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NOTE: "Standing" in the Way of Equality? The Myth of Proponent Standing and the Jurisdictional Error in *Perry v. Brown*

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Keywords

Same-sex marriage, Appellate procedure, Jurisdiction

NOTE

“STANDING” IN THE WAY OF EQUALITY? THE MYTH OF PROPONENT STANDING AND THE JURISDICTIONAL ERROR IN *PERRY V. BROWN*

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INTRODUCTION

February 7, 2012 was a triumphant day for marriage equality

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activists. Relying upon the precedent set forth in *Romer v. Evans*,¹ the U.S. Court of Appeals for the Ninth Circuit invalidated a California initiative restricting marriage to opposite-sex couples in *Perry v. Brown*² (*Perry VIII*). Declaring that the initiative, Proposition 8, deprived same-sex couples of a “societal status that affords dignity to [same-sex] relationships” by barring recognition of those relationships as “marriage,”³ the court concluded that “the People of California violated the Equal Protection Clause” by passing the initiative.⁴ To do so, the court first determined whether its jurisdiction was properly invoked in the appeal; its analysis centered on the question of standing.⁵ The court concluded that the proponents had standing, based largely on a theory that initiative proponents were upholding the integrity of the initiative process.

Whatever the merits of the equal protection claim of *Perry VIII* may be,⁶ the Ninth Circuit erred by upholding the district court’s invalidation of the initiative on substantive grounds. This Note argues that the federal appellate court lacked jurisdiction because the appellants, proponents of Proposition 8, lacked standing. In doing so, it argues that the federal appellate court erred in relying upon the California Supreme Court’s answer to the certified question of jurisdiction in *Perry v. Brown*⁷ (*Perry VII*). The state court’s decision essentially opined that the proposition’s proponents had Article III standing by virtue of state constitutional law conferring upon initiative sponsors a right to defend their own initiatives should the state executive abandon that charge.⁸

Part I discusses the finding of defender-proponent standing as

1. 517 U.S. 620 (1996).

2. 671 F.3d 1052 (9th Cir. 2012). Due to the lengthy history of this litigation, this Note follows the chronological designations of the U.S. Court of Appeals for the Ninth Circuit in its substantive opinion in *Perry VIII*.

3. *Id.* at 1092.

4. *Id.* at 1096.

5. *See id.* at 1070 (noting that the question of standing had been the jurisdictional issue that “prolonged [the court’s] consideration of [the *Perry*] case”).

6. As there are myriad writings that discuss the equal protection implications of same sex marriage, this Note is restricted solely to a discussion on standing. For a thorough discussion of the substantive constitutional claims, see Monte Neil Stewart et al., *Marriage, Fundamental Premises, and the California, Connecticut, and Iowa Supreme Courts*, 2012 BYU L. REV. 193, criticizing state court opinions upholding a right to same-sex marriage; and Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471, 489 (2012), arguing that “adherence to constitutional principle and respect for the fundamental dignity of all persons dictate a clear result”: the recognition of same-sex marriage.

7. 265 P.3d 1002, 1006 (Cal. 2011).

8. *See id.* at 1021 (acknowledging the “reasonable debate” that surrounds the question of whether the sponsors of successful initiatives have a distinct interest in defending the sponsored law when it is challenged in California courts and finding no case law preventing the recognition of such an interest).

articulated by the California Supreme Court and adopted by the Ninth Circuit; in addition, it also discusses the case law establishing limits on standing relying solely upon injuries to the sovereign state. Part II contends that non-governmental officials and entities—even ballot sponsors—cannot vindicate the interests of the state because such interests are nontransferable without an injury-in-fact and are unique to the sovereign and its agents. This Note concludes by asserting that, once a ballot initiative becomes law, a proponent cannot rely on the institutional injury to the initiative process and must show some other unique, particularized interest or injury-in-fact to defend the law in federal court.⁹

I. BACKGROUND

On November 4, 2008, California voters approved Proposition 8, a statewide referendum which amended the state constitution and vitiated a previously-recognized right of same-sex couples to marry.¹⁰ Two same-sex couples, comprised of Kristin Perry, Sandra Stier, Paul Katami, and Jeffrey Zarrillo, filed suit in the U.S. District Court for the Northern District of California, seeking a preliminary injunction invalidating the initiative-turned-law as unconstitutional.¹¹ During the district court’s consideration of the case, a group of Proposition 8 sponsors filed a motion to intervene;¹² the trial court subsequently granted the motion.¹³

9. Whether the proponents of Proposition 8 would have had individual standing is beyond the scope of this Note. For an extensive analysis of individuated standing in the *Perry* case, see Heather Elliott, *Standing Lessons: What Can We Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 573–74 (2012), concluding that while the proponents of Proposition 8 would have difficulty establishing a harm and a stake sufficient for Article III standing, the Court would nevertheless recognize “special judicial solicitude” for those types of parties; and Sara Rappaport, Comment, *California Notwithstanding: Why the Ninth Circuit Erred in Following the California Supreme Court’s Grant of Standing to the Proponents of Proposition 8*, 21 AM. U. J. GENDER SOC. POL’Y & L. (forthcoming 2012), analyzing individual standing in the *Perry* line of cases through the scope of the test outlined in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and the generalized grievance inquiry.

10. *Perry VIII*, 671 F.3d at 1067; see also CAL. CONST. art. I, § 7.5 (recognizing marriages between a man and a woman as exclusive in the State of California). See generally Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357 (2009) (explaining the history and ramifications of Proposition 8).

11. *Perry v. Schwarzenegger (Perry IV)*, 704 F. Supp. 2d 921, 991–95 (N.D. Cal. 2010), *aff’d*, 671 F.3d 1052 (9th Cir. 2012).

12. Proposed Intervenor’s Notice of Motion & Motion to Intervene, & Memorandum of Points & Authorities in Support of Motion to Intervene at 1, *Perry IV*, 704 F. Supp. 2d 921 (No. 09-CV-2292 VRW), 2009 WL 1499309.

13. Order Granting Motion to Intervene, Continuing Hearing on Preliminary Injunction in Favor of a Case Management Conference on 7/2/2009 at 10 AM, *Perry IV*, 704 F. Supp. 2d. 921 (No. 09-CV-2292 VRW).

The district court agreed with the plaintiffs, holding that the amendment to the state constitution violated the Equal Protection Clause by “enshrin[ing] . . . the notion that opposite-sex couples are superior to same-sex couples.”¹⁴ In doing so, the district court concluded that “California has no interest in discriminating against gay men and lesbians.”¹⁵ With the district court denying a stay of its ruling,¹⁶ the proposition’s proponents appealed the trial court’s decision and requested a stay from the Ninth Circuit, which the court granted almost immediately.¹⁷ In the meantime, the state government declined to defend the validity of the law.¹⁸ In its grant of a stay, the Ninth Circuit directed the proponents to discuss “why [their] appeal should not be dismissed for lack of Article III standing.”¹⁹

The concept of standing has been described as a “complicated specialty of federal jurisdiction.”²⁰ The modern principles of standing were iterated in the Court’s decision in *Lujan v. Defenders of Wildlife*,²¹ but the application of those foundational standards has been inconsistent and controversial, especially in cases where standing doctrine has been extended to recognize dubiously abstract injuries and cases.²² The *Perry VIII* court broached an even newer frontier: one where the party defending the case on the state’s behalf is an admittedly uninjured one, wholly dependent upon the injury inflicted upon the interests of a sovereign whose executive has declined to vindicate the law.²³

14. *Perry IV*, 704 F. Supp. 2d at 1003.

15. *Id.*

16. *Perry v. Schwarzenegger*, 702 F. Supp. 2d 1132, 1138 (N.D. Cal. 2010).

17. *Perry v. Schwarzenegger*, No. 09-CV-2292 VRW, 2010 WL 3212786, at *1 (9th Cir. Aug. 16, 2010).

18. See Aaron Glantz, *Kamala Harris Won’t Defend Prop. 8*, BAY CITIZEN (Dec. 2, 2010, 11:58 AM), <http://www.baycitizen.org/blogs/pulse-of-the-bay/kamala-harris-wont-defend-prop-8/> (reporting on Attorney General-elect Kamala Harris’s victory speech and noting her quote that she “will not defend Prop. 8”).

19. *Perry v. Schwarzenegger*, 2010 WL 3212786, at *1.

20. *United States ex rel. Chapman v. Fed. Power Comm’n*, 345 U.S. 153, 156 (1953).

21. 504 U.S. 555, 560–61 (1992) (establishing the tripartite test for standing, consisting of: an injury-in-fact, causation, and redressability).

22. Compare *FEC v. Akins*, 524 U.S. 11, 21, 24–25 (1998) (recognizing a particularized, “informational injury” that arises from the plaintiffs’ inability to obtain information-lists), with *id.* at 34–35 (Scalia, J., dissenting) (criticizing the *Akins* majority for eroding the paramount requirement of standing that particularized grievances are present, as opposed to generalized ones).

23. See *Perry VIII*, 671 F.3d 1052, 1074 (9th Cir. 2012) (deeming questions as to the personal injury suffered by initiative proponents irrelevant for standing purposes as only the “authority to assert the *State’s* interest in the initiative’s validity” was at stake (citation omitted)).

A. *The Order of Battle: The Ninth Circuit’s Certified Question and the California Supreme Court’s Response*

Before analyzing the merits of the Proposition 8 proponents’ appeal, the Ninth Circuit certified a threshold question of standing to the California Supreme Court: “[w]hether under Article II, Section 8 of the California Constitution,” an official initiative proponent who possesses a “particularized interest in the initiative’s validity” may defend the initiative’s constitutionality when state officials charged with such defense have declined to do so.²⁴

The California Supreme Court responded by declaring that the proponents had standing for the appeal.²⁵ The state court began its inquiry by noting that the requisite elements of Article III standing could be satisfied by an interest “to defend a challenged voter-approved initiative measure in order ‘to guard the people’s right to exercise initiative power.’”²⁶ The California court deduced this interest from the origins of the initiative power as enshrined in the California Constitution, which was designed to allow for the adoption of measures that elected officials declined to propose and enact into law.²⁷ A faithful defender of successful initiatives was “essential to the integrity of the . . . process,”²⁸ and the state’s refusal to defend such laws meant that the California Constitution impliedly authorized the proponents of any successful initiative to step in the stead of the state.²⁹

Mindful of the unique interests of initiative proponents, the California Supreme Court began its federal standing analysis by expressing that it did not intend to “decide any issue of federal law” and acknowledging that the question of standing was ultimately a federal matter.³⁰ The court did, however, surmise that in instances where federal standing depended upon the sovereign state’s defense of its laws, the U.S. Supreme Court’s decision in *Karcher v. May*³¹ harmonized the federal standing inquiry with state law; in other words, the California high court concluded that federal courts look to “whom the state has authorized to assert the state interest in the

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

25. *Perry VII*, 265 P.3d 1002, 1006 (Cal. 2011).

26. *Id.*

27. *Id.* at 1016.

28. *Id.* at 1006.

29. *See id.* at 1006–07 (concluding that as initiative proponents are “the most obvious and logical persons to assert the state’s interest in the initiative’s validity on behalf of the voters who enacted the measure,” they are able to “step in to assert the state’s interest” in the event that state officials fail to do so).

30. *Id.* at 1011.

31. 484 U.S. 72 (1987).

validity of the challenged measure.”³² Thus, the dispositive jurisdictional question in *Perry VII* was whether state law provided such authorization to non-state actors.³³

The California high court found such authorization within the penumbra of the state constitution.³⁴ While the state constitution did not itself expressly authorize proponent representation of state interests in the absence of a government-sponsored defense of initiatives,³⁵ the court emphasized that the absence of a party to vigorously defend the law would risk jeopardizing the integrity of the initiative process. Thus, not only were such proponents proper parties to defend the legality of otherwise-abandoned initiatives under California state law,³⁶ such a result was appropriate as a matter of sound judicial policy.³⁷

Notwithstanding the central jurisdictional question, the state supreme court made two additional and equally important observations regarding standing. First, the court all but acknowledged that the proponents likely did not possess an individuated injury-in-fact required for individual standing.³⁸ In addition, the court attempted to draw a distinction between proponent standing and the standing attendant to private attorney general causes of action: private attorney general causes of action were *affirmative* authorizations to “act . . . on behalf of the public and

32. *Perry VII*, 265 P.3d at 1011.

33. *See id.* at 1013 (emphasizing the absence of state law authorization for vindicators of state interests in prior cases); *see also* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (observing that there was “no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State”).

34. In finding that proponent standing was recognized by the California Constitution, the state supreme court stressed the “nature and purpose” of the initiative process rather than the face of the provision itself. *See Perry VII*, 265 P.3d at 1006. Thus, it would be fitting to conclude that while proponent standing under California law does not derive directly from the Constitution’s initiative process, it is a derivative jurisdictional element that emanates from the initiative provision.

35. *See* CAL. CONST. art. II, § 8 (establishing and outlining the power of state electors to propose and approve or reject amendments to the state constitution).

36. *See Perry VII*, 265 P.3d at 1022 (stating that when state officials decline to defend the constitutionality of successful initiatives, California courts should “ordinarily permit the official proponents of an initiative measure to intervene in an action challenging the validity of the measure in order ‘to guard the people’s right to exercise initiative power’” (citing *Bldg. Indus. Ass’n v. City of Camarillo*, 718 P.2d 68, 75 (Cal. 1986))).

37. *See id.* at 1016 (reciting the principle of California judicial policy to protect the initiative power by providing a liberal construction of it so that “the right be not improperly annulled”).

38. *See id.* at 1021 (explaining that once a measure has been enacted as a constitutional amendment, “it is arguably less clear that the official proponents possess a personal legally protected stake that differs from that of [a generalized grievance]”); *see also id.* at 1015 (declining to engage in an individuated inquiry for proponents of a voter-approved initiative).

institute proceedings to enforce a public right,” whereas proponent standing was premised on “*passive*, defensive authority.”³⁹ Paradoxically, while taking pains to distinguish the private attorney general doctrine from proponent standing, the court simultaneously justified its opinion by reasoning that the private attorney general doctrine, recognized under state law, reinforced the notion that initiative proponents could satisfy Article III by relying on state law.⁴⁰ After a lengthy exposition as to the nature of the initiative process, the California court concluded that Proposition 8’s proponents likely had standing sufficient to satisfy Article III.⁴¹

B. *The Ninth Circuit’s Opinion*

Upon receiving the opinion of the California Supreme Court, the Ninth Circuit agreed with the decision *in toto*.⁴² The federal appellate court adopted the logic of the California court and countenanced it on the premise that “as independent sovereigns, [states may] decide for themselves who may assert their interests and under what circumstances, and . . . bestow that authority accordingly.”⁴³ As a result, the Ninth Circuit deemed the California high court’s answer to the certified question as dispositive of the jurisdictional issue: the principles of federalism compelled the federal court to recognize all legitimate vindicators of the state’s interests *under California law* as having standing before the federal courts.⁴⁴ So long as the state itself has suffered an injury sufficiently cognizable to confer standing and the proponent party possesses authorization under state law, the Ninth Circuit concluded that the initiative proponents could take the place of the state in defense of Proposition 8’s validity.⁴⁵

39. *Id.* at 1030 (emphasis added).

40. *See id.* (explaining that California’s private attorney general doctrine exists to promote the public interest “by bringing lawsuits to enforce state constitutional or statutory provisions in circumstances in which enforcement by public officials may not be sufficient”).

41. *Id.* at 1025.

42. *Perry VIII*, 671 F.3d 1052, 1072–73 (9th Cir. 2012).

43. *See id.* at 1071.

44. *See id.* at 1071–72 (deferring to the “[p]rinciples of federalism” that prohibited federal courts from “tell[ing] a state who may appear on its behalf”). Interestingly enough, the standing question in *Perry* led to a case of mutual deference. The California Supreme Court deferred to the ultimate judgment of the Ninth Circuit on the question of federal law; the Ninth Circuit, in turn, essentially deferred to the state court. *Compare Perry VII*, 265 P.3d at 1011 (“[W]e fully recognize that the effect that this opinion[] . . . may have on the question of standing under federal law is a matter that ultimately will be decided by the federal courts.”), *with Perry VIII*, 671 F.3d at 1072 (“Who may speak for the state is, necessarily, a question of state law. . . . We are bound to accept the California court’s determination.”).

45. *Perry VIII*, 671 F.3d at 1072.

The federal appellate court also acknowledged, albeit indirectly, that the proponents lacked *individual* standing to defend the law's validity.⁴⁶ It did so in part by declining to inquire as to whether the proponents had third-party standing;⁴⁷ had the court done so, such an inquiry would be tantamount to admitting that the proponents could not rely on sovereign-conferred standing.⁴⁸ But it is worth noting that if individual standing did exist for the *Perry* proponents, the doctrine of constitutional avoidance would have obligated the court to decide the standing issue on narrower constitutional grounds;⁴⁹ in other words, the Ninth Circuit was obligated by the doctrine of constitutional avoidance⁵⁰ to rely upon the well-established individual injury analysis of *Lujan*⁵¹ rather than enter into the uncharted frontier of extending sovereign standing to initiative proponents if both assertions of standing were tenable.⁵² Having failed to do so, the court impliedly admitted that the former did not exist.

Instead, the Ninth Circuit brusquely dismissed the need to assess whether the proponents had a personal injury that could lend itself to Article III standing.⁵³ Because of the state's sovereign interest in defending its laws and the role of initiative proponents as substitutes

46. See *id.* at 1074 (explaining that the proponents need only have the "authority to assert the interests of the State of California, rather than any authority that they might have to assert particularized interests of their *own*").

47. See *id.* at 1073–74 (noting that the third-party standing inquiry was unnecessary, as a proponent defending an otherwise abandoned measure "speaks to the court *as* the State, not as a third party").

48. See *id.* (asserting that the requirements of third-party standing are not relevant because the proponents of Proposition 8 have no more need to satisfy these requirements than state executive officers otherwise would).

49. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring) (listing a series of constitutional avoidance principles, one of which includes the notion that a rule of constitutional law will be formulated no "broader than is required by the precise facts to which it is to be applied" (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885))).

50. Constitutional avoidance is generally a canon of statutory interpretation. See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."). Nevertheless, it is also a principle of jurisprudence where a federal court declines to "decide a constitutional question if there is some other ground upon which to dispose of [the] case." See *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (*per curiam*). Using the logic of the latter principle, if a court can rely upon an established means to dispose of a standing question, as opposed to interpreting a new means of recognizing standing, the court should proceed by the well-established analytical path.

51. 504 U.S. 555 (1992).

52. See *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring) (emphasizing that a federal court should not decide new constitutional questions "unless absolutely necessary" to decide the case).

53. *Perry VIII*, 671 F.3d at 1072.

for state officers, the court reasoned that there was no need for such discussion.⁵⁴ Consequently, the federal appellate court concluded that Proposition 8’s proponents possessed standing in accordance with Article III, bypassing the individuated standing question.⁵⁵

C. Karcher, *Arizonans for Official English*, and the Implied Limitations on State-conferred Standing

Underpinning the decisions of the Ninth Circuit and the California Supreme Court are the two seminal cases from the U.S. Supreme Court involving an attempt to vindicate the state’s interest by someone other than the sovereign’s executive agents: *Karcher v. May*⁵⁶ and *Arizonans for Official English v. Arizona*.⁵⁷ In *Karcher*, the Supreme Court considered whether the former presiding officers of the New Jersey legislature could continue their defense of a state law that the state executive had initially refused to defend after the legislators lost their positions of high office in the state legislature.⁵⁸ The Court held in the negative, reasoning that the legislature could only be represented by officers acting in their official capacity,⁵⁹ and the former presiding officers could not rely merely on their status as legislators to invoke the Court’s jurisdiction.⁶⁰ The Court’s decision in *Karcher* not only reaffirmed the now well-established rejection of legislative standing,⁶¹ but also suggested that even possessing the color of state authority, i.e., status as legislators, is insufficient for taking the sovereign’s stead for purposes of Article III standing.⁶² An uninjured party defending the state’s interests must be some official emanation thereof.⁶³

54. *Id.*

55. *Id.* at 1075.

56. 484 U.S. 72 (1987).

57. 520 U.S. 43 (1997).

58. *Karcher*, 484 U.S. at 74.

59. *See id.* at 77–78 (explaining that Karcher and Orechio’s loss of their positions as “presiding legislative officers” meant that “[t]he authority to pursue the lawsuit on behalf of the legislature belongs to those who succeeded [them] in office”).

60. *See id.* at 81 (concluding that individual legislator standing was insufficient to grant authority to pursue the appeal on behalf of the legislature); *see also id.* at 84–85 (White, J., concurring in the judgment) (clarifying the scope of the Court’s opinion by noting that the question of whether Karcher could have invoked legislator standing was tabled for another day).

61. *See id.* at 84–85 (White, J., concurring in the judgment) (noting the Court’s unwillingness to discuss legislative standing on the merits); *see also* *Raines v. Byrd*, 521 U.S. 811, 829–30 (1997) (holding that challenges to legislation based on status as members of Congress did not satisfy Article III, as the perceived injuries were to the institutional whole and not to the individual legislators themselves).

62. *Cf. Karcher*, 484 U.S. at 81 (holding that Karcher and Orechio’s ability to pursue an appeal dissipated with their loss of legislative high office and their return to their status as “individual legislators”).

63. *Cf. id.* at 77 (suggesting that the ability to defend the claim on behalf of the

In *Arizonans for Official English*, the Court expanded the holding in *Karcher* to include initiative sponsors, rejecting the notion that the financial and political sponsors of a statewide initiative had “a quasi-legislative interest in defending the constitutionality of the measure they successfully sponsored.”⁶⁴ The Court’s rationale in so holding was three-fold: first, the sponsors were not democratically elected representatives of the people; second, Arizona law did not recognize the sponsors as “agents of the people of Arizona to defend [the validity of laws] in lieu of public officials”; and third, even if state authorization was given to initiative proponents, the Court was unsure as to whether they were “Article-III-qualified defenders of the measures they advocated.”⁶⁵

In both *Karcher* and *Arizonans for Official English*, neither party was injured by the respective states’ refusal to defend the challenged law.⁶⁶ Thus, in both instances, the defenders of the law relied solely upon the sovereign’s interest in defending its own laws, claiming that the injury to the sovereign in itself was enough.⁶⁷ But each instance was marked by a rejection by the Court of the non-state party’s assertion of standing; in turn, three principles of jurisdiction were impliedly revealed: first, one must actually be an official emanation of the state to represent the state’s interests as an uninjured defender; second, lawful authorization by the state is required to represent its interests; and third, the question of whether a litigant has Article III standing is *separate* from the inquiry as to whether a state has properly and discernibly conferred its interests to a non-state party.⁶⁸

II. ANALYSIS

The standing requirement of Article III is an axiomatic component

state rested with whoever officially held the legislative high office charged with representing the interests of the entire legislature).

64. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (declining to adopt a proposed corollary to *Karcher* where sponsorship of an initiative is a sufficient “stake” in a controversy to establish Article III standing).

65. *Id.*

66. See *id.* at 57 (explaining the district court’s observation that the arguments made by *Arizonans for Official English* (AOE) as to the expenses “spent to promote the ballot initiative did not suffice to establish standing *to sue or defend* in a federal tribunal” (emphasis added)); *Karcher*, 484 U.S. at 79 (noting that the district court permitted *Karcher* and *Orechio* to intervene solely in a *representative* capacity).

67. See *Arizonans for Official English*, 520 U.S. at 65 (summarizing AOE’s assertion of a “quasi-legislative interest in defending the constitutionality of the measure they successfully sponsored”); cf. *Karcher*, 484 U.S. at 78 (rejecting the argument that representation in an individual legislative capacity was sufficient to provide Article III standing).

68. See *Arizonans for Official English*, 520 U.S. at 65 (explaining that an intervenor in a cause of action, seeking to pursue an appeal on its own, must independently meet the requirements of Article III).

of federal jurisdiction;⁶⁹ however, it is still an “amorphous,” sometimes ill-defined concept that is wrought with “complexities and vagaries.”⁷⁰ There are arguably many ways to reach the same jurisdictional mountaintop.⁷¹

The modern standing inquiry requires, in part, that there be an injury-in-fact that is “concrete and particularized,” and “actual or imminent, not ‘conjectural or hypothetical.’”⁷² As a corollary to this principle, states are presumed to have standing to defend the validity and constitutionality of their laws.⁷³

While it is true that states may “decide for themselves who may assert their interests,”⁷⁴ the state’s conferral of its sovereign interest must still conform to the demands of Article III.⁷⁵ Thus, the defender of a state interest must be the state itself, a designated agent of the state or an emanation thereof,⁷⁶ or a non-state actor able to demonstrate an injury-in-fact.⁷⁷

69. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (describing Article III’s standing requirement as a “bedrock requirement”).

70. *Flast v. Cohen*, 392 U.S. 83, 98 (1968).

71. See generally Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131 (2009) (providing an overview of the evolution of standing in the federal courts).

72. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The two other prongs of the standing inquiry are causation and redressability, which are not necessarily at issue in this particular case.

73. See *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (reaffirming the principle that “a State has standing to defend the constitutionality of its statute”).

74. *Perry VIII*, 671 F.3d 1052, 1071 (9th Cir. 2012); see also *Karcher v. May*, 484 U.S. 72, 82 (1987) (relying upon state case law that permitted the New Jersey Legislature to defend the state’s interests in certain instances (citing *In re Forsythe*, 450 A.2d 499, 500 (N.J. 1982) (per curiam))).

75. See *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 804 (1985) (explaining that Article III standing is a federal question that is not dependent upon state court standing); see also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (articulating that “the federal judiciary is supreme in the exposition of the law of the Constitution” and that this principle is “a permanent and indispensable feature of our constitutional system”).

A state defending its own laws acquires standing automatically under Article III and thus does not need to show an injury-in-fact; the injury to its sovereignty is simply enough. See *Diamond*, 476 U.S. at 62 (explaining that states possess standing in the defense of their own laws). Those other than the state seeking to vindicate the state’s interest must show Article III standing by their own means and cannot rely on the sovereign’s interest alone. See *infra* Part II.A (explaining why *Karcher* and *Arizonans for Official English* foreclose the possibility of a state transferring its interest to an uninjured non-state actor); *infra* Part II.B (contending that *Stevens* further forecloses an uninjured party’s reliance on the sovereign injury, absent historical justification).

76. See, e.g., *Ex parte Young*, 209 U.S. 123, 154 (1908) (acknowledging the authority of the attorney general to enforce a railroad rate statute as part of his general powers pursuant to his service as a state officer). The phrase “emanation of state” is a catch-all phrase used to include all state agencies and other entities that would bear the imprimatur of state government. While the state executive is typically charged with the prosecution of laws, the Court’s decision in *Virginia Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632 (2011), suggests that other elements

Instead of adhering to these principles, the Ninth Circuit took the state constitution's implied authorization of proponent standing and summarily declared such authorization to be conclusive as to the standing question.⁷⁸ In doing so, the court failed to properly constrain its application of sovereign standing and declined to engage in an individuated standing analysis which would satisfy Article III, thus improperly ruling on the merits of *Perry VIII*.

A. *A Sovereign's Ability to Designate a Defender of Its Interests Should Be Limited by an "Emanation of State" Principle*

While a state may designate a party to champion its interests in federal court, that party nevertheless must meet the rigors of Article III's case-or-controversy requirement.⁷⁹ A state acquires standing solely by the virtue of it being a sovereign in defense of its laws;⁸⁰ the sovereign's agents similarly acquire such standing only in their official capacities, as the state has no choice but to speak through its officers.⁸¹ Thus, no individuated injury-in-fact is necessary for the state itself, its agents, or an emanation or other instrument of the sovereign.⁸² However, if the party defending the state law on appeal cannot be recognized as an agent or emanation of the sovereign, the party must demonstrate an injury-in-fact sufficient to satisfy Article III's requirements in order to vindicate the state's interests.⁸³

The Supreme Court's opinion in *Arizonans for Official English* is

of the state government not distinctly part of the Executive could nonetheless possess a sovereign's interest and have Article III standing. *See id.* at 1636–38 (recognizing that a state agency, with a board comprised of executive and legislative appointees, could file a lawsuit against the state executive without impinging on fundamental concepts of sovereign immunity).

77. *See Diamond*, 476 U.S. at 65 (“Even if there were circumstances in which a private party would have standing to defend the constitutionality of a challenged statute, this is not one of them. *Diamond* is not able to assert an injury in fact.”).

78. *See Perry VIII*, 671 F.3d at 1072 (holding that the California Supreme Court's opinion with respect to state law authorization for proponent standing was binding on the entire jurisdictional question).

79. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (“Standing to sue *or defend* is an aspect of the case-or-controversy requirement.” (emphasis added)); *supra* Part I.C (describing the impact of *Karcher* and *Arizonans for Official English* on standing jurisprudence).

80. *See Diamond*, 476 U.S. at 62–64 (restating the presumption that a state can defend the validity of its own statute when it is a party before the court).

81. *See Ex parte Young*, 209 U.S. at 174 (Harlan, J., dissenting) (noting that “the intangible thing called a state, however extensive its powers,” can only be represented “by and through its officers”).

82. *See supra* notes 74–81 and accompanying text (explaining how an “emanation of state” theory is derived from the principle that a state has standing to defend its own laws).

83. *See infra* notes 88–103 and accompanying text (describing why mere authorization by the sovereign to defend the law does not satisfy Article III's standing requirements).

instructive on two points:⁸⁴ first, a federal court must inquire whether state law *explicitly* authorizes representation;⁸⁵ and second, *notwithstanding the answer to the first query*, the court must inquire whether Article III takes cognizance of the party as a proper vindicator of the state law—in other words, whether an initiative proponent can constitutionally champion the rights of the sovereign.⁸⁶ By accepting the affirmative answer to the first inquiry as determinative of the second, the Ninth Circuit in *Perry VIII* conflated the inquiries as one; in doing so, it failed to satisfy the rigorous demands of Article III.⁸⁷

In other words, a state law’s explicit or implied conferral of litigation authority to an individual only satisfies the first query in *Arizonans for Official English*; the question of whether an authorized defender is “Article III qualified” and whether the state’s authorization is proper under Article III is determined separately by the limitations implied by *Karcher*. Put simply, the two-pronged approach in *Arizonans for Official English* asks two different questions of two different sovereigns: the first prong asks whether the state has given its permission for its interests to be defended by someone else, and the second asks whether the judicial power of the United States recognizes that defender under its own rules of jurisdiction. *Karcher* suggests that Article III allows only the state itself,⁸⁸ its duly-appointed agents,⁸⁹ or an emanation of the state to properly represent the state’s interests without a concrete and particularized injury-in-fact.⁹⁰ Even bearing the appearance of some colorable state authority is not enough.

84. This does not include the Court’s separate inquiry as to whether the proponent is an elected representative; for obvious reasons, this question is not necessary except in *Karcher*-like circumstances where a legislator is involved.

85. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (concluding that state law did not allow for the appointment of initiative sponsors as agents of the state and its people).

86. See *id.* (questioning whether initiative proponents are proper defenders under Article III).

87. See *Perry VIII*, 671 F.3d 1052, 1073 (9th Cir. 2012) (finding the California Supreme Court’s determination in *Perry VII* to be binding and dispositive of the Article III standing question).

88. See *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (explaining that Article III’s case-or-controversy requirement would be presumptively met by a state defending the constitutionality of one of its statutes).

89. See *Arizonans for Official English*, 520 U.S. at 65 (highlighting the lack of “Arizona law appointing [the] initiative sponsors as *agents of the people* of Arizona” (emphasis added)).

90. Cf. *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011) (considering whether an independent state agency outside of the purview of the state executive branch can bypass the sovereign immunity requirement in a suit against a state officer).

In *Karcher*, the Court foreclosed the use of the legislative standing doctrine as a means of allowing the former presiding officers to defend the challenged law.⁹¹ Despite the fact that, as legislators, Karcher and Orechio held some measurable color of state authority, that alone was insufficient⁹²—an *uninjured* party must be some *official* embodiment of the sovereign to represent the state's interests.⁹³ Legislative standing, on the other hand, is a type of *individual* standing that does not rely upon the power or authority of the state: it does not exist because legislators *are* the legislature; rather, it exists to protect a legislator's role within the legislative body as an individual member.⁹⁴ Thus, whatever color of sovereign authority Assemblyman Karcher may have *appeared* to have possessed as a member of the New Jersey legislature was insufficient to stand in the stead of the sovereign in an Article III court.⁹⁵

Mindful of the principle that a state's interests can only be represented in an Article III court by an emanation of the state or an injured non-state party, the Ninth Circuit's suggestion that Proposition 8's proponents were no different from a state attorney general when defending an interest conferred by state statute is puzzling.⁹⁶ As Justice Harlan explained in his dissent in *Ex parte Young*,⁹⁷ a state cannot "appear or be represented or known in any court in a litigated case, except by and through its officers."⁹⁸ Consequently, it is obvious and well recognized that when a state officer enforces a law and takes upon the legal defense attendant to such execution, the officer is acting as both the state and in a personal capacity.⁹⁹

91. *Karcher v. May*, 484 U.S. 72, 81 (1987).

92. *See id.* (rejecting Karcher and Orechio's status as "individual legislators and representatives" as sufficient to confer sovereign standing).

93. *See id.* (emphasizing that the appellants could not act in their official capacities because they no longer held legislative high office).

94. *See Raines v. Byrd*, 521 U.S. 811, 824 (1997) (declining to recognize legislator standing in an instance where the legislators' *individual* ability to vote had not been interfered with); *see also* James A. Turner, Comment, *The Post-Medellín Case for Legislative Standing*, 59 AM. U. L. REV. 731, 748 (2011) (positing that in theory, legislative standing must confront the same hurdles as "traditional" individual standing, while encountering a more burdensome standard in practice).

95. *See Karcher*, 484 U.S. at 78–80.

96. *See Perry VIII*, 671 F.3d 1052, 1074 (9th Cir. 2012) (reasoning that because the Attorney General of California "obviously need not show that she would suffer any *personal* injury as a result of the statute's invalidity" while vindicating a state interest, the same principle must apply to the initiative proponents).

97. 209 U.S. 123 (1908).

98. *Id.* at 175 (Harlan, J., dissenting).

99. *See id.* at 157 (majority opinion) (acknowledging that a state officer can only be enjoined from enforcing an allegedly unconstitutional act if the officer had some responsibility to enforce the act, as the lack thereof would be a poorly disguised attempt to circumvent sovereign immunity by making a state a party by proxy); *see*

The same cannot be said for an initiative proponent;¹⁰⁰ an initiative proponent does not act as an official emanation of the state, but rather in a purely personal capacity, prompted to intervene by an abstract interest of defending the integrity of the initiative process.¹⁰¹ An initiative proponent cannot rightfully contend that he or she is representing the state in some official form.¹⁰² The mere fact that an initiative proponent has been authorized to enforce the law, like the Attorney General, does not make the proponent an enforcer of the state and thus an official emanation thereof. Instead, it only satisfies the first element of the *Arizonans for Official English* inquiry: whether the state has given its permission.¹⁰³ Article III, on the other hand, demands some degree of official capacity, which such proponents do not possess.

Some scholars suggest that intervenor-defendant standing can be demonstrated by “showing a reasonable apprehension of injury from judicial resolution of the plaintiff’s claim, or by establishing a right, conferred by state or federal law, to defend against the plaintiff’s claim.”¹⁰⁴ Such a standard, however, would merely be a variant of the conflation in *Perry VIII*; it accepts that state law authorization is sufficient to establish Article III standing, which contravenes the more meticulous inquiry required by the *Arizonans for Official English* Court.¹⁰⁵ The more reasonable approach is to require the two-pronged inquiry in *Arizonans for Official English*; a more onerous test

also Nathan C. Thomas, Note, *The Withering Doctrine of Ex Parte Young*, 83 CORNELL L. REV. 1068, 1078–79 (1998) (explaining the “legal fiction” of *Ex parte Young* that an “official’s unconstitutional conduct [is] state action for purposes of the Fourteenth Amendment” while “not attributable to the State for purposes of the Eleventh [Amendment]” (quoting *Fla. Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982))).

100. Cf. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (failing to discern any agency principle that would allow AOE to represent the state’s interests in agency).

101. See *Perry VII*, 265 P.3d 1002, 1022 (Cal. 2011) (citing institutional reasons that are protective of the initiative power as cause for recognizing proponent standing to defend a successful initiative).

102. Cf. *Perry VIII*, 671 F.3d 1052, 1071–72 (9th Cir. 2012) (recognizing the unique role of the state attorney general in defending suits against the state but asserting that “states need not follow that approach” and can instead opt to allow for non-governmental defenders to act “*in lieu of public officials*” (emphasis added)).

103. See *Arizonans for Official English*, 520 U.S. at 65 (failing to discern an Arizona law that grants initiative sponsors authority to act as agents of the people).

104. See, e.g., Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1571 (2012) (applying the intervenor-defendant standing model to DOMA and Proposition 8 cases and concluding that Proposition 8 intervenors have standing while DOMA intervenors do not).

105. See *Arizonans for Official English*, 520 U.S. at 65 (expressing two distinct concerns with the AOE’s standing claim: first, that there was no law conferring agency to ballot proponents; and second, whether the initiative proponents in question were “Article-III-qualified defenders”).

for defendant standing remains faithful to the notion that the power of the federal courts should be employed “only ‘in the last resort, and as a necessity.’”¹⁰⁶

B. The Supreme Court’s Decision in Stevens Further Solidifies the Nontransferability of a State Sovereign Interest to an Uninjured Party

Another one of the Court’s more recent standing cases further reinforces the notion that a non-state party cannot rely solely on an injury to a sovereign for purposes of Article III standing, even with the sovereign’s conferral of such an interest. Oddly enough, this observation comes from the Court’s decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.¹⁰⁷ *Stevens* was a *qui tam* action¹⁰⁸ by a relator who claimed that a state natural resources agency was submitting false grant claims to the Environmental Protection Agency.¹⁰⁹ In *Stevens*, the relator did not claim a personalized injury-in-fact; rather, the action was brought solely “in the name of the government,” with financial spoils for a successful prosecution by the relator.¹¹⁰ The relator sought to vindicate an injury-in-fact to the sovereignty of the United States and a proprietary injury to the nation for the fraud itself.¹¹¹ The Court grappled with whether to allow the relator to prosecute such a claim because the power of Article III can only be invoked to remedy injuries to the complaining party, not a third-party beneficiary who is without injury.¹¹²

Despite the lack of an individuated injury-in-fact, the Court held that the relator had Article III standing.¹¹³ It did so *solely* by virtue of a quirk of legal history: *qui tam* actions were recognized under the

106. *Allen v. Wright*, 468 U.S. 737, 752 (1984) (quoting *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)).

107. 529 U.S. 765 (2000).

108. *Qui tam* lawsuits have traditionally been used to “discover and prosecute fraud against the national treasuries.” *Riley v. St. Luke’s Episcopal Hosp.*, 252 F.3d 749, 752 (5th Cir. 2001). Relators are persons who bring civil actions on behalf of the government, in the form of a *qui tam* suit, usually for some form of pecuniary benefit; a relator generally is not personally injured. *See, e.g.*, 31 U.S.C. § 3730(b) (2006) (authorizing relators for *qui tam* actions filed for violations of the False Claims Act); *see also* *Stauffer v. Brooks Bros.*, 619 F.3d 1321, 1325 (Fed. Cir. 2010) (recognizing that a *qui tam* relator may suffer “no injury himself” but may rely exclusively upon a statutory assignment of injury for purposes of standing).

109. *Stevens*, 529 U.S. at 770.

110. *Id.* at 769–70.

111. *Id.* at 771.

112. *See id.* at 771–72 (reiterating that “[t]he [Article] III judicial power exists only to redress or otherwise to protect against injury to the complaining party” (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975))).

113. *See id.* at 777–78 (noting that there was no question as to whether an False Claims Act *qui tam* relator had Article III standing).

common law as a “case or controversy” and thus were cognizable under Article III.¹¹⁴ The Court provided no rationale for how its decision in *Stevens* could be reconciled with the modern *Lujan* analysis, strongly suggesting that *qui tam* cases are *sui generis*,¹¹⁵ validated as “cases and controversies” within the meaning of Article III because of their historical origins.¹¹⁶ Because of their idiosyncratic nature, *qui tam* actions seem to be the exceptions that prove the rule: without the virtue of legal history grandfathering a cause of action into Article III, as in the case of *qui tam* actions, a non-state party must otherwise demonstrate an injury-in-fact apart from the injury to the sovereign the party seeks to vindicate.¹¹⁷ In *Perry VIII*, no such historical quirks are available to justify the state’s conferral of its interest to an uninjured initiative proponent. Thus, a successful initiative proponent’s defense of an unenforced law, lacking a cognizable injury, seems akin to “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”—in other words, the citizen-suit forbidden by *Lujan*.¹¹⁸

Anticipating comparisons to citizen-suit provisions, the California Supreme Court reasoned that the *Perry* proponents were different from those seeking to prosecute a generalized grievance in the form of a citizen-suit because such proponents were fulfilling the role of the state in asserting a “passive, defensive authority” to protect a law they sought to enact through the initiative process.¹¹⁹ The Article III jurisprudence of federal courts, however, does not readily distinguish

114. See *id.* (“We think this history well nigh conclusive with respect to the question before us here: whether *qui tam* actions were ‘cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.’” (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998))).

115. See F. Andrew Hessick, *Standing, Injury In Fact, and Private Rights*, 93 CORNELL L. REV. 275, 280 n.18 (2008) (summarizing the debate between those who consider *qui tam* actions “*sui generis*” and those who consider *qui tam* actions as proving that there is “no restriction whatsoever on private individuals enforcing public rights” (citing Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 175–76 (1992); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 727 (2004))).

116. See Heather Elliott, *Congress’s Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 202 (2011) (contending that the decision in *Stevens* could be explained by “the practice of assigning claims [having] a venerable history” and also arguing that the *Lujan* Court took care to distinguish *qui tam* actions from general citizen suits).

117. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572–73 (1992) (distinguishing *qui tam* actions from instances in which an injury-in-fact would be necessary for Article III standing).

118. See *id.* at 573–74.

119. *Perry VII*, 265 P.3d 1002, 1030 (Cal. 2011).

between plaintiff and defendant standing.¹²⁰ Indeed, the California court made its distinction without support from case law; instead, it was veered towards its decision by the policy of safeguarding the integrity of the initiative process¹²¹—the very type of interest that is too “generalized” for anyone other than the state executive to vindicate in federal court.¹²²

Further cementing the idea that the state sovereign interest is not transferable to an uninjured non-state party is the fact that the Supreme Court has recognized, albeit in the context of states as plaintiffs, that states have a “special position and interest” as quasi-sovereign entities.¹²³ The “special solicitude” that the Court has recognized attaches to the state as a *party*, not the nature of the state’s interest.¹²⁴ This solicitude exists precisely because the state, as a *party*, has the capacity to defend an “interest independent of and behind the titles of its citizens”¹²⁵—it does so strictly by acting as *parens patriae*.¹²⁶ When a non-state party attempts to do the same, an Article III court becomes nothing more than a “forum in which to air . . . generalized grievances about the conduct of government.”¹²⁷

The lesson learned from the Court’s standing jurisprudence, particularly with respect to standing based on the sovereign’s interests, is straightforward: a state is entitled to special consideration with respect to Article III standing when it is party to the litigation vindicating its own interests,¹²⁸ but that solicitude dissipates when an uninjured non-state actor attempts to vindicate the state’s interests on

120. See Hall, *supra* note 104, at 1542 (opining that the question of standing to defend has not been “comprehensively considered” and that the courts addressing the matter have “developed no coherent theory and thus have produced ill-considered and inconsistent outcomes”).

121. See *Perry VII*, 265 P.3d at 1030 (justifying proponent standing in part on the premise that such a defense would “guard the people’s right to exercise initiative power”).

122. Cf. *Lujan*, 504 U.S. at 577 (warning that the prosecution of claims by the “undifferentiated public interest” would result in interference with the functions of the federal executive).

123. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

124. See *id.* at 518, 520 (discerning “considerable relevance” in the nature of the sovereign state as a *party*, in contrast to the private individual of *Lujan*).

125. *Id.* at 518 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

126. *Id.* at 520 n.17. But cf. Katherine M. Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2053, 2066–67 (2011) (emphasizing the distinction between a sovereign interest and a quasi-sovereign interest and that the exercise of a state’s *parens patriae* power only applies to claims defending quasi-sovereign interests).

127. *United States v. Richardson*, 418 U.S. 166, 173 (1974).

128. See Kenneth T. Cuccinelli, II et al., *State Sovereign Standing: Often Overlooked, but Not Forgotten*, 64 STAN. L. REV. 89, 108 (2012) (observing that the Court has “repeatedly held that states, as an incident of sovereignty, have the ability to protect their enactments from being challenged in federal court” (emphasis added)).

the sovereign’s behalf, even with the sovereign’s permission.¹²⁹ Arguably, making the case for the peculiarity and the nontransferable nature of the state’s solicitude is easier in *Perry* than cases involving so-called “quasi-sovereign interests,” as the Court has long recognized the distinct nature of the sovereign’s ability to “exercise . . . sovereign power over individuals and entities within the relevant jurisdiction . . . [including] the power to . . . enforce a legal code.”¹³⁰

The Ninth Circuit, in accepting the advisory opinion of the California Supreme Court wholesale, neglected to conduct a proper Article III analysis; such an analysis would have revealed that whatever the state constitution conferred to initiative proponents, it was insufficient for establishing Article III standing.¹³¹ The federal appeals court failed to recognize the dissipation of solicitude that made the proponents’ reliance on the state’s interest untenable.¹³² Lacking a personalized injury-in-fact, the state constitution’s implied conferral of interest is little more than an attempt “to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts.’”¹³³ This is an intolerable invocation of the judicial power of Article III.

CONCLUSION

The jurisdictional circumstances of *Perry* are likely to be rarely encountered; in most instances where a state confers the responsibility of vindicating its interests to private attorneys general, it would not be difficult to discern an injury-in-fact particularized to a litigant.¹³⁴ Moreover, an “emanation of state” constraint on Article

129. See *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (reasoning that as states are the only entities who create legal codes, states are the only parties that have a “direct stake” that meets the case-or-controversy requirement of Article III); see also *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011) (commenting that it may be entirely possible that “a State is the only entity capable of demonstrating the requisite injury”).

130. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601–02 (1982) (distinguishing the sovereign interest of enforcement from a number of other interests, including non-sovereign proprietary interests, non-sovereign private interests where the state serves as a nominal party, and “quasi-sovereign” interests of the state in the well-being of its citizens).

131. See *supra* Part I.C (explaining the limits on state-conferred standing).

132. See *supra* notes 123–30 and accompanying text (arguing that the special solicitude accorded to states cannot be transferred to other parties).

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

134. E.g., *Grayson v. AT&T Corp.*, 15 A.3d 219, 246–47 (D.C. 2011) (en banc) (dismissing a complainant’s action filed to vindicate the interests of “the general public” for failure to plead an injury). In *Grayson*, the D.C. Court of Appeals, which subscribes to Article III principles of justiciability, noted that a representative action would have been possible had one of the complainants, Paul Breakman, pled an injury-in-fact. See *id.* at 247 (“By stating that he brings his claim in a wholly representative capacity, Mr. Breakman essentially implies that as the ‘party seeking

III standing would not affect the typical case involving a citizen-sponsored initiative—i.e., a challenge by individuals unconstitutionally burdened by a state law, as such challengers could demonstrate the requisite injury-in-fact by the burden they bear.¹³⁵

Requiring that the uninjured vindicator of a state law, citizen-sponsored or otherwise, be an emanation of the state merely reflects the reality that the sovereign may be the “only entity capable of demonstrating the requisite injury.”¹³⁶ To hold otherwise would result in a cascading erosion of the “bedrock principle” of standing. If uninjured proponents of an initiative are cognizable litigants under Article III, then it is difficult to discern where to draw the line.¹³⁷

Hence, the Ninth Circuit erred in *Perry VIII* by recognizing that the proponents, lacking any emanation of state authority, had standing to appeal. No matter how well-intentioned the court was in reaching the merits, it should not have done so. This is especially true given the reality that whatever the answer to the threshold jurisdictional question might be, the result is the same: “marriage equality will exist in California, at least unless and until in some other case, some day, the Supreme Court comes to a different conclusion.”¹³⁸

review,’ he ‘himself [is not] among the injured.’” (citing *Lujan*, 504 U.S. at 563)).

135. *E.g.*, *Romer v. Evans*, 517 U.S. 620, 623–24 (1996) (invalidating a referendum measure designed to prevent sub-state entities from protecting gays and lesbians as a class).

136. *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011).

137. Even the California Supreme Court recognized this difficulty. *See Perry VII*, 265 P.3d 1002, 1021 (Cal. 2011) (acknowledging the difficulty of distinguishing between the interest of the proponents and a voter or citizen of California in general).

138. Erwin Chemerinsky, *Prop. 8—A Matter of Standing*, L.A. TIMES, Aug. 15, 2010, at A30.