

2012

Private Parties, Legislators, and the Government's Mantle: On Intervention and Article III Standing

Suzanne B. Goldberg
Columbia Law School, sgoldb1@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Civil Procedure Commons](#), and the [Constitutional Law Commons](#)

Recommended Citation

Suzanne B. Goldberg, *Private Parties, Legislators, and the Government's Mantle: On Intervention and Article III Standing*, COLUMBIA PUBLIC LAW RESEARCH PAPER No.12-325 (2012).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/1775

This Working Paper is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

Columbia Law School

Public Law & Legal Theory Working Paper Group

Paper Number WP 12-325

Private Parties, Legislators, and the Government's Mantle:
On Intervention and Article III Standing

Suzanne Goldberg
Columbia Law School

December 24, 2012

Private Parties, Legislators, and the Government's Mantle: On Intervention and Article III Standing

By Suzanne B. Goldberg¹

Abstract

This essay takes up questions regarding whether initiative proponents and legislators can defend a law in federal court when the government declines to defend. Looking first at intervention under the Federal Rules of Civil Procedure, I argue that neither has the cognizable interest needed to enter an ongoing lawsuit as a party. Yet even if they are allowed to intervene, these would-be defenders of state or federal law cannot take on the government's mantle to satisfy Article III because the government's standing derives from the risk to its enforcement powers, which is an interest that cannot be delegated to others. Nor can they make out any more than a desire to have the law enforced consistent with their views, which is the sort of generalized grievance the Supreme Court has long rejected as a basis for standing.

Yet numerous courts have permitted intervention and accorded standing to these types of intervenors, including in the marriage cases before the Supreme Court in the 2012 term. We can understand this unduly generous approach as a part of a larger phenomenon at the crossroads of procedure and judicial legitimacy. In these high-vulnerability contexts, where courts are asked to decide the constitutionality of popular measures, legitimacy concerns, including what I term countermajoritarian anxiety and guilt, permeate procedural decisionmaking and, at times, override otherwise operative procedural constraints.

Table of Contents

- I. Introduction**
- II. An Opening Question: Intervention's Scope and Limits**
- III. The Article III Questions: Government's Mantle and Injury in Fact**
- IV. Procedural Legitimacy and the Costs of Exclusion**
- V. Conclusion**

* * *

¹ Herbert and Doris Wechsler Clinical Professor of Law, Columbia Law School. I welcome your comments at sgoldb1@law.columbia.edu. Please note that this Essay [12.24.12 draft] is a work in progress and that, in addition to ongoing development of the ideas here, the footnotes will be subject to substantial revision prior to publication. [thanks to come]

I. Introduction

Imagine a town called Defendantville in Anystate, USA. If ever Anystate's governor and attorney general decline to defend a voter-initiated law, they can designate someone in Defendantville to defend the law in their stead. None of Defendantville's residents has the power to enforce the state's laws but, for the limited purpose of defending those laws in court, any of them can take on the mantle of Anystate's sovereignty. Now imagine, instead, that a federal statute is being challenged. The government has declined to defend, and a group of lawmakers steps in. This group, too, claims the government's mantle and seeks to enter the lawsuit as defendants.

The questions that prompt this Essay arise at the point when these lawsuits are brought in federal court: First, can states delegate their sovereignty – and with it, their Article III standing – to private parties for purposes of defending their laws?² Second, can a subset of legislators take up a measure's defense when the executive branch refuses? The first, of course, implicates what the Ninth Circuit permitted in *Perry v. Brown*, when California declined to defend Proposition 8, a voter-initiated measure that withdrew marriage rights from same-sex couples, and the court agreed to decide an appeal from the proposition's sponsors.³ And the second reflects what numerous federal courts have permitted to the Bipartisan Legal Advisory Group of the House of Representatives, which stepped in when the Department of Justice decided no longer to defend the Defense of Marriage Act (DOMA).⁴

Through attention to both doctrine and judicial legitimacy dynamics, this essay shows that Article III standing cannot be delegated from governments to individuals in this way, even when those individuals are elected officials. The legal argument here proceeds in three steps. We begin pre-constitutionally, with the Federal Rules of Civil Procedure (FRCP) – specifically, with an extended

² Standing is an essential element of Article III's "bedrock" case or controversy requirement. See *Raines v. Byrd* at 819. For more detailed doctrinal discussion, see *infra* at xx.

³ See *Perry v. Brown*, 671 F.3d 1052 (2012), *cert. granted sub nom* *Hollingsworth v. Brown*, 2012 WL 3134429 (Mem.) (Dec. 7, 2012) (directing the parties to address "whether petitioners have standing under Article III, § 2 of the Constitution in this case").

⁴ For extended discussion of BLAG and its role in the DOMA litigation, see *infra* at xx. In granting the writ of certiorari in *United States v. Windsor*, the Court added this question to the merits-related question about DOMA's constitutionality. See *U.S. v. Windsor*, 2012 WL 4009654 (Mem) (Dec. 7, 2012) (directing the parties to address the question "whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in the case.").

discussion of Rule 24 intervention. While Rule 24 provides the procedural entrée for outsiders to become parties in an ongoing lawsuit, access is restricted to those with cognizable interests closely related to the litigation. Passionate commitment to the issue before the court does not count; for this reason, most initiative proponents do not qualify. Although they invest heavily in a measure's success, they typically do not experience a change to their own legal status when a measure passes that would translate to the sort of interest Rule 24 requires.⁵

The discussion then turns to Article III. Through an inquiry into why governments have standing to defend their laws, it becomes clear that government standing cannot be imputed to private actors or individual legislators, even when those actors have engaged in the lawmaking process. When a statute is challenged, governments have the concrete and specific interest that basic standing doctrine requires⁶ because their authority to enforce their own laws is subject to diminishment. Private parties and even individual legislators, by contrast, do not have this same stake because they do not have and cannot exercise the government's enforcement power. Consequently, governments cannot properly extend the Article III standing associated with their enforcement powers to these individuals and organizations either explicitly or by implication.

Next, absent the government's mantle, we see that most initiative proponents and lawmakers also cannot establish standing by the conventional means available to federal court litigants who seek redress for an injury. As noted above, voter initiatives typically do not alter their proponents' rights vis a vis the general population in a way that would give rise to a concrete, particular claim. This is certainly the case for Proposition 8's promoters, whose right to marry was left unaffected by the measure they helped pass. The same is true for those legislators who would defend DOMA, or any other measure they supported. In these contexts, the grievance amounts to a demand for government to enforce its laws in a particular way rather for redress of an individualized injury caused by the government's action. This law enforcement claim is not particular to the measure's strongest supporters. Instead, anyone in the population might make it,

⁵ Although the discussion here will continue for the sake of comprehensiveness and to illuminate synergies between intervention and standing jurisprudence, intervention law is sufficient, on its own, to resolve most questions about initiative promoters' entry into litigation. Indeed, in *Perry*, which is currently pending before the U.S. Supreme Court, while the plaintiffs-respondents have arguably waived their objection to the misapplication of Rule 24 by the lower courts, there is no bar to the Supreme Court resolving the case on this procedural ground.

⁶ See *infra* at xx.

which is why standing jurisprudence has long found it to be inadequate for Article III courts.⁷

Because intervention and standing jurisprudence are relatively clear in rebuffing party status for initiative proponents and individual legislators, as just discussed, something more than a doctrinal misunderstanding must be enabling these actors to become defendants in federal litigation. The remainder of the Essay explores why some federal courts have been overly generous in allowing intervention and finding standing for these would-be defenders. By looking at intervention and standing decisions across contexts, including in *Perry* and in the DOMA litigation, we can see this deviation from procedural rules in relief. It is, I argue, part of a larger phenomenon at the crossroads of procedure and judicial legitimacy, where judicial legitimacy concerns appear to permeate procedural decisionmaking and override otherwise operative procedural constraints.

It is not surprising that litigation involving voter-initiated and otherwise popular measures present a high-vulnerability context for courts that are sensitive to their countermajoritarian position.⁸ But it is striking how far procedural decisionmaking in these cases may wind up deviating from what the governing rules and doctrine would seem to require, even when courts are willing to strike down these measures on the merits.

In these contexts, procedural deviation functions as a kind of release valve that federal courts use, probably inadvertently, to signal engagement with and accountability to the public. Especially in decisions regarding intervention by initiative proponents, two related legitimacy concerns come to the fore. One I characterize as countermajoritarian guilt. This concern draws from Lockean notions of fairness and procedural due process rhetoric and reflects the impulse that it is unfair to block initiative promoters from defending their measures after they put in the work to obtain passage. The other I describe as countermajoritarian anxiety to capture courts' concern that the adjudication process will be both tainted and ineffectual if the promoters of a challenged measure are denied full party status.

⁷ See *Lujan* at 573-74 (stating that an abstract interest in the government's "proper application of the Constitution and laws" is insufficient, of itself, for Article III standing). In *U.S. v. Robinson*, 418 U.S. 166 (1974), the Court rejected standing for an individual who sought a report on Central Intelligence Agency expenditures under the Constitution's Accounts Clause. Although the plaintiff argued that not having this information would limit his ability to vote, the Court held, per Chief Justice Burger, that "[t]his is surely a generalized grievance since the impact on him is plainly undifferentiated and common to all members of the public." *Id.* at xx

⁸ See *infra* at xx.

My ultimate claim here is that although these concerns warrant serious attention, loosening intervention law is a costly and ultimately flawed way to address them. Allowing initiative promoters and groups of lawmakers to intervene as full parties, and then to appeal without a concomitant appeal by a government defendant, defies the intervention rules' text and weakens Article III's constraints. Even worse, this trend blurs the lines of what entities federal courts will count as governments and what interests courts will treat as governmentally-sanctioned. These concerns do not suggest that proponents should be absent from litigation involving their measures, however. Instead, amicus status – including “litigating amicus” status, as needed – is far more appropriate, doctrinally and otherwise, to insure that the federal courts operate with both constitutional integrity and public legitimacy.

II. An Opening Question: Intervention's Scope and Limits

When plaintiffs challenge a law's constitutionality, even in the case of a voter-initiated law, they nearly always sue government officials. The reason is straightforward: the remedy they need, most often, is a court order blocking those officials from enforcing the challenged law.⁹ By contrast, participation is not so automatic for initiative proponents; instead, typically, proponents must move to intervene. This section looks to intervention law's gatekeeping function, then, as the threshold inquiry to be addressed even before the question of standing for non-state actors.

As any first year law student knows, intervention in federal court comes in two types – intervention of right, under Federal Rule of Civil Procedure 24(a), and permissive intervention under F.R.C.P. 24(b).¹⁰ In essence, intervention of right is

⁹ In these cases, the designated defendant is sometimes the governor, and at others, it is the attorney general or the head of the relevant state agency, but in all instances, the defendant is an official representative of the state. The reason that plaintiffs sue an official rather than the state itself flows in part from the statute that authorizes federal suits for state-based violations of constitutional rights, which creates a cause of action against *persons* who deprive others of constitutional rights. 42 U.S.C. sec. 1983. More significantly, sovereign immunity doctrine bars the state from being sued directly. *See Ex parte Young*, 209 U.S. 123, 157–58, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Still, as the Ninth Circuit explained in *Perry v. Brown*, at 1071, “in a suit for an injunction against enforcement of an allegedly unconstitutional state law, it makes no practical difference whether the formal party before the court is the state itself or a state officer in his official capacity.”

Of course, there are instances where constitutional challenges to state laws might arise in suits against local government units or private parties. Typically in these cases, a procedural rule requires that the state attorney general receive notice of the challenge and, often, an opportunity to participate in the law's defense. [cites]

¹⁰ Rule 24 provides in full:

allowed when non-parties have a sufficient interest in the action's subject matter and will not be able to protect that interest if they are not named a party to the suit.¹¹ If an existing party adequately represents the would-be intervenor's interest, however, intervention is denied.¹² Permissive intervention under F.R.C.P. R.24(b) requires less; the proposed intervenor need only have "a claim or defense that shares with the main action a common question of law or fact."¹³ The federal rules also instruct courts to consider whether the new permissive intervenor "will unduly delay or prejudice" the parties in the existing litigation.¹⁴

Underlying this straightforward text we find, not surprisingly, a host of questions. For would-be intervenors of right, we need to know, for example, how

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention. (1) *In General*. On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact. (2) *By a Government Officer or Agency*. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order. (3) *Delay or Prejudice*. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

Considerations of timeliness are also paramount for courts in adjudicating intervention motions. [cites to come] Because those considerations are typically not present in the types of cases I focus on here, I do not address them in depth. The district court's timeliness assessment is ordinarily reviewed for abuse of discretion; the circuits vary in how closely they review district court decisions regarding the other FRCP 24(a) factors. [cites] The rule also allows intervention by those with statutory authorization but no statutes authorize intervention for the initiative proponents and subsets of lawmakers I focus on here so, again, I do not discuss the portions of the intervention rule that address that issue.

More generally, it is well settled that the rule is to be construed liberally. [cites to come] At the same time, however, despite its label, intervention of right is not absolute; courts retain discretion to deny intervention, particularly where movants will not contribute distinctly to the litigation. In granting parents' motion to intervene in a school desegregation suit, Judge Bazelon observed that the "decision whether intervention of right is warranted thus involves an accommodation between two potentially conflicting goals: to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending." *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969).

¹² See *infra* at xx.

¹³ F.R.C.P. R.24(b).

¹⁴ *Id.*

much of an interest the proposed intervenor must have in the lawsuit's subject matter. Likewise, we need to know the conditions under which the intervenor's ability to protect that interest will be impaired, and how much similarity must exist between the proposed intervenor and an existing party to find that the intervenor is already adequately represented in the litigation. For would-be permissive intervenors, a central question concerns how much in common the outsider non-party must have with the main action to become a full party to the litigation. Likewise, we must know how much delay or prejudice to existing parties is too much. The discussion that follows takes up these inquiries.

Intervention of Right

Although there is consensus that intervention of right is a relatively limited procedural option, courts diverge in assessing how much interest the proposed intervenor must have "in the property or transaction that is the subject matter of the action."¹⁵ The basic rule is clear that the interest's sufficiency must be

¹⁵ For discussion of the circuit split regarding the need for intervenors to establish independent Article III standing, see *infra* at xx. Also oft-debated regarding intervention of right is the "adequate representation" inquiry, which can lead a court to deny intervention even if the movant has a sufficient interest in the litigation. See, e.g., *Prete v. Bradbury*, 483 F.3d 949, 955-56, 957-59 (9th Cir. 2006) (rejecting intervention where sponsors of an Oregon ballot measure had a protectable interest but were adequately represented by the government defendant). On the one hand, when the government is a party, it is frequently treated as providing adequate representation if the intervention applicant and government party seek the same ultimate objective. See, e.g., *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297 (9th Cir. 1997) (sustaining denial of intervention where the court found that the group that had drafted and sponsored initiative was adequately represented by the state defendant); *Wade v. Goldschmidt*, 673 F.2d 182, 186 n.7 (7th Cir. 1982). On the other, it is "not uncommon" for courts to depart from the assumption that government representation is adequate in cases where "government regulations are challenged and private parties who benefit from such regulations seek to intervene as defendants." *United States v. Hooker Chems. & Plastics Corp.*, 101 F.R.D. 451, 457 (W.D.N.Y.), *aff'd*, 749 F.2d 968 (2d Cir. 1984). The leading case in the area is *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n. 10, 30 L.Ed.2d 686 (1972)), which held that "The requirement of [Rule 24(a)(2)] is satisfied if the applicant shows that the representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Id.* at 538 n. 10, 92 S.Ct. 630. See also *Builders Ass'n of Greater Chicago v. City of Chicago*, 170 F.R.D. 435 (N.D. Ill. 1996) (holding that "applicants do not need to show, to a certainty, that the City will not fully protect their interests; rather, they need only show that the City might fail to do so").

In the kinds of cases at issue here, where a non-state actor seeks intervention to defend a measure passed by voter initiative, the adequate-representation inquiry should not to pose much of a barrier because initiative promoters arguably bring a different quality of enthusiasm and expertise to the litigation. The inadequacy of government representation is even clearer, of course, where the government defendant opposes the challenged measure.

In addition to the divergence among circuits discussed in the text, circuits have also split over whether an intervenor as of right must have standing independent of the original parties to the suit. Compare *San Juan County v. United States*, 420 F.3d 1197, 1204-05 (10th Cir.2005) (holding

determined functionally rather than formally.¹⁶ But what this flexible approach means for the required interest's breadth is not entirely clear, and circuits have split over how best to make that determination. The Supreme Court's most recent extended engagement with FRCP 24(a) "recognized that certain public concerns may constitute an adequate 'interest'" and that a "'significantly protectable interest'" is what is required.¹⁷ Commentators and lower courts, however, have suggested that the Court's rulings do not provide much help.¹⁸ As Judge Bazelon observed some years earlier, "The effort to extract substance from the conclusory phrase 'interest' or 'legally protectable interest' is of limited promise."¹⁹ As a result, "the circuit courts of appeals have struggled to reach a definitive interpretation" of the rule,²⁰ and "[c]ourts have adopted a variety of approaches and a wide range of terminology in discussing the issue of interest."²¹

that Article III standing is not necessary for intervention); *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir.1994) (same); *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir.1991) (same); *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir.1989) (same); and *United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir.1978) (same); with *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir.1996) (holding that Article III standing is required for intervention), and *United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir.1985) See *Jones v. Prince George's County*, 348 F.3d 1014, 1017 (D.C.Cir.2003); *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1023 (8th Cir.2003) (same); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir.1996) (same).

¹⁶ The original rule required intervenors to be legally bound by the original litigation's result, while the post-1966 version, still in place today asks whether the existing litigation would impair the outsider's interest "as a practical matter." *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984) (en banc). This increased flexibility was aimed deliberately to "expand the circumstances in which intervention of right would be appropriate." *San Juan Cty v. US*, 503 F.3d 1163 (10th Cir. 2007) (en banc) (discussing rule revisions).

¹⁷ *Diamond v. Charles*, (discussing *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967) and *Donaldson v. United States*, 400 U.S. 517, 531 (1971)). Concurring in *Diamond v. Charles*, Justice O'Connor added that "[c]learly, *Donaldson's* requirement of a 'significantly protectable interest' calls for a direct and concrete interest that is accorded some degree of legal protection." (citations omitted) *Diamond* at 75. See also Advisory Committee's Notes on Fed.Rule Civ.Proc. 24, 28 U.S.C.App., p. 567.

¹⁸ See, e.g., 7C Wright et al., *supra*, § 1908, at 263 (There is not as yet any clear definition, either from the Supreme Court or from the lower courts, of the nature of the "interest relating to the property or transaction which is the subject of the action" that is required for intervention of right.) (quoting Fed.R.Civ.P. 24(a)); *San Juan Cty*, at xx ("The Supreme Court has directly addressed the impaired-interest requirement on only two occasions [*Cascade Natural Gas Corp.* and *Donaldson*]. Neither opinion is much help. One contains merely a bare holding, with essentially no explanation. The other explains its holding but it is unclear how much it relies on Rule 24.").

¹⁹ *Smuck v. Hobson*, 408 F.2d 175, 178 (D.C.Cir.1969) (Bazelon, C.J., plurality opinion).

²⁰ 7C Wright et al., *supra*, § 1908, at 270. Circuit courts vary, too, in the standard of review they apply to district court rulings on intervention motions. On motions to intervene as of right, appellate review ranges from abuse of discretion in the First Circuit, *see, e.g.*, *International Paper Co. v. Inhabitants of Town of Jay, Me.*, 887 F.2d 338, 343-44 (1st Cir. 1989) to *de novo* in the Fifth Circuit, *see, e.g.*, *City of Houston v. American Traffic Solutions, Inc.*, 668 F.3d 291, 293 (5th Cir.

2012) (citation omitted). *See also* *Fund for Animals v. Norton*, 322 F.3d 728, 733 n.2 (D.C. Cir. 2003) (comparing *Smoke*, 252 F.3d at 470-71 (stating that the court reviews denials of intervention as of right for clear error), and *Foster*, 655 F.2d at 1324 (same), with *Mova Pharm.*, 140 F.3d at 1074 (explaining that “[t]o the extent that a district court’s ruling on a motion to intervene as of right is based on questions of law, it is reviewed *de novo*; to the extent that it is based on questions of fact, it is ordinarily reviewed for abuse of discretion”), and *Building & Constr. Trades*, 40 F.3d at 1282 (stating that denials are reviewed under an abuse of discretion standard). For permissive intervention, by contrast, the standard is settled at abuse of discretion. *See Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 142 (1944) (denial of Rule 24(b) permissive intervention is within the district court’s discretion and is reviewable only where clear abuse of discretion has been shown).

²¹ 6 James Wm. Moore et al., *Moore's Federal Practice* § 24.03 [2][a], at 24-30 (3d ed. 2006). For example, the Second Circuit barred a utility company from intervening in a citizen’s suit seeking Environmental Protection Agency review of air quality standards because the company’s interest was “too remote and therefore insufficient”). *See also American Lung Ass’n v. Reilly*, 962 F.2d 258, 261 (2d Cir. 1992) (interest of utility companies in citizens’ suit seeking review by EPA of air quality standards was too remote and, therefore, insufficient). Similarly, *Trans Chem. Ltd. v. China Nat’l Mach. Imp. & Exp. Corp.*, 332 F.3d 815, 823-824 (5th Cir. 2003) (applicants for intervention did not have “direct and substantial” interest in suit to enforce arbitration award when they sought intervention to litigate whether they were owners of plaintiff corporation). For additional discussion of interests sufficient to justify intervention of right, see, e.g., *Hazardous Waste Treatment Council v. South Carolina (In re Sierra Club)*, 945 F.2d 776, 779 (4th Cir.1991) (holding that an environmental organization that was party to an administrative permitting proceeding was entitled to intervene of right in an action challenging the constitutionality of a state regulation); *Sagebrush Rebellion, Inc.*, 713 F.2d at 527-28 (holding that wildlife organizations were entitled to intervene of right in an action procedurally challenging the Department of the Interior’s decision to establish a conservation area); *Washington State Bldg. & Constr. Trades Council*, 684 F.2d at 630 (holding that “the public interest group that sponsored the [statute as a ballot] initiative ... was entitled to intervention as a matter of right under Rule 24(a)” in an action challenging the constitutionality of the statute); *Yniguez*, 939 F.2d at 735 (same); *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861, 869 (8th Cir.1977) (holding that a neighborhood association, whose “professed purpose ... is to preserve property values and insure that abortion facilities do not affect the health, welfare and safety of citizens,” was entitled to intervene in an action challenging the constitutionality of a local ordinance imposing a moratorium on the construction of abortion clinics); *New York Public Interest Research Group v. Regents of the Univ.*, 516 F.2d 350, 351-52 (2d Cir.1975) (holding that a pharmacists’ organization and individual pharmacists had a right to intervene in an action brought by consumers to challenge a state regulation prohibiting the advertising of the price of prescription drugs); *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of Interior*, 100 F.3d 837 (10th Cir. 1996) (holding that a prospective intervenor’s interest in Mexican spotted owl, as photographer, amateur biologist, and naturalist who had been at forefront of efforts to protect owl under Endangered Species Act (ESA), was direct, substantial, and legally protectable interest, for purposes of intervention as of right in county coalition’s action challenging Fish and Wildlife Service’s (FWS) decision to protect owl under Act.)

Cases denying intervention of right also offer insight into the scope of the “interest” requirement. *See, e.g., Keith v. Daley*, 764 F.2d 1265, 1269-70 (7th Cir.1985) (holding that lobby organization in Illinois legislature did not have protectable interest in lawsuit regarding constitutionality of law regulating abortion because the only entities with sufficient interest were governmental bodies required to defend and enforce law of state); *United States v. 36.96 Acres of*

For intervenors seeking to defend a ballot measure and lawmakers seeking to defend legislation that they support, an additional challenge lies in showing that the interest, however defined, is at risk of impairment by the ongoing litigation. Because ballot measures do not typically create property or other cognizable rights for their proponents, and because legislation does not typically create rights particular to legislators, it is not clear how proponents or legislators in those contexts can claim any sort of cognizable interest, much less a “significant protectable interest.” After all, to take the case of Proposition 8, it is difficult to see how the measure, which restricts the marriage rights of same-sex couples, could impair, practically or otherwise, a protectable interest of its official proponents where none of the individuals identifies as gay or as seeking to marry a same-sex partner, and the sponsoring not-for-profit organization does not claim to include individuals seeking to marry a same-sex partner in its membership.²² The same is true for BLAG and its effort to defend DOMA.

Still, numerous courts have found that initiative proponents do have the requisite interest for intervention as right. Indeed, the Ninth Circuit concluded, in a case involving an English-only initiative, that “[t] here appears to be a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of the litigation to intervene pursuant to Fed.R.Civ.P. 24(a).”²³ On its view, because “Rule 24 traditionally has received a liberal construction . . . the public interest group that sponsored the initiative [is] entitled to intervention as a matter of right under Rule 24(a).”²⁴

But the special ballot-sponsor intervention rule has never been as categorical as the Ninth Circuit suggests. In particular, the Sixth Circuit warned

Land, 754 F.2d 855, 858-60 (7th Cir.1985) (holding that lobby organization attempting to foster national legislation did not have right to intervene; only government had a protectable interest in condemnation action between sovereign and private party); *Resort Timeshare Resales, Inc. v. Stuart*, 764 F.Supp. 1495, 1499 (S.D.Fla.1991) (holding that lobbyist was not entitled to intervene when asserted interest in law was too nebulous to create “real party in interest” in litigation challenging constitutionality of state statute requiring timeshare sellers to obtain real estate licenses).

²² The initiative proponents whose cert petition was granted in *Perry v. Brown* include Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, and ProtectMarriage.com – Yes on 8, a Project of California Renewal. [cite and discussion of the proponent who removed himself from the case to come]

²³ *Yniguez v Arizona*, 939 F.2d 727, 735 (9th Cir. 1991) (citations omitted).

²⁴ *Id.* See also *See Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1251-1253 (10th Cir. 2001) (environmental groups had sufficient interest in national monument to intervene in suit seeking to have creation of monument declared illegal); *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Dep't of Interior*, 100 F.3d 837, 840-844 (10th Cir. 1996) (wildlife photographer had sufficient interest to intervene in suit to protect Mexican Spotted Owl).

that “[w]ithout [] limitations of the legal interest required for intervention, Rule 24 would be abused as a mechanism for the over-politicization of the judicial process.”²⁵ It reasoned that while public interest organizations, including ballot measure sponsors, have a sufficient interest in the initiative *process*, only those “regulated by the new law, or, similarly, whose members are affected by the law, may likely have an ongoing legal interest in its enforcement after it is enacted.”²⁶ Any others can have “only a generic interest shared by the entire . . . citizenry,” and an “interest so generalized will not support a claim for intervention as of right).²⁷

Consistent with this view, far fewer courts have accepted intervention by subgroups of lawmakers, as will be discussed at greater length *infra*. Yet for BLAG, as also discussed below, intervention has come easily.²⁸

The latter part of this Essay will theorize about the reasons for this divergence between Rule 24(a) jurisprudence and its application in *Perry* and the DOMA cases; for purposes here, the point is simply that, notwithstanding the raft of judicial decisions allowing intervention of right to Proposition 8’s proponents and BLAG, it is not obvious that either can claim the interest required of those who seek to intervene as of right.

Permissive Intervention

Perhaps permissive intervention is a better fit for ballot measure sponsors? Recall that permissive intervention’s chief requirements are that the moving party have a claim or defense involving a question of fact or law that is common to the original action and that the intervention not unduly delay or prejudice the existing litigants. As the Supreme Court has explained, F.R.C.P. 24(b) “plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary

²⁵ Coalition to Defend Affirmative Action v. Granholm (at 783- but quoting something else). Similar, the Seventh Circuit observed that there is no special public interest rule. [check – not sure this is actually in the op] BUT - No special public interest rule. *Keith v. Daley*, 764 F.2d 1265, 1268-1269 (7th Cir. 1985) (citing Moore’s, intervention of right denied to pro-life public interest group seeking to challenge abortion legislation).

²⁶ In Granholm (quoting .” *Id.* at 345; accord, e.g., *Grutter*, 188 F.3d at 401 (holding that proposed intervenors, who were applicants to the University of Michigan, had a substantial legal interest in the school’s admissions process); *Miller*, 103 F.3d at 1247 (holding that the Michigan Chamber of Commerce had a substantial legal interest where it was regulated by at least three of the four statutory provisions challenged by plaintiffs).

²⁷ Granholm, citing/quoting: .” *Miller*, 103 F.3d at 1246 (quoting and citing with approval *Athens Lumber Co. v. Federal Election Comm’n*, 690 F.2d 1364 (11th Cir.1982)

²⁸ See *infra*.

interest in the subject of the litigation.”²⁹ Moreover, courts have made clear that permissive intervention can be granted where an applicant presents the same legal claim or defense as an existing party, even when its claims arise from different factual circumstances.”³⁰

Because permissive intervention encompasses so many would-be litigants who have only a minimal connection to the ongoing lawsuit, district courts have significant discretion³¹ to gauge the costs and benefits associated with allowing them in.³² With some frequency, district courts allow permissive intervention by public interest organizations with long-standing interest and expertise in the issues before the court.³³ But again, questions about the value and burdens associated

²⁹ *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 459, 60 S. Ct. 1044, 1055, 84 L.Ed. 1293, 1306 (1940). See also *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1108-1111 (9th Cir. 2002) (district court did not abuse its discretion in granting permissive intervention to environmental group seeking to support of U.S. Forest Service rule, even though applicants had no "significant protectable interest" in subject matter of suit).

³⁰ See, e.g., *McNeill v. New York City Hous. Auth.*, 719 F. Supp. 233, 250-251 (S.D.N.Y. 1989) (granting low-income tenants' motion to intervene permissively because applicants presented identical legal claims to those of tenant plaintiffs despite fact that circumstances of intervenors' claims were different from those of original plaintiffs).

³¹ See, e.g., *South Dakota ex rel. Barnett v. United States Dep't of Interior*, 317 F.3d 783, 787-788 (8th Cir. 2003) ("Reversal of a decision denying permissive intervention is extremely rare, bordering on nonexistent"); *Rosenshein v. Kleban*, 918 F. Supp. 98, 106 (S.D.N.Y. 1996) (observing that the district court possesses "broad discretion in resolving applications for permissive intervention"); *Sackman v. Liggett Group, Inc.*, 167 F.R.D. 6, 22 (E.D.N.Y. 1996) (district court's discretion under Fed. R. Civ. P. 24(b) is broad). On appellate review of intervention motions generally, see *supra* note xx.

³² See, e.g., *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir.1977) (considering additional factors in exercising discretion, including “the nature and extent of the intervenors' interest” and “whether the intervenors' interests are adequately represented by other parties”).

³³ See, e.g., *Natural Resources Defense Council, Inc. v. Tennessee Valley Auth.*, 340 F. Supp. 400, 408-409 (S.D.N.Y. 1971) , rev'd on other grounds, 459 F.2d 255 (2d Cir. 1972) (granting permissive intervention to Audubon Society in environmental dispute involving strip-mining and asserts that "Audubon demonstrates a long-standing interest in and familiarity with strip-mining, expertise that may be helpful in clarifying the facts and issues"); *General Motors Corp. v. Burns*, 50 F.R.D. 401, 405 (D. Haw. 1970) (allowing Fed. R. Civ. P. 24(b) intervention and noting Hawaii's statement that intervenor "and its members have unique knowledge of the Hawaii automobile industry and ... similar statutes in other jurisdictions" that will help "to fully present to the Court all of the facts in this case"); *Johnson v. Mortham*, 915 F. Supp. 1529, 1538-1539 (N.D. Fla. 1995) (granting permissive intervention to the NAACP in a redistricting dispute, reasoning that the NAACP's participation would aid the court in its constitutional inquiry and would bring a "unique perspective," and noting that the organization had been allowed to intervene in similar actions around the country). Cf. *League of United Latin Am. Citizens v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989) (rejecting county's permissive intervention motion in a Voting Rights Act case because its input would not significantly help develop relevant factual issues).

with the intervention loom large.³⁴ Consequently, when courts believe that a potential intervenor will essentially repeat the same sort of evidence that existing parties will present, they typically characterize intervention as counterproductive and as something that will unnecessarily prolong the litigation.³⁵ But again, even absent redundancy, the rule's plain text requires that the intervening party have a claim or a defense; nothing in the rule indicates that the intervenor can appear to assert interests it does not possess.

Although adequacy of representation is not formally part of the permissive intervention rule as it is for intervention as of right, courts often consider it as part of this calculus when deciding whether to grant a permissive intervention request.³⁶ Likewise, if one of the existing parties is the government and that party

³⁴ *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 343-346 (6th Cir. 2007) (holding that denial of permissive intervention should not be reversed without clear abuse of discretion, and such abuse was not shown when district court had addressed relevant criteria, including delay and prejudice, under Fed. R. Civ. P. 24(b)); *1st Circuit Daggett v. Commission on Governmental Ethics & Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999) (stating, in case challenging campaign financing legislation, that relevant factor justifying rejection of intervenors was the need to expedite resolution of case). Cf. *H.L. Hayden Co. v. Siemens Med. Sys.*, 797 F.2d 85, 89 (2d Cir. 1986) (finding no abuse of discretion where state was not allowed to intervene in a private antitrust action because, in addition to the potential for undue delay, the state failed to demonstrate that its intervention would assist in the "just and equitable adjudication of any of the issues between the parties").

³⁵ See *South Carolina v. North Carolina*, 130 S.Ct. 854, 875 (2010) (Roberts, J., concurring and dissenting in part) ("Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention.") (citation omitted). See also *Getty Oil Co. v. Department of Energy*, 865 F.2d 270, 277 (Temp. Emer. Ct. App. 1988) (holding that when non-party presented no new questions, intervention should be denied and amicus curiae brief would be more efficient); *Arney v. Finney*, 967 F.2d 418, 421-422 (10th Cir. 1992) (sustaining denial of intervention because applicant's intervention would not aid class of prison inmates in its attempt to correct allegedly unconstitutional conditions); *NBD Bank, N.A. v. Bennett*, 159 F.R.D. 505, 508 (S.D. Ind. 1994) (denying intervention to an association of insurance agents that sought to intervene and defend suit by banks against state insurance commissioner and reasoning that intervenor raised no new defenses).

³⁶ *Natural Resources Defense Council, Inc. v. New York State Dep't of Envtl. Conservation*, 834 F.2d 60, 61-62 (2d Cir. 1987) (concluding that the fact that intervenor's claimed interest was economic and existing defendants' interest was governmental did not establish inadequate representation in citizens' suit under Clean Air Act). Cf. *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk*, 101 F.R.D. 497, 502 (E.D.N.Y. 1984) (discussing adequacy of representation of intervenors' interest by existing parties is "minor factor at most" in determining motions for intervention) (citation omitted); *New Orleans Pub. Serv., Inc. v. United Pipe Line Co.*, 732 F.2d 452, 472 (5th Cir. 1984) (stating that whether intervenors' interests are adequately represented by other parties is proper factor to consider in acting on request for permissive intervention); *South Dakota ex rel. Barnett v. United States Dep't of Interior*, 317 F.3d 783, 787-788 (8th Cir. 2003) (observing that whether existing parties will adequately protect proposed intervenor's interests is a minor variable, but it is legitimate consideration, and that district court did

is aggressively seeking the same outcome as the proposed intervenor, courts are often unwilling to grant permissive intervention.³⁷

Intervention Rules as Applied: Perry v. Brown

Perry is a particularly interesting case for exploring the application of this intervention jurisprudence in part because the district court granted only two intervention motions from a much broader array. Most significantly for purposes here, the district court found that Proposition 8's sponsors could intervene as of right under FRCP 24(a), concluding, without explanation, that they had a "significant protectible interest in defending Proposition 8's constitutionality" and that that interest would be affected directly by the lawsuit.³⁸ The court found as well that their interest "was not represented by another party" because the Attorney General, who was charged with enforcing the measure, had indicated his view that Proposition 8 was unconstitutional.³⁹ The district court also granted the City of San Francisco's motion to intervene permissively because the City had claimed its financial interest would be adversely affected by Proposition 8. The court made clear that this factor, rather than the City's ability to contribute generally to the factual record, led it to permit intervention. Based on that analysis, the court limited the City's participation in the case to issues related to its financial interest.⁴⁰ Proposition 8's promoters faced no similar limitation.

not abuse its discretion when it denied intervention primarily because it found that proposed intervenor's interests were adequately protected by U.S. Government); *Arney v. Finney*, 967 F.2d 418, 421 (10th Cir. 1992) (holding that the fact that applicant's interests were adequately represented by class representatives meant applicant had no right to intervene, and was also relevant factor in denial of permissive intervention); *Arney v. Finney*, 967 F.2d 418, 421-422 (10th Cir. 1992) (upholding denial of applicant's motion to intervene as class representative in action challenging prison conditions because other class representatives adequately represented interests of class, including applicant)).

³⁷ See, e.g., *Menominee Indian Tribe v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996) (denying permissive intervention request of paper trade association and paper manufacturers and asserting that "[w]hen intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears").

³⁸ Order at 3, *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010) (No. 76). Because it granted the proponents' Rule 24(a) motion, the court did not address the motion for permissive intervention.

³⁹ *Id.*

⁴⁰ Transcript of Oral Argument at 55, *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (9th Cir. 2010) (No. 162) ("[I]t seems to the Court that what distinguishes San Francisco as an intervenor, especially from the others seeking intervention, that is San Francisco claims a governmental interest that no other party, including the Governor and the Attorney General of California, has

At the same time, the court rejected intervention motions by organizations representing same-sex couples and by an organization opposed to marriage rights for same-sex couples. Regarding intervention of right, it found that the organizations representing couples had advanced a sufficient interest but were adequately represented by the existing plaintiffs, and that the proposed defendant-intervenor did not have the requisite interest and, even if it did, it was already adequately represented.⁴¹ With respect to permissive intervention, the court held that “the participation of these additional parties would add very little, if anything, to the actual record, but in all probability would consume additional time and resources of both the Court and the parties that have a direct stake in the outcome of these proceedings.”⁴² The Ninth Circuit affirmed both rulings, consistent with its Circuit’s settled recognition of initiative-sponsors as parties.⁴³

In short, intervention rules operated to filter out many would-be intervenors from the litigation, including those with cognizable injuries as a result of Proposition 8. But they did not serve a gatekeeping role with respect to Proposition 8’s official sponsors and instead endowed those sponsors with full status as defendants.

Intervention Rules as Applied II – BLAG and the DOMA cases

The ease with which BLAG intervened in to defend DOMA in multiple federal courts is notable as well. BLAG, a 5-person body comprised of House

asserted. Because of this interest, it appears that San Francisco has an independent interest in the proceedings, and the ability to contribute to the development of the underlying issues without materially delaying the proceedings.”).

⁴¹ *Id.* at xx.

⁴² *Id.* at 53.

⁴³ The organization opposing marriage rights for same-sex couples, The Campaign for California Families, appealed the denial of its interventions motions to the Ninth Circuit, which affirmed the district court’s ruling. Regarding the motion to intervene as of right, the court wrote:

The reality is that the Campaign and those advocating the constitutionality of Prop. 8 have identical interests—that is, to uphold Prop. 8. Any differences are rooted in style and degree, not the ultimate bottom line. Divergence of tactics and litigation strategy is not tantamount to divergence over the ultimate objective of the suit. Because the existing parties will adequately represent the Campaign’s interests, we affirm the district court’s denial of intervention as of right.

Perry v. Brown, 587 F.3d 947, 949 (9th Cir. 2009). Regarding permissive intervention, the court added that “[i]t was well within the district court’s discretion to find that the delay occasioned by intervention outweighed the value added by the Campaign’s participation in the suit.” *Id.* at 956.

majority and minority leaders,⁴⁴ filed intervention motions in numerous DOMA actions after the U.S. Department of Justice announced that it would no longer defend the statute.⁴⁵ Most of these motions were unopposed;⁴⁶ all have been granted.⁴⁷

⁴⁴ Manual and Rules of the House of Representatives, Section 670, Rule II.8 (“The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships.”).

⁴⁵ See Letter from Eric H. Holder, Jr., Attorney Gen. of the U.S., to Representative John A. Boehner, Speaker, U.S. House of Representatives 5 (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (announcing and explaining DOJ’s decision not to defend DOMA). The Attorney General is required to notify the House leadership pursuant to 2 U.S.C. §530D(a)(1)(B)(ii) of its decision “to refrain (on the grounds that the provision is unconstitutional) from defending . . . the constitutionality of any provision of any Federal statute.”

The House Speaker responded by convening BLAG and indicating that BLAG would intervene to defend DOMA. See Press Release, Representative John Boehner, Speaker of the U.S. House of Representatives, House Will Ensure DOMA Constitutionality Is Determined by the Court (Mar. 9, 2011), available at <http://johnboehner.house.gov/News/DocumentSingle.aspx?DocumentID=228585>.

BLAG’s two minority members opposed the decision to intervene. See Representative Nancy Pelosi, Pelosi Letter to Speaker Boehner on House Counsel Defense of DOMA (Mar. 11, 2011), available at <http://pelosi.house.gov/news/press-releases/2011/03/pelosi-letter-to-speaker-boehner-on-house-counsel-defense-of-doma.shtml>.

⁴⁶ Plaintiffs in suits challenging DOMA did not generally oppose BLAG’s motions to intervene. See, e.g., *Golinski v. U.S. Office of Personnel Mgt.*, 824 F.Supp.2d 968, 977 (N.D. 2012); *Windsor v. United States*, 797 F. Supp.2d 320, 323 (S.D.N.Y. 2011) (“Neither the plaintiff nor the DOJ opposes BLAG’s intervention”). But see *Revelis v. Napolitano*, 844 F.Supp.2d 915, 924 (N.D.Ill. 2012) (“Plaintiff opposes BLAG’s motion to intervene, arguing that it should be limited to *amicus curiae* status.”). In several cases, the DOJ sought to limit BLAG’s involvement to making substantive arguments in DOMA’s defense. The court in *Windsor* rejected that argument, see *Windsor* at 323-25, but the district court in *Revelis* appeared to accept it. *Revelis* at 924, 925 (acknowledging DOJ’s request that BLAG be “limited to making substantive arguments in support of DOMA, while they continue to file all procedural notices” and holding that “BLAG may intervene for the purpose of defending the constitutionality of DOMA”).

⁴⁷ See *Blesch v. Holder*, 2012 Westlaw 1965401 *1 (E.D.N.Y. May 31, 2012) (“Each of the 10 federal courts to consider the issue has permitted the House to intervene. See *Torres–Barragan v. Holder*, No. 10–55768 (9th Cir. April 10, 2012) (ECF No. 56); *Massachusetts v. U.S. Dep’t of HHS*, Nos. 10–2204, 10–2207, 10–2214 (1st Cir. June 16, 2011) (ECF No. 5558549); *Revelis v. Napolitano*, No. 11–cv01991 (N.D.Ill. Jan. 5, 2012) (ECF No. 33); *Cozen O’Connor, P.C. v. Tobits*, No. 11–cv–00045 (E.D.Pa. Dec. 16, 2011) (ECF No. 82); *Bishop v. United States*, No. 04–cv–00848 (N.D.Okla. Aug. 5, 2011) (ECF No. 181); *Lui v. Holder*, 11–cv–01267 (C.D.Cal. July 13, 2011) (ECF No. 25); *Dragovich v. U.S. Dep’t of the Treasury*, No. 10–cv–1564 (N.D. Cal. June 10, 2011) (ECF No. 88); *Golinski v. U.S. Office of Pers. Mgmt.*, No. 10–cv–0257 (N.D. Cal. June 3, 2011) (ECF No. 116); *Windsor v. United States*, 10–cv–08435, 797 F.Supp.2d 320 (S.D.N.Y. June 2, 2011); *Pederson v. U.S. Office of Pers. Mgmt.*, 10–cv–01750 (D.Conn. May 27, 2011) (ECF No. 55).”). For web-accessible versions of some of these opinions, see *Dragovich v. U.S. Dep’t of the*

Only two opinions gave the intervention motion extended consideration and both found that BLAG had the requisite interest level for intervention of right. In *Windsor*, the magistrate concluded that “BLAG has a cognizable interest in defending the enforceability of statutes the House has passed when the President declines to enforce them.”⁴⁸ And in *Revelis*, the court found that BLAG’s interests exceeded those of an “ordinary taxpayer” because “[t]he House has an interest in defending the constitutionality of legislation which it passed when the executive branch declines to do so.”⁴⁹

The essay’s next part shows through Article III case law, why individual representatives and subgroups of legislators, such as BLAG, do not actually have more of a particularized interest than voters or taxpayers in enforcing the statutes they participating in passing.⁵⁰ Here, it simply bears noting that although some courts have treated BLAG as though it were the House of Representatives,⁵¹ it is

Treasury, 764 F. Supp. 2d 1178 (N.D. Cal. 2011); *Windsor v. United States*, No. 10-civ-8435 (S.D.N.Y. filed Nov. 9, 2010); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010).]

⁴⁸ *Windsor*, 797 F.Supp.2d 320, 324 (S.D.N.Y. 2011).

⁴⁹ *Revelis*, 844 F.Supp.2d at 924-25.

⁵⁰ Although BLAG’s submissions supporting intervention have cited to cases involving intervention by the House, Daniel Meltzer observed that “some of these cases . . . involved executive-legislative disagreements about the separation of powers, and in none of them did the congressional intervenor appear actually to have engaged in full-scale litigation in the district court, as distinguished from having defended the statute in connection with a motion for a preliminary injunction, a motion to dismiss for failure to state a claim, or a motion for summary judgment on a very limited record, such as affidavits.” Daniel Meltzer, 61 *Duke L. Rev.* 1183, 1210 n.133 (2012).

⁵¹ In *Revelis*, the court deemed “unpersuasive” the plaintiff’s contention “that BLAG does not represent Congress as a whole.” *Revelis*, 844 F.Supp.2d at 925. It wrote “BLAG, a five-member bipartisan group, is the mechanism through which the House presents its position in litigation, and courts have allowed it to intervene in cases where appropriate.” *Id.* The court cited two cases in support. One, *In re Matter of Koerner*, 800 F.2d 1358, 1360 (5th Cir. 1986), contained no analysis of the intervention motion. The other, *Barnes v. Kline*, 759 F.2d 21, 23, n.3 (D.C. Cir. 1985), *vacated on other grounds sub nom. by Burke v. Barnes*, 479 U.S. 361 (1987), does not appear to strengthen BLAG’s position for two reasons. First, that case involved legislators’ objection to the President’s handling of a bill that, they argued, had nullified their votes. Recognizing an interest like this would conceivably be consistent with extant doctrine finding that legislators have a cognizable interest in the legislative process being a fair one. *See infra* at n. xx But interest in fair process does not translate to a cognizable interest for individuals or subgroups of legislators in enforcing legislation once it has passed. And second, although the Supreme Court did not address the question of intervenors’ interests because it vacated the decision below on mootness grounds, Justice Stevens’ dissent on the mootness point, underscored that the Court had not found the representatives to have sufficient interest in pursuing the action on their own behalf. *See id.* at 366 (“There is, of course, a serious question whether the Senate of the United States and a group of 33 Congressmen have standing to enforce those duties [created by the challenged law] in this litigation.”).

not. According to the House rules, BLAG can direct the House Office of the General Counsel to file amicus briefs” in cases involving the House’s interests” but must “call for legislation or a House resolution” to “authorize[e] the General Counsel to represent the House itself.”⁵² There is no such resolution regarding DOMA.⁵³ Indeed, two of BLAG’s five members opposed the use of House resources to defend DOMA,⁵⁴ and 133 members of the House filed an amicus curiae brief in the First Circuit maintaining that DOMA is unconstitutional.⁵⁵ Congress also has not authorized BLAG to represent the federal governments interests.⁵⁶ The easy equation that some have made between BLAG and the House of Representatives thus finds no support in the facts.

III. The Article III Questions: Government’s Mantle and Injury in Fact

Our inquiry must continue because being granted intervenor status does not, of itself, secure federal jurisdiction.⁵⁷ Particularly where an intervenor is the *only*

⁵² See Martin O. James, Congressional Oversight 122 (2002) (“The office may appear as *amicus curiae* on behalf of the Speaker and the Bipartisan Legal Advisory Group in litigation involving the institutional interests of the House. Where authorized by statute or resolution, the general counsel may represent the House itself in judicial proceedings.”). Indeed, 28 U.S.C. §530D, in requiring the Attorney General to notify Congress if the Executive Branch declines to defend a law, specifies that notification must be completed “within such time as will reasonable *enable the House of Representatives* and the Senate to take action, separately or jointly, to intervene in timely fashion in the proceeding.” *Id.* (emphasis added).

⁵³ Cf. *INS v. Chadha*, 462 U.S. 919, 930 n.5 (1983) (noting that full House and Senate had authorized intervention via resolution). For discussion of the ways in which the House might authorize action, see *Walker v. Cheney*, 230 F.Supp.2d 51, 70 (D.D.C. 2002) (discussing cases where “the relevant House of Congress had also passed a resolution expressly endorsing pursuit of the lawsuit”).

⁵⁴ See *supra* note xx.

⁵⁵ *Amicus Br. Of Members of the House of Representatives, Massachusetts v. U.S. Dep’t of Health and Human Svcs.*, Hos. 10-2204, 10-2207, 10-2214 (1st Cir. filed Nov. 3, 2011).

⁵⁶ For more on this point, see Matthew Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 Fordham L. Rev. 1539, 1576-78 (2012). There are additional important questions regarding whether the House, or even the full Congress, can legitimately intervene to defend a federal law. As the Court suggested in *United States v. Providence Journal Col*, 485 U.S. 693, 701 (1988), “[i]t seems to be elementary that even when exercising distinct and jealously separated powers, the three branches are but ‘co-ordinate parts of one government.’” (citations omitted). See also 28 U.S.C. §§ 516, 517, 518, and 519 (providing that the Attorney General shall direct all litigation in which the United States has interests).

⁵⁷ See *Diamond v. Charles*, 476 U.S. 54, 68 (1986) (“[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.”) (citing *Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339 (1945); *Bryant v. Yellen*, 447 U.S. 352, 368 (1980)). As David Shapiro explained,

party to seek an appeal in federal court, it must have Article III standing just like any other party.⁵⁸

So, we arrive at our constitutional question: can a ballot initiative proponent or elected officials who has survived the intervention hurdle also satisfy Article III's standing requirements for purposes of defending a challenged enactment. As noted earlier, this question breaks into two – first, whether these actors can derive their standing from the government, and second, whether they have their own particularized interest that suffices to establish standing.

Plaintiffs, Defendants, and Governments – A Quick Primer on Standing

Typical discussions of Article III standing, which arise mainly regarding plaintiffs,⁵⁹ stress that parties seeking to invoke federal jurisdiction must establish:

A distinction between standing to intervene and to appeal makes particular sense when the “case or controversy” limitation on the federal judicial power is recalled. Adding C to the litigation between A and B may pose no problems under Article III of the Constitution, but permitting C to be the sole adversary of B on appeal, when his interest in the case may be only in its value as precedent, certainly does give difficulty since there is no real controversy between A and C.

David Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv.L.Rev. 721, 753-54 (1968).

⁵⁸ See *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (“Standing to sue or defend is an aspect of the case-or-controversy requirement of Article III.”); *Diamond v. Charles*, 476 U.S. 54, 56 (1986) (same regarding standing to defend). The Court has acknowledged that if existing parties have Article III standing, additional parties need not necessarily satisfy standing requirements themselves. See *Diamond* at 64 (“Had the State sought review, this Court’s Rule 10.4 makes clear that Diamond, as an intervening defendant below, also would be entitled to seek review, enabling him to file a brief on the merits, and to seek leave to argue orally. But this ability to ride “piggyback” on the State’s undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for Diamond to join.”); cf. *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) (finding that it was not necessary to decide standing of other plaintiffs because one plaintiff was found to have standing); *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264 & n. 9 (1977) (same).

Indeed, the circuits have split over whether proposed intervenors must establish Article III standing in addition to satisfying Rule 24’s requirements. See, e.g., *Diamond*, 476 U.S. at 68 (“[T]he precise relationship between the interest required to satisfy the Rule and the interest required to confer standing, has led to anomalous decisions in the Courts of Appeals”) (citing divergent circuit court cases); *id.* at 68-69 (“We need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III.”); *McConnell v. FEC*, 540 U.S. 93, 233 (2003) (plurality op.), *rev’d on other grounds* by *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010) (holding that because existing defendant has standing, “we need not address the standing of the intervenor-defendants, whose position here is identical to the FEC’s”) (citations omitted).

⁵⁹ See *supra* text at xx.

“(1) an injury in fact (*i.e.* a “concrete and particularized” invasion of a “legally protected interest”); (2) causation (*i.e.* a “fairly . . . trace[able]” connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (*i.e.*, it is “likely” and not ‘merely “speculative”’ that the plaintiff’s injury will be remedied by the relief plaintiff seeks in bringing suit.”⁶⁰

While some of these concerns are particular to plaintiffs, the Court has reinforced that, even for defendant-intervenors, having a “direct stake in the outcome” remains critical.⁶¹ The Court has insisted, further, that federal litigation “is not to be placed in the hands of ‘concerned bystanders’ who will use it simply as a ‘vehicle for the vindication of value interests.’”⁶²

Separately, the Court has made clear that governments have standing to defend their own laws, including via intervention. Indeed, perhaps because the point seems so obvious, there is relatively little discussion of it in the case law. As the Supreme Court explained matter-of-factly in *Maine v. Taylor*, “a State clearly has a legitimate interest in the continued enforceability of its own statutes.”⁶³ For this reason, the Court permitted Maine to obtain Supreme Court review of a federal prosecution that had led a circuit court to invalidate a state law, even though the

⁶⁰ *Sprint Communications Co., L.P. v. APCC Svcs*, 554 U.S. 269, 273 (2008) (quoting *Lujan* at 560-61). In addition, the Court has several prudential grounds for limiting standing. See *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (describing these grounds, which include limitations on third-party standing, as “judicially self-imposed limits on the exercise of federal jurisdiction”). In the context of initiative proponents, third-party standing is not at issue. Instead, the alternate claims are that the initiative proponents are functioning as the government’s authorized representatives or that the proponents’ own interests have been infringed in ways that justify federal jurisdiction.

In all instances, the party that seeks to invoke federal jurisdiction bears the burden to establish standing. For cases making this point in the context of plaintiffs seeking review, see, e.g., *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (“[W]hether the plaintiff has made out a ‘case or controversy’ between himself and the defendant is the threshold question in every federal case, determining the power of the court to entertain the suit.”); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006) (reiterating that “a plaintiff must demonstrate standing for each claim [s]he seeks to press”). For discussion of intervenor’s burden to establish standing to pursue an appeal, see *infra* at xx.

⁶¹ *Diamond v. Charles*, 476 U.S. 54, 63 (1986) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)).

⁶² *Id.* (quoting *U.S. v. SCRAP*, 412 U.S. 669, 687 (1973)).

⁶³ *Maine v. Taylor*, 477 U.S. 131, 137 (1986). See also *Fleet Aerospace Corp. v. Holderman*, 848 F.2d 720, 723 (6th Cir. 1988) (same). Not surprisingly, there are few cases that make this observation explicitly. In nearly all cases, the point that states have standing to defend their own laws is taken as obvious for the reasons discussed *supra* at xx.

federal government had declined to pursue its own appeal.⁶⁴ Likewise, in rejecting a private actor's effort to defend a state law in *Diamond v. Charles*, the Court observed that “[b]ecause the State alone is entitled to create a legal code, only the State has the kind of ‘direct stake’ identified in *Sierra Club* [] in defending the standards embodied in that code.”⁶⁵ Federal statutory law also reflects the importance of the state's interest in defending its own laws, authorizing states to intervene in federal litigation whenever “the constitutionality of any statute of that State affecting the public interest is drawn in question.”⁶⁶

The Limits of Formal Delegation

If only formal conferral was necessary for governments to confer Article III standing to others, the questions on which this Essay focuses could be resolved simply. Although issues particular to the putative delegations to Proposition 8's proponents in *Perry* or to BLAG in *Windsor* and the other DOMA cases would remain,⁶⁷ there would be little need for extended discussion here.

But statutory conferral of standing, in itself, is not sufficient to satisfy Article III. Indeed, it is “settled that Congress cannot erase Article III's standing

⁶⁴ The case arose from the federal government's prosecution of a bait-seller under a federal statute that made it a crime to import fish or wildlife in violation of state law. Maine intervened, pursuant to 28 U.S.C. sec. 2403(b), which authorizes states to intervene in federal proceedings where the constitutionality of state laws is challenged. After the First Circuit invalidated the Maine bait law that underlay the prosecution, the federal government noticed an appeal to the Supreme Court but then dismissed its appeal voluntarily. *Maine*, 477 U.S. at 137 n.5.

⁶⁵ *Diamond v. Charles*, 476 U.S. at 65. *See also* *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) (explaining that creation and enforcement of a civil and criminal code is an “easily identified” sovereign interest).

⁶⁶ 28 U.S.C. §2403(b). The statute provides in full:

In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Id.

⁶⁷ *See infra* at xx.

requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.”⁶⁸

This is not to say that jurisdictional conferrals are entirely unimportant. Indeed, the Court has indicated that, at the federal level, they can “eliminate[] any prudential standing limitations and significantly lessen[] the risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit.”⁶⁹ At the state level too, they seem to provide some assurance related to standing, or, perhaps more accurately, their absence is noteworthy. In considering initiative proponents’ standing to defend Arizona’s official-English rule, for example, the Court noted pointedly that it was “aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.”⁷⁰ And in a case involving a New Jersey minute-of-silence law, the Court, in recognizing Article III standing, deemed it important that “state law authorize[d] legislators to represent the State’s interests.”⁷¹

Indeed, presumably it was in response to the Court’s *Arizonans* ruling that the Ninth Circuit asked the California Supreme Court to determine whether Proposition 8’s proponents had authorization to stand in the government’s stead.⁷²

⁶⁸ *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100(1979)). See also *Simon v. Eastern Ky. Welfare Rts. Org.*, 426 U.S. 26, 41 n.22 (1972) (“The plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.”) (quoting *Warth v. Seldin*, 422 U.S., at 501).

In the 2011 term, the Court dismissed as improvidently granted a case raising the question whether Article III jurisdiction arises in circumstances where the plaintiff would not have to establish an actual financial injury to prevail in obtaining statutory damages. See *First American Financial Corp.*, 610 F.3d 514 (2011) (granting Article III standing for damages under the Real Estate Settlement Procedures Act where plaintiff did not have to show actual financial injury), *cert dismissed as improvidently granted* by *First American Financial Corp. v. Edwards*, 132 S.Ct. 2536 (2012).

⁶⁹ *Raines* at 820 n.3. See also *INS v. Chadha*, 462 U.S. 919, 930, n. 5, 939-940 (1983) (holding Congress a proper party to defend a statute’s validity where both Houses, by resolution, had authorized intervention in the lawsuit).

⁷⁰ *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997).

⁷¹ See *Karcher v. May*, 484 U.S. 72, 82 (1987)

⁷² The proponents had “claim[e]d to assert the interest of the People of California in the constitutionality of Proposition 8, which the People themselves enacted.” *Perry* at 1072. In situating its analysis of the proponents’ standing, the Ninth Circuit distinguished the *Arizonans* case, citing the Supreme Court’s “grave doubts’ about the sponsors’ standing” because there had been no legislative authorization. *Id.* (citing *Arizonans*, 520 U.S. at 65-66).

The Ninth Circuit had certified this question to the California Supreme Court: Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative’s validity or the authority to assert the State’s interest

The California court held that they did.⁷³ BLAG, by contrast, does not have formal authorization from the House of Representatives⁷⁴ although no court to date has deemed that absence significant.

The Government-Mantle Theory of Standing and the Legislature-as-a-Whole

Since formal authorization alone does not satisfy Article III, the next question we must address is whether individuals and organizations that seek to defend official enactments can derive their standing from the government's standing to defend its own laws. In theory, this could be accomplished either by the government delegating its standing or by others taking up the government's mantle and stepping into legislative-defense role voluntarily in the government's absence. The discussion in the sections that follow will begin by considering the arguments favoring these sorts of standing transfers. My ultimate argument, though, is that the government-mantle theory, while conceivably viable for legislatures as a whole, is neither doctrinally permissible nor normatively sensible for others.

Thus far, the Supreme Court has kept a tight constraint on government stand-ins for Article III purposes, recognizing full legislatures, but few others, as qualified federal court litigants. Although it has offered almost no explanation, the Court seems to believe that the lawmaking body should be able to defend its work if the executive branch does not. In the New Jersey minute-of-silence case, for example, the Court allowed a circuit decision to stand where the state's Attorney General had declined to defend the law and the state General Assembly speaker and Senate president had obtained authorization to intervene on the legislature's

in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.

Perry, 631 F.3d 1052 (9th Cir. 2012). *Cf. id.* at 1072 (“The State's highest court thus held that California law provides precisely what the *Arizona*s Court found lacking in Arizona law: it confers on the official proponents of an initiative the authority to assert the State's interests in defending the constitutionality of that initiative, where the state officials who would ordinarily assume that responsibility choose not to do so.”).

⁷³ It wrote that “under article II, section 8 of the California Constitution and the relevant provisions of the Elections Code, the official proponents of a voter-approved initiative measure are authorized to assert the state's interest in the initiative's validity, enabling the proponents to defend the constitutionality of the initiative and to appeal a judgment invalidating the initiative.” *Perry v. Brown*, 52 Cal.4th 116, xx (2011). “[T]he role played by the proponents in such litigation,” the court explained, “is comparable to the role ordinarily played by the Attorney General or other public officials in vigorously defending a duly enacted state law and raising all arguable legal theories upon which a challenged provision may be sustained.” *Id.* at 525.

⁷⁴ *See supra* at xx.

behalf.⁷⁵

Similarly, the Court has accepted that Congress, with proper authorization, can step in to defend a statute, consistent with Article III, if the executive branch or one of its agencies accepts the plaintiff's contention that the challenged measure is unconstitutional. In *INS v. Chadha*, the Court wrote, regarding Congress's intervention where the INS declined to defend an immigration statute, that "[w]e have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."⁷⁶

Allowing the legislature as a whole to step into the government's shoes for Article III purposes is arguably consistent with governments' standing to intervene in defense of their own laws – any time a statute is challenged, the government's enforcement powers are at risk of diminishment. While the legislature does not have its own enforcement powers, one could reasonably argue that the government mantle can apply because its lawmaking responsibilities satisfy Article III's "direct stake" requirement.⁷⁷

⁷⁵ *Karcher v. May*, 484 U.S. 72, 82 (1987). The Court wrote, simply, that "the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals." *Id.* Describing the ruling later, the Court wrote that "[w]e have recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests." *Arizonans*, 520 U.S. at 65. It is hard to know whether this broader characterization, which refers to "legislators" rather than the legislature, was intentional, but given the absence of any acknowledgment or explanation and the dissonance with other doctrine, it is unlikely that the Court in *Arizonans* intended to expand *Karcher's* reach.

⁷⁶ 462 U.S. 919, 940 (1983). Interestingly, neither of the two cases cited in support of this proposition is actually on point. Instead, one of the cases, *Cheng Fan Kwok v. INS*, 392 U.S., at 210 n. 9, indicates in the cited footnote only that the Court had appointed a member of the Supreme Court bar to present argument as amicus curiae defending the challenged law when the agency had aligned itself with the petitioner. *Id.* (The entire footnote reads: Since the Immigration Service had aligned itself with petitioner on this question, the Court invited William H. Dempsey, Jr., Esquire, a member of the Bar of this Court, to appear and present oral argument as amicus curiae in support of the judgment below). The other, *United States v. Lovett*, 328 U.S. 303 (1946), does not discuss standing at all.

Given that the Court reinforced the Congress-as-proper-party point in *Arizonans*, the absence of meaningful precedential support in *Chadha* might not be as troubling as it seems. See *Arizonans*, 520 U.S. at 65n.20.

⁷⁷ My tentative view is that this argument is not persuasive for reasons related to those the Court gave in *United States v. Richardson*, 418 U.S. 166 (1974) regarding the U.S. government's institutional design, see *infra* at xx, but fuller discussion of this point is beyond the scope here.

Individual Legislators, Legislative Subgroups, and the Limits of the Government-Mantle Theory

If a legislature can establish Article III standing to defend its enactments, then why not individual legislators who supported, and perhaps even led the charge to have a challenged measure enacted? Here, the Court has drawn a sharp line, rejecting federal jurisdiction even for legislators who have statutory support for their intervention, unless those legislators seek federal jurisdiction for a narrow set of actions related to the voting process rather than outcomes.

This issue – and the contrast between full legislature’s and individual legislators’ standing to invoke federal jurisdiction in constitutional litigation regarding government enactments – arose most starkly in *Raines v. Byrd*, where six members of Congress had statutory authorization to challenge the Line Item Veto Act on constitutional grounds.⁷⁸ To establish Article III standing, the members argued that the veto law diminished their political power. The Court, however, rejected the plaintiffs’ institutional injury assertion as “wholly abstract and widely dispersed,” holding that “these individual members of Congress do not have a sufficient ‘personal stake’ in this dispute and have not alleged a sufficiently concrete injury to have standing.”⁷⁹

⁷⁸ 521 U.S. 811 (1997). The Act provided that “[a]ny Member of Congress or any individual adversely affected by [this Act] may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution.” *Id.* at 815-16 (discussing § 692(a)(1)).

⁷⁹ *Id.* at 830. See also *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 543-544 (1986) (holding that a school board member who “has no personal stake in the outcome of the litigation” lacked standing); *U.S. v. Ballin*, 144 U.S. 1, 7 (1892) (“The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate members or number of members, but the action of the body as a whole.”). Cf. *Nevada Comm. On Ethics v. Carrigan*, 131 S.Ct. 2343, 2350 (2011) (“[T]he legislator casts his vote ‘as trustee for his constituents, not as a prerogative of personal power.’ In this respect, voting by a legislator is different from voting by a citizen. While ‘a voter’s franchise is a personal right,’ ‘[t]he procedures for voting in legislative assemblies . . . pertain to legislators not as individuals but as political representatives executing the legislative process.’”) (internal citations omitted); *Bond v. United States*, 131 S.Ct. 2355, 2365 (2011) (“compar[ing] *Clinton v. City of New York*, 524 U.S. 417, 433–436 (1998) (injured parties have standing to challenge Presidential line-item veto) with *Raines v. Byrd*, 521 U.S. 811, 829–83 (1997) (Congress Members do not).”)

Lower courts have also long concluded that an individual’s status as an elected official does not itself confer Article III standing. See, e.g., *Harrington v. Bush*, 553 F.2d 190 (D.C.Cir.1973) (denying standing to a member of House of Representatives who sought a declaratory judgment barring certain illegal activities by the Central Intelligence Agency); *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975) (finding that members of House of Representatives lacked standing to challenge funding expenditure for military action in Southeast Asia); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315 (2nd Cir. 1973) (holding that member of

Similarly, the Court summarily affirmed a three-judge district court that found no Article III standing where a senator sought to carry out “his special [institutional] duties and responsibilities” and had statutory authorization to bring suit in federal court.⁸⁰ Noting that the decision to appoint Judge Mikva did not diminish the effectiveness of the senator’s vote or otherwise injure his interests, the district court concluded that individual members of Congress were “powerless to procure” federal standing in this way, and that Congressional authorization to file suit could not confer on them “a ‘right’ to seek a decision from a federal court.”⁸¹

While individual legislators cannot claim the government’s mantle for enforcement purposes, the Supreme Court has found that they can invoke federal jurisdiction to protect the voting *process* and their own election. That is, their roles enable them to establish a “direct stake” in the lawmaking process even if they cannot claim that stake in the outcomes. For example, in *Coleman v. Miller*, the Court found Article III standing for a group of legislators who challenged the process by which the state legislature ratified a proposed U.S. constitutional amendment regarding child labor.⁸² Still, exhibiting some sensitivity to having

House of Representatives lacked standing to seek a declaratory judgment barring military action in Cambodia). *Cf. Powell v. McCormack*, 395 U.S. 486, 496, 512-514, 89 S.Ct. 1944, 1950-1951, 1959-1960, 23 L.Ed.2d 491 (1969) (finding standing for a Member of Congress on the ground that he suffered a concrete and personal injury when he was barred from taking his seat, and his salary, in the House of Representatives).

⁸⁰ *McClure v. Carter*, 513 F.Supp. 265, 270, 266 n.1 (D. Idaho 1981), *aff’d sub nom McClure v. Reagan*, 454 U.S. 1025 (1981).

⁸¹ 513 F.Supp. at 271 (D. Idaho 1981). Nor can former legislators take advantage of the governmental-standing mantle. *See Karcher v. May*, 484 U.S. 72, 81 (1987) (“Karcher and Orechio participated in this lawsuit in their official capacities as presiding officers of the New Jersey Legislature, but since they no longer hold those offices, they lack authority to pursue this appeal on behalf of the legislature.”).

⁸² 307 U.S. 433 (1939). In *Raines v. Byrd*, the Court discussed the procedural defects at issue in *Coleman* at some length:

With the vote deadlocked 20 to 20, the amendment ordinarily would not have been ratified. However, the State's Lieutenant Governor, the presiding officer of the State Senate, cast a deciding vote in favor of the amendment, and it was deemed ratified (after the State House of Representatives voted to ratify it). The 20 State Senators who had voted against the amendment, joined by a 21st State Senator and three State House Members, filed an action in the Kansas Supreme Court seeking a writ of mandamus that would compel the appropriate state officials to recognize that the legislature had not in fact ratified the amendment. That court held that the members of the legislature had standing to bring their mandamus action, but ruled against them on the merits.

This Court affirmed. By a vote of 5-4, we held that the members of the legislature had standing. In explaining our holding, we repeatedly emphasized that if these legislators (who were suing as a bloc) were correct on the merits, then their votes not to ratify the amendment were deprived of all validity.

allowed individual legislators to achieve Article III standing, even related to the voting process, the Court later stressed that *Coleman* was “[t]he one case in which we have upheld standing for legislators (albeit *state* legislators) claiming an institutional injury.”⁸³ To achieve Article III standing under *Coleman*, the Court also suggested that legislators would have to “allege[] that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated.”⁸⁴

The other oft-cited case to support individual legislator standing, *Powell v. McCormack*,⁸⁵ is even more limited. There, Representative Adam Clayton Powell succeeded in establishing Article III standing but only because he suffered an individualized and concrete injury of the sort easily recognized by standard doctrine when he was barred from taking his seat and salary in the House of Representatives after having been duly elected.⁸⁶

Whither BLAG?

As the case law just discussed makes plain, BLAG, as a subgroup of the House of Representatives, or even as the official representative of the House,⁸⁷ is not well positioned to claim Article III standing to defend DOMA.⁸⁸ The reason, again, is that it cannot claim the government’s enforcement powers; nor can the government’s decisions about enforcement strategy be said to present the sort of

Raines, 511 U.S. at 822 (footnote and citation omitted).

⁸³ *Raines*, 521 U.S. 811, 821. The Court added: “It is obvious, then, that our holding in *Coleman* stands (at most, see n. 8, *infra*) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.” *Id.* at 822. See also *Planned Parenthood of Mid-Missouri and Eastern Kansas v. Ehlmann*, 137 F.3d 573, 578 (8th Cir. 1998) (finding that ten legislators lacked standing to seek enforcement of abortion restrictions and describing *Coleman* as limiting legislator standing to cases involving alleged “distortion of the legislative process” and not authorizing standing for legislators who object on constitutional grounds to a properly enacted law).

⁸⁴ *Raines*, 521 U.S. at 824.

⁸⁵ 395 U.S. 486 (1969).

⁸⁶ *Id.* at 512-14 (1969).

⁸⁷ There is no apparent support for BLAG having this representative status. See *supra* xx.

⁸⁸ Unlike in *Perry*, where the intervenors’ inability to attain Article III standing requires dismissal, see *infra*, there is a strong argument that the Supreme Court retains jurisdiction to hear *Windsor*, even without BLAG having its own Article III standing. The United States is subject to a court order requiring reimbursement of taxes to Edie Windsor, the plaintiff-respondent. In addition, its enforcement powers are diminished by DOMA’s invalidation, even if it is in agreement with that determination. I do not address the Supreme Court’s related jurisdictional question in *Windsor* regarding “[w]hether the Executive Branch’s agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case” as it discussion of it would extend well beyond this essay’s scope.

limited process-based challenges that have occasionally been permitted.⁸⁹ Presumably for this reason, most of BLAG's prior involvement in other federal litigation has come in the form of amicus brief participation rather than through intervention seeking full party status.⁹⁰

Private Actors and the Government Mantle

The question remains whether private actors can claim the government's mantle, either with the government's endorsement, as in *Perry*, or without. Because *Perry* presents the strongest version of this claim that governments can delegate their Article III standing, we will begin there and then consider the full array of arguments that might support individuals and organizations stepping in when government declines to defend a challenged law. As will be quickly apparent, though, the doctrine leaves little room for private actors to establish the interest and injury required by Article III in this context, and the theories that might enable initiative proponents to stand out from among other private actors would, if accepted, undermine Article III as a meaningful limitation on federal jurisdiction.

In recognizing Article III standing for the individuals and organization that sponsored Proposition 8,⁹¹ the Ninth Circuit wrote: "All that matters, for federal standing purposes, is that the People have an interest in the validity of Proposition 8 and that, under California law, Proponents are authorized to represent the People's interest."⁹² Yet, as we know from the doctrine just discussed, neither the

⁸⁹ See *supra* xx.

⁹⁰ See, e.g., *Raines v. Byrd*; *Dickerson v. U.S. Waxman v. Evans* shows the limited nature of BLAG even more sharply. In *Waxman*, which involved a suit by Congressional Democrats seeking access to census information, House members submitted two amicus briefs, each opposed to the other, with BLAG on one side and the House Democratic leadership on the other. See Louis Fisher, *The Politics of Executive Privilege* 176 (2004).

⁹¹ The Ninth Circuit had to decide the standing question because the state of California did not appeal from the district court's determination that Proposition 8 was unconstitutional. [cite]

⁹² *Perry* at 1073; see also *id.* at 1075 ("Because the State of California has Article III standing to defend the constitutionality of Proposition 8, and because both the California Constitution and California law authorize 'the official proponents of [an] initiative ... to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so,' we conclude that Proponents are proper appellants here.") (internal citation omitted). Regarding this authorization, the Ninth Circuit added that "[t]he People of California are largely free to structure their system of governance as they choose, and we respect their choice." *Perry* at 1073.

The court made a point of acknowledging, too, that state law could not sidestep Article III constraints. *Perry* at 1074 ("To be clear, we do not suggest that state law has any "power directly to enlarge or contract federal jurisdiction." *Duchek v. Jacobi*, 646 F.2d 415, 419 (9th Cir.1981). "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." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985).).

intervenor’s assertion of an interest nor the government’s authorization suffices to confer standing.⁹³ Indeed, the Supreme Court has spoken quite pointedly against the easy attribution of standing to initiative proponents. In addressing Arizona’s official-English initiative for a unanimous court, Justice Ginsburg confirmed that “this Court has never identified initiative proponents as Article-III-qualified defenders.”⁹⁴

Private actors seeking to insure that the laws and Constitution are properly enforced outside the initiative context fare no better vis a vis Article III. In fact, the Court has repeatedly affirmed that “[a]n interest shared generally with the public at large in the proper application of the Constitution and laws will not do.”⁹⁵ Nearly a century ago, the Court faced the issue of private actors seeking to ensure government accountability in a suit by a citizen who was also a taxpayer and a member of the American Constitution League to challenge the Nineteenth Amendment’s ratification process.⁹⁶ Although the plaintiff claimed injury in that “[f]ree citizens would be deprived of their right to have such elections duly held, the effectiveness of their votes would be diminished, and election expenses would be nearly doubled,” the Court found that he lacked a sufficient interest for Article III standing.⁹⁷

Some decades later, the Court reinforced the point in rejecting taxpayer standing to challenge a state law, explaining that the party invoking federal jurisdiction “must be able to show . . . that he has sustained . . . some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally.”⁹⁸ And again, the Court reinforced that generalized grievances are

⁹³ See *supra* at xx.

⁹⁴ *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997).

⁹⁵ *Id.* (citing *Lujan*, 504 U.S. at 573-576). Similarly, in *In Ex Parte Levitt*, 302 U.S. 633 (1937) (per curiam), the Supreme Court found no Article III standing for a member of the Supreme Court bar who sought to challenge Justice Black’s appointment based on the Constitution’s Ineligibility Clause. The Court explained:

It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.

Id. at 634.

⁹⁶ *Fairchild v. Hughes*, 258 U.S. 126 (1922).

⁹⁷ *Id.* at 127, 129.

⁹⁸ *Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429, 434 (1952) (citation omitted). Not surprisingly, then, “when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.” *Lujan* at 562 (citations omitted).

insufficient for standing purposes in response to a federal taxpayer who sought information about the Central Intelligence Agency's expenditures pursuant to the Constitution's Statement and Account Clause so that he could "intelligently follow the actions of Congress or the Executive" and "properly fulfill his obligations as a member of the electorate in voting for candidates seeking national office."⁹⁹ As the Court reiterated, this desire to have the law enforced in a particular way "is surely [] a generalized grievance . . . since the impact on him is plainly undifferentiated and 'common to all members of the public.'"¹⁰⁰

Individuals who have pursued what they perceived as the government's interests by seeking to defend official enactments have similarly been deemed to lack an adequately individualized stake. In *Diamond v. Charles*, for example, the Court rejected a doctor's proposed intervention to defend a state abortion restriction on the ground that it was "simply an effort to compel the State to enact a code in accord with [the doctor's] interests."¹⁰¹ This "expression of a desire that [a law] as written be obeyed" is one available to the sovereign, which has a "direct stake" in defending its laws, but not to a citizen with no individualized injury.¹⁰²

But perhaps one might argue that initiative proponents are differently situated to pursue the government's interests when they seek to enforce a law that they have sponsored, particularly when they have been authorized by the state, as Proposition 8's proponents purportedly were.¹⁰³ In particular, the *qui tam* cases might be invoked for support because the Court has permitted private actors to invoke federal jurisdiction in the course of actions seeking redress related to alleged fraud against the United States.¹⁰⁴ In *Vermont Agency of Natural Resources v. U.S. ex rel Stevens*, for example, the Court acknowledged that the private actor, known as the relator, does not suffer an invasion of its own legally

⁹⁹ *U.S. v. Richardson*, 418 U.S. 166, 176 (1974).

¹⁰⁰ *Id.* at 176-77 (quoting *Ex Parte Levitt*, 302 U.S. 633, 634 (1937)).

¹⁰¹ *Diamond v. Charles*, 476 U.S. 54, 65 (1986).

¹⁰² *Id.* at 66.

¹⁰³ None of the statutes governing ballot initiative sponsors addresses, much less authorizes, those sponsors to defend "their" measure on the state's behalf. [cite] Although the California Supreme Court construed them to do so and the Ninth Circuit accepted that construction, it is not clear that that construction is warranted. [cite]

¹⁰⁴ Most *qui tam* suits are brought under the False Claims Act, 31 U.S.C. §3279(a), which permits a private party, known as the "relator" to bring an action "for the person and for the United States Government" against a defendant who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." Three other statutes also allow for *qui tam* proceedings. See *Vermont Agency of Natural Resources v. U.S. ex rel Stevens*, 529 U.S. 765, 769 n.1 (2000).

protected interest in a conventional sense.¹⁰⁵ Instead, the interest is that of the United States and “the ‘right’ he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails.”¹⁰⁶ But, the Court found, standing exists because the relator is a partial assignee of the United States’ fraud claim, so that, when the relator files, it is pursuing its own interests.¹⁰⁷

Unfortunately for initiative proponents, the government cannot assign the interests that give rise to standing in this context. That is, while a government can assign its claim for financial compensation, as in the *qui tam* context, its enforcement powers are not similarly alienable.¹⁰⁸

Perhaps initiative proponents are more like representatives of the legislature than like assignees of the government, drawing on *Karcher*’s and *Chadha*’s acceptance of legislative bodies’ Article III standing.¹⁰⁹ Here, the argument would be that, like those leaders, the initiative proponents are preserving the voters’ power to see that their initiative-enacted laws are enforced. The difficulties with this position, though, are several. First, it is factually weak. Sponsoring individuals and organizations are enthusiastic supporters of proposed legislation but they are not enactors. That role belongs to the voting public. As leading

¹⁰⁵ *Id.* A concrete interest in the suit’s outcome, alone, is insufficient because, as the Court explained, that is not necessarily an interest related to an injury in fact – even someone who has wagered on the outcome of a lawsuit could be said to have a concrete interest. *Id.*

¹⁰⁶ *Id.* at 773. *See also id.* (“[A]n interest that is merely a ‘byproduct’ of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes.”).

¹⁰⁷ *Id.* at 773 (affirming “the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor”). The Court elaborated this point in *Sprint Communications Co., L.P. v. APCC Svcs., Inc.*, 544 U.S. 269 (2008), where assignees of payphone operators had brought compensation claims in federal court but had promised to pay proceeds from those claims to the assignor. Reviewing historical practice in England and the U.S., the Court observed that “[w]here assignment at issue, courts . . . have always permitted the party with legal title alone to bring suit; and . . . there is a strong tradition specifically of suits by assignees for collection.” *Id.* at 286. The Court reinforced the point by reference to *Vermont Agency*, reiterating that, in the context of *qui tam* claims, private actors standing arises from its possessing an assigned interest from the United States. *Id.* *See also id.* at 289 (describing assignment as conferring a “property right”); 290 (describing assignees as asserting “*legal rights of their own*”) (emphasis in original).

¹⁰⁸ *Cf. Diamond v. Charles*, 476 U.S. 54, 64 (1986) (“[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”) (citation omitted).

¹⁰⁹ A separate argument might seek to recognize initiative sponsors as an alternate legal defense team for the state when the usual defense group is not available. *Cf. Perry v. Brown*, 134 Cal.Rptr.3d at 525 (“[T]he role played by the proponents in such litigation,” the court explained, “is comparable to the role ordinarily played by the Attorney General or other public officials in vigorously defending a duly enacted state law and raising all arguable legal theories upon which a challenged provision may be sustained.”). This is not a reading that the Ninth Circuit embraced, *see supra*, nor could it have, since counsel to a party does not have standing to pursue an appeal that the party itself declines to pursue. *See, e.g., Allen v. Wright*, 458 U.S. at 751 (requiring that a party “allege *personal injury*”) (emphasis added).

supporters, proponents are more like individual lawmakers – perhaps closest to the lead sponsor of a piece of legislation. And individual lawmakers, as we know, may have a cognizable interest in the voting *process*¹¹⁰ but they do not have Article III jurisdiction for claims that would have the state enforce its laws in a particular way.

Second, there is nothing in the initiative process framework to justify treating proponents as the voters’ proxy in litigation, notwithstanding the Ninth Circuit’s suggestion in *Perry* that ballot measure sponsors have special, distinguishing responsibilities.¹¹¹ Unlike in legislatures, where governing rules frequently designate the leadership to appear on the body’s behalf in a range of proceedings, initiative statutes focus almost entirely on the steps in the process – how many signatures must sponsors obtain to put a measure on the ballot; how those signatures will be assessed; what sorts of information goes into a voter guide; etc.¹¹² Not a single provision bears remotely on enforcement, or even defense, of a proposed measure. Against this background, the state could conceivably designate anyone in the voting population, or even anyone at all, to handle the voters-as-lawmakers enforcement action. After all, even from within the process-focused rules, there is no requirement that the initiative sponsor be either the most effective or the most generous initiative supporter or the one, for that matter, that the voters would have chosen.¹¹³

In this sense, the initiative process laws on which *Perry* relied to distinguish Proposition 8’s proponents from the measures’ other supporters are most analogous to provisions that set out the legislature’s lawmaking processes. It is not a serious argument that these sorts of measures should help an individual legislator overcome the standing hurdle to defend a measure enacted according to these processes; nor should it be that the analogous voter initiative provisions give official sponsors access to federal jurisdiction once the initiative has passed.

To be sure, ballot measure proponents and individuals and organizations involved with lobbying efforts for legislation stand out from the general public

¹¹⁰ See *supra* at xx (discussing *Coleman v. Miller*).

¹¹¹ See *supra* at note xx and accompanying text. See also *Perry v. Brown*, 134 Cal.Rptr.3d at xx) (describing initiative proponents as “the most obvious and logical persons to assert the state’s interest,” because of their unique legal status in relation to the initiative).

¹¹² [cite]

¹¹³ The “single-subject rule” that is typically part of a voter initiative framework would likely preclude sponsors from merging into the measure a vote on who would represent the voters’ interests if the state declined enforcement. Cf. William E. Adams, Jr., *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 Ohio St. L. Rev. 583 (1994).

because of their involvement in getting a particular piece of legislation passed. But dedication of time and resources also cannot be what confers Article III standing on proponents to defend the measures they help pass. If it were enough, then there should be no difference between the official ballot sponsors and other, non-official initiative supporters that make equivalent contributions.¹¹⁴ In effect, then, returning to where this Essay started, the state could choose anyone in Defendantville to do the job of representing the voters.

Still, even if we accept initiative sponsors as the voters' representatives, the requisite interest for Article III standing does not follow because the voters would be seeking federal jurisdiction for the purpose of having the state enforce the law consistent with their preferences. That aim, as discussed above, is precisely the sort of "generalized grievance" that the Court has rejected in the past as

¹¹⁴ Indeed, alternative frameworks might award of standing to whoever is deemed to have contributed most financially or otherwise. One can easily imagine scenarios where an organization that rushed to become a measure's official sponsor turned out not to take leadership of the initiative campaign or even, conceivably, to support the initiative at election time. For obvious reasons, formal deference to official sponsorship might not make sense but neither would having a court try to sift among competing proponents to select one for the grant of standing. A resort to random selection would likewise present many difficulties, as would the option of open-door participation.

insufficiently particularized.¹¹⁵

None of this is to say that states must keep initiative proponents, organizational advocates, or even taxpayers from intervening to defend state laws in state courts. To the contrary, as the Supreme Court has made clear repeatedly, state courts are not burdened by Article III's constraints.¹¹⁶ But it is to say that a state cannot, even with the best of intentions, extend its sovereignty to a private actor for purposes of standing in federal court.

¹¹⁵ See *supra* at xx; *Lujan*, at 573-74 (stating that an abstract interest in the government's "proper application of the Constitution and laws" cannot justify Article III standing); *FEC v. Akins* (rejecting individual enforcement of general constitutional provisions); *U.S. v. Richardson*, 418 U.S. 166, 178 (1974) (finding no Article III standing for individuals "to invoke the judicial power to determine the validity of executive or legislative action" based on "a general interest common to all members of the public") (citation and internal punctuation omitted).

Further, if we accept that the voters-as-lawmakers are entitled to access federal court to defend their initiatives, it is not clear why they could not access federal court to assert their interests in other ways, including to defend measures enacted by elected representatives or even to demand particular types of legislation. Surely the voters have as much stake as their elected representatives in defending enacted measures and in the legislative process working properly; the distinction between direct and representative democracy should not make a difference for Article III purposes. Yet to permit voter standing in these circumstances, even by someone purporting to represent voters at large would be, again, to open the federal courts to those with non-particularized interests. It could even follow, arguably, that the authority to stand in for the legislature's interests should be available to anyone purporting to represent the lawmaking body, whether in or outside of the legislature. While it might be logical and convenient to reserve that role to the legislative body's leadership, it cannot be that the state's grant of permission is the linchpin for representative standing without conceding, contrary to decades of standing jurisprudence, that governments can legislate around the strictures of Article III. [more to come]

In addition, allowing the voters to "take their state to court," in effect, by giving them the authority to act on the state's behalf arguably creates a *Pennhurst* problem by permitting federal courts to adjudicate alleged violations of state law. Although the California Supreme Court found that the state had consented to being represented by the initiative proponents, it is not clear that that consent satisfies the "clear waiver" requirement. [cites]

¹¹⁶ *Asarco v. Kadish*, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy"); *City of Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983) ("[T]he state courts need not impose the same standing . . . that govern federal-court proceedings."). Cf. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) ("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.").

Beyond the mantle-of-government theory - the injury-in-fact problem for initiative proponents and legislators

Given that legislators and initiative proponents cannot claim a governmental, or even quasi-governmental, interest, they must demonstrate another cognizable interest if they are to invoke a federal court's jurisdiction in defense of an initiated measure. Yet for the reasons just discussed, participation in the political process, even as a ballot measure sponsor or lawmaker, does not give rise to the sort of distinctive, palpable interest that generates Article III standing.

What about passion, then?¹¹⁷ The familiar doctrine bears repeating because, as explored further below, concerns about excluding a measure's most passionate supporters seem to drive, at least subliminally, some of the judicial decision-making in this area.

The Court faced the question squarely over 40 years ago in *Sierra Club v. Morton*, when it rejected the position that a litigant could gain standing based either on its own commitment to an issue or as the representative of the commitments and interests of others.¹¹⁸ As the Court explained in the context of an environmental-protection suit brought under the Administrative Procedures Act, "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved.'"¹¹⁹ Since then, the Court has reiterated the point in other contexts, too, making clear that while an individual's or organization's interests might conflict sharply with the government or other adverse party, "motivation is not a substitute for the actual

¹¹⁷ In most cases, litigants seeking federal court jurisdiction have suffered a palpable injury to their economic interests, obviating the need for extended discussion of standing in those contexts. The Court has also been clear that infringement of non-economic rights can give rise to standing. See *Asarco v. Kadish*, 490 U.S. 605, 616 (1989) ("Our precedents demonstrate that a party may establish standing by raising claims of noneconomic injury.") (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972)).

However, "claims of injury that are purely abstract, even if they might be understood to lead to "the psychological consequence presumably produced by observation of conduct with which one disagrees," do not provide the kind of particular, direct, and concrete injury that is necessary to confer standing to sue in the federal courts." *Id.* (citation omitted). In *Asarco*, the Court found that although teachers' association members might have a particular interest in the state's educational system, that interest did not distinguish them, for standing purposes, from others, including students, parents, and other citizens who might also be interested but would not have standing. *Id.*

¹¹⁸ 405 U.S. 727 (1972). See *id.* at 736 (describing *Sierra Club's* standing claim as resting on its "longstanding concern with and expertise in such matters" being "sufficient to give it standing as a 'representative of the public.'" (footnote omitted).

¹¹⁹ *Id.* at 739.

injury needed by the courts”¹²⁰

The Court’s explanation is as important as its conclusion because it shows why initiative proponents and legislators cannot possibly claim Article III standing by virtue of their heightened concern for the issue implicated by the measure they promoted. “[I]f a ‘special interest’ in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide ‘special interest’ organization however small or short-lived,” the Court wrote.¹²¹ It continued: “And if any group with a bona fide ‘special interest’ could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.”¹²²

IV. Procedural Legitimacy and the Costs of Exclusion

One might ask, still, whether this is the system we want or, put another way, whether policy or other arguments ought to compel a rethinking of standing doctrine in this area. I turn first to Court’s observations about this normative question and then consider how thinking about the question from non-consequentialist and consequentialist perspectives might help.

In *U.S. v. Richardson*, the Court confronted the consequences of its ruling that a private party lacked standing to demand that the Central Intelligence Agency act consistently with its constitutional obligation to provide an accounting of its expenditures because he had not suffered a personalized injury.¹²³ “It can be argued that if respondent is not permitted to litigate this issue, no one can do so,” the Court acknowledged. The same is true for Proposition 8 – if the state declines to defend and the measure’s proponents lack Article III standing, the litigation cannot properly continue past the district court.¹²⁴ (The DOMA cases are

¹²⁰ *Schlesinger v. Reservists Committee to Stop the War*, at 226. *See also id.* at 225-26 (“the essence of standing ‘is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened to be, injured by the unconstitutional conduct.’”) (quoting *Doremus v. Board of Education*, 342 U.S. 429, 435 (1952); *U.S. v. Richardson* at 177 (“While we can hardly dispute that this respondent has a genuine interest in the use of funds and that his interest may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury as a result of the operation of this statute.”)).

¹²¹ *Sierra Club* at 739.

¹²² *Id.* at 739-40.

¹²³ 418 U.S. 166 (1974).

¹²⁴ There is no Article III problem in the district court because the parties invoking federal jurisdiction the suit alleged a concrete and particularized injury brought on by the state’s refusal to allow them to marry. [cite] Likewise, the fact that the governor and attorney general agreed with

positioned differently because the federal government has sought review in each case.)¹²⁵

The Court responded to what might seem a troubling result by situating it within the Framers' political vision for the United States, with the allocation of some disputes to the judiciary and others to the political process.

The Constitution created a representative Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the 'ground rules' established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls.¹²⁶

Indeed, the Court's observation is an important reminder that relaxing Article III's constraints in the context of voter initiatives or other popular measures would have consequences that extend beyond the jurisprudential to the very nature of our government structure. Somewhat dramatically, the Court proclaimed: "Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts."¹²⁷

Continuing, the Court made an observation that seems tailor-made for both BLAG and Proposition 8's proponents:

Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.

In other words, when we step back to consider whether it might be best to ease Article III's requirements in the voter initiative context, it bears remembering that far more is in play than the frustration of initiative supporters and supporters of a

the plaintiffs about Proposition 8's invalidity did not vitiate the case or controversy within the meaning of Article III; only an injunction ordering the State not to enforce the measure could sufficiently remedy the plaintiffs' alleged injury.

¹²⁵ See *supra* n. xx.

¹²⁶ U.S. v. Richardson, 418 U.S. at 179.

¹²⁷ *Id.*

particular law if a federal appeal is foreclosed.

Considering additional non-consequentialist and consequentialist arguments for and against allowing intervention and standing in these contexts proves useful, too. On the non-consequentialist side, we could say that permitting private actors and legislators to participate in defending government action is a good in itself. For initiative proponents, the argument is strongest—the very point of the initiative process is to enable and encourage citizens to participate directly in government. This argument could also be extended to support inclusion of legislators and even citizen-lobbyists as defendants in suits regarding measures they supported. It is reasonable to think that opening this part of the process could foster even greater civic engagement. To return to the illustration from the Essay’s outset, if there really was a Defendantville, its inhabitants presumably would feel more a part of government if they knew they could not only advocate for laws but also defend those laws against post-enactment challenge challenges.

More pragmatically, it seems obvious that those who are both highly passionate and knowledgeable about a particular measure are likely to bring robust arguments into the litigation process. And, as the Ninth Circuit has pointed out, government cannot necessarily be counted on to do the same, particularly if it disagrees with the measure’s very merits. Indeed, to the extent citizens turned to voter initiatives to avoid the legislature, it seems reasonable to assume that those same citizens will be more apt to fully illuminate issues and arguments that the reviewing court would want to consider.¹²⁸

Also obvious, particularly in the voter initiative context, is that blocking private actors from defending measures they have worked energetically to pass could have a range of negative public effects.¹²⁹ Most directly, decisions along those lines may discourage others from becoming involved in the legislative process. To the extent a state values its initiative system, as California does, this risk could be seen as substantial.

Further, if courts are seen as shutting their doors to keep engaged citizens from defending “their” laws, the risk is not only disillusionment but also heightened distrust of the judiciary. After all, the Article III concerns that would require such

¹²⁸ *Yniguez* at 733 (“The official sponsors of a ballot initiative have a strong interest in the vitality of a provision of the state constitution which they proposed and for which they vigorously campaigned. The district court’s decision striking down Article XXVIII essentially nullified the considerable efforts AOE made to have the initiative placed on the ballot and to obtain its passage.”). The California Supreme Court, among others, has made this point as well. [cite]

¹²⁹ Also, with respect to challenges to state law measures, the Article II concerns about diminishing the unitary executive if “outsiders” represent the government are not present. [cite]

a decision are not likely to come through sympathetically, if at all, in news media coverage.¹³⁰ Indeed, general faith in government can only be hurt if the state or federal government refuses to defend a law and the initiative proponents or legislators who supported it are barred from taking an appeal if the measure is struck down.

Countermajoritarian anxiety and guilt at work

These points, taken together, help to explain why some courts, perhaps including the Ninth Circuit in *Perry* and the federal courts that have decided DOMA cases, deviate from the seemingly clear limitations imposed by the federal intervention rules and Article III when considering the role of initiative proponents and legislators in defending official enactments. To put them into jurisprudentially familiar terms, we might say that these courts are being driven by a combination of countermajoritarian anxiety and countermajoritarian guilt.

On the anxiety side, the fear is, as just noted, that the adjudication process will fall apart in some way if a ballot measure sponsor or subgroup of legislators is denied standing to appeal the measure's invalidation, especially in circumstances where the government itself declines to appeal.¹³¹ The litigation might be diminished without the benefit of the proponents' arguments and, further, the reputation of the court and the political process may suffer immeasurable damage by the proponents' exclusion.

Guilt seems also to be operative, especially in the voter initiative context. After all, stepping back from standing doctrine's fine points, it can seem unfair, in a Lockean sense, to take those who labored to pass legislation and preclude them from defending their work.¹³² Strains of due process jurisprudence also reinforce this sense of countermajoritarian guilt, suggesting that it is procedurally as well as substantively unfair to deprive ballot measure sponsors or even voters¹³³ of a meaningful opportunity to be heard in defense of the measure they helped pass.

This anxiety and guilt, when left unexposed, risk obscuring the significant costs associated with allowing governments to delegate their authority to private actors and individual legislators. Most fundamentally, private parties, no matter

¹³⁰ My own experience confirms that most reporters tend to avoid what they perceive as an "in the weeds" standing and jurisdictional questions, which are far less interesting to their audience than a measure's subject matter and consequences in the world.

¹³¹ This anxiety is likely triggered even earlier, when courts are asked to allow these actors to intervene.

¹³² [cites to come]

¹³³ [cites to come] As discussed *supra*, the same argument could apply to those who were involved in advocating for legislation that was enacted by lawmakers.

how engaged in the political process, are not subject to any of the accountability-oriented limitations that are in place, formally and normatively, to constrain government actors. There are no transparency requirements, few ethical limitations, and no obligation to carry forward the public interest rather than their own (or to take into account conflicting views of the public interest). Even legislators, as individuals and in subgroups, are not subject to the same limitations as the government as a whole.

Relatedly, and as a partial result of these constraints being absent, private parties and legislative subgroups are free to argue whatever they wish in the guise of government interests when they pursue appeals under the government's mantle. So, for example, Proposition 8's sponsors could freely argue that heterosexual parents should be privileged over gay parents¹³⁴ even though California law and policy affirmatively rejected that position. Indeed, Proposition 8's sponsors could have argued – as state interests – that gay people are mentally ill, child molesters, and otherwise dangerous to society had they chosen to do so, notwithstanding that nothing in California law supports those positions.¹³⁵ The same is true for BLAG.¹³⁶ This setup presents its own sort of legitimacy risk, where courts can be seen as giving any group – regardless of how divisive – a governmental platform for advancing its views.

Thus, just as it seems wrong to bar private actors and legislators from participating fully in a measure's defense, so too does it seem wrong to allow those actors to function as the government when they do not share the government's enforcement interest or accountability constraints.

Procedural accommodations

The question, then, is how, procedurally, to accommodate the assortment of concerns in play – fairness, guilt, anxiety, and judicial legitimacy writ large – together with the real constraints of intervention rules and Article III. Simply condemning the concerns as unreasonable and advocating a hard doctrinal line will not do; after all, these concerns, articulated and not, are likely to influence the

¹³⁴ In fact, Proposition 8's sponsors made this argument, asserting that “children are better off when raised by two biological parents and that society can increase the likelihood of that family structure by allowing only potential biological parents—one man and one woman—to marry.” Perry, at 1096. While this argument was not as overtly hostile to gay parents as similar claims from amicus Campaign for California Families, the result was, in effect, to advocate, on the state's behalf, a legislative preference for heterosexual parents.

¹³⁵ These two assertions, which once had much traction in antigay arguments, have long been considered empirically unsound in the United States. See Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 U.C.L.A. L. Rev. 1375 (2010).

¹³⁶ [cites to come]

acceptability of any proposed solution.

With respect to guilt, which is the more inward-looking of the strands of legitimacy concerns, it may help to recall that any deprivation caused to private parties is not categorical. In the state court system, an initiative proponent or other private actor can participate in a state law's defense as fully as the state will allow, entirely free from Article III constraints. Of course, the availability of state-court standing will be cold comfort to an advocate if litigation is brought in federal court and it will typically be of little help to members of Congress. In these circumstances, perhaps the best a court can do is to provide an accessible explanation of federal courts' limited powers¹³⁷ and to reinforce that fairness concerns, however powerful, cannot overcome the constraints of Article III.

Countermajoritarian anxiety about deficiencies in the adjudication process and harms to judicial legitimacy if private actors and legislators cannot intervene to defend a challenged measure can be more readily addressed. With respect to the process itself, *amicus curiae* status is already routinely granted to insure that courts receive a robust set of arguments and to enable at least some participation by those with a strong interest in the case.¹³⁸

While *amicus* briefs may be adequate in most circumstances, courts might also consider authorizing certain amici to participate more extensively in litigation. This "litigating *amicus*" status has long been available, at the discretion of district courts,¹³⁹ to enable amici to engage in discovery and participate in trial, including by calling and questioning witnesses.¹⁴⁰ Of course, allowing extensive

¹³⁷ See *supra* at xx and accompanying text.

¹³⁸ In the many marriage cases that have been or are in the process of being litigated in the past decade, nearly all have had extensive *amicus* briefing. [cite] Still, advocates who can intervene as of right must be permitted to do so, rather than being restricted to *amicus* status. See, e.g., *Utahns for Better Transp. v. United States Dep't of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002) (holding that right to file an *amicus* brief did not substitute for the right to intervene as party).

¹³⁹ See, e.g., *Clark v. Sandusky*, 205 F.2d 915, 917 (2d Cir. 1953) (stating that trial court's decision regarding *amicus curiae* participation "lies wholly within the discretion of the trial court and is not reviewable"); *Verizon New England v. Maine Public Utilities Com'n*, 229 F.R.D. 335, 338 (D. Me. 2005) (noting that the district court has "discretion to determine the fact, extent, and the manner of participation by the *amicus*"); *Petition of Oskar Tiedemann & Co.*, 183 F.Supp. 129, 131 (D. Del. 1960) ("The matter of intervention of *amici curiae* is solely in the discretion of the trial Court.").

¹⁴⁰ See Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin after the Friends Leave?*, 41 *Am. U. L. Rev.* 1257-1258, 1256-1267 (1992); see also Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 71 *Yale L. J.* 694 (1963); Frank M. Covey, *Amicus Curiae: Friend of the Court*, 9 *DePaul L. Rev.* 30 (1959-1960); Michael J. Harris, *Amicus Curiae: Friend or Foe? The Limits of Friendship in American Jurisprudence*, 5 *Suffolk J. Trial & App. Advoc.* 1 (2000); cf. Stuart Banner, *The Myth of the Neutral Amicus: American Courts and*

involvement by amici risks inefficiencies and worse,¹⁴¹ but enough courts have granted litigating amicus status to suggest that careful management can control for these problems while maximizing the benefits from the additional participation.¹⁴²

Further, courts can – and already do – try to anticipate reputational backlash from potentially divisive decisions through the way in which they communicate their decisions. Often, in difficult circumstances, courts take space at the outset of an opinion to explain that their judicial role requires them to do whatever they have done.¹⁴³ We see much evidence of this in the marriage cases, where

their Friends, 1790-1890, 20 Const. Comment. 111, 130 (2003); [<-need to double-check whether these sources add value]

see also Russell v. Board of Plumbing Examiners, 74 F.Supp.2d 349, 351 (S.D. N.Y. 1999) (observing that “[a] court can allow *amici* to call their own witnesses and cross examine the witnesses of other parties” but also that litigating amici are “precluded from engaging in adversarial activities such as motions to compel” and from taking appeals”).

¹⁴¹ In a strong critique of a lower court decision to permit a litigating amicus, where the amicus had brought contempt claims against the defendant in the district court, the circuit court decried “this legal mutant characterized as “litigating *amicus curiae*,” and warned that allowing such status to non-parties “will implicate and erode the future core stability of American adversary jurisprudence as we know it today.” U.S. v. State of Mich., 940 F.2d 143, 163-167 (6th Cir. 1991). The court added that allowing expanded amicus participation “would extend carte blanche discretion to a trial judge to convert the trial court into a free-wheeling forum of competing special interest groups capable of frustrating and undermining the ability of the named parties/real parties in interest to expeditiously resolve their own dispute and capable of complicating the court’s ability to perform its judicial function.” *Id.* While other courts have expressed concerns about the litigating amicus role, the Sixth Circuit’s opinion is unusual for its energetic skepticism.

¹⁴² *See, e.g.,* Morales v. Turman, 820 F.2d 728, 730 (5th Cir. 1987) (noting with approval that “counsel for *amici* toured [the defendant’s] facilities, located and interviewed *amici*’s expert witnesses, attended without participating in the depositions taken by the parties, actually participated in the depositions of *amici*’s witnesses, and prepared pretrial memoranda on behalf of *amici*. *Amici*’s counsel also presented *amici*’s witnesses at trial and cross-examined plaintiffs’ and defendants’ witnesses.”); Alliance of Automobile Mfrs. v. Gwadowsky, 297 F.Supp.2d 305, 306-308 (D. Me. 2003) (granting “*amicus curiae* ‘plus’ status, but with restrictions” including “requiring “notice and service of all documents and events just as if it were a party to the case” and some participation in discovery and at trial but excluding “an independent right to engage in written forms of discovery”); Daggett v. Webster, 190 F.R.D. 12, 14-15 (D. Me. 1999) (ordering that “all documents must be given to *amici* as if they were parties and *amici* have ability to, with witness’s acquiescence, examine or cross-examine a witness (as long as Attorney General’s office does not also examine or cross-examine”).

¹⁴³ This anticipation of countermajoritarian backlash is particularly common when courts strike down voter initiatives. *See, e.g.,* Romer v. Evans; [cites and additional discussion to come]. In decisions sustaining measures they find disagreeable, courts will often state that their decision does not endorse the wisdom of the challenged government action, or something along those lines. *See, e.g.,* Perry at 1073 (“It matters not whether federal courts think it wise or desirable for California to afford proponents this authority to speak for the State, just as it makes no difference whether federal courts think it a good idea that California allows its constitution to be amended by a majority vote through a ballot measure in the first place.”). [more cites to come]

decisions frequently come across as though courts are apologizing to one disappointed constituency or another for the outcome.¹⁴⁴ While this is no guarantee that those careful comments will reach the general public, which overwhelmingly learns about decisions from media accounts rather than from judicial opinions,¹⁴⁵ it is at least a protective step that courts can take for themselves.

V. Conclusion

At the end of the day, no matter how powerful the anxiety nor how wrenching the guilt that might flow from limiting private individuals and legislators' participation, federal courts are simply not open-door institutions for dispute resolution, including for contentious legal and social conflicts. Instead, to grapple realistically with intervention rules and Article III jurisprudence means that even the most enthusiastic defenders of challenged laws cannot alchemize a cognizable interest that their circumstances do not otherwise create. Nor can they properly claim the mantle of governmental standing, no matter how willing the government is to share or delegate its access.

Instead, federal courts are limited to authorizing amicus status for those whose strongest connection to the challenged measure is an intense interest either in favor or against. And while federal circuit courts can virtually always hear appeals from governments desiring to defend their own laws, they cannot make space on their docket when it is only individual citizens or legislators who are seeking review, no matter how politically desirable that review might be.

¹⁴⁴ [cites to come]

¹⁴⁵ [cite]