won't Defend Their Own State's Gay-Marriage Bans*, WASH. POST (Feb. 20, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/02/20/six-attorneys-general-wont-defend-their-own-states-gay-marriage-bans/>; see also *Holder Gives Nod to State AGs to Drop Defense of Gay Marriage Bans amid Court Challenges*, FOX NEWS (Feb. 25, 2014), <http://www.foxnews.com/politics/2014/02/25/holder-gives-nod-to-state-ags-to-drop-defense-gay-marriage-bans-amid-court/>.

which was set up and envisioned by the Founder's separation-of-powers design to operate as a check on the political branches. Even if the Court had found the Proponents had standing to defend their initiative, what would the Court have done if it had been a typical legislatively adopted statute? Or a constitutional amendment via a legislative convention rather than ballot initiative?⁶² Or even an initiative where its proponents subsequently refused to defend the law due to litigation costs? Perhaps, it could be argued, the legislative representatives would be the appropriate parties to defend a law in court in the event the executive branch shirks its duties. But the Court has been reluctant to extend standing to a legislator who bases his or her claim on nothing more than an institutional injury to the legislature as a whole.⁶³ Furthermore, in the case of an initiative adopted by the people rather than the legislature, it seems that no individual representative would be in any better position to establish standing than would an ordinary citizen. Consequently, legislators would likely face many of the same hurdles to showing injury as did the Proponents in *Hollingsworth*.⁶⁴ Based on the Court's ruling, it is difficult to envision just what kind of party, if any, would have standing to defend the law in *Hollingsworth*. The other contention is that no party should have standing to defend the law other than those officials specifically charged with that duty—namely, the governor, the attorney general, and other subsidiary executives.⁶⁵ The only remedy in such a case would then be political: to vote those state officials out of office and replace them with persons who would enforce the law. But the political process is not always sufficiently responsive or capable of correcting such instances of corruption.⁶⁶ Does the Court really intend to deny legal accountability for state executive nonfeasance? Based on the

⁶² See CAL. CONST. art. XVIII, § 2.

⁶³ See *Raines v. Byrd*, 521 U.S. 811, 821–26 (1997); see also *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (finding certain circumstances that a legislator could bring a claim when he had a “plain, direct and adequate interest” in the case).

⁶⁴ See *Reuss v. Balles*, 584 F.2d 461, 465 (D.C. Cir. 1978) (“Although appellant’s status as a legislator introduces somewhat unique considerations into the case at bar, we must bear in mind that there are no special standards to be employed in analyzing legislator standing questions.”); see also S. DOC. NO. 112-9, at 743–46 (2013) (summarizing the doctrine of standing for Members of Congress and stating that a congressional representative “along with every other person attempting to invoke the aid of a federal court, must show ‘injury in fact’ as a predicate to standing”). But see *Hall*, *supra* note 30, at 1545–51 (explaining how the rules of standing might apply uniquely to legislative representatives).

⁶⁵ Although the Court did not say as much in *Hollingsworth*, it seems to be the inevitable result of the Court’s final ruling: if the official proponents of a law do not have standing, then who else besides the attorney general would?

⁶⁶ See *supra* note 54 and accompanying text.

Court's current doctrine of standing, and its prohibition of generalized grievances as applied in *Hollingsworth*, this, unfortunately, seems to be the conclusion at which the Court has arrived, and its consequences are only just beginning to be realized.

III. THE CAUSE: THE STANDING DOCTRINE AND THE PARTICULARIZED INJURY REQUIREMENT

The Court's decision in *Hollingsworth* to deny the Proponents the right to appeal ultimately flowed from its doctrine of standing. The doctrine in essence functions as a principle of separation of powers by limiting those cases that can be brought before a federal court. It is supposedly derived from the case or controversy requirement of Article III, Section 2 of the United States Constitution, which the Court has interpreted to limit federal judicial jurisdiction to "actual controversies arising between adverse litigants."⁶⁷ Therefore, if the plaintiff and defendant do not have actual adverse interests in a case, the Court will simply dismiss it for lack of Article III standing.⁶⁸ In order for there to be the requisite adversity, each litigant must have "a personal stake in the outcome of the controversy."⁶⁹

The *Hollingsworth* case presents a unique twist on the typical application of the standing doctrine to the extent that it was being applied to an intervening defending party, rather than a plaintiff. In the vast majority of federal cases, questions of standing are concerned, as a practical matter, solely with the nature of a plaintiff's claim.⁷⁰ The plaintiff is the one who has or will imminently suffer an injury, and so he or she is the one seeking redress in court. Standing is rarely an issue for defendants because they almost always unquestionably have it. The threat of an imminent adverse judgment exposes the defendant to an injury and, thus, confers standing upon him.⁷¹ If

⁶⁷ U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases . . . [or] Controversies."); *Muskrat v. United States*, 219 U.S. 346, 361 (1911).

⁶⁸ Sometimes adversity and standing are treated as separate elements required under Article III, but as the Court stated in *Baker v. Carr*, "the gist of the question of standing" is whether the parties have "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." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

⁶⁹ *Id.*

⁷⁰ See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011) ("To state a case or controversy under Article III, a plaintiff must establish standing.") (emphasis added); *Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' . . .") (emphasis added).

⁷¹ See Hall, *supra* note 30, at 1552.

it does not, however, then that destroys standing—for the adversity element of Article III implies that standing must be satisfied by both parties lest there not be an actual controversy.⁷² Therefore, it seems appropriate to require of the defendant, as much as of the plaintiff, that standing be satisfied. *Hollingsworth* also presents a unique situation in light of the fact that the Proponents were intervening parties to the original action; they were not named in the plaintiffs' original complaint but rather sought to intervene under Rule 24 of the Federal Rules of Civil Procedure.⁷³ The Court has indicated that when the original parties to the action have standing, any intervening parties need only satisfy the requirements specifically laid out in Rule 24; they are not required to independently meet the constitutional standing requirements of Article III so long as the original parties do.⁷⁴ If, however, the original parties lose their standing or fall out of the case, then any intervening parties who wish to maintain suit would need to independently satisfy those requirements. This is why, when the original defendants (the state officials) refused to appeal the unfavorable district court ruling, the Proponents were required by the Court to demonstrate independent Article III standing in order to maintain a defense of the case on appeal. As a result, because the parties in question are intervening defendants, *Hollingsworth* presents a unique approach to the question of standing; it is hard to imagine a scenario much different than that of *Hollingsworth* where an intervening defendant's standing is genuinely in question.⁷⁵ The general idea of applying the requirements of standing to an intervening defendant who wishes to make an independent appeal nevertheless seems appropriate, even if the particular criteria applied were inappropriate, as this Comment contends was the case in *Hollingsworth*. The only question the Court faces then concerns to whom exactly it should apply those criteria. The Proponents argued—and the Ninth Circuit found—that they should be applied to the State of California because the Proponents were representing the state in the suit. Because the state certainly has standing to defend its own laws in court, so

⁷² *Id.* at 1551 (“The terms ‘case’ and ‘controversy,’ in their nature, presuppose a dispute with interested parties on both sides; indeed, it makes little sense even to speak of a case or controversy with only one interested party.”) (citations omitted); *see also* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997).

⁷³ *See* FED. R. CIV. P. 24 (laying out the requirements of intervention).

⁷⁴ Intervention is governed by Rule 24 of the Federal Rules of Civil Procedure, and the Court has determined that intervening parties need not independently establish the elements of standing when they are met by the original plaintiff(s) and defendant(s). *See id.*; *see also* *Diamond v. Charles*, 476 U.S. 54, 64 (1986).

⁷⁵ For a similar situation, *see* *Diamond*, 476 U.S. at 57–59 (where a doctor sought to intervene in defense of an Illinois abortion statute).

too does its authorized representative—whether that is the Attorney General or the Proponents of the proposition. The Supreme Court, however, ultimately rejected this approach, reasoning that even if they represent the interests of the state, the Proponents must still independently satisfy the requirements of standing.⁷⁶ Assuming that the Court got this right and that the Proponents themselves must independently satisfy the requirements of standing, the *Hollingsworth* decision still exposes a real analytical problem with the doctrine.

The doctrine of standing is traditionally divided into two categories: namely, constitutional requirements, which the Court has interpreted to impose certain essential unalterable demands of the constitution, and prudential limitations, which tend to be more flexible and subject to the requirements of the situation and the laws of Congress.⁷⁷ The Court has indicated that the three basic prerequisites of constitutional standing require that: (1) the party has suffered an injury; (2) the injury is caused by the conduct complained of in court; and (3) the injury is remediable by the court.⁷⁸ Although none of these elements are precisely at issue in *Hollingsworth*, the Court has developed a correlated requirement to the first element necessitating that the injury be “particularized” and that it “affect the plaintiff in a personal and individual way.”⁷⁹ Spelled out and applied, this principle basically prevents litigants from raising generalized grievances common to the public at large. Reasoning that certain matters of widespread concern are better addressed through the political branches of government, the Court has held this element to prohibit citizens from attempting to vindicate public rights in federal court. In *Federal Elections Commission v. Akins*, for instance, the Court explained that “the political process, rather than the judicial process, may provide the more appropriate remedy” for resolving general complaints about the government.⁸⁰ Likewise, in *Warth v. Seldin*, the Court declared that “other governmental institutions may be more competent to

⁷⁶ *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) (“But even when we have allowed litigants to assert the interests of others, the litigants themselves still ‘must have suffered an injury in fact.’”).

⁷⁷ See S. DOC. NO. 112-9, at 737 (2013).

⁷⁸ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (“[O]ur cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an ‘injury in fact’ Second, there must be a causal connection between the injury and the conduct complained of Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”).

⁷⁹ *Id.* at 560 n.1.

⁸⁰ *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 23 (1998).

address” such questions of “wide public significance.”⁸¹ In *Lujan*, the Court reiterated the principle stating that:

We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.⁸²

Thus, a broad bar on generalized grievances has been maintained under the auspices of the Court’s standing doctrine. However, where the Court had previously found this requirement to be a prudential limitation more readily subject to exceptions,⁸³ the Court has more recently recognized it as an unalterable maxim of Article III standing.⁸⁴ It is this new—though erroneous—interpretation that seems to necessitate the result of *Hollingsworth*. If the Court rather were to have reaffirmed these requirements as prudential limitations, as it has in the past, then it could have excepted the Proponents in *Hollingsworth* from the general rule, allowed them to make their case in defense of the law, and prevented the abusive implications of the litigation veto.

Because it recognized these requirements as constitutional, however, the Court bound its own hands and was unable to make an exception for the Proponents’ appeal. Finding that “[t]heir

⁸¹ *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *see also* *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221–22 (1974); *United States v. Richardson*, 418 U.S. 166, 179 (1974) (“[T]he absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.”); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (“[G]eneralized grievances [are] more appropriately addressed in the representative branches.”). Again, as seen in the *Hollingsworth* case, the political process was not sufficient because of the executive officials’ failure to enforce the law. It is therefore worthwhile to contrast the Court’s policy reasoning in *Mellon* and *Akins* with the policy implications of the *Hollingsworth* decision. Such consideration should provoke a serious reconsideration of the Court’s prohibition of generalized grievances.

⁸² *Lujan*, 504 U.S. at 573–74; *see also* *Allen*, 468 U.S. at 754 (“[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.”); *Warth*, 422 U.S. at 499 (“[W]hen the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.”).

⁸³ *See* S. DOC. NO. 112-9, at 737 (2013) (“[I]t is clear that the Court feels free to disregard any of these prudential rules when it sees fit.”).

⁸⁴ Although it has settled recently on classifying the requirement as a constitutional mandate, the Court had previously, though inconsistently, identified it as a prudential limit. *See* S. DOC. NO. 112-9, at 726; *see also, e.g.,* *Warth*, 422 U.S. at 499–500 (prudential); *Valley Forge Christian Coll. v. Ams. United*, 454 U.S. 464, 485, 490 (1982) (seemingly constitutional); *Allen*, 468 U.S. at 751 (prudential); *Lujan*, 504 U.S. at 575 (constitutional). And most recently in *Hollingsworth*, the Court cited *Lujan* with approval and recognized the element as a constitutional requirement. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013).

only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law,” the Court summarily determined that they could not satisfy the particularized injury requirement.⁸⁵ As a consequence, it held that they had raised nothing more than a generalized grievance and could not maintain the suit. It is not so much that the Court lacked precedent; in point of fact, the Court held very strictly to its most recent decisions even in the face of its severe adverse implications. Rather, the severity of those policy implications (following from the legal unaccountability of state executives) should have prompted the Court to more seriously consider its application of that precedent to the case at hand. In *Flast v. Cohen*, for instance, the Court lowered the barrier to allow taxpayers to challenge the constitutionality of congressional taxation or spending—apparently recognizing the particularized injury requirement as a prudential limitation.⁸⁶ *Flast*, however, did not create an open-ended license for citizens to bring suits against the government; rather, the Court set two strict criteria to protect this new taxpayer suit from abuse. First, the taxpayer can *only* challenge congressional action arising under the Taxing and Spending Clause of the U.S. Constitution.⁸⁷ Second, the taxpayer must allege that the taxing or spending power violates a *specific* constitutional limitation.⁸⁸ By cracking open the door to such suits, the Court recognized the importance of having a judicial remedy available to keep government taxing and spending accountable to the constitution. On the other hand, by prescribing strict limitations for the suit, the Court was also able to prevent abuse of such suits.

Another instance where the Court seemingly allows exception to the particularized injury requirement comes up in shareholder derivative actions. As will be shown further in Part IV, federal courts have allowed shareholders to bring derivative claims on behalf of their corporation despite the fact that their injury is shared in common with a great many other shareholders. Many of the same purposes and policies that have allowed these cases to proceed in federal court notwithstanding the lack of a particularized injury should prompt the Court to reconsider its decision in *Hollingsworth* and allow citizens in certain circumstances to bring suit against—or, as the case may be, on behalf of—the government.

The taxpayer and the derivative suit exceptions both

⁸⁵ *Hollingsworth*, 133 S. Ct. at 2662.

⁸⁶ *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

⁸⁷ *Id.*; U.S. CONST. art I, § 8, cl. 1.

⁸⁸ *Flast*, 392 U.S. at 102–03.

indicate that the requirement of a particularized injury is really only a matter of prudential standing. If the Court genuinely believed that the requirement flowed from a constitutional mandate, then no statute or precedent to the contrary could consistently permit such exceptions. Rather, the Court has and continues to allow these exceptions in recognition of certain great policy concerns. Whatever the proper classification of the particularized injury requirement—whether prudential, as it was in the past, or constitutional, as it is currently formulated—the Court clearly makes exceptions to it and should seriously consider doing so for cases like *Hollingsworth*.

IV. THE SOLUTION: THE SHAREHOLDER DERIVATIVE SUIT AS A MODEL EXCEPTION

The theory of a shareholder derivative action is in principle not very different from the idea of a public interest citizen suit. But where the Court has recognized and affirmed the former, it has generally rejected the latter for lack of standing. Derivative suits to be sure are subject to strict limitations and procedures to prevent their abuse as they rightly should be,⁸⁹ but unlike citizen suits they are not proscribed altogether from being brought in federal court. Despite the lack of a particularized injury to any one shareholder that is differentiable from that suffered by every other shareholder, the Court continues to recognize the importance of making an exception to that requirement in order to allow shareholders access to a judicial remedy that can hold management accountable and enforce the rights of the corporation. In this way, the derivative suit exemplifies the Court's own willingness to lower the bar on standing in certain circumstances. In the same manner then, it is here proposed that—subject to rational limitations and requirements to prevent abuse—citizens should be entitled to hold their government accountable to the law and bring their grievances before a court of law even if they allege nothing more than a common and widespread injury.

In essence, the derivative suit is the right of a shareholder to assert a right or claim on behalf of the corporation.⁹⁰ Under business law, a properly formed corporation is a discrete legal entity subject to its own rights and liabilities, which are ordinarily distinct from that of its shareholding owners.⁹¹ In a

⁸⁹ See *infra* notes 106–107 and accompanying text.

⁹⁰ *Levine v. Smith*, 591 A.2d 194, 200 (Del. 1991) (“A shareholder derivative suit is a uniquely equitable remedy in which a shareholder asserts on behalf of a corporation a claim belonging not to the shareholder, but to the corporation.”).

⁹¹ Roger M. Michalski, *Rights Come With Responsibilities: Personal Jurisdiction in*

typical corporate paradigm, shareholders vote to elect a board of directors who in turn appoint executive officers to manage the affairs of the corporation. Therefore, not unlike a republican form of government, although shareholders own the business and may elect their representatives on the board, they do not control or dictate the day-to-day business decisions of the company. Thus, operational decisions—including the right to bring suit on behalf of the corporation—normally fall within the discretion of corporate management.⁹² However, in certain circumstances, the directors and officers may refuse to bring a suit that they otherwise rightly should in the best interests of the company. For example, the directors might be guilty of fraud, self-dealing, mismanagement, negligence, waste of corporate assets or of acting on some other personal interest that conflicts with the interests of the corporation. Or they might simply have acted *ultra vires*—that is, in excess of their authorized authority under either state law or the corporation's charter and bylaws.⁹³ In whichever of these instances, those persons responsible for managing the corporation will be unlikely to direct the company to file suit against themselves.⁹⁴ In theory, if shareholders disagreed with the directors' decisions, they could vote them out of office and elect new directors who would appoint new officers who would bring the suit and enforce the company's legal rights. In practice, however, the Court has found that shareholder voting is simply insufficient as a mechanism of corporate managerial accountability.⁹⁵ Consequently, the Court extended a judicial remedy to shareholders by allowing them to step in and represent the corporation's legal interests through derivative proceedings. For this reason, the Court acknowledged, the

the Age of Corporate Personhood, 50 SAN DIEGO L. REV. 125, 131 (2013).

⁹² Susanna M. Kim, *Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits?*, 66 TENN. L. REV. 81, 100 (1998) ("Under the basic corporate law paradigm, shareholders, as owners of the corporation, elect directors to manage the corporation on the shareholders' behalf and to make decisions affecting the corporation, including the decision to initiate litigation.").

⁹³ Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1307 (2001) ("A shareholder could bring a derivative action on behalf of the corporation to recover damages suffered from an ultra vires transaction.").

⁹⁴ Gregory P. Williams & Evan O. Williford, *Derivative Litigation: Fundamental Concepts and Recent Developments*, in 2005 REVIEW OF DEVELOPMENTS IN BUSINESS AND CORPORATE LITIGATION 444, 448 (2005), available at <http://apps.americanbar.org/buslaw/newsletter/0039/materials/pp5.pdf>.

⁹⁵ *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547–48 (1949) ("The vast aggregate of funds committed to corporate control came to be drawn to a considerable extent from numerous and scattered holders of small interests. The director was not subject to an effective accountability. . . . This remedy born of stockholder helplessness was long the chief regulator of corporate management and has afforded no small incentive to avoid at least grosser forms of betrayal of stockholders' interests.") (emphasis added).

purpose of the “derivative action was to place in the hands of the individual shareholder a means to protect the interests of the corporation from misfeasance and malfeasance of ‘faithless directors and managers.’”⁹⁶ As an owner of the business, the shareholder’s purpose in protecting the corporation is to protect his or her own financial investment, although that is a generalized injury that the individual shareholder shares with all other shareholders. Even though the shareholder suffers no particularized injury, the Court permits this kind of derivative action when management exceeds its authority under the corporation’s constitution—that is, its charter and bylaws.

Ordinarily shareholders would lack standing as individuals to bring suit because of the absence of a particularized injury. The only injury the shareholder suffers is derivative of the harm done to the company and thus shared in common with all of the other stockholders.⁹⁷ If the shareholder did suffer a personal, individualized injury, then there would be no need for derivative proceedings; that individual could just bring a personal claim against the company.⁹⁸ For example, if the shareholder suffered a loss of voting rights due to a corporate reorganization, that shareholder would suffer a personal and particularized injury because it was him or her who was entitled to those voting rights as opposed to the corporation.⁹⁹ In that case, the shareholder could sue the corporation and the directors directly rather than derivatively on behalf of the corporation. In contrast, the derivative suit is meant to cover injuries to the corporation that harm all the shareholders through their equity interests in the company. As Richard Epstein points out, the “derivative action is meant to cover cases where no particular shareholders have . . . suffered any special injury at all.”¹⁰⁰ For many large publicly-traded companies, a derivative claim would run into many of the same concerns that the Court has expressed relating to plaintiffs who raise generalized grievances about government—namely that such grievances would be better addressed through electoral procedures and voting processes. As noted above, such processes are not always sufficient to hold management accountable.¹⁰¹ Therefore, because the shareholder lacks particularized injury and raises little more than a

⁹⁶ *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991) (citing *Beneficial Indus.*, 337 U.S. at 548).

⁹⁷ Kim, *supra* note 92, at 102–03.

⁹⁸ See *id.* (noting that sometimes it can be difficult to discern between a direct and derivative injury/claim); see also Williams & Williford, *supra* note 94, at 449–52.

⁹⁹ See *Eisenberg v. Flying Tiger Line, Inc.*, 451 F.2d 267 (2d Cir. 1971).

¹⁰⁰ Epstein, *supra* note 3, at 26.

¹⁰¹ See *supra* note 95 and accompanying text.

widely-shared grievance about corporate management, the derivative suit ordinarily could not satisfy general standing requirements.

In light of weighty policy considerations, however, the Supreme Court created an exception to the particularized injury requirement for the derivative suit. In *Cohen v. Beneficial Industrial Loan Corp.*, the Court explained:

Equity came to the relief of the stockholder, *who had no standing to bring civil action at law against faithless directors and managers*. Equity, however, allowed him to step into the corporation's shoes and to seek in its right the restitution he could not demand on his own. . . . [W]hen, as was usual, those who perpetrated the wrongs also were able to obstruct any remedy, equity would hear and adjudge the corporation's cause through its stockholder. . . . This remedy born of stockholder helplessness was long the chief regulator of corporate management and has afforded no small incentive to avoid at least grosser forms of betrayal of stockholders' interest. It is argued, and not without reason, that without it there would be little practical check on such abuses.¹⁰²

Born in equity and later codified in the Federal Rules of Civil Procedure, a shareholder bringing a derivative suit, therefore, need not satisfy all of the requirements of standing.¹⁰³ Furthermore, that the Court has allowed shareholder suits to avoid the particularized injury requirement indicates that this specific requirement is merely prudential: for while states can alter prudential limitations, constitutional limitations are in theory fixed and unchangeable. A different standard is allotted for derivative suits under the federal rules requiring only that (1) the plaintiff be a shareholder in the corporation and (2) the plaintiff fairly and adequately represent the interests of other similarly situated shareholders in enforcing the rights of the corporation.¹⁰⁴ These less exacting standing requirements stand in contrast to the elements normally required to satisfy standing. The Court is thus willing to set aside certain limitations in the interest of maintaining strong corporate managerial accountability.

Rather than broadly prohibiting derivative actions, federal courts have opened wide the class of eligible plaintiff-shareholders who can bring the suit. Of course, recognizing the dangers arising from abuse of such derivative

¹⁰² *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949) (emphasis added).

¹⁰³ *Lewis v. Knutson*, 699 F.2d 230, 238 (5th Cir. 1983).

¹⁰⁴ FED. R. CIV. P. 23.1; *see also* MODEL BUS. CORP. ACT § 7.41 (2005); N.J. STAT. ANN. § 14A:3-6.2 (West 2015).

proceedings (often called “strike suits”),¹⁰⁵ the Court has allowed the institution of certain other preconditions on plaintiffs who wish to bring such actions against their company and directors. One such condition often requires that the plaintiff post expenses to cover the corporation’s legal fees in the event that the shareholder loses the case.¹⁰⁶ Another condition usually necessitates that—prior to bringing suit—the shareholder must make a demand upon the corporation and directors to properly file the suit or else the shareholder must meet a high burden of showing that such a demand would be futile.¹⁰⁷ These two conditions thereby act as guardians of the derivative action in order to prevent the abuse of the suit and extortion of management for settlement value. Even these conditions, however, do not constrain the class of eligible plaintiffs but simply require that they clear certain hurdles to demonstrate the legitimacy of their suit.

Given the importance the Court attaches to maintaining corporate accountability, as illustrated by the creation of a standing exception for the derivative suit, is it really unreasonable for the Proponents and the citizens of California to ask the Court to recognize a corresponding exception for them to hold their state executives accountable to the law? Their plight is certainly not beyond comparison to that of the shareholders. In both cases, executive management is refusing to sustain a lawsuit that it rightly should. Comparable to corporate directors’ and officers’ refusal to institute a suit, the Governor and Attorney General in *Hollingsworth* refused to defend a state law

¹⁰⁵ For a discussion of strike suits, see William M. Lafferty & W. Leighton Lord III, *Towards a Relaxed Summary Judgment Standard for the Delaware Court of Chancery: A New Weapon Against “Strike” Suits*, 15 DEL. J. CORP. L. 921, 924 (1990).

¹⁰⁶ For an example of such a requirement, see N.J. STAT. ANN. § 14A:3-6.8 (West 2015) (“In any derivative proceeding or shareholder class action instituted by a shareholder or shareholders holding less than 5% of the outstanding shares of any class or series of the corporation, unless the shares have a market value in excess of \$250,000, the corporation in whose right the action is brought shall be entitled at any time before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including fees of attorneys, that may be incurred by it in connection with the action or may be incurred by other parties named as defendant for which it may become legally liable.”). For further analysis of “Security for Expense” statutes, see John B. Lieberman III, *Corporations – Stockholders’ Suit - State Security for Expenses Statute Is Inapplicable in Stockholders’ Derivative Suit in Federal Court for Violation of Securities Exchange Act Provision and Regulation Thereunder*, 7 VILL. L. REV. 292, 292–94 (1962).

¹⁰⁷ For an example of such a demand requirement, see MODEL BUS. CORP. ACT § 7.42 (2005) (“No shareholder may commence a derivative proceeding until: (1) a written demand has been made upon the corporation to take suitable action; and (2) 90 days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.”). For a broader analysis and discussion of the requirement, see Williams & Williford, *supra* note 94, at 452–89.

and then to appeal the unfavorable district court ruling.¹⁰⁸ In both cases, the electoral power of voting is insufficient to hold those officials accountable. The Court clearly stated as much of the corporate scheme in *Cohen*, and there are good reasons for thinking that is equally true of the state.¹⁰⁹ In both cases, the parties are seeking a judicial remedy to enforce the rights of their respective state and corporate organizations. Where the shareholder seeks to file suit on behalf of the business, the citizen-Proponents in *Hollingsworth* sought to appeal the suit on behalf of the state. And, most relevantly, in both cases the parties lack a direct particularized injury. The injury to the shareholders arises from the harm caused to the corporation and is shared in common with all of the stockholders while the citizen-Proponents' injury arises from harm caused to the state that is shared in common by all its citizens.¹¹⁰ Yet, in one instance, the Court was willing to create an exception to the requirements of standing while in the other it refused to grant any such exception. This inconsistency highlights the weighty countervailing policy considerations that the Court simply refused to address in *Hollingsworth*.¹¹¹

CONCLUSION

Perhaps there are concerns about the separation of governmental powers and even questions of federalism in *Hollingsworth* that are not present in the derivative suit, but that by no means obviates the necessity of having legal accountability for the executive branches of government. Ever since *Marbury v. Madison*, it has been the Court's role to interpret the law and check the constitutional boundaries of the other branches of government.¹¹² For this reason, Richard Epstein notes that the doctrine of standing "operates at cross purposes with the function of judicial review."¹¹³ *Marbury* on the one hand empowers courts to review the actions of coordinate branches of government while *Mellon* and its standing prodigy have limited that power. The doctrine of standing therefore becomes a matter of balancing the dangers of federal judicial activism with the dangers of executive and legislative abdication. *Hollingsworth* illustrates the latter and the Court's concurrent failure to check the exercise of that power. As illustrated by the

¹⁰⁸ *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660 (2013).

¹⁰⁹ See *supra* note 54 and accompanying text.

¹¹⁰ *Hollingsworth*, 133 S. Ct. at 2661.

¹¹¹ See *supra* Parts I–II.

¹¹² *Marbury v. Madison*, 5 U.S. 137 (1803).

¹¹³ Epstein, *supra* note 3, at 2.

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shareholder derivative suit, it would not have been beyond the Court's reasonable power to recognize a limited exception to the prudential doctrines of standing in order to remedy such an executive abuse. That the Court wished to avoid deciding the merits of such a controversial case is perhaps understandable, but its refusal to adjudicate the matter on grounds of standing is not so excusable. To the extent that it allows executive state officials to disregard the law without appropriate legal accountability, the Court's decision to abdicate that responsibility may turn out to be far more controversial and damaging than any adjudication on the merits could possibly have been.

