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# “Standing” in the Shadow of *Erie*: Federalism in the Balance in *Hollingsworth v. Perry*

Glenn S. Koppel\*

## I. Introduction

Consider the following *Erie* issue: For the purpose of deciding whether the official proponents of a California initiative have Article III standing to appeal a lower court judgment declaring the initiative unconstitutional—admittedly a question of federal law under Article III’s “case-or-controversy” provision—should a federal appeals court apply *California state law*, as interpreted by that state’s Supreme Court, authorizing the proponents to assert the state’s particularized interest in defending the validity of the challenged initiative, or should the federal court apply *federal standing law* requiring a text-based, formal agency relationship between the State of California, as principal, and the initiative proponents, as its agent? In other words, is the scope of Article III broad enough to encompass, and therefore govern, the question of the initiative proponents’ authority to assert the State’s interest in federal court and, thereby, preempt state law on this question?<sup>1</sup>

This *Erie* issue<sup>2</sup> confronted the U.S. Supreme Court in

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1. See *Perry v. Brown*, 265 P.3d 1002, 1011 (Cal. 2011) (framing the issue in the following terms: “the role that state law plays in determining whether, under federal law, an individual or entity possesses standing to participate as a party in a federal proceeding.”).

2. While the *Erie* doctrine typically applies to issues arising in diversity suits, it is also applicable to “questions of state law arising in a nondiversity case,” like *Hollingsworth*. RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 563 (6th ed. 2009) (“But what

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*Hollingsworth v. Perry*,<sup>3</sup> one of the two same-sex marriage cases decided by the Supreme Court in June 2013. In *Hollingsworth*, the Court avoided ruling on the merits of the constitutionality of Proposition 8 because a five-Justice majority found that the initiative's proponents lacked standing to appeal the judgment of the district court that invalidated the proposition.<sup>4</sup> And yet, *neither the Court's Opinion nor the dissent refers to Erie doctrine in analyzing this essentially vertical choice-of-law question.*

This Article provides an insight into the Court's divergent views on the federal standing issue in *Hollingsworth* by viewing the Justices' conflicting positions through the lens of the Court's *Erie* jurisprudence, which, at its core, focuses on calibrating the proper judicial balance of power in a given case between conflicting federal and state interests in determining vertical choice-of-law issues. *Hollingsworth* is uniquely positioned at the intersection of federal standing principles and *Erie* doctrine, confronting the Court with competing balance of power concerns inherent in our federal system. Standing, as a requirement for the limited exercise of federal judicial power under Article III, addresses the *horizontal* balance of power among the three branches of the federal government. *Erie* addresses the vertical balance of power between federal and state courts. Standing is a malleable doctrine that federal courts have employed to avoid ruling—prematurely in the case of same-sex marriage—on the merits of a controversial issue. This Article employs *Erie* doctrine to critically assess whether a closely divided Supreme Court in *Hollingsworth* correctly privileged the horizontal balance of power concerns at the expense of the vertical ones.

Achieving a proper balance between federal and state

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of questions of state law arising in a nondiversity case? *See* *Maternally Yours v. Your Maternity Shop*, 234 F.2d 538, 540-41 n.1 (2d Cir. 1956), where the court said, with respect to a supplemental state law claim in a federal question case: '[I]t is the *source* of the right sued upon, and not the ground on which federal jurisdiction is founded, that determines the governing law. \* \* \* Thus, the *Erie* doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law.' That understanding has gained general acceptance."').

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

4. *See id.* at 2662-63.

interests in resolving difficult *Erie* issues periodically confronts the Court whenever a case presents a potential conflict between federal and state law.<sup>5</sup> An essentially functionalist enterprise, this interest balancing process was first explicitly articulated by the Court in its 1958 decision in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,<sup>6</sup> which replaced the “mechanistic”<sup>7</sup> test of *Guaranty Trust Co. v. York*<sup>8</sup> that privileged outcome-determinative state law, including technically “procedural” law over federal law including—it was feared by some commentators at the time<sup>9</sup>—federal procedural rules promulgated under the Rules Enabling Act.<sup>10</sup> Even after the Court, in *Hanna v. Plumer*, held that a Federal Rule, validly promulgated under the Rules Enabling Act and broad enough to cover the issue in dispute, prevails over conflicting state law regardless of outcome difference,<sup>11</sup> *Byrd*’s interest balancing approach to vertical choice-of-law issues continues to influence, explicitly or implicitly, the Court’s *Erie* decision-making, most recently in *Gasperini v. Center for Humanities, Inc.*,<sup>12</sup> in 1996, and *Shady Grove Orthopedic Associates v.*

5. See *infra* Part III.

6. 356 U.S. 525 (1958).

7. See Paul J. Katz, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and Reverse-Erie Analysis*, 99 NW. U. L. REV. 1315, 1326 (2005) (discussing the recanting of the mechanistic test).

8. 326 U.S. 99 (1945).

9. See 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4508 (2d ed. 1996) (“In the wake of [the] three 1949 decisions [that followed *York*] many observers believed that there was no longer much, if any, room for independent federal regulation of procedure.”).

10. 28 U.S.C. § 2072 (2012).

11. See *Hanna v. Plumer*, 380 U.S. 460 (1965).

12. 518 U.S. 415 (1996). *But see* Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its Erie-Hanna Jurisprudence*, 73 Notre Dame L. Rev. 963, 1007-1008 (Yet much as I may disagree with Professor Floyd when he asserts that “[t]he Gasperini majority relied centrally on *Byrd*” (cite omitted)—for the Court does not engage in *Byrd*-style balancing to decide on the allocation of trial- and appellate-level responsibilities, and *Byrd* plays no role in the choice of standard for verdict-excessiveness review—the opinion largely earns his criticism that “*Byrd* still lives, but we know not why, or to what extent.” (cite omitted). About all we get from the Gasperini opinion is the apparent direction not to rely solely on “outcome determination” analysis in decisional-federal-law “cases presenting countervailing federal interests,” 518 U.S. at 432.)

*Allstate Insurance Co.*<sup>13</sup> in 2010.

Wright, Miller & Cooper commented, before the *Hollingsworth* decision, that “[l]ittle attention has been paid to the question whether state law may have some independent influence on standing.”<sup>14</sup> I have been able to locate only one article that explores in depth the relationship between standing and *Erie*<sup>15</sup> but did so as a reverse-*Erie* question—whether state courts are constitutionally required under the Supremacy Clause to apply federal standing requirements when adjudicating federal claims. When does Congress’ “substantive interest in uniform enforcement of its policies [in state courts] outweigh[] a state’s interest in maintaining its own justiciability limits[?]”<sup>16</sup> It is settled law that state courts are not bound by Article III’s case or controversy requirement.<sup>17</sup> The author, however, applies the *Byrd*-

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13. 559 U.S. 393 (2010).

14. 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.14 (3d ed. 2008).

15. For another reference to federal standing and *Erie*, see William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 Calif. L. Rev. 263, 295, note 143 (1990) (“Further, under my theory of standing as a matter of substantive law . . . state standing law should be binding on the federal courts, just as other substantive state law currently binds the federal courts under the *Erie* doctrine. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Thus, a state court determination of standing to enforce *state* substantive law should be binding on the *federal* courts.”).

16. Katz, *supra* note 7, at 1331 (arguing that state standing rules “affect the behavior of potential litigants and the courts” and, therefore, have a substantive impact of the uniform enforcement of federally created rights).

17. See, e.g., Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1260, 1272 (2011) (“This is so because the Supreme Court’s recent justiciability case law ties its hands in such cases. The Court has held that federal justiciability requirements are constitutionally mandated constraints on federal jurisdiction, applicable not only to the original jurisdiction of lower federal courts, but also to the Supreme Court’s appellate jurisdiction. In contrast, most state courts treat the doctrines of standing, mootness, and ripeness as discretionary, holding that they possess broad discretion to hear cases that are moot or unripe, or in which the plaintiff lacks standing. State justiciability law is a question of state court jurisdiction, which is a matter generally committed to the authority of state government, rather than one imposed by the federal Constitution. From these principles, the Court has deduced that it lacks jurisdiction over state court determinations of federal law rendered in cases that would not satisfy federal justiciability standards . . . . The Supreme Court, too, has repeatedly acknowledged the principle that, as a matter of sovereignty, state courts are free to apply their own

balancing approach to weigh the interest of state courts in applying their own—“procedural”—standing rules against the “substantive” interest of Congress in the uniform enforcement of federal rights in all state courts across the nation, and concludes that the federal interest in the application by state courts of uniform federal standing principles should prevail.<sup>18</sup> This Article proposes that the Court’s majority and dissenting opinions in *Hollingsworth* can be similarly understood in terms of *Byrd*-style balancing of competing federal and state interests.

Also at play in *Erie* jurisprudence in resolving potential conflicts between federal and state laws is the unresolved tension between formalism and functionalism in the interpretation of legal text, a thread that weaves its way through the Court’s *Erie* case law.<sup>19</sup> The pendulum of the Court’s *Erie* jurisprudence has swung over the years between a formalist approach that favors a principled, bright-line rule aimed at achieving the benefits of uniformity and predictability, and a functionalist approach that favors “getting it right” on a case-by-case basis by inquiring into the purpose behind the state rule to discern whether there are substantive interests at stake that should be respected in federal court decision-making. This formalist-functionalist tension is also manifested in the majority and dissenting opinions in

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conceptions of justiciability and are not bound by Article III’s limitations on federal court jurisdiction.”).

18. *Also see* Fletcher, *supra* note 15 at 282, note 92: “My thesis may be quickly stated: Standing determinations are decisions on the merits rather than jurisdictional decisions. Whether a plaintiff has standing depends on the particular statutory or constitutional provisions under which she brings suit. Article III imposes no standing-based “case or controversy” limitations except in feigned cases when a plaintiff lies about an injury she claims to suffer, and in cases where Congress grants standing as a mechanism to solicit a judicial opinion to which Congress desires an answer. If standing decisions are understood, as I think they should be, as decisions on the merits, it necessarily follows that state courts should be required under the supremacy clause to abide by federal standing doctrine. Although I believe this approach is correct, I have refrained from relying on it in this Article.”

19. *See generally* Glenn S. Koppel, *The Fruits of Shady Grove: Seeing the Forest for the Trees*, 44 AKRON L. REV. 999 (2011) [hereinafter *The Fruits of Shady Grove*]; Glenn S. Koppel, *The Functional and Dysfunctional Role of Formalism in Federalism: Shady Grove Versus Nicasastro*, 16 LEWIS & CLARK L. REV. 905 (2012).

*Hollingsworth*.

In *Perry v. Brown*, the Ninth Circuit panel adopted a functionalist approach to federal court standing by narrowly construing the scope of Article III standing law to create room for the application of state law—in deference to California’s state interests—to determine a question it termed “*antecedent to determining federal standing*[:] . . . who is authorized to assert the People’s interest in the constitutionality of an initiative measure?”<sup>20</sup> When the Ninth Circuit certified this question to the California Supreme Court, it seemed to this puzzled author to be an unassailable principle that the federal judiciary has an overriding interest, as an independent judicial system, in determining that question as a matter of federal standing law rooted in Article III’s case-or-controversy provision, without regard to conflicting state law. Upon further reflection, based upon a careful reading of the opinions of the California Supreme Court and the Ninth Circuit panel in *Perry v. Brown*, and the U.S. Supreme Court in *Hollingsworth*, I realized that important sovereign state interests in self-government warranted a narrow construction of Article III standing doctrine. The California Supreme Court responded, in functional terms, that “[t]he initiative power would be significantly impaired if there were no one to assert the state’s interest in the validity of the measure when elected officials decline to defend it in court or to appeal a judgment invalidating the measure[.]”<sup>21</sup> and held:

[W]hen the public officials who ordinarily defend a challenged state law or appeal a judgment invalidating the law decline to do so, 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

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20. *Perry v. Brown*, 671 F.3d 1052, 1074-75 (9th Cir. 2012) (emphasis added).

21. *Perry v. Brown*, 265 P.3d 1002, 1024 (Cal. 2011).

judgment invalidating the initiative.<sup>22</sup>

The Ninth Circuit panel adopted the Supreme Court of California’s holding in *Perry v. Brown* as the basis for the panel’s holding that the official proponents of Proposition 8 had federal appellate standing to assert the interests of the State of California.<sup>23</sup> Justice Kennedy’s dissenting opinion in *Hollingsworth* agreed with the panel’s functionalist analysis that “[p]roper resolution of the justiciability question requires, in this case, a threshold determination of state law”<sup>24</sup> and that state law governs the authority of initiative proponents to assert, in federal court, the State’s interest in “the integrity of its initiative process.”<sup>25</sup>

The Supreme Court’s five-Justice majority rejected the Ninth Circuit’s functionalist ruling in favor of what appears, at least on the surface, to be a rigidly formalist approach that broadly construes the reach of Article III standing doctrine to control the authority of initiative proponents under state law to represent the State’s interest in federal court. The Court’s majority and dissenting opinions in *Hollingsworth* appear to align along formalist versus functionalist lines, suggestive of the Court’s past *Erie* decisions. These decisions have oscillated between formalist bright-line tests and flexible functional tests that create room for consideration of any competing substantive state interests at stake. Most recently the Court used a bright-line test in *Shady Grove*,<sup>26</sup> where another five-Justice majority ruled that the literal text of the federal class action rule preempted a “conflicting” state class action rule. The Court used a flexible functional test in *Gasperini*, where the federal rule governing new trial motions was narrowly construed to avoid a conflict with state substantive interests in controlling runaway jury verdicts that underlay New York’s procedural statute giving state courts increased scrutiny over

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22. *Id.* at 1033.

23. *See Perry*, 671 F.3d at 1075.

24. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013) (Kennedy, J., dissenting).

25. *Id.*

26. *See infra* Part III.



jury awards.<sup>27</sup>

The Court in *Hollingsworth* ruled that—to confer federal standing on initiative proponents—federal standing principles require that state law explicitly—by legal text—appoint initiative sponsors “as agents of the people . . . to defend . . . the constitutionality of initiatives made law of the State.”<sup>28</sup> The Court’s majority found lacking “the most basic features of an agency relationship” consistent with the Restatement of Agency.<sup>29</sup> In the absence of a fiduciary relationship between initiative proponents and the State, the former would merely be asserting their own generalized interest instead of the State’s particularized interest: “And *no matter its reasons*, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance *cannot override our settled law to the contrary*.”<sup>30</sup> As noted by one commentator, “[t]he California Supreme Court’s holding that California law allows for proponents of initiatives to represent the State’s interest was not grounded in the text of a statute or any provision of the California State Constitution.”<sup>31</sup> This Article proposes that the Court’s requirement of a “textual basis . . . for delegation of [a] State’s Article III standing[.]”<sup>32</sup> consistent with the Restatement, is *formalist in its inflexibility* which is not warranted given the malleable nature of federal standing law.

However, a deeper analysis of the *Hollingsworth* opinions from an *Erie* perspective reveals, instead, a stark contrast

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27. See generally *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996).

28. *Hollingsworth*, 133 S. Ct. at 2666 (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997)) (“we [we]re 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”).

29. *Id.*

30. *Id.* at 2667 (emphasis added).

31. Corrine Blalock, *Hollingsworth v. Perry: Expressive Harm and the Stakes of “Marriage”*, 8 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 217, 234 (2013); see also Marty Lederman, *Understanding Standing: The Court’s Article III Questions in the Same-Sex Marriage Cases (VII)*, SCOTUSBLOG (Jan. 21, 2013, 9:01 PM), <http://www.scotusblog.com/2013/01/understanding-standing-the-courts-article-iii-questions-in-the-same-sex-marriage-cases-vii/> (referring to the California’s Supreme Court’s functionalist reasoning as “untethered to text and precedent”).

32. Blalock, *supra* note 31, at 234.

between *two conflicting functionalist* views in terms of balancing the federal and state interests at stake and the potential harms to each interest that would result from application of federal or state law to the question of the proponent’s authority to assert the state’s interest in defending Proposition 8 in federal court. The majority’s requirement of a formal agency relationship is grounded in its functionalist concern with “preserv[ing] the federal courts’ Article III role”<sup>33</sup> and conflicts with the dissent’s functionalist concern with preserving the integrity of the State’s initiative process.

Part II provides a brief background of the *Hollingsworth* opinions. Part III briefly narrates the evolution of *Erie* jurisprudence from a mechanistically-applied outcome determinative test that favored state substantive interests over federal interests in the uniform application of the federal rules, to a flexible, functional approach, in *Byrd*,<sup>34</sup> that restored some equilibrium to the federal/state judicial balance by counterbalancing “outcome determination” with the interests of the federal courts as an independent judicial system. This *Byrd*-based balancing equation implicitly—if not explicitly—has informed the Court’s subsequent *Erie* decisions from *Hanna* through *Gasperini*, to *Shady Grove*.<sup>35</sup>

Part IV critically evaluates each side’s warnings in *Hollingsworth* that a Pandora’s box would be opened—undermining the foundations of either Article III standing or California’s initiative process—if federal standing law or California state law were applied, and demonstrates that the majority and dissenting opinions reflect this *Byrd*-based interest-balancing approach to the vertical choice of law issue in dispute. Part IV concludes that the majority “got it wrong” in terms of *Erie* doctrine by overstating the harm to the federal interest in keeping the exercise of judicial power within the confines of Article III at the expense of substantial harm to California’s interest in the integrity of its initiative process.

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33. Brief for Walter Dellinger as Amicus Curiae in Support of Respondents on the Issue of Standing at 28, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 768643, at \*28.

34. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958).

35. See generally Richard D. Freer & Thomas C. Arthur, *The Irrepressible Influence of Byrd*, 44 CREIGHTON L. REV. 61 (2010).

This Article does not take a position on the merits of the initiative process. A respectable case can be made that the legislative dysfunction that gave rise to the initiative power in the early Twentieth Century has gradually warped that power in the current century as interest groups—including some located out-of-state—funnel financial resources to finance media campaigns in support of controversial initiatives, as occurred in the run-up to the passage of Proposition 8.<sup>36</sup>

## II. A Synopsis of *Hollingsworth v. Perry*: The Standing Issue in Context

Appellate standing was a threshold issue in both *Hollingsworth v. Perry* and *United States v. Windsor*, the two “same-sex” marriage cases before the Court. Applying federal law requiring petitioners to have suffered “a concrete and particularized” injury, standing was upheld in *Windsor* but denied in *Hollingsworth*.

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36. See, e.g., Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES, Nov. 15, 2008, at A1 (“As proponents of same-sex marriage across the country planned protests on Saturday against the ban, interviews with the main forces behind the ballot measure showed how close its backers believe it came to defeat — and the extraordinary role Mormons played in helping to pass it with money, institutional support and dedicated volunteers. ‘We’ve spoken out on other issues, we’ve spoken out on abortion, we’ve spoken out on those other kinds of things,’ said Michael R. Otterson, the managing director of public affairs for the Church of Jesus Christ of Latter-day Saints, as the Mormons are formally called, in Salt Lake City. ‘But we don’t get involved to the degree we did on this.’ . . . In the end, Protect Marriage estimates, as much as half of the nearly \$40 million raised on behalf of the measure was contributed by Mormons.”); see also *Proposition 8—Tracking the money: Final Numbers*, L.A. TIMES (Feb 3, 2009, 6:21PM), <http://www.latimes.com/local/la-moneymap,0,1777132.htmlstory#axzz2xBWVIM6v> (Approximately 30% of the money raised in support of Prop 8 (\$13,254,350 out of a total \$44,103,525) and 28% of the money raised in opposition to Prop 8 (\$11,224,394 out of a total \$38,766,260) came from outside California.); see generally Allen K. Easley, *Buying Back the First Amendment: Regulation of Disproportionate Corporate Spending in Ballot Issue Campaigns*, 17 GA. L. REV. 675 (1983).

A. United States v. Windsor

Edith Windsor, who married her same sex partner in a lawful ceremony in Canada, sought to claim the estate tax exemption granted by U.S. tax law for surviving spouses. Windsor, however, was barred from doing so by § 3 of the Defense of Marriage Act (DOMA) which excludes a same-sex partner from the definition of “spouse.”<sup>37</sup> In her federal district court suit seeking a tax refund denied her by the IRS, Windsor claimed that § 3 was unconstitutional. Although the government continued to enforce § 3 by not paying Windsor the refund, the Justice Department, on the President’s instruction, did not defend it. The Bipartisan Legal Advisory Group (BLAG) of the House of Representatives intervened to defend § 3’s constitutionality. The federal district court invalidated § 3 as unconstitutional and ordered the Government to pay Windsor a refund which, continuing to enforce DOMA, it refused to do. The United States appealed to the Court of Appeals, which affirmed the district court’s judgment, and the case subsequently went to the Supreme Court. BLAG appeared as *amicus curiae*. The Government appealed, but declined to defend the lower court decisions on the merits, in order to obtain a Supreme Court ruling invalidating § 3 of DOMA.<sup>38</sup>

The Court did not have to decide whether BLAG had Article III standing because, according to Justice Kennedy’s Opinion of the Court, the Government, as petitioner, continued to suffer a real and immediate economic “injury to the national Treasury if payment is made,” payment of “money that [the U.S.] would not disburse but for the court’s order.”<sup>39</sup> This despite the fact that the Government agreed with Ms. Windsor that the provision of DOMA that denied her the same benefits as a heterosexual married couple received under the federal tax laws was unconstitutional and welcomed the district court’s order to refund the money. The Court held: [E]ven where “the

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37. United States v. Windsor, 133 S. Ct. 2675, 2682 (2013).

38. *Id.* at 2686 (“That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not.”).

39. *Id.* .

Government largely agree[s] with the opposing party on the merits of the controversy, there is sufficient adverseness and an adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party.”<sup>40</sup>

A weakness in the majority’s finding of “sufficient adverseness,” based on the Government’s intent to enforce § 3, is the Government’s agreement with the plaintiff’s position that § 3 is unconstitutional. Justice Kennedy acknowledged that the “Executive’s agreement with Windsor’s legal argument raises the risk that instead of a ‘real, earnest and vital controversy’ the Court faces a ‘friendly, non-adversary, proceeding . . . [in which] ‘a party beaten in the legislature [seeks to] transfer to the courts an inquiry as to the constitutionality of the legislative act.’”<sup>41</sup> Noting that “this case is not routine,”<sup>42</sup> he minimized the problem in two ways. First, by characterizing adverseness as a “*prudential* problem[],” Justice Kennedy downgraded adverseness from a *required element* of standing to a flexible “prudential consideration”<sup>43</sup> subject to the Court’s discretion. Second, he relied on BLAG, a non-party participating solely in an *amicus curiae capacity*, to shore up Government’s ineffectual defense, noting that “BLAG’s sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree.”<sup>44</sup>

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40. *Id.* at 2686-87 (alteration in original) (internal quotation marks omitted).

41. *Id.* at 2687 (alteration in original); *see also id.* at 2689 (“The Court’s jurisdictional holding, it must be underscored, does not mean the arguments for dismissing this dispute on prudential grounds lack substance.”).

42. *Id.* at 2689 (“[T]he merits question . . . is one of immediate importance to the Federal Government and to hundreds of thousands of persons. These circumstances support the Court’s decision to proceed to the merits.”).

43. *Id.* at 2687 (emphasis added).

44. *Id.* at 2688-89 (emphasizing that “[t]he Court’s jurisdictional holding . . . does not mean the arguments for dismissing the dispute on prudential grounds lack substance” cautioning that “there is no suggestion here that it is appropriate for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal”).

Justice Scalia challenged the Court’s reliance on *amici curiae* to provide a vigorous defense of the challenged statute, contending that

[T]he existence of a controversy is not a ‘prudential’ requirement that we have invented, but an essential element of an Article III case or controversy. The majority’s notion that a case between friendly parties can be entertained so long as ‘adversarial presentation of the issues is assured by the participation of *amici curiae* prepared to defend with vigor’ the other side of the issue . . . effects a breathtaking revolution in our Article III jurisprudence.<sup>45</sup>

In contrast to the *Windsor* majority’s reliance on BLAG’s ability to sharpen the issues for the Court, the majority in *Hollingsworth* cast doubt on the value of the Proposition 8 proponents’ adversarial presentation, noting that they “answer to no one . . . decide for themselves, with no review, what arguments to make and how to make them[,]”<sup>46</sup> and “are free to pursue a purely ideological commitment to the law’s constitutionality . . . .”<sup>47</sup>

#### B. *Hollingsworth v. Perry*

Unlike *Windsor* where the Court did not have to decide whether BLAG had appellate standing because the Justice Department had petitioned on behalf of the United States, in *Hollingsworth* the state officials who were the named defendants in the district court suit declined to appeal the judgment invalidating Proposition 8, leaving the official initiative proponents as the only petitioners before the Court of Appeal and the Supreme Court. Consequently, the standing issue before the Ninth Circuit, in *Perry v. Brown*, and the Supreme Court, in *Hollingsworth*, focused exclusively on

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45. *Id.* at 2702 (Scalia, J., dissenting) (citation omitted).

46. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666 (2013).

47. *Id.* at 2667.

whether the initiative proponents had appellate standing to assert either their *own* interest or *the state's* interest. As noted by Professor Lederman,

the Court [had] little choice but to decide whether the Proposition 8 proponents have Article III standing to appeal in *Hollingsworth v. Perry*. The proponents are, after all, the only petitioners in that case, and in order to ensure the case remains fit for federal-court adjudication, 'the parties must have the necessary stake not only at the outset of litigation, but throughout its course,' including on appeal.<sup>48</sup>

In 2008, the California Supreme Court held that limiting marriage to heterosexual couples violated the equal protection clause of the California Constitution.<sup>49</sup> In reaction to that decision, California voters passed Proposition 8, which amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."<sup>50</sup> The plaintiffs in *Hollingsworth*, two same sex couples who wanted to be married, filed suit in federal court challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and naming as defendants the several state officials responsible for enforcing the state's marriage laws. Although these state officials filed answers to the complaint, they refused to argue in favor of Proposition 8's constitutionality.<sup>51</sup> The district court allowed the official initiative proponents to intervene to defend Proposition 8. After a 12-day trial, the District Court declared Proposition 8 unconstitutional and enjoined its enforcement by

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48. Marty Lederman, *Understanding Standing: The Court's Article III Questions in the Same-Sex Marriage Cases (V)*, SCOTUSBLOG (Jan. 20, 2013, 7:46 AM), <http://www.scotusblog.com/2013/01/understanding-standing-the-courts-article-iii-questions-in-the-same-sex-marriage-cases-v/> (citations omitted).

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

50. *Id.* (alteration in original).

51. See *Perry v. Brown*, 671 F.3d 1052, 1068 (9th Cir. 2012).

“defendants and all persons under their control or supervision . . .”<sup>52</sup> Only the official proponents appealed the injunction to the Ninth Circuit; the government defendants did not.

Concluding that the “Proponents’ standing to appeal depended on the precise rights and interests given to official sponsors of an initiative under California law, which ha[ve] never been clearly defined by the State’s highest court[,]” the Ninth Circuit certified the following 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* in the initiative’s validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.<sup>53</sup>

The California Supreme Court did not address whether official initiative proponents have a *particularized interest* in the initiative’s validity, focusing, instead, on whether proponents had the authority to assert *the State’s interest*. Unable to identify a “specific source of authority”<sup>54</sup> grounded in the text of a statute or provision of the California Constitution or the initiative itself, the Court engaged in a functional interpretation of the state constitutional provision setting forth the People’s initiative power as well as the provisions of the Election Code relating to the proponent’s role in the initiative process. The Court concluded that the State’s interest in the integrity of the initiative power “would be significantly impaired if there were no one to assert the state’s interest in the validity of the measure when elected officials decline to

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52. *Perry v. Schwarzenegger*, 702 F. Supp. 2d 1132, 1139 (N.D. Cal. 2010).

53. *Perry*, 671 F.3d at 1070 (emphasis added).

54. *Perry v. Brown*, 265 P.3d 1002, 1024 (Cal. 2011).



defend it in court or to appeal a judgment invalidating the measure.”<sup>55</sup> The Court held:

[W]hen the public officials who ordinarily defend a challenged measure decline to do so, article II, section 8 of the California Constitution and the applicable provisions of the Elections Code authorize the official proponents of an initiative measure to intervene or to participate as real parties in interest in a judicial proceeding to assert the state’s interest in the initiative’s validity and to appeal a judgment invalidating the measure.<sup>56</sup>

Also functionalist in nature—and especially significant in light of the closeness of the five-to-four split in the U.S. Supreme Court in *Hollingsworth* over the proper balance between federal and state interests—is the California Supreme Court’s reference to the *primary purpose*<sup>57</sup> underlying the state’s initiative power “to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions *that their elected officials had refused or declined to adopt*.”<sup>58</sup> In the opinion of California’s high court, this purpose

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55. *Id.*

56. *Id.* at 1025.

57. For an explanation of the nature of functionalism or instrumentalism, see BAILEY KULKIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 145 (1994) (“Instrumentalist adjudication does not disregard the governing rule but application of the rule may be modified if strict application would undermine or fail to further the function intended to be achieved by the rule or the legal system of which it is a part.”).

58. *Perry*, 265 P.3d at 1016 (emphasis added); see also Marty Lederman, *Understanding Standing: The Court’s Article III Questions in the Same-Sex Marriage Cases (VI)*, SCOTUSBLOG (Jan. 21, 2013, 6:52 AM), <http://www.scotusblog.com/2013/01/understanding-standing-the-courts-article-iii-questions-in-the-same-sex-marriage-cases-vi/> (“[T]he state supreme court’s principal justification [for interpreting California law to authorize initiative proponents to represent the state’s interest in defending an initiative’s validity was] . . . frankly a functionalist one—namely, preservation of the efficacy of the California initiative process[.]” [hereinafter *Understanding Standing (VI)*]).

would be undermined if initiative proponents were unable to defend the measure, once adopted, when state officials refuse to do so.<sup>59</sup> Also noteworthy, in light of the doubts expressed by the majority opinion in *Hollingsworth* about the qualifications of the proposition’s official proponents to represent the State’s interest<sup>60</sup> on appeal, the California Supreme Court concluded that “the official proponents . . . have a unique relationship to the voter-approved measure that makes them *especially likely to be reliable and vigorous advocates* for the measure and to be so viewed by those whose votes secured the initiative’s enactment into law.”<sup>61</sup>

At this point, the Ninth Circuit panel confronted a classic *Erie* choice-of-law issue. For the purpose of determining federal appellate standing, should the federal court apply California law that “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?”<sup>62</sup> Or is the proponents’ authority to represent the State’s interest on appeal in federal court governed by federal standing principles under Article III?

The panel narrowly interpreted the reach of Article III standing jurisprudence to conclude that, as a matter of vertical federalism, federal law does not control this issue. A conflict between Article III jurisprudence and state law, as interpreted by the California Supreme Court in *Perry v. Brown*, was

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59. See *Perry*, 265 P.3d at 1022 (noting that the “enhanced risk [that public officials may not defend the approved initiative measure with vigor] is attributable to the unique nature and purpose of the initiative power, which gives the people the right to adopt into law measures that their elected officials have not adopted and may often oppose”).

60. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666, 2667, 2671 (2013) (In contrast to the *Windsor* majority’s reliance on BLAG’s ability to sharpen the merits issues for the Court, the majority in *Hollingsworth*, seemed to cast doubt on the value of the Prop 8 proponents’ adversarial presentation, noting that they “answer to no one,” “decide for themselves with no review, what arguments to make and how to make them,” and “are free to pursue a purely ideological commitment to the law’s constitutionality . . .”).

61. *Perry*, 265 P.3d at 1024 (emphasis added).

62. *Perry v. Brown*, 671 F.3d 1052, 1072 (9th Cir. 2012).

thereby avoided. While acknowledging that state law does not have the “power directly to enlarge or contract federal jurisdiction” since “[s]tanding 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,” the panel ruled that “[s]tate law does have the power, however, to answer *questions antecedent to determining federal standing, such as the one here*: who is authorized to assert the People’s interest in the constitutionality of an initiative measure[.]”<sup>63</sup>

The panel engaged in an *Erie*-style analysis of the balance of power in vertical federalism, coming down heavily in favor of respecting

[the states’] prerogative, as independent sovereigns, to decide for themselves who may assert their interests and under what circumstances, and to bestow that authority accordingly. . . . Principles of federalism require that federal courts respect such decisions by the states as to who may speak for them: “there are limits on the Federal Government’s power to affect the internal operations of a State.”<sup>64</sup>

The panel stressed California’s unique commitment to the People’s initiative power and the key role the ballot initiative plays in California’s governmental structure, and agreed with the contention of the State’s highest court that “[t]he initiative power would be significantly impaired if there were no one to assert the state’s interest” in defending the measure on appeal when state officials refused to do so.<sup>65</sup> The panel’s opinion did not address “whether, under California law, the official proponents also possess a particularized interest in a voter-approved initiative’s validity[.]”<sup>66</sup> holding only that:

Because the State of California has Article III

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63. *Id.* at 1074-75 (emphasis added) (citations omitted).

64. *Id.* at 1071 (citations omitted).

65. *Id.* at 1073 (alteration in original) (quoting *Perry*, 265 P.3d at 1024).

66. *Id.* at 1074 (citing *Perry*, 265 P.3d at 1015).

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 declined to do so,” we conclude that Proponents are proper appellants here.<sup>67</sup>

As discussed in Part IV, the U.S. Supreme Court in *Hollingsworth* sharply divided over the Ninth Circuit’s vision of vertical federalism in the context of federal standing and the appropriate balance to strike between federal and state interests. The majority affirmed that “standing in federal court is a question of federal law, not state law[]”<sup>68</sup> and that the states cannot override the “vital [federal] interests going to the role of the Judiciary in our system of separated powers . . . simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse.”<sup>69</sup> By contrast, the four-Justice dissent charged that “[t]he Court’s opinion disrespects and disparages both the political process in California and the well-stated opinion of the California Supreme Court in this case.”<sup>70</sup>

The standing issue in *Hollingsworth* raised the vertical choice of law question whether state law can have some independent influence on federal appellate standing. In a federal question case concerning the constitutionality of a state initiative, does California state law govern an “antecedent” or “threshold” question whether the proponents of a state initiative are authorized to represent the State’s interest for the purpose of determining the standing of the proponents to appeal in federal court? Or, rather, does Article III control this question, requiring that, in order for the authority conferred on initiative proponents by state law to assert the state’s interest

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67. *Id.* at 1075 (citation omitted).

68. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013).

69. *Id.*

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

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in defending an initiative to be sufficient to confer federal court standing on the proponents, that authority must meet the formal agency requirements of the Restatement (Third) of Agency?

As noted earlier, Wright, Miller, & Cooper commented, before the *Hollingsworth* opinions were published, that “[l]ittle attention has been paid to the question whether state law may have some independent influence on standing.”<sup>71</sup> In federal court diversity cases, there is precedent to support the application of state standing rules that would deny standing where federal standing doctrine recognizes standing. However, it is unclear whether, in federal diversity cases, where the court is adjudicating a state right, standing is never satisfied if recognized under state law but not under Article III principles.<sup>72</sup> In *Perry v. Schwarzenegger*, the district court exercised federal question jurisdiction to adjudicate plaintiffs’ claim that Proposition 8 violated their federal constitutional rights. According to Wright, Miller, & Cooper, “[w]hen suit is brought in a federal court to enforce a claim of federal right, whether statutory or constitutional, the question of standing *ordinarily* is treated as a federal question”<sup>73</sup> which is governed by federal law. As previously mentioned, even the Ninth Circuit panel conceded in *Perry v. Brown*, that “[s]tanding to sue in any Article III court is, of course, a federal question

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71. 13B WRIGHT, MILLER & COOPER, *supra* note 14, at § 3531.14.

72. *See* 13B WRIGHT, MILLER & COOPER, *supra* note 14, at § 3531.14 (“Of course state rules that recognize standing need not be honored if Article III requirements are not met, although Article III concepts should be sufficiently flexible to recognize state-created rights to proceed in the public interest. If a clear case should appear in which standing would be recognized by state rules but denied by prudential federal rules, the federal court would have to choose between the general obligation to exercise diversity jurisdiction and its doubts as to the wisdom of enforcing this state claim of this particular plaintiff. It does not seem likely that the same choice should be made for all cases. It might be appropriate to deny standing on the basis of strong prudential objections, particularly if the interests pursued by the plaintiff seem remote and the substantive issues are sensitive. This course would be a *de facto* form of abstention. On the other hand, state standing might well be honored if there is a reasonable ground for seeking decision and the prudential objections are relatively weak.”).

73. *Id.* (emphasis added) (footnote omitted).

which does not depend on the party’s . . . standing in state court.”<sup>74</sup>

In *Hollingsworth*, the Supreme Court’s five-to-four disagreement over the applicable law—federal or state—to determine the federal standing issue, based on the proponents’ authority under California law to assert the State’s interest on appeal, reflects core differences over the weight to be accorded competing federal and state interests.

The majority placed overriding weight on the federal interest in confining the Judicial Power within Article III limits, a concern relating to the foundation of the federal tripartite governmental structure that dictates the application of federal standing law to safeguard that structure. Applying federal standing precedent, the majority ruled that the Proposition 8 proponents possessed only a “generalized” interest<sup>75</sup> which did not satisfy “Article III’s requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury [which] serves vital interests going to the role of the Judiciary in our system of separation of powers.”<sup>76</sup> The Court imposed a formal, text-based “agency” requirement on the authority of a state to authorize private parties to represent the state’s interest in federal court. As a “gloss on Article III,” in Professor Lederman’s words,<sup>77</sup> federal standing law, according to the Court’s majority, requires that state law expressly appoint initiative proponents as the State’s agents to suffice for federal standing. The Court’s Opinion noted that the California Supreme Court “never described petitioners as ‘agents of the people,’ or of anyone else.”<sup>78</sup> The initiative proponents were merely private parties, possessing only a generalized interest, who were not the State’s *agents* as “agency” is narrowly defined by the Restatement of Agency. Observing that the “basic features of an agency relationship are missing here,”<sup>79</sup> the majority stressed the absence of a

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74. *Perry v. Brown*, 671 F.3d 1052, 1074 (9th Cir. 2012) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985)).

75. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666 (2013).

76. *Id.* at 2667.

77. *See Understanding Standing (VI)*, *supra* note 58.

78. *Hollingsworth*, 133 S. Ct. at 2666.

79. *Id.*

fiduciary relationship between the proponents and the State: “[P]etitioners answer to no one; they decide for themselves, with no review, what arguments to make and how to make them.”<sup>80</sup> This essentially formalist approach to the choice of law issue in *Hollingsworth* was driven by a functionalist “parade of horrors”<sup>81</sup> that would be unleashed if California law were to override vital federal interests.<sup>82</sup> The majority implied that, had California law appointed the initiative proponents as the State’s agents, that would satisfy federal standing law, but “[n]either the California Supreme Court nor the Ninth Circuit ever described the proponents as agents of the State, and they plainly do not qualify as such.”<sup>83</sup>

By contrast, the dissent placed overriding weight on California’s interest in organizing its own governmental structure which dictates the application of California law giving “a proponent . . . the authority to appear in court and assert the State’s interest in defending an enacted initiative when the public officials charged with that duty refuse to do so.”<sup>84</sup> In Justice Kennedy’s view, the state’s interest would be harmed by refusing to apply California law as interpreted by the state’s Supreme Court: “Giving the Governor and attorney

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80. *Id.*

81. See *Understanding Standing (VI)*, *supra* note 58.

82. *Hollingsworth*, 133 S. Ct. at 2666-67.

83. *Id.* at 2667. Both parties argued *Karcher* and *Arizonans* to support their opposing views on the agency issue. See *infra* Part IV, for a discussion of these decisions. The Court’s Opinion acknowledged that the Proponents would have had federal standing if California state law had appointed them as the agents of the People to assert their interests in defending the initiative, noting that, in *Karcher*, New Jersey law “provide[d] for other officials to speak for the State in federal court[.]” *Hollingsworth*, 133 S. Ct. at 2664. Both parties in *Hollingsworth* cited the Court’s earlier decision in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), which denied appellate standing to the official sponsors of the ballot initiative based, in part, on the absence of an “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.” *Arizonans for Official English*, 520 U.S. at 65. The majority opinion in *Hollingsworth* rejected the proponents’ argument that California law appointed them agents of the People, noting that the California Supreme Court “never described petitioners as ‘agents of the people,’ or of anyone else.” *Hollingsworth*, 133 S. Ct. at 2666.

84. *Hollingsworth*, 133 S. Ct. at 2668 (Kennedy, J., dissenting).

general [a] *de facto* veto will erode one of the cornerstones of the State’s governmental structure.”<sup>85</sup> While acknowledging that the “proponent’s standing to defend an initiative in federal court is a question of federal law[,]”<sup>86</sup> the dissent agreed with the Ninth Circuit’s and the California Supreme Court’s functionalist reasoning that the authority of the proponents to assert the State’s interest in defending an initiative when the public officials refused to do so is “a threshold determination of state law”<sup>87</sup> which must be applied by the federal courts to avoid undermining the “primary purpose” underlying the People’s initiative power.<sup>88</sup> Justice Kennedy’s dissent also argued that the majority’s invocation of formal agency principles as a matter of federal standing law is misplaced, asserting that “the Restatement may offer no workable example of an agent representing a principal composed of nearly 40 million residents of a State[]”<sup>89</sup> and that it is for the California Supreme Court, not federal law, to determine whether the proponents are sufficiently accountable to the People.<sup>90</sup> He concluded that, “[c]ontrary to the Court’s suggestion, this Court’s precedents do not indicate that a formal agency relationship is necessary.”<sup>91</sup>

The opinions’ words, taken at face value, indicate that the disagreement between the majority and the dissenting justices concerns the perennial *Erie* question of the appropriate balance to strike, in vertical choice of law, between competing federal and state interests. Chief Justice Roberts, speaking for the majority, viewed as paramount the “vital [federal] interests going to the role of the Judiciary in our system of separated powers.”<sup>92</sup> This overriding federal concern with maintaining

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85. *Id.* at 2671.

86. *Id.* at 2668.

87. *Id.*

88. *See id.* at 2671 (“The California Supreme Court has determined that this purpose is undermined if the very officials the initiative process seeks to circumvent are the only parties who can defend an enacted initiative when it is challenged in a legal proceeding.”).

89. *Id.*

90. *Id.* at 2671-72.

91. *Id.* at 2672.

92. *Id.* at 2667.



the balance of power among the three branches of the federal government was at the core of Justice Scalia's dissent in *Windsor*:

[T]hose who wrote and ratified our national charter . . . knew well the dangers of "primary" power, and so created branches of government that would be "perfectly coordinate by the terms of their common commission," none of which branches could "pretend to an exclusive or superior right of settling the boundaries between their respective powers."<sup>93</sup>

By contrast, Justice Kennedy's dissent chided the majority for "nullifying" the choice of the people of California who, in adopting the initiative process, "have exercised their own inherent sovereign right to govern themselves."<sup>94</sup>

Although the *Hollingsworth* opinions do not refer to *Erie* by name, the majority's and dissent's disagreement on standing can profitably be understood within the framework—in the shadow—of *Erie*. Some commentators have observed that the Court frequently employs flexible standing principles to avoid wrestling with difficult constitutional issues.<sup>95</sup> This could have been the case, beneath the surface, in *Hollingsworth*, where the Court's standing ruling may have camouflaged a behind-the-

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93. *United States v. Windsor*, 133 S. Ct. 2675, 2698 (2013) (Scalia, J., dissenting); see also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 886-90 (1983).

94. *Hollingsworth*, 133 S. Ct. at 2675 (Kennedy, J., dissenting).

95. See 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3531 ("However reassuring it may seem to describe the elements of standing in these brief phrases, the [standing] doctrines have changed continually. Decisions in recent years seem to have achieved a stability in expression, but there are almost unlimited opportunities to disagree in applying the Supreme Court's broad expressions. Decades ago, Justice Douglas observed that '[g]eneralizations about standing to sue are largely worthless as such.' Many exasperated courts and commentators have echoed the thought, often adding that *standing doctrine is no more than a convenient tool to avoid uncomfortable issues or to disguise a surreptitious ruling on the merits.*") (emphasis added) (citations omitted).

scenes agreement among the majority Justices to avoid ruling on the substantive constitutional issue of the validity of Proposition 8 with its all-or-nothing implications for the right of same-sex marriage nationally.<sup>96</sup> Parsing the words used in the two opinions to justify their conflicting conclusions on standing, this Article purports to analyze the Court’s division over the standing issue in terms of the proper judicial balance of power in intra-state federalism that lies at the heart of *Erie* jurisprudence. Part III’s theme that *Erie* jurisprudence is, at its core, about weighing competing federal and state interests sets the stage for Part IV’s critical assessment of the Court’s opinion that, from the perspective of *Erie* jurisprudence, sacrifices California’s sovereign interest in self-government to avoid dealing with the merits of the case by applying a stringent view of federal standing that trumps California state law.

### III. “Erie” Jurisprudence: An Exercise in Calibrating the Appropriate Balance of Power in Judicial Federalism between Federal and State Interests

As Professor Freer observed, “there are competing interests in every difficult *Erie* case”<sup>97</sup> which the Court has had to balance, and this is equally true in *Hollingsworth*. Ever since the Supreme Court in its *Erie* opinion interpreted the Rules of Decision Act to require federal courts to apply state

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96. See Marty Lederman, *Understanding Standing: The Court’s Article III Questions in the Same-Sex Marriage Cases (I)*, SCOTUSBLOG (Jan. 17, 2013, 11:05 AM), <http://www.scotusblog.com/2013/01/understanding-standing-the-courts-article-iii-questions-in-the-same-sex-marriage-cases-i/> (“There already has been much speculation, and no doubt there will be much more, about whether some or all of the Justices might be motivated to find a lack of justiciability in either or both cases in order to avoid a holding on the merits—and about whether they would be wise or justified in doing so.”) [hereinafter *Understanding Standing (I)*]. Justice Kennedy hinted in his dissent that the Court’s Opinion may have been motivated by a desire to avoid confronting a contentious issue on the merits: “Of course, the Court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject.” *Hollingsworth*, 133 S. Ct. at 2674.

97. Freer & Arthur, *supra* note 35, at 77.

substantive law in the absence of controlling federal law and, subsequently in *Hanna v. Plumer*, interpreted the Rules Enabling Act to require the application of valid and controlling federal rules of procedure, federal statutes and federal constitutional provisions regardless of outcome difference<sup>98</sup>, the Court has struggled, through a series of decisions, to find the appropriate balance in vertical choice of law between state and federal interests. As noted by Justice Frankfurter in *Guaranty Trust v. York*, *Erie* “expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts[.]”<sup>99</sup> an issue that split the Court in *Hollingsworth*.

The shifting judicial balance of power manifested by the Court’s *Erie* jurisprudence reflects, in part, the tension between formalism and functionalism and the corresponding and elusive attempts to distinguish between “substance” and “procedure” in determining the deference federal courts owe to state law and in determining the limits of the federal rulemaking power under the “substantive rights proviso” of the Rules Enabling Act.<sup>100</sup> *Erie* doctrine has alternated cyclically between formalism and functionalism as the Court has attempted to accommodate the tension between formalism’s emphasis on predictability and certainty in the application of *Erie* doctrine versus functionalism’s premium on “getting it right” in the individual case to achieve the just result.<sup>101</sup> The shifting nature of *Erie* doctrine also reflects the Court’s attempt, in each case, to calibrate the appropriate judicial balance of power between state and federal sovereign interests. The challenge of resolving this tension has frequently produced five-to-four decisions or an indeterminate set of majority, plurality and dissenting opinions.<sup>102</sup> This occurred again in the

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98. See *Hanna v. Plumer*, 380 U.S. 460 (1965).

99. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

100. 28 U.S.C. § 2072 (2012).

101. See *The Fruits of Shady Grove*, *supra* note 19, at 1007 (“III. The Roots of *Shady Grove*: “*Erie*” Jurisprudence and the Oscillating Pendulum of Judicial Federalism Between Federal and State Interests”).

102. See, e.g., *Gasperini v. Ctr. for Humanities*, 518 U.S. 415 (1996) (Justice Ginsburg delivered the opinion of the Court, in which Justices O’Connor, Kennedy, Souter, and Breyer joined. Justice Stevens filed a dissenting opinion. Justice Scalia filed a dissenting opinion, in which The Chief Justice Rehnquist and Justice Thomas

Court’s most recent “Erie” offering in *Shady Grove* and, most recently, in *Hollingsworth v. Perry*, effectively an “Erie” decision in all-but-name.

In 1938, *Erie* realigned the federal/state judicial balance of power in overruling 100 years of precedent under *Swift v. Tyson* by re-interpreting the Rules of Decision Act’s mandate that federal courts apply “[t]he laws of the several States” to include state substantive case law as well as statutory law.<sup>103</sup> After *Erie*, federal courts could no longer refuse, in the absence of controlling federal constitutional provisions, treaties or statutes, to apply the same state substantive law that a state court would apply a block away. As observed by one commentator, *Erie* doctrine is, at its core, “about procedural federalism.”<sup>104</sup>

In *Guaranty Trust*, decided seven years after *Erie*, the Court rejected a rigid formalist approach to determining whether a given state law was “substantive” in favor of a functional analysis that gave effect to the core policy underlying *Erie* “that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result.”<sup>105</sup> *Guaranty Trust*’s outcome determinative test continued to shift the judicial balance of judicial power in the direction of respect for state interests by expanding the meaning of “substantive” beyond its technical definition to include state procedural law that significantly affects the enforcement of state substantive rights. Concern by many

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joined.); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 395-96 (2010) (“Justice SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II-A, an opinion with respect to Parts II-B and II-D, in which THE CHIEF JUSTICE, Justice THOMAS, and Justice SOTOMAYOR join, and an opinion with respect to Part II-C, in which THE CHIEF JUSTICE and Justice THOMAS join. . . . Justice Ginsburg filed a dissenting opinion, in which Justices Kennedy, Breyer, and Alito joined.”).

103. *Erie R.R. v. Tompkins*, 304 U.S. 64, 71 (1938); see 28 U.S.C. § 1652 (2012).

104. Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 308 (2008).

105. *Guaranty Trust Co. v. York*, 320 U.S. 99, 109 (1945).

commentators that the balance had now shifted too far in the state direction was raised by three post-*Guaranty Trust* decisions—*Woods*, *Cohen*, and *Ragan*—in which the Court “seemed committed to applying this outcome determinative test to its farthest reach” that threatened to neglect the federal judicial system’s interest in the uniform application of federal procedural rules promulgated under the authority of the Rules Enabling Act.<sup>106</sup>

These three decisions transformed *Guaranty Trust*’s functionalist approach into a formalist one that asks: Is the choice of competing rules as viewed by the court *post-hoc* outcome determinative? The answer literally will be yes in almost every case. Therefore, the federal rule must almost always yield to state law. As noted by Professor John Hart Ely:

[I]t would seem that any rule can be said to have both “procedural effects,” affecting the way in which litigation is conducted, and “substantive effects,” affecting society’s distribution of risks and rewards. Thus, an “effects test” would seem destined either to unintelligibility or to the invalidation of every Federal Rule, thereby rendering the Enabling Act entirely self-defeating.<sup>107</sup>

In an effort to restore equilibrium to the balance between federal and state interests, and in reaction to the perceived threat to “the integrity and independence of the federal courts[,]”<sup>108</sup> the Court explicitly adopted an interest-balancing approach in *Byrd v. Blue Ridge Electric Cooperative, Inc.*<sup>109</sup> As Professor Freer comments, “[b]y recognizing three interests—(1) some federal systemic interest, (2) the state interest in

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106. See 19 WRIGHT, MILLER & COOPER, *supra* note 9, at § 4508 (“In the wake of these three 1949 decisions many observers believed that there was no longer much, if any, room for independent regulation of procedure.”).

107. John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724 n.170 (1974) (citation omitted).

108. Richard D. Freer, *Some Thoughts on the State of Erie After Gasperini*, 76 TEX. L. REV. 1637, 1647 (1998).

109. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958).

governing the primary activity of citizens, and (3) the litigant interest in uniformity of outcome—and by embracing the concept of balancing, the Court reinvigorated principles of federalism in the vertical choice of law equation.”<sup>110</sup> In evaluating the state’s interest, *Byrd* identified a type of state procedural law that is sufficiently “bound up with [state-created] rights and obligations in such a way that its application in the federal court is required.”<sup>111</sup> This concept of “bound up” state procedure reappeared most recently in Justice Stevens’ plurality opinion in *Shady Grove*<sup>112</sup> and, effectively, in Justice Kennedy’s *Hollingsworth* dissent. Justice Kennedy views the authority to assert the State’s interest in defending challenged initiatives, granted by California law to official initiative proponents, as essential to the integrity of California’s initiative process. As written elsewhere, this interest-balancing approach to conflicting federal/state interests also sheds light on the Court’s multiple opinions in *Shady Grove* as it does in *Hollingsworth*.<sup>113</sup> *Byrd*’s interest-balancing approach, in Professor Freer’s and Professor Arthur’s view, “actually explains the results in cases in which the Court did not cite it.”<sup>114</sup>

In 1965, the *Erie* pendulum moved even further toward the federal interest<sup>115</sup> in horizontal procedural uniformity at the

110. Freer, *supra* note 108, at 1651 (footnotes omitted).

111. *Byrd*, 356 U.S. at 535 (emphasis added).

112. See *infra* text accompanying notes 157-61. In his plurality opinion, Justice Stevens inquired whether an exception to New York’s state’s class action rule stating that an action to recover a statutory penalty may not be maintained as class action was “so intertwined with a state right or remedy that it functions to define the scope of the state-created right.” *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 423 (2010) (Stevens, J., concurring) (emphasis added).

113. *The Fruits of Shady Grove*, *supra* note 19, at 1006 (“In calibrating the judicial balance of power between federal and state interests, the Court’s majority [in *Shady Grove*] reaffirmed . . . the vitality of the [Rules Enabling Act’s] policy of federal procedural uniformity in diversity actions, by holding that Rule 23 . . . controlled the issue in dispute, was valid, and, therefore, preempted New York’s conflicting, and outcome determinative, class action rule.”).

114. See Freer & Arthur, *supra* note 35, at 62.

115. See Ely, *supra* note 107, at 696 (“The Court [after *Byrd*] could not leave such sensible moderation alone, however, and in 1965, the pendulum that had begun in *Byrd* to swing back toward the

expense of vertical substantive-outcome uniformity.<sup>116</sup> *Hanna* purported to insulate Federal Rules, and by implication other federal directives, that are on point from *Erie* analysis by holding that they must be applied by federal courts over conflicting and outcome determinative state law.<sup>117</sup> However, because only federal directives that are broad enough to control the issue in dispute can preempt conflicting state law, *Hanna's* seemingly inflexible, formalist rule leaves room for respecting integrally bound up state procedural law by narrowly construing the scope of the federal law in question.<sup>118</sup> Hence, even after *Hanna*, the Court still engages in the *Byrd*-style exercise of balancing federal and state interests by choosing to interpret arguably applicable federal directives broadly or narrowly and did so, implicitly, in *Hollingsworth*.

As expressed by Professors Freer and Arthur:

The starting point in vertical choice of law analysis is whether a federal directive applies.

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teaching of *Erie* swung too far, indeed perhaps beyond its 1938 starting place, in Chief Justice Warren's opinion for the Court in *Hanna v. Plumer*.").

116. See *Hanna v. Plumer*, 380 U.S. 460, 472-73 (1965) ("One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules. This is especially true of matters which relate to the administration of legal proceedings, an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules.").

117. See *id.* at 473-74 ("To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act. Rule 4(d)(1) is valid, and controls the instant case.").

118. *Hanna* itself recognizes that *Erie* applies if the federal rule is not broad enough to control the issue in dispute. *Id.* at 470 ("The *Erie* rule has never been invoked to void a Federal Rule. It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law.").

The decision on this point determines which regime—pro-federal or pro-state—will apply. . . . Through the years, the Court has been anything but consistent in its approach to the important funneling function of assessing the breadth of a Federal Rule.<sup>119</sup>

By interpreting the scope of a federal directive narrowly to avoid conflict with state law that is integrally bound up with the enforcement of substantive state rights or broadly to preempt state law, the Court has, in some cases, deferred to state substantive policy.<sup>120</sup> In other cases, the Court has favored federal interests over competing state interests by broadly construing federal law, in formalist, plain-meaning-of-the-text fashion, to govern the issue in dispute.<sup>121</sup> The Court’s opinion in *Walker v. Armco Steel Corp.* exemplifies the formalist approach where the Court asserted: “The Federal Rules should be given their plain meaning. If a direct collision

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119. Freer & Arthur, *supra* note 35, at 70. Also see Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 Notre Dame L. Rev. 987, 1001 (2011) (responding to “those scholars who hold that Byrd is not central to the unguided Erie choice”: “First, Hanna did not say it was overruling Byrd, and instead cited it twice for support. Second, the passage of Hanna most inconsistent with the Byrd holding lies in a footnote to dicta. Third, the focus of those dicta was to straighten out an error of the old outcome-determinative test, not to inter Erie’s greater concern with meshing state and federal interests. Fourth, subsequent lower court cases continued regularly to cite Byrd, often in a way essential to their results. Fifth, the Supreme Court in *Gasperini* applied Byrd to reach its result that the federal government’s interests in controlling its courts’ standard of appellate review outweighed New York’s substantive interests. It resurrected Byrd’s term of ‘essential characteristics’ of the federal system, which means nothing more than an affirmative countervailing consideration of sufficient weight to overcome the interests in favor of applying state law.”)

120. See *id.* (“At least six times, the Court has found that a Federal Rule did not apply—in *Cohen v. Beneficial Industrial Loan Corp.*, *Palmer*, *Ragan v. Merchants Transfer & Warehouse Co.*, *Walker*, *Semtek International v. Lockheed Martin Corp.*, and *Gasperini*.”).

121. See *id.* (“In four cases before *Shady Grove*, the Court found that a Federal Rule was on point—in *Sibbach v. Wilson, Mississippi Publishing Corp. v. Murphree*, *Burlington Northern Railroad v. Woods*, and *Hanna*.”).



with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies.”<sup>122</sup> The Court’s opinion in *Gasperini* illustrates the functionalist approach to accommodate both federal and state interests in the same decision,<sup>123</sup> giving rise to speculation by one commentator that the Court “may have replaced the [formalist] search for ‘plain meaning’ with a heightened sensitivity to potential impact on state policy.”<sup>124</sup>

In *Gasperini*, the *Erie* pendulum reversed course once again, swinging in the direction of accommodating state interests by narrowly construing a Federal Rule of Procedure to avoid a collision with a state procedural rule. The plaintiff in *Gasperini* won a \$450,000 jury verdict in a diversity suit.<sup>125</sup> The defendant moved, under Federal Rule 59, for a new trial on the grounds that the damage award was excessive.<sup>126</sup> Rule 59(a)(1)(A) provides that “[t]he court may . . . grant a new trial . . . for any reason for which a new trial has heretofore been granted in an action at law in federal court[.]”<sup>127</sup> Traditionally, one of those reasons is verdict-excessiveness, but Rule 59 does not specify the applicable standard for determining whether the jury’s damage award is excessive. In scrutinizing jury awards, federal trial judges have ordered new trials on grounds of excessive damages only when the verdict is so unreasonable that it “*shock[s] the conscience[.]*”<sup>128</sup> New York’s CPLR § 5501(c), a tort-reform measure in procedural garb designed to curb runaway jury awards, gave New York’s appellate courts

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122. See, e.g., *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980) (“The Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies.”).

123. See 19 WRIGHT, MILLER & COOPER, *supra* note 9, at § 4511 (Supp. 2013) (“[T]he Court’s decision in *Gasperini* is a reasonable attempt to perform the balancing of interests required by *Byrd*.”).

124. Freer, *supra* note 108, at 1643.

125. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 420 (1996).

126. *Id.* at 420, 422 (“Before 1986, state and federal courts in New York generally invoked the same judge-made formulation in responding to excessiveness attacks on jury verdicts: courts would not disturb an award unless the amount was so exorbitant that it ‘shocked the conscience of the court.’”).

127. FED. R. CIV. P. 59.

128. *Gasperini*, 518 U.S. at 422 (emphasis added).

greater authority to scrutinize jury awards by permitting a new trial if an award “*deviates materially* from what would be reasonable compensation.”<sup>129</sup> On appeal to the Supreme Court, Justice Ginsburg, writing for the Court, framed the following *Erie-Hanna* issue: “This case presents an important question regarding the standard a federal court uses to measure the alleged excessiveness of a jury’s verdict in an action for damages based on state law.”<sup>130</sup>

Justice Ginsburg gave scant attention to the threshold question under *Hanna* whether Rule 59 was broad enough to control the standard for determining excessiveness, addressing the issue indirectly in a footnote directed at Justice Scalia’s dissent. She noted, “Justice Scalia finds in Federal Rule of Civil Procedure 59 a ‘federal standard’ for new trial motions in ‘direct collision’ with, and ‘leaving no room for the operation of,’ a state law like CPLR § 5501.”<sup>131</sup> While acknowledging that it is “indeed ‘Hornbook’ law that a most usual ground for a Rule 59 motion is that ‘the damages are excessive[,]’”<sup>132</sup> Justice Ginsburg’s footnote continued: “Whether damages are excessive for the claim-in-suit must be governed by *some law*. And there is no candidate for that governance other than the law that gives rise to the claim for relief—here, the law of New York.”<sup>133</sup> In justifying this narrow interpretation of Rule 59, Justice Ginsburg noted that “[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies.”<sup>134</sup> She will, again, in her dissenting opinion in *Shady Grove*—and to a more limited extent, Justice Stevens in his concurring opinion in that case—urge this same restraint in interpreting federal law to accommodate state law. However, seventeen years later, in *Hollingsworth*, Justice Ginsburg cast her vote with the majority of Justices who declined to interpret federal standing doctrine under Article III “with sensitivity” to the interests of

129. N.Y. C.P.L.R. § 5501(c) (McKinney 2011) (emphasis added).

130. *Gasperini*, 518 U.S. at 422.

131. *Id.* at 437 n.22 (emphasis omitted) (quoting *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987)).

132. *Id.* (citations omitted).

133. *Id.*

134. *Id.* at 427 n.7.

California in the integrity of the State's hallowed initiative process. Justice Kennedy's dissent in *Hollingsworth* argued that federal standing doctrine does not control the threshold issue whether official initiative proponents are authorized to assert the state's interest in the initiative's validity.

This Article argues in Part IV that *Hollingsworth*, viewed from an *Erie* perspective, is similar to *Gasperini* because, in both cases, the textual sources of the applicable legal principles did not expressly address the issues-in-dispute and, therefore, did not lend themselves to an inflexible, formalist approach. In such cases, where federal *decisional* law—rather than literal text—provides the applicable legal principles, *Gasperini* provides credible support for employing a *Byrd*-style analysis to critically evaluate the Court's opinions in *Hollingsworth*. As observed by Professor Freer: "*Gasperini* shows that *Byrd* survives *Hanna* and serves at least to identify federal systemic interests."<sup>135</sup> Professor Rowe, commenting on *Gasperini*'s influence on *Erie-Hanna* doctrine, noted a limited role for *Byrd*-balancing methodology in decisional rule cases where "an 'essential characteristic' of the federal judicial system presenting a 'countervailing federal interest' is involved."<sup>136</sup>

In *Gasperini*, the majority implicitly rejected Justice Scalia's dissenting view that the disruption of the judge-jury relationship in federal court, that would be caused by "changing the standard by which trial judges review jury

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135. Freer, *supra* note 108, at 1660 ("[*Gasperini*] is frustratingly mum, though, about *Byrd*'s future in any larger sense . . . . But, reading between the lines of *Gasperini*, we can find that *Byrd*—writ large—may have a strong future.").

136. Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in its Erie-Hanna Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 1014 (1998) ("[T]he *Hanna* 'twin aims' approach remains applicable to such decisional-rule cases – unless an 'essential characteristic' of the federal judicial system presenting a 'countervailing federal interest' is involved. In such cases *Byrd* and *Gasperini* call for a broadening beyond the 'twin aims' version of 'outcome determination' analysis to include consideration of the nature and weight of the state's interest in application of its own rule in federal court, with particular focus on whether it is 'bound up with' clearly substantive state-law rights and an eye to whether the state or federal interest should prevail or if the two can be accommodated.").

verdicts,”<sup>137</sup> qualified as an “essential characteristic” of the federal trial courts that would trigger *Byrd*’s interest-balancing analysis. In *Hollingsworth*, the overriding essential characteristic was the federal judiciary’s limited Article III role among the three branches of the federal government. Both *Gasperini* and *Hollingsworth* involved an “essential characteristic” of the federal judicial system presenting a “countervailing federal interest” in which decisional law gives content to vaguely worded text.<sup>138</sup> In *Gasperini*, federal decisional law—not the literal text of Federal Rule 59—provides the precedent for the *shocks the conscience* standard. In *Hollingsworth*, federal decisional law—not the literal text of Article III—provides the governing law on federal standing.<sup>139</sup> Both cases involve a state rule integrally bound up with state substantive rights. In *Gasperini*, CPLR § 5501(c) was a procedural mechanism, in Professor Rowe’s words, “to control something that is very much a matter of state substantive law, the amounts of compensatory damages recoverable on state-law claims . . . .”<sup>140</sup> In *Hollingsworth*, state decisional law authorizing initiative proponents to assert the State’s interest in the initiative’s validity is bound up with the integrity of the State’s initiative process.

Professor Rowe cautions that the omission of an explicit reference to *Byrd* in that part of the *Gasperini* Court’s opinion

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137. “But the scope of the Court’s concern is oddly circumscribed. The ‘essential characteristic’ of the federal jury, and, more specifically, the role of the federal trial court in reviewing jury judgments, apparently counts for little. The Court approves the ‘accommodation’ achieved by having district courts review jury verdicts under the ‘deviates materially’ standard, because it regards that as a means of giving effect to the State’s purposes ‘without disrupting the federal system,’ *ante*, at 437. But changing the standard by which trial judges review jury verdicts *does* disrupt the federal system, and is plainly inconsistent with the ‘strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal court.’ *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 538, 2 L. Ed. 2d 953, 78 S. Ct. 893 (1958). “The Court’s opinion does not even acknowledge, let alone address, this dislocation.” 515 U.S. at 462 (Scalia, J. dissenting).

138. *See id.*; *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Gasperini*, 518 U.S. 415 (1996).

139. *See supra* text accompanying notes 77-85.

140. Rowe, *supra* note 136, at 998.

that addressed the applicable standard of review for verdict excessiveness indicates “the seeming limit on the scope of Byrd’s applicability”<sup>141</sup> and that “Byrd plays no role in the choice of standard for verdict-excessiveness.”<sup>142</sup> He concludes that this omission sends “the message still surprisingly often ignored that the place to start in a federal decisional-law case is with the Hanna ‘twin aims’ formulation, and not with *Byrd*’s balancing approach.”<sup>143</sup> While it is true that “Erie” analysis does not start with *Byrd*, neither does it necessarily stop with the *Hanna* “twin aims” version of the outcome determinative test.<sup>144</sup> It is plausible to conclude that the Gasperini majority did not explicitly mention *Byrd* because—having by implication determined that that the disruption of the judge-jury relationship was not sufficiently compelling to constitute an overriding essential characteristic of the federal judicial

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141. *Id.* at 999.

142. *Id.* at 1008.

143. *Id.* at 1000.

144. On the continuing relevance of *Byrd* in “Erie” analysis post-*Gasperini*, see Erwin Chemerinsky, Federal Jurisdiction 341-42 (6th ed. 2012) (emphasis added):

If there is no conflict between state and federal law, both are to be applied. But if state and federal law are inconsistent, the following questions must be asked: First, is there a valid federal statute or federal rule of procedure on point, such as a provision of the Federal Rules of Civil Procedure or the Federal Rules of Appellate procedure? If so, then the federal law is to be applied, even if there is conflicting state law. If there is no valid statute or rule of procedure, the second question is whether the application of the state law in question is likely to determine the outcome of the lawsuit. If the state law is not outcome determinative, then federal law is used. *But if the state law is deemed to be outcome determinative, then the third question is asked: Is there an overriding federal interest justifying the application of federal law? If state law is outcome determinative and there is no countervailing federal interest, then state law controls. Otherwise, federal law is applied.* In applying this test, federal courts are to be guided by the goals of the *Erie* doctrine, which are to prevent forum shopping and the inequitable administration of justice.

system<sup>145</sup>—it did not have to engage in a *Byrd*-balancing analysis. This conclusion is bolstered by the Court’s explicit invocation of *Byrd* in that aspect of its opinion dealing with the allocation of authority between federal trial and appellate courts in applying the excessiveness standard where the majority held that the Second Circuit erred in applying the New York’s statute’s *de novo* standard of appellate review instead of the federal abuse of discretion standard: “[T]he Second Circuit did not attend to ‘an essential characteristic of [the federal-court] system,’ (cite omitted) when it used § 5501(c) as ‘the standard for [federal] appellate review’ (cite omitted).”<sup>146</sup>

Fourteen years after *Gasperini*, the balance of federal/state interests shifted back toward the federal judiciary’s interest in regulating procedure. This occurred when a five-Justice majority ruled in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,<sup>147</sup> that the federal class action rule preempted a conflicting New York state class action rule that would have barred the state law claim-in-suit from being maintained as a class action in New York state court. The Court fractured into essentially three different views about the proper approach to balancing state and federal interests in resolving vertical

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145. Rowe, *supra* note 136 at 999, note 150 (“The Gasperini Court speaks early in part III.B of its opinion, once it has resolved the choice of standard in favor of the state rule and moved on to the trial-appeal allocation of responsibility for the standard’s application, of Byrd’s having said that the “outcome-determination’ test was an insufficient guide in cases presenting countervailing federal interests.” *Gasperini*, 116 S. Ct. at 2222. The implication seems strong that the Court saw no federal interest sufficient to invoke Byrd in the content of the standard itself in this case, as opposed to the allocation of responsibility for its application within the federal judicial structure.”); Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on Erie and Gasperini*, 46 Kan. L. Rev. 751, 771 (1998) (commenting on *Gasperini*’s impact on *Byrd*: “[W]ith respect to the district court’s standard for reviewing verdicts, the Court gave no consideration to whether there were countervailing federal interests. One could argue that a lower standard for new trials may increase the number of trials in federal court and impose significant burdens. This may not be a sufficiently large or likely federal interest, but it would have been helpful for the Court to so state.”).

146. *Gasperini*, 518 U.S. at 431.

147. 559 U.S. 393 (2010).

choice of law issues.<sup>148</sup> Professors Freer and Arthur commented, “[e]ach of the three opinions in *Shady Grove* reflects [Byrd’s] influence, if not its command.”<sup>149</sup>

The majority and dissenting Justices disagreed about whether the federal class action rule was broad enough in scope to govern the issue-in-dispute. The majority broadly construed Federal Rule 23 by applying a formalist, plain-text approach to the vertical choice of law issue, an approach dictated by the plain-text, literal wording of the two competing class action rules which both literally addressed the same issue—whether Shady Grove was authorized to “*maintain*” a class action. The federal rule thereby preempted the conflicting state procedure, transforming, in the words of Justice Ginsburg’s dissenting opinion, “a \$500 case into a \$5,000,000 award, although the State creating the right to recover has proscribed this alchemy.”<sup>150</sup> The Court effectively decided that the federal interest, reflected in the Rules Enabling Act, in prescribing a uniform procedural framework for civil litigation across all federal district courts, outweighed what Justice Ginsburg explained in her dissenting opinion as “New York’s legitimate interest in keeping certain monetary awards reasonably bounded”<sup>151</sup> by barring the use of the class action device to recover a statutory penalty created by state law. Justice Scalia’s plurality opinion articulated a rigidly formalist, textual approach, applying the literal words of both class action rules that left no room for an inquiry into the legislature’s intent in enacting the state class action rule. Justice Stevens, who agreed with the plurality that the two class action rules were literally in conflict, adopted a more flexible version of plain-text statutory analysis in resolving vertical choice of law issues that would leave some room for applying “bound up” state procedure.

Justice Ginsburg’s dissent, joined by three other Justices, advocated a functionalist approach—reminiscent of *Guaranty Trust’s* outcome determinative test—to interpret Federal

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148. See *The Fruits of Shady Grove*, *supra* note 19.

149. Freer & Arthur, *supra* note 35, at 62.

150. *Shady Grove Orthopedic Assocs.*, 559 U.S. at 436 (Ginsburg, J., dissenting).

151. *Id.* at 437.

Rules with awareness of, and sensitivity to, important state regulatory policies.”<sup>152</sup> The dissent characterized the policy behind New York’s class action rule as essentially substantive in nature which should be accommodated by narrowly construing Federal Rule 23 to avoid a conflict with New York’s class action rule.<sup>153</sup> Just as Justice Kennedy’s dissent, three years later in *Hollingsworth*, will support the Ninth Circuit’s narrow interpretation of the scope of Article III’s standing jurisprudence by framing the authority of the initiative proponents to assert the State’s interest in Proposition 8’s validity as a *threshold question* to be resolved by applying California state law, Justice Ginsburg’s dissent in *Shady Grove* agreed with the Second Circuit’s view that New York’s class action rule addressed (in Justice Scalia’s words characterizing the position of the dissent) “*an antecedent question*”:

Rule 23 . . . concerns only the criteria for determining whether a given class can and should be certified; section 901(b) [of New York’s class action rule], on the other hand, addresses *an antecedent question*: whether the particular type of claim is eligible for class treatment in the first place—a question on which Rule 23 is silent.<sup>154</sup>

Justice Stevens’ concurring opinion in *Shady Grove* opted for a “plain textual meaning” approach to the interpretation of state statutes less rigid than that embraced by Justice Scalia’s plurality opinion, leaving some room for applying bound-up state rules. In Justice Stevens’ interpretation of the Rules Enabling Act’s substantive rights proviso, “[i]n order to displace a federal rule, there must be more than just a

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152. *Id.*

153. *See id.* at 449 (“The absence of an inevitable collision between Rule 23 and § 901(b) becomes evident once it is comprehended that a federal court sitting in diversity can accord due respect to both state and federal prescriptions.”); *see also id.* at 451 (“By finding a conflict without considering whether Rule 23 rationally should be read to avoid any collision, the Court unwisely and unnecessarily retreats from the federalism principles undergirding *Erie*.”).

154. *Id.* at 399 (majority opinion) (emphasis added).



possibility that the state rule is different than it appears.”<sup>155</sup> To overcome the use of a state statute’s “plain text[]” as a default tool of interpretation, Justice Stevens would require that legislative history *clearly show* the legislature’s intent to use procedure to change the substantive law of the State, something akin to *Byrd’s* characterization of state procedure that is *integrally bound up* with the enforcement of state substantive rights.<sup>156</sup> Rejecting the dissent’s advocacy of the very functionalist “outcome determinative test,” Justice Stevens adopted a more modified functionalist standard that “distinguish[es] between procedural rules adopted for *some* policy reason and seemingly procedural rules that are *intimately bound up in the scope of a substantive right or remedy.*”<sup>157</sup> In deciding whether New York’s competing class action rule was “substantive,” such that Federal Rule 23 could not validly preempt the state rule, he inquired, in *Byrd’s* terminology, whether the state rule is “so intertwined with a state right or remedy that it functions to define the scope of the state-created right”<sup>158</sup> and found that it was not.<sup>159</sup> Professors Freer and Arthur have commented that Justice Ginsburg’s dissenting opinion also applies *Byrd’s* “bound up” approach in her “functional analysis of the New York statute”<sup>160</sup> increasing to five the Justices in *Shady Grove* “willing to engage in the ‘bound up’ analysis suggested by *Byrd.*”<sup>161</sup>

As discussed in Part IV, the *Hollingsworth* Court’s majority and dissenting opinions reflect this interest-balancing approach to the vertical choice of law issue in dispute. The majority broadly construed the scope of federal standing jurisprudence to govern the authority of the initiative

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155. *Id.* at 436 (Stevens, J., concurring).

156. *Id.*

157. *Id.* at 433 (emphasis added).

158. *Id.* at 423.

159. *See id.* at 436 (“But given that there are two plausible competing narratives, it seems obvious to me that we should respect the plain textual reading of § 901(b), a rule in New York’s procedural code about when to certify class actions brought under any source of law, and respect Congress’ decision that Rule 23 governs class certification in federal courts.”).

160. Freer & Arthur, *supra* note 35, at 75.

161. *Id.* at 76.

proponents to assert the State’s interest in Proposition 8’s validity. By contrast, the dissent narrowly construed standing doctrine to avoid a conflict with California state law to accommodate the state interest in the integrity of California’s initiative process by characterizing the issue of the proponent’s authority as a threshold question governed by state law. Though *Erie* is not mentioned in either the majority or dissenting opinions, the divergent views on the standing issue reflect, at bottom, a difference over the “proper balance of the core *Erie* interests.”<sup>162</sup>

#### IV. A Critical Assessment of the Federal-State Balance of Interests in *Hollingsworth v. Perry*

As discussed in Part III, the decision whether to narrowly or broadly construe the scope of a federal rule, statute, or constitutional provision is often determined by how the Court balances state interests against federal interests. If the Court decides that state interests weigh more heavily, then it will narrowly construe the federal directive in order to give effect to the state law. If federal interests are deemed to outweigh state interests and outcome difference, the Court will broadly construe the federal directive. What follows is a critical analysis of *Hollingsworth*’s majority and dissenting opinions in light of the *Byrd*-balancing factors: (1) the federal systemic interest, (2) the state interest in governing the primary activity of citizens, and (3) the litigant interest in uniformity of outcome.<sup>163</sup>

The split between the majority and dissenting Justices in *Hollingsworth* can be interpreted, from an *Erie* perspective, as a difference of opinion over the proper balance between California’s state interest in conferring authority on Proposition 8’s initiative proponents to defend that initiative when state officials refused to do so, and the federal interest in confining the exercise of the federal judicial power within the constitutional limits imposed by Article III’s case-or-controversy provision. In effect, and without saying so

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162. *Id.* at 78.

163. *See supra* text accompanying note 112.

explicitly, the Justices implicitly engaged in a *Byrd*-style weighing of federal and state interests as it did in the Court's most recent *Erie* decisions in *Gasperini* and *Shady Grove*. Viewed in this light, *Hollingsworth* is the latest in a tortuous line of Supreme Court decisions often referred to as *Erie*'s progeny.

No one disputes that federal standing under Article III requires "the litigant to prove that he has suffered a *concrete and particularized injury* that is fairly traceable to the challenged conduct"<sup>164</sup> or that the State of California suffered a particularized injury when the district court declared Proposition 8 unconstitutional and permanently enjoined its enforcement.<sup>165</sup> Because "[t]he exclusive basis of [the Ninth Circuit's] holding that Proponents possess Article III standing is their authority to assert the interests of the State of California, rather than any authority they might have to assert particularized interests of their own,"<sup>166</sup> the federal standing issue before the U.S. Supreme Court focused exclusively on whether the proponents were qualified to assert the State's particularized interest. Therefore, the *Erie* issue that divided the Justices in *Hollingsworth* essentially turned on whether the federal courts should be free to second-guess, and consequently to override, the judgment of a state's highest court about the qualifications of the initiative's proponents to represent the state's interest in federal court. This issue, in turn, homed in on whether the proponents would be advocating the state's particularized interest or their own generalized grievance. Framing the issue in terms of the judicial balance of power in our federal system, does the federal judiciary or California's judiciary get to decide whether initiative proponents are qualified to assert a state's particularized interest in defending an initiative's validity in federal court?

The majority ruled that Article III standing precedent

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164. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (emphasis added).

165. *See id.* at 2664 ("No one doubts that a State has a cognizable interest 'in the continued enforceability' of its laws that is harmed by a judicial decision declaring a state law unconstitutional.").

166. *Perry v. Brown*, 671 F.3d 1052, 1074 (9th Cir. 2012) (emphasis omitted).

controls this issue, not California law as interpreted by the state’s high court, and that federal standing jurisprudence imposes a formal “agency” requirement on a proponent’s authority to represent the State’s interest in federal court. Noting that “[n]either the California Supreme Court nor the Ninth Circuit ever described the proponents as agents of the State, and [that] they plainly do not qualify as such,” the Court held they did not have Article III standing. Without a formal agency relationship that assured the proponents’ accountability, as fiduciaries, to the State, the Court feared that the proponents’ interests were unhinged from the State’s, freeing them to assert their own generalized ideological views.<sup>167</sup> The majority also seems to have minimized the harm to the State’s interest in defending Proposition 8, having been made aware of the “variety of ways for a state to guarantee a defense of its initiatives” described in Walter Dellinger’s *amicus* brief in support of Respondents on the standing issue.<sup>168</sup> This expansive interpretation of Article III standing doctrine to reach what the Ninth Circuit called a “question[]

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167. See *Hollingsworth*, 133 S. Ct. at 2666-67 (“[T]he most basic features of an agency relationship are missing here. . . . [P]etitioners answer to no one; they decide for themselves, with no review, what arguments to make and how to make them. Unlike California’s attorney general, they are not elected at regular intervals—or elected at all. No provision provides for their removal. As one *amicus* explains, ‘the proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however, and to whatever extent they choose to defend it.’ . . . They are free to pursue a purely ideological commitment to the law’s constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities.”).

168. Brief for Walter Dellinger as Amicus Curiae in Support of Respondents on the Issue of Standing, *supra* note 33, at 30; see also Marty Lederman, *Revisiting the Court’s Several Options in the California Marriage Case*, SCOTUSBLOG (Mar. 29, 2013, 4:54 PM), <http://www.scotusblog.com/2013/03/revisiting-the-courts-several-options-in-the-california-marriage-case/> (“As Justice Breyer noted . . . the Dellinger brief describes several ways in which California law could be amended to prevent [executive officials in California to effectively thwart the initiative process], including by providing for an independent counsel who *would* be required to act as a fiduciary of the state with the responsibility of defending initiatives when the Attorney General declines to do so.”).

antecedent to determining federal standing<sup>169</sup> was driven—at least on the surface—by the majority’s overriding concern with protecting “vital [federal] interests going to the role of the Judiciary in our system of separated powers.”<sup>170</sup> To protect these vital federal interests, the Court placed Article III limits on the power of state law to, in Professor Lederman’s words, “expand the category of persons entitled to represent the state’s interests in federal court.”<sup>171</sup> “And no matter its reasons,” the Court’s Opinion affirmed, “the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary.”<sup>172</sup>

Justice Kennedy’s dissenting opinion offered a contrasting balance-of-power assessment, arguing that the State’s overriding interest in preserving “the integrity of its initiative process[]”<sup>173</sup> requires that California state law, not federal standing doctrine, control the issue of the proponents’ qualifications to represent the State’s interest in federal court:

[T]he Court today concludes that this state-defined status and this state-conferred right fall short of meeting federal requirements because the proponents cannot point to a formal delegation of authority that tracks the requirements of the Restatement of Agency. But the State Supreme Court’s definition of proponents’ powers is binding on this Court. And that definition is fully sufficient to establish the standing and adversity that are requisites for justiciability under Article III of the United States Constitution.<sup>174</sup>

Addressing the qualifications of the initiative proponents to represent the State’s interest, Justice Kennedy converted what

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169. *Perry*, 671 F.3d at 1074.

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

171. *See Understanding Standing (VI)*, *supra* note 58.

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

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

174. *Id.* at 2668.

the majority viewed as “deficiencies in the proponents’ connection to the State government . . . — that proponents who are not formally appointed as agents of the State would represent their own generalized interest—into “essential qualifications to defend the initiative system[]” since “[t]he very object of the initiative system is to establish a lawmaking process that does not depend upon state officials.”<sup>175</sup> He also challenged the relevance of the Restatement’s concept of a formal agency relationship to “an agent representing a principal composed of nearly 40 million residents of a State.”<sup>176</sup>

Did the Court “get it right” from the *Erie* perspective of calibrating the appropriate judicial balance of power in vertical federalism? A critical analysis of the Court’s Opinion in light of *Erie* jurisprudence, summarized in Part III, indicates that the Court’s majority overstated the harm to the federal interest—maintaining the separation of powers structure of the federal government—that would accrue from conferring federal standing on the proponents, and understated the impairment of California’s interest—maintaining the integrity of the People’s initiative power as an integral part of the State’s governmental structure—that was caused by the Court’s denial of standing. Justice Kennedy’s dissenting opinion makes a compelling case for privileging California’s interest in the integrity of its initiative process over competing federal interests. Each state has a sovereign interest within the federal system in determining its own governmental structure. Whatever its shortcomings, the initiative process in California is sacrosanct, accurately described by Justice Kennedy as “one of the cornerstones of the State’s governmental structure.”<sup>177</sup>

As noted by the Ninth Circuit panel, the question of the proponents’ authority to defend the validity of Proposition 8 is integral to the balance of power within California’s governmental organization under the State’s Constitution.<sup>178</sup>

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175. *Id.* at 2670.

176. *Id.* at 2671.

177. *Id.*

178. *See* *Perry v. Schwarzenegger*, 628 F.3d 1191, 1197 (9th Cir. 2011) (“Rather than rely on our own understanding of this balance of power under the California Constitution, however, we certify the question so that the Court may provide an authoritative answer as to the rights, interests, and authority under California law of the official

The California Supreme Court determined that the power of the People to “to alter or reform” the structure of state government, set forth in Article II, section 1 of the California Constitution, “reflects a basic precept of [California’s] governmental system[.]”<sup>179</sup> The Court observed that the initiative power is rooted in that basic precept<sup>180</sup> and affirmed that “[t]he primary purpose of the initiative was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt.”<sup>181</sup>

For good or ill, California’s initiative power is an integral part of the State’s governmental structure that provides, through direct democracy, a counterweight to the power of elected officials. The official proponents’ authority under California law to defend an initiative when state officials refuse to do so is, in *Byrd’s* terminology, “bound up”<sup>182</sup> with the integrity of that process. As Justice Kennedy observed, “[t]he very object of the initiative system is to establish a lawmaking process that does not depend upon state officials.”<sup>183</sup> The California Supreme Court determined that “this purpose is undermined if the very officials the initiative process seeks to

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proponents of an initiative measure to defend its validity upon its enactment in the case of a challenge to its constitutionality, where the state officials charged with that duty refuse to execute it.”)

179. *Perry v. Brown*, 265 P.3d 1002, 1016 (Cal. 2011).

180. *See id.* (“Although California’s original 1849 Constitution declared that ‘[a]ll political power is inherent in the people,’ it was not until 60 years later—in 1911—that the California Constitution was amended to afford the voters of California the authority to *directly* propose and adopt state constitutional amendments and statutory provisions through the initial power.”).

181. *Id.*

182. *See Katz, supra* note 7, at 1332 (recognizing the “bound-up” connection between standing-related issues and the enforcement of substantive rights was recognized in the reverse-*Erie* context: “The fact that Congress may neglect to assign standing limits to its legislation does not imply that these limits are not ‘bound up’ in the federal right. In the *Erie* and reverse-*Erie* contexts, the Court determines if a certain rule should always accompany a substantive right by asking whether the rule is integral to the substantive right or merely incidental to the forum which normally adjudicates the right.”).

183. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2670 (2013) (Kennedy, J. dissenting).

circumvent are the only parties who can defend an enacted initiative when it is challenged in a legal proceeding.”<sup>184</sup> In light of the independent nature of the people’s initiative power that allows voters to bypass the legislative and executive branches, these enforcement mechanisms should not be dependent on action by state officials whose potential “residual hostility or indifference” to the initiative might “prevent a full and robust defense of the measure” in court.<sup>185</sup> *Byrd* teaches that “bound up” state procedure—here, the proponents’ authority to assert the State’s substantive interest—should be applied by federal courts. Justice Kennedy affirmed that the California Supreme Court is best qualified to judge how best to defend that interest: “And if the Court’s concern is that the proponents are unaccountable, that fear is neither well founded nor sufficient to overcome the contrary judgment of the State Supreme Court.”<sup>186</sup>

Addressing the majority’s requirement that only *textual* delegation of authority consistent with the Restatement will suffice to confer federal standing, the dissent—correctly, in my view—responds that it is “not for [the U.S. Supreme Court] to say that a State must determine the substance and meaning of its laws *by statute, or by judicial decision, or by a combination of the two. That, too, is for the State to decide.*”<sup>187</sup>

The Court’s majority implicitly decided that federal separation of powers concerns outweighed what it perceived to be the negligible impact on California’s interest in self-government. To allow “a private party . . . [to] have standing to seek relief for a generalized grievance” in contravention of “[t]he Article III requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury[,]” the Chief Justice declared, threatens “vital interests going to the role of the Judiciary in our system of separated powers . . . . States cannot alter that role simply by issuing to private parties who otherwise lack standing a

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184. *Id.* at 2671.

185. *Perry v. Brown*, 265 P.3d 1002, 1006 (Cal. 2011).

186. *Hollingsworth*, 133 S. Ct. at 2671-72 (Kennedy, J., dissenting).

187. *Id.* at 2669 (emphasis added) (citations omitted).



ticket to the federal courthouse.”<sup>188</sup> He characterized that federal interest as an “*overriding and time-honored concern* about keeping the Judiciary’s power within its proper constitutional sphere[.]”<sup>189</sup>

This view reflects a “slippery slope” concern that, as expressed in Walter Dellinger’s *amicus* brief, “the Article III principle that federal courts cannot serve as a forum for the airing of generalized grievances would be *drained of any practical meaning*” if “a state can transform a generalized interest in a law’s enforcement from an insufficient basis for Article III standing into a cognizable Article III injury simply by relabeling it as the state’s interest.”<sup>190</sup> The *amicus* brief argued, and apparently persuaded the majority, that “[t]he adoption of common-law agency as a limit on who can assert the state’s interest is necessary to preserve the federal courts’ Article III role.”<sup>191</sup> But would the *Hollingsworth* Court’s application of the California Supreme Court’s interpretation of state law have unleashed a “parade of horrors”<sup>192</sup> that would threaten to undermine the foundation of Article III standing? Is a strict, formalist application of standing law to determine the authority of initiative proponents to represent the State’s interest in federal court required to preserve the separation-of-powers structure of the federal government?

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188. *Id.* at 2667; *see also id.* at 2661 (“The doctrine of standing, we recently explained, ‘serves to prevent the judicial process from being used to usurp the powers of the political branches. In light of this ‘overriding and time-honored concern about keeping the Judiciary’s power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of [an] important dispute and to “settle” it for the sake of convenience and efficiency.’”).

189. *Id.* at 2661 (emphasis added) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)).

190. Brief for Walter Dellinger as Amicus Curiae in Support of Respondents on the Issue of Standing, *supra* note 33, at 4 (emphasis added).

191. *Id.* at 28.

192. *See Understanding Standing (VI)*, *supra* note 58 (referring to the concern expressed by the City and County of San Francisco’s concern expressed to the California Supreme Court in *Perry v. Brown* about the “inevitable parade of horrors” that would flow from a ruling untethered from text that would provide “no principled way to draw a line between delegating Proponents the authority to appeal on behalf of the State and delegating Proponents other decisions.”).

A formalist approach to interpreting legal doctrine can, at times, be justified by functional considerations such as the need to preserve the benefits of a uniform procedural framework for federal court litigation as envisioned by the Rules Enabling Act and the Federal Rules of Civil Procedure.<sup>193</sup> The Court’s opinion in *Shady Grove*, correctly in my view, chose to weight more heavily the federal judiciary’s interest in horizontal rules uniformity over each state’s interest in vertical substantive law uniformity.<sup>194</sup> Justice Scalia’s formalist interpretation of Rule 23 prevailed over Justice Ginsburg’s functionalist approach—reminiscent of *Guaranty Trust’s* outcome determination test—that would threaten the uniform application of the Federal Rules.

Unlike Rule 23, which merited the *Shady Grove* Court’s formalist approach to rules interpretation, based on the proposition that there exist certain inherently “procedural” norms<sup>195</sup> that are distinct from those of “substantive” law that defines legal rights and obligations, Article III-based justiciability doctrine, of which “standing” is a more specific category,<sup>196</sup> is liberally informed by political considerations that vary from case to case and judge to judge<sup>197</sup> and “attitudes toward the avoidance of decision on justiciability grounds are apt to vary directly with perceptions as to the institutional role of judicial review.”<sup>198</sup> While “[t]he threshold requirements [for standing] are attributed to the ‘case’ and ‘controversy’ terms that define the federal judicial power in Article III[,]”<sup>199</sup> the text of Article III does not expressly refer to standing which is, rather, a creature of judicial interpretation.

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193. See Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1169-70 (2005).

194. See generally *The Fruits of Shady Grove*, *supra* note 19.

195. See, e.g., FED. R. CIV. P. 1.

196. See 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3529 (3d ed. 2008).

197. See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

198. 13 WRIGHT, MILLER, COOPER & FREER, *supra* note 196, at § 3529.

199. 13A WRIGHT, MILLER & COOPER, *supra* note 95, at § 3531.

Justiciability doctrine's indeterminacy<sup>200</sup> renders it incapable of uniform, principled application in federal court decisions. Referring to the "malleable" nature of the precedents that "afford ample opportunity for courts to avoid decision on justiciability grounds simply because decision is thought to be inconvenient," Wright, Miller, Cooper, and Freer observe that "[t]his opportunity has fostered a continuing debate on the extent to which courts should in fact be free to avoid awkward decisions on grounds of 'prudence' falling somewhere between implementation of strict principle and mere caprice."<sup>201</sup> The authors comment:

Over the course of the Twentieth century, judicial opinions moved back and forth along the intermediate spectrum from emphasis on a policy that judicial review not be available freely to a gradually expanding concern that judicial review be available whenever substantial need can be shown.<sup>202</sup>

*Hollingsworth's* majority and dissenting opinions reflect opposite ends of this spectrum. Given the "nearly ineffable"<sup>203</sup> state of federal standing doctrine, the case for federal standing uniformity on the issue presented in *Hollingsworth* is weak.

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200. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968) ("Justiciability is itself a concept of uncertain meaning and scope.").

201. 13 WRIGHT, MILLER, COOPER & FREER, *supra* note 196, at § 3529 ("The precedents are sufficiently malleable to afford ample opportunity for courts to avoid decision on justiciability grounds simply because decision is thought inconvenient."); see also *Understanding Standing (I)*, *supra* note 96 ("There already has been much speculation, and no doubt there will be much more, about whether some or all of the Justices might be motivated to find a lack of justiciability in either or both cases in order to avoid a holding on the merits — and about whether they would be wise or justified in doing so.").

202. 13 WRIGHT, MILLER, COOPER & FREER, *supra* note 196, at § 3529.

203. *Id.* at § 3529 ("Expansion of the categories of justiciable controversies has underscored the nearly ineffable nature of the judgments involved."); see also *Wymbs v. Republican State Exec. Comm. of Fla.*, 719 F.2d 1072, 1085 n.34 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984).

As previously noted, the vertical choice-of-law issue in *Hollingsworth*, viewed in the light of *Erie* jurisprudence, is more comparable to *Gasperini* than to *Shady Grove*. Whereas Rule 23 goes into inordinate detail about the prerequisites for class certification, stating very explicitly that a class action may be “maintained” if it meets the prerequisites, Rule 59, by contrast, says little about the grounds for granting a new trial and nothing about the standard for judicial scrutiny of damage awards. This left Justice Ginsburg, in her *Gasperini* Opinion, with room to honor New York’s substantive interests in the uniform application, in state and federal courts, of the State’s more rigorous standard for scrutinizing damage awards.<sup>204</sup> In *Hollingsworth*, Article III, which is the textual source of standing decisional law, is textually open-ended, like Rule 59, and does not lend itself to a categorical or formalist approach to standing issues.

Notwithstanding the comparability of competing federal and state interests in *Hollingsworth* and *Gasperini*, two of the Justices—Ginsburg and Breyer—who voted with the *Gasperini* majority and with the dissent in *Shady Grove* to narrowly interpret federal law to give effect to substantive state interests voted with the majority in *Hollingsworth* to override

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204. Professor Steinman has invoked *Gasperini* to support his contention that *Erie*—not *Hanna*—governs the choice of law issue where a federal rule employs generalized language:

Many aspects of federal court procedure that plaintiffs often seek to avoid are not dictated by the text of the Federal Rules. Rather, the Rules use generalized language that is virtually devoid of meaningful content. It has been the judicial gloss on those Rules—not the Rules themselves—that has led to the pro-defendant summary judgment standards that have held sway since the 1986 trilogy, the demanding pleading standard recently suggested by *Bell Atlantic Corp. v. Twombly*, and the federal courts’ current hostility toward class actions. There is, therefore, a surprisingly strong argument that a federal court’s choice between state and federal law on these issues should be treated as an unguided one. The most recent Supreme Court decision on this issue is *Gasperini v. Center for the Humanities*.

Steinman, *supra* note 104, at 282-83.

California's substantive interests. Justice Kennedy remained true to his sensitivity to state interests in the vertical choice-of-law context by voting with the dissent in *Hollingsworth* and *Shady Grove*, and with the majority in *Windsor* in deference to the sovereign interest of the States in regulating domestic relations.<sup>205</sup> The unusual alignment of liberal and conservative Justices joining in the Court's opinion speaks more to the politics of the Court in avoiding a broad pronouncement about same-sex marriage applicable to all states than it does about being consistent with *Erie* jurisprudence, including *Gasperini*.

In weighing the balance in favor of federal interests, the Court's majority also seems to have minimized the harm to California's interest in defending its initiatives when state officials decline to do so. Walter Dellinger's *amicus* brief described to the Court several ways "for a state to guarantee a defense of its initiatives without conscripting federal courts to adjudicate the grievances of private parties who have nothing more than a generalized interest in an initiative's enforcement."<sup>206</sup> Two of these methods envisioned suit in state court to defend an initiative, brought either by initiative proponents against the state Attorney General "for a binding determination that the initiative is constitutional" or by the Attorney General herself to obtain a declaratory judgment on the initiative's constitutionality.<sup>207</sup> But this state court approach—falling short of formal agency requirements—would still have denied the Proposition 8 proponents appellate review by the United States Supreme Court for lack of federal standing to appeal. A third approach suggests that the State require the Attorney General or other state official to defend

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205. See *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013).

206. Brief for Walter Dellinger as Amicus Curiae in Support of Respondents on the Issue of Standing, *supra* note 33, at 30; see also Lederman, *supra* note 168 ("As Justice Breyer noted . . . the Dellinger brief describes several ways in which California law could be amended to prevent [executive officials in California from thwarting the initiative process by refusing to defend the initiative], including by providing for an independent counsel who *would* be required to act as a fiduciary of the state with the responsibility of defending initiatives when the Attorney General declines to do so.").

207. Brief for Walter Dellinger as Amicus Curiae in Support of Respondents on the Issue of Standing, *supra* note 33, at 31.

the initiative,<sup>208</sup> but this would require action by a state official which, by implication from the rationale of the California Supreme Court’s holding in *Perry v. Brown*, is incompatible with the purpose of the initiative process to empower the People to act independently of state officials when state officials refuse to act. Dellinger’s fourth approach suggested that the State require the Attorney General “to enforce [the initiative] and take all possible appeals [without defending the initiative], while *allowing the proponents or others to participate as amici curiae to defend the initiative on the merits.*”<sup>209</sup> This scenario, however, is exactly what happened in *Windsor* where Justice Scalia, in his dissent, argued unsuccessfully that the absence of adverseness between the Attorney General and the respondents should have precluded standing by the federal government.<sup>210</sup> The fifth, and more promising, suggestion would have the state “create an independent office responsible for defending initiatives in cases in which the Attorney General declines to do so[]” subject to “removal for cause by the Governor or Attorney General.”<sup>211</sup> But even here, would independent counsel provide as vigorous a defense of the initiative as its official proponents? In this connection, Justice Kennedy’s dissent cited the California Supreme Court’s finding that the proponents “have a unique relationship to the voter-approved measure that makes them especially likely to be reliable and vigorous advocates for the measure and to be so viewed by those whose votes secured the initiative’s enactment . . . .”<sup>212</sup> It is noteworthy that, in the wake of *Hollingsworth*, “initiative proponents [in California] have begun writing instructions into proposed laws that would allow them to assume the power to act on behalf of the state if

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208. *Id.*

209. *Id.* at 32 (emphasis added).

210. *See* *United States v. Windsor*, 133 S. Ct. 2675, 2701 (2013) (Scalia, J., dissenting) (“Article III requires not just a plaintiff (or appellant) who has standing to complain but *an opposing party* who denies the validity of the complaint.”).

211. Brief for Walter Dellinger as Amicus Curiae in Support of Respondents on the Issue of Standing, *supra* note 33, at 32.

212. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2669-70 (2013) (Kennedy, J., dissenting) (quoting *Perry v. Brown*, 265 P.3d 1002, 1024 (Cal. 2011)).

elected officials declined to do so.”<sup>213</sup>

Even if, as a matter of vertical choice-of-law doctrine, and for the sake of argument, federal courts should be free to second-guess a State’s judgment on the qualifications of private parties to represent the State’s interest, how valid are the majority’s concerns? In part, the majority and dissenting Justices in *Hollingsworth* appeared to be sparring over the qualifications of initiative proponents who lack formal accountability to the State to represent the State’s interests. The Court’s Opinion expressed the majority’s concern that the proponents would be “free to pursue a purely ideological commitment to the law’s constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities.”<sup>214</sup> A contrary view of the proponents’ qualifications was expressed by the California Supreme Court in *Perry*:

The experience of California courts in reviewing challenges to voter-approved initiative measures over many years . . . teaches that permitting the official proponents of an initiative to participate as parties in postelection cases, even when public officials are also defending the initiative measure, often is essential to ensure that the interests and perspective of the voters who approved the measure are not consciously or unconsciously subordinated to other public interests that may be championed by elected officials[.]<sup>215</sup>

The Court’s majority implied that the *State’s interest* is unitary and self-defining, and that the requirement of a formal appointment by the State of a party as the State’s agent is necessary to assure that the State’s interest, and none other, will be represented. Without such a formal agency relationship, the Court asserted, initiative proponents, who are otherwise

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213. Laura W. Brill, Op Ed – A lesson for California: Bad initiatives make bad law, Los Angeles Times, April 27, 2014.

214. *Id.* at 2667.

215. *Perry v. Brown*, 265 P.3d 1002, 1023-24 (emphasis added).

unaccountable to the State or its People, may assert their own generalized interests. Along these lines, Dellinger’s *amicus* brief cited “serious administrability concerns . . .” that would confront a federal court “when proponents disagree among themselves on such matters as whether to appeal, whether to settle the case, whether to stipulate to facts, and what arguments should be made.”<sup>216</sup>

In defending an initiative’s validity, the question of whose interest is being asserted by a party—whether *official* or *private*—is a difficult one. The California Supreme Court observed in *Perry v. Brown* that there is no single, self-defining State or People’s interest:

In many instances the interests of two or more public officials or entities may conflict and give rise to *differing official views* as to the validity or proper interpretation of a challenged state law. In such instances, it is not uncommon for different officials or entities to appear in a judicial proceeding as distinct parties and to be represented by separate counsel, *each official or entity presenting its own perspective of the state’s interest* with regard to the constitutional challenge or proposed interpretation at issue in the case.<sup>217</sup>

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216. Brief for Walter Dellinger as Amicus Curiae in Support of Respondents on the Issue of Standing, *supra* note 33, at 30.

217. *Perry*, 265 P.3d at 1025-26 (emphasis added). The Supreme Court of California’s opinion suffers from its own ambiguity concerning the “interest” official proponents are authorized by California law to represent. Professor Lederman comments, in this connection:

That court made numerous references to the notion that state law provides initiative proponents the authority to represent ‘the people’s interest,’ which it appeared to equate with ‘the state’s interest.’ The court was unclear, however, about whether the ‘people’s’ interest in question is the interest of the people *in voting for the initiative*, or the interest of the people in *enforcement of state law*: The court toggled back and forth between references to the need ‘to protect the people’s right to *exercise their initiative*



The third interest to be factored into the Byrd interest-balancing equation is the litigant's interest in uniformity of outcome.<sup>218</sup> The Supreme Court's refusal in *Hollingsworth* to apply California law to determine the sufficiency of the proponents' authority to assert the State's interest for purposes of federal standing could, in the absence of a state statute formally appointing proponents as agents of the State, lead to a substantial difference in the outcome of future litigation challenging the constitutionality of state's initiatives. Plaintiffs who file suit to challenge the constitutionality of state initiatives will, going forward, likely forum shop in federal court, where formal agency principles apply under federal standing law, gambling on a favorable trial court judgment that will be appellate-proof. If suit were brought in state court, parties defending the initiative, who suffer an adverse trial judgment, would have at least two opportunities to appeal within the state court system, though, ultimately, not to the U.S. Supreme Court which would apply federal standing principles as interpreted in *Hollingsworth*.

## V. Conclusion

*Hollingsworth* confronted the Supreme Court with a clash of federal and state interests typical of the *Erie* issues that closely divided the Court in *Shady Grove* and *Gasperini*. Though the Court's majority and dissenting opinions expressly disagreed over the weight to be accorded each interest in our federal system, *Erie* and its progeny were not explicitly

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*power*' and the people's interest in 'the initiative's *validity*.' The latter interest appears to be the same as the sovereign's interest in enforcement of its laws, and thus would be consistent with the idea of the proponents standing in for the Attorney General to defend the state's own interest in preserving the validity of its laws. The former interest, however, is more akin to the interest of the *lawmaking body* in seeing to it that its legislative handiwork is honored.

*Understanding Standing (VI)*, *supra* note 58.

218. *See supra* text accompanying note 112.

mentioned. Nevertheless, the conflicting choice-of-law judgments reflected in these opinions were made in the shadow of *Erie*. Whether or not the Court’s broad construction of federal standing doctrine—nominally, to avoid harming the federal interest in the horizontal balance of power among the three branches of the federal government—masked a behind-the-scenes decision by the Court’s majority to avoid ruling on the merits, the Court’s Opinion upsets the vertical balance of power between federal and state courts that lies at the heart of *Erie* jurisprudence.