

# FEDERALISM STANDING

*Heather Elliott\**

|  |     |
|--|-----|
| INTRODUCTION .....   | 435 |
| I. FLETCHER'S FEDERALISM STANDING .....  | 437 |
| II. <i>HOLLINGSWORTH V. PERRY</i> .....  | 442 |
| III. A NEW INSTANCE OF FEDERALISM STANDING? .....                                      | 445 |
| A. <i>The Supreme Court's Holding Is Troubling and Unusual</i> .....                   | 445 |
| B. <i>The Ninth Circuit's Standing Analysis Was Problematic</i> .....                  | 447 |
| C. <i>The California Supreme Court's Analysis Was Proper Federalism Standing</i> ..... | 451 |
| CONCLUSION.....  | 456 |

## INTRODUCTION

Standing “is built on a single basic idea—the idea of separation of powers.”<sup>1</sup> Most often, the powers thought to be separated thereby are the three branches of the federal government.<sup>2</sup> Less attention has been paid to standing’s use in maintaining the proper spheres of activity for the federal and state governments.<sup>3</sup>

One scholar who has paid attention to federalism issues and standing doctrine is now-Judge William Fletcher. As he noted in 1990,<sup>4</sup> plaintiffs

---

\* Associate Professor of Law, The University of Alabama School of Law. Deepest thanks to Judge William A. Fletcher for inspiring this Symposium and this piece and for his helpful comments at the Symposium. Thanks also to Tara Grove, Andy Hessick, Bob Pushaw, Tom Rowe, Jon Siegel, Max Stearns, and Ernie Young for their participation in and comments at the Symposium. Finally, thanks to Sarah Simpler for invaluable research assistance.

1. *Allen v. Wright*, 468 U.S. 737, 752 (1984).

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

3. Given the volume of articles on standing doctrine, the comparatively lesser scholarship that discusses standing and federalism is still extensive. See, e.g., Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 493–96 (2012); Helen Hershkoff, *State Courts and the ‘Passive Virtues’: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001); Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?*: Massachusetts v. EPA’s New Standing Test for States, 49 WM. & MARY L. REV. 1701 (2008); Dru Stevenson & Sonny Eckhart, *Standing as Channeling in the Administrative Age*, 53 B.C. L. REV. 1357, 1407–15 (2012); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995). Of course, the literature on federalism and Article III generally (as opposed to standing doctrine specifically) is voluminous.

4. William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 264 (1990).

who lack Article III standing may bring federal law claims in state courts because the state courts are not bound by Article III, and yet, precisely because those plaintiffs lack Article III standing, the Supreme Court could not hear an appeal.<sup>5</sup> The troubling result is that state courts can announce unreviewable decisions on federal law.

The Supreme Court in *ASARCO* held that a losing defendant in such a case would have standing to appeal because of the adverse judgment, but a losing plaintiff, who lacked federal standing to sue initially, could not appeal.<sup>6</sup> Since such plaintiffs usually invoke federal law and defendants reject it, the Supreme Court would have appellate jurisdiction over state court decisions favorable to federal law but not over those contrary to it. Because review is forbidden precisely where it is most needed, Fletcher argued, the state courts should be made to apply Article III justiciability standards to federal questions: federal law cases should be heard in state court only when they can be heard in federal court.<sup>7</sup>

To add further symmetry to what we might call this doctrine of federalism standing, Andy Hessick argues in this volume that diversity cases in federal court, which are always predicated on state-law claims, should be judged by the standing doctrine of the alternative state forum rather than by federal Article III standards. In this way, state law will have its true scope and litigants will be truly free to choose between state and federal court in diversity cases.<sup>8</sup>

A third permutation of federalism standing may have arisen in the recent U.S. Supreme Court case, *Hollingsworth v. Perry*. There, a federal district court struck down under the federal Constitution a voter-enacted ban on marriage between same-sex couples (Prop 8).<sup>9</sup> The state officials who would normally defend such laws declined to do so, and the Ninth Circuit, relying on a California Supreme Court decision,<sup>10</sup> held that the proponents of the ballot initiative (the Proponents) had standing to appeal on behalf of the State.<sup>11</sup> The United States Supreme Court ultimately held that the Proponents lacked standing and dismissed the appeal.<sup>12</sup>

This is a federalism standing problem, albeit a less common one, parallel to those discussed by Fletcher and Hessick. True, it is not a federal question in state court, nor a state law case in federal court. Instead, it is a

---

5. *Id.*

6. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 618–23 (1989).

7. Fletcher, *supra* note 4, at 263, 264; see *infra* notes 21–42, 44 and accompanying text.

8. F. Andrew Hessick, *Standing in Diversity*, 65 ALA. L. REV. 417, 418 (2013).

9. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660 (2013) (citing *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

10. *Perry v. Brown (Perry III)*, 265 P.3d 1002, 1005–07 (Cal. 2011).

11. *Perry v. Brown (Perry IV)*, 671 F.3d 1052, 1070 (9th Cir. 2012), vacated and remanded *sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652; see *infra* notes 65–68 and accompanying text.

12. *Hollingsworth*, 133 S. Ct. 2652; see *infra* notes 69–78 and accompanying text.

federal question in federal court that nevertheless implicates important federalism issues. Can or should standing in the federal court depend on the state's political structure? If it can't or shouldn't, do the people of California receive justice?

Standing for the Proponents might have been predicated on well-established concepts permitting the assignment of claims: qui tam relators sue to vindicate harms to the United States, and assignees may litigate claims.<sup>13</sup> The Supreme Court distinguished these cases, apparently worried about the consequences of a broad standing holding.<sup>14</sup>

However, the Court could have adopted the California Supreme Court's holding that Proponent standing was essential to vindicating California's ballot initiative system. On this narrower logic, Proponent standing depends on a fundamental aspect of state governance and applies in many fewer cases.<sup>15</sup> And there is good reason for the Court to have adopted the California court's logic. When the Court rejected it, the People of California were left with no way to defend their constitutional amendment. That seems a bad outcome for "Our Federalism."<sup>16</sup>

More generally, I think this case highlights some of the pernicious consequences of the Court's metastasizing standing doctrine.<sup>17</sup> Article III makes the Supreme Court the ultimate arbiter of federal law questions. How then is it not within the Supreme Court's jurisdiction to hear an appeal, when a federal court has struck down a state constitutional amendment under the Due Process Clause of the Constitution? The state officials may have acquiesced in that act, but why should that matter? Shouldn't a higher court make sure the lower court was correct in striking down that amendment? Doesn't "Our Federalism" demand that?

## I. FLETCHER'S FEDERALISM STANDING

While it is Fletcher's *Structure of Standing* article that inspired this Symposium,<sup>18</sup> his article *The 'Case or Controversy' Requirement in State Court Adjudication of Federal Questions*<sup>19</sup> has also been influential.<sup>20</sup> In it,

---

13. See *infra* notes 91–99 and accompanying text.

14. *Hollingsworth*, 133 S. Ct. at 2665.

15. See *infra* notes 62–64 and accompanying text.

16. *Younger v. Harris*, 401 U.S. 37, 44 (1971) ("What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.").

17. See *infra* notes 81–85 and accompanying text.

18. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

19. Fletcher, *supra* note 4, at 263.

20. Westlaw citation check on September 1, 2013 finds 71 citations to this article.

he notes that the states' freedom from Article III constraints "has had two linked and anomalous consequences": state courts can hear federal law questions when the plaintiff lacks Article III standing, and the Supreme Court cannot review those decisions.<sup>21</sup> Both affect Our Federalism.

First, Fletcher notes, for the first century of our republic, the federal and state courts had similar views of what constituted the "judicial power": courts acted judicially when they decided cases or controversies, but not when they issued advisory opinions (as many state courts can under their own constitutions).<sup>22</sup> While the Supreme Court could not review state court advisory opinions, "no one questioned the Supreme Court's constitutional authority to review all state court decisions in litigated cases dealing with federal law."<sup>23</sup> Fletcher concedes that this latter point is nowhere explicitly discussed, but he concludes that this means everyone "simply assumed" such review was available.<sup>24</sup>

By the early 1900s, Fletcher shows, state courts had started to issue decisions in disputes that did not clearly look like cases or controversies, and the Court responded with "genuine puzzlement about how to treat state court decisions in such suits."<sup>25</sup> The paradigm suit looks like this:

The plaintiff challenged a state statute in state court on the ground that it violated the federal Constitution; the state court, using a standard of justiciability that differed from the federal standard, agreed to hear the case and sustained the statute; the United States Supreme Court held that it could not review the state court decision because the plaintiff had not shown a stake in the legal question he sought to have litigated; and the judgment of the state court sustaining the statute against a federal constitutional challenge was left undisturbed.<sup>26</sup>

Thus, "as state courts allowed litigants to assert unconventional interests or to seek unconventional forms of relief"<sup>27</sup> (for example, in the early twentieth century, state courts but not federal courts could issue declaratory judgments),<sup>28</sup> the Court's jurisdiction to hear appeals in those cases became more problematic. In addition, given the Supreme Court's mandatory appellate jurisdiction over state court decisions contrary to

---

21. Fletcher, *supra* note 4, at 264.

22. *Id.* at 266–69.

23. *Id.* at 269.

24. *Id.*

25. *Id.* at 279.

26. *Id.* at 274.

27. *Id.* at 279.

28. *Id.* (citing Federal Declaratory Judgment Act of 1934, ch. 512, 48 Stat. 955 (codified as amended at 28 U.S.C. §§ 2201–2202) (2006)).

federal right, the Court came to use justiciability reasoning for “the further and ulterior purpose of permitting it to avoid deciding difficult or awkward cases.”<sup>29</sup>

When the federal courts were empowered to hear declaratory judgment actions, and when the Supreme Court’s jurisdiction over state court decisions contrary to federal right was made discretionary, Fletcher argues, the justifications for the Court’s odd justiciability rules over state court decisions became less tenable.<sup>30</sup> The Court’s decision in *ASARCO, Inc. v. Kadish* was an effort to change the approach to such cases, but it provided only “a [p]artial and [p]erverse reform.”<sup>31</sup> The Court held that, even though plaintiffs would have lacked Article III standing had they sued in federal court, the Supreme Court nevertheless had jurisdiction because the defendants had standing to appeal. The defendants were harmed by the adverse judgment, which upheld the plaintiffs’ federal law claim against the defendants’ state law defense, and that harm was concrete and immediate enough to satisfy Article III.<sup>32</sup> As Fletcher notes, “[t]hat the defendants were adversely affected by the state court judgment should have been beside the point, for the difficulty had always been that the plaintiffs (not the defendants) had insufficient interest to satisfy [A]rticle III.”<sup>33</sup> Moreover, “[i]t is very odd to give a right of appeal to only one party, contrary to the virtually universal practice in Anglo-American jurisprudence of granting appeal symmetrically, either to both parties or to neither.”<sup>34</sup>

Most problematically, however, Fletcher notes that “*Asarco* grants review to precisely the wrong side”<sup>35</sup>:

[T]here has always been greater distrust of state court decisions sustaining state statutes against federal challenges than of decisions striking down state statutes. Yet the effect of *Asarco* is to grant review when the state court is most to be trusted (when it strikes down a state statute), but to deny review when the state court is most to be distrusted (when it sustains a state statute).<sup>36</sup>

The solution, Fletcher argues, is to require state courts to apply federal Article III justiciability standards when hearing federal law claims.<sup>37</sup> I call

---

29. *Id.* at 276.

30. *Id.* at 279–80.

31. *Id.* at 280 (citing *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 618–23 (1989)).

32. *Id.* at 280–81 (summarizing *ASARCO*).

33. *Id.* at 281.

34. *Id.*

35. *Id.*

36. *Id.* at 281–82.

37. *Id.* at 282.

his solution “federalism standing” because his argument is explicitly based in considerations of federalism. Fletcher notes that we often forget that state courts, as well as federal courts, decide federal law questions:

We should free ourselves of the mistaken, perhaps largely unconscious, habit of thinking that only the federal courts are important enough to have a “case or controversy” requirement . . . To the degree that the “case or controversy” requirement serves the values of sensitive and wise adjudication, it should apply to both state and federal courts.<sup>38</sup>

Fletcher also reminds us that federalism is about protecting the federal powers, not just the states’ powers. The Supreme Court is “the final appellate tribunal on questions of federal law,” and the *ASARCO* rule insulates certain state court decisions from Supreme Court review, indeed from decisions “where review is most needed.”<sup>39</sup>

But Fletcher’s solution also protects the states. It “treat[s] the [state and federal] courts as genuine partners in the business of adjudicating federal law.”<sup>40</sup> It also protects state lawmaking processes from state courts who might strike down state law while “hid[ing] behind the supposed commands of the federal sovereign” in cases that are nevertheless unreviewable by the federal Supreme Court.<sup>41</sup>

How can Article III standards be enforced in state court suits involving federal law? Fletcher relies largely on “the good faith of the state courts . . . to follow the commands of federal law,” but notes that direct review by the U.S. Supreme Court in a few cases and the treatment of non-Article-III decisions as non-preclusive will police the boundaries.<sup>42</sup>

Other scholars have suggested different solutions to the *ASARCO* problem, but none address the full federalism problem noted by Fletcher. Matthew Hall, for example, would have the Court return to jurisdiction over state-court decisions *adverse* to claims of federal right; he rejects Fletcher’s solution as too much an imposition on “state prerogatives to structure state judicial systems as state authorities see fit.”<sup>43</sup> But, as Fletcher notes, state courts that decide claims *favorable* to federal right may trample state legislative prerogatives—and, if those anti-state law decisions are incorrect on federal law and yet unreviewable by the Supreme

---

38. *Id.* at 283.

39. *Id.* at 283–84.

40. *Id.*

41. *Id.* at 288–90.

42. *Id.* at 303.

43. Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1261 (2011); see also Brian A. Stern, Note, *An Argument Against Imposing the Federal “Case or Controversy” Requirement on State Courts*, 69 N.Y.U. L. REV. 77 (1994).

Court, state legislatures have no recourse.<sup>44</sup> Moreover, Hall's concern ignores the federal law basis for all the claims at issue: if federal law is supreme, and if the United States Supreme Court's central role is as final arbiter of federal law questions, those concerns need to be weighed in the balance as well.

Paul Katz adds that *Congress's* interests are implicated, because Congress enacts laws against a background of which plaintiffs it expects will enforce private rights of action under those laws. "When Congress faces state courts with a variety of standing requirements, however, its statutory policy will receive a different level of enforcement . . . depending on the jurisdiction."<sup>45</sup> For this reason, Katz argues, state courts should have to follow federal standing rules in federal law cases.<sup>46</sup> But Robert Schapiro points out that Congress may *want* state courts to be enforcing federal law when the federal courts will not: "In this way, the state courts and Congress act as partners in realizing federal statutory rights."<sup>47</sup>

My mission here is not to take sides in the debate over who should have standing in state courts to enforce federal law—my general criticisms of the Court's Article III standing doctrine demonstrate that I would prefer a broader approach in both state and federal courts<sup>48</sup>—but merely to emphasize that standing doctrine has important federalism components. In this volume, Professor Hessick demonstrates a mirror-image problem of federalism standing: if state courts have different standing rules, then those rules should apply to diversity cases in federal court.<sup>49</sup> If federal courts apply Article III limitations that do not apply in state court, then state law causes of action are given less (or greater) scope than state legislatures meant them to have;<sup>50</sup> litigants also do not have the free choice between the state and federal forum that diversity jurisdiction is meant to provide.<sup>51</sup>

Thus standing doctrine turns out to have important federalism aspects when federal forums hear state law cases and when state forums hear federal law cases. As I discuss in the next Part, the recent marriage-equality case from California may represent a new form of federalism standing: a federal question case in federal court that nevertheless implicates important federalism issues.

---

44. Fletcher, *supra* note 4, at 288–90.

45. Paul J. Katz, Comment, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and the Reverse-Erie Analysis*, 99 NW. U. L. REV. 1315, 1316, 1318 (2005).

46. *Id.* at 1316–17.

47. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 305 (2005).

48. Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 592–98 (2012); Elliott, *supra* note 2, at 508–17.

49. Hessick, *supra* note 8, at 418.

50. *Id.* at 427

51. *Id.*

II. *HOLLINGSWORTH V. PERRY*

The Supreme Court determined in June 2013 that it lacked jurisdiction to review a lower-court decision striking down California's ban on marriage between same-sex couples—a ban enacted through California's ballot initiative system. The Court's standing decision leaves intact a far-reaching district court decision striking down on federal grounds that initiative-created California constitutional amendment. As much as one might agree with that outcome on the merits (which has the effect of recognizing marriage equality in California), the standing analysis has important and problematic federalism implications. After reviewing the background of the case in this Part, I discuss this new instance of federalism standing in Part III.

Prop 8 was enacted in 2008,<sup>52</sup> adding to the California Constitution the language: "Only marriage between a man and a woman is valid or recognized in California."<sup>53</sup> Soon thereafter, Kristin Perry and Sandra Stier, a lesbian couple, and Paul Katami and Jeffrey Zarrillo, a gay couple, challenged this enactment by suing in the federal District Court for the Northern District of California in San Francisco.<sup>54</sup> Named as defendants were several California officials, including then-Governor Arnold Schwarzenegger and then-Attorney-General Jerry Brown; the officials appeared but refused to defend the law. The Proponents, who had put Prop 8 on the ballot and campaigned for it, intervened to provide that defense.<sup>55</sup> The district court ultimately struck down California's gay marriage ban as violating both the Due Process and Equal Protection Clauses of the U.S. Constitution.<sup>56</sup>

The plaintiffs had Article III standing, their desire to marry frustrated by the voter-enacted ban on marriage between same-sex couples. Because the California officials remained as parties in the trial court, the status of the Proponents when they intervened as defenders of Prop 8 was not closely scrutinized. But after the district court struck down Prop 8, the California officials did not appeal.<sup>57</sup> Because the U.S. Supreme Court had previously suggested that ballot initiative proponents lacked standing to

---

52. CAL. SEC'Y OF STATE, STATEMENT OF VOTE: 2008 GENERAL ELECTION 7 (2008), available at [http://www.sos.ca.gov/elections/sov/2008-general/sov\\_complete.pdf](http://www.sos.ca.gov/elections/sov/2008-general/sov_complete.pdf).

53. CAL. SEC'Y OF STATE, VOTER INFORMATION GUIDE: TEXT OF PROPOSED LAWS 128 (2008), available at <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop8>.

54. Perry v. Schwarzenegger (*Perry I*), 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010), *aff'd* 628 F.3d 1191 (9th Cir. 2011), *pet. for cert. filed* (Jul 30, 2012) (No. 12-144).

55. *Id.* at 928.

56. *Id.* at 927.

57. Perry v. Schwarzenegger (*Perry II*), 628 F.3d 1191, 1195 (9th Cir. 2011), *petition for cert. filed* (Jul 30, 2012) (No. 12-144).

appeal a judgment striking down their initiative,<sup>58</sup> questions immediately emerged regarding the Proponents' standing to appeal the invalidation of Prop 8.<sup>59</sup>

The Ninth Circuit, concerned that it lacked jurisdiction but mindful of the special context of ballot initiatives, concluded that California election law held the answer to the Proponents' standing.<sup>60</sup> It therefore certified to the California Supreme Court the question whether California law made the Proponents the proper parties to defend Prop 8 on appeal.<sup>61</sup>

The California Supreme Court, in response, held that California law made the Proponents proper representatives of the State in defending Prop 8.<sup>62</sup> While the Court stated that it expected public officials to defend state statutes when their constitutionality is challenged in federal court, the Court noted that when those officials declined to do so, the California constitution and statutes "authorize the official proponents . . . to participate . . . in a judicial proceeding to assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure."<sup>63</sup> The Court emphasized that, without oversight from the Proponents, state officials might discriminate against laws enacted by direct democracy: "[T]he voters . . . may reasonably harbor a legitimate concern that the public officials . . . may not, in the case of an initiative measure, always undertake such a defense with vigor . . ."<sup>64</sup>

The Ninth Circuit, after receiving the California Supreme Court's answer to the certified question, proceeded to find that the Proponents had Article III standing to proceed with the appeal.<sup>65</sup> However, the Ninth Circuit's standing analysis seems far broader than the California court's. The Ninth Circuit held that, when a state had suffered a harm—any harm, apparently—"all a federal court need determine is . . . 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>66</sup> California was harmed by the determination that Prop 8 was unconstitutional, and California had authorized ballot initiative proponents to defend their initiatives when California elected officials refused to do so; thus the Proponents were

---

58. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997).

59. *Perry v. Schwarzenegger*, No. 10-16696, 2010 WL 3212786 at \*1 (9th Cir. Aug. 16, 2010) (citing *Arizonans*) (order granting motion to stay).

60. *Perry II*, 628 F.3d at 1196 ("The parties agree that 'Proponents' standing'—and therefore our ability to decide this appeal—"rises or falls" on whether California law' affords them the interest or authority described in the previous section." (quoting and citing only the Proponents' brief)).

61. *Id.* at 1193.

62. *Perry III*, 265 P.3d 1002, 1125–26 (Cal. 2011).

63. *Id.* at 1152.

64. *Id.* at 1125.

65. *Perry IV*, 671 F.3d 1052, 1070 (9th Cir. 2012).

66. *Id.* at 1072.

proper defenders of Prop 8.<sup>67</sup> The Ninth Circuit went on to affirm the district court's decision on considerably narrower grounds.<sup>68</sup>

The Supreme Court, after ordering special briefing on the question of the Proponents' standing to appeal, held, 5–4, that the Proponents lacked standing.<sup>69</sup> Chief Justice Roberts, joined by Justices Scalia, Ginsburg, Breyer, and Kagan, concluded that the Proponents personally could point only to a generalized grievance of the kind long found insufficient to support standing.<sup>70</sup> And while California had suffered an injury in having its law invalidated, it had chosen not to appeal. The Proponents were thus barred by usual rules against “third-party” standing from appealing. In addition, the Proponents held no official position in state government authorizing them to appeal, nor were they agents of the State under any standard definition of agency.<sup>71</sup> The Court concluded by emphasizing its respect for the California Supreme Court and the California initiative system. Yet, the Court says, “standing in federal court is a question of federal law, not state law. And no matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary.”<sup>72</sup>

Justice Kennedy, joined by Justices Thomas, Alito, and Sotomayor, would have adopted the California Supreme Court's view and allowed the Proponents to defend Prop 8 on appeal. Justice Kennedy criticized the majority's failure to recognize the consequences of its decision for California, stating that, “[i]n my view Article III does not require California, when deciding who may appear in court to defend an initiative on its behalf, to comply with the Restatement of Agency or with this Court's view of how a State should make its laws or structure its government.”<sup>73</sup> The Court failed to “take into account the fundamental principles or the practical dynamics of the initiative system in California”

---

67. *Id.* at 1075.

68. *Id.* at 1076–96 (noting that “[t]he district court held Proposition 8 unconstitutional [using fairly broad arguments under] the Due Process Clause [and under] the Equal Protection Clause,” further noting that “Plaintiff–Intervenor San Francisco also offer a third argument [under the Equal Protection Clause which provides] the narrowest ground for adjudicating the constitutional questions before us,” and adopting that narrowest ground).

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

70. *Id.* at 2662.

71. *Id.* at 2664–67. This part of the opinion reveals that the Court was most likely trying to get rid of the case so that it did not have to reach the merits. *See infra* notes 79–85 and accompanying text. Agency comes up only because the Court itself had sloppily referred to it in *Arizonans*. The Proponents' argument, when read fully, does not depend at all on a concept of agency. But the Court beats the concept of agency to death in rejecting the Proponents' standing. “The lady doth protest too much, methinks.” WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 2.

72. *Hollingsworth*, 233 S. Ct. at 2667.

73. *Id.* at 2668 (Kennedy, J., dissenting).

and that failure “has implications for the 26 other States that use an initiative or popular referendum system.”<sup>74</sup>

Justice Kennedy started by acknowledging the truth of the Court’s statement: “[A] proponent’s standing to defend an initiative in federal court is a question of federal law.”<sup>75</sup> But, Justice Kennedy wrote, the federal requirements are satisfied by the Proponents. First, California “sustained a concrete injury, sufficient to satisfy the requirements of Article III, when a United States District Court nullified a portion of its State Constitution.”<sup>76</sup> Second, California has an initiative system precisely to allow the People to act despite the preferences of their elected officials, and the California Supreme Court held that the Proponents were proper parties to represent the State in court when the state officials refused to do so.<sup>77</sup> The Court should have deferred to that choice, particularly because other similar litigation arrangements have long been recognized as proper under Article III.<sup>78</sup> Thus Justice Kennedy and three of his fellow Justices would have held that the Proponents were proper appellants and that the Court had jurisdiction.

### III. A NEW INSTANCE OF FEDERALISM STANDING?

*Hollingsworth* suggests a new category of federalism standing: a case of federal law in federal court that nonetheless raises important federalism issues. If the California Supreme Court has determined that the Proponents’ participation is necessary for California democracy, that determination deserves more deference than it received from the U.S. Supreme Court. After explaining why this is not merely another confusing yet tolerable addition to already confusing standing doctrine, I explain why the U.S. Supreme Court was correct to reject the Ninth Circuit’s standing analysis and yet wrong to reject the California Supreme Court’s reasoning. I conclude by noting that my previous arguments for a prudential abstention doctrine, in place of today’s mandatory tripartite test, would better serve the issues raised by federalism standing.

#### A. *The Supreme Court’s Holding Is Troubling and Unusual*

It is usually worth asking whether the standing rule established by a particular case justifies the hand-wringing such decisions tend to provoke.

---

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 2669.

78. *Id.* at 2673–74.

Much of the time, the rule established is not particularly hard to follow (buy airplane tickets, says *Lujan v. Defenders of Wildlife*,<sup>79</sup> actually hike in the wilderness area at issue, says *Sierra Club v. Morton*)<sup>80</sup> even if the rule is viewed as a senseless hurdle by those who have to satisfy it and is viewed as illogical or worse by those (like me) who find the whole standing quagmire bad doctrine.

Here, I think there is very good reason to be concerned by the Supreme Court's holding that the Proponents lack standing to appeal. Having the gay marriage case cut short after the district court opinion leaves an issue of great national importance<sup>81</sup> in limbo and, more to the point of this discussion of federalism standing, leaves the voters of California (at least those who supported Prop 8) with no avenue of review even though their law had been declared unconstitutional.<sup>82</sup>

I acknowledge that there is a misfit between the Proponents' use of the legislative process against a historically oppressed minority and then of the courts to defend that legislation. Given footnote four of *Carolene Products*, the role of the courts is to protect the minority, not to give the majority a second bite at a legislative apple.<sup>83</sup> But logically this is not a second bite: this is not going to court after you have *lost* at the ballot box. Instead, the Proponents sought to defend a duly enacted law. Even though Prop 8's discrimination against same-sex couples is reprehensible, the law was enacted by the People of California, and the standing of the Proponents to defend the California Constitution should not, I believe, depend on the content of the ballot initiative.<sup>84</sup> Any *Carolene Products* concerns must be balanced with respect for Our Federalism.

It is also worth noting that *Hollingsworth* presents an unusual *appellate* standing problem. The vast majority of standing decisions are about

---

79. 504 U.S. 555, 579 (1992)

80. 405 U.S. 727, 735 (1972)

81. See, e.g., *Perry II*, 628 F.3d 1191, 1200–02 (Reinhardt, J., concurring) (stating that “[o]ral argument before this court was viewed on television and the Internet by more people than have ever watched an appellate court proceeding in the history of the Nation” and describing the case as involving a “critical constitutional question that is of interest to all Americans, and particularly to the millions of Californians who voted for Proposition 8 and the tens of thousands of same-sex couples who wish to marry in that state”).

82. Cf. *Perry v. Brown*, 681 F.3d 1065, 1067 (9th Cir. 2012) (O’Scannlain, J., dissenting from denial of rehearing en banc) (describing *Perry v. Brown* as a “momentous case” and one that “overruled the will of seven million California Proposition 8 voters”).

83. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

84. “[T]he question before us involves a fundamental procedural issue that may arise with respect to *any* initiative measure, without regard to its subject matter.” *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2674 (2013) (Kennedy, J., dissenting) (quoting *Perry v. Brown*, 52 Cal. 4th 1116, 1124 (Cal. 2011)).

whether the plaintiff has standing to start the case at all; those decisions implicate the extension of the federal courts' powers into *ultra vires* areas. There is something fundamentally different, it seems to me, about appellate jurisdiction when the trial court undoubtedly had jurisdiction.<sup>85</sup>

### B. The Ninth Circuit's Standing Analysis Was Problematic

In finding the Supreme Court's analysis problematic, I do not intend to suggest that it should have affirmed the Ninth Circuit's opinion. Although that court properly held that the Proponents had standing to appeal, its reasoning was overly broad.

The Ninth Circuit emphasized that state law could not directly answer the federal standing question: “[W]e do not suggest that state law has any power directly to enlarge or contract federal jurisdiction. Standing to sue in any Article III court is, of course, a federal question which does not depend on the party's standing in state court.”<sup>86</sup> However, here, because the State was the relevant party—the State conceived as the People of California, rather than its elected representatives—special circumstances justified deference to state law. Thus “[s]tate law does have the power . . . to answer questions antecedent to determining federal standing, such as the one here: who is authorized to assert the People's interest in the constitutionality of an initiative measure?”<sup>87</sup>

The Ninth Circuit thus asked the California Supreme Court to determine whether the Proponents were proper parties to represent the People of California on appeal.<sup>88</sup> That court concluded that, because the initiative process would be short-circuited if state officials could decline to defend initiative-enacted law, the Proponents must have standing to defend that law.<sup>89</sup>

Oddly, however, the Ninth Circuit's opinion on standing went much further than the California Supreme Court's answer. The Ninth Circuit set out the relevant test as follows: “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>90</sup> While in *Perry IV* the relevant harm to California was the invalidation of a constitutional amendment, the Ninth Circuit's test suggested that any harm to a state would qualify.

- 
85. Heather Elliott, Standing to Appeal (2013) (unpublished manuscript) (on file with the author).
86. *Perry IV*, 671 F.3d 1052, 1074 (9th Cir. 2012) (quotations and citations omitted).
87. *Id.* at 1074–75.
88. *Perry II*, 628 F.3d 1191, 1193 (9th Cir. 2011).
89. *Perry III*, 265 P.3d 1002, 1006 (Cal. 2011).
90. *Perry IV*, 671 F.3d at 1072 (emphasis added).

This logic may seem proper under existing Supreme Court precedent allowing the assignment of claims, where the person who suffered an Article III injury in fact is different from the person who litigates the claim based on that harm. Thus, for example, the Supreme Court found standing for qui tam relators in the *Vermont Agency* case.<sup>91</sup> The False Claims Act confers on private citizens the power to sue on behalf of the United States to recover payments made on fraudulent claims (such as falsified bills on a federal highway construction project).<sup>92</sup> Qui tam relators are not themselves injured in any way by false claims, other than the injury that all of us feel when the Treasury is defrauded—a harm too generalized to justify Article III standing.<sup>93</sup> The Court nevertheless upheld the relator provisions of the False Claims Act: the relator has standing, the Court held, because he is an assignee of the *Government's* claim for damages.<sup>94</sup> The United States is harmed when it is defrauded; the FCA “can reasonably be regarded as effecting a partial assignment” of the right to sue to redress that harm.<sup>95</sup> In addition, “the long tradition of *qui tam* actions in England and the American Colonies”<sup>96</sup> is “well nigh conclusive” evidence that “*qui tam* actions were ‘cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.’”<sup>97</sup> Thus, qui tam relators can proceed under Article III.

The Court has similarly upheld the standing of those who litigate cases under private assignment agreements. According to a 2008 case, I can assign my claim to you to litigate for me, and even if what I pay you for doing so has no relationship to the amount you recover on my behalf, you have standing to proceed under Article III, because *I* would have had standing.<sup>98</sup> Nor does it matter that you suffer no personal injury; you are suing to get redress for *my* injury.<sup>99</sup>

---

91. See *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000).

92. 31 U.S.C. § 3730 (2006).

93. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–574 (1992) (“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.”)

94. *Stevens*, 529 U.S. at 765.

95. *Id.* at 765–66.

96. *Id.* at 774. In this way, the government and the relator have a relationship akin to that between an assignor and an assignee of a claim. Cf. *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2542 (2008).

97. *Stevens*, 529 U.S. at 777 (quoting *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 102 (1998)).

98. *Sprint*, 128 S. Ct. at 2542 (“It is, of course, true that the aggregators did not originally suffer any injury caused by the long-distance carriers; the payphone operators did. But the payphone operators assigned their claims to the aggregators lock, stock, and barrel.”).

99. *Id.* at 2543.

Thus, one might think that the Ninth Circuit's standing syllogism (state suffers harm, assigns right to sue to private citizen) is a simple application of the qui tam and assignment cases. But there are three concerns with the Ninth Circuit's logic. The first is the interest assigned. When the United States assigns its interest in a false claim to a qui tam relator, it assigns a proprietary interest similar to that any private person might have in, e.g., a damages claim. One might question whether the State of California's harm *qua* state is similarly delegable,<sup>100</sup> though both the majority and dissents in *Hollingsworth* appear to believe it is.<sup>101</sup> Indeed, much more "core" sovereign interests have been delegated in the past.<sup>102</sup> Nevertheless, to assign a State's sovereign interest in its laws seems somewhat different from assigning a State's private property interests.

The second concern is with how the claim is assigned. The Court suggests in the *Sprint* case that the contractual nature of that assignment was important.<sup>103</sup> The majority in *Hollingsworth* repeatedly expresses concern that the Proponents do not have any fiduciary obligations to California because the State's claim is assigned to the Proponents merely by their voluntary status *as* proponents. Thus, for the Ninth Circuit to consider this claim "assigned" may be a stretch. As I discuss below, the federalism concerns involved in *Hollingsworth* counsel deference to California's choices here; while the means of assignment might make a difference if we are adopting the broad rule the Ninth Circuit embraces,

---

100. Suzanne B. Goldberg, *Article III Double-Dipping: Proposition 8's Sponsors, BLAG, and the Government's Interest*, 161 U. PA. L. REV. ONLINE 164, 173–176 (contending that, because recognizing marriages and conferring benefits on married people "is a power that *only* the government can exercise," California cannot delegate its right to defend Prop 8 on appeal to the Proponents, and further rejecting Proponents' standing on California law, legislative standing, taxpayer standing, and legislature standing); Andrew Kim, Note, '*Standing*' in the Way of Equality?: *The Myth of Proponent Standing and the Jurisdictional Error in Perry v. Brown*, 61 AM. U. L. REV. 1867, 1878–1885 (2012). It is true that the Court held that the Proponents had no interest in enforcement, Slip Op. at 8, but that was stated in the context of why the Proponents *personally* suffered no concrete harm in the Article III sense. When discussing whether California can delegate *its* harm, the Court clearly states that it can. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664 (2013).

101. *Hollingsworth*, 133 S. Ct. at 2664 ("To vindicate [its interest in the constitutionality of its laws] or any other [interest], a State must be able to designate agents to represent it in federal court."); *id.* at 2673 (Kennedy, J., dissenting) (noting that the federal rules of criminal procedure allow federal courts to appoint private attorneys to investigate and prosecute instances of criminal contempt).

102. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541–42 & n.4 (1943) (allowing an informer's action to proceed, in which private citizens prosecuted criminal instances of fraud against the U.S.: "Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it; to nullify the criminal statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours.").

103. *Sprint*, 128 S. Ct. at 2543 ("Petitioners make a purely functional argument, as well. Read as a whole, they say, the assignments in this litigation constitute nothing more than a contract for legal services. We think this argument is overstated. There is an important distinction between simply hiring a lawyer and assigning a claim to a lawyer (on the lawyer's promise to remit litigation proceeds). The latter confers a property right (which creditors might attach); the former does not.").

here, given the more limited reach of federalism standing, California should determine who represents it.<sup>104</sup>

Third, and most pragmatically, the logic of the Ninth Circuit's holding logically extends far further than the Supreme Court is likely to desire. States can assert not only the whole range of harms that a human person or corporation can assert (think, for example, of Massachusetts's claim of loss of real property in its challenge to the EPA's failure to regulate greenhouse gases, which a majority of the Supreme Court held sufficient under Article III)<sup>105</sup> but also any number of harms to their sovereignty and their people.<sup>106</sup>

So, for example, states challenging the newly enacted federal healthcare law (known as Obamacare and properly called the Patient Protection and Affordable Care Act) asserted broad rights to sue the federal government simply because they claimed that a federal law might interfere with a state law.<sup>107</sup> As amici in one of the cases stated,

[I]f a putative conflict between state and federal law itself sufficed to satisfy the injury-in-fact prong of standing analysis, there would be no way of ensuring that the challenged federal law actually injured an individual party; the existence of standing would be governed simply by the abstract—and quite possibly hypothetical—conflict between state and federal law.<sup>108</sup>

Alexander Bickel made a similar criticism of 1960s voting litigation by the Southern states: "It would make a mockery, moreover, of the constitutional requirement of case or controversy . . . to countenance automatic litigation—and automatic it would surely become—by states situated no differently than was South Carolina in this instance."<sup>109</sup>

If states' broad assertions of injuries are combined with the Ninth Circuit's holding that it is "[ir]relevant whether Proponents have suffered a personal injury, in their capacities as private individuals," and that court's further holding that states are apparently free to authorize anyone to represent the state in litigation,<sup>110</sup> one can easily see why some of the first questions asked at oral argument seemed directly targeted at the breadth of the Ninth Circuit's holding:

---

104. See *infra* notes 117–142 and accompanying text.

105. *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007).

106. E.g., *id.* at 518 ("States are not normal litigants for the purposes of invoking federal jurisdiction.").

107. See Elliott, *supra* note 48, at 579–81 (2012).

108. Brief for Professors of Federal Jurisdiction as Amici Curiae in Support of Appellant at 34, *Va. ex rel. Cuccinelli v. Sebelius*, No. 11-1057 (4th Cir. Mar. 7, 2011) (citations omitted).

109. Alexander Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 89–90.

110. *Perry IV*, 671 F.3d 1052, 1074 (9th Cir. 2012) (emphasis removed).

*Justice Kagan:* “[C]ould the State assign to *any* citizen the rights to defend a judgment of this kind?”<sup>111</sup>

*Chief Justice Roberts:* “[A] State can’t authorize *anyone* to proceed in Federal court, because that would leave the definition under Article III . . . who has standing to bring claims up to each State.”<sup>112</sup>

*Justice Kennedy:* “But in this case the proponents . . . must all act in unison under California law . . . so in that sense it’s different from simply saying *any* citizen.”<sup>113</sup>

At the same time, several Justices were extremely concerned about the consequences for California’s initiative system if the Proponents could *not* defend the law:

*Justice Kennedy:* “The State could go in and make a defense, maybe a half-hearted defense of the statute . . . and then when the statute is held invalid . . . simply leave.”<sup>114</sup>

*Justice Alito:* “[I]f the Attorney General and the governor don’t like the ballot initiative, it will go undefended?”<sup>115</sup>

*Justice Alito:* “Now, in a State that has initiative, the whole process would be defeated if the only people who could defend the statute are the elected public officials.”<sup>116</sup>

The solution to this dilemma would have been to reject the Ninth Circuit’s broad language and specifically rely on the initiative process itself as a justification for proponent standing, adopting the California Supreme Court’s analysis. Unfortunately, a majority of the Court joined a troubling and badly reasoned opinion that ignores the People of California’s interest in defending Prop 8.

### C. The California Supreme Court’s Analysis Was Proper Federalism Standing

The Court could easily have rejected the Ninth Circuit’s broad language and adopted a much narrower view of standing based on California’s initiative process. That approach (taken by Justice Kennedy in

---

111. Transcript of Oral Argument at 5, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144) (emphasis added).

112. *Id.* at 6 (emphasis added).

113. *Id.* at 6–7 (emphasis added).

114. *Id.* at 29.

115. *Id.* at 30.

116. *Id.* at 33.

dissent) takes federalism seriously as a factor to be considered in standing doctrine.

Justice Kennedy agrees with the majority that the key Article III inquiry is the harm done to California: “[T]he State of California sustained a concrete injury.”<sup>117</sup> If one believes that only California can sue to vindicate such an injury,<sup>118</sup> the inquiry would end there. However, both the majority and the dissent agree that such injuries are, in principle, assignable.<sup>119</sup>

The question, then, is whether California can assign or otherwise delegate to the Proponents the authority to defend its interests in court. According to Justice Kennedy’s dissent, it is not just any private citizen who may represent California when state officials decline to do so. The California Supreme Court determined that the Proponents were “a small, identifiable group”; who “[b]ecause many of their decisions must be unanimous” and “necessarily few in number”; whose “identities are public”; and whose “commitment is substantial.”<sup>120</sup> To recognize the Proponents as proper assignees or delegates of California’s injury is far from embracing the notion that a state could make *anyone* the proper party to defend its interests in court.

Moreover, this interpretation of California’s election laws issued from the California Supreme Court. The Court should have been “bound by a state court’s construction of a state statute.”<sup>121</sup> In rejecting it, the United States Supreme Court gave incredibly short shrift to a state supreme court’s interpretation of state law.

Indeed, the Court seems to impose a lot of its own ideas about good governance on California: the class of proper representatives is apparently

---

117. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013) (Kennedy, J., dissenting) (internal quotation marks omitted); *see also id.* at 2664 (majority opinion) (“No one doubts that a State has a cognizable interest ‘in the continued enforceability’ of its laws that is harmed by a judicial decision declaring a state law unconstitutional.”).

118. *See supra* notes 91–107 and accompanying text.

119. *Hollingsworth*, 133 S. Ct. at 2664 (“To vindicate [its interest in the constitutionality of its laws] or any other, a State must be able to designate agents to represent it in federal court.”; *see also id.* at 2673–74 (Kennedy, J., dissenting). Nor do I find convincing the Court’s invocation of the prudential rule against third-party standing. *Id.* at 2663. The rule against third-party standing (where I am prohibited from suing to vindicate *your* harm) is justified because, if you have been harm, you are in the best position to decide whether to sue; if I sue on your behalf when you have decided not to sue, I am an officious intermeddler. Here, it is true that state officials decided not to sue, and if the Proponents claim to represent those interests, the third-party standing doctrine might apply. But the Proponents—endorsed by the California Supreme Court—claimed to represent the People of California, and the People, as the initiative and referendum system reflects, are not coextensive with California’s elected officials.

120. *Id.* at 2669 (Kennedy, J., dissenting).

121. *Id.* (quoting *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993)).

limited to state officials or officially appointed agents.<sup>122</sup> But as Justice Kennedy points out, “what the Court deems deficiencies in the proponents’ connection to the State government, the State Supreme Court saw as essential qualifications to defend the initiative system.”<sup>123</sup> Similarly, “[t]here are reasons . . . why California might conclude that a conventional agency relationship is inconsistent with the history, design, and purpose of the initiative process.”<sup>124</sup> Thus the Court ignores “[t]he very object of the initiative system[:] to establish a lawmaking process that does not depend upon state officials.”<sup>125</sup>

Justice Kennedy emphasizes that the majority’s opinion is bad not only for California but also for all states that use ballot initiatives and referenda as means of making law. As I have argued elsewhere, “[t]o permit ballot initiatives to change the law by direct democratic vote, but to have no mechanism by which those initiatives can be defended in court, makes hollow the promise of direct democracy.”<sup>126</sup>

Even the Court’s rejection of the qui tam and assignment cases as relevant precedents undermines state interests. Though the Court doesn’t say much on those cases, it appears to believe that those cases are justified by historical practice under which proponent standing is too new to qualify.<sup>127</sup> But ballot initiative systems were a reaction to changes wrought by the Industrial Revolution and the incredible political corruption of the Gilded Age,<sup>128</sup> and thus any justiciability questions arising from them cannot have a historical pedigree dating back to the Founding.

The Court justifies its refusal to give weight to California’s interpretation by stating that “standing in federal court is a question of

---

122. *Id.* at 2664–65, 2666–67 (majority opinion). The Court makes much of its earlier decision in *Karcher v. May*, 484 U.S. 72 (1987), where *former* state legislators were held to lack standing to pursue an appeal because New Jersey’s statute authorized only the *current* holders of offices to appear in court. The Court makes the leap to stating that those who represent a state *must* be current officeholders, no matter what the state statute provides. That is not respectful of state choices.

123. *Id.* at 2670 (Kennedy, J., dissenting).

124. *Id.* at 2671.

125. *Id.* at 2670.

126. Elliott, *supra* note 48, at 571; see also Maxwell A. Stearns, *Grains of Sand or Butterfly Effect: Standing, the Legitimacy of Precedent, and Reflections on Hollingsworth and Windsor*, 65 ALA. L. REV. 349, 396 (2013) (“[I]f a state has an initiative process, it must be permitted to establish an external means of defending the outcome of that lawmaking process, which, after all, is designed precisely to bypass elected public officials in policymaking, when those officials are unwilling to defend the challenged law.”).

127. *Hollingsworth*, 133 S. Ct. at 2665.

128. William B. Fisch, *Constitutional Referendum in the United States of America*, 54 AM. J. COMP. L. 485, 494 (2006) (“Citizen initiative as a direct means of proposing legislation or constitutional amendment was next publicly advocated in its modern form by reformers in South Dakota and New Jersey in 1885, responding to social and economic upheavals brought about by the Industrial Revolution and to widespread corruption of the legislative process of many if not most states that prevented the adoption of remedial laws.”).

federal law, not state law.”<sup>129</sup> But federalism is also a question of federal law.<sup>130</sup> To quote the Court’s already notorious voting rights decision of 2013,

Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. This allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. But the federal balance is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.<sup>131</sup>

Thus, the Court cannot sweep away California’s interests in its own election law as a state law issue because federalism—a part of federal law—protects those interests. When standing doctrine and federalism present incompatible answers, there is no ready way to choose, and the Court cannot simply ignore California’s interests by waving the Article III banner.

To be sure, the Court may have been vindicating federalism concerns more broadly by leaving the merits of marriage equality to the states for a while longer. Thus federalism interests do not tug only in the direction of protecting California’s initiative system: the states more generally also may have an interest in working through issues of social policy as our fifty laboratories of democracy.<sup>132</sup> It is no accident that the Court’s opinion begins with the sentence: “The public is currently engaged in an active political debate over whether same-sex couples should be allowed to marry.”<sup>133</sup> Justice Kennedy also acknowledges that “the Court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject.”<sup>134</sup> But, as Justice Kennedy goes on to say, “[I]t is

---

129. *Hollingsworth*, 133 S. Ct. at 2667.

130. See, e.g., Hershkoff, *supra* note 3, at 1897–1901; *id.* at 1906 (“[F]ederalism [is] a key motivation for restricting Article III power.”).

131. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (internal quotation marks and citations omitted).

132. “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

133. *Hollingsworth*, 133 S. Ct. at 2659.

134. *Id.* at 2674 (Kennedy, J., dissenting).

shortsighted to misconstrue principles of justiciability to avoid that subject.”<sup>135</sup>

There is also the institutional role of the Court itself. It is widely thought that some members of the Court feared being caught in the political debate over marriage equality and suffering the same kinds of critiques that followed *Roe v. Wade*.<sup>136</sup> And as Professor Stearns argues in this volume, the social choice analysis of standing (which, he argues, permits the Court to prevent private litigants from manipulating the path that doctrine takes) may justify this course:

Perhaps some who joined the *Hollingsworth* majority thought that the case for a constitutional right to same-sex marriage would be strengthened if the precedents . . . continued to develop incrementally . . . The irony, of course, is that this implicit suggestion of judicial modesty . . . came at the price of two seemingly problematic, and frankly non-modest, standing decisions.<sup>137</sup>

The Court also has the institutional role of protecting minorities from the depredations of the majority: “[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”<sup>138</sup> When the state initiative system has been used, as here, to oppress a historically excluded minority, the plaintiffs were obviously correct to seek the assistance of the federal courts. One could further argue that those plaintiffs, and others like them, need the Supreme Court—in its institutional role as overseer of federal law *and* protector of discrete and insular minorities—to confirm the district court’s opinion under the federal Constitution.

So we have a number of considerations that should go into the determination of whether the Supreme Court had jurisdiction to hear the appeal: the federalism interests of California and other initiative and referendum states, other states wishing to weigh in on marriage equality, the institutional interests of the Supreme Court, and the liberty and equality interests of the plaintiffs and others similarly situated. To squeeze all these interests into the tripartite test of standing seems nonsensical, as it often

---

135. *Id.*

136. *But see* Adam Liptak, *Court Is ‘One of Most Activist,’ Ginsburg Says, Vowing to Stay*, N.Y. TIMES, Aug. 25, 2013, at A1, available at 2013 WLNR 21101236 (Justice Ginsburg stating her belief that the Court had moved too fast in *Roe* but denying any connection between *Roe* and *Hollingsworth*).

137. Stearns, *supra* note 126, at 397.

138. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

does.<sup>139</sup> A prudential doctrine of abstention, which I have advocated elsewhere, would allow all these concerns to be addressed explicitly in the Court's determination of its jurisdiction.<sup>140</sup> At a minimum, however, *Hollingsworth* shows that the Court should incorporate some notion of federalism into its standing analysis, just as it justifies that doctrine by reference to separation of powers.

The Court's analysis in *Hollingsworth*, I think, also shows that it has taken a major wrong turn in insisting that standing be present at all stages of litigation.<sup>141</sup> By far the better answer comes from a recognition that Fletcher made in his 1990 piece: Article III makes the Supreme Court the ultimate arbiter of federal law questions.<sup>142</sup> Here, a federal trial court with unquestioned jurisdiction struck down a state constitutional amendment under the federal Constitution. That federal law question should be within the appellate jurisdiction of the Supreme Court.<sup>143</sup> That Court might abstain for prudential reasons, but there is no need to spend pages and pages on a standing inquiry.

## CONCLUSION

Standing "is built on a single basic idea—the idea of separation of powers."<sup>144</sup> But, as Judge Fletcher, Professor Hessick, and I have shown, standing also has a role in maintaining the proper spheres of activity for the federal and state governments. A proper view of federalism standing, such as that taken by Justice Kennedy, would have found standing for the Proponents. The *Hollingsworth* Court instead used standing to diminish the states, and *Hollingsworth* will only add to the confusing morass that—despite then-Professor Fletcher's efforts a quarter-century ago—is Article III standing doctrine.

---

139. See generally Elliott, *supra* note 2 (showing that standing is made to perform many functions to which it is totally unsuited).

140. Elliott, *supra* note 2, at 516 (arguing for a prudential abstention doctrine to replace much of current standing doctrine so that courts can "more intelligibl[y] and thus more defensibl[y]" pursue standing's goals).

141. Already, L.L.C. v. Nike, Inc., 133 S. Ct. 721 (2013).

142. Fletcher, *supra* note 4, at 283.

143. See Elliott, *supra* note 85.

144. Allen v. Wright, 468 U.S. 737, 752 (1984).